

A
New Law Dictionary:

CONTAINING
the INTERPRETATION and DEFINITION

OF
WORDS and TERMS used in the LAW;

AS ALSO,

The LAW and PRACTICE,
UNDER

The Proper HEADS and TITLES.

TOGETHER WITH

Such LEARNING as explains

The History and Antiquity of the Law; our Manners,
Customs, and Original Government.

Collected and Abstracted from

All Dictionaries, Abridgments, Institutes, Commentaries, Reports,
Year-Books, Charters, Registers, Chronicles, and Histories,
Published to this Time.

Adapted to the Use of

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The Ninth Edition.

With great *Additions* and *Improvements*, from the latest Reports and
Statutes to this Time.

Also many NEW TITLES, not in any other Work of the Kind.

Originally COMPILED by

G I L E S · J A C O B.

Now corrected and greatly enlarged by

OWEN RUFFHEAD and J. MORGAN, ESQUIRES.

L O N D O N :

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and W. DOMVILLE.

MDCCLXXII.



P R E F A C E

THIS New Edition was undertaken by the late Mr. *Ruffhead*, who not living to go through half the Work, the Proprietors desired the present Editor to complete it.

A New Edition was absolutely necessary, the Eighth being very defective and erroneous, and almost wholly engrafted, with many of it's Imperfections, into another Compilation by a Person formerly engaged to render it more perfect.

Under these Circumstances, and for that the Book admitted of many *Improvements*, the Proprietors resolved to publish a *Ninth* Edition, and not to spare any Expence to have it *Corrected* and *Enlarged*, so as to merit the Acceptance of the Public.

To attain that End many common Precedents have been omitted. — A great Variety of useless Matter rejected, — and many Additions and other Alterations made: Indeed the Additions are so considerable, that the present Book contains 257 Pages more than any former Edition.

With respect to the Precedents omitted, most of them were useless; others might have been attended with ill Consequences, if depended on; for whether in Pleading or Conveyancing, unless in very common Cases, Precedents, (even if good) in unskilful Hands, like good Medicines for particular Cases, administered by an Empirick, may be productive of the worst Effects. Every Practitioner's Office contains what are requisite for common Use. 'Twas therefore judged advisable to substitute valuable *Learning*, in the place of useless *Forms*.

As to Alterations, the principal Articles of the old and new Matter are, in this Edition, *divided* and *arranged* under proper *Heads*, following, in most Instances, the Method observed in *BACON's*, or the *NEW ABRIDGMENT*.

There are occasionally *Notes of Practice*, &c. by the Editor. which his own Experience hath enabled him to make. Many of the *References* in the former Edition are *Corrected*. The *Chapters*, to a great Number of *Statutes*, omitted in the last, are *supplied*: and, a Variety of new *References* to the Reporters, &c. added. Yet, References are not made for the Sake of referring, but sometimes to offer to the Student, on applying to the Authors, new Objects for Reflection.

With respect to the *Statute-Law*, the *Acts* are not given at large, and very seldom even *Clauses*, but *Abstracts*, full enough for a Work of this Kind. The same may be said as to *Cases* in *Law* and *Equity*, which, being sometimes stated in the original Reporters, with great Prolixity, are here *abstracted*, and only the *essential Part* given, unless in very particular Instances. Where a *Subject* is, in it's Nature, prolix, so much as the Form of the Work would admit, hath been inserted, and for further Illustration, References made to the most approved Authors.

The present Editor hath taken the Liberty of revising and making many Additions to that Part, through which Mr. *Ruffhead* had gone. He hath also enrich'd the Work at large with a great Number of Extracts from, and References to, *Blackstone's Commentaries*, *Lord Lyttelton's History of Henry II.* *Lord Bacon's Works*, *Locke on Government*, *Montesquieu's Esprit des Loix*, the *Parliamentary History of England*, &c. *Robertson's History of the Emperor Charles V.* *Squire's Anglo-Saxon-Government*, *Madox's History of the Exchequer*, *Viner's Abridgment*, the *New Abridgment*, *Comyns's Digest*, *Foster's*, *Burrow's*, *Annals*'s, *Wilson's*, and *Vezey's Reports*: Authors either lately published, or (excepting *Viner's* and the *New Abridgment*,) not applied to by the Authors or Editors of Law Dictionaries.

Exclusive of various other Alterations, which are innumerable, many TITLES are added, not in any other Work of this Kind.

It is proper to observe, that the former Editions of this Work, contained a great Fund of Learning, useful and curious, relative to our ANCIENT HISTORY, LAWS and CUSTOMS. Nothing of that Kind is omitted in the present; and what hath fallen within the Editor's Notice, hath also been added.

Many of the Editor's Additions, tend to shew, the Improvements made in our Laws and Constitution (unnoticed in former Editions) and, the legal ones, include a Variety of the later Determinations, on Points of Consequence.

As the Work now stands, it is a Collection, from a great Number of the best Authors, Ancient and Modern, (especially *Spelman*, the *Monasticon*,

nasticon, &c. among many others,) and may be very useful, to the *Lawyer*, the *Divine*, the *Merchant*, and the *Gentleman*. Even the *Tradesman* will find many Articles, necessary for him to be acquainted with: And as to the *Form*, that of a *Dictionary*, is of all others, the most universally useful. 'Tis obviously so, with regard to the Laws of *England*, and therefore, in that Respect, does not require a Recommendation.

The Book cannot contain every Thing; but the Editor hath in general referred to almost every useful Author. He will here advise the Reader, if the *Forms* of *Writs* are wanting, to apply to the Books of Practice, *Theſaurus Brevium*, *Fitzherbert's Natura Brevium*, and the *Register*. For *Conveyancing*, to *Wood*, *Horselman*, &c. For *Indictments*, to the *Crown Circuit Companion*, *Officium clerici pacis*, and *Tremayne's Pleas of the Crown*; but, in every Case of Nicety, or where there is a Doubt, to take proper Assistance.

With Respect to the present Edition, the Editor will not pretend that it is a perfect Work. 'Twould be the highest Degree of Arrogance. Human Works are, and ever will be, Imperfect.

A few Cases may not be Law: They are either stated to shew how Determinations have varied, or perhaps, tho' 'tis hoped but seldom, from Innovation. There are, occasionally, *Observations* without Authority——They may be the Editor's. There are some *Cases* unsupported——They were in the Original, and he might suppose them Law, or worthy Consideration. There are others with Queries.—The Editor introduced those Queries, as either doubting of the Law, or suggesting to the Reader that the Subjects were proper for Reflection. Repetitions may occasionally happen.—He flatters himself there are but few. In so voluminous a Work, 'twas morally impossible wholly to avoid Repetition.

As to References, some must unavoidably be erroneous. In such Cases the Editor would recommend to the Reader, to consult the Index to the Author. Should that fail, then to transpose the Figures, as 'tis seldom examining above three Pages: Should he still be disappointed, to apply to *Comyns's Digest*, or some Abridgment, if the Reference is to a Law-Book.

The Editor hopes, if Men of Sense should think any Thing exceptionable on the Subject of *Religion* or *Politics*, they will not impute it to him. He wishes well to the Religion, and admires the Constitution of his Country. In a Work of this Kind, the *Law* is, in general, to be stated, the *Sentiments* of a private Man; but seldom.

It is very necessary the Editor should offer some Apology for himself. He hath gone through the Work with infinite Difficulty, it taking up
much

much more of his Time than he either expected, or could conveniently spare, from the Avocations of his Profession. Yet, he hath done every Thing his Leisure and Abilities would permit, to render the Work correct and useful. 'Twas absolutely necessary for a Man of Business to assist in a Performance of this Kind, but 'tis too much to lie on the Hands of one alone ; and indeed he hath often been troublesome to his Friends. It is much to be wished that Men of Experience would sometimes employ a few leisure Hours in useful Productions ; for, notwithstanding the Man of Speculation may understand the *Theoretic*, yet, he who is acquainted with the *practical Part* of any Profession, is more able to give *useful Instruction*.

Altho' the Work is, like all human Compositions, in several instances, defective, yet, on the whole, it contains a great Body of *ancient* and *modern* Learning, much more perhaps than any Performance of the Kind, and 'tis hoped, on a close Examination, 'twill be found to be, by far, the best *Law Lexicon* extant—The Proprietors have been at a very great Expence to give it that Superiority they wished it should possess, and for their sakes, the Editor hopes, it will be kindly received.

With respect to Himself, he has only farther to wish, that some abler Hand, more at Leisure, would have undertaken the Completion of the Work, as began by Mr. *Ruffhead*.

N. B. The References to *Lord Bacon's* Works are to the last *Quarto* Edition. To *Montesquieu* the last *London Quarto* Edition in *French* : But the Book and Chapter are added. To *Cowell* the Edition of 1727. To *Wood's Institutes* of the *Common Law*, the eighth Edition, in general. To *Moor*, *Leonard*, *Hobart*, &c. the Reference is sometimes to the *Number* of the *Case*.

New Law-Dictionary:

CONTAINING

The Whole Law, and The Practice thereof, under all the Heads and Titles of the Same.

A B A

A.

A, The first letter of the *alphabet*, which being prefixed to words in *English*, signifies as much as *un* in *French*, as *a man*, *un homme*.

Ab, From the word *abbot*, and in the beginning of any place signifieth that the place belonged to some *abbey*.

Abacot, A cap of state, wrought up in the form of two crowns worn by our ancient *British* kings. *Chron. Angl.* 1463. *Spelman's Gloss.*

Abactors, (*abactores*, derived *ab abigendo*) Stealers and drivers away of cattle by herds, or in great numbers. They are thus distinguished from *fures*: *nam qui ovem unam surripuerit, ut fur coercetur, qui gregem ut abactor.* *MS.*

Abacus, *arithmetick*, From the *abacus*, or table strewed with dust, on which the ancients made their characters and figures. *Omnium liberalium artium peritus, abacum præcipue, lunarem computum & cursum rimatus.* *Knighton's Chron. lib. i. c. 3.*

Abandum, (*abandendum*) Any thing sequestred, proscribed, or abandoned. *Abandon, i. e. In bannum res missa.*—A thing *bann'd* or denounced as forfeited and lost; from whence is to *abandon*, desert, or forsake as lost and gone.

Abarnare, From the Sax. *Abarian*, to discover and disclose to a magistrate any secret crime.—*Si homo furtivum aliquid in domo sua occultaverit, & ita fuerit abarnatus, rectum est ut inde habeat quod quaesivit.* *Leg. Canuti Reg. cap. 104.*

Abate, As derived from the French *Abbatre*, signifies to prostrate, break down or destroy; and in law, to *abate* a castle or fort, is interpreted to beat it down. *Old Nat. Brev. 45. Westminster. 1. c. 17. Abater Maison*, is to ruin or cast down a house, and level it with the ground. Thus, to *abate* a writ, is to defeat or overthrow it, by some error or exception. *Brit. c. 48.* In the statute *de conjunctim feoffatis*, the writ shall be *abated*, that is, shall be disabled and overthrown. *34 Ed. 1. stat. 2.* The appeal shall *abate*, and be defeated by reason of covin or deceit. *Staundf. Pl. Cr. 148.* And the justices shall cause the said writ to be *abated* and quashed. *Anno 11 H. 6. c. 2.* The word *abate* likewise is sometimes used in contradistinction to *disseise*, and as he that puts a person out of possession of his house, land, &c. is said to *disseise*; so he that steps in between the former possessor and his heir, is said to *abate*. *Kitch. 173. Old Nat. Br. 115.*

A B A

Abatement, (from the French) in *Latin intrusio*, or rather *interpositio*, to distinguish it from intrusion after the death of tenant for life; is used in that sense for the act of the *abator*, as the *abatement* and entry of the heir into the land before he hath agreed with the lord. *Old Nat. Br. 91.*

Abatement, when it relates to writs or plaints, is the quashing or destroying of the plaintiff's writ or plaint; and under this signification, which is most general, it is used to denote a plea put in by the defendant, in which he shews cause to the court why he should not be impleaded or sued, or if impleaded, not in the manner and form he then is; therefore praying that the writ or plaint may *abate*, that is, that the suit of the plaintiff may for that time cease. *Co. Lit. 134. b. 227. a. P. N. B. 115. Corwell. Gilb. H. C. P. 186. Terms de Ley 1.*

Herein it is material to consider,

1st, What may be pleaded in abatement.

2dly, The time and manner of pleading in abatement.

3dly, The judgment in abatement.

As to what may be pleaded in abatement, the defendant may plead,

I. To the jurisdiction of the court.

II. To the person of the plaintiff, as

1. Outlawry.
2. Excommunication.
3. Alienage.
4. Premunire.
5. Popish recusancy.

III. To the person of the defendant.

IV. To the writ.

V. To the count or declaration.

VI. Abatement by demise of the king, marriage, or death of parties.

I. With respect to pleas in abatement to the jurisdiction of the court, it is to be premised, that the courts of *Westminster* have a superintendency over all other courts, and may, if they exceed their jurisdiction, restrain them by prohibition; or if their proceedings are erroneous, may rectify them by writs of error and false judgment. Nothing shall be intended within the jurisdiction of an inferior court, but what is expressly alleged; so that where an action is brought on a promise in a court below, not only the *promise*, but the *consideration* of the promise, must be alleged to arise within an inferior jurisdiction; because such inferior courts are bounded in their

B

original

Original creation, to causes arising within the limits of such new-erected jurisdiction; and therefore if a debtor, that has contracted a debt out of such limited jurisdiction, comes within it, yet they cannot sue there for such debt, because the *cause of action* did not arise within such jurisdiction; and therefore it is not within the limits of their commission to try and determine; for which reason the *consideration* of the promise, which is the cause of action, must be alledged to be within the jurisdiction of the court; and not only so, but it must be proved upon the trial; and if the plaintiff prove a *consideration* out of the jurisdiction, that cannot be given in evidence; and if it be, the defendant's counsel may tender a bill of exceptions.

There are no pleas to the jurisdiction of the courts at *Westminster* in transitory actions, unless the plaintiff by his declaration shews the cause of action accrues within the county palatine, or if it be between the scholars of *Oxford* and *Cambridge*. 4 *Inst.* 213. 1 *Sid.* 103. There is a difference between a franchise to demand consuance, and a franchise, *ubi breve domini regis non currit*. For in the first case the tenant or defendant shall not plead it, but the lord of the franchise must demand consuance; but in the other case, the defendant must plead it to the writ. 4 *Inst.* 224. See titles **Franchise, Consuance, County Palatine**.

Where a franchise, either by letters patent or prescription, hath a privilege of holding pleas within their jurisdiction, if the courts at *Westminster* intrench on their privileges, they must demand consuance, that is, desire that the cause may be determined before them; for the defendant cannot plead to the jurisdiction: and the reason is, because a defendant is arrested by the king's writ. But within a franchise, where the king's writ doth not run, he is not legally convened, and therefore he may plead it to the jurisdiction.

The pleas to the jurisdiction of the courts at *Westminster*, according to chief baron Gilbert, are,

Antient demesne. *Herne's Pl.* 351. See title **Antient demesne**.

Held of the king's manor. *Hansf.* 103.

Counties palatine. *Rast.* 419. *Herne* 7. See title **County palatine**.

Cinque ports. See title **Cinque ports**.

The plea of *privilege* is likewise a plea to the jurisdiction of the court, though it doth not arise from the matter in variance, not being within the jurisdiction of the court, but it submits to the court, whether it ought to take consuance of the action, or proceed against the defendant in that court, by reason of his being a person privileged by another court, where he ought properly to be sued. But the law on this head will properly fall under the division concerning pleas in abatement respecting the person of the defendant.

II. As to pleas in abatement to the person of the plaintiff, 1. Outlawry may be pleaded in abatement, because the plaintiff having refused to appear to the process of the law, thereby loses its protection; but this is only a disability 'till the outlawry is reversed, or 'till he has obtained a charter of pardon. 1 *Inst.* 128. *Lit. sect.* 197. *Dy.* 28, 222. *Aff.* 49. *Br. Nonability* 25.

But this disability is only pleadable when the plaintiff sues in his own right; for if he sues in *autre droit*, as executor or administrator, or as mayor with his commonalty, outlawry shall not disable him, because the person whom he represents has the privilege of the law. *Co. Lit.* 128. Nor when the plaintiff brings a writ of error to reverse an outlawry, shall outlawry in that suit, nor at any stranger's suit, disable him; for if he were outlawed at several mens suits, and one should be a bar to another, he could never reverse any of them. The outlawry itself is no objection; for that would be *exceptio ejusdem rei cuius petitur dissolutio*: nor is another outlawry pleadable in bar to such writ of error; for then two erroneous outlawries would be irreversible. 1 *Inst.* 128. *Doct. Plac.* 396.

But when outlawry is pleaded in abatement, the plaintiff shall not reply that the outlawry is erroneous, for it is good till reversed. 1 *Lutw.* 36.

As outlawry is a *dilatory* plea, when it is pleaded in another court than where the outlawry issued, the defendant must bring in the Record immediately. For this being in delay, if the court should give time, and it should not be brought in, then the delay of justice would be from the court; and since there is a way of having it immediately, by producing it under the great seal, no time shall be given to bring it *sub pede sigilli*; but otherwise when it is in the same court; for then the record is already in court. *Doct. Placit.* 393. *Stamf.* 103. *Fitz. Coron.* 233.

Outlawry in a county palatine cannot be pleaded in any of the courts of *Westminster*; for he is only ousted of his law within that jurisdiction, and it shall not extend to disable a man in another county, where they have no power; for the county palatine being a royal jurisdiction within bounds, the losing the privileges of law within that jurisdiction, can be no disadvantage to him in another county; and if he does not live within the palatine jurisdiction, he is not obliged to attend there. But it seems that outlawry in the county palatine of *Lancaster* may be pleaded in the courts of *Westminster*; because that county was erected by act of parliament in the time of *Ed. 3.* but *Durham* and *Chester* are by prescription. *Fitz. Coron.* 233. 12 *Ed. 4.* 16. *Doct. Placit.* 396. Yet query, as to this doctrine? for the same reason militates against it.

Outlawry may be always pleaded in abatement, but not in bar, unless the cause of action be forfeited. 1 *Inst.* 128. 6. *Doct. Pl.* 395.

In personal actions, where the damages are uncertain, outlawry cannot be pleaded in bar; but in actions on the case, where the debt to avoid the *law wager*, is turned into damages, there outlawry may be pleaded in bar, for it was vested in the king, by the forfeiture, as a debt certain, and due to the outlaw: and the turning it into damages, whereby it becomes uncertain, shall not divest the king of what he was once lawfully possessed of. 2 *Lutw.* 1604. 3 *Lev.* 29. 2 *Vent.* 282. 3 *Leon.* 197. 203. *Cro. Eliz.* 204. *Owen* 22.

2. Excommunication is a good plea even to an executor or administrator, though they sue in *autre droit*; for an excommunicate person is excluded from the body of the church, and is incapable to lay out the goods of the deceased to pious uses. 1 *Inst.* 134. 43 *E. 3.* 13. *Theol.* 11.

But in an action brought by bailiffs and commonalty, the defendant shall not plead excommunication in the bailiffs; because they sue as a corporation, and a corporation cannot be excluded from the communion of the visible church. *Theol.* 11. 30 *E. 3.* 4. *Co. Lit.* 134.

Likewise excommunication is no plea in a *qui tam*, because it is for example; and the statute having given the informer an ability to sue, and not excepted excommunicated persons from the liberty of informing, he is enabled to sue by the statute, notwithstanding the censures of the church. 12 *Co.* 61.

When excommunication is pleaded in the plaintiff, he shall not reply, that he has appealed from the sentence; for the sentence is in force until it is repealed, and whilst it is in force he cannot appear in any of the courts of justice; but he may reply that he is absolved, for then his disability is taken away. *Bro. Excom.* 3. 3 *Bulf.* 72. 20 *H. 6.* 25. *Roll.* 226.

When prohibition is brought against the bishop, and he pleads excommunication against the plaintiff, and in the excommunication there is no cause of such excommunication shewn, this is no good plea; for in such case it will be intended, that the excommunication was for endeavouring to hinder the bishop's proceeding by application to the temporal court; and if such excommunication were allowed, it would destroy all prohibitions, and the plea of excommunication in this case is *exceptio ejusdem rei cuius petitur dissolutio*. *Theol.* 10, 11. 28 *E. 3.* 27. 8 *Co.* 68.

The court will not receive the certificate of excommunication of one bishop from another, because they must have the certificate from the bishop whose subject he was; and he might have been absolved, that is, discharged from the excommunication by his own ordinary after the first certificate to the bishop. *Vide Bro. Excom.* *Finn.*

Fitz. Excom. 8 Co. 68. *Co. Lit.* 134. Nor will they receive a certificate; (because he may stand assailed by the present ordinary that now is,) after the decease of the bishop who has certified; and the court will not receive any certificate, but from such person to whom they can write to assail. *Bro. Excom.* 21. *Fitz. Excom.* 26. 1 Roll. 883.

3. *Alienage*.--An alien born may be pleaded in *abatement*: but Jews may prosecute actions and recover, a plea in *abatement* against them being but a disability so long as the king shall prohibit them to trade. 1 *Lill.* 4.

An alien enemy, or one whose king is in enmity with ours, cannot bring any action either real, personal, or mixed. Yet see *Lord Raym.* 282. *Wells v. Williams*.

Those pleas are at present seldom pleaded, and as little regarded. Wars are not now so implacable as formerly.

An alien in league shall maintain personal actions; otherwise he would not be able to merchandise and trade amongst us. But he shall not maintain real or mixed actions, because there is no necessity that he should settle amongst us. *Co. Lit.* 129. b. *Yelv.* 198. 1 *Bulstr.* 134. If alienage be pleaded to an alien in league, that must be in disability of the plaintiff; but if it be to an alien enemy, it may be pleaded to the action; because it is forfeited to the king, as a reprisal for the damages committed by the dominion in enmity with him. *Bro. Denizen* 10. *Co. Lit.* 129. b.

Where the defendant pleads that the plaintiff is an alien in *abatement* of the writ, it is triable where the writ is brought, and the replication must conclude to the country; but otherwise it is laid where it is pleaded in bar, that the plaintiff is an alien, the replication must conclude with an *averment*. *Salk.* 2. *West.* 5. *Comb.* 394. *Texell.* 5. *Hooper contra*. Where the defendant pleads, that the plaintiff was an alien, born at Roan in the kingdom of France, within the ligeance of the king of France, the plaintiff replies, that he is an alien friend, born at Hamborough, within the ligeance of the emperor, and traverseth that he was born at Roan. Holt inclined it was an ill traverse, and offered an ill issue. *Comb.* 212. See title *Offens*.

4. *Præmunire*. Persons attainted of *præmunire* are incapable of bringing any action; for they are out of the protection of the law. *Lit. seâ.* 199. *Co. Lit.* 129. See title *Præmunire*.

5. *Popish recusancy*. This disability of popish recusancy convict, is by stat. 3 Jac. 1. c. 5. which disables to all intents, as excommunication, except where he sues for lands, tenements, leases, annuities, rents, and hereditaments, or for the issues and profits thereof, which are not to be seized into the hands of the king, his heirs or successors.

Of pleading *recusancy* in disability, vide the case of *Coburn v. Fletcher*, *Modern Cases in Law and Equity*, 1 Part, 43.

III. *Pleas in abatement to the person of the defendant*. Of these pleas, the plea of *privilege* is one of the most material. The officers of each court enjoy the privilege of being sued only in those courts to which they respectively belong; the reason whereof is, because of the duty they are under of attending those courts, and lest their clients causes should suffer if they were drawn to answer to actions in other courts. 2 *Mod.* 297. *Vaugb.* 155. 2 *H.* 7. 2. 2 *Roll. Abr.* 272. 1 *Lutw.* 44. 639. But this is to be understood, when the plaintiff can have the same remedy against the officer in his own court, as in that where he sues him; for if money be attached in an attorney's hands by foreign attachment in the sheriff's court in London, he shall not have his privilege; because in this case the plaintiff would be remediless. 1 *Sand.* 67, 68. *Turwill's case*.

So if a writ of entry, or other real action, be brought against an attorney of the King's Bench, he cannot plead his privilege; because, if this should be allowed, the plaintiff would have a right without a remedy; for the King's Bench hath not cognizance of real actions. 1 *Sand.* 67.

So if an attorney of the Common Pleas be sued in an *appal*, he shall not have his privilege; for his own court hath not cognizance of this action; for this vide

38 *H.* 6. 29. b. 9 *E.* 4. 35. *Cro. Car.* 585. 1 *Leon.* 189. 2 *Leon.* 156.

But the privilege, which the court indulges their officers with, is restrained to the suits only, which they bring in their own right; for if they sue or are sued as executors or administrators, they then represent common persons, and are to have no privilege. *Hob.* 177.

So if an officer of one court sues an officer of another court, the defendant shall not plead his privilege; for the attendance of the plaintiff is as necessary in his court as that of the defendant is in his; and therefore the cause is legally attached in the court where the plaintiff is an officer. 2 *Mod. Rep.* 298. *Hamelton v. Jutice Scroggs*. 2 *Lev.* 129. 2 *Roll. Abr.* 275. pl. 4. *Moor* 556.

So if a privileged person brings a joint action, or if an action be brought against him and others, he shall not have his privilege, but this is to be understood where the action is joint, and cannot be severed; for if the action can be severed, without doing any injury, the officer shall have his privilege. *Dyer* 277. *Godb.* 10. 2 *Roll. Abr.* 275. 2 *Lev.* 129. 1 *Vent.* 298, 9.

An officer shall not have his privilege against the king; for as the executive power is lodged in the king, it would be unreasonable that his court, which gives relief to private persons, should protect any subject from being brought to justice, for offending against the laws, which concern the whole commonwealth. *Hob.* 9. *Bro. Superfed.* 1. 2 *Roll. Abr.* 274. (a). But in any action *qui tam*, at the suit of an informer, he shall have his privilege. *Lil. Reg.* 7. 3 *Lev.* 398. *Lutw.* 193.

If an action be brought in the King's Bench against an attorney of the Common Pleas, it is not enough for him to say that he is an attorney, for his being an attorney does not abate the plaintiff's bill, when once the action is attached in the King's Bench; but he must shew that he was an attorney at the time of the plaintiff's exhibiting the bill; for then it will appear to the court, that the plaintiff might have sued the defendant there, as a privileged person. 1 *Salk.* 1. *Pease v. Parsons*.

It is said by Holt, in the case of *Duncombe v. Church*, *Comb.* 390. that if a person who hath the privilege of being sued in another court, be in actual custody of the Marshal, he cannot plead his privilege; but otherwise where he is bailed, and so only supposed in *custodia mariscalii*. 1 *Salk.* 1. *Jones v. Bodinner*, the same point.

The court of King's Bench will take notice of the privilege of their own officers; as where a *filazer* of the King's Bench was arrested by a writ, he was discharged on common bail. *Brown's case*. *Salk.* 544.

But where an attorney of the Common Pleas was sued by a bill in the King's Bench; upon a motion for his being discharged, the court, *absente Holt*, denied it, and put him to plead his privilege. 1 *Mod. Ent.* 26.

Here should be observed the difference;--the former was an actual officer, whose attendance was absolutely necessary, and no one to supply his place; the latter, an attorney, and the number of attorneys is very great.

After a general *imparlance*, an officer cannot plead his privilege, because by *imparling* he affirms the jurisdiction of the court; but by the better opinion it seems, that after a special *imparlance* he may plead his privilege. *Bro. Priv.* 25. 22 *H.* 6. 6, 22, 71. 1 *Roll. Rep.* 294. 1 *Sid.* 29. 2 *Roll. Abr.* 273, 279. *Hard.* 365. 1 *Lutw.* 46. 1 *Salk.* 1. And now the common practice is to use a special *imparlance*.

Misnomer likewise may be pleaded in *abatement*. But though a defendant may, by pleading in *abatement*, take advantage of a *misnomer* when there is a mistake in the writ or declaration, as to the name of baptism or surname; yet in such a plea he must set forth his right name, so as to give the plaintiff a better writ. *Finch* 363. 9 *Hen.* 5. 1.

And where a defendant comes in *gratis*, or pleads by the name alledged by the plaintiff, he is estopped to alledge any thing against it. *Style* 440. Where one is misnamed in a bond, the writ may be in the right name, and the count shew that defendant, by such a name, made the bond. To the plea of *misnomer*, the plaintiff may reply, the defendant was known by the name in the writ. 1 *Salk.* 6.

If *A.* gives a bond by the name of *B.* and he is accordingly sued by that name of *B.* he may plead *misnomer*, and the other may reply, that he made the bond by the name of *B.* and estop him by demanding judgment, if against his own deed he shall be admitted to say his name is *A.* and then he may rejoin and say, that he made no such deed, and this he must do without oyer; for if he prays oyer, he admits his name to be *B.* *Salk. 7. Linch v. Hooke.*

One defendant cannot plead *misnomer* of his companion; for the other defendant may admit himself to be the person in the writ. *1 Lutw. 36.* The defendant, though his name be mistaken, is not obliged to take advantage of it; and therefore if he be impleaded by a wrong name, and afterwards impleaded by his right name, he may plead in bar the former judgment, and aver that he is *una et eadem persona.* *Gilb. H. C. P. 218.*

Where an indictment for a capital crime is abated for *misnomer* of the defendant, the court will not dismiss him, but cause him to be indicted *de novo* by his true name. *2 Hawk. 367.* Pleas in abatement found against a defendant in capital cases, are not peremptory, as they are in other cases; but he may afterwards plead over to the felony. *1b. 191.*

A writ also may be abated for want of addition of the place, trade, dignity, &c. of the defendant; as where one pleads there is no such place, or that he is a *baron* and not a *knight*, &c. *1 Vent. 154.* If the addition of the defendant's quality and dwelling be omitted in any original writ, in a personal action, appeal, or indictment, where exigent may be awarded, the writ shall abate; but it shall not abate for surplusage in the addition. *1 H. 5. cap. 5.*

The name of *earl*, if omitted, abates the writ. *Davis Rep. 60. a.* But if a person is created an *earl* pending the action, bill, or suit, it shall not abate. *1 Ed. 6. cap. 2. sect. 3.* But there must be an entry on the roll, with a *post ultimam continuationem, scilicet*, that such a day and year, the king by his letters patent, &c. setting it forth with a *proferri in cur. &c. quod predicti. defendens non* *1 Mod. Ent. 31, 32.*

The defendant's being under the protection of the law, as by being an *infant*, *feme covert*, &c. may likewise be pleaded in abatement. A *feme covert*, after an arrest, giving bail-bond by a wrong name, may plead the *misnomer*, and he is not estopped by the bail-bond. *1 Salk. 7. Linch v. Hooke.* See titles *Feme Covert*, *Infant*.

On the whole, it is proper to observe, as to *misnomers*, the courts at *Westminster* will not abate a writ for a trifling mistake, as the omission or insertion of a letter, that does not make a material variation in the sound, &c.

As to *infancy*, it may either be pleaded in bar, or given in evidence, on the general issue, unless in the case of necessities, when the law binds an infant to his promise.

As to *coverture*, it may be pleaded in bar, or abatement. But vide *post Div. vi.*

IV. As to pleas in abatement to the writ, the writ being the foundation of the subsequent proceedings, great certainty and exactness is requisite, to the end that no person be arrested or attached by his goods, unless there appear sufficient grounds to warrant such proceedings; so that if the writ vary materially from that in the Register, or be defective in substance, the party may take advantage of it. See *5 Co. 12. 9 H. 7. 16. 10 Ed. 3. 1. 2 Inst. 662. Plowd. 1, 51, 52, 80. Carth. 172.* But where the writ shall not abate for variance from the Register, so that it be equivalent. See *Hob. 1, 51, 52.* What variance between a bond and the declaration abates the writ, see *Hob. 116. Walter v. Pigot. Mo. 645. 2 Roll. 147. 1 Cro. 896. Hob. 18, 19, 20.*

In declaring on bonds, 'tis most advisable to omit the *alias dict.* for 'tis unnecessary.

Where a demand is of two things, and it appears the plaintiff hath an action only for one, the writ may not be abated in the whole, but shall stand for that which is good; but if it appear, that although he cannot have this writ which he hath brought for part, he may have another, the writ shall abate in the whole. *11 Rep. 45. 1 Saund. 285.* A writ of *ejectment* shall be abated, on its

appearing to the court to be sued out before the cause of action. *Cro. Car. 272.* Now the practice is, to serve a copy of the declaration in the first instance.—If judgment goes by default, there is not any one to bring error. If the tenant appears, there are several instances, where the issue may be made right, and the variance shall not hurt. In case administration be granted after the action brought, and this appears, the plaintiff's writ abates. *Hob. 245.*

V. As to pleas in abatement to the count or declaration, it is observable, that after the party suing has declared, the party impleaded may demand oyer of the writ; and then, if there be any fault or insufficiency in the count for a cause apparent in itself, or if there be a variance between the count and the writ, or between the writ and a record, specialty, &c. mentioned in the count, the party impleaded ought to shew it, by his pleading. *Theol. lib. 10. c. 1. sect. 5. Fitz. Count, 27.*

One may plead in abatement of a declaration, where 'tis by original; but if the action be by bill, you must plead in abatement of the bill only. *5 Mod. 144.* A little variance between the declaration and the bond pleaded, will not make naught the declaration; but uncertainty will abate it. *Plowd. 84.* The variance of the declaration from the obligation, or other deed on which it is grounded, will sometimes abate the action; and if a declaration assign waste in a town not mentioned in the original writ, the writ of waste shall abate. *Hob. 18, 38.*

Likewise where the declaration is otherwise defective, in not pursuing the writ, or not setting forth the cause of action with that certainty which the law requires, or laying the offence in a different county from that in which the writ was brought. *1 New Abr. 6.*

It is a good plea in abatement that another action is depending for the same thing; for whenever it appears on record, that the plaintiff has sued out two writs against the same defendant, for the same thing, the second writ shall abate; and it is not necessary that both should be pending at the time of the defendant's pleading in abatement; for if there was a writ in being at the time of suing out the second, it is plain the second was vexatious and ill *ab initio.* *9 H. 6. 12. Mo. 418, 539. 5 Co. 61. Doct. Pl. 10, 67.* But it must appear plainly to be for the same thing; for an assize of lands in one county shall not abate an assize in another county, for these cannot be the same lands. *4 H. 6. 24. Doct. Pl. 10.*

In general writs, as *trespass*, *assize*, *covenant*, where the special matter is not alledged, and the plaintiff is nonsuited before he counts; and the second writ is sued pending the other, yet the former shall not be pleaded in abatement, because it does not appear to the court that it was for the same thing; for the first writ being general, the plaintiff might have declared for a distinct thing from what he demanded by the second writ; but when the first is a special writ, and sets forth the particular demand, as in a *precipe quod reddat*, &c. there the court can readily see that it is for the same thing; and therefore though the plaintiff be nonsuited before he counts, yet the first shall abate the second writ, it being apparently brought for the same thing. *5 Co. 61. Doct. Pl. 11, 12.* If an action of debt, &c. be depending in an inferior court, a bill for the same debt may be brought in any court in *Westminster.* *5 Co. 62.* In an action of debt, &c. another action depending in the courts of *Westminster* for the same matter, is a good plea in abatement; but a plea of an action in an inferior court is not good, unless judgment be given. *5 Co. 68.*

If a second writ be brought tested the same day the former is abated, it shall be deemed to be sued out after the abatement of the first. *Allen 34.*

If an action, pending in the same court, be pleaded to a second action brought for the same thing, the plaintiff may pray that the record may be inspected by the court, or demand oyer of it, which if not given him in convenient time, he may sign his judgment. *Dy. 227. Carth. 453, 417.*

VI. With respect to abatement by the demise of the king, or by the marriage, or death of the parties, it is to

be observed, that 1. As to the *demise* of the king at common law, all patents of justices, commissions civil and military, were thereby determined; also all suits depending in the king's courts were discontinued by the death of the king; so that the plaintiffs were obliged to commence new actions, or to have re-summons or attachment on the former processes, to bring the defendant in; but to prevent the inconvenience, expence and delay which this occasioned, the statutes of 1 Ed. 6. c. 7. 7 & 8 Will. 3. c. 27. and 7 Ann. c. 8. were made, which see under title *Prærogative*.

But proceedings on an information, in nature of a *quo warranto*, are not abated by the demise of the crown. 2 Stra. 728. Where the king brings a writ of error in *quare impedit*, it abates by his death. 2 Stra. 243.

2. With respect to the *marriage* of the parties, *coverture* is a good plea in *abatement*, which may be either before the writ sued, or pending the writ. By the first the writ is abated *de facto*, but the second only proves the writ abatable; both are to be pleaded, with this difference, that *coverture*, pending the writ, must be pleaded, *post ultimam continuationem*; whereas *coverture* before the writ brought, may be pleaded at any time, because the writ is *de facto* abated; but if a feme sole takes out a writ, and after marriage, the defendant was legally attached on such suit, and therefore may plead in chief to it any defence he has; but such plea must be *puis darrein continuance*. Doct. Pl. 3. 1 Sid. 140. 1 Leon. 168, 169.

If a writ be brought by A. and B. as baron and feme, whereas they were not married until the suit depended, the defendant may plead this in *abatement*; for though they cannot have a writ in any other form, yet the writ shall abate, because it was false when sued out. Fitz. Brief, 476. If a writ be brought against a feme covert as sole, she may plead her *coverture*; but if she neglects to do it, and there is a recovery against her as a feme sole, the husband may avoid it by writ of error, and may come in at any time and plead it. Latch 24. Stile 254, 280. 2 Roll. Rep. 53. If an action be brought in an inferior court against a feme sole, and pending the suit she intermarries, and afterwards removes the cause by *habeas corpus*, and the plaintiff declares against her as a feme sole, she may plead *coverture* at the time of suing the *habeas corpus*; because the proceedings here are *de novo*; and the court takes no notice of what was precedent to the *habeas corpus*; but upon motion on the return of the *habeas corpus*, the court will grant a *procedendo*. For though this be a writ of right, yet where it is to abate a rightful suit, the court may refuse it; and the plaintiff had bail below to this suit, which by the contrivance he is ousted of, and possibly by the same means of the debt. 1 Salk. 8.

In ejectment against baron and feme, after verdict for the plaintiff, baron dies between the day of *Nisi prius* and the day in Bank; adjudged that the writ should stand good against the feme, because it is in nature of a trespass, and the feme is charged for her own act; and therefore the action survives against her. So if the wife had died, the baron should have judgment entered against him. Cro. Jac. 356. Cro. Car. 509. 1 Roll. Rep. 14. Moor 469.

If a feme sole plaintiff, after verdict, and before the day in Bank, takes husband, she shall have judgment, and the defendant cannot plead this *coverture*, for he has no day to plead it at. Cro. Car. 232. 1 Bulst. 5.

If an original be filed against a feme sole, and before the return she marries, you may declare against her without taking notice of her husband, for her intermarriage is no *abatement* of the writ in fact, but only makes it *abateable*. Comb. 449. 1 Roll. Rep. 53.

'Tis now in general held, that if a feme sole commences an action, and pending the same marries, the suit is abated, but that it is otherwise with respect to a feme sole defendant, as she shall not take advantage of her own act.

3. As to pleas in *abatement* by the death of parties, the general rule is, that whenever the death of any party happens pending the writ, and yet the plea is in the same condition as if such party were living, there such

death makes no alteration or *abatement* of the writ. 1 New Abr. 7.

The death of the plaintiff did in all cases *abate* the writ before judgment, till the stat. 8 & 9 W. 3. c. 11. by which neither the death of plaintiff or defendant shall *abate* it, if the action might be originally prosecuted by and against the executors or administrators of the parties; and if there are two or more plaintiffs or defendants, and one or more die, the writ or action shall not *abate*, if the cause of action survives to the surviving plaintiff against the surviving defendant, &c. Stat. *ibid*.

Before this statute it was held, that if there were two executors, and they brought an action of debt, and one of them died, that the writ should not *abate*; for in this case summons and severance lies, after which the one executor does not proceed for a moiety, but for a whole, as representative of the testator. Cro. Eliz. 652. Co. Lit. 139. 1 Leon. 44. So in a *quare impedit*, by two jointenants, and one is summoned and severed, and the severed person dies, the writ shall not *abate*, because the advowson is an intire thing, and he proceeded for the whole, after the severance; and so he may after the death of the severed jointenant. Dyer 279.

If there were several defendants in the original action, and one died, the writ did not *abate*; because there being a joint demand, it survives against the residue; but in this case there must be a suggestion on the roll, because it would be error to give judgment against a deceased person. Hard. 151, 164. Stile 299. 3 Mod. 249. Cro. Car. 426. 1 Jones 367. 1 Rol. Abr. 756. 1 Show. Rep. 186. But in a writ of error, if there be several plaintiffs, and one dies, the writ shall *abate*, because the writ of error is to set persons *in statu quo*, before the erroneous judgment given below; and they that are plaintiffs in error were distinct sufferers in the judgment, since there might be different executions issued thereupon, and different representatives were by such judgment affected; and by consequence the survivor cannot prosecute the writ of error for the whole, left by a collusive persuasion, or by negligence or design he should hurt the representative of the deceased. Bridg. 78. Yelv. 208. 10 Co. 135. 1 Vent. 34. 1 Sid. 419. cont. But if any of the defendants in error die, yet all things shall proceed, because the benefit of such judgment goes to the survivor, and he only is to defend it. Sid. 419. Yelv. 208. 1 L. Raym. 439. In an *audita querela*, by two, the death of one shall not *abate* the writ; for the survivor is not to be restored to any thing he has lost, but to discharge himself of the execution; and thereupon, notwithstanding the death of the other, he may proceed for a discharge *in toto* for himself. 1 Vent. 34. 3 Hen. 7. 1. 3 Mod. 249. If there be several persons named as plaintiffs in the writ, and one of them was dead at the time of purchasing the writ, this may be pleaded in *abatement*; because it falsifies the writ; and because the right was in the survivors, at the time of suing the writ, and the writ not accommodated, as the case was. 20 Hen. 6. 30. 18 E. 4. 1. 2 H. 7. 16. 1 Brownl. 3, 4. Clift Ent. 6. Raft. Ent. 126.

By stat. 17 Car. 2. c. 8. (made perpetual by 1 Jac. 2. c. 17.) it is enacted, that the death of either of the parties between verdict and judgment, shall not be alleged for error, so as judgment be entered within two terms after such verdict.

Secondly, of the *time* and *manner* of pleading in *abatement*.

A plea in *abatement* must be put in within *four days* after the return of the writ, because the person coming in by the process of the court ought not to have time to delay the plaintiff. Lutw. 1181. Hob. 19. 2 Stra. 1192.

But if a declaration be delivered against one in custody, he has the whole term to plead in *abatement*. Salk. 515.

If the declaration be delivered in the vacation, or so late in term, that defendant is not bound to plead to it that term; he may plead in *abatement*, within the first four days of next term.

As pleas in *abatement* enter not into the merits of the cause, but are dilatory, the law has laid the following restrictions

frictions on them. First, By the statute of 4 & 5 Ann. cap. 16. for amendment of the law, no dilatory plea is to be received unless on oath, and probable cause shewn to the court. Secondly, No plea in abatement shall be received after *respondens ouster*, for then they would be pleaded *in infinitum*. 2 Saund. 41. Thirdly, That they are to be pleaded before imparlance. See *Yelv.* 112. 1 *Lutw.* 46, 178. 2 *Lutw.* 1117. *Doct. Pla.* 224. Except where antient demesne is pleaded; for this may be done after imparlance, because the lord might reverse the judgment by writ of *disceit*, and it goes in bar of the action itself. For this see *Dyer in marg.* 210. *Stike* 30. *Latch* 83. 5 *Co.* 105. 9 *Co.* 31. *Han. Ent.* 103. Fourthly, That when issue is joined on them, if it be found against him who pleads such dilatory plea, it shall be peremptory. 2 *Show. Rep.* 42. 6 *Mod.* 236.

With respect to pleas to the jurisdiction of the court, it is to be observed, that the defendant must plead *in propria persona*; for he cannot plead by attorney without leave of the court first had, which leave acknowledges the jurisdiction; for the attorney is an officer of the court; and if he put in a plea by an officer of the court, that plea must be supposed to be put in by leave of the court. 1 *New Abr.* 2.

The defendant must make but half defence, for if he makes the full defence *quando & ubi curia consideraverit*, &c. he submits to the jurisdiction of the court. *Lutw.* 9. 1 *Show. Rep.* 386.

If a plea is pleaded to the jurisdiction of the court, it ought to conclude with a prayer of judgment in this manner, *viz.* *The said defendant prays judgment, whether the court will take any farther cognizance of the said plea.* 1 *Mod. Ent.* 34.

As to pleas in disability of the plaintiff, they may not be pleaded after a general imparlance. 1 *Lutw.* 19. It may be added, that in pleading *ouster* in disability in another court, the antient way was to have the record of the outlawry itself *sub pede sigilli by certiarari* and *mitimus*; but this being very expensive, it is now sufficient to plead the *capias ulagatum* under the seal of the court from whence it issues; for the issuing of execution could not be without the judgment; and therefore such execution is a proof to the court that there is such a judgment, which is a proof that the defendant's plea of matter of record is proved by a matter of record; and consequently appears to the court not to be merely dilatory; and therefore on shewing such execution, if the plaintiff will plead *nul tiel record*, the court will give the defendant a day to bring it in. *Co. Lit.* 128. *Doct. Placit. tit. Outlawry*. But where excommunication is pleaded, it is not sufficient to shew the writ *de excommunicato capiendo* under the seal of the court; for the writ is no evidence of the continuance of the excommunication, since he may be *affoiled* by the bishop, and that will not appear in the king's court, because such affoiment is not returned into the king's court from whence the *significavit* is sent.

If a plea in abatement be pleaded to the person of the plaintiff, there it must conclude, *if he ought to be compelled to answer.* 1 *Mod. Ent.* 34. If it be pleaded to the writ, then the plea concludes with the prayer of judgment of the writ, and that the writ may be *quashed*. When it is to the action of the writ, there he should shew that the party ought not to have that writ, but by the matter of his plea should intimate to him how he should have a better. *Latch* 178. *Respondere non debet* is a proper beginning to a plea to the jurisdiction of the court, but a plea of *ne unques executor*, ought to begin with *petit. judic. de bill.* 5 *Mod.* 132, 133, 146. 1 *Saund.* 283. 2 *Saund.* 97, 189, 190, 339. *Lutw.* 44. *Show.* 4. In a replication to a plea in abatement where matter of fact is pleaded, the plaintiff must pray his damages. *Vide* 1 *L. Raym.* 339, 554. 2 *L. Raym.* 1022. If upon issue verdict be found for him he shall have final judgment; but where matter of law is pleaded, the plaintiff must only maintain his writ. 3 *Anne in B. R.* If one pleads matter of abatement, and concludes in bar, *Et petit judicium si actionem habere debet*, though he begins in abatement, and the matter be also in abatement, yet the conclusion being in bar, makes it a bar;

and the reason is, because you admit the writ by concluding specially against the action. 18 *H. 6.* 27. 32 *H. 6.* 17. 36 *H. 6.* 18. 22 *H. 6.* 536. 1 *Show.* 4. 2 *L. Raym.* 1018. If a man pleads matter in bar, and concludes in abatement, it shall be taken for a plea in bar, from the nature and reason of the thing; for the plaintiff can have no writ if he has not a cause of action, and therefore the court will take the plea to be in bar. 37 *H. 6.* 24. 36 *H. 6.* 24. 2 *Mod.* 6.

As to the conclusion of a plea in abatement, *vide* 1 *L. Raym.* 337, 593.

A plea was held good in bar, though pleaded in abatement, and the defendant hath his election to plead, either in bar or abatement; the nature of a plea in abatement is to intitle the plaintiff to a better writ, and is hath been expressly resolved, that where the plea is in abatement, and it is of necessity that the defendant must disclose matter of bar, he shall have his election to take it either by way of bar or abatement. 2 *Roll. Rep.* 64. *Salkill v. Shilton*. In short, whatever destroys the plaintiff's action, and disables him for ever from recovering, may be pleaded in bar. But the defendant is not always obliged to plead in bar, but may plead in abatement, as in *replevin* for goods, the defendant may plead property in himself, or in a stranger, either in bar or in abatement, for if the plaintiff cannot prove property in himself, he fails of his action for ever; and it is of no avail to him who has the property if he has it not. 1 *Vent.* 249. 2 *Lev.* 92. 1 *Salk.* 5, 92. *Carth.* 243.

Where matter of bar may be pleaded in abatement, *vide* 2 *L. Raym.* 1207, 1208. *Hackett v. Tilly*.

Thirdly, Of the judgment in abatement. If issue be taken upon a plea to the writ, judgment against the defendant is peremptory; but if there be a demurrer, it is then only that the plaintiff answer over. *Latch* 374. *Yelv.* 12. *Allen* 66. Upon a judgment in waste for the damages recovered, the defendant demurs partly in abatement, and partly in bar, the court shall give judgment in chief. *Show.* 255. If the defendant imparts to a day in a personal action, and does not appear at that day, judgment final shall be given against him; for the default is peremptory as to him; and there is no process to bring him into court again. 38 *H. 6.* 33. So in debt, if the defendant pleads in abatement to the writ, to which the plaintiff imparts, and at the day given, the defendant makes default, judgment final is upon the default, though the plea was only in abatement. 10 *E. 4.* 7. *Mod. Cases* 5. Where matter of abatement is pleaded in bar, there shall be judgment in chief. 1 *Lev.* 291. The judgment for the defendant, on a plea in abatement, is *quod breve*, or *narratio cassetur*; if issue be joined on a plea in abatement, and it be found for the plaintiff, it shall be peremptory against the defendant, and the judgment shall be *quod recuperet*, because the defendant chusing to put the whole weight of his cause upon this issue, when he might have had a plea in chief, is an admission that he had no other defence. *Yelv.* 112, 2 *Show.* 42. *Str.* 532.

In abatement, if issue is joined on a matter of fact, and found for the plaintiff, the jury who try that issue shall assess the damages.—If there is a demurrer to the plea, and adjudged for plaintiff, then a *respondens ouster* is awarded.

Abatementum, Is a word of art, and signifies an entry by interposition. *Co. Lit.* 277. *Vide* *Plea, Writs, &c.*

Abator, Is a person that abates or entereth into a house or land, void by the death of him that last possessed the same, before the heir takes possession, and by that means keeps out the heir. *Old Nat. Br.* 115.

Abatude, Is any thing diminished.—*Moneta abatuda*, is money clipped or diminished in value: *si tempore solutionis hac moneta fuerit abatuda sive deteriorata*. *Charta Simonis Comit. Leicestriz*, anno 1290.

Abbay, (*abbatia*) Is the same as to the government of a religious house, and the revenues thereof, subject to an abbot, as a bishoprick is to a bishop. This word is used in some of our antient grants, particularly anno 34 & 35 *H. 8.* in a grant to the countess of Pembroke.

Abbat, or abbot, (*abbas* in Latin, in French *abbe*, and in Saxon *abbud*) Is a spiritual lord or governor, having the

the rule of a religious house. The word is also by some derived from the Syriac *abba pater*. Of these abbots here in England some were elective, some preservative; and some were *mitred*, and some were not; such as were mitred had episcopal authority within their limits, being exempted from the jurisdiction of the diocesan; but the other sort of abbots were subject to the diocesan in all spiritual government. The mitred abbots were lords of parliament, and called *abbots sovereign*, and *abbots general*, to distinguish them from the other abbots. And as there were abbots, so there were also lords priors, who had exempt jurisdiction, and were likewise lords of parliament. Some reckon twenty-six of these lords abbots and priors that sat in parliament. Sir Edw. Coke says, there were twenty-seven parliamentary abbots and two priors. *Co. Lit. 97*. In the parliament 20 R. 2. there were but twenty-five; but anno 4 Ed. 3. in the summons to the parliament at Winton more are named. And in *Monasticon Anglicanum* there is also mention of more, the names of which were as follow: abbots of St. Austin's Canterbury, Ramsey, Peterborough, Croiland, Evesham, St. Bennet de Hulmo, Thornby, Colchester, Leicester, Winchcomb, Westminster, Cirencester, St. Albans, St. Mary's York, Sherwobury, Selby, St. Peter's Gloucester, Malmesbury, Walsham, Thornby, St. Edmond's, Beaulieu, Abingdon, Hyde, Reading, Glastonbury, and Ojny. — And priors of Spalding, St. John's of Jerusalem, and Lewes. — To which were afterwards added the abbots of St. Austin's, Bristol, and of Bardeny, and the priory of Sempringham. These abbots and priories were founded by our ancient kings and great men, from the year 602 to 1133. An abbot with the monks of the same house were called the *convent*, and made a corporation; but the abbot was not chargeable by the act of his predecessor, unless it were under the common seal, or for such things as came to the use of the house or convent. *Terms de Ley* 4. By stat. 27 Hen. 8. cap. 28. all abbots, monasteries, priories, &c. not above the value of 200 l. per ann. were given to the king, who sold the lands at low rates to the gentry. Anno 29 H. 8. the rest of the abbots, &c. made voluntary surrenders of their houses, to obtain favour of the king: and anno 31 H. 8. a bill was brought into the house to confirm those surrenders; which passing, completed the dissolution, except the hospitals and colleges, which were not dissolved, the first till the 33d, and the last till the 37th of H. 8. when commissioners were appointed to enter and seize the said lands, &c.

Abbatis, An avener or steward of the stables; the word was sometimes used for a common hostler, pronounced short in the middle syllable. — *Abbatis ad canam dat equis abbas avenam*. Spelm.

Abbrocament, (*abbrocamentum*) The buying up of wares before they are exposed to sale in a fair or market, and selling the same by retail; which is a forestalling of a market or fair. *MS. de placit' coram rege* Ed. 3. *pencs J. Frevor, Mil.*

Abbutals, (from the French *aboutir*, to limit or bound) Are the buttings and boundings of lands, east, west, north, or south, shewing how the same lie with respect to others; as by what lands, highways, or other places, they are limited and bounded. Camden tells us, that limits were distinguished by hillocks raised in the lands called *Bosentines*, whence we have the word *butting*. The sides on the breadth of lands are properly *adjacentes*, lying or bordering; and the ends in length *abuttantes*, *abutting* or bounding. And in old surveys, these last are called *head-lands*, from *capitare*, to head. The boundaries and *buttals* of corporation and church lands, and of parishes, are preserved by an annual procession. And *abuttals* or boundaries are of several sorts; such as inclosures of hedges, ditches and stones in common fields, brooks, rivers, and highways, &c. of manors and lordships.

Abdicare, (*abdicare*) to renounce or refuse any thing. *Terms de Ley* 5.

Abdication, (*abdication*) In general, is where a magistrate, or person in office, renounces and gives up the same, before the term of service is expired. And this word is frequently confounded with resignation, but differs from it, in that *abdication* is done purely and

simply; whereas *resignation* is in favour of some other person. *Chamb. Dic.* 'Tis said to be a renunciation, quitting and relinquishing, so as to have nothing further to do with a thing; or the doing of such actions as are inconsistent with the holding of it. On king James's leaving the kingdom, and *abdicating* the government, the lords would have had the word *desertion* made use of; but the commons thought it was not comprehensive enough, for that the king might then have liberty of returning. *Abdication Debates*. The Scots called it a *forfeiture* of the crown, from the verb *forisfacio*. — This word is fully canvassed in the *Parliamentary Debates*, on the abdication of James II.

Abditorium, An abditory or hiding-place, to hide and preserve goods, plate, or money; and is used for a chest in which reliques are kept, as mentioned in the inventory of the church of York, *Mon. Ang. p. 173*. — *Item anum coffeur, & una pixis de Ebore ornata cum argento deaurato, item tria abditoria*, &c.

Abched, From the French *abecher*, to feed, is an old word, which signifies to be satisfied.

Aberamurder, (*abermurdrum*) Plain or downright murder; as distinguished from the less heinous crimes of manslaughter and chancemedley. It is derived from the Saxon *abere*, apparent, notorious, and *mord*, murder; and was declared a capital offence, without fine or commutation, by the laws of *Canute*, cap. 93. and of *Hen. 1.* cap. 13. *Spelm.*

Abet, (*abettare*) From the Saxon *a*, and *bedan* or *beten*, to stir up or incite; or from the French *bouter*, *impellere* or *excitare*. In our law it signifies as much as to encourage or set on; the substantive *abetment* is used for an encouraging or instigation. *Staundf. Pl. Cr.* 105. And *abettor* (*abetator*) is an instigator or setter on; one that promotes or procures a crime. *Old Nat. Br.* 21. *Abettors* of murder are such as command, procure, or counsel others to perpetrate the murder; and in some cases these *abettors* shall be taken as principals, in others but as accessaries; their presence or absence, at the time of committing the fact, making the difference. *Co. Lit.* 475. Vide *Accessaries*. *Hawk. P. C. part 2. tit. Accessary*, under letter B. and *tit. Appeal*, under letters R. S.

Abeyance, or *abbayance*, (from the Fr. *bayer*) To expect. It is what is in expectation, remembrance, and indentment of law. By a principle of law, in every land there is a fee-simple in some body, or it is in *abeyance*; that is, though for the present it be in no man, yet it is in expectancy belonging to him that is next to enjoy the land. *Co. Lit.* 342. *Lit. c. Discontin.* If a man be a patron of a church, and presents one to the same, now the fee of the lands and tenements pertaining to the rectory is in the parson; but if the parson die, and the church become void, then is the fee in *abeyance*, until there be a new parson presented, admitted, and inducted; for the patron hath not the fee, but only the right to present, the fee being in the incumbent that is presented. *Terms de Ley* 6. The frank-tenement of the glebe of a parsonage, during the time the parsonage is void, is in no man; but in *abeyance* or expectation, belonging to him who is next to enjoy it. If a man makes a lease for life, the remainder to the right heirs of J. S. the fee-simple is in *abeyance* until J. S. dies. *Co. Lit.* 342. In this case the remainder passeth from the grantor presently; though it vests not presently in the grantee, but is said to be in *abeyance* until J. S. dies, after whose death the heir has a good remainder, and it ceases to be in *abeyance*. *Terms de Ley*. If lands be leased to A. B. for life, the remainder to another person for years, the remainder for years is in *abeyance* until the death of the lessee, and then it shall vest in him in remainder as a purchaser, and as a chattel shall go to his executors. 3 *Leon.* 23. Where tenant for term of another's life dieth, the freehold of the lands is in *abeyance* till the entry of the occupant. Fee-simple in *abeyance* cannot be charged until it comes in *esse*, so as to be certainly charged or aliened; though by possibility it may fall every hour. *Co. Lit.* 378. The word *abeyance* hath been compared to what the civilians call *hereditatem jacentem*; for as the civilians say lands and goods do *jacere*, so the common lawyers say, that things in like estate are in *abeyance*, as the logicians term it in *posse*.

posse, or in understading; and as we say in *nubibus*, that is, in consideration of law. See *Plowd. Rep. Walsingham's case*.

Abgetoria, *abgetorium*, The alphabet, *A, B, C, &c.* This seems to be an *Irish* word. *Mat. Westm. reports of St. Patrick* — *Abgetoria quoque 345 & eo amplius scripsit, totidem episcopus ordinavit* — The *Irish* still call the alphabet *abghittin*.

Abigeus, For *abigenus*, signifies a thief who hath stolen many cattle, *viz. Si quis suam surripuit fur erit, & si quis gregem abigeus erit*. *Bract. l. 3. cap. 6.*

Ability. The king's issue are of *ability* to inherit in *England* wheresoever born; and children of subjects born beyond sea, may inherit if their birth were within the allegiance of the king. *Stat. 25 Ed. 3. Stat. 2. 42 Ed. 3. c. 10.* or born out of allegiance, if children of natural born subjects, *7 An. c. 5.* declared to be natural born, *4 Geo. 2. c. 21.*

Natural subjects may inherit, and make their title by ancestors born beyond sea. *11 & 12 W. 3. c. 6. 25 Geo. 2. c. 39.* Vide *Naturalization*.

Abisbering, Is understood to be quit of amercements. It originally signified a forfeiture or amercement; and is more properly *misbering* or *miskering*, according to the learned *Spelman*. Since, it hath been termed a liberty or freedom, because wherever this word is used in a grant or charter, the persons to whom made have the forfeitures and amercements of all others, and are themselves free from the controul of any within their fee. *Rastal's Abr. Terms de Ley.*

Abjuration, (*abjuratio*) A forswearing or renouncing by oath, signifies a sworn banishment, or an oath taken to forsake the realm for ever. *Stauf. Pl. C. l. 2. c. 40.* It hath also now another signification, extending to the person as well as place; as to *abjure* the Pretender by oath, whereby a man binds himself not to own any regal authority in the person called the Pretender, nor ever to pay him any obedience, &c. Formerly, in king *Edward the Confessor's* time, and other reigns down to the *22 H. 8.* (in imitation of the clemency of the *Roman* emperors towards such as fled to the church) if a man had committed felony here, and he could fly to a church or church-yard before his apprehension, he might not be taken from thence to be tried for his crime; but on confession thereof before the justice, or before the coroner, he was admitted to his oath to *abjure* or forsake the realm; which privilege he was to have forty days, during which time any persons might give him meat and drink for his sustenance, but not after, on pain of being guilty of felony: the form of the oath you may read in an ancient tract, *de Officio Coronatorum*, and in *Horn's Mirror, lib. 1.* But at last, this punishment being but a perpetual confinement of the offender to some sanctuary, wherein (upon *abjuratio* of his liberty and free habitation) he would chuse to spend his life, as appears by the *stat. anno 22 H. 8. c. 14.* It is enacted *21 Jac. 1. cap. 28.*

That thence after no sanctuary or privilege of sanctuary should be allowed; whereupon this *abjuratio* ceased. *2 Inst. 629.* An *abjuratio* or deportation for ever into a foreign country, is a civil death, and called (by the Lord *Coke*) a divorce between husband and wife; and the wife of such a person may bring actions, or be impleaded during the natural life of the husband, which she may not do in any other case: also she shall have her dower or jointure, &c. *Co. Lit. 133.* This is where a person suffers banishment for any crime. By *stat. 35 Eliz.* Popish recusants not making the submission of conformity, &c. are to *abjure* the realm. And by *1 W. & M. 13 W. 3. 1 Geo. 1. &c.* All persons are to *abjure* the pretended prince of *Wales*; and refusing the oath, are liable to divers penalties and forfeitures, &c. This *abjuratio* oath was invented for the security of the crown, and the protestant religion. See *Oaths*.

Abolition, A destroying or effacing, or putting out of memory: it also signifies the leave given by the king, or judges, to a criminal accuser to desist from further prosecution. *Stat. 25 H. 8. c. 21.*

Abridge, (*abbreviare*) Is derived from the French word *abreger*, to make shorter in words so as to retain the sense and substance. And in the common law it sig-

nifies particularly the making a declaration or count shorter, by severing some of the substance from it: a man is said to *abridge* his plaint in assise; and a woman her demand in action of dower, where any land is put into the plaint or demand which is not in the tenure of the defendant; for if the defendant pleads non-tenure, joint-tenancy, &c. in abatement of the writ, as to part of the lands, the plaintiff may leave out those lands, and pray that the tenant may answer to the rest. The reason of this abridgment of the plaint is, because the certainty is not set down in such writs, but they run in general; and though the demandant hath abridged his plaint in part, yet the writ will be good for the remainder. *Brook, tit. Abridgment, vide 21 H. 8. c. 3.*

Abrogate, (*abrogare*) To disannul or take away any thing: as to *abrogate* a law, is to lay aside or repeal it. *Stat. 5 & 6 Ed. 6. c. 3.*

Abteentes, or *des absenteees*, was a parliament so called, held at *Dublin* 10 May 8 Hen. 8. And mentioned in letters patent, dat. 29 Hen. 8. *4 Co. Inst. 354.*

Abolve, (*absolvere*) To *absolve* one excommunicated, or pardon, or set free from excommunication. Vide *Affoile*.

Abolutions from *Rome*, high treason, &c. *Stat. 23 Eliz. c. 1.* See *Bull.*

Absoniare, Was a word used by the *English Saxons* in the oath of fealty, and signified to shun or avoid. — As in the form of the oath among the *Saxons* recorded by Mr. *Sommer*: *In illo Deo, pro quo sanctum hoc sanctificatum est, volo esse nunc domino meo N. fidelis & credibilis, & amare quod amat, & absoniare quod absoniat, per Dei rectum, & seculi competentiam.*

Abque hoc, (without this, that, &c.) Are words of exception made use of in a *traverse*; as the defendant pleads that such a thing was done at *B.* &c. *abque hoc*, that it was done at, &c. *Mod. Ca. 103.*

Accapitum, and *accapitare*. The same with relief due to lords of manors. — *Capitali domino accapitare, i. e. to pay a relief to the chief lord.* *Fleta, l. 2. c. 50.*

Accedas ad Curiam, Is a writ that lies where a man hath received false judgment in a hundred court, or court-baron. It is directed to the sheriff; and issued out of the Chancery, but returnable into *B. R.* or *C. B.* And is in the nature of the writ *de falso judicio*, which lies for him that had received false judgment in the county-court. In the *Register of Writs*, it is said to be a writ that lies as well for justice delayed, as for false judgment; and that it is a species of the writ *recordare*, the sheriff being to make record of the suit in the inferior court, and certify it into the king's court. *Reg. Orig. 9. 56. F. N. B. 18. Dyer 169.*

Accedas ad Witecomitem, Where a sheriff hath a writ called *pone* delivered to him, but suppresseth it; this writ is directed to the coroner, commanding him to deliver a writ to the sheriff. *Reg. Orig. 83.*

Acceptance, (*acceptatio*) Is the taking and accepting of any thing in good part, and as it were a tacit agreement to a preceding act, which might have been defeated and avoided, were it not for such acceptance had. To state the law under this head, it will be proper to consider the title,

I. With regard to the acceptance of rent.

II. To show how far the acceptance of one estate shall destroy another.

III. How far the acceptance of one thing shall be a good bar to the demand of another.

IV. Where the acceptance of money shall discharge a bond; and what other satisfaction shall be good.

I. With regard to the acceptance of rent, it is necessary to shew, 1. Where such acceptance shall confirm a lease. *1 Nels. Abr. 7.*

If a bishop before the statute *1 Eliz.* leased part of his bishoprick for term of years, reserving rent, and then died; and after another was made bishop, who accepted and received the rent when due, by this acceptance, the lease was made good, which otherwise the new bishop might have avoided. It is the same if baron and feme seized of lands in right of the same, join and make a lease or

or feoffment, reserving rent; and the baron dies, after whose death the feme receives or *accepts* the rent; by this the lease or feoffment is confirmed, and shall bar her from bringing a *cui in vita*. Co. Lit. 211. Tenant in tail made a lease for years, rendring 20s. rent, and afterwards released 19s. and died; the issue in tail accepted the 12d. rent: the better opinion was, that by the acceptance of the shilling for rent he had affirmed the lease, and could not distrain for the 19s. rent. *Dyer* 304. Tenant for life, remainder in tail; a stranger levies a fine to him in remainder, who leased the lands to the conusor, rendring rent, the tenant for life died, and the issue in tail accepted the rent: adjudged, that by the fine and acceptance of the rent, the lease was affirmed. *Dyer* 209. See *Smith* against *Stapleton*, *Plowd.* 418, 434. Lord and tenant; the rent is behind many years, the tenant made a feoffment in fee, and the lord accepted the rent of the feoffee which became due in his time; adjudged, that by such acceptance he shall lose all the arrearages, and cannot avow for the same. 3 *Rep.* 65. *Penant's* case. Lease for years, rendring rent, with a clause of re-entry; the lessee paid the rent, which the lessor accepted, and put into a bag, but afterwards finding brass money amongst it, he refused to carry it away, and entered for the condition broken; but adjudged unlawful; because after he had accepted the rent he is barred. 5 *Rep.* 113. *Wade's* case.

Acceptance of the next rent due, at a day afterwards, will bar one to enter for a condition broken before by reason of non-payment of the rent; because the lessor thereby affirmeth the lease to have continuance. Co. Lit. 211. And taking a distress affirmeth the continuance of the rent; but if rent was due, at a day before, and thereby the condition was broken, one may receive that rent, and yet re-enter: and if he *accepts* of part of the rent, he may enter for a condition broken, and retain the lands until he has the whole rent. 3 *Rep.* 64. 1 *Inst.* 203.

If an infant accepts of rent at his full age, it makes the lease good, and shall bind him. *Plowd.* 418.

2. Where the acceptance of rent shall not make the lease good.

If a parson, &c. makes a lease for years not warranted by the stat. 32 H. 8. but is void by his death; acceptance of rent by a new parson or successor will not make it good. 1 *Saund.* 241. And if a tenant for life make a lease for years, there no acceptance will make the lease good, because the lease is void by his death. *Dyer* 46, 239.

Tenant in tail made a lease for years, rendring rent to him and his heirs, and died; his son and heir accepted the rent, and was afterwards executed for treason, leaving issue a son; the king accepted the rent, but that did not make the lease good, the lands being in his hands by the attainder, and not in the reverter. *Dyer* 115. Lease for years, with condition, that the lessee shall not alien or assign, without the assent of the lessor, and if he did, that then the lessor should re-enter: he assigned part of the land without assent, &c. and then the lessor before notice of the assignment, accepts the rent, and afterwards entered for the condition broken, and adjudged lawful; for the condition being collateral, he might assign the land so secretly, that it may be impossible for the lessor to know it. 3 *Rep.* 65. *Penant's* case. Cro. Eliz. 453. S. C. Lease for twenty-one years, rendring rent, on condition, that if the lessee did let any part of it above three years, then the lease to be void, and that the lessor might enter; he let it out for three years, and so from three years to three years, during the term of twenty-one years, if he so long lived; the lessor accepted the rent of the assignee, and afterwards entered; this was a breach of the condition, and the acceptance of it afterwards did not dispense with it, because the original lease was void and determined. Cro. Car. 368. If tenant in tail make a lease for years, to commence after his death, rendring rent, in such case acceptance of rent by the issue will not make the lease good to bar him, because the lease did not take effect in the life of his ancestor. *Plowd.* 418.

3. How far the acceptance of rent after assignment of the term destroys the privity of contract between the lessor and the first lessee.

If a lessor *accepts* of rent from an assignee, knowing of the assignment, it bars him from action of debt against the lessee; for the privity of contract is extinguished: but after such acceptance, the lessor or his assigns may maintain an action against the first lessee upon his covenant for payment of the rent. 1 *Saund.* 241. 3 *Rep.* 24. Acceptance of rent from the assignee has been adjudged a sufficient notice of the assignment, so that the lessor could not resort to the first lessee. 2 *Bulst.* 151.

Lessee for years assigned his term, and died intestate, the lessor brought debt against his administrator, who pleaded the assignment, and that the plaintiff had notice, and had accepted the rent of the assignee: adjudged, that by the death of the lessee, the privity of contract was determined, and the action would not lie against the administrator. Cro. El. 715. and cited in *Walker's* case, 3 *Rep.* 24.

II. How far the acceptance of one estate shall destroy another.

If a lessee, for term of twenty years, *accepts* of a lease of the same land for ten years, by the lessee's acceptance of the new lease, the term of twenty years is determined in law. 2 *Roll. Abr.* 469.

Lease for years to R. B. rendring rent; the next year a lease was made of the same lands to the lady P. for ninety-nine years; the next year the same lands were demised to the said R. B. for forty-one years, who accepted the lease, but that did not extinguish his first lease; because the lessor by making the intermediate lease to the lady P. had only a reversion, and could not afterwards give any interest to R. B. but if it had not been for this intermediate lease, then the acceptance of the second lease for forty-one years had been a surrender of the first. *Hutt.* 104.

If a man hath a lease for years, which is good in law, and afterwards accepts a new lease of the same land, which is void in law, this is no surrender in law of the good lease. *Hutt.* 101. *Baker v. Willoughby.* *Wells v. Whitewood*, *ibid.* S. P.

A man, in consideration of a marriage to be had with M. R. made an estate to her for life of certain lands in full satisfaction of her dower; afterwards they married, and the husband died, and the widow brought a writ of dower against the heir, who pleaded in bar the acceptance of the estate for life: adjudged no good plea; for such acceptance did not bar her of her dower at the common law, because she had no title of dower when the acceptance was made; and besides no collateral acceptance can bar any right of inheritance or freehold. See 4 *Rep.* *Vernon's* case.

A man made a lease of a manor for thirty years, excepting the wood, &c. and afterwards made a lease of the woods to the same lessee for sixty years, and a third lease to him of the manor for thirty years, without any exception; resolved, that by the acceptance of this future lease, the lease for sixty years was surrendered; because by such acceptance the lessee had affirmed, that the lessor had authority to make a new lease. 5 *Rep.* 11. *Jew's* case.

In a special verdict in trespass, the case was, a lease was made to husband and wife for their lives, and afterwards they accepted a new lease for themselves and their son; *habendum* to all three of them, *a die datus indenturæ*, for the term of their lives with a letter of attorney to make livery: adjudged, that the acceptance of a second lease, to commence *a die datus*, was a surrender of the first, and this by the express agreement in writing of the lessees themselves; for otherwise the lessor had no power to make a new lease. *Moor* 636.

III. How far the acceptance of one thing shall be a good bar to the demand of another.

Where the condition of a bond is to pay money, acceptance of another thing is good. But if the condition is not for money, but a collateral thing, it is otherwise. *Dyer* 56. 9 *Rep.* 79. And the acceptance of uncertain things, as customs, &c. made over, may not be pleaded in satisfaction of a certain sum due on bond. Cro. Car. 192. If a woman hath title to an estate of inheritance,

as dower, &c. she shall not be barred by any collateral satisfaction or recompence: and no collateral acceptance can bar any right of inheritance or freehold, without some release, &c. 4 Rep. 1. When a man is entitled to a thing in gross, he is not bound to accept it by parcels; and if a lessor distrains for rent, he is not obliged to accept part of it; nor in action of detinue, part of the goods, &c. 3 Salk. 2.

If a man be bound in 200 quarters of corn, with condition to pay 20*l.* the obligor may, by agreement, give the obligee any other thing in satisfaction of the money; but if the condition had been to pay 100 quarters of corn, there the acceptance of money, or any other thing, had not been good, because the contract was not made for money, but for a collateral thing. *Pryto's case*, 9 Rep. 79.

Debt upon bond, conditioned for the obligor to make an assurance of such lands to such uses as in the condition mentioned; the defendant pleaded, that he had made a feoffment of the same lands to other uses than in the condition expressed, which the obligee had accepted; and upon demurrer it was adjudged an ill plea; for the obligor ought not to vary from the uses set forth in the condition. 1 Brownl. 60.

Acceptance of a less sum may be in satisfaction of a greater sum, if it be before the day on which the money becomes due. 3 Bulst. 301. Thus in debt on bond; the defendant pleaded payment of the money according to the condition, &c. upon which they were at issue, and the evidence was, that the defendant had paid the money before the day appointed by the condition, and that the plaintiff had accepted it: adjudged, this was a good discharge of the bond, if it had been specially pleaded; but as the defendant had pleaded, it must be found against him, and so it was. *Godb.* 10.

Now, by the stat. 12 Ann. c. 16. payment after the day, specified in the condition, may be pleaded. — And 'tis much to be doubted, whether the case in *Godb.* is law, for if the money was paid before the day, it must have been paid at the day; and therefore paid according to the condition.

The wife, whilst sole, in consideration the plaintiff had expended 1500*l.* about her suits, promised to pay, &c. and in an action on the case against husband and wife, they pleaded that the plaintiff did not expend 10*l.* and that the heir made a lease for years to the plaintiff to the use of the wife; to commence after her death, in recompence of her dower, and that they agreed the plaintiff should retain the lease to his own use in satisfaction of his expences, which he accepted; and upon demurrer to this plea it was held ill, because the agreement to accept the lease, being at a time to come, was not executed, but executory. *Dyer* 356. *Onely v. Earl Rivers*.

IV. Where the acceptance of money shall discharge a bond; and what other satisfaction shall be good.

Where a lesser sum is paid before it is due, and the payment is accepted, it shall be good in satisfaction of a greater sum; but after the money is due, then a lesser sum, though accepted, shall not be a satisfaction for a greater sum. Thus in debt upon bond, conditioned to pay 8*l.* &c. defendant pleaded payment of 5*l.* before the day mentioned in the condition, which the obligee accepted in satisfaction of the bond; and upon demurrer this was adjudged a good plea. *Moore* 677.

But payment after the day of a less sum is not good, as the bond is forfeited, at common law; and there is not any statute to relieve.

Debt upon bond of 16*l.* conditioned to pay 8*l.* 10*s.* on a certain day; the defendant pleaded, that before that day, he at the request of the plaintiff, paid to him 5*l.* which he accepted in satisfaction of the debt, and upon demurrer the plaintiff had judgment, because the defendant had pleaded the payment of the 5*l.* generally, without alledging, that it was in satisfaction of the debt. It is true, he sets forth, that it was accepted in satisfaction of the debt, but it ought likewise to be paid in satisfaction. 5 Rep. 517. Debt upon bond, conditioned, that in consideration the plaintiff had paid 12*l.* to the defendant, he became bound to pay the plaintiff 12*l.* if he

lived one month after the date of that bond; and if not paid at that time, then to pay to him 14*l.* if he lived six months after the date of the bond; the defendant pleaded, that after the six months, he paid the plaintiff 8*l.* and then gave him another bond in the penalty of 20*l.* conditioned to pay him 10*l.* on a certain day, in full satisfaction of the other bond, and that the plaintiff did accordingly accept the said bond; upon a demurrer to this plea it was held ill; for admitting that one bond might be given in satisfaction of another, yet it cannot be after the other is forfeited, as it was in this case; because after the forfeiture the penalty is vested in the obligee, and a less sum cannot be a satisfaction for a greater. 1 Lut. 464.

It has been adjudged, that the acceptance of one bond cannot be pleaded in satisfaction of another bond. *Cro. Car.* 85. *Moore* 872. *Cro. Eliz.* 716, 727. 2 *Cro.* 579. Thus in debt on a bond of 100*l.* conditioned for the payment of 52*l.* 10*s.* on a certain day; the defendant pleaded, that at the day, &c. he and his son gave a new bond of 100*l.* conditioned for the payment of 52*l.* 10*s.* at another day then to come, which the plaintiff accepted in satisfaction of the old bond; and upon demurrer it was adjudged for the plaintiff, because the acceptance of a new bond to pay money at another day, could not be a present satisfaction for the money due on the day when it was to be paid on the old bond. *Hob.* 68. But it is otherwise where the second bond is not given by the obligor, as in debt upon bond against the defendant as heir, &c. he pleaded, that his ancestor, the obligor, died intestate, and that W. R. administered, who gave the plaintiff another bond in satisfaction of the former: there was a verdict for the defendant: and it being moved in arrest of judgment, this distinction was made, that if the obligor, who gave the first bond, had likewise given the second, it would not have discharged the first; but in this case the second bond was not given by him who gave the first, but by his administrator, which had mended the security, because he may be chargeable *de bonis propriis*; and for that reason the second bond was held to be a discharge of the first. 1 Mod. 225.

Necessary, accessorius vel accessorium, (particeps criminis) Is where a man is guilty of a felonious offence, not principally, but by participation, as by command, advice, or concealment, &c.

The law relating to this title may be reduced under the following divisions:

- I. Of accessories before the fact.
- II. Of accessories after the fact.
- III. Of accessories to felonies, by common law and by statute.
- IV. Of the proceedings against accessories.

I. An accessory before the fact is he, that being absent at the time of the felony committed doth yet procure, counsel, command, or abet another to commit a felony, and it is an offence greater than the accessory after; and therefore in many cases clergy is taken away from accessories before, which yet is not taken away from accessories after, as in petit treason, murder, robbery, and wilful burning, by 4 & 5 P. & M. c. 4. 1 *Hale's History of the Pleas of the Crown* 615. — If the commander or counsellor be present, he is a principal. *H. H. P. C.* 616. Words which sound in bare permission, make not an accessory, as if A. says he will kill J. S. and B. says, you may do your pleasure for me, this makes not B. accessory. 1 *H. H. P. C.* 616. 21 *Hen.* 7. 36, 37. *Crompt.* 41. b. If A. hire B. to mingle or lay poison for C. and B. doth it accordingly, and C. is poisoned; B. though absent, is principal, and A. is accessory; but if A. were present at the mingling or laying of the poison, though both were absent at the taking of it, yet both are principal, for they are both equally acting in the poisoning. But if A. buys the materials of the poison, knowing and consenting to the design, and deliver them to B. to mingle and apply it, or lay it in the absence of A. here it seems A. is only accessory before. *H. H. P. C.* 616. See 3 *Lust.* p. 50. *State Tr.* vol. 1. p. 329.

There cannot be an *accessary* before the fact in manslaughter, because it is committed of a sudden, and unpremeditated. *H. P. C.* He who counsels or commands any evil, shall be adjudged *accessary* to all that follows upon it, but not to any thing else. If a person commandeth another to beat such a person, and he beats him so that he dies of his wounds, the person commanding will be *accessary* to the murder: but if the command had been to beat another person, or to burn such a house, and he burns another, he that commandeth will not be *accessary*. 3 *Inst.* 51. If I command a person to do an unlawful act, as to rob *A. B.* at one place, and he doth it at another; or to rob him on such a day, and he doth it not himself, but procures another to do it; or to kill by poison, and he doth it by violence; in all these cases I shall be *accessary*: but where the command is to kill *A. B.* and he killeth *A. D.* this difference in substance will not make the commander *accessary*. *Plowd.* 475. If a man counsels a woman to murder the child in her womb, and the woman murder her child after it is born, he is *accessary* to the murder. *Dyer* 185.

II. An accessary after the fact.

An *accessary* after the fact is he that receives, assists or comforts any man that hath committed murder or felony, which hath come to his knowledge; but this doth not extend to a woman who receives or assists her husband, though a husband receiving his wife will be *accessary*: and a servant may be *accessary* in relieving his master, or assisting him in his escape, &c. 3 *Inst.* 108.

If the wife alone, the husband being ignorant of it, do knowingly receive a felon, the wife is *accessary* and not the husband. 1 *H. H. P. C.* 621.

But if felons come to the house of *D.* and *M.* his wife, and *M.* know them to be felons, though *D.* doth not, and both *D.* and *M.* receive and entertain them, but *M.* consents not to the felony: adjudged, that this makes not *M.* *accessary*. 3 *Inst.* 108. *cap.* 47. cites *Mich.* 37 *E.* 3. *Dey's* case.

But if the husband and wife both receive a felon knowingly, it shall be judged only the act of the husband, and the wife shall be acquitted. 1 *H. H. P. C.* 621.

If a felon comes to the house of another, and he permits him to escape without arrest, knowing him to have committed felony, this doth not make a man *accessary*; but if he take money of the felon to suffer such escape, it makes him an *accessary*: and so it is if he shut the fore door of his house, whereby the pursuers are deceived, for here is not a bare omission, but an act done. 1 *Hale's Hist. P. C.* 619.

By statute 3 & 4 *W. & M.* c. 19. "Receivers of stolen goods knowing them to be stolen, are to be deemed accessaries after the fact, and suffer as such." But because these receivers often concealed the principal felons, and thereby escaped being punished as accessaries; therefore by 1 *An.* c. 9. it is enacted, that "whosoever shall buy or receive stolen goods, knowing them to be stolen, may be prosecuted for a *misdemeanor*, and punished by fine and imprisonment, tho' the principal felon be not convicted"; and this shall exempt them from being punished as accessaries, if the principal shall afterwards be convicted. But by 5 *An.* c. 31. it is enacted, that "if any person shall receive or buy knowingly any stolen goods, or knowingly harbour or conceal any felon, he shall be taken as *accessary* to the felon, and shall suffer as a felon." This statute does not take away the benefit of clergy; but by stat. 4 *Geo.* 1. such person may be transported for fourteen years. And by this last-mentioned statute it is also enacted, that "whosoever shall take a reward under the pretence of helping any one to stolen goods, shall suffer as a felon, as if he himself had stolen them, unless he cause such felon to be apprehended and brought to trial, and give evidence against him." Upon this clause the famous *Jonathan Wild* was convicted and executed. 10 *Geo.* 1. *Vide* 10 *Geo.* 3. a new act against receiving.

Likewise if any person, knowing another to have committed piracy, shall on the land or sea receive, entertain, or conceal him, or receive or take into their custody any ship, vessel, or goods, which have been piratically taken,

shall be adjudged *accessary* to the piracy. 11 & 12 *W.* 3. *cap.* 7. s. 9.

Accessaries after the fact can only be in felonies, and in those felonies, where by the law, judgment of death regularly ought to ensue; and therefore there is no *accessary* in petit larceny, homicide *per infortunium*, or homicide *se defendendo*. 1 *H. H. P. C.* 618.

III. Of accessaries to felonies by common law and by statute.

As to felonies at common law it is said, that accessaries both before and after are included; and as to felonies by act of parliament; regularly if an act of parliament enact an offence to be felony, though it mention nothing of accessaries before or after, yet virtually and consequentially those, who counsel or command the offence, are accessaries before, and those that knowingly receive the offender, are accessaries after; as in the case of rape made felony by the statute of *Westminster* 2. c. 34. 1 *H. H. P. C.* 613. 2 *Inst.* 434. *Staundf. P. C. lib.* 1. c. 47. But if the act of parliament, that makes the felony, in express terms comprehend accessaries before, and makes no mention of accessaries after, namely, receivers or comforters, there it seems there can be no accessaries after; for the expression of procurers, counsellors, abettors (all which import accessaries before) makes it evident, that the law-makers did not intend to include accessaries after, which is an offence of a lower degree than accessaries before; as the statute of 8 *H. n.* 6. c. 12. for stealing of records, the statute of 33 *Hen.* 8. c. 8. for witchcraft, &c. 1 *H. H. P. C.* 614.

In the highest capital offence, namely, *high treason*, there are no accessaries, neither before nor after; for all consenters, aiders, abettors, and knowing receivers and comforters of traitors are all principals. 1 *H. H. P. C.* 613.

In cases that are criminal but not capital, as in *trespass*, *mayhem*, or *præmunire*, there are no accessaries, for all the accessaries before are in the same degree as principals; and accessaries after by receiving the offenders cannot be in law under any penalties as accessaries, unless the acts of parliament that induce those penalties, do expressly extend to receivers or comforters, as some do. 1 *H. H. P. C.* 613. And though generally an act of parliament, creating a felony, renders (consequentially) accessaries before and after within the same penalty, yet the special penning of the act of parliament in such cases sometimes varies the case. Thus the statute of 3 *Hen.* 7. c. 2. for taking away maidens, &c. makes the offender, and the procuring and abetting, yea and wittingly receiving also, to be all equally principal felonies, and excluded of clergy. 1 *H. H. P. C.* 614.

In what cases accessaries are excluded from clergy, see the *quarto* edition of *The Statutes at Large*, title *Accessarii*, under the head of *Felonies without Clergy*.

IV. Of the proceedings against accessaries.

By the statute 2 & 3 *Ed.* 6. c. 24. the *accessary* is indictable in that county where he was *accessary*, and shall be tried there, as if the felony had been committed in the same county; and the justices, before whom the *accessary* is, shall write to the justices, &c. before whom the principal is attainted, for the record of the attainer. 1 *Hale's Hist. P. C.* 623. This writing is to be by writ in the king's name, under the *seal* of the justice so sending it. *Dyer* 253. *b.* The *accessary* may be indicted in the same indictment with the principal, and that is the best and most usual way; but he may be indicted in another indictment, but then such indictment must contain the certainty and kind of the principal felony. 1 *H. H. P. C.* 623. Formerly it was held, that the *accessary* might be tried and punished as if the principal had been attainted; and this, although the principal was admitted to his clergy, pardoned, or otherwise delivered before attainer. By stat. 29 *Geo.* 2. c. 30. the buyer or receiver of stolen lead, iron, copper, brass, bell-metal, or solder, may be convicted, although the principal hath not been convicted, and shall be transported for fourteen years. If the principal be erroneously attainted, yet the *accessary* shall be put to answer, and shall not take

take advantage of the error in that attainder; but the principal reverſing the attainder, reverſeth the attainder of the acceſſary. 1 *H. H. P. C.* 625.

Where the principal is not attained, but diſcharged by being burnt in the hand only, the acceſſary after the fact ought to be diſcharged without burning in the hand, on being put to his book. *Cro. Car.* 566. *pl. 3.* *Hill. 15 Car. B. R. Stevens's caſe.*

The acceſſary ſhall not be conſtrained to answer to his indictment, till the principal be tried; but if he will waive that benefit, and put himſelf upon his trial before the principal be tried, he may; and his acquittal or conviction upon ſuch trial is good. But it ſeems neceſſary in ſuch caſe to reſpite judgment till the principal be convicted and attained; for if the principal be after acquitted, that conviction of the acceſſary is annulled, and no judgment ought to be given againſt him; but if he be acquitted of the acceſſary, that acquittal is good, and he ſhall be diſcharged. 1 *H. H. P. C.* 623, 624.

It ſeems to be ſettled at this day, that if the principal and acceſſary appear together, and the principal plead the general iſſue, the acceſſary ſhall be put to plead alſo; and that if he likewiſe plead the general iſſue, both may be tried by one inqueſt; but that the principal muſt be firſt convicted; and that the jury ſhall be charged, that if they find the principal Not guilty, they ſhall find the acceſſary Not guilty. But it ſeems agreed, that if the principal plead a plea in bar, or abatement, or a former acquittal, the acceſſary ſhall not be forced to answer, till that plea be determined: for if it be found for the principal, the acceſſary is diſcharged; if againſt the principal, yet he ſhall after plead over to the felony, and may be acquitted. 1 *H. H. P. C.* 624. 2 *Haw. 323.* Where there are two principals, the attainder of one of them gives ſufficient foundation to arraign the acceſſary. *Jenk. Cent.* 76. Vide *Haw. P. C.* tit. *Acceſſary.* See *Murder Principal, &c.*

Accola, An huſbandman who came from ſome other parts or country to till the lands, *eo quod adveniens terram colat.*—And is thus diſtinguiſhed from *Incola*, viz. *Accola non propriam, propriam colit Incola terram.* Du Fresnoie.

Accolade, (from the French accoller, *collum amplecti*) A ceremony uſed in knighthood by the king's putting his hand about the knight's neck.

Accompt, (*computus*) Is a writ or action which lies againſt a bailiff or receiver to a lord or others, who by reaſon of their offices and buſineſſes are to render accompt, but reſuſe to do it. *F. N. B.* 116.

This action is now ſeldom uſed, but it lies in the following caſes:

If a perſon receives money due to me upon an obligation, &c. I may either have an action of accompt againſt him as my receiver; or action of debt, or on the caſe, as owing me ſo much money as he hath received. 1 *Lill.* 33.

If I pay money in my own wrong to another, I may bring an action againſt him for ſo much money received to my uſe; but then he may diſcharge himſelf by alledging it was for ſome debt, or to be paid over by my order to ſome other perſon, which he hath done, &c. 1 *Lill.* 30. But if a man have a ſervant, whom he orders to receive money, the maſter ſhall have accompt againſt him, if he were his receiver. 1 *Inſt.* 172. If money be received by a man's wife to his uſe, action of accompt lies againſt the huſband, and he may be charged in the declaration as his own receipt. *Co. Lit.* 295. Account does not lie againſt an infant; but it lies againſt a man or woman, that is guardian, bailiff or receiver, being of age and diſcover: and though an apprentice is not chargeable in this action, for what he uſually receives in his maſter's trade; yet upon collateral receipts he ſhall be charged as well as another. 1 *Inſt.* 172. *Roll. Abr.* 117. 3 *Leon.* 92. As to other actions of accompt, they will not lie of a thing certain; if a man delivers 10*l.* to merchandize with, he ſhall not have account of the 10*l.* but of the profits, which are uncertain: and this is one reaſon why this action will not lie for the arrears of rent. 1 *Danv. Abr.* 215. Action of account may be brought againſt a factor that ſells goods and merchandizes upon credit, without a particular commiſſion ſo to do, though the goods are *bona peritura*. 2 *Mod.* 100. If there are

two demands in a declaration, to which the defendant pleads an accompt ſtated, the plaintiff can never after reſort to the original contract, which is thereby merged and diſcharged in the accompt: if *A.* ſells his horſe to *B.* for 10*l.* and there being divers other dealings between them, they come to an accompt upon the whole, and *B.* is found in arrear 5*l.* *A.* muſt bring his *inſinuat computaſſet* for it, but if there be only one debt betwixt the parties, entering into an accompt for that would not determine the firſt contract. 1 *Mod. Rep.* 206. 2 *Mod.* 44. It has been held, that mutual demands on an accompt are not extinguished by ſettling it, and promiſe to pay the balance; wherefore *assumpsit* lies for the original debt. *Fitzgib.* 44. A man having received of another 100*l.* to be employed in merchandize abroad, covenants at his return to accompt to him; this doth not alter the caſe, but notwithstanding the covenant, action of accompt may be brought. 2 *Bulſt.* 256. And if I deliver to another perſon goods or money beyond ſea, to be delivered to me again in *England* at a certain place, and he delivers it not, I may be relieved by this action. *F. N. B.* 18.

It may be brought againſt the following perſons:

If a man makes one his bailiff of a manor, &c. he ſhall have a writ of accompt againſt him as a bailiff; where a perſon makes one receiver, to receive his rents or debts, &c. he ſhall have accompt againſt him as receiver, and if a man makes one his bailiff and alſo his receiver, then he ſhall have accompt againſt him in both ways. Alſo a perſon may have a writ of accompt againſt a man as bailiff or receiver, where he was not his bailiff or receiver; as if a man receive money for my uſe, I ſhall have an accompt againſt him as receiver; or if a perſon deliver money unto another to deliver over unto me, I ſhall likewiſe have accompt againſt him as my receiver: ſo if a man enter into my lands to my uſe, and receives the profits thereof, I ſhall have accompt againſt him as bailiff. 9 *H. 6.* 36 *H. 6.* 10 *R. 2.* *Fitz. Accompt.* 6.

A judgment in accompt, as receiver, is no bar to action of accompt as bailiff; but 'tis ſaid a bailiff cannot be charged as receiver, nor a receiver as bailiff; becauſe then he might be twice charged. 2 *Lev.* 127. 1 *Danv. Abr.* 220, 221. The heir may have writ of accompt before or after his full age, againſt a guardian in ſocage; and if he ſue the guardian for profits of his lands taken before he is fourteen years old, he muſt charge him as guardian; but if it be for taking the profits after that age, there he muſt ſue him as bailiff. *Lit.* 124. *F. N. B.* 118. Where an heir ſues a ſtranger that doth intermeddle with his land, he ſhall charge him in accompt as guardian. *F. N. B.* 18. A man deviſes land to be ſold by his executors, and the money thence ariſing to be diſtributed amongſt his daughters; action of accompt lies in this caſe, for the daughters againſt the executors. *Jenk. Cent.* 215. 2 *Roll. Abr.* 285. An action of accompt lies againſt a bailiff, not only for what profits he hath made and raiſed, but alſo for what he might have made and raiſed by his care and induſtry, his reaſonable charges and expences deducted. *Co. Lit.* 172. One merchant may have accompt againſt another, where they occupy their trade together; and if one charges me as bailiff of his goods *ad merchandizandum*, I muſt answer for the increaſe, and be puniſhed for my negligence; but if he charges me as receiver *ad computandum*, I muſt be answerable only for the bare money or thing delivered. *F. N. B.* 117. *Co. Lit.* 272. 2 *Leon. Ca.* 245.

If a bailiff or receiver make a deputy, action of accompt will not lie againſt the deputy, but againſt him. 1 *Leon.* 32. But ſeveral ſtatutes have extended the benefit of this writ or action.

The ſtatute of 13 *E. 3. c. 23.* gives an action of account to the executors of a merchant; the ſtatute 25 *Ed. 3. c. 5.* to executors of executors; the ſtatute 31 *Ed. 3. c. 11.* to adminiſtrators: and by the ſtatute 3 & 4 *Ann. c. 16.* actions of account may be brought againſt the executors and adminiſtrators of every guardian, bailiff and receiver, and by one jointenant, tenant in common, his executors and adminiſtrators againſt the other as bailiff, for receiving more than his ſhare, and againſt their executors and adminiſtrators.

It may be proper to say something concerning the plea and judgment in account; and though the order may seem somewhat irregular, it will be necessary first to explain the nature of the judgment, which being rightly understood, the distinctions as to the method of pleading will be more easily conceived.

The usual judgment is *quod computet*; on which the defendant is taken by *capias ad computandum*: but there are two judgments in this writ, for if the defendant cannot avoid the suit by plea, judgment is first given, *That he do account*; and having done this before the auditors, there is another judgment entered, that the plaintiff shall recover of the defendant so much as is found in arrears. 11 Rep. 40. The first judgment is but an award of the court, like to a writ to enquire of damages; and these two judgments depend one upon another; for if judgment be to *account*, and the party die before he hath accounted, the executor cannot proceed in the action, but it must be begun again; and no writ of error will lie upon the first till after the second judgment. *Ibid.* Thus it appears, that after the first judgment to account, auditors are assigned; and

With respect to the plea, the following distinctions are to be noticed:

What may be pleaded in bar to the action, shall not be allowed to be pleaded before the auditors. *Cro. Car.* 82; 161. Some pleas are in bar of the *account*, and others in discharge before auditors; and some pleas will be allowed before auditors, that will not be in bar to the *account*. *Dyer* 21. 11 Rep. 8. In *account* the plaintiff declared of the receipt of money by the hands of a stranger; the defendant pleaded a gift of the money afterwards by the plaintiff; this was a good plea as well in bar of the action, as before auditors. *Winch* 9.

The pleas in this action are, *quod nunquam fuit receptor, quod plene computavit, &c.* It is no plea by an *accountant* that he was robbed; but alledging it was without his default and negligence, will be a good plea. *Co. Lit.* 89. That the defendant *never was bailiff*, is the general bar; and it is a good plea in bar, by claiming a property in the things to be accounted for. 21 Ed. 3. 29 E. 3. 47. A defendant, as receiver, cannot wage his law, where he receives the money by another's hands: 'tis otherwise where he received it of the plaintiff himself. 1 *Cro.* 919. Supposing there was not any evidence of the delivery.

It may be proper to add, that the process in *account* is summons, *pone* and distress, and upon a *nihil* returned, the plaintiff may proceed to outlawry. The statute of Limitations, 21 Jac. 1: doth not bar a man who is a merchant from bringing action of *account* for merchandize at any time; but all other actions of *account* are within the statute. In *Chancery* upon an *account* of fifteen or twenty years standing, the defendant may be allowed to prove, on his own oath, what he cannot otherwise make proof of; but here the particulars must be named, as to whom the money was paid, for what, and when; *&c.* 1 *Chan. Rep.* 146. And a defendant shall be discharged upon his oath of sums under 40 s. though it is held a plaintiff shall not so charge another, or be allowed any thing in equity on his oath. 2 *Chan. Caf.* 249. 1 *Vern.* 283. See *Oath*. Vide *Comyn's Digest*, tit. *Account*.

Accountant General, A new officer in the court of *Chancery*, appointed by act of parliament, to receive all money lodged in court, in the place of the masters, *&c.* He is to convey the money to the Bank, and take the same out by order; and shall only keep the account with the bank, for the Bank is to be answerable for all money received by them, and not the *Accountant General*; &c. Stat. 12 Geo. 1. c. 32. No fees shall be taken by this officer or his clerks, on pain of being punished for extortion; but they are to be paid salaries. The *Accountant General* 650 l. per annum, out of interest made of part of the suitors money. 12 Geo. 2. cap. 24. Vide 4 Geo. 3. c. 32. 120 l. per ann. to his third clerk.

Counterfeiting the hand of the *Accountant General* is felony without clergy. 12 Geo. 1. c. 32. sec. 9.

Accord, (*French*) Is an agreement between two or more persons, where any one is injured by a trespass, or offence done, or on a contract, to satisfy him with some recompence; which if executed and performed, shall be

a good bar in law, if the other party after the *accord* performed bring any action for the same. *Terms de Ley* 14.

For the right understanding of this head, it is to be shewn,

- I. In what cases *accord* may be pleaded.
- II. In what manner it may be pleaded.

I. When a duty is created by deed in certainty, as by bill, bond, or covenant to pay a sum of money, this duty accruing by writing, ought to be discharged by matter of as high a nature; but when no certain duty arises by deed, but the action is for a tort or default, *&c.* for which damages are to be recovered, there an *accord* with satisfaction is a good plea. 6 Rep. 43. In *accord*, one promise may be pleaded in discharge of another, before breach; but after breach, it cannot be discharged without a release in writing. 2 Mod. 44. *Accord* with satisfaction, upon a covenant broken, is a good plea in satisfaction and discharge of the damages. *Lutw.* 359. And *accord* made before the covenant broken, hath been adjudged a good bar to an action of covenant, as it may be in satisfaction of damage to come. 1 *Danv. Abr.* 546.

If a contract without deed is to deliver goods, *&c.* there money may be paid by *accord* in satisfaction; but if one is bound in an obligation to deliver goods, or to do any collateral thing, the obligee cannot by *accord* give money in satisfaction thereof: though when one is bound to pay money, he may give goods or any other valuable thing in satisfaction. 9 Rep. 78. 1 *Lift.* 212. Where damages are uncertain, a lesser thing may be done in satisfaction, and in such case an *accord* and satisfaction is a good plea; but in action of debt on a bond, there a lesser sum cannot be paid in satisfaction of a greater. 4 Mod. 88. *Accord* with satisfaction is a good plea in personal actions, where damages only are to be recovered; and in all actions which suppose a wrong *vi & armis*, where a *capias* and *exigent* lie at the common law, in trespass and ejectment, detinue, *&c.* *accord* is a good plea: So in an appeal of maihem. But in real actions it is not a good plea. 4 Rep. 1, 9, 70. 9 Rep. 77. Of late it hath been held, that upon mutual promises an action lies, and consequently there being equal remedy on both sides, an *accord* may be pleaded without execution, as well as an arbitrament. *Raym.* 450. 2 *Jones* 158. Acceptance of the thing agreed on in these *accords* is the only material thing to make them binding. *Heb.* 178. 5 Mod. 86.

II. As to the manner in which it may be pleaded.

It is to be observed, that *accord* executed only is pleadable in bar, and *executory* not. 1 Mod. 69. Also in pleading it, it is the safest by way of satisfaction, and not of *accord* alone. For if it be pleaded by way of *accord*, a precise execution thereof in every part must be pleaded: but by way of satisfaction, the defendant need only alledge, that he paid the plaintiff such a sum, *&c.* in full satisfaction of the *accord*, which the plaintiff received. 9 Rep. 80: The defendant must plead, that the plaintiff accepted the thing agreed upon in full satisfaction, *&c.* And if it be on a bond, it must be in satisfaction of the money mentioned in the condition, and not of the bond; which cannot be discharged but by writing under hand and seal. *Cro. Jac.* 254. 650.

For further information respecting the doctrine of *accords*, see title **Acceptance**, which includes a great deal of the law relative to this head.

Account. See **Accountant**.

Accroche, (from the Fr. *accrocher*) To hook or grapple unto. It signifies as much as to encroach, and is mentioned in the statute 25 Ed. 3. c. 8. to that purpose. The *French* use it for delay; as, *accrocher un procès*, to stay the proceedings in a suit.

Accusation, (*accusatio*) To charge any person with a crime. By *Magna Charta*, no man shall be imprisoned or condemned on any *accusation*, without trial by his peers, or the law. 9 H. 3. None shall be vexed upon any *accusation*, but according to the law of the land; and no man may be molested by petition to the king, *&c.*

unless it be by indictment, or presentment of lawful men, or by process at common law. 25 Ed. 3. 28 Ed. 3. c. 3. None shall be compelled to answer an *accusation* to the king, without presentment, or some matter of record. Stat. 42 Ed. 3. Promoters of suggestions are to find surety to pursue them, and not making them good, shall satisfy damages to the party *accused*, and pay a fine to the king. 38 Ed. 3. c. 9. In treason there must be two lawful *accusers*. Stat. 5 & 6 Ed. 6. A person is not obliged to answer on oath to a matter by which he may accuse himself of any crime, &c. 2 Mod. Rep. 278.

Acephali, The levellers in the reign of king Hen. 1. who acknowledged no head or superior. *Leges H.* 1. They were reckoned so poor that they had not a tenement by which they might acknowledge a superior lord. *Du Cange*.

Ac etiam billae, Words or a clause of a writ, where the action requires good bail. The stat. 13 Car. 2. c. 2. which enjoins the cause of action to be particularly expressed in the writ or process which holds a person to bail, hath ordained the inserting of this clause in writs; but it ought not to be made out against a peer of the realm, or upon a penal statute, or against an executor or administrator, or for any debt under 10*l*. Nor in any action of account, action of covenant, &c. unless the damages are 10*l*. or more: nor in action of trespass, or for battery, wounding or imprisonment; except there be an order of court for it, or a warrant under the hand of one of the judges of the court out of which the writ issues: 1 *Lill. Abr.* 13. See an historical account of *ac etiams* in *North's Life of Lord Keeper Guildford*, fol. 99, 100.

Achat, (Fr. *achet*) Signifies a contract or bargain. Purveyors by stat. 36 Ed. 3. were called *achators*, from their frequent making of bargains.

Acherfet, A measure of corn, conjectured to be the same with our quarter or eight bushels. The monks of *Peterborough* had an allowance weekly of twelve *acherfetos* de frumento, and eight *acherfetos* de brasio, and six de *Grad.* and eleven *acherfetos* de fabis, &c.

Scholite, (*acholitus*) An inferior church servant, who, next under the subdeacon, followed or waited on the priests and deacons, and performed the meaner offices of lighting the candles, carrying the bread and wine, and paying other servile attendance.

Acknowledgment Money, Is a sum paid in some parts of *England* by tenants on the death of their landlords, as an acknowledgment of their new lords; in like manner as money is usually paid on the attornment of tenants.—*Solvet XIIId. ad recognitionem cujuslibet novi domini de Hope*, &c.—*Ex libro Cart. Prior. Leominstræ*.—It is in *Latin* called, *Laudativum vel Laudemium, a laudando Domino*.

Acquiescentia de Shiris & Hundredis, To be free from suits and services in shires and hundreds.

Acquiescentia Plegis, A writ of *justicies* lying for the surety against a creditor, who refuses to acquit him after the debt is satisfied. *Reg. of Writs* 158.

Acquiescere, Is a law word, signifying *quietum reddere*. *Dr. Wilk. Gloss.* And it also sometimes signifieth to pay. *Mon. Angl. tom. 1. fol. 199.*

Acquittal, (from the *French* word *acquitter*, and the *Latin* compound *acquiescere*) To free or discharge. It signifies in one sense to be free from entries and molestations of a superior lord for services issuing out of lands; and in another signification (the most general) it is taken for a deliverance and setting free of a person from the suspicion of guilt; as he that on trial is discharged of a felony, is said to be *acquiescentus de feloniam*; and if he be drawn in question again for the same crime, he may plead *auter foits acquit*; as his life shall not be twice put in danger for the same offence. 2 *Inst.* 385. When two are indicted, the one as principal, and the other as accessory, the principal being discharged, the accessory of consequence will be *acquitted by law*. *Acquittal in fact*, is when a person is found Not guilty of the offence by a jury, on verdict, &c. But in murder, if a man is *acquitted*, appeal may be brought against him. 3 *Inst.* 273.

If one be *acquitted* on an indictment of murder, supposed to be done at such a time; and after indicted again in the same county, for the murder committed at another time; here, notwithstanding that variance, the party may plead *auter foits acquit*, by averring it to be the same felony: so where a person is indicted a second time, for robbery upon the same person, but at another vill, &c. 2 *Hawk.* 370. Where a man is discharged on special matter found by the *grand jury*, yet he may be indicted *de novo* seven years afterwards, and cannot plead this *acquittal*; as he may upon the special matter found by the *petit jury*, and judgment given thereon. *Ibid.* 246. If a person is lawfully *acquitted* on a malicious prosecution, he may bring his action, &c. for damages, after he hath obtained a copy of the indictment and the judge's certificate; but it is usual for the judges of *gaol delivery* to deny a copy of an *acquittal* to him who intends to bring an action thereon, when there was probable cause for a criminal prosecution. *Carth. Rep.* 421.

Acquittance, (*acquiescentia*) Signifieth a discharge in writing, of a sum of money, or debt due; as, where a man is bound to pay rent, reserved upon a lease, &c. and the party to whom due, on receipt thereof, gives a writing under his hand witnessing that he is paid: this will be such a discharge in law, that he cannot demand and recover the sum or duty again, if the *acquittance* be produced. *Terms de Ley* 15. *Dyer* 6, 25, 51. An *acquittance* is a discharge and bar in the law to action &c. And if one acknowledges himself to be satisfied by deed, it may be a good plea in bar, without any thing received; but an *acquittance*, without seal, is only evidence of satisfaction, and not pleadable.

'Tis observed, that a general receipt or *acquittance* in full of all demands, will discharge all debts, except such as are on specialty, *viz.* bonds, bills, and other instruments sealed and delivered; on which account those can only be destroyed by some other specialty of equal force, such as a general release, &c. There being this difference between that and the *general acquittance*. See 2 *Cro.* 650.

But in some cases a court of equity will order accounts to be opened, even after an *acquittance* in full of all demands.

And now, in the superior courts of law, the producing an *acquittance* will not bar the action, if the plaintiff can by any means shew a mistake, and that he has not been paid, or paid so much as the *acquittance* is for.

In some cases payment may be refused, unless an *acquittance* is given. Thus the obligor is not bound to pay money upon a single bond, except an *acquittance* be given him by the obligee; nor is he obliged to pay the money before he hath the *acquittance*. But in case of an obligation with a condition, it is otherwise; for there one may aver payment. And by 3 & 4 *Ann. c.* 16. If an action of debt is brought upon a single bill, and the defendant hath paid the money, such payment may be pleaded in bar of the action.

A servant may give an *acquittance* for the use of his master, where such servant usually receives his master's rents, &c. and the master shall be bound by it. 1 *Inst.* 112. The manner of tender and payment of money shall be generally directed by him who pays it, and not by him who receives it; and the *acquittance* ought to be given accordingly.

Acre, (from the *German* word *acker*, i. e. *ager*) A quantity of land, containing in length 40 perches, and in breadth four perches; or in proportion to it, be the length or breadth more or less. By the customs of various countries, the perch differs in quantity, and consequently the *acres* of land. It is commonly but 16 feet and a half, but in *Staffordshire* it is 24 feet. According to the statute 34 *Hen.* 8. concerning the sowing of flax, it is declared that 160 perches make an *acre*, which is 40 multiplied by four; and the ordinance of measuring land, 35 *Ed.* 1. agrees with this account. The word *acre* formerly meant any open ground or field; as *castle-acre*, *west-acre*, &c. and not a determined quantity of land. Also *acre*, or *acre-fight*, is an old sort of duel fought by single combatants. *English and Scotch*, between the frontiers of their kingdoms, with sword and lance; and this duelling was called

called camp-fight, and the combatants champions, from the open field that was the place of trial.

Armilla, Military utensils. — *Quilibet paratus sit cum armillis & barnesibus, &c. & quicumque habet decem libras in bonis, & non habuerit omnia cremorum armilla, perdat omnia bona.* Du Cange.

Action, (actio) Is the form of a suit given by law for recovery of that which is one's due: or it is a legal demand of a man's right. 1 Inst. 285. The learned Bracton thus defines it, *Actio nihil aliud est quam jus prosequendi in judicio quod alicui debetur.* And actions are either criminal or civil; criminal, to have judgment of death, as appeals of death, robbery, &c. or only to have judgment for damage to the party, fine to the king and imprisonment, as appeals of maihem, &c. 1 Inst. 284. 2 Inst. 40. Civil actions are such as tend only to the recovery of that which by reason of any contract, &c. is due to us; as action of debt, upon the case, &c. 2 Inst. 61.

Under criminal actions may be classed actions penal; which lie for some penalty or punishment in the party sued, be it corporal or pecuniary. Bract.

Actions upon statute, brought upon the breach of any statute, whereby an action is given that lay not before; as where one commits perjury to the prejudice of another, the party that is injured shall have a writ upon the statute.

Actions popular, given on the breach of some penal statute, which every man hath a right to sue for himself and the king, by information, action, &c. And because this action is not given to one especially, but generally to any that will prosecute, it is called action popular, or qui tam action. See title Qui tam.

Actions civil are divided into real, personal, and mixed. Action real is that action whereby a man claims title to lands, tenements, or hereditaments, in fee, or for life: and these actions are possessory, or auncestrel; possessory, of a man's own possession and seisin; or auncestrel of the possession or seisin of his ancestor. Action personal is such as one man brings against another, on any contract for money or goods, or on account of any offence or trespass; and it claims a debt, goods, chattels, &c. or damages for the same. Action mixed is an action that lieth as well for the thing demanded, as against the person that hath it; in which the thing is recovered, and likewise damages for the wrong sustained: it seeks both the thing whereof a man is deprived, and a penalty for the unjust detention. But detinue is no action mixed, notwithstanding the thing demanded and damages for withholding it be recovered; for it is an action merely personal, brought only for goods and chattels. In a real action, setting forth the title in the writ, several lands held by several titles may not be demanded in the same writ: in personal actions, several wrongs may be comprehended in one writ. 8 Rep. 87. A bar is perpetual in personal actions, and the plaintiff is without remedy, unless it be by writ of error or attain: but in real actions, if the defendant be barred, he may commence an action of a higher nature, and try the same again. 5 Rep. 33. Supposing he did not at first sue by a writ of right, which is the highest in the law. Action of waste sued against tenant for life, is in the realty and personalty; in realty, the place wasted being to be recovered, and in the personalty, as treble damages are to be recovered. 1 Inst. 284.

Many personal actions die with the person. Thus if a lessee for years commit waste, and dies, action of waste may not be had against his executor or administrator, for waste done by the deceased. And where a keeper of a prison permits one in execution to escape, and afterwards dieth, no action will lie against his executors. Also if a battery be committed on a man, and he that is the aggressor, or the party on whom committed, die, the action is gone. 1 Inst. 53. But in real actions it is otherwise, for they survive.

Again, actions are either local or transitory. Actions real and mixed, ejectment, waste, trespasses, quare clausum fregit, &c. are to be laid in the same county where the land lieth: personal and transitory actions, as debt, detinue, assault and battery, &c. may be brought in any county, (except it be against officers of places, &c. by statute 21

Jac. 1.) 1 Inst. 282. Actions transitory may be laid in any county, although the statute 6 R. 2. enacted, That writs of debt, account, &c. should be commenced in the county where the contracts were made; for that statute was never put in use; and yet generally actions have been laid in the county where the cause of them was arising. If the cause of action arise in two counties, an action may be brought in either county: but if a nuisance be erected in one county, to the damage of a man in another, the assise must be brought in confinio comitatum. Mich. 8 Ann. B. R.

The defendant cannot by his plea oblige the plaintiff to lay his action in a different county from that in which he brought it, unless the matter pleaded be local; for in transitory actions he must move the court on affidavit, that if the plaintiff hath any cause of action, such cause accrued in the county of, &c. and not where the plaintiff hath laid it, &c. and such motion must be made before issue joined; for by joining issue, he agrees with the plaintiff, as to the manner of bringing the action, and though the court seldom refuses on such an affidavit to change the venue, yet if before or after the motion made, the plaintiff will enter into a rule, to offer material evidence, in the county where he laid his action, the cause will be tried there. 1 Sid. 44. 2 Salk. 669, 670.

But though the court, on application, seldom refuses to change the venue, yet there are cases in which the judges have refused; as where a peer of the realm brings an action of scandalum magnatum, the court will not change the venue; because a scandal raised on a peer reflects on him through the whole kingdom. 2 Mod. 215. 1 Lev. 56. S. P.

Also a serjeant at law, barrister, attorney, or any other privileged person, whose attendance is necessary at Westminster-hall, may lay his action in Middlesex, though the cause of action accrued in another county; and the court, on the usual affidavit, will not change the venue. 2 Salk. 668, 670. 2 Show. Rep. 176, 177, 242. S. P.

But if a privileged person be sued, and the action brought against him in the right county, his privilege will not intitle him to have it tried in Middlesex. Carth. 126. 2 Salk. 668.

So if an attorney lays his action in London, the court will change the venue on the usual affidavit; for by not laying it in Middlesex, he seems regardless of his privilege. 2 Vent. 47.

If the action be grounded on a specialty, the court will not change the venue; for not being dated at any particular place, it may be presumed to be omitted, that it may charge the defendant at any place. 2 Mod. 228.

It is not the course of the court to change the venue in an action of escape; per Holt Ch. Just. 2 Mod. 228. The court will not change the venue in an action of covenant. 1 Lev. 307.

Actions likewise are said to be perpetual and temporary: Perpetual, those which cannot be determined by time; and all actions may be called perpetual that are not limited to time for their prosecution: Temporary actions are those that are expressly limited: as for example; the statute 7 H. 8. c. 3. gives action within four years after the offence committed: the 1 Ed. 6. c. 1. within three years: the 31 Eliz. c. 5. within one year, &c. Since the statute of limitations, all actions seem to be temporary; or not so perpetual, but that they may in time be prescribed against: a real action may be prescribed against within five years, on a fine levied, or recovery suffered. By stat. Hen. 8. A writ of right for recovery of lands is to be brought within sixty years: by 21 Jac. 1. Writs of formedon for any title to lands in esse, are to be sued within twenty years: actions of debt, on the case, of account, detinue, trover and trespass, are to be brought within six years; of assault and battery within four years; and slander within two years: but the right of action in these cases is saved to infants, feme covert, persons beyond sea, &c. And on a fresh promise the time limited may be enlarged; also the taking out and filing of a writ, is a good bringing of an action to avoid the statute of limitations. 1 Lill. 19.

Actions also are joint or several; joint, where several persons are equally concerned, and the one cannot bring the

the *action*, or cannot be sued, without the other; *several*, in case of trespass, &c. done where persons are to be severally charged, and every trespass committed by many is several. 2 Leon. 77.

Having said thus much concerning the general divisions of actions, it remains to consider,

- I. By whom and against whom actions may be brought.
- II. What particular actions are adapted to particular cases.

I. In all *actions* there must be a person able to sue; the party sued must be one sueable for the thing laid; and the plaintiff is to bring his right and proper *action* which the law gives him for relief. 1 Shep. Abr. 20. There are three sorts of *damages* or wrongs, either of which is a sufficient foundation for an *action*. 1. Where a man suffers damage in his *same* and credit. 2. Where one has damage to his person, as by imprisonment, battery, &c. which respects his *liberty*. 3. Where a person suffers any damage in his *property*. Cnrrb. Rep. 416.

A man attainted of treason or felony, convict of recufancy, an outlaw, excommunicated person, convict of *præmunire*, an alien enemy, &c. cannot bring an *action*, till pardon, reversal, absolution, &c. But executors or administrators, being outlawed, may sue in the right of the testator or intestate, though not in their own right. A feme covert must sue with her husband: and infants are to sue by guardian, &c. 1 Inst. 128. *Actions* may be brought *against* all persons, whether attainted of treason or felony, a convict recusant, outlawed and excommunicate, &c. and a feme covert must be sued with her husband. A *seire facias*, or any writ to which the defendant may plead, or by which a plaintiff may recover, is an *action*. 6 Rep. 3. Salk. 5.

II. What particular actions are adapted to particular cases.

There are various kinds of actions suited to different cases, as actions of COVENANT, DEBT, DETINUE, TRESPASS, TROVER, &c. which see under titles COVENANT, DEBT, DETINUE, TRESPASS, TROVER, &c.

But where the law has made no provision, or rather, where no general action could well be framed before hand, the ways of injuring, and methods of deceiving being so various, every person is allowed to bring a special action on his own case. 1 New Abr. 44. Co. Lit. 56. a. 6 Mod. 53, 54.

This action is in practice become the most universal of any, as most of the other actions may, under particular circumstances, be resolved into this, which it will be necessary, therefore, to consider somewhat largely.

Action upon the *case* is a general *action* given for redress of wrongs and injuries, done without force, and by law, not particularly provided against, in order to have satisfaction for damages: and in *actions upon the case*, the like process is to be had as in *actions* of trespass or debt. 19 H. 7. c. 9. Terms de Ley 17. It is called *action on the case*, because the whole cause or *case*, so much as in the declaration (except time and place) is set down in the writ; and there is no other action given in the *case*, save only where the plaintiff hath his choice to bring this or another *action*.

That is, all actions originally were sued in the court of Common Pleas, and there the foundation of the suit is, a writ, called an *original*, whereon the *capias* is grounded, and which *original* (in *case*, int' al') contains the nature of the plaintiff's complaint at large.

'Tis the same where suits are commenced in B. R. by *original* out of Chancery.

In all cases, where a man has a temporal loss, or damage by the wrong of another, he may have an action upon the *case* to be repaired in damages. But the particular damage must be specially alleged.

This action, as hath been intimated, lies in a great variety of instances, which are particularly enumerated in NELSON'S Abridgment. Of these the chief are, 1. Action of the *case* for words which is brought for words spoken or written which affect a person's life, reputation, office, or trade, or tend to his loss of preferment, in marriage or service, or to his disinherittance, or which

occasion him any particular damage. This action therefore will lie for charging another with any capital, or other crime. To say of another he is a traitor, *action* lies. 1 Bulst. 145. But if one call another a seditious traitorous knave, no *action* lieth; because the words imply an intention only, and not an unlawful act. 4 Rep. 19. Nor to say of a man he deserves to be hang'd: nor to call another a rogue generally, or say he will prove him to be a rogue; though it will lie to say a man is a rogue of record. 4 Rep. 15. Darv. 92. Words which charge a person with being a murderer, highwayman, or thief, in express terms, are held *actionable*. 1 Roll. Abr. 47. Tho' for saying such a one would have taken his purse on the highway, or have robbed him, an *action* lies not; for nothing is shewn to be done in order thereto. Cro. Eliz. 250. Likewise to say a man was in gaol for stealing any thing is not *actionable*, for the words do not affirm the theft. Darv. 140. But to say, I think A. B. committed such a felony; or, I dreamt he stole a horse, &c. these words are *actionable*. Dal. 144. 1 Darv. 105. If a felony be done, and common fame is, that such a person did it, although one may charge or arrest him on suspicion of that felony; yet a man may not affirm that he did the same, for he may be innocent all the while, and therefore affirming it hath been held *actionable*. Hob. 138, 203, 381.

It was heretofore held, that no action would lie for words importing a charge of murder, without an averment that the person said to be killed was dead; but the latter and better opinion is, that the party shall be intended to be dead, unless the contrary appears in the pleadings. 1 Vent. 117. Cro. Jac. 489. Sid. 53. Cro. Eliz. 560, 823. If one say of another, Thou art a bugging rogue, and I could hang thee, *action* lies. 1 Sid. 373. And if a man say, I know myself, and I know you, I never bugger'd a mare, &c. it is *actionable*.

When such words are spoken of another maliciously, for which criminally, if true, such other might be punished, *action* lies; as, to say of a person, he hath perjured himself; or that he would prove him perjured; or that he was forsworn in the court of Chancery, Common Pleas, &c. are *actionable*: but not to call a person forsworn man, unless it be said in a court of record. 3 Inst. 163. Darv. 87, 89. To say a man hath forged an obligation, &c. and he will prove it; this is *actionable*. Darv. 130.

Some writers make a difference, where the subsequent words are introduced by the word *and*; as, you are a thief, and have stolen, &c. which are additional, and shall not correct; and the word *for*; as you are a thief, for you have, &c. Hob. 386. Style 115. Godb. 89. The words, He is a maintainer of thieves, and keeps none but thieves in his house, will not support an *action*, unless it be averred that he knew them to be thieves. 1 Cro. 746.

To say an alehouse-keeper keeps a bawdy-house, *action* lies. Cro. Eliz. 582. Though to say of an inn-keeper, that he harbours rogues, &c. is not *actionable*; for his inn is common to all guests. 2 Roll. Rep. 136. To say of another he hath the French pox, *action* will lie. Cro. Jac. 430. But 'tis said, if one say that he had the pox, after cured, no *action* lies; because none will then avoid his company, &c. Ney 151. To call a man a whore-master, or a woman whore, no *action* lies; for these are merely spiritual. Darv. But calling a woman whore in London, is *actionable* by the custom of the city.

Words likewise are *actionable* which tend to the disgrace or detriment of a person in office, or of a man in the exercise of his profession or trade.

Calling an officer in the government, &c. jacobite, hath been held *actionable*; aliter of a private person. Farrest. Rep. 107. To say a justice of peace doth not administer justice, is *actionable*. Cro. Eliz. 358. And so for other disgrace in his office.

But it is to be observed, that as to words for which an *action* lies, relating to a man's office, they must have a plain and direct meaning, to charge him with some crime that is punishable; and be spoken of his office, or otherwise they are not *actionable*. 6 Mod. 200. Thus the plaintiff, being a justice of peace, the defendant said, Mr.

Stukely covereth and hideth felonies, and is not worthy to be a justice of peace; actionable, for though his office is not named, the words necessarily refer to it. 4 Rep. 16.

The plaintiff being a justice of peace, and high sheriff, the defendant said, 'Tis well known I am a true subject; but thou (innuendo the plaintiff's servant) servest no true subject, and thine own conscience may accuse thee thereof; actionable. 1 Leon. 335.

Case, &c. for these words spoken of a justice of peace, *He is a forsworn justice, and not fit to be a justice of peace;* after a verdict for the plaintiff it was intimated, that the words were not actionable, because *forsworn* doth not intend judicial perjury, and there was no discourse of his office; but adjudged actionable, because the words *forsworn justice* shew that the defendant intended perjury relating to his office, for *sermo refert ad conditionem personæ*. 1 Vent. 50.

Slander, &c. brought by a doctor of the civil law, who was also a justice of peace and chancellor of the bishoprick of Norwich, for these words, *He is not fit to be a chancellor or a justice of peace, he is a knave, a rascal, and a villain, it is not fit to practise, he ought to have his gown pulled over his ears;* actionable, the plaintiff had a verdict, and 40*l.* damages. 2 Lutw. 1288.

The defendant spoke of an officer, (*viz.*) *You have cozened the state of 20000*l.* and I will prove it, for you have received 25000*l.* of the office, and not compounded for it, and have justified in words in the order of your commission;* actionable. Style 436.

In offices of profit, for such words as impute the want either of understanding, ability, or integrity to execute them, this action lies.

But in offices of honour, words that impute want only of ability, are not actionable; as to say of a justice of peace, *He a justice of peace! he is an ass, and a beetle-headed justice:* the reason is, because a man cannot help his want of ability, as he may his want of honesty; otherwise where words impute dishonesty or corruption. 2 Salk. 695. But if special damage can be proved, it may be actionable; and indeed in every case, where special damage can be proved, an action will lie.

As to words tending to the disgrace or detriment of a man in his profession or trade, it is to be premised, that where the words are disgracing a man's profession, they also must appear to be spoken precisely of it; for to say a person has cozened one in the sale of certain goods, is not actionable; unless you shew that the party lived by such selling. 1 Roll. Abr. 62.

To say of a doctor in divinity, *Doctor S. is robbing the church;* and at another time, *Doctor S. hath robbed the church;* actionable. Cro. Car. 301, 417.

In case, &c. in which the plaintiff declared, that he was instituted and inducted into a parsonage in, &c. and that he executed the office of a pastor in that church for the space of four years, and that the defendant said of him, *You are a drunkard, a savor-master, a common sweaver, and a common lver, and you have preached false doctrine, and deserve to be degraded;* after a verdict for the plaintiff, it was objected, that the words are not actionable, because they import no civil or temporal damage to the plaintiff; but adjudged actionable, for, if true, he may be degraded, and so lose his freehold. Allen 63.

These words spoken of a preaching parson, *Parrat is an adulterer, and had two children by B. G.'s wife, and I will cause him to be deprived for it;* not actionable; for 'tis a spiritual defamation, and punishable in that court. Cro. Eliz. 502.

To say of a counsellor, that he is no lawyer; that they are fools who come to him for law, and that he will get nothing by the law, action lies. Danv. 113. And it is the same to say he hath disclosed secrets in a cause.

To call a doctor of physick fool, ass, empirick, and mountebank, or say he is no scholar, are actionable. Cro. Car. 270. So to say of a school-master, put not your son to him, for he will come away as very a dunc as he went. Heil. 71. Where one says of a midwife, that many have perished for her want of skill, an action will lie. Cro. Car. 211. If one calls a merchant bankrupt, action lies. 1 Leon. 336. And to call a trading person bankrupt knave, is actionable. 1 Danv. 90. Also if one say of a

merchant, that he is a beggarly fellow, and not able to pay his debts; or say of a person that he is a runaway, and dares not shew his face, by reason whereof he is disgraced and injured in his calling, these are actionable. Raym. 184.

Words likewise as hath been said tending to the loss of preferment in marriage, &c. are actionable. Thus to say that a woman hath a bastard, or is with child; or that a certain person hath had the use of her body, whereby she loses her marriage, action lies; though not without special damage, on action at common law. 2 Salk. 696. If a man is in treaty with a woman to marry, and another tells him, she is under a pre-contract; this doth not imply a scandal, but yet, if false, an action will lie. Mich. 5 Ann. To say of a man that he lay with a certain woman, &c. by which he loses his marriage, is actionable; for in these cases there is a temporal damage. 1 Danv. 81.

As to words tending to a person's disinherittance, if one says of another that has land by descent, that he is a bastard; action upon the case lies, as it tends to his disinherittance. Co. Ent. 28. But to say of a son and heir apparent, that he is a bastard, action lies not until he is disinherited, or is prejudiced thereby. 1 Danv. 83. To slander the title of another person to his lands is actionable; but the words must be false, and be spoken by one that neither hath, nor pretendeth title to the land himself; and who is not of counsel to him that pretends right. 4 Rep. 17. If a man shall pretend title to the land another hath in possession, and hath no colour of title to it; and shall say he hath such a deed or conveyance of it, where in truth he hath none, or if he hath any it is a counterfeit and forged deed, and he knows it to be so: in this case the words may bear an action; but if there be any colour for what is said, they will not be actionable. 2 Cro. 339. Yelv. 80, 88. And the party of whom the words are spoken must have, or be likely to have some special damage by the speaking of them; as that he is hindered in the sale of his lands, or in his preferment in marriage, &c. without which it is said action doth not lie. 1 Cro. 99. 2 Cro. 213, 397. Popb. 187. 2 Bulst. 90. The affirming that another hath title to the land, where actionable, see 4 Rep. 175.

If A. says, that B. said that C. did a certain scandalous thing, C. shall have action against A. with averment that B. never said so, whereby A. is the author of the scandal. Cro. Jac. 406. See 1 Roll. Abr. 64.

It is to be observed in general, that though scandalous words are spoken before a man's face, or behind his back, by way of affirmation, or report, when drunk, or sober; and although they are spoken in any language, if they are understood by the hearers, they are actionable: also words may be actionable in one county, which are not so in another, by the different construction, &c. 4 Rep. 14. Hob. 165, 236. But if the defendant can make proof of the words, he may plead special justification. Co. Ent. 26. Yet where the plaintiff has a pardon, after an offence committed, the words are still actionable. Moor 865. If words may receive a double interpretation, the one way that they shall be actionable, and the other way not, they shall be taken in mitiori sensu, so far as not to be actionable. Cro. Jac. 438. Therefore to say that a man hath the pox, when it may be the ordinary disease; or that he is a coiner of money, when it may be his trade, and he may do it by authority, &c. no action will lie: and yet in this case, if the common and violent sense of the words in the import thereof be the worst sense, they may be taken accordingly, and are liable to action. 4 Rep. 20. Hob. 126. 3 Cro. 352. The words to maintain this action must be direct and certain, that there may be no intendment against them: but as some words separate, without others joined with them, are not actionable; so some words that are actionable may be qualified by the precedent or subsequent words, and all the words are to be taken together. 4 Rep. 17. 1 Cro. 127. Meor Ca. 174, 331. Where words spoken are somewhat uncertain, by the precedent conference or some circumstance; with an averment, they may be many times made certain and actionable. 2 Bulst. 227. So by the pleadings of the parties, and verdict of a jury for the plaintiff. 2 Cro.

107. The thing said by the words must be that which is possible to have been done; for if it be of a thing altogether and apparently impossible, no *action* lies. 4 Rep. 16. For words spoken in pursuit of a prosecution in an ordinary court of justice; and where a lawyer in pleading his client's cause, shall utter words according to his instructions; and to say of one he is a ballard, when this is to defend the party's own title, where he himself doth claim to be heir of the land that is in question; these words will not bear an *action*. 2 Cro. 90. 4 Rep. 13.

In this *action* the nature of the words must be set forth, with the manner of speaking them, the time and place, when and where spoken, and before whom, and the damage thereby to the plaintiff; that his credit was, and how, impaired, with the aggravating circumstances: but it matters not whether the plaintiff doth in his declaration set forth all the circumstantial words as they are spoken; so as to shew the very words that are *actionable*, and the substance of them, &c.

2. *Action* on the case likewise lies upon an *assumpsit* or undertaking; and such actions are founded on a contract either express, or implied by law, and gives the party damages in proportion to the loss he has sustained by the violation of the contract. 4 Co. 92. Moor 667. For the law on this head see title *Assumpsit*.

3. It has been premised, that a special *action* on the case lies in all instances wherein no general *action* could be framed; it will be necessary therefore to point out some of those particular cases to which it is most peculiarly applicable.

It was formerly held, that if my fire, by misfortune, burn the goods of another man; for this wrong he shall have *action on the case* against me: and if my servant puts a candle or other fire in any place in my house, and this burns all my house and the house of my neighbour, *action of the case* lies for him against me. 1 Danv. 10.

But by stat. 6 Ann. c. 31. it is enacted, that an *action* shall not be brought against any, in whose house or chamber any fire shall accidentally happen: but by the same statute it is enacted, that if any servant through negligence shall cause an house or outhouse to be fired, such servant being thereof convicted upon oath before two justices, shall forfeit 100*l.* unto the churchwardens of the parish of, &c. to be distributed amongst the sufferers, as to the churchwardens shall seem just, and upon non-payment, shall be committed to some workhouse by a warrant of one justice, there to be kept eighteen months at hard labour.

This *action* likewise lies against carriers and others upon the custom of *England*.

But see the statutes 6 Ann. and 10 Ann. c. 14. If a person delivereth goods to a common carrier, to carry them to a certain place, and he loseth them, *action upon the case* lies against him; for by the common custom of the realm he ought to carry them safely: it is the same of a common hoyman or lighterman, who is a water-carrier of goods; but goods in this case may be thrown overboard in a tempest, to preserve the passengers lives in the lighter, &c. and no *action* lies. 2 Bulst. 280. If a common carrier is robbed of goods, he is chargeable for them, because he had his hire, and took upon himself the safe delivery of the goods therefore: and though a person doth not acquaint the carrier with all the particulars in a box, as that there is such a sum of money, &c. the carrier shall answer for the money, if robbed: though a special acceptance may excuse him. 1 Danv. 13.

If a carrier asks whether money or plate is contained in a parcel, and is answered in the negative, and upon a robbery, and *action* brought, 'tis proved there was money or plate, we conceive the law does not make the carrier liable, he being deceived.

Case, &c. upon the custom of *England* against a *master* of a *ship*, for negligently keeping the plaintiff's goods; adjudged he is rather an *officer* than a *servant*, for he may pawn the ship if he see occasion: he may sell *bona peritura*, &c. and tho' he receives his wages from the owners, yet in effect he is paid by the merchant; for 'tis he who pays the owners, and there is no difference between this case and that of a hoyman or a common carrier. 1 Vent. 190.

In an *action on the case* upon the custom of the realm against the defendant, who was master of a *stage-coach*, the plaintiff sets forth, that he took a place in the coach for such a town, and that in the journey the defendant, by negligence, lost the plaintiff's trunk; upon Not guilty pleaded, the evidence was, that the plaintiff gave the trunk to the man who drove the coach, who promised to take care of it, but lost it; and the question was, whether the *master* was chargeable, and adjudged that he was not, unless the *master* takes a *price* for the carriage of the goods as well as for the carriage of the person, and then he is within the custom as a carrier is: that a *master* is not chargeable for the acts of his *servant*, but when they are done in execution of the authority given by the master, and then the act of the servant is the act of the master. 1 Salk. 282.

If a mail is robbed, and bills are lost; by *Holt*, Chief Justice, *action* lies against the post-mailer, as against a common carrier, &c. he being paid a salary for doing his duty; but 'twas over-ruled by the other justices. 1 Salk. 17. And we do not know of any other case upon this point since determined.

A common inn-keeper is chargeable for goods stolen in his house; and if the inn-keeper be not of sound memory, it is said *action* lies against him: but if the inn-keeper be an infant, no *action* will lie against such infant. The person robbed must be a traveller, and guest in the inn; if the goods are committed to the host on another account, and are stolen, no *action* will lie. So if a man comes to an inn, and leaving goods there, goes away for two or three days, if in that time they are stolen, no *action* lies against the inn-keeper; for at the time of the stealing he was not his guest: but where a man comes on horse-back to an inn, and leaves his horse with the host, if he goes away from the inn for several days, and in his absence the horse is stolen, the inn-keeper shall be charged for it; because he had benefit by the continuance of the horse with him, he being paid for it, and so the owner was a guest. Moor 877. If a man upon a special agreement boards in an inn for any time and is robbed, the inn-keeper shall not answer for it. Latch 127. for he is not a guest but a boarder. An inn-keeper is liable, though the guest doth not acquaint him what goods or money he hath. 8 Rep. 33. If an inn-keeper refuse to entertain his guest, this *action* may be brought against him. Dyer 158.

This *action* lies for deceits in contracts, bargains, and sales: if a vintner sells wine, knowing it to be corrupt, as good and not corrupt, though without warranty, *action* lies. Danv. 173. So if a man sells a horse, and warrants him to be sound of his limbs, if he be not, *action on the case* lies. 11 Hen. 6. A person warrants a horse wind and limb, that hath some secret disease known to the seller, but not to the buyer, this *action* may be brought: though if one sell a horse and warrant him sound, and he hath at the time visible infirmities, which the buyer may see: *action on the case* will not lie. Yelv. 114. 2 Cro. 675. Where one sells me any wares or commodities, and is to deliver that which is good, but delivers what is naught; or sells any thing by false or deceitful weights and measures, with or without warranty, *action on the case* lies; and so where a man doth sell corrupt victuals, as bread, beer, or other thing for food, and knows it to be unwholesome. Dyer 75. 4 Rep. 18. 2 Cro. 270. Yet if the buyer or his servant shall see and taste the victuals, &c. and like and accept the same, no *action* can be had. 7 H. 4. 16. Nor will *case* lie upon a warranty of what is out of a man's power, or of a future thing; as that a horse shall carry a man thirty miles a day, or the like. Finch 188. If a man sells certain packs of wool, and warrants that they are good and merchantable, if they are damaged, *action of the case* lies against him. 1 Danv. 187. The bare affirmation by the seller of a particular sort of diamond, without warranting it to be such, will not maintain an *action*. 2 Cro. 4. 196. But where a man hath the possession of a personal thing, the affirming it to be his own is a warranty that it is so; though it is otherwise in case of lands, where the buyer at his peril is to see that he hath title. 1 Salk. 210. If a person sells to another cattle or goods, that are not his own, *action of the case* lies: so if he warrants cloth to be

of such a length, that is deficient of it. If a taylor undertakes to make a suit of clothes, and spoils them, *action* lies: and if a carpenter promises to repair my house before a certain day, and doth not do it, by which my house falls; or if he undertakes to build a house for me, and doth it ill, *action on the case* lies. 1 *Danv.* 32. If a surgeon neglects his patient, or applies unwholesome medicines, whereby the patient is injured, this *action* lieth. And if a counsel retained to appear on such a day in court, doth not come, by which the cause mis-carries, *action* lies against him: so if after retainer, he become of counsel to the adversary against the plaintiff. 11 *H.* 6. 18. For stopping up a water-courte or way; breaking down a party wall; stopping of ancient lights, and for any private nuisance to a man's water, light, or air, whereby a person is damaged, this *action* lieth. 1 *Cro.* 427. 2 *Id.* 159. Where a smith promises to shoe my horse well, if he pricks him, *action of the case* lies; and so when he refuses to shoe him, or when I travel without, and my horse is damaged. If a horse that is hired hath been abused by the rider, *action* lies: so where goods pawned are not delivered, on offering the money.

Where any one personates another, for cheating at gaming, where a surety is not saved harmless, &c. 2 *Inst.* 198. If I lend another my horse to ride to far, and he rides further, or forward and backward, or doth not give him meat, this *action* lieth. 1 *Cro.* 14. And where one lends me a horse for a time, if he take him from me within that time, or disturb me before I have done what I hired him for; *action of the case* lies: and though I ride the horse out of the way in my journey, he may not take him from me. 8 *Rep.* 146. This *action* lies for keeping a dog accustomed to bite sheep; but not for a man's dog running at my sheep, though he kill them, if it be without his content. 1 *Danv.* Abr. 19. *Hest.* 171. *Action of the case* will lie against a gaoler for putting irons on his prisoner; or putting him in the stocks, or not giving sufficient sustenance to him, being committed for debt. *F. N. B.* 83. The master may in many cases have this *action* against his servant, steward, or bailiff, for any special abuse done to him, and for negligence, &c. Also it lies for taking or enticing away my servant, and retaining him; or threatening a servant, whereby I lose his service. *Lunc.* 68. 1 *Cro.* 777. 1 *Shep.* Abr. 52, 59. A servant is trusted with goods and merchandize consigned to him by a merchant, to pay the customs for them, and dispose of them to profit; if he to deceive the merchant, and have allowance for it on his account, and to defraud the king, lands some of the goods without paying the customs, by which they are forfeited, *action of the case* lieth. *Lanc.* 65. 2 *Cro.* 266. If I trust one to buy a lease or other thing for me, and he buyeth it for himself, or doth not buy it, this *action* lies against him; but if he doth his endeavour it sufficeth. *Bro.* 117. And where a man is disturbed in the use of a seat in the church, which he hath had time out of mind; a steward is hindered in the keeping of his courts; a keeper of a forest disturbed in taking the profits of his office; a bailiff in distraining for an amercement, &c. *action on the case* will lie. *Bend.* 89. *Lib. Intr.* 5. *Moor* 987. An *action of the case* lies for him in reversion, against a stranger, for damage to his inheritance, though there be a term in esse. 3 *Lev.* 360. Also if a lessor comes to the house he has demised, to see if it be out of repair, or any waste be done, and meets with any disturbance therein; or if one disturbs a parson in taking his tithes, this *action* lies. 2 *Cro.* 478. 2 *Inst.* 650. And for setting up a new mill on a river, to the prejudice of another who hath an ancient mill, an *action* will lie. *Lib. Intr.* 9.

Action on the case likewise lies for and against commoners, &c. for injuries done in commons.

Case against *R. B.* for surcharging the common; it was objected in arrest of judgment, that *case* would not lie, but an *assise*; adjudged, that the plaintiff might have either *action*. *Style* 164.

Case, &c. by a commoner for digging pits and spreading the gravel, &c. by which he lost his common; the defendant pleaded; that he is lord of the soil, and that he did dig for coals, doing as little damage to the pasture as he could, and averred, that he had left common sufficient; and upon a demurrier to this plea, it was adjudged,

that it amounted to no more than the general issue, and that the lord could not dig pits in the common, for the statute of 43 *Eliz.* intends only an improvement by enclosing. *Sid.* 106. 2 *Cro.* 165.

Action on the case may likewise be brought for malicious prosecutions: where a suit is without ground, and one is arrested, *action on the case* lies for unjust vexation: so for false imprisonment. And for falsely and maliciously arresting a person for more than is due to the plaintiff, whereby the defendant is imprisoned, for want of bail; or if it be on purpose to hold him to bail, *action on the case* will lie, after the original *action* is determined. 1 *Lev.* 275. 1 *Salk.* 15. And *action* likewise lies against sheriffs, for default in executing writs; permitting escapes, &c.

Actions on the case likewise lie for conspiracy, escape and rescous, nuisances, &c. which see under titles Conspiracy, Escape, Rescous and Nuisances, &c. Vide Com. Dig. V. 1. tit. *Action, Action upon the Case*, &c. &c.

Action prejudicial, (otherwise called *preparatory*, or *principal*) is an *action* which arises from some doubt in the principal; as in case a man sues his younger brother for lands descended from his father, and it is objected against him that he is a bastard: now this point of bastardy is to be tried before the cause can any further proceed: and therefore it is termed *prejudicialis*, quia prius judicanda. *Bract.* lib. 3. c. 4. num. 6. *Cowell*.

Action of a writ, Is a phrase of speech used, when one pleads some matter, by which he shews the plaintiff had no cause to have the writ he brought, yet it may be that he may have another writ or *action* for the same matter. Such a plea is called a *plea to the action of the writ*; whereas, if by the plea, it should appear that the plaintiff hath no cause to have an *action* for the thing demanded, then it is called a *plea to the action*. *Cowell.* *Termes de la ley*.

Actionare, i. e. *In jus vocare*, or to prosecute one in a suit at law. *Thorn's Chron.*

Action Burnel, A statute so called, made 13 *Ed.* 1. ann. 1285, ordaining the *statute merchant*: it was so termed from a place named *Action Burnel*, where it was made; being a castle sometime belonging to the family of *Burnel*, and afterwards of *Lovel*, in *Shropshire*. *Cowell*.

Actor, The proctor or advocate in civil courts or causes. *Actor dominicus*, was often used for the lord's bailiff or attorney. *Actor ecclesie* was sometime the serinick term for the advocate or pleading patron of a church. *Actor villæ* was the steward or head bailiff of a town or village. *Cowell*.

Acts done, Are distinguished into *acts of God*, the *acts of the law* and *acts of men*. The *act of God* shall prejudice no man: as where the law precribeth means to perfect or settle any right or estate; if by the *act of God* the means in some circumstances become impossible, no party shall receive any damage thereby. *Co. Lit.* 123. 1 *Rep.* 97. So in an *action of case* against a *largeman*, who justified, for that there were several passengers in his barge, and a sudden tempest arising, all the goods in the barge were thrown overboard to save the lives of the passengers, amongst which the goods of the plaintiff were thrown over, and that he had not any notice that there was *money in the pack*; adjudged, that the *action* would not lie, because what the owner of the barge did in this case was occasioned by the *act of God*, and in defence of their lives. 1 *Roll. Rep.* 79.

The *acts of the law* are esteemed beyond the *acts of man*: and when to the perfection of a thing, divers *acts* are required, the law hath most regard to the original. *act.* 8 *Rep.* 78. The law will construe things to be lawfully done; when it standeth indifferent whether they should be lawful or not: but whatsoever is contrary to law is accounted not done. 1 *Inst.* 42. 3 *Rep.* 74. Our law doth favour substantial more than circumstantial *acts*; and regards *deeds* and *acts* more than words: and the law doth not require unnecessary things. *Plowd.* 10. As to *acts of men*; that which a man doth by another, shall be said to be done by himself; but personal things cannot be done by another. *Co. Lit.* 158. A man cannot do an *act* to himself, unless it be where he hath a double capacity; no person shall be suffered to do any thing against his own *act*; and every man's *acts* shall be construed most strongly against himself. *Plowd.* 140.

But

But if many join in an *act*, and some may not lawfully do it; it shall be adjudged the *act* of him who might lawfully do the same. *Dyer* 192. *Acts* that men are forced by necessity and compulsion to do, are not regarded: and an *act* done between persons shall not injure a stranger not party or privy thereto. *Plow.* 19. 6 *Rep.* 16.

Where *mutua laests* are to be done, who is to do the first *act*, see title *Condition*.

Acts of Parliament, Are positive laws, consisting of two parts, (*viz.*) the words of the *acts*, and the sense and meaning of them, which being joined make the law. The words of *acts of parliament* shall be taken in a lawful sense: cases of the same nature are within the remedy, though out of the letter of the *act*; and some *acts* extend by equity to other things than are mentioned therein, &c. 1 *Inst.* 24, 381. Vide *Statute*.

Actuary, (*actuarius*) A clerk that registers the *acts* and constitutions of the convocation.

Adcredulitate, To purge one's self of an offence by oath. *Qui in collegio fuerit ubi aliquis occisus est, adcredulitet se quod eum non percussit.* *Leges Inae*, c. 36.

Addition, (*additio*) Signifieth a title given to a man besides his Christian and surname, setting forth his estate, degree, trade, &c. As for example; *additions* of estate are yeoman, gentleman, esquire, &c. *Additions* of degree, are knight, earl, marquiss, and duke: *additions* of trade, are merchant, clothier, carpenter, &c. There are likewise *additions* of place of residence, as *London*, *York*, *Bristol*, &c. And these *additions* were ordained that one man might not be grieved or molested for another: and that every person might be certainly known, and bear his own burden. If one be of the degree of a duke and earl, &c. he shall have the *addition* of the most worthy dignity. 2 *Inst.* 669. But the titles of duke, marquiss, and earl, &c. are not properly *additions*, but names of dignity. *Terms de Ley* 20. And the title of knight or baronet, is part of the party's name, and ought to be rightly used; but the titles of esquire, gentleman, yeoman, &c. being no part of the name, but *additions* as people please to call them, may be used or not used, or if varied is not material. 1 *Lill.* 34. An earl of Ireland is not an *addition* of honour here in *England*, but such a person must be written by his Christian and surname, with the *addition* of esquire only: and sons of *English* noblemen, although they have given them titles of nobility in respect to their families; if you sue them, they must be named by their Christian and surnames, with the *addition* of esquire, as such a one esquire, commonly called Lord A. &c. 2 *Inst.* 596, 666.

By the common law, a man that had no name of dignity, was named by his Christian and surname in all writs; which was sufficient. If he had an inferior name of dignity, as knight, &c. he ought to be named by his Christian and surname with the name of dignity: but a duke, &c. might be sued by his Christian name only, and name of dignity, which stands for his surname. 2 *Inst.* 665, 666. By stat. 1 *Hen.* 5. cap. 5. It is enacted, that in suits or actions where process of outlawry lies, *additions* are to be made to the name of the defendant, to shew his estate, mystery, and place of dwelling; and that writs not having such *additions* shall abate, if the defendant takes exception thereto, but not by the court *ex officio*. By pleading to issue, the party passes by the advantage of exception for want of *addition*; for by the common law it is good without *addition*, and the statute gives remedy only by exception. *Cro. Jac.* 610. 1 *Roll.* 780. No *addition* is necessary, where process of outlawry doth not lie. 1 *Salk.* 5. If a city be a county of itself, wherein are several parishes, *addition* thereof, as of *London* is sufficient: but *addition* of a parish, not in a city, must mention the county, or it will not be good. 1 *Danw.* 237. An *addition* after the *alias dictus* is ill; and according to *Holt* Chief Justice, if a man of *Wills* commit felony at *Westminster*, he shall be indicted by his name, as of *Westm.* 3 *Salk.* 20.

A gentleman by reputation, that is neither so by birth, nor by office, nor by creation, but commonly called gentleman, and known by that name, is a sufficient *addition*; but if he be named yeoman, he cannot qualify the indictment. 2 *Inst.* 668.

Where there are several defendants of different names, and the same *addition*, it is safest to repeat the *addition* of each of their names, applying it particularly to every one of them. 2 *Harok.* 87.

And where a father hath the same name and the same *addition* with a defendant being his son, the action is abateable, unless it add the *addition* of the younger to the other *additions*; but where the father is the defendant, it is said that there is no need of *addition* of the elder. 2 *Harok.* 187.

Adeling, (from the Saxon *adelan*) Signifying excellent, was a title of honour amongst the *Angles*; properly belonging to the king's children; it being usual for the *Saxons* to join the word *ling* to the Christian name, which signified a son, or the younger. King *Edward the Confessor* having no issue, and intending to make *Edgar*, his nephew, the heir of the kingdom, gave him the title and title of *Adeling*. *Spelm.* Gloss.

Ademption, or taking away of a legacy; this arises from a supposed alteration of a testator's intent, by calling in money due to him on bond, &c. that he had expressly devised by will to another person. *Tulbo's Chan. Ca.* See *Legacy*.

Ad Inquirendum, Is a judicial writ, commanding enquiry to be made of any thing relating to a cause depending in the king's courts. It is granted upon many occasions for the better execution of justice. *Reg. Judic.*

Adjournment, (*adjournamentum*) The same with the French word *ajournement*, and signifies a putting off until another day, or to another place. As *adjournment* in eyre, by stat. 25 *Ed.* 3. is an appointment of a day, when the justices in eyre will sit again. A court, the parliament, and writs, &c. may be *adjourn'd*; and the substance of the *adjournment* of courts is to give licence to all parties that have any thing to do in court to forbear their attendance till such a time. Every last day of the term, and every eve of a day in term, which is not *dies juridicus*, or a law day, the court is *adjourned*; and it is usually done two several times, sitting the court. 2 *Inst.* 26. The terms may be *adjourned* to some other place, and there the *King's Bench* and other courts at *Westminster* be held: and if the king puts out a proclamation for the *adjournment* of the term, this is a sufficient warrant to the keeper of the Great Seal to make out writs accordingly; and proclamation is to be made, appointing all persons to keep their day, at the time and place to which, &c. 1 *And.* 279. 1 *Lev.* 176. Though by *Magna Charta* the court of *Common Pleas* is to be held at *Westminster*. But necessity will sometimes supersede the law, as in the case of a *plague*, a *civil war*, &c. In the first year of king *Car.* 1. a writ of *adjournment* was delivered to all the justices, to *adjourn* two returns of *Trinity* term: and in the same year *Michaelmas*-term was *adjourned* until *crispine annivarsum* to *Reading*; and the king by proclamation signified his pleasure, that his courts should be there held. *Cro. Car.* 13, 27. Anno 17 *Car.* 2. The court of *B. R.* was *adjourned* to *Oxford*, because of the plague; and from thence to *Windor*; and afterwards to *Westminster* again. 1 *Lev.* 176, 178.

On a foreign plea pleaded in *assise*, &c. the writ shall be *adjourned* into the *Common Pleas* to be tried; and after *adjournment*, the tenant may plead a new plea pursuant to the first: but if he pleads in abatement a plea triable by the *assise*, on which it is *adjourned*, he cannot plead in bar afterwards, &c. 1 *Danw.* Abr. 249. The justices of *assise* have power to *adjourn* the parties to *Westminster*, or to any other place; and by the express words of *Magna Charta*, cap. 12. they may *adjourn*, &c. into *C. B.* before the judges there. *Dyer* 132.

If the judges of the court of *King's Bench*, &c. are divided in opinion, two against two, upon a demurrer or special verdict (not on a motion) the cause must be *adjourn'd* into the *Exchequer Chamber*, to be determined by all the judges of *England*. 3 *Mod.* 156. 5 *Mod.* 335. After dissolution or prorogation of parliament, and after *adjournment* for above fourteen days, actions may be prosecuted against persons entitled to privilege, &c. Stat. 12 *W.* 3. Now see new act 10 *Geo.* 3.

Adiratus, A price or value set upon things stolen or lost, as a recompence to the owner.—*Poterit enim rem suam petere*

peters ut adiratum per testimonium proborum hominum. Bract. 1. 3. tract. 2. cap. 32.

Adjudication, (adjudicatio) A giving or pronouncing by judgment, a sentence or decree. Stat. 16 & 17 Car. 2. c. 10.

Adjura Regis, A writ brought by the king's clerk presented to a living, against those that endeavour to eject him, to the prejudice of the king's title. Reg. of Writs 1.

Ad Largum, At large: and there is title at large, assise at large, verdict at large; to vouch at large, &c.

Adlegiare, Or *aleier* in French, is for one to purge himself of a crime by oath. In the laws of king Alfred, in Brompt. Chron. cap. 4. *Si se velit adlegiare*, &c. And cap. 13. *Si accusetur, inde adlegiet se per sexaginta hidas*, &c.

Admeasurement, (admesuratio) Is a writ brought for remedy against such persons as usurp more than their share, to bring them to reason. It lies in two cases; one is termed *admeasurement of dower (admesuratio dotis)* where a man's widow after his decease holdeth from the heir more land, &c. as dower, than of right belongs to her: and the other is *admeasurement of pasture (admesuratio pasturæ)* which lies between those that have common of pasture appendant to their freehold estates, or common by vicinage, where any one or more of them furcharge the common. Reg. Orig. 156, 171. In the first case, the heir shall have this writ against the widow, whereby she shall be *admeasured*, and the heir restored to the overplus; and in the last case, it may be brought against all the other commoners, and him that furcharged; for all the commoners shall be *admeasured*. Terms de Ley 23. The heir shall have a writ of *admeasurement* of dower, for dower assigned in the time of his ancestor: and if an heir within age assign unto the wife more in dower than she ought to have, &c. the guardian in right may have a writ of *admeasurement*. But if the guardian assigns dower more than she ought to have, the heir, during his nonage, shall not have a writ of *admeasurement* of dower. 7 Hen. 2. 4. Vide 13 E. 1. c. 7. & Fitz. N. B. 148. If the wife after assignment of dower do improve the land, and make it better than it was at the time of the assignment; an *admeasurement* doth not lie of that improvement. Nat. Brevium 332.

A person who hath common appurtenant certain, or common by certain grant, shall be *admeasured*, and a tenant shall have *admeasurement* against him: but he who hath a common appurtenant without number, or common in gross without number, shall not be stinted, nor shall a writ of *admeasurement* of pasture lie against him. If the lord furcharge the common, his tenant must not have a writ of *admeasurement*; but an assise of common against the lord. And so if the lord do make improvement of the common. And it is said, that if the tenant furcharge the common, the Lord shall not have a writ of *admeasurement* against him; but he may distrain the surplussage cattle. On a second furcharge of a common, after *admeasurement* made, the plaintiff shall recover his damages against him that was defendant in the first writ; and he shall forfeit to the king the cattle which he put in over and above the due number after the *admeasurement* made. Stat. 13 Ed. 1. cap. 7. Vide c. 8. & Fitz. N. B. 125. The writs of *admeasurement* of dower and pasture are *vicontiel*, and shall be directed unto the sheriff, and shall not be returnable; and they run thus:

A writ of admeasurement of dower.

George the Third, &c. to the sheriff of, &c. A. the son [or cousin] and heir of B. hath complained unto us, that C. who was the wife of the aforesaid B. hath for dower more of the freehold which was of the aforesaid B. sometime her husband, in N. than she ought to have, and than belongs to her to have; and therefore we command you that justly and without delay you cause that dower to be *admeasured*, so that the aforesaid C. may not have more for dower of the inheritance of the aforesaid A. than she ought to have, and than belongs to her to have, according to her reasonable dower; and let the aforesaid A. have of that dower that which he ought to have and belongs to him to have, that we may hear no more clamour thereof for want of right, &c.

A writ of admeasurement of pasture.

George the Third, &c. to the sheriff of, &c. greeting. A. B. hath complained to us, that C. D. and E. F. have unjustly furcharged their common of pasture in, &c. so that they have in it more beasts and cattle, than they ought to have, and to them belongeth to have; and therefore we command you, that justly and without delay, you cause to be *admeasured* that pasture, so that the said C. D. and E. F. may not have therein more beasts and cattle than they ought, and to them it belongs to have, according to their freehold which they have in the same town; and that the said A. B. may have in that pasture so many beasts and cattle as he ought to have, and belongs to him to have; that we may hear no more clamour thereof, &c.

Adminicle, (adminiculum) Signifies aid, help, or support; being used to this purpose, Stat. 1 Ed. 4. cap. 1.

Administrator, (Latin) Is one that hath the goods of a man dying intestate committed to his charge by the ordinary, for which he is accountable when thereunto required.

For the better understanding this head it is to be considered,

- I. By whom and to whom administration is to be granted.
- II. Of the interest, power, and duty of an administrator.
- III. Of suits by and against administrators.
- IV. How administration may be revoked.

I. The bishop of the diocese where the party dies is regularly to grant *administration*: but when the person dying hath goods in several dioceses, which are *bona notabilia*, *administration* must be granted by the archbishop in the prerogative court, or it will be void. 1 Plowd. 281. See *Bona notabilia*.

At common law, and before the statute of Westm. 2. cap. 19. the ordinary had the absolute disposal of intestates estates. And therefore if a man died intestate, neither his wife, child, nor next of kin, had any right to a share of his estate, but the ordinary was to distribute it according to his conscience to pious uses; and sometimes the wife and children might be amongst the number of those whom he appointed to receive it; but however the law trusted him with the sole disposition.

The first statute that abridged the power of the ordinary herein, was the stat. West. 2. 13 Ed. 1. c. 19. A.D. 1285. Whereas after the death of a person dying intestate, which is bounden to some other for debt, the goods come to the ordinary to be disposed; the ordinary from henceforth shall be bound to answer the debts as far forth as the goods of the dead will extend, in such sort as the executors of the same party would have been bounden, if he had made a testament.

Before this statute the ordinary had the absolute disposal of intestates estates; and as that statute first subjected them to an action at the suit of creditors, so from thence they found, as my Lord North observes, that what was before very beneficial to them began to be very troublesome, which obliged them to put the administration into other hands, taking security to save them harmless from suits. Raym. 497.

But this method did not intirely free them from the trouble they had before; for such persons, being looked upon as servants or attornies to the ordinaries, could not sue for, nor gather in the intestate's estate. 2 Inst. 397. Co. Lit. 133. 1 Roll. Abr. 906. This however was remedied by the stat. 31 Ed. 3. cap. 11. (A.D. 1357.) Where a man dieth intestate, the ordinaries shall depute the next and most lawful friends to administer his goods, which deputies shall have action to demand and recover as executors the debts due to the intestate, and shall answer also to others to whom the said dead person was bounden and bound, in the same manner as executors, and shall be accountable to the ordinaries as executors. And it is enacted by the stat. 21 Hen. 8. cap. 5. sect. 13. In case any person die intestate, or the executors refuse to prove the testament, then the ordinary shall grant administration to the widow, or next kin, or to both, by dis-

cretion of the ordinary, taking surety for true administration.

Secd. 4. Where divers persons be in equality of kindred, the ordinary is to be at liberty to accept one or more, taking nothing for the same, as in probate of testaments, unless the goods of the deceased amount to above the value of an hundred shillings.

As the law is now settled *administration* must be granted, 1st. To the husband, of the wife's goods and chattels. 2. To the wife, of the husband's goods and chattels. 3. If there be no husband or wife, to the children, sons or daughters. 4. If there be no children alive, to the father or mother. 5. Then to a brother or sister of the whole blood, or of the half blood. 6. And if there are none such, to the next of kin, as uncle, aunt, or cousin. 7. Then to a creditor of the deceased. 8. And for want of all these, to any other person, at the discretion of the ordinary: or the ordinary may grant to a stranger letters *ad colligendum bona defuncti*, to gather up the goods of the deceased; or may take them into his own hands, to pay the deceased's debts, in such order as an executor or administrator ought to pay them: but 'tis said, he or the stranger who hath letters *ad colligendum*, cannot sell them, without making themselves executors of their own wrong, and action lies only against the ordinary, &c. *Wood's Inst.* 333.

Administration likewise may be granted *durante minori* atate of an infant executor or administrator.

If one makes an infant his executor, or dies intestate, and the right of administration devolves upon an infant, in these cases the ordinary is to grant administration during the minority of the infant, *id est*, in the first case till he arrives at the age of *fourteen*, and in the latter till he arrives at the age of *twenty-one*, because an infant cannot, before his full age, give bond to administer faithfully. *Goddolph. 102. 5 Co. 29. Hob. 250. Yelv. 128.*

And as such an administrator is but in nature of a curator for the infant, and has no interest or benefit in the testator or intestate's estate, but in right of the infant; it has been always held discretionary in the ordinary to whom to grant it, and therefore it hath been frequently adjudged, that he is not obliged within the statute 21 H. 6. to grant it to the next of kin either of the deceased, or the infant. *Hob. 250. 1 Vent. 219. 1 Keb. 549. 3 Mod. 24. 1 New Abr. 381.*

If an infant, and one of full age, are made executors, he who is of full age may take out administration *durante minori* atate of the infant, and may declare as executor or administrator *durante minori* atate, and there is no absurdity in this case, that there should be an executor and administrator to the same party. *1 New Abr. 381.*

Administration also may be granted *de bonis non*, where the first administrator dies, or the executor dies intestate, or without probate of the will.

If a person dies intestate, and administration is granted to J. S. who dies without having administered all the intestate's goods, in this case the ordinary must grant administration of the goods unadministered to another; for the first administrator cannot continue the trust reposed in him to his executor or administrator, because he has no interest but what he derives from the act of the ordinary. *1 New Abr. 385.*

So if an executor dies intestate, administration *de bonis non cum testamento annexo* of the testator must be granted by the ordinary, for they are not devolved on the administrator of the intestate, because he had them in *ante deum* in order to discharge the trust reposed in him, but if the executor makes his executor, then the trust is devolved on him; and after payment of the debts and legacies of the first testator he has an absolute property in the goods. *1 New Abr. 386.*

If the executor dies before probate, though he administered in part by disposing of the testator's goods, &c. yet his executor cannot be executor to the first testator, but in this case there is not an administration *de bonis non* granted, but an immediate administration, because the executor died *ante onus executionis testamenti super se susceptum*, which is the foundation the spiritual court proceed upon. *1 New Abr. 386.*

So if an executor refuses administration with the will annexed, it is to be granted to another. *1 New Abr. 386.*

Besides all these administrations, there is administration *durante absentia extra regnum*, where a person is absent abroad; and administration *pendente lite*, which may be granted by the ordinary as well as *durante minori* atate.

In these cases administration is to be granted to the next of kin to the first testator or intestate, but if the testator appoints a residuary legatee, such legatee is entitled to administration. *1 New Abr. 385.*

II. With respect to the interest of an administrator.

An administrator, by virtue of his administration, hath interest in all the chattels, real and personal of the intestate, and in all the goods and chattels, either in possession or action, in like manner as an executor in the goods of the testator deceased. And all these goods and chattels which belonged to the intestate at the time of his death, and which come to the hands of the administrator, shall be *assets*, or sufficient goods and chattels, to make him chargeable to the creditors, as executors are to creditors and legatees. Before they come to his hands he is not chargeable. *Wood's Inst. new edition, 339.*

N. B. If the references to Wood's Institute, or any other author, should not agree with the reader's edition, yet the parts may easily be found by referring to the index of the book referred to.

An administrator can't take advantage by his administration, (unless by paying his own debt first, if it is equal in degree with others, or by taking the goods and chattels as they are appraised) because the surplusage must be distributed amongst the next of kin, if there are any kin, according to the statute of the 22 & 23 Car. 2. c. 10. hereafter to be mentioned. If a debtor takes administration of the goods and chattels of his creditor, this shall not discharge the debtor; but his debt shall be *assets*; because the intestate did not act to free him from the debt. Whereas by making a debtor executor, the testator doth thereby release the debt. (But the duty remains, and is *assets*. *1 Inst. 264. l.*) When an administrator (as well as an executor) hath paid funeral charges, debts, &c. with his own money, he may retain so much of the goods of the intestate in kind according to the value, and shall have property in them. But by such payment the property is altered from the intestate to the administrator. *Wood's Inst. new edition, 339.*

As to the power of an administrator, he can do nothing till an administration is granted to him; but after the administration is granted, his power is almost equal with that of an executor. Yet if there are many administrators, one of them cannot sell goods, release debts, &c. without the other, but they must all join, because they have but one authority. See 30 Car. 2. c. 7. 4 & 5 W. & M. c. 24. And see title *Executors*.

With regard to the office and duty of an administrator, it is the same with that of an executor, as to the burial of the deceased and payment of funeral charges, the making of an inventory of his goods and chattels, the payment of debts, and the passing of an account. But something more is to be done by an administrator with respect to distributing the effects of intestates, which is regulated by the statute, commonly called the Statute of Distribution, that is, the 22 & 23 Car. 2. c. 10. by which it is enacted, that all ordinaries and ecclesiastical judges (upon granting administration) must take bond of the administrator with two or more sureties, with condition that the administrator shall make a true and perfect inventory of all the goods and chattels of the deceased, and exhibit it into the registry of the ordinary's court by such a day; and to administer according to law, and to make a true and just account thereof, and to make distribution of the surplusage as followeth: *viz.* one third to the wife of the intestate, the residue among his children, and such as legally represent them, if any of them be dead, other than such children (not heirs at law) who shall have any estate by settlement of the intestate in his life-time, equal to the other shares. Children, other than heirs at law, advanced by settlements or portions not equal to other shares, shall have so much of the surplusage as shall make

make the estate of all to be equal. But the heir at law shall have an equal part in the distribution with the other children, without any consideration of the value of the land which he hath by descent or otherwise from the intestate.

Sect. 5. If there be no children, nor legal representatives of them, one moiety shall be allotted to the wife, the residue equally to the next of kindred to the intestate, in equal degree, and those who represent them.

Sect. 6. No representation shall be admitted among collaterals after brothers and sisters children. And if there be no wife, all shall be distributed among the children; and if no child, to the next of kin to the intestate in equal degree, and their representatives.

Sect. 7. No such distribution shall be made till one year after the intestate's death; and every one, to whom any shares shall be allotted, shall give bond with sureties in the said courts, that if debts afterwards appear, he shall refund his ratable part thereof, and of the administrator's.

Sect. 8. In all cases where the ordinary hath used to grant administration *cum testamento annexo*, he shall continue so to do. *Made perpetual, 1 Jac. 2. cap. 17.* But by

Stat. 1 Jac. 2. cap. 17. s. 6. No administrator shall be cited into court to render an account of the personal estate of his intestate, otherwise than by an inventory thereof, unless at the instance of some person in behalf of a minor, or having a demand out of such estate as a creditor, or next of kin; nor shall be compellable to account before any ordinary or judge empowered by the act of 22 & 23 Car. 2. cap. 10. otherwise than as aforesaid.

Sect. 7. If after the death of a father, any of his children shall die intestate, without wife or children, in the life-time of the mother, every brother and sister, and their representatives, shall have equal share with her.

Upon this clause of the statute this case has been determined. After the death of the father the son died intestate, without issue, but leaving a wife, a mother, three brothers, a sister, and two nieces, the children of a deceased brother: this is within the statute; the intestate's wife shall have but one moiety, and as to the other moiety, the intestate's brothers and sisters, &c. shall come in for an equal share thereof with the mother. *2 P. Williams 344.*

But if a child dies intestate and unmarried, the father surviving has the child's whole estate at this day. *1 P. Williams 48.* And this without taking administration to him. *Pr. Ch. 260.*

Sect. 8. The clause in the said act of 22 & 23 Car. 2. c. 10. by which is provided, that that act shall not prejudice the customs of the city of London and province of York, shall not extend to such part of any intestate's estate, as an administrator, by virtue of his being so, by pretence of any custom may claim, to exempt the same from distribution.

It has been held, that a descent of lands in the nature of *Borough English* to the youngest son, will not prevent his having a full distributive share of his father's personal estate: the right to which vests immediately on the intestate's death: but not so as to exclude a posthumous child. *W. & A. edit. 341.*

It has been resolved likewise, that the *half blood* shall have a share upon a distribution equally with the *whole blood*. *Id.*

It seems to have been always holden, that the husband was intitled to administration as best friend to his wife, within the words of the statute 31 E. 3. but there being some doubt, whether since the statute of 22 & 23 Car. 2. he was not obliged to make distribution amongst the rest of her kindred, it was thought proper to settle this matter by a subsequent law, *viz.*

Stat. 29 Car. 2. cap. 3. sect. 25. The act of 22 & 23 Car. 2. cap. 10. shall not extend to the estates of *feme covert*s that die intestate, but that their husbands may have administration of their personal estates, and recover and enjoy the same as they might have done before the making of the said act. *Made perpetual, 1 Jac. 2. c. 17.*

Also since the statute 22 Car. 2. the ordinary may grant administration to the wife or next a-kin, at his

election, but then she must have her distributive share; also the ordinary may grant administration *quoad partem* to the wife, and as to the other part, to the next of kin; in which case neither can complain, since the ordinary need not have granted any part of the administration to the party complaining. *1 Sid. 179. Ryms. 93. 1 Show. 351. 1 Salk. 36.*

If there be grandfather, father and son, and the father dies intestate, the son shall have the administration, and not the grandfather, tho' they be both in equal degree as to nearness of kindred. *2 Vern. 125. laid arguendo.*

Since the making this statute 22 & 23 Car. 2. a man died intestate having one son, who likewise died intestate, and administration of goods was granted to the *next of kin of the father*, because there being but *one child*, there can be no *distribution*; and so this is a case out of the statute, and therefore the son is to have the whole at Common law; but it hath been otherwise adjudged since that time, (*viz.*) that by this statute of distribution of intestates estates, a right is vested in one child, where there is one and no more (*viz.*) a right to sue for the estate; and by consequence, if he die, before the estate is recovered and actually in his possession, it must go to his administrator, and not to the administrator of the father. *Banb. v. Newton, 35 Car. 2. Palmer v. Allcock. 3 Mod. 58.*

So where a person died intestate, leaving two, who were next a-kin, in equal degree to him, one of them died intestate within the year, and before distribution; adjudged, that *an interest was vested in him*, and his next of kin shall have administration, like the case of a *residuary legatee* dying before probate of the will, (*viz.*) his next of kin shall have the administration, and the next of the testator. *Show. 25.*

Administration was granted to the *grandmother*; and the *aunt* moved for a *mandamus*, but it was denied; for she is as near of kin as the *aunt*, or rather nearer, because she is in the right line ascending. *1 Salk. 30, 39.*

III. Of suits by and against administrators.

Against an administrator and for him, action will lie, as for and against an executor, and he shall be charged to the value of the goods, and no further; unless it be by his own false plea, or by wasting the goods of the intestate. An executor or administrator shall never be charged *de bonis propriis*, but where he doth some wrong; as by selling the testator's goods, and converting the money to his own use, concealing or wasting them, or by pleading what is false. *Dyer 210. 2 Roll. Rep. 295.* But this plea must be of a fact, within his own knowledge. If an administrator plead *plene administravit*, and 'tis found against him, the judgment shall be *de bonis propriis*, because 'tis a false plea, and that upon his own knowledge. *2 Cro. 191. Contra* where he pleads such a plea, and that he hath no more than to satisfy such a judgment, &c. the recovery shall be *de bonis testatoris*, &c. *2 Roll. Rep. 400.* Upon *plene administravit* pleaded by an administrator, the plaintiff must prove his debt, or he shall recover but a penny damages, though there be assets; because the plea only admits the debt, but not the *quantum*. *1 Salk. 296.* Special bail is not required of administrators in any action brought against them for the debt of the intestate; except where they have wasted the goods of the deceased: nor shall costs be had against administrators. *Vide New Abr. tit. Costs.* Where an administrator is plaintiff, he must shew by whom administration was granted; for that only intitles him to the action: but if an administrator is defendant, the plaintiff need not set forth by whom administration was granted, for it may not be within his knowledge. *Sid. 228, 1 Lutw. 301.* If a stranger that is not administrator, take the goods and administer in his own wrong, he shall be charged and sued as an executor, *Terms de Ley 24.* And generally an administrator shall be charged by others, for any debt or duty due from the deceased, as he himself might have been charged in his lifetime; so far as he hath any of the intestate's estate, to discharge the same. *Co. Lit. 219. Dyer 14.* An administrator's power is given by the administration, therefore he can do nothing until that be granted; and yet as to goods taken away before, the administration shall relate so as to give the administrator an action for them. *Fitzherb. 26.*

If a man have judgment for land in a real or mix'd action, and for damages, and then dies; his executor or administrator, not the heir, shall have execution for the damages; but not for the land. *Fitz. Admin.* 53. March 9.

IV. How administration may be revoked.

The ordinary ought not to repeal letters of administration which he hath duly granted; but if they are granted to such persons who ought not by law to have them, he may revoke them. 1 *Lill.* 38. For just cause they may be revoked, and where a person is a lunatick, &c. And if granted where not grantable, they may be repealed by the delegates. 1 *Lev.* 157, 186. If an administration is granted, and afterwards a will is produced and proved, the administration shall be revoked; and all acts done by the administrator are void. 2 *Roll. Abr.* 907. If a citation is granted against a stranger administrator, and his administration is revoked by sentence, yet all acts done by him *bona fide* as administrator are good till the revocation; the administration being only voidable. 6 *Rep.* 18. 8 *Rep.* 135. But if there is any fraud, a creditor may have relief upon the stat. 13 *Eliz. cap.* 5. And when the first administration is merely void, as granted by a wrong person, &c. it is otherwise: so when there is an appeal from the grant of the administration, to suspend the former decree. 5 *Rep.* 30. Administration was granted to J. S. and he released all actions, and after the administration was revoked, and declared void; this release was held good. 1 *Brownl.* 51. If an administrator give goods away, and then administration is revoked or repealed, 'tis said the gift is good; except it be by *covin*, when it shall be void only against a creditor by statute: and where the administrator after many goods administered, had his administration revoked, and it was committed to B. who sued the first administrator for goods unduly administered; it was held, that there was no remedy but in *Chancery*. 6 *Rep.* 19. *Clays.* 44. 4 *Shep. Abr.* 89. See *Hob.* 266. But we conceive, in such a case as this, the second administrator might maintain an action at law against the first, for money had and received, &c. or trover for any goods remaining in his possession.

In 2 *Leon.* 155. 'tis said, where the first administration is void, the administrator, who, under that administration, takes the goods, is a trespasser. And this we apprehend to be law, because at the time of taking he had not any authority. Letters of administration obtained by fraud are void. 3 *Rep.* 78, 6 *Rep.* 18, 19. 8 *Rep.* 143. Vide *Com. Dig.* 1 V. tit. Administration and Administrator, and the table to *Coke's Reports*, same title.

Administratrix, (Lat.) She that hath goods and chattels of an intestate committed to her charge, as an administrator.

Admiral, (admiralius, admirallus, admiralis, capitaneus or custos maris) is derived of the French *amerel*, and signifies an high officer or magistrate, that hath the government of the king's navy, and the determining of all causes belonging to the sea. This word is also said to have its derivation from the Saxon *acen mereal*, over all the sea: and in ancient time the office of the admiralty was called *custodia maritimæ Angliæ*. *Co. Lit.* 260. It appears that anciently the admirals of England had jurisdiction of all causes of merchants and mariners, happening not only upon the main sea, but in all foreign parts within the king's dominions, and without them, and were to judge them in a summary way, according to the laws of Oleron and other sea laws. 4 *Inst.* 75. In the time of king Ed. 1. and king John, all causes of merchants and mariners, and things arising upon the main sea, were tried before the lord admiral: but the first title of admiral of England, expressly conferred upon a subject, was given by patent of king Ric. 2. to the earl of Arundel and Surry. Of late times this high office has been generally executed by commissioners; who by statute are empowered to use and execute the like authorities as lord admiral. 2 *W. & M. cap.* 2. In the reign of Ed. 3. the court of admiralty was established, and Ric. 2. limited its jurisdiction.

By the statute 13 Ric. 2. *stat.* 1. c. 5. it is enacted, that, upon complaint of incroachments made by the admirals and their deputies, the admirals and their deputies shall meddle with nothing done within the realm, but only with things done

upon the sea. For the construction of this statute, see 2 *Bulstr.* 323. 3 *Bulstr.* 205. 13 *Co.* 52.

By stat. 15 Ric. 2. c. 3. it is declared, that all contracts, pleas and quarrels, and other things done within the bodies of counties by land or water, and of wreck, the admiral shall have no cognizance, but they shall be tried, &c. by the law of the land; but of the death of a man, and of mayhem done in great ships, being in the main stream of great rivers beneath the points near the sea, and in no other place of the same river, the admiral shall have cognizance; and also to arrest ships in great fleets, for the great voyages of the king and the realm, saving to the king his fortresses; and shall have jurisdiction in such fleets during such voyages, only saving to lords, &c. their liberties.

By the statute 2 Hen. 4. c. 11. reciting the R. 2. c. 5. it is enacted, that he that finds himself wronged against the form of the statute, shall have his action writ grounded upon the case against him that so pursued in the admiralty, and recover double damages against him, and he shall incur the pain of 10l. if he be attainted.

By the statute 28 Hen. 8. cap. 15. it is enacted, that "all felonies and robberies, &c. upon the sea, or in any haven, river, creek or place, where the admiral or admirals have, or pretend to have power, authority or jurisdiction, shall be inquired, tried, heard, determined and adjudged in such shires and places in the realm, as shall be limited by the king's commission or commissions to be directed for the same, in like form and condition as if any such offence or offences had been committed or done in or upon the land; and such commissions shall be had under the king's great seal, directed to the admiral or admirals or to his or their lieutenant, deputy or deputies, and to three or four such other substantial persons as shall be named or appointed by the lord chancellor of England for the time being, from time to time, and as oft as need shall require, to hear and determine such offences after the common course of the laws of this land, used for felonies and robberies, &c. done and committed upon the land within this realm": And it is further enacted, "that if any person or persons happen to be indicted for any such offence done, or hereafter to be done upon the seas, or in any other place above limited, that then such order, process, judgment and execution, shall be used, had, and done, and made to and against every such person and persons so being indicted, as against felons, &c. for any felony, &c. upon the land, by the laws of the land is accustomed; and such as shall be convicted of any such offence, by verdict, confession or process, by authority of any such commission, shall have and suffer such pains of death, losses of lands, goods and chattels, as if they had been attainted and convicted of such offence done upon the land; and also, that they shall be excluded from the benefit of the clergy."

It was held (*Yelv.* 134.) that by force of this statute, accessaries to this offence could not be tried; but this is remedied by 11 & 12 W. 3. cap. 7. by which their aiders and comforters, and the receivers of their goods are made accessaries, and to be tried as pirates by 28 Hen. 8. cap. 15. also the said statute 11 & 12 W. 3. directs how pirates may be tried beyond sea, according to the Civil law, by commission under the great seal of England.

By the statute 5 Eliz. cap. 4. and 13 Eliz. cap. 1. in the act mentioned, if done on the main sea, or coasts of the sea, being no part of the body of any county, and without the precinct, jurisdiction and liberties of the cinqueports, and out of any haven and pier, shall be tried before the admiral or his deputy, and other justices of oyer and terminer, according to the statute of 28 H. 8.

By the statute 1 Ann. cap. 9. captains and mariners belonging to ships, and destroying the same at sea, shall be tried in such places as shall be limited by the king's commission, and according to 28 H. 8.

The statute 10 Ann. cap. 10. directs how the trial of officers and soldiers, that either upon land out of Great Britain, or at sea hold correspondence with a rebel enemy.

And by the statute 4 Geo. 1. cap. 11. all persons who shall commit any offence for which they ought to be adjudged pirates, felons, or robbers by 11 & 12 W. 3. may be tried and judged for every such offence according to

the form of 28 H. 8. and shall be excluded from the benefit of clergy.

* The jurisdiction of the lord admiral therefore is confined to the main sea, or coasts of the sea, not being within any county. Thus, the *admiralty* hath cognizance of the death or maim of a man, committed in any ship riding in great rivers, beneath the bridges thereof, next the sea: but by the common law, if a man be killed upon any arm of the sea, where the land is seen on both sides, the coroner is to inquire of it, and not the *admiralty*; for the county may take cognizance of it; and where a county may inquire, the lord admiral has no jurisdiction. 3 Rep. 107. All ports and havens are *infra corpus comitatus*, and the admiral hath no jurisdiction of any thing done in them: between high and low water-mark, the common law and admiral have jurisdiction by turns; one upon the water, and the other upon the land. 3 Inst. 112. Every commander, officer, and soldier of ships of war, shall observe the commands of the admiral, &c. on pain of death, or other punishment. 13 Car. 2. cap. 9. The lord admiral hath power to grant commissions to inferior vice-admirals, &c. to call courts martial, for the trial of offences against the articles of war; and these courts determine by plurality of voices, &c. Stat. *Ibid.* Admiralty process is made out in the name of the admiral, who has under him a judge of the *admiralty*: and though the proceedings are according to the Civil law, and the maritime laws of *Rhodes* and *Oleron*, the sea being without the common law; yet by the several statutes abovementioned certain offences at sea may be tried by special commission to the lord admiral, &c. according to the laws of *England*.

The *admiralty* is said not to be a court of record, by reason it proceeds by the *Civil* law. 4 Inst. 135. But the *admiralty* has jurisdiction where the common law can give no remedy; and all maritime causes, or causes arising wholly upon the sea, it hath cognizance of. 6 Rep. The *admiralty* hath jurisdiction in cases of freight, mariners wages, breach of charter-parties, though made within the realm; if the penalty be not demanded: and likewise in case of building, mending, saving, and victualling ships, &c. so as the suit be against the ship, and not against the parties only. 2 Cro. 216. Mariners wages are contracted on the credit of the ship, and they may all join in suits in the *admiralty*; whereas at common law they must all sever: the master of a ship contracts on the credit of the owners, and not of the ship; and therefore he cannot prosecute in the *admiralty* for his wages. 1 Salk. 33. It is allowed by the common lawyers and civilians, that the lord admiral hath cognizance of seamen's wages, and contracts, and debts for making ships; also of things done in navigable rivers, concerning damage done to persons, ships, goods, annoyances of free passage, &c. And of contracts, and other things done beyond sea, relating to navigation and trade by sea. Wood's Inst. 218. But if a contract be made beyond sea, for doing of an act or payment of money within this kingdom; or the contract is upon the sea, and not for a marine cause, it shall be tried by a jury; for where part belongs to the common law, and part to the admiral, the common law shall be preferred. And contracts made beyond sea may be tried in B. R. and a fact be laid to be done in any place in *England*, and so tried here. 2 Bulstr. 322.

Where a contract is made in *England*, and there is a conversion beyond sea, the party may sue in the *admiralty*, or at common law. 4 Leon. 257. So where a bond is made and delivered in *France*: but we apprehend, if 'tis under seal, it can't be sued in the *admiralty*. An obligation made at sea, it has been held cannot be sued in the admiral's court; because it takes its course, and binds according to the common law. Hob. 12. The court of *admiralty* cannot hold plea of a matter arising from a contract made upon the land, tho' the contract was concerning things belonging to the ship: but the *admiralty* may hold plea for the seamen's wages, &c. because they become due for labour done on the sea; and the contract made upon land, is only to ascertain them. 3 Lev. 60. Though where there is a special agreement in writing, by which seamen are to receive their wages, in any other manner than usual; or if the agreement at land

be under seal, so as to be more than a parol contract, it is otherwise. 1 Salk. 31. See Hob. 79. If the master pawns the ship on the high sea out of necessity for tackling or provision, without the consent of the owners, it shall bind them; but 'tis otherwise where the ship is pawned for the master's debt: the master can have no credit abroad, but upon the security of the vessel; and the *admiralty* gives remedy in these cases. 1 Salk. 35. The master hath a right to hypothecate the ship, for any debt, incurred on her account. Vide 1 Inst. 134, 140. Tho' the agreement is made, and the money lent at land. 1 Lord Ray. 152. *Benzen v. Jeffries*. Sale of goods (taken by piracy) in open market, is not binding by the admiral law, so that the owner may retake them; but at common law the sale is binding, of which the *admiralty* must take notice. 1 Roll. Abr. Vide 1 Vent. 308.

If a ship is taken by pirates upon the sea, and the master, to redeem the ship, contracts with the pirates to pay them 50*l.* and pawns his person for it, and the pirates carry him to the isle of S. and there he pays it with money borrowed, and gives bond for the money, he may sue in the *admiralty* for the 50*l.* because the original cause arose upon the sea, and what followeth was but accessory and consequential. Hard. 183.

If goods delivered on shipboard are imbezilled, all the mariners ought to contribute to the satisfaction of the party that lost his goods, by the maritime law, and the cause is to be tried in the *admiralty*. 1 Lill. 368. By the custom of the *admiralty*, goods may be attached in the hands of a third person, in *causa maritima* & *civili*, and they shall be delivered to the plaintiff after defaults, on caution to restore them, if the debt, &c. be disproved in a year and a day; and if the party refuse to deliver them, he may be imprisoned *quousque*, &c. March Rep. 204. The court of *admiralty* may cause a party to enter into bond in nature of caution or stipulation, like bail at common law; and if he render his body, the sureties are discharged; and execution shall be of the goods, or of the body, &c. not of the lands. Godb. 260. 1 Shep. Abr. 129. See 1 Salk. 33. T. Ray. 78. 2 Lord Ray. 1286. *Fitzg.* 197. A person in execution, on judgment in the admiral's court, upon a contract made on the land in *New England* was discharged, being out of the *admiralty* jurisdiction. 3 Cro. 603. 1 Cro. 685. And where sailors cloaths were bought in St. Katherine's parish, near the Tower, London, which were delivered in the ship; on a suit in the *admiralty* for the money, prohibition was granted; for this was within the county: so of a ship lying at Blackwall, &c. Owen 122. *Hughes's* Abr. 113. But the *admiralty* may proceed against a ship, and the sails and tackle, when they are on shore, altho' alleged to be detained at land: yet upon alleging offer of a plea, claiming property therein, and refusal of the plea, on this suggestion a prohibition shall be had. 1 Show. 179.

If there be a war with the Dutch, and an *Englishman* having letters of mark, takes an *Offender* for a Dutch ship, and brings it into a haven, and libels against it to have it condemned as a prize; but sentence be given that it is no prize; the *Offender* may libel in the *admiralty* against the captain, for the damage the ship received while it lay in the port; for the original taking being at sea, the bringing it into the port, in order to have it condemned, is but a consequence thereof. 1 Lev. 243. 1 Sid. 367.

If an *English* ship takes a *French* ship richly laden, the *French* being in enmity with us, and such ship is libelled against, and after due notice on the exchange, &c. declared a lawful prize, the king's proctor may exhibit a libel in the *admiralty* court, to compel the taker (who sent the ship to *Barbadoes*, and converted the lading to his own use) to answer the value of the prize to the king; although it was objected, that by the first sentence the property was vested in the king, and that this second libel was in nature of an action of trover, of which the court of *admiralty* cannot hold plea. *Carib.* 399.

If the owner of a ship victuals it and furnishes it to sea, with letters of reprisal, and the master and mariners when they are at sea commit piracy upon a friend of the king, without the notice or assent of the owner, yet by

this the owner shall lose his ship by the admiral law, and our law ought to take notice thereof. 1 *Rel. Abr.* 530. But see 1 *Roll. Rep.* 285.

By the Civil law and custom of merchants, if the ship be cast away, or perish through the mariners defaults, they lose their wages; so if taken by pirates, or if they run away; for if it were not for this policy, they would forsake the ship in a storm, and yield her up to enemies in any danger, 1 *Sid.* 179. 1 *Mod.* 93. 1 *Vent.* 146.

The admiralty court may award execution upon land; tho' not hold plea of any thing arising on land. 4 *Inst.* 141. And upon letters missive or request, the admiralty here may award execution on a judgment given beyond sea, where an *Englishman* flies or comes over hither, by imprisonment of the party, who shall not be delivered by the common law. 1 *Roll. Abr.* 530. When sentence is given in a foreign admiralty, the party may libel for execution of that sentence here; because all courts of admiralty in Europe are governed by the civil law. *Sid.* 418. Sentences of any admiralty in another kingdom are to be credited, that ours may be credited there, and shall not be examined at law here: but the king may be petitioned, who may cause the complaint to be examined; and if he finds just cause, may send to his ambassador where the sentence was given, to demand redress, and upon failure thereof, will grant letters of marque and reprisal. *Raym.* 473.

If one be sued in the admiralty, contrary to the statutes 13 & 15 R. 2. he may have a *superfedeas*, to cause the judge to stay the proceedings, and also have action against the party suing. 10 *Rep.* 75. A ship being privately arrested by admiralty process only, and no suit, it was adjudged a prosecution within the meaning of the statutes; and double damages, &c. shall be recovered. 1 *Salk.* 31, 32. And if an erroneous judgment is given in the admiralty, appeal may be had to delegates appointed by commission out of Chancery, whose sentence shall be final. *Stat.* 8 *Elix.* cap. 5.

Appeals may be brought from the inferior admiralty courts to the lord high admiral: but the lord warden of the cinque ports hath jurisdiction of admiralty exempt from the admiralty of England. A writ of error does not lie upon a sentence in the admiralty, but an appeal. 4 *Inst.* 135. And vide *id.* 339. By the *stat.* 22 Geo. 2. c. 3. His majesty's commission to all the privy counsellors then and for the time being, and to the lord chief baron of the court of Exchequer, the justices of the King's Bench and Common Pleas, and barons of the said court of Exchequer, then and for the time being, for hearing and determining appeals from sentences in causes of prizes pronounced in the courts of admiralty, in any of his majesty's dominions, declared valid, although such chief baron, justices and barons are not of the privy counsel. But no sentence shall be valid, unless the major part of the commissioners present be of the privy counsel. See *stat.* 29 Geo. 2. cap. 34. and *Com. Dig.* 1 V. tit. Admiralty.

Admission, (admissio) Is when a patron of a church having presented to it, the bishop upon examination admits the clerk, by saying *admitto te habilem*. Co. L. 344. a. It is properly the ordinary's declaration that he approves of the presentee, to serve the cure of the church to which he is presented. Co. L. 344. a. All persons are to have episcopal ordination before they are admitted to any parsonage or benefice; and if any shall presume to be admitted, not having such ordination, &c. he shall forfeit 100l. *Stat.* 14 Car. 2. No person is to be admitted into a benefice with cure of 30l. per ann. in the king's books, unless he is a bachelor of divinity at least, or a preacher lawfully allowed by some bishop, &c. Action of the case will not lie against the bishop, if he refuse to admit a clerk to be qualified according to the canons, (as for any crime or impediment, illiterature, &c.) but the remedy is by writ *quare non admisit*, or *admittendum clericum* brought in that county where the refusal was. 7 *Rep.* 3.

The ordinary may refuse a clerk presented to him, if he be *minus idoneus*, as outlawed, excommunicated, within age. 2 *Inst.* 632. Or *mere laicus*. 2 *Inst.* 632. 5 Co. 58. a. Or *criminosus*, as a heretick or schismatick, &c. 2 *Inst.* 632. *Dal.* 51. Or a manslayer, felon, &c.

5 Co. 58. Or guilty of any offence for which he ought to be deprived. 5 Co. 58. a. Or if he be illiterate. 2 *Inst.* 632. *Cases in Parliament* 91. And to say *quod fuit minus sufficiens in literaturâ & eâ ratione inhabilis*, is sufficient; for it is in the negative, and does not consist of a single instance, but general ignorance. Vide *Mod.* 135. *Ca. Parl.* 92. 3 *Lev.* 114. *Sulk.* 539.

If the patron brings a *quare impedit* against the upon refusal of his clerk the cause of refusal is traversed. If it be a spiritual matter, and the clerk is living, he shall be tried by the metropolitan. 2 *Inst.* 632. 5 Co. 58. a. If it be a temporal matter, or a spiritual matter, and the party is dead, it shall be tried by the country. 5 Co. 58. a. 2 *Inst.* 632.

Admittendo Clerico, A writ where a man has recovered his right of presentation against the bishop. *Reg. Orig.* 33. If a man do recover his presentation against the Common Pleas against the bishop, then he may have a writ to the same bishop to admit his clerk, or unto the metropolitan: a person recovers an advowson, and six months pass; yet if the church be void, the patron may have a writ to the bishop; and if the church is void when the writ comes to the bishop, the bishop is bound to admit his clerk. 7 H. 8. 14 H. 4. Where a man recovers against another than the bishop, this writ shall go to the bishop; and the party may have an *alias* and a *pluries*, if the bishop do not execute the writ, and an attachment against the bishop, if need be. *New Nat. Br.* 84. In a *quare impedit* betwixt two strangers, if there appears to the court a title for the king, they shall award a writ unto the bishop, for the king.

Admittendo in socium, A writ for associating certain persons to justices of assize. *Reg. Orig.* 206. Knights and other gentlemen of the county are usually associated with judges in holding their *assizes* on the circuits.

Anichiled, From the Latin *nihil*, written of old *Nicbil*, and signifies annulled, cancelled, or made void. *Stat.* 28 Hen. 8.

Ad quod Damnum, Is a writ which ought to be issued before the king grants certain liberties, as a fair, market, &c. which may be prejudicial to others: it is directed to the sheriff to inquire what damage it may do, for the king to grant a market, fair, &c. *Terms de Ley* 25.

Stat. 27 Ed. 1. *stat.* 2. sect. 1. ordains, that such as would purchase new parks shall have writs out of Chancery to inquire concerning the same.

Seçt. 4. In like manner they shall do that will purchase any fair, market, warren, or other liberty.

This writ is likewise used to inquire of lands given in mortmain to any house of religion, &c. And it is a damage to the country, that a freeholder who hath sufficient lands to pass upon assizes and jury, should alien his lands in mortmain, by which alienation his heir should not have sufficient estate after the death of the father to be sworn in assizes and juries. *F. N. B.* 121.

The writ *ad quod damnum* is also had for the turning and changing of ancient highways; which may not be done without the king's licence obtained by this writ, on inquisition found that such a change will not be detrimental to the public. *Vaugh. Rep.* 341. Ways turnable without this authority, are not esteemed highways, so as to oblige the inhabitants of the hundred to make amends for robberies; nor have the subjects an interest therein to justify going there. 3 *Cro.* 267. If any one change an highway without this authority, he may stop the way at his pleasure. But see the statute, 8 & 9 W. 3. c. 16. for enlarging of highways by order of justices of peace, &c. Where any common highway shall be inclosed after a writ of *ad quod damnum* executed, any person aggrieved by such inclosure may complain to the justices at the next quarter-sessions; but if no such complaint or appeal be made, then the inquisition and return, recorded by the clerk of the peace, shall be for ever binding. 8 & 9 W. 3.

The river Thames is an highway, and cannot be diverted without an *ad quod damnum*, and to do such a thing ought to be by patent of the king. *Noy* 105.

If there be an ancient trench or ditch coming from the sea, by which boats and vessels used to pass to the town, if the same be stopped in any part by outrageousness of the sea,

sea, and a man will sue to the king to make a new trench, and to stop the ancient trench, &c. they ought first to sue a writ of *ad quod damnum*, to enquire what damage it will be to the king or others. *F. N. B.* 225. E.

And if the king will grant to any city the *assise of bread and beer*, and the keeping of weights and measures, and *ad quod damnum* shall be first awarded, and when the same is certified, &c. then to make the grant. *F. N. B.* 225. E.

Appears by the writs in the Register, that in ancient times upon every grant, confirmation, &c. or licence made by the king, first a writ *ad quod damnum* was to be awarded, to inquire of the truth thereof, and what damage the king might have by the same: but now the practice is contrary; and in the patents of common grants of licence, are put in the end these words—*Et hoc absque aliquo breui de ad quod damnum, seu aliquibus aliis brevibus sive inquisitionibus aut mandatis superinde habendum, sive aut prosequendum.* &c. Vide *Com. Dig.* 1 V. 302, &c.

Adreſtare, adreſſare, i. e. *ad rectum ire, recto stare*, To do right, satisfy, or make amends. *Gerw. Dorobern.* anno 1170.

Ad terminum qui preterit, A writ of entry, that lies for the lessor and his heirs, where a lease has been made of lands or tenements for term of life, or years; and after the term is expired, the lands are withheld from the lessor by the tenant, or other person that possesseth the same: and it likewise lies for the heir of the lessor. *F. N. B.* 201.

Now by *stat. 4 Geo. 2. c. 28.* Tenant wilfully holding over, after demand and notice in writing for delivering possession, shall pay *double* the yearly value.

Advent, (*adventus*) A time containing about a month preceding the feast of the nativity of our Saviour *Christ*. It begins from the Sunday that falls either upon *St. Andrew's* day, being the 30th of November, or next to it, and continues to the feast of *Christ's* nativity, commonly called *Christmas*. Our ancestors shewed great reverence and devotion to this time, in regard to the approach of the solemn festival: for *in adventu domini nulla assisa debet capi.* *Int. placita de temp. regis Joh. Ebor.* 126. But the statute *West. 1. cap. 48.* ordained that notwithstanding the usual solemnity and times of rest, it should be lawful (in respect of justice and charity, which ought at all times to be regarded) to take assises of *novel disseisin, mort d'ancestor*, &c. in the time of *Advent, Septuagesima, and Lent*. This is also one of the seasons, from the beginning of which to the end of the octaves of the *Epiphany*, the solemnizing of marriages is forbidden, without special licence, as we may find from these old verses,

*Conjugium adventus prohibet, Hilarique relaxat;
Septuagena vetat, sed Pasche octava reducit;
Rogatio vetitat, concedit trina potestas.*

Ad ventrem Inſpiciendum. A writ mentioned in the statute 12 Ed. 2. See *Ventre Inſpiciendo*, by which a woman may be searched, whether she be with child by a former husband, on her withholding lands from the heir.

Adventure, A thing sent to sea, the *adventure* whereof the person sending it, stands to out and home. *Lex Mercat.* Vide *Adventure*.

Adultery, (*adulterium, quasi ad alterius thorum*) Anno 1 Hen. 7. cap. 7. and in divers old authors termed *adultery*, is the sin of incontinence between two married persons; and if but one of the persons be married, it is nevertheless *adultery*: but in this last case it is called *single adultery*, to distinguish it from the other, which is double. This crime is severely punished by the laws of God, and the ancient laws of the land: the *Julian law*, among the old *Romans*, made it death; but in most countries at this time the punishment is by fine, and sometimes banishment; in *England* it is punished by fine, penance, &c. King *Edmund*, a Saxon, *Leg. sua*, cap. 4. *Adulterium affici jussit instar homicidii.* And *Canutus* i. e. *Dane*, *Hominem adulterum in exilium relegari jussit, sicut nam nasum & aures præcidi.* *Leg. par. 2. c. 6.* &c. *Leg. Hen. 1. cap. 12.—Ren, &c. Vic.*

South'ton, Præcipimus tibi quod diligenter inquiri facias per legales homines de visis. *Candeur.* si *Robertus Pincerna habens suspectum Will. Wake qui cum uxore sua adulterium committeret, prohibuit ei ingressum domus sue, & si idem Will. post prohibitionem illam domum ipsius Roberti ingressus adulterium prædictum commisit, inde præfatus Robertus mentula eum privavit, & si inquisitio dederit, quod ita sit, tunc eidem Roberto & suis qui cum eo erant ad hoc faciend. terr. & catalla sua occasione illa in manum nostram seiscita, in pace esse facias, donec aliud inde tibi præcipimus, &c.* *Clauſ. 14. Joh. m. 2.* Perhaps this might be in some measure agreeable to a law made by *William the Conqueror*, that whoever forced a woman should lose his genitals, the offending parts.

Before the statute 22 Car. 2. which makes malicious maiming felony, it was a question, whether cutting off the privy members of a man, taken in adultery with another man's wife, was felony or not? For according to *Bracton, sequitur pena aliquando capitalis*: but anno 13 H. 3. one *John*, a monk, being taken by *Henry Hull* in the act with his wife, he cut off the privy members of the monk, and was only indicted for a maihem. 3 *Inst.* 118. If a wife elope from her husband, and live with the adulterer, (without being reconciled to the husband) she shall forfeit her dower. 1 *Inst.* 36. 2 *Inst.* 435. And there is a notable cause concerning *Margaret*, the wife of *John de Cameis*, who with her husband's consent lived in adultery with *Sir William Pannel*, yet lost her dower. 2 *Inst.* *Adultery* being a thing temporal, as well as spiritual, is against the peace, &c.

Advocate, Is the patron of a cause assisting his client with advice, and who pleads for him: it is the same by the Civil and Ecclesiastical laws, as a counsellor by the common law. The ecclesiastical, or church-advocate, was originally of two sorts; either an advocate of the causes and interest of the church, retained as a counsellor and pleader of its rights; or an advocate, or patron of the presentation and advowson. Both these offices at first belonged to the founders of churches and convents, and their heirs, who were bound to protect and defend their churches, as well as to nominate or present to them.—As *Ailwin*, founder of *Ramsay* abbey, *proruit in medium, se Ramsayensis ecclesie advocatum, se possessionem ejus tutorem allegans.* *Lib. Rameſ. sect. 49.* But when the patrons grew negligent in their duty, or were not of ability or interest in the courts of justice, then the religious began to retain law advocates, to solicit and prosecute their causes. Vide *Spelman*.

Advocati, Were those which we now call patrons of churches, and reserved to them, and their heirs, a liberty to present a person on any avoidance. *Blount*.

Advocatione Decimarum, A writ that lies for tithes, demanding the fourth part, or upwards, that belong to any church. *Reg. Orig.* 29.

Advow, (*advocare*) To justify or maintain an act formerly done. For example: one takes a distress for rent, and he that is distrained sues the replevin: now the distrainer, justifying or maintaining the act, is said to *advow* or *avow*: and hence comes *advowant* and *advowry*. *Old Nat. Br.* 43. Now called *avowant* and *avowry*, the *d* being dropped in spelling, as well as in pronunciation. The signification of this word is also to bring forth any thing: anciently when stolen goods were bought by one, and sold to another, it was lawful for the right owner to take them wherever they were found; and he in whose possession they were found, was bound *advocate*, i. e. to produce the seller to justify the sale; and so on till they found the thief. Afterwards the word was taken for any thing which a man acknowledged to be his own, or done by him, and in this sense it is mentioned in *Fleta*, lib. 1. cap. 5. par. 4. *Si vir ipsum in domo sua suscepit, natriet & advocaverit filium suum.* See *Advowry*.

Advowee, or *avowee*, (*advocatus*) Is used for him that hath right to present to a benefice: and by 25 Ed. 3. *stat. 5.* we find *advowee paramount* is taken for the king, the highest patron.—*Advocatus est ad quem pertinet jus advocationis alicujus ecclesie, ut ad ecclesiam, nomine proprio non alieno, possit presentare.* *Fleta*, lib. 5. c. 14.

Advowson, (*advocatio*) Signifies the right of presentation to a church or benefice: and he who hath this right

present is styled *patron*: because they that originally obtained the right of presentation to any church, were maintainers of, or benefactors to the same church. When the Christian religion was first established in England, kings began to build cathedral churches, and to make bishops; and afterwards, in imitation of them, several lords of manors founded particular churches on some part of their own lands, and endowed them with glebe, reserving to themselves and their heirs a right to present a fit person to the bishop, when the same should become void: and this is called an *advowson*, and he that hath this right of presentation is termed the *patron*, it being presumed that he who founded the church will *avow* and take it into his protection, and be a *patron* to defend it in its just rights. 1 *Nelf. Abr.* 184. See further as to the origin of *lay-patronages*, *Willon Rep.* part 2. 183.

Under this head it may be proper

- I. To consider the several kinds of *advowson*.
- II. How *advowsons* may lapse.
- III. How they may be gained by *usurpation*.

I. *Advowsons* are of two kinds; *appendant*, and in *gross*: *Appendant*, is a right of presentation dependant upon a manor, lands, &c. and passes in a grant of the manor as incident to the same; and when manors were first created, and lands set apart to build a church on some part thereof, the *advowson* or right to present to that church became *appendant* to the manor. *Advowson* in *gross* is a right subsisting by itself, belonging to a *person*, and not to a manor, lands, &c. So that when an *advowson* *appendant* is severed by deed or grant from the corporeal inheritance to which it was *appendant*, then it becomes an *advowson* in *gross*. 1 *Inst.* 121, 122.

If he that is seised of a manor, to which an *advowson* is *appendant*, grants one or two acres of the manor, together with the *advowson*; the *advowson* is *appendant* to such acre; especially after the grantee hath presented. *Watson's Compleat Incumbent*, c. 7.

But this feoffment of the acre with the *advowson* ought to be by deed, to make the *advowson* *appendant*; and the acre of land and the *advowson* ought to be granted by the same clause in the deed; for if one having a manor with an *advowson* *appendant*, grant an acre parcel of the said manor, and by another clause in the same deed grants the *advowson*; the *advowson* in such case shall not pass as *appendant* to the acre: but if the grant had been of the *intire* manor, the *advowson* would pass as *appendant*. So if a husband, seised in right of his wife of a manor to which an *advowson* is *appendant*, doth alien the manor by acres to divers persons, saving one acre; the *advowson* shall be *appendant* to that acre. Or if a lessee for life of a manor to which an *advowson* belongs, alien one acre, with the *advowson* *appendant*, the *advowson* is thereby *appendant* to that acre. *Watf.* c. 7.

The right of *advowion*, tho' *appendant* to a manor, castle, or the like, may be severed from it; and being severed, becomes an *advowson* in *gross*; and this may be effected divers ways: as, 1. If a manor or other thing to which it is *appendant* is granted, and the *advowson* excepted. 2. If the *advowson* is granted alone, without the thing to which it was *appendant*. 3. If an *advowson* *appendant* is presented to by the *patron*, as an *advowson* in *gross*. *Gibf.* 757.

A disappendency may also be temporary; that is, the appendency, tho' turned into *gross*, may return: as, 1. If the *advowson* is excepted in a lease of a manor for life; during the lease, it is in *gross*, but when the lease expires it is *appendant* again. 2. If the *advowson* is granted for life, and another enfeoffed of the manor with the appurtenances; in such case the reversion of the *advowson* passeth, and at the expiration of the grant it shall be *appendant*, and so in other cases.

But in case of the king, by the statute of *prærogativa regis*, 17 Ed. 2. c. 15. When the king giveth or granteth land or a manor with appurtenances; without he make express mention in his deed or writing, of *advowson* of churches when they fall, belonging to such manor or land, at this day the king reserveth to himself such *advowsons*, albeit that among other persons it hath been observed otherwise.

But when he reserveth, as in case of the restitution of a bishop's temporalities; then *advowsons* pass without express mention, or any words equivalent thereto. 10 Co. 64.

The law, in the case of a common person, is thus shown by *Rolls*, out of the antient books: If a man of a manor to which an *advowson* is *appendant*, that manor, without saying *with the appurtenances* (yet the *advowson* shall pass; for 'tis parcel of the manor. 1 *Col. Abr.* 60.

An *advowson* being an inheritance incorporeal, and lying in manual occupation, cannot pass by *livery*; but may be granted by *deed*, or by *will*, either for the inheritance, or for the right of one or more turns, or for as many as shall happen within a time limited.

But this general rule, with regard to *advowsons* in *gross*, next avoidances, and the like, is to be understood with two limitations.

First, That it extends not to ecclesiastical persons of any kind or degree, who are seised of *advowsons* in the right of their churches; nor to masters and fellows of colleges, nor to guardians of hospitals, who are seised in right of their houses; all these being restrained (the bishops by the 1 *Elix. cap.* 19. and the rest by the 13 *Elix. cap.* 10.) from making any grants but of things corporeal, of which a rent or annual profit may be reserved; and *advowsons* and next avoidances, which are incorporeal and lie in grant, cannot be of that sort; and therefore such grants, however confirmed, are void against the successor; tho' they have been adjudged to be good against the grantors (as bishop, dean, master, or guardian) during their own times.

Corporeal hereditaments are said to lie in *livery* (as actual possession may be given of them). Incorporeal are said to lie in grant (for the reverse of the preceding reason). And they pass merely by the delivery of the deed. Vide *Braddon*, l. 2. c. 18. *Blackstone's Commentaries*, 2 V. 317.

Secondly, Where the right of granting is absolute and indisputable; yet a grant cannot be made by a common person, whilst the church is void, so as to be intitled thereby to such void turn; for however the avoidance that shall happen next after, or the inheritance of the *advowson*, may be granted when the church is void; the void turn itself (being a mere spiritual thing and annexed to the person of the *patron*) is not grantable: it is then (as the law books speak) a thing in power and authority, a thing in action and effect; the execution of the *advowson*, and not the *advowson*. This is the doctrine and language of all the books; which also say, that if two have a grant of the next avoidance, and one releaseth all right and title to the other while the church is void: such release for the same reason is void. But all this is to be understood of common persons only, and not of the king, whose grant of a void turn hath been adjudged to be good. *Gibf.* 758. *Watf.* c. 10.

And with respect to clergymen, it is to be observed, that by 12 *Ann. stat.* 2. c. 12. they are prohibited from purchasing the next avoidance of living.

But this act being only restrictive upon clergymen, all other persons continue to purchase next avoidances as they did before, and present thereunto as they think proper.

As to *advowsons* in *gross*, there cannot be any descent thereof from the brother to the sister of the *intire* blood, where there is a brother of the half blood; but the same shall descend to the brother of the half blood, unless the first had presented to it in his life time, and then it shall descend to the sister, she being the next heir of the *intire* blood. *Watf.* c. 8. We take it for granted, that in this case the brother of the half blood must take as heir of the ancestor, who last presented, he being, by the exercise of that right, &c. the person last actually seised.

So if one be seised of an *advowson* in fee, and the church doth become void, the void turn is a chattel; and if the *patron* dieth before he doth present, the avoidance doth not go to his heir, but to his executor. *Watf.* c. 9.

But if the incumbent of a church be also seised in fee of the advowson of the same church, and die; his heir, and not his executors, shall present; for altho' the advowson doth not descend to the heir at the death of the incumbent, and by his death the church become void, so that the avoidance may be said in this case to be severed from the advowson before it descend to the heir, and vest in the executor; yet both the avoidance and descent to the heir happening at the same instant, the title of the heir shall be preferred as the more antient and worthy. *Watf. c. 9.*

By last will and testament, the right of presenting to the next avoidance, or the inheritance of an advowson, may be devised to any person; and if such devise be made by the incumbent of the church, the inheritance of the advowson being in him, it is good, tho' he die incumbent; for altho' the testament hath no effect but by the death of the testator, yet it hath an inception in his life time. And so it is, tho' he appoint by his will who shall be presented by the executors, or that one executor shall present the other, or doth devise that his executors shall grant the advowson to such a man. *Watf. c. 10.*

Also advowsons are either *presentative*, *collative*, or *donative*.

An advowson *presentative* is, where the patron does present or offer his clerk to the bishop of the diocese, to be instituted in his church.

This may be done either by word or writing. The king may present by word, or in writing under any seal; who otherwise cannot do any legal act, but by matter of record. But where an *aggregate corporation* doth present, it must be under seal. The presentation to a vicarage doth of common right belong to the parson. If a *feme covert* hath title to present, the presentation must be by husband and wife, and in both their names, except in case of the queen consort. *Wood's Inst. 155, &c.*

And if a *feme covert* is seised of an advowson, and the church becometh void, and the wife dieth, the husband shall present to the advowson. A guardian by socage or by nurture cannot present to a vacant living in right of the heir, or in his name, because he can make no benefit of it, or account for it, though it is sometimes practised, and made good by time. Therefore the infant shall present of whatsoever age. *Vide Co. Lit. 17. b.* If a common patron presents first one clerk, and then another, the bishop may institute which he pleases; unless he revokes the presentation of one of them before he is admitted by the bishop. If there is a right of nomination in one, and a right of presentation in another, to the same benefice; he that has the right of nomination is the true patron, and the other is obliged to present the clerk which is nominated. *Id. 156.*

An advowson *collative* is that advowson which is lodged in the bishop; for *collation* is the giving of a benefice by a bishop, when he is the original patron thereof, or he gains a right by *lapse*.

Institution is given by the bishop upon a presentation of a clerk; but *collation* is an immediate institution, because the bishop is both *patron* and *ordinary*. *Institution* and *collation* are in effect (for the most part) the same, and are terms made use of to distinguish the *persons*, who have the power to bestow the benefice. (But where they differ, see of *Lapse* and *Usurpation postea*). *Id. 157, &c.*

An advowson *donative* is, when the king or other patron (in whom the advowson of the church is lodged) does, by a single donation in writing, put the clerk into possession, without presentation, institution, or induction. Donatives are either of churches parochial, chapels, prebends, &c. and may be exempt from all ordinary jurisdiction, so that the ordinary cannot visit them, and consequently cannot demand procurations. If the true patron of a church or chapel donative doth once present to the ordinary, and his clerk is admitted and instituted, it becomes a church presentative, and shall never have the privilege of a donative afterwards. Yet if a stranger presents to such a donative, and institution is given, all is void. *Id. 158.*

The right of donation descends to the heir (the ancestor by whom the church became void in his life time) and not to the executor, which it would had it

been a *presentative* benefice. *Wilson Rep. part 2. 150, 1.*

There's not any case in the books to exclude the heir of a donative from his turn in this case. And a patron of a donative can never be put out of possession by an usurpation. *Id. ibid.*

Advowsons were formerly most of them appendant to manors, and the patrons parochial barons; the lordship of the manor, and patronage of the church were feldem in different hands till *advowsons* were given to religious houses; but of late times the lordship of the manor and the *advowson* of the church have been divided; and now not only lords of manors, but mean persons have, by purchase, the dignity of patrons of churches, to the great prejudice thereof. By the common law the right of patronage is a real right fixed in the patrons or founders, and their heirs, wherein they have as absolute a property as any other man hath in his lands and tenements: for *advowsons* are a temporal inheritance, and lay fee; they may be granted by deed or will, and are assets in the hands of heirs or executors. *1 Inst. 119.* A recovery may be suffered of an *advowson*; a wife may be endowed of it; a husband tenant by the curtesy; and it may be forfeited by treason or felony. *1 Rep. 56. 10 Rep. 55.* If an *advowson* descends to coparceners, and the church, after the death of their ancestors, becomes void, the eldest sister shall first present. *13 E. 1. c. 5. f. 5.* And when coparceners, jointenants, &c. are seised of an *advowson*, and partition is made to present by turns, each shall be seised of their separate estate. *7 Ann. c. 18.*

Persons seised of *advowsons*, being papists, are disabled to make presentations, and the chancellors of the universities shall present. *1 W. & M. cap. 26.* And presentations to *advowsons*, &c. for money or other reward, shall be void, &c. *Stat. 31 Eliz. c. 6.*

Besides the statutes above taken notice of, there are several other statutes respecting this title, which will more properly be treated of under the particular heads of *Darrein Presentment*, *Lapse*, *Presentation*, *Quare impedit*, *Simony*, *Usurpation*, &c.

II. How advowsons may lapse.

A *lapse* is a title given to the ordinary, to collate to a church, by the neglect of the patron to present to it within six months after avoidance. Or a *lapse* is a devolution of a right of presenting from the patron to the bishop; from the bishop to the archbishop; from the archbishop to the king. The term in which the title by *lapse* commences from one to the other successively is six months, or half a year according to the calendar, not accounting twenty-eight days to the month, as in other cases, because this computation is by the Ecclesiastical law, and because *tempus semestre*, in the stat. of *West. 2. chap. 5.* is intended of half a year, the whole year containing 365 days, which being divided, the half year for the patron to present is 182 days. The day in which the church becomes void is not to be reckoned as part of the six months. *Wood's Inst. 160.* But for the law on this head, see title *Lapse*.

III. How they may be gained by usurpation.

An *usurpation* must commence upon a *presentation*, not a *collation*, and is settled by institution six months before a *quare impedit* brought. But as to this head see title *Usurpation* and *Quare impedit*. *Vide Com. Dig. 1 V. tit. Advowson.*

Moiety of the Moiety of the Church, (*advocatus medietatis ecclesiae*) is where there are two several patrons and two several incumbents in one and the same church, the one of the one moiety, the other of the other moiety thereof. *Co. Lit. 17. b. Medietas advocacionis*, a moiety of the *advowson*, is where two must join in the presentation, and there is but one incumbent; as where there are two parceners: and though they agree to present by turns, yet each of them hath but the moiety of the church. *1 Inst. 17. b.* But vide *7 Ann. c. 18.*

Abolition of Religious Houses, Where any person founded any house of religion, they had thereby the *advowson* or patronage thereof, like unto those who built and endowed parish churches. And sometimes these patrons

had the sole nomination of the abbot, or prior, &c. either by investiture or delivery of a pastoral staff: or by direct presentation to the diocesan; or if a free election were left to the religious, a *conge d'eslire*, or licence for election, was first to be obtained of the patron, and the elect confirmed by him. *Kennet's Paroch. Antiq.* 147, 163.

Aerie, (*aerie accipitrum*) airy of goshawks, is the proper term for hawks, for that which of other birds we call a nest. *Stat. 9 H. 3. c. 12.* And it is generally said to come from the French word *aerie*, a hawk's nest. The liberty of keeping these *aeries* of hawks was a privilege, granted to great persons: and the preserving the *aeries* in the king's forests was one sort of tenure of lands by service. *Anno 20 Ed. 1. Simon de Raghton & al' tenent terras in Raghton, &c. per serjantiam custodiendi acrias aufurcorum domini regis.*

Estimatio Capitis, (*pretium hominis*) King *Athelstane* ordained that fines should be paid for offences committed against several persons according to their degrees and quality, by estimation of their heads. *Cress. Ch. Hist.* 834. *Leg. Hen. 1.*

Attache Robanda, A writ that lay to inquire, whether the king's tenant holding in chief by chivalry, was of full age to receive his lands into his own hands. It was directed to the escheator of the county; but is now disused, since wards and liveries are taken away by the statute. *Reg. Orig.* 294.

Affeerers, (*affectores*) From the Fr. *affirmer*, to affirm. They are those that in courts-leet upon oath settle and moderate the fines and amercements imposed on such persons as have committed faults arbitrarily punishable, viz. that have no express penalty appointed by statute: and they are also appointed for moderating amercements in courts baron. The persons nominated to this office affirm upon their oaths what penalty they think in conscience ought to be inflicted on the offenders. This word is used *Stat. 25 Ed. 3. c. 7.* Where mention is made, that the justices before their rising in every sessions shall cause the amercements to be *affeer'd*. And this seems to be agreeable to *Magna Charta*, by which it is ordained, that persons are to be amerced after the manner of the fault; and the amercements shall be assessed by the oath of honest and lawful men of the vicinage. *9 Hen. 3. cap. 14. Vide Com. Dig. 4 V. 139. tit. Leet, (O. 2.)*

Affiance, The plighting of troth between a man and a woman, upon agreement of marriage: it is derived from the Latin word *affidare*, and signifies as much as *fidem ad alium dare*. *Lit. sect.* 39.

Affidare, To plight one's faith, or give, or swear fealty, i. e. fidelity. *MS. Dom. de Farendon 22.*

Affidatio Dominorum, An oath taken by the lords in parliament, *anno 3 Hen. 6. Rot. Parl.*

Affidatus, Signifies a tenant by fealty, also a retainer. — *Affidatio accipitur pro mutua fidelitatis connexionem, tam in sponsaliis, quam inter dominum & vassallum—proles de affidato & non maritata, non est hæres.* *MS. Arth. Trevor Ar. Vide Spelm.*

Affidari, seu *affidari ad arma*, to be mustered and inrolled for soldiers upon an oath of fidelity. *Dom. de Farendon MS.* 55.

Affidavit, Signifies in law an oath in writing; and to make *affidavit* of a thing, is to testify it upon oath. An *affidavit*, generally speaking, is an oath in writing, sworn before some person who hath authority to administer such oath: and the true place of habitation, and true addition of every person who shall make an *affidavit*, is to be inserted in his *affidavit*. *1 Lill. Abr.* 44, 46: *Affidavits* ought to set forth the matter of fact only, which the party intends to prove by his *affidavit*; and not to declare the merits of the cause, of which the court is to judge. *21 Car. 1. B. R.* The plaintiff or defendant may take *affidavit* in a cause depending; yet it will not be admitted in evidence at the trial, but only upon motions. *1 Lill. 44.* When an *affidavit* hath been read in court, it ought to be filed, that the other may see it, and take a copy. *Pasch. 1655.* An *affidavit* taken before a master in Chancery will not be of any force in the court of King's Bench, or other courts, nor ought to be read there; for it

ought to be made before one of the judges of the court wherein the cause is depending. *Style's Rep.* 455. But by *Stat. 29 Car. 2. c. 5.* The judges, &c. of the courts at Westminster by commission may empower persons in the several counties of England to take *affidavits* concerning matters depending in their several courts, as masters in Chancery extraordinary used to do. Where *affidavits* are taken by commissioners in the country, according to the statute *29 Car. 2.* and 'tis express'd to be in a cause depending between two certain persons, and there is no such depending, those *affidavits* cannot be read, because the commissioners have no authority to take them; (and for that reason the party cannot be convicted of perjury upon them); but if there is such a cause in court, and *affidavits* taken concerning some collateral matter they may be read. *Salk.* 46f.

Affidavits are usually for certifying the service of process, or other matters touching the proceedings in a cause.

If a person exhibits a bill for the discovery of a deed, and prays relief thereupon, he must annex an *affidavit* to his bill, that he has not such deed in his possession, or that it is not in his power to come at it; for otherwise he takes away the jurisdiction of the common law courts, without shewing any probable cause why he should sue in equity. *1 Chan. Ca.* 11, 231. *1 Vern.* 59, 180, 247.

But if he seeks discovery of the deed only, or that it may be produced at a trial at law, he need not annex such *affidavit* to his bill; for it is not to be presumed that in either of these cases he would do so absurd a thing, as exhibit a bill, if he had the deed in his possession. *1 Vern.* 180, 247.

In bills of interpleader, the party who prefers it must make *affidavit* that he does not collude with either of the other parties. *1 New Abr.* 66.

An *affidavit* must set forth the matter positively, and all material circumstances attending it, that the court may judge whether the deponent's conclusion be just or not. *1 New Abr.* 66.

And therefore, on motion to put off a trial for want of a material witness, it must appear that sufficient endeavours were made use of to have him at the time appointed, and that he cannot possibly be present, though he may on further time given. *Farrer's.* 121. *Comb.* 421, 422.

Upon a rule to shew cause, the plaintiff offered several new *affidavits*, and this diversity was taken, viz. where they contain new matter, and where they only confirm what was alledged and sworn when the rule was made; in the latter case they may be read, not in the former. *1 Salk.* 461.

There being one *affidavit* against another relating to a judgment, the matter was referred to a trial at law upon a feigned issue, to satisfy the conscience of the court as to the fact alledged. *Comberb.* 399. See *Stat. 17 Geo. 2. c. 7.* for taking and swearing *affidavits* to be made use of in any of the courts of the county palatine of Lancaster. Vide as to modern determinations in several cases relative to *affidavits*, *Wilson's Rep. part 1* 231, 279, 335; *part 2.* 121, 124, 227, 371.

In what cases *affidavits* are made necessary by statute, see titles *Statement*, *Wail*.

Affinage, (*Fr. affinage*) Refining of metal, *purgatio metalli*; inde, fine and refine.

Affirm, (*affirmare*) Signifies to ratify or confirm a former law or judgment: so is the substantive *affirmance* used *anno 8 Hen. 6. c. 12.* And the verb itself by *Wesl's Symbol. part 2. tit. Fines, sect. 152.* *19 H. 7. cap. 20.*

Affirmation, An indulgence allowed by law to the people called *quakers*, who in cases where an oath is required from others, may make a solemn *affirmation* that what they say is true; and if they make a false *affirmation*, they are subject to the penalties of perjury: but this relates only to oaths to the government, and on public occasions; for *quakers* may not give testimony in any criminal cause, &c. *Stat. 7 & 8 W. 3. c. 34.* and *Stat. 22 G. 2. c. 46.* See *Quakers*. But if a *quaker* will submit to take the usual oath, he may give evidence in a criminal cause.

Affixare, To set a value or price on a thing. *Et quod amerciamen. predictor. tenentium afforentur & taxentur per sacramentum purum. Charta anno 1316. apud Thorn. Du Gange.*

Affixatus, Appraised or valued, as things vendible in a fair or market. — *Retinuit rex potestatem pardonandi et amerciamen. tam afforata, quam non afforata, id est de se quam de omnibus hominibus. Cartular. Glaston. MS. f. 58.*

Afforciamen, (*afforciamen*) A fortress, strong hold, or other fortification. — *Pro reparatione murorum & aliorum afforciamen. tam afforata, quam non afforata, id est de se quam de omnibus hominibus. Cartular. Glaston. MS. f. 58.*

Affociare, To add, increase, or make stronger. — *Cum iuratores in veritate dicenda sunt sibi contrarii, de consilio vrie affocietur assisa, ita quod apponantur alii iuxta numerum majoris partis quæ dissenserit. Bract. lib. 4. c. 19. viz. Let the witnesses be increased.*

Afforest, (*afforestare*) To turn ground into a forest. *Chart. de Forest. c. 1.* When forest ground is turned from forest to other uses, it is called *disafforested*. *Vide Forest.*

Affray, Is derived from the Fr. word *effrayer*, to fright, and it formerly meant no more; as where portions appeared with armour or weapons not usually worn, to the terror of others. *Stat. 2 Ed. 3. c. 3.* But now it signifies a skirmish or fighting between two or more, and there must be a stroke given, or offered, or a weapon drawn, otherwise it is not an *affray*. *3 Inst. 158.* *An affray is a public offence to the terror of the king's subjects, and so called, because it affrighteth and maketh men afraid. 3 Inst. 158.*

From this last definition it seemeth clearly to follow, that there may be an *assault*, which will not amount to an *affray*; as where it happens in a private place, out of the hearing or seeing of any, except the parties concerned, in which case it cannot be said to be to the terror of the people. *1 Hawk. 134.*

Also it is said, that no quarrelsome or threatening words whatsoever shall amount to an *affray*; and that no one can justify laying his hands on those who shall barely quarrel with angry words, without coming to blows; yet it seemeth, that the constable may, at the request of the party threatened, carry the person who threatens to beat him before a justice in order to find sureties. *1 Hawk. 135.*

Also, it is certain, that it is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the messenger of such a challenge; or even barely to endeavour to provoke another to send a challenge, or to fight; as by dispersing letters to that purpose, full of reflections, and insinuating a desire to fight. *1 Hawk. 135.*

But admitting that bare words do not, in the judgment of law, carry in them so much terror as to amount to an *affray*, yet it seems certain, that in some cases there may be an *affray*, where there is no actual violence; as where a man arms himself with dangerous and unusual weapons in such a manner as will naturally cause a terror to the people; which is said to have been always an offence at the common law, and is strictly prohibited by statute *2 Ed. 3. c. 3.*

A constable may require *affrayers* to depart, and if they resist, he may call others to his assistance; who, if they refuse to assist him, may be fined and imprisoned: and a private person, or stander-by, may put a stop to an *affray*, and seize the offenders, where persons are assembled in a tumultuous manner to break the peace. *3 Inst. 158. H. P. C. 135.* In case a person be dangerously wounded, any man may apprehend the offender, and carry him before a justice, in the same manner as a constable. *Dalt. 35.* In a very dangerous *affray*, a constable can justify commitment, till the offenders find sureties for the peace. *Lamb. 139.* He may likewise put the *affrayers* in the stocks till he can procure proper assistance to convey them to gaol. *Dalt. 38.*

If an *affray* be in an house, the constable may break open the doors to preserve the peace; and if *affrayers* fly to an house, and he follow with fresh suit, he may break open the doors to take them. *1 Hawk. 137.*

But in cases of *affrays*, the constable must apprehend the persons offending before the *affray* is over, or else he may not do it without a warrant from a justice, except it be in an extraordinary case; as where a person is wounded dangerously. *Dalt. 36.* In case of a sudden *affray*, through passion or excess of drinking, the constable may put the persons in prison, if there be one in the vill, until the heat of their passion and intemperance is over, though he deliver them afterwards; or till he can bring them before a justice of peace, and that to avoid the present danger. *2 Hale's Hist. P. C. 90, 95.* If a constable is hurt in an *affray*, he may have his remedy by action of trespass, and have good damages; but the *affrayers*, if they are hurt, shall have no remedy. *Lamb. 141.* And where any other persons receive harm from the *affrayers*, they may have remedy by action against them. *Dalt. 35.*

A justice of peace may commit *affrayers*, until they find sureties of the peace. And there is no doubt but that a justice of peace may and must do all such things to that purpose, which a private man or constable are either enabled or required by the law to do: but it is said, that he cannot without a warrant authorize the arrest of any person for an *affray* out of his own view; yet it seems clear, that in such case he may make his warrant to bring the offender before him, in order to compel him to find sureties for the peace. *1 Hawk. 137.*

It is inquirable in the court leet; and punishable by justices of peace in their sessions, by fine and imprisonment. And it differs from assault, in that it is a wrong to the public; whereas assault is of a private nature. *Lamb. lib. 2.*

Affreightment, (*affretamentum*) The freight of a ship, from the French *fret*, which signifies the tons. *Pat. 11 Hen. 4.* See *Charter-Party*.

Affri, vel *affra*, Bullocks, or horses or beasts of the plough. — *Viccomes liberet ci omnia catalla debitoris, exceptis bobus & affris caruæ. Westm. 2. c. 18.* *Et communiam pasturæ ad decem boves & duos affros in prædictis pasturis. Mon. Angl. par. 2. f. 291.* And in the county of Northumberland, the people to this day call a dull or slow horse, a false *aver* or *aser*. *Spelm. Gloss.*

African Company, The royal African company of merchants established by king Charles II. for trading to Africa. And all persons may trade thither, as well as the company, paying 10 per cent. on exportation of goods, for maintaining the forts, &c. And the like duty upon importation; on payment of which duties they shall be protected in their trade. *Stat. 9 & 10 W. 3.* *Vide Merchant.* See *Stat. 23 Geo. 2. c. 31.* for extending and improving the trade to Africa, and *Stat. 24 Geo. 2. c. 49.* and also *Stat. 25 Geo. 2. c. 40.* for application of a sum of money therein mentioned, granted to his Majesty, for a compensation to the African company, for their charter, lands, forts, castles, slaves, military stores, and other effects; and to vest the lands, forts, castles, slaves, military stores, and other effects, in the company of merchants trading to Africa, &c.

Agalma, The impression or image of any thing on a seal: — *ego Dunstanus hanc libertatem crucis agalmate consignavi.* — *Chart. Edg. Reg. pro Westminster. Eccles. anno 698.*

Age, (*ætas*, Fr. *age*) In common acceptation signifies a man's life from his birth to any certain time, or the day of his death: it also hath relation to that part of time wherein men live. But in the law it is particularly used for those special times which enable persons of both sexes to do certain acts, which before through want of years and judgment they are prohibited to do. As for example; a man at twelve years of age ought to take the oath of allegiance to the king: at fourteen, which is his age of discretion, he may consent to marriage, and chuse his guardian; and at twenty-one he may alien his lands, goods and chattels: a woman at nine years of age is dowable; at twelve she may consent to marriage; at fourteen she is at years of discretion, and may chuse a guardian; and at twenty-one she may alienate her lands, &c. *1 Inst. 78.*

If at the time of the marriage the husband be above fourteen, and the wife under twelve, when she attains the

age of twelve years, the husband may disagree as well as the wife, and so *vice versa*. *Co. Lit.* 79.

A disagreement to the marriage, before the age of consent, is of no force; for, if the husband disagree before fourteen, and marry another, the issue of the second marriage is a bastard. 1 *Rol.* 341. *Contra Dyer* 13. *a. in marg.* If after the age of consent, the husband or wife disagree by parol, yet cohabit as husband and wife, this amounts to an agreement. 1 *Rol.* 341. *Vide Com. D. V. 1. tit. Baron and Feme.*

There are several other *ages* mentioned in our antient books, relating to aid of the lord, wardship, &c. now of no use. *Co. Lit.* The age of twenty-one is the full age of man or woman; which enables them to contract and manage for themselves, in respect to their estates, until which time they cannot act with security to those who deal with them; for their acts are in most cases either void or voidable. *Perk.* But a person under twenty-one may contract for necessities suitable to his quality, and it shall bind him; also one under age may be executor of a will. 1 *Inst.* 171. And at fourteen years of age a person may dispose of goods and personal estate by will; though not of lands till the age of twenty-one. It hath been adjudged, that if one be born on the first of February at eleven o'clock at night, and the last of January in the one and twentieth year at one o'clock in the morning, he makes his will of lands, &c. and dies; yet such will is good, for he then was of age. *Mod. Caf.* 260. A person under the age of twenty-one may make a purchase; but at his full age he may agree or disagree to it. 1 *Inst.* 2. 6. So where persons marry, the man under the age of fourteen, or the woman within twelve, they may disagree to the marriage at those ages: and the law is the same in other cases. Persons under the age of fourteen are not generally punishable for crimes; but if they do any trespass, they must answer for the damage. 1 *Inst.* 247. 2 *Roll. Abr.* 547. As to their not being generally punishable for crimes before the age of fourteen, the rule is general, yet hath its exceptions founded on the nature of the case, and the judgment of the infant. At *Bury* summer assizes, in 1748, a boy of ten years of age was convicted of murder, and that with great justice and propriety, he having done a variety of acts, with that deliberation, which shewed his judgment sufficiently ripe to render him accountable for his actions. *Vide* the case of *William York*. *Forster's Rep.* 70, &c. Fourteen is the age by law to be a witness; and in some cases a person of nine years of age hath been allowed to give evidence. 2 *Hawk.* 434. None may be a member of parliament under the age of twenty-one years; and no man can be ordained priest till twenty-four; nor be a bishop till thirty years of age.

Age-Prier, (*etatem precari*, or *etatis precatio*) Is when an action being brought against a person under age for lands which he hath by descent, he by petition or motion shews the matter to the court, and prays that the action may stay till his full age, which the court generally agrees to. *Terms de Ley* 30. This is called *parol demurrer*, i. e. a staying or delaying of the plea or suit. *Parol* signifies the plea or suit.—*Demurrer*, to stay or abide. But as a purchaser, a minor shall not have age-prier: nor in a writ of assise, because it is of his own wrong, and this writ shall not be delayed; or in a writ of dower; or of partition. *Stat.* 3 *Ed.* 1. 38 *Ed.* 3. *Hob.* 342. In a writ of debt against an heir, he shall have his age, for at full age he may plead *riens per descent*, or a release to his ancestor, and be discharged. *Danv. Abr.* 259. See *Parol Demurrer*.

Agensfrida, The true lord or owner of any thing.—*Si porcus non fuerit ibi saepius quam semel det agensfrida unum solidum.* *Leg. Inæ*, c. 50. *apud Brompt.* c. 45.

Agenhine, A guest at an inn after three nights, when accounted one of the family. See *Hogbenhine*.

Agent and Patient, Is when a person is the doer of a thing, and the party to whom done: as where a woman endows herself of the best part of her husband's possessions, this being the sole act of herself to herself, makes her *agent and patient*. Also if a man be indebted unto another, and afterwards he makes the creditor his executor, and dies, the executor may retain so much of the goods

of the deceased as will satisfy his debt; and by this retainer he is *agent and patient*, that is, the party to whom the debt is due, and the person that pays the same. But a man shall not be judge in his own cause, *quia iniquum est aliquem suæ rei esse judicem.* 8 *Rep.* 138.

Agild, Signifies to be free from penalties, not subject to the customary fine or imposition. *Sax. a gild, fine multa.* *Leges Aluredi*, cap. 6. *Si utlagata officiat et occidatur, pro eo quod contra Dei rectum & regis imperium stet—jaceat agild.* In *Leg. Hen.* 1. c. 88. *Agilde* was a person so vile, that whoever kill'd him was to pay no mulct for his death.

Agiler, From the *Sax. a gile*, an observer or informer.

Agillarius, An hey-ward, herd-ward, or keeper of cattle in a common field. Towns and villages had their hey-wards, to supervise and guard the greater cattle, or common herd of kine and oxen, and keep them within due bounds; and if these were servile tenants, they were privileged from all customary services to the lord, because they were presumed to be always attending their duty, as a shepherd on his flock. And lords of manors had likewise their heywards, to take care of the tillage, harvest work, &c. and see that there were no incroachments made on their lordships: but this is now the business of bailiffs. *Kennet's Paroch. Antiq.* 534, 576.

Agist, (from the *Fr. giste*, a bed or resting-place) Signifies to take in and feed the cattle of strangers in the king's forest, and to gather up the money due for the same. *Chart. de Foresta*, 9 *H.* 3. c. 9. The officers appointed for this purpose are called *agisters*, or *gist-takers*, and are made by the king's letters patent: there are four of them in every forest wherein the king hath any pawnage. *Manw. For. Laws* 80. They are also called *agistators*, to take account of the cattle *agisted*.

Agistment, (*agistamentum*) Is where other men's cattle are taken into any ground, at a certain rate per week: it is so called, because the cattle are suffered *agister*, that is, to be levant and couchant there; and many great farms are employed to this purpose. 2 *Inst.* 643. Our graziers call cattle which they thus take in to keep *gisments*; and to *gise* or *juice* the ground, is when the occupier thereof feeds it not with his own stock, but takes in the cattle of others to *agist* or pasture it. *Agistment* is likewise the profit of such feeding in a ground or field: and extends to the depasturing of barren cattle of the owner, for which tithes shall be paid to the parson. There is *agistment of sea-banks*, where lands are charged with a tribute to keep out the sea. *Terræ agistatæ* are lands whose owners are bound to keep up the sea-banks. *Spelm. in Romney-Marsh.*

Agitatio Animalium in Foresta, The drift of beasts in the forest. *Leg. Forest.*

Agius, (*Gr. i. e. holy*)—*Ego triumphalem trophæum agie crucis impressi.* *Mon. Angl.* p. 15, 17.

Agnus Dei, A piece of white wax in a flat oval form, like a small cake, stamp'd with the figure of the lamb, and consecrated by the pope. *Agnus Dei*, crosses, &c. are not permitted to be brought into this kingdom, on pain of a *præmunire*. *Stat.* 13 *Eliz.* c. 2.

Agriaria Lex, A law made by the Romans for distribution of lands among the common people.

Agreement, *agreementum* (*aggregatio mentium*) Signifies a joining together of two or more minds in any thing done, or to be done. *Plowd.* 17.

But I. It is to be observed, that the persons whose minds are so joined together, should be such as are capable of binding themselves by their agreements. For

A person non compos is not capable of entering into any agreement, as an agreement is an act of the understanding which they are incapable of; and therefore they are to be under the care of their curators or guardians, by a commission from the publick. 1 *New Abr.* 67. See title *Idiots and Lunatics*.

Also an infant, for the same reason, is generally incapable of contracting, except for necessities, &c. See *Infant*.

A wife during the intermarriage is incapable of entering into any agreement *in pais*, being under power of her husband. See title *Baron and Feme*.

The ancestor seised in fee may by his agreement bind his heir; therefore if A. agrees to sell lands, and receives part of the purchase-money, but dies before a conveyance is executed, and a bill is brought against the heir, he will be decreed to convey, and the money shall go to the executor, especially if there are more debts due than the testator's personal estate is sufficient to pay. 2 Vern. 215. Abr. Eq. 265. But

If tenant in tail agrees to convey, or bargains and sells the lands for valuable consideration, without fine or recovery, and dies before the fine or recovery be levied or suffered, the issue is not bound either in law or equity; for equity cannot set aside the statute *de donis*; which says, *ut voluntas donatoris observetur*; nor can the court set up a new manner of conveyancing, and thereby supersede fines and recoveries; for thereby the king would lose the perquisites by fines, or the writs of entry and fines for alienation. Hob. 203. 1 Chan. Ca. 171. 1 Lev. 239. 2 Vent. 350. Yet

If there be tenant in tail in equity as of a trust, or under an equitable agreement, and he for valuable consideration bargains and sells the land without fine or recovery, this shall bind his issue, because the statute *de donis* doth not extend to it, being an intail in equity and a creature of the court. 1 Chan. Ca. 234. 2 Chan. Ca. 64. 1 Vern. 13, 440. 2 Vern. 133, 583, 702.

II. The agreement so entered into may be of different kinds,

as,
1st, An agreement executed already at the beginning; as where money is paid for the thing agreed, or other satisfaction made. 2dly, An agreement after an act done by another; as where one doth such a thing, and another person agrees to it afterwards, which is executed *alio*: and 3dly, An agreement executory, or to be performed *in futuro*. This last sort of agreement may be divided into two parts; one certain at the beginning, and the other when the certainty not appearing at first, the parties agree that the thing shall be performed upon the certainty known. *Terms de Ley* 31. See titles Condition, Contract, Covenant.

Agreements likewise may be either in writing or by parol.

The common law required no other solemnity in passing lands or tenements, but that of livery and seisin, which being a translatiō of the feud *coram paribus curiis*, and testified by them, was held an act of sufficient notoriety to direct the lord of whom to demand his services, and strangers against whom to commence their actions; but now by the stat. 29 Car. 2. c. 3. sect. 1. it is enacted, that "all leases, estates, interests of freehold, or terms of years, or any uncertain interests of, in or out of any messuages, manors, lands, tenements or hereditaments made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former usage to the contrary notwithstanding."

Sec. 2. "Except leases not exceeding the term of three years from the making thereof, whereupon the reversion is reserved to the landlord, during such term, shall amount unto two third parts, at the least, of the full improved value of the thing demised."

Sec. 3. Also it is enacted, that "no leases, estates or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest of, in, to or out of any messuages, manors, lands, tenements or hereditaments shall be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized; by writing or by act or operation of law."

Sec. 4. And it is further enacted, that "no action shall be brought whereby to charge any executor or administrator, upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, de-

fault or miscarriages of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized."

Sec. 17. It is enacted, that "no contract for the sale of any goods, wares and merchandises for the price of 10*l*. sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment; or that some note or memorandum, in writing, of the said bargain be made and signed by the parties to be charged, or their agents thereunto lawfully authorized."

In the construction of this statute, the following points have been resolved.

That if there be a parol agreement for the purchase of lands, and a bill brought for a specific execution thereof, and the substance of the agreement set forth in the bill, and confessed by the defendant's answer, that in such case the court will decree a specific execution; because there is no danger of perjury, which was the principal thing the statute intended to prevent. Abr. Eq. 19. sed q.

Also a parol agreement which is intended to be reduced into writing, but prevented by fraud, may be decreed in equity; as if upon a marriage-treaty, instructions are given by the husband to draw a settlement, and by him privately countermanded; and afterwards he draws in the woman, by persuasions and assurances of such settlement to marry him. Abr. Eq. 19.

So where a parol agreement was concerning the lending of money on a mortgage, and the conveyance proposed was an absolute deed from the mortgagor, and a deed of defeasance from the mortgagee, and after the mortgagee had got the deed of conveyance, he refused to execute the defeasance; yet it was decreed against him on the point of fraud. Abr. Eq. 20.

Every agreement ought to be perfect, full and compleat, being the mutual consent of the parties; and should be executed with a recompence, or be so certain as to give an action or other remedy thereon. *Plowd.* 5. Any thing under hand and seal, which imports an agreement will amount to a covenant: and a *proviso*, by way of agreement, amounts likewise to a covenant; and action may be brought upon them. 1 Lev. 155. An agreement being put in writing only for remembrance, doth not change its nature; but if it be put in writing sealed and delivered, it is of greater force. Hob. 79. Where an agreement for the purchase of lands, being in writing, and signed by both the parties, but not sealed; it was held good in *Chancery*, and decreed to be executed. Though where a person gives a guinea, &c. earnest, without agreement in writing it is otherwise. *Preced. Canc.* 16, 560.

A note of an agreement, sign'd by one party only, will bind both in equity: so it is of agreements in part executed, by delivering possession of the lands, though neither party sign them. Abr. Cas. Eq. 21. But if any estate in possession or reversion be made to me, I must agree to it, before it will be settled; for I may refuse, and so avoid it: a release, deed, or bond, is made and delivered to another to my use, this will vest in me without any agreement of mine; but if I disagree to it, I make the deed void. *Dyer* 167. And regularly where a man hath once disagreed to the party himself, he can never after agree: an obligation being made to my use, and tendered to me, if I refuse it, and after agree again and will accept it, now this agreement afterwards will not make the obligation good, that was void by the refusal. *Co. Lis.* 79. 5 Rep. 119.

An agreement may be as well in the party's absence, as in his presence; but a disagreement must be to the person himself to whom made. 2 Rep. 69. When an estate is made to a *feme covert*, it is good till disagreement without any agreement of the husband: though a new estate granted

granted to the wife where she hath an estate before, as by the taking of a new lease, and making a surrender in law, will not vest till the husband agree to it. *Hob. 204.* A forced agreement of the party is accounted no agreement, and therefore he that did agree to the thing shall not be compelled to perform it. *1 Lill. 48.*

If an agreement be in the nature of a penalty, the courts of equity will not relieve against it; for the terms shall be judged the measure of satisfaction to the parties. *Preced. Can. 102.*

III. As to a remedy, for a breach, &c.

In many cases the party injured by breach of an agreement, may have a remedy either by action at Common law, or have recourse to a court of equity; but here a general rule must be observed, that wherever the matter of the bill is merely in damages, there the remedy is at law, because the damages cannot be ascertained by the conscience of the chancellor, and therefore must be settled by a jury. See *Abr. Eq. 16.*

But if there be matter of fraud mixt with the damages; as if *A.* sues *B.* on a covenant at law for damages, and *B.* files a bill for an injunction upon this equitable suggestion, that the covenant was obtained by fraud, if *A.* files his cross bill for relief upon that covenant, the court will retain it, because the validity of the covenant is disputed in that court, and on a head properly cognizable there: if the validity of the deed be established, the court will direct an issue for the quantum of the damages. *Abr. Eq. 17.* *1 Chan. Rep. 158.*

So where the agreement is to do something in specie, as to convey lands, execute a deed, &c. there it will be proper to apply to a court of equity for a specific execution to which the party is intitled, if the agreement be good and sufficiently proved, when otherwise he could only recover damages at law. *1 Chan. Ca. 42.*

But here it must be observed, that agreements, out of which an equity can be raised for a decree in specie, ought to be obtained with all imaginable fairness, and without any mixture tending to surprize or circumvention; and that they be not unreasonable in themselves. *Abr. Eq. 17.*

As where by a marriage agreement the son's intended wife was to have more than would have been left for the father (though indebted), his wife and two daughters unpreferred; the court would not decree it, principally, by reason of the extremity of it, but lest the party to his remedy at law. *2 Chan. Ca. 17.*

Also in equity voluntary conveyances are good against the parties, and cannot be revoked, nor will the court interpose in behalf of one volunteer against another; but if they affect creditors, purchasers or younger children, the court will set them aside. *1 Chan. Rep. 173.* *1 Vern. 100, 464.*

If there be a defective conveyance, without an equitable consideration, a court of equity will not oblige the party to make it good, tho' there be a covenant for further assurances; as if a man makes a feoffment to a stranger without livery, the feoffor or heir shall not be obliged to make good that feoffment, but it shall be construed in equity to be an estate at will, as it is in law. *2 Vent. 365.* *2 Vern. 40.* *2 Vern. 475.*

Agri, In our law, denotes arable land in the common fields. *Forfeiture.*

Aid, (*auxilium*) Is all one with the French *aide*, and is generally understood to be a subsidy granted to the crown. By the antient law of the land, the king and any lord of the realm, might lay an aid upon their tenants, for knight- ing an eldest son, or marriage of a daughter; but this was taken away by the statute 12 Car. 2. c. 24. This imposition, which was often levied in former times, seems to have descended to us from Normandy, or rather from the feudal law. *Grand Custom. c. 35.* It is said to differ from tax in signification; for taxes were antiently levied at the will of the lord, upon any occasion whatsoever, but aids could not be levied but where it was lawful and customary so to do; as to make the eldest son a knight, marry the eldest daughter, or to redeem the lord from prison. By stat. 34 Ed. 1. c. 1. It is ordained that the king shall levy no aid or tax without his parliament.

Aid-Prayer, (*auxilium petere*) A word made use of in pleading, for a petition in court to call in help from another person that hath an interest in the thing contested: this gives strength to the party praying in aid, and to the other likewise, by giving him an opportunity of avoiding a prejudice growing towards his own right. As tenant for life, by the curtesy, for term of years, &c. being impleaded, may pray in aid of him in reversion; that is, desire the court that he may be called by writ to alledge what he thinks proper for the maintenance of the right of the person calling him, and of his own. *F. N. B. 50.* Aid shall be granted to the defendant in *ejectione firme*, when the title of the land is in question: lessee for years shall have aid in trespass; and tenants at will: but tenant in tail shall not have aid of him in remainder in fee; for he himself hath the inheritance. *Danv. Abr. 292.* If a writ of replevin, the avowry being for a real service, aid is granted before issue; and in action of trespass after issue join'd, if there be cause, it shall be had for the defendant, tho' never for the plaintiff. *Jenk. Cent. 64.* *Fitz. Abr. 7.* There ought to be privity between a person that joins in aid and the other to whom he is joined; otherwise joinder in aid shall not be suffered. *Danv. 318.* There is a prayer in aid of patrons, by parsons, vicars, &c. And between coparceners, where one coparcener shall have aid of the other to recover *pro rata.* *Co. Lit.* And also servants, having done any thing lawfully in right of their masters, shall have aid of them. *Terms de Ley 34.*

Aid of the King, (*auxilium regis*) Is where the king's tenant prays aid of the king, on account of rent demanded of him by others. A city or borough, that hold a fee-farm of the king, if any thing be demanded against them which belongs thereto, they may pray in aid of the king: and the king's bailiffs, collectors, or accountants shall have aid of the king. In these cases, the proceedings are stopp'd till the king's counsel are heard to say what they think fit, for avoiding the king's prejudice: and this aid shall not in any case be granted after issue; because the king ought not to rely upon the defence made by another. *Jenk. Cent. 64.* *Terms de Ley 35.* *Stat. 4 Ed. 1. and 14 Ed. 3.*

Aiel, (of the French *aieul*, i. e. *avus*) Signifies a writ which lies where a man's grandfather or great grandfather (called *Befaille*) being seized of lands and tenements in fee-simple, the day that he died, and a stranger abateth or entrench the same day, and dispossesses the heir of his inheritance. *F. N. B. 222.* The aunt and the niece shall join in a writ of aiel of the seisin of their grandfather. And the writ run thus: *Rex vic. &c. Prac. A. B. quod juste, &c. redd. B. & D. unum messuagium, &c. de quo D. avus præd. B. & proavus præd. D. cujus hæred. ipsi sunt, fuit seistus, &c.*

Alimenta, Includes any liberty of passage, open way, water-course, &c. for the ease and accommodation of tenants. *Kitch.*

Al, (*ald*) Words which begin with *al* or *ald* in the names of places, signify antiquity; as *Alborough, Aldworth, &c.*

Alanerarius, A manager and keeper of dogs, for the sport of hawking, from *alanus*, a dog, known to the ancients. *Du Fresno.* But Mr. Blount renders it a falconer. — Robertus de Chedworth vice-com. Linc. liberavit lvi s. viii d. Johanni de Bellovento, pro putura septem leporarium & trium falconum & alanerarii & pro vadiis unius bracenarii. 16 E. 1.

Alba, (the *alb*) A surplice or white sacerdotal vest, antiently used by officiating priests.

Alba firma, This word is used by my Lord Coke, and seems to signify a tenure. — *Duplex est tenura in com. Westmorland, scilicet, una per albam firmam, & alia per cornagium, &c.* 2 Inst. 10.

Albergellum, The same with *halberga*: *omnis homo, &c. habet albergellum & capellum ferreum, lanceam & gladium.* It here signifies a defence for the neck. *Hoveden 611.*

Album, Is a word made use of for white rent, paid in silver. *Rot. Parl. 6 H. 3.*

Alder, Signifies the first; as *alder best*, is the best of all; *alder lieft*, the most dear.

Alderman,

Alderman, (Sax. *calderman*, Lat. *aldermanus*) Hath the same signification in general as senator, or senior: but at this day, and long since, those are called *aldermen* who are associates to the civil magistrate of a city or town corporate. Stat. 24 H. 8. cap. 13. An *alderman* ought to be an inhabitant of the place, and resident where he is chosen; and if he removes, he is incapable of doing his duty in the government of the city or place, for which he may be disfranchiz'd. Mod. Rep. 36. *Alderman Langham* was a freeman of the city of London, and chosen *alderman* of such a ward, and being summoned to the court of *aldermen* he appeared, and the oath to serve the office was tendered to him, but he refused to take it, in contempt of the court, &c. whereupon he was committed to Newgate; and it was held good. March Rep. 179. The *aldermen* of London, &c. are exempted from serving inferior offices; nor shall they be put upon assizes, or serve on juries, so long as they continue to be *aldermen*. 2 Cro. 585. In *Spelman's Glossary* we find that we had anciently a title of *aldermannus totius Angliæ*; witness this inscription on a tomb in Ramsey abbey — *Hic requiescit D. Ailwinus incliti regis Eadgari cognatus, totius Angliæ aldermannus, & hujus sacri canobii miraculosus fundator*. And this officer was in nature of Lord Chief Justice of England. *Spelm.* *Alderman* was one of the degrees of nobility among the Saxons, and signified an earl; sometimes applied to a place, it was taken for a general, with a civil jurisdiction as well as military power; which title afterwards was used for a judge, but it literally imports no more than *elder*.

There was likewise *aldermannus hundredi*: which dignity was first introduced in the reign of Hen. 1. Among his laws, cap. 8. we read, *præsit autem singulis hominum novenis decimus, et toti simul hundredo unus de melioribus, et vocatur aldermannus, qui dei leges et hominum jura vigilantibus fideat observantia promovere*. Du Fresne. Cowel.

Alæ Ecclesiæ, The wings or side-issles of the church, from the French *Les ailes de l'Eglise*. — *Ad bases pilæ murus erat tabulis marmoreis compositus, qui chorum cingens & presbyterium, corpus ecclesiæ lateribus, quæ alæ vocantur, dividebat*. Gervas. Dorobern' in descript. eccl. Cantuar.

Alcenarium, A sort of hawk called a *lanner*. See *Putura*.

Alcet, (Sax. *alsæt*) A cauldron or furnace, wherein boiling water was put for a criminal to dip his arm in up to his elbow, and there hold it for some time. *Du Cange*.

Alehouses, Are to be licensed by justices of peace, who take recognizances of alehouse-keepers not to suffer disorders in their houses, and they have power to put down alehouses, &c. But the act is not to restrain selling of ale in fairs. 5 & 6 Ed. 6. c. 25. Alehouse-keepers are liable to a penalty of 20s. for keeping alehouses without licence; not exceeding 40s. nor under 10s. for selling ale in short measure; and 10s. for permitting tipling, &c. and persons retailing ale or beer, alehouse-keepers, &c. shall sell ale by a full ale quart or pint, according to the standard in the Exchequer, marked from the said standard; and sub-commissioners, or collectors of excise, are to provide substantial ale quarts and pints in every town in their divisions; and mayors and chief officers to mark measures, or forfeit 5 l. by statute 1 Jac. 1. c. 9. 3 Car. 1. c. 3. 11 & 12 W. 3. c. 15. See *Brewers*.

By the 17 Geo. 2. c. 17. sect. 18. A penalty is inflicted on alehouse-keepers having licence to retail spirituous liquors, exercising particular trades, during the continuance of such licence. And by the 30 Geo. 2. c. 24. sect. 14. A penalty likewise is inflicted on publicans permitting journeymen, &c. to game in their houses.

By the 2 Geo. 2. c. 28. sect. 11. Licences are to be granted at public meetings of the justices only.

By the stat. 26 Geo. 2. c. 31. Justices on granting licences are to take recognizances in 10 l. with sureties in the like sum for the maintaining good order. Licences to be granted to none, not licensed the preceding year, unless they produce certificates of their good character. Licence only to be granted to that place for which it was granted. Licences to be granted on the first of September, or within

twenty days after, yearly, and to be for one year only; penalty of selling ale, &c. without a licence, first offence 40s. second offence 4 l. third offence 6 l.

By the 6 Geo. 1. c. 21. sect. 56. Ale-licences are to be duly stamped, before recognizances taken.

By 26 Geo. 2. c. 13. sect. 12. Justices being brewers, maltsters, distillers, or victuallers, are restrained from granting licences.

This stamp duty by stat. 9 Ann. c. 23. is one shilling, and by stat. 29 Geo. 2. sect. 1. every licence is charged with a further duty or stamp of 20s. And by last-mentioned act, sect. 20. If any person shall write any licence without such stamp, he shall forfeit 10 l. with costs, to be recovered as stamp penalties; and the licence shall not be available till the duty shall be paid, and also a penalty of 5 l.

By the statutes 16 Geo. 2. c. 8. sect. 8. and 24 Geo. 2. c. 40. sect. 9. No person shall retail any distilled spirituous liquors, without a licence from the officer of excise, taken out ten days before, for which he shall pay 40s. yearly. And by statutes 16 Geo. 2. c. 8. sect. 11. and 29 Geo. 2. c. 12. sect. 22. Such persons shall be first licensed to sell ale or spirituous liquors by two or more justices of the peace. And by statutes 9 Geo. 2. c. 23. sect. 14. and 24 Geo. 2. c. 40. sect. 28, 29. The justice's clerk shall have 2s. 6 d. and no more for such licence.

Aler san jour, (Fr.) To go without day, viz. to be finally dismissed the court, because there is no further day assigned for appearance. *Kitch.* 146.

Ale-Silver, A rent or tribute annually paid to the lord-mayor of London, by those that sell ale within the liberty of the city. *Antiq. Purvey.* 183.

Ale-stake, A may-pole called *ale-stake*, because the country people drew much ale there: but it is not the common may-pole, but rather a long stake drove into the ground, with a sign on it, that ale was to be sold.

Ale-taster, Is an officer appointed in every court leet, sworn to look to the assize and goodness of ale and beer, &c. within the precincts of the lordship. *Kitch.* 46. In London there are ale-conners, who are officers appointed to taste ale and beer, &c. in the limits of the city.

Alias, A second or further writ, issued from the courts at Westminster, after a *capias*, &c. sued out without effect.

Alias diffus, Is the manner of description of a defendant, when sued on any specialty, as a bond, &c. where after his name, and common addition, then comes the *alias dict.* and describes him again by the very name and addition, whereby he is bound in the writing. *Dyer* 50. *Jenk. Cent.* 119. 'Tis unnecessary to set forth the *alias dict.* therefore better to omit it, as a variance may be fatal. See *Misnomer*.

Alien, (*alienus, alienigena*) One born in a strange country, out of the allegiance of the king: but a man born out of the land, so as it be within the limits of the king's obedience beyond sea; or born of English parents out of the obedience of the king, if the parents at the time of the birth were of such obedience, is no *alien*.

If an English merchant goes beyond sea, and takes an alien wife, the issue shall inherit him; so it is if an Englishwoman goes beyond sea and takes an alien husband, the children there born shall inherit her; for though the statute 25 Ed. 3. c. 2. be in the conjunctive, yet it hath been construed in the disjunctive to hinder this disability; and the word *and* being taken instead of *or*, as sometimes it is, it being not reasonable that the child should not inherit the parent that is of ability, for the defect of the other that is not. *Cro. Car.* 601, 602. *Lit. Rep.* 22, 24. *S. C.* 1 *Sid.* 198. *S. C.* cited. See *Lit. Rep.* 27. and *Bro. tit. Denizen* 6.

There are two incidents regularly that are necessary to make a subject born; first, that his parents, at the time of his birth, be under the actual obedience of the king; Secondly, that the place of his birth be within the king's dominions. 7 Rep. 18. And it is the place of the birth that makes the disability of an alien to have lands, &c. The blood is not the disability, but the place where born. *Cro. Jac.* 539. And if one born out of the king's obedience come and reside in England, his children, begotten and born here, are not aliens but denizens. 7 Rep.

Children

Children of an ambassador in a foreign country, by a wife being an *English* woman, by the Common law, are natural-born subjects, and not *aliens*. 7 *Rep.* 11. And if an *English* merchant living beyond sea marries a wife there, and hath a child by her, and dies, this child is born a denizen, and shall be heir to him, notwithstanding the wife be an *alien*. *Cro. Car.* 605. *March* 91. Those who are born in the *English* plantations, are subjects born. *Dawo. Abr.* 324.

An *alien* cannot hold land by descent or purchase, or be tenant by the curtesy, or in dower. 5 *Rep.* 502. But all persons, being the king's natural-born subjects, may inherit, as heirs to their ancestors, though their ancestors were *aliens*, by statute 11 & 12 *W. 3. c. 6.* In case an *alien* purchase land, the king upon office found, shall have it. 1 *Inst.* 2. So if an *alien* purchase any estate of freehold in houses, lands, tenements or hereditaments, the king upon office found shall have them. If an *alien* be made denizen and purchase land, and die without issue, the lord of the fee shall have the escheat, and not the king. But as to a lease for years, there is a difference between a lease for years of a house for the habitation of a merchant stranger being an *alien*, whose king is in league with ours, and a lease for years of lands, meadows, pastures, woods, and the like. For if he take a lease for years of lands, meadows, &c. upon office found the king shall have it. But of a house for habitation, he may take a lease for years as incident to commerce, for without an habitation he cannot merchandize or trade. But if he depart or relinquish the realm, the king shall have the lease. So it is if he die possessed thereof, neither his executors or administrators shall have it, but the king: for he had it only for habitation, as necessary to his trade or traffick, and not for the benefit of his executor or administrator. But if the *alien* be no merchant, then the king shall have the lease for years, tho' it were for his habitation, and so it is if he be an *alien* enemy. 1 *Inst.* 2. b. This doctrine is rather obsolete.

As an *alien* cannot inherit himself, so he cannot be inherited; the grandfather born in *England*, the son an *alien*, the grandson born in *England*, the grandson shall not inherit the grandfather, because he must then represent the father, who cannot be represented; but if the father be an *alien*, and two brothers born in *England*, they may inherit each other, because the descent is immediate, and they don't take by representation of the father. 1 *Sid.* 193, 198. 1 *Vent.* 413 to 429. *Hard.* 224. *Co. Lit.* 8. *Cont.*

If the eldest son be an *alien*, the younger brother born in *England* shall inherit the father; otherwise it were if the eldest son were attainted, because the eldest son and all his descendants are before the younger brother, and the younger cannot inherit before that line is extinct; and it is a foreign presumption, to suppose that any of that line should come over and have children in *England*; but the person attainted is supposed to have all his children residing in the kingdom under the king's allegiance; therefore there is a line continuing before that of the younger brother. 1 *Vent.* 417. 1 *Inst.* 8. a. 1 *Sid.* 195.

For the same reason, if an *alien* hath four sons, the two eldest *aliens*, and the two younger naturalized, and one of the younger sons purchase lands and dies, the eldest brother having issue born within the realm, the younger brother, and not the issue of the eldest, shall inherit. *Hard.* 224.

If an *alien* hath a son an *alien*, and afterwards is made a denizen, and hath a second son, the second son shall inherit though the eldest son be alive. *Cro. Jac.* 539. Vide 1 *Inst.* 8. a. &c. very full on this subject.

If an *alien* enemy comes here *sub salvo conductu*, he may maintain an action. So if an *alien* amy come hither in time of peace *per licentiam domini regis*, as the *French* protestants did, and lives here *sub protectione*, and a war afterwards happens between the two nations, he may maintain an action, for suing is but a consequential right of protection; and therefore an *alien* enemy, that is here in peace under protection, may sue a bond; *aliter* of one commorant in his own country. 1 *Salt.* 46.

Aliens may obtain goods and personal estate, by trade, &c. And may maintain actions for the same; they may also have actions of assault and battery, and for support of their credit. 2 *Bull.* 134. But they cannot bring any real action, unless it be for an house for necessary habitation, being for the benefit of trade. 7 *Rep.* And an *alien* enemy cannot maintain any action whatsoever, nor get any thing lawfully within this realm. *Terms de Ley* 36.

An *alien* friend may be an administrator, and shall have administration of leases, as well as personal things, because he hath them in another's right, and not to his own use. *Cro. Car.* 8. 1 *Vent.* 417. *S. C.* cited.

But it has been long doubted, whether an *alien* enemy should maintain an action as executor; for on the one hand it is said, that by the policy of the law, *alien* enemies shall not be admitted to actions to recover effects which may be carried out of the kingdom, to weaken ourselves and enrich the enemy; and therefore public utility must be preferred to private convenience; but on the other hand it is said, that these effects of the testator are not forfeited to the king by way of reprisal, because they belong not to the *alien* enemy, for he is to recover them for others; and if the law allows such *alien* enemies to possess the effects as well as an *alien* friend, it must allow them power to recover, since in that there is no difference, and by consequence he must not be disabled to sue for them; if it were otherwise it would be a prejudice to the king's subjects, who could not recover their debts from the *alien* executor, by his not being able to get in the effects of the testator. *Cro. Eliz.* 683. *Molloy* 870. *Carter* 49, 191. *Skin.* 370.

An *alien* enemy coming into this kingdom, and taken in war, shall suffer death by the martial law; and not be indicted at the Common law, for the indictment must conclude *contra ligeantiam suam*, &c. And such was never in the protection of the king. *Molloy de jur. Marit.* 417. *Aliens*, living under the protection of the king, may have the benefit of a general pardon. *Hob.* 271. No *alien* shall be returned on any jury, nor be sworn for trial of issues between subject and subject, &c. but where an *alien* is party in a cause depending, the inquest of jurors are to be half denizens, and half *aliens*: but in cases of high treason, this is not allowed. 2 *Inst.* 17. An *alien* shall not have any vote in choice of knights of the shire, or burgesses to parliament. *Hob.* 270. And persons that are *aliens*, or born out of the realm, are incapable to be members of parliament, enjoy offices, &c. *Stat.* 12 *W. 3. cap.* 2. *Aliens* are to take an oath to be true to the king, and obedient to his laws. Vide 14 *H. 8. 21 H. 8. cap.* 16. 32 *H. 8. c.* 16. No *alien* shall be a factor abroad, in the *English* plantations, under penalties. *Stat.* 12 *Car.* 2. *cap.* 18. See *Artificers*. See *Stat.* 11 & 12 *W. 3. c.* 6. for enabling subjects to inherit, notwithstanding their father and mother were *aliens*. And *Stat.* 25 *Geo.* 2. *c.* 39. for obviating some doubts thereupon. See farther titles *Denizen*, *Naturalization*.

The most usual and best pleading in actions brought by an *alien*, is both exclusive and inclusive, viz. *extra ligeantiam domini regis*, &c. *et infra ligeantiam alterius regis*. 7 *Rep.* 16. b. cites 9 *E. 4. 7. et Lib. Intrat. fo.* 244. But for the pleadings under this title see title *Abatement*, And *Com. Dig.* 1 *V.* same title.

Alienation, (from *alienare* to *alien*) A transferring the property of a thing to another: it chiefly relates to lands and tenements; as to *alien* land in fee, is to sell the fee-simple thereof, &c. And to *alien* in mortmain, is to make over lands or tenements to a religious house or body politic; for which the king's licence is to be obtained. *Stat.* 15 *R. 2. c.* 5. Fines for *alienations* are taken away by statute; except fines due by particular customs of manners. 12 *Car.* 2. *Dawo. Abr.* 327. All persons who have a right to lands may generally *alien* them to others: but some *alienations* are forbidden: as an *alienation* by a particular tenant, such as tenant for life, &c. which incurs a forfeiture of the estate. 1 *Inst.* 118. For if lessee for life, by livery *alieneth* in fee, or makes a lease for the life of another, or gift in tail, it is a forfeiture of his estate: so if tenant in dower, tenant for another's life,

tenant for years, &c. do *alien* for a greater estate than they lawfully may make. 1 *Inst.* 233, 251. Conditions in feoffments, &c. that the feoffee shall not *alien*, are void. 1 *Inst.* 206. *Hob.* 261. And it is the same where a man possessed of a lease for years, or other thing, gives and sells his whole property therein; upon such condition: but one may grant an estate in fee, on condition that the grantee shall not *alien* to a particular person, &c. And where a reversion is in the donor of an estate, he may restrain an *alienation* by condition. *Lit.* 361. *Wood's Inst.* 141. Estates in tail, for life, or years, where the whole interest is not parted with, may be made with condition not to *alien* to others; for the preservation of the lands granted in the hands of the first grantee.

Alimony, (*alimonia*) Signifies nourishment or maintenance; and in a legal sense, it is taken for that allowance which a married woman sues for and is entitled to; upon any occasional separation from her husband. *Terms de Ley* 38. Where a woman is divorced *a mensa & thoro*, she may sue her husband in her own name for *alimony* or maintenance out of the husband's estate, during the separation, either in the *Chancery* or *Spiritual* court; and it will be allowed, except it be in cases of elopement and adultery. 1 *Inst.* 235. a. But the *Spiritual* court is the proper court to sue in for *alimony*; and the not allowing a wife maintenance is not an offence within the statute 1 *Eliz.* but a neglect of the husband's duty, and a breach of his vow. 12 *Rep.* 30. A man may be sued in the *Spiritual* court for beating his wife, and he may be ordered to pay her so much *per week alimony*; but a prohibition hath been granted by *B. R.* in such a case; and the wife may have *fureties* of the peace for unreasonable beating her. *Trin.* 11 *Jac.* 1. *Moor* 874. *Alimony* was antiently expressed by *rationabile estoverium*, reasonable maintenance.—*Rex* *vic.* *Bucks* *salutem*. *Præcipimus tibi quod de maritagio Emmæ de Pinkney uxoris Laurentii Penire, qui excommunicatus est, eo quod prædictam Emmam affectione maritali non trahat, eidem Emmæ rationabile estoverium suum invenias, donec idem Laurentius vir suis eam tanquam uxorem suam traxerit, ne iteratus clamor ad nos inde perveniat.*—*Rot.* 7 *Hen.* 3.

Alaunds, *ab alanis*, *Scythia gente*, Hare-hounds.

Alloy, (*Fr.* in *Lat.* *allaya*) A word used for the tempering and mixture of other metals with silver or gold. *Stat.* 9 *H.* 5. This *alloy* is to augment the weight of the silver or gold, so as it may defray the charge of coining, and to make it the more fusile. A pound weight of standard gold, by the present standard in the mint, is twenty-two carats fine, and two carats *alloy*; and a pound weight of right standard silver consists of eleven ounces two-penny weight of fine silver, and eighteen penny weight of *alloy*. *Lownd's Essay upon Coins*, pag. 19. One penny weight of angel gold is worth four shillings and two-pence; of crown gold, three shillings and ten-pence; and one ounce of pure silver is worth five shillings and four-pence; and with *alloy*, five shillings. *Med. Jus.* tit. *Coin*, pag. 120.

Allegiance, *allegiantia*—(formerly called *ligeance*, from the Latin *alligare* & *ligare*, i. e. *ligamen fidei*) Is the sworn *allegiance*, or faith and obedience, which every subject owes to his prince. It is either perpetual, where one is a subject born; or where one hath the right of a subject by naturalization, &c. or it is temporary, by reason of residence in the king's dominions. To subjects born, it is an incident inseparable; and as soon as born they owe by birth-right obedience to their sovereign; and cannot be confined to any kingdom, but follows the subject wheresoever he goeth. The subjects are hence called *liege people*, and are bound by this *allegiance* to go with the king in his wars, as well within as without the kingdom. 1 *Inst.* 2, 329. 2 *Inst.* 741. All persons above the age of twelve years are to be required to take the oath of *allegiance* in courts-leet. And there are several statutes requiring the oath of *allegiance* and supremacy, &c. to be taken under penalties: justices of peace may summon persons above the age of eighteen years to take these oaths. 1 *Eliz.* 1 *W. & M.* &c. Absolving any persons from their *allegiance* is high treason, by 1 & 2 *Eliz.* For the other statutes respecting *allegiance* see 5 *Eliz.* c. 1. *Feb.* 5.—11 *El.* c. 1.—3 *Jac.* 1. c. 4.—7 *Jac.* 1. c. 6. *Feb.* 25 *Car.* 2. c. 2.—7 & 8 *W.* 3. c. 24. & 27.—13 &

14 *W.* 3. c. 6.—1 *Ann.* c. 22.—6 *Ann.* c. 14.—8 *Ann.* c. 15.—1 *Geo.* 1. c. 13.—2 *Geo.* 2. c. 31.—And see title *Daths*.

Allegiate, To defend or justify by due course of law:—*Si quis se velit allegiare secundum regis Weregildum hoc faciat.* *Leges Alured*, cap. 4. *Speint*.

Aller Good, The word *aller* is used to make what is added to signify superlatively; as *aller good* is the greatest good.

Allebiare, Signifies to levy or pay an accustomed fine: Some of our antient historians mention such fines paid by persons to their lords for redemption of their daughters, or for a licence to marry them. *Brady's Pref. to Eng. Hist.* 64.

Allocation, (*allocatio*) In a legal sense is an allowance made upon account in the *Exchequer*; or more properly a placing or adding to a thing.

Allocations facienda, A writ for allowing to an accountant such sums of money as he hath lawfully expended in his office; directed to the lord treasurer, and barons of the *Exchequer*, upon application made. *Reg. Orig.* 206.

Allocare Comitatu, Is a new writ of *exigent* allowed; before any other county court holden; on the former not being fully served, or complied with; &c. *Fitz. Exig.* 14.

Allodial, This is where an inheritance is held without any acknowledgment to any lord or superior; and therefore is of another nature from that which is feudal. *Allodial* lands are free lands, which a man enjoys without paying any fine, rent, or service to any other. See *Allodium*.

Alumines, (from the *Fr.* *allumer*, to lighten) Is used for one who coloureth or painteth upon paper or parchment; and the reason is, because he gives light and ornament by his colours to the letters or other figures. The word is used *stat.* 1 *R.* 3. c. 9.

Almanack, Is part of the law of England, of which the courts must take notice, in the returns of writs, &c. but the *almanack* to go by is that annex'd to the *Book of Common Prayer*. *Mod. Caf.* 41, 81. See *Year* and *Stat.* 24 *G.* 2. c. 23. and 25 *Geo.* 2. c. 30. for correcting the calendar and regulating the commencement of the year.

The diversity of fixed and moveable feasts was condemned *per tot. cur.* for we know neither the one nor the other but by the *almanacks*, and we are to take notice of the course of the moon. 6 *Mod.* 150, 160. *Pasch.* 3 *Ann.* *B. R.* in the case of *Harvey v. Broad*.—*ibid.* 196. *S. C.* and *Holt Ch. J.* said, that at the council of *Nice* they made a calculation moveable for *Easter* for ever, and that is received here in *England*, and become part of the law; and so in the calendar established by act of parliament.—2 *Salk.* 626. pl. 8. *S. C.* accordingly; *per cur.*

Whether such a day of the month was on a *Sunday* or not, and so not a *dies juridicus*, is triable by the country or the *almanack*. *Dyer* 182. pl. 55.

It was said that the court might judicially take notice of *almanacks*, and be informed by them; and cited *Robert's* case in the time of Lord *Castine*; and *Coke* said, that so was the case of *Galery v. Banbury*, and judgment accordingly. 1 *Leo.* 242. pl. 328. *Pasch.* 29 *Eliz.* *B. R.* *Page v. Fawcett*.—*Cro. Eliz.* 227. pl. 12. *S. C.* and held that examination by *almanacks* was sufficient, and a trial *per pais* not necessary, tho' the error assigned, viz. that the 16 *Feb.* on which day judgment was said to be given, was on a *Sunday*, was an error in fact; and the judgment was reversed.

Almaria, for *armaria*: The archives of a church; a library.—*Omnia etiam ecclesie almaria confregit, chartas & privilegia quædam igne cremavit.* *Gervasi Dorob.* in *R.* 2.

Almoner, or *Almoner*, (*elemosynarius*) An officer of the king's house, whose business it is to distribute the king's *alms* every day. He ought to admonish the king to bestow his *alms*, especially upon saints days and holidays; and he is likewise to visit the sick, widows that are poor, prisoners and other necessitous people, and to relieve them under their wants; for which purpose he hath the forfeitures of *deodands*, and the goods of *seignior de se*, allowed him by the king. *Flota*, lib. 2. cap. 22. The lord

Almoner has the disposition of the king's dish of meat, after it comes from the table, which he may give to whom he pleases; and he distributes four-pence in money, a two-penny loaf of bread, and a gallon of beer; or instead thereof three-pence daily at the court gate to twenty-four poor persons of the king's parish, to each of them that allowance. This officer is usually some bishop.

Almshouse, or *almshouse*, Saxon for *alms money*: It has been taken for that we call *Peter Pence*, first given by Ina king of the *West Saxons*, and antiently paid in England on the first of August. It was likewise called *romekeob*, *rome-scot*, and *beorthpeneing*. Selden's Hist. Tithes 217.

Almutium, A garment which covered the head and shoulders of priests. *Quæruit episcopus in quali habitu esset? Responsum est, quod in tunica de Burneto & almutio sine cuculla.* W. Thorn. 1330.

Alnage, (Fr. *aulnage*) Signifies a measure, particularly the measuring with an ell. *Stat. 17 Ed. 4. cap. 5.*

Alnager, or *aulnager*, (Fr. *alner*, Lat. *ulniger*) Is properly a measurer by the ell; and the word *aulne* in French significeth an ell. An *aulnager* with us is a public sworn officer of the king's, whose place it is to examine into the assise of all cloths, made throughout the land, and to fix seals upon them; and another branch of his office is to collect a subsidy or *alnage* duty granted to the king. He hath his power by *Stat. 25 Ed. 3.* and several other antient statutes; which appoint his fees, and inflict a punishment for putting his seal to deceitful cloth, &c. viz. a forfeiture of his office, and the value. *27 Ed. 3. 3 R. 2.* But there are now three officers belonging to the regulation of clothing, who bear the distinct names of *searcher*, *measurer*, and *aulnager*; all which were formerly comprised in one person. *4 Inst. 31.* And because the subjects of this kingdom should not be abused, an office of *searching* is established by act of parliament.

By 11 & 12 W 3. c. 20. Alnage duties are taken away.

Alnetum, A place where alders grow; or a grove of alder trees.—*Alnetum est, ubi alni arbores crescunt.*—Domesday-Book.

Alodium, In *Domesday* signifies a free manor: and *alodarii* lords of manors, or lords paramount. *Quando moritur alodarius, rex inde habet relevationem terre, &c.* Domesday, tit. Kent. 1 Inst. 1, 5. See *Fee*, and Dalrymple's Feudal Tenures.

Alroberium, *A purse*. This word is mentioned in *Fleta*, lib. 2. c. 82. par. 2.

Altarage, (*altaragium*) The offerings made upon the altar, and also the profit that arises to the priest by reason of the altar, *obventio altaris.* Mich. 21 Eliz. It was declared that by *altarage* is meant tithes of wool, lambs, colts, calves, pigs, chickens, butter, cheese, fruits, herbs, and other small tithes with the offerings due: the case of the vicar of *West-Haddon* in *Northamptonshire*. But the word *altarage* at first is thought to signify no more than the casual profits arising to the priest, from the people's voluntary oblations at the altar; out of which a portion was assigned by the parson to the vicar: since that, our parsons have generally contented themselves with the greater profits of glebe, and tithes of corn and hay; and have left the small tithes to the officiating priests: and hence it is that vicarages are endowed with them. *Termes de Ley* 39. 2 Cro. 516.

It seems to be certain, that the religious, when they allotted the altarage in part or in whole to the vicar or chaplain, did mean only the customary and voluntary offerings at the altar, for some divine office or service of the priest, and not any share of the standing tithes, whether predial or mixt. *Kenn. Paroch. Antiq. Gloss.*

In the case of *Franklyn* and the master and brethren of *St. Cross*, T. 1721, it was decreed, that where *altaragium* is mentioned in old endowments, and supported by usage, it will extend to small tithes, but not otherwise. *Bunb. 79.*

Alteration, (*alteratio*) Is the changing of a thing: and when witnesses are examined upon exhibits, &c. they ought to remain in the office, and not to be taken back into private hands, by whom they may be altered. *Hob.*

Alto e Basso. By this is meant the absolute submission of all differences. *Pateat universis per presentes quod Willielmus T. de Y. & Thomas G. de A. posuerunt se in alto & basso in arbitrio quatuor hominum, viz.—de quadam querela pendente, &c. Et prædicti quatuor homines judicaverunt, &c.* Dat. anno 2 Hen. 5.

Amabyr, vel *Amabyr*, A custom in the honour of *Clun*, belonging to the earls of *Arundel*: *Pretium virginittatis domina solvendum. LL. eccl. Gul. Howeli Dha, regis Walliz. Puella dicitur esse desertum regis, & ob hoc regis est de ea amvabyr habere.* This custom *Henry* earl of *Arundel* released to his tenants. *Anno 3 & 4 P. & M.*

Amabius, A servant or client. *Cowel.*

Ambassador, (*legatus*) Is a servant of the state, representing the king in a foreign country, to take care of the public affairs. And *ambassadors* are either ordinary, or extraordinary; the ordinary *ambassadors* are those who reside in the place whither sent; and the time of their return being indefinite, so is their business uncertain, arising from emergent occasions; and commonly the protection and affairs of the merchants is their greatest care: the extraordinary *ambassadors* are made *pro tempore*, and employed upon some particular great affairs, as condolences, congratulations, or for overtures of marriage, &c. Their equipage is generally very magnificent; and they may return without requesting of leave, unless there be a restraining clause in their commission. *Molloy 144.*

An agent represents the affairs only of his master; but an *ambassador* ought to represent the greatness of his master, and his affairs. *Ibid.* By the laws of nations, none under the quality of a sovereign prince can send any *ambassador*: a king that is deprived of his kingdom and royalty, hath lost his right of legation. No subject, though ever so great, can send or receive an *ambassador*; and if a vice-roy does it, he will be guilty of high treason: the electors and princes of *Germany* have the privilege of sending and reception of *ambassadors*; but it is limited only to matters touching their own territories, and not of the state of the empire. It is said there can be no *ambassador* without letters of credence from his sovereign, to another that hath sovereign authority: and if a person be sent from a king or absolute potentate, though in his letters of credence he is termed an agent, yet he is an *ambassador*, he being for the public. *4 Inst. 153.*

Ambassadors may, by a precaution, be warned not to come to the place where sent; and if they then do it, they shall be taken for enemies: but being once admitted, even with enemies in arms, they shall have the protection of the laws of nations, and be preserved as princes. *Moll. 146.* If a banished man be sent as an *ambassador* to the place from whence he is banished, he may not be detained or molested there. *4 Inst. 153.* The killing of an *ambassador* has been adjudged high treason. *3 Inst. 8.* Some *ambassadors* are allowed, by concession, to have jurisdiction over their own families; and their houses permitted to be sanctuaries: but where persons who have greatly offended fly to their houses after demand and refusal to deliver them up, they may be taken from thence. *Ambassadors* cannot be defended when they commit any thing against the state, or the person of the king with whom they reside. *4 Inst. 152.* An *ambassador*, guilty of treason against the king's life, may be condemned and executed: but for other treasons, he shall be sent home, with demand to punish him, or to send him back to be punished. *4 Inst. 152. 1 Roll. Rep. 185.*

If a foreign *ambassador* commits any crime here, which is *contra jus gentium*, as treason, felony, &c. or any other crime against the law of nations, he loseth the privilege of an *ambassador*, and is subject to punishment as a private alien; and he need not be remanded to his sovereign, but of courtesy. *Dawv. Abr. 327.* But if a thing be only *malum prohibitum* by an act of parliament, private law, or custom of the realm, and it is not *contra jus gentium*, an *ambassador* shall not be bound by them. *4 Inst. 153.* And it is said *ambassadors* may be excused of practices against the state where they reside, (except it be in point of conspiracy, which is against the law of nations) because it doth not appear whether they have it in *mandatis*; and then they are excused by necessity of obedience. *Bar. Max. 26.*

By the civil law, the person of an *ambassador* may not be arrested; and the moveable goods of *ambassadors*, which are accounted an accession to their persons, cannot be seized on, as a pledge; nor for payment of debts; tho' by leave of the king or state where they are resident; but on refusal of payment, letters of request are to go to his master, &c. *Molloy* 157. *Dawv.* 328.

By our statute law, an *ambassador*, or public minister, or his domestic servants, registered in the secretary's office, and thence transmitted to the sheriff's office of *London* and *Middlesex*, are not to be arrested; if they are, the process shall be void, and the persons suing out and executing it shall suffer such penalties and corporal punishment as the lord chancellor or either of the chief justices shall think fit. *Stat. 7 Ann. cap. 12.* Also the goods of an *ambassador*, or of his servants, shall not be distrained. *Stat. ibid.*

4 *Geo. 2. Widmore v. Alvarez:* In the case of the French ambassador, it was ruled, that the person need not lie in the house, but he must do some actual service there.

Upon a motion to supersede a process against the defendant, upon the statute 7 *Ann.* as being in the service of a foreign ambassador; the court held, that to be a privileged servant within the act, it is not required that the party actually live in the ambassador's house; yet it is not enough that the party be registered in the secretary's office as a servant; but when he comes for the benefit of the act, he must shew the nature of his service, that the court may judge, whether he be a domestic servant within the meaning of the act of parliament. In this case, it was objected against the defendant, that he was a trader, and so expressly excluded from privilege by the statute: to which Mr. Solicitor General, who was counsel for the defendant, answered, that by traders within this act, must be understood such as may have the benefit of the statutes concerning bankrupts, which infants are not intitled to, as it was determined in one *Whitlock's* case; and that the defendant could prove he had exercised no trade since his full age. *Fitzgib. Rep.* 200.

A chaplain to an ambassador, who does not do any duty in the ambassador's house, shall not be protected. *Seacomb v. Bowlsby. Wilf. Rep. part 1. 20.*

The court of B. R. refused to allow *Caroline* protection, as interpreter to the ambassador from the *Bay of Tripoly*, not appearing that he was a domestic servant. *Wilf. Rep. part 1. 78, 79.*

To what laws an ambassador, &c. is subject, vide *Blackston's Com. 1 V. 253. 4. &c.*

Ambidexter, (Lat.) One that can use his left hand as well as his right; or that plays on both sides. But in a legal sense, it is taken for a juror or embracore, who takes money of both parties for giving his verdict; and such a one shall be imprisoned, never more be of a jury, and further punished at the king's pleasure. 5 *Ed. 3. c. 10. Crompt. Just.* 156. See *Decies tantum.*

Ambra, (Sax. amber, Lat. ambra) A vessel among the Saxons contained a measure of salt, butter, meal, beer, &c. *Leg. Ina West Sax.*

Ambry, The place where the arms, plate, vessels, and every thing which belong'd to housekeeping were kept; and probably the ambry at *Westminster* is so called, because formerly set apart for that use: or rather the *almonery*, from the Latin *elemosynaria*, an house adjoining to an abbey, in which the charities were laid up for the poor.

Amenable, (Fr. amener) To bring or lead unto: or amenable (from the Fr. *Main*, a hand) signifies tractable, that may be led or governed: and in our books it is commonly applied to a woman, that is governable by her husband. *Cow. Interp.* It also, in the modern sense, signifies to be responsible, or subject to answer, &c. in a court of justice.

Amendment, (emendatio) The correction of an error committed in any process, which may be amended after judgment; and if there be any error in giving the judgment, the party is driven to his writ of error; though where the fault appears to be in the clerk who writ the record, it may be amended. *Terms de Ley* 39.

At common law there was little room for amendments, which appears by the several statutes of amend-

ments and *jeofails*, and likewise by the constitution of the courts; for, says *Britton*, the judges are to record the parols [or pleas] deduced before them in judgment; also, says he, *Ed. 1.* granted to his justices to record the pleas pleaded before them; but they are not to erase their records, nor amend them, nor record against their inrolment; nor any way suffer their records to be a warrant to justify their own misdoings, nor erase their words, nor amend them; nor record against their inrolment. This ordinance of *Ed. 1.* was so rigidly observed, that when justice *Ingham*, in his reign, moved with compassion for the circumstances of a poor man who was fined 13s. 4d. erased the record, and made it 6s. 8d. he was fined 800 marks, with which, 'tis said, a clock-house at *Westminster* was built, and furnished with a clock; but as to the clock, it has been denied by authors of credit. Notwithstanding what is mentioned above, there were some cases that were amendable at Common law.

Original writs are not amendable at Common law, for if the writ be not good, the party may have another: judicial writs may and have been often amended. 8 *Rep.* 157.

Whatever at Common law might be amended in civil cases, was at Common law amendable in criminal cases, and so it is at this day; resolved by *Holt Ch. J. Powell* and *Powis J.* 1 *Salk.* 51. pl. 14.

Tho' misawarding of process on the roll might be amended at Common law the same term, because it was the act of the court; yet if any clerk at Common law issued out an erroneous process on a right award of the court, that was never amended in any case at the Common law. 1 *Salk.* 51. pl. 14.

Statutes of amendment extend only to pleadings of record, therefore pleadings while in paper, are amendable by the Common law. Antiently all pleas were *ore tenor* at the bar; and then, if any error was spied in them it was presently amended. Since that custom is changed, the motion to amend because all in paper, succeeded in the room of it; and it is a motion that the court cannot refuse: but they may refuse it if the party desiring it refuse to pay costs, or the amendment desired should amount to a new plea. 10 *Mod.* 88.

But the law respecting amendments has been much extended by the following statutes: By

Stat. 14 Ed. 3. c. 6. It is assented, that by the misprision of a clerk in any place wheresoever it be, no process shall be annulled or discontinued, by mistaking in writing one syllable, or one letter too much or too little; but as soon as the thing is perceived, by challenge of the party, or in other manner, it shall be hastily amended in due form, without giving advantage to the party that challengeth the same, because of such misprision.

By this statute the justices had liberty, on challenge of the party, to amend the process where the clerk had mistaken one syllable or letter, and the judges afterwards construed the statute so favourably, that they extended it to a word; but they were not so well agreed, whether they could make these amendments, as well after as before judgment; for they thought their authority was determined by the judgment; and therefore to put an end to the diversity of opinions by the following statute, *vin. 9 H. 5. c. 4.* It is declared that the judges shall have the same power, as well after as before judgment, as long as the record in process is before them. *Gill. H. C. B.* 110.

This statute is confirmed by statute 4 *Hen. 6. c. 3.* with an exception, that it shall not extend to process on outlawry, or to records or processes in *Wales*. But according to 2 *Sand. 40.* this last exception, and the like exception in 3 *Hen. 6. c. 15.* seem to be annulled by the statute 22 *Hen. 8. c. 26.* by which it is enacted, that the laws of *England* shall be used, practised and executed in *Wales*.

Though the foregoing statutes gave the judges a greater power than they had before, yet it was found that they were too much cramped, having authority to amend nothing but process, which they did not construe in a large signification, so as to comprehend the whole proceedings in real and personal actions, and criminal and common pleas, but confined it to the *issue process* and *jury process*. 8 *Co.* 157. e. And therefore to enlarge the authority of the courts, the statute 8 *Hen. 6. c. 12.* gives power to amend

amend what they shall think in their discretion to be the misprision of their clerks in any record, process, and plea, warrant of attorney, writ, panel, or return. *Gilb. H. C. B.* 110.

There are only two statutes of amendments, viz. the 14 *Ed. 3.* and 8 *H. 6.* the rest are reckoned to be statutes of jeofails, and not of amendments; per *Powell J.* 1 *Salk.* 51. pl. 14. *Mich. 3 Ann. B. R.* in case of *The Queen v. Tutchin.* — And *ibid.* he held that the 8 *H. 6.* was only to enlarge the subject-matter of 14 *Ed. 3.* and that 14 *E. 3.* extends only to process out of the roll, viz. writs that issue out of the record, and not to proceedings in the roll itself; but that the 14 *E. 3.* extends not to the king, because of these words (*challenge of the party*) and that the statute 8 *H. 6.* has always been construed in imitation of the act of *Ed. 3.* and the exception in the statute of *H. 6.* was only *ex abundanti cautela*; and all judges and sages of the law in all ages have taken it not to extend to the crown; and the cases on the other side are not to be relied upon.

Farther by Stat. 8 *Hen. 6. c. 15.* "The King's justices, before whom any misprision shall be found, be it in any records and processes depending before them, as well by way of error as otherwise, or in the returns of the same, by sheriffs, coroners, bailiffs of franchises, or any other, by misprision of the clerks of any of the said courts, or of the sheriffs, coroners, their clerks, or other officers clerks, or other ministers whatsoever, in writing one letter or one syllable too much or too little, shall have power to amend the same.

As these statutes only extended to what the justices should interpret the misprision of their clerks, and other officers, it was found by experience, that many just causes were overthrown for want of form, and other failings, not aided by this statute, though they were good in substance; and therefore the statutes of jeofail were made. *Gilb. H. C. B.* 111. See *Jeofail.*

By the foregoing statutes the faults and mistakes of clerks are in many cases amendable: the misprision of a clerk in matter of fact is amendable; though not in matter of law. *Palm.* 258. If there be a mistake in the legal form of the writ, it is not amendable: there is a diversity between the negligence and ignorance of the clerk that makes out writs; for his negligence (as if he have the copy of a bond, and do not pursue it) this shall be amended; but his ignorance in the legal course of original writs is not amendable. 8 *Rep.* 159. A party's name was mistaken in an original writ; and it appearing to the court that the curfitor's instructions were right, the writ was amended in court; and they amended all the proceedings after. 2 *Vent.* 152. *Cro. Car.* 74. If a thing which the plaintiff ought to have entered himself, being a matter of substance, be totally omitted, this shall not be amended; but otherwise it is if omitted only in part and misentered. *Danv. Abr.* 346. By the Common law a writ of error, returned and filed, could not be amended; because it would alter the record: but now by Stat. 5 *Geo. 1. cap. 13.* Writs of error, wherein there shall be any variance from the original record, or other defect, may be amended by the court where returnable. When the award of a writ of inquiry on the roll is good, the writ shall be amended by the roll. *Carth.* 70. The court cannot amend to make a new writ; or to alter a good writ, and adapt it to another purpose, &c. only when the writ is bad and vicious on the face of it. *Mod. Caf.* 263, 310.

With respect to declarations, a declaration grounded on an original writ may not be amended, if the writ be erroneous: though if it be on a bill of *Middlesex* or a *latitat*, it is amendable. 1 *Lill. Abr.* 67. Declarations upon any penal statutes, *qui tam*, &c. may not be amended after issue joined. 2 *Mod.* 144. And indictments of treason, and felony, writs of appeal, &c. are excepted out of the statutes of amendments; though some things in them are amendable at Common law. *Mod. Caf.* 269. A plaintiff may amend his declaration in matter of form after a general issue pleaded, before entry thereof, without payment of costs: if he amend in substance, he is to pay costs, or give imparlance; and if he amend after a special plea, though he would give imparlance, he must

pay costs. 1 *Lill.* 58. A declaration in ejectment, laid the demise before the time; this was not amendable, for it would alter the issue, and make a new title in the plaintiff. 1 *Salk.* 48. The plaintiff declared on the statute of *Winton* for a robbery done to himself, when it should have been of his servants; he had leave to amend. 3 *Lew.* 347. If a defendant pleads a plea to the right, or in abatement, the plaintiff may amend his declaration; but not where he demurs, for this fault may be the cause of the demurrer. 1 *Salk.* 50. A plea, when only on paper, upon notice and payment of costs, may be amended; but if the plea be entered on parchment, it is not amendable, being a plea of record: after demurrer, and after issue joined, a plea may not be amended. A demurrer may be amended, after the parties have joined in demurrer, if it be only in paper. *Styl.* 48. Where a plea shall be amended, when in paper, or on record, &c. see the statute 4 *Geo. 2. c. 26.*

As to the amendments of records, &c. an issue entered upon record, with leave of the court may be amended, but not in a material thing, or in that which will deface the record. 1 *Lill. Abr.* 61. A record may be amended by the court in a small matter, after issue joined, so as the plea be not altered. *Danv. Abr.* 338. If on a writ of error a record is amended in another court in affirmance of the judgment, it must be amended in the court where judgment was given. *Hardr.* 505. Where the record of *nisi prius* does not agree with the original record, it may be amended after verdict, provided it do not change the issue: but a record shall not be amended to attain the jury, or prejudice the authority of the judge. *Mich. 8 W.* A general or special verdict may be amended by the notes of the clerk of assize in civil causes; but not in criminal actions. 1 *Salk.* 47. The issue roll shall be amended by the imparlance roll, which is precedent: but a roll may not be amended after verdict, when there is nothing to amend it by; tho' surplusage may be rejected, and so make it good. *Cro. Car.* 92. 1 *Sid.* 135.

A mistake of the clerk in entering a judgment; as where it was that the defendant recovered, instead of the plaintiff, &c. was ordered to be amended. *Cro. Jac.* 631. *Hutt.* 41. A judgment may be amended by the paper book signed by the master. 1 *Salk.* 50. At Common law, the judges may amend their judgments of the same term; and by statute of another term. 8 *Rep.* 156. 14 *J.* 3. If judgments are not well entered, on payment of costs they will be ordered to be so: when judgments are entered, 'tis said the defects therein being the act of the court, and not the misprision of the clerk, are not amendable. *Golb.* 104. Mistakes in returns of writs, fines and recoveries, made by mutual assent of parties may be amended. 5 *Rep.* 45. Judgment shall not be staid after verdict, for that an original wants form, or varies from the record in point of form, which are amendable. 5 *Rep.* 45. After verdict given in any court of record, there shall be no stay of judgment for want of form in any writ, or insufficient returns of sheriffs, variance in form between the original writ and declaration, &c. Stat. 32 *H. 8.* 18 *Elix.* Vide 5 *Geo. 1. c. 13.* Where judgment shall not be reversed for defects in form or substance. And see title *Jeofail.*

In the case of *Newcomb v. Green*, *B. R.* the *posse* was amended by the judges notes. *Wilf. Rep. part 1.* 33. 2 *Stra.* 1197. *S. C.*

As to amendment, and the statutes relative thereto, vide *Blackst. Com.* 3 *V.* 406, &c. And see *Bathurst's Nisi Prius*, 296, &c.

Amendments are usually made in affirmance of judgments; and seldom or never to destroy them: and where amendments were at Common law, the party was to pay a fine for leave to amend. 3 *Salk.* 29. Vide *Com. D.* 1 *V.* tit. *Amendment.*

Amerciament, *amerciamentum*, (from the Fr. *merci*) signifies the pecuniary punishment of an offender against the king or other lord in his court, that is found to be in *miseriordia*, i. e. to have offended, and to stand at the mercy of the king or lord. The author of *Terms de Ley* saith, that *amerciament* is properly a penalty assessed by the peers or equals of the party *amerced*, for the offence done; for which he putteth himself at the mercy of the lord.

lord. *Terms de Ley* 49. And by the statute of *Magna Charta*, a freeman is not to be amerced for a small fault, but proportionable to the offence, and that by his peers. 9 *H. 3. c. 4.* *Amerciaments* are a more merciful penalty than a fine: for which, if they are too grievous, a release may be sued by an antient writ called *moderata misericordia*. The difference between *amerciaments* and fines, is this; fines are said to be punishments certain, and grow expressly from some statute; but *amerciaments* are such as are arbitrarily imposed. *Kitch.* 78. Also fines are imposed and assessed by the court: *amerciaments* by the country: and no court can impose a fine, but a court of record: other courts can only *amerce*. 8 *Rep.* 39, 41.

A court-leet can *amerce* for public nuisances only. 1 *Saund.* 135. For a fine and all *amerciaments* in a court-leet, a distress is incident of common right: but for *amerciament* in a court baron, distress may not be taken but by prescription. 11 *Rep.* 45. When an *amerciament* is agreed on, the lord may have an action of debt, or distrain for it, and impound the distress, or sell it at his pleasure: but he cannot imprison for it. 8 *Rep.* 41, 45. *Vide* the case of the *Duke of Bedford v. Alcock*, B. R. *Wilf. Rep.* part 1. 248. In courts baron the *amerciaments* ought to be assessed; but 'tis otherwise of fines imposed by a court of record. 2 *Inst.* 27. An *amerciament* of a freeholder must be assessed by freeholders of the manor, or debt will not lie for it. *Baldwin v. Judge*, *Wilf. Rep.* 2—20. In the court baron, tenants not doing suit of court, persons making any incroachments, not performing what is ordered, or for other misdemeanors there punishable, are to be *amerced*: these *amerciaments* are made upon presentment of the jury; and if they are grounded upon a void presentment, the *amercements* are also void. 1 *Lill. Abr.* 72.

There is also *amercement* in pleas in the courts of record, when a defendant delays to tender the thing demanded by the king's writs, on the first day. 1 *Inst.* 116. And in all personal actions without force, as in debt, detinue, &c. if the plaintiff be nonsuited, barred, or his writ abate for matter of form, he shall be *amerced*: but if on judicial process, founded on a judgment and record, the plaintiff be nonsuited, barred, &c. he shall not be *amerced*. 1 *Nelf. Abr.* 206. And an infant, if nonsuited, is not to be *amerced*: 'tis otherwise when at age. *Jenk. Cent.* 258.

Sheriffs are to be *amerced* for the faults of their officers; and clerks of the peace are *amercable* in B. R. for gross faults in indictments removed thither. *Hill.* 21 *Car.* The *amercement* of the sheriff, or other officer of the king, is called *amercement royal*. *Terms de Ley*. A town shall be *amerced* for the escape of a murderer, in the day-time: and if the town be walled, 'tis said, it shall be subject to *amercement*, whether by day or night. 3 *Inst.* 53. *Amerciaments* are likewise in several other cases. See *Blackst. Com.* 3 *V.* 159.

Amice, (from the Lat. *amicus*) Is taken for a priestly garment.

Amicia, (the same with *almutium*) A cap made with goats or lambs skins: that part whereof which covered the head was square, and one part of it hung behind, and covered the neck. *Monasticon*, 3 tom. p. 36.

Amictus, Was the uppermost of the six garments worn by priests, tied round the neck, and it covered the breast and heart.—*Ne inde ad linguam transeat mendacium; ne vanitates cogitet.*—*Amictus*, alba, cingulum, stola, manipulus & planeta.—These were the six garments of priests.

Amicus Curie, If a judge is doubtful or mistaken in matter of law, a stander-by may inform the court, as *amicus curie*. 2 *Co. Inst.* 178. In some cases, a thing is to be made appear by suggestion on the roll by motion; sometimes by pleading, and sometimes as *amicus curie*. 2 *Keb.* 548. Any one as *amicus curie* may move to quash a vicious indictment; for if there were a trial and verdict, judgment must be arrested. *Comberb.* 13. A counsel urg'd, that he might, as *amicus curie*, inform the court of an error in proceedings, to prevent giving false judgment; but it was denied, unless the party was present. 2 *Sbourn. Rep.* 297.

Amittre Legem Terræ, To lose and be deprived of the liberty of swearing in any court: as to become infa-

mous, renders a person incapable of being an evidence. *Vide Glanvil*, lib. 2. And see the statute 5 *Eliz. cap. 9.* against perjury. So a man that is outlawed, &c. is said to lose his law, i. e. is put out of the protection of the law, at least so far as relates to the suing in any of his majesty's courts of justice, tho' he may be sued.

Ammodragium, A service. — *Terræ in com.* *Flint. tenentur de domino rege per annua servitia, & per ammodragium quod ad quinque solidos extenditur cum acciderit.* Pat. 7 Ed. 2.

Amnesty, (*amnestia*, *oblivio*) An act of pardon or oblivion, such as was granted at the restoration by king Charles II.

Amnium Insulæ, Isles upon the west coast of Britain. Blount.

Amortization, (*amortizatio*, Fr. *amortissement*) Is an alienation of lands or tenements in mortmain, viz. to any corporation or fraternity, and their successors, &c. And the right of *amortization* is a privilege or licence of taking in mortmain. *Jus amortizationis est privilegium seu licentia capiendi in manum mortuam.* In the statute de libertatibus perquirendis anno 27 Ed. 1. the word *amortissement* is used.

Amortize, (Fr. *amortir*) Is to alien lands in mortmain. See *Mortmain*, and the Stat. 7 Ed. 1. of amortizing lands.

Ampliation, (*ampliatio*) An enlargement, but in sense of law it is a referring of judgment, till the cause is further examined.

Amy, (*amicus*) In law *prochein amy* is the next friend to be trusted for an infant. And infants are to sue by *prochein amy* (i. e. next friend) or guardian, and defend by guardian. *Alien amy* is a foreigner here subject to some prince in friendship with us.

An, Four & waste, (Fr.) Year, day and waste; a forfeiture of lands to the king by tenants committing felony, and afterwards the land falls to the lord.

Ancestor, (*antecessor*) Signifies as much as predecessor, or one that has gone before in a family: but the law makes a difference between what we commonly call an ancestor and a predecessor; the one being applied to a natural person and his ancestors, and the other to a body politic and their predecessors. *Co. Lit.* A prepossessor of an estate hath been called ancestor.

Ancestrel, What relates to or hath been done by one's ancestors; as *homage*, *ancestrel*, &c.

Anchoy, Is a measure of brandy, &c. containing ten gallons. *Lex Mercat.*

Anchorage, (*ancoragium*) A duty taken of ships for the use of the haven where they cast anchor. *MS. Arth. Trevor, Ar.* The ground in ports and havens belonging to the king, no person can let any anchor fall thereon, without paying therefore to the king's officers.

Ancients, Gentlemen of the inns of court. In *Gray's inn* the society consists of benchers, ancients, barristers, and students under the bar; and here the ancients are of the oldest barristers. In the *Middle Temple*, such as have gone through, or are past their readings, are termed ancients; the inns of *Chancery* consist of ancients and students or clerks; and from the ancients one is yearly chosen the principal or treasurer.

Ancient Demesne, or *demean* (*vetus patrimonium domini*) Is a tenure whereby all the manors belonging to the crown in the days of St. Edward, and William, called the Conqueror, were held. The number and names of all manors, after a survey made of them, were written in the book of *Domesday*; and those which by that book appear to have at that time belonged to the crown, and are contained under the title *terra regis*, are called *ancient demesne*. *Kitch.* 98. The lands which were in the possession of Edward the Confessor, and were given away by him, are not at this day ancient demesne, nor any others, except those writ down in the book of *Domesday*; and therefore, whether such lands are ancient demesne or not, is to be tried only by that book. 1 *Salk.* 57. 4 *Inst.* 269. *Hob.* 188. 1 *Brownl.* 43.

But if the question is, whether lands be parcel of a manor which is ancient demesne, this shall be tried by a jury. *Salk.* 56, 774. *Vide Com. Dig.* 1 *V.* tit. *Abatement*.

Ancient demesne is pleaded as to such a manor, and issue is taken whether 'tis so or not, this shall be tried by the book of *Domesday*; but if issue be taken, that *certain acres are parcel* of the manor of *H.* which is ancient demesne, *that shall be tried by a jury*; for parcel or not parcel is matter of fact, which cannot be tried by that book. 9 *Rep.* case of the abbot of *Strata Marcella*.

Fitzherbert tells us, that tenants in *ancient demesne* had their tenures from ploughing the king's lands, and other works towards the maintenance of the king's freehold, on which account they had liberties granted them. *F. N. B.* 14, 228. And there were two sorts of these tenures and tenants; one that held their lands freely by charter; the other by copy of court-roll, according to the custom of the manor. *Brit. c.* 66. The tenants holding by charter cannot be impleaded out of their manor; for if they are, they may abate the writ by pleading their tenure: they are free from toll, for all things bought and sold concerning their substance and husbandry. And they may not be impanelled upon any inquest. *F. N. B.* 14. If tenants in *ancient demesne* are returned on juries, they may have a writ *de non ponendis in assis*, &c. and attachment against the sheriff. 1 *Rep.* 105. And if they are disturbed by taking duties of toll, &c. they may have writs of *monstraverunt*, to be discharged. These tenants are free as to their persons; and their privileges are supposed to commence by act of parliament; for they cannot be created by grant at this day. 1 *Salk.* 57.

Lands in *ancient demesne* are extendible upon a statute merchant, staple, or elegit. 4 *Inst.* 270. No lands ought to be accounted *ancient demesne* but such as are held in socage; and whether it be *ancient demesne* or not, shall be tried by the book of *Domesday*. A lessee for years cannot plead in *ancient demesne*: nor can a lord in action against him plead *ancient demesne*, for the land is frank-fee in his hands. *Danv. Abr.* 660. In real actions, ejectment, replevin, &c. *ancient demesne* is a good plea; but not in actions merely personal. *Danv.* 658. If in *ancient demesne* a writ of right close be brought, and prosecuted in nature of a *formedon*; a fine, levied there by the custom, is a bar: and if this judgment be reversed in *C. B.* that court shall only judge, that the plaintiff be restored to his action in the court of *ancient demesne*; unless there is some other cause, which takes away its jurisdiction. *Jenk. Cent.* 87. *Dyer* 373. A fine in the king's courts will change *ancient demesne* to frank-fee at Common law; so if the lord enfeoffs another of the tenancy; or if the land comes to the king, &c. 4 *Inst.* 270. See *Fine*.

But if the lord be not a party, he may have a writ of *disceit*, and avoid the fine or recovery; for lands in *ancient demesne* were not originally within the jurisdiction of the courts of *Westminster*; but the tenants thereof enjoy this amongst other privileges, not to be called from the business of the plough by any foreign litigation. 7 *Hen.* 4. 44. 1 *Roll. Abr.* 327.

But if the lord be party, then the lands become frank-fee, and are within the jurisdiction of the courts of *Westminster*, for the privilege of *ancient demesne* being established for the benefit of lord and tenant, they may destroy it at pleasure. 2 *Roll. Abr.* 324. 1 *Salk.* 57.

With respect to pleading, it is to be observed, that in all actions wherein if the demandant recovers, the lands would be frank-fee, *ancient demesne* is a good plea. 8 *Hen.* 35. 1 *Roll. Abr.* 322.

Therefore in all actions real, or where the realty may come in question, *ancient demesne* is a good plea; as *assise*, writ of *ward of land*, writ of *account* against a bailiff of a manor, writ of *account* against a guardian, &c. See 4 *Inst.* 270. 1 *Roll. Abr.* 322, 323.

In *replevin* *ancient demesne* is a good plea, because by indentment the freehold will come in question. *Gad.* 64. 1 *Bulst.* 108.

In an *ejectiōis firmæ* *ancient demesne* is a good plea; for by common indentment the right and title of the land will come in question; and if in this action it should not be a good plea, the ancient privileges of those tenants would be lost, inasmuch as most titles at this day are tried by *ejectment*. *Hob.* 47. 1 *Bulst.* 108. *Hell.* 177. *Cro. Eliz.* 826.

But in all actions merely personal, as *debt* upon a lease, *trespass quare clausum fregit*, &c. *ancient demesne* is no plea. *Hob.* 47. 5 *Co.* 105. Vide *Com. D.* 1 *V.* tit. *Abatement*.

Ancient, (Fr. *ancienness*, Lat. *antiquitas*) Eldership or seniority. This word is used in the stat. of *Ireland*, 14 *Hen.* 3.

Andena, A swath in mowing: it likewise signifies as much ground as a man can stride over at once.

Anelacius, A short knife or dagger.—*Loricæ erat indutus, gestans anelacium ad lumbare.* *Mat. Paris* 277.

Anfeldtyhde, or *ansfaltible*, A simple accusation; for the Saxons had two sorts of accusation, viz. *simplex* and *triplex*: that was called single, when the oath of the criminal and two more was sufficient to discharge him; but his own oath, and the oaths of five more were required to free him a *triplici accusatione*. *Sommer.* In the laws of *Adelfan* we read—*Et si anfeldtyhde sit, immergatur manus post lapidem, vel examen usque ad Wriste.* *Leg. Adelfani*, cap. 19. apud *Brompton*.

Angaria, (from the Fr. *angarie*, i. e. personal service) Is a troublesome vexatious duty or service which tenants were obliged to pay their lords; and they performed it in their own persons.—*Terram liberam ab omniibus angariis & exactionibus*, &c. *MS.* *Elia* *Ashmole*, arm.—*Præstationes angariarum & perangariarum, plaustrorum & navium.* *Impressing of ships.* *Blount.*

Angelica Vestis, A monkish garment which laymen put on a little before their deaths, that they might have the benefit of the prayers of the monks. It was from them called *angelicus*, because they were called *angeli*, who by their prayers *animæ salutis succurrebant*. And the word *succurrendum*, in our old books, is understood of one who had put on the habit, and was near death: *si quis ad succurrendum metu mortis se loco præterminato dederit, illic recipitur.* *Monasticorum*, 1 tom. p. 632.

Angel, Signifies, in the computation of money, ten shillings of *English* coin.

Angild, (*angildum*) The bare single valuation or compensation of a criminal; from the Sax. *an* one, and *gild*, payment, mulct, or fine. *Una solutio, si villanus furatus fuerit*, &c. *Et habeas plegium, admonsas eum de angildo.* *Twigild* was the double mulct or fine; and *trigild* the treble, according to the rated ability of the person. *Law of Ina*, c. 20. *Spelm.*

Anblote, A single tribute or tax. The words *anblote* and *anset* are mentioned in the laws of *William the Conqueror*; and their sense is, that every one should pay according to the custom of the country, his part and share, as *scot* and *lot*, &c. *Leg. W.* 1. c. 64.

Aniens, (Fr.) Void, being of no force. *F. N. B.* 214.

Annales, Yearlings, or young cattle of the first year.—*Vituli primo anno postquam nati sunt, vituli vocantur; secundum compoto annales vocantur; tertio bovici; quarto bovetti.*—*Regule compoti domus de Wyndon*, *MS.*

Annats, (*annates*) This word has the same meaning with *first-fruits*, *anno* 25 *H.* 8. c. 20. The reason of the name is, because the rate of the first-fruits paid for spiritual livings, is after the value of one year's profit. *Annates more sua appellant primos fructus unius anni sacerdotii vacantis, aut dimidium eorum partem.* *Pol. Virgil de Invent. rer.* lib. 8. c. 2.

Annealing of Tile, (*anno* 17 *Ed.* 4.) From the Sax. *analan*, *accendere*, signifies the burning or hardening of tile.

Anniented, (from the Fr. *annentir*) Abrogated, frustrated, or brought to nothing. *Lit.* 3. c. *sect.* 741.

Anniversary Days, (*dies anniversarii*) Solemn days appointed to be celebrated yearly in commemoration of the deaths or martyrdom of saints; or the days whereon, at the return of every year, men were wont to pray for the souls of their deceased friends, according to the custom of the *Roman Catholics*, mentioned in the statute of 1 *Ed.* 6. cap. 14. and 12 *Car.* 2. cap. 13. This was in use among our ancient Saxons, as you may see in *Lib. Rames.* *sect.* 134.—*Anniversaria dies ideo repetitur defunctis, quoniam nescimus qualiter eorum causa habeatur in alia vita.* *Alcuinus's Divine Offices.* The *anniversary*, or yearly return

return of the day of the death of any person, which the religious register'd in their *obituary* or *martyrology*, and annually observ'd in gratitude to their founders and benefactors, was by our forefathers called a *year-day* and a *mind-day*, i. e. a memorial day: and tho' this proceeded from one of the trading arts of the priests, who got many a legacy for thus continuing the memorial of their friends; yet abating the superstition of it, we must confess this practice of theirs has been a great advantage to the history of men and times, by fixing the *obits* of great and good men.

Infant Nubile, (Lat.) When a woman is under 12 years of age, her age to marry, she is said to be *infra annos nubile*, and unmarried; so that it signifies the marriageable age of a woman. 2 Co. Inst. 434.

Incipit Domini, The computation of time from the incarnation of our Saviour; which is generally inserted in the dates of all public writings, with an addition of the year of the king's reign, &c. The Romans began their *era* of time from the building of Rome: the Grecians computed by *olympiads*; and the Christians reckon from the birth of *Jesus Christ*.

Innocentia, **Innujance**, or *nuisance*, is a word used for any hurt done to a public place, as a highway, bridge, river, &c. or to any private place, by laying any thing therein that may breed infection, by incroachments, or such like means; and it is also taken for the writ brought upon such a transgression. This word is mentioned anno 22 H. 8. c. 5. Vide *Nuisance* and *Highways*.

Inquisitio Penstone, An ancient writ for providing the king's chaplain unprovided with a pension. It was brought where the king had due to him an *annual pension* from an abbot or prior, for any of his chaplains whom he should nominate, (being unprovided of livings) to demand the same of such abbot or prior. Reg. Orig. 165, 307.

Annuit, A word signifying the yearly rent or income of a prebendary.

Annuitus, A yearly stipend assigned to a priest for celebrating an anniversary, or for saying continued masses one year, for the soul of a deceased person. *Inhibemus quoque districtius ne aliquis rector ecclesie faciat hujusmodi pactum cum suo sacerdote, addidit: quod ipse sacerdos, prater cetera stipendia poterit recipere annualia & triennalia.* Conf. Rob. Grostest Episcopi Lincoln. in Append. ad Fascic. P. 411.

Annuitus, (*annuus redditus*) Is a yearly rent, payable for term of years, life, or in fee; and it is used for a writ that lies against a person for recovery of such rent. Reg. Orig. 158. *Annuitus* hath also been defined to be a yearly payment of a certain sum of money, granted to another for life, &c. to be received of the grantor or his heirs, so that no freehold be charged therewith; whereof a man shall never have assize or other action, but a writ of *annuitus*. *Terms de Ley* 44. *Comm. D. 1 V. tit. Action, &c.*

To make a good grant of an *annuitus*, no particular technical mode of expression is necessary. For if a man grants an *annuitus* another, to be received out of his coffers, or to be received out of a bag of money, or to be received of a stranger, yet this is sufficient to charge his person, and the subsequent words shall be rejected. 1 Roll. Abr. 227.

So, if a man grant a rent out of his manor, when he has not any manor; this is a good annuity. 1 Roll. Abr. 227.

Or, if he grant a rent of 20l. per annum, to be received of his tenants in D. when he has not any tenant there. 1 Roll. Abr. 227.

If a man grant a rent out of land, in which he has nothing, *proviso* that he be not charged for this in a writ of *annuitus*, it shall be a good annuity; for the proviso, being repugnant, is void. Co. Lit. 146. a. 2 Bull. 149.

If a man grant a rent-charge out of his land, the grantee has an election to take it as a rent, or as an annuity. Lit. Abr. 219. 2 Bull. 148.

The transitive called *Doctor and Student*, dial. 1. cap. 3. shows several differences between a rent and an annuity, viz. that every rent is issuing out of land; but an annuity chargeth the person only, as the grantor and his heirs, who have assize by default: for the recovery of an annuity, no action lies, but only the writ of *annuitus*; but of a rent the same remedy lies as for lands; and an annuity is ne-

ver taken for assize, because it is no freehold in law; nor shall it be put in execution upon a statute merchant, staple, or *elegit*, as a rent issuing out of land may. Dyer 345. 2 Rep. 144. If no lands are bound for the payment of an annuity, a distress may not be taken for it. Dyer 65.

And hence it is, that if a rent be granted out of lands, with a proviso that the person of the grantor shall not be charged, that this proviso is void, because the grantee, having no distress given by the deed for the recovery of the rent, would be without any manner of remedy, if the proviso took place. 6 Co. 58. b.

But if an annuity issue out of land, (which of late it often doth) the grantee may bring a writ of *annuitus*, and make it personal, or an assize, or distress, &c. so as to make it real. 1 Inst. 144. And if the grantee take a distress; yet he may afterwards have writ of *annuitus*, and discharge the land, if he do not avow the taking, which is in nature of an action. 1 Inst. 145. But if the grantee of a rent bring an assize for it, he shall never after have writ of *annuitus*; he having elected this to be a rent: so if the grantee of an annuity avow the taking of a distress, in a court of record. Darv. Abr. 486. And if the grantee purchase part of the land out of which an annuity is issuing, he shall never after have a writ of *annuitus*. Co. Lit. 148. Where a rent-charge, issuing out of lands, granted by tenant for life, &c. determines by the act of God; as an interest was vested in the grantee, it is in his election to make it a rent-charge, and so charge the lands therewith, or a personal thing to charge the person of the grantor in annuity. 2 Rep. 36. A. seised of lands in fee, he and B. grant an annuity or rent-charge to another; this *prima facie* is the grant of A. and confirmation of B. But the grantee may have a writ of *annuitus* against both. If two men grant an annuity of 20l. per ann. although the persons be several, if the deed of grant be not for them severally, yet the grantee shall have but one *annuitus* against them. 1 Inst. 144.

When a man recovers in a writ of *annuitus*, he shall not have a new writ of *annuitus* for the arrears due after the recovery, but a *scire facias* upon the judgment, the judgment being always executory. 2 Rep. 37. No writ of *annuitus* lies for arrearages only when an annuity is determined, but for the annuity and arrearages. 1 Inst. 285. Though if a rent-charge be granted out of a lease for years, it hath been adjudged that the grantee may bring *annuitus* when the lease is ended. Moor, cap. 450. Where an annuity is granted to one for life, during the term he shall have a writ of *annuitus*; and when that is determined, his executors may have action of debt; for the realty is then resolved into the personality. 4 Rep. 49. New Nat. Br. 278. Upon a rent created by way of reservation, no writ of *annuitus* lies. Darv. 483. If a man grants a rent out of his manor, or lands, or to be received of his tenants, and he hath no manor, lands, or tenants, yet it may be a good annuity, though void as to a rent. Darv. Abr. 485. A person grants to me 10l. every year, that I shall be resident in such a parish; an annuity lies for this, it being annual at my will; and it is the same if a rent be granted payable at the end of a certain number of years, though it be not annual. Ibid. 452. A grant is made by a person of an annuity to another and his heirs, without the grantor's saying for him and his heirs, this is determinable by the death of the grantor. Darv. Abr. 482. Writ of *annuitus* may not be had against the grantor's heir, unless the grant be for him and his heirs; and there must be assets to bind the heir, by grant of an annuity by his ancestor, when he is named. 1 Inst. 144. 1 Roll. Abr. 226. But it is otherwise in case of the grant of a rent out of land, or a grant of a rent whereof the grantor is seised, for this charges the land, but an annuity charges the person only. Br. Charge, pl. 54.

An annuity granted by a bishop with confirmation of dean and chapter, shall bind the successor of the bishop. New Nat. Br. 340. If the king grant an annuity, it must be expressed by whose hands the grantee shall receive it, as the king's bailiff, &c. or the grant will be void; for the king may not be sued, and no person is bound to pay it if not expressed in the patent. 9 H. 6. New Nat. Br. 341. If where an annuity is granted *pro decimis*, the grantor

grantor is disturbed of his tithes, the annuity ceaseth; and so it is where any annuity is granted to a person *pro consilio*, and the grantee refuseth to give counsel: for where the cause and consideration of the grant amounts to a condition, and the one ceases, the other shall determine. 1 *Inst.* 204.

There are now very few, if any, grants of annuities, without a covenant for payment, expressed or implied; and therefore, where a distress can't be made, or is not approved of, the grantee may bring an action of covenant, and recover the arrears in damages, with costs of suit. And that action is now usually brought, real actions and writs of annuity being much out of use.

See more concerning this head under title Grant.

Ansel, or ansul. See *ansel* weight — *De pede, pollice, cubito, & palma, de ansul, balancibus & mensuris.* Thorn. Chron.

Antejuramentum, and præjuramentum. By our ancestors called *juramentum calumnie*; in which both the accuser and the accused were to make this oath before any trial or purgation, *viz.* the accuser was to swear that he would prosecute the criminal; and the accused was to make oath on the very day that he was to undergo the ordeal, that he was innocent of the crime of which he was charged. *Leg. Athelstan. apud Lambard* 23. If the accuser failed to take this oath, the criminal was discharged; and if the accused did not take his, he was intended to be guilty, and not admitted to purge himself. *Leg. Hen. 1. c. 66.*

Antistitium. A word used for monastery in our old histories. *Blount.*

Antisthetarius. Signifies where a man endeavours to discharge himself of the fact of which he is accused, by recriminating and charging the accuser with the same fact. This word is mentioned in the title of a chapter in the laws of Canutus, *capite* 47.

Apatifatio. An agreement or compact made with another. *Upton, lib. 2. c. 12.* — *De officio militari, viz. concedimus per presentes bonum & saluum conductum, ac saluam guardiam sive securitatem apatificationis.*

Apostare. To be brought to poverty. — *Permisit suos spoliare patriam, apostiare vulgus. Walsingham in R. 2.* It hath been used sometimes to signify, shun or avoid.

Apostare. To violate: *apostare leges*, and *apostatate leges*, wilfully to break or transgress the laws. — *Qui leges apostabit terræ suæ, reus sit apud regem.* *Leg. Edw. Confessoris, c. 35.*

Apostata Capiendo. A writ that formerly lay against one who having entered and professed some order of religion, broke out again, and wandered up and down the country, contrary to the rules of his order: it was directed to the sheriff for the apprehension of the offender, and delivery of him again to his abbot or prior. *Reg. Orig. 71, 267.*

Apothecaries. Are exempted from serving offices, &c. Their medicines are to be searched and examined by the physicians chosen by the college of physicians, and if faulty shall be burnt, &c. 32 *Hen. 8. c. 40.* 1 *M. Stat. 2. c. 9.* And apothecaries to the army are to make up their chests of medicines at Apothecaries Hall, there to be openly viewed, &c. under the penalty of 40*l.* *Stat. 10 Ann. cap. 14.* Vide 6 & 7 *W. 3. c. 4.* See Physicians.

Apparator, or Apparitor. A messenger that serves the process of the spiritual court. His duty is to cite the offenders to appear; to arrest them; and to execute the sentence or decree of the judges, &c. *Anno 21 Hen. 8. cap. 5.* In the year 1316 Walter archbishop of Canterbury granted the following commission to an apparitor of his consistory court. — *Walterus Dei gratia Cant. archiep. totius Angliæ primas, dilecto filio Willielmo de Graftone in apparitoris officio, in curia nostra Cantuar', videlicet, in consistorio ac decanatu nostro ecclesiæ beatæ Mariæ de arcubus London, ministranti salutem, gratiam & benedictionem. Personam tuam, eo quod de fidelitate in dicto officio per laudabile testimonium apud nos multipliciter commendaris, volentes prosequi cum favore, dictum apparitoris officium in curia, consistorio & decanatu prædictis perpetuo possidendum tibi conferimus per presentes: ita tamen quod te fideliter geras in officio prædicto memorato. Volentes & tibi specialiter concedentes, ut cum in ministerio dicti officii per teipsum personaliter vacare non poteris, vel absens fueris a curia, consistorio &*

decanatu prædictis, nihilominus per aliam idoneam personam, quem ad hoc assignandum omnia & singula quæ dicto incumbunt officio — facere valeas, & jugiter exercere. — *Dat. apud Lambith. 8 Id. Mart. 1316.*

If a monition be awarded to an apparitor, to summon a man, and he upon the return of the monition avers that he had summoned him, when in truth he had not, and the defendant be thereupon excommunicated; an action on the case at Common law will lie against the apparitor for the falsehood committed by him in his office, besides the punishment inflicted on him by the ecclesiastical court for such breach of trust. *Ayl. Parerg. 70. 2 Bull. 264.*

Apparator, Comitatus. An officer formerly called by this name; for which the sheriffs of *Buckinghamshire* had a considerable yearly allowance; and in the reign of Queen *Elizabeth*, there was an order of court for making that allowance: but the custom and reason of it are now altered. *Hale's Sber. Acco. 104.*

Appartement. (from the Fr. *parcillement*, i. e. in like manner) Signifies a resemblance or likelihood; as *appartement* of war. 2 *R. 2. Stat. 1. c. 6.*

Apparura. Furniture and implements; *appertinet. dominus clamat habere omnes carrucas ferro non ligatas, & omnes carrucas cum tota apparura.* *Placit. in Itin. apud Cestriam 14 Hen. 7. Carrucarum apparura* is plough-tackle, or all the implements belonging to a plough.

Appeal, appellum. (from the Fr. *appel* or *appeller* to accuse) Is a word used in our law for the removal of a cause from an inferior court or judge to a superior: but more commonly for the accusation of a murderer, by a party who had interest in the person killed; or of a felon by one of his accomplices. 1 *Inst.* 287. It signifies as much as *accusatio* with the Civilians; for as in the Civil law, cognizance of criminal causes is taken either upon inquisition, denunciation or accusation; so in the Common law, it is upon indictment, or *appeal*, indictments comprehending both inquisition and denunciation. And accusation or *appeal* is a lawful declaration of another man's crime, (being felony at least) before a competent judge, by one that sets his name to the declaration, and undertakes to prove it, upon the penalty that may ensue of the contrary. *Bract. lib. 3. Brit. c. 22, 25. Staundf. lib. 2. cap. 6.*

There were anciently several kinds of appeals, which seem obsolete at this day; as appeals of treason, which might be sued before the parliament and other courts of law, as well as before the constable and marshal, and were determinable by battle. 2 *Inst.* 132. *Bract. 118. 2 Hawk. P. C. 161.*

But appeals before the parliament are taken away by 1 *H. 4. cap. 14.* and those before other law-courts are become obsolete.

But as to the jurisdiction of the constable and marshal, in relation to treasons committed out of the realm, it seems to continue still in force: for in the 7th year of *Charles* the first, an appeal of treason, supposed to be committed beyond sea, was actually commenced before the constable and marshal; who, for want of sufficient proof to clear the truth, awarded that a duel should be fought between the parties, for the final determination of the matter. See *Rushworth's Collect. part. 2. vol. 1. p. 112.*

Appeals *de pace, de plagis, and de imprisonment* are out of use, and have been turned to actions of trespass for many hundred years past; also the whole learning of appeals of *arson* seems obsolete at this day. 1 *Inst.* 288. a.

The kinds of appeals, therefore, that seem to require any consideration at this day, are those of death, larceny, and rape, which are capital appeals, and that of mayhem, which is considered as a trespass. 1 *New Abr. 122.*

An appeal of death, which is now chiefly in use, is a vindictive action which the law gives a wife against her husband's murderer, and to the heir at law against one who kills his ancestor, which being the suit of the subject, the king cannot pardon. 1 *New Abr. 122.* And see 9 *Hen. 3. c. 34.* and 3 *Hen. 7. c. 1.*

An appeal of murder is for retribution, or satisfaction, as far as the law can give it; i. e. life for life.

By *Magna Charta*, c. 34. a woman can't sue an appeal for the murder of any one, but her husband.

At the Common law, before the statute 9 *Hen. 3.* a woman as well as a man might have had an appeal of death of any of her ancestors, and therefore the son of a woman shall at this day have an appeal, if he be heir at the death of the ancestor, for the son is not disabled, but the mother only, for the statute says, *propter appellum feminæ*. 2 *Inst.* 68.

The judges are so far bound to take notice of this statute, that if a woman brings an appeal of death of her father, or of any other besides her husband, they ought *ex officio* to abate it, tho' the defendant takes no exception to it. 2 *Hawk. Pl. C.* 166. cap. 23. f. 42.

A feme shall have appeal where she shall have no dower, as where she elopes from her baron. *Br. Appeal*, pl. 17. cites 50 *E. 3.* 15. per *Ingleby*.

The wife is to be a wife *de facto* to be intitled to appeal; and if she marries again, before the appeal is brought, or whilst the same is depending, her appeal will be gone. 2 *Inst.* 68, 317. When a woman has judgment in appeal, of the death of her husband, she cannot have execution if she do not personally pray it: a judge went to a woman great with child, to know if she would have execution? She said, Yes, and the appellee was hanged. *Jenk. Cent.* 137. But if she marry after the judgment, she cannot pray execution. 2 *Hawk. P. C.* 164.

For the death of an ancestor who leaves no wife, the heir only can bring an appeal, and such heir must himself be innocent of the fact, he must be heir general according to the course of the Common law, and also heir male, and in his count must set forth how he is heir to the deceased. 2 *Hawk. P. C.* 165.

The husband shall not have an appeal for the death of his wife; but the heir only. *Danv. Abr.* 488. An heir shall not have appeal for the death of a man married, except the wife kill the husband; in which case the heir may prosecute the appeal. 1 *Leon.* 326. 1 *Inst.* 33.

If a wife dies within the year, the heir shall have no appeal. *Keilw.* 120. And if after the death of the ancestor the heir male dies, 'tis said another heir shall not have appeal. *H. P. C.* 182. For a person that prosecutes an appeal must be immediate heir to the ancestor killed, or his suit shall not be received. *Stamdf.* 59. But where an appeal lies against an heir, the next heir shall bring it. *H. P. C.* 182. An infant may prosecute an appeal: and it is to be brought where the felony is done, and the party wounded shall die. *Stamdf.* 63.

But an idiot, or person born deaf and dumb, or one attainted of treason or felony, or outlawed in a personal action, so long as such attainder or outlawry continues in force, cannot bring any appeal whatsoever. 2 *Hawk.* 168. *H. P. C.* 183. 2 *Hawk. P. C.* 162.

The appellant is to commence his appeal in person; but he may proceed by attorney, having a special warrant of attorney filed. 1 *Salk.* 60. The appeal must be brought in a year and a day after the death of the person murdered: and the count must set forth the fact, and the length and depth of the wound, the year, day, hour, place where done, and with what weapon, &c. And that the party died in a year and a day. 2 *Inst.* 665. 6 *Ed. 1. c. 9.* Principal and accessaries before and after are to be joined in appeal. *Danv. Abr.* 493. And this is to be observed, though the accessory is guilty in another county. 3 *H. 7. c. 1.*

An appeal is prosecuted two ways; either by writ, or bill: appeal by writ is when a writ is purchased out of Chancery by one for another, to the intent he appeal a third person of some felony committed by him, finding pledges that he shall do it: appeal by bill is where a man of himself gives up his accusation in writing, offering to undergo the burden of appealing the person therein named. *Bracton*.

This appeal may be brought by bill before the justices in the King's Bench; before justices of gaol delivery, and commissioners of oyer and terminer, &c. or before the sheriff and coroner, in the county court: but the sheriff and coroner have only power to take and enter the appeal and count; for it must be removed by *Certiorari* into *B. R.*

In appeal by original, principals and accessaries are generally charged alike without distinction, till the plaintiff counts: but 'tis otherwise in appeals by bill. *Danv.* 494.

There is to be but one appeal against the principal and accessory; if the principal is acquitted, it shall acquit the accessory; and both shall have damages against the appellant on a false appeal, or the accessory may bring a writ of conspiracy. 33 *Hen. 6. cap. 2.* 2 *Inst.* 383. Though where a person is acquitted on a just appeal, he may be arraigned upon indictment at the king's suit: and if a murderer be acquitted upon indictment, or found guilty and pardoned by the king, the wife or heir may bring appeal. *Wood* 629.

When a person is indicted for murder, and acquitted thereupon, he is to be bailed till the year and day is past, allowed for bringing the appeal, if an appeal be intended. 3 *Hen. 7. cap. 1.*

If the defendant in appeal is attaint, or acquit: or the plaintiff nonsuit after appearance, which is peremptory, no other appeal lies. *H. P. C.* 188. But if the appeal is good and well taken, and afterwards fails, the defendant shall be arraigned at the suit of the king; 'tis otherwise if the appeal was never good or well taken; as if it abates for misnomer, &c. *Stamdf.* 147, 148. If there be an indictment and appeal depending at the same time against the same person, the appeal shall be tried first, if the appellant be ready. *Kel.* 107. Otherwise the king would destroy the suit of the party; for this reason the king by his pardon cannot bar an appeal. *Jenk.* 160. pl. 4.

The case of other appeals than of murder, as of robbery, rape, &c. are not within the statute, 3 *H. 7. c. 1.* And therefore *auterfoits acquit*, upon an indictment within the year, stands as at Common law a good bar to an appeal of robbery, or any offence other than murder or manslaughter; and yet the judges at this day never forbear to proceed upon an indictment of robbery, rape, or other offence, though within the year, because appeals of robbery especially are very rare, and of little use, since the statute of 21 *H. 8. cap. 11.* gives restitution to the prosecutor as effectually as upon an appeal. 2 *Hale's Hist. P. C.* 250.

Where the appellant doth not prosecute his appeal; or in case he release to the defendant; the appellee may be arraigned at the king's suit. If the defendant on an indictment is convicted of manslaughter, and allowed his clergy, it will bar an appeal: though some of our books tell us the heir may lodge an appeal immediately before clergy had: and others say clergy ought to be granted, and that it is unreasonable an appeal should interpose presently to prevent judgment. 3 *Inst.* 131. If a person, immediately after the verdict of manslaughter, put in an appeal of murder, and before the appeal is arraigned, the defendant demands his benefit of clergy; this is a good bar to appeal, and praying of clergy, is having of clergy, though the court delay calling the party to judgment, &c. 1 *Salk.* 60, 62. *Kel.* 93. But formerly it was held, that the court might delay the calling a convict to judgment, and thereby hinder him from his clergy, and make him liable to an appeal, especially if the appeal were depending; and where the record of a conviction of manslaughter is erroneous, or insufficient, &c. the offender cannot plead the conviction and clergy had therein, in bar of an appeal or second indictment, &c. 2 *Hawk. P. C.* 378, 379. A charter of pardon is no bar of an appeal: and if the party be outlawed, &c. in appeal, and the king pardon him, a *scire facias* shall issue against the appellant, who may pray execution, notwithstanding such pardon; but if returned *sci. fac.* and he appears not, then the appellee shall upon the pardon be discharged. *H. P. C.* 251. A peer in appeal of murder shall not be tried by his peers, but by a common jury; though he shall upon an indictment for murder. *Vide Stat. 5 H. 7. c. 1.* directing appeals before the sheriff and coroner, or at King's Bench, or gaol delivery. No appeals to be pursued in parliament. 1 *H. 4. c. 14.*

No *cessum* is allowed the appellant, in appeal of death. *Stat. 13 Ed. 1.* In appeal the court can grant no imparlance, but it may be adjourned. 1 *Sid.* 325. And where

where *appeal* of death is brought, the defendant cannot justify *se defendendo*; but must plead Not guilty, and the jury are to find the special matter. *Bro. App.* 122. 3 *Salk.* 37. *Appeal* is the nicest suit in law, for any small matter will abate it; the process must bear date the same day with the return of the writ; if it be a day afterwards, it is a discontinuance; and it varies from all other proceedings, for there can be no amendment of the writ, nor is the discontinuance of it helped by any statute. *Nelf. Abr.* 215.

The court *ex officio* will quash the writ for apparent faults appearing on the face of the writ; as where the sense is defective for want of a material word, or where it wants those words of art which the law has appropriated for the description of the offence. 2 *Hawk. P. C.* 184.

Also the court will abate the writ when the declaration varies from the writ in some material point, either as to the reign of the king, or as to the county wherein the fact is laid, &c. 2 *Hawk. P. C.* 184.

The declaration must set forth the offence with the utmost certainty, and likewise describe it by such words of art as the law has appropriated to the purpose; therefore if the word *felonice* in any appeal, *murdravit* in an appeal of murder, *rapuit* in an appeal of rape, *cepit* in an appeal of larceny, *mayhemavit* in an appeal of mayhem, be omitted, they cannot be supplied by any circumlocution.

A release of all manner of actions, or of all actions criminal, or of all actions concerning pleas of the crown, or of all appeals, or of all demands, is a good bar of any appeal; but a release of all personal actions does not bar an appeal of felony, being an action of an higher nature. *Cro. Jac.* 283. *Yelv.* 204. 2 *Hawk. P. C.* 196.

If the appellee pleads a special plea, which does not amount to a confession of the fact, he must at the same time plead over to the felony, except in special cases; as where such plea would be prejudicial to him, or where such plea declines the jurisdiction of the court. 2 *Hawk. P. C.* 196. *Carth.* 56.

In *appeal of murder* brought by the wife for the death of her husband; the appellee pleaded, that she was never lawfully married to her husband, but did not plead over to the felony; adjudged, that this plea being to be tried by the ordinary upon his certificate, whether the marriage was lawful or not, in such case the defendant need not plead over to the felony; but where the plea is triable by the Common law, he must plead over to the felony. *Cro. Eliz.* 224.

By statute an *appellant*, bringing a false *appeal*, shall suffer a year's imprisonment, yield damages to the party grieved, and pay a fine to the king; and being unable, those that abetted him shall be punished in like manner. *Stat.* 13 Ed. 1. c. 12.

The form of an appeal of murder.

WILTS. **B**E it remember'd, That at the general delivery of the gaol of the lord the king, in the county of W. held for the said county at, &c. in the county aforesaid, the day, &c. in the first year of the reign of our sovereign lord George the Third, by the grace of God, of Great Britain, France and Ireland, king, defender of the faith, &c. before Sir F. P. and A. D. esq; &c. justices of our said lord the king assigned to hold pleas, &c. and justices of the said lord the king, his gaol there of the prisoners in the same being to deliver assigned, &c. J. B. son and heir of T. B. deceased, in his proper person, by bill earnestly appealed R. D. late of, &c. and T. E. &c. in the custody of W. C. esq; sheriff of the county aforesaid, to the bar there brought in their proper persons, of the death of the said T. B. his father; and there are pledges of prosecuting his said bill, that is to say, John Doe and Richard Roe; which said bill follows in these words: Wilts ff. J. B. son and heir of T. B. late of, &c. in the county of W. esq; in his proper person, earnestly appeals R. D. late of, &c. gentleman, and T. E. late of, &c. in custody of W. C. esq; sheriff of the county of W. aforesaid, being to the bar brought in their proper persons, of the death of the said T. B. his said father; for that the said R. D. not having God before his eyes, but being moved and seduced by the instigation of the devil, on the day, &c. in the year of the

reign, &c. with force and arms, &c. at the parish of, &c. in the county of W. aforesaid, that is to say, in a certain place called, &c. in the king's highway there, upon the said T. B. in the peace of God and of our said lord the king then and there being, feloniously, wilfully, and of his malice forethought, made an assault, and the said R. D. a certain pistol of the value of ten shillings, then and there charged with gunpowder and a leaden bullet, which pistol the said R. D. in his right hand then and there had, feloniously, wilfully, and of his forethought malice, directed against the said T. B. he shot off and discharged, and with the said leaden bullet, by force of the said gunpowder out of the pistol aforesaid, so as aforesaid directed, shot and discharged, the said T. B. in and upon the right side of the breast of him the said T. B. near his right shoulder, then and there feloniously, wilfully, and of his malice forethought, struck, pierced and wounded, and then and there the said R. D. with the said bullet, so shot and discharged from the said pistol as aforesaid, in and upon the said right side of the breast of him the said T. B. near his said right shoulder, feloniously, wilfully, and of malice forethought, gave to the same T. B. one mortal wound, of the length and depth, &c. of which said mortal wound the said T. B. then and there instantly died. And the said T. E. the said day, &c. in the same year, at, &c. aforesaid, in the place aforesaid, and in the king's highway aforesaid, there feloniously, wilfully, and of his malice forethought, was present, abetting, aiding, comforting and maintaining the said R. D. the felony and murder aforesaid, in manner and form aforesaid, to do and commit: and so the said R. D. and T. E. the said T. B. in manner and form aforesaid, feloniously, wilfully, and of their malice forethought, killed and murdered, against the peace of our said lord the king, his crown and dignity, &c. And as soon as the said felons the said felony and murder had committed, they fled; and the said J. B. son and heir of the said T. B. made fresh pursuit after the said felons, &c. And if the said R. D. and T. E. the felony and murder aforesaid so as aforesaid done, are willing to avow and affirm, then the said J. B. is ready the said felony and murder against them the said R. D. and T. E. to prove, according as the court of our said Lord the now king here shall consider thereof, and hath found pledges to prosecute his Appeal, &c.

Appeal of Mayhem, Is the accusing one that hath maimed another: but this being generally no felony, it is in a manner but an action of trespass; and nothing is recovered by it but damages. In an action of assault and maiming, the court may increase damages, on view of the maim, &c. And though maim is not felony, in appeals and indictments of maim, the words *felonice maimavit* are necessary. 3 *Inst.* 63. *Bracton* calls *appeal of maim* *appellum de plagis et maimis*, and writes a whole chapter upon it. *Lib.* 3. *tract.* 2. *cap.* 24. In an *appeal of maim*, the defendant pleads that the plaintiff had brought an action of trespass against him, for the same wounding, and had recovered, and damages given, &c. And this was a good plea in bar of the *appeal*; because in both actions damages only are to be recovered. 4 *Rep.* 43. And where there is a recovery in assault and battery, &c. the jury give damages according to the hurt, which was done, and it shall be intended a maim at that time; and therefore *appeal of maim* doth not lie. *Hob.* 94. 1 *Leon.* 318. In *appeal of maim*, the appellant ought not to plead in abatement of the writ, and likewise over to the maim; if he doth, he will lose the benefit of his plea to the writ. *Moor* 457.

Appeal of Rape, Lies where a rape is committed on the body of a woman. 3 *Inst.* 30. A feme covert, without her husband, may bring *appeal of rape*: and the *Stat.* 11 Hen. 4. *cap.* 13. gives power where a woman is ravished, and afterwards consents to it, for a husband; or a father, or next of kin, there being no husband, to bring *appeal of rape*: also the criminal, in such case, may be attainted at the suit of the king. 3 *Inst.* 131. 6 R. 2. *cap.* 6.

If a woman be ravish'd by her next of kin, and consents to him, and has neither husband nor father, the next of kin to him shall have the *appeal*; for he has disabled himself by the rape, whereby he becomes a felon. 2 *Inst.* 434. — *Hale's Hist. P. C.* 632. S. P. cites 28 H. 6. *Corone* 459. — 2 *Hawk. P. C.* 173. c. 23. f. 64. S. P.

If there be no husband, nor father, then the appeal is given to the heir, whether male or female. *Hale's P. C.* 186.

In appeal of rape of his feme, the *defendants pleaded, Ne unques accouple* in lawful matrimony, because one was affianced to the feme, and after another married her, and after she came to him who affianced her, and he married her, and she is afterwards ravished. The first who married her shall have the appeal of rape, for the first espousals are good till they are divorced for the precontract, and the opinion here is that, *Ne unques accouple*, &c. in this case is not a good plea; for the statute gives it to the barons, *si viros habuerint*; so that baron in possession shall have it, where espousals are not void. *Br. Appeal*, pl. 32. cites 11 H. 4. 13.

This statute, as to the husband, shall be construed strictly, and be intended of a husband in possession, tho' there be good cause of divorce; for he is her husband till a divorce be had. *Contra* where the marriage is void; for there he is not *vir ejus*, and therefore, in that case, *Ne unques accouple*, &c. is no plea by the best opinion, tho' *contra* in appeal of the death of the husband, or in demand of dower, because they are by the Common law. *Br. Parliament*, pl. 89. cites 11 H. 4. 14. — 2 Hawk. Pl. C. 173. cap. 23. s. 62. says, that *Ne unques accouple*, &c. is a good plea, and shall be tried by the bishop's certificate, who, if the marriage were unlawful by reason of a pre-contract, ought to certify against the appellant.

The statute of *Westm.* 1. c. 13. enacts that appeal of rape shall be brought within forty days: but by *Stat. Westm.* 2. c. 34. relating to this offence, no time is limited for the prosecution; so that it may be brought in any reasonable time. *H. P. C.* 186. Appeal of rape is to be commenced in the county where committed: and if a woman be assaulted in one county, and ravished in another, the appeal of rape lies in that county where she was ravished. *H. P. C.* 186. It is held, that though formerly the defendant might have his clergy, 'tis taken away by the *Stat.* 18 *Eliz.* cap. 17. *Dyer* 201.

Form of an Appeal of Rape.

A. B. of, &c. in his proper person earnestly appeals to the form of the statute made in the parliament of the lord Richard the second, king of England, in the sixth year of his reign hold, &c. for that, that is to say, that the said C. D. the day and year, &c. at, &c. in the county aforesaid, M. B. wife of the said A. B. feloniously ravished, and her carnally knew, against the form of the statute aforesaid, &c. And as soon as, &c. And this (the felony and rape aforesaid) the said A. B. is ready to prove against him the said C. D. as the court, &c.

Appeal of Robbery. A remedy given by the Common law, where a person is robbed of his goods, &c. to have restitution of the goods stolen: as they could not be restored on indictment at the king's suit, this appeal was judged necessary. *3 Inst.* 242. If a man robbed make fresh pursuit after, and apprehend and prosecute the felon, he may bring appeal of robbery at any time afterwards. *Staundf.* 62.

An infant shall have an appeal of robbery. *St. P. C.* 60. b. cap. 9.

Appeal of felony lies against a feme covert without her baron. *St. P. C.* 62. cap. 11.

So it lies against an infant; and so of all others who may commit felony. *St. Pl. C.* 62. cap. 11.

A woman at this day may have an appeal of robbery, &c. for she is not restrained thereof. *2 Inst.* 68.

Adjudged, that an appeal of robbery may be brought by the party robbed twenty years after the offence committed, and that he shall not be bound to bring it within a year and a day, as he must do in appeal of murder. *4 Leon.* 16. But the courts of law would now scarce permit a prosecution after such a length of time, unless good cause could be shewn why it had not been sooner commenced, as that the offender had fled the kingdom, and was but just returned, &c. If one man robs several persons, every one of them may have appeal: likewise if the robber be attainted at the suit of one, he shall be tried at the suit of the rest, so as their appeals were commenced before the attainder;

Danw. Abr. 494. In appeal of robbery, the plaintiff must declare of all the things whereof he is robbed, or they shall be forfeited to the king; for the appellants can have restitution for no more than is mentioned in his appeal. *3 Inst.* 227. By the Year-book 21 Ed. 1. 16. Restitution of goods was granted upon an outlawry, in appeal of robbery; but a person having preferred an indictment against a robber, and afterwards an appeal, on which he was outlawed, the plaintiff moved to have restitution of his goods, and it was denied. *2 Leon.* 108. If the count or declaration in appeal of burglary be sufficient, and the defendant is convicted at the suit of the party upon the appeal; he shall not be again impeached for the same offence at the king's suit. *4 Rep.* 39. By *Stat.* 21 H. 8. cap. 11. the like restitution of stolen goods may be had on indictments after attainder, as on appeals: and appeals of rape and robbery are now much out of use; but the appeal of murder still continues, and is sometimes brought. Vide as to appeal *Black. Com.* 4 V. 308, &c. and *Hawk. Pleas of the Crown*, tit. Appeal, where the subject is fully treated, and in a very masterly manner.

Appeal to Rome. This was ever esteemed so great an interruption to national justice, that even at the time the Roman Catholic religion was the religion of this kingdom it was prohibited. By the *Stat.* 24 Hen. 8. appealing to Rome incurs the penalty of a *præmunire*: and it is made treason by 13 *Eliz.* cap. 2.

Where an appeal in an ecclesiastical cause is made before the bishop, or his commissary, it may be removed to the archbishop; and if before an archdeacon, to the Court of Arches, and from the Arches to the archbishop; and when the cause concerns the king, appeal may be brought in fifteen days from any of the said courts to the prelates in convocation. *24 H. 8. c. 12.* And the *Stat.* 25 H. 8. cap. 19. gives appeals from the archbishop's courts to the king in Chancery, who thereupon appoints commissioners finally to determine the cause; and this is called the Court of Delegates: there is also a court of commissioners of review; which commission the king may grant as supreme head, to review the definitive sentence given on appeal in the Court of Delegates. On taking away the supremacy of the pope in this kingdom, this power was lodged in the crown, as originally belonging to it. *4 Inst.* 340. The dean of Wells was deprived of his deanery, by the commissary of the bishop of Bath and Wells, from which sentence the dean appealed to the archbishop, who affirmed it; and thereupon he exhibited an appeal to the king in Chancery, but found no relief, for the king granted the deanery to one Turner. But anno 1 Mar. the deprived dean obtained another commission to the Delegates, and by their sentence was restored to his deanery; and after the death of queen Mary, 1 *Eliz.* Turner had a commission of review, and he was restored, though it was insisted there ought to be no farther appeal. *Dyer* 273. In the 39th year of queen *Eliz.* sentence being given in an ecclesiastical cause, the party against whom had, appealed to the archbishop, &c. who affirmed the sentence; then he appealed to the Delegates, and they repealed both the former sentences: on which the queen granted a commission *ad revivendum* the sentence of the Delegates, and it was held lawful. *Cro. Eliz.* 571. The bishop of Winchester is made visitor of Magdalen college in Oxford, by whom the president of the said college was deprived, who appealed to the queen in Chancery: resolved, that the appeal doth not lie, for 'tis out of the statutes *24 & 25 H. 8.* *Dyer* 209. See 4 *Mod.* 106. See *Admiral*.

Appearance. In the law signifieth the defendant's filing common or special bail, when he is arrested on any process out of the courts at Westminster: and there can be no appearance in the court of B. R. but by special or common bail. There are four ways for defendants to appear to actions; in person, or by attorney; by persons of full age; and by guardians, or next friend, by infants. *Show.* 165.

By the Common law, the plaintiff or defendant, demandant or tenant, could not appear by attorney without the king's special warrant by writ or letters patent, but ought to follow his suit in his own proper person; by reason whereof there were but few suits. *Co. Lit.* 128. *2 Inst.* 249. But it is now the common course for the plaintiff

Plaintiff or defendant, in all manner of actions where there may be an attorney, to appear by attorney, and put in his warrant without any writ from the king for that purpose. And therefore, generally, in all actions real, personal, and mixt, the demandant or plaintiff, tenant or defendant, may appear by attorney. *F. N. B.* 26.

But in every case, where the party stands in contempt, the court will not admit him to appear by attorney, but oblige him to appear in person. As if he comes in by a *cepi corpus* upon an *exigent*. *F. N. B.* Or, if he be outlawed. *2 Cro.* 462, 616.

But by *Stat. 4 & 5 W. & M. c. 18*. Persons outlawed in any case, except for treason or felony, may appear by attorney to reverse the same without bail; except where special bail shall be ordered by the court.

In all cases where process issues forth to take the person's body, if a common appearance only, and not special bail is required, there every such person may appear in court in his proper person, and file common bail. *1 Lill. Abr.* 85. *Hill. 22 Car. B. R.*

In a capital case the party must always appear in person, and cannot plead by attorney: also in criminal offences, where an act of parliament requires that the party should appear in person; and likewise in appeal, or on attachment. *2 Hawk. P. C.* 141, 373.

On an indictment, information or action, for any crime whatsoever under the degree of capital, the defendant may, by the favour of the court, appear by attorney; and this he may do as well before plea pleaded, as in the proceeding after, till conviction. *1 Lev.* 146. *Kelw.* 165. *Dyer* 346. *Cro. Jac.* 462.

If husband and wife are sued, the husband is to make attorney for her. *2 Saund.* 213.

If an idiot doth sue or defend, he cannot appear by guardian, *prochein amis*, or attorney, but must appear in proper person; but otherwise of him who becomes *non compos mentis*; for he shall appear by guardian if within age, or by attorney if of full age. *Co. Lit.* 135. b. *2 Inst.* 390. *4 Co.* 124.

A corporation aggregate of many persons cannot appear in person, but by attorney, and such appearance is good. *10 Rep.* 32. in the case of *Sutton's Hospital*.

If a man is bound to appear in court on the first day of the term, it shall be intended the first day in common understanding, *viz.* the first day in full term. *1 Lill.* 83. *2 Leon.* 4. In case the defendant's attorney doth receive a declaration against his client from the plaintiff's attorney; this obliges the attorney to appear to it: and if an attorney has a warrant from the defendant to be his attorney in a suit depending in *B. R.* and he files common bail accordingly; it has been held, that he must appear by that warrant in all suits against the defendant in the same term; provided declarations are filed in the office, and copies delivered to the defendant, or his attorney, who filed the bail, before the end of the term his bail is filed. For the defendant being, after appearance and bail put in, supposed to be in custody of the marshal, the attorney that appears for him is bound to receive any declaration that is brought against him during that term. *Comp. Attorn.*

Attornies subscribing warrants to appear, are liable to a penalty of 5*l.* and attachment, upon non-appearance. And where an attorney promises to appear for his client, the court will compel him to appear and put in common bail, in such time as is usual by the course of the court; and that although the attorney say he hath no warrant for appearance: nor shall repealing a warrant of attorney, to delay proceedings, excuse the attorney for his not appearing, who may be compelled by the court. *1 Lill.* 83, 84. The defendant's attorney is to file his warrant the same term he appears, and the plaintiff the term he declares, under penalties by *Stat. 4 & 5 Ann. cap. 16*.

An attorney is not compellable to appear for any one, unless he take his fee, or back the warrant; after which the court will compel him to appear. *1 Salk.* 87.

If an attorney appears, and judgment is entered against his client, the court will not set aside the judgment, tho' the attorney had no warrant, if the attorney be able and responsible; for the judgment is regular, and the plaintiff is not to suffer when in no default; but if the attorney

be not responsible or suspicious, the judgment will be set aside; for otherwise the defendant has no remedy, and any one may be undone by that means. *1 Salk.* 86.

Attachment denied by the court against an attorney, who appeared for the plaintiff without a warrant; but said an action on the case lies. *Comb.* 2.

In actions by original, appearances must be entered with the Filazer of the county; and if by bill, they shall be entered with the Prothonotary: and appearances and common bail are to be entered and filed by the defendant within eight days after the return of the process, on which he was arrested, &c. on pain of forfeiting 5*l.* to the plaintiff, for which the court shall forthwith award judgment and execution. *5 & 6 W. & M. c. 21*. If the defendant does not appear and find bail, the plaintiff's attorney is to call upon the sheriff for the return of the writ, whether the defendant be arrested, or not; and proceed accordingly.

On two *nibils* returned upon a *scire facias* *scire facias*, they amount to a *scire feci*, and the plaintiff giving role, the defendant is to appear, and judgment shall be had against him by default: and where a defendant doth not plead after appearance, judgment may be had against him. *Style* 208. Upon a party's appearing, errors in writs are in many cases salved, and the party may be obliged to answer as if there had been no such error. *2 Hawk.* 302. Where the first process in an inferior court is a *capias* which ought not to be, it is salved and made good by appearance; for the defendant hath by his appearing admitted the writ to be legal. *Lutw.* 954. For, in inferior courts, regularly a *plaint* should be levied, and summons issued, and returned before suing forth the *capias*. On appearance, a writ hath had its end, and the plaintiff shall declare: also an appearance takes away all discontinuance, and had process before it. *Jenk. Cent.* 57.

By late statutes, where a defendant is served with a copy of process, in actions of debt, &c. under 10*l.* a common appearance shall be entered, or common bail filed by the plaintiff, if the defendant doth not appear within eight days after the return of the writ; on affidavit made of the service of the process. *Stat. 12 Geo. 1. c. 26*. And a notice shall be indorsed on the copy of the process, of the intent and meaning of the service, for the defendant to appear, &c. by *5 Geo. 2. c. 17*.

A wife may appear without her husband. *Wilf. Rep. part 1.* 264. A man may appear before the return of a *capias ad respondendum*. *Id.* 39. For the appearance is to the suit.

Appearance in person and by attorney are very different. Vide *1 Sid.* 93, 322, 392. *4 Rep.* 71. *1 Lev.* 80. *Ray.* 59.

Appearance by guardian and next friend. Vide *Infants, &c.*

Appendant, (appendens) Is a thing of inheritance, belonging to another inheritance that is more worthy. As an advowson, common, court, &c. may be appendant to a manor: common of fishing, appendant to a freehold: land appendant to an office: a seat in a church to a house, &c. But land is not appendant to land, both being corporeal, and one thing corporeal may not be appendant to another that is corporeal; but an incorporeal thing may be appendant to it. *1 Inst.* 121. *4 Rep.* 86. *Daw.* *Abr.* 500. A forest may be appendant to an honour; and waifs and estrays to a leet. *1 Co. Inst.* 367. And incorporeal things, advowsons, ways, courts, commons, and the like, are properly parcel of and appendant to corporeal things; as houses, lands, manors, &c. *Plowd.* 170. *4 Rep.* 38. If tenant in tail of a manor whereunto an advowson is appendant is disseised, and the disseisor suffers an usurpation; by the disseisee's entering into the manor, he is restored to the advowson. *1 Inst.* 49. But if one disseise me of common appendant belonging to my manor, and during the disseisin I sell the manor; by this the common is extinct for ever. *4 E. 3.* 21. *11 Rep.* 47. Common of estovers cannot be appendant to land; but to a house to be spent there. *1 Inst.* 120. By the grant of a messuage, the orchard and garden will pass as appendant.

Appendants are ever by prescription, and this makes a distinction between appendants and appurtenances, for appur-

appurtenances may be created in some cases at this day; as if a man at this day grant to a man and his heirs, common in such a moor for his beasts, levant or couching upon his manor; or if he grant to another common of shevers or turbary in fee-simple, to be burnt or spent within his manor; by these grants, these commons are appurtenant to the manor, and shall pass by the grant thereof; in the Civil law it is called *adjunctum*. Co. Lit. 121. b.

What things may be appendant, vide *Pl. Com.* 103. b. 104. b. 170.

Appenditia, The *appendages* or pertinences of an estate:—*Simon earl of Northampton gave to the knights templars his manor of Merton in com. Oxon. cum omnibus appenditiis suis*.—*Kenet's Paroch. Antiq.* 110. Hence our pences, or pent-houses, are called *appenditia domus*, &c.

Appannage, or *apannage*, (Fr.) Is derived from *appendendo*; or the German word *apanage*, signifying a portion. It is used for a child's part or portion; and is properly the portion of the king's younger children in France, where, by a fundamental law, called the *law of apennages*, the king's younger sons have duchies, counties, or baronies granted to them and their heirs, &c. the reversion being reserved to the crown, and all matters of regality as to coinage, and levying taxes in such territories. *Spelman Gloss.*

Appensura, The payment of money at the scale or by weight. — *Dedit regi prefato appensuram novum librum purissimi auri juxta magnum pondus Normannorum*. Hist. Elien. edit. Gale, l. 2. c. 19.

Apples, A duty is granted on all apples imported into Great Britain, to be paid before landing thereof, by Stat. 10 Geo. 2. c. 27.

By what measure apples are to be sold, see 1 Ann. St. 1. c. 15.

Appoiare, Is a word used in old historians, and signifies to lean on, or prop up any thing, &c. *Walsingham ann.* 1271. *Mat. Paris. Chron. Angl. Regis ann.* 1321.

Apponere, To pledge or pawn.—*Accepta à fratre Guillelmo summa non modica Normanniam illi apponuit*. *Nebenbrunfels, lib.* 1. c. 2.

Appportionment, (*apportionamentum*) Is a dividing of a rent, &c. into parts, according as the land out of which it issues is divided among two or more. If a stranger recovers part of the land, a lessee shall pay, having regard to that recovered, and what remains in his hands. Where the lessor recovers part of the land: or enters for a forfeiture into part thereof; the rent shall be *apportioned*, 1 Inst. 148. If a man leases three acres, rendering rent, and afterwards grants away one acre, the rent shall be *apportioned*. 1 Inst. 144. Lessee for years leases for years, rendering rent, and after devises this rent to three persons, this rent may be *apportioned*, *Danv. Abr.* 505. If a lessee for life or years under rent, surrenders part of the land, the rent shall be *apportioned*: but where the grantee of a rent-charge purchases part of the land, there all is extinct. *Moor*, 231. A rent-charge, issuing out of land, may not be *apportioned*: nor shall things entire, as if one holds lands by service to pay yearly to the lord, at such a feast, a horse, &c. 1 Inst. 149. But if part of the land, out of which a rent-charge issues, descends to the grantee of the rent, this shall be *apportioned*. *Danv.* 507.

A grantee of a rent releases part of the rent to the grantor, this doth not extinguish the residue, but it shall be *apportioned*: for here the grantee dealeth not with the land, only the rent. Co. Lit. 148. On partition of lands out of which a rent is issuing, the rent shall be *apportioned*. *Danv. Abr.* 507. And where lands held by lease rendering rent are extended upon eject, one moiety of the rent shall be *apportioned* to the lessor. *Nid.* 503. If part of lands leased is surrounded by fresh water, there shall be no *apportionment* of rent: but if it be surrounded with the sea, there shall be an *apportionment* of the rent. *Dyer* 56. A man purchases part of the land where he hath common appurtenant, the common shall be *apportioned*: of common appurtenant it is otherwise, and if by the act of the party, the common is extinct. 3 Rep. 79. Common appurtenant and appurtenant may be *apportioned* on alienation of

part of the land to which it is appendant or appurtenant. *Wood's Inst.* 199. If where a person has common of pasture sans number, part of the land descends to him, this being intire and uncertain cannot be *apportioned*: but if it had been common certain, it should have been *apportioned*. 1 Inst. 149. Conditions generally are intire, and cannot be *apportioned* by the act of the party. 1 Nels. Abr. 227. A contract may not be divided or *apportioned*, so as to subject a man to two actions. 1 Salt. 65.

Apportum, (from the Fr. *apport*) Signifies properly the revenue or profit which a thing brings in to the owner: and it was commonly used for a corody or pension. It hath also been applied to an augmentation given to an abbot out of the profits of a manor for his better support. — *Ita quod profectus manerii predicti nomine apporti, quolibet anno prefato A. in subventionem sustentationis sue subventur*, &c. Anno 22 Ed. 3.

Appostat of Sheriffs, The charging them with money received upon their accounts in the Exchequer. Stat. 22 & 23 Car. 2.

Appraisers of goods are to be sworn to make true *appraisements*; and valuing the goods too high, shall be obliged to take them at the price *appraised*. Statute 11 Ed. 1. Stat. *Alton Barnet*.

Appendage, (Fr.) A fee or profit *appendre*, is fee or profit to be taken or received. Anno 2 & 3 Ex. 6. cap. 8.

Apprentice, (*apprenticus*, Fr. *apprenti*, from *apprendre* to learn) Signifies a young person bound by indentures to a tradesman or artificer, who upon certain covenants is to teach him his mystery or trade: these *apprentices* are a kind of bond-men, differing only in that they are servants by covenant, and for a certain term, usually seven years; and they live for the most part more reputably. *Smith's Rep. Adel. lib.* 3. cap. 3.

It will be proper under this head to explain—

- I. Who may be bound apprentices, and in what manner; and who are compellable to receive them.
- II. How they are to be provided for and governed during their apprenticeship, and in what manner they are to be assigned, &c.
- III. What trades may not be exercised without having served an apprenticeship.
- IV. How apprentices may acquire settlements.
- V. For what offences they are punishable, and how.

I. It seems clearly agreed, that by the Common law infants, or persons under the age of twenty-one years, cannot bind themselves apprentices, in such a manner as to intitle their masters to an action of covenant, or other action against them for departing from their service, or other breaches of their indentures; which makes it necessary, according to the usual practice, to get some of their friends to be bound for the faithful discharge of their offices, according to the terms agreed on. 1 Co. 89. b. 2 Inst. 379, 380. 3 Leon. 63. *Parish* 15. And notwithstanding the fifth of Eliz. c. 4. enacts, that although persons bound apprentices shall be within age at the time of making their indentures, they shall be bound to serve for the years in their indentures contained, as if they were at full age at the time of making of them; it hath been held, that although an Infant may voluntarily bind himself an apprentice, and if he continue an apprentice for seven years, he may have the benefit to use his trade; yet neither at the Common law, nor by any words of the abovementioned statute, can a covenant or obligation of an infant, for his apprenticeship, bind him; but if he misbehaves himself, the master may correct him in his service, or complain to a justice of peace, to have him punished according to the statute: but no remedy lieth against an Infant upon such covenant. *Cris. Car.* 179. *Cris. Jac.* 104. S. P.

But if any one entices an apprentice from his master's service, or harbours him after notice, the master may maintain a special action on the case, against the person so doing. *Vide* 1 Salt. 380.

By the custom of London, an infant unmarried, and above the age of fourteen, may bind himself apprentice to a freeman of London, by indenture with proper covenants;

ants; which covenants, by the custom of London, shall be as binding as if he were of full age. *Moor* 134. 2 *Bulst.* 192. 2 *Rel. Rep.* 305. *Palm.* 361. 1 *Mod.* 271. 2 *Keb.* 687. But a waterman's apprentice is not, within the custom of London, to bind himself being under twenty-one. *Arg. and agreed by all.* 6 *Mod.* 69. *Mich.* 2 *Ann. B. R.* in the case of *Barber v. Dennis.*

A freeman's widow may take a maid apprentice for seven years, and inroll her as a youth; if she be above fourteen years old: and if an exchange woman, that hath a husband free of London, ~~and~~ such apprentice, she shall be bound to the husband; and may be made free, at the end of the apprenticeship, if she be then unmarried. *lex Londonen.* 48.

By Stat. 5 *Eliz. c. 4. sect. 35.* The justices may compel certain persons under age to be bound as apprentices, and on refusal may commit them, &c. And by Statute 42 *Eliz. c. 2.* Churchwardens and overseers of the poor may bind out poor apprentices, by assent of two justices of peace. And persons receiving money with poor apprentices, where money is given for placing such out, are to give security for repayment in seven years, for the binding out others, &c. 7 *Jac. 1. c. 3.* And if any person refuse to accept a poor apprentice, he shall forfeit 10 *l.* Stat. 8 & 9 *W. 3.* Also justices of peace and churchwardens, &c. may put out poor boys apprentice to the sea-service. 2 *Ann. c. 6.*

As to the manner of their being bound—

By the Statute 5 *El. c. 4. sect. 25.* An apprentice must be bound by deed indented.

And as an apprentice can only be bound by deed, so it is necessary, according to the custom of some places, that such deed or indenture be inrolled; as in London, if the indentures be not inrolled before the chamberlain within a year, upon a petition to the mayor and aldermen, &c. a *scire fac* shall issue to the master, to shew cause why not inrolled; and if it was through the master's default, the apprentice may sue out his indentures, and be discharged; otherwise if through the fault of the apprentice: as if he would not come to present himself before the chamberlain, &c. for it cannot be inrolled, unless the apprentice be in court and acknowledge it. 2 *Rel. Rep.* 305. *Palm.* 361. 1 *Mod.* 271.

Indentures are likewise to be stamped, and are chargeable with several duties by act of parliament.

A duty of 6 *d.* in the pound under 50 *l.* and 12 *d.* in the pound for sums exceeding it, given with apprentices (except poor apprentices) is granted by statute; to be paid in a month, within the weekly bills of mortality, and in any other part of Great Britain, within two months after indentures executed, &c. And if the full sum agreed be not inserted, or the duty not paid, indentures shall be void, and apprentices not capable of following trades; also the masters are liable to penalties. 8 *Ann. c. 9.* 9 *Ann. c. 21.*

By the Stat. 9 *Ann. c. 21.* If the master shall neglect to pay the duties within the time limited, he shall forfeit 50 *l.* half to the king, and half, with full costs, to him who shall sue.

And by the Stat. 18 *Geo. 2. cap. 22. sect. 23, 24.* If he shall neglect to pay the same as aforesaid, he shall, besides all other penalties, forfeit double duty.

But there are several statutes allowing further time to pay the duties, and stamp indentures, thro' neglect omitted, &c. Stat. 6 & 7 *Geo. 1. c. 2.* 3 *Geo. 2, &c.* And acts of indemnity of this nature are usually passed every two or three years.

By the 20 *G. 2. cap. 45. sect. 5.* If any master, having forfeited the double duty, shall pay the same, and tender the indenture to be stamped, within two years after the determination of the apprenticeship, and before suit hath been commenced for the penalties, the indenture shall be valid, and the penalties discharged.

Se. 6, 7. And if after the master shall have forfeited the double duty, the apprentice shall in the presence of, or by writing under his hand signed in the presence of one witness, require his master to pay the same, and the master shall not do it in three months; and such apprentice shall at any time within two years after the determination of his apprenticeship pay the double duty, he may in three

months after such payment, demand of his master double the sum contracted for in the indenture; and, if not paid in three months after, may recover the same by action at law, with full costs. And the apprentice immediately after payment of the said double duties, (if his apprenticeship shall not be then expired) and signifying by writing under his hand, that he desires to be discharged from his apprenticeship, shall be discharged accordingly, and shall have the same benefit of the time he hath served as he would have had in case he had been assigned, or turned over to a new master.

Se. 8. And where any prosecution shall be commenced against the master for the penalties, if the apprentice shall pay the double duty at any time in two years after the end of his apprenticeship, he may thereupon exercise his trade, and the indenture shall be valid, and may be given in evidence.

II. With regard to their being procured for, &c.

As by the Stat. 5 *Eliz.* the justices of peace have a power of imposing an apprentice on a master, in consequence thereof an indictment lies for disobedience to their orders, either in not receiving, or receiving and after turning off, or not providing for such apprentice; for tho' an act of parliament prescribes an easier way of proceeding by complaint; yet that does not exclude the remedy by indictment. 6 *Mod.* 163. 1 *Salk.* 381.

The justices of peace may discharge an apprentice not only on the default of the master, but also on his own default; for in such case it is but reasonable that the contracts, which were made by their authority, should be dissolved by the same power. *Salk.* 108. 5 *Mod.* 139. 2 *Salk.* 471.

Justices may not only discharge apprentices, but may oblige the master to refund part of the money.

It hath been held, that an order on the master to return money is good, tho' it is not averred that he had any with the apprentice; for the order being to return money, is as necessary a proof of the receipt of it, as if it had been expressly alleged: and in this case the court seemed to be of opinion, that the justices had jurisdiction as to discharging and obliging the master to refund, as well in other trades as those mentioned in the statute; and that the justices are not obliged in their orders to set forth all the steps they take in their proceeding, there being nothing in the act which makes it necessary, and that there was a known and established distinction between orders and convictions. *Trin. 7 Geo. 2. in B. R. The king v. Amies.*

Justices have likewise a power to settle differences between masters and apprentices.

By the Stat. 20 *Geo. 2. c. 19.* Any two justices, upon complaint of any apprentice put out by the parish, or with whom no more than 5 *l.* was paid, of any misusage, refusal of necessary provision, cruelty, or other ill treatment by his master, may summon the master to appear before them, and upon proof of the complaint on oath to their satisfaction, (whether the master be present or not, if service of the summons be proved) to discharge such apprentice by warrant or certificate, for which no fee shall be paid: and on complaint of the master against any such apprentice, touching any misdemeanour, miscarriage, or ill behaviour, the justices may punish the offender by commitment to the house of correction, there to be corrected and kept to hard labour, not exceeding a calendar month; or otherwise by discharging such offender. Either party may appeal to the sessions, and the determination there is to be final. By 31 *G. 2. c. 11.* This act is extended to servants in husbandry, though hired for less than a year.

With regard to the assigning of apprentices, it hath been held, that an apprentice is not assignable. He cannot be bound nor discharged without deed. 1 *Salk.* 68. *pl. 7, Mich. 13 W. 3. B. R.*

But though an apprentice is not assignable, yet such assignment amounts to a contract between the two masters, that the child should serve the latter. 1 *Salk.* 68. *pl. 7. Mich. 13 W. 3. B. R. Caster v. Eccles parish.*

L'kewife

Likewise, by the custom of the city of London, an apprentice may be turned over from one master to another: and if the master refuse to make the apprentice free at the end of the term, the chamberlain may make him free: in other corporations, there must be a *mandamus* to the mayor, &c. to make him free in such case. *Danv. Abr.* 421. *Wood's Inst.* 51.

But it hath been held, that tho' justices of peace have a jurisdiction of discharging apprentices, and may bind them to other masters, that they cannot turn them over; and therefore an order that an apprentice, whose master was dead, should serve the remainder of his time with his master's widow's second husband, was quashed; because the justices have nothing to do about turning over an apprentice; and that tho' he applied to them, that could not give them a jurisdiction. *Comb.* 324.

It seems agreed, that if a man be bound to instruct an apprentice in a trade for seven years, and the master dies, that the condition is dispensed with, being a thing personal; but if he be bound further, that in the mean time he will find him in meat, drink, and cloathing and other necessities, here the death of the master doth not dispense with the condition, but his executors shall be bound to perform it as far as they have assets. *1 Sid.* 216. *1 Keb.* 761, 820. *1 Lew.* 177.

But if a person is bound apprentice by a justice of peace, and the master happens to die before the term expired, the justices have no power to oblige his executor, by their order, to receive such apprentice and maintain him; for by this method the executor is deprived of the liberty of pleading *plene administravit*, which he may do, in case covenant be brought against him, and must maintain the apprentice, whether he hath assets or not. *Carth.* 231. *1 Salk.* 66. *1 Show.* 405. It is said, however, that the executor or administrator may bind him to another master for the remaining part of his time. *Burn* 38.

But it is said, that in this case of the master's dying, by the custom of London, the executor must put the apprentice to another master of the same trade. *1 Salk.* 66. *per Holt Ch.*]

Whatever an apprentice gains is for the use of his master; and whether he was legally bound or no, is not material, if he was an apprentice *de facto*. *Salk.* 68. For enticing an apprentice to imbezil goods, indictment will lie. *1 Salk.* 330. A master may be indicted for not providing for, or turning away an apprentice. If a master gives an apprentice licence to leave him, it cannot afterwards be recalled. *Mod. Caf.* 70. An apprentice marries, without the master's privity, that will not justify his turning him away, but he must sue his covenant. *2 Vern.* 492. By the custom of the city of London, a freeman may turn away his apprentice for gaming. *Ibid.* 241. Though if a master turns an apprentice away on account of negligence, &c. equity may decree him to refund part of the money given with him. *1 Vern. Rep.* 460. As no apprentice can be made without writing; so none may be discharged by his master, but by writing under his hand, and with the allowance of a justice of peace, by statute. *Salk.* 121.

III. As to the exercising of trades.

By the Common law no man may be prohibited to work in any lawful trade, or in more trades than one, at his pleasure. *11 Co.* 53.

So that without an act of parliament no man may be restrained, either from working in any lawful trade, or using diverse mysteries or trades; therefore an act of parliament made to restrain any person herein, must be taken strictly, and not favourably as acts made in affirmance of the Common law. *Burn* 39.

It is enacted by the *5 Eliz. cap. 4, sect. 31*. "That it shall not be lawful to any person or persons, other than such as now do lawfully use or exercise any art, mystery, or manual occupation, to set up, occupy, use or exercise any craft, mystery or occupation, now used or occupied within the realm of England or Wales, except he shall have been brought up therein seven years, at the least, as an apprentice, in manner and form aforesaid; nor to set any person on work in such mystery, art or occupation, being not a workman at this day, except he shall have been

apprentice, as is aforesaid; or else having served as an apprentice, as is aforesaid, shall or will become a journeyman, or hired by the year; upon pain that every person willingly offending, or doing the contrary, shall forfeit and lose for every default forty shillings for every month."

It hath been ruled, that there are many trades within the general words and equity of this act, besides those which are particularly enumerated therein; yet it seems agreed, and hath frequently been adjudged, that in every indictment, &c. it must be alledged, that it was a trade at the time of making the statute, for the words thereof are, *any craft, mystery or occupation, now used, &c.* from whence it seems to follow, that a new manufacture, which to all other purposes may be called a trade, is yet not a trade within this statute. *2 Salk.* 611. *Palm.* 528. *1 Sid.* 175.

Also it seems agreed, that the act only extends to such trades as imply mystery and craft, and require skill and experience; that therefore merchants, husbandmen, gardeners, &c. are not within the statute; and on this foundation it hath been held, that a hemp-dresser is not within the statute, as not requiring much learning or skill, and being what every husbandman doth use for his necessary occasions. *8 Co.* 136. *2 Bull.* 190. *Cro. Car.* 499.

It is clearly agreed, that the following the common trade of a brewer, baker, or cook, is within the statute, as unskillfulness herein may be very prejudicial to the lives and healths of his majesty's subjects; but it is at the same time agreed, that the exercising of any of these trades in a man's own house or family, or in a private person's house, is not within the restraint of the statute. *11 Co.* 54. *m. Cro. Car.* 499. *Hob.* 183, 211. *Moor* 886. *8 Co.* 129. *Palm.* 542. *Lit. Rep.* 251. *Bridg.* 141.

But it hath been held, that this statute doth not restrain a man from using several trades, so as he had been an apprentice to all; wherefore it indemnifies all petty chapmen in little towns and villages; because their masters kept the same mixed trades there before. *Carth.* 163.

A man may exercise as many trades as he hath worked at, or served as an apprentice to, for seven years. *Wils. Rep. part 2.* 168.

It hath been resolved, that there is no occasion for any actual binding, but that the following a trade for seven years, is a sufficient qualification within the statute. *1 Salk.* 67. *2 Salk.* 613.

By the statutes *2 P. & M. c. 11.* *5 Eliz. c. 4.* Aliens and denizens are restrained to use any handicraft or trade therein mentioned, unless they have served seven years apprenticeship within the realm, under the penalty of 40s. per month. *Hurt.* 132. But it hath been adjudged, that if an apprentice serve seven years beyond sea, he shall be excused from the penalties of the statute. *5 Eliz.* And so if he serves seven years, tho' he was never bound. *1 Salk.* 76. And apprentices going into the army in the wars, and set up their trades in the county where born, tho' they did not serve out their times. *Stat.* 10 & 11.

So it hath been held, that serving five years to a trade out of England and two in England, is sufficient to satisfy the statute; but that there must be a service of a full time either in England, or out of England; and therefore serving five years in any country, where by the law of the country more is not required, will not qualify a man to use the trade in England. *Ca. in Law and Eq.* 70.

By the statute *31 Eliz. cap. 5, sect. 7.* It is enacted, "That all suits for using a trade without having been brought up in it, shall be laid and prosecuted in the general quarter sessions of the peace, or assizes in the same county where the offence shall be committed, or otherwise inquired of, heard and determined in the assizes, or general quarter sessions of the peace in the same county where such offence shall be committed, or in the leet within which it shall happen, and not in any wise out of the same county where such offence shall happen or be committed."

In the construction of this statute it hath been held, that it remains not a suit in the King's Bench or Exchequer, for such offence happening in the same county where these courts are sitting; for the negative words of the

the statute are not, that such suits shall not be brought in any other court, but that they shall not be brought in any other county; and the prerogative of these high courts shall not be restrained without express words. *Cro. Jac.* 178. *Hob.* 184. *1 Salk.* 373.

But where the offence is in a different county, such suits in these, or any other courts out of the proper county seem to be within the express words of the statute. *Hob.* 184, 327. *Cro. Jac.* 85.

Infants voluntarily binding themselves apprentice, and continuing seven years, shall have the benefit of their trades; but a bond for their service shall not bind them. *Cro. Car.* 179.

IV. As to apprentices acquiring settlements, it will be necessary to consider the following statutes.

By Stat. 13 & 14 Car. 2. c. 12. On complaint by the churchwardens or overseers within 40 days after any person shall come to settle in any parish, on any tenement, under 10l. a year; two justices (one of whom to be of the quorum) may remove him to the place where he was last legally settled, either as a native, householder, sojourner, apprentice or servant, for the space of 40 days at the least.

By 1 Jac. 2. c. 17. and 3 & 4 W. & M. c. 11. The said 40 days shall be reckoned, not from the time of his coming to inhabit, but from the time of his delivering notice in writing, and of the publication of such notice in the church.

And by the said statute of 3 & 4 Will. & M. c. 11. sect. 8. If any person shall be bound an apprentice by indenture, and inhabit in any town or parish, such binding and inhabitation shall be adjudged a good settlement, though no such notice in writing be delivered and published.

By 31 Geo. 2. c. 11. No apprentice bound by any deed, writing or contract, not indented, being first legally stamped, shall be liable to be removed from the town, parish or place where he or she shall have been so bound an apprentice, and resident forty days, by virtue of any order of removal, granted by two justices of the peace of any county, &c. or by virtue of any order of the justices at their general or quarter sessions, by reason or on account of such deed, writing or contract, not being indented only.

By Statute 12 Ann. st. 1. c. 18. sect. 2. If any person shall be an apprentice bound by indenture, to any person residing under a certificate, in any parish, township, or place, and not afterwards having gained a legal settlement in such parish, &c. such apprentice, by virtue of such apprenticeship, &c. shall not gain any settlement in such parish, &c. but every such apprentice shall have his settlement in such parish, &c. as if he had not been bound apprentice.

And by the 9 & 10 W. c. 11. No person, who shall come into any parish by a certificate, shall be adjudged by any act whatsoever to gain a settlement in such parish, unless he shall bona fide take a tenement of 10l. a year, or execute an annual office in such parish. (And consequently not by apprenticeship.) *Vide* (however) *Ca. of Settlements* 58.

Where one is bound apprentice by indenture, it cannot be discharged but by deed or by sessions, and a hiring after he is bound, or any consequences arising upon such hiring, are intirely void whilst the indenture subsists, and till it is defeasanced; for when an apprentice serves 40 days, by virtue of the indenture, he cannot gain another settlement, tho' his master consents, because he had a settlement by the service under the indenture. *Admitted per cur.* 8 *Mod.* 236. *Pasch.* 10 Geo. *Buckington parish v. Sewington.*

But binding an apprentice and serving will not make a settlement; but the settlement must be by inhabiting, which cannot be but where the party lodges; *per Fortescue* and *Raymond* J. 2 *Ld. Raym. Rep.* 1731, S. C. by name of *The Inhabitants of St. John Baptist in Dewizes v. The Inhabitants of Bishops Cannings.* *Vide Cases of Settlements* 118. pl. 159. *Trin.* 1724. *B. R.*

A poor child being bound apprentice at A. was assigned over to another master that lived in B. held he should gain a settlement at B. where his second master lived. *1 Salk.* 68. pl. 7. *Mich.* 13 W. 3. *B. R. Caster v. Aicles parish.*

Upon a special order of sessions the case was stated, that an apprentice was bound to A. in one parish, but by agreement served B. in another parish, and the sessions settled him with B. and by the court; He gains a settlement in the last place; for a person may serve his master in another parish or place; and altho' he serves another man, yet it is by consent of his master, and the benefit accrues to his master. *Stran.* 554. *Cases of S.* 153. *Trin.* 9 Geo. 1. Between the parishes of Allhallows on the Wall and St. Olave in Surry.

The son was bound an apprentice to his father, and the father gave up his indenture to the son, and bound him out to a service into another parish for a year, where he served, but did not cancel the indenture, and becoming poor the justices ordered him last legally settled in the parish where the father lived, because the indenture being still in force, his apprenticeship continued; *per cur.* The indenture not being cancelled, the obligation of the apprentice continues. 6 *Mod.* 190, 191.

V. As to their punishment for particular offences, it is to be observed, That

At Common law, a servant or apprentice, without any regard to age, may be guilty of felony in feloniously taking away the goods of their master, tho' they were goods under their charge, as a shepherd, butler, &c. and may at this day for any such offence be indicted, as for felony at Common law; but at Common law, if a man had delivered goods to his servant to keep, or carry for him, and he carried them away *animo furandi*; this was considered only a breach of trust, but not felony. *1 Hale's Hist. P. C.* 505, 666.

But now by the statute of 21 H. 8. cap. 7. It is enacted, that servants guilty of a breach of trust in imbeziling money, goods, &c. delivered to them to the value of 40s. or above, are guilty of felony: with a proviso nevertheless, that the act do not extend to apprentices, nor to persons under the age of eighteen years.

By the act of 27 H. 8. cap. 17. Clergy was taken away in this case, if the indictment were laid specially upon the act of 21 H. 8. and pursuant to the same, and by the act 38 H. 8. cap. 2. this act of 21 H. 8. was made perpetual; but by the act of 1 Ed. 6. cap. 12. these acts were both repealed; but again, by the act of 5 Eliz. cap. 10. this act of 27 H. 8. was re-enacted and revived; but it did not revive the act of 27 H. 8. for taking away clergy. But now by 12 Ann. cap. 7. clergy in such case is taken from facts committed in any house or out-house, except as to apprentices under the age of fifteen years robbing their masters. *1 Hale's P. C.* 666, 667.

The statute however extends only to such as were servants to the owner of the goods, both at the time they were delivered, and also at the time when they were stolen. *1 Hawk. P. C.* 92.

Therefore a receiver, who having received his master's rents runs away with them; or a servant, who being intrusted to sell goods, or to receive money due on a bond, sells the goods, &c. and departs with the money, is not within the statute; but that a servant who receives his master's goods from another servant, to keep for the master, is as much guilty as if he had received them from the master's own hands; because such delivery is looked upon as a delivery by the master. *Dyer* 5. pl. 2, 3. 3 *Inst.* 105. *1 Hawk. P. C.* 92.

As to apprenticeship, *vide Black. Com.* 1 V. 427, 8.

Appropriation, (*appropriatio*, from the Fr. *approprier*) Is the annexing of a benefice, originally *juris divini* & in *patrimonio nullius*, to the proper and perpetual use of some religious house, bishoprick, college, or spiritual person, to enjoy for ever. And when appropriation is made, the patron is perpetual parson, and hath perpetual institution and induction; for the appropriation alone is a sufficient admission, &c. *Plowd.* 499. To make an appropriation, the king's licence is to be obtained in Chancery, the consent of the ordinary, patron and incumbent, where the church is full, and of the diocesan, and patron, if the benefice is void. *Plowd.* 496. 15 R. 2. c. 6. Appropriation made during the vacancy of the benefice is executed immediately; and when the church is full, by apt words, the patron is constituted parson, after it becomes

become void. 11 Rep. 11. An appropriation may be by the king alone, where he himself is patron: as when by letters patent he grants the advowson which he is seised of in right of his crown to a dean and chapter, &c. *Plowd.* 499. No appropriation can be made without licence of the king. 8 Rep. 11. Nor may it be properly, unless to a spiritual person capable of the cure: it may be to a bishop, &c. and his successors. *Danv. Abr.* 511.

The act of endowment by the bishop might be made, either in the act of appropriation, or by a subsequent act and a separate instrument; which is mentioned in this place, that in searching for endowments in the registries of bishops, or the court of augmentations, neither the one nor the other should be neglected; for altho' a separate act or instrument of endowment may not be found, yet it is possible the endowment may have been made in the act of appropriation. *Gibf.* 719.

Upon the making an appropriation, an annual pension was reserved to the bishop and his successors, commonly called an *indemnity*, and payable by the body to whom the appropriation was made. The ground of which reservation, in an antient appropriation in the registry of the archbishop of Canterbury, is expressed to be, for a recompence of the profits which the bishop would otherwise have received during the vacation of such churches. *Gibf.* 719.

Where appropriations are made, a vicar is to be endowed to serve the cure: and formerly in licences of appropriation, it was expressed that the diocesan should also provide a convenient sum of money to be yearly paid out of the fruits, towards the sustentation of the poor of the parish. *Stat.* 15 R. 2. c. 6. A vicarage endowed may not be appropriated; but it may be united to another church, or to a dean and chapter, or college, with the king's consent. *Hob.* 307.

A vicarage by endowment becomes a benefice distinct from the parsonage. As the vicar is endowed with separate revenues, and is now enabled by the law to recover his temporal rights, without aid of parson or patron; so hath he the whole cure of souls transferred to him, by institution from the bishop. It is true, in some places, both the parson and the vicar do receive institution from the bishop to the same church, as it is in the case of *finecures*; the original of which was thus: the rector (with proper consent) had a power to intitle a vicar in his church, to officiate under him; and this was often done; and by this means, two persons were instituted to the same church, and both to the cure of souls, and both did actually officiate. So that however the rectors of *finecures*, by having been long excused from residence, are in the common opinion discharged from the cure of souls, (which is the reason of the name); and however the cure is said in the law-books to be in them *habitualliter* only; yet in strictness of law, and with regard to their original institution, the cure is in them *actualiter*, as much as it is in the vicar. *Gibf.* 719.

The parson, by making the endowment, acquires the patronage of the vicarage. For in order to the appropriation of a parsonage, the inheritance of the advowson was to be transferred to the corporation to which the church was to be appropriated; and then, the vicarage being derived out of the parsonage, the parson of common right must be patron thereof. So that if the parson makes a lease of the parsonage, (without making a special reservation to himself of the right of presenting to the vicarage) the patronage of the vicarage passeth as incident to it. But it was held in the 21 Ja. that the parishioners may prescribe for the choice of a vicar. And before that, in the 16 Ja. in the case of *Stirley* and *Underhill*, it was declared by the court, that tho' the advowson of the vicarage of common right is appendant to the rectory, yet it may be appendant to a manor; as having been reserved specially upon the appropriation. *Gibf.* 719.

An appropriation cannot regularly be granted over, neither can it endure longer than the body spiritual to which it was at first appropriated, because by the appropriation not only the *glebe* and *tithes* do pass, which might be granted away if that could be granted over, but it also giveth the person, to whom the appropriation is made, a spiritual function; it makes him parson of the church,

and supplieth institution and induction, which being the highest parts of a trust, cannot for that reason be assigned over, and therefore every instrument of appropriation runs thus, (*viz.*) That they and *their successors* shall be parsons; and not they and *their assigns*; for by the usual words, that they shall hold the church to *their own use*, they are made parsons. *Hob.* 307. *Wright* versus *Gerard*.

But those to whom granted may make leases of the profits. *Plowd.* 499. If after an appropriation a clerk is presented to the bishop, and instituted and inducted, the benefice returns to its former nature, and the appropriation is dissolved. 7 Rep. 13. But if lessee for years of an appropriation presents thereto, this *disappropriation* shall not bind him in the reversion. *Danv.* 513. If a feme endowed of an advowson appropriate presents to it, the appropriation is dissolved. 1 Inst. 46. If a man recovers the advowson in writ of right, this disappropriates the church: and dissolution of the spiritual corporation disappropriates an appropriation. Though appropriation cannot properly be made, except to spiritual persons, and their successors; yet by the statute 31 H. 8. the king's patentees (although laymen) are rendered capable of parsonages appropriate of dissolved monasteries; but these are generally called *impropriations*. Appropriations have been judged an abuse and robbery of the church and parish priests, &c. *Kennet's Paroch. Antiq.* 433.

The form of a grant of appropriation.

Sciatis quod nos dedimus, &c. decano & capitulo ecclesie cathedralis, &c. Ad-vocation' rectorie ecclesie parochialis, de, &c. Habend. & tenend. &c. iisdem decano & capitulo & successoribus suis in perpetuum. Et ulterius sciatis per presentes quod nos de gratia nostra speciali ac auctoritate nostr. regia suprema & ecclesiastica, qua nunc fungimur, pro nobis, heredibus & successoribus nostris concedimus & licentiam damus predict. decano & capitulo & successoribus suis rectoriam & ecclesiam predict. quando per mortem, resignationem, vel deprivationem, aut per aliquem alium modum quemcunque vacare contigerit, immediate in suos proprios usus tenere sibi & successoribus suis in perpetuum possint & valeant absque molestatione & impedimento nostro, heredum aut successorum nostrorum, ac hoc absque aliqua presentatione, inductione, sive admissione alicujus incumbens ad eandem rectoriam eorum in posterum fiend', ac ulterius.

An appropriation by the patron, or first founder, is thus: Ego A. B. de, &c. concessi ecclesiam & advocationem meam de H. cum terris & decimis omnibus ad eam pertinentibus, decano de, &c.

Vide, on the subject of appropriation, *Black. Com.* 1 V. 385. 6.

Appropriate Communism, To discommon, and inclose any parcel of land, that was before open common.—Anno D. 1299. The prior and convent of *Burcester*, granted to the rector of *Asherugge* and the *bon hommes* of that place, quod sibi possint appropriare, & includere pro voluntate sua tres acras de communi pastura in *Blaketborn*, &c. *Paroch. Antiq.* 336.

Approve, (*approbare*) To augment a thing to the utmost: to approve land is to make the best benefit of it, by increasing the rent, &c. 2 Inst. 474.

Approvement Is where a man hath common in the lord's waste, and the lord makes an inclosure of part of the waste for himself, leaving sufficient common with egress and regress for the commoners. *Reg. Jud.* 8, 9. If there be not sufficient common left for the tenant, he may have a writ of assize, and shall recover treble damages. *Stat.* 3 & 4 Ed. 6. c. 3. And a commoner may break down an inclosure, if the lord doth inclose part of the common, and not leave sufficient room in the residue. But if any, upon just title of approvement, do make a hedge or ditch for that purpose, which afterwards is thrown down in the night by persons unknown, the towns adjoining may be distrained to make such hedge, &c. for which there is a *noctanter* writ. *Stat.* 13 Ed. 1. c. 46. 2 Inst. 474. Approvement is to be only by inclosure; and the lord may not, by the statutes of approvement, dig pits for gravel, or coal, &c. 1 Roll. Abr. 90.

405. 9 *Re.* 112. Approvement may be made between neighbour and neighbour: though one of them dwell in another town, if the commons join together; and if the lord hath common in the tenant's ground, the tenant may approve. 2 *Iust.* 475. The common is to be common appendant or appurtenant, to be subject to approvement, and not common in gross to a certain number. The word approvement is also used for the profits of the lands themselves. *Cromp. Jurisd.* 152. And the statute of *Merton* 20 *H.* 3. makes mention of land newly approved. *F. N. B.* 71. Approvement ann. 43 *Elix.* c. 11. is the same with improvement.—*Idem* approveamentum.—*Cum omnibus approveamentis & aliis pertinentiis suis.* Mon. Angl. 607. See farther title *Enclosure*, and *Black. Com.* 2 *V.* 34. and 3 *V.* 240, 1.

Approver, or **Prober**, (*approbator*) Is one that confessing felony committed by himself, appealeth or accuseth others to be guilty of the same crime. He is called *approver* in this sense, because mult *prove* what he hath alledged; and that proof was by battle, or the country, at the election of him appealed: and the form of this accusation you may find in *Crom.* 1. *Iust.* 250. See also *Braddon*, lib. 3. *Staundf. Pl. Cor.* 52. If a person indicted of treason or felony, not disabled to accuse, upon his arraignment, before any plea pleaded, and before competent judges, confesseth the indictment, and takes an oath to reveal all treasons and felonies that he knoweth of; and therefore prays a coroner to enter his appeal, or accusation against those that are partners in the crime contained in the indictment; such a one is an *approver*. 3 *Iust.* 129. *H. P. C.* 192. Though the approver is sworn to discover all treasons and felonies, he is not to be an approver but of the offence whereof he is indicted: and this accusation of himself, and oath, makes his accusation of another of the same crime to amount to an indictment; and if his partners are convicted, the king is to pardon him, as to his life: but he ought not to be suffered to continue in the kingdom. Coroners may award process to the sheriff against appellees in the same county, on the discovery of the approver: and the justices of gaol-delivery, &c. have power to award process in any county to apprehend and try them. 2 *Harwk. Pl. Cor.* 208. A man may be an approver against any person within the realm, if there be such a person, and he be named of the county where he dwells; but if there be no such person, the approver shall be hanged for his false appeal. *Ibid.* 206. When a person hath once pleaded Not guilty, he cannot be an approver. 3 *Iust.* 129. And persons attainted of treason or felony shall not be approvers; their accusation will not then be of such credit as to put a man upon his trial. 2 *Harwk.* 205. Vide 5 *H.* 4. *cap.* 2. as to charters of pardon.

Infants under age of discretion may not be approvers: and it being in the discretion of the court to suffer one to be an approver, this method of late hath seldom been practised. But we have, in cases of burglary and robbery on the highway, what seems to amount to the same, by statute; it being ordained, that where persons charged with such crimes, out of prison, discover two others concerned in the crime, they shall have a pardon, &c. *Stat.* 5 *Ann.* c. 31.

Approvers, Anno 9 *H.* 6. Bailiffs of lords in their franchises are called their *approvers*: and approvers in the marches of *Wales* were such as had licence *de vendre & acheter* beasts, &c. But by the Statute 2 *Ed.* 3. c. 12. approvers are such as are sent into counties to increase the farms of hundreds, &c. held by sheriffs. Such persons as have the letting of the king's demesnes, in small manors, are called approvers of the king (*approbatores regis*) anno 51 *H.* 3. And in the *Stat.* 1 *Ed.* 3. c. 8. Sheriffs are called the king's approvers.

Appuare, To take to his own use or profit, *viz.* *domini vasorum & bestiarum*, &c. Appuare se possunt de vastis, &c. *W.* 2. c. 20.

Appurtenances, (*pertinentia*) Derived from the French *appartenir*, to belong to, signify things both corporeal and incorporeal appertaining to another thing as principal: as hamlets to a chief manor; and common of pasture, piscary, &c. Also liberties and services of tenants. *Brit. cap.* 39. If a man grant common of estovers to be burnt

in his manor, these are appurtenant to the manor; for things appurtenant may be granted at this day. *Co. Lit.* 121. Common appurtenant may be to a house, pasture, &c. Outhouses, yards, orchards, and gardens are appurtenant to a messuage; but lands cannot properly be said to be appurtenant to a messuage. 1 *Lill. Abr.* 91. And one messuage cannot be appurtenant to another. *Ibid.* Lands cannot, in the true sense of the words *cum pertinentiis*, be appurtenant to the house; but the word *pertinentis* may be taken in the sense of usually letten or occupied with the house. *Plowd.* 170. Lands shall pass in a lease or devise of a house with the appurtenances, as pertaining to the same, when it hath been used and occupied with it ten years or more; which is judged a sufficient time to make it appertaining to the house. *Cro. El.* 704.

By the later authorities, lands will not pass by the word *appurtenances*, but only such things which do properly belong to the house; as where a man was seised of two houses and of eighty acres of land belonging to one of them, known by a particular name, and made a feoffment of the house and eighty acres to B. B. who made another feoffment to the said feoffor, by which he took back the same house and lands, and forty acres more by another name; and about ten years afterwards he devised this house and all the lands thereunto appertaining, to his youngest son; adjudged, that tho' he used those forty acres with the house for ten years and more, yet it would not pass by these words *thereunto appertaining*, because they were conveyed to him by a new name. *Palm.* 375. *Loftus* versus *Baker*. *Godb.* 352. *S. C.* reported by the name of *Knight's* case. *Cro. Car.* 57. *Hearn* versus *Allen*, *S. P. Hutt.* 85. *S. C.* *Litt. Rep.* 8. *S. C.*

Lands, a common, &c. may be appurtenant to a house; though not a way. 3 *Salk.* 40. Grant of a manor, without the words *cum pertinentiis*, 'tis said will pass all things belonging to the manor. *Owen's Rep.* 31. Where a person hath a messuage, &c. to which estovers are appurtenant, and it is blown down or burnt by the act of God; if the owner re-edify it, in the same place and manner as before, he shall have the antient appurtenances. 4 *Rep.* 86. A turbary may be appurtenant to a house; to a seat in a church, &c. but not to land; for the things must agree in nature and quality. 3 *Salk.* 40. *Vide* tit. *Appendant*, and see *Plowd.* *Com.* 103. b. 104. b. 170. Also *vide* *Com. D.* 1 *V.* tit. *Appendant* and *Appurtenant*.

Aquage, (*aquagium*, *quasi aquæ agium*, i. e. *aqueductus & aquægangium*) A water-course. — *Non liceat alicui de cetero facere dammas vel fordas aut alia impedimenta in aliquibus landeis, watergangiis, fossatis sive aquagiis communibus in morisco prædicto.* *Ordin. Maris. de Romney* fact. temp. Hen. 3. & *Ed.* 1. p. 72.

Arabant, (*ad curiam domini*) Was intended of those who held by the tenure of ploughing and tilling the lord's lands within the manor. *Spelm. Gloss.*

Arace, (*angl.*) To raise, from the French *arracher, evellere*.

Arabo, *In arabo conjurare*, i. e. To make oath in the church, or some other holy place; for according to the *Riparian* laws, all oaths were made in the church upon the relics of saints.

Aratrum Terræ, As much as can be tilled with one plough.—*Hoc manerium est 30 aratrorum.* *Tiborn. anno* 616. *Aratura terræ* is the service which the tenant is to do for his lord in ploughing his land.

Arbitrator, (*Lat.*) Is a private extraordinary judge between party and party, chosen by mutual consent, to determine controversies between them. *West. Symb. sect.* 21. And arbitrators are so called, because they have an arbitrary power; for if they observe the submission, and keep within due bounds, their sentences are definitive, from which there lies no appeal. 1 *Roll. Abr.* 251. The award of arbitrators is definitive, and being chosen by the parties, they are not tied to such formalities of law as judges in other cases are; and yet they have as great power as other judges to determine the matters in variance; but their determination must be certain, and it is to be according to the express condition of the bond by which the parties submit themselves to their judgment. 1 *Nels. Abr.* 234. *Dyer* 356. The *Chancery* will not give

give relief against the award of the arbitrators, except it be for corruption, &c. And where their award is not strictly binding by the rules of law, the court of equity can decree a performance. *Chanc. Rep.* 279. *1 Vern.* 24. But when arbitrators make their award upon one day, they cannot make another award between the parties on any other day; nor can they do it part at one time, and part at another, altho' all the times are within the submission. *26 Hen. 6.* 52. *39 Hen. 6.* 12. Yet the arbitrators may agree upon a thing one day, and of another thing another time, and at last make an award of the whole. *47 Ed. 3.* 21. *2 Mod. Entr. Engl.* 262.

When there is but one arbitrator, which happens where the matter is referred to two, and they cannot agree, but leave it to be determined by a third person, it is called an *umpirage*. *8 Rep.* 98. But the arbitrators are to refuse, and declare they will make no award, before the umpire shall proceed: though an umpire's award shall be good when the arbitrators make a void award, which is no award. *Lill. Abr.* 170. It is said an umpirage cannot be made till the arbitrators time is out; and if any other power be given to the umpire it is not good, for two persons cannot have a several jurisdiction at one time. *1 Mod. Rep.* 15.

The arbitrators are persons indifferently chosen, to determine the matters in controversy according to their own minds, whether they be matters of law or fact; infants, persons excommunicate, outlawed, &c. may be arbitrators; for every person must use his own discretion in the choice of his judges, and being at liberty to chuse whom he likes best, cannot afterwards object the want of honesty or understanding to them, or that they have not done him justice. *West. Symb. 2 part, sect. 27.*

The arbitrators are persons trusted with the authority, and it is not within their power to assign it.

Neither *natural* nor *legal disabilities* do hinder any one from being an arbitrator; if they are incompetent judges, the fault is in those that chuse them.

Before we dismiss this article, it will be necessary briefly to consider, *what things may be submitted to arbitration, and by whom.*

It is held clearly, that all chattels personal, and personal actions, such as trespass, conspiracy, maintenance, and things of an uncertain nature, may be determined by arbitration, and the right transferred by naked award, though the submission were not by deed; for these being transferrable by the party himself without any solemnity, whatever the parties themselves could do, may be done by the arbitrators, who are their substitutes, and stand in their place; and if on these submissions without deed, the arbitrators award one party a sum certain, he may bring an action of debt for it; but if the award be of doing some other thing, which is beneficial to him, he must have his action on the case. *22 Hen. 6.* 39. *9 Co.* 78. *1 Roll. Abr.* 242.

Bonds are generally executed and exchanged between the parties at variance, to perform the award, for the nonperformance of which action of debt may be brought on the bond. The defendant may prayoyer of the bond and condition, and then plead according to the nature of his case, and the plaintiff reply thereto, or demur, as occasion requires; so that the whole of the case will by these means come before the court.

A debt on a specialty or record, tho' certain, may be submitted and transferred by an award, *amongst other things*, but not by itself. *1 Lev.* 192. But freehold, or inheritance of lands, cannot be determined by arbitration; and therefore there cannot be a partition by an award; for freehold doth not pass without livery. *1 Roll. Abr.* 242. So the interest of an estate for years cannot be transferred by an award; for it is a chattel real. *1 Roll. Abr.* 242. *Contr. Dyer* 183. *a. in marg.* *2 Leon.* 104. *Cro. Eliz.* 223.

If a man be bound to stand to an award, and the arbitrators make an award, that *land shall be conveyed*; if the party refuses the conveyance, he forfeits the obligation. *1 Roll. Abr.* 244. So, if an award be, that one shall pay so much in satisfaction of a specialty; though the specialty is not thereby discharged, yet if he com-

mences an action upon the specialty afterwards, he forfeits his obligation. *1 Roll. Abr.* 242. *2 Cro.* 447.

An annuity is not determinable by award, for it is reckoned in nature of a freehold, and therefore cannot pass without the deed of the party. *9 Hen. 6.* 60. *14 Hen. 4.* 19. *3 Hen. 4.* 6. *1 Roll. Abr.* 266.

It has been doubted, whether leases for years, being chattels real, could be transferred by award; therefore it seems safest when the controversy relates to these, that the parties be bound in mutual obligations to perform the award, and then if the arbitrators award that one shall assign, transfer, &c. the lease to the other, if he refuses, he forfeits his obligation. *1 Roll. Abr.* 242. *9 Co.* 78. *6 Co.* 41.

Causes criminal are not arbitrable, because they ought to be punished for the common good. *West. Symb. part 2. sect. 33.*

Also causes matrimonial seem not arbitrable, because marriage ought to be free, and religion disallows the severing those whom the church hath joined. *West. Symb. part 2. sect. 33.* *1 Roll. Abr.* 252. But the damages a person sustained by a promise of marriage, or any thing relating to a marriage portion, may be submitted. *16 Ed. 4.* 2.

Debts due by specialty cannot be discharged by naked award; but if the submission were by bond, the award would be a good bar, for one specialty may be dissolved by another. *1 Hen. 7.* 16. *b. Dyer* 51. *6 Co.* 44.

A certain and fixed debt is not discharged by an award, but the end and design of an arbitration is to reduce uncertain debts and duties to a certainty; and to award a man a certain debt is to give him no more, nor do any greater thing for him than was done before, for now he can have but an action, and that he might have had before, and to give him less than he had before is to do him a manifest injustice, which the arbitrator cannot do. *Cro. Jac.* 99, 447, 647. *3 Hen. 4.* 4. *4 Hen. 7.* 6. *10 Hen. 7.* 4. *1 Roll. Abr.* 264.

Submissions are likewise general; as of all controversies, debts, dues, &c. and here the arbitrators are not obliged to determine all matters disclosed, but their arbitration of some things will be good, tho' they leave other things undone; but where the submission is special or conditional, *ita quod* an award be made of all controversies depending, they ought to determine all matters whereof they have notice, because here by the express words of the authority, I do not own his determination, unless all matters in controversy are settled; and therefore to determine one without the others, is to act contrary to the authority; but if upon such a submission, the arbitrators make an award but of one thing, it shall be intended there were no others to make an award of, unless the other side shew there was, and that the arbitrators had notice thereof. *Cro. Eliz.* 839. *Cro. Jac.* 200, 355. *8 Co.* 98. *Dyer* 216. *1 Roll. Abr.* 257. *1 Sand.* 32. *1 Brownl.* 63.

As to the persons who may submit to arbitration, it is to be observed, that

Persons that cannot contract, cannot submit to arbitration, therefore *femes covert*, and persons compelled by threats and imprisonment cannot submit. *9 Ed. 3.* 23. *10 Hen. 6.* 14, 19. *Latch* 27.

The husband may submit the chattels he hath in right of his wife to an award, for he may dispose of them. *Style* 351. *March* 77, 78.

If the husband submits to arbitration the chattels the wife hath as executrix or administratrix, this shall bind the wife, because the wife cannot personate any one without the husband during coverture. *21 Hen. 7.* 29. *1 Roll. Rep.* 269. *Cro. Jac.* 447.

If an infant submit to arbitration, he may execute or avoid what his election, as he may all other his contracts. *13 Hen. 4.* 12. *10 H. 6.* 14. *March* 111, 141. *1 Jones* 164. *1 Lev.* 17. *1 Rel. Abr.* 730.

Persons attainted or outlawed cannot submit to arbitration, for they have no property, and cannot by the law controvert any thing. *3 Hen. 6.* 26. *5 Hen. 7.* 16.

A dean without the chapter, a mayor without his commonalty, the master of a college or hospital without his fellows, cannot submit to an award, for the submission has the force of a contract, and they cannot contract without them. 21 *Ed. 4.* 13.

If one party and the deputy or attorney of the other party submit to an award, this is well enough, for the act of my deputy is my own act. *Dyer* 21. 1 *Roll. Abr.* 244. 2 *Mod.* 228.

If several persons do a trespass, and one of the wrongdoers and the party to whom it is done submit to arbitration, and an award is made, the other persons shall take advantage of it by way of extinguishment of the trespass; the same law where the party releases to one of them; for in both cases a satisfaction really is, or is presumed to be made, and a man cannot receive a double compensation for the same wrong. 1 *Salk.* 70. *Carth.* 412. 20 *Hen. 6.* 12. a. 41. a. *Roll. Abr.* 268. An award may be good in part, tho' bad in part. *Wilf. Rep. part 2.* 267, 293. See more concerning this head under title *Award*.

Arbitrament, (*arbitrium*) Is the sentence or determination pronounced by arbitrators, and published when they have heard all parties. And arbitrament is either general, of all actions, demands, quarrels, &c. or special, of some certain matters in controversy: it may be also absolute, or conditional. 8 *Rep.* 98. To every arbitrament five things are incident. 1. Matter of controversy. 2. Submission. 3. Parties to the submission. 4. Arbitrators. 5. Giving up the arbitrament. *Hardr.* 44. Arbitrators can't refer arbitrament to others, if the submission be not so: but an arbitrament that one shall release to another, by advice of a certain person, this is good; because 'tis a reference only for the execution of it. *Jenk. Cent.* 129. Submissions to arbitrament are usually by bond; and the parties who bind themselves are obliged to take notice of the award at their peril: but things relating to a freehold; debts due on bond; or on certain contract; criminal offences, &c. are not arbitrable. *Danv. Abr.* 513. 9 *Rep.* 78. 1 *Roll. Abr.* 244, 342. See *Arbitrator*. Vide *Com. D.* 1 *V.* 401, &c.

Arca Cyrographica, five cyrographorum judeorum, This was a common chest with three locks and keys, kept by certain Christians and Jews, wherein all the contracts, mortgages, and obligations belonging to the Jews were kept, to prevent fraud; and this by order of K. *Rich. I.* *Hoveden's Annals*, p. 745.

Archery, A service of keeping a bow, for the use of the lord to defend his castle.—*Johannes de*, &c. qui tenet de dom. reg. in capite per serjantiam archeriar. *Co. Litt.* fecit. 157.

Archbishop, (*archiepiscopus*) Is the chief of the clergy in his province, and is that spiritual secular person, who hath supreme power under the king in all ecclesiastical causes: and the manner of his creation and consecration, by an archbishop and two other bishops, &c. you may find in the *Stat.* 25 *Hen. 8.* c. 20. An archbishop is said to be introned, when a bishop is said to be intalled; and there are four things to compleat a bishop or archbishop, as well as a parson: first, election, which resembles presentation; the next is confirmation, and this resembles admission; next, consecration, which resembles institution; and the last is installation, resembled to induction. 3 *Salk.* 72. In antient times the archbishop was bishop over all England, as *Austin* was, who is said to be the first archbishop here; but before the Saxon conquest the Britains had only one bishop, and not any archbishop. 1 *Roll. Rep.* 328. 2 *Roll.* 440.

But at this day, the ecclesiastical state of England and Wales is divided only into two provinces or archbishopricks, to wit, Canterbury and York. Each archbishop hath within his province bishops of several dioceses. The archbishop of Canterbury hath under him within his province, of ancient foundations, Rochester, London, Winchester, Norwich, Lincoln, Ely, Chichester, Salisbury, Exeter, Bath and Wells, Worcester, Coventry and Litchfield, Hereford, Landaff, St. David's, Bangor, and St. Asaph; and four founded by king Henry 8. erected out of the ruins of dissolved monasteries, viz. Gloucester, Bristol, Peterborough, and Oxford. The archbishop of York hath under him four, viz. the

bishop of the county palatine of Chester, newly erected by king Hen. 8: and annexed by him to the archbishoprick of York; the county palatine of Durham; Carlisle; and the isle of Man, annexed to the province of York by king Hen. 8. but a greater number this archbishop antiently had, which time hath taken from him. 1 *Inst.* 94.

The archbishop of Canterbury is now styled metropolitanus & primas totius Angliæ; and the archbishop of York styled primas & metropolitanus Angliæ. They are called archbishops in respect of the bishops under them; and metropolitans, because they were consecrated at first in the metropolis of the province. 4 *Inst.* 94. Both the archbishops have distinct provinces, wherein they have suffragan bishops of several dioceses, with jurisdiction under them. And each hath two concurrent jurisdictions, one as ordinary, or the bishop himself within his diocese; the other as superintendant throughout his whole province of all ecclesiastical matters, to correct and supply the defects of other bishops. The archbishop of Canterbury hath the privilege to crown all the kings of England; and to have prelates to be his officers; as for instance; the bishop of London is his provincial dean; the bishop of Winchester, his chancellor; the bishop of Lincoln, his vice-chancellor; the bishop of Salisbury, his precentor; the bishop of Worcester, his chaplain, &c. It is the right of the archbishop to call the bishops and clergy of his province to convocation, upon the king's writ: he hath a jurisdiction in cases of appeal, where there is a supposed default of justice in the ordinary; and hath a standing jurisdiction over his suffragans: he confirms the election of bishops, and afterwards consecrates them, &c. And he may appoint coadjutors to a bishop that is grown infirm. He may confer degrees of all kinds; and censure and excommunicate, suspend or depose, for any just cause, &c. 2 *Roll. Abr.* 223. And he hath power to grant dispensations in any case, formerly granted by the see of Rome, not contrary to the law of God: but if the case is new and extraordinary, the king and his counsel are to be consulted. *Stat.* 25 *H. 8.* He may retain eight chaplains: and during the vacancy of any see, he is guardian of the spiritualties. *Stat. ibid.* and 21 *H. 8.*

The archbishop of Canterbury hath the precedency of all the clergy; next to him the archbishop of York; next to him the bishop of London; next to him the bishop of Durham; next to him the bishop of Winchester; and then all the other bishops of both provinces after the seniority of their consecration; but if any of them be a privy counsellor, he shall take place next after the bishop of Durham. 1 *Inst.* 94. 1 *Ought. Ord. Jud.* 486.

The first archbishop of York, that we read of, was *Paulinus*, who, by pope Gregory's appointment, was made archbishop there, about the year of our Lord 622. *Godol.* 14.

The archbishop of York hath the privilege to crown the queen consort, and to be her perpetual chaplain. *Chamberlain's Present State* 65.

The archbishop of Canterbury is the first peer of the realm, and hath precedence, not only before all the other clergy, but also (next and immediately after the blood royal) before all the nobility of the realm: and as he hath the precedence of all the nobility, so also of all the great officers of state. *God.* 13.

The archbishop of York hath the precedence over all dukes, not being of the blood royal; as also before all the great officers of state, except the lord chancellor. *God.* 14.

Archdeacon, (*archidiaconus*) Is one that hath ecclesiastical dignity, and jurisdiction over the clergy and laity next after the bishop throughout the diocese, or in some part of it only. Archdeacons had antiently a superintendant power over all the parochial clergy in every deanery in their precincts; they being the chiefs of the deacons; though they have no original jurisdiction, but what they have got it from the bishop, either by prescription or composition; and Sir *Simon Degg* tells us, that it appears an archdeacon is a meer substitute to the bishop; and what authority he hath is derived from him, his chief office being to visit and inquire, and *episcopo nunciare*, &c. In antient times archdeacons were employed in servile duties of

of collecting and distributing alms and offerings; but at length, by a personal attendance on the bishops, and a delegation to examine and report some causes, and commissions to visit the remoter parts of the dioceses, they became, as it were, overseers of the church; and by degrees advanced into considerable dignity and power. *Lanfranc*, archbishop of *Canterbury*, was the first prelate in *England* who instituted an *archdeacon* in his diocese, which was about the year 1075. And an *archdeacon* is now allowed to be an ordinary, as he hath a part of the episcopal power lodged with him. He visits his jurisdiction once every year: and he hath a court, where he may inflict penance, suspend, or excommunicate persons, prove wills, grant admittations, and hear causes ecclesiastical, &c. subject to appeal to the bishop of the diocese. It is one part of the office of an *archdeacon* to examine candidates for holy orders, and to induct clerks within his jurisdiction, upon receipt of the bishop's mandate. 2 *Cro.* 556. 1 *Lev.* 193. *Wood's Inst.* 30.

Archdeacons are commonly given by bishops, who do therefore prefer to the same by collation: but if an *archdeaconry* be in the gift of a layman, the patron doth present to the bishop, who institutes in like manner as to another benefice; and then the dean and chapter do induct him, that is, after some ceremonies, place him in a stall in the cathedral church to which he belongeth, whereby he is said to have a place in the choir. *Watf.* c. 15.

Archdeacons, by the 13 & 14 *Car.* 2. c. 4. are to read the Common Prayer and declare their assent thereunto, as other persons admitted to ecclesiastical benefices; and also must subscribe the same before the ordinary: but they are not obliged by the 13 *Eliz.* to subscribe and read the thirty-nine articles; for altho' an *archdeaconry* be a benefice with cure, yet it is not such a benefice with cure as seems to be intended by that statute, but only such benefices with cure as have particular churches belonging to them. *Watf.* c. 15. And they are to take the oaths at the sessions, as other persons qualifying for offices.

The judge of the *archdeacon's* court (where he doth preside himself) is called the official. *Wood's Inst.* 30.

By the statute of the 24 *Hen.* 8. c. 12. An appeal lieth from the *archdeacon's* to the bishop's court.

And it hath been also held, that where the *archdeacon* hath a peculiar jurisdiction, he is totally exempt from the power of the bishop, and the bishop cannot enter there, and hold court; and in such case, if the party who lives within the peculiar be sued in the bishop's court, a prohibition shall be granted; for the statute intends that no suit shall be *per sultum*: but if the *archdeacon* hath not a peculiar, then the bishop and he have a concurrent jurisdiction, and the party may commence his suit either in the *archdeacon's* court or the bishop's, and he hath election to choose which he pleaseth: and if he commence in the bishop's court, a prohibition shall be granted; for if it should, it would confine the bishop's court to determine nothing but appeals, and render it incapable of having any causes originally commenced there. *L. Raym.* 123.

An *archdeacon* is a ministerial officer, and cannot refuse a churchwarden elected by the parish. *Rex v. Martin Rice*, 1 *L. Raym.* 138.

Arches Court, (*curia de archibus*) The chief and most antient consistory court belonging to the archbishop of *Canterbury* for the debating of spiritual causes. It is so called from the church in *London*, commonly called *St. Mary Le Bow*, (where it was formerly held) which church is named *Bow Church* from the steeple which is raised by pillars, built *archwise*, like so many bent bows. *Cowel.* The judge of this court is styled the Dean of the *Arches*, or Official of the *Arches* court: he hath extraordinary jurisdiction in all ecclesiastical causes, except what belong to the prerogative court; also all manner of appeals from bishops or their chancellors or commissaries, deans and chapters, *archdeacons*, &c. first or last are directed hither: he hath ordinary jurisdiction throughout the whole province of *Canterbury*, in case of appeals; so that upon any appeal made, he, without any farther examination of the cause, sends out his citation to the appellee, and his inhibition to the judge from whom the appeal was made.

Of this see more 4 *Inst.* 337. But he cannot cite any person out of the diocese of another, unless it be on appeal, &c. 23 *H.* 8. c. 9. In another sense the dean of the *arches* has a peculiar jurisdiction of thirteen parishes in *London*, called a deanery, (being exempt from the authority of the bishop of *London*) of which the parish of *Bow* is the principal. The persons concerned in this court, are the judge, advocates, registers, proctors, &c. And the foundation of a suit in these courts, is a citation for the defendant to appear; then the libel is exhibited, which contains the action, to which the defendant must answer; whereupon the suit is contested, proofs are produced, and the cause determined by the judge, upon hearing the advocates on the law and fact; when follows the sentence or decree thereupon.

This court (as also the court of peculiars, the admiralty court, the prerogative court, and the court of delegates for the most part) is now held in the hall belonging to the college of *Civilians*, commonly called *Doctors Commons.* *Floy.* 21.

From this court the appeal is to the king in *Chancery*; by the 25 *Hen.* 8. c. 19.

Archives, (*archiva*, from *arca*, a chest) The *Rolls*, or any place where antient records, charters, and evidences, belonging to the crown and kingdom, are kept; also the *Chancery*, *Exchequer office*, &c. And it hath been sometimes used for repositories in libraries.

Arrestment, *Surprise*, *affrightment*. — To the great *arrestment* and *estrayement* of the Common law. *Rot. Parl.* 21 *Edw.* 3.

Arrestant, The edict of the king, commanding all his tenants to come into the army: if they refuse, then to be deprived of their estates.

Arentate, To rent out, or let at a certain rent. — *Richardus de Armeitone ballivus manerii de Kingsford militasse & per violentiam dictos religiosos de eadem piscaria ejecit, & ipsum domino suo arentari fecit in 12 sol. quos idem dominus per 6 annos recepit.* *Consuetud. Domus de Farendon*, MS. fol. 53.

Argentum Album, Silver coin, or pieces of bullion that antiently passed for money. By *Domesday tenure*, some rents to the king were paid in *argento albo*, common silver pieces of money; other rents in *libris urfis* & *pen-satis*, in metal of full weight and purity: in the next age, that rent which was paid in money, was called *blanch searm*; and afterwards *rubite-rent*; and what was paid in provision, was termed *black mail*. *Spelm.* Gloss.

Argentum Dei, God's money; i. e. money given in earnest upon the making of any bargain; hence comes *arles*, earnest. — *Adam de Holt vendidit quintam partem manerii de Berterton Henrico Scot, & cepit de prædicto Henrico tres denarios de argento Dei præ manibus.* *Placit. apud Cast.* 2 *Ed.* 3.

Argill, or *Argoil*, Clay, lime, and sometimes gravel; also the lees of wine, gathered to a certain hardness. *Lav. Fr. Diæ.*

Argumentosus, A word which signifies *ingenious*, mentioned by our historian *Neuburgensis*. *In picturis quoque opera argumentosa vocamus.* *Lib.* 1. c. 14.

Brietum Lebatio, An old sportive exercise, supposed to be the same with running at the quintal.

Arma dare, To dub or make a knight. *Anno Dom.* 1144. 10 *Steph.* *Ego Brientius filius comitis, quem bonus rex Henricus nutritus & cui arma dedit & honorem*, A. D. 1278. 31 *Ed.* 3. *Arma capere* is to be made a knight. *Kenet's Paroch. Antiq.* p. 288. And in *Walsingham*, p. 507. *Die Dominica in Vigilia Purificationis Edwardus juvenis suscepit arma militaria.* The word *arma*, in these places, signifies only a sword; but sometimes a knight was made by giving him the whole armour. — *Lanfrancus Dorobernensis episcopus cum lorica induit, & galeam capiti imposuit, & regis filio militiæ cingulum in nomine Dei cinxit.* *Ordericus Vitalis*, lib. 8. de *Henrico*, &c.

Arma libera, A sword and a lance which were usually given to a servant when he was made free. *Leg. Will.* cap. 65.

Arma moluta, Sharp weapons that cut, opposed to such as are blunt, which only break or bruise. *Braet. lib.* 3. *Arma moluta plagam faciunt, sicut gladius & hujusmodi: Ligna vero & lapides, brusuras, orbis & icūs, qui judicari*

non possunt ad plagam, ad hoc ut inde venire possit ad duellum. They are called *arma simulata* by *Flores*, lib. 1. c. 33. par. 6.

Arma Reversata: This was when a man was convicted of treason or felony: thus our historian *Knibton*, speaking of *Hugh Spenser*, tells us, *Primo vestierunt eum uno vestimento cum armis suis reversatis.* Lib. 3. p. 2546.

Armscote, Is a sort of punishment decreed or imposed on an offender by the judge. *Malmsh. lib. 3. p. 97. Walsingham, p. 430.* At first it was to carry a saddle at his back in token of subjection, *viz. Nudis vestigiis equestrem sellam ad satisfaciendum humeris ferret.* *Brompton* says, that in the year 1176, the king of *Scots* promised king *Hen. 2.* at *York*, *Lanceam & sellam suam super altare Sancti Petri ad perpetuam hujus subjectionis memoriam offerre.*

Armigeri, A title of dignity, belonging to such gentlemen that bear arms: and these are either by *curtesy*, as sons of noblemen, eldest sons of knights, &c. Or by *creation*, such as the king's servants, &c. The word *armigeri* has been also applied to the higher servants in convents. *Paroch. Antiq. 576. See Esquire.*

Armour and Arms, In the understanding of law, are extended to any thing that a man wears for his defence, or takes into his hands, or useth in anger to strike or cast at another. *Crompt. Just. 65.* Arms are also what we call in Latin *insignia*, ensigns of honour; as to the original of which, it was to distinguish commanders in war; for the ancient defensive armour being a coat of mail, &c. which covered the persons, they could not be distinguished, and therefore a certain badge was painted on their shields, which was called *arms*; but not made hereditary in families till the time of king *Rich. 1.* on his expedition to regain *Jerusalem* from the *Turks*: and besides shields with arms, they had a silk coat drawn over their armour, and afterwards a stiff coat, on which their arms were painted all over, now the herald's coat of arms. *Sid. Rep. 352.* By the Common law, it is an offence for persons to go or ride armed with dangerous and unusual weapons: but gentlemen may wear common armour according to their quality, &c. 3 *Inst. 160, &c. St. de defens. part. arm.* The king may prohibit force of arms, and punish offenders according to law; and herein every subject is bound to be aiding. *Stat. 7 Ed. 1.* None shall come with force and arms before the king's justices, nor ride armed in an affray of the peace, on pain to forfeit their armour, and suffer imprisonment, &c. 2 *Ed. 3. c. 3.*

Imbezilling the king's armour felony. *Stat. 31 Eliz. c. 10.* Armour may be exported. 12 *Car. 2. c. 4. sect. 10.* Unless prohibited by proclamation. 12 *Car. 2. c. 4. sect. 12.* Importing arms or ammunition prohibited. 1 *Jac. 2. c. 8.*

As to arms for necessary defence, vide *Black. Com. 1 V. 145.*

As to riding or going armed, vide *Black. Com. 4 V. 148, &c.*

Arnalia, arable grounds. This word is mentioned in *Domesday*, tit. *Essex.*

Arnaldia, arnaldia; A sort of disease that makes the hair fall off, like the *alopecia*, or like unto a distemper in foxes.—*Deinde uterque rex incidit in agriitudinem quam arnaldiam vocant, in qua ipsi ad mortem usque laborantes capillos suos deposuerunt.* *Rog. Hoveden, p. 693.*

Armatarius, (Lat.) A word often used for a grocer, but held not good in law proceedings. 1 *Vent. 142.*

Arpen, or arpent, Signifies an acre or furlong of ground: and according to the old French account in *Domesday-book*, 100 perches make an arpent. The most ordinary acre, called *l'arpent de France*, is one hundred perches square: but some account it but half an acre.—*Septem acres terre & unum arpentum quæ me contingebant per eschietam.* *Ex Reg. Priorat. de Wormsley, fol. 7.* where arpen seems to be some quantity less than an acre.

Arpentator, a measurer or surveyor of land.

Arquebuss, (Fr. arquebuse) A short hand-gun, a caliver or pistol: mentioned in some of our ancient statutes. *Law. Fr. Diâ.*

Arack. The same duty and excise payable for brandy and foreign spirits, and no more, shall be paid for arack imported from the *East-Indies*; and the like allowance to be made on exportation, &c. *St. 7 Geo. 2. c. 14.*

Arasatio Peditum, Is used in *Pat. 1 Ed. 2.* for the arraying of foot-soldiers.

Araters, (arraiatores) Such officers as had the care of the soldiers armour, and whose business it was to see them duly accounted. *Stat. 12 R. 2. c. 6.* In several reigns commissioners have been appointed for this purpose.

Aratun, (from the Fr. arranger, to set a thing in order) Hath the same signification in law: but the true derivation is from the French *arraisonner*, i. e. *ad rationem ponere*, to call a man to answer in form of law. A prisoner is arraigned, when he is indicted and brought to trial: and to arraign a writ of assise, is to cause the demandant to be called to make the plaint, in such manner as the tenant may be obliged to answer. 1 *Inst. 262.* But no man is properly arraigned but at the suit of the king, upon an indictment found against him, or other record wherewith he is to be charged; and this arraignment is to take care that the prisoner do appear to be tried, and hold up his hand at the bar, for the certainty of the person, and plead a sufficient plea to the indictment. 1 *Inst. 262, 263.* The prisoner is to hold up his hand only in treason and felony; but this is only a ceremony: if he owns that he is the person, it is sufficient without it; and then upon his arraignment his fetters are to be taken off; and he is to be treated with all the humanity imaginable. 2 *Inst. 315. 3 Inst. 35.* If in action of slander for calling one thief, the defendant justifies that he stole goods, and issue is thereon taken; if it be found for the defendant in *B. R.* and for felony in the same county where the court sits, or before justices of assise, &c. he shall be forthwith arraigned upon this verdict of twelve men, as on an indictment. 2 *Hale's Hist. P. C. 151.** The pleas upon arraignment are either the general issue, Not guilty; plea in abatement, or in bar; and the prisoner may demur to the indictment; he may also confess the fact, but then the court has nothing more to do than to proceed to judgment against him. If he stands mute, and doth not put himself upon trial, he shall suffer the penance *pain fort & dure*, in cases of felony, &c. 3 *Inst. 217.* Standing mute, or not answering directly, in certain cases, excludes offenders from clergy. See 25 *H. 8. c. 3.—1 Ed. 6. c. 12.—4 & 5 P. & M. c. 4.—3 & 4 W. & M. c. 9.—1 Ann. c. 9.*

By the Common law, if a principal is acquitted, or is pardoned, or dies, the accessory shall not be arraigned. But vide *Stat. 1 Ann. cap. 9.* and word *Accessory*. For the solemnity of the arraignment and trial of a prisoner, see *Dalt. chap. 185. p. 515.*

Array, (arraya live arraiaementum) An old French word, signifying the ranking or setting forth of a jury of men impanelled upon a cause. 18 *H. 6. c. 14.* And when we say to array a panel, that is, to set forth the men impanelled one by another. *F. N. B. 157.* To challenge the array of the panel, is at once to except against all the persons arrayed or impanelled, in respect of partiality, &c. 1 *Inst. 156.* If the sheriff be of affinity to either of the parties; or if any one or more of the jurors are returned at the nomination of either party; or for any other partiality; the array shall be quashed. The word array also relates, in a particular manner, to military order, as to conduct persons armed, &c. *Stat. 14 Car. 2. cap. 3.*

Arrearage, (arveragia, from the French arriere, retro, behind) Is taken for money unpaid at the due time, as rent behind; the remainder due on an account, or a sum of money remaining in the hands of an accountant. When arrears of rent are presumed in law to be satisfied, vide *Acceptance.*

Arrestatus, One suspected of any crime.—*Si autem aliquis arrestatus fuerit de morte alicujus periclitantis capietur & imprisonetur.*—*Offic. Coronat. Spelm. Gloss.*

Arrenatus, arraigned, accused.—*Stephanus Raban, vic. Leicestr. arrenatus & ad rationem positus de hoc quod, &c.* *Rot. Parl. 21 Ed. 1.*

Arrentation, (from the Spanish arrendar) Is as much as *ad certum redditum dimittere*; and it signifies the licensing the owner of lands in the forest, to inclose them with a low hedge and small ditch, according to the assize of the forest, under a yearly rent: saving the arrentations is a saving power to give such licences. *Ordin. Forestæ, 34 Ed. 1.*

Arrest,

(arrestum) Cometh of the Fr. word *arrestar*, to stop, or stay. It is a restraint of a man's person, obliging him to be obedient to the law: and it is defined to be the execution of the command of some court of record, or officer of justice. An *arrest* is the beginning of imprisonment, where a man is first taken, and restrained of his liberty, by power or colour of a lawful warrant: also it signifies the decree of a court, by which a person is *arrested*. 2 *Shep. Abr.* 299.

Arrests are either in civil or criminal cases.

An *arrest* in a *civil cause* is defined to be the apprehending or restraining one's person by process in execution of the command of some court, or officer of justice. *Wood's Inst.* 575.

There are several statutes, securing the liberty of the subject, against unlawful arrests. See *Magna Charta*, c. 29. 3 *Ed.* 1. 43.

There are statutes likewise protecting the clergy from arrests while attending divine service. See 50 *Ed.* 3. c. 5. 1 *R.* 2. c. 15. 1 *Mar. sess.* 2. c. 3.

Several persons are likewise by the Common and Statute law of the land privileged from arrests. Peers of the realm, members of parliament, &c. may not be arrested, unless it be in criminal cases; but the process against them is to be summons, distress infinite, &c. 12 *W.* 3. c. 3. But see 2 *Ann.* c. 18. Also corporations and companies must be made to appear by *distringas*, and cannot be arrested. *Finch* 353. 3 *Salk.* 46. Persons attending upon any courts of record, on business there, are to be free from arrests. 3 *Inst.* 141. A clerk of the court ought not to be arrested for any thing which is not criminal, because he is supposed to be always present in court to answer the plaintiff. 1 *Lill.* 94. Arrests are not to be made within the liberty of the king's palace: nor may the king's servants be arrested in any place, without notice first given to the lord chamberlain, that he remove them, or make them pay their debts. Ambassadors servants, &c. freed from arrests. Vide *Ambassador*.

Seamen in the king's service privileged from arrests for debts under 20 *l.* 1 *Geo.* 2. c. 14. *sect.* 15. 14 *Geo.* 2. c. 38. *sect.* 3.

Soldiers or marines not liable to arrests for a debt of less than 10 *l.* 30 *Geo.* 2. c. 6. *sect.* 64. 30 *Geo.* 2. c. 11. *sect.* 37.

There is this difference between arrests in civil and criminal cases, that none shall be arrested for debt, trespass, &c. or other cause of action, but by virtue of a precept or commandment out of some court: but for treason, felony, or breach of the peace, any man may arrest without warrant or precept. *Terms de Ley* 54.

There are several statutes likewise regulating the issuing and execution of warrants for arrests, and ascertaining the fees to be taken on such occasions.

The bailiff's fee for an arrest, by an ancient statute, is but four-pence, and the sheriff's twenty-pence: and bailiffs cannot legally take any thing but what is allowed by this statute, and other subsequent acts. For taking fees not warranted by law, they shall render treble damages to the party grieved, and incur a forfeiture of 40 *l.* *Stat.* 23 *Hen.* 6. *cap.* 10. Sheriffs are not to grant warrants for arrests before the receipt of the writs; if they do, they shall forfeit 10 *l.* and damages, and pay a fine to the king. *Stat.* 43 *Eliz.* c. 5. And every warrant to issue upon any writ to arrest any person, shall have the same day and year set down thereon as on the writ, under the like penalty of 10 *l.* *Stat.* 6 *Geo.* 1. c. 21.

No bailiff, or other officer, shall carry any person under arrest to any tavern, alehouse, &c. without his consent; so as to charge him with any beer, ale, wine, &c. but what he shall freely call for: nor shall demand or receive more from him for the arrest or waiting than by law ought to be, until an appearance procured, bail found, &c. Nor take or exact any more for keeping such person out of prison, than what he shall of his own voluntary accord truly give: nor take more for lodging than what is reasonable, or shall be adjudged so by the next justice of peace. *Stat.* 22 & 23 *Car.* 2. *cap.* 2. And by a late act bailiffs, &c. are not to carry any person arrested to a tavern, alehouse, &c. or the private house of such of-

ficers, without the free and voluntary consent of the party; nor carry such person to prison within twenty-four hours from the time of the arrest; nor take any reward for keeping him out of gaol, &c. *Stat.* 2 *Geo.* 2. *cap.* 22. And see 32 *Geo.* 2. c. 28. a new act on this subject. But if a person arrested refuse to be carried to some convenient house of his own nomination, &c. to be kept in safe custody during the twenty-four hours before carried to prison, then the sheriff's officers, &c. may immediately convey him to gaol, to prevent an escape. 3 *Geo.* 2. c. 27. By *Stat.* 29 *Car.* 2. c. 7. No writ, process, warrant, &c. (except in cases of treason, felony, or for breach of the peace) shall be served on a Sunday; on pain that the person serving them shall be liable to the suit of the party grieved, and answer damages, as if the same had been done without writ: an action of false imprisonment lies for arrest on a Sunday, and the arrest is void. 1 *Salk.* 78. A defendant was arrested on a Sunday by a writ out of the *Marshalsea*; and the court of *B. R.* being moved to discharge him, it was denied; and he was directed to bring action of false imprisonment. 5 *Mod. Rep.* 95. The defendant being taken upon a Sunday, without any warrant, and locked up all that day; on Monday morning a writ was got against him, by which he was arrested; it was ruled, that he might have an action of false imprisonment, and that an attachment should go against those who took him on the Sunday. *Mod. Caf.* 96. Attachments have been often granted against bailiffs for making arrests on Sunday: but affidavit is usually made, that the party might be taken upon another day. 1 *Mod.* 56. A person may be retaken on a Sunday, where arrested the day before, &c. *Mod. Caf.* 231. And a man may be taken on a Sunday on an escape warrant: when he goes at large out of the rules of the *King's Bench* or *Fleet* prison, &c. *Stat.* 5 *Ann.* c. 9. Also bail may take the principal on a Sunday, and confine him till Monday, and then render him. 1 *Nelf.* 258.

No special writ shall be sued out of the superior courts, unless the cause of action be 10 *l.* or above, on pain of 10 *l.* and the proceedings thereon to be void, by *Stat.* 5 *Geo.* 2. c. 27. This statute, and the *Stat.* 12 *Geo.* 1. c. 29. are made perpetual by the *Stat.* 21 *Geo.* 2. c. 3.

When a person is apprehended for debt, &c. he is said to be arrested: and writs express *arrest* by two several words *capias* and *attachias*, to take and catch hold of a man; for an officer must actually lay hold of a person, besides saying he arrests him, or it will be no lawful arrest. 1 *Lill. Abr.* 96. If a bailiff be kept off from making an arrest, he shall have an action of assault: and where the person arrested makes resistance, or assaults the bailiff, he may justify beating of him. If a bailiff touches a man, which is an arrest, and he makes his escape, it is a rescous, and attachment may be had against him. 1 *Salk.* 79. If a bailiff lays hold of one by the hand, (whom he had a warrant to arrest) as he holds it out at the window, this is such a taking of him, that the bailiff may justify the breaking open of the house to carry him away. 1 *Vent.* 306.

When a person has committed treason or felony, &c. doors may be broke open to arrest the offender; but not in civil cases, except it be in pursuit of one arrested; or where a house is recovered by real action, to deliver possession to the person recovering. *Plowd.* 5 *Rep.* 91. So in ejectment, action of trespass, &c. lies for breaking open a house to make arrest in a civil action. *Mod. Caf.* 105. But if it appears a bailiff found an outer door, &c. open, 'tis said he may open the inner door to make an arrest. *Cumbr.* 327. An arrest in the night, as well as the day, is lawful. 9 *Rep.* 66. And every one is bound by the Common law to assist not only the sheriff in the execution of writs, and making arrests, &c. but also his bailiff, that hath his warrant to do it. 2 *Inst.* 193. A bailiff upon an arrest ought to shew at whose suit, out of what court the writ issues, and for what cause, &c. but this is when the party arrested submits himself to the arrest: a bailiff, sworn and known, need not shew his warrant, though the party demands it; nor is any other special bailiff bound to shew his warrant, unless it be demanded. 9 *Rep.* 68, 69. An arrest without shewing the warrant, and without telling at whose suit, until the other

other demanded it, was held legal; and that this need not be done until the party obeyed and demanded the same. *Cro. Jac.* 485. If an action is entered in one of the *compters of London*, a city serjeant may arrest the party without the sheriff's warrant. *1 Lill. Abr.* 94. And by the custom of *London*, a debtor may be arrested before the money is due, to make him find sureties: but not by the Common law. *1 Nels. Ab.* 258.

If a wrong person is arrested; or one for felony, where no felony is done, &c. it will be false imprisonment, liable to damages. Attornies, &c. for vexation, maliciously causing any person to be arrested, where there is no cause of suit, &c. shall suffer six months imprisonment, and before discharged pay treble damages, and forfeit 10*l.* *Stat. 8 Eliz. c. 2.* A bailiff having a writ to arrest *A. B.* comes up to another person, and asks him if his name be *A. B.* and he answers that it is, whereupon the bailiff arrests him, it will be a false arrest, for which action lies. *Lanc.* 49. *Sed quere?* And if a warrant be to take *A.* the son of *B.* and the bailiff makes an arrest on the son of *D.* who indeed is the right person intended, but not the party within his warrant, it will be false imprisonment. *Ibid.*

Sheriffs in *Wales*, and the counties palatine, shall not hold to bail on process from *Westminster*, unless the debt be sworn to be 20*l.* *11 & 12 W. 3. c. 9. sect. 2.*

By *Glynn Ch. J. Mich.* 1658. If one be arrested by the sheriff of the county, within a liberty, without a *non omittas*, yet the arrest is good; for the sheriff is sheriff of the whole county, but the bailiff of the liberty may have his action against the sheriff, for entering of his liberty. But upon a *quo minus*, a sheriff may enter any liberty, and execute it *impune*. *Pract. Reg.* 72.

With regard to arrests in *criminal cases*, it hath already been observed, that for *treason, felony, or breach of the peace*, any person may arrest without warrant or precept. But the king cannot command any one by word of mouth to be arrested; for he must do it by writ, or order of his courts, according to law: nor may the king arrest any man for suspicion of treason, or felony, as his subjects may; because if he doth wrong, the party cannot have an action against him. *2 Inst.* 186.

Arrests by *private persons* are in some cases commanded. Persons present at the committing of a felony must use their endeavours to apprehend the offender, under penalty of fine and imprisonment. *3 Inst.* 117. *4 Inst.* 177.

And for this cause, by the Common law, if any homicide be committed, or dangerous wound given, whether with, or without malice, or even by misadventure or self-defence, in any town, or in the lanes or fields thereof, in the day time, and the offender escape, the town shall be amerced, and if out of a town, the hundred shall be amerced. *3 Inst.* 53.

And since the statute of *Winchester, c. 5.* which ordains that walled towns shall be kept shut from sun-setting to sun-rising; if the fact happen in any such town by night, or by day, and the offender escape, the town shall be amerced. *3 Inst.* 53.

And, as private persons are bound to apprehend all those who shall be guilty of any of the crimes above mentioned in their view, so also are they, with the utmost diligence, to pursue and endeavour to take all those who shall be guilty thereof, out of their view, upon a hue and cry levied against them. *3 Inst.* 117.

By the vagrant act 17 *Geo. 2. c. 5.* Every private person may apprehend beggars and vagrants.

And every private person is bound to assist an officer, requiring him to apprehend a felon.

Arrests also by private persons are, in some cases, permitted only; and arrests of this kind are either on suspicion of crimes already done, or supposed to have been done, or to prevent their being committed.

Many sufficient causes of suspicion to justify the arrest of an innocent person for felony are enumerated in *2 Hawk.* 76. Yet it is holden by some, that none of the causes there specified will justify the arresting of a man for the suspicion of crimes, unless a crime was actually committed; but out of this rule, the apprehending a person upon hue and cry must be excepted. *2 Hawk.* 76.

As to the arresting of offenders by *private persons* of their own authority, permitted by law for the prevention of *treason* or *felony* only intended to be done; it seems any one may lay hold of a person, whom he sees upon the point of committing treason, or felony, or doing an act which would manifestly endanger the life of another, and detain him, till it may be reasonably presumed he has changed his purpose. *2 Hawk.* 77. Indeed the law of reason says thus, and we want not the authority of books to justify the position.

As to arrests for inferior offences, no private person can arrest another for a bare breach of the peace after it is over; but it is held, that a private man may arrest a night-walker, or a common cheat going about with false dice, and actually caught playing with them in order to have him before a justice of peace; and the arrest of any other offenders, by private persons, for offences in like manner scandalous, and prejudicial to the public, seems justifiable. *2 Hawk.* 77.

In some cases likewise arrests by private persons are rewarded by law.

By *4 & 5 W. & M. c. 8.* Persons apprehending *highwaymen*, and prosecuting them to conviction, are intitled to a reward of 40*l.* and if they are killed in the attempt, their executors, &c. are intitled to the like reward.

By the *6 & 7 W. 3. c. 17.* Persons apprehending *counterfeiters* and *clippers* of the coin, and prosecuting them to conviction, are intitled to 40*l.*

By the *10 & 11 W. 3. c. 23.* Persons apprehending *shoplifters*, and prosecuting them to conviction, shall have a certificate thereof *gratis* from the judge, which certificate (before any benefit has been made of it) may be once assigned over, and no more, and the original proprietor, or assignee, shall by virtue thereof be discharged from all parish and ward offices, within the parish or ward wherein the felony was committed.

By *5 Ann. c. 31.* Persons who shall take any one guilty of *burglary*, or the *felonious breaking and entering* any house in the day-time, and prosecute them to conviction, shall receive, above the reward given by the above mentioned statute of *10 & 11 W. 3.* the sum of 40*l.* within one month after such conviction.

With regard to arrests by *public officers*, they may be made either with or without process.

Arrests without process may be made by *watchmen, constables, bailiffs of towns, or justices of peace.* For the power of *watchmen*, see *Stat. Winchester, c. 4.* It has been holden, that this statute was made in affirmance of the Common law, and that every private person may by the Common law arrest any *suspicious night-walker*, and detain him till he give a good account of himself. *2 Hawk.* 80.

As to arrests by *constables*, they are either made by their own authority, which differs but little from the power of a private person, or they are made by a warrant from a justice of peace.

As to the justifying arrests by constables, by virtue of a warrant from a justice of peace, it seems clear, that an arrest, unlawfully made by a constable without a warrant, cannot be made good by a warrant taken out afterwards; also it hath been holden, that if a constable, after he hath arrested the party by force of any such warrant, suffer him to go at large upon his promise to come again at such a time, and find sureties, he cannot afterwards arrest him by force of the same warrant; however, if the party return and put himself again under the custody of the constable, the constable may lawfully detain him, and bring him before the justice, in pursuance of the warrant. *2 Hawk.* 80. *Dyer* 244. 6.

A constable cannot justify any arrest by force of a warrant from a justice of peace, which expressly appears on the face of it, to be for an offence whereof a justice of peace hath no jurisdiction, or to bring the party before him at a place out of the county for which he is a justice. *2 Hawk.* 82.

As to the doctrine of general warrants, 'tis now sufficiently exploded. See the case of *The King and John Wilkes, Esq; Wilf. Rep. part 2. 151, &c.*

'Tis the better opinion at this day, that any constable, or even a private person, to whom a warrant shall be directed

directed from a justice of peace, to arrest a particular person for felony, or any other misdemeanor within his jurisdiction, may lawfully execute it, whether the person mentioned in it be, in truth, guilty or innocent, and whether he were before indicted of the same offence or not: for, however the justice himself may be punishable for granting such a warrant, without sufficient grounds, it is reasonable that he alone be answerable for it, and not the officer, who is not to examine or dispute the reasonableness of his proceeding. *Id.*

With regard to arrests by *bailiffs of towns*, their power is founded on the above mentioned statute of *Winchester*, c. 4. And as to arrests by *justices of peace*, arrests by their command are either by word of mouth or by warrant.

A justice of peace may, by word of mouth, authorise any one to arrest another, who shall be guilty of an actual breach of the peace in his presence, or shall be engaged in a riot in his absence. *2 Hawk. 83. Dalr. c. 117.*

And a justice of peace may lawfully grant a warrant for apprehending, or arresting persons charged with treason, felony, premunire, or any other offence against the peace; and generally, wherever a statute gives one or more justices of peace a jurisdiction over any offence, any one justice of peace may, by his warrant, cause such offenders to be arrested and brought before him. *2 Hawk. 84.*

But it is said, that antiently no one justice of peace could legally make out a warrant for an offence against a penal statute, or other misdemeanor; cognizable only by a sessions of two or more justices; for that one single justice of peace hath no jurisdiction of such offence, and regularly those only who have jurisdiction over a cause can award process concerning it. Yet the long, constant, universal, and uncontrolled practice of justices of peace seems to have altered the law in this particular, and to have given them an authority, in relation to such arrests, not now to be disputed. *Ibid.*

A justice of peace may justify the granting a warrant for the arrest of any person upon strong grounds of suspicion of felony, or misdemeanor, but he seems to be punishable, as well at the suit of the king, as of the party grieved, if he grant any such warrant groundlessly, or maliciously, without such a probable cause as might induce a candid and impartial man to suspect the party to be guilty. *2 Hawk. 84.*

Every warrant ought to be under the hand and seal of the justice of peace, and specify the day it was made out: if it be for the peace or good behaviour, it is advisable to set forth the special cause upon which it is granted, but if it be for treason or felony, or other offences of an enormous nature, it is said that it is not necessary to set it forth, and it seems to be rather discretionary than necessary to set it forth in any case. *2 Hawk. 85.*

We apprehend the meaning of this doctrine is, that the warrant need not express the *species*, but we conceive it absolutely necessary to express the *genus*, as for *treason or felony*, or *suspicion of treason or felony*.

The warrant may be directed to the sheriff, bailiff, constable, or to any indifferent person by name, who is no officer; for, tho' the justice may authorise any one to be his officer, whom he pleases to make such, yet it is most advisable to direct to the constable of the precinct wherein it is to be executed; for that no other constable, and *a fortiori* no private person, is compellable to serve it. *2 Hawk. 85.*

A bailiff or constable, if they be sworn, and commonly known to be officers, and act within their own precincts, need not shew their warrant to the party, notwithstanding he demand the sight of it; but that these and all other persons whatsoever making an arrest, ought to acquaint the party with the substance of their warrant; and all private persons to whom such warrants shall be directed, and even officers, if they be not sworn and commonly known; and even these, if they act out of their own precincts, must shew their warrants if demanded. *2 Hawk. 86.*

The sheriff, having such warrant directed to him, may authorise others to execute it; but every other person, to whom it is directed, must personally execute it, yet,

it seems, that any one may lawfully assist him. *2 Hawk. 86.*

If a warrant be generally directed to all constables, no one can execute it out of his own precinct; but if it be directed to a particular constable by name, he may execute it any where within the jurisdiction of the justice. *2 Hawk. 86.*

Where one is authorised to arrest a person who shelters himself in a house; if entrance be denied, the officer may justify the breaking open the doors, particular instances of which are enumerated by *Serjeant Hawkins. V. Pleas of the Crown, p. 86. & 87.*

Also it is enacted by the 3 & 4 *Jac. 1. par. 35.* That upon any lawful writ, warrant or process awarded to any sheriff or other officer, for the taking of any popish recusant, standing excommunicated for such recufancy, it shall be lawful, if need be, to break any house. *2 Hawk. 87.*

But it hath been resolved, that where justices of peace are, by virtue of a statute, authorised to require persons to come before them to take certain oaths prescribed by such statute, the officer cannot lawfully break open the doors. *2 Hawk. 87.*

After presentment or indictment found in felony, &c. the first process is a *capias*, to arrest and imprison the offender: and if the offender cannot be taken, an exigent is awarded in order to outlawry. *H. P. C. 209.*

Arrest of Judgment. To move in *arrest of judgment*, is to shew cause why judgment should be itaid, notwithstanding verdict given; for in many cases, though there be a verdict, no judgment can be had. And the causes of arrest of judgment are, want of notice of trial; where the plaintiff before trial treats the jury; the record differing from the deed pleaded; for material defect in pleading; where persons are misnamed; more is given and found by the verdict than laid in the declaration; or the declaration doth not lay the thing with certainty, &c. And here all matters of fact are to be made out by proper affidavits. *Comp. Atorn. 329, &c.* Judgment may be arrested for good cause in criminal cases, as well as civil; if the indictment be insufficient, &c. *3 Inst. 210.* Four days are allowed to move in *arrest of judgment*; and the defendant hath all the term wherein the verdict was given to speak any thing to arrest it, if the plaintiff hath not given his four days rule, and signed his judgment; after which defendant is put to his writ of error. *2 Lill. 93.* On motion in *arrest of judgment*, if the court be divided, two judges against two, the plaintiff must have his judgment; unless a rule be made at first to stay all proceedings, until the court otherwise order, &c. *2 Lill. Abr. 118. See Jeofails and Judgment.*

Arrest of enquest is to plead in arrest of taking the enquest, upon the former issue, and to shew cause why an enquest should not be taken. *Bro. tit. Replead. Vide on this subject Black. Com. 3 V. 393.* What causes are not sufficient. *Id. 394, &c.*

Arrestandis bonis ne dissipentur, A writ which lies for a man whose cattle or goods are taken by another, who during the contest doth or is like to make them away, not being of ability to render satisfaction. *Reg. Orig. 126.*

Arrestande ipsum qui Pecuniam Recepit, &c. Is a writ that lieth for apprehending a person who hath taken the king's prest-money to serve in wars, and hides himself when he should go. *Reg. Orig. 24.*

Arresto factio super bonis mercatorum alienigenorum, A writ that lies for a denizen against the goods of *alien* found within this kingdom, in recompence of goods taken from him in a foreign country, after denial of restitution. *Reg. Orig. 129.* This the antient civilians called *clario gatio*; but by the moderns it is termed *reprisalia*.

Arrested, arrestatus, quasi, ad rectum vocatus, Is where a man is convened before a judge, and charged with a crime. *Naunf. Pl. Co. 45.* And it is sometimes used for imputed or laid unto; as no folly may be arrested to one under age. *Littleton, cap. Remitter.* Chaucer useth the verb *arresteth*, that is, lays blame, as it is interpreted. *Bracton* says, *ad rectum habere malefactorem*, i. e. to have the malefactor forth coming, so as he may be charged, and put to his trial. *Bract. lib. 3. tract. 2. cap. 10.*

And in another place, *reatus de morte hominis*, charged with the death of a man. From hence it may with some reason seem, that the word is the same with *reatum*.

Arrows. By an ancient statute, all heads for arrows shall be well brazed, and hardened at the point with steel, on pain of forfeiture and imprisonment: and to be marked with the mark of the maker. Stat. 7 H. 4. c. 7.

Arrura.—In the black book of Hereford, *De Operationibus Arruræ*, signifies days work of ploughing; for anciently customary tenants were bound to plough certain days for their lord. *Una arrura*, one day's work at the plough; and in *Wiltshire*, earing is a day's ploughing. *Paroch. Antiq.* p. 41.

Arson, (from *ardeo*, to burn) Is house burning, which is felony at Common law. 3 Inst. 66. It must be maliciously, voluntarily, and an actual burning: not putting fire only into a house, or any part of it, without burning; but if part of the house is burnt; or if the fire doth burn, and then goeth out of itself, it is felony. 2 Inst. 188. H. P. C. 85. The burning of a frame of a house is not accounted house-burning, because the frame of a house cannot come under the word *domus*, necessary in every indictment for *arson*: this was when the law proceedings were in *Latin*; now, of course, the word *house* is requisite; and it must be the house of another, for if a man burns his own house only, though with intention to burn others, it was not at Common law felony, but a great misdemeanour, punishable with fine, pillory, &c.

If a house is fired by negligence or mischance, it cannot amount to *arson*. 3 Inst. 67. H. P. C. 85. Where one burns the house of another, if it be not wilful and malicious, 'tis no felony, but only trespass: therefore if A. shoot unlawfully in a gun at the cattle or poultry of B. and by means thereof sets another's house on fire, this is not *arson*; for though the act he was doing was unlawful, yet he had no intent to burn the house. 1 Hale's Hist. P. C. 569. By Stat. 23 H. 8. c. 11. Burning of houses, or barns wherein any corn is, is felony without benefit of clergy. And the Stat. 22 & 23 Car. 2. c. 7. makes it felony to set barns, stables, stacks of corn, hay, &c. on fire in the night-time, or any out-houses, or buildings: but the offender may be transported for seven years.

By 6 Annæ, c. 31. Servants through negligence or carelessness, setting on fire any dwelling-house, or out-house, shall forfeit 100*l.* to be levied by warrant of two justices, and paid to the churchwardens of the parish, to be distributed to the sufferers by the fire; or on default shall be sent to the house of correction, and there kept to hard labour eighteen months, &c. By 9 Geo. 1. c. 22. (made perpetual by 31 Geo. 2. c. 42.) Setting fire to any house, barn, or out-house, or to any hovel, cockmow, or stack of corn, straw, or wood, is made felony without benefit of clergy.

N. B. This must be of course a wilful act to render it felony.

See farther on this subject 3 Ed. 1. c. 15.—37 Hen. 8. c. 6.—4 & 5 P. & M. c. 4.—43 Eliz. c. 13.—1 Geo. 1. Stat. 2. c. 48.—6 Geo. 1. c. 16.—20 Geo. 2. c. 52. & 28 Geo. 2. c. 19. And vide also *Black. Com.* 4 V. 220, &c.

Arser in le main, Burning in the hand, is the punishment of criminals that have the benefit of clergy. *Terms de Ley*.

Arura, The trial of money by fire, after it was coined. In *Domesday* we read, *reddis 50*l.* ad arsuram*, which is meant of lawful and approved money, whose alloy was tried by fire.

Art and Part, Is a term used in *Scotland* and the north of *England*; when one charged with a crime, in committing the same, was both a contriver of, and acted his part in it.

Arthel, A *British* word, and more truly written *arddel*, signifying to avouch; as if a man were taken with stolen goods in his hands, he was to be allowed a lawful *arthel* (or vouchee) to clear him of the felony: it was part of the law of *Howel Dda*; according to whose laws every tenant holding of any other than of the prince or the lord of the fee, paid a fine *pro defensione regia*, which was called *arian ardbet*. The privilege of *arthel* occasioning a delay

and exemption of criminals from justice, provision was made against it by Statute 26 H. 8. c. 6.

Articuli Cleri, (*articles of the clergy*) Are statutes containing certain *articles* relating to the church and clergy, and causes ecclesiastical. 19 E. 2. and 14 E. 3.

Articulus, An *article*, or complaint, exhibited by way of libel, in a court Christian. Sometimes the religious bound themselves to obey the ordinary, without such formal process: as *An. Dom.* 1300. The prior and convent of *Burcester*, submitted themselves to the official of *Lincoln*, &c.—*Quod possint ees et eorum successores per omnem censuram ecclesiasticam ad omnium & singulorum premissorum observationem absque articuli, seu libelli, petitione, & quocunque strepitu judiciali compellare.* *Paroch. Antiq.* p. 344.

Artificers, Are taken for such as are masters of their arts, or whose calling and employment doth consist chiefly of bodily labour. We might, with Mr. Harris, more elegantly and scientifically define an *artist* to be “A man possessing an habitual power of becoming the cause of some effect, according to a system of various and well-approved precepts.” But to the law—

If *artificers* or workmen conspire not to do any work but at certain prices, &c. they are liable to penalties by the Statute 2 & 3 Ed. 6. c. 15. A stranger, *artificer* in *London*, &c. shall not keep above two strangers servants; but he may have as many *English* servants and apprentices as he can get. Stat. 21 H. 8. c. 16. *Artificers* in wool, iron, steel, brals, or other metal, &c. persons contracting with them to go out of this kingdom into a foreign country, shall be fined not exceeding 100*l.* and be imprisoned three months: and *English artificers* going abroad, not returning in six months after warning given by our ambassadors, &c. shall be disabled to hold lands by descent or devise, be incapable to take any legacy, &c. and deemed aliens. Stat. 5 Geo. 1. c. 27. By the Stat. 23 Geo. 2. c. 13. Persons convicted of seducing artificers in the manufactures of *Great Britain* or *Ireland*, out of the dominions of the crown of *Great Britain*, to forfeit 500*l.* and to be imprisoned for twelve months; for the second offence to forfeit 1000*l.* and be imprisoned two years. Prosecution to be commenced within twelve months after the offence committed. *Vide* as to seducing and transporting of artists, *Black. Com.* 4 V. 160.

Arundinetum, A ground or place where reeds grow. 1 Inst. 4. And it is mentioned in the book of *Domesday*.

Arvil-Supper, A feast or entertainment made at funerals, in the north part of *England*: *arvil bread* is the bread delivered to the poor at funeral solemnities. *Cowell*. And *arvil*, *arval*, *arsal*, are used for the burial or funeral rites; as,

Come, bring my jerkin, Tibb, I'll to the arvil,
You man's dea Seny Scoun, it makes me marvil.

Yorkshire Dial. p. 58.

Acisterium, (*archisterium*, *arcisterium*, *acisterium*, *alcisterium*, *architrium*) Is a Greek word, and signifies a menastery. It often occurs in our old histories. *Du Cange*.

Affach, or *affath*, Was a custom of purgation used of old in *Wales*, by which the party accused did clear himself by the oaths of 300 men. It is mentioned in ancient MSS. and prevailed till the time of Hen. 5. when it was abrogated. 1 H. 5. c. 6.

Affart, (*assartum*) Fr. *affartir*, To make plain. *Assartum est quod redactum est ad culturam.* Fleta, lib. 4. cap. 21. And the word *assartum* is by *Spelman* derived from *exertum*, to pull up by the roots; for sometimes 'tis wrote *effart*. Others derive it from *exaratum* or *exartum*, which signifies to plough or cut up. *Manwood*, in his *Forest Laws*, says it is an offence committed in the forest, by pulling up the woods by the roots, that are thickets and coverts for the deer, and making the ground plain as arable land: this is esteemed the greatest trespass that can be done in the forest to vert or venison, as it contains in it waste and more; for whereas waste of the forest is but the felling down the coverts which may grow up again, *assart* is a plucking them up by the roots, and utterly destroying them, so that they can never afterwards spring up again. And this is confirmed out of the red book

book in the *Exchequer*, in these words—*Affarta vero dicuntur quæ apud Isidorum occisiones nuncupantur, quando forissem nemora vel dumeta, pascuis & latibulis ferarum opportuna, succiduntur: quibus succisis & radicibus avulsis, terra subvertitur & excolitur.*—But this is no offence if done with licence; and a man may, by writ of *ad quod damnum*, sue out a licence to *assart* ground in the forest, and make it several for tillage. *Reg. Orig.* 257. Hence lands are called *assarted*: and formerly *assart rents* were paid to the crown for forest lands *assarted*. *Stat.* 22 *Car.* 2. c. 6. *Affartments* seem to be used in the same sense in *Rot. Parl.* Of *assarts* you may read more in *Crompt. Juris.* p. 203. And *Charta de Foresta*, anno 9 *H.* 3. c. 4. *Manwood*, part 1. p. 171.

Affault, (*assultus*) from the *Fr.* verb *assayer*, Signifies a violent injury offered to a man's person, of a more extensive nature than battery; for it may be committed by offering a blow, or by a terrifying speech. *Lamb. Eiren. lib.* 1. cap. 3. But it is said that at this day no words whatsoever, be they ever so provoking, can amount to an assault, notwithstanding the many ancient opinions to the contrary. 1 *Hawk. P. C.* 134.

The feudists define assault thus: *assultus est impetus in personam aut locum, siue hoc pedibus fiat, vel equo, aut machinis aut quacunq; alia re affiliatur.* *Zafius de Feud.* p. 10. num. 38. And *assilire est vim adferre.* *Lib. Feud.* 1. tit. 5. sect. 1. Also the *Lat.* *assultus* is used in this sense in the laws of *Edw. Confes.* cap. 12. To strike a man, though he be not hurt with the blow, is an assault: and to strike at a person, notwithstanding he be neither hit nor hurt, hath been so adjudged. 22 *Lib. Aff.* pl. 60. For assault doth not always necessarily imply a hitting, or blow; because, in trespasss for assault and battery, a man may be found guilty of the assault, and excused of the battery. 25 *Ed.* 3. c. 24. If a person in anger lift up or stretch forth his arm, and offer to strike another; or menace any one with any staff or weapon, it is trespasss and assault in law: and if a man threaten to beat another person, or lie in wait to do it, if the other is hindered in his business, and receives loss thereby, action lies for the injury. *Lamb. lib.* 1. 22 *Aff.* pl. 60. Where a man assaults any person, beats, or doth him any manner of violence, either with hand, foot, or weapon; or throws any thing at him, drink in his face, &c. whereby he is hurt; it is such an assault for which action may be brought, and damages recovered. *Comp. Astorn.* 133. So spitting in a man's face, or treading on his toes.

In many cases a man may justify an assault; thus, to lay hands gently upon another, not in anger, is no foundation of an action of trespasss and assault: the defendant may justify *molliter manus imposuit* in defence of his person, or goods; or of his wife, father, mother, or master; or for the maintenance of justice. *Bract.* 9 *E.* 4. 35 *H.* 6. c. 51.

A servant, &c. may justify an assault in defence of a master, &c. but not *cont.* *Bath. Ni. Pri.* p. 18. *L. Raym.* 62.

If an officer, having a warrant against one who will not suffer himself to be arrested, beat or wound him in the attempt to take him, he may justify it; so if a parent in a reasonable manner chastise his child, or master his servant, being actually in his service at that time, or a schoolmaster his scholar, or a gaoler his prisoner, or even a husband his wife (for reasonable and proper cause); or if one confine a friend who is mad, and bind and beat him, &c. in such manner as is proper in his circumstances; or if a man force a sword from one who offers to kill another; or if a man gently lays his hand on another, and thereby stay him from inciting a dog against a third person; if I beat one (without wounding him, or throwing at him a dangerous weapon) who wrongfully endeavours with violence to dispossess me of my lands or goods, or the goods of another delivered to me to be kept for him, and will not desist upon my laying my hands gently on him and disturbing him; or if a man beat, wound or maim one who makes an assault upon his person, or that of his wife, parent, child, or master; or if a man fight with, or beat one who attempts to kill any stranger; in these cases it seems the party may

justify the assault and battery. See 1 *Hawk. P. C.* 130. and the several authorities there cited.

And on an indictment the party may plead Not guilty, and give the special matter in evidence; but in an action he must plead it specially. 6 *Mod.* 172. Supposing it matter of justification.—If of *excuse*, 'tis said it may be given in evidence, on the general issue. *Vide Bath. Ni. Pri.* 16.

Also in cases of assault, for the assault of the wife, child, or servant, the husband, father, and master, may have action of trespasss. *Peſ quod servitium amissi.* Otherwise in case of a wife, husband and wife should join in the action for the personal abuse of the wife, (the husband not having sustained any damage.) If the husband has been damaged, as by tearing her cloaths, &c. for that peculiar injury to himself he alone must sue.

As to parent and child, master and servant, unless injury accrues to the parent or master, the child or servant must sue.

For assaults the wrong-doer is subject both to an action at the suit of the party, wherein he shall render damages; and also to an indictment at the suit of the king, wherein he shall be fined according to the heinousness of the offence. 1 *Hawk.* 134.

Where a man is assaulted, and he hath no witnesses to prove the same, or in other cases, the party assaulted may bring an information in the crown-office; and not have common action of trespasss. *Vide Stat.* 4 & 5 *W. & M.* c. 18. which requires recognizances to be taken to prosecute with effect, &c. And *Stat.* 8 & 9 *W.* 3. c. 11. enacting, That where there are several defendants to any action of assault, &c. and one or more acquitted, the person so acquitted shall recover costs of suit, unless the judge certify that there was a reasonable cause for making such person a defendant or defendants to such action.

If any person assault a privy counsellor, in the execution of his office, it is felony. *Stat.* 9 *Ann.* c. 16.

Stat. 6 *Geo.* 1. c. 23. sect. 11. If any person shall wilfully and maliciously assault any person in the public streets or highways, with an intent to tear, spoil, cut, burn or deface, and shall tear, spoil, cut, burn, or deface the garments, &c. of such person, 'tis felony; and the offender may be transported for seven years.

Assaulting persons in a forcible manner, with intent to commit robbery, is made felony and transportation, by *Stat.* 7 *Geo.* 2. c. 21. And assaulting or threatening a counsellor at law, or attorney employed in a cause against a man; or a juror giving verdict against him; his adversary for suing him, &c. is punishable on an indictment, by fine and imprisonment, for the contempt. 1 *Hawk.* 58.

Vide further, as to assault and battery, *Bath. Ni. Pri.* 14, &c. *Black. Com.* 4 *V.* 216, &c. As to assault and battery, and false imprisonment, *Bath. Ni. Pri.* 21, &c. *Black. Com.* 4 *V.* 218, &c.

Assay of weights and measures, (from the *Fr.* *essay*, i. e. a proof or trial) Is the examination of weights and measures, by clerks of markets, &c. *Reg. Orig.* 279.—*Ac assiam & assiam Panis, Vini, & Cervisie.* *Paten.* 37 *H.* 8. *Tho. Marrow.*

Assayer of the king, (*Assayator regis*) An officer of the king's mint, for the trial of silver; he is indifferently appointed between the master of the mint and the merchants that bring silver thither for exchange. *Anno* 2 *H.* 6. cap. 12. Vessels of gold shall be assayed. 28 *Ed.* 1. c. 20. and 18 *Car.* 2. c. 5.—*Mandatum est Will. Hardeſ clerico, quod convocatis in presentia sua omnibus monetariis assayatoribus, custodibus, operariis & aliis ministris de Cambiis regis London & Cantuar. per visum & testimonium illorum provident, quod tot tales operarii sint in predictis Cambiis, qui sufficient operationes regias faciendas, ne rex pro defectu hujusmodi ministrorum dampnum incurrat.* *Claus.* 17 *H.* 3. p. 8.

Assayers, of plate made by goldsmiths, &c. These are for assaying and marking thereof, of whom with their fees; and how the assay offices are regulated by statute, see 12 *Geo.* 2. c. 26. and *Goldsmiths.*

Assayflare, A word used in old charters for to take fellow judges. — *Henricus Dei gratia rex Angl. &c. Dilecto & fideli suo Nicholao de la Tour salutem. Sciatis quod constituimus vos iusticiarium nostrum una cum hiis quos vobis duxeritis assayflandos ad assisam novae disseisinae capiendam.*—Cartular. Abbat. Glaston. MS. f. 57.

Asscurate, (*adsecurare*) To make secure by pledges, or any solemn interposition of faith. In the charter of peace between *Hen. 2.* and his sons, this word is mentioned. *Hoveden, anno 1174.*

Asssembly unlawful, (from the Fr. *asssembler*, i. e. *aggregare*) To flock together. It is the meeting of three or more persons to do an unlawful act, altho' they do it not: as to assault or beat any person; enter into houses, or lands, &c. *West. Symb. part 2. sect. 65.* Their meeting and abiding together makes the crime, where they do not execute their intentions: if the intention be to redress public grievances, and be executed, it is adjudged treason. *3 Inst. 9.* The late riot act ordains, that where twelve persons, or more, *unlawfully assembled*, continue together an hour after proclamation to depart, they shall be guilty of felony. *Stat. 1 Geo. 1. c. 6.* See *Rebellious Assembly and Riot.* Vide *Black. Com. 4 V. 146.*

Assent, or consent. To a legacy of goods, the assent of the executor is necessary, before the legatee may take the same; but to a devise of lands that are freehold, it is not required. *Co. Lit. 111.* The assent of an executor to a devise of a legacy, or of any personal thing, is so necessary, that if the legatee or devisee take the thing without the delivery and assent of the executor, he may have an action of trespass against them. *Keilw. 128. 1 Nelf. Ab. 260.* The Common law takes notice of the assent of the executor to the legacy, and doth give him time to consider of the value of the goods, and state of the debts of the testator, that he may pay a legacy with safety; the executor being to pay debts before legacies. *Perk. 570.* No property can be transferred to the legatee without the assent of the executor: but if the executor doth once assent to the legacy, the legatee hath such a property vested in him that he may take it, though the executor revokes his assent afterwards. And there may be an assent implied, as well as express; as if the executor offers the legatee money for what is bequeathed him; or directs others to the legatee to buy it, &c. *Plowd. 543. 4 Rep. 28.* When there are many executors, the assent of one to a legacy is sufficient: and one executor may take a legacy without the assent of his co-executors. *Perk. 572.* Assent may be before or after probate of the will. An infant executor, at the age of seventeen years, may assent to a legacy: but it has been doubted, whether an *administrator durante minori etate* can assent. *Cro. Eliz. 719.* A husband is to give assent where his wife is executrix. A court of equity, or the spiritual court, may compel an executor to assent to a legacy. *March 97.* But an assent to a void devise will be also void. *Plowd. 525.* Assent of *dean and chapter* in making leases of church lands; vide *Leases.* Of the major part of corporations, in making by-laws, vide *By-laws.* And see *Assets.*

Assessors, Those that *assess* public taxes; as two inhabitants in every parish were assessors for the royal aid, to rate every person according to the value of his estate. *Anno 16 & 17 Car. 2.* There are assessments of parish duties, for raising money for the poor, repairing of highways, &c. made and levied by rate on the inhabitants; as well as assessments of public taxes, &c. See *Assessors.*

Assets, (Fr. *asset*, i. e. *satiss*) Signifies goods enough to discharge that burden which is cast upon the executor or heir, in satisfying the debts and legacies of the testator or ancestor. *Bro. tit. Assets.* Assets are real, or personal; where a man hath lands in fee simple, and dies seised thereof, the lands which come to his heir are assets real: and where he dies possessed of any personal estate, the goods which come to the executors are assets personal: assets are also divided into *assets per descent*, and *assets inter maines*; assets by descent is where a person is bound in an obligation, and dies seised of lands which descend to the heir, the land shall be assets, and the heir shall be charged as far as the land to him descended will extend: *assets inter maines* is when a man indebted makes executors, and

leaves them sufficient to pay his debts and legacies; or where some commodity or profit ariseth to them in right of the testator, which are called *assets in their hands.* *Terms de Ley 56, 77.*

As to assets by descent it is to be observed, that by the Common law, if an heir had sold or aliened the lands which were assets, before the obligation of his ancestor was put in suit, he was to be discharged, and the debt was lost: but by statute, the heir is made liable to the value of the land by him sold, in action of debt brought against him by the obligee, who shall recover to the value of the said land, as if the debt was the proper debt of the heir; but the land which is sold or aliened *bona fide* before the action brought, shall not be liable to execution upon a judgment recovered against the heir in any such action. *Stat. 3 & 4 W. & M. cap. 14.* Where a man binds himself and his heirs in a bond; and dies, leaving issue two sons, if the eldest son enters on the lands by descent as heir to the father, and die without issue; and then the youngest son enters, he shall be charged with assets as heir to the father. *Dyer 268.* Lands which come to the heir by purchase shall not be assets; for 'tis only lands by descent that are assets. *1 Danv. Abr. 577.* A reversion in fee, depending upon an estate-tail, is not assets; because it lies in the will of the tenant in tail to dock and bar it by fine, &c. *6 Rep. 56.* But after the tail is spent, it is assets. *3 Mod. 257.* And a reversion on an estate for life or years shall be assets. A reversion expectant upon the determination of an estate for life is assets, and ought to be pleaded specially by the heir; and the plaintiff in such case may take judgment of it *cum acciderit.* *Dyer 371. Carthew's Rep. 129.* An advowson is assets; but not a presentation to a church actually void, which may not be sold. *Co. Lit. 374.* Lands of *cestuy que trust* shall be assets by descent. *Stat. 29 Car. 2. c. 3. f. 12.* Also

"Estate *pur auter vie* shall be assets in the hands of the heir, if it come to him by reason of a special occupancy, and where there is no special occupant, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands."

And lands by descent in antient demesne will be assets in debt. But a copyhold estate descending to an heir is not assets; nor is any right to an estate assets, without possession, &c. till recovered and reduced into possession. *Danv. 577.*

An annuity is no assets, for it is only a *chose en action.* *Br. Assets per Descent, pl. 26.*

Equity of redemption of an estate mortgaged, and a term for years to attend the inheritance are assets. *3 Leon. 32.* An heir may plead *riens per descent*, but the plaintiff may reply that he had lands from his ancestor; and special matter may be given in evidence, &c. *3 & 4 W. & M. c. 14. 5 Rep. 60.* A special judgment against assets only shall have relation to, and bind the lands from the time of the filing the original writ or bill. *Carth. Rep. 245.* As to the heir being bound, vide *Co. L. 209, 376, 383, 384, 386.*

As to assets *inter maines*, money decreed in a court of equity by reason of executorship, or arising by sale of lands by executors; and damages recovered by executors; also interest of the testator's money lent by executors, shall be assets. *2 Chan. Rep. 152.* Those goods and chattels, which belonged to the testator at his death, and which do come to the hands of the executor, are assets, to make the executor chargeable to creditors, &c. *6 Rep. 47.* But such things as are not valuable shall not be assets: and debts, &c. when recovered by the executor after the death of the testator, shall be accounted assets; and not before recovered, for the executor shall not be charged for a debt, if he cannot recover it. *Wood's Inst. 323.* A release of a certain debt due to the testator makes it assets in the executor's hands; because it shall be intended he would not have made the release, unless the money had been paid to him. *1 Nelf. Abr. 262.*

If an obligee or creditor is made executor, the debt is assets; but he may pay himself before any other in equal or inferior degree. *1 Inst. 264. Office of Ex. ch. 2. p. 43, 63.*

If an executor of his own wrong, to whom 20*l.* is owing, doth seize goods to the value of 20*l.* intending to pay himself a debt of that value, this shall be assets in his hands to make him chargeable to any creditor or legatee. 5 Rep. 30.

Tho' a plantation be an inheritance, yet, being in a foreign country, it is a chattel to pay debts, and a thing that is testamentary. Vent. 358.

Leases are assets to pay debts, notwithstanding the assent of the executor to the devise of them. 1 Lill. Abr. 99. Where an executor of lessee for years receives the profits of the land, they are appropriated to the use of the lessor; but what is over and above the rent shall be assets. 1 Salk. 79. If an executor surrenders a term of years which he had as executor, to him in reversion; or if he purchases the reversion, 'tis not extinct as to him, but shall still remain assets to the executor to satisfy debts and legacies. 1 Rep. 87.

Assets in the hands of one executor is assets in the hands of others; and if an executor hath goods of the testator in any part of the world, he shall be charged in respect of them. 6 Rep. 47. In actions against executors, the jury must find assets of what value; for the plaintiff shall recover only according to the value of the assets found. 1 Rol. Rep. 58.

Assewiare, To draw or drain water from marsh grounds.—*Quod ipsi mariscum prædictum assewiare, & secundum legem Marisci, Wallis includere & in culturam redigere. — Et Mariscum illum sic assewiatum, inclusum & in culturam redactum tenere.* Mon. Ang. 2 Vol. f. 334.

Assidere, or **assedere**, To tax equally. *Provisum est generaliter quod præd. quadragesima hoc modo assideatur & colligatur.* Mat. Paris. anno 1232. Sometimes it hath been used to assign an annual rent, to be paid out of a particular farm, &c. As, *manerium rex Stephanus dedit & assedit eis pro centum marciis.*

Assign, (*assignare*) Hath two significations; one general, as to set over a right to another, or appoint a deputy, &c. And the other special, to set forth or point at, as we say to assign error, assign false judgment, waste, &c. And in assigning of error, it must be shewn where the error is committed; in false judgment, wherein the judgment is unjust; in waste, wherein especially the waste is done. F. N. B. 19, 112. Reg. Orig. 72. Also justices are said to be assigned to take assises. Stat. 11 H. 6. c. 2. And see **Assignee** and **Assignment**.

Assignee, (*assignatus*) Is he that is deputed or appointed by another to do any act, perform any business, or enjoy any commodity. And assignees may be by deed, or in law: assignee by deed is when a lessee of a term, &c. sells and assigns the same to another, that other is his assignee by deed: assignee in law is he whom the law so makes, without any appointment of the person; as an executor is assignee in law to the testator. Dyer 6. But if there be assignee in deed, assignee in law is not allowed: if one covenant to do a thing to J. S. or his assigns by a day, and before that day he dies; if before the day he name any assignee, the thing must be done to his assignee named; otherwise to his executor or administrator, who is assignee in law. 27 H. 8. 2. A. leased lands to B. for nine years, the remainder after his death to the executors or assigns of the said B. for forty years, then B. dies intestate, and his wife administers to him; in this case the administrators are not assignees. Owen 125. He is called assignee, who hath the whole estate of the assignor: and an assignee, though not named in a condition, may pay the money to save the land; but he shall not receive any money, unless he be named. 1 Inst. 215. Assignees may take advantage of forfeitures on conditions, when they are incident to the reversion, as for rent, &c. 1 And. 82. And regularly every assignee of the land may take advantage of inherent covenants; also assignees are bound by such covenants, as a covenant to repair, &c. But if it concerns a thing not in being at the time of the demise, as to make a new edifice, &c. the assignee is not bound, except he be named in express words; nor is he when named, if the thing to be done does not concern the thing demised, but is collateral to it; or in contracts merely personal. 1 Cro. 552. 1 Rol. Abr. 915. Plowd. 284.

Under the word *assigns*, the assignee of an assignee in perpetuum, the heir of an assignee, or the assignee of an heir, shall take. Co. Lit. 384. b. So, if a man covenant with another, his executors and assigns, the assignee of an assignee, and his executors, and the assignee of an executor or administrator of every assignee are included, and shall have covenant. 5 Co. 17. b. But if an obligation be, to pay such persons as he shall name by his will, or writing; there must be an express nomination, and his executor shall not take as assignee. Mo. 855.

A devisee is an assignee in law; per cur. 2 Show. 59.

Where a power is coupled with an interest, an assignee of an executor of an assignee may take as assignee. 2 Show. 57.

An assignee is he that possesses or enjoys a thing in his own right; and deputy is he that does it in the right of another. Perkins. See **Condition**, **Covenant**, &c.

Assignment, (*assignatio*) Is the setting over or transferring the interest a man hath in any thing to another. For the better explaining this head, it will be proper to consider,

I. What things are assignable.

II. Where an assignee shall take advantage of the covenant of an assignor.

III. Where an assignee shall be bound by the covenant of an assignor.

I. Assignments may be made of lands in fee, for life, or years; of an annuity, rent-charge, judgment, statute, &c. but as to lands they are usually of leases and estates for years, &c. And no estate of freehold, or term for years, shall be assigned but by deed in writing signed by the parties; except by operation of law. Stat. 29 Car. 2. c. 3. A possibility, right of entry, title for condition broken, a trust, or thing in action, cannot be granted or assigned over. 1 Inst. 214.

But though a bond, being a *chose in action*, cannot be assign'd over so as to enable the assignee to sue in his own name, yet he has by the assignment such a title to the paper and wax, that he may keep or cancel it. Co. Lit. 232. And bonds, &c. are assigned by power of attorney to receive and sue in the assignor's name: but bills of exchange are assignable by indorsement, and the assignees may recover in their own names by Stat. 3 & 4 Ann. c. 9.

Also in equity a bond is assignable for a valuable consideration paid, and the assignee alone becomes intitled to the money; so that if the obligor, after notice of the assignment, pays the money to the obligee, he will be compelled to pay it over again. 2 Vern. 595.

An assignee must take it subject to the same equity that it was in the hands of the obligee; as if on a marriage treaty the intended husband enters into a marriage-brotherage bond, which is afterwards assigned to creditors, yet it still remains liable to the same equity, and is not to be carried into execution against the obligor. 2 Vern. 428.

Where there is a bond for the performance of covenants in a lease, if the lessee assigns the lease, he may likewise assign the bond; but this must be before any of the covenants are broken; but if any of the covenants are broken, and the lessee afterwards assigns the lease and bond, and the assignee puts the bond in suit, 'tis maintenance. Godb. 81.

'Tis enacted by the statute 7 Jac. 1. c. 15. That a debtor to the king shall not assign any debts to him, but such as did originally grow due to the debtor; afterwards there was a debtor to the husband in 2000*l.* by a statute; the husband made his wife executrix, and died; she married again one G. D. who was indebted to the king, and then the husband and wife assigned this statute to the king in satisfaction of the debt due to him; adjudged, that the assignment was good, for tho' the second husband had the statute in right of his wife, and by consequence the debt was not originally due to him; yet because he might release the statute 'tis the same thing as if it had been originally taken in his name. 2 Cro. 324.

An office of trust is not grantable or assignable to another; and therefore it was adjudged, that the office of a *flawer*, which

which was an office of trust, could not be assigned, and if it could not be assigned, it cannot be extended upon a statute. *Dyer* 7.

A possibility, right of entry, or thing in action, or cause of suit, or title for a condition broken, cannot be granted or assigned over by law; for if this were permitted, it would promote maintenance, and prove prejudicial to such as, being able to contend with those with whom the original contract was, might find themselves depressed by a powerful adversary. *Co. Lit.* 214. *1 Rol. Abr.* 376. *Skin.* 6, 26.

A bare power is not assignable, but where it is coupled with an interest it may be assigned: agreed *per cur.* as where a lease was made with power for lessor, his heirs and assigns, to cut down, grub up, and sell trees; and lessor granted some of the trees to defendant who with his servants entered and cut them down; and it was objected, that this was a power annexed to the reversion only, and not assignable; and that he might have justified under the lessor, but not in his own right. But judgment *quod quercus nil capiat*. The liberty is annexed to the trees, and as incident to them, assignable with them. *2 Jon.* 206. The lessor might sever the trees from the reversion. *2 Mod.* 317.

Arrears of rent, &c. is a *chose in action*, and not assignable. See *Skin.* 6.

It hath been doubted if a lease for years before entry and possession be assignable. See *Show.* 291.

A lessee out of possession cannot make any assignment of his term off from the land; but must first enter, and recontinue his possession; or seal and deliver the deed upon the land, which puts the assignee into actual possession. *Dalif.* 81. But it has been adjudged, that where lessee for years of the crown is put out of his estate by a stranger, yet he may assign the term, tho' he is not in possession; because the reversion being in the crown, he cannot lawfully be put out of possession, but at his own will. *Cro. Eliz.* 275.

If lessee for years assigns all his term in his lease to another, he cannot reserve a right in the assignment; for he hath no interest in the thing by reason of which the rent reserved should be paid; and where there is no reversion there can be no distress: but debt may lie upon it, as on a contract. *1 Lill. Abr.* 99. Lessee for term of years assigns over his term and dies, his executors shall not be charged for rent due after his decease. *Noy's Max.* 71. Where the executor of a lessee assigns the term, debt will not lie against him for rent incurred after the assignment; because there is neither privity of contract, nor estate between the lessor and executor: but if the lessee himself assigns his lease, the privity of contract remains between him and the lessor, although the privity of estate is gone by the assignment, and he shall be chargeable during his life; but after his death, the privity of contract is likewise determined. *3 Rep.* 14. *1 Nelf. Abr.* 271. Although a lessee make an assignment over of his term, yet debt lies against him by the lessor or his heir, (not having accepted rent from the assignee;) but where a lessee assigns his term, and the lessor his reversion, the privity is determined, and debt doth not lie for the reversioner against the first lessee. *Moor* 472. Vide *Barker v. Dormer.* *1 Sho.* 191.

In case of action of debt for rent by the assignee of a reversion, the defendant, a lessee may plead, that, before any rent became due, he assigned the term to another; but he must set forth in his plea that he gave notice to the plaintiff of the assignment made. *Raym.* 163. A man made a lease, provided that the lessee or his assigns should not alien the premises without licence of the lessor, &c. who after gave licence to the lessee to alien; by this the lessee or his assigns may alien in infinitum. *4 Rep.* 119.

Adjudged, that some things in respect of their nature are not assignable, or to be granted over; as for instance, if the donee in tail holdeth of the donor by *fealty*, he cannot assign it over to another, because *fealty* is incident to, and inseparable from the reversion; so if the founder of a college grant his foundation, tho' it be to the king, the grant is void, because 'tis inseparable from his blood. *11 Rep.* in *Magdalen College's* case.

Several things are assignable by acts of parliament, which seem not assignable in their own nature; as promissory notes, by the *3 & 4 Ann. c. 9.* bail-bonds by the sheriff, by *4 & 5 Ann. c. 16.* a judge's certificate for taking and prosecuting a felon to conviction, by *10 & 11 W. 3. c. 23.* a bankrupt's effects by the several statutes of bankruptcy.

II. As to what cases give the assignee advantage of the assignor's covenant, it is to be observed, in general, that

If the remainder of a term of years be assigned to another, the assignee shall have the benefit of a lessee; and of re-entry upon a lease made by the grantor for fewer years, &c. by the *Stat. 32 H. 8. cap. 34.* And the assignee of a reversion of a term shall take advantage of a covenant against the lessee of a shorter term; as where lessee for twenty years makes a lease for four years. *Moor* 694, 695. The word *heir* is sufficient to make an assignee; and the grantee of a common person is assignee to have benefit of a covenant, grant, &c. *Plowd.* 173. A lease was made for years of lands, excepting the woods; the lessor grants the trees to the lessee, and he assigns the land over to another: the trees do not pass by this assignment to the assignee. *Goldsb.* 188.

The lessor demised land, and covenanted with the lessee, his executors and assigns, that if he were disturbed or forced to pay any charge, &c. he should retain so much of the rent; afterwards the lessee made an assignment of his term: and it was held, that his assignee might have remedy upon the covenant by way of retainer against the assignee of the reversion. *Plowd.* 72.

Lessee for years made an assignment of part of his term, and the assignee covenanted to repair; afterwards the lessee devised the reversion of the whole term to another, and died, and the devisee brought an action of covenant against the assignee; adjudged, that this devisee of the reversion was an assignee to take the benefit of this covenant or condition within the statute *32 H. 8. c. 34.* of conditions. *Godb.* 161.

An assignee of an assignee, an executor or administrator of an assignee, or an assignee of an executor, are comprehended under the word *assigns*, and these shall have an action of covenant for a breach of any covenant which runs with the land. *5 Rep.* 16. *Spencer's* case.

Lessee for years covenanted for himself and his assigns, that he would not lop the trees, &c. afterwards the lessee died intestate, and administration was granted to *W. R.* who lopped the trees, &c. adjudged, that it was a breach of the covenant, for an administrator is an assignee as well as an executor. *Moor* 44.

Lessee for life made a lease for seventeen years, who in the next year assigned the term to *B.* who made a lease to *W. R.* for fourteen years, rendering rent on certain days, and if he should for three days after, being lawfully demanded, and not paid, the lease to be void; he in the reversion for seventeen years, granted all his estate and interest by deed parol to one *Rouland*, who demanded the rent, and entered for non-payment; one question was, whether at *Common law*, without the help of the statute *32 H. 8. c. 34. of conditions*, the assignee of him in reversion could take the same advantage of this lease, being void, as the assignee of the term himself might have done, who granted the lease for fourteen years? and adjudged, that he might by the grant of all his estate, if it had been in writing, and that by the statute *32 H. 8. c. 34.* the grantee of the reversion of a term, shall have the benefit of a condition annexed to a lesser term derived out of a larger. *Moor* 525.

III. With respect to the cases in which the assignee is bound by the covenant of the assignor.

As the rent issues out of the land, the assignee generally who has the land, and is privy in estate, is debtor in respect thereof. *3 Rep.* 32.

The assignee of a term is bound to perform all the covenants annexed to the estate; as if *A.* leases lands to *B.* and *B.* covenants to pay the rent, repair houses, &c. during the said term, and *B.* assigns to *J. S.* the assignee is bound

bound to perform the covenants during the life of the first lessee, though the assignee be not named, because the covenant runs with the land being made for the maintenance of a thing in *esse* at the time of the lease made. 1 *Roll. Abr.* 521. *Cro. Eliz.* 457. *Moor* 399. 5 *Co.* 24.

But if *A.* leases for years to *B.* and *B.* for himself, his executors and administrators, covenants with *A.* to build a wall upon a part of land demised, and after *B.* assigns, the assignee is not bound by this covenant; for the law will not annex the covenant to a thing not in *esse*. 5 *Co.* 15. Yet vide *post*.

But if *B.* had covenanted for him and his assigns to build the wall, &c. this would have bound the assignee, because it is to be done upon the land, and the assignee is to have the benefit thereof. 5 *Co.* 15.

The lessee covenanted for himself, his executors and administrators, to leave fifteen acres every year for pasture, without ploughing it, and afterwards he assigned his lease to the defendant, against whom an action of covenant was brought for not leaving fifteen acres in pasture, &c. and upon a demurrer to the declaration it was insisted for the defendant, that he was not bound by this covenant, because he was not assignee of the lessee, who had covenanted only for his executors and administrators, and not for his assigns, for they were not named in the covenant; but adjudged this covenant binds him, though not named, because it is for the benefit of the estate; but it had been otherwise if it had been to do a collateral act as to build *de novo*, or the like, for in such case the assigns of the covenantor are not bound, unless named. 2 *Cro.* 125.

Where the executor of a lessee assigns the term, debt will not lie against him for rent incurred after the assignment, because there is neither privity of contract between the lessor and the executor, before the assignment, nor privity of estate, after the assignment, and this was *Verton and Syddalis's* case; but where the lessee himself assigns his lease, in such case the privity of contract still remains between him and the lessor, though the privity of estate is gone by the assignment, and therefore notwithstanding that assignment, he shall be chargeable during his life, but after his death the privity of contract is likewise determined. 3 *Rep.* 24.

If an assignment is made by an assignee, the first assignee is not suable for the rent; for if he be accepted by the lessor, the admission of one assignee is the admission of twenty. *Comp. Attorn.* 491. Assignment by an assignee dischargeth him, because he was only chargeable as having the land; and there is no occasion for giving notice to the lessor of his assignment over. *Comerb.* 192.

Lessee for years rendering rent, covenants to build a house on the land in ten years; within which time he assigns his term, action lies on the covenant against the assignee. *Godb.* 60. But where a lessee covenanted for himself and his assigns to rebuild a house before such a time, which he did not do, but after the time expired he assigned the term; adjudged that this covenant will not bind the assignee, because it was broken before the assignment. 1 *Salk.* 199.

Also though the covenant be for him and his assigns, yet if the thing to be done be merely collateral, and no way concern the thing demised, the covenant shall not bind the assignee; as if it be to build an house upon other land of the lessor, or to pay a collateral sum. 5 *Co.* 15.

The statute 32 *H. 8. c.* 34. enables grantees of reversions to enter for conditions broken, and to bring actions of covenant, &c. and also enables the tenants of particular estates as for life, &c. to have actions of covenant against their grantees; the question was, if a lessee for life covenant for himself, his executors and administrators, to build a wall on the lands, and afterwards he assigns the estate to *W. R.* whether he or the grantee of the reversion may have an action of covenant against *W. R.* the assignee, if the wall is not built; and adjudged, that he may, though the word assigns was not in this covenant, but only executors and administrators; for by the acceptance of the possession he had made himself subject to all the covenants which run with the land, and are inherent to it. Such as paying rent, repairing, building walls, &c. and to such

he is bound without the special word assigns, but not to any collateral covenants. *Moor* 159.

Where tenant for years assigns his estate, no consideration is necessary; for the tenant being subject to payment of rent, &c. is sufficient to vest an estate in the assignees: in other cases some consideration must be paid. 1 *Mod.* 263. The words required in assignments are, grant, assign, and set over; which may amount to a grant, feoffment, lease, release, confirmation, &c. 1 *Inst.* 301. In these deeds the assignor is to covenant to save harmless from former grants, &c. That he is owner of the land, and hath power to assign; that the assignee shall quietly enjoy, and to make further assurance; and the assignee may covenant to pay the rent, and perform the covenants, &c. See farther Assignee, Condition, Covenant.

An assignment of chambers in an inn of court.

THIS indenture, made the day, &c. in the year of our Lord, &c. Between *A. B.* of, &c. *esq;* of the one part, and *C. D.* of, &c. gent. of the other part: Whereas in and by a certain writing made and dated, &c. at Lincoln's Inn, the benchers of the said inn did order that the said *A. B.* should have a lease of all that chamber up one pair of stairs, number, &c. belonging to Lincoln's Inn aforesaid, for the term of twenty-one years, to commence, at, &c. under the yearly rent of, &c. as by the said recited writing or order may more fully appear: and whereas in pursuance of the said order, a lease of the said chamber hath been since made and granted to the said *A. B.* for the said term of twenty-one years, &c. Now this indenture witnesseth, That the said *A. B.* for and in consideration of the sum of two hundred pounds of lawful money of Great Britain, to him in hand paid by the said *C. D.* at and before the sealing and delivery hereof, the receipt whereof he doth hereby acknowledge, Hath granted, bargained, sold, assigned and set over; and by these presents doth grant, bargain, sell, assign and set over unto the said *C. D.* his executors, administrators and assigns, All that the chamber aforesaid with the appurtenances, and all the estate, right, title, interest, property, claim and demand whatsoever of him the said *A. B.* of, in and to the same, or any part thereof: To have and to hold the said chamber, with the appurtenances, to the said *C. D.* his executors, administrators and assigns, from henceforth, for and during all the rest and residue of the said term of twenty-one years, therein to come and unexpired. And the said *A. B.* doth by these presents, for himself, his executors and administrators, covenant and grant to and with the said *C. D.* his executors, administrators, and assigns, in manner following; (that is to say) that he the said *A. B.* hath good right, full power and lawful authority, to grant and assign the said chamber and premises above mentioned, in manner and form aforesaid: And that the same is free and clear of all former grants, assignments, incumbrances, arrears of rent, and all other duties payable to the said society of Lincoln's Inn, or any the officers or ministers thereof, or otherwise howsoever: And also that he the said *C. D.* his executors, administrators and assigns, shall and lawfully may at all times hereafter, during the rest and residue now to come and unexpired of the said term of twenty-one years, peaceably and quietly have, hold, occupy, possess and enjoy the said chamber and premises above mentioned, and hereby granted and assigned, without any let, suit, trouble, eviction, ejection, claim or demand, of or by the said *A. B.* his executors, administrators, or assigns, or any other person or persons whatsoever: And further, that he the said *A. B.* his executors and administrators shall and will, from time to time, and at all times hereafter, upon the reasonable request, and at the costs and charges of the said *C. D.* his, &c. make do, and execute, or cause to be made, done, and executed, all and every such further acts and assurances, for the better assigning and assuring of the said chamber, and premises to the said *C. D.* as by him the said *C. D.* or his counsel learned in the law, shall be reasonably devised, advised or required. In witness whereof the parties above named have hereunto put their hands and seals the day and year above written.

Form of an assignment of a bond.

TO all people to whom these presents shall come, greeting: Whereas *A. B.* of, &c. in and by one bond or obligation,

obligation, bearing date, &c. became bound to C. D. of, &c. in the penal sum of, &c. conditioned for the payment of, &c. and interest at a day long since past, as by the said bond and condition thereof may appear: And whereas there now remain due to the said C. D. for principal and interest on the said bond, the sum of, &c. Now know ye, That the said C. D. for and in consideration of the said sum of, &c. of lawful British money to him in hand paid by E. F. of, &c. the receipt whereof the said C. D. doth hereby acknowledge; he the said C. D. hath assigned and set over, and by these presents doth assign and set over unto the said E. F. the said recited bond or obligation, and the money thereupon due and owing, and all his right and interest of, in and to the same. And the said C. D. for the consideration aforesaid, hath made, constituted and appointed, and by these presents doth make, constitute and appoint the said E. F. his executors and administrators, his true and lawful attorney and attorneys irrevocable, for him and in his name, and in the name and names of his executors and administrators, but for the sole and proper use and benefit of the said E. F. his executors, administrators and assigns, to ask, require, demand and receive of the said A. B. his heirs, executors and administrators, the money due on the said bond; and on non-payment thereof, be the said A. B. his heirs, executors and administrators, to sue for, and recover the same; and on payment thereof to deliver up and cancel the said bond, and give sufficient releases and discharges therefore, and one or more attorney or attorneys under him to constitute; and whatsoever the said E. F. or his attorney or attorneys, shall lawfully do in the premises, the said C. D. doth hereby allow and affirm. And the said C. D. doth covenant with the said E. F. that be the said C. D. hath not received, nor will receive the said money due on the said bond, or any part thereof; neither shall or will release or discharge the same, or any part thereof; but will own and allow of all lawful proceedings for recovery thereof; he the said E. F. saving the said C. D. harmless, of and from any costs that may happen to him thereby. In witness, &c.

Assimulare, To put highways together: 'tis mentioned in *Leg. Hen. 1. c. 8.*

Assa Cadere. This word signifies to be nonsuited; as when there is such a plain and legal insufficiency in a suit, that the complainant can proceed no further on it. *Fleta, lib. 4. cap. 15. Bracon, lib. 2. cap. 7.*

Assa cadit in Juratam, Is where a thing in controversy is so doubtful, that it must necessarily be tried by a jury. *Fleta, lib. 4. c. 15.*

Assa continuanda, A writ directed to the justices of assize for the continuation of a cause, when certain records alleged cannot be produced in time by the party that has occasion to use them. *Reg. Orig. 217.*

Assa Proroganda, Is a writ directed to the justices assigned to take assizes, for the stay of proceedings, by reason of the party's being employed in the king's business. *Reg. Orig. 208.*

Assise, (Fr. *assise*) According to our antient books is defined to be an assembly of knights, and other substantial men, with the justice, in a certain place, and at a certain time appointed. *Custum. Normand. cap. 24.* This word is properly derived from the Latin verb *assideo*, to sit together; and is also taken for the court, place or time, when and where the writs and processes of assise are handled or taken. And in this signification assise is general; as when the justices go their several circuits with commission to take all assises; or special, where a special commission is granted to certain persons (formerly oftentimes done) for taking an assise upon one or two disseisins only. *Bracon. lib. 3.* Concerning the general assise, all the counties of England are divided into six circuits, and two judges are assigned by the king's commission to every circuit, who hold their assises twice a year in every county, (except *Middlesex*, where the king's courts of record do sit, and where his courts for his counties palatine are held) and have five several commissions. 1. Of *oyer and terminer*, directed to them and many other gentlemen of the county, by which they are empowered to try treasons, felonies, &c. and this is the largest commission they have. 2. Of *gaol delivery*, directed to the judges and the clerk of assise associate, which gives them power to try every prisoner in the gaol committed for any offence whatsoever,

but none but prisoners in the gaol; so that one way or other they rid the gaol of all the prisoners in it. 3. Of *assise*, directed to themselves only and the clerk of assise, to take assises, and do right upon writs of assise brought before them by such as are wrongfully thrust out of their lands and possessions: which writs were heretofore frequent, but now men's possessions are sooner recovered by ejectments, &c. 4. Of *nisi prius*, directed to the judges and clerk of assise, by which civil causes grown to issue in the courts above, are tried in the vacation by a jury of twelve men of the county where the cause of action arises; and on return of the verdict of the jury to the court above, the judges there give judgment. 5. A commission of the peace, in every county of the circuits; and all justices of the peace of the county are bound to be present at the assises; and sheriffs are also to give their attendance on the judges, or they shall be fined. *Bacon's Elem. 15, 16, &c.* There is a commission of the peace, *oyer and terminer* and *gaol-delivery* of *Newgate*, held several times in a year, for the city of London and county of *Middlesex*, at *Justice Hall* in the *Old Bailey*, where the lord mayor is the chief judge. In *Wales* there are but two circuits, *North* and *South Wales*; for each of which the king appoints two persons learned in the laws to be judges. *Stat. 18 Eliz. c. 8.* If justices sit by force of a commission, and do not adjourn the commission, it is determined. 4 *Inst. 265.* The constitution of the justices of assise was begun by *Hen. 2.* though somewhat different from what they now are: and by *Magna Charta* justices shall be sent through every county once a year, who, with the knights of the respective shires, shall take assises of novel disseisin, &c. in their proper shires, and what cannot be determined there shall be ended by them in some other place in their circuit; and if it be too difficult for them, it shall be referred to the justices of the bench, there to be ended. 9 *Hen. 3. c. 12.* Justices of assise, &c. are to hold their sessions in the chief towns of the county; and their records to be sent into the *Exchequer*. 6 *R. 2. 9 Ed. 3.* By the *Stat. 21 Geo. 2. c. 12.* The summer assises in *Buckinghamshire* shall be held at the town of *Buckingham*. Assise is likewise used for a jury, where assises of novel disseisin are tried: the panels of assises shall be arrayed, and a copy indented delivered by the sheriff, &c. to the plaintiffs and defendants six days before the sessions, &c. if demanded, on pain of 40*l.* by *Stat. 6 Hen. 6. cap. 2.* And assise is taken for a writ for recovery of possession of things immovable, whereof any one and his ancestors have been disseised. Likewise in another sense, it signifies an ordinance or statute. *Reg. Orig. 279.* The writs of assise are the four sorts following:

Writ of Novel Disseisin, (*assisa nova disseisina*).

An assise of *novel disseisin* is a remedy *maxime festinam*, for the recovery of lands or tenements, of which the party was disseised. 2 *Inst. 410.* And it is called *novel disseisin*, because the justices in eyre went their circuits from seven years to seven years; and no assise was allowed before them, which commenced before the last circuit, which was called an *antient assise*; and that which was upon a *disseisin* since the last circuit, an assise of *novel disseisin*. *Co. Lit. 153. b.*

An assise is called *festinum remedium*. 1. Because the tenant shall not be effoined. 2. Shall not cast a protection. 3. Shall not pray in aid of the king. 4. Shall not vouch any stranger, except he be present, and will enter presently into warranty; so of receipt. 5. The parol shall not demur for the nonage of the plaintiff or defendant. 8 *Co. 50. Booth 262.*

It lies where tenant in fee-simple, fee-tail, or for term of life, is put out and disseised of his lands, or tenements, rents, common of pasture, common way, or of an office, toll, &c. *Glawv. lib. 10. Reg. Orig. 197.* Assise must be of an actual freehold in lands, &c. and not a freehold in law; it lieth of common of pasture, where the commoner hath a freehold in it, and the lord or other persons feed it so hard, that all the grass is eat up; but then the plaintiff must count and set forth how long the land was fed, and alledge *per quod proficuum suum ibidem amisit*, &c. 9 *Rep. 113.* One may have an assise of land and rent, or of several rents, and offices and profits in his soil, all in one writ: and if it be of a rent-charge, or rent-sock, it shall be

be general *de libero tenemento* in such a place, and all the lands and tenants of the tenements charged ought to be named in the writ; but in assise for rent service it is otherwise. *Dyer* 31. An assise may be brought for an office held for life; but then it must be an office of profit, not of charge only: of the toll of a mill, or market, assise lieth; though it may not be brought of suit to a mill. *8 Rep.* 46, 47.

Seisin of an office may be alledged by taking money for the business done, and the place where the officer sat be put in view. *Dyer* 114.

An assise was brought of the office of a *flaxer* of the court of Common Pleas, and the demandant counted *de libero tenemento*, and alledged *seisin*, by taking money for a *capias*, and the *post* was put in view where the officer sat. *Dyer* 114.

An assise lieth of the office of *register of the admiralty*, and the demandant laid a prescription to it, *viz.* *quod quilibet hujusmodi persona*, who should be named by the admiral, should be register of the admiralty for life. *Dyer* 153.

It lieth of offices of *woodward*, *park-keeper*, and *keeper of chases*, *warrener*, &c. but these are not at Common law; but by the statute of *Westm.* 2. because they are of profits to be taken *in alieno solo*: it likewise lieth of all other offices and bailiwicks in fee. *8 Rep.* 47.

In an assise of a *new office*, it ought to be shewed what profits belong to it; but it is otherwise of an ancient office, because it is presumed, that the profit thereof is sufficiently known. *8 Rep.* 45.

Tenants in common shall each have a several assise for his moiety, or part, because they are seised by several titles; but *twenty jointenants* shall have but one assise in all their names, because they have but one joint title; so if there are three jointenants, and one of them releaseth all his right to one of his companions, and then the other two are disseised of the whole, they shall have but one assise in both their names, for the two parts, because they had a joint title to it at the time of the disseisin, and he to whom the release was given shall have an assise in his own name, because of that part he is *tenant in common*. *1 Inst.* 196.

If lessee for years, or tenant at will, be ousted, the lessor, or he in remainder, may have assise, because the freehold was in him at the time of the disseisin. *Kel.* 109. Assise lies for tithes, by *Stat* 32 *Hen.* 8. c. 7. *Cro. Eliz.* 559. But not for an annuity, pension, &c. In some cases an assise will lie, where ejectment will not; for instance, *de uno crofto*, because it may be put in view to the jury. *2 Bull.* 214. Ejectment will not lie *de piscaria*, by reason the sheriff cannot deliver possession of it; but an assise will lie for it, as it may be viewed by the recognitors. *Cro. Car.* 534. Assise will sometimes lie where trespass *vi & armis* doth not; as where a lord enters and distrains his tenant so often, when nothing is due, that the tenant is disturbed in manuring his lands; in such case he may have assise *de siveit suis distrays*, but he cannot have trespass *vi & armis* against his lord. *8 Rep.* 47. *1 Nels. Abr.* 276.

By *Magna Charta*, 9 *Hen.* 3. cap. 12. assises of *no disseisin*, &c. shall be taken in the proper counties, by the King's justices: and for estovers of wood, profit taken in woods, corn to be received yearly in a certain place; and for toll, tonnage, &c. and of offices in fee, an assise shall be; also for common of turbary, and of fishing, appendant to freehold, &c.

In an assise, the plaintiff must prove his title, then his *seisin* and *disseisin*: but *seisin* of part of a rent is sufficient to have assise of the whole; and if a man who hath title to enter set his foot upon the land and is ousted, that is a sufficient *seisin*. *Comp. Attorn.* 267.

As the writ of assise restores the party to the actual *seisin* of his freehold, for so are the words of the writ, *viz.* *facias tenementum illud seiseri*, &c. consequently the party that brings the writ must found it upon an actual *seisin*, which he has been deposed of, for otherwise this remedy is not commensurate to his case. See *2 Rol. Abr.* 463.

Therefore if there be lord and tenant by rent-service, and the lord grants the services to another, and the tenant attorns by a penny, this being given by way of attorn-

ment, is not sufficient *seisin* to ground an assise on; *secus* if the penny had been given by way of *seisin* of the rent. *Lit. fea.* 565. *Co. Lit.* 315. 4 *Co.* 9. 10 *Co.* 127.

The first process in this action is an original writ issued out of Chancery, directed to the sheriff, commanding him to return a jury, who are called the recognitors of the assise. An assise is to be arraigned on the day the writ is returnable, on which day the defendant is to count; and the tenant is to appear and plead instantly, unless the court thinks proper to allow him an imparlance, which is said cannot be without shewing good cause. *Style Reg.* 88.

If in an assise no tenant of the freehold be mentioned, the defendant may plead it; and where one defendant pleads, no tenant of the freehold named in the writ, if this is found, the writ shall abate *quoad* all. *Dyer* 207. On such a plea of the defendant, the plaintiff says that he hath made a feoffment to persons unknown, and he himself hath continually taken the profits; if then they are at issue upon the taking of the profits, and it be found against the defendant, it shall not be inquired of the points of the assise, for the disseisin is acknowledged. *1 Danv. Abr.* 584. And if the deed of the ancestor of the plaintiff be pleaded in bar, and this is denied, and found for the plaintiff; the assise shall not inquire of the points of the writ, but only of the damages. *Ibid.* 585.

In an assise for an office newly erected and constituted, the demandant in his plaint must shew what fee or profit is granted for the exercise thereof; for this office cannot have a fee or profit appurtenant to it as an ancient office may; and for an office without fee or profit no assise lies. *8 Co.* 49.

But in an assise for an ancient office, the demandant in his plaint need not shew what fee or profit is belonging to it, for it shall be intended there is some fee or profit. *8 Co.* 49.

In this suit, if the defendant fail to make good the exception which he pleads, he shall be adjudged a disseisor, without taking the assise; and shall pay the plaintiff double damages, and be imprisoned a year. *Stat.* 13 *Ed.* 1. cap. 25. In assise the tenant pleads in bar, and the plaintiff makes title, but the tenant doth neither answer nor traverse the title; in this case the assise shall be awarded at large. *Cro. Eliz.* 559. And if any other title is found for the plaintiff, he shall recover. *Bro. Ass.* 281. If a tenant pleads in abatement in an assise, he must at the same time plead over in bar; and no imparlance shall be allowed, without good cause: and where there are several defendants, and any of them do not appear the first day, the assise shall be taken against them by default. *Pasch.* 5 *W.* 3. If assise be brought against a lessee, he may not plead *assisa non*; for that is the form of the plea in bar for tenant of the freehold: he ought to plead the special matter, *viz.* his lease, the reversion in the plaintiff, and that he is possessed, and so in without wrong. *Jenk. Cent.* 142. An assise is to be first arraigned, and the plaintiff's counsel prays the court that the defendant may be called; whereupon he is called; and if the defendant appears, then his counsel demand *oyer* of the writ of assise, and the return of it; which is granted; and then he prays leave to imparl to a short time after, and the jury is adjourned to that day: at the day given by the court, the defendant is again called, and upon his appearance, he pleads to the assise; and upon this an issue is joined between the parties, and the jurors are sworn to try the issue, the counsel proceeding to give them their evidence: after the trial the court gives judgment, and the plaintiff recovering is to have writ of *seisin*, &c. *1 Lill. Abr.* 105, 106.

The jurors that are to try the assise are to view the thing in demand: by writ of assise the sheriff is commanded, *Quod faciat duodecim liberos & legales homines de vicineto, &c. Videre tenementum illud, & nomina eorum imbrevari, & quod summoneat eos per bonas summonitiones, quod sint coram justitiariis, &c. parati inde facere recognitionem, &c.*

By *Westm.* 2. cap. 25. A certificate of assise is given, which is a writ for the party grieved, by a verdict or judgment given against him in an assise, when he had something to plead, as a record or release, which could not have

have been pleaded by his bailiff; or when the assise was taken against himself by default, to have the deed tried, and the record brought in before the justices, and the former jury summoned to appear before them at a certain day and place, for a further examination and trial of the matter. See *Booth* 215, 287. 4 Co. 4. b. 2 Inst. 26.

The plaint need not be so certain in assise as in other writs; the judgment being to recover *per visum recognitorum*; and if the plaint be but so certain as that the recognitors may put the demandant into possession, it is sufficient. *Dyer* 84. The demandant in an assise may abridge his plaint at any time after the jury are charged, before verdict. 1 *Danv.* 580. For proceedings in writ of assise of novel disseisin, see *Plowd.* 411, 412.

Where an assise concerns the king and his prerogative, the judges may be prohibited to proceed therein, by writ *de non ulterius proseguendo rege inconsulto*. *Ibid.* 277. The court of Common Pleas or King's Bench may hold plea of assises of land in the county of Middlesex; by writ out of Chancery. 1 *Lill. Abr.* 105. And in cities and corporations an assise of fresh force lies for recovery of possession of lands, within forty days after the disseisin, as the ordinary assise in the county. *F. N. B.* 7.

Form of a writ of assise of novel disseisin.

GEORGE the Third, &c. To the sheriff of W. greeting.

A. B. hath complained to us, that C. D. unjustly and without judgment hath disseised him of his free tenement or freehold in, &c. within thirty years now last past; and therefore we command you, that if the said A. makes you secure in prosecuting his claim, then that you cause the said tenement to be resealed of the chattels which in it were taken, and the same tenement with its chattels to be in peace, until the next assises, when our justices into those parts shall come; and in the mean time do you cause twelve free and lawful men of that venue or neighbourhood to view the said tenement, and their names to be impanelled, and summon them by good summoners, that they be before our said justices at the said assises, ready to make recognisance thereof; and put by sureties and safe pledges the said C. or his bailiff, if he shall not be found, that he then be there to hear that recognisance; and have you there the summoners, the names of the pledges, and this writ. Witnesses, &c.

A count, or declaration, with a plea, issue, and judgment in an assise.

WILTS, ff. **T**HE assise come to recognise, whether C. D. unjustly and without judgment did disseise A. B. of his freehold in, &c. within thirty years now last past, &c. And whereupon the said A. by T. E. his attorney complains, that he the said C. disseised him of one messuage, twenty acres of land, and, &c. with the appurtenances, in, &c. And for his title to the tenements and assise aforesaid, the said A. saith, that T. B. father of him the said A. long before the obtaining of the said original writ of assise, was seised of the tenements aforesaid with the appurtenances, in his demesne as of fee; and being so seised thereof, the day and year, &c. at, &c. aforesaid, by his indenture, made between him the said T. of the one part, and, &c. of the other part, which one part thereof with the seal of the said T. affixed thereto and by him signed, the said A. here brings into this court, the date whereof is the same day and year aforesaid, he for himself his heirs and assigns did covenant, grant, &c. (here reciting a deed of covenants to levy a fine of the tenements, among other things, and the fine levied accordingly) to the use of A. and his heirs, &c. By virtue of which fine so levied, the said A. into the said tenements with the appurtenances entered, and was thereof seised in his demesne as of fee, until the aforesaid C. D. him the said A. thereof unjustly, and without judgment did disseise as aforesaid; and this he is ready to verify; whereupon he prays the assise, &c. And the said C. by, &c. his attorney comes, &c. and saith, that he has nothing in the said tenements with the appurtenances, to put in view of the recognitors of the said assise, and in the plaint or declaration aforesaid specified, nor had at the day of bringing the original writ of assise aforesaid, or ever after, nor any injury or disseisin did to the said A. And of this he puts himself upon the assise; and the said C. does so likewise: therefore let the assise thereof between them be taken, &c. (here follows the verdict of the recognitors or jury,

for the plaintiff A.) Therefore it is considered, that the said A. do recover against the said C. his seisin of the tenements aforesaid, with the appurtenances, and also, &c. And the said C. is in mercy, &c. And hereupon the said A. prays the writ of the lord the king, to be directed to the sheriff of the county aforesaid, to cause to be delivered to him full seisin of the tenements aforesaid with the appurtenances; and it is granted to him, returnable here, &c.

Assise of Mort d'Ancestor, (assisa mortis antecessoris)

is a writ that lieth where a man's father, mother, brother, sister, uncle, aunt, &c. died seised of lands, tenements, rents, &c. that were held in fee, and after their deaths a stranger abateth. *Reg. Orig.* 223. It is good as well against the abator, as any other in possession of the land: but it lies not against brothers or sisters, &c. where there is privity of blood between the person prosecuting and them. *Co. Litt.* 242. And it must be brought within the time limited by the statute of limitations, or the right may be lost by negligence. If the ancestor were seised the day that he died, of any lands, or other estate in fee simple, although a stranger entereth and disseiseth him of that land the day that he died, so that he dieth not seised of the said land; yet the person who is his heir shall have the assise of mort d'ancestor, because the writ doth not suppose that the ancestor died seised; but saith *parati sacramento recogn.* Si W. B. Pater, &c. *suit seifitus die quo obiit*, &c. And the same is sufficient, although he died not seised. *Fitz. Nat. Br.* 433. If a man go beyond sea in pilgrimage, and dieth there; or if he enter into religion, &c. his heir shall have a writ of assise of mort d'ancestor, and it sufficeth that the ancestor was seised the day he went out of the land, although it was not the day of his death. *Ibid.* 434, 435. By the statute of Gloucester, if tenant by the curtesy alien his wife's inheritance, and dieth, the heir of the wife shall have an assise of mort d'ancestor, if he have not assets by descent from the tenant by the curtesy; and the same shall be as well where the wife was not seised of land the day of her death, as where she was seised thereof. 6 *Ed.* 1. *New Nat. Br.* 489. A warden of a college, &c. shall have assise of mort d'ancestor of rent where his predecessor was seised. And a man may have assise of mort d'ancestor of rents, against several persons in several counties; having in the end of the writ several summons against the tenants: and the process in this writ, is summons against the party; and if he makes default at the day of the assise returned, then the plaintiff ought to sue out a resummons; and if he makes default again, the assise shall be taken, &c. *Bro. Assis.* 88. In a mort d'ancestor, if the tenant says, the plaintiff is not next heir, and this is found against him, the points of the writ shall be inquired of: and in this case, the assise may find, that though the plaintiff be the next heir, yet he is not next heir as to this land; for this is in regard of their inquiry at large. *Br. Mort. d'An.* 47. 1 *Danv. Abr.* 584. Damages shall be recovered in the assise of mort d'ancestor; but it lieth not of an estate tail, only where the ancestor was seised in demesne as of fee. *Bro. Assis.* If a man be barred in assise of novel disseisin, upon shewing a descent, or other special matter, he may have mort d'ancestor, or writ of entry sur disseisin, &c. 4 *Rep.* 43.

Form of a writ of assise of mort d'ancestor.

GEORGE the Third, &c. To the sheriff of W. Greeting. If A. B. shall make you secure, that he will prosecute his claim, then summon, &c. Twelve free and lawful men of the neighbourhood of, &c. that they be before our justices at the first assises, when into those parts they shall come; or before our justices at Westminster on the day, &c. or before our trusty and beloved, &c. and those whom to them we shall associate, at a certain day and place, which the said justices shall cause you to know (or to be known to you) ready upon oath to recognise, if W. B. father of the said A. &c. was seised in his demesne as of fee, of one messuage, and one yard-land with the appurtenances in D. the day which he dy'd; and whether he dy'd, &c. And if the said A. be his next heir; and in the mean time, let them see the said messuage and land, and do you cause their names to be impanelled; and summons by good summoners C. D. who

who now holdeth the said messuage and lands, that he be there to hear the recognition: and have you there the summoners, and this writ. Witness, &c.

Writ of Darrein Presentment, (*assisa ultimæ presentationis*) a writ lying where a man and his ancestors have presented a clerk to a church, and after, the church being void, a stranger presents his clerk to the same church, whereby the person having right is disturb'd. *Reg. Orig.*

20. And a man shall have *assise of darrein presentment*, although neither he nor his ancestors did present to the last avoidance: as if tenant for life or years, or in dower, or by the curtesy, suffer an usurpation in a church, &c. and die; he in reversion who is heir unto the ancestor who last presented, shall have *assise of darrein presentment*, if he be disturbed: but if a man present; and then grant the advowson unto another for life, and he suffer one usurpation, or two, or three usurpations; now at the next avoidance he in the reversion shall not have an *assise of darrein presentment*, if he be disturbed to present. 10 Ed. 3. In this case he is put to his writ of right. If a disturber present to an advowson, and the patron bring an *assise of darrein presentment*, and pending the writ, the incumbent dieth, if the disturber presenteth again and dies, yet the patron shall have an *assise of darrein presentment* upon the first disturbance against the heir of the disturber by journeys accounts. *New Nat. Br.* 71. *Assise of darrein presentment* doth not lie for one coparcener against the other: the church is never litigious between parceners; for if they cannot agree, the ordinary ought to admit the presentee of the eldest: *contra* of jointenants. *Mich.* 15 Ed. 3. If a man present to a church, and afterwards the parson doth resign, &c. and the patron presents again and is disturbed, he shall have this writ, although the former presentee be living; and the writ shall suppose, that the defendant doth deforce him of the advowson; and yet the plaintiff by his declaration counteth that he or his ancestors last presented, by which he supposeth that he is in possession, &c. *New Nat. Br.* 74. A person presents to an advowson, and after the incumbent dies, and the ordinary doth present another by lapse, on that incumbent's death the right patron shall present; and if he be disturbed, he shall have an *assise of darrein presentment*, notwithstanding the mean presentment: but one cannot make title to a presentment in time of war. *Ibid.* A tenant in tail of an advowson may have this writ, as well as tenant in fee thereof, and is not put to a *quare impedit*: and 'tis said a lessee for years may bring it, if he hath presented before, although he hath no freehold; for this assise is not like an assise of *novel disseisin*. *F. N. B.* 31. Though he who will generally bring the *assise of darrein presentment*, ought to have the same estate or part thereof, which he had at the time of the first presentment: therefore if such lessee for years of an advowson presents, and after his estate is enlarged for life, or in fee; and then the church becomes void, he shall not have this writ, because he hath a new estate by enlargement, and no part of his former estate. *Kelw.* 118. *Mallor. Qu. Imped.* 162. By *Magna Charta* 9 H. 3. c. 13. These *assises of darrein presentment* are to be always taken before the justices of the bench, and there shall be determined. In *assise of darrein presentment*, the process is summons and re-summons, *habeas corpus*, &c. And if the writ be brought in *Middlesex*, at the return the assise shall be there arraigned at the bar, and the tenant demanded; if the tenant doth not appear, a re-summons shall be awarded; and if upon that he appeareth not, the assise is to be taken against him by default, &c. In this assise six of the jury ought to have the view of the church, to the intent that they may put the plaintiff in possession, if he recovers; and the judgment is to recover the presentation and damages, and the value of the church for half a year; and if six months be past, two years value of the church shall be recovered, by *Stat. West.* 2. 13 Ed. 1. cap. 5.

Form of a writ of *assise of darrein presentment*.

GEORGE the Third, &c. To the sheriff of W. greeting. If A. B. shall secure you, &c. then do you summon by good summoners twelve free and lawful men of the venue or

neighbourhood of D. that they be before our justices, &c. ready to recognise upon their oaths what patron in the time of peace presented the last parson, or incumbent, who is dead, to the church of, &c. which is vacant, as 'tis said, and the advowson whereof the said A. saith belongs to him; and in the mean time the church let them view, and do you cause their names to be returned, and summon C. D. who deforced him of that advowson, that he be there to hear, &c. And have you then there the summoners and this writ. Witness, &c.

Writ de utrum, (*assisa utrum*) Lieth for a parson against a layman, or a layman against a parson, for lands or tenements doubtful, whether they be lay-fee, or free alms belonging to the church. *Braz. lib.* 4. It is a writ of the highest nature that a parson can have: and if a parson, prebendary, &c. lose by default in a real action, he may have this writ; for it is his writ of right. 6 Rep. 8. These are the four kinds of writs of assise, used in actions possessory; and are called *petit assises*, in respect of the grand assise: for the law of fees is grounded upon two rights, one of possession, the other of property; and as the grand assise serves for the right of property, so the *petit assise* serveth to settle the right of possession. *Horn's Mirr.* At Common law there are but two forms of writs of assise, viz. *assise de libero tenemento*, and *assise de communia pasturæ*. 8 Rep. 45. The assises of *novel disseisin*, &c. and *de communia pasturæ*, were instituted by Hen. 2. in the place of duels: and therefore Glanville tells us, that *Magna assisa est regale beneficium clementia principis de consilio procerum populis indultum, a quo vitæ hominum et status integritati tam salubriter consulitur, ut in jure, quod quis in libero soli tenemento possidet, retinendo, duelli casum homines declinare possunt ambiguum*, &c. *Glanv. lib.* 2. cap. 7.

Writ of the Forest, (*assisa de foresta*) Is a statute touching orders to be observed in the King's forest. *Mannwood* 35. The statute of view of frank-pledge, anno 18 Ed. 1. is also called the *assise of the King*: and the statute of bread and ale, 51 H. 3. is termed the *assise of bread and ale*. And these are so called, because they set down and appoint a certain measure, or order, in the things they contain. There is further an *assise of nuisance*, *assisa nocu-menti*, where a man maketh a nuisance to the freehold of another, to redress the same. And besides Littleton's division of assises, there are others mentioned by other writers, viz. *assise at large*, brought by an infant to enquire of a disseisin, and whether his ancestor were of full age, good memory, &c. when he made the deed pleaded, whereby he claims his right. *Assise in point of assise* (*assisa in modum assisæ*) which is when the tenant as it were setting foot to foot with the demandant, without any thing further, pleads directly to the writ, no wrong, no disseisin. *Assise out of the point of assise*, is when the tenant pleadeth something by exception; as a foreign release, or foreign matter triable in a foreign county; which must be tried by a jury, before the principal cause can proceed. *Assise of right of damages*, is where the tenant confesseth an ouster, and referring it to a demurrer in law, whether it were rightly done or not, is adjudged to have done wrong; whereupon the demandant shall have a writ of assise to recover damages. *Braz. lib.* 4. *F. N. B.* 105. Assises are likewise awarded by default of tenants, &c.

Assises, (*assiores*) Sunt qui assisas condunt, aut taxationes imponunt.—In Scotland, (according to Skene) they are the same with our jurors; and their oath is this;

We shall leil swith say,
And na swith conceal, for naething we may,
So far as we are charg'd upon this assise,
Be God himself, and be our part of paradise,
And as we will answer to God, upon
The dreadful day of dome,

Assise, Rented or farmed out for such an assise, or certain assessed rent in money or provisions, *terra assisa* was commonly opposed to *terra dominica*; this last being held in demain, and occupied by the lord, the other let out to inferior tenants. So among the lands of the Knight's Templars, belonging to their preceptor of Sandford. *Cam. Oxon. Apud corvele de dono Matildis regine habentur quatuor hide,*

bidæ, quarum duæ sunt in dominico, & duæ assisæ ab hominibus apud, &c.—Kennet's Paroch. Antiq. 141. And hence comes the word to assise or allot the proportion and rates in taxes and payments by *assessors*.

Assithment, A wiregeld, or compensation, by a pecuniary mulct: from the preposition *ad*, and the Sax. *sithbe*, *vice: quod vice supplicii ad expiandum delictum solvitur*.

Association, (*associatio*) Is a writ or patent sent by the King, either at his own motion, or at the suit of a party plaintiff, to the justices appointed to take assises, or of *oyer and terminer*, &c. to have others *associated* unto them. And this is usual where a justice of assise *lies*; and a writ is issued to the justices alive to admit the person associated: also where a justice is disabled, this is practised. *F. N. B.* 185. *Reg. Orig.* 201, 206, 223. The clerk of the assise is usually associate of course; in other cases, some learned serjeants at law are appointed. It has been holden, that an association after another association allowed and admitted, doth not lie; nor are the justices then to admit other association in that writ afterwards, so long as that writ and commission stand in force. *Br. Assise* 386. *Mich.* 32 *H.* 6. The king may make an association unto the sheriff upon a writ of *redisseisin*, as well as upon assise of *novel disseisin*. *New Nat. Br.* 416, 417.

Association of Parliament, In the reign of king William III. the parliament entered into a solemn association to defend his majesty's person and government against all plots and conspiracies: and all persons bearing offices civil or military, were enjoined to subscribe the association, to stand by king William, on pain of forfeitures and penalties, &c. By Stat. 7 & 8 *W.* 3. cap. 27.

Affoile, (*absolvere*) To deliver from excommunication. *Staundf. Pl. Cr.* 72.—The defendant shall remain in prison till the plaintiff is affoiled; that is, delivered from his excommunication: and in Stat. 1 *Hen.* 4. c. 10. Mention being made of K. *Edw.* 3. it is added, whom God affoil.

Assumpsit (from the Lat. *assumo*) Is taken for a voluntary promise, by which a man assumes or takes upon him to perform or pay any thing to another: it comprehends any verbal promise, made upon consideration, and the Civilians express it diversly, according to the nature of the promise, calling it sometimes *pactum*, sometimes *promissionem*, or *constitutum*, &c. *Terms de Ley*.

Here it is to be considered,

- I. In what cases an assumpsit is the proper action.
- II. What words will create an assumpsit.
- III. What consideration is sufficient.
- IV. Of the proceedings.

I. In every action upon assumpsit, there ought to be a consideration, promise, and breach of promise. 1 *Leon* 405. For

An assumpsit is an action the law gives a party injured, for the breach or non-performance of a contract legally entered into; it is founded on a contract either express or implied by law, and gives the party damages in proportion to the loss he has sustained by the violation of the contract. 4 *Co.* 92. *Moor* 667.

But here it must be observed, that the law distinguishes between a general *indebitatus assumpsit* and a *special assumpsit*: for though they come under the denomination of actions on the case, and the party is to be recompensed in damages alike in both, yet the first seems to be of a superior nature, and will lie in no case but where debt will lie; but for a particular undertaking, or collateral promise to discharge the debt or duty of another, a *special assumpsit* must be brought. 1 *New Abr.* 163.

Action of the case on assumpsit lies for not making a good estate of land sold, according to promise; not paying money upon a bargain and sale, according to agreement; not delivering goods upon promise, on demand; this is by express assumpsit; and implied assumpsit is where goods are sold, or work is done, &c. without any price agreed upon; on *action of the case* by *quantum meruit*, the law implies a promise and satisfaction to the value.

When one becomes legally indebted to another for goods sold, the law implies a promise that he will pay this debt; and if it be not paid, *indebitatus assumpsit* lies.

1 *Daru. Abr.* 26. And *indebitatus assumpsit* lies for goods sold and delivered to a stranger *ad requisitionem* of the defendant. *Ibid.* 27. But on assumpsit for goods sold, you must prove a price agreed on, otherwise the action will not lie; though this is helped by laying a *quantum meruit* with the *indebit. assumpsit*, wherein if you fail in proof of the price agreed, you may recover the value. *Wood's Inst.* 536.

If *A.* and *B.* having dealings with each other, make up their accounts, and *B.* is found in arrear, and promises to pay the balance, an *assumpsit* lies against him, and *A.* need not bring a writ of account. *Cro. Jac.* 69. *Yelv.* 70. *S. P.* 1 *Robt Abr.* 7. *S. P.* 1 *Robt. Rep.* 396. *Bulst.* 208. *Moor* 854.

So if *A.* gives money, or delivers goods to *B.* to merchandize therewith, and *B.* promises to render an account, *assumpsit* lies on this express promise as well as account. 1 *Salk.* 9.

So if a tenant, being in arrear for rents, settles an account of arrears with his landlord, and promises to pay him the sum in which he is found in arrear, an *assumpsit* lies on this promise. 1 *Robt. Abr.* 7. *Bro. Account* 81. *Raym.* 211. 2 *Keb.* 813. Vide *Style* 131, 283. *Cro. Jac.* 602.

But if the obligor in a bond, without any new consideration, as forbearance, &c. promises to pay the money, an assumpsit will not lie, but the obligee must still pursue his remedy by action of debt. 1 *Robt. Abr.* 8. *Hutt.* 34. *Cro. Eliz.* 240. seems contra.

Where a man comes to buy goods, and they agree upon a price and a day for the payment, and the buyer takes them away, an *assumpsit* for the money is the proper action, for *trover* will not lie for the goods, because the property was changed by a lawful bargain, and by that bargain the buyer was to convert the goods before the money was due; but if a man comes to buy goods, and they agree upon a price for present money, and the buyer takes the goods away without payment, *trover* lies, because the property is not altered, and therefore the taking away the goods, without payment of the money, is an injurious taking, for which the action lies; but if a man sells goods on payment of money on a day to come, and the money be paid, and the goods not delivered, *trover* lies, because the property is in the buyer. 1 *New Abr.* 167.

If a man and a woman, being unmarried, mutually promise to marry each other, and afterwards the man marries another woman, by which he renders himself incapable of performing his contract, an *assumpsit* lies, in which the woman shall recover damages; for though matrimonial causes are regularly cognizable in the spiritual courts, yet the contract in the present case being *executory*, and revoked by the husband by the subsequent marriage, could not be enforced by ecclesiastical censures, as a contract *in presenti* may; hence therefore, there being no adequate remedy in the spiritual courts, and marriage being an *advantage*, and the loss of it a *temporal loss*, it is fit there should be a remedy in the *temporal courts*, otherwise there would be a failure in justice. *Carter* 232. *Dickenson and Holcroft*.

An *indebitatus assumpsit* lies for money by custom due for scavage; adjudged upon a special verdict, by which it was found, that the sum demanded was due by custom, but that there was no express promise to pay it. 2 *Lev.* 174.

Indebitatus assumpsit will not lie upon a bill of exchange accepted; but action upon the custom only. 1 *Vent.* 152.

If one receives my rent, under pretence of title, I may have an *indebitatus assumpsit* against him. 2 *Mod.* 263.

So where *A.* took out administration to a person supposed to have died intestate, and appointed *J. S.* his attorney, who received money, &c. and paid it to the administrator; afterwards a will appearing, the letters of administration were called in, and the executor brought an *indebitatus assumpsit* against the attorney; who objected, 1. That he acting only as attorney for him, who in fact was administrator, the receipt of the money was not his but the administrator's: and 2dly, That the action ought to have been a *special assumpsit*, the money being received by

by special authority, and that expressly to the use of another; but the court held, that the authority being void, it was a receipt of so much money for the use of the plaintiff on an implied contract, for which an *indebitatus assumpsit* well lies. 1 Salk. 27.

If a feme sole marries a man, who in truth is married to another woman, and he makes a lease of her lands and receives the rents, she may bring an *indebitatus assumpsit* ainst him for so much money received to her use; adjudged after verdict, though objected, that he having no right to receive, the tenant remained still liable, and he had his remedy over against the husband; but the court held, that he being visibly a husband, the tenant was discharged, at least that the recovery in this action would discharge the tenant, as it would be a satisfaction to the true lessor. 1 Salk. 28.

Where action is brought upon a contract, if the plaintiff mistakes the sum agreed upon, he fails in his action; but if he brings it upon the promise in law, arising from the debt, there, though he mistakes the sum, he shall recover. *Alley* 29. Every contract made between parties, implies a mutual promise for performance: and yet an action may be brought on a reciprocal promise by one against the other, although he who brings it hath not performed on his side. *Dyer* 30, 75. When an *assumpsit* or promise is the ground of the action, it must be precisely set forth. 3 *Lev.* 319. If a promise be made without limitation of time for its performance, reasonable time shall be allowed, if there be an immediate consideration for it; and not time during life. 1 *Lill. Abr.* 112. On promise to deliver a thing such a day, the party is bound to do it without request. 1 *Lev.* 284. But if a promise be to do any thing upon request, the request is necessary to intitle the plaintiff to the action, on which it shall arise. 1 *Lev.* 48. For the difference between an *assumpsit* in deed and in law, vide *Gilb. Evid.* 172, 193. and *vide ib.* 204, 5. Every executory contract, and debt that is not upon record, or on a specialty, which may be turned into damage, imports in it an *assumpsit* in law, and one may have debt or action on the case upon it at his election; for when a man doth agree to pay money, or to deliver any thing, he thereby *promiseth* to pay or deliver it. *Plowd.* 128. 1 *Cro.* 94.

Every contract executory implies an *assumpsit* to pay money at the day agreed, or immediately, if no time be limited; but it is not so of an *indeb. assump.* because the cause does not appear. Said by *Popham* to be the opinion of all the justices of England. *Mo.* 667.

The *assumpsit* in an agreement that will be binding and give action, must be compleat and perfect, and duly pursued and observed: and if the party that makes the *assumpsit*, and he to whom it is made, agree together, and a bond is given and taken for what is promised; by this the *assumpsit* is discharged. Also where an *assumpsit* is to stand to an award, if the award made be void; it will make the *assumpsit* void. *Yelv.* 87. 2 *Leon. ca.* 223. 1 *Leon.* 170. *Indeb. assump.* lies by a *prothonotary* against an attorney, for fees for work done for defendant as attorney. *Holt's Rep.* 20. Where money is over paid, this action will lie for the surplus. *Arg.* 11 *Mod.* 147. Vide *Burr. Rep.* tit. *Action on the Case.* An *indebitatus assumpsit* will lie for meat and drink for a bastard child; per *Pemberton*, Ch. J. 2 *Show.* 184.

A. promises B. that when A. receives 100*l.* which C. owes A. that he will pay B. 20*l.* *indebitatus assumpsit* lies not. Otherwise if the money had been originally the money of B. *Skin.* 196. For there was not any consideration. *Indebitatus assumpsit* lies for a customary fine, *super mortem domini.* *Show.* 35. *Indebitatus assumpsit* lies upon a personal contract for a sum in groats, as *pro rebus venditis*; per *Holt*, Ch. J. *Show.* 36.

Indebitatus lies for fees for being knighted. *Show.* 78.

Indebitatus assumpsit lies for money paid by mistake, on an account or deceit; but not for money paid knowingly on illegal consideration, as an usurious bond. *Salk.* 22.

Indebitatus assumpsit will lie in no case but where debt lies, therefore it lies not on a wager, nor upon a mutual *assumpsit*, nor against the acceptor of a bill of exchange; for his acceptance is but a collateral engagement: but lies against the drawer himself; for he was really a debtor by the receipt of the money. 1 *Salk.* 23.

Indebitatus assumpsit lies not on collateral engagements. See the preceding case; and 1 *Salk.* 23. *Butcher and Andrews*, which was an *indebitatus assumpsit* against the father, for money lent the son at the father's request, and so judgment was arrested; for this was a collateral promise. But per *Holt*, Ch. J. if it had been for so much money paid by the plaintiff at the request of the defendant the father to the son, it might have been good; for then it would be the father's debt, and not the son's. *Carth.* 446.

Though as hath been said, *assumpsit* lies not for rent usually reserved on leases; yet if a man promise to pay, without a lease, so much a week as long as A. B. &c. permits him to enjoy a Warehouse, &c. which is a special cause of promise, this action may lie. 2 *Cro.* 592. And if one receive any rent on pretence of title, *assumpsit* lies; as it does also for the receipt of profits of an office, &c. 2 *Mod.* 260. Now, by 11 *Geo.* 2. c. 19. §. 14. where the demise is not by deed, the landlord may recover his rent in an action on the case, for use and occupation. Where a person pays money upon a mistake; or if he receives more from another in a reckoning than he ought, or more fees than should be taken, an *assumpsit* lies. 1 *Salk.* 22. *Comb.* 447. If a man receives money for the use of another person, *assumpsit* may be had against him as bailiff or receiver, which supplies the place of action of account: and where money was deposited on a wager, an *indebitatus* lay for money received to a man's use. *Show.* 117.

If where a promise is made, one part of it is against law, and another part of it lawful, this is ground sufficient for *assumpsit*. 4 *Rep.* 94.

The person to whom a promise is made, shall have the action; and not those who are strangers, or for whose benefit it is intended. *Danv.* 64. Nor shall action be brought against one for what another receives, nor at his request, &c. 1 *Salk.* 23. But if a man delivers money to A. B. to my use, I may have an action on the case against him for this money. If a man accounts, and upon the account is found in arrear to a certain sum, and presently in consideration thereof assumes to pay the debt at a day; action on the case lies for this after the day. *Yelv.* 70. And on a promise to pay a sum of money at so much a month, an action of the case may be brought before the whole is payable; for it is grounded upon the promise, which is broken by every Non-payment, and damages may be recovered: 'tis not like the case of a bill of debt, which is founded on the specialty, and cannot be demanded until the intire sum is due. 2 *Cro.* 504.

II. As to the words by which an *assumpsit* may be created.

The intent of the parties by and to whom the promise or *assumpsit* is made, is more to be regarded than the form of words, and this intent and meaning is to be followed, not in the letter, but the substance of it: if a promise be to provide wedding clothes for a woman, this shall be taken for such clothes to be worn the wedding or feast-day according to the dignity of the person. *Poph.* 182. *Yelv.* 87. 3 *Cro.* 53.

All promises and contracts are to receive a favourable interpretation; and such construction is to be made, where any obscurity appears, as will best answer the intent of the parties; otherwise a person, by obscure wording of his contract, might find means to evade and elude the force of it. Hence it is a general rule, that all promises shall be taken most strongly against the promisor, and are not to be rejected, if they can by any means be reduced to a certainty: Therefore,

If A. in consideration that B. will marry his daughter, assumes and promises to give with her a child's part, and that at the time of his death he will give to her as much as to any of his children, except his eldest son; this is a good promise; for though a child's part in itself is altogether uncertain, yet being to give as much as to any of his children, the promise is certain enough, it being averred what the younger son had. 1 *New Abr.* 168. *Poph.* 148. 2 *Rel. Rep.* 104.

But if there be a discourse between the father of A. and B. in relation to a marriage between the said A. and the daughter of B. and B. *tunc & ibidem* affirms and publishes

lishes to the father of *A. quod daret ei qui maritaret* his said daughter with his consent 100*l.* and after *A.* marries the daughter of *B.* with his consent; yet this affirmance and publication of *B.* shall raise no promise upon which an action upon an *assumpsit* may be brought, because these words do not include any promise. 1 *Roll. Abr.* 6.

If a man promises another, in consideration that he will assign to him a certain term, to pay him 10*l.* this is a good *assumpsit*, though the time of assignment and payment be not appointed; for the 10*l.* shall be paid in a convenient time after the assignment, which also must be done in a convenient time, and he shall not have time during his life. 1 *Roll. Abr.* 14, 15.

If the plaintiff declares, that whereas there was a communication between the plaintiff and defendant, concerning the bark of certain wood, and that thereupon it was agreed that the defendant should give to the plaintiff two shillings per seam for all the bark of such wood as the plaintiff should cut, and that thereupon the defendant assumed and promised to have ready upon a certain day, articles purporting the agreement, and an obligation for the performance thereof, &c. the declaration is not good, because not said in what sum the obligation was to be; and a certain sum cannot be intended, because the number of seams are altogether uncertain; but being after verdict upon the general issue, it was adjudged for the plaintiff; but *per cur.* upon demurrer, or special issue, it had been naught. 1 *Sid.* 270. 1 *Keb.* 776.

But if there be an agreement to enter into an obligation for performance of a thing of a certain value, without mentioning in what sum, it shall be according to the value. 1 *Sid.* 240.

III. What Consideration is sufficient.

The consideration is the ground of the common action on the case: and no action on the case lieth against a man for a promise where there is no consideration why he should make the promise. 1 *Danv.* 53.

A consideration altogether executed and past, is not good to maintain an *assumpsit*, for it is not reasonable that one man should do another a kindness, and then charge him with a recompence; for this would be obliging him whether he would or no, and a bringing him under an obligation without his own concurrence; but if it were moved by a precedent request, it is good, and doth amount to a promise. 1 *Roll. Abr.* 11, 12.

Therefore if the servant of *A.* be arrested in London, for a trespass, and *J. S.* who knows *A.* bails him, and after *A.* for his friendship, promises to save him harmless, and *J. S.* comes to be charged, yet this is no consideration to ground an *assumpsit* on, because the bailing, which was the consideration, was past, and executed before. *Dyer* 272. 1 *Roll. Abr.* 11. 2 *Leon.* 225. *Owen* 144.

But it had been otherwise if the master had before requested him to become bail for his servant, and the bailing had been after. *Dyer* 172.

In consideration that he had paid money for the defendant, and obtained a release of his debt, was held a continuing consideration, because the benefit of it was continuing to the party. 2 *Keb.* 99.

Where a plaintiff by the defendant's appointment paid a little before 20*l.* for a debt of the defendant, he promised to repay it on demand; that consideration shall be held to be past, and the judgment in the action stayed. *Cro. Eliz.* 741.

Assumpsit, in consideration that *N.* the plaintiff, had paid for *B.* the defendant, and at his request, 10*l.* at such a day, (which was a year before) he promised to repay it, *cum inde requisitus esset.* It was objected, that this consideration was for a thing past, and therefore not good. *Sed non allocatur*; for the payment being laid to be at his request, the consideration continues, and so is the common course. *Cro. Eliz.* 282. *

If a man promise to do a thing by such a day, without any consideration or reward, and doth it not, no action will lie; but if he actually enters upon the performance of the thing, and then neglects it to the deceit of the plaintiff, action on the case lies. *Trin.* 2 *Ann.* 3 *Salk.* 11.

If *A.* undertakes to do a thing without hire, as to take brandies out of one cellar, and to lay them down in another cellar, no action lies for the non-feasance; but if he enters on the doing it, action lies for a misfeasance, if it be through his own neglect, or mismanagement, because it is a deceit; but not if by mere accident; *per Holt.* 1 *Salk.* 26.

Where the doing a thing will be a good consideration, a promise to do that thing will be so too; *per Holt.* Ch. J. 12 *Mod.* 459.

Parting with my note to the defendant is a good consideration. 7 *Mod.* 12, 13.

A consideration upon which a promise begins cannot be discharged without some other consideration and consideration that if a person will forbear to sue another upon a bond, &c. may be a good consideration to pay a debt, on promise to do it. *Cro. Jac.* 620, 683. But we conceive there should be a note in writing to avoid the statute of frauds, 29 *Car. 2. c. 3.* *Vide* the case of *Buckmyr v. Darnall.* 2 *L. Ray.* 1085. And the case of *Read executor v. Nash.* *Wilf. Rep. par.* 1. 305. There 'tis laid down, that with respect to this statute, an original promise is not within the statute. A collateral promise, is; when it's to pay the debt of another already contracted. Two persons go to an inn-keeper, one hires an horse, and the other promises that if the inn-keeper will deliver the horse, he will see it forthcoming, this promise for another, is not good without note in writing: but the person is chargeable upon the special bailment, and so good without a note. 1 *Lill.* 118. *Vide* 2 *L. Ray.* 1085. An infant having bought goods and wares died, and made his wife executrix; she being asked for the money says, forbear me till such a time, and I will pay it you; this was held no good *assumpsit*, for it wanted a consideration. 1 *Leon. Ca.* 156. But where an executrix, in consideration the plaintiff would not molest her, but give her a day, promised to pay money due from the testator; action lay without shewing that she had assets; for that shall be intended, and her promise, and the plaintiff's forbearance of the suit, was good cause of action. 2 *Cro.* 273. An administratrix promised to pay the plaintiff money, if he would forbear suit till she had taken out letters of administration; this was not a good *assumpsit*, for the defendant was not liable to the suit as administratrix till administration had, so there was no consideration. *Style* 248, 395.

If one, in consideration I will be bound for him, or for his friend, promise to save me harmless; this is a good consideration and promise: but if one promise to another to save harmless, and say not for what, or against whom, these *assumpsits* are uncertain and insensible, and therefore void; though if any certainty can be made of them, they may be good. 10 *Rep.* 102. *Dyer* 356. In case a promise be, that he who hath the fee simple of land, shall not alien it; or that a man shall not take the profit of his lands, or use the thing he hath bought; or if it be to save a man harmless whatsoever he shall do, &c. the promises so made will not bind or bear an action. 10 *Rep.* 101. *Co. Litt.* 206. *Dyer* 304. *Plowd.* 64. Where a man promises me, that if I will travel with him to London, to help him to search for the will of *J. S.* he will pay me 5*l.* for my pains; if I sue for the money, I must shew that I did travel with him to London, and help him to search for the will, &c. 2 *Cro.* 620.

An *assumpsit* may be upon a general consideration; but it doth not lie where the plaintiff has an obligation to pay the money, which is a stronger Lien than *assumpsit*; nor when the party has a recognizance for the duty, &c. *Jenk. Cent.* 293.

Love or friendship are not considerations to ground actions upon. 2 *Leon.* 30. Also—

Idle and insignificant considerations are looked upon as none at all; for where-ever a person promises without a benefit arising to the promisor, or loss to the promisee, it is looked upon as a void promise. 2 *Bulst.* 269.

Lastly, It is to be observed that considerations may be void as being against law, for if they are wicked and ill in themselves, or unlawful, by being prohibited by some act of parliament, they are void; therefore if an officer,

who,

the duty of his office, is obliged to execute writs, promises in consideration of money paid him, to serve a certain process, an *assumpsit* will not lie on this promise; for the receipt of the money was extortion, and the consideration is unlawful. 1 *Roll. Abr.* 16.

So if an executor sues execution by *elegit*, and *B.* a stranger, as a friend to the executor, in consideration that the sheriff would forthwith execute the said *elegit*, and of six-pence to him by the sheriff paid, promises to pay him 60*l.* upon which the sheriff executes the writ, yet no action lies, because the consideration is against law; for the sheriff ought to do his duty without reward, and his 60*l.* is no discharge of the fees due to the sheriff, being given by a stranger, and not expressed for them. 1 *Roll. Abr.* 16.

But if a man brings a *capias* that he has against *A.* to the sheriff, and prays him that he will make *J. S.* his special bailiff, and promises him that if he will make *J. S.* his special bailiff that if *A.* escapes from the bailiff, that he will bring no action for the escape against him, this is an *assumpsit* upon which an action lies, if he brings any action against the sheriff for the escape. 1 *Roll. Abr.* 16. 1 *Leon.* 132. 3 *Leon.* 227. *Cro. Eliz.* 178.

So where the sheriff takes goods in execution upon a *feri facias*, and a stranger promises the officer to pay him the debt, in case he will restore them, this is a lawful consideration; for by the *feri facias*, he may sell the goods, and this in effect is doing no more. 1 *Salk.* 28. Vide the law of considerations very judiciously treated. *Black. Com.* 2 V. 444, &c.

IV. As to the proceedings in *Assumpsit*.

The plaintiff must set forth every thing essential to the gift of the action, with such certainty, that it may appear to the court that there were sufficient grounds for the action; for if any thing material be omitted, it cannot appear to the court whether the damages given by the jury were in proportion to the demand, or whether the party was at all intitled to a verdict. And therefore in an action upon the case, the plaintiff cannot declare *quod cum* the defendant was indebted to the plaintiff in such a sum, and that the defendant, in consideration thereof, *super se assumpsit* to pay, &c. without shewing the cause of the debt. 10 *Co.* 77.

If in an *assumpsit* the plaintiff declares, *quod cum* there were several reckonings and accounts between the plaintiff and defendant; and at such a day, &c. *in simul computaverunt* for all debts, reckonings and demands; and the defendant upon the said account was found to be in arrear the sum of 20*l.* in consideration whereof the defendant promised to pay, &c. this is a good declaration, without shewing it was *pro mercimoniis*, or otherwise, wherefore he should have an account; for an account may be for divers causes, and several matters and things may be included and comprised therein, which *in pede computi* are reduced to a sum certain, and thereupon being indebted to the plaintiff, it is sufficient to ground an action. *Cro. Car.* 116.

If in an *assumpsit* the plaintiff declares, that the defendant did assume and promise to pay to the plaintiff so much money, and also to carry away certain wood before such a day; the defendant as to the money cannot plead that he paid it, and as to the carriage of the wood *non assumpsit*, for the promise being intire cannot be apportioned. *March* 100. On an *assumpsit* in law, payment, or any other matter that excuses payment, may be given in evidence, on the general issue. In an *assumpsit* in deed, it must be pleaded. *Gilb. Evid.* 204, 5.

If the plaintiff declares upon an *indebitatus assumpsit*, and upon a *quantum meruit*, and the defendant pleads, that after the said several promises made, and before the action brought, the plaintiff and defendant came to an account concerning divers sums of money, and that the defendant was found in arrear to the plaintiff 30*l.* and thereupon, in consideration that the defendant promised to pay the said 30*l.* the plaintiff likewise promised to release and acquit the defendant of all demands, this is a good plea; for by the account the first contract is merged. 2 *Mod.* 43, 44.

The defendant cannot plead that he revoked his promise; as if *A.* is in execution at the suit of *B.* and *J. S.*

desires *B.* to let him go at large, and that he will satisfy him; to which *B.* agrees; though *J. S.* before any thing is done in pursuance of this promise and agreement, comes to *B.* and tells him, that he revokes his promise, and that he will not stand to it; yet such revocation cannot be pleaded in bar to the action. 1 *Roll. Abr.* 32.

In *assumpsit* the plaintiff declared, that in consideration that he had done the defendant *multum & gratissimum servitium*, he promised to pay the plaintiff 10*l.* and also in consideration that he had done him *multa beneficia*, he promis'd, &c. it was moved in arrest of judgment, that neither of these considerations were sufficient, especially the last, because there ought to have been some service particularly express'd; and the court for that reason held it merely void, and judgment *quod querens nil capiat*, &c. *Vent.* 27.

In an action upon an *assumpsit*, if the consideration be executory; as if one promises to do something for me, in consideration of something to be done before by me, to or for him, if I will sue him for that he is to do for me, I must aver, that I have done that which was first to be done by me, for till that be done I may not maintain an action upon the promise. 2 *Cro.* 583. *Pain v. Baswick.*

And where it is executory, and averred that it is executed, when indeed it is not, the defendant may shew it specially, and may take issue as well for not performing the consideration executory, as upon the promise; but if he pleads generally *non assumpsit*, he can not call the performance of the consideration executory, and so it is upon a promise to do any thing upon condition. 1 *Mod. Ent.* 320.

Assumption, The day of the death of a saint, so called, *Quia ejus anima in caelum assumitur.* Du Cange.

Assurance of lands, is where lands or tenements are conveyed by deed: and there is an assurance of ships, goods and merchandise, &c. See *Insurance*.

Aster, and *Homo Aster*, a man that is resident. *Britton* 151.

Astrarius Hares, (from *Astre*, the hearth of a chimney) is where the ancestor by conveyance hath set his heir apparent and his family in a house in his life-time.

— *Dicitur ille cui antecessor in vita sua per chartam hereditatem restituit.* 1 *Inst.* 8.

Astrum, A house or place of habitation, also from *astre*. — *Præceptum fuit vicecom. quod replegiat corpus Willielmi J. quod Richardus S. Valentio cepit & captum tenuit, qui Richardus venit & advocat captionem ut de villano suo, & quod cepit ipsum in astro suo in quo natus fuit, &c.* *Placit. Hillar.* 18 Ed. 1.

Ategar, A weapon among the Saxons, which seems to have been a hand-dart, from the Sax. *Aeton* to sling or throw, and *Gar* a weapon. *Spelm.*

Athe, (*Adda*) A privilege of administering an oath, in some cases of right and property; from the Sax. *ath, othe, juramentum*. It is mentioned among the privileges granted by king *Hen. 2.* to the monks of *Glastenbury*. *Cartular. Abbat. Glaston.* MS. fol. 14, 37.

Atia, See *odio & atia*, A writ of enquiry whether a person be committed to prison on just cause of suspicion.

Atilia, Utensils or country implements: *remaneant duo equi carellarii cum carella & triginta sex boves cum quatuor carucis & atiliis.* *Blount.*

Atrium, Is taken for a court before the house, and sometimes a church-yard.

Attach, (*attachiare*, from the Fr. *attacher*) Signifies to take or apprehend by commandment of a writ or precept. *Lamb. Eiren. lib. 1. cap. 16.* It differs from arrest, in that he who arresteth a man carrieth him to a person of higher power to be forthwith disposed of; but he that *attacheth* keepeth the party attached, and presents him in court at the day assigned; as appears by these words of the writ, *Præcipimus tibi quod attachias talem & habeas eum coram nobis, &c.* Another difference there is, that arrest is only upon the body of a man; whereas an attachment is oftentimes upon his goods. *Kitch. 279.* A *capias* taketh hold of immoveable things, as lands or tenements, and properly belongs to real actions: but attachment hath place rather in personal actions. *Bract. lib. 4. Attachiamantum est districtio personalis, & Cape magnum districtio realis.* *Fleta, lib. 5. cap. 24.*

Attachment,

Attachment, (from *attach*) is a process that issues at the discretion of the judges of a court of record, against a person for some contempt, for which he is to be committed, and may be awarded by them upon a bare suggestion, or on their own knowledge, without any appeal, indictment or information; for though by the statute of *Magna charta*, none are to be imprisoned *sine iudicio parium vel per legem terræ*; yet this summary method of proceeding being absolutely necessary to the furtherance and execution of justice, seems to have been long practis'd, and is certainly now established as part of the law of the land. *Lamb. Eiren. lib. 1. c. 16. 1 New Abr. 180. See West. 2. c. 3.* But we apprehend it must be for a contempt in the face of the court: or in the cases after mentioned; and if for a contempt in the face of the court, the commitment is by rule of court, not on process, unless the party escape out of court, before he is secured.

All courts of record have a discretionary power over their own officers, and are to see that no abuses be committed by them, which may bring disgrace on the courts themselves; therefore if a sheriff or other officer shall be guilty of a corrupt practice in not serving a writ; as if he refuse to do it, unless paid an unreasonable gratuity from the plaintiff, or receive a bribe from the defendant, or give him notice to remove his person or effects, in order to prevent the service of any writ; the court which awarded it may punish such offences in such manner as shall seem proper by attachment. *Dyer 218. 2 Hawk. P. C. 142.*

But if there be no palpable corruption, nor extraordinary circumstance of wilful negligence or obstinacy, the judgment whereof is to be left to the discretion of the court; it seems not usual to proceed in this manner, but to leave the party to his ordinary remedy against the sheriff, either by action, or by rules to return the writ, or by an *alias* and *pluries*, which if he have no excuse for not executing, an attachment goes of course. *Hob. 62. 264. Noy 101. F. N. B. 38. Finch 237. 5 Mod. 314, 315.*

Generally an *attachment* doth lie for any contempt done against the courts at *Westminster*: but the court of *B. R.* will not grant *attachment* against one for disobeying an order made by justices of assize, or a judge at his chamber, except it be entered and made a rule of court; for it is no contempt to the court, but to the judge that made the order. *1 Lill. Abr. 121. Attachment* lies against attorneys for injustice, and base dealing by their clients, in delaying suits, &c. as well as for contempts to the court. *2 Hawk. 144.* If affidavits to ground an *attachment* are full as to the charge; yet if the party being an attorney, &c. deny such charge by as plain and positive affidavits, he shall be discharged; but if he takes a false oath, he may be indicted of perjury. *Mod. Caf. in L. & E. 81.* Against sheriffs making false returns of writs, and against bailiffs for frauds in arrests, and exceeding their power, &c. *attachment* may be had. For contempts against the king's writs; using them in a vexatious manner; altering the teste, or filling them up after sealed, &c. *attachment* lies. And for contempts of an enormous kind, in not obeying writs, &c. *attachment* may be issued against peers. *2 Hawk. 152, 153.* But in some cases the court doth not generally grant *attachments* against persons for misdemeanors, but will send a tipstaff for them, if they live near the town. *21 Car. B. R.* For persuading jurors not to appear on a trial, *attachment* lies against the party, for obstructing the proceeding of the court. *1 Lill. 121.* The court of *B. R.* may award *attachments* against any inferior courts usurping a jurisdiction, or acting contrary to justice. *Salk. 207.* Though 'tis usual first to send out a prohibition. *Attachment* lies for proceeding in an inferior court, after a *habeas corpus* issued, and a *superfedeas* to stay proceedings. *21 Car. B. R.* And *attachment* may be granted against justices of peace, for proceeding on an indictment after a *certiorari* delivered to them to remove the indictment. *1 Lill. 121.* But it doth not lie against a corporation. *Attachment* lies against a lord that refuses to hold his court, after a writ issued to him for that purpose, so that his tenant cannot have right done him. *New Nat. Br. 6, 27.*

An attachment is the proper remedy for disobedience of the rules of court; as of those made in ejectment, arbitrament, &c. So where a defendant in account, being adjudged to account before the auditors, refuses to do it, unless they will allow matter disallowed by the court before, or where one refuses to pay costs taxed by the master, whose taxation the law looks upon as a taxation by the court. *1 Mod. 21. 1 Salk. 71.*

But an attachment is not usually granted for disobedience of a rule of *Nisi prius*, unless it be first made a rule of court; nor for disobedience of a rule made by a judge at his chamber, unless it be entered; nor for disobedience of any rule without personal service. *1 Salk.*

Also an attachment is proper for abuses of the process of the court; as for suing out execution where there is no judgment, bringing an appeal for the death of one known to be alive, making use of the process of a superior court, as a stale to bring a defendant within the jurisdiction of an inferior court, and then dropping it, using such process in a vexatious, oppressive, or unjust manner, without colour of serving any other end by it. *2 Hawk. P. C. 154.*

Attachments are usually granted on a rule to shew cause, unless the offence complained of be of a flagrant nature, and positively sworn to; in which last case the party is ordered to attend, which he must do in person, as must every one against whom an attachment is granted; and if he shall appear to be apparently guilty, the court in discretion, on consideration of the nature of the crime, and other circumstances, will either commit him immediately, in order to answer interrogatories to be exhibited against him, concerning the contempt complained of, or will suffer him to enter into recognizance to answer such interrogatories; which if they be not exhibited within four days, the party may move to have the recognizance discharged; otherwise he must answer them, tho' exhibited after the four days; but in all cases, if he fully answer them, he shall be discharged as to the attachment, and the prosecutor shall be left to proceed against him for the perjury, if he thinks fit; but if he deny part of the contempts only, and confess other part, he shall not be discharged as to those denied, but the truth of them shall be examined, and such punishment inflicted as from the whole shall appear reasonable; and if his answer be evasive as to any material part, he shall be punished in the same manner as if he had confessed it. *2 Hawk. P. C. 141. 1 Salk. 84. 6 Mod. 73. 2 Jones 178.*

Attachment out of *chancery* may be had of course upon affidavit made that the defendant was served with a *subpoena*, and appeared not; or upon non-performance of any order or decree; also after the return of this *attachment*, that the defendant *non est inventus*, &c. *Attachment* with proclamation issues against him, &c. *West. Symb.* And for contempts, when a party appears, he must upon his oath answer interrogatories exhibited against him; and if he be found guilty, he shall be fined. But this mode of proceeding by examining a person accused, on oath, is such an inducement to perjury, and so repugnant to nature, (by calling on a man to accuse himself) that tho' long practised, the propriety, if not the legality of such a procedure may justly be called in question.

Attachment of *privilege* is where a man by virtue of his privilege calls another to that court whereto he himself belongs, and in respect thereof is privileged, there to answer some action: or it is a power to apprehend a man in a place privileged. *Book Entr. 431.* Corporation courts have sometimes power by charter to issue *attachments*, and some courts-baron grant *attachments* of debt. *Kitch. 79.*

Attachment foreign, is an *attachment* of the goods of foreigners, found in some liberty, to satisfy their creditors within such liberty. *Carth. Rep. 66.* And by the custom of some places, as *London*, &c. a man may attach money, or goods, in the hands of a stranger. But a foreign *attachment* cannot be had when a suit is depending in any of the courts at *Westminster*; which makes the matter not to be meddled with by any other court. *Cro. Eliz. 691.* And nothing is *attachable* but for a certain and due debt: though by the custom of *London* money may be attached before due, as a debt; but

not levied before due. *Sid.* 327. 1 *Nelf. Abr.* 282,

Foreign attachments in London, upon plaint of debt are made after this manner; A. oweth B. 100*l.* and C. is indebted to A. 100*l.* B. enters an action against A. of 100*l.* and by virtue of that action a serjeant attacheth 100*l.* in the hands of C. as the money of A. to the use of B. which is returned upon that action. The attachment being made, and returned by the serjeant, the plaintiff is immediately to see an attorney before the next court holden for the compt; or the defendant may then put in bail to the attachment, and nonsuit the plaintiff: four court days must pass before the plaintiff can cause C. the garnishee, in whose hands the money was attached, to shew cause why B. should not condemn the 100*l.* attached in the hands of C. as the money of A. the defendant in the action (though not in the attachment) to the use of B. the plaintiff: and the garnishee C. may appear in court by his attorney, wage his law, and plead that he hath no money in his hands of the defendant's, or other special matter; but the plaintiff may hinder his waging of law, by producing two sufficient citizens to swear that the garnishee had either money or goods in his hands of A. at the time of the attachment, of which affidavit is to be made before the lord mayor, and being filed, may be pleaded by way of estoppel. Then the plaintiff must put in bail, that if the defendant come within a year and a day into court, and he can discharge himself of the money condemned in court, and that he owed nothing to the plaintiff at the time in the plaint mentioned, the said money shall be forth-coming, &c. if the garnishee fail to appear by his attorney, being warned by the officer to come into court to shew cause as aforesaid, he is taken by default for want of appearing, and judgment given against him for the goods and money attached in his hands, and he is without remedy either at Common law or in equity; for if taken in execution, he must pay the money condemned, though he hath not one penny, or go to prison; but the garnishee appearing to shew cause why the money or goods attached in his hands ought not to be condemned to the use of the plaintiff, having seen an attorney, may plead as aforesaid, that he hath no money or goods in his hands of the party's against whom the attachment is made, and it will then be tried by a jury, and judgment awarded, &c. but after trial, bail may be put in, whereby the attachment shall be dissolved, but the garnishee, &c. and his security will then be liable to what debt the plaintiff shall make out to be due, upon the action: and an attachment is never thoroughly perfected, till there is a bail, and satisfaction upon record. *Privileg. Lond.*

Where a foreign attachment is pleaded to an action, the custom is to set forth, that he who levied the plaint shall have execution of the debt owing by himself, and by which he was attached, if the plaintiff in the original action shall not disprove it within a year and a day; now if the plaintiff in the action below doth not set forth such conditional judgment given by the court, 'tis wrong, because he doth not bring his case within the custom. *Vide 2 Lutw.* 985.

In *assumpsit*, &c. there was evidence given, that the debt was attached by the custom of London before the action brought, and that it was condemned there before the plea pleaded; and this evidence was given upon the general issue *non assumpsit*, and it being insisted for the defendant, that this should relate so as to defeat the plaintiff's action; it was adjudged, that where there is an attachment and condemnation before the action brought, it may be given in evidence upon the general issue, because there is an alteration of the property; but if the attachment be only before the action brought, and the condemnation afterwards, the attachment may be pleaded in abatement, and the condemnation may be pleaded in bar, but shall not be given in evidence on the general issue, because by the condemnation the property is altered, but not before. 1 *Salk.* 280.

In *assumpsit*, the defendant in discharge of the note upon which the action was brought, produced the record of a foreign attachment, wherein the said debt was

attached and condemned; and Trevor, Ch. Just. of C. B. held this a good discharge; but if the plaintiff could have shewed an original precedent to the attachment, so that it might appear, that the court was possessed of the action before the attachment, the plaintiff might have recovered, notwithstanding the debt was attached and condemned; but in this case the declaration was between the time of the attachment and the condemnation. 1 *Salk.* 291.

Action of debt, &c. the defendant pleaded in bar, that there was a custom in London to attach the debt before the day of payment came; et per curiam, such a custom may be good, but to have judgment to recover the debt before the day of payment is come, cannot be a good custom, because the debtee himself could not recover in such case, and therefore he who made the attachment shall not. This custom was pleaded, that the debtee in person, or by his attorney, may swear that the debt is due; but this cannot be good as to the attorney; it was agreed, that goods might be attached by a foreign attachment, and that the value thereof ought to be found before judgment; but that this plea was ill, because the defendant did not aver it, viz. et hoc paratus est verificare. W. Jones 406.

Case by administrator, in which the case was, that Tenant was indebted to the intestate by bond, and the intestate was indebted to Heydon upon a contract, and that he (the administrator) intending to put the bond in suit against Tenant, he promised, that if the administrator would forbear, &c. he the defendant would pay, &c. afterwards Heydon brought an action of debt upon the contract against the administrator in London, and the money which Tenant owed to the intestate was attached in Tenant's hands; and now the administrator brought an action on the promise against Tenant, who pleaded all this matter; and upon a demurrer it was insisted for the plaintiff, that this debt was not attachable by a foreign attachment, because the promise being to pay at a day to come, rests altogether in damages, and nothing is attachable but a certain and due debt: sed per curiam, this debt is attachable, for it is a due and certain debt before the promise made, because the promise was to pay the debt due to the intestate by bond; but it might have been otherwise if the debt had arisen upon a promise. 1 *Roll. Rep.* 105.

In an action on the case the plaintiff had judgment against the defendant, and he owing 60*l.* to one G. D. he entered a plaint against him in London, and attached the 60*l.* in the hands of the said defendant, against whom the plaintiff had recovered as aforesaid, and had execution according to the custom; afterwards the plaintiff brought a *sci. fa.* against the defendant, to shew cause why he should not have execution upon the judgment which he had recovered, to which the defendant pleaded the execution upon the attachment; and upon demurrer to that plea it was adjudged against the defendant, because a duty which accrue by matter of record, cannot be attached by the custom of London; for judgments obtained in the king's courts shall not be defeated or avoided by such particular customs, they being of so high a nature, that they cannot be reached by attachment. 1 *Leon.* 29.

Debtor and creditor being both citizens of London, the debtor delivered several goods to the Exeter carrier then in London, to carry and deliver them at Exeter, and the creditor attached them in the hands of the carrier for the debt due to him from his debtor; adjudged, that the action should be discharged, because the carrier is privileged in his person and goods, and not only in the goods which are his own, but in those of other men, of which he is in possession, for he is answerable for them. 1 *Leon.* 189.

An executor submitted to an award, and the arbitrators awarded, that the defendant should pay the executor 350*l.* This money is not attachable in his hands by any creditor of his testator, though it is assets in his hands when recovered, because it was not due to the testator tempore mortis, and the custom of foreign attachments extends only to such debts. 1 *Vent.* 111.

A sum of money was to be paid at *Michaelmas*, and it was attached before that day; adjudged, that a *foreign attachment* cannot reach a debt before it is due; therefore, though the judgment on the attachment was after *Michaelmas*, yet the money being attached before it was due, it is for that reason void. *Cro. Eliz.* 184.

Attachment of the forest. Is one of the three courts held there. *Manwood* 90, 99. The lower court is called the *attachment*; the middle one, the *swainmote*; the highest, the *justice in Eyre's seat*. The court of *attachment* seemeth to be so called, because the *wardens* of the forest have therein no other authority, but to receive the *attachments* of offenders against *Vert* and *Venison*, taken by the rest of the officers, and to enroll them, that they may be presented and punished at the next *justice seat*. *Manwood* 93. And this *attaching* is by three means; 1. By goods and chattels. 2. By the body, pledges, and mainprise. 3. By the body only. This court is kept every forty days. See *Crompton*, in his *Court of the Forest*.

Attainder, (attinēla and attinēlura) Is when a man hath committed treason, &c. and after conviction sentence is passed on him: or where a person is *attainted* of treason, and condemned by parliament.

A man is *attained* by appearance, or by process: *attainder* on appearance is by confession, or verdict, &c. Confession, when the prisoner upon his indictment being asked whether Guilty or Not guilty, answers Guilty, without putting himself upon his country; (and formerly confession was allowed before the coroner in sanctuary; whereupon the offender was to abjure the realm, and this was called *attainder* by abjuration.) *Attainder* by verdict is when the prisoner at the bar pleadeth Not guilty, and is found Guilty by the verdict of the jury of life and death. And *attainder* by process, (otherwise termed *attainder* by default or outlawry) is when the party flieth, and is not found, until he have been five times publickly called or proclaimed in the county, on the last whereof he is outlawed upon his default. *Staudf. Pl. Co.* 44, 122, 182. Also persons may be attained by act of parliament.

Acts of attainder of criminals have been passed in several reigns, on the discovery of plots and rebellions, from the reign of king *Charles II.* when an act was made for the *attainder* of several persons guilty of the murder of king *Charles I.* to this time; among which, that for *attainting* Sir *John Fenwick*, for conspiring against king *William*, is the most remarkable; it being made to *attaint* and convict him of high treason on the oath of one witness, just after a law had been enacted, That no person should be tried or *attainted* of high treason where corruption of blood is incurred, but by the oath of two lawful witnesses, unless the party confess, stand mute, &c. *Stat. 7 & 8 W. 3. cap. 3.* But in the case of Sir *John Fenwick*, there was something extraordinary; for he was indicted of treason, on the oaths of two witnesses; though but one only could be produced against him on his trial.

Attainder of a criminal is larger than conviction; a man is convicted when he is found guilty by verdict, or confesses the crime, before judgment had; but not *attainted* till judgment is also passed upon him. *1 Inst.* 390. A person *attainted* of high treason forfeits all his lands, tenements and hereditaments; his blood is corrupted, and he and his posterity are rendered base; and this corruption of blood cannot be taken off but by act of parliament. *Co. Lit.* 391. But if one commits treason, and dies before *attainder*, he forfeits nothing: and one slain in open rebellion, shall forfeit nothing, if he be not *attainted* by parliament. *3 Inst.* 12. And collateral blood may inherit on an *attainder*; though the lineal blood is barred. If an *attainted* person marries an heiress, and has issue by her; 'tis said that issue shall inherit, for he claims only from the mother. *Jenk. Cent.* 3. In the case of felony, where land is given in tail to A. and the heirs male of his body, under the statute of *Westm.* 2. and he commits murder, or any felony, his heir shall have the land, and the blood is not corrupted: though in case of treason, where the father hath lands, and is *attainted*, it is otherwise by the 26 H. 8. c. 13. *Ibid.* 82. *Vide 1 & 2 Pb. & M. c. 10.*

Grandfather, father and son; the grandfather was *tenant in tail*, the father was *attainted* of treason; ~~here,~~ though the blood is corrupted, yet the son would formerly inherit *per formam doni*; but since the statute 26 H. 8. which gives the forfeiture of the lands of *tenant in tail* for treason, the law is otherwise, and by the attainder of the tenant in tail the issue in tail is barred. *8 Rep.* in *Digley's case*.

In treason for counterfeiting the coin, although by a late statute corruption of blood is saved; yet the lands of the offender are forfeited immediately to the king on *attainder*, it being a distinct penalty from corruption of blood: for the corruption may be saved, and the forfeiture remain, &c. And accordingly so it is provided by some statutes. *1 Salk.* 85.

Adjudged, that an attainder of felony makes a forfeiture of the estate to the lord only by way of *escheat pro defectu tenentis*, and the not descending is the consequence of the corruption of blood. *1 Salk.* 85.

T. S. having an estate for three lives, was *attainted* on the statute 8 & 9 Will. 3. of treason for counterfeiting the coin, by which statute corruption of blood is saved; and for that reason it was a question, whether the lands were forfeited to the king, which were given to Baron *Lovell* as forfeited, who brought a bill in the Exchequer to redeem, and had a decree, from which there was an appeal to the house of lords, where the judges held, that in treason the lands came to the king as an *immediate forfeiture*, which was a distinct penalty from corruption of blood, for the corruption may be saved, and the forfeiture still remain. *1 Salk.* 85.

Husband and wife were tenants in *special tail*; they had issue a son, the husband was *attainted* of treason, and died, the wife continued in possession as tenant in *special tail*, and the son was restored by act of parliament, and made inheritable to his father, *saving to the king all advantages which he might have by the attainder*; the wife died; adjudged, that the father had not any estate forfeitable, for the wife being likewise tenant in *special tail*, the estate survived to her, and was not impeached by the attainder, and she dying, the son is then inheritable to the estate tail, which might certainly have been barred by a common recovery suffered by the wife, and in such case the king would have been bound. *1 Leon.* 157.

Covenant to stand seized to the use of himself for life, remainder to *Thomas Palmer*, the eldest son of his brother *John Palmer* for life, remainder to the eldest son of Sir *Thomas Palmer* in tail male, remainder to his own right heirs; afterwards the covenantor was *attainted* of treason, and executed before the birth of any son of *Thomas*; adjudged, that this attainder was a bar to the after-born son, and that the fee simple was vested in the crown, discharged of all remainders. *Moor* 815.

Attainders may be reversed or falsified, (i. e. proved to be false) by writ of error, or by plea; if by writ of error, it must be by the king's leave, &c. And when by plea, it may be by denying the treason, pleading a pardon by act of parliament, &c. *3 Inst.* 232. By a king's taking the crown upon him, all *attainders* of his person are *ipso facto* purged, without any reversal. *1 Inst.* 43. *Wood* 17. This is a very peculiar doctrine, tho' the declaration of parliament, viz. made in favour of *Henry the 7th.* If the intelligent reader will consider it a moment, a comment must appear unnecessary.

Lands coming to the king by *attainder* of treason, afterwards granted to another, shall be holden as if there were no *attainder*. *7 Ed. 4. c. 5.* The 8 W. 3. c. 5. requires Sir *George Barclay*, major general *Holmes*, and other persons, to surrender themselves to the lord chief justice, or secretaries of state; or to be *attainted*. By the 13 W. 3. the pretended *Prince of Wales* is under *attainder* of treason, &c. And by 1 Geo. 1. c. 16. the late duke of *Ormond* and others are *attainted*. And besides these acts of *attainder*, we have lately had bills for inflicting pains and penalties, as those against the late bishop of *Rochester*, &c. *Stat. 10 Geo. 1.* In passing bills of *attainder*, no evidence is necessary. See *Evidence*.

Attachmenta bonorum, A distress taken upon goods or chattels, where a man is sued for personal estate or debt, by

by legal attachiators or bailiffs, as security to answer an action. There is likewise *attachiamenta de spinis & bosco*, a privilege granted to the officers of a forest, to take to their own use, thorns, brush, and wind-fall within their precincts.—*John Fitz Nygel*, forester of *Bermwood*, H. D. 1230, *debet habere feodum in Bosco domini regis; videlicet attachiamentum de spinis, de Bosco suo, & de Bosco qui vento profuitur*. Kennet's Paroch. Antiq. p. 209.

Attaint, (*attinēda*) Is a writ that lieth after judgment against a jury that have given false verdict in any court of record, in an action real or personal, where the debt or damages amount to above 40*s*. Stat. 5 & 34 Ed. 3. c. 7. It is called *attaint*, because the party that obtains it endeavours thereby to stain or *taint* the credit of the jury with perjury, by whose verdict he is grieved: and if the verdict be found false, then the punishment by the Common law was, that the jurors meadows should be plough'd up, their houses broke down, woods grubb'd up, and all their lands and tenements be forfeited to the crown: but if it passed against him that brought the attaint, then he was to be imprisoned and ransomed at the king's will. Glanv. lib. 2. By the Statute 23 H. 8. c. 3. the severity of the Common law is mitigated, where a petty jury is attainted; for that statute enacts, That upon untrue verdicts before judges of record, the thing in demand extending to 40*l*. value, attaints shall be granted against the petty jury; the process to be summons, resummons, and distress infinite, &c. but the defendants may plead, they gave a true verdict, &c. to bar the attaint: and the grand jury is to try the verdict of the petty jury on the attaint; and if such petty jury be found to have given an untrue verdict, they shall each forfeit 20*l*. to be divided between the king and the plaintiff, and incur several fines at the discretion of the justices, and be disabled to give testimony in any court. Also an attaint shall lie for a personal thing under the value of 40*l*. in manner as aforesaid; but here the forfeiture of each petty juror shall be 5*l*. &c. Stat. Ibid.

It may be material, however, under this head, to state more particularly,

- I. By and against whom attaint may be brought.
- II. In what cases it will lie.
- III. Of the proceedings in attaint.

I. The party grieved may have writ of attaint against the other party, (whether plaintiff or defendant) and against the jurors, or such of them as shall be then living: it is said any one that is hurt by the false verdict may bring this writ; and if the verdict be for matter of land, the remedy commonly runs with the land, so that any party or privy, as an heir or executor may have it. F. N. B. 109. Co. Lit. 294.

Attaint was brought upon the statute 23 H. 8. c. 3. against the executors of *Sir John Barker*, whereas the verdict was in a cause between him and one *Austin*, and the statute gives an attaint between the parties, and doth not mention heirs or executors, yet this attaint was held good; so an executor shall have restitution upon the statute 21 H. 8. tho' that statute does not mention executors. 1 And. 24, 25.

Where *trespass* is brought against *baron and feme*, and the plaintiff recovers, the *baron alone shall not have attaint*, for it shall be brought according to the record. Br. Baron and Feme, pl. 22. Successors of a person shall have error or attaint of judgment against the predecessor. Br. Attaint, pl. 110. If a man has issue a son by one woman, and a daughter by another, and intails the lands to him and his second feme, and the heirs of their two bodies, and recovery is had against them by false oath, the attaint is given to the son and not to the daughter; per *Fortescue*. Br. Attaint, pl. 40. None shall have attaint but he that may be restored to the thing lost by the judgment; per *Bramstone Ch. J.* Mar. 210. Reversioners may have an attaint upon a false verdict, &c. against a particular tenant, who shall be restored to his possession, and the reversioner to his arrears. Stat. 9 R. 2. c. 3. This action must be brought against the jurors, and the parties to the first suit; or if the parties be dead, their heirs, or executors, or any other for the most part that recovered by the first judgment. Dyer 201.

If all the jurors but one are dead, the action is gone, and no attaint can be brought; and where any one dies depending the suit, it is gone; but not by the death of the defendant that recovered in the first action. Dyer 139. Hob. 227.

II. As to the cases in which an attaint lies.

Attaint lies where a jury gives verdict contrary to evidence; and where a judge declares the law erroneously, judgment may be reversed; but in this case the jury shall be excused. Vaugh. 145. Attaint lies not for that which is not given in evidence; nor upon an inquest of office, &c. or when a thing found is impertinent to the issue. Hob. 53. Co. Lit. 355. And no attaint lieth where the king is sole party, and the jury find for him. 4 Leon. 46. It lies upon a false verdict given in cases of felony, 6 Rep. in the case of pardons; but where the queen is sole party, and the jury find for her, no attaint lies; aliter where the suit is *tam pro domino rege quam pro seipso*. 4 Leon. 46. An attaint may be brought where any material falsehood is found, though some truth may be found with it; as where a jury shall find a man guilty of many trespasses, who is guilty but of one trespass. So if a jury find any thing against the Common or Statute law, that all men are to take notice of, this may make them chargeable in attaint. Bro. 44. Hob. 227.

Where the evidence given to the jury is false in part, tho' it be in a point not material, yet this is sufficient excuse for their not giving him credit in any other part of his evidence, and so had no cause to find their verdict upon this oath against the party against whom it was given. Cro. Eliz. 309, 310. It lies against a jury, for finding the bond of *Edward* the bond of *Edmond*. Palm. 286. The jury may be attainted two ways; 1st, where they find contrary to evidence; 2dly, where they find out of the compass of the *allegata*. But to attaint them for finding contrary to evidence is not easy, because they may have evidence of their own conscience of the matter by them, or they may find upon distrust of the witnesses, or their own proper knowledge; but if they find upon evidence that does not prove the *allegata*, there it is easy to subject them to an attaint, because it is manifest that what is so found is an evidence not corresponding to their issue, and this was the only curb they had over the jurors; for the judge being best master of the *allegata*, if they did not follow his direction touching the proof, they were then liable to the danger of an attaint; and therefore since the judges, from the difficulty of attainting the jury have granted new trials, whereby jurors have been freed from the fear of attaint, they have taken a great liberty in giving verdicts; but since the attaint is only disused, and not taken away, 'tis necessary that a certain matter should be brought before them; and therefore in *irregularities*, the quantity and value of the thing demanded must be so conveniently described, that if the jury find damages beyond such quantities and value, it may be apparently excessive, and they subject to the attaint; and so on special contracts, they must be set forth so precisely, that if evidence be given of another contract, and not in the allegations, and get the jury find for the plaintiff, they may be subject to an attaint; and were it otherwise, if the plaintiff had a jury to his turn, and the judge should direct that the plaintiff be nonsuit, yet if the plaintiff would stand the trial, the judge must give positive directions to find for the defendant, there would be no means of compelling the jury to find according to the direction of the judge, if they were not under the terror of an attaint, if they did otherwise; so this is the only curb that the law has put in the hands of the judges to restrain jurors from giving corrupt verdicts. Gilb. H. C. B. 128. But this doctrine does not imply that a jury are at all events to follow the direction of a judge. They are to use their own discretion. They are (as every man is) supposed to know the law, and are therefore judges of the law, as well as of the fact. Vide *Hawles on Juries*.

Where a jury finds a thing which is out of the issue, there a verdict is void, because they are sworn to try the issue between the parties, according to the evidence given; so that whatsoever they try besides the issue, is not *per juratores*; and therefore if that matter so tried is false,

'tis no perjury, nor doth an attaint lie against them. *Hob. 53.*

III. With regard to the proceedings in attaint.

The process to be issued is directed by the 23 *H. 8. c. 3.* already mentioned: and by the said statute if any of the petit jury appear at the return of the writ of attaint, the plaintiff shall assign the false oath of the verdict untrue given. And if the defendant, or any of the petit jury appear not on distress, the grand inquest shall be taken by default.

The petit jury can plead no plea, but such as may excuse them of the false oath. 1 *Rol. Abr. 285.*

The petit jury cannot plead that the plaintiff in the attaint was tenant after the attaint purchased. 1 *Rol. Abr. 285.* The plaintiff in attaint may not produce more witnesses, nor give further matter in evidence, than what was deposed in the first action; but the defendant in attaint may give new matter in evidence to inforce the first verdict, and the plaintiff shall have time to disprove it. *Dyer 59. 1 Nels. Abr. 288. 1 Rol. Abr. 285.*

In an attaint the plaintiff cannot give in evidence a record which was not given to the petit jury; for they were not bound to find it, if it was not shewn to them. 1 *Rol. Abr. 285.*

In the court of *King's Bench* and *Common Pleas*, and the court of *Hustings* of *London*, attaint may be brought; and the plaintiff setting aside the verdict, shall have restitution, &c. But if the first verdict be affirmed, the plaintiff shall be imprisoned and fined. 11 *H. 7. c. 21.*

In attaint the parties and the jury appeared and demandedoyer of the record upon which the attaint was founded, which record being in the *Common Pleas*, they had it, and thereupon the plaintiff assigned the false oath; the defendants pleaded, that they made a good and lawful oath; upon which they were at issue, and in the same term the record was removed by a writ of error into the *King's Bench*; adjudged, that notwithstanding it was thus removed, the court of *Common Pleas* might proceed if the process for the grand jury were returned. *Dyer 284.*

Attaint was brought in the *Common Pleas* against a jury, for a verdict given in the *King's Bench*, whereupon the record was removed from that court to the *Common Pleas*, and there the verdict was affirmed; adjudged, that the plaintiff in the action shall have execution according to the verdict, for the record is in the *King's Bench*, and nothing but the tenor thereof in the *Common Pleas*; but if the verdict had been set aside, and execution had been put upon it before it was set aside, then the court of *Common Pleas* might have awarded restitution to the party grieved. *Cro. Eliz. 371.*

A nonsuit in attaint is peremptory: and no *superfedeas* is grantable upon attaint. *Co. Lit. 227.*

An attaint as well as a writ of error shall follow the nature of the action upon which 'tis founded; so that if summons and severance lies in the first action, it shall do so likewise in the attaint, but this is not a *superfedeas* as a writ of error is; adjudged likewise, if damages are recovered against several in an action of conspiracy, all of them must join in an attaint, and the nonsuit of one of them shall not hurt the rest. 6 *Rep. 25.*

But adjudged, that where an assise was brought against three coparceners, who all pleaded that there was no tenant of the freehold named in the writ, and the jury found that two of them were disseisors and tenants, &c. and that the third had nothing, &c. and afterwards they all three joined in an attaint, and after appearance the third sifter, who was acquitted as aforesaid by the said verdict, was now nonsuited in the attaint, in that case the attaint was abated, because she had no cause to bring an attaint, for there was no verdict against her. 1 *Leon. 317.*

In an attaint the plaintiff shall recover against all the jurors, tenants, and defendants, the costs and damages, which he shall sustain by delay or otherwise in that suit: and if the defendant's plea in bar be found against him, the plaintiff will have judgment to be restored to what he lost, with damages, by *Stat. 11 H. 6. c. 4. and 15 H. 6. c. 5.*

Besides the statutes abovementioned in the course of this article, there are others to which it will be sufficient barely to refer, as the subject of them is in a great measure grown obsolete. See 3 *Edw. 1. c. 38. 14 Edw. 2. c. 2. 1 Edw. 3. c. 6. 28 Edw. 3. c. 8. 18 Hen. 6. c. 2. 37 Hen. 8. c. 9.*

This writ to attaint so many men of such a foul crime is seldom used, unless the corruption be very gross and apparent: and instead of attaint, where the verdict is supposed to be given against evidence, it is now usual to have new trials granted: but an issue found by verdict shall be always intended true, until reversed by attaint, according to our old books. *Co. Lit. 227.* The writ of attaint is generally to summon a jury to inquire if the former jurors made a false oath, and who were the jury of the first inquest, &c. and to have them before the lord the king, or before the justices, &c. *N. B. 252, 253.*

Form of a count in attaint.

Bedford, ff. A Jury of twenty-four, &c. of the neighbourhood of C. came to recognise whether the jurors, by whom a certain inquisition was lately summoned before the lord the king at Westminster, by bill without the writ of our said lord the king, between A. B. and C. D. of a certain trespass, &c. to the said A. by the said C. done, and afterwards before the beloved and faithful of our said lord the king, &c. justices assigned to take the assises, &c. in the county aforesaid taken, have made a false oath therein, as the said C. grievously complaining to our said lord the king sheweth, or not, &c.

Attainted. See **Attainder.**

Attal Sarifin, The inhabitants and miners of Cornwall, called an old deserted mine, that is given over, by this name of attal Sarifin, i. e. the leavings of the Sarafins, Sassins, or Saxons. Cowel.

Attegia, (from the Lat. *ad* and *tego*) A little house. 'Tis mentioned in *Ethelwerd, lib. 4. Hist. Angl. cap. 3.*—*Pellunt ingenuos passim, attegas figunt in oppido.*

Attendant, (*attendens*) Signifies one that owes a duty or service to another, or in some sort depends on him. Where a wife is endowed of lands by a guardian, &c. she shall be attendant on the guardian, and on the heir at his full age. *Terms de Ley.*

Attermining, (from the Fr. *attermine*) Is used for a time or term granted for payment of a debt. *Ordinatio de libertatibus perquirendis, ann. 27 Ed. 1.* And in the *Stat. Westm. 2.* it seems to signify the purchasing or gaining a longer time for payment of debts.—*Atterminent querentes usque in proximum parliamentum. West. 2. c. 4.*

Attile, attilium, attilamentum The rigging or furniture of a ship. This word is mentioned in *Fleta, lib. 1. c. 25. Batellus* (i. e. the boat) *cum omni onere & Artillamento.*

Attornate Rem, To attorn or turn over money and goods, viz. to assign or appropriate them to some particular use and service. *Kennet's Paroch. Antiq. p. 283.*

Attornato faciendo vel recipiendo, A writ to command a sheriff or steward of a county-court, or hundred court, to receive and admit an attorney, to appear for the person that owes suit of court. *F. N. B. 156.* Every person that owes suit to the county-court, court-baron, &c. may make an attorney to do his suit. *Stat. 20 H. 3. c. 10.*

Attorney, (*atturatus*) Is he that is appointed by another man to do any thing in his absence. *West. Symb. Crompt. Jurisdic. 105.* An attorney is either publick, in the courts of record, the *King's Bench* and *Common Pleas*, &c. and made by warrant from his client: or private, upon occasion for any particular business, who is commonly made by letter of attorney. In ancient times those of authority in courts had it in their power whether they would suffer men to appear or sue by any other but themselves: and the king's writs were to be obtained for the admission of attorneys: but since that, attorneys have been allowed by several statutes. As by 27 *Ed. 1. &c.*

Attornies

Attornies may be made in such pleas whereon appeal lieth in criminal cases there will be no attornies admitted. *Stat. 6 Ed. 1.* An infant ought not to appear by attorney, but by guardian; for he cannot make an attorney, but the court may assign him a guardian. *1 Lill. Abr. 138.* Infants, after they come to full age, may sue by attorney, though admitted before by guardian, &c. In action against baron and feme, the feme being within age, she must appear by guardian: but if they bring an action, the husband shall make attorney for both. *1 Dan. Abr. 602.* And it is said, that where baron and feme are sued, though the wife cannot make attorney, the husband may do it for both of them. *2 Sand. 213.* One *non compos mentis*, being within age, is to appear by guardian; but after he is of age he must do it by attorney. *Inst. 135.* An idiot is not to appear by attorney, but in proper person. A corporation cannot appear otherwise than by attorney, who is made by deed under the seal of the corporation. *Plowd. 91.* Persons that owe suit to county-courts, &c. making attornies. See *Stat. 20 H. 3. c. 10.*

Attornies at Law, Are such persons as take upon them the business of other men, by whom they are retained.

Before the statute of *West. 2. c. 10.* [*13 Ed. 1. A. D. 1285.*] all attornies were made by letters patent under the great seal, commanding the justices to admit the person to be his attorney. These patents, where they were obtained, seemed to have been inrolled by a proper officer, called the clerk of the warrants; and also the courts inrolled those patents on which any proceedings were. If such letters patent could not be obtained, the persons were obliged to appear each day in court in their proper persons. *Gilb. H. C. P. 32, 33.*

The said statute of *West. 2.* gives to all persons a liberty of appearing, and appointing an attorney, as if they had letters patent; and therefore the clerk of the warrants received each person's warrant, and upon the warrant it equally appeared to the court, that he had appointed such a one his attorney to the end of the cause, unless revoked; so that on each act there is no occasion of the plaintiff's and defendant's presence, as was used before that time. This authority continues till judgment, and for a year and a day, and afterwards to sue out execution, and for a longer time, if they continue execution; but if not, the judgment is supposed to be satisfied; and to make it appear otherwise, the plaintiff must again come into court, which he either does by a *scire fac'* or an action of debt on the judgment. *Gilb. H. C. P. 33.*

Who may make attornies, see farther *20 H. 3. c. 10.* — *12 Edw. 2. c. 1.* — *7 Ric. 2. c. 14.*

Parties to fines, as well defendant or plaintiff as tenants or defendants, that will acknowledge their right of lands unto other in pleas of *quarrantia chartæ*, covenant, &c. before the fines pass, shall appear personally, so that their age, ideocy, or other default (if any be) may be discerned: provided that if any, by age, impotency, or casualty, is not able to come in court, one of the justices shall go to the party and receive his cognizance, and shall take with him a knight or man of good fame. Barons of the Exchequer and justices shall not admit attornies, but in pleas that pass before them, and where they be assigned. Reserved to the Chancellor his authority in admitting attornies, and to the Chief Justices. *Stat. 15 Edw. 2. stat. 1.*

In respect of the several courts, there are attornies at large; and attornies special, belonging to this or that court only. An attorney may be a solicitor in other courts, by a special retainer: one may be attorney on record, and another do the business; and there are attornies who manage business out of the courts, &c. *Anno 4 H. 4.* it was enacted, that the justices should examine attornies, and remove the unskilful; and attornies shall swear to execute their offices truly, &c. *The Stat. 33 H. 6.* was made to restrain the number of attornies. And by *3 Jac. 1. c. 7.* Attornies &c. shall not be allowed any fees laid out for counsel, or otherwise, unless they have tickets thereof signed by them that receive such fees; and they shall give in true bills to their clients of all the charges of suits, under their hands, before the clients shall be charged with the payment thereof; if they delay

their clients suit for gain; or demand more than their due fees and disbursements, the clients shall recover costs and treble damages; and they shall be for ever after disabled to be attornies: none shall be admitted attornies in courts of record, but such as have been brought up in the said courts, or are well practised and skilled, and of an honest disposition; and no attorney shall suffer any other to follow a suit in his name, on pain of forfeiting *20 l.* to be divided between the king and the party grieved. This statute, as to fees to counsel, doth not extend to matters transacted in inferior courts, but only to suits in the courts of *Westminster-Hall*. *Carth. 147.* Attornies, &c. are to take the oath to the government, under penalties and disability to practice. *13 W. 3. cap. 6.*

By the *Stat. 12 Geo. 1. cap. 29.* If any who hath been convicted of forgery, perjury, &c. shall practise as an attorney or solicitor in any suit or action in any court, the judge where such action shall be brought hath power to transport the offender for seven years, by such ways, and under such penalties as felons.

The act *2 Geo. 2. c. 23.* ordains, That all attornies shall be sworn, admitted and inrolled, before allowed to sue out writs in the courts at *Westminster*; and after the first of December 1730 none shall be permitted to practise but such as have served a clerkship of five years to an attorney, and they shall be examined, sworn and admitted in open court; and attornies shall not have more than two clerks at one time, &c. every writ and copy of any process served on a defendant, and also every warrant made out thereon, shall be indorsed with the name of the attorney by whom sued forth; and no attornies or solicitors shall commence any action for fees till a month after the delivery of their bills subscribed with their hands: also the parties chargeable may in the mean time get such bills taxed, and upon the taxation the sum remaining due is to be paid in full of the said bills, or in default the parties shall be liable to attachment, &c. And the attorney is to pay the costs of taxation, if the bill be reduced a sixth part. There is a penalty of *50 l.* inflicted, and disability to practice, for acting contrary to this statute. By the *6 Geo. 2. cap. 27.* Persons having served five years as clerks to attornies, though not bound by contract; or who had been bound, but not served five years; and sons of attornies that served that time with their fathers, &c. were to be sworn and admitted. By *12 Geo. 2. c. 13.* Attornies, &c. that act in any county-court, without being admitted according to the statute *2 Geo. 2.* shall forfeit *20 l.* recoverable in the courts of record: and no attorney, who is a prisoner in any prison, shall sue out any writ, or prosecute suits; if he doth, the proceedings shall be void, and such attorney, &c. is to be struck off the roll. But suits commenced before by them may be carried on. A quaker serving a clerkship, and taking his solemn affirmation instead of an oath, shall be admitted an attorney. By the *Stat. 22 Geo. 2. c. 46.* Persons bound clerks to attornies or solicitors are to cause affidavits to be made and filed of the execution of the articles, names and places of abode of attorney or solicitor, and clerk, and none to be admitted till the affidavits be produced and read in court; no attorney having discontinued business to take any clerk. Clerks are to serve actually during the whole time, and make affidavits thereof. Persons admitted sworn clerks in *Chancery*, or serving a clerkship to such, may be admitted solicitors. By the *Stat. 23 Geo. 2. c. 26.* Any person, duly admitted a solicitor, may be admitted an attorney, without any fee for the oath, or any stamp to be impressed on the parchment, whereon his admission shall be wrote.

Attornies of courts, &c. shall not receive or procure any blank warrant for arrests from any sheriff, without writ first delivered, on pain of severe punishment, expulsion, &c. And no attorney shall make out a writ with a clause *ac etiam bille*, &c. where special bail is not required by law. *Passb. 15 Car. 2.* Attornies are to enter and file warrants of attorney in every suit, on pain of *10 l.* and imprisonment. *Stat. 32 H. 8.* And the plaintiff's attorney is to file his warrant the term he declares, and the defendant his the term he appears. *4 & 5 Ann.* Action upon the case lies for a client against his attorney, if he appear for him without a warrant; or if

he plead a plea for him, for which he hath not his warrant. 1 *Lill. Abr.* 140. But if an attorney appear without warrant, and judgment is had against his client, the judgment shall stand, if the attorney be responsible: *contra*, if the attorney be not responsible. 1 *Salk.* 88. Action lies against an attorney for suffering judgment against his client by *nil dicit*, when he had given him a warrant to plead the general issue: this is understood where it is done by covin. 1 *Danv. Abr.* 185. If an attorney makes default in a plea of land, by which the party loses his land, he may have a writ of deceit against the attorney, and recover all in damages. *Ibid.* An attorney owes to his client secrecy and diligence, as well as fidelity; and if he take reward on the other side, or cause an attorney to appear and confess the action, &c. he may be punished. *Hob.* 9.

But action lies not against an attorney retained in a suit, though he knows the plaintiff hath no cause of action; he only acting as a servant in the way of his profession. 4 *Inst.* 117. 1 *Mod.* 209. Though where an attorney or solicitor is found guilty of a gross neglect; the court of Chancery has in some cases ordered him to pay the costs. 1 *P. Williams* 593. He who is attorney at one time, is attorney at all times, pending the plea. 1 *Danv.* 609. And the plaintiff or defendant may not change his attorney, while the suit is depending, without leave of the court, which would reflect on the credit of attorneys; nor until his fees are paid. *Mich.* 14 *Car.* A cause is to proceed notwithstanding the death of an attorney therein; and not be delayed on that account. For if an attorney dieth, the plaintiff or defendant may be required to make a new attorney. 2 *Keb.* 275. An attorney, solicitor, &c. having fees due to him, may detain writings until his just fees are paid: but if there be no fees due to him, the court on motion will compel the delivery of them. 1 *Lill.* 148. Any papers may be detained by an attorney till the money is paid for drawing them; but he cannot detain writings which are delivered to him on a special trust, for the money due to him in that very business, &c. if he doth, a rule may be obtained that he shall deliver them by such a day, or an attachment shall issue against him. *Mod. Caf. in Law and Equity* 306. The court will make a rule for delivery of writings when they come to the attorney's hands by way of his business; and when they come to him in any other manner, the party must bring his action. 1 *Salk.* 87. Attornies have the privilege to sue and be sued only in the courts at Westminster, where they practise: they are not obliged to put in special bail, when defendants; but when they are plaintiffs, they may insist upon special bail in all bailable cases. 1 *Vent.* 299. *Wood's Inst.* 450. And they shall not be chosen into offices, against their Wills. See *Privilege*.

Attorney of the Duchy Court of Lancaster, (*attornatus curie ducatus Lancastrie*) Is the second officer in that court; and seems for his skill in law to be there placed as assessor to the chancellor, and chosen for some special trust reposed in him, to deal between the king and his tenants. *Convel.*

Attorney General, Is a great officer under the king, made by letters patent. It is his place to exhibit informations, and prosecute for the crown, in matters criminal; and to file bills in the *Exchequer*, for any thing concerning the king in inheritance or profits; and others may bring bills against the king's attorney. His proper place in court, upon any special matters of a criminal nature, wherein his attendance is required, is under the judges, on the left hand of the clerk of the crown: but this is only upon solemn and extraordinary occasions; for usually he does not sit there, but within the bar in the face of the court. *Mich.* 22 *Car. B. R.*

Attornment, (*attornamentum*, from the Fr. *tourner*) Signifies the tenant's acknowledgment of a new lord, on the sale of lands, &c. As where there is tenant for life, and he in reversion grants his right to another; it is necessary the tenant for life agree thereto, which is called attornment. It gives no interest, but only perfects the grant of another: and tenant in tail is not compellable to attorn, on the reversion being granted; he having an estate of inheritance. 1 *Inst.* 316, 319. This attornment is in deed, or in law; voluntary and compulsory;

and may be made, as set down by *Littleton*, in these words, *viz.* I attorn to you by force of the grant, or I agree to the grant, or I become your tenant, &c. Or by any words or act which import an assent to the grant. *Litt.* 551. 1 *Danv.* 623. It may be made by payment of a penny rent, &c. to the grantee. 1 *Inst.* 309. Where an estate is granted to one for life, remainder to another in fee, attornment to the tenant for life is good to him in remainder. 1 *Inst.* 312. By feoffment of a manor, the services do not pass without attornment. 1 *Dayv. Abr.* 612. But if a person comes to an estate by recovery; or where a fine is levied of lands; or by deed of bargain and sale inrolled, according to the statute, there needs no attornment, they being in by the *Stat.* 27 *H. 8.* c. 10. And if a reversion be devised by will to another, the estate passeth without attornment. 8 *Hen.* 6. This was a large head in our Common law; but now much of this learning is out of use. And by a late statute, it is enacted, That all grants and conveyances of manors, lands, rents, reversions, &c. by fine, or otherwise, shall be good without the attornment of the tenants of such lands, or of the particular tenant upon whose estate any such reversion, &c. shall be expectant or depending: but notice must be given of the grant, to the tenant; before which he shall not be prejudiced by payment of any rent to the grantor, or for breach of the condition for non-payment. *Stat.* 4 *Ann.* c. 16. s. 9. And attornments of lands, &c. made by tenants to strangers shall be void, and their landlord's possession not affected thereby: though this shall not extend to vacate any attornment made pursuant to a judgment at law, or with consent of the landlord; or on a forfeited mortgage, &c. by 11 *Geo.* 2. c. 19.

Attrapper, (*Fr.*) Taken, or seized. *Law Fr. Dict.*

Avage, or *avisage*, A rent or payment by tenants of the manor of *Writtle* in *Essex*, upon *St. Leonard's day*, 6 November, for the privilege of pawning in the lord's woods, *viz.* for every pig under a year old, an half-penny; for every yearling pig, one penny; and for every hog above a year old, two-pence.

Avantagium, Profit and advantage.—*Walterus Cantuar. archiep.* ad feodi firmam tradidit Johanni de B. terras in, &c. cum omnibus suis utilitatibus ac avantagiis inde provenientes. *Regist. Eccl. Christi Cantuar.* MS. anno 11 Ed. 2.

Auxionarii, *auxionarii*, Sellers, regrators, or retailers. *Placit. Parl.* 18, Ed. 1. But more properly brokers.

Audience Court, (*curia audientie Cantuariensis*) Is a court belonging to the archbishop of *Canterbury*, having the same authority with the court of arches, though inferior to it in dignity and antiquity. It is held in the archbishop's palace; and in former times the archbishops were wont to try and determine a great many ecclesiastical causes in their own palaces; but before they pronounced their definitive sentence, they committed the matter to be argued by men learned in the law, whom they named their auditors: and so in time it grew to one special man, who at this day is called *causarum negotiorumque audientie Cantuariensis auditor officialis*. And to the office of auditor was formerly joined the chancery of the archbishop, which meddled not with any point of contentious jurisdiction; that is, deciding of causes between party and party, but only such as are of office, and especially as are *voluntarie jurisdictionis*, as the granting the custody of spiritualities, during the vacancy of bishopricks, institutions to benefices, dispensations, &c. but this is now distinguished from the audience. The auditor of this court antiently by special commission was *vicar general* to the archbishop, in which capacity he exercised ecclesiastical jurisdiction of every diocese becoming vacant within the province of *Canterbury*. 4 *Inst.* 337. But now the three great offices of official principal of the archbishop, dean or judge of the peculiars, and official of the audience are, and have been for a long time past, united in one person under the general name of *dean of the arches*, who keepeth his court in *Doctors Commons* hall. *Johns.* 254.

The archbishop of *York* hath in like manner his court of audience. *Johns.* 255.

Audiendo & terminando, A writ, or rather a commission to certain persons, when any insurrection or great

riot is committed in any place, for the appeasing and punishment thereof. *F. N. B.* 110. See *Oyer and Terminer*.

Audita Querela, Is a writ that lies where a man hath any thing to plead, but hath not a day in court to plead it: And it is usually brought where one is bound in a statute merchant, statute staple, or recognisance, or judgment is given against him for debt, and his body in execution thereupon, at the complaint of the party, upon suggestion of some just cause why execution should not be granted; as a release, or other exception. This writ is granted, by the lord chancellor to the justices of either bench, willing them to grant summons to the county where the creditor lives, for his appearance before them at a certain day. *F. N. B.* 102. To writs of execution the defendant cannot plead; so that if there be any matter since the judgment, to discharge him of the execution, he is to have *audita querela*; upon which, the justices shall hear the complaint, and do right: and *audita querela* cannot be brought in a release, until judgment is entered of record. *1 Mod.* 111.

An *audita querela* is in nature of a suit in equity, where a person is charged with a debt that is paid, or being released, &c. *2 Cro.* 29. And there must be a charge and burthen come, or coming upon the party that is to have it, of which he ought by law to be discharged; and then it is to be in such a case wherein he hath no other way to relieve himself. *2 Cro.* 29. *1 Cro.* 44. And it may be brought against the prosecutor himself, and sometimes against him and others that ought to bear part of the burthen with him. *Kelw.* 25.

On a statute, the conusor or his heir may bring *audita querela*, before execution is sued out; but this may not be done by a stranger to the statute, or a purchaser of the land. *1 Danv. Abr.* 630. *3 Rep.* 13. If a lessee covenants for him and his assigns to repair, and the lessee assign over, and the covenant is broken; if the lessor sues one of them and recovers damages, and then sues the other, he may bring *audita querela* for his relief. *Bro.* 74. And where a man hath goods from me by my delivery, and another takes them from him, so that he is liable to both our suits: and one of us sue and recover against him, and then the other sues him, his remedy is this writ. *Dyer* 232. One binds himself and his heirs in an obligation, if the obligee recover of the heir, and after sue the executors for the same cause, &c. they may have the writ *audita querela*. *Plowd.* 439. If two joint and several obligors are sued jointly, and both taken in execution, the death or escape of one will not discharge the other, so as to give him this action; but if such obligors be prosecuted severally, and a satisfaction is once had against one of them, or against the sheriff upon the escape of one, the other may have it. *Hob.* 58. *5 Rep.* 87. Judgment is had against a sheriff on an escape of a person in execution, and after the first judgment is reversed for error, the sheriff shall have relief by *audita querela*, *8 Rep.* 142. If the plaintiff hath had satisfaction against one trespasser, and he proceed to require it against the other, he shall have this writ. *Hob.* 66. And where there is judgment against three, and one of them taken in execution, they may all join in *audita querela*, when they have cause to have the same. *3 Cro.* 443. A plaintiff, that sues an administrator, has his letters of administration revoked; the defendant must be relieved by *audita querela*, for he cannot plead it. *Style* 417. If one accepts of a lesser sum of money for a greater debt, and after the day, and yet sues the bond; this writ will not lie, because it lieth only where a discharge is in law. *Trin.* 18 *Jac.* 1. *B. R.* It may be brought by an infant in the *King's Bench* or *Common Pleas*, to avoid a statute acknowledged by him whilst he was within age. *1 Cro.* 208.

If *A.* being within age becomes bail for *B.* and after two *seire fa.* and *nihil* returned, judgment is given against *A.* &c. he may have an *audita querela*, and avoid the recognizance, and so the judgment thereupon of consequence shall be avoided. *Telv.* 155.

But if *A.* being within age enters into a bond to *B.* who procures *C.* without any warrant, to appear for *A.* and confesses a judgment thereupon, yet *A.* shall not

have an *audita querela*, but he must take his remedy by action of *disceit* against the attorney. *Cro. Jac.* 694.

If a statute be acknowledged to two, of which one is an infant, and they make a defeazance, and after sue execution contrary to it, an *audita querela* shall be brought against both; for it does not appear within the deed that he was an infant; also the deed of an infant is only voidable, and peradventure he will affirm it. *1 Rol. Abr.* 312.

The writ of *audita querela* may be had, where a recognisance or statute entered into is defective, and not good; or being upon an usurious contract, by dures or imprisonment, or where there is a defeasance upon it, &c. *Moore, ca.* 1097. *1 Brownl.* 39. *2 Bulst.* 320. So upon shewing an acquittance of the cognisee, on a suggestion that he had agreed to deliver up the statute. *1 Rol.* 309. Where one enters into a statute, and after sells his lands to divers purchasers; or judgment is had against a man, who leaves land to several heirs, &c. and one of the purchasers, or one heir alone is charged, he may have this writ against the rest to contribute to him. *3 Rep.* 44. *2 Bulst.* 15.

If tenant in tail acknowledges a statute and dies; and the conuzee sues execution against the heir, he may avoid it by assise, without being put to his *audita querela*. *1 Rol. Abr.* 304.

So if a disseisor acknowledges a statute, and the disseisee enters, the conusee extends the land, the disseisee is not put to his *audita querela* to avoid the extent; the conusor having only a tortious and unlawful seisin of the land, and consequently no power to charge it. *1 Rol. Abr.* 304.

But if *A.* be tenant for life, remainder to *B.* his son in tail, and *A.* enters into a recognizance to *C.* and dies; *C.* brings a *sci. fac.* and *B.* is returned heir and tertenant, and warned, but makes default; he can have no *audita querela* to avoid this execution, because he had a day given him in court to set aside the recognizance, and it was his folly not to appear when warned. *Raym.* 19. *1 Sid.* 54.

Where a statute or recognisance is acknowledged before one who hath not power to take it, and afterwards the cognisor makes a feoffment of the land to another, and the cognisee taketh out execution, in such case the feoffee may have an *audita querela*, and avoid the execution. *Dyer* 35, 27.

If *A.* enters into a statute to *B.* and pays the money at the day assigned, upon which the statute is cancelled, and after *B.* forges a new statute in the name of *A.* in this case *A.* may relieve himself by *audita querela*; for the forged statute having all the essentials of a true one, the court was obliged to look on it as such till the contrary appeared, which the conusor could not set forth before execution, having no day to appear judicially in court, and therefore is put to this writ to avoid the execution founded on the injustice of the pretended conusee. *F. N. B.* 104.

If the conusee of a statute, upon agreement with the conusor, delivers up the statute in lieu of an acquittance, and after sues execution, and the conusor prays a re-extent, because that the land was extended too low, and has it granted him, he shall never avoid the extent by *audita querela*; because by his praying the re-extent he admits the statute good and executory. *1 Rol. Abr.* 313.

If upon an *elegit* the sheriff takes an inquisition, and there are several lands found subject to the extent, and several values found, and the sheriff returns, that he has delivered some of the lands in particular for the moiety, where it appears according to the values found, that an equal moiety is not delivered to the party who recovered, but more than a moiety; yet this is not void, nor is it a disclaim by the entry, but only voidable by *audita querela*. *1 Rol. Abr.* 305.

If a man in execution upon a judgment for debt or damages, be delivered out of execution by the sheriff or gaoler who hath him in execution, with the assent of him at whose suit he is in execution, and after, by colour of this judgment, he takes him again and puts him in prison, an *audita querela* lies upon this matter, and thereupon he shall be delivered. *1 Rol. Abr.* 307.

But

But if *A.* be in execution at the suit of *B.* and after *A.* escapes with the consent of the sheriff, and after *A.* returns to the prison, and the sheriff keeps him in prison upon the said execution, *A.* shall not be discharged by *audita querela*, for *B.* has it still in his election to have him in execution at his suit, and shall not be compelled to take his remedy against the sheriff for this voluntary escape, who perhaps may be worth nothing. 1 *Rel. Abr.* 307.

If a statute be made to baron and feme, and they make a defeasance, and sue execution contrary to it, the *audita querela* shall be brought against both, although the defeasance be void as to the wife; for this action is in lieu of an answer of the execution, which is sued by both; and this is all one as if the baron alone had made the defeasance, which would have been a sufficient discharge. 1 *Rel. Abr.* 312.

If a statute be acknowledged to a feme sole and *J. S.* and after the feme takes husband, and *J. S.* releases, and after execution is sued, the *audita querela* may be brought against the baron and feme and *J. S.* 1 *Rel. Abr.* 312.

If two executors sue execution for damages recovered by the testator, where one hath released, an *audita querela* lies against both. 1 *Rel. Abr.* 312.

If *A.* consuee of a statute releases to the tenant all right, interest, and demands, together with all suits and executions, and afterwards sues execution, the tertenant shall have an *audita querela* to set aside this execution. *Cro. Eliz.* 40. 1 *And.* 133.

So in trespass or other action, if it be found for the plaintiff by *nisi prius*, and after, before the day in bank, the plaintiff releases to the defendant, and after judgment is given for the plaintiff, the defendant shall have an *audita querela* upon this matter; because he could not plead the release at the day in bank. 1 *Rel. Abr.* 307.

In an *audita querela*, the process is a *venire facias*, *distingas*, *alias*, *pluries*, and if *non est inventus* be returned, or that be bath nothing, the plaintiff shall have a *capias* against the defendant. *F. N. B.* 104. *Dyer*, 297. b.

If an *audita querela* is founded on a record, or the person bringing it is in custody, the process upon it is a *scire facias* but if founded on matter of fact, or the party is at large, then the process is a *venire*. 1 *Salk.* 92.

And if there be a default by the defendant upon a *scire feci*, or two *nibils* returned, the plaintiff shall have judgment. 1 *Salk.* 93. But, where an *audita querela* is sued *quia timet*, and the party is at large, there shall never be a *scire facias*. 1 *Salk.* 92.

Adjudged, that where the party hath some matter which he might have pleaded to the *sci. fa.* in his discharge, and two *nibils* are returned, and judgment against him, the court will relieve him upon motion, without putting him to bring an *audita querela*. 1 *Salk.* 93.

An *audita querela* shall be granted out of the court, where the record, upon which it is founded, remains, or it may be returnable in the same court. *F. N. B.* 105. b. And therefore if a man recover in *B. R.* or *C. B.* the defendant having a release after judgment, and before execution, shall sue the *audita querela* out of *B. R.* or *C. B.* where the record is. *F. N. B.* 105. So, if a recognizance be acknowledged in *C. B.* and execution be sued upon it after release, the defendant shall sue the *audita querela* out of *C. B.* *F. N. B.* 105. But an *audita querela* may be by original, and upon a judgment in *C. B.* It goes out of chancery returnable in *C. B.* *F. N. B.* 105.

The writ of *audita querela* shall be allowed only in open court. 1 *Bulst.* 140. 2 *Bulst.* 97. 2 *Sherr.* 240.

Upon *audita querela* brought, a *superfedeas* shall go to stay execution, and the judgment in this action is to be discharged of execution. *Hob.* 2. If an *audita querela* be unduly gotten, upon a false surmise, it may be quashed. 1 *Bulst.* 140. This writ lies not after judgment upon a matter which the party might have pleaded before. *Cro. Eliz.* 35. A bare surmise is not sufficient to avoid a judgment: but generally some specialty must be shewn. *Cro. Jac.* 579. Upon a release or other deed pleaded, no *superfedeas* will be granted till the plaintiff in the *audita querela* hath brought his witnesses into court to prove the

deed: and if execution be executed before, bail is to be put in by allowance of the court. 1 *Lill. Abr.* 151.

Upon a motion for an allowance of an *audita querela*, it was held, that bail must be given in court, and not elsewhere, unless in cases of necessity, to be allowed by the court, and then it may be put in before two judges. *Palm.* 422.

And by bail the party is in custody of the law, and if he make not out his *audita querela*, he must render his body in execution again, or pay the debt for which he is in execution, or else his bail must pay it. If after judgment against bail, the judgment against the principal is reversed, or the money paid by the principal; the bail may have *audita querela*. *Cro. Jac.* 645. 8 *Rep.* 143. And it may be brought by the bail to avoid an execution against them, where no process is sued forth against the principal in his life-time, &c. *Goldsb.* 174. Where a plaintiff in *audita querela* gets judgment, he shall have restitution of his goods, though taken in execution before the writ brought. *Sid.* 74.

A man nonsuited in an *audita querela*, may have a new writ. *F. N. B.* 104. When *audita querela* is extended on any statute, &c. before the time *audita querela* lieth. 22, 46 *E. 3.* A writ in the nature of an *audita querela*, has been made out returnable in *B. R.* on a special pardon, setting forth the whole matter. *Jenk. Cent.* 109. And in some cases after a judgment, the court will relieve the party on motion, without *audita querela*. 1 *Salk.* 93.

A writ of *audita querela*.

GEORGE the Third, &c. To our justices assigned to hold pleas before us, greeting. We having received information, by the grievous complaint of *A. B.* That whereas *C. D.* in Easter term, &c. and now hath to the damage of the said *A. B.* &c. wherefore the said *A. B.* hath brought us to provide him relief, and being unwilling that the said *A. B.* should be any ways injured, and desirous that what is right and just should be done in this case: We command you, that in order to hear the complaint of the said *A. B.* you call before you the aforesaid parties, and such others as it shall seem meet to you to convene; and having heard the aforesaid parties, and their several reasons, you cause to be done full and speedy justice to the said parties, which of right, and according to the laws and customs of our kingdom, you shall see ought to be done. Witnesses, &c.

Auditor, (*Lat.*) Is an officer of the king, or some other great person, who examines yearly the accounts of all under officers, and makes up a general book, which shews the difference between their receipts and charge, and their several allowances, commonly called *allocations*: as the auditors of the *exchequer* take the accounts of those receivers who collect the revenues. 4 *Inst.* 106. Receivers general of *sec-farm* rents, &c. are also termed auditors, and hold their audits for adjusting the accounts of the said rents at certain times and places appointed. And there are auditors assigned by the court to audit and settle accounts in actions of account, and other cases, who are proper judges of the cause, and pleas are made before them, &c. 1 *Brownl.* 24.

Auditor of the Receipts, An officer of the *exchequer*, that files the tellers bills, and having made an entry of them, gives the lord treasurer, &c. weekly, a certificate of the money received: he makes debentures to the tellers, before they pay any money; and takes their accounts: he also keeps the black book of receipts, and the treasurer's key of the treasury, and seeth every teller's money locked up in the treasury. 4 *Inst.* 107.

Auditors of the Imprest, Are officers in the *exchequer*, who have the charge of auditing the great accounts of the king's customs, naval and military expences, of the *mint*, &c. and any money imprested to men for his majesty's service. *Pract. Excheq.* 83.

Auditores, Is the same with *audientes*, i. e. the catechumens, or those who were newly instructed in the mysteries of the christian religion before they were admitted to baptism; and *auditorium* is that place in the church where they stood to hear, and be instructed.

'Tis what we now call *navis ecclesiæ*: and in the primitive times, the church was so strict in keeping the people together in that place, that the person who went from thence in sermon time was excommunicated. *Blount.*

Avenage. (from the Lat. *avena*) A certain quantity of oats paid by a tenant to his landlord as a rent, or in lieu of some other duties.

Avenor, (*avenarius*, from the Fr. *avoine*, i. e. oats) Is an officer belonging to the king's stables, that provides oats for his horses: he is mentioned 13 *Car. 2. cap. 8.*

Adventure. *Adventures* of trials of skill at arms, and signifies military exercises on horseback.—*Affisa de armis* 36 *Hen. 3. Brady's Append. Hist. Eng. 250.* And 'tis mentioned in *Addit. Mat. Parij. p. 149. Quid nulli convenient ad turmandum, vel burdandum nec ad alias quas-cunque aventuras.*

Adventure, (properly *adventure*) A mischance causing the death of a man: as where a person is suddenly drowned, or killed by any accident, without felony. 1 *Inst. 291.*

Avera, (*quasi ouera*, from the Fr. *ouvre* and *ouvrage*, *ou* *operatum*) signifies a day's work of a ploughman, formerly valued at 8d. It is found in *domesday.* 4 *Inst. 269.*

Average, (*averagium*) Is said to signify service which the tenant owes to his lord by horse or carriage: but it is more commonly used for a contribution that merchants and others make towards their losses, who have their goods cast into the sea for the safeguard of the ship, or of the other goods and lives of those persons that are in the ship, during a tempest. It is in this sense called *average*, because it is proportioned and allotted after the rate of every man's goods carried. By the laws of the sea, in a storm, when there is an extreme necessity, the goods, wares, guns, or whatsoever else is on board the ship, may (by consulting the mariners) be thrown over board by the master, for the preservation of the ship; and it shall be made good by *average* and contribution. *Mo. 297.* But if the master takes in more goods than he ought, without leave of the owners and freighters, and a storm ariseth at sea, and part of the freighters goods are thrown over board, the remaining goods are not subject to *average*; but the master is to make good the loss out of his own estate: and if the ship's gear or apparel be lost by storm, the same is not within the *average.* *Leg. Rebd.* If goods are cast over board before half the voyage is performed, they are to be estimated at the price they cost: but if they are ejected afterwards, then at the price as the rest are sold at the port of arrival. *Leg. Oleron.* Where goods are given to pirates by way of composition to save the rest, there shall be *average*, by the civil law. *Mo. 297.* — *Average* is likewise a small duty, paid to masters of ships when goods are sent in another man's ship, for their care of the goods, over and above the freight — *Paying so much freight for the said goods, with prime and average accustomed.* Words in bills of lading.

Average of Corn Fields. The stubble or remainder of straw and grain left in corn fields after the harvest is carried away. In *Kent* it is called the *gratten*, and in other parts the *roughings*, &c.

Aver Corn, i. a reserved rent in corn, paid by farmers and tenants to religious houses: and signifies by *Sommer* corn drawn to the lord's granary, by the working cattle of the tenant. 'Tis supposed that this custom was owing to the Saxon *cyriac fecat*, church seed, a measure of corn brought to the priest annually on St. Martin's day, as an oblation for the first-fruits of the earth: under which title the religious had corn rent paid yearly; as appears by an inquisition of the estate of the abbey of *Glastenbury.* *A. D. 1201.*

Aver Land, Seems to have been such lands as the tenants did plough and manure, *cum averiis suis*, for the proper use of a monastery, or the lords of the soil. *Mon. Angl.*

Aver Penny, (or *average penny*) Money paid towards the king's *averages* or carriages, or to be freed thereof. — *Aver penny hoc est, quietum esse de diversis denariis pro averagiis domini regis.* *Rassal.*

Aver Siftber, A custom or rent formerly so called: *Corwel.*

Averia, Cattle: *Spelman* deduces the word from the Fr. *ouvrer*, to work, as if chiefly working cattle: though it seems to be more probably from *avoir*, to have or possess: the word sometimes including all personal estate, as *catalla* did all goods and chattels. This word is used for oxen or horses of the plough; and in a general sense any cattle. — *Homines per averia sua, viz. Equos & boves, & affros graviter distruxit. W. Thorn, in Ed. 2.* 'Tis used in the same sense in *W. 2. c. 18. Averia elongata*; see *Elongata.*

Averia Captis in Withernam, A writ for the taking of cattle to his use, who hath cattle unlawfully distrained by another, and driven out of the county where they were taken, so that they cannot be replevied by the sheriff. *Reg. Orig. 82.* If the cattle are put into any strong place in the same county, the sheriff may take the *posse comitatus*, and break into it, to make the replevin. But when they are driven out of the county, he hath no authority to pursue them. *Vide 1 & 2 P. & M. c. 12.*

Averment, (*verificatio*, from the Fr. *averer*, i. e. *verificare, testari*) Is an offer of the defendant to make good or justify an exception pleaded in abatement or bar of the plaintiff's action: and it signifies the act, as well as the offer of justifying the exception; and not only the form, but the matter thereof. *Co. Litt. 362.* *Averment* is either general, or particular; general, which concludes every plea, i. e. or is in bar, or in a replication, or other pleadings, containing matter affirmative, and ought to be with these words, *Et hoc paratus est verificare, &c.* Particular *averment* is when the life of tenant for life, or of tenant in tail, &c. is averred. *Ibid.*

In replevin the defendant made cognisance as bailiff to baron and feme, he being seized in right of the *jeme for rent in avero existens*; the plaintiff demurr'd specially; for that the *life of the wife was not averr'd.* But *Hale* Ch. J. held, that the rent in *avero existens* is *quasi* an averment, and after verdict, or upon a general demurrer, had been good; and *Twifden* and *Wild* held it good enough on a special demurrer, which *Hale* doubted, and judgment was for the avowant. 2 *Lev. 88.*

He that claims estate from tenant for life, or in tail, or from parson of a church, ought to aver his life. *Br. Estate, pl. 18.*

Where one thing is to be done in consideration of another, on contracts, &c. there must be an *averment* of performance, but where there is promise against promise, there needs no *averment*; for each party hath his action. 1 *Lev. 87.* The use of *averment* being to ascertain what is alledged doubtfully, deeds may sometimes be made good by *averment*, where a person is not certainly named; but when the deed itself is void for uncertainty, it cannot be made good by *averment.* 5 *Rep. 155.* *Averment* cannot be made against a record, which imports in itself an uncontrollable verity. 1 *Inst. 26.*

Where a statute is recited, there one may not aver that there is no such record; for generally an *averment*, as this is, doth not lie against a record; for a record is a thing of solemn and high nature, but an *averment* is but the allegation of the party, (21 *Car. B. R.*) and not so much credit in law to be given to it. *Lil. P. R. 155.*

Where *D.* has appeared as an attorney for *A.* in an action brought by *A.* against *B.* it cannot be assigned for error, that *D.* was not an attorney, or that there is no such person in *verum natura*; for it is against the record; and the admittance of him for an attorney by the court, makes him an attorney, if he was not an attorney before this admittance; in a writ of error brought in this writ, and error assigned *ut supra*, the defendant in the writ of error in this case pleads *in nullo est erratum*; this does not confess that he was not an attorney; but this plea *est quasi* a demurrer, that this is not an error at all; adjudged and affirmed in error. *Jenk. 232.*

Averment lies not against the proceedings of a court of record. 2 *Hawk. P. C. c. 1. sect. 14.* Nor shall it be admitted against a will concerning lands. 5 *Rep. 68.*

And an *averment* shall not be allowed where the intent of the testator cannot be collected out of the words of the will. 4 Rep. 44. One may not *aver* a thing contrary to the condition of an obligation, which is supposed to be made upon good deliberation, and before witnesses, and therefore not to be contradicted by a bare *averment*. 1 Lill. Abr. 156. An *averment* of a wicked and unlawful consideration of giving a bond, may well be pleaded, though it doth not appear on the face of the deed: and any thing which shews an obligation to be void may well be averred, although it doth not appear on the face of the bond. Adjudged on demurrer, after two arguments in the case of *Collins and Blantern*, C. B. Easter, 7 Geo. 3. *Wilson* par. 2. fo. 347, &c.

N. B. The plea in this case was settled by Lord Lifford, now Chancellor of Ireland, then Mr. serjeant Hewitt, and afterwards perused and signed by Mr. serjeant Glyn, Mr. serjeant Hewitt being made a judge of B. R. before the plea was delivered. *Vide* the plea, fo. 345. *Wilson*.

One cannot avoid a statute-merchant, obligation, release, &c. against the party himself named in it, by averring a delivery thereof upon condition, unless he shews a writing of the condition. *Br. Faits*, pl. 10. *Sed qu.* for defendant may plead that the bond was delivered as an *escrow*, to be delivered upon a certain condition to the obligee. *Wilf.* par. 2. fo. 347.

But 'tis otherwise in *detinue* against a stranger, where the thing is bailed into an indifferent hand; *nota* the diversity; for there it is averrable contrary against the party himself. *Br. Faits*, pl. 10.

If an heir is sued on the bond of his ancestor, it must be averred that the heirs of the obligor were expressly bound. 2 Saund. 136. In declaring you shew that the obligor bound his heirs. Another consideration than mentioned in a deed, may be averred, where it is not repugnant or contrary to the deed. *Dyer* 146. But a consideration may not be averred, that is against a particular express consideration; nor may *averment* be against a consideration mentioned in the deed, that there was no consideration given. 1 Rep. 176. 8 Rep. 155. No *averment* will lie upon a deed of another use, against the uses expressed in the deed; but where no use is expressed, or but uncertainly, an *averment* shall be admitted, and may serve for addition or explication. 2 Rep. 75. But *vide* case of *Collins and Blantern*, before referred unto. And if an estate is made to a woman that hath a husband, by fine or deed, for her life; in this case it may be averred to be made to her for her jointure, although there be another use or consideration expressed. 4 Rep. 4. *Averment* may be of a use upon any fine, or common recovery; though not of any other use than what is expressed in it: it may be received to reconcile a fine, and the indenture to lead the uses. *Dyer* 311. 2 Bulst. 235. 1 And. 312.

If one has two manors known by the name of *W.* and levies a fine of his manor of *W.* he shall by *averment* ascertain which of them it was; *per cur.* 6 Mod. 235.

Two manors were known by the name of *W.* and sometimes distinguished with an *alias*; an annuity of 20*l.* *per ann.* is granted out of the manor of *W.* one of them is but 8*l.* *per ann.* and the other of more than the annuity. It is a good *averment* in law, that the greater manor should be liable to the rent-charge. *Chan. Rep.* 138.

If a piece of ground was anciently called by one name, and of late is called by another, and it is granted to me by this new name; an *averment* may be taken that it is all one thing, and it will make it good. *Dyer* 37. 44. No *averment* lies against any returns of writs, that are definitive to the trial of the thing returned; as the return of a sheriff upon his writs, &c. But it may be where such are not definitive; and against certificates upon commissions out of any court: also against the returns of bailiffs of franchises, so that the lords be not prejudiced by it. *Dyer* 348. 8 Rep. 121. 2 Cro. 13. When certainty is expressed by argument and implication in pleading, there it need not be averred. 2 Bulst. 95, 142.

In an action on the case for these words, viz. *Thy son hath robbed me*, the plaintiff cannot maintain the action, without averring, that the defendant had no more sons; but if the words had been spoken to the son instead of

the father or to the wife, viz. *Thy father hath robbed me*, &c. there needs no *averment*, because a son can have but one father, and a husband but one wife. 2 Cro. 443.

The father having two sons, both of one name, levied a fine of lands to the use of *W.* his son and his heirs; in this case the judges cannot take notice to which of his sons the land doth belong; but if the party averreth, that the cognisor had two sons, named *W.* the elder, and *W.* the younger, and that his intent was to levy the fine to *W.* the younger, this *averment* is good, it being of matter of fact not apparent in the fine, but out of it, and therefore it shall be tried by a jury; but if a man, by deed executed under his hand and seal, giveth goods to one of the sons of *G. D.* who hath several sons at that time, there an *averment* shall not be allowed which son he meant; because the deed itself being void for uncertainty, it cannot be made good by an *averment*. 5 Rep. 155.

A special *averment* must be made upon the pleading of a general pardon, for the party to bring himself within the pardon. *Hob.* 67. A person may *aver* he is not the same person on appeal of death in favour of life. 1 Nelf. Abr. 305.

Where a man is to take a benefit by an act of parliament, there in pleading he must *aver*, that he is not a person exempted; but where he claims no benefit by it, but only to keep that which he had before, in such case 'tis not necessary to make such *averment*. *Plow. Com.* 488.

In an action upon the statute 32 H. 8. c. 9. against buying pretended titles, if the plaintiff declares, that the defendant, or any of his ancestors, or any other person under whom he claims, were not in possession of the land, nor received the rents, &c. by the space of a year, &c. he need not *aver*, that the title is pretended, because the statute makes it so; and therefore 'tis impertinent to *aver* a thing which clearly appears both by the statute and the declaration. *Plow. Com.* 87.

Pleas merely in the negative, shall not be averred, because they cannot be proved: nor shall what is against presumption of law, or any thing apparent to the court. 1 Inst. 362, 373. The statute of *Westm.* 2. 13 Ed. 1. gives the *averment*, not summoned according to law, &c. on a bond given to the sheriff or gaoler, contrary to the 23 H. 6. c. 9. there may be *averment* by that statute: upon bonds for usury, the usury may be averred by virtue of 13 Eliz. c. 8. And so in case of simony. *Star.* 31 Eliz. c. 6. But there is no *averment* of maintenance. *Jenk. Cent.* 94, 108, 121. By statute, no exception or advantage shall be taken upon a demurrer, for want of *averment* of *hoc paratus est*, &c. except the same be specially set down for cause of demurrer. 4 & 5 Ann. c. 16.

Averrare, To carry goods in a waggon, or upon loaded horses, a duty required of some customary tenants.—*Debent fruges domini metere, prata falcare, & carriare & averrare.* Cartular. Glaston. MS. f. 4.

Augea, A cistern for water.—*Episcopus B. concedit civibus W. unum caput pro conductu aquatico cum augeis, spirabilibus, & ceteris machinis, sub & super terraneis.* A. D. 1451. Reg. Eccl. Well. MS.

Augmentation, (*augmentatio*) The name of a court erected 27 H. 8. for determining suits and controversies relating to monasteries and abbey lands. The intent of this court was, that the king might be justly dealt with touching the profits of such religious houses, as were given to him by act of parliament. It took its name from the augmentation of the revenues of the crown, by the suppression of religious houses: and the office of *augmentation*, which hath many curious records, remains to this day, though the court hath been long since dissolved. *Terms de Ley* 68.

Avifamentum, Advice, or counsel.—*De avifamento & consensu concilii nostri concessimus*, &c. was the common form of our kings grants.

Aula, i. e. A court-baron, *aula ibidem tent. die*, &c. *Aula ecclesiæ* is that which is now termed *navis ecclesiæ*. *Eadm. lib.* 6. p. 141.

Aulnage. See *Alnage*.

Aumone, (Fr. *aumône*, alms) Tenure in *aumone* is where lands are given in alms to some church, or religious house, upon condition that a service or prayers shall be

be offered at certain times for the repose of the donor's soul. *Britt.* 164. Vide *Frankalmoin*.

Auncel-weight, (*quasi hand jale weight*, or from *ansa*, the handle of the balance) An antient manner of weighing, by the hanging of scales or hooks at each end of a beam or staff, which by lifting up in the middle with one's finger or hand, discovered the equality or difference between the weight at one end and the thing weighed at the other. This weighing being subject to great deceit, was prohibited by several statutes, and the even balance commanded in its stead, 34 *Ed.* 3. 8 *Hen.* 6. 22 *Car.* 2. &c. But notwithstanding it is still used in some parts of England: and what we now call the *stilliards*, a sort of hand-weighing among butchers, being a small beam with a weight at one end, (which shews the pounds by certain notches) seems to be near the same with the *auncel-weight*.

Aunciatus, A word signifying antiquated. — *Sicut charta eorum aunciata est et libertus anterior.* Brompton, lib. 2. cap. 24. par. 6.

Avoidance, In the general signification is when a benefice is void of an incumbent; in which sense it is opposed to plenary. Avoidance is either in *fact*, as by death of the incumbent; or in *law*: and may be by cession, deprivation, resignation, &c. In the first case,

Where the avoidance is by the death of the incumbent, or by his being made a bishop, in such cases the patron is to take notice of it at his peril; and the six months, in which he is to present another, shall be accounted from the death of the one, and the creation of the other; but if the avoidance be by resignation, which is the act of the party himself, or by deprivation, which is the act of the law, in both those cases the patron must have notice, and the six months shall be accounted from the time of the notice, and not from the resignation or deprivation. *Dyer* 327.

Where the patron himself took notice of a deprivation, which was obtained at his own prosecution, for not reading the thirty-nine articles; yet, in such case, lapse shall not incur, without an actual notice of the deprivation given to him by the bishop; for 'tis he, and no other person, who is required by the law to give notice, and it must not be a general notice, but it must be particular, and the cause be expressed for which he was deprived. 6 *Rep.* 29.

Where the bishop refused to institute a clerk, he must give notice of such refusal to the patron himself, if he is within that county where the church is become void; but if he is not in that county, then notice must be given at the door of that church; but where 'tis doubtful who is patron, and upon *jus patronatus* awarded, 'tis found, that such a one is patron, though it may happen he is not the true patron, yet if he gives him notice, and no presentation is made within six months after such notice, the bishop may collate to the church; and though that collation shall not bind the true patron, yet the bishop shall be excused from being a disturber. 1 *Leon.* 32.

There are avoidances by act of parliament, wherein there must be a judicial sentence pronounced to make the living void: if a man hath one benefice with cure, &c. and take another with cure without any dispensation to hold two benefices, in such case the first is void by the act 21 *Hen.* 8. c. 13. if it was above the value of 8*l.* During an avoidance, it is said that the house and glebe of the benefice are in *abeyance*: but by the Stat. 28 *Hen.* 8. cap. 11. The profits arising during the avoidance are given to the next incumbent towards payment of the first fruits; though the ordinary may receive the profits to provide for the service of the church, and shall be allowed the charges of supplying the cure, &c. for which purpose the churchwardens of the parish are usually appointed. The next avoidance of a church may be granted by deed, where the church is full: if a grant be made of the next avoidance when it shall happen, and the church is void at that time, this will make the grant void as to that very avoidance, but it may be good for the next turn after that.

And the distinction which hath obtained is this: if it come in question, whether the church be full of an incumbent or not, the same shall be tried by the certificate

of the bishop, who best knows of the institution; but if the issue to be tried be, whether the church be void or not, the same shall be tried by a jury at the Common law, unless the issue to be tried be upon some special act of avoidance, for then the same shall be tried by the certificate of the bishop, so as the special cause of the avoidance be spiritual. *Gib.* 793. *Hughes*, c. 13. 1 *Burn* E. L. 78. And see 25 *Ed.* 3. §. 3. c. 8.

If a clerk is instituted to a benefice of the yearly value of 8*l.* and before induction accepts another benefice with cure, and is instituted, the first benefice is void by the statute 21 *H.* 8. for he who is instituted only, is properly said to have accepted a benefice within the words of the act. 4 *Rep.* 78.

The patron granted the next avoidance to two jointly and severally; adjudged, that this grant is not good, because an interest cannot be divided; so where there was a grant of the next avoidance to three, *habendum* to them and to each of them jointly and severally, the first presented the third, and adjudged good; but if the bishop had refused to admit the presentee, he might have failed in a *quare impedit*, because the severance in the *habendum* is void in law; but 'tis otherwise in case of an authority, for that may be divided. *Goldf.* 142.

But if he is induced into a second benefice, the first is void *in facto et jure*, and not voidable only. *quoad* the patron, and until he presents another; and in such case the patron ought to take notice of the avoidance at his peril, and present within the six months. *Cro. Car.* 258.

A grant of the next avoidance is no more than a chattel, and goes to executors. *Right Clerg.* 68.

Avoirdupois, or *averdupois*, (Fr. *avoir du poids*, i. e. *habere pondus*, aut *justi esse ponderis*) Signifies a weight different from that which is called troy weight, which contains but twelve ounces in the pound, whereas this hath sixteen ounces: and in this respect it is probably so called, because it is of greater weight than the other. It also signifieth such merchandizes as are weighed by this weight; and is mentioned in divers statutes, as 9 *Ed.* 3. 27 *Edw.* 3. c. 10. 2 *R.* 2. c. 1. *Averium ponderis*, full weight, or *averdupois*. *Cart.* 3 *Ed.* 2.

Avowee, Of a church benefice. *Britt.* c. 29. See *Advowee*.

Avowry, (Fr. *advouerie*) Is where a man takes a distress for rent or other thing, and the party on whom taken sues forth a *replevin*, then the taker shall justify his plea for what cause he took it; and if in his own right, he must shew the same, and *avow* the taking; but if he took it in right of another, he must make cognizance of the taking, as bailiff or servant to the person in whose right he took the same. *Terms de Ley* 70. 2 *Lill.* 454. The *avowry* must contain sufficient matter for judgment to have return: but so much certainty is not required in an *avowry* as in a declaration; and the *avowant* is not obliged to alledge seisin within the statute of limitations. Nor shall a lord be required to *avow* on any person in certain; but he must alledge seisin by the hands of some tenant within forty years. 21 *Hen.* 8. c. 19. 1 *Inst.* 268. In *avowry* seisin in law is sufficient, so that where a tenant hath done homage or fealty, it is a good seisin of all other services to make an *avowry*, though the lord, &c. had not seisin of them within sixty years. 32 *H.* 8. cap. 2. 4 *Rep.* 9. A man may distrain and *avow* for rent due from a copyholder to a lord of a manor; and also for heriots, homage, fealty, amercements, &c. 1 *Nels. Abr.* 315. If a person makes an *avowry* for two causes, and can maintain his *avowry* but for one of them, it is a good *avowry*: and if an *avowry* be made for rent, and it appears that part of it is not due, yet the *avowry* is good for the rest. Supposing sufficient rent due to justify a distress. An *avowry* may be made upon two several titles of land, though it be but for one rent; for one rent may depend upon several titles. 1 *Lill. Abr.* 157. *Saund.* 285. If a man takes a distress for rent reserved upon a lease for years, and afterwards accepts a surrender of the lands, he may nevertheless *avow*, because he is to have the rent due, notwithstanding the surrender. 1 *Danv. Abr.* 652. Where tenant in tail aliens in fee, the donor may *avow* upon him, the reversion being in the donor, whereunto the rent is incident. *Ibid.* 650. If there be tenant for life,

life, remainder in fee, the tenant for life may compel the lord to *avow* upon him: but where there is tenant in tail, with such remainder, and the tenant in tail makes a feoffment, the feoffee may not compel the lord to *avow* upon him. 1 *Danv. Abr.* 648. 1 *Inst.* 268. If the tenant enfeoffs another, the lord ought to *avow* upon the feoffor for the arrears before the feoffment, and not upon the feoffee. 1 *Danv.* 650. The lord may *avow* upon a disseisor. 20 *Hen.* 6. And if a man's tenant is disseised, he may be compelled to *avow*, by such tenant or his heir. A defendant in replevin may *avow* or justify; but if he justifies he cannot have a return. 3 *Rev.* 204. The defendant need not *aver* his *avowry* with an *hoc paratus est*, &c. And the *avowant* shall recover his damages and costs, by 21 *Hen.* 8. c. 19. By which statute it is enacted, That if in any *replegiare* for rents, &c. the *avowry*, cognisance, or justification be found for the defendant, or the plaintiff be nonsuit, &c. the defendant shall recover such damages and costs as the plaintiff should have had, if he had recovered. And by 17 *Car.* 2. c. 7. When a plaintiff shall be nonsuit before issue in any suit of replevin, &c. removed or depending in any of the courts at *Westminster*, the defendant making suggestion in the nature of an *avowry* for rent, the court on prayer shall award a writ to inquire of the sum in arrear, and the value of the distress, &c. Upon return whereof the defendant shall recover the arrears, if the distress amounts to that value, or else the value of the distress with costs; and where the distress is not found to the value of the arrears, the party may distrain for the residue. *Vide* 17 *Car.* 2. c. 7. The learning of *avowries* is abridged by the *Stat.* 21 *H.* 8. c. 19. and the intricacies of process in replevin, &c. much remedied in cases of distresses for rent, by the 17 *Car.* 2. c. 7. *Vide* 11 *Geo.* 2. c. 19. f. 23. See *Distress* and *Replevin*.

Tures, A punishment by the Saxon laws of cutting off the ears, inflicted on those who robbed churches, or were guilty of any other theft. *Fleta*, lib. 1. c. 38. par. 10. And this punishment also extended to many other crimes as well as theft. *Upton de Militari Officio*, pag. 140.

Turicularius, A secretary.—*Quem sibi amicularium & auricularium constituerat*. Mon. Angl. p. 120.

Turum Reginae, The queen's gold. *Rot. Parl. Ann.* 52 *H.* 3. *Vide* *Black. Com.* 1 *V.* 221.

Tusculare. Formerly persons were appointed in monasteries to hear the monks read, and direct them how, and in what manner they should do it with a graceful tone or accent, to make an impression on their hearers, which was required before they were admitted to read publicly in the church; and this was called *auscultare*, viz. to read or recite a lesson.—*Quicumque leſurus vel canturus eſt aliquid in monaſterio, ſi neceſſe habeat, ab eo, (viz. Cantore) priuſquam incipiat, debet auſcultare. Lanfrancus in Decretis pro ordine Benedicti.* c. 5.

Tuſturus and Oſturus, A goſhawk; from whence we uſually call a ſaulkoner, who keeps that kind of hawks, an *oſtringer*. In antient deeds there has been reſerved, as a rent to the lord, *unum auſturm*.

Tuter Droit, Is where perſons ſue or are ſued in another's right; as executors, administrators, &c.

Tuterſoits acquit, Is a plea by a criminal that he was heretofore acquitted of the ſame treaſon or felony: for one ſhall not be brought into danger of his life, for the ſame offence more than once. 3 *Inst.* 213. We muſt except out of this general rule, the right which the widow hath to ſue an appeal for the death of her husband, and the heir for the death of his anceſtor. There is alſo plea of *auterſoits convicted*, and *auterſoits attain*; that he was heretofore convicted, or attained, of the ſame felony. In appeal of death, *auterſoits acquit*, or *auterſoits attain*, upon indictment of the ſame death, is no plea. *H. P. C.* 244. But in other caſes where a perſon is attained, it is to no purpoſe that he ſhould be attained a ſecond time. And conviction of manſlaughter, where clergy is admitted thereon, will bar any ſubſequent proſecution for the ſame death. 2 *Haw. P. C.* 377.

Turhority, Is nothing but a power to do ſomething: it is ſometimes given by word, and ſometimes by writing: alſo it is by writ, warrant, commiſſion, letter of attorney, &c. and ſometimes by law. The authority that is given

muſt be to do a thing lawful; for if it be for the doing any thing againſt law, as to beat a man, take away his goods, or diſſeiſe him of his lands, this will not be a good authority to juſtify him that doth it. *Dyer* 102. *Kelw.* 89. An authority given to another perſon, to do that which a man himſelf cannot do, is void: and where an authority is lawful, the party to whom given muſt do the act in the name of him who gave the authority. 11 *Rep.* 87.

An authority in ſome caſes cannot be transferred.

One, who has an authority to do any act for another, muſt execute it himſelf, and cannot tranſfer it to another; for this being a truſt and confidence reſoſed in the party, cannot be aſſigned to a ſtranger whoſe ability and integrity were not ſo well thought of by him for whom the act was to be done; therefore an executor, having authority to ſell, cannot ſell by attorney. 9 *Co.* 77. b. 1 *Rel. Abr.* 330.

So if a leſſee for life hath power to make leaſes, rendering the ancient rent, he cannot make them by letter of attorney. 2 *Rel. Rep.* 303.

If A. lends B. a horſe to ride to *York*, B. cannot let his man ride him; for the licence is a matter of pleaſure annexed to the perſon of B. and cannot be transferred; adjudged upon a deſurrer, in an action of treſpaſs, for immoſtately riding the plaintiff's mare; where the defendant pleaded, that the plaintiff *licentiam eidem dedit equitare*; and that the defendant and his ſervant *alternatim* had rid upon the ſaid mare. 1 *Rel. Abr.* 330. 1 *Mod.* 110.

Some authorities likewise determine with the life of the perſon who gave them.

The authority given by letter of attorney muſt be executed during the life of the perſon that gives it; becauſe the letter of attorney is to conſtitute the attorney by repreſentative for ſuch a purpoſe, and therefore can continue in force only during the life of me that am to be repreſented; and hence it is, that if J. S. make a letter of attorney to deliver ſeiſin after my death, it is void; becauſe he cannot deliver ſeiſin during my life; for that were plainly without any authority from me; nor can he do it after my death, for the former reaſon. 2 *Rel. Abr.* 9. *Co. Lit.* 52.

But if any corporation aggregate, as a mayor and commonalty, or dean and chapter, make a feoffment and letter of attorney to deliver ſeiſin, this authority does not determine by the death of the mayor or dean, but the attorney may well execute the power after their death; becauſe the letter of attorney is an authority from the body aggregate, which ſubſiſts after the death of the mayor or dean, and therefore may be repreſented by their attorney; but if the dean or mayor be named by their own private name, and die before livery, or be removed, livery after ſeems not good. *Co. Lit.* 52. 2 *Rel. Abr.* 12.

It is a rule that every authority ſhall be countermandable, and determine by the death of him that gives it, &c. But where an intereſt is coupled with an authority, there it cannot be countermanded or determined. *And.* 1. *Dyer* 190.

A deviſe to another to have the diſpoſing, ſelling, and letting his land; ſo a deviſe to his ſon, but that his wife ſhall take the profits; ſo a deviſe, that his executor ſhall have the overſight and dealing of his lands; ſo a deviſe to an infant in tail, but that G. D. ſhall have the overſight of his will, and the education of his ſon till of age, and to receive, ſet, and let for him; theſe and ſuch like words give the deviſee an authority, but no intereſt. *Dyer* 26. b. 2 *Leon.* 221. 3 *Leon.* 78, 216. *Moor* 635. *S. P. Cro. Eliz.* 674, 678, 734.

Where goods are deviſed to a particular purpoſe, there the deviſee hath no intereſt in them; as for inſtance, the teſtator deviſed ſeveral legacies, and after thoſe were paid, then he deviſed the reſidue to his wife to diſpoſe for the good of his ſoul, and payment of his debts, and made her ſole executrix; adjudged, that by this deviſe he had no intereſt in the reſidue, for it was deviſed for a particular purpoſe, viz. to pay the teſtator's debts. *Dyer* 331.

The law makes a difference where lands are deviſed to executors to ſell, and where the deviſe is, that his lands ſhall be ſold by his executors; for in the firſt caſe an intereſt

interest passes to the executors, because the lands are expressly devised to them, but in the other case they have only an authority to sell. *Goldf. 2. Dyer 219. Moor 61. Keilw. 107. b. 1 And. 145.*

The testator devised, that his executors should receive the issues and profits of his lands till his son came of age, ~~to pay his debts and legacies, and to breed up his younger children~~; the testator died, so did the executor, during the minority of the son, having first made J. S. his executor; adjudged, that his executor of an executor may dispose of the issues and profits for the purposes mentioned in the will during the infancy of the son; because the first executor had not only a bare authority, but an interest vested in him. *Dyer 210.*

An authority may be delegated by deed indented, tho' the attorney be not party to the deed; because the attorney takes nothing by the deed, but has only a naked authority delegated to him; and therefore, since a man may take an estate in remainder, though he is no party to the deed, a *fortiori* one not party to the deed may receive a naked authority or power by it. *2 Rol. Abr. 8, 9.*

N. B. Indenting is not necessary.

Where the testator gives another authority to sell his lands, he may sell the inheritance, because he gave him the same power he had himself, and in such case the purchaser shall be in by the devise. *2 Rep. 53.*

An authority may be apportioned or divided, but an interest is inseparable from the person, and where an act, which is in its nature indifferent, will work two ways, the one by an authority, and the other by an interest, the law will attribute it to the interest; as for instance, where a man is seised of three acres holden in capite, to the use of such person, and of such estate as he shall devise, and afterwards he, by his last will, devised all his lands to G. D. in fee, this shall only pass two parts, viz. two acres and no more; but where an interest and authority meet, if the party declare, that the thing shall take effect by virtue of his authority, there it shall prevail against the interest; therefore if the testator had recited his power, and relied upon it, the three acres would have passed by his express declaration; nay, if he had not made such a declaration, yet if the act itself doth import, that it must necessarily work by his power, or be void, the law will adjudge it to take effect according to the meaning of the party; therefore it was resolved in Sir Edward Cleeve's case, that he being seised of three acres of equal value, settled two of them in jointure upon his wife, and afterwards made a feoffment of the third acre to the use of such person to whom he should devise the same, and then devised it to G. D. that this devise was good by virtue of his authority to devise, or else the whole had been void. *6 Rep. 17.*

In many cases authorities must be strictly executed according to the power given.

If a man devise that his executors shall sell his land, this gives but a naked authority; and the lands, till the sale is made, descend to the heir at law; and in this case all must join in the sale; and if one die, it being a bare authority, cannot survive to the rest. *Co. Lit. 112. b. 113. a. 181. b.*

But if a man by will give land to executors to be sold, and one of them die, the survivors may sell; for the trust being coupled with an interest, shall survive together with it. *Co. Lit. 113. b. 181. b.*

If a letter of attorney be to make livery upon condition, so as to make a conditional feoffment, and the attorney delivers seisin absolutely, the livery is not good; because the attorney had no authority to create an absolute feoffment; and therefore such absolute feoffment shall not bind the feoffor, because he gave no such authority. *2 Rol. Abr. 9.*

But if the letter of attorney had been to make livery absolutely, and the attorney had made it upon condition, this seems a good execution of his power, and the feoffment good; because when the attorney had once delivered seisin, he has fully executed his power; and the condition annexed to it being without authority, is void; and therefore shall not destroy the operation of the livery. *2 Rol. Abr. 9.*

If a warrant of attorney be given to make livery to one, and the attorney makes livery to two; or if the attorney had authority to make livery of Black-Acre, and he made livery of Black-Acre and White-Acre, though the attorney has in these cases done more, yet there is no reason that shall vitiate what he has done pursuant to his power, since what he did beyond it is a perfect nullity and void. *Perk. sect. 189.*

If a letter of attorney be given to two jointly to take livery, and this feoffor makes livery to one in the absence of the other, in the name of both, this is void; because they being appointed jointly to receive livery, and to be considered but as one. *Co. Lit. 49. b. 2 Rol. Abr. 8.*

But if a feoffment be made to A. and B. and the feoffor gives a letter of attorney to deliver seisin, and J. S. gives livery to A. in the absence of B. in the name of both, this is a good livery; for though the intire possession be delivered to one only, yet they being jointtenants by the deed of feoffment, such livery to one makes no alteration or change in the possession; because if the livery had been made to both, each had been placed in the whole possession; besides that, every man being presumed to accept a gift for his advantage, A. is looked upon as the attorney of B. to receive the possession for him; and therefore the livery to A. enures to the benefit of B. till he disagrees to it. *Co. Lit. 49. 2 Rol. Abr. 8.*

But if a letter of attorney be made to three conjunctim & divisim, and two only make livery, this is not good, because not pursuant to their authority; for the delegation was to them all three, or to each of them separately; yet if the third was present at the time of the livery made by two, though he did not actually join with them in the act of livery, yet the livery is good; because when they all three are upon the land for that purpose, and two make livery in the presence of the third, there is his concurrence to the act, though he did not join in it actually, since he did not dissent to it. *Dyer 62. 1 Rol. Abr. 329. Co. Lit. 181. b. 1 Rol. Rep. 299. Yelv. 26.*

If a letter of attorney be given to A. to make livery of lands already in lease, the attorney may enter upon the lessee in order to make livery; because whilst the lessee continues in possession, the attorney cannot deliver seisin of it; and therefore to execute the power given him by the letter of attorney, it is necessary he should have a power to enter upon the lessee. *Co. Lit. 52. Poph. 103. Dyer 131. a. 340. a.*

If a sheriff makes a warrant to four or three, or a *capias* jointly or severally to arrest one, two of them may arrest the party, for the greater expedition of justice. *Co. Lit. 181. Palm. 52. 2 Rol. Rep. 137.*

Where the mayor and commonalty of London had constituted J. S. their bailiff to receive their rents, and to make demand of them, and to make entry, such general authority is not sufficient to authorize a bailiff to take advantage, and demand a rent accrued due after the authority given; for it is a new right attached, and there ought to be a special authority for that purpose. *Skin. 413.*

If the lord gives licence to a copyholder for life, to lease the copyhold for five years, the copyholder may lease it for three years; for this is comprehended within the licence, inasmuch as he hath given him licence to lease for more years. *1 Rol. Abr. 330.*

So if the lord gives licence to a copyholder for life, to lease the copyhold for five years, if the copyholder *tandem vixerit*, and he leases it for five years generally without limitation, this is a good execution, and pursuant to the licence; for the lease is determinable by his death, by a limitation in law; and therefore as much is implied by law, as if he had made an actual limitation. *1 Rol. Abr. 330, 331. Cro. Jac. 436. S. B.*

The king may not give any one authority or licence to do any thing that is *malum in se*. *11 Rep. 86. See Licence.*

Autumn, Is the decline of the summer. Some computed the years by *autumnus*; but the *Englisch Saxons* by winters; *Tacitus* says, that the ancient Germans knew the other divisions of the year, but did not know what was meant by *autumn*. *Linderwood* tells us, when the several seasons of the year begin, in these lines,

*Dat Clemens Hiemem, dat Petrus ver Cathedratus,
Æsuat Urbanus, Autumnat Bartholomæus.*

Autumnalia, Those fruits of the earth which are ripe in autumn or harvest.

Auxilium ad filium Militem faciendum & filium Maritandum, A writ formerly directed to the sheriff of every county where the king or other lord had any tenants, to levy of them an aid towards the knighting of a son, and the marrying of a daughter. *F. N. B.* 82. See *Aid*.

Auxilium Curia, A precept or order of court for the citing or convening of one party, at the suit and request of another, to warrant some thing. — *Vocat inde ad warrantiam* Johannem Sutton de Dudley chevalier & Isabellam uxorem, ut habeat eos hic in Octabis S. Michaelis, per auxilium curia. *Kennet's Paroch. Antiq.* 477.

Auxilium facere alicui in Curia Regis. To be another's friend and solicitor in the king's court; an office undertaken by some courtiers for their dependants in the country — *Sciant presentes & futuri, quod ego Bernardus de S. Walericio concessi Rogero de Berkley & heredibus suis auxilium & consilium meum in curia domini mei regis Anglia.* *Paroch. Antiq.* 126.

Auxilium Regis, The king's aid, or money levied for the king's use, and the public service; as where taxes are granted by parliament.

Auxilium Vicecomiti, A customary aid or duty anciently payable to sheriffs, out of certain manors, for the better support of their offices. *Prior de Kime Com. Linc. tenet duas carucatas terre in Thorpe per servitium xl. denariorum per annum, ad auxilium vicecomitis.* *Mon. Angl. Tom. p.* 245. An exemption from this duty was sometimes granted by the king: and the manor of *Stretton* in *Warwickshire* was freed from it by charter. *14 H. 3. M. 4.*

Awail, Seems to signify what we now call *way-laying*, or lying in wait to execute some mischief. *Stat. 13 R. 2. Stat. 2. c. 1.* It is ordained that no charter of pardon shall be allowed before any justice for the death of a man slain by *awail*, or malice prepensed, &c.

Award, (from the Fr. *agard*) Is the judgment and arbitration of one or more persons, at the request of two parties who are at variance, for ending the matter in dispute without public authority: and may be called an *award*, because it is imposed on both parties to be observed by them. *Distum quod ad custodiendum seu observandum partibus imponitur.* *Spelm.* An *award* may be by word, or in writing; but is usually in writing; and must be exactly according to the submission.

It must likewise be equal, certain, and final, and the performance of it must be possible and lawful.

If an *award* be according to the submission by bond, though it is void in law, if it be not observed, the obligation will be forfeited. *1 Danv. Abr.* 515.

The submission to an *award* may be by bond, covenant, or by an *assumpsit* or promise; or without all this, by a bare agreement to refer the matter to such a person or persons. *10 Rep.* 131. *Dyer* 270.

An *award* may be void in some part, and good in another part, if it makes an end of all the differences submitted; and if an *award* be good in part, and void in part, the good shall be performed. *10 Rep.* 31. *2 Saund.* 293. An *award* without a deed of submission, will be a good bar of a trespass. *Danv.* 548. But the delivery of the *award* in writing, under hand and seal, &c. must be pleaded, and be exactly replied to by the plaintiff, in action of debt on an *award*, or it will be ill on demurrer. *Dyer* 243. *2 Mod.* 77, 78, 269. Debt on obligation to perform an *award*, which was, that the defendant should enjoy a house of which the plaintiff was lessee for years during the term, paying to the plaintiff 20s. yearly, and for non-payment of this the action was brought; and it was held to lie. *1 Cro.* 211. If more is awarded than submitted, the *award* will be void; but when an *award* seems to extend to more than in the submission, the words *de & super præmissis* restrain it to the thing submitted. *Cro. Eliz.* 861. So if an *award* be made of any other thing than what is contained in the submission, it is void; for no acts are my own, or binding to me, unless

done by me or by commission from me. *Plow.* 396. *Dyer* 242.

If arbitrators award to do an act to a stranger, this is good; for the stranger is put by the arbitrators in the place of the party, and they have power to award this act, since it is not impossible or unequal, and it is relating to the submission. *Mo.* 3, 359. *10 Co.* 131. *3 Jac.* 62. *1 Rol. Abr.* 248. *Hard.* 46. *1 Leon.* 316.

But an award that an act should be done by a stranger, is void; because he is not within the submission. *Hard.* 46.

If two submit to an award all actions, and the arbitrators award a release of all actions till the time of the award, some books have said, that this is void for the whole, because it extends to things partly in the submission and partly to things out of it, and it is one intire act; for say they, to do that act they are not obliged, because not within the submission; and to do an act relating only to things contained in the submission, is another act from what is awarded; others have said, that this is not void, unless there are shewn on the other side, causes of action arising between the time of making the award, otherwise none shall be intended; and then the release only relates to the things in submission. *10 Co.* 131, 132. *1 Rol. Rep.* 45, 162, 270. *1 Rol. Abr.* 242. *Cro. Eliz.* 809. *Cro. Jac.* 353, 447. *Popb.* 137. *1 Sid.* 365. *2 Mod.* 169.

But it has been resolved, and seems now settled, that the act is not intire; for he may release all actions to the time of the submission; for though there is one deed of release awarded, yet that deed relates to several things that are dividable in their own nature one from another, and so it shall be good for what is in the submission, and void for the residue. *3 Lev.* 188. *2 Mod.* 169. *1 Salk.* 74. *3 Lev.* 413. *2 Lev.* 3.

A submission is of all actions and demands, &c. though there be but one cause or matter between them, an *award* may be made for this: and where two things are submitted, and the *award* but of one, it is good, if the arbitrators have no further notice of the other; though if it be of three things, or some particulars, with a general clause of all other matters, in that case they must make the *award* for the things particularly named, without any other notice given. *Dyer* 216. *2 Cro.* 130. *Godb.* 146.

If two submit all quarrels concerning tithes in a place certain, and the arbitrator awards that one shall pay to the other 20*l.* and the other should release to him all actions, this shall be intended all actions concerning tithes, unless the contrary appear on the other side, and the actions may be severed; and this shall be good for the acts in the submission, and void for the rest. *Palm.* 107. *1 Rol. Rep.* 362. *Cro. Jac.* 66.

An award may be good, though made of less than is contained in the submission; as if the submission be of all actions, trespasses, demands and controversies, and the award be made of some only, this is good; for no more shall be supposed to be made known to the arbitrator: and if there be other causes of action in being, and they be made known to the arbitrator, they must be shewn on the other side; and this as well where the submission is conditional by *ita quod*, as where it is absolute; for the award being made *de præmissis* shall be supposed to settle all things. *Hob.* 49. *8 Co.* 98. *Cro. Jac.* 278. *1 Sand.* 32. *1 Brownl.* 63. *2 Brownl.* 310. *1 Sid.* 12. *Dyer* 216, 242. *Hard.* 45.

If the submission be by divers persons, and the arbitrators award between some of them only, this is good; but if a submission is of certain things in special, with a proviso in the condition, that the *award* may be made of the premises, &c. by such a day, there the *award* must be made of all, or it will be void. *8 Rep.* 79. *Hob.* 49. an *award* of all actions real, when the submission is of actions personal, is not good. *Plowd.* 306. *10 Rep.* 132. Yet if the submission be of things personal, and the *award* is, that one of the parties shall do an act real, in satisfaction of a personal injury, &c. or a submission be of one thing, and the *award* made of something incident to, or necessarily depending upon it; or if the submission is of all actions real and personal, and the *award* only of matters personal, &c. it will be good in these cases;

cases, if nothing else is notified to the arbitrators. *Dyer* 216.

Where the *submission* is general and conditional to end all *controversies*, an *indictment* for a *battery* is not a *controversy* between the parties, within the meaning of the *submission*, for that is the King's suit; and if the arbitrators award the ceasing of such a prosecution, it would be *void*, because it would be to *obstruct justice*. Resolved, *Freem. Rep.* 204. pl. 208.

A *submission* of all debts and demands, and a release of all judgments, *actions* and extents awarded, is a good award. 2 *Sand.* 190.

A *submission* of all matters between the plaintiff and another, and an award made of things that the party hath in right of his wife, is good; for these things are comprehended under the words *all matters*. 10 *Hen.* 6. 18. 3 *Bulst.* 65.

A *submission* of all injuries; an award of all debts, duties and trespasses, is a good award; for whatever is against law is an injury. 3 *Bulst.* 312, 313.

A *submission* of all actions now depending, and an award of all actions, good; for it is all intended actions depending. *Cro. Eliz.* 66, 858.

If there be a controversy between the parson and his parishioners, whether tithes shall be paid in *year* or not, and they submit all controversies, and the arbitrators award that they shall pay so much a year for tithes, this is good; for that was the debate on the award. 1 *Rol. Abr.* 254.

If the *submission* be of all controversies to the time of the *submission*, and the award be that one of them should deliver up an obligation made since the *submission*, in satisfaction of all matters, &c. this is good; because the bond is given only in satisfaction. 1 *Rol. Abr.* 246.

An award may be good, though part of it be made of a thing not within the *submission*; as if an award be to pay 1000*l.* and to procure a person to be bound to pay 22*l.* *per ann.* the plaintiff must lay the breach in not paying the 1000*l.* for as to the other part it is wholly void. See 1 *Leon.* 304, 305. *Cro. Jac.* 149. *Poph.* 134. 10 *Co.* 131. 5 *Co.* 78.

Awards likewise, as has been said, must be equal.

An award made only on one side, without any thing on the other, is void in law: as that one shall pay or give bond for money to the other party, and he do nothing for it; but if it be to give bond to pay, or to pay a debt, and that the other shall be discharged of the debt, &c. this is good: so where it is, that one party shall pay money to the other, and then the other shall release all actions to him. 8 *Rep.* 72, 98.

Thus in case of a trespass submitted, the arbitrators award that one shall pay the other 3*l.* this is void, because only on one side; for it is not said for what, and so the trespass is not discharged, and then the other party hath no advantage by the award; but if it were awarded *de et super premissis*, it would be well enough; likewise if the award had been that he shall pay 3*l.* for a trespass, it had been good, and yet one only was to do an act, but then the trespass by that award had been discharged. 1 *Rol. Abr.* 253, 254. *Hob.* 49.

Upon a *submission* of all trespasses, duties, and demands, the award was, that the defendant should pay to the plaintiff, in satisfaction of all trespasses done to him by the defendant before the day of the *submission*, so much. In debt upon this award defendant demurred to the declaration, and insisted that the award was void, it being of one side; for the plaintiff was to do nothing. But adjudged good; for by the payment of the money he is acquitted of all trespasses done to the plaintiff, and it is a good bar against him, and it shall not be intended that the arbitrators had notice that the defendant had any cause of action against the plaintiff, unless shewn on the defendant's part; and judgment for the plaintiff, *Haughton hæstante*. *Cro. Jac.* 354.

If an award be, that an obligor in a single obligation shall pay the debt, this is no award, unless it be provided that he be discharged; for payment in that case is no discharge. *Hob.* 49. pl. 55.

But if the award be, that she one shall pay 10*l.* for trespass, it is good; for a satisfaction implies a discharge, and

that is the reason of the judgment in *Bisspools case*. *Hob.* 49.

If divers trespasses be referred to arbitrament, and the award is, that one of the parties shall make the other party amends, or give a release, and say not what amends, or what release, &c. it is void for uncertainty. 5 *Rep.* 78. *March* 18.

A naked award is no good plea in trespass, unless something be awarded to the plaintiff in amends; for if there be no trespass there is nothing about which an award can be made; and if there be one, and they do not award satisfaction, they do not act according to the design of their institution, for they are not indifferent, and so there is no good award. 1 *Brownl.* 63. *Cro. Eliz.* 904. 1 *Rol. Abr.* 251.

If an award be to pay so much money in discharge of all actions, a release shall be intended to be awarded, unless the contrary be shewn on the other side. 2 *Rol. Rep.* 1.

A *submission* to award was of all matters in controversy by rule of court; and award was made, that so much money should be paid on one side, and nothing was awarded of the other side; and moved to set it aside as being an award only *ex parte*. Per *Holt*, The common exceptions against an award will not hold here, it being an award upon *submission* by rule of court; for tho' there be no release awarded of one side, yet the *submission* was of all matters in controversy; and we will not grant an attachment before they tender a release; for if one comes to have aid of the court, he shall do that which is fair and equitable before he has it. 12 *Mod.* 234.

Award was, that each party should give to the other a general release of all demands; provided, that if either of them dislike the award within twenty days after made, and within that time pay 10*s.* the arbitrament to be void: it was held that the first part of the award was good, and the proviso repugnant and void.

As an award is in nature of a judgment, it ought to be wholly decisive, for if it doth not determine the matter, it becomes a new controversy; therefore if the arbitrators award a bond for quiet enjoyment of lands, without appointing a certain sum, this is a void award, and the party is not obliged to give bond to the value of the land; for then the sense of the award must be supplied by averment; now if it hath the credit of a judgment, there can be no interpretation made of the award, but by the words of the award itself; for if it receives its meaning from any matters out of the award, the mind of the arbitrators is only guess at, and not express'd; but the parties intended to be obliged only by what the arbitrators themselves declare to be their award, and the bond to be according to the value, they cannot assign their power to any person to assess the value. 5 *Co.* 77. *Cro. Eliz.* 432. 1 *Rol. Abr.* 263. *Moor* 359. 1 *Rol. Rep.* 271. *Dyer* 242. *Telv.* 78.

An award was to pay money, but express'd no place where it should be paid. Resolved, that in law this should have a reasonable construction, and the party ought to have a reasonable time for the payment; but *Foster* conceived it not good, because in such case the bond of *submission* would be immediately forfeited, as there was neither time nor place where the money should be paid; but in answer to this were cited 3 *H.* 7. and 16 *E.* 4, where it is said, that if an arbitrator awards that one party shall pay so much such a day, and keeps the award in his pocket till the day be past, yet the bond shall not be forfeited; and so it was adjudged by all the other justices. 2 *Brownl.* 211.

If the condition of an obligation be to submit to an award all controversies between A. and B. and an award is made that A. shall permit B. to enjoy certain leases of lands purchased from J. S. and that B. shall pay the rents, and perform the covenants, and deliver to A. a true copy of the leases, and pay the arrears to the time of the purchase from J. S. this is a good award as to the rents and covenants, though not particularly specified; for it is true, an award is to be interpreted by its own words, and not by any matter out of the award which doth not appear in the words; but when the words of an award

award have relation to things certain out of the award, these things may be averred; for that is the express mind of the arbitrators, which they have expressly referred to; but as to the arrears the award is void, because they have not referred to any matter that falls within the cognizance of B. for he cannot compel A. or J. S. to set the time of the purchase; and an award of what cannot be certainly done is not a certain determination. 1 Rol. Abr. 264.

An award may be good for part only, but then it must be final as to that part. 19 Hen. 6. 30. 8 Ed. 4. 10.

An award that all suits shall cease is a final award; so an award that one of the parties shall not sue an obligation; for this amounts to an extinguishment of the debt. An award that a suit in chancery shall be dismissed, is a final award; so if the arbitrators award a *retraxit*, or an award that one shall not prosecute nor proceed in such a term, seems to be good; but an award that one of the parties shall be nonsuit is not good, because the party may begin again, so that each party shall discontinue their actions which they have against each other; for this is not a final determination. 2 Mod. 227. 1 Lev. 58. 1 Rol. Abr. 54. 1 Salk. 75. 6 Mod. 282.

When the arbitrators award a thing not submitted, with a reservation to themselves of a future power of judging of the matter, and they award a thing within the submission, this is good for the thing within the submission; for as to that it is final, and void for the residue. Palm. 146. Cro. Jac. 315, 584.

If they arbitrate that all controversies shall cease, except that concerning one bond, this is final; for as to the bond, they arbitrate that it shall continue in force. Cro. Jac. 277, 400.

A conditional award not good, because not final to determine matters in difference; the same law where any thing is referred to the arbitrator's future judgment or exposition. 1 Sid. 59. Cro. Jac. 508. Hob. 218. Palm. 110.

An award to give such a release as counsel, &c. should advise, is good, for this is only a ministerial, and not a judicial act. Style 219.

An award to pay all costs which should be taxed by a prothonotary, &c. not good, because not final. Sid. 358.

The performance of what is awarded likewise must be possible and lawful.

If the arbitrators award a thing impossible *ex natura rei*, it is void; as if they award a sum of money to be paid at a day past, it is void. 8 Ed. 4. 1. b. But if they award a thing which cannot be done, but is not in the nature of the act itself contradictory or repugnant; this may be a good award; for there is no contrivance to be made of the award, but by the words thereof. 1 Rol. Abr. 248.

An award to levy a fine is good; for though it is an act of the court, yet by the law and publick justice of the kingdom, it is not to be refused to any man; but if the award be to command the justices to do it, this is no good award; for the parties in effect pray leave to agree from the King himself, which is quite different from the nature of a command. 1 Rol. Abr. 249.

An award to pay so much *apud domum J. S.* good; for he is not bound to pay it in the house, but as near as he can to it, or it shall be intended a common inn; and if the party will not let him pay there, it has been said that the endeavour is sufficient; for they cannot award anything that will make the party a trespasser. 1 Rol. Abr. 249. 1 Rol. Rep. 6. Cro. Car. 226. 2 Bulst. 39. 3 Lev. 153. An award that one of the parties shall do a thing out of his power, as to deliver up a deed which is in the custody of J. S. is void; agreed *per cur.* 12 Mod. 585. If an arbitrator awards a thing against law, this is void. 1 Rol. Abr. 249. And a party is not to be made a judge in his own cause by award. 1 Salk. 71. Where a thing is to be done on payment of money, a tender of the money is as much as an actual payment. Mod. Caf. 33. Action of debt may be brought for money adjudged to be paid by arbitrators, declaring on the award; and also action of debt upon the bond for not performing the award. Brownl. 55.

With respect to pleading awards in bar, there is a difference between an accord with satisfaction and an award; for in an accord a man must plead present satisfaction,

and it is no plea in bar to plead an accord with satisfaction at a day to come; for in all personal injuries the law gives damages as an equivalent; and when the party accepts of an equivalent, there is no injury or cause of complaint, and therefore a present satisfaction is a good plea; but where the wrong-doer promises a future satisfaction, the injury continues till satisfaction is made, and consequently there is a cause of complaint in being; and if the trespass were now barred by this plea, he can have no remedy for the future satisfaction, for that supposes the injury still to have continuance; but where persons submit to arbitration, the arbitrators are judges of the injury; and if they award money payable at a day to come, that is a good award, and may be a good plea in bar to an action of trespass brought in the mean time, because this thereby becomes the immediate debt attainable by law. 5 Ed. 4. 7. Plowd. 5. b.

A man cannot plead generally the award performed, but he ought to set forth the award, and shew how he hath performed it. Moor 3. p. 9. In pleading a countermand to a submission to arbitrate, it need not be alledged, that the party gave notice to the arbitrators, for without that it is no countermand, and therefore if no notice be given, issue may be joined upon the point *quod non retractavit*. 8 Co. 82. If the submission be by word, though the award be by deed, the party may wage his law; for though a deed cannot be dissolved without deed, yet a verbal contract may be dissolved by word only: and this in its original is a verbal contract. Co. Lit. 295. 2 Sand. 65.

Arbitrators are to make their award *secundum allegata & probata*, but they may not injoin any oath to the witnesses: the award ought to be published; and no one is bound to perform till he can know what the award is. 4 Rep. 82. Brownl. 311. A submission to award may be revoked and countermanded, before the award made; where there is no specialty to abide the award of J. S. &c. 8 Rep. 8. By Stat. 9 & 10 W. 3. c. 13. Submissions to awards, by agreement of the parties, may be made a rule of any of his majesty's courts of record; and on a rule of court thereupon, the parties shall be finally concluded by such arbitrament: and in case of disobedience thereto, the party refusing to perform the same, shall be subject to the penalties of contemning a rule of court, &c. unless it appears on oath that such award was unduly procured, when it shall be set aside: but this statute extends only to personal matters, for which there is no other remedy but by personal action, or by suit in equity. Attachment lies for non-performance of an award made a rule of court; after personal demand of performance. 1 Salk. 83. In making a submission to an award a rule of the court of Chancery, which the parties may agree to, it must be done pursuant to the act of parliament; and the method is to move that court, to confirm the award, upon the Master's report: though if there be such submission to a reference, and the award made is to be confirmed by decree, without appeal; yet exceptions may be taken thereto. 2 Vern. 109. See 1 Mod. 21. And vide Arbitrator.

Form of an Award on a Submission.

TO all people to whom this present writing indented of award shall come greeting. Whereas there are several accounts depending, and divers controversies and disputes have lately arisen between A. B. of, &c. gent. and C. D. of, &c. all which controversies and disputes are chiefly touching and concerning, &c. And whereas for the putting an end to the said differences and disputes, they the said A. B. and C. D. by their several bonds or obligations bearing date, &c. are become bound each to the other of them in the penal sum of &c. to stand to, and abide the award and final determination of us E. F. G. H. &c. so as the said award be made in writing, and ready to be delivered to the parties in difference on or before, &c. next, as by the said obligations, and the conditions thereof may appear. Now know ye, That we the said arbitrators, whose names are hereunto subscribed, and seals affixed, taking upon us the burthen of the said award, and having fully examined and duly considered the proofs and allegations of both the said parties, do for the settling

settling amity and friendship between them, make and publish this our award, by and between the said parties in manner following, that is to say; Imprimis, We do award and order, that all actions, suits, quarrels and controversies whatsoever had, moved, arisen or depending between the said parties in law or equity for any manner of cause whatsoever, touching the said, &c. to the day of the date hereof, shall cease and be no further prosecuted, and that each of the said parties shall pay and bear his own costs and charges, in any wise relating to, or concerning the said premises. And we do also award and order that the said A. B. shall pay, or cause to be paid to the said C. D. the sum of, &c. within the space of, &c. And also at his own costs and charges do, &c. And further we do award and order that the said C. D. shall pay or cause to be paid, to the said A. B. the sum of, &c. on or before, &c. or give sufficient security for the same to the said A. B. &c. And we do award and order that, &c. And lastly, we do award and order that the said A. B. and C. D. on the receipt of the several sums, &c. abovementioned, shall in due form of law execute each to the other of them general releases, sufficient for the releasing by each to the other of them, his executors and administrators, of all actions, suits, arrests, quarrels, controversies and demands whatsoever touching or concerning the premises aforesaid, or any matter or thing thereunto relating, from the beginning of the world until the day of, &c. last. In witness, &c.

Awme, or *anme*, (Teut. *ohn*, i. e. *cadus vel mensura*) A measure of Rhenish wine, containing forty gallons; mentioned in the statute 1 Jac. 1. c. 33. and 12 Car. 2. c. 4. This word is otherwise called *awame*, as you may read in a very old printed book.—The rood of Rhenish wine of Dordrecht is ten *awmes*, and every *awme* fifty gallons. The rood of Antwerp is fourteen *awmes*, and every *awme* thirty-five gallons. By this account it contains different quantities in several countries.

Axe and **Axen**, Comes from the Saxon verb *axian*, to demand, and from hence we have our English word *ask*. In Somersetshire, and some other counties of England, in the country dialect the word *axe* is made use for *ask*.

Axel, and **besaicl**, A writ that lies for an heir dispossessed of his inheritance left by his grandfather, or great grandfather, &c. See *aile*.

Azaldus, Signifies a poor horse or jade.—*Affri*, *azaldi*, & *alii equi valoris*, &c. Claus. 4 Ed. 3.

B.

Baca, A hook or link of iron, or staple.—*In axibus emptis & carrellis exandis novem denarios in colariis, bacis & sellis ad idem emptis xlii den.*—*Consuetudin. domus de Farendon, MS. penes Wh. Kennet, f. 20.*

Baccinium, or *bacina*, A basin or vessel to hold water to wash the hands.—*Non topeta, non mountergia, non bacinia, & nil omnino per violentiam exigatur.* Simeon Dunelm. anno 1126. Mon. Angl. tom. 3. p. 191.—*Petrus filius Petri Picot tenet medietatem Heydenæ per serjantiam serviendi de bacinis.*—This was a service of holding the basin, or waiting at the basin, on the day of the king's coronation. *Lib. Rub. Scaccar. f. 137.*

Bachelor, The commonalty as distinguished from baronage.—*Festivitate S. Edmundi Regis & Confessoris, in quindenam S. Michaelis apud Westmonasterium, per dominum regem regaliter celebrato communitas bacheloriarum Anglie significavit domino Edwardo filio regis, &c.* Annal. Burton. p. 426. sub an. 1259.

Bachelors, (*baccalarius*, from the Fr. *bachelier*, viz. *tyro*, a learner :) In the universities there are *bachelors of arts*, &c. which is the first degree taken by students, before they come to greater dignity. And those that are called *bachelors of the companies of London*, are such of each company, as are springing towards the estate of those that are employed in council, but as yet are inferiors; for every of the twelve companies consist of a *master*, two *wardens*, the *livery*, (which are assistants in matters of council, or such as the assistants are chosen out of) and the *bachelors*. The word *bachelor* is used 13 R. 2. and signifies the same with *knight-bachelor*. By 3 E. 4. c. 5. it is a simple knight, and not knight banneret, or *Knight of the Bath*.

Anno 28 E. 3. a petition was recorded in the *Tower*, beginning thus: *A nostre Seigneur le Roy monstrent votre simple bachelor, Johan de Bures, &c.* Bachelor was anciently attributed to the admiral of England, if he were under a baron. In Pat. 8 R. 2. we read of a *baccalarius regis*. And touching the further etymology of this word, *baccalarei* (teste Renano) a bacillo nominati sunt, quia primi studii auctoritatem quæ per exhibitionem baculi concedebatur jam consecuti fuissent, &c.

Bachberinde, (*Sax.*) Signifieth bearing upon the back, or about a man. *Brañon* useth it for a sign or circumstance of theft apparent, which the Civilians call *furtum manifestum*; for, dividing *furtum* into *manifestum* & *non manifestum*, he defineth the former thus; *furtum vero manifestum est, ubi latro deprehensus est seistus de aliquo latrocinio, scil. handhabend, & bacherind, & infecutus fuerit per aliquem cujus res illa fuerit.* Brañt. lib. 3. tract. 2. cap. 32. *Manwood* remarks it as one of the four circumstances or cases, wherein a forester may arrest the body of an offender against vert or venison in the forest: by the assise of the forest of Lancaster (says he) taken with the manner, is when one is found in the king's forest in any of these four degrees, *stable-stand, dog-draw, backbear, and bloody-band.* Manw. 2 part, Forest Laws.

Baco, Is a bacon hog, as often used in old charters. *Blount.*

Bacille, A candlestick properly so called, when formerly made *ex baculo* of wood, or a stick. *Hugo episcopus Dunelmensis fecit in ecclesia coram altari tria ex argente bacilla, in quibus lumina die noctuque perpetuo ardentia lucerent.* Clodingham Hist. Dunelm apud Wartoni Ang. Sac. p. 1723.

Badger, (from the Fr. *bagage*, a bundle, and thence is derived *bagagier*, a carrier of goods) Signifies with us one that buys corn or victuals in one place, and carries them to another to sell and make profit by them: and such a one is exempted in the Stat. 5 & 6 Ed. 6. c. 14. from the punishment of an ingrosser within that statute. But by 5 Eliz. c. 12. *badgers* are to be licensed by the justices of peace in the sessions; whose licences will be in force for one year, and no longer; and the persons to whom granted must enter into a recognizance that they will not by colour of their licences forestall, or do any thing contrary to the statutes made against forestallers, ingrossers, and regrators. If any person shall act as a *badger* without licence, he is to forfeit 5*l.* one moiety to the king, and the other to the prosecutor, leviable by warrant from justices of peace, &c. Vide 13 El. c. 25. f. 20.

Bag, An uncertain quantity of goods and merchandize, from three to four hundred. *Lex Mercat.*

Baga, A bag or purse.—*Carta Decani Ecclesiæ Litchfield, in Mon. Angl. tom. 3. page 237. Ducentas Marcas pecuniæ in quadam бага de Whalley.*

Bagavel, The citizens of Exeter had granted to them by charter from K. Edw. 1. a collection of a certain tribute or toll upon all manner of wares brought to that city to be sold, towards the paving of the streets, repairing of the walls, and maintenance of the city, which was commonly called in old English *begavel, betbugavel, and chippinggavel.* Antiq. of Exetef.

Bahadum, A chest or coffer; it is mentioned in *Fleta*, lib. 2. c. 21.

Bajardour. (Lat. *bajulator*) A bearer of any weight or burden.—*Offerebant duos incisores in sua lapidina, & cariagium petræ usque ad navim, & de navis usque duos bajardours servituros ad ecclesiam.* Petr. Bles. Contin. Hist. Croylond, p. 120.

Bail, *ballium*, (from the Fr. *bailier*, which comes of the Greek *βάλλω*, and signifies to deliver into hands) is used in our Common law for the freeing or setting at liberty of one arrested or imprisoned upon any action, either civil or criminal, on surety taken for his appearance at a day and place certain. Brañt. lib. 3. tract. 2. cap. 8. The reason why it is called *bail*, is because by this means the party restrained is delivered into the hands of those that bind themselves for his forthcoming, in order to a safe keeping or protection from prison: and the end of *bail* is to satisfy the condemnation and costs, or render the defendant to prison.

With respect to bail in *civil cases* it is to be observed, that there is both *common* and *special bail*: *common bail* is in actions of small concernment, being called *common*, because any sureties in that case are taken; whereas in causes of greater weight, as actions upon bonds, or specialty, &c. where the debt amounts to 10*l.* *Special bail* or surety must be taken, such as subsidy men at least, and they according to the value. 4 *Inst.* 179. For common bail fictitious names only are now used.

By *Stat.* 23 *Hen.* 6. c. 9. Sheriffs, &c. are to let to bail persons by them arrested by force of any writ, in any personal action, &c. upon reasonable sureties, having sufficient within the county to keep their days in such place, &c. as the writs require. And the *Stat.* 1 *W. & M.* sess. 2. c. 2. (36.) provides against excessive bail.

By the *Stat.* 12 *Geo.* 1. c. 29. None shall be held to special bail on process out of any superior court, where the cause of action doth not amount to 10*l.* or upwards; nor out of any inferior court where it doth not amount to 40*s.* Affidavit is to be made of the cause of action, and filed before some judge, or commissioner of the court whence the writ issues, or before the officer issuing it, and the sum specified in the affidavit indorsed on the back of the writ; for which sum bail shall be taken, and no more: and if there be no such affidavit and indorsement, the defendant shall not be arrested by his body, &c. *Vide* 21 *Geo.* 2. c. 3.

In actions of battery, trespass, slander, &c. though the plaintiff is like to recover large damages, special bail is not to be had, unless by order of court, and the process is marked for special bail: nor is it required in actions of account, or of covenant, except it be to pay money; nor against heirs or executors, &c. for the debt of the testator, unless they have wasted the testator's goods. 1 *Danv.* Abr. 681.

Neither is an executor, administrator or heir, upon the removal of a cause out of an inferior court, obliged to put in bail. 2 *Lev.* 204. 1 *Sid.* 418. 1 *Lev.* 945, 268. 2 *Jones* 82. 1 *Salk.* 98. *S. P. cont.* *Lit. Rep.* 81.

But if there be a *devastavit* suggested, which can only be on an action of debt on a judgment, they must find special bail. 1 *Lev.* 145. 1 *Sid.* 63. 1 *Salk.* 98.

An attorney, or other officer, whose attendance is required in the court to which he belongs, shall not be held to special bail. 1 *Mod.* 10. Unless at the suit of an attorney of another court.

If baron and feme are sued, the husband must put in bail for both, but if the husband does not appear upon the arrest, the wife must file common bail before she can be discharged; for otherwise the plaintiff could not proceed to obtain judgment. *Goldf.* 127. *Cro. Eliz.* 370. *Cro. Jac.* 445. *Style* 475. 1 *Mod.* 8. 6 *Mod.* 17, 105.

In all actions brought in *B. R.* upon any penal law, the defendant is to put in but common bail. *Yelv.* 53. In actions where damages are uncertain, bail is to be at the discretion of the court: on a dangerous assault and battery, upon affidavit of special damages, a judge's hand may be procured for allowance of an *ac etiam* in the writ: and in action of *scandalum magnatum* the court on motion ordered special bail. *Raym.* 74. Special bail is ordered, by rule of court, in all causes of removal, whether by *habeas corpus*, writ of privilege, *certiorari*, &c. except where the defendant is sued as executor or administrator: and a caveat is to be entered with the judges for good bail. And when bail is taken by the chief justice, or other judge on a *habeas corpus*, the bail taken in the inferior court is dismissed; though the last bail be not filed presently, nor till the next term. *Yelv.* 120, 121. Yet it has been held, where a cause is removed out of an inferior court by *habeas corpus*, if the bail below offer themselves to be bail above, they shall be taken, not being excepted against below, unless the cause comes out of *London*. For the sufficiency of the bail there is at the peril of the clerk, and he is responsible to the plaintiff; so that the plaintiff had not the liberty of excepting against them, and the clerk is not responsible for their deficiency in the court above, though he was in *London*. 1 *Salk.* 97.

In *London*, 'tis said, special bail is to be given in action of account, &c. But on removal by *habeas corpus* into *B. R.* that court will accept common bail. 2 *Keb.* 404.

There is not only bail to appear, &c. on writs of error; but also in *audita querela*, a recognisance of bail must be acknowledged; and upon a writ of *attaint*, to prosecute, &c. *Jenk. Cent.* 129.

By the *Stat.* 3 *Jac.* 1. c. 8. No execution shall be delayed by any writ of error or *superfedeas* thereupon, for the reverting of any judgment; unless such person in whose name such writ shall be brought, with two sufficient sureties, shall first, before such stay made, or *superfedeas* awarded, be bound unto the party for whom any such judgment is or shall be given, in double the sum adjudged, to prosecute the writ of error with effect; and also to satisfy the debt, damages, and costs adjudged, &c.

Note; by the *Stat.* 3 *Jac.* 1. cap. 8. When a writ of error is brought on a judgment had upon a bond to pay money (only) there special bail ought to be given; and after a year a *scire facias* ought to precede the *levari*, or *feri facias*. 11 *Mod.* 2.

If a cause removed from an inferior court, be remanded back by *certiorari* to the same term, the original bail in the inferior court are chargeable, but not if remanded in another term. 2 *Cro.* 363. One in execution in custody of the marshal of *B. R.* is not compellable to find bail, if another action be brought against him. But if he be in the prison of the *Fleet* in execution, on action brought in *B. R.* he must be removed into the custody of the marshal of that court, or put in bail to the action. *Trin.* 24 *Car.* *B. R.* One taken on a writ of execution is not bailable by law; except an *audita querela* be brought: but where a writ of error is brought and allowed, if the defendant be not in execution, there shall not be an execution awarded against him, at the request of the bail, though he be present in court. 1 *Nelf. Abr.* 331. The bail ought not to join with the principal, nor the principal with the bail, in a writ of error to reverse the judgment against either. 2 *Cro.* 295.

On *capias ad satisfaciendum* against the defendant returned *non est inventus*, *scire facias* is to issue against the bail, or an action may be brought. Where a defendant renders his body in discharge of the bail, the plaintiff is by the rules of the court to make his choice of proceeding in execution, whether he will charge body, goods, or lands. 1 *Lill.* 183. And if the principal after judgment renders not himself in discharge of his bail, it is at the election of the plaintiff to take out execution either against him or proceed against his bail: but if he takes the bail in execution, though he hath not full satisfaction, he shall never after take the principal; and if the principal be taken, he may not after meddle with the bail.

Where two are bail, although one be in execution, the plaintiff may take the other. 2 *Cro.* 320. 2 *Bulst.* 68. If a principal render himself, and there is none to require his commitment, the court is *ex officio* to commit him; and if the plaintiff refuse him, he shall be discharged, and an entry made of it upon the record. *Moor, cas.* 1249. A defendant having rendered himself to discharge the bail, and prayed entry of it; the court asked the plaintiff if he would have execution of his body, and he said no: the bail was discharged. 1 *Leon.* 59. See *Hob.* 210. There must be an *exoneratur* entered, to discharge the bail. If the defendant dies before a *capias ad satisfaciendum* against him returned and filed, the bail will be discharged. 1 *Lill.* 177. On the death of the principal, 'tis impossible for the bail to bring in his body: and the bail stand engaged that the principal shall render himself, which must be intended upon process awarded against him in his life time. 1 *Nelf.* 328.

The bail upon a writ of error cannot render the party in their discharge; because they are bound in a recognisance that the party shall prosecute the writ of error with effect, and pay the money if judgment be affirmed. 1 *Lill. Abr.* 173. Before a *scire facias* taken out against bail, the principal may render his body in discharge of the bail: and if the bail bring in the principal before the return of the second *sci. fac.* against them, they shall be discharged. 1 *Roll. Abr.* 250. 1 *Lill.* 471. Antiently

tiently the bail were to bring in the principal upon the first *scire fac.* or it would not be allowed. 3 *Balk.* 182. If bail surrender the principal at or before the return of the second *scire facias*, it is good, although there be not immediate notice of it to the plaintiff; and if through want of notice, he is at further charge against the bail, that shall not vitiate the surrender, but the bail shall not be delivered till they pay such charges: if at any time after the return of the *capias*, the bail surrender the principal at a judge's chamber, and he thereupon is committed to the tipstaff, from whom he escapes, &c. this will not be a good surrender; but if it be before or on a *capias* returned, it is otherwise, the one being an indulgence, and the other matter of right. *Mod. Caf.* 238. When a person makes his escape out of prison, and is retaken and bailed; the bail shall be discharged on a writ to the sheriff commanding him to keep the prisoner in discharge of the bail. *Stat. 1 Ann. st. 2. c. 6. Sec. 3.* The judges of the courts at Westminster have power by statute to appoint commissioners in every county to take recognisances of bail, in causes depending in their courts; and to make such rules for justifying the bail as they shall think fit, &c. *Stat. 4 & 5 W. & M. c. 4.*

The commissioners are to take bail, but are obliged by rule of court to keep a book wherein are the names of the plaintiff, defendant, and bail, and the person who transmits the same, and who makes affidavit that the recognisance was duly acknowledged in his presence: on such affidavit the judges make a conditional allocatur, and the bail are to stand absolute, unless the plaintiff excepts against them within twenty days, and if he excepts, the bail may justify by affidavit before the commissioners in the country. *Gilb. H. C. B. 32.*

If a defendant puts in bail by a wrong name, the proceedings shall nevertheless be good; for otherwise every man impleaded, may give a false name to his attorney by which he will be bailed, and then plead it in arrest of judgment. *Goldsb.* 138. But it hath been held, that if the bail be entered in one name, and the declaration and all the proceedings are by a contrary name, it will be erroneous. 1 *Cro.* 223. So if there is bail, and the bail be taken off the file, the plaintiff is without remedy: though a *habeas corpus* and *bail-piece* were lost in B. R. new ones were ordered to be made out. *Style* 261.

Stat. 21 Jac. 1. cap. 26. enacts, That it is felony without benefit of clergy to acknowledge, or procure to be acknowledged, any bail in the name of other person not privy or consenting thereto, provided that it shall not corrupt the blood, or take away dower.

Stat. 4 & 5 W. & M. cap. 4. s. 4. enacts, That any person representing or personating another before commissioners appointed to take bail, shall be adjudged guilty of felony.

Special bail, which is taken before a judge, or by commissioners in the country, when accepted, is to be filed; after twenty days notice given of putting in special bail before a judge, on a *cepi corpus*, if there be no exception, the bail shall be filed in four days. 1 *Lill. Abr.* 174. Upon a *cepi corpus* twenty days are allowed to except against the bail: so on a writ of error; and you need not give notice; but you cannot take out execution without giving a four days rule to put in better bail: in all other cases, notice must be given. Upon a *habeas corpus*, eight and twenty days are appointed to except against the bail, and after that, if it be not excepted against, it shall be filed in four days. 1 *Salk.* 98.

As to putting in common bail, or entering a common appearance, *vide* the books of practice by Richardson or Harrison.

The exception to bail put in before a judge, must be entered in the bail book, at the judge's chambers at the side of the bail there put in, after this manner: *I do except against this bail, A. B. attorn. for the plaintiff.* And if there be no such exception, the defendant's attorney may take the *bail-piece* from the judge's chamber, and file it. Bail is not properly such until it is filed, when it is of record: but it shall be accounted good, till the same is questioned and disallowed. When cognitors of bail are questioned, they are to justify themselves in open court, by oath of their abilities; or before one of the

judges of the court; or by affidavit before commissioners who took the bail.

Bail cannot be justified before a judge in his chamber, except it be by consent, or for necessity in vacation; but in the latter case they ought to be justified again in term, and upon that the defendant is compelled to accept a declaration to go to trial at the assizes, if it be an issuable term; and upon putting in bail, it is not enough to give notice of their being put in, but it ought to be of their names, places of abode, and trade or vocation, that the plaintiff may know how to enquire after them; and after exception to bail there is no set time to justify, or change them for better, but it must be in convenient time. 6 *Mod.* 24, 25.

It being doubtful whether Sunday should be reckoned as one day in notice to justify bail, it was determined per cur. that for the future Sunday shall not be counted one, (it not being a proper day to enquire after bail) but two days notice must be given, of which Sunday shall not be one; upon motion for defendant to justify bail, notice was served Saturday June 23, to justify bail Monday 25; the notice being insufficient, the bail was not suffered to justify. *Notes in C. B. 220.*

The court may adjudge bail sufficient, when the plaintiff will not accept of it. Also the court on motion, or a judge at his chamber, will order a common appearance to be taken, when special bail is not required, on affidavit made by the defendant of the smallness of the debt due, &c. The putting in of a declaration, and the acceptance of it by the defendant's attorney with the privacy of the plaintiff's attorney, is an acceptance of the bail. If a plaintiff accepts of an assignment of the bail bond, and the defendant puts in the same bail that were put in to the sheriff at the return of the writ, the plaintiff cannot except against them; but 'tis otherwise where he hath not taken an assignment. *Farrell. Mod. Caf.* 62. When a sheriff hath taken good bail of the defendant, he will on a rule return a *cepi*, and assign the bail bond to the plaintiff, which may be done by indorsement without stamp; so as it be stamped before action brought thereupon; and then the defendant and bail may be sued on the bond, by the plaintiff in his own name, i. e. as assignee of the sheriff. *Stat. 4 & 5 Ann. c. 16.* But if the plaintiff takes an assignment of the bail-bond, though the bail is insufficient, the court will not amerce the sheriff. 1 *Salk.* 99. By the antient practice, a bail-bond could not be put in suit till a rule was had to amerce the sheriff, for not having the body at the return of the writ; and the course now is, to stay proceedings on the bail-bond, if there is no return of a *cepi corpus*. *Mod. Caf.* 229. 3 *Salk.* 57. In case the defendant doth not put in bail, the attorney for the plaintiff is to call on the sheriff for his return of the writ; and so proceed to an attachment against the sheriff. If on a *cepi corpus* no bail is returned, a rule will be made out to bring in the defendant's body. Though a defendant, with leave of the court, may deposit money in court instead of bail; and in such case the plaintiff shall be ordered to waive other bail. *Lill. Abr. Trin. 23 Car. B. R.* Bail to the action is to be taken before none but a judge of the court; but for appearance may be before any officer, and if it be illegally taken, it will not oblige one as bail. 2 *Cro.* 94. It is said bail are liable to all actions of the plaintiff the same term wherein they shall declare against the defendant; yet where an attorney appeared for one in the *King's Bench*, and special bail was entered for his client to that action; it was agreed, that the bail is not bound to stand bail to all other actions that shall be declared in against the party in the by: but the attorney is obliged to appear for him in all such actions, and to put in common bail. *Style* 464.

If more damages, &c. are recovered than mentioned in the plaint, or than the sum wherein the bail is bound, the bail will not be liable. 1 *Salk.* 102. So where a declaration is laid in another county, when the original is sued out in London, and bail put in there upon it. 3 *Lev.* 235. *Contra* where the suit is by *latitat*. An order of court was made anno 22 Car. 2. That in case of bail, if the recovery be for a larger sum than in the *scutiam*, the bail shall not be chargeable at all: but by a late

late order, bail is answerable for any less sum which the plaintiff shall recover. *Ord. Pasch. 5 Geo. 2.* A bail cannot be a witness for the defendant at the trial; but the court, on motion, will discharge the bail, upon giving other sufficient bail. *Wood's Inst. 582.* Bail-pieces are written on a small square piece of parchment, with the corners cut off at the bottom. A special bail-piece is in the following form: and all the difference between a special bail-piece and a common one is, that in the former the real names of the bail, with their additions, are inserted; whereas in the latter the fictitious names of *John Doe* and *Richard Roe* are inserted.

Form of a special bail-piece.

Of the term of St. Michael, in the first year of the reign of King George the Third.

Middlesex, (to wit) A. B. of the parish of, &c. in the county aforesaid, gent. is delivered to bail upon an arrest, unto E. F. of, &c. in the said county, gentleman, and G. H. of, &c. in the same county, yeoman.

T. Edwards, }
attorney.

At the suit of C. D.

As to bail for crimes, at Common law bail was allowed for all offences except murder. *2 Inst. 190.* And if the party accused could find sufficient sureties, he was not to be committed to prison; for all persons might be bailed till convicted of the offence. *2 Inst. 186.* But by statute it was after enacted, that in case of homicide the offender should not be bailed: and by our statutes, murderers, outlaws, house-burners, thieves openly defamed, &c. are not bailable; but where persons are guilty of larceny, are accessories to felony, or guilty of light suspicion, they may be admitted to bail. *Stat. 3 Ed. 1. c. 15.*

One indicted and found guilty of the death of a man by misadventure, as by casting a stone over a house, and by chance killing a man, woman, or child, is not bailable. *Coke of Bail, &c. c. 5. cites 3 Ed. 3. Corone 354.*

So if one indicted be found guilty of the death of a man *se defendendo*, he ought not by law to be bailed; for according to *Bracon's* rule, *invenientur culpabiles.* *Coke of Bail, &c. c. 5.*

One indicted of conspiracy, viz. that he with others conspired falsely to indict another of murder or felony, by means whereof he was indicted, and afterwards convicted, shall not be bailed. *Coke of Bail, &c. cap. 5.* and says, that this was the resolution of all the judges, upon the question demanded by King Ed. III. himself, as appears *27 Aff. 1.*

One indicted for burglary may be bailed. *Coke of Bail, &c. c. 5. cites 29 Aff. 44.*

One indicted or appeal'd of robbery may be bailed. *Coke of Bail, &c. c. 5.*

One indicted or appeal'd of rape may be bail'd: yet that was no felony at Common law, till the *Stat. Westm. 2. cap. 34.* *Coke of Bail, &c. c. 5.*

If one be appeal'd by an approver, and be of good and honest fame, he may be bailed during the life of the approver. *Coke of Bail, &c. c. 5.*

One indicted for putting out eyes, or cutting out of tongues, may be bailed. *Coke of Bail, &c. c. 5.*

Roll Ch. J. said, he doubted whether one indicted of perjury may be bailed, tho' the clerks of the criminal side said he might. *Sty. 368.*

One committed by the council of state and the parliament, for publishing a seditious pamphlet, was denied to be bailed. *Sty. 397.*

One indicted on suspicion of robbery was outlawed, and taken on the outlawry, and brought writ of error, and being brought to B. R. by *habeas corpus*, prayed to be bailed, and took two exceptions to the indictment; 1st, That he was in prison, and knew nothing of the outlawry;

2dly, That the charge is too general, and no-body prosecutes; but *per Roll Ch. J.* He cannot be bailed. *Sty. 418.* But see *4 & 5 H. & M. c. 18.* which enacts, that persons outlawed, except for treason or felony, may appear by attorney and reverse the same without bail; except special bail shall be ordered by the court: and that persons arrested upon any *capias utlagatum*, except for treason or felony, may be discharged by an attorney's engagement to appear: and in cases where special bail is required, the sheriff may take bond with sureties.

One charged with buggery is not bailable; *per Holt Ch. J. 12 Mod. 435.*

It was doubted, whether persons committed by rule of court are intitled to the benefit of the *habeas corpus* act; and it was resolved by two judges, viz. *Eyre* and *Fortescue*, (*absente Powis & dissentiente Pratt*) that none are intitled to make their prayer, but such as are committed by warrant of a justice of peace, or secretary of state, and not those committed by rule of court; for that is not in the meaning of the act of parliament, (*a commitment by warrant.*) *10 Mod. 429.*

But in the late case of *Bingley*, he was brought before a judge of B. R. and bailed.—And the judges never denied him an *habeas corpus*, when applied for, though a person under such circumstances, on obtaining *habeas corpus* might perhaps be remanded.

Having thus briefly shewn what criminals are bailable, it remains to consider by whom they may be bailed.

By the Common law the sheriff might bail persons arrested on suspicion of felony, or for other offence bailable; but he hath lost this power by the *Stat. 1 Ed. 4. c. 22.* Justices of peace may let to bail persons suspected of felony, or others bailable, until the next sessions: though where persons are arrested for manslaughter or felony, being bailable by law, they are not to be let to bail by justices of peace but in open sessions, or where two justices (*quorum unus*) are present; and the same is to be certified with the examination of the offender, and the accusers bound over to prosecute, &c. *3 H. 7. 1 & 2 P. & M.* If a person be dangerously wounded, the offender may be bailed till the person is dead; but 'tis usual to have assurance from some skilful surgeon, that the party is like to do well. *2 Inst. 186.* A man arrested and imprisoned for felony, being bailable, shall be bailed before it appears whether he is guilty or not; but when convicted, or if on examination he confesseth the felony, he cannot be bailed. *4 Inst. 178.* For where in manslaughter, felony, &c. it is certainly known that the party did it, he ought not to be bailed.

It is to be observed, that the *Stat. West. 1. 3 Ed. 1. c. 15.* above mentioned, doth not extend to the judges of B. R. &c. only to sheriffs and other inferior officers. *H. P. C. 98, 99.*—Likewise,

Justices of gaol-delivery not being within the restraint of the statute of *Westm. 1.* may bail persons convicted before them of homicide by misadventure, or self-defence, the better to enable them to purchase their pardon. *Crompt. 154. a. H. P. C. 101. F. N. B. 246. S. P. C. 15.*

Also it seems that in discretion they may bail a person convicted before them of manslaughter, upon special circumstances, as if the evidence against him were slight, or if he had purchased his pardon. *H. P. C. 101. Crompt. 153.*

The court of B. R. bails in all cases, and may bail murder, &c. If a man is found guilty of murder by the coroner's inquest, yet B. R. may bail him; for they may examine into the depositions taken by the coroner. *1 Salk. 104.* But if a criminal be indicted of murder, the court will not bail him, though upon affidavits of evidence which might discharge the prosecution: nor when a person is found guilty of any crime by the grand jury, because they cannot have notice of what evidence was before the jury, which by their oath they are obliged to conceal. *1 Salk. 104.* And

Here it must be observed, that with respect to the nature of the offence, although this court is not tied down by the rules prescribed by the stat. of *Westm. 1.* yet it will in discretion pay a due regard to those rules, and not admit a person to bail who is expressly declared to be irrepleviable,

replevisable, without some particular circumstances in his favour. 2 *Inst.* 185, 186, 189. *H. P. C.* 104. 1 *Salk.* 61. 3 *Bulst.* 113. 2 *Hawk. P. C.* 113, 114. 5 *Mod.* 454.

And therefore if a person be attainted of felony, or convicted thereof by verdict general or special, or notoriously guilty of treason or manslaughter, &c. by his own confession or otherwise, he is not to be admitted to bail without some special motive to induce the court to grant it. *Kelynge* 90. *Dyer* 79. 1 *Bulst.* 87. 2 *Hawk. P. C.* 114.

The defendant being indicted for murder at the quarter sessions, and the indictment being removed into *B. R.* by *certiorari*, the defendant appeared, and pleaded Not guilty, and he moved to be bailed, which the court granted, being satisfied by several affidavits that there was good reason for it. 2 *Jo.* 222.

The defendant was indicted for murder, and the trial coming on, the prosecutor alleged, that there had been great labouring of the jury, and therefore did not proceed, suspecting a partial jury, but brought an appeal; and tho' by the appeal the indictment still continued, and was not gone, yet the delay being occasioned by the prosecutor, the party was bailed; but by *Crake J.* If the labouring the jury had been proved, peradventure he would not be bailable. *Bulst.* 85.

The jury on an indictment of murder found a special verdict, whereupon the court were divided, two against one, and thereupon the prisoner moved to be bailed, but all the court denied it; and as for the verdict there was a *curia advisare*, and the matter adjourned, and the prisoner carried away in custody. *Bulst.* 89.

Formerly persons committed for treason, by the king's command, or order of council, were not to be delivered without trial, &c. But it is said that the court of *B. R.* has power to bail in all cases of treason. *Stim.* 163. cites the opinion of the judges in the house of lords 1678. in *Zachary Croston's* case.

Upon a commitment of either house of parliament, when it stands indifferent on the return of the *habeas corpus*, whether it be legal, or not, the court of *B. R.* ought not to bail a prisoner; but when it appears to be illegal, they may do it, as well as on an unwarrantable commitment of the king and council. 2 *Hawk.* 110. And a person committed for a contempt, by order of either house of parliament, may be discharged by *B. R.* after a dissolution or prorogation, which determines all orders of parliament: also 'tis said on an impeachment, when the parliament is not sitting, and the party has been long in prison, *B. R.* may bail him. The court of *B. R.* hath bailed persons committed to the Fleet Prison by the Lord Chancellor; when the crime of commitment was not mentioned, or only in general terms, &c. 2 *Hawk.* *P. C.* 111. And *B. R.* having the control of all inferior courts, may at their discretion bail any person unjustly committed by any of those courts. In admitting a person to bail in the court of *B. R.* for felony, &c. a several recognisance is entered into to the king in a certain sum from each of the bail, that the prisoner shall appear at a certain day, &c. And also that the bail shall be liable for the default of such appearance, body for body. And it is at the discretion of justices of the peace, in admitting any person to bail for felony, to take the recognisance in a certain sum, or body for body: but where a person is bailed by any court, &c. for a crime of an inferior nature, the recognisance ought to be only in a certain sum of money, and not body for body. 2 *Hawk.* 115. And the bail are to be bound in double the sum of the criminal. Where persons are bound body for body, if the offender doth not appear, whereby the recognisance is forfeited, the bail are not liable to such punishment to which the principal would be adjudged if found guilty, but only to be fined, &c. *Wood's Inst.* 618. If bail suspect the prisoner will fly, they may carry him before a justice to find new sureties; or to be committed in their discharge. 1 *Rep.* 99.

The courts of *King's Bench*, *Common Pleas* and *Exchequer*, in term time, and the *Chancery* in the term or vacation, may bail persons by the *habeas corpus* act; but not such as are committed for treason, or felony specially

expressed in the warrant of commitment; unless it be where a Sessions is past from the time of commitment of the prisoner, without any prosecution; when he may be bailed. And *B. R.* will not admit a person to bail on the *habeas corpus* statute, on commitment for treason or felony, without four sureties. The court of *B. R.* may bail persons committed by the king's special command, or by the privy council, on the like circumstances upon which it will grant bail on other commitments: this is where the crime is specified in the warrant of commitment; and wherever any commitment by the privy council hath not expressed with some certainty the crime alleged against the party, it has been usual to admit him to bail on his *habeas corpus*. 2 *Hawk. P. C.* 107, 109. See *Stat.* 16 *Car.* 1. cap. 10. But concerning bail on *habeas corpus*, see title *Habeas Corpus*.

To refuse bail when any one is bailable; or to admit any to bail who ought not by law to be admitted, or to take slender bail, is punishable by fine, &c. 2 *Inst.* 291. *H. P. C.* 97. And see farther, 3 *Edw.* 1. c. 15. 27 *Edw.* 1. St. 1. c. 3. 4 *Edw.* 3. c. 2. 1 & 2 *P. & M.* c. 15. & 31. *Car.* 2. c. 2.

No person shall be bailed for felony by less than two, and it is said not to be usual for the *King's Bench* to bail a man on a *habeas corpus*, on a commitment for treason or felony, without four sureties; the sum in which the sureties are to be bound, ought to be never less than 40*l.* for a capital crime; but it may be higher in discretion, on consideration of the ability and quality of the prisoner, and the nature of the offence; and the sureties may be examined on oath concerning their sufficiency, by him that takes the bail; and if a person be bailed by insufficient sureties, he may be required either by him who took the bail, or by any other who hath power to bail him, to find better sureties, and on his refusal may be committed; for insufficient sureties are as none. 2 *Hawk. P. C.* 88. *H. P. C.* 97.

But justices must take care, that under pretence of demanding sufficient surety, they do not make so excessive a demand, as in effect amounts to a denial of bail; for this is looked upon as a great grievance, and is complained of as such by 1 *W. & M. sess.* 2. (the Bill of Rights) by which it is declared, that excessive bail ought not to be required. 2 *Hawk. P. C.* 89.

If where a felony is committed, one is brought before a justice on suspicion, the person suspected is to be bailed, or committed to prison; but if there is no felony done, he may be discharged. *H. P. C.* 98, 106.

Bailiff, (*ballivus*) From the French word *bayliff*, that is, *praefectus provinciae*, and as the name, so the office itself was answerable to that of France; where there are eight parliaments, which are high courts from whence there lies no appeal, and within the precincts of the several parts of that kingdom which belong to each parliament there are several provinces to which justice is ministered by certain officers called *bailiffs*: and in England we have several counties in which justice hath been administered to the inhabitants by the officer whom we now call *sheriff* or *viscount*, (one of which names descends from the Saxons, the other from the Normans;) and tho' the sheriff is not called *bailiff*, yet 'tis propable that was one of his names also, because the county is often called *balliva*: as in the return of a writ, where the person is not arrested, the sheriff saith, *Infratominatus A. B. non est inventus in balliva mea*, &c. *Kitch. Ret. Brev. fol.* 285. And in the statute of *Magna charta*, cap. 28. and 14 *Ed.* 3. c. 9. the word *bailiff* seems to comprise as well sheriffs, as *bailiffs* of hundreds. As the realm is divided into counties, so every county is divided into hundreds; within which in ancient times the people had justice ministered to them by the several officers of every hundred, which were the *bailiffs*, as those officers do in France and Normandy, being chief officers of justice within their precincts. *Custom. of Normand.* cap. 1. And it appears by *Bracton*, (*lib.* 3. tra. 2. cap. 34.) that *bailiffs* of hundreds might anciently hold plea of appeal and approvers; but since that time the hundred courts, except certain franchises, are swallowed in the county-courts; and now the *bailiff's* name and office is grown into contempt, they being generally officers to serve writs, &c. within their liberties.

liberties. Though in other respects, the name is still in good esteem; for the chief magistrates in divers towns, are called *bailiffs*: and sometimes the persons to whom the king's castles are committed are termed *bailiffs*, as the *bailiff of Dover Castle*, &c.

Of the ordinary *bailiffs* there are several sorts, viz. *bailiffs* of liberties; *sheriffs bailiffs*; *bailiffs* of lords of manors; *bailiffs* of husbandry, &c. *Bailiffs* of liberties are those *bailiffs* who are appointed by every lord within his liberty, to execute process and do such offices therein, as the *bailiff errant* doth at large in the county; but *bailiffs* errant or itinerant, to go up and down the county to serve process, are out of use. *Bailiffs* of liberties and franchises, are to be sworn to take distresses, truly impanel jurors, make returns by indenture between them and sheriffs, &c. and shall be punished for malicious distresses, by fine and treble damages, by ancient statutes. Vide 12 Ed. 2. St. 1. c. 5. 14 Ed. 3. St. 1. c. 9. 20 Ed. 3. c. 6. 1 Ed. 3. St. 1. c. 5. 2 Ed. 3. c. 4. 4 Ed. 3. c. 9. 5 Ed. 3. c. 4. 11 H. 7. c. 15. 27 H. 8. c. 24. 3 Geo. 1. c. 15. §. 10. The *bailiff* of a liberty, may make an inquisition and extent upon an *elegit*: the sheriff returned on a writ of *elegit*, that the party had not any lands but within the liberty of St. Edmund's Bury, and that J. S. *bailiff* there had the execution and return of all writs, and that he inquired and returned an extent by inquisition, and the *bailiff* delivered the moiety of the lands extended to the plaintiff, who by virtue thereof entered, &c. and it was held a good return. 3 Cro. Rep. 319. These *bailiffs* of liberties cannot arrest a man without a warrant from the sheriff of the county: and yet the sheriff may not enter the liberty himself, at the suit of a subject, (unless it be on a *quo minus*, or *capias utlagatum*) without clause in his writ, *Non omittas propter aliquam libertatem*, &c. If the sheriff, &c. enters the liberty without such power, the lord of the liberty may have an action against him; tho' the execution of the writ may stand good. 1 Kent. 406. 2 Inst. 453.

Sheriffs bailiffs are such who are servants to sheriffs of counties to execute writs, warrants, &c. Formerly *bailiffs* of hundreds were the officers to execute writs; but now it is done by special *bailiffs*, put in with them by the sheriff. A *bailiff* of a liberty is an officer which the court takes notice of; though a sheriff's *bailiff* is not an officer of the court, but only the sheriff himself. Pasch. 23 Car. 1. B. R. The arrest of the sheriff's *bailiff* is the arrest of the sheriff; and if any rescous be made of any person arrested, it shall be adjudged done to the sheriff: also if the *bailiff* permit a prisoner to escape, action may be brought against the sheriff. 1 Inst. 61, 168. Sheriffs are answerable for misdemeanors of their *bailiffs*; and are to have remedy over against them. 2 Inst. 19. And the court of B. R. will punish *bailiffs* that misbehave themselves in executing process, &c.

Bailiffs of lords of manors are those that collect their rents, and levy their fines and amercements: but such a *bailiff* cannot distrain for an amercement without a special warrant from the lord or his steward. Cro. Eliz. 698. He cannot give licence to commit a trespass, as to cut down trees, &c. though he may license one to go over land, being a trespass to the possession only, the profits whereof are at his disposal. Cro. Jac. 337, 377. A *bailiff* may by himself, or by command of another take cattle damage-feasant upon the land. 1 Danv. Abr. 685. Yet amends cannot be tendered to the *bailiff*, for he may not accept of amends, nor deliver the distress when once taken. 5 Rep. 76. These *bailiffs* may do any thing for the benefit of their masters, and it shall stand good till the master disagrees; but they can do nothing to the prejudice of their masters. Litt. Rep. 70.

Bailiffs of courts baron summon these courts, and execute the process thereof; they present all pound breaches, cattle-strayed, &c. *Bailiffs* of husbandry are belonging to private men of good estates, and have the disposal of the under-servants, every man to his labour; they also sell trees, repair houses, hedges, &c. and collect the profits of the land for their lord and master, for which they render account yearly, &c. Besides these there are also *bailiffs* of the forest, of which you may read *Magnwood*, part 1. pag. 113.

An Appointment of a Bailiff of a Manor.

K Now all men by these presents, That I W. B. of &c. Esq; lord of the manor of D. in the county of G. Have made, ordained, depused, and appointed, and by these presents do make, ordain, depuse, and appoint J. G. of, &c. my bailiff, for me and in my name, and to my use, to collect and gather, and to ask, require, demand and receive of all and every my tenants, that have hold, or enjoyed, or now do, or hereafter shall hold or enjoy any messuages, lands, or tenements, from, by or under me, within my said manor of D. all rents, and arrears of rent, heriots, and other profits, that now are, or hereafter shall become payable, due, owing or belonging to me, within the said manor; and in default of payment thereof, to distrain for the same from time to time, and such distress or distresses to impound, detain and keep, until payment be made of the said rents and profits, and the arrears thereof. And I do also further empower and authorize the said J. G. to take care of and inspect into all and every my messuages, lands and woods, within the said manor, and to take an account of all defects, decays, wastes, spoils, trespasses, or other misdemeanors, committed or permitted within my said manor, or in any messuages, lands or woods there; and from time to time, to give me a just and true account in writing thereof: and further to ask and do all other things that to the office of a bailiff of the said manor belongs and appertains, during my will and pleasure. In witness, &c.

Bailiwick, (*balliwa*) Is not only taken for the county; but signifies generally that liberty which is exempted from the sheriff of the county, over which the lord of the liberty appointeth a *bailiff* with such powers within his precinct, as an under-sheriff exerciseth under the sheriff of the county; such as the *bailiff* of Westminster, &c. Stat. 27 Edin. cap. 12. Wood's Inst. 206.

Bailment, (from *bailor*, to deliver) Is a delivery of things to another, sometimes to be delivered back to the bailor that delivered them, sometimes to the use of the bailee to whom delivered, and sometimes to a third person. This delivery is called a *bailment*; which may be *simple*, or *general*, as to keep for my use; or *special*, or *conditional*, to be redelivered when money is paid, &c.

The learning under this head is well exemplified in the case of *Cogg* and *Bernard*, which was thus—The defendant did undertake to remove a quantity of brandy from *Brook's Market* to *Water Lane*; and by reason of his neglect one of the casks broke; and on Not guilty, a verdict was for the plaintiff; and in arrest of judgment two exceptions were taken: 1st, Because in the declaration he was not alledged to be a common porter. 2^{dly}, Because it was not averred that he had a reward.

My lord chief justice Holt in his argument on this case enumerated six species of bailment.

The first is a bare and naked bailment to another, to keep for the use of the bailor, which is called *depositum*.

2. A delivery of goods to another which are in themselves useful to keep, and these are to be restored again in specie, which is called *accommodatum*.

3. A delivery of goods for hire, which is called *locatio* or *conductio*.

4. A delivery by way of pledge, which is called *vadium*.

5. A delivery of goods to be carried for a reward.

6. Such a delivery as here in the case at bar, where the goods are delivered to do some act about them, as the carrying, and without a reward which is called *mandatum*, by *Bracton*, lib. 3. 1006 in *English*, an acting by commission.

As to the first, if a person out of kindness keeps the goods of another, he shall not be answerable if they be stolen, without there be a particular default in him: and 2^{dly}, such a bailee is not chargeable for a common neglect, for it must be a gross neglect for which he shall be liable.

2. A lending *gratis* to use for his advantage; there the borrower is strictly bound to keep it, for if he be guilty of the least neglect he shall be answerable; as if I lend a horse to go to the North of England, and he goes to the West, and the horse is stole, he shall in that case be chargeable; for if he had gone as I directed, the horse, perhaps, would not have been stolen; this sort of bailment is mentioned

tioned in *Bracton* 99. but in this case, if the horse had been in the stable of the bailee, and stolen thence without his default, as perhaps the thieves might first have bowed the bailee, and then have taken the horse, he shall not be answerable; but if he left the stable door open, he shall for that neglect be answerable; *Bracton* says he ought to take the utmost care, but in no place says he shall be charged where no default was in him.

3. As to the third bailment, where goods are hired out for a reward, *Bracton* 62. says, the hirer is to take all imaginable care, and to restore them at the time, and he is bound to such a care as a diligent master of a family useth to his family, which care, if he so useth, he shall not be bound; now the most diligent man is liable to be robbed, and therefore I collect, that if he be so careful, as according to *Bracton's* definition, and be robbed, he shall not be liable.

4. If goods be pawned, the pawnee has a special property, which is in nature of a security to compel the pawner to pay; and if the goods be the worse for using, the pawnee must not use them, as clothes, &c. but if they be not the worse for using, he may use them at his peril; as jewels pawned to a lady, and she keeps them in a box, and they are stolen, she shall not be charged; but if she goes abroad with them to a play, and there they are stolen, she shall be answerable. 2dly, If the pawnbroker be at charge in keeping of them, as if it were a horse, and he gives it meat, he may use it for his reasonable charge he has been at. *Bracton* 99. If a creditor takes a pawn, he is bound to restore it upon payment; but if he, notwithstanding all his diligence lose it, he shall howsoever recover his debt, 29 *Aff. pl.* 28. for the law does not lay upon him an obligation to keep against all accidents; but if the money be tendered, and he after detains, and then it is lost, he shall then be liable, for he is then a wrong-doer, and his keeping it after is the occasion of its being stolen, and he is then answerable at all events.

5. Goods to be carried for a reward. 1. If you deliver them to a publick or common carrier, and they are stolen, he must be liable, for the law charges him at all events; but yet the act of God, or the enemies of the Queen, may excuse, and this is a political institution by the laws of England, that people may be safe in their dealing; for otherwise carriers, that are frequently trusted with things of greatest value, would be often tempted to confederate with thieves. 2dly, But he who has a particular private employment, though he has a reward, yet he is not bound against all events, as a factor or a bailiff, if they do to the best of their power; and that is *Southcott's* case, and he is bound no otherwise than as his master himself should do; for it were unjust to charge him with what he cannot prevent.

6. To this point; here is a man not entrusted to keep, but to carry, and not to have any thing for his pains, and through his negligence miscarries, though he be to have nothing, yet it appears there was a neglect, and for that reason he is chargeable; but if the goods had been misused by a third person in the way as he carried them, and without any neglect of his, I hold that he would not then be liable, because he had nothing for a reward. In this case the court resolved that the plaintiff should have judgment. 1 *New Abr.* 243. *Comyn.* 133. S. C. 2 *Ld. Raym.* 909. S. C.

Upon bailment or delivery of goods, these things are to be observed: if they are delivered to a man to be safely kept, and after these goods are stolen from him; as he undertook to keep them safely, this shall not excuse him; but if he undertook to keep them as his own, he shall be excused. 2 *Inf.* 89. 4 *Rep.* 83. 1 *Roll. Abr.* 338.

If a man deliver goods to another to be kept, or which is all one, to be safely kept, the bailee undertakes to keep them only from all damages that arise from his own negligence; and the undertaking being only to keep them, he ought not to use them as though he had an interest in them.

So a *ferriar*, if a man delivers goods to another to keep as a man would keep his own; and this is called a special bailment, in which the bailee doth undertake for no more than for his diligence in the keeping of them,

and has no manner of use of the thing to him committed, but the naked possession only. *Co. Litt.* 89. a. 4 *Co.* 83. b. *Doct. & Stud.* 129.

If where goods are delivered to one as a pledge, they are stolen from him, action lieth not against him; because he hath a property in them, and therefore ought to keep them no otherwise than as his own. *Co. Litt.* 89. A man leaves a chest locked up with another to be kept, and doth not make known to him what is therein; if the chest and goods in it are stolen, the person who received them shall not be charged for the same, for he was not trusted with them. *Ibid.* And what is said as to stealing is to be understood of all other inevitable accidents: but it is necessary for a man that receives goods to be kept, to receive them in a special manner, viz. to be kept as his own, or at the peril of the owner. 1 *Hill. Abr.* 193, 194. The case of a carrier, inn-keeper, &c. is different; for as they have their hire, and thereby implicitly undertake the safe delivery of the goods intrusted with them, they shall answer the value if they are stolen from them. 1 *Roll. Abr.* 338. But—

If money is delivered to A. to keep generally, without any consideration or reward for so doing, if A. is robbed, he is discharged, and the owner shall bear the loss. Ruled upon evidence per *Ld. Pemberton.* 2 *Show. pl.* 166.

If I deliver 100*l.* to A. to buy cattle, and he bestows 50*l.* of it in cattle, and I bring an action of debt for all, I shall be barred in that action for the money bestowed and charges, &c. but for the rest I shall recover. *Hob.* 207.

If one deliver his goods to another person, to deliver over to a stranger; the deliverer may countermand his power, and require the goods again, and if the bailee refuse to deliver them, he may have an action of account for them. *Co. Litt.* 286.

If A. delivers goods to B. to be delivered over to C. C. hath the property, and C. hath the action against B. for B. undertakes for the safe delivery to C. and hath no property or interest but in order to that purpose. 1 *Roll. Abr.* 606.

But if the bailment were not on valuable consideration, the delivery is countermandable; and in that case, if A. the bailor bring trover, he reduces the property again in himself, for the action amounts to a countermand of the gift; but if the delivery was on a valuable consideration, then A. cannot have trover, because the property is altered, and in trover the property must be proved in the plaintiff. 1 *Bull.* 68.

If goods be bailed to bail over on a consideration precedent, on his part, to whom they ought to be bailed, the bailor can't countermand it; otherwise where 'tis voluntary, and without consideration. But where 'tis in consideration of a debt, it is not countermandable; otherwise if it be to satisfy the debt of another; per *Egerton.* 1 *Leon.* 30. *pl.* 36.

And where a man delivers goods to another to be redelivered to the deliverer at such a day, and before the bailee doth sell the goods in market overt; the bailor may at the day seize and take his goods, for the property is not altered. *Godb.* 160.

If A. borrows a horse to ride to Dover, and he rides out of his way, and the owner of the horse meets him, he cannot take the horse from him; for A. has a special property in the horse till the journey is determined; and being in lawful possession of the horse, the owner cannot violently seize and take it away, for the continuance of all property is to be taken from the form of the original bargain, which in this case was limited till the appointed journey was finished. *Telv.* 172.

But if A. borrows a horse to go to Dover, and goes to other places, the owner may have an action on the case against him for exceeding the purposes of the loan; for so far it is a secret and fallacious abuse of his property; but no general action of trespass, because it is not an open and violent invasion of it. 1 *Rel. Rep.* 128.

As to borrowing a thing perishable, as corn, wine, or money, or the like, a man must, from the nature of the thing, have an absolute property in them; otherwise it could not supply the uses for which it was lent, and therefore he is obliged to return something of the same sort, the

the same in quantity and quality with what is borrowed. *Dr. & Stud.* 129.

If one delivers a ring to another to keep, and he breaks and converts the same to his own use; or if I deliver my sheep to another to be kept; and he suffers them to be drowned by his negligence; or if the *bailie* of a horse, or goods, &c. kill or spoil them, in these cases action will lie. 5 *Rep.* 13. 15 *E.* 4. 20. *b.* 12 *E.* 4. 13.

If a man delivers goods to another, the *bailie* shall have a general action of trespass against a stranger, because he is answerable over to the *bailor*; for a man ought not to be charged with an injury to another, without being able to retire to the original cause of that injury, and in amends there to do himself right. 13 *Co.* 69. 14 *Hen.* 4. 28. 25 *H.* 7. 14.

If a man *bail* goods to one, to *bail* over to another, and the *bailie*, contrary to the trust in him, doth not deliver but convert them to his own use; he shall be chargeable both to the *bailor*, and him to whom the goods ought to have been *bailed*. 1 *Bulst.* 68, 69.

Vide on this subject of *bailment*, *Baib Ni. pri.* 47. *Black. Com.* 2. v. 452.

Bairman, A poor insolvent debtor left bare and naked. — *Bairman qui debet feri, jurabit in curia quod nihil habet ultra 5 solidos & 5 denarios.* *Stat. Will. Reg. Scot.* cap. 17.

Bakers, Making bread under weight, deficient in goodness, &c. the same may be seized by justices of peace, &c. and penalties are inflicted by Stat. So for selling their large bread at higher price than set. *Vide* 51 *H.* 3. *St.* 6. *Ord. pro pistor.* c. 2. 8 *Ann.* c. 18. 1 *Geo.* 1. c. 26. §. 5. &c. 3 *Geo.* 2. c. 29. §. 2. By the *Stat.* 22 *G.* 2. c. 46. *Bakers* are to mark on every loaf exposed to sale, as white bread a large W. as wheaten bread a large W. H. as household bread a large H. under the penalty of 20s. See *Mayors.* See *Bread.*

Balkanifer, or *baldakinifer*, i. e. A standard bearer; 'tis mentioned in *Matt. Paris.* *Anna* 1237. — *Et die Balkanifer, qui ut alii, qui ceciderunt, cruentissimam de se reliquit hostibus victoriam, &c.*

Balconies, Or open galleries for people to stand and behold things, to be to houses in the chief streets of *London* four foot wide, &c. *Stat.* 19 *Car.* 2. c. 23.

Bale, (Fr.) A pack, or certain quantity of goods or merchandize; as a *bale* of silk, cloth, &c. This word is used in the statute 16 *R.* 2. and is still in use.

Balenger, By the *Stat.* 28 *H.* 6. c. 5. seems to have been a kind of barge, or water vessel. But elsewhere it rather signifies a man of war. — *Tandem pene solus fugiens in balengario.* *Walsing.* in *R.* 2. *Hostes armaverunt quinque vasa bellica qualia balingarias appellamus.* *Ibid.*

Baleuga, A territory or precinct. *Charta Hen.* 2. See *Bannum & Banleuga.*

Ballistarius, A *ballister* or cross-bow man. *Gerrard de la War* is recorded to have been *ballistarius domini regis.* &c. 28 & 29 *Hen.* 3.

Baliba, Is expounded to signify jurisdiction. *Co. Lit.* 105.

Balibo amobendo, A writ to remove a *bailiff* from his office, for want of sufficient land in the *bailiwick.* *Reg. Orig.* 78. For if a sheriff chuse one to be *bailiff* of a hundred; or if the lord of a liberty elect one to be *bailiff* of the liberty, who hath not land sufficient in the county to answer the king and his people, according to the statute of *Westmin.* 2. then this writ shall be sent to the sheriff to discharge such *bailiff*, and chuse another in his place.

Balkers, Are derived from the word *balk*, because they stand higher, as it were on a balk or ridge of ground, to give notice of something to others. *Shep. Epitom.* vide *Conderg.*

Ballance of Trade, A computation of the value of all commodities which we buy from foreigners, and on the other side the value of our own native products, which we export into neighbouring kingdoms; and the difference or excess between the one side and the other of such account or computation is called the *balance of trade*: which excess can be answered by us in nothing but our coin or bullion. The overplus of goods brought from our colonies in *America*, and other foreign parts, with which we

supply our neighbours, is computed in time of peace at least to *ballance* our trade.

Ballare, Signifies *scopis expurgare.* 'Tis mentioned in *Fleta, lib.* 2. cap. 87.

Ballast, Is gravel or sand to poise ships, and make them go upright: and ships and vessels taking in *ballast* in the river *Thames*, are to pay so much a tun to *Trinity House Deptford*; who shall employ *ballastmen*, and regulate them, and their lighters to be marked, &c. on pain of 10s. *Stat.* 6 *Geo.* 2. c. 29.

Ballium, A fort of fortrefs or bulwark — *Eam civitatem cum exteriori ballio castri bellatorum suorum insulibus occupavit.* *Matt. Westm.* Anno 1265.

Ban, or *bans*, (from the Brit. *ban*, i. e. *clamor*) Is a proclamation, or publick notice; any publick summons or edict, whereby a thing is commanded or forbidden. It is a word ordinary among the feudists; and there is both *bannus* and *bannum* which signify two several things. This word *bans* we use here in *England*, especially in publishing matrimonial contracts, which is done in the church before marriage, to the end that if any man can speak against the intention of the parties, either in respect of kindred, precontract, or for other just cause, they may take their exception in time, before the marriage is consummated: and in the canon law, *Bannæ sunt proclamationes sponsæ & sponsæ in ecclesiis fieri solitæ.* But there may be a faculty or licence for the marriage, and then this ceremony is omitted; and ministers are not to celebrate matrimony between any persons without a licence, except the *bans* have been first published three several times; upon pain of suspension, &c. *Can.* 62. See the *Stat.* 7 & 8 *W.* 3. c. 35. See *marriage* and *Stat.* 26 *Geo.* 2. c. 33.

Bancalt, A covering of ease and ornament for a bench, or other seat; mentioned in the *Monasticon*, *Tom.* 1. pag. 222.

Bane, (from the Sax. *bana*, a murderer) Signifies destruction or overthrow: as, I will be the *bane* of such a man, is a common saying; so when a person receives a mortal injury by any thing, we say, it was his *bane*: and he who is the cause of another man's death, is said to be *le bane*, i. e. a malefactor. *Bract. lib.* 2. *tract.* 8. cap. 1.

Banerett, (*banerettus, miles vexillarius*) Sir *Tho. Smith*, in his *Repub. Angl.* cap. 18. says, is a knight made in the field, with the ceremony of cutting off the point of his standard, and making it as it were a banner, and accounted so honourable, that they are allowed to display their arms in the king's army as barons do, and may bear arms with supporters. *Cambden*, in his *Britan. fol.* 109. hath these words, *baneretti, cum vassalorum nomen jam desierat, a baronibus secundi erant; quibus inditum nomen a vexillo; concessum illis erat militaris virtutis ergo, quadrato vexillo (perinde ac barones) uti, unde & equites vexillarii a nonnullis vocantur, &c.* 'Tis said that they were antiently called by summons to parliament: and that they are next to the barons in dignity, appears by the statute 14 *R.* 2. c. 11. and 5 *R.* 2. *Stat.* 2. cap. 4. *William de la Pole* was created *banerett* by *K. Edward* the Third, by letters patent, *Anno Regni sui* 13. And those *banerets*, who are created *sub vexillis regis, in exercitu regali, in aperto bello, & ipso rege personaliter presente, explicati*, take place of all *Baronets*; as we may learn by the letters patent for creation of *Baronets.* 4 *Inst.* 6. Some maintain that knights *banerets* ought not to be made in a civil war: but *Hen.* 7. made divers *banerets* upon the *Cornish* commotion, in the year 1495. See *Selden's Titles of Honours*, f. 799.

Banishment, (Fr. *bannissement*) *Exilium, abjuratio*, is a forsaking or quitting of the realm; and a kind of civil death, inflicted on an offender: there are two kinds of it, one voluntary and upon oath, called *abjuratio*; and the other upon compulsion, for some offence. *Strandf. Pl. Cr.* f. 117. By *Magna charta*, none shall be outlawed or banished his country, but by lawful judgment of his peers, or according to the law of the land. 9 *H.* 3. c. 29. And by the common law no person shall be banish'd, but by authority of parliament; or in case of abjuratio for felony, &c. but this is taken away by statute. 3 *Inst.* 115. *Stat.* 21 *Jac.* 1. c. 28. See *Abjuratio.*

Bank, (Lat. *bancus*, Fr. *banque*) In our Common law, is usually taken for a seat or bench of judgment; as *Bank le Roy*, the King's Bench, *Bank le Common Pleas*, the Bench of Common Pleas, or the Common Bench; called also in Latin *Bancus Regis*, and *Bancus Communium Placitorum*. Comp. Just. 67, 91. *Jus Banci*, or the privilege of the bench, was antiently allowed only to the king's judges, *qui summam administrant justitiam*; for inferior courts were not allowed that privilege.

There are, in each of the terms, stated days, called *days in bank*, *dies in banco*, that is, days of appearance in the court of Common Pleas. They are generally at the distance of about a week from each other, and regulated by some festival of the church. On some one of these days in bank all original writs must be made returnable; and therefore they are generally called the returns of that term. Vide *Black. Com.* 3 V. 277.

The adjournment day, or first return day after the trial of a cause, and whereon the *distingas juratores* is returnable, is called a day in bank until four days after, which judgment can't be signed. The use of which four days is, that the party, against whom judgment is given, may have an opportunity of moving in arrest of judgment, if he thinks proper.

There is another sort of *bank*, which signifies a place where a great sum of money is to let out to use, returned by exchange, or otherwise disposed of to profit: and a *Bank of England* managed by a governor and directors, established by parliament, with funds for maintaining thereof, appropriated to such persons as were subscribers; and the capital stock, which is enlarged by divers statutes, is exempted from taxes, accounted a personal estate assignable over, not subject to forfeiture; and the company make dividends of the profits half-yearly, &c. The funds are redeemable by the parliament, on paying the money borrowed: and the Company of the Bank is to continue a corporation, and enjoy annuities till redeemed, &c. During the continuance of the Bank, no body politick, &c. other than the Company, shall borrow any sums on bills payable at demand; and forging or altering Bank-notes, or tendering such forged notes in payment, demanding to have them exchanged for money, &c. is felony. And officers or servants of the Company, that imbezil any Bank-note, &c. wherewith they are intrusted, being duly convicted, shall suffer death as felons. Vide the statutes 5 & 6 and 8 & 9 W. 3. c. 20. and 7 Annæ, &c. See also 1 Geo. 1. c. 12. and 11 Geo. 1. c. 9. and 15 Geo. 2. c. 13. See Stat. 24 Geo. 2. c. 4. for enabling the Bank of England to hold general courts and courts of directors in the manner therein mentioned.

Bankers, The money'd goldsmiths first got the name of *bankers* in the reign of K. Charles the Second, as by the words of an act of parliament, anno 22 & 23 Car. 2. appears,—*Whereas several persons, being goldsmiths, and others, by taking up or borrowing great sums of money, and lending out the same again for extraordinary hire and profit, have gain'd and acquired to themselves the reputation and name of bankers, &c.* thus runs the statute: but bankers of late are those goldsmiths and private persons in whose hands money is deposited and lodged for safety, to be drawn out again as the owners have occasion for it.

Bankrupt, (*bancus ruptus*) Is so called, because when the bank or stock is broken or exhausted, the owner is said to be a *bankrupt*. And this word *bankrupt* is derived from the Fr. *banqueroute*, which signifies a breaking or failing in the world: *banque* in French is as much as *mensa* in Latin, and *route* is the same as *vestigium*; and this term is said to be taken originally from the Roman *mensarii*, which were set in publick places, and when a tradesman slipp'd away, with an intention to deceive his creditors, he left only some *vestigia* or signs of his table or shop behind him. *Cowel.* But a *bankrupt* with us signifieth generally either man or woman; that living by buying and selling hath gotten other mens goods into his or her hands, and hideth himself in places unknown, or in his own house, in order to deceive and defraud his creditors. 4 Inst. 277.

But for the better understanding of this head, it will be proper to consider,

- I. Who may be a bankrupt, and by what acts they may become so.
- II. Who may take out a commission of bankruptcy, and of the power and duty of commissioners.
- III. Of the chusing of assignees, and of their interest in the bankrupt's estate; with the manner in which creditors are to prove their debts.
- IV. Of the distribution of the bankrupt's estate.
- V. Of the duty, privilege, discharge, and certificate of the bankrupt.

I. By Stat. 1 Jac. 1. c. 15. A bankrupt is thus described, viz. All and every person who shall use the trade of merchandise, by way of bargaining, exchange, bartering, or otherwise in gross, or by seeking his or her living by buying and selling, who shall depart his house, or absent himself, or suffer himself to be arrested for any debt or other thing not grown due, for money delivered, wares sold, or other good consideration; or shall suffer himself to be outlawed, or go to prison, or fraudulently procure himself to be arrested, or his money or goods attached; or make any fraudulent conveyance of his lands, goods, or chattels, whereby his creditors may be defeated in the recovery of their just debts; or being arrested for debt shall lie in prison six months, or more, upon such arrest or detention, shall be adjudged a *bankrupt*.

The 21 Jac. 1. c. 19. hath other descriptions of a *bankrupt*; but they are all declared void by a late statute. It is not buying and selling of land, but of personal things, that will make a man liable to be a *bankrupt*; nor is it buying only, or selling only, but both buying and selling. Every one that gets his living by buying and selling in trade and merchandise, may come under the denomination of a *bankrupt*, upon his failing therein. But adventurers in the East India company, members of the bank of England, of the South Sea company, and other societies, shall not be adjudged *bankrupts*, in respect of their stock, &c. Also no person concerned as receiver general of taxes, &c. shall be a *bankrupt*: and farmers, graziers, &c. are excepted out of the statutes; as buying and selling is not their only or principal means of livelihood. 14 Car. 2. c. 24. But vide the statutes 4 Ann. c. 17. 5 Ann. c. 22. 3 Geo. 1. c. 12. 5 Geo. 1. c. 24. 10 Ann. c. 15. 7 Geo. 1. c. 31. 3 Geo. 2. c. 29. 5 Geo. 2. c. 30. 24 Geo. 2. c. 57. 28 Geo. 2. c. 13. *sect.* 22. An innkeeper is not within the statutes, for though he buys provisions to be spent in his house, yet he doth not properly sell it, but utters it to his guests at no certain price. *Cro. Car.* 395. And a taylor is not within the statute of *bankrupts*, because he lives by making of garments, and not by buying and selling. A shoemaker hath been adjudged within the statutes, as he lives by his credit in buying leather, and selling it again in shoes, &c. And carpenters in London, weavers, dyers, tanners, bakers, brewers, vintners, &c. may be *bankrupts*: but handicraftsmen, husbandmen, labourers, &c. are not within the statutes. *Cro. Car.* 21. *Cro. Jac.* 585. 3 Mod. 330. It hath lately been determined in the court of King's Bench that a *virtual*ler, following the business of *virtual*ler only, is not within the bankrupt laws. In the case of *Perkin v. Proctor and Green*, vide *Wilson Rep. par. 2. fo. 382, &c.* A feme sole merchant in London may be a *bankrupt*. If a merchant gives over his trade, and some years after becomes insolvent for money he owed while a merchant, he is a *bankrupt*: but if it be for new debts, or old debts continued on new security, it is otherwise. 1 Vent. 5, 29.

By Stat. 5 Geo. 2. c. 30. *sect.* 39. Persons dealing as bankers, brokers, and factors, being frequently intrusted with large sums of money, and with goods and effects of very great value belonging to other persons, are declared to be subject to all the statutes made concerning *bankrupts*.

By Stat. 5 Geo. 2. c. 30. *sect.* 40. No driver of cattle, or any receiver general of taxes, shall be deemed a *bankrupt*.

An ironmonger, who buys rod iron, or bar iron, and causes it to be worked up into wares, may be a *bankrupt*. *Good.* 11. *Stone* 120.

A salesman may be a *bankrupt*. *Good. 12.*

A nobleman, who hath granted to him the sole importing of cards or glasses, may be a *bankrupt*. *Stone 120.*

An officer of the court takes a lease of the king of the sole pre-emption of tin, he is a *bankrupt* for all debts he contracts during his term. *Stone 120.*

Persons residing abroad may be adjudged *bankrupts* here. Thus

A man born in *England* goes over to *Ireland*, and there trades and buys goods in *England*, and sells them in *Ireland*, and being indebted in *England* becomes *bankrupt*, adjudged a *bankrupt* in *England*. *Raym 375.* A gentleman of the *Temple* went to *Lisbon*, and traded to *England* and broke; it was adjudged he was a *bankrupt* by reason of his trading hither and back again, which gained him credit here, though he was out of the realm. *Salk. 110.*

A member of parliament is liable to a commission of bankruptcy, and accordingly on the 23d of *January 1741*, a joint commission was taken out against *John Caswell* and *John Mount* of *London*, bankers and partners; and *Mr. Caswell* was then a member of parliament, and the parliament then sitting; and on the 21st of *May 1717*, a commission was taken out against *John Burridge* of *London*, merchant, who was also a member of parliament, and the author likewise sets forth a resolution of the house of commons, bearing date the 16th of *November* in the 9th year of king *George*, 1722, whereby it is unanimously declared, that no copartner in any trade or undertaking, was intitled to the privilege of that house, in respect of any matter relating to such copartnership. *Dav. 6.* And

By 4 *Geo. 3. c. 33.* Members of parliament are made subject to *bankrupt* laws; but not subject to arrest, except in cases made felony by those laws.

The statutes relating to bankrupts have been adjudged to extend to physicians, when they have been proved to have traded or merchandized, or to have bought and sold goods, effects, and merchandizes, and accordingly on the 29th of *October 1726*, a commission of bankruptcy was taken out against Doctor *John Lane*, a physician in *Bristol*, and he was found a *bankrupt*, on his being proved a dealer in copper and lead. *Dav. 9.* And every one who buys and sells goods and chattels, &c. and thereby endeavours to get a living, is, in respect of such trading, subject to the *bankrupt* laws, any other profession that they follow, being out of the question.

Private gentlemen may be *bankrupts*, though never bred up to trade, but have only invested their money in it, in order to make better interest thereof, notwithstanding they have never acted or appeared in the trade, or been known to any persons trading with the person to whom they so lent the money, or been personally concerned in the buying and selling any goods whatsoever. See *Dav. 9.* And why not? For if intitled to the profits, they ought to be subject to all the consequences of trading.

A pawnbroker, merely as such, is not liable to the statutes relating to bankrupts, because he does not buy nor sell for himself, and is only a common lender of money at interest, and the pledges which he sells are for the benefit of the borrower; but if he is in any other way a trader, he is then liable to become a *bankrupt*: for if a man hath several trades, and one is within, but another not within the statutes, he shall nevertheless be adjudged a trader, so as to make him a *bankrupt*.

With respect to the acts by which a man may become a *bankrupt*, they may be collected from the foregoing and following statutes, and are briefly thus:

1. To depart the realm.
2. To begin to keep his house, privately, to absent himself from, and avoid his creditors.
3. To offer himself willingly to be arrested for any debt, or other thing, not grown due, for money delivered, wares sold, or any other just or lawful cause, or good consideration or purpose.
4. To suffer himself to be outlawed.
5. To yield himself to prison.
6. To depart from his dwelling-house, to the intent or purpose to defraud or hinder a just creditor or creditors of

his or their just debt or duty. *Stat. 13 Eliz. c. 7. 1 Jac. 1. c. 15. sect. 2.*

7. Willingly or fraudulently to procure himself to be arrested, or his goods, money, or chattels, to be attached or sequestered.

8. To make any fraudulent grant or conveyance of his lands, tenements, goods or chattels, to the intent, or whereby his creditors shall and may be defeated or delayed for the recovery of their just debts. *1 Jac. 1. c. 15. sect. 2.*

9. Being arrested for debt, to lie in prison two months, after his arrest, upon that or any other arrest, or detention for debt.

10. To obtain privilege other than that of parliament.

11. Being arrested for 100*l.* or more, to escape out of prison.

12. To prefer to any court any petition or bill against any of the creditors, thereby endeavouring to enforce them to accept less than their just debts, or to procure time, or longer days of payment, than was given at the time of their original contracts. *Stat. 21 Jac. 1. c. 19. sect. 2.*

13. For a bankrupt to pay, satisfy, or secure the petitioning creditor his debt. *Stat. 5 Geo. 2. c. 30. sect. 24. Vide Black. Com. 2 V. 478, &c.*

By 4 *Geo. 3. c. 33.* Neglecting to make satisfaction for any just debt to the amount of 100*l.* within two months after service of legal process, for such debt, upon any trader having privilege of parliament, is an act of *bankruptcy*.

If a merchant departs the realm with the consent of his creditors, he does not thereby commit an act of *bankruptcy*. *Dav. 30.*

But if a merchant departs the realm to merchandize, and becomes indebted, and to avoid arrests, defers his return; this is tantamount to a departing of the realm. *Stone 123.*

As to keeping of the house, &c. if a man keeps his house for a long time, this does not immediately make him a *bankrupt*; but if he conceals himself within his house but for a day or an hour to delay or defraud his creditors, he is a *bankrupt*. *Palm. 325.*

If a man denies himself to a creditor wilfully, knowing he comes for money, and with an intent to defraud and delay him of his debt, such denials are taken to be acts of *bankruptcy*; and several persons have been found bankrupts on such accounts.

But in a petition which came on before the late Lord Chancellor *Hardwicke*, on the 6th of *August 1743*, it was said, that the being denied to a creditor was only an evidence of an act of *bankruptcy*; but that the absconding was the material part of it. *Dav. 92, 93.*

A merchant trader indebted, keeps in another man's house, or on shipboard, adjudged a keeping in his house: but a withdrawing must be on purpose to defraud creditors; and if a man goes sometimes at large, so as he may be met with one time or other, it will excuse him. But this must be such a going at large, as that 'tis evident he did not intend to avoid his creditors, and must be a going abroad in the day time, at usual times of business, and in the common and usual way.

Keeping house for fear of an attachment in Chancery, is no act of *bankruptcy*. *Stone 123.*

So if a man absents himself for felony, it is not an act of *bankruptcy*, it not being to defraud the creditor of his just debt or duty due to him. *Dav. 91.*

As to the outlawry, if a jury on a verdict find a man to be outlawed, it must be proved to be done in fraudem creditorum, or to defraud his creditors. *Keb. 11. 2 Sid. 69, 114, 176.*

A man may be so unfortunate as to be outlawed, and know nothing at all of the matter, and may afterwards come and procure the outlawry to be reversed; and if so, it is not an act of *bankruptcy*; and this was determined in the case of *Radford v. Bildworth*, &c. above.

If an outlawry be reversed for want of proclamations, all done in the mean time by the commissioners, is void; but if it were reversed for error, contrary. *Stone 124. Good. 23.*

As to lying in prison upon an arrest, it is said, that lying in prison makes a man a *bankrupt* from the first arrest, that is, from the time of the first arrest upon which he lies in prison, and not where he puts in sufficient bail, for that might be infinitely prejudicial and mischievous, and no man could ever safely pay or receive from a tradesman. *Salk. 109.* adjudged in *B. R.* and affirmed in error. *Came v. Coleman.*

But it is held by *Holt C. J.* that if a defendant renders in discharge of his bail, and lies in prison two months, he is a *bankrupt* from the first arrest, not from the render only. *Salk. 110. 2 Show. 519.*

Yet in order to make it a compleat act of *bankruptcy*, his lying in prison two months without putting in bail ought to be proved, otherwise a third person, who may be an innocent man, may be affected thereby; and the intention or desire of any man to be a *bankrupt*, or to be unjust, ought not to prejudice such innocent person, unless an essential fact, which creates an act of *bankruptcy*, is proved against the person so intending to be a *bankrupt*. *Dav. 94.*

With regard to the bankrupt's paying or securing the debt of the petitioning creditor,

The doing this is declared, shall be taken to be such an act of *bankruptcy*, that on good proof such commission shall be superseded, and the Lord Chancellor, &c. may, on any creditor's petitioning, award a new commission.

And such person, so taking or receiving such goods, or satisfaction, shall lose his whole debt, and the money received, and shall pay the same to such persons as the commissioners shall appoint, in trust for the bankrupt's creditors in proportion. See *5 Geo. 2. c. 30. sect. 24.*

But if a banker, who hath many peoples money in his hands, refuses payment, yet keeps his shop open, and as often as he is arrested gives bail; by this means he may give preference of payment to his friends; and if when he hath done he runs away, such payment shall stand against a commission of *bankruptcy*. *Farrell. Rep. 139.* If after a plain act of *bankruptcy*, one goes abroad and is a great dealer, yet this will not purge the first act of *bankruptcy*; though if he pays off or compounds with his creditors, he is become a new man. *Trin. 2 Ann. 1 Salk. 110.* The commissioners of *bankrupts* have the power to adjudge a man a *bankrupt*; yet in an action the jury must find whether he was so, or not. *1 Dav. 687.* He that is a *bankrupt* to one creditor, is accounted in law a *bankrupt* to all the creditors; and being once adjudged so, is always so to the rest of the creditors. *22 Car. 1. B. R.*

Where there are two partners in trade, and one breaks, you shall not charge the other with the whole; but the estate belonging to the joint trade ought to be divided, &c. *Mod. Rep. 45.* And if one of them becomes a *bankrupt*, it will not affect his companion. *3 Salk. 61.* Acts discharging *bankrupts* shall not discharge any partner in trade, or one jointly bound with the *bankrupt*. *1 Dav. Abr. 686.*

II. As to the taking out the commission,

The commission of *bankruptcy*, which arms the commissioners with all the power which they are to exercise over the *bankrupt* and his estate, is to be granted by the Lord Chancellor, Lord Keeper, or Commissioners of the Great Seal, on the application of creditors only; for if twenty swear that such a one is a *bankrupt*, yet a commission cannot be awarded without a petition from the creditors for that purpose; and this is a matter not discretionary, but to be granted *de jure*. *1 New Abr. 251.*

By *34 H. 8. cap. 4.* "The Lord Chancellor, Treasurer, &c. were to take order with the bankrupt's lands and goods for payment of his debts."

And by *13 Eliz. cap. 7.* "The Lord Chancellor or Keeper, upon complaint in writing, shall have power, by commission under the Great Seal, to appoint honest and discreet persons, who, or the most of them, may take such order with the body, &c." By *1 Jac. 1. c. 15.* The commission does not abate by the bankrupt's death. And

By *5 Geo. 2. cap. 30. sect. 44.* it is enacted, "That no commission of *bankruptcy* shall abate by the death of

the king; and where by the death of the commissioners or otherwise, it becomes necessary to renew the commission, no more than half fees are payable thereupon."

No commission of *bankruptcy* shall be granted, unless the debt of one creditor amount to 100*l.* or of two creditors to 150*l.* or of three or more to 200*l.* *5 Geo. 2. c. 30.*

In order to the taking out a commission of *bankruptcy*, it is usual first for a creditor to make affidavit before a master in Chancery, that the party is indebted in a sum sufficient to make him a *bankrupt*; then to petition the Lord Chancellor for a commission; give bond to prove the person a *bankrupt*, &c. within some or one of the statutes; and next follows the commission, directed to five commissioners, (whereof two are to be esquires of the quorum.)

By the *5 Geo. 2. c. 30. sect. 22.* it is enacted, "That persons who have bills, bonds, promissory notes, or other personal security for their money, payable at a future day, who by the *7 Geo. 1. cap. 31.* are enabled to come in as creditors, and allowed to discount such debts, allowing 5*l. per cent.* &c. may (though disabled by the statute) petition for, or join with others in petitioning for any commission of *bankruptcy*."

By the *13 Eliz.* abovementioned, the commissioners have power over the whole estate, freehold and copyhold, goods, debts, chattels, and effects of the *bankrupt*, and may sell his land.

They have no estate, and have only power to sell; and to pass the estate there must not only be a deed indented, but the same must be inrolled also. *2 Show. 156. i. e.* as to the real estate.

They may break open houses. *Stat. 21 Jac. 1. c. 19. sect. 8.*

But they cannot break open a house to search for the bankrupt's goods, unless the bankrupt's goods be in the house of the bankrupt. *2 Show. 247.*

Bankrupts are to be apprehended, on a commission issued and certified, by virtue of a justice's warrant; and refusing to be examined, the commissioners may commit them. *5 Geo. 2. c. 30.*

Also commissioners may examine bankrupt's wife touching his estate. *Stat. 21 Jac. 1. c. 19. sect. 6.*

But he cannot be examined against her husband touching his *bankruptcy*, or whether he had committed any act of *bankruptcy*, or as to how and when he became a *bankrupt*; and if they commit her, and though the warrant of commitment mentioned to be, as well for refusing to discover the goods, &c. of the bankrupt as the time and manner of his *bankruptcy*, yet the commitment will be held illegal, and the wife ordered to be discharged. *1 Will. Rep. 610, 611.*

By *1 Jac. 1. c. 15.* The commissioners may commit such persons as have the bankrupt's goods, or are indebted to him; who refuse to come before them, or to be sworn when present.

They may likewise examine and commit any other person, not answering interrogatories. *Stat. 5 Geo. 2. c. 30. sect. 16.*

A person once examined by the commissioners of *bankrupts* cannot be examined again without a new commission. *2 Show. 102.*

Equity will not compel a man to discover what goods he really bought of a *bankrupt* after the *bankruptcy*, and before the commission sued out, where the party has no notice of the *bankruptcy*. *1 Vern. 27.*

Though such persons have been examined by the commissioners, yet 'tis said a bill for a discovery of the same matters may be filed against them in Chancery. *2 Chan. Ca. 73.*

With respect to their duty, they are by *5 Geo. 2. c. 30.* to take an oath, before they proceed, for the due execution of their trust; and by the same statute

The commissioners are not to eat, &c. at bankrupt's or creditors expence, or to take more than 20*s.* each commissioner for each meeting.

The commissioners are to appoint three meetings within 42 days, but the Lord Chancellor may enlarge the time.

They are to give notice of their meeting in the Gazette, and to admit creditors to prove their debts. Same statute.

The farther particulars of their duty may be collected by attending to the subsequent divisions :

III. *As to the manner of chusing assignees, and their interest, &c.*

It is enacted by 5 Geo. 2. c. 30. *sect.* 26. That commissioners are to assign the bankrupt's effects to such persons as shall be chosen by a major part of the creditors; who (by *sect.* 35. with consent of creditors) may compound with debtors, &c. And by the same statute, None are to vote for the choice of assignees, whose debt doth not amount to 10*l.* Notice shall be given to creditors to meet and chuse assignees, and prove debts, &c. which they may do without paying contribution.

New assignees may be chosen by the creditors; and the old ones shall deliver up effects to them, under the penalty of 200*l.* And after the end of four months and within twelve months are to account, and then a dividend shall be made; and there may be a second dividend in eighteen months, if the estate be not wholly divided on the first, which shall be final, unless any law suit is depending, or the effects are not disposed of, &c.

Assignees or commissioners may pay off mortgages on the bankrupt's estate: likewise assignees of the commissioners shall have the benefit of covenants of re-entry, &c. on lands. 2 *Rep.* 25.

All the goods and chattels of the bankrupt, which he was possessed of at the time of his becoming bankrupt, may be sold by the commissioners; and notwithstanding the bankrupt sell them in market overt. Sale of goods by a bankrupt, after an act of bankruptcy, may be avoided by the commissioners of bankruptcy; and they may in this case bring trover for the goods, or debt, or *assumpsit* for the value, &c. 3 *Salk.* 60. Offices of inheritance may be sold; but not offices of trust, annexed to the person for life. If a bankrupt commits felony, it is said his land shall not escheat, but the commissioners may sell it: and his creditors shall have his goods, not the King. *Stone* 126, 130.

Commissioners may assign debts, &c. to the creditors, who may proceed to execution, though the bankrupt dies; persons suspected to detain any of the bankrupt's goods or estate may be arrested, and still refusing to deliver them shall be committed. *Sed quære?* The usual method is to bring an action of *trover*.

Freehold and copyhold lands, goods and debts may be assigned, tho' transferred into other mens names, except *bona fide*, and on valuable consideration. *Stat.* 13 *Eliz.* c. 7. *sect.* 7. 1 *Jac.* 1. c. 15. *sect.* 5.

Assignees shall compound with the lord for fine of copyhold lands, and be admitted. *Stat.* 13 *Eliz.* c. 7. *sect.* 3.

The commissioners may sell a copyhold intailed, which by custom may be intailed and cut off; otherwise, if there be no such custom. *Stone* 127. *Billing.* 148.

Assignees may sue actions in their own names for the debts due to the bankrupt, for they are transferred by act of parliament, but yet it is not a debt upon record; but as in debt upon contract defendant might have waged his law against the bankrupt, so he may against the assignees. *Cro. Jac.* 105.

But if the commission be not taken out within six years, directed by law for suing of debts, and the assignment made within that time, a defendant in an action may plead the statute of limitations: if the commission be taken out in six years, the statute preserves the debt, being to relieve the creditors against fraud, &c. 1 *Saund.* 37.

Notice of the assignment of the debt is not necessary to be given to the debtor, before action brought by the assignees for the debt. *Lutw.* 456.

When an action is brought by an assignee under a commission of bankruptcy, it need not be set forth in the declaration how he became assignee. *Barnard. K. B.* 309. and vide *Carth.* 29.

In case of bankruptcy *trover* will lie generally; *per cur.* 3 *Keb.* 254. *pl.* 22.

Sale of goods by a bankrupt after an act of bankruptcy is not merely void, the contract is good between the parties; but it may be avoided by the commissioners or assignees at pleasure; therefore they may either bring

trover for the goods, as supposing the contract may be void, or may bring debt or *assumpsit* for the value, which affirms the contract. 3 *Salk.* 59. *pl.* 2.

Though assignees may as aforesaid bring actions of law in their own names, yet no bill in equity shall be commenced by any assignee or assignees, without the consent of the major part in value of the creditors of such bankrupt, who shall be present at a meeting of the creditors, pursuant to notice to be given in the *London Gazette* for that purpose. 5 Geo. 2. c. 30. *sect.* 36.

They may also, with the like consent of creditors, submit disputes to arbitration, and compound with debtors to the bankrupt's estate. 5 Geo. 2. c. 30. *sec.* 33, 34.

Assignees likewise, or the major part of the commissioners, may settle open, unbalanced and mutual accounts; and what shall appear on the balance before the person became bankrupt, and no more, shall be claimed or paid on either side. 5 Geo. 2. c. 30. *sect.* 28.

The assignees are to keep fair accounts in their books, of all monies received and paid, and to make oath or affirmation before the commissioners of the truth of such accounts. 5 Geo. 2. c. 30. *sect.* 33.

Assignees may be removeable on the petition of creditors to the Lord Chancellor, &c. and if a new assignment is made, the estate shall be vested in such new assignees; and the commissioners shall give notice in the *two London Gazettes* that shall immediately follow the removal of such assignees, and the appointment of the new ones, for the debtors to the bankrupts not to pay any money to the old assignees. 5 Geo. 2. c. 30. *sect.* 31.

If an assignee is guilty of a breach of trust, he will be liable to pay interest and costs.

If one assignee dies, the trust goes to the survivor, and the executors of the deceased assignee must account with the survivor; and if assets are denied, he must account for assets before a Master in Chancery.

If the bankrupt's real estate is conveyed to assignees, and one of them dies, this is a jointenancy, and goes to the survivor; and he may alone sell such estate to a purchaser. But if both die before any conveyance is made, then the heir at law of the survivor must convey to such new assignees as the court shall appoint, or join with such new assignees in the conveyance to a purchaser. *Dav. Bank.* 409.

The law is very clear, that the assignees are exactly in the same place as the bankrupt, and stand in his place to every particular, and any agreement entered into shall bind them; and though there may not be the same remedy against them, that is not from the nature but the necessity of the thing; for he shall make an adequate and compleat satisfaction as far as his fortune in the hands of the assignees will admit of. *Select Ca. in Ch.* 77.

The assignees are bound by all acts done by the bankrupt before he becomes so, whether of a legal or equitable nature, if they were done upon a valuable consideration, and without fraud; and whatever disposition of his estate he makes, that will affect himself, does equally conclude the assignees, who stand directly in his place. 2 *Eq. Abr.* 101. *pl.* 5.

The assignee of a bankrupt exhibits his bill against the defendant, to discover goods of the bankrupt, that came to his hands after the bankruptcy. The defendant, by way of plea, sets forth, that he had no goods of the bankrupt's, or that ever were his, but what he bought for full and valuable consideration, and *bona fide*; and that at the time of the sale and payment of his money, he had no notice either of the commission, or of any act of bankruptcy committed by the bankrupt. On long debates, the plea was allowed by the Lord North, and to take what remedy they could before the commissioners, or at law. *Hutchins*, counsel for the defendant, cited a former precedent, but it was not produced. 2 *Chan. Ca.* 135.

A purchases of a man, who had committed an act of bankruptcy, but without notice thereof: afterwards a commission is taken out, and there being a term standing out in trustees, the assignee brings a bill against them and the purchaser, to have the term assigned to him; but bill dismissed. 2 *Vern.* 599.

A puts out 1000*l.* at interest to the East India company, and takes bond for it in the name of J. S. his wife's

wife's relation, and afterwards *A.* is bankrupt; *J. S.* is summoned before the commissioners, but, before his examination, tells the company, that the money was not his, but that they should pay it to the person who should bring the bond; and accordingly *A.*'s wife brought the bond, and received the money. The court would not enforce *J. S.* to pay the money. *Cb. Pre.* 18.

A man had devised lands, which were in mortgage, to be sold, and the surplus of the money to be paid to his daughter; the daughter married a man who soon after became a bankrupt, and the commissioners assigned this interest of the wife's; the husband died, and the assignees brought this bill against the wife and trustees, to have the land sold, and the surplus of the money paid to them; but the court would not assist in stripping the wife (who was wholly unprovided for) of this interest, but dismissed the bill at the Rolls. *Eq. Ca. Abr.* 54.

The creditors have a right to the bankrupt's goods, by the act of bankruptcy, and thereby they are bound: tho' until assignment by the commissioners, the property is not transferred out of the bankrupt. *1 Salk.* 108. The commissioners are to sell all the bankrupt's lands in fee, for life, or years, &c. and it will be binding against the bankrupt and his issue, &c. *1 Lill. Abr.* 204. They may sell all entailed lands in possession, reversion, or remainder, except entailed in the crown, of the gift of the king; and this shall bind the issue in tail, and all others, which a common recovery might cut off. *Ibid.* 205. But, as before said, sales of the bankrupt's land by commissioners, are to be by deed inrolled. If a bankrupt grant his lands or goods in the names of other persons, the commissioners notwithstanding may make sale of them: but not lands, &c. conveyed *bona fide* before the party became a bankrupt. *Wood's Inst.* 310. And no purchase of lands shall be impeached, unless the commission of bankruptcy be sued out within five years after a man becomes bankrupt. Lands held by a bankrupt in jointenancy may be sold as to the moiety: also lands which a person hath in right of his wife, (but not her dower), and lands devised to a bankrupt, the commissioners may sell.

With respect to the manner of creditors proving their debts, it may be proper to consider the nature of their debts, and how far they are legally to be received as creditors.

An assignee, or indorsee of a bankrupt's notes at an under value is a creditor for the full sums, and may sue out a commission. But it is otherwise where he is assignee of a bond, or where the indorsement of the note is subsequent to the bankruptcy. *1 Peer. Will.* 782.

Persons who are security for another may come in as creditors. *2 Cro. Rep.* 127.

But a seller of lands need not come in as a creditor for the remainder of his purchase money. *1 Vern.* 267.

If a creditor advances money to a bankrupt after a commission sued out, though he did not know it, he will lose his money. *2 Vern.* 156.

When money is obtained by judgment in action of debt, and the plaintiff becomes bankrupt, and a commission of bankruptcy is taken out against him, though the sheriff may bring the money into court, it shall be delivered to the plaintiff, and not the assignee of the commission, unless he take out a *scire facias* against the defendant, in order to try the bankruptcy. *1 Vent.* 193. A plaintiff that hath a defendant's body in execution, who becomes bankrupt, shall not come in to be relieved by the statutes: but if the plaintiff recovers damages, &c. against the defendant, and hath judgment, and then the defendant becomes bankrupt, the plaintiff is a creditor; for it is a debt due to him, and action of debt lies on the judgment. *1 Cro.* 166. If a debtor to a bankrupt pays him his debt voluntarily, he must pay it over again; but 'tis otherwise in case of payment by compulsion of law. *2 Vent.* 258. Sureties or bail, when they have paid the debt, may come in as creditors: but mortgagees, or persons that have a pledge of the bankrupt's goods, having security for their debts in their hands, are not creditors within the statutes. Those that attach goods of the bankrupt, are to come in as creditors. If an executor becomes bankrupt, a legatee is to be creditor. And aliens as well as denizens may come in as creditors; for all statutes

concerning bankrupts extend to aliens, who shall be subject to the laws against bankrupts, &c. *Hob.* 287. *Stat. 21 Jac. 1. c. 19.*

Though a creditor comes into a commission of bankruptcy, and proves his debt, being prevailed on to be an assignee, being informed that otherwise he will lose his debt, yet if the bankrupt has no estate, the creditor may take the bankrupt in execution, if he will waive any benefit of the statute. *1 Peer. Will.* 560.

Creditor coming in under a commission, though only to prove his debt, and oppose the bankrupt's obtaining his certificate, yet he shall not sue the bankrupt at law, unless he will waive all benefit of the commission, as to the dividends; and by the Lord Chancellor King ordered, he should waive it as to voting against his certificate. But now the creditor is to make his election, whether he will proceed at law, or come in under the commission; and if he has received any dividend, he is to refund it, but may oppose the certificate. *Dav. Bank.*

Creditors by recognizances, statute-staple, or judgments, specialties with penalties, attachments and securities, where no execution or extent sued out, shall only be relieved as to a ratable part with the rest of the creditors, without any regard to the penalty; and to prove their debt under a commission of bankruptcy. *1 Peer. Will.* 92.

A trader seized of lands in fee, gives judgment to *B.* and then sells the lands to *C.* and afterwards becomes bankrupt; though the judgment-creditor cannot come in for more than his proportion with the bankrupt's creditors; yet it is said that he may extend the land in *C.* the purchaser's hands, *C.* having purchased before the bankruptcy, and this not prejudicing the creditors. So if *A.* the trader gives judgment to *B.* and articles for a valuable consideration to sell to *C.* and then becomes a bankrupt; it seems the judgment shall bind the lands in the hands of *C.* who article to buy them; but whatever money the purchaser was to pay the bankrupt, the same shall be liable to the bankruptcy. *1 Peer. Will.* 737.

Creditors can't prove contingent or uncertain debts, which may or may not happen, or debts upon bottomree bonds, till the debts are reduced to a certainty. *Dav. Bank.* 289.

But where a commission issues against the obligor in a bottomree or *respondentia* bond, or the under writer or assurer in an assurance, before loss of the ship or goods, the obligee or assured may claim, and after loss prove his debt in like manner as if the loss had happened before the suing forth the commission; and have a proportionable dividend. And the bankrupt shall be discharged from the debt due by the bond or policy, and have all advantages of the statutes now in force, as if the contingency had happened before the suing forth the commission.

If a creditor has 100*l.* due to him from two bankrupts, and proves his debt of 100*l.* under the first commission, and receives 40*l.* for the 100*l.* he shall only come in as a creditor for 60*l.* under the second commission. *2 Peer. Will.* 89.

A. gives a promissory note to *B.* or order for 200*l.* *B.* indorses it to *C.* who indorses it to *D.* *A.* *B.* and *C.* become bankrupts, and *D.* receives 5*s.* in the pound out of *A.*'s estate, *D.* shall come in as a creditor for 150*l.* only, out of *B.*'s effects. If *D.* had at that time paid contribution money, it should have been returned to *D.* *2 Peer. Will.* 407.

A merchant mortgages his land; the mortgagee may chuse to come in as a creditor. *Stone* 130.

A. makes a mortgage, and afterwards a commission of bankruptcy is taken out against him, and commissioners make an assignment of his estate, and then *B.* lends 2000*l.* to the bankrupt on a second mortgage, having no notice of the bankruptcy, and afterwards he gets in the first mortgage. The prior mortgage shall not protect the mortgage subsequent to the bankruptcy. *2 Vern.* 357.

A merchant pledges goods, and becomes a bankrupt, the party need not come in. *Stone* 130.

An executor becomes bankrupt, a legatee shall be relieved. *Stone* 131.

If there be an act of bankruptcy committed, and a creditor obtains a judgment subsequent to it, then a commission is taken out; now the judgment is thereby avoided. 12 Mod. 446.

Rent due to a landlord is a debt of the highest nature, and affects the goods, chattels, and stock of the tenant upon the premises; and (if there is no seizure made by the landlord) in the case of an execution or extent, a year's rent is to be reserved for him, as appears by the statute 8 Ann. c. 14. *sect. 1.*

But in commissions of bankruptcy it is otherwise, and though no commission can remove or carry away any goods belonging to the bankrupt, if the landlord seizes for the rent before the goods are removed, and he is to be first discharged, even if there are several years rent in arrear; yet if the landlord does not seize before the commission of bankruptcy carries away the goods from off the premises, he must then come in as a creditor for his rent, with the rest of the bankrupt's creditors. *Dav. Bank. 314.*

Also if there are not sufficient goods upon the premises to pay the landlord's rent, he can then only take what goods there are upon the premises, and after they are appraised and sold, as the law, in cases of distress for rent, directs; then the landlord may come in as a creditor for the rent remaining due to him, with the rest of the creditors under the commission. *Dav. Bank. 314.*

By the Stat. 19 Geo. 2. c. 32. no creditor *bona fide* of a bankrupt for or in respect of any goods really sold to such bankrupt, or of any bill of exchange really and *bona fide* drawn, negotiated, or accepted by such bankrupt, shall be liable to refund to the assignees any money, which before the suing forth of the commission was really and *bona fide*, and in the usual course of trade, received by such person of any bankrupt before notice that he was become a bankrupt, or in insolvent circumstances.

As to the manner of creditors proving their debts, they may prove them without paying any contribution on account of the same: and the commissioners after they have declared the person against whom a commission shall issue to be a bankrupt shall cause notice thereof to be given in the *London Gazette*, and shall appoint a time and place for the creditors to meet, in order to choose assignees, at which meeting the said commissioners shall admit the proof of any creditors debts, that shall live remote from the place of such meeting of the commissioners, by affidavit, or being quakers, by solemn affirmation, and also permit any person duly authorized by letter of attorney from such creditors, oath or affirmation being made of the due execution thereof, either by an affidavit sworn or affirmation made before a Master in Chancery, or before the commissioners *viva voce*, and in case of creditors residing in foreign parts before a magistrate where the party shall be residing, to be, together with such creditors letters of attorney attested by a notary public, to vote in the choice of assignees.

And if any person shall prove a debt, which shall not be really due, and under such fictitious debt sign the bankrupt's certificate, unless the bankrupt shall disclose the fraud, and object to the reality of the debt, the certificate shall be void, and the bankrupt shall not be intitled to be discharged from his debts, or to any benefit or allowances under 5 G. 2. c. 30. *sec. 26 & 29.*

IV. Of the distribution of the bankrupt's estate.

The commissioners, after sale of the bankrupt's estate, are to make distribution among the creditors, first making the bankrupt his allowance, &c. After four months, and distribution made, no creditor can come in to disturb it; but he may come in for the residue, of which no distribution is made. 1. *Danv. 603.* And the court of Chancery hath sometimes allowed creditors to come in after distribution, upon particular circumstances which have happened; and the Lord Chancellor ordered the execution of the commission to be suspended. *Chan. Rep. 307.* If commissioners refuse to pay a creditor his proportionable part, he may bring action of debt, or be more properly relieved in Chancery: where the commissioners do not pursue the acts of their commission, the party injured must

bring his action, and set forth the finding of the commissioners, that the debtor is a bankrupt. But if a commission is not duly obtained against a person, he may traverse, by saying he is not a bankrupt. 8 Rep. 121. By 1 Jac. 1. c. 15. In actions against commissioners, or others under them, executing any matter by force of the 13 Eliz. c. 7. or that statute, the defendants may plead Not guilty, or justify that it was done by the authority of those acts, &c. without shewing forth the commission; to which the plaintiff may reply, that the defendant did the fact of his wrong, &c. 1 *Danv. 694.*

Creditors before choosing assignees, shall fix the method of dividends: and assignees shall, after the expiration of four months, and within twelve months from the time of issuing of such commission, cause at least 21 days publick notice to be given in the *London Gazette*, of the time and place the commissioners and assignees intend to meet, to make a dividend or distribution of such bankrupt's estate and effects; at which time the creditors, who have not before proved their debts, shall then be at liberty to prove the same; and upon every such meeting assignees shall produce their accounts, and the said commissioners, or the major part of them, shall order such part of the neat produce of the said bankrupt's estate, as by such accounts, or otherwise, shall appear to be in the hands of the said assignees, to be forthwith divided amongst such of the bankrupt's creditors, who have duly proved their debts under such commission, in proportion to their several and respective debts. And a final dividend shall be made within eighteen months after the issuing of any commission. 5 Geo. 2. c. 30. *sec. 32, 33, and 37.*

Creditors, upon what security soever they be, come in all equal, unless such as have obtained actual execution before the bankruptcy, or had taken pledges for their just debts; and the reason is, because, from the act of bankruptcy, all the bankrupt's estate is vested in the commissioners who are established as courts of justice touching the bankrupt's estate, and before whom the creditors must authenticate their debts, in order to receive their dividends; and therefore they must equally admit all persons to make proof of their debts; but such as have pawns or mortgages have a property in the thing so pledged, precedent to the translation of the property to the commissioners, in which case they have only an equity of redemption, and are in no better condition than the bankrupt himself; that the bankrupt, before the assignment of the commissioners, has such property as will maintain an action for the recovery of the goods. *New Abr. 258. in notes. See Salk. 108.*

Joint debts are to be paid out of the joint stock first; and if there be any overplus, then that ought to be applied to pay particular debts of each partner; but if there be not enough to pay all the joint debts; and if either of the partners shall pay more than a moiety of the joint debts, then such partner is to come in before the commissioners of bankrupts, and be admitted as a creditor for what he shall pay over and above his moiety. 2 *Chan. Rep. 226.*

If there be several joint traders, payment to one of them is payment to all; so if they all, except him to whom the payment was made, were bankrupts, the payment is only unavoidable as to his proportion. 12 Mod. 447.

And if there be four partners, whereof three are bankrupts, and their shares assigned, and a payment was made to him that was no bankrupt, it is payment to all the assignees, for now they are all partners. 12 Mod. 447.

On a joint commission of bankruptcy against two traders, separate creditors are allowed to come in, for the joint effects are to be applied, first to pay the partnership debts, and then the separate debts; and the separate effects to pay first the separate creditors, and afterwards the partnership creditors. *Per Cowper, Chan. 2 Vern. 706.*

Two partners in trade put in each an equal stock, and agreed by covenant, that the stock should pay the debts of the stock, and neither of their separate debts should charge the stock, but only his own estate, or to that effect; they both became bankrupts, and a commission issued

issued against them both; one of them owed separately more than the other; the question was between the separate creditors of each bankrupt, and the creditors on account of the joint stock, for these would exclude the separate creditors from charging the joint stock, but that it should satisfy the stock debts; but the Lord North was of a contrary opinion, for the covenant of the partners cannot bind any of the creditors, but only themselves. 2 Chan. Ca. 139.

R. S. and G. were partners together in the trade of a dry-salter: G. embezzles and wastes the joint stock, contracts private debts, and becomes a bankrupt; the commissioners assign the goods in partnership. Bill by R. the plaintiff for an account, and to have the goods sold to the best advantage, and insisted, that out of the produce of the goods the debts owing by the joint trade ought to be paid in the first place, and that out of G.'s share satisfaction must be made for what G. had wasted or embezzled; that the assignees could be in no better a case than the bankrupt himself, and were intitled only to what his third part would amount unto, clear after debts paid and deductions for his embezzlement; and the court seemed to be of that opinion, but sent it to a Master to take the account and state the case. 2 Vern. 293.

If one or more of the joint traders become bankrupt, his or their proportions only are assignable by the commissioners to be held in common with the rest, who were not bankrupts. 12 Mud. 446.

V. Of the duty, privilege, discharge, and certificate of the bankrupt.

The 5 Geo. 2. c. 30. ordains, that if bankrupts do not, after notice in the Gazette, surrender to the commissioners in forty-two days, to be examined, and discover and deliver up all their estates real and personal, they shall be adjudged guilty of felony; but the Lord Chancellor may enlarge the time for surrendering, not exceeding fifty days further: they are to deliver all books of account, writings, &c. on oath to the assignees; and shall be allowed 5*l.* per Cent. so as not to exceed 200*l.* if they pay 10*s.* in the pound, 7*l.* 10*s.* per Cent. not above 250*l.* if they pay 12*s.* 6*d.* per pound, and 10*l.* per Cent. not exceeding 300*l.* if they pay 15*s.* in the pound; but no advantage is given to any bankrupt, who hath lost 5*l.* a day, or 100*l.* in a year at gaming, or 100*l.* by stockjobbing, &c. And the body of the bankrupt only, not his future estate, shall be discharged, except he pays 15*s.* per pound. §. 9. On a second bankruptcy, four parts in five in number and value of creditors, not for less than 20*l.* are to sign certificates, and consent to the bankrupt's discharge, &c. of which oath is to be made, and other creditors may be heard against it: bonds or notes given to any creditor so consent to a certificate, shall be void; and if the person issuing any commission have privately more than the other creditors, the commission may be superseded, and he shall lose his debt. And when the commission is executed, and the party hath conformed to the statutes, his certificate is granted and allowed, &c.

The commissioners are to certify to the Lord Chancellor, that the bankrupt hath conform'd, and four parts in five, in number and value, of the creditors must sign the bankrupt's certificate.

The 5 Geo. 2. c. 30. §. 13. empowers any judge of the court wherein judgment has been obtained against a bankrupt, for any debt owing before he became a bankrupt, the bankrupt being in prison in execution on such judgment, to discharge such bankrupt on producing his certificate.

A creditor came in under the commission, and proved his debt, and after arrested the bankrupt, who now prayed to be discharged. Ld. Ch. King said it has been the construction of equity upon statute of 4 Ann. cap. 17. which discharges the bankrupt of his debts, on a certificate, by four-fifths of his creditors, and allowed by the Chancellor, that where a trader becomes bankrupt, and any one of his creditors comes in before, under the commission to prove his debt, though with design only to oppose the bankrupt's certificate; yet this is an election to take his remedy for his debt under the commission, and if pending that, the creditor sues and arrests the bankrupt, it is taken

to be an oppression, and ordered the creditor, at his own expence, to discharge the bankrupt out of custody. 2 Will. Rep. 394. But *vide ante*, & *post*.

But if such creditor will waive any benefit under the statute, and stay a reasonable time, and there is an improbability of the bankrupt's being able to gain his certificate sign'd by four-fifths in number and value of the creditors, or allowed by the court; in such case, if the creditor applies to the court, declaring his consent to waive any right or share of the bankrupt's estate under the commission, and praying, that he may sue the bankrupt; Ld. Ch. King thought it reasonable for the court to give leave to such creditor to proceed at law against the bankrupt for his debt. 2 Will. Rep. 395.

The stat. 5 Geo. 2. c. 30. sect. 7. extends not to debts due to a bankrupt as executor, but it is for this particular reason, because they are appropriated to pay testator's debts; and if they were assigned it would be a wrong, viz. a *devastavit*; and it being objected, that it extends not to debts due to the bankrupt jointly with another, it was answered by Ld. Ch. J. Parker, in delivering the opinion of the court, that the case cited for that purpose from Lev. 17. is not determined. Will. Rep. 254. Gilb. Ca. 323.

If a bankrupt has a certificate, and an action be brought against him afterwards for a debt precedent to the statute, he may plead his certificate upon the roll, and so prevent a judgment from being entered up afterwards; but having neglected so to do, it was his own default: that a court of equity is not to relieve either his pleading, or his want of a plea, or no proper plea put in in time, nor could he be relieved on an *audita querela*; because he had an opportunity, and might have pleaded his certificate before the judgment was entered; and upon producing such precedents where bankrupts had been relieved against judgments obtained against them, they did not come up to the case in question; and the petition was dismissed. 2 Vern. 696, 697.

Per Lord C. Talbot; Though a creditor of a bankrupt under 20*l.* is by the last act excluded from assent or dissent to the certificate, yet as he is affected by the consequence of allowing the certificate, he hath right to petition, and shew any fraud against allowing the certificate. 7 Vin. Abr. 134. pl. 18.

A question was, concerning the form of certificates on the late act; but per Lord C. Parker, the commissioners are to certify one day, that the bankrupt has in all things conformed, &c. and then the next day, the creditors certify on the same parchment their consent, at the foot of which the commissioners are to certify that the creditors had consented, according to the terms of the act. 7 Vin. Abr. 132. pl. 9.

The defendant and his partner in trade had a joint commission of bankruptcy taken out against them, under which they obtained a certificate. The plaintiff was a separate creditor, and had obtained a judgment before the commission or act of bankruptcy; and having now the body of the defendant in execution, the court was moved to discharge him, upon the authority of *Howard v. Poole*, where it was held, that a separate creditor might come in under a joint commission; and also on *Eq. Caf. Abr.* 55. 2 Vern. 707. 2 Will. Rep. 500. and the court discharged him accordingly. 2 Sira. 1157.

If there be two partners, and one of them becomes bankrupt, and on a separate commission being sued out against him, his certificate is allowed; this does not only discharge the bankrupt of what he owed separately, but also of what he owed jointly, and on the partnership account; because, by the act of parliament, the bankrupt, upon making a full discovery, and obtaining his certificate, is to be discharged of all debts. Now, as the debts he owes jointly with another are equally his debts as what he owes on his separate account, consequently he is to be discharged of both his joint and separate debts. And so it has been determined by the judges of B. R. By the Lord Chancellor Parker. 3 Will. Rep. 24. in a note.

On a joint commission against two partners, the separate creditors, though they have taken out separate commissions, shall yet be at liberty to come in to oppose the allowing of the certificate. 3 Will. Rep. 23.

Where

Where two partners are bankrupts, and a joint commission is taken out against them, if they obtain an allowance of their certificate, this will bar as well their separate as their joint creditors. 3 Will. Rep. 24.

The statute 5 Geo. 2. c. 30. is general, and takes no notice of separate commissions; and a discharge under a separate commission has been determined to be a discharge of debts owing under the joint trade: before the statute 10 Ann. cap. 15. if there were two partners, and only one party became bankrupt, and a separate commission was taken out against him; there was no doubt but the discharge of that bankrupt, discharged him from all debts which he owed in his joint as well as private capacity; but the great question in that case was, whether by such discharge of the bankrupt, the partner of such bankrupt should likewise be discharged from such debts as he was discharged of; and therefore that statute has enacted, that such partner shall not be discharged; though if a joint debt is discharged by a separate commission, there can be no question but a joint commission will discharge a separate debt.

Bankrupts concealing or embezzling goods, to the value of 20 l. are guilty of felony. 5 Geo. 2. c. 30.

Affidavit of a debt to make the party a bankrupt.

A. B. of, &c. maketh oath that C. D. of, &c. is truly and justly indebted to him this deponent (one of the creditors) in the sum of 100 l. and upwards; and that he is become a bankrupt within the meaning of some or one of the statutes made against bankrupts, as this deponent believes.

Jurat' die, & coram, &c.

A. B.

As to the form of the petition to the Chancellor, 'tis a matter of course, prepared by the clerk at the office, therefore 'tis not necessary to set it forth.

A bond to the Lord Chancellor on granting the commission.

K Now all men by these presents, That I A. B. of, &c. am held and firmly bound to the right honourable Robert Lord Henley, Baron of, &c. Lord Chancellor of Great Britain, in two hundred pounds of good and lawful money of this kingdom, to be paid to the said Lord Chancellor, or to his certain attorney, his executors, administrators and assigns; for which payment well and truly to be made, I bind myself, my heirs, executors and administrators, firmly by these presents sealed with my seal. Dated this day of, &c. in the year of the reign of the Lord George the Third, &c. and in the year of our Lord, &c.

The Condition of this obligation is such, That if the above bound A. B. do and shall before the major part of the commissioners to be appointed in a commission of bankrupt against C. D. of, &c. prove that the said C. D. is justly indebted unto the said A. B. in the sum of 100 l. And in like manner prove that the said C. D. is become a bankrupt within some or one of the statutes made against bankrupts; then this obligation to be void, or else to remain, &c.

Form of a commission of bankrupt.

G EORGE the Third, by the grace of God, king of Great Britain, &c. To our trusty and well beloved R. C. H. S. H. B. I. T. I. C. &c. greeting. Whereas we are informed that C. D. of, &c. using and exercising the trade of, &c. by way of bargaining, exchange, bartery, &c. seeking his living by buying and selling, did about six months since become bankrupt within the several statutes made against bankrupts, to the intent to defraud and hinder A. B. of, &c. and other his creditors of their just debts and duties to them due and owing: We therefore minding the due execution as well of the statutes touching order for bankrupts made in the parliament, begun and holden at Westminster, the day, &c. in the thirteenth year of the reign of Elizabeth queen of

England made and provided, as of the statute made in the parliament, begun and holden at Westminster, the day, &c. in the first year of king James of England, &c. intituled, An act, &c. And also of the statute made in the parliament, begun and holden, &c. in the twenty-first year of the said king James of England, &c. And also of the statute made in the parliament, holden, &c. in the fourth year of the reign of her late majesty queen Anne, intituled, &c. And also of the statute made, &c. in the fifth year of the reign, &c. Upon trust of and in the wisdom and fidelity which we have conceived in you, do by these presents, assign, appoint, constitute and ordain you our special commissioners for the purpose aforesaid, giving full power and authority unto you, or four or three of you, to proceed according to the said statutes, and every or any of them, not only concerning the said bankrupt, his body, lands and tenements, goods, chattels, debts, and other things whatsoever; but also concerning all other persons, who by concealment, claim, or otherwise do or shall offend touching the premises, or any part thereof, contrary to the intent and meaning of the said statutes, or any of them: and to do and execute all and every thing and things whatsoever, as well for and towards satisfaction and payment of the said creditors, as towards and for all other intents and purposes, according to the ordinances and provisions of the same statutes; willing and commanding you, four or three of you, whereof, &c. to proceed to the execution of this our commission, according to the true intent and meaning of the said statutes, with all diligence and effect. Witness our self at Westminster, the day, &c. in the, &c. year of our reign.

Form of a bankrupt's certificate.

To the right honourable Robert Lord Henley, Baron of, &c. Lord High Chancellor of Great Britain.

W E R. C. H. S. H. B. &c. the major part of the commissioners assigned and authorized in and by a commission of bankrupt awarded against C. D. of, &c. bearing date at Westminster, the day of, &c. last past, having begun to execute the said commission, and found that the said C. D. became a bankrupt before the date and suing out of the said commission, within the true intent and meaning of some or one of the statutes made against bankrupts, do humbly certify to your lordship that the said C. D. did on, &c. surrender himself to us, and submit himself to be examined on oath before us, from time to time, and in all things to conform himself to an act made in the fourth and fifth years of her late majesty queen Anne, intituled, An act to prevent frauds frequently committed by bankrupts, &c. And to the several other statutes made against bankrupts: whereupon and for the better discovery of the said bankrupt's estate, and putting in execution the said acts, we the said R. C. H. S. H. B. &c. have had several meetings for the examination of the said C. D. and caused due notice to be published in the Gazette of the time and place when and where we intended to finish his said examination, to the intent that the creditors of the said C. D. might be heard against the making of this present certificate, and also admitted to prove their debts; and several creditors having proved their debts, and none shewn any cause against the making of this certificate: We do therefore further certify to your lordship, that the said C. D. hath upon such examination made a discovery of his estate and effects, and in all things conformed himself according to the direction of the said late acts; and that there doth not appear to us any reason to doubt the truth of such discovery, or that the same is not a full discovery of all the estate and effects of the said C. D. And the rather, for that the persons who have signed this certificate, testifying their consent to the same, are full four parts in five, in number and value, of the creditors of the said C. D. who have duly proved their said debts. Witness our hands and seals, &c.

For more precedents, see *A General System of the Law concerning Bankrupts*.

Banks, No town or freeman shall be distrained to make banks or bridges, but such as of old time have been used to make them. Stat. 9 H. 3. c. 15. In Norfolk persons shall be discharged towards the repair of sea-banks.

as they are chargeable to the highways, by 27 *Elix.* c. 24.

Bannitus. The form of an expulsion of any member from the University of Oxford, by affixing the sentence in some public places, as a denunciation or promulgation of it. And the word *banning* is taken for an exclamation against, or cursing of another.

Bannitus. An outlaw, or banished man.—*Vobis precipimus quod eidem cancellario ad insequendum, arrestandum & capiendum dictos malefactores & bannitos, &c.* Pat. Ed. 2.

Bannitus fortis. Is used in the same sense as *bannitus*, signifying one outlawed or judicially banished. Pat. 25 H. 3. *Brady's Hist. Ang. Append.* p. 196.

Bannum vel Banleuga. The utmost bounds of a manor, or town, so used 47 *Hen.* 3. *Rot.* 44, &c.—*Notum facio, me elemosynam nostram christo concessisse & omnibus sanctis suis, &c. viz. primo terram illam a Twi-wella usque Thorney ubi bannum nostrum cessat.* Carta Canuti regis. c. c. Thorneia. *Banleuga de Arundel* is taken for all that is comprehended within the limits or lands adjoining, and so belonging to the castle or town. *Seld. Hist. of Tithes*, p. 75.

Barbers. Were incorporated with the surgeons of London; but not to practise surgery, except drawing of teeth, &c. 32 H. 8. c. 42. but separated by 18 *Geo.* 2. c. 15. See Surgeon.

Barbican. (*barbicanum*) A watch-tower, or bulwark. *Mandatum est Johanni de Kilmyn-ton custodi castri regis & bonoris de Pickering, quoddam barbicanum ante portam castri regis prædicti muro lapideo, & in eodem barbicano quandam portam cum ponte versatili, &c. de novo facere, &c.* T. Rege 10 Aug. Claus. 17 Ed. 2. m. 39.

Barbicanage. (*barbicanagium*) Money given for the maintenance of a barbican, or watch-tower; or a tribute towards the repairing or building a bulwark. *Carta* 17 Ed. 3. *Monasticon* Tom. 1. p. 976.

Barca. A barque: *Navis mercatorum & que merces exportat.* Gloss. Sax. *Elfrici*, a flothip.

Barcarium. (*barcaria*) A sheep-cote, and sometimes used for a sheep-walk. *MS. de Placit.* Ed. 3. See *Barcaria*.

Bargain and Sale. Is an instrument whereby the property of lands and tenements is for valuable consideration granted and transferred from one person to another: it is called a real contract upon a valuable consideration, for passing of lands, tenements and hereditaments, by deed indented and inrolled. 2 *Inst.* 672. *Accomp. Conv.* 1 Vol. 62.

For the more clearly comprehending the law under this head, it will be proper to consider,

I. What things may be bargained and sold.

II. By whom, to whom, and by what words a bargain and sale may be made.

III. Of the consideration and inrollment of a bargain and sale.

IV. Of the manner of pleading bargains and sales.

I. All things, for the most part, that are grantable by deed in any other way, are grantable by bargain and sale; and lands, rents, advowsons, tithes, &c. may be granted by it, in fee-simple, fee-tail, for life, &c. 1 *Rep.* 176. 11 *Rep.* 25.

Any freehold or inheritance in possession, reversion or remainder, upon an estate for years, or life, or in tail, may be bargained and sold, but the deed shall be inrolled. 2 *Co.* 54. *Dyer* 309. 2 *Inst.* 671.

But if tenant for life bargains and sells his land by deed inrolled, it will be a forfeiture of his estate. 4 *Leon.* 251.

But a man seised of a freehold may bargain and sell for years, and this shall be executed by the statute of uses, 27 H. 8. c. 10. but it need not be inrolled by the statute of inrollments. 8 *Co.* 93. 2 *Rel. Abr.* 204. 2 *Inst.* 671.

A man possessed of a term cannot bargain and sell it so as to be executed by the statute. 2 *Co.* 35, 36. *Poph.* 76.

A bargain and sale of the profit of land, is a bargain and sale of the land itself; for the profits and the land are the same thing in substance. *Dyer* 77. One bargain

and sells all his woods, and underwoods, that have been accustomably used to be felled, growing and being in the manor of D. to hold for life; it was held, that the vendee should cut but once by this, and not again. *Bro. Abr.* 55.

A rent in *esse* may be bargained and sold, because this is a freehold within the statute; and before the statute a rent newly created might be bargained and sold, because when money, as an equivalent, was given, and ceremonies or words of law were wanting, the Chancery supplied them; but it seems, that since the statute, a rent newly created cannot be bargained and sold, because there ought to be a freehold in some other person, to be executed in *cestui que use*; but here can be no seisin of his rent in the bargainor, because no man can be seised of a rent in his own land, and consequently there can be no estate to be executed in the bargainee. *Kelw.* 85. 1 *Co.* 126. 1 *And.* 327. 1 *Jones* 179.

If A. by indenture inrolled bargains and sells lands to B. and his heirs, with a way over other lands of A. this is void as to the way; for nothing but an use passes by the deed, and there can be no use of a thing not in *esse*, as a way, common, &c. before they are created. *Cro. Jac.* 189.

II. As to the persons by whom and to whom bargains and sales may be made, it is to be premised, that

The king, and all other persons that cannot be seised to a use, cannot bargain and sell, for at Common law, when a man had sold his land for money without giving livery, the use only passed in equity, and this is now executed and becomes a bargain and sale by the statute; but antecedent to any such execution there must be a use well raised, which cannot be without a person capable of being seised to a use, which the king is not, there being no means to compel him to perform the use or trust; for the Chancery has only a delegated power from the king over the consciences of his subjects; and the king is the universal judge of property, and ought to be perfectly indifferent, and not to take upon him the particular defence of any man's estate as a trustee. *Bro. Feoffment to Uses* 33. *Hard.* 468. *Poph.* 72.

If tenant in tail bargains and sells his land in fee, this passes an estate determinable upon the life of the tenant in tail; for at Common law the use could not be granted of any greater estate than the party had in him; now tenant in tail had an inheritance in him, but he could dispose of it only during his own life; and therefore when he sells the use in fee, *cestui que use* has a kind of an inheritance, yet determining within the compass of a life; and the statute executes it in the same manner as he has the use, and consequently he will have some properties of a tenant in fee, and some of a tenant for life only; but if tenant for life bargains and sells in fee, this passes only an estate for life, for he could not pass the use of an estate for life to the bargainee, and the statute executes the possession as the party has the use. 10 *Co.* 96, 98. 1 *Sund.* 260, 261. 1 *Co.* 14, 15. *Co. Lit.* 151.

A man may bargain and sell to a corporation, for they may take a use, though the money be given by the governors in their natural capacity. 10 *Co.* 24, 34. 2 *Rel. Abr.* 788.

A man may bargain and sell to his son; but then the consideration of money ought to be expressed, and it ought to have all the other circumstances of a bargain and sale; but this shall operate as a covenant to stand seised, if there be none but the consideration of natural love and affection expressed. 7 *Co.* 40. 2 *Co.* 24. *Cro. Eliz.* 394. 1 *Vent.* 137. 1 *Lev.* 56. But

If a son and heir bargains and sells the inheritance of his father, this is void, because he hath no right to transfer; the same law of a release. *Kelw.* 84. *Co. Lit.* 265.

If an infant bargains and sells his land by deed indented and inrolled, yet he may plead non-age; for notwithstanding the statute the bargainee claims by the deed as at Common law, which was, and therefore is still defeasible by non-age. 2 *Inst.* 673.

If a husband seised of lands in right of his wife, or tenant in tail bargains and sells the trees growing on the lands,

lands, and dies before severance, the bargainee cannot afterwards cut them down and take them away. *Mo.* 41.

If a wife joins with her husband in a bargain and sale by deed indented and inrolled, of her lands, yet it shall not bind her, for the wife cannot be examined by any court without writ, and there is no writ allowed in this case, which is for the better security of wives, who are by our law intirely subjected to the will of the husband. *2 Inst.* 673.

If there be two jointenants, and one of them makes a bargain and sale of his own estate in fee, and then the other dies, the other moiety shall survive to the bargainor; for since the freehold is in the bargainor the inheritance continues; but if such jointenant had bargained and sold *solum statum suum* in fee, though he died before inrollment; yet if the deed were afterwards inrolled, the moiety would not survive, but would pass to the bargainee. *Cro. Jac.* 53. *Co. Lit.* 186. *1 Bulst.* 3.

As to the words necessary.

The very words *bargain and sell* are not of absolute necessity in this deed, for other words equivalent will suffice; as if a man seised of lands in fee by the words *alien* or *grant*, sell the same to another, the deed being made in consideration of money, and indented and inrolled, will be an effectual *bargain and sale*. In short, whatever words upon valuable consideration would have raised an use of any lands, &c. at Common law, the same would amount to a bargain and sale within this act; as if a man by deed, &c. for a valuable consideration covenants to stand seised to the use of another, &c. *2 Inst.* 672. *Cro. Jac.* 210. *Mo.* 34. *Cro. Eliz.* 166.

At Common law land might be bargained and sold by words only, for it was the consideration that in equity raised the use, but since the statute of 27 Hen. 8. c. 19. lands cannot pass without indenture. *2 Inst.* 675. *Dyer* 229. *Poph.* 48. *Dalt.* 63.

Bargains and sales of lands are to be in writing indented, and inrolled in one of the courts at Westminster, or in the county where the lands lie, before the *Custos Rotularum*, justices of the peace, &c. And the inrolment shall be made within six months after the date of the deeds. *Stat.* 27 H. 8. cap. 16. *Vide Tab. 10 Stat. iii. Register.*

III. *As to the consideration and inrolment.*

There must be a good consideration given, or at least said to be given, for lands in these deeds: and for a competent sum of money, is a good consideration; but not the general words for divers considerations, &c. *Mod. Ca.* 777. Where money is mentioned to be paid in a *bargain and sale*, and in truth no money is paid, some of our books tell us this may be a good *bargain and sale*; because no averment will lie against that which is expressly affirmed by the deed, except it comes to be questioned whether fraudulent or no, upon the statute against fraudulent deeds. *Dyer* 90. If no consideration of money is expressed in a deed of *bargain and sale*, it may be supplied by an averment that it was made for money: and after a verdict on a trial, it shall be intended that evidence was given at the trial of money paid. *1 Vent.* 108. If lands are *bargained and sold* for money only, the deed is to be inrolled according to the statute; but if it be in consideration of money, and natural affection, &c. the estate will pass without it. *2 Inst.* 672. *2 Lrv.* 56. But a *bargain and sale* of lands for money may not be made to one man, to the use of another, but only to the bargainee. A man *bargains and sells* his land for money by deed inrolled to another, to hold to the bargainee in fee, to the use of the bargainor for life, &c. or to the use of any other, this limitation of the uses is void, and it shall be to the use of the bargainee in fee, because the consideration and sale implies the use to be to him only. *Benl. Rep.* 61.

If a man, in consideration of so much money to be paid at a day to come, bargains and sells, the use passes presently, and after the day the party has an action for the money, for it is a sale, be the money paid presently or hereafter. *Dyer* 337. a.

With respect to the inrollment.

If the deed of bargain and sale be not inrolled within the six months (which are to be reckoned after twenty-eight days to the month, the day of the date taken exclusively) it is of no force; so that if a man bargains and sells his land to me, and the trees upon it, although the trees might be sold by deed without inrolment, yet in this case, if the deed be not inrolled, it will be good neither for the trees nor the land. *Dyer* 90. *7 Rep.* 40. *2 Bulst.* 8. A bargain and sale of a manor to which an advowson is appendant by indenture not inrolled, will not pass the advowson or the manor, for it was to go as appendant. *Bro. Cas.* 240. And if two jointenants are of land, and one of them bargains and sells it all by such a deed indented, and then the other jointenant dieth, and the deed is inrolled; here but a moiety of the land shall pass by this deed. *2 Cro.* 53. A. bargains and sells his land to B. and his heirs, by indenture inrolled, but before the inrolment B. bargains and sells all his estate to C. and the deed was after inrolled; adjudged, that nothing did pass by the deed from B. to C. *2 Cro.* 52. But in some cases, where a deed will not enure by way of bargain and sale, by reason of some defect therein, it may be good to another purpose. *Dyer* 90.

If two bargains and sales are made of the same land, to two several persons, and the last deed is first inrolled; if afterwards the first deed is also inrolled within six months, the first buyer shall have the land; for when the deed is inrolled, the bargainee is seised of the land from the delivery of the deed, and the inrolment shall relate to it. *Hob.* 165. *Wood's Inst.* 259. Neither the death of the bargainor or bargainee, before the inrolment of the deed of bargain and sale, will hinder the passing of the estate to the bargainee: but the estate of freehold is in the bargainor, until the deed is inrolled; so that the bargainee cannot bring any action of trespass before entry had: though 'tis said he may surrender, assign, &c. *2 Cro.* 52. *1 Inst.* 147. A bargainee shall have rent which incurs after the bargain and sale, and before the inrolment. *Sid.* 310. Upon the inrolment of the deed, the estate settles *ab initio*, by the *Stat.* 27 H. 8. c. 16. And the statute of inrolment says, that it shall not veil, except the deed be inrolled; and when it is inrolled, the estate vests presently, by the statute of uses. *1 Davu. Abr.* 696. Every deed may be inrolled at Common law, for its security. If several seal a deed of bargain and sale, and but one acknowledge it, and thereupon the deed is inrolled; this is a good inrolment within the statute. *Style* 462. None can make a bargain and sale of lands, that hath not the actual possession thereof at the time of the sale; if he hath not the possession, the deed must be sealed upon the land, to make it good. *2 Inst.* 672. *1 Lill.* 290.

Houses and lands in London, and any city, &c. are exempted out of the statute of inrolments. *2 Inst.* 676. *1 Nels. Abr.* 342. But the general method now used to convey estates, is, by lease and release, whereby the possession and the fee immediately pass without inrolment.

IV. *In regard to the manner of pleading a bargain and sale*, it is to be observed, that in pleading these deeds, the deed itself must be shown under seal. *1 Inst.* 225. For though the inrolment being on record is of undoubted veracity, being the transaction of the court; yet the private deed has not the sanction of a record, though publicly acknowledged and inrolled; for it might have been falsly and fraudulently dated, or ill executed. *Co. Lit.* 225. b. 251. b. *2 Inst.* 673. *4 Co.* 71. *5 Co.* 53. *2 Rd. Rep.* 119.

It must likewise be set forth, that the inrolment was within six months, or *secundum formam statuti*, &c.

In debt for rent, the plaintiff declared upon a lease made by a stranger, who after bargained and sold the reversion to the plaintiff *per indenturam debito modo inrotulata in curia Cancellaria*; and after verdict for the plaintiff judgment was arrested, because it was not alleged, that the inrolment was within six months, nor *secundum formam statuti*, and *debito modo* will not help it, for it might be so at Common law. *Allen* 19. *Carter* 221. *Style* 34. S. C.

* If a man makes a lease for years the 10th of May, and afterwards bargains and sells his lands, and antedates the deed by making it the 10th of April, and the inrollment is also as of that time, the lessee is without remedy, for he cannot aver against the record. See Owen 138. 1 Leon. 183. 2 Leon. 121, 183. 3 Leon. 175.

In pleading a bargain and sale, the party ought regularly to aver payment of the money. 1 Leon. 170. See Moor 504.

In replevin, the case upon the pleadings was, that the defendant made a title under bargain and sale, inrolled within six months, and the statute of uses, and did not shew that it was in consideration of money; but adjudged, that after a verdict, as this case was, it shall be intended, that evidence was given at the trial of money paid. 1 Vent. 108.

The party that claims by any bargain and sale, must shew in what court the deed is inrolled, because he must shew all things in certain that make out his title; otherwise his adversary would be put to an infinite search before he could traverse with security. Yelv. 213. Cro. Jac. 291. S. C.

Debt upon a lease for years, in which the plaintiff declared, that by indenture, bearing date the 27th of Nov. G. D. in consideration of so much money, bargained and sold the reversion to him in fee, which indenture was inrolled such a day, according to the statute; and because he did not shew in what court it was inrolled, the plea was held ill; for 'tis unreasonable to put the lessee to search the courts at Westminster, and the rolls of the clerks of the peace. Yelv. 313.

Form of a bargain and sale of lands.

THIS indenture, made the day and year, &c. Between A. B. of, &c. of the one part, and C. D. of, &c. of the other part, Witnesseth, That the said A. B. for and in consideration of the sum of, &c. to him in hand paid by the said C. D. the receipt whereof the said A. B. doth hereby acknowledge, He the said A. B. hath granted, bargained and sold, aliened and conveyed, and by these presents doth grant, bargain and sell, alien and confirm unto the said C. D. his heirs and assigns for ever, All that messuage or tenement, situate, &c. and also all lands, trees, woods, underwoods, tithes, commons, common of pastures, profits, commodities, advantages, hereditaments, ways, waters, and appurtenances whatsoever to the said messuage or tenement, lands and tenements abovementioned, belonging or anywise appertaining; and also the reversion and reversions, remainders and remainders, rents and services of the said premises, and of every part thereof; and all the estate, right, title, interest, claim and demand whatsoever of him the said A. B. of, in and to the said messuage, tenement, and premises, and every part thereof; To have and to hold the said messuage or tenement, and all and singular the said premises abovementioned, and every part and parcel thereof, with the appurtenances unto the said C. D. his heirs and assigns, to the only proper use and behoof of the said C. D. his heirs and assigns for ever: And the said A. B. for him and his heirs, the said messuage or tenement, and premises, and every part thereof against him and his heirs, and against all and every other person and persons whatsoever, to the said C. D. his heirs and assigns, shall and will warrant, and for ever defend by these presents. In witness, &c.

The manner of inrolling a bargain and sale.

BE it remembered, That on the . . . day, &c. here in the same term before the lord the king at Westminster, came A. B. of, &c. in the county of M. gentleman, in his proper person, and brought here into the court of the said lord the now king, before the king himself at Westminster, a certain indenture, which he hath acknowledged to be his deed: and he desired that that indenture in the court of the lord the now king before the said lord the king at Westminster, might be of record inrolled: and it is inrolled in form following, that is to say, This indenture, made, &c. (And so inrol it verbatim :) The term must be at the top of the roll.

Afterwards is indorsed on the back of the deed,

Inrolled in the court of the lord the king, before the king himself at Westminster, of the term of the Holy Trinity, &c. in the first year of the reign of the lord George the Third now king of Great Britain, &c.

Roll———

There is a bargain and sale of goods, for which vide Contract, &c.

Barkary, (*barkaria*, *corticulus*) A tan-house or place to keep bark in for the use of tanners. *New Book Entr. tit. Affix, Corp. Polit. 2.*

Baron, (*bars*) Is a French word, and hath divers significations here in England. First, it is taken for a degree of nobility next to a viscount. *Bracton, lib. 1. cap. 8.* says, they are called *barones*, *quasi robur belli*. In which signification it agrees with other nations, where *baronia* are as much as *provincie*: so that barons are such as have the government of provinces, as their fee holden of the king; some having greater, and others less authority within their territories. It is probable, that formerly in this kingdom, all those were called barons that had such feignories as we now call *courts-baron*; as they are at this day called *seigneurs* in France, who have any manor or lordship: and soon after the conquest, all such came to parliament, and sat as peers in the lords house. But when by experience it appeared that the parliament was too much thronged by these barons, who were very numerous, it was in the reign of King John ordained that none but the *barones majores* should come to parliament, who, for their extraordinary wisdom, interest, or quality, should be summoned by writ. After this, men observing the estate of nobility to be but casual, and depending merely upon the king's will, they obtained of the king letters patent of this dignity to them and their heirs male, who were called *barons by letters patent*, or by creation, whose posterity are now by inheritance those barons that are called lords of the parliament; of which kind the king may create at his pleasure. Nevertheless there are still barons by writ, as well as barons by letters patent: and those barons who were first by writ, may now also justly be called *barons by prescription*, for that they and their ancestors have continued barons beyond the memory of man. The calling up by writ is at this day seldom practised unless it be to summon the son of some lord to parliament, in the life-time of his ancestor; for creation by letters patent is almost altogether in use. 2 Inst. 48. The original of barons by writ, Camden refers to King Hen. 3. and barons by letters patent, or creation, commenced 13 R. 2. *Camb. Brit. pag. 109.* To these is added a third kind of barons, called *barons by tenure*, which are some of our ancient barons; and likewise the bishops, who by virtue of baronies annexed to their bishopricks, always had place in the lords house of parliament, as barons by creation. *Seager of Honour, lib. 4. cap. 13.*

There are also barons by office; as the barons of the Exchequer, barons of the Cinque Ports, &c. of which you may read under their proper titles. In antient records, the word *baron* included all the nobility of England, because regularly all noblemen were barons, though they had a higher dignity; and therefore the charter of King Ed. 1. which is an exposition of what relates to barons in *Magna Charta*, concludes *testibus archiepiscopis, episcopis, baronibus*, &c. And the great council of the nobility, when they consisted, besides earls and barons, of dukes, marquesses, &c. were all comprehended under the name of *le conseil de baronage*. *Glanv. cap. 4.* These barons have given them two ensigns to remind them of their duties; first, a long robe of scarlet, in respect whereof they are accounted *de magni robore regis*; and secondly, they are girt with a sword, that they should ever be ready to defend their king and country. 2 Inst. 5. A baron is *vir notabilis & principalis*: and the chief burghesses of London were in former times barons, before there was a lord mayor, as appears by the city seal, and their antient charters.—*Henricus 3. Rex. Sciatis nos concessisse & hac presenti charta*

charta nostra confirmasse baronibus nostris de civitate nostra London quod eligant sibi mayor de seipfis singulis annis, &c. Spelm. Gloss. The Earl palatines and marches of England had antiently their barons under them; but no barons but those who held immediately of the king were peers of the realm. 'Tis certain the king's tenants were called barons; as we may find in *Mat. Paris.* and other writers: and in days of old, all men were stiled barons; but this, We take it, was only a term in the law, not a title of nobility.

Barony, (baronia) Is that honour and territory which gives title to a baron; comprehending not only the fees and lands of temporal barons, but of bishops also who have two estates; one as they are spiritual persons, by reason of their spiritual revenues and promotions; the other grew from the bounty of our English kings, whereby they have baronies and lands added to their spiritual livings and preferments. The baronies belonging to bishops are by some called *regalia*, because *ex sola liberalitate regum eis olim concessa, & a regibus in feudum tenentur*. Blount. Barony, *Bracton* says, (*lib. 2. cap. 34.*) is a right indivisible; and therefore if an inheritance be to be divided among coparceners, though some capital messuages may be divided, yet *si capitale messuagium sit caput comitatus vel caput baroniae*, they may not be parcelled. In some cases a barony may be aliened, or entailed, and the honour pass accordingly. *Sed qu.* In antient times thirteen knights fees and a quartef made a tenure *per baroniam*, which amounted to 400 marks *per annum*.

Baronet, (baronetus) Is a dignity or degree of honour, which hath precedence before all knights, as knights of the bath, knights bachelors, &c. except *Bannerets*, made *sub vexillis regis in exercitu regali in aperto bello, & ipso rege personaliter presente*. This order of baronets was instituted by King James I. in the year 1611. with such precedence as aforesaid, and other privileges, &c. Their number at first was but two hundred; but now they are without limitation: they are created by patent with an *habendum sibi & heredibus masculis, &c.* And their dignity, on its first institution, was a kind of purchased honour, by men of great estates, qualified for titles.

Baron and feme, Are husband and wife, by our law; and they are adjudged but one person. Under this head must be considered,

I. *The legality of the marriage, and the nature of marriage contracts.*

II. *What acts and agreements of the wife before marriage bind the husband.*

III. *Of the husband's power over the person of his wife, and of her remedy for any injury done to her by him, and of actions by him for criminal conversation with her.*

IV. *Of his interest in her estate and property.*

V. *Where the husband shall be liable to the wife's debts contracted before marriage; and therein of a wife that is executrix or administratrix.*

VI. *Of her contracts during marriage, and how far the husband is bound by such contracts.*

VII. *Where she alone shall be punished for a criminal offence, and where the husband shall be answerable for what she does, in a civil action.*

VIII. *What acts done by the husband, or wife alone, or jointly with the wife, will bind the wife; and therein of her agreement or disagreement to such acts after the death of the husband.*

IX. *Where the husband and wife must join in bringing actions.*

X. *Where they must be jointly sued.*

XI. *Where a wife shall be considered as a feme sole.*

XII. *Of divorce, separate maintenance, and pin-money.*

I. **Marriage** is a compact between a man and a woman, for the procreation and education of children, which is to continue during both their lives; and it may be celebrated in a private house as well as in a church. 1 *New Abr.* 283.

Before the time of pope Innocent the Third, there was not any solemnization of marriage in the church; but the man came to the house where the woman inhabited, and led her home to his own house, which was all the cere-

mony then used. *Moor* 170. *Per Goldingham, Doctor of the Civil Law, arguendo.*

The age of consent to a marriage in an infant male is fourteen, and in a female twelve; but they may marry before; and if they agree to it when they attain these ages, the marriage is good; but they cannot disagree before then; also if one of them be above the age of consent, and the other under such age, the party so above the age may as well disagree as the other; for both must be bound or neither. *Co. Lit.* 33, 78, 79. 2 *Inst.* 454. *Inst.* 88, 89. 6 *Co.* 22. 7 *Co.* 43. 1 *Rel. Abr.* 340.

A man within the age of fourteen (his age of consent to marry) takes a woman to wife, they are *baron and feme*, so that he may have trespass *de muliere abducta cum bonis viri, &c.*

By the statute 32 *Hen. 8. cap. 38.* it is enacted, "That no reservation or prohibition (God's law excepted) shall trouble or impeach any marriage without the Levitical degrees, and that no person, of what estate, degree or condition soever he be, shall be admitted in any of the spiritual courts within the King's realm, or any his Grace's other lands and dominions, to any process, plea or allegation contrary to the statute." For the exposition of this statute, see *Co. Lit.* 24. a. 2 *Inst.* 684. See 25 *Hen. 8. c. 22.* 28 *Hen. 8. c. 7.* 28 *Hen. 8. c. 16.* Before which the ecclesiastical courts had the sole jurisdiction of matrimonial causes. See 13 *Ed. 1. the Stat. Circumspete agatis. Illob.* 181. *Co. Lit.* 235. 2 *Inst.* 683, 684. See *Vaugh.* 214. But if a man marries his cousin within the degrees, or his mother or sister, they continue husband and wife till a sentence of divorce be pronounced. 1 *Rel. Abr.* 340, 357.

By 6 & 7 *Will. 3. cap. 6.* By 7 & 8 *Will. 3. cap. 35.* By 10 *Ann. cap. 19.* Certain penalties were inflicted on parsons, &c. marrying persons without publication of bans or licence, as also on the man so married. And by 26 *Geo. 2. cap. 33.*

All bans of matrimony shall be published in an audible manner in the parish church, or in some publick chapel, in which bans of matrimony have been usually published, belonging to such parish or chapelry wherein the persons to be married dwell; upon three *Sundays* preceding the solemnization of marriage, during the time of morning service (or of evening service, if there be no morning service in such church or chapel upon any of those *Sundays*) immediately after the second lesson: and when the persons to be married dwell in divers parishes or chapelries, the bans shall be published in the church or chapel where each of them dwell; and where both or either of the persons to be married dwell in any extraparochial place having no church or chapel wherein bans have been usually published, then the bans shall be published in the parish church or chapel belonging to some parish or chapelry adjoining to such extraparochial place.

And in all cases where bans shall have been published, the marriage shall be solemnized in one of the parish churches or chapels where such bans have been published.

Sec. 2. No parson, vicar, minister, or curate, shall be obliged to publish bans of matrimony between any persons, unless the persons to be married shall seven days before the time required for the first publication of such bans, cause to be delivered to such parson, &c. a notice in writing of their christian and surnames, and of their respective abodes within such parish, chapelry, or extraparochial place, and of the time during which they have dwelt in such houses respectively.

Sec. 3. No parson, &c. solemnizing marriages between persons, both or one of whom shall be under the age of 21 years, after bans published, shall be punishable by ecclesiastical censures, for solemnizing such marriages without consent of parents or guardians, whose consent is required by law, unless such parson, &c. have notice of the dissent of such parents or guardians. And in case such parents or guardians, or one of them, publicly cause to be declared, in the church or chapel where the bans shall be so published, at the time of such publication, their dissent to such marriage, such publication of bans shall be void.

Sec. 4. No licence of marriage shall be granted by any person having authority to grant such licences, to solemnize any marriage in any other church or chapel, than in the parish church or publick chapel belonging to the parish or chapelry, within which the usual place of abode of one of the persons to be married shall have been for four weeks, immediately before the granting of such licence; or where both or either of the parties to be married dwell in an extraparochial place having no church or chapel wherein bans have been usually published, then in the parish church or chapel belonging to some parish or chapelry adjoining to such extraparochial place.

Sec. 5. All parishes where there shall be no parish church or chapel, or none wherein divine service shall be usually celebrated every Sunday, may be deemed extraparochial places for the purposes of this act.

Sec. 6. Nothing herein contained shall deprive the archbishop of Canterbury and his officers, of the right which hath hitherto been used in virtue of 25 Hen. 8. cap. 21. of granting special licences to marry at any convenient time or place.

Sec. 7. No surrogate deputed by any ecclesiastical judge, who hath power to grant licences of marriage, shall grant any such licence, before he hath taken an oath before the said judge faithfully to execute his office according to law to the best of his knowledge, and hath given security by his bond in the sum or 100*l.* to the bishop of the diocese, for the faithful execution of his office.

Sec. 8. If any person shall solemnize matrimony in any other place than a church or public chapel, where bans have been usually published, unless by special licence from the Archbishop of Canterbury; or shall solemnize matrimony without publication of bans, unless licence of marriage be first obtained from some person having authority to grant the same; every person wilfully so offending and convicted shall be adjudged guilty of felony, and be transported to some of his Majesty's plantations in America, for 14 years, according to the laws for transportation of felons. And all marriages solemnized in any other places than a church or public chapel, unless by special licence as aforesaid, or without publication of bans, or licence of marriage from a person having authority to grant the same, shall be void.

Sec. 9. All prosecutions for such felony shall be commenced within three years after the offence committed.

Sec. 10. After the solemnization of any marriage under a publication of bans, it shall not be necessary in support of such marriage to give any proof of the dwelling of the parties in the respective parishes or chapelries wherein the bans are published; or where the marriage is by licence, it shall not be necessary to give any proof that the usual place of abode of one of the parties, for four weeks as aforesaid, was in the parish church or chapelry where the marriage was solemnized; nor shall any evidence in either of the said cases be received to prove the contrary in any suit touching the validity of such marriage.

Sec. 11. All marriages solemnized by licence, where either of the parties, not being a widower or widow, shall be under the age of 21 years, which shall be had without the consent of the father of such of the parties so under age, if living, or if dead, of the guardians of the person of the party so under age, or one of them; and in case there be no such guardian, then of the mother, if living and unmarried; or if there be no mother living and unmarried, then of a guardian of the person appointed by the court of Chancery, shall be void.

Sec. 12. In case any such guardian or mother, or any of them, whose consent is made necessary, shall be *non compos mentis*, or beyond the seas, or shall refuse their consent to the marriage, it shall be lawful for any person desirous of marrying, in any of the before mentioned cases, to apply by petition to the Lord Chancellor, who is hereby empowered to proceed upon such petition in a summary way; and in case the marriage proposed appear proper, the Lord Chancellor shall judicially declare the same to be so by an order of court, and such order shall be deemed as good as if the guardian, or mother of the person so petitioning, had consented to such marriage.

Sec. 13. In no case shall any suit or proceeding be had in any ecclesiastical court, to compel a celebration of any marriage in facie ecclesiae, by reason of any contract

of matrimony, whether *per verba de presenti*, or *per verba de futuro*, entered into after the 25th of March 1754.

Sec. 14. The churchwardens and chapelwardens of every parish or chapelry shall provide books of vellum, or durable paper, in which all marriages respectively, there published or solemnized, shall be registered, &c.

Sec. 15. All marriages shall be solemnized in the presence of two witnesses, besides the minister who shall celebrate the same. And immediately after the celebration of every marriage, an entry thereof shall be made in such register, in manner and form as by the said act is prescribed.

Sec. 16. If any person shall with intent to elude this act, wilfully insert, or cause to be inserted, in the register book of such parish or chapelry, any false entry of any thing relating to any marriage; or falsly make, alter, forge, or counterfeit, or cause to be falsly made, &c. or assist in falsly making, &c. any such entry in such register; or falsly make, &c. or cause to be falsly made, &c. or assist in falsly making, &c. any such licence of marriage as aforesaid; or publish as true any such false, altered, forged, or counterfeited register, or a copy thereof, or any such false, &c. licence of marriage, knowing such register or licence of marriage respectively to be false, &c. or if any person shall wilfully destroy, or cause to be destroyed, any register-book of marriages, or any part of such register-book, with intent to avoid any marriage, or to subject any person to any of the penalties of this act; every person so offending, and being convicted, shall be adjudged guilty of felony, and shall suffer death.

Sec. 17. This act shall not extend to the marriages of any of the royal family.

Sec. 18. Nothing in this act shall extend to Scotland; nor to any marriages amongst Quakers, or amongst persons professing the Jewish religion, where both the parties to such marriage shall be Quakers, or persons professing the Jewish religion; nor to any marriage solemnized beyond the seas.

By the 13 *Sec.* of this statute the law for enforcing contracts in the spiritual court is altered.

But in these causes the temporal courts have given a remedy by action, for the breach of promise. *Cro. Eliz.* 79. *Carter* 273. In an action against husband and wife, the plaintiff declared that he promised to marry the defendant's wife whilst sole, and that she the same time promised to take him for her husband, and averred that he tendered himself, and that she refused, &c. It was objected, that marriage was no advancement to a man, though it was to a woman; also that no time was laid when this agreement was to be executed; but the court over-ruled both the objections. *Carth.* 467. *Harriſon* v. *Cage et ux.* 1 *Salk.* 24. *S. C.* See 2 *Salk.* 437, 438. If a man and an infant at the age of fifteen, promise to intermarry, and the man refuses, and after marries another, she may, notwithstanding her infancy, maintain an action; for this is a contract which she may at these years enter into, being for her advantage; and though it may be voidable as to her, yet it is good against the man, who must be presumed to have acted with as much caution as if he had contracted with a person of full age. *Trin.* 5 *Geo.* 2. adjudged between *Holt* and *Ward.* Note; By the statute of *frauds* and *perjuries*, these contracts must be reduced into writing. That is contracts in *consideration of marriage* (if not to be performed within one year). But mutual promises to marry, each are not within the statute of *frauds* and *perjuries*. Vide 1 *Str.* 34. — Also see 1 *Lord Ray.* 316. 2 *Shew.* 16. *Skin.* 142, 143. 2 *Mod.* 310.

A wife cannot be a witness against or for her husband, nor he against or for her, (except in case of high treason), because they are *duae animae in una Carne.* 1 *Nels. Abr.* 349. At common law a man could neither in possession, reversion or remainder, limit an estate to his wife; but by *Stat.* 27 *H.* 8. A man may covenant with other persons to stand seised to the use of his wife; or may make any other conveyance to her use, but he may not covenant with his wife to stand seised to her use, for they are one person in law. A man may devise lands by will to his wife, because the devise doth not take effect till after his death. *Co. Litt.* 112.

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A wife

A wife cannot devise lands to her husband: for a *feme covert* cannot make a will, as she is so entirely under the power of her husband, that what she doth cannot be called her will. *Nelf. Abr.* 347.

If a man takes *A. S.* to wife, *per duress*, though marriage be solemnized *in facie ecclesiæ*, yet it is merel void; and they are not baron and feme, because there is not any consent; and it cannot be a marriage without consent. *1 Rel. Abr.* 340.

II. As to the acts and agreements of the wife before marriage binding the husband.

By the marriage the husband and wife become one person in law, and therefore such an union works an extinguishment or revocation of several acts done by her before the marriage; and this not only for the benefit of the husband, but likewise of the wife, who, if she were allowed at her pleasure to rescind and break through, or confirm several acts, might be so far influenced by her husband, as to do things greatly to her disadvantage. *4 Co. 60. 5 Co. 10. Kelw. 162. Co. Lit. 55. Heil. 72. Cro. Car. 304.*

But in things which would be manifestly to the prejudice of both husband and wife, the law does not make her acts void; and therefore if a feme sole makes a lease at will, or is lessee at will, and afterwards marries, the marriage is no determination of her will, so as to make the lease void; but she herself cannot without the consent of her husband determine the lease in either case *5 Co. 10.*

So where a warrant of attorney was given to confess judgment to a feme sole; and the court gave leave, notwithstanding the marriage, to enter up judgment, so that the authority shall not be deemed to be revoked or countermanded, because it is for the husband's advantage; like a grant of a reversion to a feme sole, who marries before attornment, yet the tenant may attorn afterwards; otherwise if a feme sole gives a warrant of attorney, and marries, for that is to charge the husband. *1 Salk. 117, 399.*

But if a feme sole makes her will, and devises her land to *J. S.* and afterwards marries him, and then dies, yet *J. S.* takes nothing by the will, because the marriage was a revocation of it; for as the law will not allow a woman under coverture to make a will, lest she should be influenced by her husband in the disposition of her estate; so for the same reason a will made by a feme sole is countermanded by the marriage, lest she should be influenced by her husband (if it continued after the coverture) to revoke it, or let it stand, as it best answered his interest. *4 Co. 60.*

Agreements between baron and feme before marriage, are by the marriage generally extinguished: but if a person, in consideration of marriage, promise to leave his wife worth so much at his death, this being no duty in the life-time of the husband, is not extinguished by the Marriage. *Cro. Jac. 571, 623.*

A man enters into a bond to his intended wife, conditioned to leave her 1000*l.* the husband mortgaged his estate, and died, not leaving personal assets to discharge the bond; and it was decreed in equity, that though the bond was void by law, being extinguished by the marriage, yet it should be made good in equity; and that the wife might redeem and hold the land till she was satisfied her debt. *2 Vern. 480.*

Also equity will set aside the intended wife's contracts, though legally executed, when they appear to have been entered into with an intent to deceive the husband, and are in derogation of the rights of marriage; as where a widow made a deed of settlement of her estate, and married a second husband, who was not privy to such settlement; and it appearing to the court, that it was in confidence of her having such estate that the husband married her, the court set aside the deed as fraudulent; so where the intended wife, the day before her marriage, entred privately into a recognizance to her brother, and it was decreed to be delivered up. See *2 Chan. Rep. 79, 81. 2 Vern. 17.*

But where a widow, before her marriage with a second husband, assigned over the greatest part of her estate to

trustees for children by her former husband; and though it was insisted that this was without the privy of the husband, and done with a design to cheat him, yet the court thought, that a widow might thus provide for her children before she put herself under the power of a husband; and it being proved that 8000*l.* was thus settled, and that the husband had suppressed the deed, he was decreed to pay the whole money, without directing any account. *1 Vern. 408.*

A woman being married agreed with her husband, that she should have power to act as a feme sole notwithstanding that marriage; the husband died, and she married another husband, who was not privy to the settlement on the former marriage. It was decreed, that the second husband should not be bound by that settlement on the former marriage. *2 Vern. 17, 18.*

A. before marriage with *M.* agrees with *M.* by deed in writing, that she, or such as she should appoint should, during the coverture, receive and dispose of the rents of her jointure, by a former husband, as she pleased. *Per cur.* The aforesaid agreement with the feme herself before marriage, was by the marriage extinguished. *Chan. Ca. 21.*

The baron before marriage articulated with the feme to make a settlement of certain lands, before the marriage should be solemnized; but they intermarried before the settlement. Then the baron died; and on a bill by the widow for an execution of the articles, it was decreed against the heir at law of the baron; who objected, that marrying before the execution of the settlement was a waiver of the articles, and the benefit of them; and she being the only party with whom they were made, her marriage with the other party before performance was a release in law. *2 Vent. 343.*

Upon a treaty of marriage the man gave a bond to the woman, condition'd that if he did permit her to dispose of 100*l.* then the bond should be void. Afterwards the marriage took effect, so that the bond became void, yet this was held to be a good agreement; and the court decreed, that the husband should give bond to trustees with the same condition; it was held, that a bill may be exhibited by her *prochein amy*; or if trustees exhibit a bill for or on her behalf, it is good either way. *2 Freem. Rep. 205.*

III. As to the power of the husband over the wife's person, &c.

By marriage the husband hath power over his wife's person; and he may correct his wife. *Dalt. 284.* But if he threaten to kill her, &c. she may make him find surty of the peace, by suing a writ of *supplicavit* out of Chancery or by preferring articles of the peace against him in the court of King's Bench, or she may apply to the Spiritual Court for a divorce *propter sevitiam*. *Crom. 28, 136. F. N. B. 80. Heil. 149. cont. 1 Sid. 113, 116. Dalt. c. 68. Lamb. 7. Crom. 133.*

But a wife cannot, either by herself or her *prochein amy* bring a *homine replegiando* against her husband, for he has by law a right to the custody of her, and may, if he think fit, confine her, but he must not imprison her; if he does, it will be good cause for her to apply to the spiritual court for a divorce *propter sevitiam*; and the nature and proceedings in the writ *de homine replegiando* shew that it cannot be maintained by the wife against her husband. *Prec. in Ch. 492.*

With regard to actions by the husband for criminal conversation with his wife.

Licence by husband to the wife to lie with another man, cannot be pleaded in bar to an action of trespass by the husband; nor that she was a *notorious lewd woman*; but these matters may be given in mitigation of damages. *12 Mod. 232.* On licence proved, he ought to recover, not being damnified.

If adultery be committed with another man's wife without any force, but by her own consent, though the husband may have assault and battery, and lay it *vi & armis*; yet they shall in that case punish him below for that very offence; for an indictment will not lie for such an assault and battery; neither shall the husband and wife join in an action at Common law; and therefore they proceed below either civilly, that is, to divorce them, or criminally, because they were not criminally prosecuted above; and the true action for the husband in such case

is a *ſerial action*, quia the defendant uxorem rapuit, and not to lay it, *per quod consortium amiſit*; *per Holt Ch. J* and *per cur.* accordingly; for that the offence is not merely ſpiritual. 7 *Mod.* 81.

IV. Of the husband's intereſt in her eſtate, &c.

He hath likewiſe power over his wife's eſtate; and if ſhe hath a fee, he gaineth a freehold in her right; he alſo gaineth her chattels real, as terms for years, &c. and all chattels perſonal, in poſſeſſion of the wife, are the husband's: but where the wife is out of poſſeſſion, or is poſſeſſed only as executrix, or the chattels are debts and things in action, if they are not recovered by him and his wife, the husband ſhall not have them. 1 *Inſt.* 299, 351. Though money charged on lands, is not in nature of a *choſe in action*, but of rent, and is given to the husband by the intermarriage. 1 *Chan. Rep.* 189. The law gives the husband an abſolute power of diſpoſing of her perſonal property, no act of her's being of any force to affect or transfer that, which by the intermarriage ſhe has reſigned to the husband; but the freehold and inheritance of the wife, is ſubject to other rules and regulations; for the husband by the marriage does not become abſolute proprietor of the inheritance, but as the governor of the family is ſo far maſter of it as to receive the profits of it during her life, but has no power to make an abſolute ſale of it without her conſent. 10 *Co.* 42. 2 *Inſt.* 510 1 *Sid.* 11. 1 *Roll. Abr.* 347.

If lands be given to a man, and ſuch a woman who ſhall be his wife, the man ſhall have the whole: but if a feoffment be made to the uſe of the feoffee, and his wife that ſhall be, the wife he afterwards marries ſhall take jointly with him. 1 *Rep.* 101. If *baron and feme* are jointenants for years, the *baron* may diſpoſe of the whole: and if the *baron* hath a term in the right of his *feme*, he may grant over the whole. 1 *Danv.* 702. But he cannot diſpoſe of it by will, if he doth not ſurvive her. 1 *Inſt.* 46, 184. And as the husband ſurviving the wife ſhall enjoy her term, againſt her executors: ſo if the wife ſurvive her husband, ſhe ſhall have her term for years, or other chattels real again, if the husband hath not altered the property. 1 *Inſt.* 351. And if the husband charges the chattel real of his wife with a rent, &c. if ſhe ſurvives him, it will not bind her: for ſhe ſhall hold it diſcharged, as ſhe comes in paramount the charge.

A husband poſſeſſed of a term in his wife's right, may make a leaſe for years of the land, rendering rent to his executors or aſſigns, to commence after his death. 1 *Nelf. Abr.* 344. But if a leaſe be conveyed by a *feme ſole*, in truſt for the uſe of herſelf, if ſhe afterwards marries, it cannot be diſpoſed of by the husband: If ſhe dies, he ſhall not have it, but the executors of the wife. *March* 44. See 2 *Vern.* 270. A legacy is given to a *feme ſole* to be paid preſently, or at a day to come, if ſhe marry and die, before any releaſe or diſpoſal thereof by her husband; in that caſe, her executor or adminiſtrator, it has been held, ſhall have it: and if a promiſe, or bond be to *feme*, or the *baron and feme*, and the husband dies before he recovers, or releaſes the ſame, the wife, and not his executors, ſhall be intitled to it. *F. N. B.* 121. 7 *Hen.* 6. 2. *Mich.* 17 *Jac.* 1. A man and his wife covenanted by indenture, but the wife did not ſeal it; and it was held, that if the *baron* ſealed and delivered it in the name of the *feme*, it would be the deed of the wife, during the life of the husband: but if land is given to husband and wife, and the heirs of their two bodies, and the husband alone ſuffer a common recovery; this will not bind the eſtate tail, although the husband ſurvive his wife. 1 *Cro.* 769. 3 *Rep.* 5, 34.

The wife ſhall be received to defend her right, on the default of the husband, and he cannot prejudice his wife, as to her freehold and inheritance. *Fent. Cent.* 79. A husband cannot alien the wife's lands but by *fine* wherein ſhe joins; if he doth, ſhe may recover them after his death by *Cui in vita*. And by ſtatute, where a husband makes leaſes of his wife's lands, for twenty-one years, &c. ſhe is to be made a party, and the rent reſerved to husband and wife, and the heirs of the wife, &c. This is of leaſes of lands of the wife's inheritance. *Stat.* 32 *H.* 8. *cap.* 28. If a *feme* having a rent for life takes husband, the *baron* ſhall have action of debt for the rent incurred

during the coverture, after the death of the *feme*. 1 *Danv.* 719. And arrears due in the life-time of the husband, after his death, ſhall ſurvive to the wife, if ſhe outlives him, and her adminiſtrators after her death. 2 *Lut.* 1151. A *feme* leſſee for life, rendering rent, takes husband and dies, the *baron* ſhall be charged in action of debt for the rent which was grown due during the coverture, becauſe he took the profits out of which the rent ought to iſſue. *Keilw.* 125. *Raym.* 6. But if ſuch a *feme* leſſee takes *baron* and dies, 'tis ſaid the *baron* ſhall not be charged for waſte during the coverture; for he was never leſſee. 1 *Danv.* 718. If a leaſe is made to *baron and feme*, and the husband dies, and the wife accepts of the land, though ſhe may be obliged to pay the rent, or to perform a condition on the part of the leſſor; yet ſhe is not bound to perform collateral covenants, as to do no waſte, or to repair houſes, &c. 1 *Brownl.* 31. But in either of theſe caſes, we conceive for waſte, &c. action on the caſe will lie.

Where a ſtatute or obligation is made to a *baron and feme*, or to her during coverture; the husband only can make a defeaſance of it, and conclude the wife. 1 *Inſt.* 351.

If a *feme* covert ſues a woman in the ſpiritual court for adultery with her husband, and obtains a ſentence againſt her, and coſts, the husband may releaſe theſe coſts, for the marriage continues, and whatever accrues to the wife during coverture, belongs to the husband; *per Holt Ch. Juſt.* on motion for prohibition. 1 *Salk.* 115.

But if the husband and wife be divorced *a menſa & thoro*, and the wife has her alimony, and ſues for defamation or other injury, and there has coſts, and the husband releaſes them, this ſhall not bar the wife, for theſe coſts comes in lieu of what ſhe hath ſpent out of her alimony, which is a ſeparate maintenance, and not in the power of her husband. 1 *Roll. Rep.* 426. 3 *Bulſt.* 264. 1 *Roll. Abr.* 343. 2 *Roll. Abr.* 293. 1 *Salk.* 115.

A legacy was given to a *feme* covert, who lived ſeparate from her husband, and the executor paid it to the *feme*, and took her receipt for it; yet on a bill brought by the husband againſt the executor, he was decreed to pay it over again, with intereſt. 1 *Vern.* 261.

V. In regard to debts contracted by the wife before marriage.

If a *feme ſole* indebted takes husband; it is then the debt of the husband and wife, and both are to be ſued for it; but the husband is not liable after the death of the wife, unleſs there be a judgment againſt both during the coverture. 1 *Roll. Abr.* 351. Where there is judgment againſt a *feme ſole*, who marries and dies, the *baron* ſhall not be charged therewith: though if the judgment be had upon *ſcire facias* againſt *baron and feme*, and then the *feme* dies, he ſhall be charged. 3 *Mod.* 186. In action brought againſt a *feme ſole*, if pending the action ſhe marries, this ſhall not abate the action; but the plaintiff may proceed to judgment and execution againſt her, according as the action was commenced. 1 *Lill.* 217. *Trin.* 12 *W.* 3. And if *habeas corpus* be brought to remove the cauſe, the plaintiff is to move for a *procedendo* on the return of the *habeas corpus*: alſo the court of *B. R.* may reſuſe it, where brought to abate a juſt action. *Salk.* 8.

In general the husband is liable to the wife's debts contracted before marriage, whether he had any portion with her or not; and this the law preſumes reaſonable, becauſe by the marriage the husband acquires an abſolute intereſt in the perſonal eſtate of the wife, and has the receipt of the rents and profits of her real eſtate during coverture; alſo whatever accrues to her by her labour, or otherwiſe, during the coverture, belongs to the husband; ſo that in favour of creditors, and that no perſon's act ſhould prejudice another, the law makes the husband liable to thoſe debts with which he took her attached. *F. N. B.* 265. 20 *Hen.* 6. 22. *b.* *Moor* 468. 1 *Roll. Abr.* 352. 3 *Mod.* 186.

If *baron and feme* are ſued on the wife's bond, entered into by the *feme* before marriage, and judgment is had thereupon, and the wife dies before execution, yet the husband is liable; for the judgment has altered the debt. 1 *Sid.* 337.

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When *baron and feme* are sued, the husband must make an attorney for himself and his wife. If a wife be arrested, she shall be discharged on common bail, let the cause of action be what it will: but if *baron and feme* be arrested, the husband shall not be discharged, unless he give bail for his wife as well as himself. *Mod. Caf. 17.* If judgment be against husband and wife, he dies, and she survives, execution may be against her. *1 Rol. Abr. 890. l. 10, 56.*

Where a man marries a *widow executrix, &c.* her evidence shall not be allow'd to charge her second husband with more than she can prove to have actually come to her hands. *Agreed per cur. Abr. Eq. Ca. 227. Hil. 1-19.*

If *feme executrix* takes *baron*, and afterwards she releases debt of the testator by deed in her own name, this is good, for she represents the testator; *per Littleton*, but *Cook contra* without her *baron*. *Br. Coverture, pl. 52.*

D. confessed a judgment to F. who made his wife, the plaintiff, executrix and died; she administrated and married a second husband, and then she alone, without her husband, acknowledged satisfaction, though no real satisfaction was made. The court held that this was not good. *Sid. 31.*

A wife *administratrix* under 17 shall join with her husband in an action; *per Twissden J. Mod. 297.*

It was said, that if a *feme* be made *executrix* who does not administer, and she takes *baron*, the *baron* may administer for him and his *feme*, and prove the testament, &c. and there release of the *baron* is good. *Br. Executors, pl. 147.*

If a *feme executrix* takes *baron*, and he releases all actions, this shall be a bar during the coverture without question; by the justices. But *Choke* doubted if it shall be a bar after the death of the *baron*; but *per Pigot*, once extinct is for ever. *Br. Releases, pl. 29.*

If a *feme executrix* take *baron*, and the *baron* puts himself in arbitrement for debt of the testator, and award is made, and the *baron* dies, the *feme* shall be barred; *per tot' cur'.* *Brook* says, that from hence it seems to him, that the release of the *baron* without the *feme* is a good bar against the *feme*; *quod conceditur, anno 39 H. 15.* and therefore there be excepted those debts in his release, otherwise they had been extinct. *Br. Releases, pl. 79.*

A *feme executrix* takes *baron*, and they bring debt as executors, and have judgment; the defendant pleaded *outlawry of the husband* in bar; but *per cur.* Clearly the husband forfeits nothing of the goods which the wife hath as *executrix*; and judgment for the plaintiff. *3 Bulst. 210.*

The possession of the wife as *executrix*, is also the possession of her *baron*, and damages recovered in trover of them, shall be to the estate of testator, and so may concern them both. *Sty. 48.*

Obligee made his wife executrix. She married a second husband, who became bankrupt, and the commissioners assigned this debt. But by *Holt Ch. J.* they have no power to assign any thing but what is the bankrupt's estate, and if the wife dies before assignment by him, there must be an administration *de bonis non*. His power to dispose of her estate does not make a title in him; and though he may dispose of a term which he has in *jure uxoris*, yet if he becomes a bankrupt, the commissioners cannot assign over this estate; and by *Powell J.* they have nothing to do with the debts of the testator, but only with the debts of the bankrupt. *Holt's Rep. 104, 105.*

Where the wife has debts or duties due to her, she cannot, by making another person executor, preclude her husband from that benefit which to him should appertain as administrator of her goods. *West. Off. Ex. 200.*

But where they belong to her as *executrix*, no benefit can redound to the husband by having such administration of his wife's goods; for those should go to the next of kin of the wife's testator, who must take administration *de bonis non* of such testator, if she has no executor, and therefore her making executors touching these brings no prejudice to her *baron*, and so is out of the reason of the case of *Ognell v. Underhill and Appleby, West. Off. Ex. 200.*

Where the wife is *executrix* and *legatee*, if she claims as *executrix*, and dies, if the second *baron* would have advantage of it, he must take letters of administration *de bonis non* of the first husband, and not of the wife; but if

she had claimed the land and the term in it as *legatee*, and had not been in possession, administration taken of the rights and debts of the wife had been good as to that intent, tho' his wife was not actually possess'd of it, but only had a right unto it, and of such things in action the husband might be executor or administrator to his wife; and if the *baron* takes administration differently, and brings action, he will be nonsuit, and if the wife before election marries, the *baron* may make the election. *Leq. 216. pl. 298. Mich. 32 & 33 Eliz. C. B. in case of Cheyney v. Smith.*

If a man marries an administratrix to a former husband, who in her widowhood wasted the assets of her intestate, the husband is liable to the debts of the intestate, during the life of the wife; and this shall be deemed a *devastavit* in him. *Cro. Car. 603.*

VI. In regard to her contracts during marriage.

Every gift, grant, or disposition of goods, lands, or other thing whatsoever, and all obligations and feoffments made by a *feme covert*, without her husband's consent, are void. *1 H. 5. 125. Fitz. Covert. 18.*

But the husband is obliged to maintain his wife in necessaries: yet they must be according to his degree and estate, to charge him; and necessaries may be suitable to a husband's degree of quality, but not to his estate; also they may be necessaries, but not *ex necessitate* to charge the husband. *1 Mod. 129. 1 Nels. Abr. 354.* If a woman buys things for her necessary apparel, though without the consent of the husband, yet her husband shall be bound to pay for it. *Brownl. 47.* And if the wife buys any thing for herself, children, or family, and the *baron* does any act precedent or subsequent whereby he shews his consent, he may be charged thereupon. *1 Sid. 120.* Though a wife is very lewd, if she cohabits with her husband, he is chargeable for all necessaries for her, because he took her for better for worse: and so he is if he runs away from her, or turns her away: but if she goes away from her husband, then as soon as such separation is notorious, whoever gives her credit doth it at his peril, and the husband is not liable, unless he take her again. *1 Salk. 119.* Although a husband be bound to pay his wife's debts for her reasonable provision, yet if she parts from him, especially by reason of any misbehaviour, and he allows her a maintenance, he shall never after be charged with her debts, till a new cohabitation: but if the husband receive her, or come after her, and lie with her but for a night, that may make him liable to the debts. *Pasch. 3 Ann. Mod. Caf. 147, 171.* And if there be an agreement in writing between husband and wife to live separate, and that she shall have a separate maintenance, it shall bind them both till they both agree to cohabit again; and if the wife is willing to return to her husband, she may; but it has been adjudged that the husband hath no coercive power over the wife to force her, though he may visit her, and use all lawful means in order to a reconciliation. *Mich. Geo. 1. Mod. Caf. in L. & E. 22.* *Sed quare* as to her power to return. Where there is a separation by consent, and the wife hath a separate allowance, those who trust her do it upon her own credit. *1 Salk. 116.* If a husband makes his wife an allowance for clothes, &c. which is constantly paid her, 'tis said he shall not be charged. *1 Sid. 109.* And if he forbids particular persons to trust her, he will not be chargeable: but a prohibition in general, by putting her in the news-papers, is no legal notice not to trust her. *1 Vent. 42.*

The *baron* in an account shall not be charged by the receipt of his wife, except it came to his use. *1 Danv. 707.* Yet if she usually receives and pays money, it will bind him in equity. *Abr. Caf. Eq. 61.* For goods sold to a wife, to the use of the husband, the husband shall be charged, and be obliged to pay for the same. *Sid. 425.*

If the *baron* is beyond sea in any voyage, and during his absence the wife buys necessaries, this is a good evidence for a jury to find that the *baron* assumpsit. *Sid. 127.*

But such evidence is only presumptive, and not conclusive evidence, and therefore the jury in such case finding it specially, the court cannot give judgment against the *baron*; for their being necessaries and the employment, with the residue of the special circumstances, is only matter of evidence, upon which the jury should proceed to ascertain

ascertain the fact, whether the baron promised or not. *Sid.* 127. in case of *Manby v. Scott*.

And the baron might contradict such presumptive evidence by other proofs; as that he gave her ready money to buy, &c. *Sid.* 127. in case of *Manby v. Scott*.

If the wife pawns her cloaths for money, and afterwards borrows money to redeem them, the husband is not chargeable unless he were consenting, or that the first sum came to his use. 2 *Shou.* 283.

If a wife takes up clothes, as silk, &c. and pawns them before made into clothes, the husband shall not pay for them, because they never came to his use; otherwise if made up and worn, and then pawn'd; per *Holt Ch. J.* at *Guildhall.* 1 *Salk.* 118.

A wife may use the goods of her husband, but she may not dispose of them: and if she takes them away, it is not felony, for she cannot by our law steal the goods of her husband; but if she delivers them to an adulterer, and he receives them, it will be felony in him. 3 *Inst.* 308, 310.

VII. As to crimes committed by the wife.

The will of the wife is subject to that of the husband; so that if they commit a felony together, she shall be neither principal nor accessory: and if a wife doth damage to another, she can make no satisfaction during the coverture, but the husband must do it. *F. N. B.* 188.

But if husband and wife commit treason or murder, they shall be both found guilty; and the wife shall not be discharged, on presumption it was by coercion of the husband. 1 *Hale's Hist. P. C.* 47. And a wife for her own crimes, may be indicted without her husband; and she may sue and be sued without her husband, in the spiritual court. 9 *Rep.* 72. 2 *Roll. Abr.* 298. So if she commit a theft of her own voluntary act, or by the bare command of her husband, she is punishable as much as if she was sole. *H. P. C.* 65. *Dalt.* 104. 27. *Aff. pl.* 40. *Fitz. Coron.* 199.

A man must answer for the trespasses of his wife: if a feme covert slander any person, &c. the husband and wife must be sued for it, and execution is to be awarded against him. 11 *Rep.* 62. But where a feme covert commits a trespass *vi & armis*, and action is brought against baron and feme, if the jury find the wife guilty, and the husband not; here the wife shall be imprisoned, until the husband pays the fine. *Tenck. Cent.* 23.

A feme covert generally shall answer as much as if she were sole, for any offence not capital against the Common law or statute; and if it be of such nature, that it may be committed by her alone, without the concurrence of her husband, she may be punished for it without the husband, by way of indictment, which being a proceeding grounded merely on the breach of the law, the husband shall not be included in it for any offence to which he is no way privy. 9 *Co.* 71. *Hauk.* *P. C.* 3. See *Moor* 813. *Hob.* 93. *Noy* 103. *Savil* 25. *Cro. Jac.* 482. 11 *Co.* 61.

A feme covert lent 20*l.* to be paid at 20*s.* by the week, and one shilling and sixpence interest; the borrower paid the interest, which amounted to 30*s.* which the wife exacted and received; and this appearing on evidence, in an action brought by the husband for the money, *Holt Ch. J.* ruled it to be an usurious contract by the husband, sufficient to discharge and avoid the obligation civiliter, though not sufficient to charge the husband criminaliter. *Skin.* 348.

If the wife incur the forfeiture of a penal statute, the husband may be made a party to an action or information for the same, as he may be generally to any suit for a cause of action given by his wife, and shall be liable to answer what shall be recovered thereon. See 1 *Hauk.* *P. C.* 3. and the authorities there cited.

If a feme covert pretending herself to be sole, marries a second husband, he shall have no action against the first, because this action is founded on the communication and contract of the wife, which will not bind the husband; besides this is felony. 1 *Sid.* 375. 1 *Lev.* 237.

Husband and wife may be found guilty of *larceny*, *battery*, &c. and the reason why in *burglary*, *larceny*, &c. she is excused, is, because she could not tell what property the husband might claim in the goods. *Arg.* 10 *Mod.* 63

Husband and wife were indicted for keeping a *bawdy-house* and *procuring lewdness*. The court held the indictment good, and said, that keeping the house does not necessarily import property, but may signify that share of government which the wife has in a family as well as the husband. 10 *Mod.* 63.

Husband and wife were indicted for keeping a *common gaming-house*, and held good, and compared it to the case of *Queen v. Williams*; for as there the wife may be concerned in acts of bawdry, so here she may be active in promoting gaming, and furnish the guests with all conveniencies for the purpose. 10 *Mod.* 335.

VIII. Of acts done by one or both jointly or severally, &c.

At Common law, any alienation made by the husband of the wife's land, whether by feoffment, fine or recovery, was a discontinuance, and after his death she was put to her *cuius vita*, to reinstate herself; but now by the statute 32 *H. 8. cap.* 28. it is provided, That no fine levied by the husband alone, of lands, being the freehold and inheritance of the wife, shall in any wise be or make a discontinuance, or be otherwise prejudicial to her or her heirs, but that the wife and her heirs shall and may lawfully enter into the said lands, according to their rights and titles therein. 2 *Inst.* 681.

A wife is *sub potestate viri*, and therefore her acts shall not bind her, unless she levy a fine, &c. when she is examined in private, whether she doth it freely, or by compulsion of the husband: if baron and feme levy a fine, this will bar the feme: and where the feme is examined by writ, she shall be bound; else not. 1 *Darv. Abr.* 708. Therefore where baron and feme acknowledge a deed to be inrolled, or a statute, &c. this will not bind the feme, because she is not examined by writ.

If a common recovery be suffered by husband and wife of the wife's lands, this is a bar to the wife; for she ought to be examined upon the recovery. *Pl. Com.* 514. & 10 *Co.* 43. a. 1 *Roll.* 347. l. 19. *Vide post*, this division.

So if husband and wife are vouches in a common recovery, the recovery shall be a bar, tho' the wife be not examined; for tho' it be proper that she be examined, yet that is not necessary, and is frequently omitted. *Dist.*

Sid. 11. per *Roll. Sti.* 319, 320.

A wife is disabled to make contracts, &c. 3 *Inst.* 110. And if a married woman enters into bond as feme sole, if she is sued as feme sole, she may plead *Non est factum*, and the coverture will avoid her bond. 1 *Lill. Abr.* 217. A feme covert may plead *non assumptis*, and give coverture in evidence, which makes it no promise, &c. *Raym.* 395.

In case money be due to the husband by bill or bond, or for rent on a lease, and it is paid to the wife; this shall not prejudice him, if after payment he publicly disagrees to it. 19 *Jac.* 1. *B. R.* 2 *Shep. Abr.* 426.

If a feme covert levies a fine of her own inheritance without her husband, this shall bind her and her heirs, because they are estopped to claim any thing in the land, and cannot be admitted to say she was covert against the record; but the husband may enter and defeat it, either during the coverture, to restore him to the freehold he held *jure uxoris*, or after her death, to restore himself to his tenancy by the courtesy, because no act of a feme covert can transfer that interest which the intermarriage has vested in the husband; and if the husband avoids it during the coverture, the wife or her heirs shall never after be bound by it. *Bro. Tit. Fines.* 33. 10 *Co.* 43. *Hob.* 225. 7 *Co.* 8. *Co. Lit.* 46.

If a man leases to baron and feme for years rendering rent, and dies, the feme shall be bound by it; contrary of other collateral covenants. *Br. Baron and Feme.* pl. 78.

Lease made by baron and feme shall be said to be the lease of them both, till the feme disagrees, which she cannot do in the life of the baron, and waste lies by both. *Br. Agrum.* pl. 6.

A man was infeoffed to the use of a feme sole, who took an husband. They both for money sell the land to B. who pays it to the wife, and she and her husband do pray the feoffee to make estate to B. Afterwards her husband dies. Now, by the Chancellor and all the justices. H h she

she shall have aid against the first feoffee by subpoena, to satisfy her for the land; and if the second feoffee were confusant, a subpoena shall be against him for the land; for all that the wife did during her coverture (as they said) shall be taken to be done for fear of the husband *Cary's Rep.* 18, 19.

Fine by E. to the use of himself for life, remainder to his wife that should be at the time of his death, for life; remainder to the son of E. in tail. E. took to wife A. A fine levied by E. and A. his wife, who afterwards survived him, and other uses declared, is no bar to her, because it was uncertain who would be the person; but had the person been certain, there perhaps, notwithstanding it was but a possibility, it might have been a bar; per *Walmesley J.* *Cro. E.* 826. pl. 31.

The examination of a feme covert is not always necessary in levying of fines, because that being provided that she may not at the instance of her husband make any unwary disposition of her property, it follows, that when the husband and wife do take an estate by the fine, and part with nothing, the feme need not be examined; but where she is to convey or pass any estate or interest, either by herself or jointly with her husband, there she ought to be examined; therefore if A. levies a fine come ceo to baron and feme, and they render to the conuzor, the feme shall be examined; so it is where she takes an estate by the fine, rendering rent. 2 *Inst.* 515. 2 *Rel. Abr.* 17.

If baron and feme by fine *sur concessit* grant land to J. S. for 99 years, and warrant the said land to J. S. during the said term, and the baron dies, and J. S. is evicted by one that hath a prior title, he may thereupon bring covenant against the feme, notwithstanding she was covert at the time when the fine was levied. 2 *Saund.* 177. 1 *Sid.* 466. S. C. 1 *Mod.* 290. 2 *Keb.* 684, 703.

A recovery, as well as a fine by a feme covert, is good to bar her, because the *præcipe* in the recovery answers the writ of covenant in the fine, to bring her into court, where the examination of the judges destroys the presumption of the law, that this is done by the coercion of the husband, for then it is to be presumed they would have refused her. 10 *Co.* 43. 2 *Rel. Abr.* 395. *Vide ante* this division.

If a husband disseise another to the use of his wife, this does not make her a disseisee, she having no will of her own, nor will any agreement of hers to the disseisin during the coverture, make her guilty of the disseisin, for the same reason; but her agreement after her husband's death will make her a disseisee, because then she is capable of giving her consent, and that makes her tenant of the freehold, and so subject to the remedy of the disseisee. 1 *Rel. Abr.* 660. *Bro. Disseisin* 67.

But if a feme covert actually enters and commits a disseisin, either sole or together with her husband, then she is a disseisee, because she thereby gains a wrongful possession; but such actual entry cannot be to the use of her husband or a stranger, so as to make them disseisors, because though by such entry she gains an estate, yet she has no power of transferring it to another. *Co. Lit.* 357. 1 *Rel. Abr.* 660. *Bro. Disseisin* 15, 67. Sec 8 *Hen.* 6. 14. cont.

If the husband seised of lands in right of his wife, makes a lease thereof for years by indenture or deed poll, reserving rent; all the books agree this to be a good lease for the whole term, unless the wife by some act after the husband's death, shews her dissent thereto, for if she accepts rent which becomes due after his death, the lease is thereby become absolute and unavoidable; the reason whereof is, that the wife, after her intermarriage, being by law disabled to contract for, or make any disposition of her own possessions, as having subjected herself and her whole will to the will and power of her husband; the law therefore transfers the power of dealing and contracting for her possessions to the husband, because no other can then intermeddle therewith, and without such power in the husband, they would be obliged to keep them in their own manurance or occupation, which might be greatly to the prejudice of both; but to prevent the husband's abusing such power, and lest he should make leases

to the prejudice of his wife's inheritance, the law has left her at her liberty after his death, either to affirm and make good such lease, or defeat and avoid it, as she finds it subservient to her own interest; and this she may do, though she joined in such lease, unless made pursuant to statute 32 *Hen.* 8. cap. 28. *Bro. Acceptance* 10. *Bro. Leases* 24. *Cro. Jac.* 332. 2 *And.* 42. *Co. Lit.* 45. *Plow.* 137. *Cro. Jac.* 563. *Yelv.* 1. *Cro. Eliz.* 769.

Husband and wife make a lease for years, by indenture, of the wife's lands, reserving rent; the lessee enters; the husband before any day of payment dies; the wife takes a second husband, and he at the day accepts the rents, and dies; and it was held, that the wife could not now avoid the lease, for by her second marriage she transferred her power of avoiding it to her husband, and his acceptance of the rent binds her, as her own act before such marriage would have done; for he by the marriage succeeded into the power and place of the wife, and what she might have done either as to affirming or avoiding such lease before marriage, the same may the husband do after the marriage. *Dyer* 159. 1 *Rel. Abr.* 475. 1 *Rel. Rep.* 132.

The husband being seised of copyhold lands in right of his wife in fee, makes thereof a lease for years not warranted by the custom, which is a forfeiture of her estate, yet this shall not bind the wife or her heirs after the husband's death, but that they may enter and avoid the lease, and thereby purge the forfeiture; and the diversity seems between this act, which is at an end when the lease is expired or defeated by the entry of the lord, or the wife after the husband's death, and such acts as are a continuing detriment to the inheritance, as wilful waste by the husband, which tends to the destruction of the manor; so of non-payment of rent, denial of suit or service; for such forfeitures as these bind the inheritance of the wife after the husband's death; but in the other case the husband cannot forfeit by this lease more than he can grant, which is but for his own life. 2 *Rel. Rep.* 344, 361, 372. *Cro. Car.* 7. *Cro. Eliz.* 149. 4 *Co.* 27.

A feme covert is capable of purchasing; for such an act does not make the property of the husband liable to any disadvantage, and the husband is supposed to assent to this, as being to his advantage, but the husband may disagree; and it shall avoid the purchase; but if he neither agrees nor disagrees, the purchase is good, for his conduct shall be esteemed a tacit consent, since it is to turn to his advantage; but in this case, though the husband should agree to the purchase, yet after his death she may waive it, for having no will of her own at the time of the purchase, she is not indispensably bound by the contract; therefore if she does not, when under her own management and will, by some act express her agreement to such purchase, her heirs shall have the privilege of departing from it. *Co. Lit.* 3. a.

Jointress paying off a mortgage was decreed to hold over till she or her executor be satisfied, and interest to be allowed her. *Chan. Cases* 271.

The husband gave a voluntary bond after marriage to make a jointure of such value on his wife; the husband accordingly makes a jointure; the wife gives up the bond; the jointure is evicted; the jointure shall be made good out of the husband's personal estate, there being no creditors in the case; and the delivery up of the bond by a feme covert could no ways bind her interest. *Vern.* 427. pl. 402.

A feme covert agrees to sell her inheritance, so as she might have 200*l.* of the money secured to her; the land is sold, and the money put out in a trustee's name accordingly; this money shall not be liable to the husband's debts, nor shall any promise by the wife, to that purpose, subsequent to the first original agreement, be obliging in that behalf. 2 *Vern.* 64, 65. pl. 58. *Trin.* 1688.

IX. Of joinder in actions, &c.

In those cases where the debt or cause of action will survive to the wife, the husband and wife are regularly to join in action; as in recovering debts due to the wife before marriage; in actions relating to her freehold or inheritance, or injuries done to the person of the wife. *Rel. Abr.* 347.

But if a feme sole hath a rent-charge, and rent is in arrear and she marries, and the baron distrains for this rent, and thereupon a rescous is made, this is a tort to the baron himself, and he may have an action alone. *Cro. Eliz.* 439. *Owen* 82. S. P. *Moor* 584. S. C.

So if a feme sole hath right to have common for life, and she takes husband, and she is hindred in taking the common, he may have an action alone without his wife, it being only to recover damages. 2 *Bulst.* 14.

But if baron and feme are disseised of the lands of the feme, they must join in action for the recovery of this land. 1 *Bulst.* 21.

The baron may have an action alone upon the *Stat. 9 R. 2.* for entering into the land of the feme; trespass and taking charters of the inheritance of the feme; *quare impedit*, &c. But for personal torts, they must join, though the baron is to have the damages. 1 *Danv.* 709. 1 *Roll. Rep.* 360. The husband is to join in actions for battery to the wife; and a wife may not bring any action for wrong to her, without her husband. 1 *Inst.* 132, 326. An action for a battery on the wife, brought by husband and wife, must be laid to the damage of both. 2 *Lord Raym.* 1209. For an injury done to the wife alone, action cannot be maintained by the husband alone, without her; but for assault and debauching or lying with the wife, or for a loss and injury done to the husband, in depriving him of the conversation and service of his wife, he alone may bring an action; and these last actions are laid for assault, and detaining, &c. the wife, *per quod consortium amiserit*, &c. 2 *Cro.* 538. For taking any thing from the wife, the husband only is to bring the action, who has the property; for the wife hath not the property. In all cases where the feme shall not have the thing recovered, but the husband only, he alone is to bring the action. 1 *Roll. Rep.* 360. except as above, &c. For a personal duty to the wife, the baron only may bring the action: and the husband is intitled to the fruits of his wife's labour, for which he may bring *quantum meruit*. 1 *Lill. Abr.* 227. 1 *Salk.* 114. *Baron and feme* ought to join in actions for debt due to the feme before coverture: and where an action will survive to the wife, and she may recover damages, she must join with the husband in the action. 2 *Mod.* 269. In case, before marriage, a feme enters into articles concerning her estate, she is as a separate person; and the husband may be plaintiff in equity against the wife. *Preced. Chanc.* 24.

Where the feme is administratrix, the suit must be in both their names, for by the intermarriage the husband hath authority to intermeddle with the goods as well as the wife; but in the declaration the granting administration to the feme must be set forth. *Vide the Books of Entries*, and *Godb.* 40. pl. 44.

In action for goods which the feme hath as executrix, they must join, to the end that the damages thereby recovered may accrue to her as executrix in lieu of the goods. *Wint. Off. Ex.* 207.

In battery the plaintiff declared, that on such a day the defendant assaulted and beat his wife. This action was brought by the husband after the death of his wife, and it being a personal wrong, is dead with the person; and if she had been living, the husband alone could not have the action, because damages must be given for the tort offered to the body of his wife; *quod fuit concessum*. *Yelv.* 89.

In an action upon a trover before marriage, and a conversion after, the baron and feme ought to join; for this action, as a trespass, disaffirms the property; but the baron ought alone to bring a *replevin*, *detinue*, &c. for these conditions admit and affirm a property in the feme at the time of the marriage, which by consequence must have vested in the baron. 1 *Sid.* 172. 1 *Keb.* 641. S. C. 1 *Vent.* 261. 2 *Lev.* 107. S. P. and that he may join the wife at his election.

But if A. declares, that the defendant being indebted to him and his wife, as executrix to one J. S. in consideration that A. would forbear to sue him for three months, assumed, &c. and avers that he forbore, and that his wife is still alive, the action is well maintainable by the husband alone, for this is on a new contract, to which the

wife is a stranger. *Cartb.* 462. 1 *Salk.* 117. *Yelv.* 84. *Cro. Jac.* 110. S. P.

In all actions real, for the land of the wife, the husband and wife ought to join. *R.* 1 *Bul.* 21. So in actions personal for a *chose in action*, due to the wife before coverture. 1 *Roll.* 347. l. 53. *Cro. El.* 537. *Vide Com. Dig.* 1 V. 375. *ante* & *post*.

X. Of jointly suing them.

The husband is by law answerable for all actions for which his wife stood attached at the time of the coverture; and also for all torts and trespasses during coverture, in which cases the action must be joint against them both; for if she alone were sued, it might be a means of making the husband's property liable; without giving him an opportunity of defending himself. *Co. Lit.* 133. *Doctr. Placit.* 3. 2 *Hen.* 6: 4.

If goods come to a feme covert by *trover*, the action may be brought against husband and wife, but the conversion may be laid only in the husband, because the wife cannot convert goods to her own use; and the action is brought against both, because both were concerned in the trespass of taking them. See *Co. Lit.* 351. 1 *Roll. Abr.* 6. pl. 7. *Yelv.* 166. *Noy* 79. 1 *Leon.* 312. *Cro. Car.* 254, 494. 1 *Roll. Abr.* 348. But in *detinue* upon a *devastavit* against baron and feme executrix, it shall not be laid *quod devastaverunt*, for a feme covert cannot waste. 2 *Lev.* 145.

An action on the case was brought against baron and feme, for retaining and keeping the servant of the plaintiff, and judgment accordingly. 2 *Lev.* 63.

If a lease for life or years be made to baron and feme, reserving rent, an action of debt for rent arrear may be brought against both; for this is for the advantage of the wife. 1 *Roll. Abr.* 348.

If an action be brought against the husband and wife, and the wife be arrested, she shall be discharged upon common bail; for nobody can be supposed to undertake for a wife who hath no property of her own. 1 *Salk.* 114. *Comb.* 355. 6 *Mod.* 17. 805.

Where a right of action doth accrue to a woman before marriage, as where a bond is made to her and forfeited, there, if she marry, she must be joined with the husband in an action of debt against the obligor. *Owen* 82.

Where a feme sole is indebted, and afterwards married, she and her husband shall both be sued for her debts, and the action must be joint against both during her life; but if she dieth, the husband shall not be charged with her debts, unless judgment was had against him and his wife during the coverture. *F. N. B.* 120.

XI. Where a wife shall be considered as a feme sole.

A husband who has abjured the realm, or who is banished, is thereby *civilliter mortuus*; and being disabled to sue or be sued in right of his wife, she must be considered as a feme sole; for it would be unreasonable that she should be remediless on her part, and equally hard on those who had any demands on her, that not being able to have any redress from the husband, they should not have any against her. *Bro. Baron and Feme*, 66. *Co. Lit.* 133. 1 *Roll. Rep.* 400. *Moor* 851. 3 *Bulst.* 188. 1 *Bulst.* 140. 2 *Vern.* 104.

In *assumpsit* the defendant proved that she was married, and her husband alive in France, the plaintiff had judgment, upon which as a verdict against evidence she moved for a new trial, but it was denied; for it shall be intended that she was divorced: besides, the husband is an alien enemy, and in that case, why is not his wife chargeable as a feme sole? 1 *Salk.* 116. *Deerly* versus *Duchess of Marlborough*.

By the custom of London, if a feme covert trades by herself, in a trade with which her husband does not intermeddle, she may sue and be sued as a feme sole. 10 *Mod.* 6.

A woman, whose husband had left her about twelve years before, had carried on a trade in her own name as a widow, and gave receipts in her own name; being sued for debt contracted in the course of her trade, gave coverture in evidence, and gave evidence of her husband's having been lately alive in Ireland; and *Lord Ch. Justice Holt*

Holt directed the jury to find for the defendant; and so they did. 12 Mod. 603.

XII. Of divorce, separate maintenance, and pin-money.

The feme, after divorce, shall re-have the goods which she had before marriage. Br. Coverture, pl. 82.

But if he had given or sold them without collusion before the divorce, there is no remedy; but if by collusion, she may aver the collusion, and have *detinue* for the whole, whereof the property may be known; and as for the rest, which consists of money, &c. she shall sue in the spiritual court. Br. Deraignment and Divorce, pl. 1. cites 26 H. 8. 7.

If a man is bound to feme sole, and after marries her, and after they are divorced, the obligation is revived. Br. Coverture, pl. 82. Because the divorce being a *vinculo matrimonii*, by reason of some prior impediment, as precontract, &c. makes them never husband and wife *ab initio*; but if the husband had made a feoffment in fee of the lands of his wife, and then the divorce had been, that would have been a discontinuance as well as if the husband had died, because there the interest of a third person had been concerned, but between the parties themselves it will have relation to destroy the husband's title to the goods, and it proves no more than the common rule, viz. that relations will make a nullity between the parties themselves, but not amongst strangers. Lord Raym. Rep. 521. Hill. 11 W. 3.

If a man gives lands in tail to baron and feme, and they have issue, and after divorce is sued, now they have only frank tenement, and the issue shall not inherit; for it was once possible that their issue might inherit. Br. Tail et dones, &c. pl. 9.

If land be given in frankmarriage, and donees are divorced, which of them first moves for the divorce shall lose the land, *per Shelly*; but by Fitzherbert, the land shall be divided between them. Cited Dyer 13. pl. 62. Trin. 28 Hen. 8.

If the baron and feme purchase jointly and are disseised, and the baron releases, and after they are divorced, the feme shall have the moiety, tho' before the divorce they were no moieties; for the divorce converts it into moieties. Br. Deraignment, pl. 18. cites 32 Hen. 8.

If baron alien the wife's land, and then there is a divorce *causa præcontractus*, or any other divorce which dissolves the marriage a *vinculo matrimonii*, the wife during the life of the baron may enter by statute 32 Hen. 8. Dyer 13. pl. 61.

But if after such alienation and divorce the baron dies, she is put to her *cui in vita ante divortium*; and yet the words of the statute are, that such alienation shall be void, but this shall be intended to toll the *cui in vita*. Mo. 58. pl. 164. Pasch. 8 Eliz. Broughton v. Conway.

After divorce the wife shall have such goods as were hers before marriage, and are not spent. D. 13. pl. 63. by Fitzherbert, and says, that so was the opinion of the court about the 26 Hen. 8. Kelw. 122. b. pl. 75.

Divorce *causa adulterii* of the husband; afterwards the wife sues in the spiritual court for a legacy; the executor pleads the release of the baron; the release binds the wife, for the *vinculum matrimonii* continues. Cro. E. 908. Vide 1 Salk. 115.

But Holt held, that if feme covert after divorce a *mensa & thoro*, sues for a legacy, which, if recovered, comes to her husband, there the husband may release it, because there is no alimony; and if he may release the duty, he may release the costs. 1 Salk. 115. pl. 4. S. C. & S. P.

A divorce was a *mensa & thoro*, and then the husband dies intestate. The wife by bill pray'd assistance as to dower and administration (it being granted to another) and distribution. The Master of the Rolls bid her go to law to try if she was intitled to her dower, there being no impediment, and as to that dismissed the bill; and as to the administration, the granting that is in the ecclesiastical court; but the distribution more properly belongs to this court; but since in that court she is such a wife as is not intitled to administration, he dismiss'd the bill as to distribution too, and said, if they could repeal that sentence,

she then would be intitled to distribution. Ch. Prac. 111.

The plaintiff sets forth in her bill, that she joined with her husband in sale of part of her inheritance, and after some discord growing between them, they separated themselves, and 100*l.* of the money received upon the sale of the lands was allotted to the plaintiff for her maintenance, and put into the hands of Nicholas Mine, &c. and hands then given for the payment thereof unto H. G. deceased, to the use of the plaintiff, which bonds are come to the defendant as administrator to the said H. G. who refuses to deliver the same to the plaintiff, and hereupon she prays relief; the defendant does demur in law, because the plaintiff sueth without her husband; and it is ordered the defendant shall answer directly. Cary's Rep. 124.

The ecclesiastical court is the proper court for alimony, and if the person will not obey, they cannot but excommunicate him. Her. 69.

If baron and feme are divorced *causa adulterii*, which is a divorce a *mensa & thoro*, they continue baron and feme: it is otherwise in a divorce a *vinculo matrimonii*, which dissolves the marriage.

As to the consequences of a separate maintenance.

The baron covenanted with L. to pay his wife, or such as he should appoint, 50*l.* a year as a separate maintenance, provided she live at such a place as N. and W. appoint. Baron pleaded, that she did not live at such a place as N. and W. appointed. Plaintiff replies, that she was always ready to live at such a place, but that N. and W. appointed no place. Defendant demurred, for that it was a condition precedent; but the plaintiff insisted it was only subsequent, and so become impossible, N. being since dead, and no place being appointed. Per cur. The condition is subsequent, the covenant being, in pursuance of a former absolute agreement, to pay so much, and it is like an assent of the husband, which is intended, till the contrary appears. 3 Keb. 363.

Where, on a separation, lands are convey'd by the baron in trust for the feme, Chancery will not bar the feme from suing the baron in the trustee's name, and a surrender or release by the baron shall not be made use of against the feme. 2 Chan. Ca. 102.

A woman living separate from her husband, and having a separate maintenance, contracts debts. The creditors, by a bill in this court, may follow the separate maintenance whilst it continues; but when that is determined, and the husband dead, they cannot by a bill charge the jointure with the debts; by Lord Keeper North; and the rather, because the executor of the husband, who may have paid the debt, is no party. Vern. 326.

Where the husband, during his cohabitation with the wife, makes her an allowance of so much a year for her expences, if she out of her own good housewifery saves any thing out of it, this will be the husband's estate, and he shall reap the benefit of his wife's frugality, because when he agrees to allow her a certain sum yearly, the end of the agreement is, that she may be provided with clothes and other necessaries, and whatsoever is saved out of this, redounds to the husband; per Lord Keeper Finch. Freem. Rep. 304.

A term was created on the marriage of A. with B. for raising 200*l.* a year for pin-money, and in the settlement A. covenanted for payment of it. There was an arrear of one year at A.'s death, which was decreed, because of the covenant to be charged on a trust-estate settled for payment of debts, it being in arrear for one year only; *ficus* had it been in arrear for several years. Chan. Prac. 26.

The plaintiff's relation (to whom he was heir) allow'd the wife pin-money, which being in arrear, he gave her a note to this purpose; I am indebted to my wife 100*l.* which became due to her such a day; after by his will he makes provision out of his lands for payment of all his debts, and all monies which he owed to any person in trust for his wife; and the question was, whether the 100*l.* was to be paid within this trust; and my Lord Keeper decreed not; for in point of law it was no debt, because a man cannot be indebted to his wife; and it was not money due

due to any in trust for her. *Hill. 1701. between Cornwall and the earl of Montague.* But *quære*; for the testator looked on this as a debt, and seems to intend to provide for it by his will. *Ab. Eq. Ca. 66.*

Where the wife hath a separate allowance made before marriage, and buys jewels with the money arising thereout, they will not be assets liable to the husband's debts. *Cham. Prec. 295.*

Where there is a provision for the wife's separate use for clothes, if the husband finds her clothes, this will bar the wife's claim; nor is it material whether the allowance be provided out of the estate which was originally the husband's, or out of what was her own estate; for in both cases her not having demanded it for several years together, shall be construed a consent from her that she should receive it; per Lord C. Macclesfield. 2 *Wms's Rep. 82, 84.*

So where 50*l.* a year was reserved for clothes and private expenses, secured by a term for years, and ten years after the husband died, and soon after the wife died; the executors in equity demanded 500*l.* for ten years arrear of this pin-money; but it appearing that the husband maintained her, and no proof that she ever demanded it, the claim was disallowed. 2 *Wms's Rep. 341.*

As to execution where action is against husband and wife, or for her contract or tort, vide *Black. Com. 3 V. 414.*

Where she is not answerable criminally, or for tort, &c. done by persuasion or coercion of the husband, &c. vide *Black. Com. 4 V. 28. Et contra, ib. 4 V. 29, 39.*

The wife's jointure not forfeitable by the treason of the husband; tho' her dowry is, per *Stat. 5 & 6 Ed. 6. c. 11. Black. Com. 4 V. 375.* See title *Marriage.*

Bar, or Barr, (Lat. *barra*, and in Fr. *barre*.) In a legal sense is a plea or peremptory exception of a defendant, sufficient to destroy the plaintiff's action. And it is divided into bar to common intendment, and bar special; bar temporary, and perpetual: bar to a common intendment is an ordinary or general bar, which usually disableth the declaration of the plaintiff: bar special is that which is more than ordinary, and falls out upon some special circumstance of the fact, as to the case in hand. *Terms de Ley.* Bar temporary is such a bar that is good for the present, but may afterwards fail: and bar perpetual is that which overthrows the action of the plaintiff for ever. *Plowd. 26.* But a plea in bar, not giving a full answer to all the matter contained in the plaintiff's declaration is not good. 1 *Lill. Abr. 211.* If one be barred by plea to the writ, or to the action of the writ, he may have the same writ again, or his right action: but if the plea in bar be to the action itself, and the plaintiff is barred by judgment, &c. it is a bar for ever in personal actions. 6 *Rep. 7.* And a recovery in debt is a good bar to action on the case for the same thing: also a recovery on *assumpsit* in case, is a good bar in debt, &c. *Cro. Jac. 110. 4 Rep. 94.*

In all actions personal, as debt, account, &c. a bar is perpetual, and in such case the party hath no remedy, but by writ of error or attain; but if a man is barred in a real action or judgment, yet he may have an action as high a nature, because it concerns his inheritance; as for instance, if he is barred in a *formedon in descender*, yet he may have a *formedon in the remainder*, &c. 6 *Rep. 7.* It has been resolved, that a bar in any action real or personal by judgment upon demurrer, verdict, or confession, is a bar to that action, or any action of the like nature for ever: but according to *Pemberton Chief Justice*, this is to be understood, when it doth appear that the evidence in one action would maintain the other; for otherwise the court shall intend that the party hath mistaken his action. *Skin. 57, 58.*

Bar to a common intent is good: and if an executor be sued for his testator's debt, and he pleadeth that he had no goods left in his hands at the day the writ was taken out against him, this is a good bar to a common intendment, till it is shown that there are goods: but if the plaintiff can shew by way of replication, that more goods have fallen into his hands since that time, then, except the defendant allege a better bar, he shall be

condemned in the action. *Plowd. 26. Kitch. 215. Bro. tit. Barre.*

There is a bar material, and bar at large: bar material may be also called special bar; as when one, in stay of the plaintiff's action, pleadeth some particular matter, viz. a descent from him that was owner of the land, &c. a feoffment made by the ancestor of the plaintiff, or the like: a bar at large is, when the defendant, by way of exception, doth not traverse the plaintiff's title, by leading, nor confers, nor avoid it, but only makes to himself a title in his bar. *Kitch. 68. 5 H. 7. 29.* This word bar is likewise used for the place where serjeants and counsellors at law stand to plead the causes in court; and where prisoners are brought to answer their indictments, &c. whence our lawyers, that are called to the bar, are termed barristers. 24 *H. 8. c. 24.*

As to the qualities of a plea, see farther *Black. Com. 3 V. 308.*

Matter of law may be pleaded specially, tho' it may be given in evidence on the general issue. 5 *Com. Dig. 68. 1 Vent. 295. 1 Salk. 344. 2 Mod. 276. Skin. 362.*

As to the words *modo & forma* in pleading, vide 2 *Anderson 182. Co. Lit. 281. 5 Com. Dig. 109.*

Farther concerning this head, see *Statement, Pleading, Judgment, Pleading, &c.*

Barrister, Barrister, (barristerius) Is a counsellor learned in the law, admitted to plead at the bar, and there to take upon him the protection and defence of clients. They are termed *jurisconsulti*; and in other countries called *licentiatii in jure*: and antiently barristers at law were called apprentices of the law, in Lat. *apprenticii juris nobiliores*. Fortesc. The time before they ought to be called to the bar, by the antient orders, was eight years, now reduced to five; and the exercises done by them (if they were not called *ex gratia*) were twelve grand moots performed in the inns of Chancery in the time of the grand readings, and twenty-four petty moots in the term times, before the readers of the respective inns: and a barrister newly called is to attend the six (or four) next long vacations the exercise of the house, viz. in Lent and Summer, and is thereupon for those three (or two) years styled a vacation barrister. Also they are called utter barristers, i. e. pleaders ouster the bar, to distinguish them from benchers, or those that have been readers, who are sometimes admitted to plead within the bar, as the king, queen, or prince's counsel are. Barristers, who constantly attend the King's Bench, &c. are to have the privilege of being sued in transitory actions in the county of Middlesex. But it hath been questioned, whether an action of debt doth lie for their fees; unless it be upon special retainer; for a counsellor's fee is *honorarium quiddam*, not *mercenarium*, as that of an attorney or solicitor. 2 *Inst. 213, 214, &c. Wood's Inst. 448.*

Barrator, or Barretor, (Lat. *barrator*, Fr. *barrateur*) A common mover of suits and quarrels, either in courts, or elsewhere in the country, that is himself never quiet, but at variance with one or other. *Lambert* derives the word *barretor* from the Lat. *bulatro*, a vile knave: but the proper derivation is from the Fr. *barrateur*, i. e. a deceiver, and this agrees with the description of a common barretor in my Lord Coke's Reports, viz. that he is a common mover and maintainer of suits in disturbance of the peace, and in taking and detaining the possession of houses and lands, or goods by false inventions, &c. And therefore it was adjudged, that the indictment against him ought to be in these words, viz. That he is *communis malefactor, calumniator & seminator litium & discordiarum inter vicinos suos, & pacis regis perturbator, &c.* And there it is said that a common barretor is the most dangerous oppressor in the law; for he oppresseth the innocent by colour of law, which was made to protect them from oppression. 8 *Rep. 37.* No one can be a barretor in respect of one act only; for every indictment for such crime must charge the defendant with being *communis barrator*, and conclude *contra pacem, &c.* And it hath been holden, that a man shall not be adjudged a barretor for bringing any number of suits in his own right, though they are vexatious, especially if there be any colour for them; for if they prove false, he shall

pay the defendant costs. 1 *Rel. Abr.* 355. 3 *Mod.* 98. A barrister at law entertaining a person in his house, and bringing several actions in his name, where nothing was due, was found guilty of *barrettry*. 3 *Mod.* 97. An attorney is in no danger of being convicted of *barrettry*, in respect of his maintaining another in a groundless action, to the commencing whereof he was no way privy. *Id.* A common solicitor, who solicits suits, is a common *barrettor*, and may be indicted thereof, because it is no profession in law. 1 *Danv. Abr.* 725. *Barrettors* are punished by fine and imprisonment, bound to the good behaviour, &c. And belonging to the profession of the law, they ought to be further punished by disability to practise. 34 *Ed. 3. c. 1.* *Hawk. P. C.* 244.

An indictment for barrettry.

South'ton, ff. **T**HE jurors for our sovereign lord the king upon their oath present, that A. B. of &c. in the said county, yeoman, on the day, &c. in the year of the reign, &c. at H. in the said county, was and yet is a common *barrettor*, and continual disturber of the peace of our said lord the king; and also on the day and year, and at the place abovementioned, was and still is a common and troublesome slanderer, railer, and sower of discord among his neighbours, and that he hath procured and caused divers suits and quarrels then and there and elsewhere in the county aforesaid, amongst divers subjects of our lord the king, to the great contempt of our sovereign lord the king, and the bad example of other offenders, and against the peace of our said lord the king, &c. *Vide Black. Com.* 4 *V.* 133.

Barrel, (*barillum*) Is a measure of wine, ale, oil, &c. Of wine it contains the eighth part of a tun, the fourth part of a pipe, and the moiety of a hoghead; that is, thirty-one gallons and a half. 1 *R. 3. c. 13.* Of beer it contains thirty-six gallons; and of ale, thirty-two gallons. *Anno 23 H. 8. c. 4.* and 12 *Car. 2. c. 23.* It is declared, that the assise of herring barrels is thirty-two gallons wine measure, containing in every barrel usually a thousand full herrings. *Anno 13 El. c. 11.* The eel barrel contains thirty gallons. 2 *H. 6. c. 13.*

Barriers, (*Fr. barrieres*) Signifies that which the French call *jeu de barres*, i. e. *palæstra*, a martial exercise of men armed and fighting together with short swords, within certain bars or rails which separated them from the spectators; it is now disused here in England. There are likewise *barrier towns*, or places of defence on the frontiers of kingdoms.

Barrow, (from the Sax. *borrg*, a heap of earth) A large hillock or mount, raised or cast up in many parts of England, which seem to have been a mark of the Roman *tumuli*, or sepulchres of the dead. The Sax. *beora* was commonly taken for a grove of trees on the top of a hill. *Kennet's Gloss.*

Barter, (from the *Fr. baretre, circum-venire*) Signifies in our books to exchange one commodity for another, or truck wares for wares. *Anno 1 R. 3. c. 9.* And the reason may be, because they that exchange in this manner do endeavour, for the most part, one to over-reach and circumvent the other.

Barton, Is a word used in *Devonshire*, for the demesne lands of a manor; sometimes the manor-house itself; and in some places for out-houses and fold-yards. In the *Stat. 2 & 3 Ed. 6. c. 12.* *barton lands*, and demesne lands, are used as *synonyma*. See *Berton*.

Bas Chevaliers, Low or inferior knights by tenure of a bare military fee, as distinguished from bannerets, the chief or superior knights: hence we call our simple knights, viz. knights bachelors, *bas chevaliers*. *Kennet's Gloss. to Paroch. Antiq.*

Base Court, (*Fr. cour basse*) Is any inferior court, that is not of record, as the court baron, &c. *Kitch. fol.* 95, 96.

Base Estate, (*Fr. bas estat*) Is that estate which *base tenants* have in their lands. And *base tenants*, according to *Lambert*, are those who perform villainous services to their lords; *Kitch. fol.* 41. makes *base tenure* and *frank tenure* to be contraries, and puts copyholders in the num-

ber of *base tenants*; where it may be gathered that every *base tenant* holds at the will of the lord: but there is a difference between a *base estate* and *villainage*; for to hold in pure *villainage* is to do all that the lord will command him; and if a copyholder have but a *base estate*, he not holding by the performance of every commandment of his lord, cannot be said to hold in *villainage*: and copyholders are by the customs of manors, and continuance of time, grown out of that extreme servitude wherein they were first created.

Base fee, Is a tenure in *fee* at the will of the lord, distinguished from *focage free tenure*: but the Lord Coke says, that *base fee* is what may be defeated by limitation, or on entry, &c. *Co. Lit.* 1, 18. *Bassa tenura*, or *base tenure*, was a holding by *villainage*, or other customary service, opposed to *alia tenura*, the higher tenure in *capite* or by military service, &c.—*Manerium de Cheping Parendon cum pertinentiis est de antiquo dominico coronæ domini regis, unde omnia prædicta tenementa sunt parcella, & de bassa tenura ejusdem manerii.* *Confectud. Domus de Parendon, MS.* 44.

Bas Wille, The suburbs or inferior town, as used in France.

Basels, (*basselli*) A kind of coin abolished by King Hen. 2. anno 1158. *Hollingshed's Chron.* p. 67.

Baselard, or **Basillard**, In the *Stat. 12 Rich. 2. c. 6.* Signifies a weapon, which Mr. Speight, in his Exposition upon Chaucer, calls *pugnem vel fican*, a poniard; *arripit basillardo transfixit, &c.* *Cum alio basillardo penetravit latera ejus, &c.* *Knighton, lib. 5. pag.* 2731.

Basilius, A word mentioned in several of our historians signifying King, and seems peculiar to the kings of England. *Monasticon, tom. 1. p. 65.* *Ego Edgar totius Angliæ basileus confirmavi.*—In many places of the *Monasticon* this word occurs; and also in *Ingulphus*, *Malmesbury*, *Mat. Paris*, *Hoveden*, &c.

Basket-Tenure of lands. See *Campstellus*.

Basinetum, A *basnet*, or helmet. By *Inqu. 22 Ed. 4.* After the death of Laurence de Hastings, earl of Pembroke, it was found thus—*Quod quidem manerium, (i. e. de Aston Cantlore) per se teneatur de domino rege in capite, per servitium invenendi unum hominem peditem, cum arcu sine chorda, cum uno basneto, sive cappa, per xl dies sumptibus suis propriis quotiens fuerit guerra in Wallia.*

Basinet, A skin with which the soldiers covered themselves. *Blount.*

Bastard, (*bustardus*) From the Brit. *bastaerd*, i. e. *nothus* or *spurius*, is one that is born of any woman not married, so that his father is not known by the order of law; and therefore is called *filius populi*, the child of the people.

If a woman be with child by a man, who afterwards marries her, and then the child is born, this child is no *bastard*: but if a man hath issue by a woman before marriage, and after they marry, the issue is a *bastard* by our law; but legitimate by the Civil law. 2 *Inst.* 96, 97. If a man marries a woman grossly big with child by another, and within three days after she is delivered, in our law the issue is no *bastard*. 1 *Danv. Abr.* 729. And where a child is born within a day after marriage between parties of full age, if there be no apparent impossibility that the husband should be the father of it, the child is no *bastard*, but supposed to be the child of the husband. 1 *Rel. Abr.* 358. But if the husband be but eight or nine years of age, or if he be within the age of fourteen, the issue is a *bastard*: so where a husband is gelt, or hath lost his genitals, &c. which shews an impossibility to get a child, the issue of his wife, though born within marriage, is a *bastard*. 1 *Inst.* 244. 1 *Danv.* 728.

By the law of the land a person cannot be a *bastard* who is born after espousals, unless it be by special matter. If a woman elope from her husband, so as he be within the four seas, her issue shall not be a *bastard* by our law, though by the spiritual law he shall: but if the wife continues in adultery and hath issue, this is a *bastard* in our law. 1 *Danv.* 730. By the Common law, if the husband be *infra quatuor maria*, so that by intentment he may converse with his wife, and the wife hath issue, the child will not be a *bastard*: but he is a *bastard* who is born

born of a woman when her husband, at and from the time of the begetting to the birth, is *extra quatuor maria*. 1 *Inst.* 244. 2 *Salk.* 483. If a woman hath issue, the husband being over sea so long before the birth of the issue, which his wife hath in his absence, that the issue cannot be his, this is a *bastard*. 1 *Danv.* 729. If the husband be only over in Ireland, it is otherwise. A divorce *causa praeconstratus, causa affinitatis, causa frigiditytis, &c. bastards* the issue; not for cause subsequent to the marriage: but if the man and woman continue husband and wife for all their lives, the issue cannot be a *bastard* by divorce after their death. 1 *Danv.* 730. Where a woman, on divorce *a mensa a thoro*, lives in adultery with another, her children by such other are *bastards*; for children born in adultery, are born out of the limits of matrimony. Though if husband and wife consent to live separate, the children born after such separation shall be taken to be legitimate, because the access of the husband shall be presumed; but if it be found there was no access, then they are *bastards*. 1 *Salk.* 122.

But this non-access of the husband ought to be proved otherwise than upon the wife's oath; as in the following case: the defendant *Reading* was adjudged by an order of bastardy, to be the putative father of a bastard child, begotten of the wife of one *Almont* of *Shelborn*. The said woman, on the appeal, gave evidence, that the said *Reading* had carnal knowledge of her body in or about August 1732, and several times since; and that her husband had no access to her from May 1731, to the time of her examination in that court, being the 3d of October 1733. and that the said *Reading* was the father of the said child. And the question on removal of the same into the King's Bench was, whether the wife in this case could be admitted as an evidence for or against her husband, and to bastardize her own child. And the whole court were of opinion, that the wife could be a witness to no other fact but that of incontinence, and that this she must be admitted to be a witness to from the necessity of the thing: but not for the absence of the husband; which might properly be proved by other witnesses; and likened it to the case of hue and cry, where the person robbed shall be admitted a witness of the fact of robbery, but not to prove any other matter relating thereto, as in what hundred the place was, and the like, because that may be proved by others. 2 *Seff. Ca.* 175.

* A man who hath issue a son by a woman before marriage, and afterwards marries the same woman, and hath issue a second son born after the marriage; the first of these is termed in law a *bastard signe*, and the second a *mulier*; by the common law, as hath been said, such *bastard signe* is as incapable of inheriting, as if the father and mother had never married; but yet there is one case in which his issue was let into the succession, and that was by the consent of the lord and person legitimate; as if upon the death of the father the *bastard signe* enters, and the *mulier* during his whole life never disturbs him, he cannot upon the death of the *bastard signe* enter upon his issue. *Lit. fœd.* 399. *Co. Lit.* 245.

To exclude the *mulier* from the inheritance, there must not only be an uninterrupted possession of the *bastard signe* during his life, but a descent to his issue. *Co. Lit.* 244. 1 *Rel. Abr.* 624.

No man can bastardize another after his death, that was a *mulier* by the laws of holy church, and who carried the reputation of legitimate during his life; for a man must be bastardized by the rules of the Civil or Common law: by the rules of the Civil law, this person is by supposition legitimate; and if the Common law be made the judge, he cannot be bastardized; for it is a rule of Common law, that a personal defect dies with the person, and cannot after his death be objected to his successor that represents him; and this rule of law was taken from the humanity of the ancients, which would not allow the calumny of the dead, as also from an important reason of convenience, for pedigrees are often derived through several persons, concerning whom there remains little knowledge or remembrance of any thing, but only of their being; and therefore it were an easy matter to throw on them the aspersions of bastardy by any forged evidence, which cannot be confronted by opposite proof; and so it is fit

to limit a time in which all proofs of bastardy are to be disallowed. 7 *Co.* 44. *Jenk. Rep.* 268. 1 *Brownl.* 42. *Co. Lit.* 33. a. *Lit. fœd.* 399. *Co. Lit.* 245.

Though this seems to be the doctrine of the old books, yet there is this modern case. An ejectment was brought by one *Pride*, against the earls of *Bath* and *Mountague*; *Pride* made title as heir to *George*, duke of *Albemarle*, proving himself the son of one who was brother to the duke, and that the duke died without issue; the defendant gave evidence, that duke *George* had issue duke *Christopher*, who conveyed to him; plaintiff gave evidence, that duke *Christopher* was a bastard, begotten of such a woman, who at the time of her marriage with the said *George*, duke of *Albemarle*, was married to another man, who was then, and yet living: upon which it was objected, that since duke *George* and this woman lived together as man and wife, and were now dead, the plaintiff could not be admitted to bastardize the issue, who was dead also; and who, during his whole life, was reputed and taken to be the legitimate son of the duke, and so stiled by the duke himself in his deed of settlement, and in his will, his son and heir; *Et quod iustum non est aliquem post mortem facere bastardum*. The court held this true of such a bastard as is meant by *Littleton*, in his case of *bastard signe*, and *mulier puique*, that is, such a bastard as is born before the espousals of a father and mother, who may afterwards marry; and said, the rule extended only to that case. 1 *Salk.* 120. *Pride v. Earls of Bath, &c.* 7 *W. & M.* 3 *Lev.* 410. S. C. Who tells us, that though the evidence was admitted by *Holt*, and *Gil. Eyre*, who were only in court, the jury were not satisfied with it, and gave a verdict for the Earl of *Bath*.

If a woman hath a child forty weeks and eight days after the death of her husband, it shall be legitimate; the law having appointed no exact certain time for birth of legitimate issues. 1 *Danv.* 726. 2 *Lill. Abr.* 236. If a man or woman marry a second wife or husband, the first being living, and have issue by such second wife or husband, the issue is a *bastard*. 39 *Ed.* 3. cap. 14, &c. Before the statute 2 & 3 *Ed.* 6. c. 21. One was adjudged a *bastard*, *Quia filius sacerdotis*.

Bastard is *terminus a quo*, he is the first of his family; for he hath no relation of which our law takes any notice; yet this must be understood as to civil purposes, there being a relation as to moral purposes; for he cannot marry his own mother, or *bastard* sister. 3 *Salk.* 66, 67.

A *bastard* cannot inherit land as heir to his father; nor can any person inherit lands as heir to him, but one that is heir of his body. *Lit. Sec.* 401.

But though he cannot inherit any ancestor, yet when he hath gotten a name of reputation, he may purchase by it; for all surnames were originally acquired by reputation. *George Shelly* conveyed lands to the use of himself, the remainder to *George Shelly* his son; whereas in truth *George* was born of one *B.* in matrimony of one *C.* yet was reputed the son of *George*, and educated by him; though the boy was but six years old, it was ruled that he should take the remainder; for having got by reputation the name of *George Shelly*, these words are a certain designation of the person to take the remainder. But if a remainder be limited to the eldest issue of *J. S.* whether legitimate or illegitimate, and *J. S.* hath issue a bastard, he shall not take this remainder; for it is not vested in *J. S.* as it was in the other case, but is in contingency, and the certain time is not defined when this contingency shall happen; for the bastard at his birth does not acquire the reputation of being the issue of *J. S.* and since the bastard, when first in being, cannot take by virtue of this limitation, he can never take it; for he cannot be understood to be the person designed and marked out by these words, if after his birth it depends on the uncertainty of popular reputation, whether he should take the remainder or not; and such a designation of the person as contains no certainty in itself, or no relation to any other certain matter that may reduce it to certainty, is a void limitation. *Co. Lit.* 3. b. 6 *Co.* 65. 1 *New Abr.* 309.

But where a remainder is limited to the eldest son of *Jane S.* whether legitimate or illegitimate, and she hath issue, a bastard shall take this remainder, because he acquires

quires the denomination of her issue by being born of her body; and so it was never uncertain, who was designed by this remainder. *Noy 35*

If parents are married, and afterwards divorced, this gives the issue the reputation of children; and so doth a subsequent marriage of the parents. *6 Co. 65. Hugb's Abr. 363.*

If a man, in consideration of natural affection and love, covenants to stand seised to the use of a bastard, this is not good; for he is not *de sanguine patris*; but it is said that a woman may give lands in frank-marriage with her bastard, because he is of the blood of the mother; but he hath no father, but from reputation only. *Dyer 374. And. 79. 6 Co. 77. Noy 35.*

A court of equity will not supply the want of a surrender of a copyhold estate, in favour of a bastard, as it will for a legitimate child. *Preced. Chan. 475.*

Bastardy, in relation to the several manners of its trial, is distinguished into general and special bastardy. General bastardy is the bastardy tried by the bishop, which in it's notion contains two things. 1st, It should not be a bastard made legitimate by a subsequent marriage. 2^{dly}, That it should be a point collateral to the original cause of action. *1 Rol. Abr. 361.*

Formerly bastards had a way in such issues to trick themselves into legitimation, for they used to bring feigned actions, and get suborned witnesses before the bishop to prove their legitimation, and then got the certificate returned of record, and after that their legitimation could never be contested; for being returned of record as a point adjudged by its proper judges, and remaining among the memorials of the court, all persons were concluded by it; but this created great inconveniencies, as it is taken notice of in the preamble of the *9 Hen. 6. cap. 11.* in the case of several persons of quality; for the evidence of the contrary parties concerned were never heard at the trial, and yet their interest was concluded: To remedy this inconvenience without altering the rules of law, it was enacted, that before any writ to the bishop there should be a proclamation made in the same court, and after that the issue should be certified into Chancery, where proclamation should be made once in every month for three months, and then the Chancellor should certify to the court where the plea depends, and afterwards it shall be again proclaimed in the same court, that all that are concerned may go to the ordinary to make their allegations; and without these circumstances, any writ granted to the ordinary, and all proceedings thereupon, shall be utterly void. *1 Rol. Abr. 361.*

If the ordinary certify or try bastardy without a writ from the King's temporal courts, it is void; for the spiritual jurisdiction within these kingdoms is derived from the King, and therefore it must be exercised in the manner the King hath appointed; for it would be injurious if they should declare legitimation where the rights of inheritance are so nearly concerned, without any apparent necessity. *1 Rol. Abr. 361.*

The certificate must be under the seal of the ordinary, and not under the seal of the commissary only, for the command is to the bishop himself to certify, and therefore the execution of the command must appear to be by the bishop in proper person. *1 Roll. Abr. 362.*

If a man be certified bastard, this binds perpetually, though the person so adjudged a bastard is not party to the action, for all persons are estopped to speak against the memorial of any judicatory; because the act of the publick judicatory under which any person lives, is his own act; and were he not thus bound, there might be contradiction in certificates. *1 Rol. Abr. 362.*

If a man be certified bastard, that doth not bind stranger till returned of record, because it is no judicial act till recorded in the place appointed to record such transactions, nor doth it bind the party to the action till judgment thereon, because if he avoid the action he avoids all consequences of the action; and therefore if the defendant be certified bastard by the ordinary, yet if the plaintiff be nonsuit they cannot go on to trial, and so the bishop's certificate never appears of record, and therefore is not binding. *1 Rol. Abr. 362.*

If a man be certified *mulier*, no man is estopped to bastardize him, for though he may be a *mulier* by the Spiritual law, yet he may be a bastard by our law; and therefore any man, notwithstanding the certificate, may plead the issue of special bastardy. *1 Rol. Abr. 362.*

Special bastardy, which is always tried by a jury in the temporal courts, is twofold: 1st, Where the bastardy is the gist of the action, and the material part of the issue. 2^{dly}, Where those are bastards by the Common law that are *muliers* by the Spiritual law, and such are those that are born before marriage, whose parents afterwards intermarry, and whose marriage is admitted. *1 New Abr. 314. 1 Inst. 134. 1 Rol. 367. Hob. 117.*

If a man receives any temporal damage by being called a bastard, and brings his action in the temporal courts, and the defendant justifies that the plaintiff is a bastard, this must be tried at Common law, and by writ to the bishop; for otherwise you suppose an action brought in a court which hath not a capacity to try the cause of action. *1 Brownl. 1. Hob. 179. Godol. 479. Co. Ent. 29.*

If it be found by an assize taken at large that a man is a bastard, the temporal courts are judges of it, for the jury cannot be estopped to speak truth which may fall within their own knowledge, and what they find becomes the record of the temporal courts, and so within their cognizance. *Bro. Bastardy, 97.*

A bastard by the common law is made incapable of any ecclesiastical benefice; for the sacraments ought not to be committed to infamous persons: and it is the law of nature, that a bastard who is born out of lawful marriage, (unless there be some particular law to the contrary) has not any relation to his father, who begot him, but shall rely on his mother, that bore him. *Fortescue 88, 89.* By statute a woman with child of a bastard, must be first examined by a justice of peace, and the fact of her being with child proved by her oath, and then the justice is to send his warrant for the reputed father; when the party is brought before the justice, he must enter into a recognizance with sufficient sureties for his appearance at the next sessions, &c. and he may be continued on the recognizance till the woman is delivered of the child: after the child is born, two justices (*quorum unus*) residing nearest the place, are to examine the matter by witnesses, &c. and make their order for relief of the parish from the bastard: and if the two justices cannot agree, they may refer it to the sessions; also the putative father may appeal from the order of the two justices; or may give security to the parish, &c. *Stat. 18 Eliz. c. 3. 3 Car. 1. c. 4.* The two next justices of peace (one being of the *quorum*) may make orders for punishing the mother and father of a bastard child: and by order of the justices, the churchwardens and overseers of the poor may seize goods, and receive the annual rents of lands, &c. of the father and mother to discharge the parish; and justices of the peace have power to commit lewd women having bastards to the house of correction, for one year, &c. But persons able to keep them, are not within the statute. It is adjudged murder to conceal the death of a bastard child when born, unless there be proof to the contrary that it was still born. *18 Eliz. c. 3. 13 & 14 Car. 2. c. 12. 7 Jac. 1. c. 4. 21 Jac. 1. c. 27.*

It hath been adjudged, that in order to convict a woman by force of this last statute, there is no need that the indictment be drawn specially, or conclude against the form of the statute; for the statute doth not make a new offence, but only makes such concealment an undeniable evidence of murder. *2 Hawk. 438.*

Also, it hath been agreed, that where a woman appears to have endeavoured to conceal the death of such child within the statute, there is no need of any proof that the child was born alive, or that there were any signs of hurt upon the body, but it shall be undeniably taken that the child was born alive, and murdered by the mother. *2 Hawk. 438.*

But it hath been adjudged, that where a woman lay in a chamber by herself, and went to bed without pain, and waked in the night, and knocked for help but could get none, and was delivered of a child, and put it in a trunk, and did not discover it till the following night, yet she

was not within the statute, because she knocked for help. *2 Hawk. 438.*

Also, it hath been agreed, that if a woman confess herself with child beforehand, and afterwards be surprized and delivered, no body being with her, she is not within the statute, because there was no intent of concealment, and therefore in such cases it must appear by signs of hurt upon the body, or some other way, that the child was born alive. *2 Hawk. 438.*

If a woman be with child, and any gives her a potion to destroy the child within her, and she takes it, and it works so strongly that it kills her, this is murder; for it was not given to cure her of a disease, but unlawfully to destroy the child within her; and therefore he that gives her a potion to this end, must take the hazard, and if it kills the mother, it is murder. *1 Hal. H. 429, 430.*

If a woman be quick or great with child, if she take, or any other give her any potion to make an abortion, or if a man strike her, whereby the child within her is killed, tho' it be a great crime, yet it is not murder nor manslaughter by the law of England, because it is not yet in *rerum natura*, nor can it legally be known, whether it were killed or not: so it is, if after such child were born alive, and after die of the stroke given to the mother, this is not homicide. *1 Hal. H. 433.* Yet the offender may be indicted for a misdemeanor, at Common law.

If a man procure a woman with child to destroy her infant when born, and the child is born, and the woman in pursuance of that procurement kill the infant; this is murder in the mother, and the procurer is accessory. *1 Hal. H. 433.*

If a woman declares herself to be with child of a *bastard*, and on oath before a justice charge any person with getting it; he may grant his warrant to apprehend the person charged, and for bringing him before any justice, &c. who may commit him to gaol or the house of correction, unless he give security to indemnify the parish, or enter into recognizance with sureties to appear at the next quarter-sessions, and perform such order as shall be made pursuant to the statute 18 *Eliz.* But in case the woman shall die, or be married, or miscarry, &c. or if no order is made in due time, the man shall be discharged: and no justice may send for, or compel any woman before she is delivered, and one month after, to answer questions, &c. *Stat. 6 Geo. 2. c. 31.* He that gets a *bastard* in the hundred of Middleton, in the county of Kent, forfeits all his goods and chattels to the king. *MS. de Temp. Ed. 3.*

If any one conspire to charge another to be the father of a *bastard* child, he may be indicted and punished with public whipping, &c. It is only in the power of the king and parliament to make a *bastard* legitimate. *Daw. Rep. 37.* See 13 *Geo. 2. c. 29.*

Bastardy, (*bastardia*) Signifies a defect of birth, objected to one born out of wedlock. *Bract. lib. 5. c. 19.* See **Bastard**.

Bastard-child, (*Fr.*) Is where the eldest child of a person is a *bastard*. See **Bastard**.

Bastard, (*Fr.*) a Staff, or club; and by our statutes it signifies one of the warden of the *Flint's* servants or officers who attend the king's courts with a red staff for taking such into custody who are committed by the court. *1 R. 2. c. 12. 5 Eliz. c. 23.* See **Tipstaff**.

Batum, *Per batum tolmatu capere*, To take toll by strike; and not by heap; *per batum*, being opposed to *in cumulo vel cantello*—*Tolmatu ad molendinum fit secundum consuetudinem regni; mensura per quas tolmatu capi debet sunt concordantes mensuris domini regis, & capiatu tolmatu per batum, & nichil in cumulo vel cantello.* Consuetud. Domus de Farendon, *MS. f. 42.*

Debatable Ground, Is taken for the land that lay between England and Scotland, heretofore in question, when they were distinct kingdoms, to which it belong'd. *Anno 23 H. 8. c. 6. and 32 H. 8. cap. 6.* It seems to mean, as if we should say, litigious or *debatable ground*, i. e. land about which there is debate; and by that name *Stone calls ground* that is in controversy. *Camb. Britan. Tit. Cumberland.*

Bath, (*Lat. bathon*, called by the britons *badina*) Has been termed the city of sickmen: it is a place of resort in *Somersetshire* famous for its medicinal waters. The chairmen are there to be licensed by the mayor and aldermen, for carrying persons to and from the hot *baths*, &c. under the penalty of 10*s.* by statute 7 *Geo. 1. c. 19.* And a publick hospital or infirmary for poor is established in the city of *Bath*, the governors, whereof have power to hold all charities, &c. and appoint physicians, surgeons and other officers: any persons not able to have the benefit of the *Bath Waters*, may be admitted into this hospital, their case being attested by some physician, and the poverty of the patients certified by the minister and churchwardens of the place where they live, &c. Every person so admitted, shall have the use of the old hot-bath, and be entertained and relieved in the hospital; and when cured or discharged, such persons shall be supplied with 3*l.* each, to defray the expence of removing them back to their parishes, &c. *Stat. 12 Geo. 2. c. 31.* But see 6 *Geo. 3.* for paving and lighting the streets of *Bath*.

Battatoria, A fulling mill. 'Tis mentioned in the *Monasticon*, *Tom. 2. pag. 832.* *Usque ad stagnum molendini ipsius Willielmi cum battoria & a gardino suo ubique, &c.*

Battel, (*Fr. bataille*) Signifies a trial by combat, which was anciently allowed of in our laws, where the defendant in appeal of murder or felony may fight with the appellant, and make proof thereby whether he be culpable or innocent of the crime. *Glanv. lib. 14. c. 1.* When an appellee of felony wages *battel*, he pleads that he is *Not guilty*, and that he is ready to defend the same by his body, and then flings down his glove; and if the appellant will join *battel* he replies, That he is ready to make good his appeal by his body upon the body of the appellee, and takes up the glove: and then the appellee lays his right hand on the book, and with his left hand takes the appellant by the right, and swears thus: *Hear this thou who callest thyself John by the name of baptism, that I who call myself Thomas by the name of baptism, did not feloniously murder thy father W. by name, on the day and year of, &c. at B. as you surmise, nor am any way guilty of the said felony; so help me God.* And then he shall kiss the book, and say; *And this I will defend against thee by my body, as this court shall award.* Then the appellant lays his right hand on the book, and with his left hand takes the appellee by the right, and swears to this effect: *Hear this thou who callest thyself Thomas by the name of baptism, that thou didst feloniously on the day, and in the year, &c. at B. murder my father W. by name; so help me God.* And then he shall kiss the book, and say; *And this I will prove against thee by my body, as this court shall award.* This being done, the court shall appoint a day and place for the *battle*, and in the mean while the appellee shall be kept in custody of the marshal, and the appellant shall find sureties to be ready to fight at the time and place, unless he be an approver, in which case he shall also be kept by the marshal: and the night before the day of *battle*, both parties shall be arraigned by the marshal, and shall be brought into the field before the justices of the court where the appeal is depending, at the rising of the sun, bare-headed and bare-legg'd from the knee downwards, and bare in the arms to the elbows, armed only with *bastons* an ell long, and four corner'd targets; and before they engage, they shall both make oath *That they have neither eat nor drank, nor done any thing else by which the law of God may be depressed, and the law of the devil exalted:* and then, after proclamation for silence under pain of imprisonment, they shall begin the combat wherein if the appellee be so far vanquished that he cannot or will not fight any longer, he may be adjudged to be hanged immediately; but if he can maintain the fight till the stars appear, he shall have judgment to be quit of the appeal: and if the appellant becomes a crying coward, the appellee shall recover his damages, and may plead his acquittal in bar of a subsequent indictment or appeal; and the appellant shall for his perjury lose his *liberam legem*. If an appellant becomes blind by the act of God after he has waged *battel*, the court will discharge him

him of the battel; and in such case it is said that the appellee shall go free. This trial by battel is at the defendant's choice; but if the plaintiff be under an apparent disability of fighting, as under age, maimed, &c. he may counterplead the wager of battel, and compel the defendant to put himself upon his country: also any plaintiff may counterplead a wager of battel, by alledging such matters against the defendant, as induce a violent presumption of guilt; as in appeal of death, that he was found lying upon the deceased with a bloody knife in his hand, &c. for here the law will not oblige the plaintiff to make good his accusation in so extraordinary a manner, when in all appearance he may prove it in the ordinary way. It is a good counterplea of battel that the defendant hath been indicted for the same fact; when if appeal be brought, the defendant shall not wage battel. And if a peer of the realm bring an appeal, the defendant shall not be admitted to wage battel, by reason of the dignity of the appellant. 2 Hawk. P. C. 426, 427. This trial by battel is before the constable and marshal; but with all its ceremonies is now disused. See Glanv. lib. 14. *Bracton*, lib. 3. *Britton*, c. 22. *Smith de Rep. Angl. lib. 2. Co. Lit. 294, &c. Vide Trial by Battel*, described *Black. Com. 3 V. 339. Vide Combat.*

Battery, (from the Fr. *batre*, to strike, or Sax. *batte*, a club) Is an injury done to another in a violent manner; as by striking or beating of a man, pushing, jolting, flipping upon the nose, &c. And it is also defined by our law to be a trespass committed by one man upon another *vi & armis & contra pacem*, &c. This offence is punishable by action and indictment; on action for the injury at the suit of the party, the defendant shall render damages, &c. And on indictment at the suit of the king, for a breach of the peace, he shall be fined according to the heinousness of the offence. *Dalt. 282. 1 Hawk. P. C. 134.* For here the person offending is subject to a twofold punishment, *viz.* a fine to the king, and damages to the party; though it is usual only to bring an action for damages, which in battery and maihem the court may increase upon view of the record and the person. 2 *Roll. Abr. 572.* But a man may beat another who first assaults him, in his own defence, and justify in an action by special pleading, or that the battery was occasioned by his own assault; or the defendant may give that in evidence upon *Not guilty* to an indictment: and the record of the conviction of the offender by indictment may serve afterwards for evidence in action of trespass for the same assault and battery. *Terms de Ley. 2 Roll. Abr. 546.* By *Holt* Chief Justice the least touching of another in anger is a battery: if two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently, it will be no battery: but if either of them use violence to force his way in a rude manner, or any struggle is made about the passage to that degree as to do hurt, it will be a battery. *Mod. Caf. 149.* The beating of another, in a moderate manner, is lawful in some cases, as the parent of his child, a master his servant, or apprentice, &c. See *Assault.*

Batus, (Lat. from the Sax. *bat*) A boat, and *battellus* a little boat—*Concessit etiam eidem Hugo Wake pro se & hered. suis, quod predictus abbas & successores sui & ecclesia sua de Croyland habeat tres battellos in Harnolt, &c. Chart. Ed. 1. 20 Julii 18 regni.* Hence we have an old word *batswain*, for such as we now call *boatswain* of a ship.

Baubella, (*baubles*) A word mentioned in *Howeden* in R. 1. and signifies jewels or precious stones.—*Tres partes thesauri sui & omnia baubella sua divisi.*

Bauduin, (*baldicum*, and *baldekinum*) Cloth of *bawthin*, or gold: it is said to be the richest cloth, now called *brocade*, made with gold and silk, or tissue, upon which figures in silk, &c. were embroidered. *Anno 4 Hen. 8. c. 6. erat pannus auro rigidus, plumatoque opere intertextus*: but some writers account it only cloth of silk.

Bawdy-house, (*lupanar, fornix*) A house of ill fame, kept for the resort and commerce of lewd people of both sexes. The keeping of a *bawdy-house* comes under the cognizance of the temporal law, as a common nuisance, not only in respect of its endangering the public peace by drawing together dissolute and debauched persons, and pro-

moting quarrels, but also in respect of its tendency to corrupt the manners of the people, by an open profession of lewdness. 3 *Inst. 205. 1 Hawk. P. C. 196.* Those who keep *bawdy-houses* are punished with fine and imprisonment; and also such infamous punishment, as pillory, &c. as the court in discretion shall inflict: and a lodger who keeps only a single room for the use of *bawdry*, is indictable for keeping a *bawdy-house*. 1 *Salk. 382.* Persons resorting to a *bawdy-house*, are punishable, and they may be bound to the good behaviour, &c. But if one be indicted for keeping or frequenting a *bawdy-house*, it must be expressly alledged to be such a house, and that the party knew it; and not by suspicion only. *Popb. 208.* A constable, upon information, that a man and woman are gone to a lewd house, or about to commit fornication or adultery, may, if he finds them together, carry them before a justice of peace without any warrant, and the justice may bind them over to the sessions. *Dalt. 214. Sed qu. unless he finds them in the act.*

It seems always to have been the better opinion, that a man may be bound to his good behaviour, for haunting bawdy-houses with women of bad fame, as also for keeping bad women in his own house. 1 *Hawk. 132.*

But if a person is indicted for frequenting a bawdy-house, it must appear, that he knew it to be such a house; and it must be expressly alledged, that it is a bawdy-house, and not that it is suspected to be such a house. *Wood, b. 3. c. 3.* Constables in these cases may call others to their assistance, enter bawdy-houses, and arrest the offenders for a breach of the peace: in London they may carry them to prison; and by the custom of the city, whores and bawds may be carted. 3 *Inst. 206.*

A wife may be indicted together with her husband, and condemned to the pillory with him for keeping a bawdy-house; for this is an offence as to the government of the house; in which the wife has a principal share; and also such an offence as may generally be presumed to be managed by the intrigues of her sex. 1 *Hawk. 2.*

On an indictment for keeping a disorderly house, a female witness swore, that she was a sailor's wife, and during her husband's absence out of the realm, she had often prostituted herself there: Lord *Raymond* said it was an odious piece of evidence, and ought not to be heard: *Barlow's Justice, tit. Bawdy-house.*

But it is said, a woman cannot be indicted for being a bawd generally; for that the bare solicitation of chastity is not indictable. 1 *Hawk. 196. 1 Salk. 382.*

It was always held infamous to keep a bawdy-house; yet some of our historians mention bawdy-houses publicly allowed here in former times till the reign of Hen. 8. and assign the number to be eighteen thus allowed on the bank-side in *Southwark*. See *Stews and Brothel-Houses*. If two inhabitants, paying scot and lot, shall give notice to a constable of any person keeping a bawdy-house, the constable shall go with them before a justice of peace, and shall, (upon such inhabitants making oath, that they believe the contents of such notice to be true, and entering into a recognizance of 20*l.* each, to give material evidence of the offence,) enter into a recognizance of 30*l.* to prosecute with effect such person for such offence at the next sessions; the constable shall be paid his reasonable expences by the overseers of the poor, to be ascertained by two justices; and if the offender be convicted, the overseers shall pay to the two inhabitants 10*l.* each. On the constable's entering into such recognizance as aforesaid, the justice shall bind over the person accused to the next sessions, and, if he shall think proper, demand security for such person's good behaviour in the mean time. A constable neglecting his duty forfeits 20*l.* Any person appearing as master or mistress, or as having the care or management of any bawdy-house, shall be deemed the keeper thereof, and liable to be punished as such. *Stat. 25 Geo. 2. c. 36.*

Form of an indictment for keeping a bawdy-house.

THE jurors, &c. That A. B. of, &c. the day and year, &c. and at divers times before and afterwards, at H. in the county aforesaid, held and kept, and often made use

use of, and still holds and keeps, &c. in his house there, a common bawdy-house, entertainments for lechery and fornication, and permits men and other suspected persons, and not of good behaviour or fame, carnally to lie with whores, to the great detriment of all the people of our sovereign lord the king there near dwelling, and to the ill example of all other offenders in such cases, and against the peace, &c.

Bay, or *pen*, Is a pond-head made up of a great height, to keep in water for the supply of a mill, &c. so that the wheel of the mill may be driven by the water coming thence, through a passage or floodgate. A harbour where ships ride at sea, near some port, is also called a bay: and this word is mentioned *anno 27 Eliz. c. 19.*

Beacon, (from the Sax. *beacen, i. e. signum*) A signal well known; being a fire maintained on some eminence near the coasts of the sea, to prevent invasions, &c. *4 Inst. 148. 8 Eliz. c. 13.* Hence *beaconage* (*beaconagium*) money paid towards the maintenance of beacons: and we still use the word *beckon* to give notice unto. See *Stat. 5 Hen. 4. &c.* The king hath an exclusive power by commission, under the Great Seal, to appoint them. *Black. Com. 1 V. 265.* They are usually vested by letters patent in the office of Lord High Admiral. *Id.* See the power given to the *Trinity House*, per *Stat. 8 Eliz. c. 13.*

Bead, or *bede*, (Sax. *bead, oratio*) A prayer; so that to say over beads, is to say over one's prayers. They were most in use before printing, when poor persons could not go to the charge of a manuscript book: though they are still used in many parts of the world, where the Roman Catholic religion prevails. They are not allowed to be brought into England, or any superstitious things, to be used here, under the penalty of a *præmunire*, by *Stat. 13 Eliz. c. 2.*

Beam, Is that part of the head of a stag where the horns grow, from the Sax. *beam, i. e. arbor*; because they grow out of the head as branches out of a tree. *Beam* is likewise used for a common balance of weights in cities and towns. *Stat. 13 Ed. 1.*

Beams and Ballance, for weighing goods and merchandize in the city of London. See *Tonage*.

Beaters, Signifies such as bear down or oppress others, and is said to be all one with maintainers.—Justices of assize shall inquire of, hear, and determine maintainers, bearers, and conspirators, &c. *Stat. 4 Ed. 3. c. 11.*

Beasts of chase (*feræ campestris*) Are five, viz. the buck, doe, fox, marten, and roe. *Manw. part 1. pag. 342.* *Beasts of the forest* (*feræ silvestres*) otherwise called *beasts of venary*, are the hart, hind, boar, and wolf. *Ibid. par. 2. c. 4.* *Beasts and fowls of the warren*, are the hare, coney, pheasant, and partridge. *Ibid. Reg. Orig. 95, 96. &c. Co. Lit. 233.*

Beau-pleader, (*pulchre placitando*, Fr. *beauplaidier, i. e.* to plead fairly) Is a writ upon the statute of *Marlbridge*, *52 Hen. 3. c. 11.* whereby it is enacted, That neither in the circuit of justices, nor in counties, hundreds, or courts-baron, any fines shall be taken for *fair pleading*, viz. for not pleading fairly or aptly to the purpose; upon which statute this writ was ordained, directed to the sheriff, bailiff, or him who shall demand such fine, and it is a prohibition not to do it; whereupon an *alias* and *pluries* and attachment may be had, &c. *New Nat. Br. 596, 597.* And *beau-pleader* is as well in respect of vicious pleadings, as of the *fair pleading*, by way of amendment. *2 Inst. 122.*

Bedel, (*bedellus*, Sax. *hyrd*) A cryer or messenger of a court, that cites men to appear and answer: and is an inferior officer of a parish, or liberty, very well known in London, and the suburbs. There are likewise university bedels, and church bedels; now called summoners and apparitors: and *Manwood* in his *Forest Laws*, saith there are forest bedels, that make all manner of garnishments for the courts of the forest, and all proclamations, and also execute the process of the forest, like unto bailiffs errant of a sheriff in his county.—*Edgarus interdictit omnibus ministris, id est vicecomitibus, bedellis & baliwis, &c. Ne introeant fines & limites dicti marisci.* *Inglulph. Hist. Croyl.*

Bedelary, (*bedelaria*) Is the same to a bedel, as *bailiwick* to a bailiff. *Lit. lib. 3. cap. 5.*—*Will. filius Adæ*

tenet bedelarium hundredi de Macclesfield, &c. *Ex Rot. Antiq.*

Bederepe, alias *biderepe*, (Sax.) Is a service which certain tenants were anciently bound to perform, viz. to reap their landlord's corn at harvest; as some yet are tied to give them one, two, or three days work, when commanded. This customary service of inferior tenants was called in the Latin *præcaria, bedrepium, &c.*—*Debent venire in autumnno ad præcariam quæ vocatur a le bederepe. Plac. in Crast. pur. 10 H. 3. Rot. 8. Surrey. See Magna Præcaria.*

Bedetwori, Those which we now call *banditti*, profligate and excommunicated persons. The word is mentioned in *Mat. Paris. anno 1258.*

Beer, It is lawful to export beer, &c. paying a custom duty. *Stat. 22 & 23 Car. 2.* And see *1 Will. & Mar. stat. 1. cap. 22.* concerning the exportation of beer, as also the *11 & 12 Will. 3. cap. 15.* for ascertaining the measure for retailing ale and beer. And see also *Alehouses* and *Wetters*.

Beggars, Pretending to be blind, lame, &c. found begging in the streets, are to be removed by the constables; and refusing to be removed, shall be whipt, &c. *Stat. 12 Ann.* And our statutes have been formerly so strict for punishing of beggars, that in the reign of King *Hen. 8.* a law was enacted, that sturdy beggars, convicted of a second offence, should be executed as felons: but this statute was afterwards repealed. See *Rogue*.

Behaviour of persons. Vide *Good Behaviour*.

Belge, The inhabitants of *Somersetshire, Wiltshire, and Hampshire.* *Blount.*

Benefice, (*beneficium*) Is generally taken for any ecclesiastical living or promotion; and benefices are divided into *elective* and *donative*: so also it is used in the Canon law. *3 Inst. 155. Duarenus de Beneficiis, lib. 2. c. 3.* All church preferments and dignities are benefices; but they must be given for life, not for years, or at will. *Deaneries, prebendaries, &c.* are benefices with cure of souls, tho' not comprehended as such within the *Stat. 21 H. 8. c. 13.* of residence: but according to a more strict and proper acceptation, benefices are only rectories, and vicarages.

Beneficia were formerly portions of land, &c. given by lords to their followers for their maintenance; but afterwards, as these tenures became perpetual and hereditary; they left their name of *beneficia* to the livings of the clergy, and retained to themselves the name of *feuds*. And *beneficium* was an estate in land at first granted for life only, so called, because it was held *ex mero beneficio* of the donor; and the tenants were bound to swear fealty to the lord, and to serve him in the wars, those estates being commonly given to military men: but at length, by the consent of the donor, or his heirs, they were continued for the lives of the sons of the possessors, and by degrees past into an inheritance: and sometimes such benefices were given to bishops, and abbots, subject to the like services, viz. to provide men to serve in the wars; and when they as well as the laity had obtained a property in those lands, they were called *regalia* when given by the king; and on the death of a bishop, &c. returned to the king till another was chosen. *Spelm. of Feud, c. 2. Blount, verb. Beneficium.* Lands were anciently held in *beneficio*; and then granted in *alodium perpetuo jure, &c.*

Under this head the following particulars are to be attended to, which include several requisites in order to constitute a legal title to a benefice, as,

- I. *Presentation*, for which see title *Presentation*.
- II. *Examination and refusal, &c.*

It is very well known, that in the first settlement of the church of England, the bishops of the several dioceses had them under their own immediate care; and that they had the clergy living in a community with them, whom they sent abroad to several parts of their dioceses, as they saw occasion to employ them; but that by degrees, they found a necessity of fixing presbyters within such a compass, to attend upon the service of God amongst the inhabitants, and those precincts, which are since called parishes, were at first much larger; that when lords of manors

manors were inclined to build churches for their own convenience, they found it necessary to make some endowments, to oblige those who officiated in their churches to a diligent attendance; that upon this, the several bishops were very well content to let those patrons have the nomination of persons to such churches, provided they were satisfied of the fitness of those persons, and that it were not deferred beyond such a limited time. So that the right of patronage is really but a limited trust; and the bishops are still, in law, the judges of the fitness of the persons to be employed in the several parts of their dioceses. But the patrons never had the absolute disposal of their benefices upon their own terms; but if they did not present fit persons within the limited time, the care of the places did return to the bishop, who was then to provide for them. 1 *Still.* 309.

And by the statute of *Articuli Cleri*, 9 Ed. 2. *ft.* 1. *cap.* 13. it is enacted as followeth: "It is desired, that spiritual persons, whom our lord the king doth present unto benefices of the church (if the bishop will not admit them, either for lack of learning, or for other cause reasonable) may not be under the examination of lay persons in the cases aforesaid, as it is now attempted, contrary to the decrees canonical; but that they may sue unto a spiritual judge for remedy, as right shall require. The answer: Of the ability of a parson presented unto a benefice of the church, the examination belongeth to a spiritual judge; so it hath been used heretofore, and shall be hereafter."

As to causes of refusal.

The most common and ordinary cause of refusal is want of learning. But there are also many other causes for which a clerk presented may lawfully be refused; as, if he be perjured before a lawful judge; or if he be an heretic or schismatick; or irreligious; or (as is said in the old books) if he is a bastard, and not dispensed withal; or if he is within age; or if he or his patron be excommunicated for the space of forty days; or if he be outlawed; or guilty of forgery; or hath committed simony in the procuring of the presentment he brings; or of any other presentment to a former benefice; or hath committed manslaughter; that is, if he be attainted thereof, and not pardoned; and that it is said, that the ordinary may refuse a clerk upon his own knowledge for an offence committed by him, which is a good cause of refusal, altho' he be not convicted thereof by the law; and this shall be tried by issue, whether it be true or not: and generally, all such as are sufficient causes of deprivation, are also sufficient causes of refusal. *Wats.* c. 20.

If the clerk refused be the presentee of a bishop, or other ecclesiastical patron, the ordinary is not bound to give notice of the refusal: or if he should do it, such patron can never revoke nor vary his presentation, by presenting one afterwards that is better qualified, without the ordinary's consent; the law supposing him that is a spiritual person to be capable of choosing an able clerk: and so lapse may come upon him unavoidably, if the clerk first presented be justly refused. But if the clerk presented be the presentee of a lay patron, and be refused by the ordinary, the ordinary in most cases is bound to give notice to the patron of such refusal: for if in such case no notice is given, no lapse can run, tho' no other clerk be presented; nor if notice be given, unless upon trial the clerk was justly refused. But if a clerk be for good cause refused, and notice thereof be in due time and manner given to the patron, and no other clerk be presented in time; lapse doth run to the ordinary. *Wats.* c. 12.

In the case of *Hale* and the bishop of *Exeter*, *M.* 3 *Will.* it was said by the court, That if the ordinary refuse because he is criminous, he need not give notice of the refusal; for the crime is as much in the cognizance of the patron as of the bishop; but if he refuse because illiterate, he must give notice. 2 *Salk.* 539.

III. *Admission*, for which see title *Admission*.

IV. *Institution or collation*, for which see titles *Institution* and *Collation*.

V. *Induction*, and *requisites after induction*, for which see title *Induction*.

And see 1 *Burn. Eccl. Law*, p. 97.

As to the origin of the term *benefice*, see *Black. Com.*

4 *V.* 106.

Beneficio primo Ecclesiastico habendo, A writ directed from the King to the Chancellor, to bestow the benefice that shall first fall in the King's gift, above or under such a value, upon such a particular person. *Reg. Orig.* 307.

Benefit of Clergy. See *Clergy*.

Benereeth, An ancient service which the tenant rendered to his lord with his plough and cart. *Lamb. Itin.* p. 222. *Co. Lit.* 86.

Benevolence, (*benevolentia*) Is used in the chronicles and statutes of this realm for a voluntary gratuity given by the subjects to the king. *Stow's Annals*, p. 701. And *Stow* saith, that it grew from *Edward the Fourth's* days: you may find it also anno 11 *Hen.* 7. c. 10. yielded to that prince in regard of his great expences in wars, and otherwise. 12 *Rep.* 119. And by act of parliament, 13 *Car.* 2. c. 4. it was given to his majesty *K. Char.* 2. but with a proviso that it should not be drawn into future example: so that all supplies of this nature are now by way of taxes. In other nations *benevolences* are sometimes given to lords of the fee by their tenants, &c. *Cassan. de Consuet.* *Burg.* p. 134, 136.

Benevolentia Regis habenda, The form of purchasing the king's pardon and favour, in ancient fines and submissions, to be restored to estate, title, or place.—*Thomas de St. Walerico dat regi mille marcas, pro habenda benevolentia regis & pro habendis terris suis unde disseisitus fuit.* *Paroch. Antiq.* p. 172.

Bent. See 15 *Geo.* 2. c. 33. for planting the hills on the north-west coast of the kingdom, with a certain rush or shrub, called *star* or *bent*, and the penalties of cutting or carrying the same away. For the utility of this article, and how excellent a fodder it is in winter, see *Dictionary of Husbandry*, tit. *Bent*, and *Mills's Husbandry*. 'Tis an article well worth attending to in this country.

Berbiage, (*berbiagium*) *Nativi tenentes manerii de Calistoke reddunt per ann. de certo redditu vocat. berbiag. ad le Hokeday xix. s.* *MS. Survey of the Duchy of Cornwall.*

Berbicaria, A sheep down, or ground to feed sheep. *Leg. Alfredi*, c. 9. *Et quod de berbicaria, &c. Manag'ticon*, tom. 1. p. 308.

Bercaria, (*berchery*, from the Fr. *bergerie*) A sheepfold, or other inclosure for the keeping of sheep: in *Domesday* it is written *berquarium*. 2 *Inst.* 476.—*Mandat. est Roberto de Lexinton, quod abbati de Miraval faciat unam bercariam in pastura de Fairfield ad oves suas custodiendas.* *Claus.* 9 *Hen.* 3. m. 12. — *Dedi sexaginta acras terre ad unam bercariam faciendam.* — *Mon. Angl.* tom. 2. p. 599. *Bercarius* is taken for a shepherd: and *bercaria* is said to be abbreviated from *berbicaria*, and *berbex*; hence comes *berbicus* a ram, *berbicus*; *berbicus*, *caro berbicina*, mutton. *Cowel.*

Berefellarii: There were seven churchmen so called, anciently belonging to the church of *St. John of Beverley*. — *Sed quia eorum turpe nomen berefellariorum patens risui remanebat, dictos septem de cetero non berefellarios sed personas vulgus nuncupari.* *Pat.* 21 *R.* 2. par. 3. m. 10 per *Inspey*.

Beretrett, *Beretred*, A large wooden tower. *Simeon Dunelm.* Anno 1123.

Bergmaster, (from the Sax. *berg* a hill, *mons*, quasi master of the mountains) Is a chief officer among the *Derbyshire* miners, who also executes the office of a coroner. — *Juratores dicunt, quod in principio quando minatores veniunt in campum mineras quarerunt, iuvanta minera, veniunt ad ballivum, qui dicitur bergmaster, et petunt ab eo duas metas, &c.* — *Ese. de An.* 16 Ed. 1. num. 34. in *Turri London.* The Germans call a mountaineer, or miner, a *bergman*.

Bergmote, or *Bergmote*, Comes from the Sax. *berg*, a hill, and *gemote*, an assembly; and is as much as to say an assembly or court upon a hill, which is held in *Derbyshire*, for deciding pleas and controversies among the miners.

miners.—*Juratores etiam dicunt quod placita del berghmoth debent teneri de tribus septimanis in tres septimanas super minneram de Pecco.* Etc. 16 Ed. 1. And on this *count of burghmothe*, Mr. Manlowe, in his *Treatise of the Customs of the Miners*, hath a copy of *verses*, with references to statutes, &c. Vide *Squire on the Anglo-Saxon Government*.

Beria, *berie*, *berry*, A large open field; and those cities and towns in England which end with that word, are built in plain and open places, and do not derive their names from boroughs, as Sir Henry Spelman imagines. Most of our glossographers in the names of places have confounded the word *berie* with that of *bury* and *borough*, as if the appellative of ancient towns; whereas the true sense of the word *berie* is a flat wide campaign, as is proved from sufficient authorities by the learned *Du Fresne*, who observes that *Beria Sancti Edmundi*, mentioned by *Mat. Paris. sub ann. 1174.* is not to be taken for the town, but for the adjoining plain. To this may be added, that many flat and wide meads, and other open grounds, are called by the name of *beries*, and *berysfields*: the spacious meadow between Oxford and Isley was in the reign of king Athelstan called *Bery*. B. Twine, MS. As is now the largest pasture ground in Quarendon in the county of Buckingham, known by the name of *Beryfield*. And tho' these meads have been interpreted demesne or manor meadows, yet they were truly *flat* or open meadows, that lay adjoining to any vill or farm.

Berra, A plain open heath. *Berras affartare*, to grub up such barren heaths.

Bernet, *Incendium*, comes from the Sax. *hyran*, to burn: it is one of those crimes which by the laws of *Hen. 1. cap. 15. emendari non possunt*. Sometimes it is used to signify any capital offence. *Leges Canuti apud Brempt. c. 90. Leg. Hen. 1. c. 12, 47.*

Bersa, (Fr. *bers*), A limit or bound.—*Pasturam duorum taurorum per totam bersam in foresta nostra de Chippenham, &c.* Mon. Angl. tom. 2. pag. 210. A park pale.

Bersare, (Germ. *bersen*, to shoot) *Bersare in foresta mea ad tres arcus.* Chart. Ranulf. Comit. Cestr. ann. 1218. *viz.* to hunt or shoot with three arrows in my forest. *Bersarii* were properly those that hunted the wolf.

Berselet, (*berseletta*) A hound.—*Ad bersandum in foresta cum novem arcubus & sex berseletis.* Chart. Reg. de Quincy.

Berton, or **Barton**, (*bertona*) Is that part of a country farm where the barns and other inferior offices stand, and wherein the cattle are foddered, and other business is managed. See *Claus. 32 Ed. 1. m. 17.* It also signifieth a farm, distinct from a manor: in some parts of the west of England they call a great farm a *berton*; and a small farm a *living*.—*Bertonarii* were such as we now call farmers or tenants of *bertons*; husbandmen that held lands at the will of the lord.—*Cum bertonas, terris & tenementis, quibus bertonarii modo tenent ad voluntatem.* Chart. Johan. Episc. Exon. 24 Dec. Ann. 1337.

Berewicha, or **Berwica**, Villages or hamlets belonging to some town or manor. This word often occurs in *Domesday*: *ista sunt berewichæ ejusdem manerii.*

Berwick, Merchandize carried into or brought out of Scotland, or the isles thereof, shall be brought first to *Berwick*, on pain of forfeiture: and the merchants and freemen there shall have the farm of the waters royal and fishings within the feignidry. *Stat. 22 Ed. 4. c. 8.* The liberties of *Berwick* are declared, by the *Stat. 1 Jac. 1. c. 28.*

By *Stat. 20 Geo. 2. c. 42. sect. 3.* *Wales* and *Berwick* upon *Tweed* shall be included in all acts of parliament, wherein the kingdom of *England*, or that part of GREAT BRITAIN called *England*, shall be mentioned. As to *Berwick*, vide *Black. Com. 1 V. 98, &c.*

Bery, or **Bury**. The vill or seat of habitation of a nobleman, a dwelling or mansion-house, being the chief of a manor; from the Sax. *beorg*, which signifies a hill or castle; for heretofore noblemens seats were castles, situate on hills, of which we have still some remains. As in *Herefordshire*, there are the *beries* of *Stockton*, *Hope*, &c. It was anciently taken for a sanctuary.

Besaille, (Fr. *bisayenl*, *proavus*) The father of the grandfather: and in the Common law it signifies a writ that lies where the great grandfather was seised the day that he died, of any lands or tenements in fee-simple; and after his death a stranger entereth the same day upon him, and keeps out the heir. *F. N. B. 222.* Vide *Booth on Real Actions*.

Bescha, (from the Fr. *bercher*, *sodere*, to dig) A spade or shovel.—*In communi pastura turbas, cum una sola besca fodient & nihil dabunt.* Prior. Lew. Customar. de Hecham, pag. 15. Hence perhaps, *una Bescata terrainclusa*—Mon. Ang. tom. 2. fol. 642. may signify a piece of land usually turned up with a spade, as gardeners fit and prepare their grounds; or may be taken for as much land as one man can dig with a spade in a day.

Bestials, (*bestials*) Beasts or cattle of any sort; *anno 4 Ed. 3. c. 3.* it is written *bestayle*; and is generally used for all kinds of cattle, though it has been restrained to those purveyed for the king's provision. *12 Car. 2. c. 4.*

Betaches, Laymen using glebe lands. *Parl. 14 Ed. 2.*

Beberches, Bed-works, or customary services done at the bidding of the lord by his inferior tenants.—*Inter servitia customary tenentium in Blebury, de dominio abbatis & conventus Reading—prædictus abbas habebit de eis duas precarias carrucarum per annum, quæ vocantur beverches, & cum qualibet carruca duos homines qualibet die ad prundium abbatis.* Cartular. Rading. MS. f. 225.

Bedward, An old Saxon word signifying expended; for before the Britons and Saxons had plenty of money, they traded wholly in exchange of wares.

Bidale, or **Bidall**, (*precaria potaria*, from the Sax. *biddan*, to pray or supplicate) Is the invitation of friends to drink ale at the house of some poor man, who thereby hopes a charitable contribution for his relief: it is still in use in the west of England: and is mentioned *26 Hen. 8. c. 6.* And something like this seems to be what we commonly call *house-warming*, when persons are invited and visited in this manner on their first beginning house-keeping.

Bidding of the Beads, (*bidding* from the Sax. *biddan*) To pray or desire; and *bead* from the Sax. *bead* a prayer, was anciently a charge or warning given by the parish priest to his parishioners at some special times to come to prayers, either for the soul of some friend departed, or upon some other particular occasion. And at this day our ministers, on the Sunday preceding any festival or holiday in the following week, give notice of them, and desire and exhort their parishioners to observe them as they ought; which is required by our canons. See *Stat. 27 Hen. 8. c. 26.*

Bidentes, Two yearlings, or sheep of the second year.—*Will. Longspe A. D. 1234.* granted to the prior and canons of *Burcester*, *pasturam ad quingenta bidentes, cum dominicis bidentibus meis ibidem pascendis.* Paroch. Antiq. p. 216.

Biduana, A fasting for the space of two days. *Matt. West. p. 135.*

Biga, *bigata*, A cart or chariot drawn with two horses, coupled side to side; but it is said to be properly a cart with two wheels, sometimes drawn by one horse; and in our ancient records it is used for any cart, wain or waggon.—*Et quod eant cum bigis & carris cum ceteris phaleris super tenementum suum, &c.* Mon. Angl. tom. 2. fol. 256.

Bigamus, Is a person that hath married two or more wives, successively after each other, or a widow; for the canonists account a man that hath married a widow, to have been twice married. It is mentioned in the statutes *18 Ed. 3. c. 2. 1 Ed. 6. c. 12.* And *2 Inst. 273.*

Bigamy, (*bigamia*) Signifies a double marriage, or marriage of two wives; it is used in our law, for an impediment to be a clerk, by reason he hath been twice married. *4 Ed. 1. c. 5.* Which seems to be grounded upon the words of *St. Paul to Timothy, epist. 1. cap. 5. vers. 2. Oportet ergo episcopum irreprehensibilem esse & unius uxoris virum*: upon which it is said the canonists have founded their doctrine, that he that hath been twice married, may

not be a clerk; so that they do not only exclude such from holy orders, but also deny them all privileges that belong to clerks: but this law is abolished by 1 Ed. 6. and see the Stat. 18 Eliz. cap. 7. The statute called the *Statute de Bigamis*, is the 4 Ed. 1. and the 1 Jac. 1. c. 11. calls it *bigamy*, where a person marries the second wife, &c. the first being living, which is felony; but this is properly *polygamy*, and not *bigamy*, which last is not where a person hath two wives together, but where he hath two wives one after another. 2 Inst. 273.

There is a proviso in the 1 Jac. 1. c. 11. that the said statute shall not extend to any person or persons, who shall be at the time of such marriage divorced by a sentence in the ecclesiastical court declared to be void and of no effect; nor to any person or persons, for or by reason of any former marriage had or made within age of consent.

According to the construction of this provision, divorces *a mensa et thoro, causa adulterii* and *sevitie* are within the exception in the statute, though the word *separamus*, and not *divortiamus*, be made use of in the sentence; for the statute being penal, shall be construed favourably; and such separations are taken for divorces in common understanding. 1 Hawk. P. C. 111. 3 Inst. 89. H. P. C. 122. Kel. 27. Cro. Car. 461.

It has been held likewise with respect to the consent of parties. If one of the parties only were under the age of consent at the time of such marriage, the exception extends as well to the party above the age of consent, as to the other; because the power of disagreeing was equal on both sides. Vide on this subject Black. Com. 4 V. 163.

Bigot, Is a compound of several old English words, and signifies an obstinate person; or one that is wedded to an opinion, in matters of religion, &c. It is recorded that when Rollo the first duke of Normandy, refused to kiss the King's foot, unless he held it out to him, it being a ceremony required in token of subjection for that dukedom, with which the King invested him; those who were present taking notice of the duke's refusal, advised him to comply with the King's desire, who answered them *ne se bigot*; whereupon he was in derision called *bigot*, and the Normans are so called to this day.

Bilagines, (Lat.) Bilaws of corporations, &c. See *By-Laws*.

Bilancis deferendis, A writ directed to a corporation, for the carrying of weights to such a haven, thence to weigh the wool that persons by our ancient laws were licensed to transport. Reg. Orig. 270.

Bilinguis, Signifies generally a double tongued man; or one that can speak two languages: but it is used in our law for a jury that passeth between an Englishman and a foreigner, whereof part ought to be English, and part strangers. Though this is properly a jury *de medietate lingue*. 28 Ed. 3. c. 13.

Bill, (*billā*) Is diversly used: in law proceedings, it is a declaration in writing, expressing either the wrong the complainant hath suffered by the party complained of, or else some fault committed against some law or statute of the realm: and this bill is sometimes addressed to the Lord Chancellor of England, especially for unconscionable wrongs done to the complainant; and sometimes to others having jurisdiction, according as the law directs. It contains the fact complained of, the damage thereby sustained, and petition of process against the defendant for redress; and it is made use of as well in criminal as civil matters. In criminal cases, when a grand jury upon a presentment or indictment find the same to be true, they indorse on it *billā vera*; and thereupon the offender is said to stand indicted of the crime, and is bound to make answer unto it: and if the crime touch the life of the person indicted, it is then referred to the jury of life and death, viz. the petty jury, by whom if he be found guilty, then he shall stand convicted of the crime, and is by the judge condemned to death. *Terms de Ley* 86. 3 Inst. 36. See *Ignoramus* and *Indictment*.

Bill is also a common engagement for money given by one man to another; being sometimes with a penalty, called *penal bill*, and sometimes without a penalty, though the latter is most frequently used. By a bill we ordinarily

understand a single bond, without a condition; and it was formerly all one with an obligation, save only it's being called a bill when in English, and an obligation when in Latin. West. Symbol. lib. 2. sect. 146. A bill has been defined to be a writing, wherein one man is bound to another, to pay a sum of money on a day that is future, or presently on demand, according to the agreement of the parties at the time it is entered into, and the dealings between them and it is divided into several sorts, as a bill that is *single*, a bill that is *penal*, &c. Where there is a bill of 100l. to be paid on demand, it is a duty presently, and there needs no actual demand. Cro. Eliz. 548. And a single obligation or bill, upon the sealing and delivery, is *debitum in presenti*, though *solvendum in futuro*. On a collateral promise to pay money on demand, there must be a special demand; but between the parties it is a debt, and said to be sufficiently demanded by the action: it is otherwise where the money is to be paid to a third person; or where there is a penalty. 3 Keb. 176. If a person acknowledge himself by bill obligatory to be indebted to another in the sum of 50l. and by the same bill binds him and his heirs in 100l. and says not to whom he is bound, it shall be intended he is bound to the person to whom the bill is made. Roll. Abr. 148. A bill obligatory written in a book, with the party's hand and seal to it, is good. Cro. Eliz. 613. And if a man makes a bill thus: *I do owe and promise to pay to A. B. 50l. &c. for payment thereof, I bind myself to C. D. &c. another person*; it is good by the words of the first part, and the words obligatory to another person are void. A man says by his deed: *Memorandum, That I A. B. have received of C. D. the sum of 20l. which I promise to pay to E. F. In witness whereof I have hereunto set my seal, &c.* Or if the bill be, *I shall pay to C. D. 20l. In witness, &c. and the same be sealed*: or if it runs as follows, *I owe to C. D. 20l. to be paid at, &c.* Or, *I had of C. D. 20l. &c. to be repaid him again*: Or, *I A. B. do bind myself to C. D. that he shall receive 20l. &c.* All these are said to be obligatory. 2 Rol. 146. 22 E. 4. c. 22.

Now bonds, &c. are to be on stamped paper, &c.

Form of a single Bill for Money.

K NOW all men by these presents, That I A. B. of, &c. do owe and am indebted to C. D. of, &c. the sum of fifty pounds of lawful money of Great Britain, which I promise to pay unto the said C. D. his executors, administrators or assigns, at and upon the first day of October next ensuing the date of these presents. In witness whereof I have hereunto set my hand and seal the 10th day of August, Anno Domini 1770.

A Penal Bill for Payment of Money.

K NOW all men by these presents, That I A. B. of, &c. do owe unto C. D. of, &c. the sum of one hundred pounds of lawful money of Great Britain, to be paid unto the said C. D. his executors, administrators or assigns, on, &c. next ensuing the date hereof; for which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, to the said C. D. his executors, administrators and assigns in two hundred pounds of like lawful money firmly by these presents. In witness, &c.

Bill of Exceptions. Vide *Barb. Ni. pri.* 295. Black. Com. 3 V. 372.

Exception to evidence, &c. At Common law a writ of error lay for an error in law, apparent in the record, or for error in fact, where either party died before judgment; yet it lay not for an error in law not appearing in the record; and therefore, where the plaintiff or demandant, tenant or defendant, alledged any thing *ore tenus*, which was over-ruled by the judge, this could not be assigned for error, nor appearing within the record, nor being an error in fact, but in law; and so the party grieved was without remedy. 2 Inst. 436. And therefore,

By the statute of Westm. 2. "When one impleaded before any of the justices, alledges an exception, praying they

they will allow it, and if they will not, if he that alleges the exception writes the same, and requires the justices will put to their seals, the justices shall so do; and if one will not another shall; and if, upon complaint made of the justice, the King cause the record to come before him, and the exception be not found in the roll, and the plaintiff shew the written exception, with the seal of the justice thereto put, the justice shall be commanded to appear at a certain day, either to confess or deny his seal, and if he cannot deny his seal, they shall proceed to judgment according to the exception, as it ought to be allowed or disallowed."

This statute extends to the plaintiff as well as defendant, also to him who comes *in loco tenentis*, as one that prays to be received, or the vouchee; and in all actions whether real, personal, or mixt. 2 *Inst.* 427.

The statute extends not only to all pleas dilatory and peremptory, but to prayers to be received, *oyer* of records and deeds, &c. also to challenges of jurors, and any material evidence offered and over-ruled. 2 *Inst.* 427. *Dyer* 231. *pl. 3.* *Raym.* 486.

The exceptions ought to be put in writing *sedente curia*, in the presence of the judge who tried the cause, and signed by the counsel on each side; and then the bill must be drawn up and tendered to the judge that tried the cause to be sealed by him; and when signed, there goes out a *seire facias* to the same judge *ad componendum scriptum*, and that is made part of the record, and the return of the judge with the bill itself, must be entered on the issue-roll; and if a writ of error be brought, it is to be returned as part of the record. 1 *Nelf. Abr.* 373. If a bill of exceptions is drawn up, and tendered to the judge for sealing, and he refuses to do it, on petition to the Lord Chancellor, he will grant a writ for that purpose.

If one of the justices sets his seal to the bill, it is sufficient; but if they all refuse, it is a contempt in them all; for which the party grieved may have a writ grounded upon the statute, commanding them to put their seals, &c. 2 *Inst.* 427. *Raym.* 182. *S. P.* 2 *Lev.* 237. *S. P.*

Although no time be appointed by this act when the justices shall put their seals, the party must pray the same before judgment; but if they deny it, then may they be commanded after judgment to put their seals, and then the putting of their seals after judgment shall be sufficient. 2 *Inst.* 427.

When a bill of exceptions is allowed, the court will not suffer the party to move any thing in arrest of judgment on the point on which the bill of exceptions was allowed; for his proper redress is by writ of error, and it is presumed, that the court was satisfied in the point when the party tendered his bill of exceptions. 1 *Vent.* 366, 367. 2 *Lev.* 237. 2 *Jones* 117.

These bills of exception, are to be brought before a verdict given, and extend only to civil actions, not to criminal. *Sid.* 85. 1 *Salk.* 288.

Bill of Exchange. Is in general an order for the payment of money to some person or to his order, equivalent to the sum which the drawer hath received. Of these there are different kinds, it will be proper therefore to consider,

- I. The nature of bills of exchange and negotiable notes, and what shall be so deemed.
- II. Of the different kinds of bills of exchange, and negotiable notes; wherein 1. Of foreign bills. 2. Of inland bills. 3. Of promissory and negotiable notes.
- III. Of the acceptance.
- IV. Of the protest.
- V. Of the indorsement.
- VI. Who shall be liable to payment, and to whom, and therein of suing the drawer, indorser, or acceptor.
- VII. Of the action and remedy, and manner of declaring and pleading, and of the evidence requisite.
- VIII. Of bills, lost, stolen or forged.

I. As the custom of merchants hath established these bills and notes, so hath it prescribed their form, and required that the same should be in writing, and drawn by the party, or those having legal authority from him; and such drawing raises a contract to pay the same with-

out any express promise. 3 *New Abr.* 606. *Carth.* 510. *Salk.* 128. *Starky v. Cheesman.*

As to the form of the bill, it is said, that the same strictness and nicety are not required in penning of bills current between merchant and merchant, as in deeds, wills, &c. On the other hand it may happen, that a writing may have the form of a bill of exchange, and yet be otherwise. 3 *New Abr.* 606. *Lucas* 287.

As if *A.* draw a bill in this form; *Sir, pray pay to H. 1945 l. upon demand, out of the money belonging to the proprietors of the Devonshire mines, being part of the consideration-money for the purchase of the manor of West-Buckland.* This is no such bill of exchange as will intitle *H.* to an action against the drawer on the custom of merchants; for it is only a direction or appointment to the cashier to pay the money, and that out of a particular fund, and doth not answer the necessity of trade, not being a negotiable note, nor indorsible over; and charging the drawer on such a note, would be liable to this further inconvenience, that hereby every one who gives his steward an order or authority to pay money, might be charged for non-payment. *Siran.* 591. 3 *Gco.* 1. *Jenney v. Herle.* *L. Raym.* 1361.

So where a bill drawn by an officer upon his agent, requiring him to pay so much out of his growing subsistence, was held no bill of exchange, nor the drawer liable, though such bill was accepted; for it concerns neither trade nor credit; but is to be paid out of the growing subsistence of the drawer; so that if the party die, or the fund be taken away, the payment is to cease and determine. 3 *New Abr.* 606.

Also it hath been resolved, that if *A.* give a note, &c. to *B.* for the payment of a sum of money when he the said *A.* should marry such a one, *B.* cannot bring an action on such note, and declare as on a bill of exchange, setting forth the custom of merchants, &c. for that in truth there is no such custom, being only an agreement founded on a marriage brokerage, and to pay money on a collateral contingency; which contingency cannot be called trading, so as to come within the custom of merchants. 4 *Mod.* 242. *Comb.* 227. *S. C.* *Pearson ver. Garret.*

The plaintiff declared upon the custom of merchants against the defendants as acceptors of a bill of exchange, and the instrument run in these words.

Messrs. Gilly and Co.

Pray pay Mr. Richard Banbury one month after date two hundred pounds on account of freight of the Vcale Galley, Edward Champion; and this order shall be your sufficient discharge for the same.

J. Gibson.

Accepted for Lesset and Gilly at Leghorn, to pay as remitted from thence at usance.

March 18, 1748.

H. Gilley.

This was ruled to be a bill of exchange. *Siran.* 1211.

Pay to me or my order so much, is a bill of exchange if accepted; and this is the way to make a bill of exchange without the intervention of a third person. 1 *Salk.* 130. *Trin.* 2 *Ann.* *B. R.* *Builer v. Crips.*

It hath been resolved, that a bill of exchange drawn by a gentleman, who is no trader, shall notwithstanding make him responsible within the custom of merchants; for otherwise persons of distinction travelling abroad would suffer in their credit; and it might bring a general inconvenience on trade itself, when it came to be known to foreign merchants, that there were some who, though they took upon themselves to draw bills of exchange, yet were not liable to the payment thereof. *Carth.* 82. 1 *Show.* 125. *Wetherly ver. Sarsfield.* *Comb.* 45. 152. *S. C.* ill reported.

II. As to the different kinds of bills.

It is to be observed, 1. That the custom of merchants, in relation to foreign bills of exchange, seems to have prevailed time out of mind; and by this custom, if a merchant abroad draw a bill on a merchant here, or vice versa,

verfa, requesting him to pay a certain sum of money, and the drawer sets his name to it; this amounts to a promise to pay, and subjects him, though but a collateral engagement, to an action on the non-payment. 1 *Roll. Abr.* 6. *Cro. Jac.* 306. *Cro. Car.* 301.

And if the drawer, or he on whom the bill is drawn, refuse to accept it, or having accepted it, refuse to pay it, the payee, or he in whose favour it is drawn, may protest it, and shall recover against the drawer, not only the principal sum, but likewise all interest, costs, and damages, by reason of the protest or refusal of acceptance, or payment of the money. *Cro. Car.* 301.

But though the custom of merchants, in relation to bills of exchange, be established by the Common law, and such bills, being securities for money, are of great credit among them; yet they are not allowed to be securities of as high a nature as bonds or specialties; and therefore it hath been adjudged, that a bill of exchange is within the statute of limitations, and must be sued for within six years after it becomes payable. 3 *New Abr.* 602. *Carth.* 3. *Renew v. Axton.*

Also a bill of exchange is to be considered as a simple contract debt, in a course of administration, which an executor or an administrator, cannot discharge before debts by bond, without being guilty of a *devastavit*. 3 *New Abr.* 602.

So, if a merchant in London draw a bill of exchange on his correspondent in Newcastle, in favour of J. S. and the bill is refused, and J. S. dies intestate, his administrator, on letters of administration taken out in *Durham*, cannot bring an action on the custom of merchants, against the drawer, and lay the same in London; for that a bill of exchange is not equal to a bond or specialty, (which are the deceased's goods where they happen to be at his death), but is a simple contract, which follows the person of the debtor, and makes *bona notabilia* where the debtor resides; and therefore administration ought to have been taken out in London. 3 *New Abr.* 603. *Carth.* 373. *Yeoman v. Bradshaw.* *Comb.* 392. *S. C.*

Also this custom shall not prevail against the privilege of infants, so as to bind them; and accordingly it hath been adjudged, that if an infant draw a bill of exchange, infancy is a good plea in bar to an action brought against him. 3 *New Abr.* 603. *Carth.* 160. *Williams v. Harri-son.*

Bills of exchange are usually drawn payable on sight, so many days after date, or at single, double or treble usance; and it is frequent to draw two or three, if abroad or to be sent abroad, for the same sum, and of the same date, for fear of loss or miscarriage, which carry a condition with them that only one shall be paid. 3 *New Abr.* 603. *Molloy*, b. 2. cap. 10. §. 10.

An usance is said to be regularly a month. *Molloy* 277. 1 *Shew.* 317. But yet varies according to the customs of particular countries, and therefore, where the plaintiff declared on a bill of exchange drawn at *Amsterdam*, payable at *London*, at two usances, and did not shew what the two usances were, judgment was given for the defendant; for the court could not take notice of foreign usances which vary, being longer in one place than in another. 1 *Salk.* 131. *Buckley ver. Cambell.* Therefore, if there are three bills for the same sum, and an action is brought on one of them, and the plaintiff declare, that the money in *billis prædicta mentionat* is not paid, this is sufficient without averring that it was not paid on the other bills, because the sum is the same in all the bills. *Carth.* 510. 1 *Salk.* 130. *adjudged.*

2. With regard to inland bills,

Inland bills of exchange are those drawn by one merchant residing in one part of the kingdom on another residing in some city or town within the same kingdom; and these also being found useful to trade and commerce, have been established on the same foot with foreign bills; but at Common law they differ from them in this, that there was no custom of protesting them, so as to subject the drawer to interest and damages in case of non-payment, as there was on foreign bills. 3 *New Abr.* 603. 1 *Salk.* 131. *Borough v. Perkins.*

To remedy this inconvenience it was enacted by the 9 & 10 W. 3. c. 17. That bills of exchange drawn in England, &c. of 5 l. or upwards, payable at a certain

number of days, &c. after acceptance, three days after it is due may be protested, and notice thereof must be given in 14 days after the protest. Provided that in case of bills lost or mislaid, drawer to give another.

But this statute was defective, because it could not operate, unless the party, on whom the bill was drawn, accepted it by under-writing the same, which few or none cared to do. 3 *New Abr.* 604.

To remedy which it was provided by 3 & 4 Ann. c. 9. that in case of party refusing to underwrite a bill of exchange, such bill may be protested for non-acceptance. And it is thereby farther provided that no acceptance of inland bills of exchange shall be sufficient, unless the same be underwritten, nor the drawer thereof liable to costs, &c. And that no protest shall be necessary for non-payment, unless the bill be drawn for 20 l. or upwards. It is thereby also enacted, that if any person accept any such bill of exchange in satisfaction of any former debt, it shall be, esteemed full payment of such debt, if such person doth not take his due course to obtain payment thereof, by endeavouring to get the same accepted and paid, and make his protest as aforesaid. Provided that nothing in the said act contained shall extend to discharge any remedy, that any person may have against the drawer, acceptor, or indorser of such bill.

A writ of error was brought on a judgment by *nil dicit*, in an action against the drawer of an inland bill of exchange, and it was objected that since the act of 9 W. 3. no damage shall be recovered against the drawer upon a bill of exchange, without a protest, and therefore the action lies not, there being no protest.

But by *Holt* C. J. the statute never intended to destroy the action for want of a protest, but only to deprive the party of recovering interest and cost upon an inland bill against the drawer, without notice of non-payment by protest: for before the statute there was this difference between foreign and inland bills of exchange; if a bill was foreign, one could not resort to the drawer for non-acceptance or non-payment without a protest, and reasonable notice thereof. But in case of an inland bill, there was no occasion for a protest; but if any prejudice happened to the drawer, by the non-payment of the drawee, and that for want of notice of non-payment, which he to whom the bill is made ought to give, the drawer was not liable; and the word *damages* in the statute, was meant only of damages that the party is at of being longer out of money by the non-payment of the drawer, than the tenor of the bill purported, and not of damages for the original debt: and the protest was ordered for the benefit of the drawer; for if any damages accrue to the drawer for want of a protest, they shall be borne by him to whom the bill is made; and if no damages accrue to him, then there is no harm done him; and a protest is only to give a formal notice, that the bill is not accepted, or is accepted and not paid; and if in such case the damage sustained by the drawer, by his delay, amount to the value of the bill, there shall be no recovery; but otherwise he ought not to lose his debt; but that ought either to appear by evidence upon *non assumpsit* or by special pleading; and the act is very obscurely and doubtfully penned, and we must not by construction upon such an act to take away a man's right. And the judgment was affirmed *per totam curiam*. 1 *Salk.* 131. *L. Raym.* 993.

The defendant took up several goods of the plaintiff, who sent his servant with a bill to him for the money: The defendant orders the servant to write him a receipt in full of the bill, which he did, and thereupon he gave him a note upon a third person, payable in two months: The master sent several times to the third person, to present him the note, but could not get sight of him within the time, the party breaks, and all this appearing in evidence, and that the defendant went to sea the next day after he gave the note, now this action was brought, against the defendant for the money.

Holt, chief justice: If a man gives a note upon a third person in payment, and the other takes it absolutely as payment; yet if the party giving it knew the third person to be breaking, or to be in a failing condition, and the receiver of the note uses all reasonable diligence to get payment but cannot, this is a fraud, and therefore no payment; for the party failed before the money was pay-
able

able. The chief justice directed for the plaintiff. *Holt's Rep. 122. Popley v. Ashley.*

3. With respect to promissory and negotiable notes.

The increase of trade, and necessity of paper credit, put bankers and others upon an expedient of bringing promissory notes within the custom of merchants and making them negotiable, as inland bills of exchange; but this the judges would not admit of, promissory notes being only considered, by the Common law, as evidences of a debt, and not assignable or negotiable in their own nature, 1 *Salk. 24, 129. 6 Mod. 29.* But it being found necessary to make use of this kind of credit it was enacted by the 3 & 4 *Ann. c. 9.* That promissory notes, payable to order or bearer, may be assigned or indorsed, and action maintained thereon, as on inland bills of exchange.

It hath been adjudged that a note written by the plaintiff, and subscribed by the defendant, is a note made and signed by the defendant within this act; for the signing or subscribing is the lien, and the writing or making is only the mechanical part of it. *Trin. 6 Ann. Ash. ver. Baron, in B. R.*

Also it hath been held, that a note drawn, in these words, *I promise to account with J. S. or his order, for 50l. value received by me, &c.* is a good negotiable note, within the statute 3 & 4 *Ann. c. 9.* and that the word *account* shall be construed the same as to pay, and not to render an account, as factor or bailiff; and the rather, because he is not only accountable to J. S. but likewise to his order; which he cannot be as factor or bailiff, and therefore it must be to pay the money to the indorsee, or order of J. S. *Morris ver. Lea. Stra. 629.*

III. Concerning the acceptance.

It is to be observed that an acceptance, by the custom of merchants, as effectually binds the acceptor, as if he had been the original drawer; and that having once accepted it, he cannot afterwards revoke it. *Cro. Jac. 308. Hard. 487.*

A very small matter will amount to an acceptance; and any words will be sufficient for that purpose, which shew the party's assent or agreement to pay the bill; as if upon the tender thereof to him, he subscribes, *Accepted, or Accepted by me A. B. or, I accept the bill, and will pay it according to the contents;* these clearly amount to an acceptance. *Molloy, book 2. cap. 10. §. 15.*

If the party underwrites the bill, *Presented* such a day, or only the day of the month; this is such an acknowledgment of the bill as amounts to an acceptance. 3 *New Abr. 610. Comb. 401.*

If the party says, *Leave your bill with me and I will accept it, or, Call for it to-morrow and it shall be accepted;* these words, according to the custom of merchants, as effectually bind, as if he had actually signed or subscribed his name according to usual manner.

But if a man says, *Leave your bill with me; I will look over my accounts and books between the drawer and me, and call to-morrow, and accordingly the bill shall be accepted;* this does not amount to a complete acceptance; for the mention of his books and accounts shews plainly that he intended only to accept the bill, in case he had effects of the drawer's in his hands. And so it was ruled by the Lord Chief Justice Hale at Guildhall. *Molloy, book 2. cap. 10. §. 20.*

A foreign bill was drawn on the defendant, and being returned for want of acceptance, the defendant said, that if the bill came back again he would pay it; this was ruled a good acceptance. 3 *New Abr. 610. cites Mich. 6 Geo. 1. B. R. Carr v. Coleman.*

The defendant was sued as acceptor, of a bill of exchange. And upon the evidence it appeared to be a parol acceptance only, which the Chief Justice ruled to be sufficient, that being good at Common law, and the stat. 3 & 4 *Ann. cap. 9.* which requires it to be in writing in order to charge the drawer with damages and costs, having a proviso that it shall not extend to discharge any remedy that any person may have against the acceptor. Upon this direction the jury found for the plaintiff. But the Chief Justice of the Common Pleas having lately ruled it otherwise, the court was moved for a new trial. And,

in order finally to settle this point, it was ordered to be argued: and after argument the court was of opinion, that the direction in the present cause was right and agreeable to constant practice. *Stran. 1000. 8 Geo. 2. Lumley v. Palmer.*

An acceptance however, may be qualified, as thus; *I accept this bill, half to be paid in money, and half bills.* And this is good by the custom of merchants; for he who may refuse the bill totally may accept it in part; but he to whom the bill is due may refuse acceptance, and protest it so as to charge the drawer. Also it is said, that after such an acceptance, and refusal of payment, he hath the liberty of charging the drawer, that he had in case the bill had been accepted absolutely, and payment refused. 3 *New Abr. 611. Cumb. 452. Petit v. Benson.*

So the drawer may accept the bill to pay it at longer day than that on which it is made payable, and this shall bind him, but herein care must be taken, that the drawee, by such acceptance or agreement, be not a sufferer. 1 *Molloy 283.*

A bill was drawn the first of January; the person upon whom the bill was drawn, accepts it to be paid the first of March; the servant brings back the bill. The master perceiving this enlarged acceptance, strikes out the first of March, and puts in the first of January, and then sends the bill to be paid. The acceptor then refuses. Whereupon the person, to whom the monies were to be paid, strikes out the first of January, and put in the first of March again. On an action brought on this bill; the question was, whether these alterations did not destroy the bill? and ruled they did not. *Per L. Ch. Ju. Pemberton, Price and Shute. Molloy, b. 2. c. 10. sect. 28.*

If A. draw a bill payable such a day, and the drawee accept it some time after, he is liable; and in an action against him the plaintiff may declare, that *secundum tenorem & effectum billæ* he did not pay, &c. for the effect of the bill is the payment, and not the day of payment. *Carth. 459, 460. 1 Salk. 127, 129. 1 Lutw. 233. Jackson ver. Pigot.*

Having shewn what shall be a good acceptance, it will be proper to consider by whom the acceptance must be made.

A bill drawn on two must regularly have a joint acceptance; but by the custom of England, where there are two joint traders, and one accepts a bill drawn on both for him and partner, it binds both, if it concerns the joint trade; otherwise if it concerns the acceptor only in a distinct interest and respect. *Salk. 126. Pinkney v. Hall. L. Raym. 175.*

If a book-keeper, or servant, or other person have authority, or usually transacting business of this nature for the master, accept a bill of exchange, this shall bind such master. 3 *New Abr. Law, 611.*

But another person may accept the bill for the honour of the drawer; and if he pays the money in default of the party, he is to make a protest with declaration that he hath paid the same for the drawer's honour.

If a bill be accepted, and the person who accepted the same happens to die before the time of payment, there must be a demand made of his executors or administrators; and on non-payment, a protest is to be made, although the money becomes due before there can be administration, &c. A bill may be accepted for part, the party on whom drawn having no more effects in his hands; and there may be a protest for the residue.

Forging the acceptance of any bill of exchange, or the number or principal Sum of any accountable receipt, is made felony. *Stat. 7 Geo. 2. c. 22.*

IV. In regard to protest.

A protest is only but to subject the drawer to answer in case of non-acceptance or non-payment; nor does the same discharge the party acceptor if once accepted; for the payee, or person to whom payable, hath now two remedies, one against the drawer, and the other against the acceptor. *Molloy, book 2. cap. 10. sect. 17.*

A protest does not raise any debt, but only serves to give formal notice that the bill is not accepted, or accepted and not paid; and this by the Common law was,

and is still necessary on every foreign bill before the drawer can be charged; but it was not required on any inland bill, before the stat. 9 & 10 W. 3. c. 17. Nor does the want of it since that statute destroy the remedy, which the party had before against the drawer, for the principal. 3 *New Abr. Law*, 612.

He, to whom a bill is payable, must generally resort to the drawee, and desire him to accept the bill before there can be a protest; but if he be dead, or cannot be found, these are good causes for protesting the bill; also, if after acceptance, the drawee dies, there is to be a demand of his executors or administrators, and in default of payment a protest; and in case the money becomes due before an executor or administrator can be appointed, yet this delay is sufficient cause to protest the bill. 3 *New Abr. Law* 612.

But if he to whom the bill is to be paid, dies, there can be no protest before a probate of his will, or administration granted; for none but his executors or administrators can give a legal discharge or acquittance for the money, and consequently no other person can sue for or demand the same; and though security be offered to indemnify the drawee against the executors, yet he is not obliged to accept thereof; being a matter left entirely to his consideration, to judge and determine on the sufficiency of such security; and in this case it is said, that if a public notary protest the bill, an action on the case lies against him. 3 *New Abr. Law*, 612.

If a man be not to be found, or being found, is not to be met with afterwards, it is cause sufficient for a protest: which is a sort of summons to a person to accept or pay a bill, with protestation against the refuser for exchange, interest, and all charges, damages and losses that may be sustained or occasioned by such refusal. *Lex Mercat.*

If a bill be left with a merchant to accept, which is lost or mislaid, he to whom it is payable, is to request the merchant to give him a note for the payment, according to the time limited in the bill; otherwise there must be two protests, the one for non-acceptance, and the other for non-payment; and though such note be given, yet if the merchant happens to fail, there must be a protest for non-payment in order to charge the drawer. 3 *New Abr. Law*, 613.

The protest is usually made by some notary publick, and such protest is, *prima facie*, good evidence that the bill was not accepted, or if accepted, that it was not paid, and sufficient to put the proof on the other side. 3 *New Abr. Law*, 613.

As to the time in which the protest is to be made, the law hath not determined it, but the same is to be left to a jury, who are to govern themselves according to the custom of merchants in these cases, and the usages of particular countries.

Merchants generally allow three days after a bill becomes due for the payment, and for non-payment within three days protest is made, but is not sent away till the next post after the time of payment is expired, and if Saturday be the third day, no protest is made till Monday. *Molloy* 284. 1 *Show.* 164.

And it is said, that where any bill is negotiated, if the same be to be paid at a certain day, and accepted, the protest must be on the day of payment; but if payable at sight, it must be protested the third day of grace: and when such bill of exchange is not paid, the interest thereon commences only from the time of demand. 2 *Show.* 164. 6 *Mod.* 138.

A protest on a foreign bill of exchange is absolutely necessary to intitle the party to recover against the drawer, not only interest and costs, but likewise the principal sum; and for this purpose the bill must be presented in a reasonable time; and in case of refusal or acceptance, or in case the drawee cannot be found, it must be protested in a reasonable time, and notice of such protest, as also notice of a protest after acceptance and non-payment given to the drawer in a reasonable time; for though the drawer is bound to the party, to whom the bill is payable, till payment be actually made, yet it is with this condition and proviso that protest be made in due time, and a lawful and ingenious diligence used for the obtaining payment of the money; and the reason hereof is, that the drawer might have had effects, or other means of his, upon whom

he drew, to reimburse himself the bill, which since, for want of timely notice he hath remitted or lost, it were unreasonable the drawer should suffer through his neglect. 3 *New Abr. Law* 613.

As to inland bills, though a protest was not necessary at Common law in order to sue the drawer, and is only now necessary by the stat. 9 & 10 W. 3. c. 17. and the 3 & 4 Anne c. 9. to intitle the party to interest and costs; yet convenient notice must be given by the party, to whom the bill is payable, to the drawer, of the drawee's refusal of payment, and if any damages accrue to the drawer for want of such notice, it must be borne by the person to whom the bill is payable; but this must be left to a jury, who are to determine herein according to the custom of merchants. 3 *New Abr. Law* 613.

V. With respect to indorsement.

Indorsement is a term known in law, which by the custom of merchants transfers the property of the bill or note to the indorsee; and is usually made on the back of the bill, and must be in writing; but the law hath not appropriated any set form of words as necessary to this ceremony, and therefore it hath been held, that if a man write on the back of a bill of exchange, *This is to be paid to J. S. or The contents of this is to be paid to J. S.* and sets his hand to it, this is a good indorsement. 3 *New Abr. Law* 609.

Clark having a bill of exchange payable to him or order, puts his name upon it, leaving a vacant space above, and sends it to J. S. his friend, who got it accepted: but the money not being paid, Clark brought an *indebitatus assumpsit* against the acceptor: and it was objected on evidence, that the property was transferred to J. S.

Et per Holt C. J. J. S. had it in his power to act either as servant or assignee: if he had filled up the blank space making the bill payable to him, that would have witnessed his election to have received it as indorsee; but that being omitted, his intention is presumed to act only as servant to Clark, whose name he would use only in order to write the acquittance over it. 1 *Salk.* 126. *Clark v. Pigot.* But quere if plaintiff might not have struck out the indorsement. *Vide post.*

A bill payable to a man's order is payable to himself, and he may bring an action thereon, averring that he made no order, &c. 1 *Salk.* 130. *Comb.* 401.

A bill of exchange was indorsed in this manner: *Pay the contents of this bill unto the order of J. S.* who brought his action as indorsee, averring he had made no order to any body to receive the money; and on demurrer it was objected, that J. S. could not maintain an action; because the indorsement was not to him, but to his order: but the court held the action well brought against the indorser; and that among tradesmen, this form of indorsement is commonly used, although it is intended to be made payable to the person, whose order is mentioned. 3 *New Abr. Law* 609.

As to the indorsing of bills, a difference has been taken between a bill payable to J. S. or bearer, and J. S. or order; that the first is not assignable by the contract, so as to enable the indorsee to bring an action, if the drawer refuse to pay; because there is no such authority given to the party by the first contract; and the effect of it is only to discharge the drawee, if he pays it to the bearer, though he comes to it by trover, theft, or otherwise; but when the bill is payable to J. S. or order, there an express power is given to the party to assign, and the indorsee may maintain an action. 1 *Salk.* 125. 3 *Lev.* 299. 1 *Salk.* 133. *Skin.* 343. *Comb.* 204. 466. But notes payable to J. S. or bearer, are negotiable, per 3 & 4 Anne c. 9.

Also, though an assignment of a bill, payable to J. S. or bearer, be no good assignment to charge the drawer with an action on the bill, yet it is a good bill between the indorser and indorsee, and the indorser is liable to an action for the money; for the indorsement is in nature of a new bill. 1 *Salk.* 125, 133. *Skin.* 343, 411.

So it hath been adjudged, that an indorsee of a bill, payable to J. S. or bearer, may maintain an action against the drawer; on alledging a special custom, that such bill

bill should bind him, which custom is so found, or confessed by the defendant. 1 Salk. 125. 3 Lev. 299. &c.

Also, in cases of bills purchased at a discount, there is said to be this difference, that if it be a bill payable to *A. or bearer*, it is an *absolute purchase*; but if to *A. or order*, and it is indorsed blank, and filled up with an assignment, the indorser must warrant it as much as if there had been no discount. 1 Salk. 128.

A note payable to a *feme sole, or order*, who afterwards marries, can only be indorsed by the husband. *Ca. L. and Eq.* 246.

- If a bill of exchange is made payable to *A. or order*, who indorses it to *B.* who indorses it to *C.* which is protested for non-payment; *B.* may bring an action on this bill, notwithstanding his indorsement. 3 *New Abr. Law* 608. 1 *Show.* 163. *Deckers v. Harriat.*

The money is to be paid to him in whose favour the bill is drawn, or to the indorsee, in case it be indorsed over, of which indorsement the drawer and acceptor must take notice at their peril; also if there are several indorsers and indorsee, the last indorsee is intitled to the money. 3 *New Abr. Law* 608. *Carth.* 130.

It has been adjudged, that a bill of exchange cannot be indorsed for part, so as to subject the party to several actions; as if *A.* having a bill of exchange upon *B.* indorses part of it to *J. S.* *J. S.* cannot bring an action for his part; although he alledge a custom amongst merchants for such kind of indorsement; for the contract being intire, and subjecting him only to one man's action, no custom can make him liable to two or more actions for the same debt. 3 *New Abr. Law* 610. *Carth.* 466. *Hawkins v. Cardy.* 1 Salk. 65. *S. C.* where it is said, that the plaintiff should have acknowledged satisfaction for the rest. 3 *New Abr. Law* 610.

Every indorser of a bill is liable as the first drawer; the indorser is answerable, because the indorsement is in nature of a new bill. 1 Salk. 125.

But an indorser is not discharged without actual payment of the bill; unless there be some neglect or default in the indorsee, as where he doth not endeavour to receive the money in convenient time, and then the first drawer becomes insolvent. *Ibid.* 132. An indorser charges himself in the same manner as if he had originally drawn the bill: and a plaintiff need not prove the drawer's hand, as the indorser is a new drawer. 1 Salk. 127.

A blank-indorsement doth not transfer the property of a bill of exchange; though the person to whom indorsed may fill up the indorsement, so as to charge the indorser; for where one indorses his name on a bill, the indorsee may make what use of it he pleases, by way of assignment, acquittance, &c. 1 Salk. 126.

VI. Who liable, to whom payment to be made, and of suing the parties, &c.

With respect to this head, it is to be premised, that every drawer of a bill is liable to the payment thereof, as is every acceptor and indorser. Also if there are several indorsers of the same bill, the last indorsee may bring his action against the first indorser, or any of them; for the indorsement is, as it were, a new bill, or at least a warranty, as some books express it, by the indorser that the bill shall be paid. 3 *New Abr. Law* 607.

If a bill be drawn upon *A.* and he accepts it, and afterwards refuses payment, upon which the bill is protested, the person to whom it is payable may bring several actions against the acceptor and drawer; for the protest is no discharge of the acceptor. 3 *New Abr. Law* 607.

But though the drawer, acceptor, and indorser are all liable, yet the party can have but one satisfaction; and until such satisfaction is actually had, he may sue all, or any of them: and accordingly it was adjudged in the *Exchequer Chamber*, where the case was, An indorsee sued the drawer, and had judgment against him, and he also brought an action against the indorser, to which the indorser pleaded the judgment against the drawer: but the plea was held ill; for that the judgment was not satisfaction, without which the party could not be barred of the remedy, which he had against the other. 3 *New Abr. Law* 607.

And not only the drawer, acceptor, and indorser are liable, but also, by the custom of merchants, if one merchant draw a bill which is protested, and another hearing thereof declare, that he, for the honour of the drawer, will pay the contents, and thereupon subscribes in these or like words: *I the undersigned do bind myself as principal according to the custom of merchants for the sum mentioned in the bill of exchange, whereupon this protest is made, &c.* this shall as effectually bind him as if he had been the original drawer; and by this the person to whom the bill is payable hath his remedy both against such person as surety, and also against the principal; but the principal or original drawer is liable to him who subscribes for his honour. 3 *New Abr. Law* 608.

A. draws a bill upon *B.* who had effects enough in his hands to answer the bill, which some time after is protested, whereupon the bill is indorsed to *A.* the drawer, who brings an action as indorsee. *Per Parker C. J.* at *Nisi prius*, there being effects, the acceptance was not upon the honour of the drawer, and so the action is well brought; for when a merchant draws a bill on his correspondent, who accepts it, this is payment; for it makes him debtor to another person, who may bring his action; so that this is such a payment as may be set off upon a former action, and pleaded in bar of such action: But if there were no effects, the action would not lie; for it would have been an acceptance upon honour only, and the money would be recovered only to be recovered again. *Vin. Abr. tit. Bills of Exchange (H. 12.)* 12 *Mod. Trin.* 10 *Anne, B. R. Louviere v. Lanbray.*

It hath been held by some opinions, that though an indorser be liable, that yet, in an action against him, it must be alledged in the declaration, that the money was demanded of the drawer, he being the principal debtor, and the indorser only a surety, warranting payment in case the drawer made default; but the better opinion seems to be, that this is not material, every indorser being to be considered as making a new bill, or note, on whose credit alone perhaps the money was given, and the drawer not at all known to the indorsee; but it seems to be more advisable to give it in evidence, that there was a demand on the drawer, or an endeavour to find him out: but this also has been thought by some not to be necessary. 1 Salk. 126. *cont.* 1 Salk. 133.

If the indorsee of a bill accepts but two-pence from the acceptor, he can never resort to the drawer. *L. Raym.* 743. *Taffel and Lee v. Lewis.*

With respect to the person intitled to receive the money, it is to be paid to him in whose favour the bill is drawn, or to the indorsee, in case it be indorsed over; of which indorsement it seems the drawer, acceptor and drawee must take notice at their peril; also, if there are several indorsers and indorsee, the last indorsee is intitled to the money. *Carth.* 130.

If *A.* draws a bill of exchange, payable to *B.* for the use of *C.* and *B.* for valuable consideration indorses it over to *D.* *D.* may bring an action against *A.* the drawer; and he cannot plead, that the money was extended in his hands at the suit of the king, for a debt due from *C.* for *C.* being only *cestui que trust*, had only an equitable interest, and no legal remedy for the money; and *B.* is only responsible in equity to *C.* for the breach of trust. *Carth.* 5. *Skin.* 264. 1 *Show.* 5.

A bill of exchange directed to one to pay so much for value received, shall be a good discharge of the debt, if the bill be not returned back to the drawer in time, although it be not paid; for keeping the bill long, is evidence that he hath agreed to take the merchant as debtor. *Ibid.* 126. If a man pays a bill of exchange before due, and the person to whom paid fails before the time of payment, he shall be obliged to pay it again to the deliverer, because the drawer might have countermanded the same, or ordered the bill to be made payable to another person. A person gives a bill of exchange, &c. upon a third person to another in payment, and he takes it absolutely, if he knew the third person to be breaking or in a failing condition, and the receiver of the bill uses all diligence to get payment, but cannot, this is a fraud and no payment: though if a man takes a note or bill,

bill, and after it is payable makes no demand, so that it might be paid if he had been diligent enough, then if the party on whom the bill is drawn fails, it is at the peril of him that took it. *Mod. Caf. 147.* A drawer of a bill of exchange is always answerable, by the value received, though there be no tender of the bill for payment, or it be not protested, unless the person on whom drawn break, and then it is otherwise, for in that case the party who paid the money for the bill loseth it. 2 *Show. 319.* Though it is said the words *value received*, are now not absolutely necessary to a bill of exchange; for when they are mentioned therein, the drawer must answer it at Common law; and if not, then by the custom of merchants. 1 *Show. 5.* *Mod. Caf. L. & E. 267.* Vide *Stat. 3 & 4 Ann. c. 9.* According to the case of *Banbury v. Liffet and Gilly, Stra. 1211.* the words *value received* are absolutely necessary in a bill of exchange. So resolved, in that case, where it was left to a special jury of merchants.

VII. With regard to the action, &c.

It seems agreed, that against the drawer an action of debt, or a general *indebitatus assumpsit* will lie; for he having received the money, the law raises a contract, and lays him under an obligation to pay it; but it hath been adjudged, that neither an action of debt, nor an *indebitatus assumpsit* will lie against the acceptor of a bill of exchange, and therefore the remedy against him must be by a special action on the case founded on the custom of merchants; for the acceptance is only a collateral engagement to pay the debt of another, in the same manner as a promise by a stranger to pay, &c. if the creditor will forbear his debt. 3 *New Abr. Law 614.* *Hard. 485.*

But tho' a general *indebitatus assumpsit* will not lie against the acceptor of a bill of exchange, yet if A. delivers money to B. to pay over to C. and give C. a bill of exchange drawn upon B. and B. accepts it, C. may have an *indebitatus assumpsit* against B. as having received money to his use, but must not declare only upon the bill of exchange accepted. 3 *New Abr. Law 614.* 1 *Vin. 153.* 1 *Rel. Abr. 32.*

Where a bill is drawn payable to A. B. or bearer, an assignee must sue in the name of him to whom it is made payable, and not in his own name; otherwise a stranger finding the bill, might recover: if it be made payable to A. B. or order, there an assignee must sue in his own name, because the order must be made by indorsement, &c. 3 *Salk. 67.*

As to the manner of declaring on a bill of exchange, this is said to have varied; the declaration in some cases being general, sometimes special, and laid with an express promise, and at other times without it: but it seems to be now settled, that the custom of merchants concerning bills of exchange being part of the Common law, of which the judges will take notice *ex officio*, it is unnecessary to set forth the custom specially in the declaration, and that it is sufficient to say, that such a person, according to the usage and custom of merchants, drew the bill. 3 *New Abr. Law 614.*

As by the custom of merchants public notaries usually protest bills, it hath been held, that pleading *protestavit seu protestari causavit*, is sufficient; and that the party may plead *protestavit*, and give in evidence that the notary public did it. 3 *New Abr. 613.* *Cumb. 153.*

Debt against a merchant upon a bill by him payable at the feast of the purification called *Candlemas-day*; and after judgment for the plaintiff, it was moved in arrest thereof, because payment at *Candlemas* is not known in our law: but judgment was affirmed; for that amongst merchants such payment is known to be on the 2d of February; and the judges ought to take notice thereof for the maintenance of traffic. *Vin. Abr. tit. Bill of Exchange, &c. (A.) 1 Yelv. 135.* *Mich. 6 Jac. B. R. Pierson v. Pounteys.* Note; It seems by this case it is not necessary to aver in the declaration, that *Candlemas-day* was the 2d of February, though it would be better.

A person may plead the statute of limitations to an action upon a bill of exchange; and it is no good replication, that it was on account between merchants, where it appears to be for value received. *Comber. 190, 392.*

With respect to the evidence, it is to be observed, that an indorser of a bill of exchange, who has paid it, must prove the payment in an action against the acceptor. *L. Raym. 742, 743.* *Mendez v. Gareroon.*

Indorsee need not prove the drawer's hand, because, though it be a forged bill, the indorser is bound to pay it. 1 *Salk. 127. pl. 9.* *Pasch. 11 W. 3. coram Holt at Guildball, Lambert v. Park.*

If a man has a bill of exchange, he may authorise another to indorse his name upon it by parol; and when that is done, it is the same as if he had done it himself. *Per Holt Ch. J. 12 Mod. 564. Mich. 13 W. 3. at Nisi prius. Anon.*

If A. gives B. a bill of exchange on C. in payment of a former debt; this will not be allowed as evidence on non assumpsit unless paid, though B. kept it in his hands long after it was payable; for a bill shall never go in payment of a precedent debt, unless it be part of the contract that it should be so. *Salk. 124. pl. 1. coram Holt Ch. J. at Guildball, 3 W. and M. Clark v. Mundel.*

An action on a bill of exchange, being by an executor, and upon a debt laid to be due to testator, it was held necessary to prove that the acceptance was in the testator's time; *per Holt Ch. J. 12 Mod. 447. at Nisi prius, coram Holt, Pasch. 13 W. 3. Anon.*

For other matter concerning this head, see the foregoing divisions *sparsim*.

VIII. Of bills lost, stolen, or forged.

Concerning this head it is to be observed, that if a bank bill payable to A. B. or bearer, be lost, and it is found by a stranger, payment to him would indemnify the bank; yet A. B. may have trover against the finder, though not against his assignee for valuable consideration, which creates a property. 3 *Salk. 71.*

If a possessor of a bill by any accident loses it, he must cause intimation to be made by a notary public before witnesses, that the bill is lost or mislaid, requiring that payment be not made of the same to any person without his privity. And if any bill of exchange for five pounds or upwards, drawn in, or dated at and from any place of this kingdom, shall be lost, the drawer of the bill shall give another bill of the same tenor, security being given to indemnify him in case the bill so lost be found again. 9 & 10 W. 3. c. 17.

Stealing of bills of exchange, notes, &c. is felony of the same degree, as if the offender had robbed the owner of so much money, &c. And the forging bills of exchange, or notes for money, indorsements, &c. is felony, by *Stat. 2 Geo. 2. c. 25. 9 Geo. 2. c. 18.* And *vide 31 Geo. 2. c. 22. f. 78.* And by 7 Geo. 2. c. 22. Forging the acceptance of a bill of exchange is felony without benefit of clergy.

There are not only bills of exchange, but bills of credit between merchants, the forms whereof are as follow:

Form of a bill of exchange.

250l. sterling.

London, 10 August 1770.

A T double usance pay this my first bill of exchange to Mr. C. D. merchant, or order, the sum of two hundred and fifty pounds sterling, for the value here received of the said C. D. And place it to account as by advice from

Yours, &c. A. B.

To Mr. E. F. merchant,
in Amsterdam.

Form of a bill of credit.

T HIS present writing witnesseth, That I A. B. of London, merchant, do undertake, to and with C. D. of, &c. merchant, his executors and administrators, that if he the said C. D. do deliver, or cause to be delivered unto E. F. of, &c. or to his use, any sum or sums of money amounting to the sum of, &c. of lawful British money, and shall

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shall take a bill under the hand and seal of the said E. F. confessing and shewing the certainty thereof; that then I, my executors or administrators having the same bill delivered to me or them, shall and will immediately, upon the receipt of the same, pay, or cause to be paid unto the said C. D. his executors or assigns, all such sums of money as shall be contained in the said bill, at, &c. For which payment in manner and form aforesaid, I bind myself, my executors, administrators and assigns by these presents. In witness, &c.

Form of a protest of a bill of credit.

K NOW all men, That I A. B. on the day, &c. at the usual place of abode of C. D. have demanded payment of the bill of which the above is a copy, which the said C. D. did not pay, wherefore I the said A. B. do hereby protest the said bill. Dated, &c.

A common bill or note for money.

I Promise to pay to Mr. C. D. or order, the sum of one hundred pounds (for value received) within twenty-one days after the date hereof (or on demand, &c.) Witness my hand this twentieth day of August 1770.

100l. os. od.

A. B.

Vide farther as to bills of exchange, *Black. Com.* 2 *V.* 466. As to forging a bill or note, 4 *V.* 246. As to stealing of the same, 4 *V.* 234.

Bill of lading, Is a memorandum signed by masters of ships, acknowledging the receipt of the merchants goods, &c. *Vide Lex Mercatoria.*

Bill of sale, Is a solemn contract under seal, whereby a man passes the right or interest that he hath in goods and chattels; for if a man promises or gives any chattels without valuable consideration, or without delivering possession, this doth not alter the property, because it is *nudum pactum unde non oritur actio*; but if a man sells goods by deed under seal duly executed, this alters the property between the parties, though there be no consideration, or no delivery of possession, because a man is estopped to deny his own deed, or affirm any thing contrary to the manifest solemnity of contracting. *Yelv.* 196. *Cró. Jac.* 270. 1 *Brown.* 111. 6 *Co.* 18.

But what is chiefly to be considered under this head, is the statute of 13 *Eliz. cap.* 5. by which it is enacted, "That all fraudulent conveyances of lands, &c. goods and chattels, to avoid the debt or duty of another, shall (as against the party only, whose debt or duty is so endeavoured to be avoided) be utterly void, except grants made *bona fide*, and on a good (which is construed a valuable) consideration. And by the latter clause of that statute it is provided, That all parties to such fraudulent conveyance, who being privy thereunto, shall wittingly justify the same to be done *bona fide* and on good consideration, or shall alien or assign any lands, lease or goods so to them conveyed as aforesaid, shall forfeit one year's value of the lands, lease, rent, common, or other profit out of the same, and the whole value of the goods; and being thereof convicted shall suffer half a year's imprisonment without bail; the forfeiture to be divided between the queen and the party convicted.

A. being indebted to B. in 400l. and to C. in 20l. C. brings debt against him, and pending the writ, A. being possessed of goods and chattels to the value of 300l. makes a secret conveyance of them all, without exception, to B. in satisfaction of his debt; but notwithstanding, continues in possession of them, and sells some of them, and others of them, being sheep, he sets his mark on: and resolved that it was a fraudulent gift and sale within the aforesaid statute, and shall not prevent C. of his execution for his just debt; for though such sale hath one of the qualifications required by the statute, being made to a creditor for his just debt, and consequently on a valuable consideration; yet it wants the other; for the owners's continuing in possession, is a fixed and undoubted character of a fraudulent conveyance, because the posses-

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sion is the only *indiciu* of the property of a chattel, and therefore this sale is not made *bona fide*. 3 *Co.* 80. *Mo.* 638. 2 *Bull.* 226.

As the owner's continuing in possession of goods after his bill of sale of them, is an undoubted badge of a fraudulent conveyance, because the possession is the only *indiciu* of the property of a chattel, which is a thing unfixed and transitory; so there are other marks and characters of fraud; as a general conveyance of them all without any exception; for it is hardly to be presumed, that a man will strip himself intirely of all his personal property, not excepting his bedding and wearing apparel, unless there was some secret correspondence and good understanding settled between him and the vendee, for a private occupancy of all, or some part of the goods for his support; also a secret manner of transacting such bill of sale, and unusual clauses in it; as that it is made honestly, truly, and *bona fide*; are marks of fraud and collusion; for such an artful and forced dress and appearance give a suspision and jealousy of some defect varnished over with it. 3 *Co.* 81. *Mo.* 638.

If goods continue in the possession of the vendor after a bill of sale of them, though there is a clause in the bill that he shall account annually with the vendee for them, yet it is a fraud; since if such colouring were admitted, it would be the easiest thing in the world to avoid the provisions and cautions of the aforesaid act. *Mo.* 638.

If A. makes a bill of sale of all his goods, in consideration of blood and natural affection to his son, or one of his relations, it is a void conveyance in respect of creditors; for the considerations of blood, &c. which are made the motives of this gift, are esteemed in their nature inferior to valuable considerations, which are necessarily required in such sales, by 13 *Eliz. cap.* 5.

If A. makes a bill of sale to B. a creditor, and afterwards to C. another creditor, and delivers possession at the time of the sale to neither; afterwards C. gets possession of them, and B. takes them out of his possession, C. cannot maintain trespass, because the first bill of sale is fraudulent against creditors, and so is the second, yet they both bind A. and B.'s is the elder title, and the naked possession of C. ought not to prevail against the title of B. that is prior, where both are equally creditors, and possession at the time of the bill of sale is delivered over to neither. *Abr. Eq.* 148.

Fraud may be given in evidence, to defeat a fraudulent and covinous conveyance, and the party that offers it need not plead it; for the acts to prevent fraud are to be construed literally in suppression of the mischief; besides, it were an hardship to force the party to plead a thing that is managed with so much subtlety, that he cannot attain a competent knowledge of it to plead it in due time. 5 *Co.* 60.

Bill of Store, A kind of licence granted at the *custom-house* to merchants, to carry such stores and provisions as are necessary for their voyage, custom free. And *bill of sufferance* is a licence granted to a merchant, to suffer him to trade from one *English* port to another, without paying custom. *An.* 14 *Car.* 2. c. 11.

Billets of Gold, (*Fr. billet*) Are wedges or ingots of gold, mentioned in the statute 27 *E.* 3. c. 27.

Billet Wood, Is small wood for fuel, which must be three foot and four inches long, and seven inches and a half in compass, &c. Justices of peace shall inquire by the oaths of six men of the assise of *billet*, and being under size, it is to be forfeited to the poor. *Stat.* 43 *Eliz.* c. 14. *Vide* 9 *An.* c. 15. 10 *An.* c. 6. See *Fuel*.

Billinggate market to be kept every day, and toll is appointed by statute: all persons buying *fish* in this market may sell the same in any other market by retail; but none but *fishmongers* shall sell them in shops: if any person shall buy any quantity of fish at *Billinggate* for others, or any *fishmonger* shall ingross the market, they incur a penalty of 20l. And fish imported by foreigners shall be forfeited, and the vessel, &c. See 10 & 11 *H.* 3. c. 24. 1 *Geo.* 1. *Stat.* 2. c. 18. f. 1. &c. *Vide Fish* and *Fishermen*.

Billus, A stick or staff, which in former times was the only weapon for servants.—*Si quis in servum transeat, in signum*

fignam hujus transfontionis billum vel strubulum, vel deinceps ad hunc modum servitutis arma suscipiat, & in manum domini mittat. Leg. II. 1. c. 78.

Binnarium, *binna*, *benna*, Stews or water penned up for feeding and preserving of fish.—*Expense in pisce ad instaurandum binnarium empto xlii.* Consuetud. Dom. de Farrend. MS. f. 29. Vide Stat. 3 Ed. 1.

Biothanetus, One who deserves to come to an untimely end. *Ordericus Vitalis*, writing of the death of *William Rufus*, who was shot by *Walter Tyrrel*, tells us, that the bishops, considering his wicked life and bad exit, adjudged him *ecclesiastica veluti biothanetum absolutione indignum*. Lib. 10. p. 782.

Birretum, A thin cap fitted close to the shape of the head: and is also used for the cap or coif of a judge, or serjeant at law. *Spelm.*

Births, **Burials**, and **Marriages**, &c. By statute, a duty was granted on *births* and *burials* of persons, from 50*l.* a duke, &c. down to 10*s.* and 2*s.* And the like on *marriages*; also *bachelors*, above twenty-five years of age, were to pay 1*s.* yearly. Stat. 6 & 7 W. 3. c. 6. Exp. as to the duties.

Bisacutus, An iron weapon double edged, so as to cut on both sides. *Fecit eidem unam plagam mortalem de quadam bisacuta.* *Fleta*, lib. 1. c. 33.

Bisantium, *besantine*, or *besunt*, An ancient coin first coined by the Western emperors at *Bizantium* or *Constantinople*. It was of two sorts, gold and silver; both which were current in *England*. *Chaucer* represents the gold *besantine* to have been equivalent to a ducket; and the silver *besantine* was computed generally at two shillings. In some old leases of land there have been reserved, by way of rent, *unum bisantium, vel duos solidos*.

Bi-scot, At a session of *sewers* held at *Wigenhale* in *Norfolk*, 9 Ed. 3. it was decreed, That if any should not repair his proportion of the banks, ditches and causeys by a day assign'd, XII*d.* for every perch unrepair'd should be levied upon him, which is called a *bi-scow*: and if he should not, by a second day given him, accomplish the same, then he should pay for every perch 2*s.* which is called *bi-scot*. Hist. of Imbanking and Draining, f. 254.

Bishop, (*episcopus*) Is the chief of the clergy in his diocese, and the archbishop's suffragan or assistant. He is elected by the king's *conge d'eshire*, or licence to elect the person named by the king, directed to the dean and chapter; and if they fail to make election in twenty days, they incur the penalty of a *præmunire*, and the king may nominate, &c. by letters patent. Stat. 25 H. 8. c. 20. This was to avoid the power of the see of *Rome*. The dean and chapter having made their election certify it to the king, and the archbishop, &c. And then the King gives the royal assent under the Great Seal, directed to the archbishop, commanding him to confirm and consecrate the bishop elect: and on confirmation, a bishop hath jurisdiction in his diocese; but he hath not a right to his temporalities till consecration. The consecration of bishops, &c. is confirmed by act of parliament. It is held a bishop hath three powers; 1st, His power of ordination, which is gained on his consecration, and not before; and thereby he may confer orders, &c. in any place throughout the world. 2. His power of jurisdiction, which is limited and confined to his see. 3. His power of administration and government of the revenues; both which last powers he gains by his confirmation: and some are of opinion, that the bishop's jurisdiction, as to ministerial acts, commences on his election. *Palm. Rep.* 473, 474, 475. The king may not seize into his hands the temporalities of bishops but upon just cause, and not for a contempt, which is only finable. Bishops are allowed four years for payment of their first fruits, by a late statute, and every bishop may retain four chaplains. Vide 21 Hen. 8. c. 13. f. 14. 8 Eliz. c. 1. and *Table to Statutes*, tit. *Bishops and Chaplains*. A bishop hath his consistory court, to hear ecclesiastical causes; and is to visit the clergy, &c. He consecrates churches, ordains, admits, and institutes priests; confirms, suspends, excommunicates, grants licences for marriage, makes probate of wills, &c. 1 Inst. 96. 2 Rol. Abr. 230. He hath his archdeacon, dean and chapter, chancellor, and vicar-general, to assist him: may grant leases for three lives, or twenty-one years, of land usually

letten, reserving the accustomed yearly rents. Stat. 32 H. 8. c. 28. And vide 1 El. c. 19. f. 5. Leases otherwise made are void. Bishops may make concurrent leases for twenty-one years, upon leases for the like term, with confirmation of dean and chapter. Bishops are barons and lords of parliament. See more concerning this title in *Burn's Ecclesiastical Law*. And *Black. Com.* 1 V. 155, 377, 401. As to the not electing, or not consecrating of a bishop, 4 V. 115. And as to the right of a bishop to try, or to be tried, as a peer, 4 V. 261, 262.

Bishopricks, The diocese of a bishop, or that circuit, wherein he hath jurisdiction. With respect to the nomination to bishopricks, vide *Black. Com.* 1 V. 378. 4 V. 107, 408, 423.

Bissa, (*Fr. biche*) *cerva major*, A hind. — *Decimam venationis nostræ, scil. de cervis, bissis, damis, porcis & lais.* Mon. Angl. vol. 1. fol. 648.

Bissextile, (*bissextilis*) Leap year, so called, because the sixth day before the calends of *March* is twice reckoned, viz. on the 24th and 25th of *February*; so that the bissextile year hath one day more than the others, and happens every fourth year. This intercalation of a day was first invented by *Julius Cæsar*, to make the year agree with the course of the sun. And to prevent all doubt and ambiguity that might arise thereupon, it is enacted by the statute *de anno bissextili*, 21 H. 3. That the day increasing in the leap-year, and the day next before, shall be accounted but one day. *Brit. 209. Dyer 17.* See *Year*. Vide also *Black. Com.* 2 V. 141.

Bissus, *bifius*, *mica bifis*, *panis bifius*, (*Fr. pain bis*) Brown bread, a brown loaf. *Corwel.*

Black Act, By Stat. 9 Geo. 1. cap. 22. so called, Persons hunting armed and disguised, and killing or stealing deer, or robbing warrens, or stealing fish out of any river, &c. or any persons unlawfully hunting in his majesty's forests, &c. or breaking down the head of any fishpond, or killing, &c. of cattle, or cutting down trees, or setting fire to house, barn, or wood, or shooting at any person, or sending anonymous letters, or signed with fictitious name, demanding money, &c. or rescuing such offenders, are guilty of felony without benefit of clergy. This act is made perpetual by 31 Geo. 2. c. 42. And see farther 6 Geo. 2. c. 37. and 27 Geo. 2. c. 15. Vide *Black. Com.* 4 V. 144, 208, 232, 244.

Black-Book, Is a book lying in the *Exchequer*. See *Stat. Annals 154.*

Black Lead, By 25 Geo. 2. c. 10. Entering mines of black lead, with intent to steal, is made felony; and by the same act offenders committed or transported for entering mines of black lead with intent to steal, escaping, or breaking prison, or returning from transportation, are excluded from clergy.

Black-Mail, (*Fr. maille*, a link of mail, or small piece of metal or money) Signifies in the north of *England*, in the counties of *Cumberland*, *Northumberland*, &c. a certain rent of money, corn, or other thing, anciently paid to persons inhabiting upon or near the borders, being men of name and power, allied with certain robbers within the said counties; to be freed and protected from the devastations of these robbers. Anno 43 Eliz. cap. 13. These robbers were called *mosi troopers*, and several statutes have been made against them. The 9 Ed. 3. c. 4. mentions *black money*: and *black rents* are the same with *black mail*; being rents formerly paid in provisions and flesh. And by 18 Car. 2. c. 3. Notorious thieves, or spoil-takers in *Northumberland* or *Cumberland* are excluded clergy, or may be transported at discretion of the judge. Vide *Black. Com.* 2 V. 43. 4 V. 243.

Blacks of Waltham, A set of desperate deer-stealers. See *Waltham Blacks*.

Black-Rod, The gentleman usher of the black rod is chief gentleman usher to the king: he belongs to the garter, and hath his name from the *black rod*, on the top whereof sits a lion in gold, which he carrieth in his hand. He is called in the *Black Book*, fol. 255. *Lator virgæ nigre, & hostiarius*; and in other places *virgæ bajulus*. His duty is *ad portandum virgam coram domino rege ad festum sancti Georgii infra castrum de Windfore*: and he hath the keeping of the chapter-house door, when a chapter of the order of the garter is sitting; and in the time of parliament, he attends on the house of peers. His habit is like

ke to that of the register of the order, and garter king of arms; but this he wears only at the solemn times of the festival of St. George, and on the holding of chapters. The *black rod* he bears, is instead of a mace, and hath the same authority; and this officer hath anciently been made by letters patent under the great seal, he having great power; for to his custody all peers, called in question for any crime, are first committed.

Blackwell-hall. The public market of *Blackwell-hall* is to be kept every *Thursday, Friday, and Saturday*, at certain hours appointed; and the hall-keepers not to admit any buying or selling of *woollen cloth* at the said hall upon any other days or hours, on penalty of 100*l.* Factors selling cloth out of the market, shall forfeit 5*l.* &c. Registers of all the cloths bought and sold are to be weekly kept: and buyers of cloth otherwise than for ready money, shall give notes to the sellers for the money payable; and factors are to transmit such notes to the owners in twelve days, or be liable to forfeit double value, &c. Stat. 8 & 9 W. 3. cap. 9.

Bladarius, A cornmonger, meal man, or corn-chandler. It is used in our records for such a retailer of corn. Pat. 1 Ed. 3. par. 3. m. 13. See title *Clothiers*.

Blado, (*bladum*) In the *Saxon* signifies generally fruit, corn, hemp, flax, herbs, &c. *Will. de Mobun* released to his brother all the manor of *T.*—*Salvo instauro suo* & blado, &c. excepting his stock and corn on the ground. Hence *bladier* is taken for an ingrosser of corn or grain. — *Sciant quod ego Willielmus Alreton, consensu & voluntate beatrix uxoris mee, dedi Agathe Gille pro duabus marcis argenti & una mensura bladi, duas solidatas redditus in villa Leominstr. &c.* Ex libro Chartar. Priorat. Leominstric.

Blanch firmes, In ancient times the crown-rents were many times reserved in *libris albis*, or *blanch firmes*: In which case the buyer was holden *de-albare firmam*; viz. his base money or coin, worse than standard, was token down in the *Exchequer*, and reduced to the fineness of standard silver; or instead thereof, he paid to the King 12*d.* in the pound, by way of addition. *Lowndes's Essay upon Coins*, p. 5. *Blank farm*, *Blount* says, was a white farm; that is where the rent was paid in silver, and not in cattle. *Blanks*, a kind of white money coin'd by Hen. 5. in those parts of France which were then subject to England, the value whereof was 8*d.* *Stow's Annals*, p. 586. These were forbidden to be current in this realm. 2 Hen. 6. 9. As to *blanch rent*, see *Black. Com.* 2 V. 42.

Blandford, An act for rebuilding the town of *Blandford* in the county of *Dorset*, burnt down by fire in the Year 1731, and to determine all differences between proprietors, landlords and tenants of houses, and concerning ground, &c. Stat. 5 Geo. 2. c. 16.

Blanhornum, A little bell, or rather *ticinium*. — *Pecoris ticinium, & canis oppa & blanhornum, borum trium singulum est unum solidum valen.* Log. Adelftan. cap. 8.

Blank-Bar, Is used for the same with what we call a *common bar*, and is the name of a plea in *bar*, which in an action of trespass is put in to oblige the plaintiff to assign the certain place where the trespass was committed: 2 Cro. Rep. 594.

Blanks, In judicial proceedings, certain void spaces sometimes left by mistake. A blank (supposing something material wanting) is a declaration, abates the same, 4 Ed. 4. 14. 20 H. 6. 18. And such a blank is a good cause of demurrer. *Blanks* in the imparlance roll aided after verdict for the plaintiff. *Hob. 76. Parker v. Parker.*

Blasarius, Is a word used to signify an incendiary.

Blasphemy, (*blasphemia*) Is an injury offered to God, by denying that which is due and belonging to him, or attributing to him what is not agreeable to his nature. *Lindw. cap. 1.* And *blasphemies* of God, as denying his being, or providence, and all contumelious reproaches of *Jesus Christ*, &c. are offences by the Common law, punished by fine, imprisonment, pillory, &c. 1 Hawk. P. C. 87. And by statute, if any one shall by writing, speaking, &c. deny any of the persons in the *Trinity*, to be God; assert there are more Gods than one, &c. he shall be incapable of any office; and for the second offence,

be disabled to sue any action, to be executor, &c. and suffer three years imprisonment. 9 & 10 W. 3. cap. 32.

Likewise by 3 Jac. 1. c. 21. persons jestingly or prophaneely using the name of God, or of *Jesus Christ*, or of the *Holy Ghost*, or of the *Trinity*, in any stage play, &c. incurs a forfeiture of 10*l.*

Ble, Signifies light, colour, &c. And *blee* is taken for corn: As to *Boughton* under the *Blee*, &c.

Blench, A sort of tenure of land; as to hold land in *blench*, is by payment of a sugar-loaf, a couple of capons, a beaver-hat, &c. if the same be demanded in the name of *blench*, i. e. *Nollus albe firmæ.*

Blench-holding, The *white-rents*, or *blanch-farms*; *reditus albi*; this small kind of payment, called in *Scotland* *blench-bolding*, or *reditus alba firmæ.* *Black. Com.* 2 V. 42. n.

Blenheim, A noble and princely house erected in honour of the Duke of *Marlborough* at *Woodstock* near *Oxford*, which with the manor of *Woodstock* is settled on the Duke and his heirs, in consideration of the eminent services by him performed for the publick; and for building of which house the sum of 500,000*l.* was granted by parliament, &c. Stat. 3 & 4 Ann. c. 6. 5 Ann. c. 3. & c. 4. 1 Geo. 1. stat. 2. c. 12. f. 34.

Bleta, (Fr. *bleche*) *Pete*, or combustible earth dug up and dry'd for burning. — *Minister & fratres de Knareborough petunt quod ipse & eorum tenentes fodiant turbas & bletas in foresta de Knareborough.* Rot. Parl. 35 Ed. 1.

Blinds, Boughs broken down from trees, and thrown in a way where deer are likely to pass.

Blisson, Corruptly called *blissom*, is when a ram goes to the ewe, from the *teuton.* *Blets*, the bowels.

Bloated fish or Herring, Are those which are half dried. Anno 18 Car. 2. c. 2.

Bloodeus, (Sax. *blod*) Deep red colour; from whence comes *bloat* and *bloated*, viz. sanguine and high coloured, which in *Kent* is called a *blowing* colour; and a *blouse* is there a red-fac'd wench. The prior of *Burcester*, A. D. 1425. gave his liveries of this colour. *Paroch. Antiq.* 596.

Blood, (*sanguis*) Is regarded in descents of lands; for a person is to be the next and most worthy of *blood* to inherit his ancestor's estate. 1 Inst. 13. See *Jenk. Cent.* 203.

Bloodwit, or *blodwit*, compounded of the Sax. *blod*, i. e. *sanguis* and *wyte*, an old *English* word signifying *miseriordia*, Is often used in ancient charters of liberties for an amercement for bloodshed. *Skene* writes it *blud-wit*; and says *wit* in *English* is *injuria*; and that *blud-wit* is an amerciamnt or *unlaw* (as the *Scotch* call it) for wrong or injury, as bloodshed is: for he that hath *blud-wit* granted him, hath free liberty to take all amerciaments of courts for effusion of blood. *Fleta* saith, *Quod significat quietantiam misericordie pro effusione sanguinis.* Lib. 1. cap. 47. And according to some writers, *blod-wite* was a customary fine paid as a composition and atonement for shedding or drawing of blood; for which the place was answerable, if the party were not discovered: and therefore a privilege or exemption from this fine or penalty, was granted by the King, or supreme Lord, as a special favour. So king *Henry II.* granted to all tenants within the honour of *Willingford*, *Ut quieti sint de Hidaio, & blodewite*, &c. — *Paroch. Antiq.* 114.

Bloody-hand, Is one of the four kinds of circumstances by which an offender is supposed to have killed deer in the King's forest: and it is where a trespasser is apprehended in the forest, with his *hands* or other parts *bloody*, though he be not found chasing or hunting of the deer. *Manwood.* In *Scotland*, in such like crimes, they say taken in the fact, or with the *red hand*. See *Back-berrind*.

Blubber, Is whale oil, before it is thoroughly boiled and brought to perfection. It is mentioned Stat. 12 Car. 2. c. 18.

Book-board, or *book-board* (*librarium horreum*) A place where books, evidences or writings are kept.

Bockland, (Sax. *quasi bookland*) A possession or inheritance held by evidence in writing. *Bockland vero ea possidendi transmittique lege coarcebatur, ut nec dari licuit nec vendi, sed hereditibus relinquenda erat, in scriptis aliter permitteretur; Terra inde hereditaria nuncupata.* LL. Aluredi,

redii, cap. 36. *Bockland* signifies *deed land*; and it commonly carried with it the absolute property of the *land*, wherefore it was preserved in writing, and possessed by the *Thanes* or nobler sort, as *Prædium nobile, liberum & immune à servitiis vulgaribus & servilibus*, and was the same as *allodium*, descendable unto all the sons, according to the common course of Nations and of Nature, and therefore called *gavelkind*; devisable also by will, and thereupon termed *Terræ Testamentales*. *Spelm. of Feuds*. This was one of the titles which the *English Saxons* had to their *lands*, and was always in writing: there was but one more, and that was *Folkland*, i. e. *Terra Populæaris*, which passed from one to another without any writing. See *Charterland*. Also *vide* *Squire* on the *Anglo-Saxon Government*.

Boia, Chains or fetters, properly what we call *bernicles*. *Quidam a dolore capitis liberatus est, adjungens genæ suæ boias, quibus S. Britstanus ligatus fuit*. *Hist. Elien. apud Whartoni Angl. Sac. part 1. p. 618*.

Bois, (*Fr.*) Wood, and *sub-bois*, underwood. See *Bosius*.

Bolbagium, or *boldagium*, a little house or cottage. *Blount*.

Bolt, A bolt of silk or stuff, seems to have been a long narrow piece: in the accounts of the priory of *Burcester*. It is mentioned. *Paroch. Antiq. p. 574*.

Bolting, A term of art used in our *Inns of Court*, whereby is intended a private arguing of cases. The manner of it at *Gray's Inn* is thus: An ancient and two barristers sit as judges, three students bring each a case, out of which the judges chuse one to be argued, which done, the students first argue it, and after them the barristers. It is inferior to *mooting*, and may be derived from the Sax. *bolt*, a house, because done privately in the house for instruction. In *Lincoln's Inn*, *Mondays* and *Wednesdays* are the *bolting days*, in vacation time; and *Tuesdays* and *Thursdays* the *moot days*.

Bona fide. That we say is done *bona fide*, which is done really, with a good faith, without any fraud or deceit. *Stat. 13 Eliz. c. 5. 12 Car. 2. c. 18, &c.*

Bona gestura, Good abearing, or good behaviour.—*Et si per furorem vel aliquos manutentores renuerit invenire sufficientem securitatem de sua bona gestura erga balivos & comburgenses, &c. a prædicto burgo ejiciatur*. MS. Codex de LL. Statutis & Consuetud. Burgi villæ Montgomer. fol. 15.

Bonaght, or *bonaghty*, was an exaction in *Ireland*, imposed on the people at the will of the lord, for relief of the knights called *bonaghti*, who served in the wars. *Antiq. Hibern. p. 60*.

Bona Notabilia. Where a person dies having at the time of his death goods in any other diocese, besides his goods in the diocese where he dieth, amounting to the value of 5*l.* at le. st. he is said to have *bona notabilia*, and then probate of his will, or granting administration, belongs to the archbishop of the province: but this doth not prejudice those dioceses where, by composition or custom, *bona notabilia* are rated at a greater sum. *Can. 92, 93. Perkins, Sect. 489*. And in the city of *London* *bona notabilia* are 10*l.* by composition. 4 *Inft. 335*. One that hath a debt upon bond or specialty, &c. in another diocese, hath *bona notabilia*. 1 *Roll. Abr. 908*. Tho' if a person happens to die in another diocese, than that wherein he lives, on a journey, what he hath about him above the value of 5*l.* &c. shall not be *bona notabilia*. *Can. 93*.

There must be several administrations, where a person dies leaving *bona notabilia* in each province of *Canterbury* and *York*; for administration granted in one province doth not extend to goods in the other, because the archbishops have distinct supreme jurisdictions; but then there is to be *bona notabilia* in several dioceses in each province. *Dyer 305. 2 Lev. 86*. If a man dies in one diocese, without any goods, and leaves to the value of 5*l.* in another diocese, the archbishop of that province may grant administration, as he hath a general jurisdiction there; though such administration is voidable by sentence. *Cro. Eliz. 457*. But where a bishop grants administration, and there are *bona notabilia*, such administration is merely void, for he had no jurisdiction out of his diocese. 5 *Rep. 30. 1 Nels. Abr. 381. Vide Black. Com. 2 V. 509, 510*.

Bona Patria, An assise of country-men or good neighbours: It is sometimes called *assisa bona patriæ*,

when twelve or more men are chosen out of any part of the country to pass upon a assise; otherwise called *juratores*, because they are to swear judicially in the presence of the party, &c. according to the practice of *Scotland*. *Shene. See Affisors*.

Bona peritura, Goods that are perishable. The *Stat. 13 E. 1. cap. 4*. which enacts, That where any thing escapes alive out of a Ship cast away, the Ship shall not be adjudged wreck, but the cargo shall be saved and kept by the view of the sheriff, &c. in the hands of those of the town where the same was found, so that if any one within a year and a day can make proof that the goods are his, they shall be restored to him, &c. Ordains, that if the goods within the ship be *bona peritura*, such things as will not endure for a year and day, the sheriff shall sell them, and deliver the money received to answer it. See 26 *Geo. 2. c. 19*.

Boncha, A bunch, is derived from the old Lat. *bonna* or *bunna*, a rising bank, for the bounds of fields: and hence *bonum* is used in *Norfolk*, for swelling or rising up in a bunch or tumour, &c.

Bond, Is a deed or obligatory instrument in writing, whereby one doth bind himself to another, to pay a sum of money, or do some other act; as to make a release, surrender an estate, for quiet enjoyment to stand to an award, save harmless, perform a will, &c. It contains an obligation, with a penalty: and a condition, which expressly mentions what money is to be paid, or other thing to be performed, and the limited time for the performance thereof; for which the obligation is peremptorily binding. It may be made upon parchment or paper, though it is usually on paper; and be either in the writ or third person; and the condition may be either in the same deed, or in another, and sometimes it is included within, and sometimes indorsed upon the obligation; but it is commonly at the foot of the obligation. *Bro. Obl. 67*. A memorandum on the back of a bond may restrain the same by way of exception. *Moor 67*.

This security is also called a *specialty*; the debt being therein particularly specified in writing, and the party's seal; acknowledging the debt or duty, and confirming the contract; rendering it a security of a higher nature than those entered into without the solemnity of a seal; and therefore bonds or specialties shall be preferred to simple contracts, in a course of administration; and from its being a higher security, it is held, that for a breach or non-performance an action of debt only will lie.

A bond is a chose in action, which cannot be assigned over, so as to enable the assignee to sue in his own name; yet he has by the assignment such a title to the paper and wax, that he may keep or cancel it. *Co. Lit. 232*.

Also in equity a bond is assignable for a valuable consideration paid, and the assignee alone becomes intitled to the money; so that if the obligor, after notice of the assignment, pays the money to the obligee, he will be compelled to pay it over again. 2 *Vern. 595. Abr. Eq. 44*.

The assignee must take it, subject to the same equity that it was subject to in the hands of the obligee; as if, on a marriage treaty, the intended husband enters into a marriage-brokers bond, which is afterwards assigned to creditors, yet it still remains liable to the same equity, and is not to be carried into execution against the obligor. 2 *Vern. 595. Abr. Eq. 44*.

If a man enters into a bond of such a sum, on condition to be void on payment of a lesser sum; or if a man bind himself in the penalty of 100*l.* that he will pay 50*l.* by such a day; after the day of payment is past, the penalty or sum of 100*l.* is the legal debt; and for so much it hath been resolved, an executor of an obligor of such forfeited bond, may cover the assets of his testator. *Cro. Car. 490. 1 Vent. 354. 3 Lev. 368. Hill. 9 Geo. 2. in B. R. The Bank of England v. Morris. Annals's Rep. temp. Hardwicke, 219, &c.*

And as the penalty, by the bond's being forfeited, becomes the legal debt; so there was no remedy against such penalty, but by application to a court of equity, which relieves in those cases, on payment of principal, interest and costs: also tho' at law there can be no remedy

medy beyond the penalty; because in that the obligee seems to have taken up his security; yet, as it is on the foundation of doing equal justice to both parties that equity proceeds, it will, on any application for a favour from the obligor, compel him to pay the principal, interest and costs, tho' exceeding the penalty. *Show. Par. Ca. 15. Abr. Eq. 91, 92. 1 Salk. 154. 1 Vern. 342, 350. 509.*

And this rule of compelling the party to do equity who seeks equity, seems to be the reason why an obligee shall have interest after he has entered up judgment; for tho' in strictness it may be accounted his own fault why he did not take out execution, and therefore not intitled to interest; yet, as by the judgment he is intitled to the penalty, it does not seem reasonable that he should be deprived of it, but upon paying him principal and the interest, which incurred as well before as after the entering up of the judgment. *Abr. Eq. 92, 288. And see farther 4 & 5 Ann. c. 16. which will be mentioned hereafter under its proper head.*

Having shewn the nature of this security, it may be proper to consider.

- I. Who may be obligors and obligees.
- II. What words create such security.
- III. What ceremonies are requisite to a bond, wherein of signing, sealing and delivery.
- IV. Of the condition of a bond, what conditions deemed lawful, &c. and what shall be deemed a breach of the same.
- V. Of bonds void, or voidable: also how bonds may be discharged, and of the manner of pleading performance, &c.

I. All persons who are enabled to contract, and whom the law supposes to have sufficient freedom and understanding for that purpose, may bind themselves in bonds and obligations. *5 Co. 119. 4 C. 124. 1 Rol. Abr. 340.*

But if a person is illegally restrained of his liberty, by being confined in a common gaol or elsewhere, and, during such restraint, enters into a bond to the person who causes the restraint, the same may be avoided for *duress* of imprisonment. *Co. Lit. 253. 2 Inst. 482. vid. tit. Duress.*

So in respect of that power and authority which a husband has over his wife, the bond of a feme covert is *ipso facto* void, and shall neither bind her nor her husband. See *Baron and Feme*.

So though an infant shall be liable for his necessities such as meat, drink, cloaths, physick, schooling, &c. yet if he bind himself in an obligation, with a penalty for payment of any of those, the obligation is void. *Doct. and Stud. 113. Co. Lit. 172. Cro. Jac. 494 560. 1 Sid. 112. 1 Salk. 279. Cro. Eliz. 920 See Infants.*

Also though a person *non compos mentis* shall not be allowed to avoid his bond, by reason of insanity and distraction, as no man can be allowed to stultify himself, because of the ill consequences that might attend counterfeited madness; yet may a privy in blood, as the heir, and privies in representation, as the executor and administrator, void such bonds; also if a lunatick after office found, enters into a bond, it is merely void. *4 Co. 124. Beverley's case. See Infants and Lunaticks.*

But if an infant, feme covert, monk, &c. who are disabled by law to contract, and to bind themselves in bonds, enter together with a stranger, who is under none of these disabilities, into an obligation, it shall bind the stranger, though it be void as to the infant, &c. *1 Rol. Rep. 41.*

If a servant makes a bill in form, *Memorandum*, that I have received of *Edward Talbot*, to the use of my master *Serjeant Gaudy*, the sum of 40*l.* to be paid at *Michaelmas* following, and thereto set his seal, this is a good obligation to bind himself; for though in the beginning of the deed, the receipt is said to be to the use of his master, yet the re-payment is general, and must necessarily bind him who sealed; and the rather, because otherwise the obligee would lose his debt, he having no

remedy against *Serjeant Gaudy*. *Yelv. 137. Talbot ver. Godbolt.*

Infants, ideots, as also feme coverts may be obligees; and as to this the husband is supposed to assent, being for his advantage; but if he disagrees, the obligation hath lost its force; so that after the obligor may plead *non est factum*; but if he neither agrees nor disagrees, the bond is good, for his conduct shall be esteemed a tacit consent, since it is to his advantage. *5 Co. 119. b. Co. Lit. 3. a.*

But a feme covert can neither be obligor nor obligee to her husband, nor *vice versa*, being but one person in law; also by the better opinion, a bond entred into, to a feme sole, by the person whom she afterwards marries, is, by the marriage, at law extinguished. See *Baron and Feme*.

An alien may be an obligee, for since he is allowed to trade and traffick with us, it is but reasonable to give him all that security which is necessary in his contracts, and which will the better enable him to carry on his commerce and dealings amongst us. *Co. Lit. 129. b. Moor 431. Cro. Eliz. 142, 683. Cro. Car. 9. 1 Salk. 46. Fares. 15. See Alien.*

Sole corporations, such as bishops, prebends, parsons, vicars, &c. cannot be obligees, and therefore a bond made to any of these, shall enure to them in their natural capacities; for no sole body politick can take a chattel in succession, unless it be by custom; but a corporation aggregate may take any chattel, as bonds, leases, &c. in its political capacity, which shall go in succession, because it is always in being. *Cro. Eliz. 464. Dyer 48. a. Co. Lit. 9. a. 46. a. Hob. 64. 1 Rol. Abr. 515.*

If a drunken man gives his bond, it binds him; and a bond without consideration is obligatory, and no relief shall be had against it, for it is voluntary, and as a gift. *Jenk. Cent. 109.* A person enters voluntarily into a bond, though there was not any consideration for it, if there be no fraud used in obtaining the same, the bond shall not be relieved against in equity: but a voluntary bond may not be paid in a course of administration, so as to take place of real debts, even by simple contract; yet it shall be paid before legacies. *1 Chan. Cnf. 157.* An heir is not bound, unless he be named expressly in the bond; tho' the executors and administrators are.

It is clearly agreed, that two or more may bind themselves jointly in an obligation, or they may bind themselves jointly and severally; in which last case, the obligee may sue them jointly, or he may sue any one of them at his election; but if they are jointly and not severally bound, the obligee must sue them jointly; also, in such case, if one of them dies, his executor is totally discharged, and the survivor and survivors only chargeable. *2 Rol. Abr. 148. Dyer 19, 310. 5 Co. 19. Dal. 85. pl. 42. 1 Salk. 393. Carth. 61. 1 Lutw. 696.*

If three enter into an obligation, and bind themselves in the words following, *Obligamus nos & utrumque nostrum per se pro toto & in solido*, these make the obligation joint and several. *Dyer 19. b. pl. 114.*

In a bond where several are bound severally, the obligee is at his election to sue all the obligors together, or all of them apart, and have several judgments and executions; but he shall have satisfaction but once, for if it be of one only, that shall discharge the rest. If an obligation is joint, and not several, all the obligors must be sued that are bound; and if one be prosecuted, he is not obliged to answer, unless the rest are sued likewise. *Dyer 19, 310.* Where two or more are bound in a joint bond, and only one is sued, he must plead in abatement, that two more sealed the bond, &c. and aver that they are living, and so pray judgment *de billa*, &c. And not demur to the declaration. *Sid. 420.*

If action be brought upon a bond against two joint and several obligors jointly, and both are taken by *captia*, here the death or escape of one, shall not release the other; but the same kind of execution must be taken forth against them: 'tis otherwise when they are sued severally. *Hob. 59.*

Also, if two or more be jointly bound, though regularly one of them alone cannot be sued, yet if process be taken out against all, and one of them only appears, but the others stand out to an outlawry, he who appeared shall be charged with the whole debt. 9 Co. 119.

If a bond is made to three, to pay money to one of them, they must all join in the action, because they are but as one obligee. *Yelv.* 177.

So if an obligation be made to three, and two bring their action, they ought to shew the third is dead. 1 Sid. 238, 420. 1 Vent. 34.

Though there be several obligees, yet a person cannot be bound to several persons severally; and therefore an obligation of 200*l.* to two, *solvend'* the one 100*l.* to the one, and the other to the other is a void *solvend'*. *Dyer* 350. a. pl. 20. *Hob.* 172. 2 Brownl. 207. *Yelv.* 177.

If A. bind himself in a sum to B. *solvendum* to C. who is a stranger, a payment to C. is a payment to B. in an action upon it, the count must be upon a bond *solvend'* to B. 1 Sid. 295. 2 Keb. 81.

In debt, the declaration was, that the defendant became bound in a bond of—, for the payment of—to him, his attorney or assigns, and on oyer of the bond it appeared, that the *solvendum* was to the plaintiff's attorney or assigns, without mention of himself; and on demurrer for this variance 'twas said that the declaration must not be according to the letter of the obligation, but according to the operation of the law thereupon. 6 Mod. 228. *Robert v. Harnage.*

So if A. makes a bond to B. *solvendum* to such person as he shall appoint; if B. does appoint one, payment to him is a payment to B. and if B. appoint none, it shall be paid to B. himself. 6 Mod. 228.

If A. by his bill obligatory, acknowledges himself to be indebted to B. in the sum of 10*l.* to be paid at a day to come, and binds himself and his heirs in the same bill in 20*l.* but does not mention to whom he is bound, yet the obligation is good, and he shall be intended to be bound to B. to whom he acknowledged before the 10*l.* to be due. 2 Rol. Abr. 148. *Franklin versus Turner.*

II. As to the words necessary.

A bond may be made by any words, in a writing sealed and delivered, wherein a man doth declare himself to have another man's money, or to be indebted to him; but the best form of making it, is that which is most used, 2 *Shep. Abr.* 477. If a bond be thus: Know all men by these presents, that I W. R. am bound to J. S. in the sum, &c. for payment of which, I give full power to him to levy the same upon the profits of such lands yearly till it be paid; in this case, the obligee may sue upon the obligation, or levy the money according to the said clause. 3 *Leon. ca.* 299.

So a writing in this form; Memorandum, I A. B. have agreed to pay J. S. 20*l.* tho' this be in the preterperfect tense, yet if it hath all other ceremonies essential, it shall amount unto an obligation. 1 *Leon.* 25.

Debt brought upon a bond of 60*l.* the bond was in Italian, and the sum therein expressed was in these words, viz. *in cessanta libris*, and adjudged to be good. *Cro. Jac.* 208. *Parker v. Rennady.*

In debt upon a bill obligatory, demanding thirty-two pounds four shillings and sevenpence; the defendant demanded oyer of the bill, and it was *threty-two ponds* four shillings and 7-pence, *fo threty* for thirty, and *ponds* for pounds; and on demurrer for this cause, it was adjudged for the plaintiff. *Cro. Jac.* 607. *Hulbert v. Long.*

An obligation made to one, to the use of J. S. will be good for him in equity. *Bro. Ollig.* Where a bond is made *obligo me*, &c. leaving out the words *heredes, executores & administratores*, this is good; and the executors and administrators shall be bound by it. *Dyer* 13.

III. As to the ceremonies requisite to a bond or obligation.

It is said, that there are only three things essentially necessary to the making a good obligation, viz. writing in paper or parchment, sealing and delivery; but it hath been adjudged not to be necessary, that the obligor should sign or subscribe his name; and that therefore if in the

obligation the obligor be named *Erlin*, and he signs his name *Erlwin*, that this variation is not material; because subscribing is no essential part of the deed, sealing being sufficient. 2 Co. 5. a. *Godard's case.* *Noy* 21, 85. *Moor* 28. *Stil.* 97. 2 *Salk.* 412. 5 *Mod.* 281.

And though the seal be necessary, and the usual way of declaring on a bond is, that the defendant *per scriptum suum obligatorium sigillo suo sigillatum* acknowledged, &c. yet if the word *sigillat'* be wanting, it is cured by verdict and pleading over; for when he saith *per scriptum suum obligatorium*, &c. all necessary circumstances shall be intended; and if it were not sealed, it could not be his deed or obligation. *Dyer* 19. a. *Cro. Eliz.* 571, 737. *Cro. Jac.* 420. 2 Co. 5. 1 *Vent.* 70. 3 *Lev.* 348. 1 *Salk.* 141. 6 *Mod.* 306.

Also tho' sealing and delivery be essential in an obligation, yet there is no occasion in the bond to mention that it was sealed and delivered; because, as my Lord Coke says, these are things which are done afterwards. 2 Co. 5. a.

The name of the obligor subscribed, 'tis said, is sufficient, tho' there is a blank for his christian name in the bond. 2 *Cro.* 261. But where another christian name is in the bond, and the bond signed by the right name, though the jury find it to be his deed, the obligee cannot have judgment; for the name subscribed is no part of the obligation. 2 *Cro.* 558. 1 *Mod.* 107. In these cases, though there be a verdict, there shall not be judgment. Where an obligor's name is omitted to be inserted in the bond, and yet he signs and seals it; the court of Chancery may make good such an accident; and in case a person takes away a bond fraudulently, and cancels it, the obligee shall have as much benefit thereby, as if not cancelled. 3 *Chan. Rep.* 99, 184.

An obligation is good though it wants a date, or hath a false or impossible date; for the date, as hath been observed, is not of the substance of the deed; but herein we must take notice, that the day of the delivery of a deed or obligation is the day of the date, though there is no day set forth; and if a deed bear date one day, and be delivered at another, it was really dated when delivered, though the clause of *Gerens dat'* be otherwise. 2 Co. 5. *Godard's case.* *Noy* 21, 85, 86. *Hob.* 249. *Stil.* 97. *Cro. Jac.* 136, 264. *Yelv.* 193. 1 *Salk.* 76.

If a man declare on a bond, bearing date such a day, but does not say when delivered, this is good: for every deed is supposed to be delivered and made on the day it bears date; and if the plaintiff declare on a date, he cannot afterwards reply, that it was *primo deliberat'* at another day, for this would be a departure. *Cro. Eliz.* 773. 3 *Lev.* 348. 1 *Salk.* 141.

But if a bond bear date such a day, but was really delivered at a day after, the obligee may declare on a bond of such a date, but *primo deliberat'* at a day after; and if the obligee declare on a bond of such a date generally, the obligor may plead it was *primo deliberat'* on such a day after; but then he must traverse that it was delivered on the day of the date. 1 *Brownl.* 104. 1 *Lev.* 196.

A plaintiff may suggest a date in a bond, where there is none, or it is impossible, &c. where the parties and sum are sufficiently expressed. 5 *Mod.* 282. A bond dated on the same day on which a release is made of all things *usque diem datus*, &c. is not thereby discharged. 2 *Rol. Rep.* 255.

If the bond was delivered before the date, on issue, *non est factum*, joined on such a deed, the jury are not estopped to find the truth, viz. that it was delivered before the date, and it is a good deed from the delivery. 2 Co. 4, 6. 3 *Keb.* 332.

A person shall not be charged by a bond, though signed and sealed, without delivery, or words, or other thing, amounting to a delivery. 1 *Leon.* 140. But—

A bond or deed may be delivered by words, without any act of delivery; as where the obligor says to the obligee, go and take the said writing, or take it as my deed, &c. So an actual tradition, without speaking any word, is sufficient; otherwise, a man that is mute could not deliver a deed; but where on an issue of *non est factum*, the jury found that the defendant signed and sealed the obligation, and laid it on a table, and that the plain-

tiff came and took it up, this was held not to be the defendant's deed, without other circumstances found by the jury. *Co. Lit.* 36. a. *Cro. Eliz.* 835. *Leon.* 193 *Cro. Eliz.* 122.

IV. With respect to the condition, &c.

It is to be observed, that the condition of a bond must be to do a thing lawful; and bonds not to use trades, till or sow grounds, &c. are unlawful, for they are against the good of the publick, and the liberty of a freeman; and therefore void; and a condition of a bond to do any act *malum in se*, as to kill a person, &c. is void.

Conditions of bonds are to be not only lawful, but possible; and when the matter or thing to be done, or not to be done by a condition, is unlawful or impossible, or the condition itself repugnant, insensible or uncertain, the condition is void, and in some cases the obligation also. *10 Rep.* 120. But sometimes an obligation may be single, to pay the money, where the condition is impossible, repugnant, &c. *2 Mod.* 285. If a thing be possible at the time of entering into the bond, and afterwards becomes impossible by the act of God, the act of the law, or of the obligee, it is become void; as if a man be bound to appear next term, and dies before, the obligation is saved. A condition of a bond was, that J. S. should pay such a sum upon the 25th of December, or appear in Hilary term after in the court of B. R. He died after the 25th of December, and before Hilary term, and had not paid any thing: in this case the condition was not broken for non-payment, and the other part is become impossible by the act of God. *1 Mod. Rep.* 265. And when a condition is doubtful, it is always taken most favourably for the obligor, and against the obligee; but so as a reasonable construction be made as near as can be according to the intention of the parties. *Dyer* 51. If no time is limited in a bond for payment of the money, it is due presently, and payable on demand. *1 Brownl.* 53. But the judges have sometimes appointed a convenient time for payment, having regard to the distance of place, and the time wherein the thing may be performed. And if a condition be made impossible in respect to time, as to make payment of money on the 30th of February, &c. it shall be paid presently; and here the obligation stands single. *Jones* 140. Though if a man be bound in a bond with condition to deliver so much corn upon the 29th day of February next following, and that month hath then but twenty-eight days; it has been held, that the obligor is not obliged to perform the condition till there comes a leap-year. *1 Leon.* 101. *Sed qu.* if intent of parties can be shewn? If the condition of a bond be, that the obligor shall make a sufficient estate of land by such a time, by the advice of others; and they advise an insufficient estate, which he makes accordingly, this, 'tis said, is a good performance of the condition: but if it is, that the obligor do make a good and sure estate, and he by advice of counsel makes an estate that is not good; this will be no performance thereof. *Perk. Sect.* 776. *Keilw.* 95. A bond made to enfeoff two persons, if one dies before the time is past, wherein it should be done; the obligor must enfeoff the survivor of them, or the condition will be broken: and if it be that B. and others shall enjoy land, and the obligor and B. the obligee do disturb the rest; by this the condition is broken. *4 Hen.* 7. 1. *Co. Lit.* 384. Where one is bound to do an act to the obligee himself, the doing it to a stranger by appointment of the obligee, will not be a performance of the condition. *2 Bulst.* 149. If the act be to be done at a certain place, where the obligor is to go to Rome, &c. and he is to do the sole act without limitation of time, he hath term during life to perform the same: if the concurrence of the obligor and obligee is requisite, it may be hastened by the request of the obligee. *6 Rep.* 30. *1 Rol. Abr.* 437. Where no place is mentioned for performance of a condition, the obligor is obliged to find out the person of the obligee, if he be in England, and tender the money, otherwise the bond will be forfeited: but when a place is appointed, he need seek no further. *1 Inst.* 210. *Lit.* 340. And if, where no place is limited for payment of money due on a bond, the obligor, at or after the day of payment, meets with the obligee, and tenders him the

money, but he goes away to prevent it, the obligor shall be excused. *8 E.* 4. The obligor, or his servant, &c. may tender the money to save the forfeiture of the bond, and it shall be a good performance of the condition, if made to the obligee, though refused by him; yet if the obligor be afterwards sued, he must plead that he is still ready to pay it, and tender the money in court. *Co. Lit.* 208. The condition of a bond being for payment of money, it may be performed by giving any other thing in satisfaction, because the value of money is certain, and therefore may be satisfied by a collateral thing, if the obligee accepts it; but if the condition is to do a collateral thing, there 'tis otherwise, and paying money is no good satisfaction. *3 Bulst.* 148.

When the condition of a bond is to do two things, or has divers points, and the obligee supposing a breach of one of them, doth sue the obligor; if issue being joined upon that, it is found against him, and he is barred, the whole obligation is discharged: and so long as that judgment is in force, he can never prosecute upon any other point. *Dyer* 371. *2 Shep. Abr.* 487. *Sed qu. per stat. Vide post.*

In the performance of the condition of an obligation, the intention of the parties is chiefly to be regarded; and therefore a performance in substance is sufficient, tho' it differ in words or some immaterial circumstance; as if one be bound to deliver the testament of the testator, if he plead that he had delivered *litteras testamentarias*, it is sufficient. *Fro. Condition*, 158. *17 E.* 4. 3. *1 Rol. Abr.* 426.

If the condition of an obligation be to procure a lawful discharge, this must be by a release, or some discharge that is pleadable, and not by acquittance, which is but evidence. *1 Keb.* 739.

If the condition of an obligation be, that the party shall not continue such an action, and he by his attorney, but without his privity, continues, this is said to be no breach of the condition. *Cro. Jac.* 525. *2 Rol. Rep.* 63.

If the party, who is bound to perform the condition, disables himself, this is a breach; as where the condition is, that the feoffee shall re infeoff, or make a gift in tail, &c. to the feoffor, and the feoffee before he performs it, make a feoffment or gift in tail, or lease for life or years in *presenti* or *futuro* to another person, or marry or grant a rent-charge, or be bound in a statute or recognizance, or become professed; in all these cases the condition is broken; for the feoffee has either disabled himself to make any estate, or to make it in the same plight or freedom in which he received it; and being once disabled, he is ever disabled, though his wife should die, or the rent, &c. should be discharged, or he should be de-raigned, &c. before the time of the reconveyance. *Co. Lit.* 221, 222. *Poph.* 110. *1 Co.* 25. a. *1 Rol. Abr.* 447. *5 Co.* 21. a.

Where the condition is in the *conjunctive*, regularly both parts must be performed; yet, to supply the intention of the parties, it is held, that if a condition in the *conjunctive* be not possible to be performed, it shall be taken in the *disjunctive*; as if the condition be, that he and his executors shall do such a thing, this shall be taken in the *disjunctive*, because he cannot have an executor in his life-time; so if the condition be, that he and his assigns shall sell certain goods, this shall be taken in the *disjunctive*, because both cannot do it. *1 Rol. Abr.* 444. *Owen* 52. *1 Leon.* 74. *Gaulf.* 71.

If several days are mentioned for payment of money on a bond, the obligation is not forfeited, nor can be sued until all the days are past: but in some cases the obligee may prosecute for the money due by the bond presently, though it be not forfeited; and by special wording the condition, the obligee may be able to sue the penalty on the first default. *1 Inst.* 292.

V. Bonds may be either rigid or voidable.

As if an infant seal a bond, and be sued thereon, he is not to plead *non est factum*, but must avoid the bond by special pleading; for this bond is only voidable, and not in itself void. *5 Rep.* 119. But if a bond be made by a feme covert, she may plead her coverture, and conclude *non est factum*, &c. her bond being void. *10 Rep.* 119.

If a bond depends upon some other deed, and the deed becomes void, the bond is also void. A bond made with condition not to give evidence against a felon, &c. is void; but the defendant must plead the special matter. *Vide Wilson, par. 2. p. 341, &c.* Condition of a bond to indemnify a person from any legal prosecution, is against law, and void. 1 *Lutw.* 667. And if a sheriff takes a bond as a reward for doing of a thing, it is void. 3 *Salk.* 75. Interlineation in a bond in a place not material, will not make the bond void; but if it be altered in a part material, it shall be void. 1 *Nelf. Abr.* 391. And a bond may be void by rasure, &c. As where the date, &c. is rased after delivery; which goes through the whole. 5 *Rep.* 23. If the words in a bond at the end of the condition, *That then this obligation to be void,* are omitted, the condition will be void; but not the obligation.

Bonds may likewise be discharged by act of the party or by act of law.

The acceptance of a new bond will not discharge the old one, as a judgment may. *Hob.* 68. One bond cannot be given in satisfaction of another; but this is where given by the obligor himself, for it may be by others. 1 *Mod.* 221. If a bond be to pay money at such a time, &c. it is no plea for the obligor to say he did pay it; he must shew at what time, or else it may be taken that the performance was after the time limited. *Noy's Max.* 15. If a bond be of twenty years standing, and no demand be proved thereon, or good cause of so long forbearance shewn to the court, upon pleading *solvit ad diem*, it shall be intended paid. *Mod. Ca.* 22. Payment of money, without acquittance, is an ill plea to action of debt upon a single bill: but 'tis otherwise upon a bond with condition. *Dyer* 25.

But by 4 *An. c.* 16. If an action of debt be brought on single bill, or judgment, after money paid, such payment may be pleaded in bar. So of a bond with a condition, upon payment of principal and interest due by the condition, though such payment was not strictly made according to the condition, yet it may be pleaded in bar.

And it is further enacted by the said statute, *sect. 14.* "That if at any time, pending an action upon any such bond with a penalty, the defendant shall bring into court, where the action is depending, all principal money and interest due on such bond, and also all such costs, as have been expended in any suit or suits in law or equity upon such bond; the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the said bond; and the court shall and may give judgment to discharge every such defendant of and from the same accordingly."

Bonds also, as hath been said, may be discharged by operation of law.

If several obligors are bound jointly and severally, and the obligee make one of them his executor, it is a release of the debt, and the executor cannot sue the other obligor. 8 *Co.* 136. 1 *Salk.* 300. And vide 1 *Jou.* 345.

But though it be a release in law, in regard it is the proper act of the obligee, yet the debt by this is not absolutely discharged, but it remains *assets* in his hands, to pay both debts and legacies. *Cro. Car.* 373. *Yelv.* 160.

If a feme sole obligee take one of the obligors to husband, this is said to be a release in law of the debt being her own act. 8 *Co.* 136. *a. March.* 128.

If one obligor makes the executor of the obligee his executor, and leaves *assets*, the debt is deemed satisfied; for he has power, by way of retainer, to satisfy the debt; and neither he nor the administrator *de bonis non*, &c. of the obligee can ever sue the surviving obligor. *Hob.* 10.

But if two are bound jointly and severally to A. and the executor of one of them makes the obligee his executor, yet the obligee may sue the other obligor. 2 *Lev.* 73.

If two are jointly and severally bound in an obligation, and the obligee release to one of them, both are discharged. *Co. Lit.* 232. *a.*

Three were bound jointly and severally in an obligation, and an action was brought against one of them, who pleaded that the seal of one of the others was torn off, and the obligation cancelled, and therefore void against all. Upon *demurrer* it was adjudged, that the

obligation, by the tearing off the seal of one of the obligors, became void against all, notwithstanding the obligors were severally bound. 2 *Lev.* 220. 2 *Sbouv.* 289. *Sed qu.* if it was by accident, and not with intent to discharge that obligor, if a court of equity would not give relief? Indeed we should think, that as the courts of law are now very liberal in their construction of the Common law, as founded on reason, and the universal, immutable principles of justice, the tearing off one of the seals by accident might be pleaded in reply.

As to the pleading of performance, the defendant must set forth in what manner he hath performed it. Thus—

In debt on a bond, with condition for performance of several things, the defendant pleads *quod conditio ejusdem facti nunquam infracta fuit per se ipsum*, &c. and held an ill plea: because, for saving the bond, it is necessary for the defendant to shew how he hath performed the condition; and this sort of pleading was never admitted. 2 *Vent.* 156.

So if he had pleaded *performavit omnia*, it had been ill; for the particulars being expressed in the condition, he ought to plead to each particularly; but if the condition were for performance of covenants in an indenture, performance generally were a good plea. 1 *Lev.* 302. This must be understood where the covenants are set forth, and appear to be all in the *affirmative*. For if some are in the *affirmative*, some in the *negative*, or any in the *disjunctive*, the defendant should plead *specially*.

In debt on an obligation for payment of money, &c. the defendant pleads, that at the time and place *paratus fuit* to pay the money, but that nobody was there to receive it; and held ill on a general demurrer, for want of an *obtulit solvere*, for the tender only is traversable, not the *paratus*. 3 *Lev.* 104.

In debt on a bond with condition, the defendant pleads a collateral plea, which is insufficient; the plaintiff demurs, and hath judgment, without assigning a breach; for the defendant, by pleading a defective plea, by which he would excuse his non-performance of the condition, saves the plaintiff the trouble of assigning a breach, and gives him advantage of putting himself on the judgment of the court, whether the plea be good or not; but if the plaintiff had admitted the plea, and made a replication which shewed no cause of action, it had been otherwise; but if the replication were idle, and the defendant demurred, yet the plaintiff should have judgment, without assigning a breach. 1 *Lev.* 55, 84. 3 *Lev.* 17, 24.

And in all cases of debt on an obligation with condition, (that of a bond to perform an award only excepted) if the defendants plead a special matter, that admits and excuses a non-performance, the plaintiff need only answer, and falsify the *special matter alledged*; for he that excuses a non-performance admits it, and the plaintiff need not shew that which the defendant hath supposed and admitted. *Salk.* 138.

But if the defendant pleads a performance of the condition, though it be not well pleaded, the plaintiff in his replication must shew a breach; for then he has no cause of action, unless he shew it; and this difference will give the true reason, and reconcile the following cases. 1 *Salk.* 138. 1 *Lev.* 55, 84, 226. 1 *Saund.* 102, 159, 317. 3 *Lev.* 17, 24. 1 *Vent.* 114. *Cro. Eliz.* 320. *Yelv.* 78.

In debt on a bond, the defendant may have several pleas in bar; as if the plaintiff sue as executor, the defendant may plead the release of the testator for part, and for the residue the release of the plaintiff, so he may plead *payment* as to part, and as to the rest an *acquittance*. 1 *Salk.* 180.

In debt on an obligation the defendant cannot plead *nihil debet*, but must deny the deed by pleading *non est factum*; for the seal of the party continuing, it must be dissolved *eo ligamine quo ligatur*. *Hard.* 332. *Hob.* 218.

In bonds to save harmless, the defendant being prosecuted, is to plead *non damnificatus*, &c.

The stealing of any bond or bill, &c. for money, being the property of any one, made felony as if offenders had taken other goods of like value. See *Stat.* 2 *Gro.* 2. *c.* 25. See *Penalty*.

Form of a bond for payment of money.

KOW all men by these presents, That I A. B. of the parish, &c. in the county, &c. gentleman, am held and firmly bound to C. D. of, &c. in the county aforesaid, esquire, in one hundred pounds of good and lawful money of Great Britain, to be paid to the said C. D. or his certain attorney, his executors, administrators or assigns; To which payment well and truly to be made, I bind myself, my heirs, executors and administrators, firmly by these presents, sealed with my seal: dated the sixth day of May in the first year of the reign of our sovereign lord George the Third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, &c. and in the year of our Lord one thousand seven hundred and sixty-one.

The Condition of this obligation is such, That if the above bound A. B. his heirs, executors or administrators do and shall well and truly pay, or cause to be paid unto the above named C. D. his executors, administrators or assigns, the full sum of fifty-two pounds and ten shillings of lawful money of Great Britain, on or before the sixth day of November next ensuing the date hereof; then this obligation to be void, or otherwise to be and remain in full force and virtue. Or it may be thus: That if the said A. B. &c. do pay to the said C. D. &c. the full sum of fifty pounds, with interest for the same after the rate of five pounds *per centum per ann.* (or with lawful interest) on the day, &c. then, &c. and the last is the best form.

Bondage, Is slavery; and *bondmen*, in *Domesday*, are called *servi*, but rendered different from *villani*.—*Et de toto tenemento, quod de ipso tenet in bondagio in foca de Nortone cum pertin.* Mon. Angl. 2. par. fol. 609. *Bonda* is said to be a master of a family. See *Nativus*.

Bond-Tenants, copyholders, and customary-tenants, sometimes called *bond-tenants*. For according to *Calthorpe on Copyholds*, 51, 54. all those kinds of tenants agree in substance and kind of tenure; all their lands being holden in one general kind, that is, by *custom and continuance of time*; and the diversity of their names doth not alter the nature of their tenure. Vide *Black. Com.* 2 V. 147, 148.

Bonis non Imobendis, A writ directed to the sheriffs of London, &c. where a writ of error is brought, to charge them that the person against whom judgment is obtained be not suffered to remove his goods, till the error is tried and determined. *Reg. Orig.* 131.

Books. By 25 Hen. 8. c. 15. No person shall buy any printed books brought from beyond sea to sell the same again, and no one shall buy books by retail brought from beyond sea by any stranger. Likewise the prices of books, excessively increased, shall be qualified by the king's great officers.

By Stat. 7 Ann. c. 14. sect. 10. If any book shall be taken, or otherwise lost out of any parochial library, any justice may grant his warrant to search for it; and if it shall be found, it shall, by order of such justice, be restored to the library.

By 12 Geo. 2. c. 36. No person shall import or sell books first written and printed in this kingdom, and reprinted abroad, under the penalty of 5*l.* and double the value of every book so imported or sold.

As to the right of an author to the books he composes, vide *Black. Com.* 2 V. 405, &c. on *literary property*. And the case of *Millar and Taylor* in *B. R.* about *Easter* term 9 Geo. 3. Determined, that the author, or his assignee hath perpetual property.

From the seventh to the eleventh century books were very scarce. To that was chiefly owing the universal ignorance which prevailed, during that period. After the *Saracens* conquered *Egypt* in the seventh century, the communication with that country (as to *Europe*, &c.) was almost entirely broken off; and the *papyrus* no longer in use. So that paper was used, and as the price of that was high, books became extremely rare, and of great value. Vide *Robertson's History of Charles the Fifth*, 1 V. 233, 234. And *Murat. Ant. Ital.* V. 3. p. 833.

In the eleventh century the art of making paper was invented, the number of manuscripts was thereby increased, and the study of the sciences greatly facilitated. Vide *Robertson's History of Charles the Fifth*, 1 V. 235, &c.

Book of Rates, A small book, declaring the value of goods that pay custom of poundage. 12 Car. 2. c. 4. 11 Geo. 1. c. 7.

Booksellers, And authors of books, &c. Vide *Printing*.

Booting, or **Botting Corn**, Rent corn, anciently so called. The tenants of the manor of *Haddenham* in *com. Bucks*, formerly paid *booting corn* to the prior of *Rocheſter*. *Antiq. of Purveyance*, fol. 418. It is thought to be so called, as being paid by the tenants by way of *bote*, or *boot*, viz. as a compensation to the lord for his making them leases, &c.

Bozdagium, The tenure called *bordlands*. See *Ordin. Just. Itin. in insula de Jersey*.

Bozdaría, A cottage, from the Sax. *bord*, *domus*.—Cum 18 *servis*, 16 *villanis*, 10 *bordis*, & 60 *acris prati*, &c.

Bozdarí, or **Bozdbanni**, These words often occur in *Domesday*, and some think they mean *boors*, husbandmen, or cottagers. In the *Domesday* inquisition they were distinct from the *villani*; and seemed to be those of a less servile condition, who had a *bord* or cottage, with a small parcel of land allowed to them, on condition they should supply the lord with poultry and eggs, and other small provisions for his *board* or entertainment. Some derive the word *bordarii* from the old Gall. *bords*, the limits or extreme parts of any extent; as the *borders* of a country, and the borderers inhabitants in those parts. — *Dicuntur bordarii, vel quod in tuguriis (quæ cottagia vocant) habitabant; seu villarum limitibus, quasi borderers.* *Spelm.*

Bozd-halfpeny, Signifies a small toll, by custom paid to the lord of the town for setting up *boards*, tables, booths, &c. in fairs and markets: it is derived from three *Saxon* words, *bræd*. i. e. *board*, *halve*, in behalf of, and *penning*, a toll; which in the whole makes a toll for, or in behalf of *boards*.

Bozdlands, The demesnes which lords keep in their hands for the maintenance of their *board* or table. *Et dominicum quod quis habet ad mensam suam & proprie, sicut sunt bordlands, i. e. dominicum ad mensam.* *Braët. lib.* 4, tract. 3. c. 9.

Bozplode, Was a service required of tenants to carry timber out of the woods of the lord to his house: or it is said to be the quantity of food or provision, which the *bordary*, or *bordman*, paid for their *bord-lands*. The old *Scots* had the term of *burd*, and *meat-burd* for victuals and provisions; and *burden sack*, for a sack full of provender: from whence it is probable came our *burden*.

Bozd-Service, A tenure of *bord lands*; by which some lands in the manor of *Fulham* in *com. Mid.* and elsewhere, are held of the bishop of *London*, and the tenants do now pay six-pence *per acre* in lieu of finding provision, anciently for their lord's *board* or table. *Blount*.

Bozg-Brygch, *borg-bryce*, or *burg-brych*, (*Sax.*) A breach or violation of suretyship, pledge-breach, or of mutual fidelity.

Bozough, (*Fr. burg*, *Lat. burgus*, *Sax. borboe*) Signifies a corporate town, which is not a city; and also such a town or place as sends burgesses to parliament, the number whereof you may find in *Crompt. Jurisd.* f. 24. *Verstegan* saith, that *burg*, or *burgh*, whereof we make our *borough*, metaphorically signifies a town having a wall, or some kind of inclosure about it: and all places that in old time had among our ancestors the name of *borough*, were one way or other fenced or fortified. *Lit. sect.* 104. But sometimes it is used for *villa insignior*, or a country town of more than ordinary note, not walled. *Lindewood* upon the *Provincial* (*ut singula de sensibus*) says to this effect. *Aliqui interpretantur burgum esse castrum, vel locum ubi sunt crebra castra, vel dicitur burgus ubi sunt per limites habitacula plura constituta:* but he afterwards thus defines it: *Burgus dici potest villa quæcunque, alia a civitate, in qua est universitas approbata.* A *borough* is a place of safety, protection and privilege, according to *Saxnær*; and in the reign

reign of King Hen. 2. *burghs* had so great privileges, that if a bondman or servant remained in a *borough* a year and a day, he was by that residence made a freeman. *Glanville*. And why these were called *free burghs*, and the tradesmen in them *free burgeses*, was from a freedom to buy and sell, without disturbance, exempt from toll, &c. granted by charter: and *parliament boroughs* are said to be either by charter, or towns holden of the king in ancient *demesne*. *Brady*. It is conjectured that *borhse* or *borough*, was also formerly taken for those companies consisting of ten families, which were to be pledges for one another: and we are told by some writers that it is a street or row of houses close to one another. *Braet. lib. 3. tract. 2. cap. 10. Lamb. Duty of Const. p. 8. Vide Squire's Anglo Saxon Government, 236, 247, 251, 254, 258, 262, 264. Trading boroughs* were first formed in the time of *Alfred*. *Squire 247, 251. Vide also Black. Com. 1 V. 114. 2 V. 82.*

Borough Courts. *Vide Courts, and Com. Dig. 2 V. 496. § ante & post.*

Borough-holders, or Burtholders, quasi burhoe ealders. Are the same officers with *borough-heads*, or *head-boroughs*; who (according to *Lambert*) were the head men, or chief pledges of *boroughs*, chosen by the rest to speak and act in their names in those things that concerned them. See *Headborough*. *Vide Black. Com. 1 V. 114, 356. 4 V. 406.*

Borough-English, (Sax. Borhoe Englisc) Is a customary descent of lands, in some ancient *borhaghs*, and copyhold manors, that estates shall descend to the youngest son; or if the owner hath no issue, to his younger brother, as in *Edmuntun, &c. Ritcb. 102*. It has been observed, that the original of this old custom proceeded from the lord of certain lands having the privilege to lie with their tenants wives the first night after marriage; wherefore in time the tenants obtained this custom, on purpose that their eldest sons (who might be their lord's bastards) should be incapable to inherit their estates. *Præf. 3 Mod. Rep.* But the reason of the custom of borough english (*Littleton* says) is because the youngest is presumed in law to be least able to provide for himself. *Lit. 165*. This custom goes with the land, and guides the descent to the youngest son, although there be a devise to the contrary. *2 Lev. 138*. If a man seised in fee of lands in borough english, make a feoffment to the use of himself and the heirs male of his body, according to the course of the Common law; and afterwards die seised, having issue two sons, the youngest son shall have the lands by virtue of the custom, notwithstanding the feoffment. *Dyer 179*.

If a copyhold in borough english be surrendered to the use of a person and his heirs, the right will descend to the youngest son according to the custom. *1 Mod. 102*. And a youngest son shall inherit an estate in tail in borough english. *Noy 106*. But an heir at Common law shall take advantage of a condition annexed to borough english land; though the youngest son shall be intitled to all actions in right of the land, &c. *1 Nelf. Abr. 396*. And the eldest son shall have tithes arising out of land borough english; for tithes of common right are not inheritances descendable to an heir, but come in succession from one clergyman to another. *Ibid. 347*. Borough english land being descendable to the youngest son, if a younger son dies without issue male leaving a daughter, such daughter shall inherit *jure representationis*. *1 Salk. 243*. It hath been adjudged, where a man hath several brothers, the youngest may inherit lands in borough english: yet it is said where a custom is that land shall go to the youngest son, it doth not give it to the youngest uncle, for customs shall be taken strictly; and those which fix and order the descents of inheritance, can be altered only by parliament. *Dyer 179. 4 Leon. 384. Jenk. Cent. 220*.

By the custom of borough english, the widow shall have the whole of her husband's lands in dower, which is called her free-bench; and this is given to her the better to provide for the younger children, with the care of whom she is intrusted. *Co. Lit. 33, 111. F. N. B. 150. Mo. pl. 566. Vide Black. Com. 1 V. 75. 2 V. 83.*

Borough Goods, devisable. As before the statutes of 32 & 34 Hen. 8. No lands were devisable at the Common law, but in ancient baronies; so at the making of the statute of *Acton Burnel*, 11 Ed. 1. c. 1. it was doubted whether goods were devisable but in ancient boroughs: for by the writ *de rationabili parte bonorum*, anciently the goods of a man were partible between his wife and children. By the Common law, lands could not be devised from the heir; and here it seems as if goods were also not devisable from the wife and children, before the statute 11 Ed. 1. c. 1.

Bozel-fells, i. e. Country people, from the Fr. *boire, flocus*, because they covered their heads with such stuffs. *Blount*.

Borrowing, A man borrows money, corn, or such thing of another; he may not expect the same again, but the like, or so much: but if one lend me a horse, &c. he must have the same restored. If a thing be used to any other end or purpose than that for which it was borrowed, the party may have his action on the case for it, though the thing be never the worse; and if what is borrowed be lost, although it be not by any negligence of mine, as if I be robbed of it; or where the thing is impaired or destroyed by my neglect, admitting that I put it to no more service than that for which borrowed, I must make it good: so where I borrow a horse, and put him in an old rotten house ready to fall which falls on and kills him, I must answer for the horse. But if such goods borrowed perish by the act of God in the right use of them; as where I put the horse, &c. in a strong house, and it fall and kill him, or it dies by disease, or by default of the owner, I shall not be charged. *Co. Lit. 89. 29 Aff. 28. 2 H. 7. 11. Vide Black. Com. 2 V. 454.*

Bofcage, (bofcagium) Is that food which wood and trees yield to cattle; as mast; &c. from the Ital. *bosco, silva*: but *Manwood* observes, to be quit *de bofcagio*, is to be discharged of paying any duty of wind-fall wood in the forest.

Boscaria, Wood houses from boscus; or ox houses from bos. — *Ut ipsi possunt domos & boscaria satis competentia edificare.* *Mon. Angl. tom. 2. fol. 302.*

Boskus, An ancient word used in our law, signifying all manner of wood: the *Italians* make use of *bosco* in the same sense; as the *French* do *bois*. *Boskus* is divided into high-wood or timber, *hautbois*, and coppice or underwoods, *sub-bois*: but the high-wood is properly called *salvus*; and in *Fleta* we read it *maerium*. — *Cum una Carecta de mortuo bosco.* *Pat. 10 H. 6.*

Bosinnus, A certain rustical pipe, mentioned in ancient tenures. By inquisition after the death of *Lawrence Hastings*, earl of *Pembroke*, 22 E. 3. the manor of *Aspon Cantlow* in com. *Warw.* is returned to be held of the king in capite by these words: *Quod quidem manerium per se tenetur de domino rege in capite per servitium inveniendi unum hominem peditem, cum quodam arcu sine corda, cum uno bosinno sine cappa, &c.* *Ex Record. Tur. Lond.*

Botlar, An ox stall. This word occurs in *Mat. Paris. anno 1234*. And in *Ingulphus*. — *Facit tum borrea, botlaria, ovilia, &c.*

Bot, (Sax.) Signifies a recompence, satisfaction or amends: hence comes *manbote*, compensation, or amends for a man slain, &c. In king *Ina's* laws is declared what rate was ordained for expiation of this offence, according to the quality of the person slain. *Lamb. cap. 99*. From hence likewise we have our common phrase, *to-bot*, i. e. *compensationis gratia*. There are *houfe-bote, plough-bote, &c.* privileges to tenants in cutting of wood, &c. *Vide* those words, and *Shene verbo Bote*. *Vide Black. Com. 2 V. 35.*

Botelless, sine remedio. In the charter of *H. 1.* to *Thos. archbishop of York*, it is said, that no judgment or sum of money shall *acquite* him that commits sacrilege; but he is in *English* called *botelless*, viz. without emendation. *Lib. Albus penes Cap. de Subnet. Int. Plac. Trin. 12 Ed. 2. Ebor. 48*. We retain the word still in common speech; as it is *botelless* to attempt such a thing; that is, it is in vain to attempt it.

Botellaria, A buttery or cellar, in which the *botts* and *bottles* of wine, and other liquors are repositied. —

Veniet ad palatium regis, & ibit in botellarium, & extrahet a quocunque vase in dicta botellaria invento, vinum quantum viderit necessarium pro factura unius picberi claretti. Anno 31 Ed. 1.

Botha, A booth, stall, or standing in a fair or market. — *Et duas mensuras liberas ad bothas suas faciendas.* Mon. Ang. 2 par. fol. 132.

Bothagium, *Boothage*, or customary dues paid to the lord of the manor or soil, for the pitching and standing of booths in fairs or markets. — *Picagium, stallagium, bothagium & tollagium, &c. de novo mercato infra villam de Burceator; Cam. Oxon. Paroch. Antiq. p. 680.*

Botluna, or *butbna*, seems to be a park where cattle are inclosed and fed. *Hezor Boetius, lib. 7. cap. 123. Botbena*, and signifies a barony, lordship, &c. *Skene.*

Botiler of the King, (*pincerna regis*) Is an officer that provides the King's wines, who (according to *Fleta*) may by virtue of his office take out of every ship laden with sale wines, *Unum dalium eligere in prora navis ad opus regis, & aliud in puppe, et pro qualibet pecia reddere tantum 20 solid. mercatori. Si autem plura inde habere volueris, bene liceat, dum tamen pretium fide dignorum iudicio pro rege apponatur.* *Fleta lib. 2. cap. 21.* This officer shall not take more wine than he is commanded, of which notice shall be given by the steward of the King's house, &c. on pain of forfeiting double damages to the party grieved; and also to be imprisoned and ranomed at the pleasure of the King. *Stat. 25 Ed. 3. cap. 21. 45 Ed. 3. c. 3.*

Bottomry, (*sumus nauticum*) Is when the master of a ship borrows money upon the keel or bottom of his ship, and binds the ship itself; that if the money be not paid by the day assigned, the creditor shall have the ship. But it is generally where a person lends money to a merchant, who wants it to traffick, and is to be paid a greater sum at the return of the ship, standing to the hazard of the voyage; in regard to which, though the interest be greater than five per Cent. or what is allowed by law, it is not usury. For money lent to sea is allowed a larger interest than money advanced on land, by reason it is furnished at the hazard of the lender, and if the ship perishes, the lender shares in the loss; so that there is no real security, as in case of lands, &c. And the greater the danger is, the greater may be the profit reasonably required for the money advanced. *Lex Mercat. 122.*

Money lent on *bottomry* is either on the bare ship (the usual way) or upon the person of the borrower, and sometimes upon both: the first is where a man takes up money, and obliges himself, that if such a ship shall arrive at such a port, then to repay perhaps in long voyages near double the sum lent; but if the ship happens to miscarry, then nothing. But when money is lent at interest, it is delivered at the peril of the borrower, and the profit of this is merely the price of the loan; whereas the profit of the other, is a reward for the danger and adventure of the sea, which the lender takes upon himself, and makes the interest lawful. *See Laws 206, 207* Then there is *usura marina*, joining the advanced money and the danger of the sea together; and this is obligatory sometimes to the borrower's ship, goods and person. Where bonds or bills of *bottomry* are sealed, and the money is paid, if the ship receives injury by storm, fire, &c. before the beginning of the voyage, then the person borrowing only runs the hazard, unless it be otherwise provided; as that if the ship shall not arrive at such a place, at such a time, &c. there the contract has its beginning from the time of the sealing: but if the condition be that if such a ship shall sail from London to any port abroad, and shall not arrive there, &c. then, &c. there the contingency hath not its beginning till the departure.

A master of a ship may not take up money on *bottomry* in places where his owners reside, except he be a part owner, and then he may only take up so much as his part will answer in the ship; for if he exceeds that, his own estate is liable to make satisfaction; but when a master is in a strange country, where there are no owners, nor any goods of theirs, nor of his own; and for want of money he cannot perform his voyage, there he may take up money upon *bottomry*, and all the owners are chargeable thereto; but this is understood where money cannot be

procured by exchange, or any other means: and in the first case, the owners are liable by their vessel, though not in their persons; but they have their remedy against the master of the ship. *Leg. Oloron, l. 4. Vide Molloy, b. 2.*

11. §. 11. Some masters of ships who had insured or aken up money upon *bottomry* to a greater value than their adventure, having made it a practice to cast away and destroy the ships under their charge; by *Stat. 10 Car. 2. c. 6.* it is made felony, and the offenders shall suffer death.

By the *Stat. 19 Geo. 2. c. 37.* every sum lent on *bottomree* or at *respondentia* upon any subjects ships to or from the *East Indies*, shall be lent only on the ship; or the merchandise laden on board her, and so expressed in the condition of the bond, and the benefit of salvage shall be allowed to the lender, who alone shall have right to make assurance on the money lent. And no borrower of money, on *bottomree* or at *respondentia* as aforesaid, shall recover more on any assurance than the value of his interest, exclusive of the money borrowed. And if the value of his interest doth not amount to the money borrowed, he shall be responsible to the lender for the surplus, notwithstanding the ship and merchandise be totally lost.

By 19 *Geo. 2. c. 32.* obligees in *bottomree* bonds are admitted to claim, and after the loss or contingency shall have happened, to prove their debts, in cases of *bankruptcy*, in like manner as if the loss or contingency had happened before the time of the issuing of the commission of bankruptcy against the obligor.

The defendant had lent 300*l.* on *bottomry* bond, and afterwards insured 450*l.* on that ship with the plaintiff for six guineas per cent. premium, as interested for money lent, &c. The ship outlived the time at which the money was payable, and afterwards was lost in the *East Indies*. The defendant recovered the money on the *bottomry* bond, and afterwards sued the insurers upon their policy, who brought their bill to be relieved, for that the money insured by the policy was the money lent upon the *bottomry*, and that the defendant was no other-wise interested in the ship; and that the money being paid, no use ought to be made of the policy. The court decreed the policy to be delivered up. 2 *Eq. Ab. 371. Trin. 1692. Goddard and Garret. S. C. 2 Vern. 269.* where it is held, that a person having no interest but his *bottomry* bond, cannot insure; and that a person who has no interest in the ship or cargo cannot insure, though the policy was interested or not; but insurances are for the benefit of traders only, not that others unconcerned should make unreasonable gain.

As to the forms of a bill of *bottomry*, and of a *bottomry* bond, &c. they are printed and sold by the Stationers.

Vide farther as to *bottomry*, *Black. Com. 2 V. 458.*

Bobata Terra, As much land as one ox can plough, — *Cujus singula bobatz sunt quindcem acra terra.* Mon. Angl. par. 3. fol. 91. *See* Oxbang.

Bouche of Court, Commonly called *budge of court*, was a certain allowance of provision from the King, to his knights and servants, that attended him in any military expedition. The French *avoir bouche a court*, is to have an allowance at court, of meat and drink: from *bouche*, a mouth. But sometimes it extended only to bread, beer, and wine. And this was anciently in use as well in the houses of noblemen, as in the King's court, as appears by the following indenture. — *Ceste endenture fait parentre lui nobles hommes Monsieur Tho. Beauchamp, Comte de Warwick, d'une part, & Monsieur Johan. Russell de Strengesham Chevalier, de autre part, tesmoigne que le dit Johan. est, &c. Et avera par la pees. &c. bouche au court pur lui mesme, &c. Donne a nostre chastel de Warwick le 29 jour del mois de March, l'an du regne le roy Richard le second puis le conquest, &c.*

Boberium, or *boveria*, An ox-house: — *Loca ubi stabulantur boves, Gloss. in 10 Script.* And in the *Monasticon*, *Ad faciendum ubi boverias suas & alias domos usus necessarias, &c.* Mon. Angl. par. 2. fol. 210.

Bobettus, A young steer or castrated bullock. *Unus bovettus mas, quatuor boviculæ femina.* Paroch. Antiq. p. 287.

Bobacula, An heifer, or young cow; which in the east riding of *Yorkshire* is called a *whes*, or *why*.

Bough

Bough of a Tree, Seisin of land given by it, to hold of the donor, *in capite*, *Madox's Exchequer*. 1 V. 62.

Bound, or boundary, (bunda) The utmost limits of land, whereby the same is known and ascertained—*Secundum metas, meras, bundas, & marchias foreste*. 18 Ed. 3. Itin. Pick. fol. 6. See 4 Inst. 318.

Bound-Bailiffs, Are sheriffs officers, for executing of process. The sheriffs being answerable for their misdemeanors, the bailiffs are usually bound in a bond, for the due execution of their office, and thence are called *bound-bailiffs*, which the common people have corrupted into a much more homely appellation. *Black. Com.* 1 V. 345, 6.

Bounties on Exportation. *Vide Black. Com.* 1 V. 315.

Bounty of D. Anne, for maintaining poor clergymen. *Stat.* 2 & 3 Ann. c. 11. *Vide* 1 Geo. 1. c. 10. See also 5 Ann. c. 24. 6 Ann. c. 27. See *First Fruits*.

Bow-bearer, An under officer of the forest, whose office is to oversee, and true inquisition make, as well of sworn men as unworn in every bailiwick of the forest; and of all manner of trespasses done, either to vert or venison, and cause them to be presented, without any concealment in the next court of attachment, &c. *Crompt. Jurif.* fol. 201.

Bowyers, One of the ancient companies of the city of London. A bowyer dwelling in London, was to have always ready fifty bows of elm, witch-hazel, or ash, well made and wrought, on pain of 10s. for every bow wanting; and to sell them at certain prices, under the penalty of 40s. *Stat.* 8 Eliz. c. 10. And parents and masters were to provide for their sons and servants, a bow and two shafts, and cause them to exercise shooting, on pain of 6s. and 8d. c. c. by our ancient statutes. 12 Ed. 4. 33 H. 8.

Bracelets, Hounds, or rather beagles of the smaller and slower kind—*Rex constituit J. L. magistrum canum suorum vocatorum bracelets*, &c. *Pat.* 1 Rich. 2. p. 2. m. 1.

Bracenarius, (Fr. *braconnier*) A huntsman, or master of the hounds.—*Rex mandat baronibus quod allocent Rob. de Chadworth vicecom. Lincoln. lvi s. vii d. quos per preceptum regis liberavit Johan. de Bellovento pro putura septem leporariorum & trium falconum & lanerar. & pro venditiis unius bracenarii a die, &c. usque, &c. prox. sequen. utroque die computato, viz. pro putura cujuslibet leporarii & falconis 1 d. ob. & pro venditiis prædicti bracenarii per diem 11 d.* Anno 26 Ed. 1. Rot. 10. in Dorso.

Bractus, A hound; *brachetus* is in Fr. *brachet*, *braco canis jagax, indagator leporum*: so a *braco* was properly the large fleet hound; and *brachetus*, the smaller hound; and *brachete* the bitch in that kind.—*Concedo eis duos leporarios & quatuor bractos ad leporem capiendum.* *Monastic. Ang. Tom.* 2. pag. 283.

Bracinnum, A brewing: the whole quantity of ale brewed at one time, for which *tolfeſtor* was paid in some manors. *Bracina* a brew-house. *MS. penes Will. Dugdale, &c.*

Branding in the hand, or face, a punishment inflicted by law for various offences, as by burning, with a hot iron, after the offender hath been allowed clergy. *Vide Black. Com.* 4 V. 360, 370.

Brandy, A liquor made chiefly in France, and extracted from the lees of wine. In the *Stat.* 20 Car. 2. cap. 1. upon an argument in the Exchequer Anno 1668. whether brandy were a *strong water* or *spirit*, it was resolved to be a *spirit*: but in the year 1669, by a grand committee of the whole House of Commons, it was voted to be a *strong-water* perfectly made. See the *Stat.* 22 Car. 2. cap. 4. In lieu of custom duties, granted by 7 & 8 W. 3. on brandy imported from France, there shall be paid by the importer for every gallon of single proof 1s. and double proof 2s. &c. by *Stat.* 6 Geo. 2. c. 27. See farther for the duties on brandy, 33 Geo. 2. c. 9. and 2 Geo. 2. c. 5. And for offences in running brandy, see *Custom*.

Brasium, Signifies malt: in the ancient statutes *brasior* is taken for a brewer, from the Fr. *brasseur*; and at this day is used for a malster or malt-maker. It was resolved 18 Ed. 2. *Quod venditio brasii non est venditio victua-*

lium, nec debet puniri sicut venditio panis, vini & cervisie, & hujusmodi, contra formam statuti. To make malt was a service paid by some tenants to their lords.—*In manerio de Pidington quilibet virgatarius præparabit domino unum quarterium brasii per annum, si dominus inveniet bos-*

nam ad siccandum. *Paroch. Antiq.* p. 496.
Brass, Is to be sold in open fairs and markets, or in the owners houses, on pain of 10l. and to be worked according to the goodness of metal wrought in London, or shall be forfeited: also searchers of brass and pewter are to be appointed in every city and borough by head officers, and in counties by justices of peace, &c. and in default thereof, any other person skilful in that mystery, by oversight of the head officer, may take upon him the search of defective brass, to be forfeited, &c. *Stat.* 19 H. 7. c. 6. Brass and pewter, bell-metal, &c. shall not be sent out of the kingdom, on pain of forfeiting double value, &c. 33 Hen. 8. c. 7. 2 & 3 Ed. 6. c. 37.

Breach of close, Every unwarrantable entry on another's soil, the law calls a *trespass*, by *breaking his close*, the words of the writ of trespass. *Black. Com.* 3 V. 209.

Breach of Covenant, The not performing of any covenant, expressed or implied in a deed, or the doing an act, which the party covenanted not to do. *Vide Black. Com.* 2 V. 155, 6. *Vide post, Breach of Promise.*

Breach of Duty, The not executing any office, employment, or trust, &c. in a due and legal manner. *Vide Black. Com.* 3 V. 163, 4.

Breach of Peace, Offences against the public peace, are either such as are an *actual* breach of the peace, or constructively so, by aiding to make others break it. *Vide Black. Com.* 4 V. 142, &c.

Breach of the peace severely amerced in former times. *Madox's Ex.* 1 V. 557.

Breach of Pound, The breaking any pound or place where cattle or goods distrained are deposited, to rescue such distress. *Vide Black. Com.* 3 V. 146.

Breach of Prison, Breach of prison, by the offender himself, when committed for any cause, was felony at the Common law. 1 Hal. P. C. 607. So was conspiring to break it. *Bract.* l. 3. c. 9. But this severity is mitigated by the statute *de frangentibus prisonam*. 1 Ed. 2. which see. To break prison, when lawfully committed for treason or felony, remains still felony at the Common law: if on any inferior charge, 'tis still punishable, as an high misdemeanor, by fine and imprisonment. 2 Hawk. P. C. 128.

Breach of Promise, (violatio fidei) A breaking or violating a man's word. And *breach* signifies where a person commits any breach of the condition of a bond, or his covenant, &c. entered into, on action upon which the breach must be assigned. In debt on bond, conditioned to give account of goods, &c. a breach must be alleged, or the plaintiff will have no cause of action. 1 Saund. 102. And when a breach is assigned it must not be general, but must be particular; as in action of covenant for not repairing of houses, the breach ought to be assigned particularly, what is the want of reparation. If one covenant he was seised, and breach is assigned that he was not seised, it must be set forth who is seised, &c. *Cro. Jac.* 369. But on mutual promise for one to do an act, and in consideration thereof another to do some act, as to sell goods, &c. for so much money, a general breach that the defendant hath not performed his part, is well assigned. 3 Lev. 319.

If the condition of a bond consists of several parts, the defendant in pleading is to shew that he hath performed the several matters contained in the condition: but where a covenant consists of several parts in the affirmative, performance generally is a good plea. *Syd.* 215. In case of bond for performance of an award, if the defendant pleads any matter by which he admits a non-performance, and excuses it, the plaintiff in his replication must shew the award, and assign the breach, that the court may see an award was made, and judge whether it was good or not; for if it should be of a void part thereof, it need not be performed. 1 Salk. 138.

Breaches assigned ought to be according to the very words of the condition or covenant; when they may be well enough though too general. 1 Lutw. 326. Where a thing

a thing is to be done by 1 person or his assigns, the *breach* is to be that it was done neither by the one nor the other. 5 *Mod.* 133. If a person is to tender a conveyance, &c. to another, his heirs or assigns, *breach* assigned that the defendant did not tender a conveyance to the plaintiff, without the words his heirs or assigns, is good: but if the tender be to be made by another man, his heirs, &c. and not to him, it is otherwise. 1 *Salk.* 139.

Where a lessee for years is to leave all the timber on the land, which was growing there at the time of the lease, and he cut down any trees, though he leaves the timber on the land at the end of his lease, this is a *breach* of covenant: for in contracts the intention of parties is chiefly to be considered. *Raym.* 464. If lands are only excepted out of a lease, and a person is disturbed in enjoying them by the lessee, this is no *breach* of covenant; though it is said it might be otherwise if a way, common, &c. be excepted. *Moor* 553. A person brings an action for a covenant broken, he ought to assign the *breach* of it in such a manner, that the defendant may take an issue. 1 *Lill. Abr.* 240. If several *breaches* are assigned, and the defendant demurs upon the whole declaration, the plaintiff shall have judgment for all that are well assigned, for they are as several actions. *Cr. Jac.* 557. Where a declaration assigns no particular *breach* of covenant, it is cured by verdict, though ill upon demurrer. 1 *Vent.* 114, 126.

Formerly a plaintiff could assign but one *breach* in action of debt upon a bond for performance of covenants, though several things were broken; for one *breach* being proved, was a forfeiture of the bond: but in action of covenant, as many *breaches* might be assigned as the plaintiff would, because the plaintiff might have a particular damage upon each covenant broken; and a several issue must be taken upon every *breach*. 1 *Nels. Abr.* 406. And now by statute, in action on bond for performance of covenants, the plaintiff may assign as many *breaches* as he pleases, and the jury shall assess damages and costs for such *breaches* as are proved to be broken. *Stat.* 8 & 9 *W.* 3. cap. 10. And where judgment shall be given for the plaintiff in such action on a demurrer, *Nil dicit*, &c. he may suggest on the roll as many *breaches* as he thinks fit; upon which a writ of enquiry shall go, &c. And if before execution executed, the defendant brings the costs and damages into court, execution shall be stayed; and the plaintiff shall acknowledge satisfaction, if the execution be executed: but the judgment shall still stand as a security to answer the future *breach* of any covenant in the deed; for which the plaintiff or his executors, &c. may have a *scire facias* upon such judgment against the defendant. *Stat. ibid.* And see *Bond, Condition, and Covenant*.

Bread and Bect, The assize of *bread*, *beer*, and *ale*, &c. is granted to the Lord Mayor of London and other corporations: bakers, &c. not observing the assize to be set in the pillory. *Stat.* 51 *H.* 3. St. 1. ord. *Pistor.* & 51 *H.* 3. St. 6. *Vide* 2 & 3 *Ed.* 6. c. 15.

The assize of bread is regulated, by 8 *Ann.* c. 18. and 1 *Geo.* 1. c. 26. The 3 *Geo.* 2. c. 29. inflicts a penalty on selling at a higher price than is set by the Lord Mayor. By the 22 *Geo.* 2. c. 46. bakers marks are to be set on their bread. But see 31 *Geo.* 2. c. 29. containing new regulations concerning the assize of bread, and to prevent adulteration. And see farther 32 *Geo.* 2. c. 18. how penalties not appropriated by 31 *Geo.* 2. c. 29. shall be distributed. And lastly see 3 *Geo.* 3. c. 6. and 11 wherein there are farther regulations concerning the assize of bread, and for preventing the adulteration thereof.

Bread of Treet, or Trite, (*panis tritici*) Is bread mentioned in the statute 51 *Hen.* 3. of assize of bread and ale; wherein are particularised *wastel bread*, *cockes bread*, and *bread of treet*, which answer to the three sorts of bread now in use, called white, wheaten, and house-hold bread. In religious houses they heretofore distinguished bread by these several names, *panis armigerorum*, *panis conventualis*, *panis puerorum*, & *panis famulorum*. *Antiq. Not.*

Brecca, (from the Fr. *breche*) A breach or decay. In some ancient deeds there have been covenants for repairing *muros* & *breccas*, *portas* & *fossata*, &c. — *De brecca*

agua inter Woolwich & Greenwich superuidend. Pat. 16 Ric. 2. A duty of 3d. per ton on shipping was granted for amending and stopping of *Dagenham breach*, by *Stat.* 12 *Ann.* c. 17.

Brede, A word used by *Bracton* for broad; as too large and too *brede*, is proverbially too long and too broad. *Bract. lib.* 3. tract. 2. c. 15. There is also a *Sax.* word *rede* signifying deceit. *Leg. Canut.* c. 44.

Bredmite, (*Sax. bread and white*) A fine or penalty imposed for defaults in the assize of bread: to be exempt from which, was a special privilege granted to the tenants of the honour of *Wallingford* by King *Hen.* 2. *Paroch. Antiq.* 114.

Brehon. In Ireland the judges and lawyers were anciently stiled *brehons*; and thereupon the *Irish* law called the *brehon law*. 4 *Inst.* 358. *Vide* *Edm. Spencer's state of Ireland*, p. 1513. edit. *Hughes*. In a parliament held at *Kilkenny*, 40 *Ed.* 3. under *Lionel Duke of Clarence*, the then Lientenant of Ireland, the *brehon law* was formally abolished. *Black. Com.* 1 *V.* 100.

Breifna, Weather-sheep. — *Concedo deo & monachis* 30 *breifnas singulis annis.* *Mon. Angl.* tom. 1. cap. 406.

Brenagium, A payment in bran, which tenants anciently made to feed their lords hounds. *Floun.*

Bretoyfe, or *Bretoise*, The law of the marches of *Wales*, in practice among the ancient Britos. — *Ego Henricus de Penebrugge dedi omnibus liberis burgenfibus meis burgi mei de Penebrugge omnes libertates & liberas consuetudines secundum legem de Bretoyfe*, &c. *Pat. sine dat.* Here *legem de Bretoyfe* is said to signify *legem marchiarum*; for *Penebrugge*, now called *Pembridge*, is a town in *Herefordshire* which borders upon *Wales*.

Breve, Is any writ by which a man is summoned or attached to answer in action, or whereby any thing is commanded to be done in the King's courts, in order to justice, &c. It is called *breve* from the brevity of it; and is directed either to the chancellor, judges, sheriffs, or other officers; the various forms of it you may see in the register. — *Breve, quia breviter & paucis verbis intentionem proferentis exponit & explanat*, &c. *Bract. lib.* 5. *Tract.* 5. cap. 17. See *Stens de verb. Breve*. *Vide* *Writ*.

Breve perquirere, To purchase a writ or licence of trial, in the King's courts, by the plaintiff, *qui breve perquisivit*: and hence comes the usage of paying 6s. 8d. fine to the King, where the debt is 40*l.* and of 10*s.* where the debt is 100*l.* &c. in suits and trials for money due upon bond, &c.

Breve de Resto, A writ of right, or licence for a person ejected out of an estate, to sue for the possession of it when detained from him. *Vide* *Resto*.

Brevia testata. 'Tis mentioned by the feudal writers. *Vide* *Feud.* l. 1. 64. Our modern deeds are in reality nothing more than an improvement or amplification of the *brevia testata*. *Black. Com.* 2 *V.* 307.

Brevibus & Rotulis liberandis, A writ or mandate to a sheriff to deliver unto his successor the county, and the appurtenances, with the rolls, briefs, remembrances, and all other things belonging to that office. *Reg. Orig. fol.* 295.

Brewers, Are to put their drink in vessels mark'd by a cooper, or forfeit 3*s.* 4d. a barrel; and not selling it at reasonable rates, appointed by justices of peace, incur a forfeiture of 6*s.* for every barrel, kilderkin 3*s.* 4d. &c. by *Stat.* 23 *H.* 8. cap. 4. And *brewers* are to make an entry at the excise office once a week for liquors brewed, under penalties, &c. 12 *Car.* 2. c. 24. 15 *Car.* 2. c. 30. 7 & 8 *W.* 3. If *brewers* mix any sugar, molasses, &c. in brewing beer or ale, they shall forfeit 20*l.* *Stat.* 1 *Ann.* cap. 3. See 2 & 3 *Ed.* 6. c. 15. 1 *Will.* & *M.* c. 24. 10 & 11 *Will.* c. 21. 9. *Ann.* c. 12. 12 *Ann.* *Stat.* 1. c. 2. See *Excise*.

Bribery, (from the Fr. *briber*, to devour or eat greedily) Is a high offence, where a person in a judicial place takes any fee, gift, reward or brokerage, for doing his office, but of the King only. 3 *Inst.* 145. But taken largely it signifies the receiving, or offering, any undue reward, to or by any person concerned in the administration of publick justice, whether judge, officer, &c. to act contrary to his duty; and sometimes it signifies the taking or giving a reward for a publick office. 3 *Inst.* 9.

To take a bribe of money, though small, is a great fault ;
 ges servants may be punished for receiving bribes.
 If a judge refuse a bribe offered him, the offerer is pun-
 ishable. *Fertefcue, cap. 51.*

Bribery in judicial or ministerial officers is punished by
 fine and imprisonment. Before the statute 25 *Ed. 3.*
 Bribery in a judge was looked upon as so heinous an
 offence, that it was sometimes punished as high treason;
 and it is at this day punishable, with forfeiture of office,
 fine and imprisonment. In the reign of King *James I.*
 the Earl of *M.* lord treasurer of *England*, being impeached
 by the Commons, for refusing to hear petitions referred
 to him by the King, till he had received great bribes, &c.
 was by sentence of the lords, deprived of all his offices,
 and disabled to hold any for the future, or to sit in parli-
 ament; also he was fined fifty thousand pounds, and
 imprisoned during the King's pleasure. 1 *Hawk. P. C.*
 170. In the eleventh year of King *George I.* the Lord
 Chancellor *M——* had a milder punishment: he was
 impeached by the commons with great zeal, for bribery,
 in selling the places of Masters in Chancery for exorbitant
 sums, and other corrupt practices, tending to the great
 loss and ruin of the suitors of that court; and the charge
 being made good against him, being before divested of
 his office, he was sentenced by the lords to pay a fine of
 thirty thousand pounds, and imprisoned 'till it was paid.
Vide the Trial. 'Tis said that one of the peers (if not two)
 who voted against him, had been possessed of the office of
 Chancellor, and sold the places of Masters in Chancery,
 whenever vacant!

By statute, the chancellor, treasurer, justices of both
 benches, barons of the exchequer, &c. shall be sworn not
 to ordain or nominate any person in any office for any
 gift, brokerage, &c. 12 *R. 2. c. 2.* And the sale of offices
 concerning the administration of publick justice, &c. is
 prohibited on pain of forfeiture and disability, &c. by 5
 & 6 *Ed. 6. c. 16.* In the construction of the last men-
 tioned statute, it has been resolved that the offices of the
 ecclesiastical courts are within the meaning of that act, as
 well as the offices in the courts of Common law; and it
 hath been adjudged, that one who contracts for an office,
 contrary to the purport of the said statute 5 & 6 *E. 6. c. 16.*
 is so disabled to hold the same, that he cannot be restored
 to a capacity of holding it by any grant or dispensation
 whatsoever. *Cro. Jac. 269, 386. Hawk. P. C. 171.*

Officers of the customs, &c. taking any bribe or re-
 ward, whereby the crown shall be defrauded, shall forfeit
 100*l.* and be rendered incapable of any office. *Stat. 14*
Car. 2. c. 11. But there is a saving clause for the first
 offence, acknowledging it in two months. No person
 setting up for member of parliament, shall after the teste
 of the writ of election, or after any place becomes vacant,
 give any bribe of money, meat, drink, gift, reward, &c.
 in order to be elected, on pain of disability to serve in
 parliament. 7 *W. 3. cap. 4.* And electors taking bribes,
 are disabled to vote, and to hold any office or franchise,
 and as well he that takes as he that offers a bribe,
 shall forfeit 500*l.* &c. by *Stat. 2 Geo. 2. c. 24.* And
 see 9 *Geo. 2. c. 38.* As to bribery in magistrates, *vide*
Black. Com. 4 V. 139. And as to bribery in elections,
vide Black. Com. 1 V. 178. See Parliament.

Bribeur, (Fr. *bribeur*) Seems to signify in some of our
 old statutes, one that pilfers other mens goods. 28 *Ed.*
 2. *cap. 1.*

Brickalls, An engine mentioned in *Blount*, by which
 walls were beat down.

Bricks, Are to be made between the 1st day of *March*
 and 29th of *September*, and shall be burnt either in kilns, or
 distinct clamps, &c. Also place-bricks when burnt, must
 not be less than nine inches long, two inches and a half
 thick, and four and a quarter wide, on pain of forfeiting
 20*s.* a thousand, &c. Searchers of bricks and tiles shall
 be appointed by justices of peace in their quarter sessions,
 who are to make presentments, and may be fined 10*l.*
 for defaults: combinations to advance the price of bricks,
 ingrossing them, &c. incurs a penalty of 20*l.* And mix-
 ing mould, soil or mud with brick earth, is liable to
 penalties. *Stat. 12 Geo. 1. cap. 33. 2 Geo. 2. cap. 15.*
 But bricks may be made of brick earth and sea-coal ashes
 sifted, not exceeding a certain quantity; and cladders or

breeze may be used with coal in the burning of bricks,
 and stock-bricks and place-bricks burnt in the same clamp,
 being set in distant parcels, &c. by 3 *Geo. 2. c. 22.* and
 see 6 *Geo. 1. c. 6.* what quantity of bricks may be car-
 ried in one load in *London*, and concerning the carrying
 of bricks and tiles as ballast, see *Tiles.*

Bridge, (*pons*) A building of stone or wood erected
 a-cross a river, for the common ease and benefit of tra-
 vellers. Publick bridges, which are of general conve-
 niency, are of common right to be repaired by the whole
 inhabitants of that county in which they lie. *Hale's*
P. C. 143. 13 Co. 53. Cro. Car. 365.

But a corporation aggregate, either in respect of a spe-
 cial tenure of certain lands, or in respect of a special pre-
 scription; also any other person, by reason of such a
 special tenure, may be compelled to repair them. *Hale's*
P. C. 143. Dalt. c. 14.

At Common law those who are bound to repair pub-
 lick bridges, must make them of such height and strength,
 as shall be answerable to the course of the water; and
 they are not trespassers if they enter on any land adjoining
 to repair them, or lay the materials necessary for the
 repairs thereon. *Dalt. cap. 16.* Common bridges being
 built for the common ease of the people, of common
 right ought to be repaired by the county; but a particular
 person, town, &c. may be bound to repair them by te-
 nure, or prescription. 6 *Mod. 307.* And if a man erects
 a bridge for his own use, and the people travel over it as
 a common bridge, he shall notwithstanding repair it:
 though a person shall not be bound to repair a bridge,
 built by himself for the common good and publick con-
 venience, but the county must repair it. 2 *Inst. 701.*
 1 *Salk. 359.* Where inhabitants of a county are indicted
 for not repairing a bridge, they must set forth who ought
 to repair the same, and traverse that they ought. 1 *Vent.*
 256. A vill may be indicted for a neglect in not repair-
 ing a bridge; and the justices of peace in their sessions
 may impose a fine for defaults. And any particular inha-
 bitant of a county, or tenant of land chargeable to repairs
 of a bridge, may be made defendant, and be liable for
 not repairing it, and be liable to pay the fine assessed by
 the court for the default of the repairs; who are to have
 their remedy at law for a contribution from those who
 are bound to bear a proportionable share of the charge.
 6 *Mod. 307.*

If a manor is held by tenure of repairing a bridge, or
 highway, which manor afterwards comes into several
 hands, in such case every tenant of any parcel of the
 demesnes and services, is liable to the whole charge, but
 shall have contribution of the rest; and this though the
 lord may agree with the purchasers to discharge them of
 such repairs, which only binds the lord, and doth not
 alter the remedy which the publick hath. 1 *Darv. Abr.*
 744. 1 *Salk. 358.*

So if a manor, subject to such charge, comes into the
 hands of the crown, yet the duty upon it continues; and
 any person claiming afterwards under the crown, the
 whole manor, or any part thereof, shall be liable to an
 indictment or information, for want of due repairs. 1 *Salk.*
 358.

If part of a bridge lie within a franchise, those of the
 franchise may be charged with the repairs for so much:
 also by a special tenure, a man may be charged with the
 repairs of one part of a bridge, and the inhabitants of a
 county are to repair the rest. *Hawk. P. C. 221. Raym.*
 384, 385.

Indictments for not repairing of bridges, will not lie
 but in case of common bridges on highways; though it
 hath been adjudged they will lie for a bridge on a com-
 mon footway. *Mod. Caf. 256.* Not keeping up a ferry,
 being a common passage for all the King's people, is in-
 dictable, as well as not keeping up bridges. 1 *Salk. 12.*
 All householders dwelling in any county or town, whether
 they occupy lands or not; and all persons who have land
 in their own possession, whether they dwell in the same
 county or not, are liable to be taxed as inhabitants, to-
 wards the repairs of a public bridge, by the *Stat. 22 H.*
8. cap. 5. Where it cannot be discovered who ought to
 repair a bridge, it must be presented by the grand jury in
 quarter-sessions; and after their inquiry, and the order

of sessions upon it, the justices may send for the constables of every parish, to appear at a fixed time and place, to make a tax upon every inhabitant, &c. But it has been usual, in the levying of money for repairs of bridges, to charge every hundred with a sum in gross, and to send such charge to the high constables of each hundred, who send their warrants to the petty constables, to gather it, by virtue whereof they assess the inhabitants of parishes in particular sums, according to a fixed rate, and collect it, and then they pay the same to the high constables, who bring it to the sessions.

This method of raising money, though it be contrary to the statute 22 H. 8. c. 5 has been observed some years past; but by the 1 Ann. cap. 18. justices in sessions, upon presentment made of want of reparations, are to assess every town, parish, &c. in proportion towards the repairs of a bridge; and the money assessed is to be levied by the constables of such parishes, &c. and being demanded, and not paid in ten days, the inhabitants shall be distrained; and when the tax is levied, the constables are to pay it to the high constable of the hundred; who is to pay the same to such persons as the justices shall appoint, to be employed according to the order of the justices, towards repairing of the bridge: and the justices may allow any person concerned in the execution of the act 3*d.* per pound out of the money collected. All matters relating to the repairing and amending of bridges, are to be determined in the county where they lie, and no presentment or indictment shall be removed by certiorari. And by this statute, the evidence of the inhabitants of those places where the bridges are in decay, shall be admitted at any trial upon an information or indictment, &c.

By 14 Geo. 2. c. 33. the justices at their general sessions, may purchase or agree with persons for any piece of land, not above one acre, near to any county-bridge, in order to enlarge or more conveniently rebuild it; and the ground shall be paid for out of the money raised by 12 Geo. 2. c. 29. for better assessing, collecting, and levying, &c. No persons are compellable to make a new bridge but by act of parliament: and the inhabitants of the whole county cannot of their own authority change a bridge from one place to another. If a man has toll for men and cattle passing over a bridge, he is to repair it; and toll may be paid in these cases, by prescription, or statute. See **County Rates**. And *vide Black. Com.* 1 V. 357. 4 V. 167, 417.

Bridge-masters. There are *bridgemasters* of London-bridge, chosen by the citizens, who have certain fees and profits belonging to their office, and the care of the said bridge, &c. *Lex London.* 283.

Brief, (*brevis*) An abridgment of the client's case, made out for the instruction of counsel, on a trial at law; wherein the case of the plaintiff, &c. is to be briefly but fully stated, the proofs must be placed in due order, and proper answers made to whatever may be objected against the client's cause, by the opposite side; and herein great care is requisite, that nothing be omitted to endanger the cause. *Form of a Brief*, see *Pract. Solic.* p. 311.

Brief al Cbesque, A writ to the bishop, which in *Impedit* shall go to remove an incumbent, unless he recover or be presented *pendente lite*. 1 Keb. 386.

Briefs, or licences to make collection for *lofs by fire*. Stat. 4 & 5 Ann. cap. 14. *Vide Church-wards.*

Briga, (Fr. *brigue*) Debate or contention.—*Et posuit terram illam in brigam, & intricavit terram, scilicet, per diversa fraudulenta suffraganea; Ideo committitur Marrese. Ebor.* Hill. 18 Ed. 3. Rot. 28.

Brigandine, (Fr. in Lat. *lorica*) is a coat of mail or ancient armour, consisting of many jointed and scale-like plates, very pliant and easy for the body. This word is mentioned in 4 & 5 P. & M. cap. 2. and some confound it with *haubergeon*; and others with *brigantine*, a long but low-built vessel, swift in sailing, used at sea.

Brigantes, A word used for *Yorkshire, Lancashire, bishoprick of Durham, Westmoreland, and Cumberland.* Blount.

Brigbote, or *Brug-bote*, Signifies to be freed from the reparation of bridges. It is compounded of the Sax. *brig*, a bridge, and *bote*, which is a yielding of amends,

or supplying a defect: but this is more properly *bruck-bote*, from the Germ. *bruck*, i. e. a bridge, and *bote*, a compensation; and it is used for the liberty or exemption of being free from tribute or contribution towards the mending or re-edifying of bridges. *Plena, lib.* 1. c. 47. *Selden's Titles of Honour, fol.* 622.

Bristol, A great city, famous for trade: the mayor, burgesses, and commonalty of the city of *Bristol*, are conservators of the river *Avon* from above the bridge there to *Kings-Road*, and so down the *Severn* to the two islands called *Holmes*; and the Mayor and justices of the said city, may make rules and orders for preserving the river, and regulating pilots, masters of ships, &c. Also for the government of their markets: and the streets are to be kept clean and paved; and lamps or lights hung out at night. Stat. 11 & 12 W. 3. c. 23. No person shall act as a broker in the city of *Bristol*, till admitted and licensed by the Mayor and Aldermen, &c. on pain of forfeiting 500*l.* and those who employ any such, to forfeit 50*l.* &c. by Stat. 3 Geo. 2. c. 31. By the Stat. 22 Geo. 2. c. 20. the Stat. 11 & 12 W. 3. is rendered more effectual so far as it relates to the paving and enlightening the streets; and divers regulations are made in relation to the hackney coachmen, halliers, draymen and carters, and the markets and sellers of hay and straw, within the said city and liberties thereof. See **Brokers**.

Brocage, (*brocagium*) The wages or hire of a broker; which is also termed *brokerage*. 12 R. 2. c. 2. and 11 H. 4.—*Ex broccagio, vel alio sinistro pacto.* Rot. Stat. 31 Ed. 3.

Brocella, This word, as interpreted by Dr. *Thoroten*, signifieth a wood; and it is said to be a thicket or covert of bushes and brush wood, from the obsolete Lat. *brusca, terra bruscosa, & brocia*, Fr. *broce, brocelle*: and hence is our *brauce* of wood, and *broufing* of cattle.—*Dedi unam brocellam vocat.* &c. Reg. de Thurgaton, MS.

Brocha, (from the Fr. *broche*) An awl, or large packing needle, the use whereof is very well known. A spit in some parts of *England* is called a *broche*; and from this word comes to pierce or *broach* a barrel. That it was an iron instrument, you may learn from the following authority.—*Henricus de Havering tenet manerium de Norton in Com. Essex, per serjeantiam incendendi unum hominem, cum uno equo, &c. & uno sacco de corio, & una brochia ferrea.* Anno 13 Ed. 1.

Brochia, A great can or pitcher. *Pract. lib.* 2. tract. 1. cap. 6. Where it seems that he intends *saccus* to carry dry, and *brochia* liquid things.

Brochalfpeny, or *Broadhalfpeny.* See *Bordhalfpeny*.

Brokers, (*broccatores, broccarii & auxionarii*) Are those that contrive, make and conclude bargains and contracts between merchants and tradesmen, in matters of money and merchandize, for which they have a fee or reward. These are *exchange brokers*; and by the statute 10 R. 2. cap. 1. they are called *broggers*; also *broggers of corn* is used in a proclamation of Queen *Elizabeth*, for badgers. *Baker's Chron. fol.* 411. The original of the word is from a trader broken, and that from the Sax. *broc*, which signifies misfortune, which is often the true reason of a man's breaking; so that the broker came from one who was a broken trader by misfortune, and none but such were formerly admitted to that employment; and they were to be freemen of the city of *London*, and allowed and approved by the Lord Mayor and aldermen, for their ability and honesty. By the Stat. 8 & 9 W. 3. cap. 20. they are to be licensed in *London* by the Lord Mayor, who gives them an oath, and takes bond for the faithful execution of their offices: if any persons shall act as brokers, without being thus licensed and admitted, they shall forfeit the sum of 500*l.* And persons employing them 50*l.* And brokers are to register contracts, &c. under the like penalty: also brokers shall not deal for themselves, on pain of forfeiting 200*l.* They are to carry about them a silver medal, having the King's arms and the arms of the city, &c. and pay 40*s.* a year to the chamber of the city. Stat. 6 Ann. c. 16. A penalty of 500*l.* is inflicted on lawful brokers selling shares of stock not authorized by act of parliament; by Stat. 6 Geo. 1. c. 18. **Brokers** negotiating or transacting contracts,

on *premiums* to accept or refuse stock, or in the nature of wagers, &c. relating to the value, incur the like penalty of 500*l.* And negotiating agreements knowingly, for the sale of stock, where the seller is not actually possessed of the same, &c. shall forfeit 100*l.* And brokers shall keep a book called the *broker's book*; in which they shall enter all contracts and agreements, with the names of the buyers and sellers, and day of making contracts, &c. to be produced when required, on pain of 50*l.* Stat. 7 Geo. 2. cap. 8. And see farther 3 Geo. 2. c. 31. concerning the admission of brokers in the city of Bristol.

There are likewise *pawn-brokers*, who commonly keep shops, and let out money to poor necessitous people upon pawns, for the most part on extortion; but these are more properly *pawn-takers*, and are not of that antiquity or credit as the former; nor do the statutes allow them to be brokers, though now commonly so called. These brokers often deal in stolen goods, as they buy them cheap, and are a great nuisance: notwithstanding there is a law declaring that wrongful sale of goods stolen, &c. to and by brokers, shall not alter the property; and if they do not discover such goods at the request of the owner, they are to forfeit double value. 1 Jac. 1. cap. 21. The reason of exorbitant interest being taken by these brokers, is the want of witnesses to prove the contract, or other proof of the money taken, but the party's own evidence; but they may be punished for their extortion on an action, *qui tam*, &c. See *Pawn*.

Brok, An old sword or dagger. — *Jurati dicunt super sacramentum, quod Johannes de Monemne miles per Robertum armigerum suum, percussit Adam Gilbert capellandum de Wilton in gutture quodam gladio, qui dicitur brok, per quod propinquior erat morti, &c.* Rot. Parl. 35 Ed. 1.

Bruised, Bruised or injured with blows, wounds, or other casualty. Cowel.

Brothel-houses, Lewd places, being the common habitations of prostitutes. King Hen. 8. by proclamation, in the 37th year of his reign, suppressed all the stews or brothel-houses, which had long continued on the bank side in *Southwark*, contrary to the law of God and of the land. 3 Inst. 205. A *brothelman* was a loose idle fellow; and a *feme bordelier* or *brothelier*, a common whore. And *horelman* is a contraction of *brothelman*. Chaucer. See *Lewdy-House*.

Bruere, This the *Latins* call *erica*, and signifies heath ground; and *brueria*, briars, thorns, or heath, from the Sax. *brær*, *briar*. — *Humphry duke of Gloucester grants the forester of Shotore and Stowode, tantum de arboribus & brueriis, quantum pro vestura indiguerit, habebit.* Paroch. Antiq. 620.

Bruius, A wood or grove; Fr. *breil*, *breuil*, a thicket or clump of trees in a park or forest. Hence the abbey of *Bruer*, in the forest of *Wichwood* in com. Oxon: and *Bruel*, *Brebul*, or *Brill*, a hunting seat of our ancient kings in the forest of *Bernwood* in com. Bucks.

Bruietus, A small coppice or wood. — *Dedimus Willielmo B. Licentiam claudendi duos bruilletos, qui sunt extra regardum foreste nostre quorum unus est inter Swinburn & Estorbrig.* Car. Ric. 1. *Bruella* seems likewise to signify a little wood, or heathy ground. — *In dominicis bosci domini episcopi, scil. in bruellis ex parte australi regii itineris.* Reg. Priorat. de Wermey, fol. 24.

Bruscia, Sometimes signifies a wood: and in *Mon. Angl.* *Charta nostra confirmavimus centum acras tam de terra quam de bruscia de manerio de Riveria.* Monast. tom. 1. pag. 773.

Brusua and **Brusula**, Brouse or brushwood. *Mon. Angl.* tom. 1. fol. 773.

Bubbles, The South-sea project, and various other schemes, similar to the end intended, that of defrauding the subject, though different as to the means, called by the name of *bubbles*. The Stat. 6 Geo. 1. c. 18. makes all unwarrantable undertakings by unlawful subscriptions subject to the penalties of a *perjury*.

Bucklarium, A buckler. — *Et quod malefactores noñtiter cum gladiis & bucklariis, ac aliis armis, &c.* Clauf. 26 Ed. 1. m. 8. intus.

Buckstall, A toil to take deer, which by the Stat. 19 Hen. 7. is not to be kept by any person that hath not a park of his own, under penalties. There is a privilege

of being quit of amerciaments for *buckstalls*. — *Et sint quieti de chevagio, bondpeny, & buckstall, & de omnibus missricordiis, &c.* Privileg. de Semplingham. See 4 Inst. 306.

Bucksheat, Is the same with *French wheat*, used in many counties of this kingdom: in *Essex* it is called *brank*; and in *Worcestershire*, *crap*. It is mentioned in the Stat. 15 Car. 2. c. 5.

Bucinus, A military weapon for a footman. — *Petrus de Chetwood tenet — per serjeantiam inveniend. unum hominem peditem, cum una lancea, & uno bucino ferreo, &c.* Tenures, pag. 74.

Buggery, or *sodomy*, Comes from the Italian *buggerare*, to *bugger*; and it is defined to be a carnal copulation against nature, and this is either by the confusion of species; that is to say, a man or a woman with a brute beast, or of sexes, as a man with a man, or man unnaturally with a woman. 12 Co. Rep. 36. This sin against God, nature, and the law, 'tis said was brought into England by the Lombards. Rot. Parl. 50 Ed. 3. numb. 58. Stat. 25 H. 8. cap. 6. And in ancient times, according to some authors, it was punishable with burning, though others say with burying alive: but at this day it is felony excluded clergy, and punished as other felonies. 25 H. 8. cap. 6. and 5 Eliz. 17.

By the articles of the navy, (22 Geo. 2. c. 33.) If any person in the fleet shall commit the unnatural and detestable sin of buggery or sodomy, with man or beast; he shall be punished with death by the sentence of a court martial.

It is felony both in the agent and patient consenting, except the person on whom committed be a boy under the age of discretion; when 'tis felony only in the agent: also persons present, aiding and abetting to this crime, are all principals; and the statutes make it felony generally: there may be accessaries before and after the fact; but though none of the principal offenders shall be admitted to clergy, the accessaries are not excluded it. 1 Hale's Hist. P. C. 670. For many years past the crime of buggery has been greatly practised, and without any exemplary punishment of the committers of it; till anno 12 Geo. 1. a great number of these wretches were convicted of the most abominable practices, and three of them put to death; which seasonable justice seems to have given a check to the before growing evil.

In every indictment for this offence, there must be the words, *rem habuit veneram & carnaliter cognovit, &c.* and of consequence some kind of penetration and emission must be proved; but any the least degree is sufficient. 1 Hawk. 6. The general words of these indictments are, that A. B. on such a day, at, &c. with force and arms, made an assault upon C. D. and then and there wickedly, devilishly, feloniously, and against the order of nature, committed the venereal act with the said C. D. and carnally knew him, and then and there wickedly, &c. did with him that sodomitical and detestable sin called buggery, (not to be named among Christians) to the great displeasure of God, and disgrace of all mankind, &c. This crime is excepted out of our acts of general pardon. Vid. Black. Com. 4 V. 215.

Buildings, If a house new built exceeds the ancient foundation, whereby that is the cause of hindering the lights or air of another house, action lies against the builder. Hob. 131. In London a man may place ladders or poles upon the ground, or against houses adjoining for building his own; but he may not break ground: and builders of houses ought to have licence from the mayor and aldermen, &c. for a board in the streets, which are not to be incumbered. Cit. Lib. 30. 146. In new building of London, it was ordained, that the outsidies of the buildings be of brick or stone, and the houses for the principal streets to be four stories high, having in the front balconies, &c. by Stat. 19 Car. 2. c. 3. And vide 6 Ann. c. 31. 7 Ann. c. 17. & 11 Geo. 1. c. 28. & 33 Geo. 2. c. 30. sect. 24. If any person build any new house in London, he must erect a party-wall of brick or stone between house and house, of the thickness of two bricks in length in the ground story, &c. or he shall forfeit 50*l.* leviable by warrant of justices of peace. And party-pipes are to be fixed on the sides of such houses, for conveying water falling from the tops thereof

thereof into the channels, &c. *Stat. 6 Ann. c. 30.* 11 *Geo. 1. c. 28.* And see further 19 *Car. 2. c. 3.* 22 *Car. 2. c. 11.* 7 *Ann. c. 17.* 5 *Eliz. c. 4.* 35 *Eliz. c. 6.* 33 *Geo. 2. c. 30.* 4 *Geo. 3. c. 14.* & 6 *Geo. 3. c. 37.* See *Fire.*

Bull, (*bullā*) A brief or mandate of the pope or bishop of *Rome*, from the lead or sometimes gold seal affixed thereto, which *Mat. Paris*, anno 1237, thus describes: *In bulla domini papae stat imago Pauli a dextris crucis in medio bullae figurata, & Petri a sinistris.* These decrees of the pope are often mentioned in our statutes, as 25 *Ed. 3. c. 28 H. 8. cap. 16.* 1 & 2 *P. & M. c. 8.* and 13 *Eliz. cap. 2.* And have been heretofore used, and of force in this land: but by the statute 28 *Hen. 8. c. 16.* it was enacted, That all bulls, briefs and dispensations had or obtained from the bishop of *Rome*, should be void. And by 13 *Eliz. c. 2.* vide 23 *Eliz. c. 1.* If any person shall obtain from *Rome* any bull or writing to absolve or reconcile such as forsake their due allegiance, or shall give or receive absolution by colour of such bull, or use or publish such bull, &c. it is high treason.

Bull and Boar, By the custom of some places, a parson may be obliged to keep a bull and a boar for the use of the parishioners, in consideration of his having tithes of calves and pigs, &c. 1 *Rel. Abr. 559.* 4 *Mod. 241.*

Bulls Salts, As much salt as is made at one wealing or boiling: a measure of salt, supposed to be twelve gallons. *Mon. Angl. tom. 2.*

Bullion, (*Fr. billon*) The ore or metal whereof gold is made; and signifies with us gold or silver in *billets*, in the mass before it is coined. *Anno 9 Ed. 3. c. 2.*

Bultel, Is the bran or refuse of meal after dressed; also the bag wherein it is dressed is called a *bulter*, or rather *boulter*. The word is mentioned in the statute *de assisa panis & cervisiae*, anno 51 *Hen. 3.* Hence comes *bulted* or *bouted bread*, being the coarsest bread.

Bur, A sort of records of the Chancery lying in the office of the *Rolls*; in which are contained, the files of bills and answers, of *hab. cor. cum causa*, *certiorari's*, attachments, &c. *fiere facias's*, certificates of statute staple, extents and liberates, *superfedeas's*, bails on special pardons, bills from the Exchequer of the names of sheriffs, letters patent surrendered and deeds cancelled, inquisitions, privy seals for grants, bills signed by the king, warrants of escheators, customers, &c.

Burcheta, (from the *Fr. berche*) A kind of gun used in forests.

Burcifer Regis, Purse-bearer, or keeper of the king's privy purse. *Pat. 17 Hen. 8.*

Burbate, To jest or trifle. — *Quod nulli veniant ad turniandum vel burdandum, nec ad alias quasunque aventuras, &c.* *Mat. Paris, Addit. p. 149*

Burgage, (*burgagium*) An ancient tenure proper to boroughs, whereby the inhabitants by custom hold their lands or tenements of the king, or other lord of the borough, at a certain yearly rent. *Old Tenures.* It is kind of socage tenure, and signifieth the service whereby the borough is holden; and the king hath nothing to do with heirs of this land, whether they be under fourteen, or above that age, and under twenty-one. 1 *Inst. 109. Jenk. Cent. 127.* *Swinburn* ranks it inter ignobiles tenuras. And 37 *Hen. 8. c. 20.* Item non utimur facere fidelitatem vel servitium forinsecum domini feodorum pro terris & tenementis nostris, nisi tantummodo redditus nostros de eisdem terris exeuntes; quia tenemus terras & tenementa nostra per servitium burgagii, ita quod non habemus medium inter nos & dominum regem. *MS. Codex de LL. Statutis & Consuetud. Burgi villae Montgomer. a temp. Hen. 2.*—Anciently a dwelling-house in a borough-town was called a *burgage*. —*Sciant quod ego Editha, &c. Dedi—in liberam, puram & perpetuam elemosinam totum illud burgagium cum edificiis & pertin. suis quod jacet in villa Leominstr. Ex libro chartarum priorat. Leom'. Vide Black. Com. 2 V. 82. 4 V. 412.*

Burgh, A small walled town, or place of privilege, &c. See *Borough.*

Burg-bote, (from *burg, castellum*, and *bote compensatio*) Is a tribute or contribution towards the building or repairing of castles, or walls of a borough or city: from

which divers had exemption by the ancient charters of the Saxon kings. *Rastal. burg-bote significat quietantiam reparationis murorum civitatis vel burgi. Fleta, lib. 1. c. 47.*

Burgeses, (*burgarii & burgeses*) Are properly men of trade, or the inhabitants of a borough or walled town; but we usually apply this name to the magistrates of such a town, as the bailiff and burgeses of *Leominster*, &c. In Germany, and other countries, they confound *burges* and citizen; but we distinguish them as appears by the statute 5 *R. 2. c. 4.* where the classes of the commonwealth are thus enumerated, *count, baron, banneret, chivalier de counter; citizen de citee; burges de burgh.* See *Co. Lit. 80.* We now also call those *burgeses*, who serve in parliament, for any borough or corporation: and no man is qualified to be such a *burges*, that hath not an estate of 300 *l.* a year, clear of all incumbrances. *Stat. 9 Ann. cap. 7.* But see *Stat. 33 Geo. 2. c. 20.* Burgeses of our towns are called in *Doomsday*, the *hemines* of the king, or of some other great man; but this only shews whose protection they were under, and is not any infringement of their civil liberty. *Squire Ang. Sax. Gov. 260. n.*

Burgeses & homines burgorum & villarum, Madox Excheq. 1 V. 333. The aid of burghs, *ib. 1 V. 600, 601.* Vide *Borough.*

Burgh-breche, A fine imposed on the community of a town, for the breach of the peace, &c. *Angli omnes decem-virali olim fidejussione pacem regiam stipulati sunt, quod autem in hanc commissum est, burgh-brech dicitur, &c. Leg. Canuti, cap. 55.*

Burgherfith, or *burgherliche*, Is a word used in *Domesday*, signifying *violatio pacis in villa.* *Blount.*

Burghmote, A court of a borough. — *Et habeatur in anno ter bergesmotus, &c. nisi sapius sit, & interfit episcopus & aldermannus, & doceant ibi dei rectum & seculi.* *LL. Canuti, MS. cap. 44.*

Burghware, (*quasi burgivver*) A citizen or *burgess*. — *Willielmus rex salut. Willielmum episcopum, & Godfredum Portgrefium, & omnem burghware infra London. Charta Willielmi sen. Londinensibus concessa.*

Burglary, (*burglaria*, from the Sax. *burgh, domus*, or *arx*, & *laron, furtum*) Is where a man breaketh and entereth the house of another in the night-time, to the intent to commit some felony, whether the intention be executed or not. 4 *Co. 49.* In the natural signification, burglary is nothing but the robbing of a house; but our law restrains it to robbing a house by night, or breaking in with an intent to rob, or do some other felony: and the like offence committed by day is called *house-breaking*, to distinguish it from *burglary*. It is an offence excluded the benefit of clergy, and may be committed a great many ways: and if a man hath two houses, and resides sometimes in one of the houses, and sometimes in the other, if the house he doth not inhabit is broken by any person in the night, it is burglary. *Poph. 52. 18 Eliz. c. 7.*

And when several come with a design to commit burglary, and one does it, while the rest watch near the house, here his act is, by interpretation, the act of all of them. *Wood 377.* If thieves pretend business to get into a house by night, and thereupon the owner of the house opens his door, and they enter and rob the house, this is burglary. *Kel. 42.* Also if a person be within the house, and steal goods, and then open the house on the inside, and go out with the goods, this is burglary, though the thief did not break the house. 3 *Inst. 64.* If a thief unlocks a door, or draws the latch of a room to rob, &c. or if one comes down a chimney, opens a window, breaks a hole in the wall, &c. all these are a breaking: and if the thief set his foot over the threshold of the door of the house, or put his hand, pistol, &c. within the door or window, it is an entry sufficient to make it burglary. *H. P. C. 80, 81.*

Every entrance into the house by a trespasser is not a breaking in this case, but there must be an actual breaking. As if the door of a mansion house stand open, and the thief enters, this is no breaking. So it is if the window of the house be open, and a thief with a hook or other engine draweth out some of the goods of the owner, this is no burglary, because there is no actual breaking of the house. But if the thief breaketh the glass of the window,

dow, and with a hook or other engine draweth out some of the goods of the owner, this is burglary, for there was an actual breaking of the house. 3 *Inst.* 64. These acts amount to an actual breaking, viz. opening the casement, or breaking the glass window, picking open the lock of a door, or putting back the lock, or the leaf of a window, or unlatching the door that is only latched. 1 *Hal.* H. 552.

One of the servants of the house opened his lady's chamber door, which was fastened with a brass bolt, with design to commit a rape; and it was ruled to be burglary, and the defendant was convicted and transported. *Stran.* 481.

Though the house is to be a mansion-house, and the out-houses adjoining to the mansion-house are part thereof, wherein this crime may be committed; but not a barn, stable, &c. at any distance from the house. 4 *Rep.* 40. Part of a house divided from the rest, having a door of its own to the street, this is a mansion-house of him who hires it. *Kel.* 84.

To break and enter a shop, not parcel of the mansion-house, in which the shop-keeper never lodges, but only works or trades there in the day-time, is not burglary, but only larceny; but if he, or his servant, usually or often lodge in the shop at night, it is then a mansion-house, in which a burglary may be committed. 1 *H. H.* 557, 558.

It is not necessary to make it burglary, that any person be actually in the house at the very time of the offence committed. 1 *Harv.* 103.

A chamber in an inn of court, where one usually lodges, is a mansion-house; for every one hath a several property there. But a chamber where any person doth lodge as an inmate, cannot be called his mansion; though if a burglary be committed in his lodgings, the indictment may lay the offence to be in the mansion-house of him that let them. 3 *Inst.* 65. *Kel.* 83. If the owner of the house breaks into the rooms of his lodgers, and steals their goods, it cannot be burglary to break into his own house, but it is felony to steal their goods. *Wood's Inst.* 378. A lodger in an inn hath a special interest in his chamber; so that if he opens his chamber door, and takes goods in the house, and goes away, it seems not to be burglary. And where A. enters into the house of B. in the night, by the doors open, and breaks open a chest, and steals goods without breaking an inner door; it is no burglary by the Common law, because the chest is no part of the house: though it is felony ousted of clergy by statute; and if one break open a counter or cupboard, fixed to a house, it is burglary. 1 *Hale's Hist. P. C.* 554. See 3 *W. & M.* c. 9.

The intention to commit felony to make burglary must be of such a fact, as was felony at Common law; and not of a felony newly made by act of parliament: but the offences of burglary and felony may be joined in the same indictment; and where a man commits burglary, and at the same time steals goods out of the house, if he be acquitted of the burglary, he may notwithstanding be indicted of the larceny. 2 *Hale's Hist. P. C.* 245. Taking away goods from a dwelling-house in the night or day, where any person is therein; and breaking any shop, ware-house, &c. and taking away goods privately to the value of 5*s.* though no person be therein, is burglary, by *Stat.* 3 *W. & M.* c. 9. 10 & 11 *W.* 3. c. 23. And a reward of 40*l.* is given by the statute for apprehending a burglar, and prosecuting him to conviction. 5 *Ann. cap.* 31. See *Stat.* 12 *Ann. cap.* 7. by which if any person shall enter into the mansion-house of another, by day or by night, without breaking the same, with an intent to commit felony, or being in such house shall commit any felony, and shall in the night time break the said house to get out, he shall be guilty of burglary, and ousted of the benefit of clergy, in the same manner as if he had broken and entered the house in the night-time, with intent to commit felony. And see 3 *Geo.* 1. c. 15. & 6 *Geo.* 1. c. 23. concerning payment of the rewards for apprehending and convicting of burglars. See likewise 25 *Geo.* 2. c. 36. which provides, That the charges of prosecuting and convicting a burglar shall be

paid by the treasurer of the county where the burglary was committed.

An indictment for burglary.

Dorset, ff. **T**HE jurors, &c. upon their oath present, that A. B. of, &c. in the said county, labourer, on the day of, &c. in the year of the reign, &c. with force and arms, did feloniously break and enter the mansion-house of C. D. esquire, at, &c. in the county aforesaid, in the night-time, that is to say, between the hours of ten and eleven of the clock in the evening of the same day (one E. F. then being in the same house in the peace of God and of our sovereign lord the king) and then and there feloniously did, take and carry away twenty pounds of lawful money, and also, &c. of the goods and chattels of the said C. D. then and there found in the said house, against the peace of our said lord the king, his crown and dignity.

Buri, A word signifying husbandmen.—In Upton *sumt* 18 villani, 11 bordarii, & duo buri, &c. *Mon.* Angl. tom. 3. p. 183.

Burials, Persons dying are to be buried in woollen, on pain of forfeiting 5*l.* And affidavit is to be made of such burying before a justice, &c. under the like penalty. *Stat.* 30 *Car.* 2. c. 3.

Burneta, Cloth made of dy'd wool. A burnet colour must be dy'd; but brunus color may be made with wool without dying, which we call medleys or russets. *Differentia inter brunum colorem & burnetam; brunus enim color potest fieri ex lana absque tinctura, viz. russetum: burnetum vero requirit tincturam & artificium hominis quoad colorem.* Lyndewood. Thus much is mentioned because this word is sometimes wrote bruneta.

Burning in the Hand. Vide Branding.

Burning of houses, outhouses, &c. Vide Arson, and Black. Com. 4 *V.* 360, 370. For Malignant Burning, ib. 243, 4, 5. For Burning to Death, ib. 244, 245, 222, 370, 401.

Burrochium, A burrock, or small ware over a river, where wheels are laid for the taking of fish. *Coruel.*

Bursa, A purse. *Reddendo inde ad bursam abbatis vi. d. ad festum sancti Michaelis, &c.* Ex lib. Chart. Priorat. Lecomitir.

Bursaria, The bursery, or exchequer of collegiate and conventual bodies; or the place of receiving and paying, and accounting by the bursarii, or bursers, A. D. 1277. *Computaverunt patres Radulphus de Meriton, & Stephanus de Oxon. de bursaria domus Bercestre coram auditoribus. Paroch. Antiq.* p. 288. But the word bursarii did not only signify the bursars of a convent or college; but formerly stipendiary scholars were called by the name of bursarii, as they lived on the burse or fund or publick stock of the university. At Paris, and among the Cistercian monks, they were particularly termed by this name:—and—in ea universitate (scil. Oxon.) sunt clara collegia a regibus, reginis, episcopis, & principibus fundata, & ex stipendiis eorum scholastici plurimi utuntur, quos Parisienses bursarios vocamus. *Johan. Major. Gest. Scot.* lib. 1. c. 5.

Burse, (bursa, cambium, basilica) An exchange or place of meeting of merchants.

Bursholders. See Borough-holders.

Busones Comitatus: They are mentioned in *Bracton*. —*Jussicarii vocatis ad se quatuor vel sex, vel pluribus de majoribus comitatus qui dicuntur busones comitat. & ad quorum nutum dependent vota aliorum, &c.* *Bract.* lib. 3. tract. 2. cap. 1. Mr. Blount says busones is used for barones.

Bussa, An old word signifying a great ship. *Blount's Dict.*

Buttillus, A bushel; from butta, butta, buttis, a standing measure: and hence butticella, butticellus, buttillus, a less measure. Some derive it from the old Fr. bouts, leather continents of wine; whence come our leather budget and bottles. *Kenner's Gloss.*

Busta and **Butsus**, busta, and buscus, &c. The same with brucia and brusula.

Buttard, A large bird of game, usually found on downs and plains, mentioned in the *Stat.* 25 *Hen.* 8. cap. 11.

Butchers,

Butchers, Are to sell their meat at reasonable prices, or shall forfeit double the value, to be levied by warrant of two justices of peace, &c. And conspiring to sell their meat at certain rates; or selling flesh of cattle dying of the murrain, &c. are liable to divers penalties by statutes 7 Ed. 2. 23 Ed. 3. 2 & 3 Ed. 6. Butchers are not to kill meat in their scalding-houses, or within the walls of London, &c. Nor buy any fat cattle to sell again, on pain of forfeiting the value; but this shall not extend to selling calves, lambs, or sheep dead, from one butcher to another. Stat. 4 Hen. 7. 3 & 4 Ed. 6. c. 19. And see farther 21 Hen. 8. c. 8. 22 Hen. 8. c. 6. 24 Hen. 8. c. 3. 2 Hen. 8. c. 1. 27 Hen. 8. c. 9. 33 Hen. 8. c. 11. 2 & 3 Ed. 6. 15. 1 Jac. 1. c. 22. 3 Car. c. 1. 15 Car. 2. c. 8.

By Stat. 5 Ann. c. 34. sect. 2. Butchers within ten miles of London not to sell fat cattle alive or dead to one another. But by 7 Ann. c. 6. they may sell dead calves or sheep. See likewise 9 Ann. c. 11. and title **Hides**.

Butt, (*butticum*) A measure of wine, &c. well known among merchants, and containing 126 gallons of Malmsey wine, by Stat. 1 R. 3. c. 13.

Butter and Cheese. Justices of peace in sessions may restrain retailing *butter and cheese*; which is to be sold in open shop, and not above a barrel of butter or wey of cheese at one time, under penalties. 3 & 4 Ed. 6. cap. 21. 21 Jac. 1. cap. 22. Every Kilderkin of butter shall contain 112 pounds, the firkin 56, and pot 14 pounds of good butter, besides the casks and pots; and old bad butter shall not be mixed with good, nor shall butter be repacked for sale, which incurs forfeiture of double value, &c. And sellers and packers of butter shall pack it in good casks, and set their names thereon, with the weight of the cask and butter, on pain of 10s. Stat. 13 & 14 Car. 2. cap. 26. Butter and cheese may be transported: buyers of butter are to put marks on casks; and persons opening them afterwards, or putting in other butter, &c. 17. See farther relating to this subject, 9 Hen. 6. c. 8. 5 Eliz. c. 12. 32 Car. 2. c. 2. & 17 Geo. 2. c. 8.

Buttons, Made of hair, or other foreign buttons, shall not be imported, on pain of forfeiture, &c. Also buttons are not to be made of cloth, fluff, or wood, under penalties. See 4 W. & M. c. 5. c. 10. 10 W. 3. c. 2. 4 Geo. 1. c. 7. See farther 13 & 14 Car. 2. c. 13. 8 Ann. c. 6. & 7 Geo. 1. c. 12. And see title **Tailors**.

Butts, The place where archers meet with their bows and arrows to shoot at a mark, which we call shooting at the *butts*. Also *butts* are the ends or short pieces of land in arable ridges and furrows. *butum terræ*, a butt of land. — *Dedi decem acras & unum buttum terræ*, &c. Cart. M. de Sibbeford, penes Will. Dugdale, Mil. See **Abbutts**.

Butlerage of Wines, Signifies that imposition upon wine brought into the kingdom, which the king's *butler* may take of every ship, viz. 2s. for every ton of wine imported by strangers. Rot. Parl. 11 H. 4. anno 1 H. 8. c. 5. See **Botiler of the King**, and **Prisage**, and **Black Com.** 1 V. 314.

Butts-carle, butsecarl, buscarles, (*buscarli & butsecarli*) *sunt qui portus nauticos custodiunt*: Mariners or seamen. *Selden's Mare Clausum*, fol. 184.

Buzonis, Seems to be the shaft of an arrow, before it is fledged or feathered. — Radulphus de Stopham tenet maner. de Brianstan. com. Dorseto per serjeantiam inveniend' domino regi garcionem deferentem unum arcum sine corda, & unum buzonem sine pennis. S. Ed. 1.

Bye, Words ending in *by* or *bee*, signify a dwelling place or habitation, from the Sax. *bye*.

By-laws, (*bilagines*, from the Goth. *by*, *pagus*, and *lagen*, *lex*) Are laws made *obiter*, or by the *by*; such as orders and constitutions of corporations, for the governing of their members; of courts-leet and court-baron; commoners or inhabitants in vills, &c. made by common assent, for the good of those that made them, in particular cases whereunto the publick law doth not extend; so that they bind farther than the common or statute law: guilds and fraternities of trades, by letters patent of incorporation, may likewise make *by-laws*, for the better regulation of trade among themselves, or with others. *Kitch.* 45, 72. 6 Rep. 63.

In Scotland those laws are called laws of *birlaw* or *bur-law*; which are made by neighbours elected by common consent in the *birlaw courts*, wherein knowledge is taken of complaints betwixt neighbour and neighbour; which men so chosen are judges and arbitrators, and stiled *birlaw-men*. And *birlaws*, according to *Skene*, are *leges rusticorum*, laws made by husbandmen, or townships, concerning neighbourhood amongst them. *Skene*, pag. 33.

A power of making by-laws is included in the very act of incorporating, and incident to every corporation aggregate, without express words in the charter; and all by-laws must ever be subject and squared to the rule of the general law of the realm, as subordinate to it. *Hob.* 211.

The inhabitants of a town, without any custom, may make ordinances or *by-laws*, for repairing of a church, or highway, or any such thing, which is for the general good of the publick; and in such cases, the greater part shall bind all: though if it be for their own private profit, as for the well ordering of their common, or the like, they cannot make *by-laws* without a custom to warrant it; and if there be a custom, the greatest part shall not bind the rest in these cases, unless it be warranted by the custom. 5 Rep. 63.

Every city and town corporate hath power to make *by-laws*, for the better government of the body politick. *Hob.* 211. 5 Mod. 429. But a corporation cannot make a *by-law* to bind strangers which are not of their body, or to extend to places out of the jurisdiction of the makers: nor may by-laws be made in the form of acts of parliament. 1 Nels. Abr. 411. Also by-laws may not be made to restrain a person from setting up his trade, it being against the Common law to restrain men from trades: a by-law that no person who is not a freeman of a corporation shall set up a trade, under a penalty, hath been adjudged void and against law; as it excludes those who have served apprenticeships in the corporations, who by law may use trades. 1 Lutw. 562.

By-laws ought to be for the common good and benefit of all those who live in the place where made; and restraining men from using trades cannot be for common good, so that such by-laws have been condemned: but such a by-law warranted by particular custom, as that no strange artificer who is not free of that place shall use any art within the same, hath been held good. *Nels. Lutw.* 175. A custom that no foreign tradesman shall use or exercise a trade in a town, &c. will warrant that which a grant cannot do; and where custom has restrained, a by-law may be made that upon composition foreigners may exercise a trade. *Carter* 120.

A by-law by a corporation may inflict a penalty, recoverable by distress, or action of debt, and be good. 1 *Danv. Abr.* 738. But 'tis said it cannot be made under a certain penalty to be levied by distress, and sale of the offender's goods. 2 *Vent.* 182. For a by-law may not be made on pain of forfeiture of goods: nor may it inflict imprisonment, being contrary to *Magna Charta*. 2 *Inst.* 54. Where by-laws are good, notice of them is not necessary, because they are presumed for the better government and benefit of all persons living in those particular limits where made, and therefore all persons therein are bound to take notice of them. 1 *Lutw.* 404.

The freeholders in a court leet may make by-laws relating to the publick good, which shall bind every one within the leet. 2 *Danv.* 457. And a court-baron may make by-laws, by custom, and add a penalty for the non-performance of them. But all by-laws are to be reasonable; and ought to be for the common benefit, and not private advantage of any particular persons; and must be consonant to the publick laws and statutes, as subordinate to them. *Goldb.* 79. And by Stat. 19 H. 7. c. 7. By-laws made by corporations are to be approved by the Lord Chancellor, or Chief Justices, &c. on pain of 40 l. Vide *the Statute*. Vide also *Black Com.* 1 V. 475. And as to actions on by-laws, *ib.* 3 V. 159.

Cabal, (*cabala*) A junto or private meeting; from a doctrine or science practised by the *Jews*. 'Tis a mysterious doctrine among the *Jews*, received by oral tradition from their fathers, and at last compiled into a body, in their *Talmud*. It also signifies a skill or science practised by the more modern *Jews*, in discovering mysteries and expositions from the numbers that letters of words make.

Caballa (from the Lat. *caballus*) Belonging to a horse. *Domesday*.

Cablith, (*cablicium*) Signifies brushwood, according to the writers of the forest laws: but Sir Henry Spelman thinks it more properly windfall-wood, because it was written of old *cadibulum*, from *cadere*: or if derived from the Fr. *chablis*, it also must be windfall-wood.—*Item dicunt, quod ceppeg & cablicia vento prostrat. valent, &c.* Inq. de an. 47 H. 3.

Cables for shipping; making them of old materials, which shall contain seven inches in compass when made and tarred, &c. is liable to a forfeiture of four times the value, by *Stat. 35 Eliz. c. 8.* And see 21 *Hen. 8. c. 12.*

Cachepolus or **Cacherellus**, An inferior bailiff, a catchpole.—*In stipendiis ballivi XIII. IV. d. in stipendiis unius cachepoli IX. VII. d. per ann. &c.*—*Consuetud. domus de Farendon MS. fol. 23.*—And in *Thorn*, *cacherellos* are mentioned, viz. *Seneschallus & custodes nostri diligenter inquirant de injuriis per cacherellos vicecomitis, &c.*

Cade, Of herrings is 500, of sprats 1000. *Book of Rates, fol. 45.* But it is said, that anciently 600 made the cade of herrings, and six score to the hundred, which is called *Magnum Centum*.

Cadet, The younger son of a gentleman; particularly applied to a volunteer in the army, waiting for some post.

Caep Gildum, The restoring goods or cattle. *Blount. See Ceapgild.*

Cagis, A cage or coop for birds.—*Mandatum est vicecom. Wilts. quod emat in baliua sua 300 gallinas, &c. cum cagis, in quibus eadem gallinae poni possunt. Ex Rot. Claus. 38 H. 3.*

Calamus, A cane, reed, or quill; comprised among merchandise or drugs to be garbled. 1 *Jac. 1. c. 19.*

Calangium and **Calangia** A challenge, claim, or dispute.—*Sciant quod ego Godfridus, &c. dedi, &c. sine aliqua reclamacione seu calangio, &c. Mon. Angl. Tom. 2. fol. 252.*

Calcerum, **Calcea**, A causey or common hard way, maintained and repaired with stones and rubbish, from the Lat. *calx*, chalk, Fr. *chaux*, whence their *chauffee* and our *causway*, or path raised with earth, and paved with chalk-stones, or gravel. *Calcearum operations* were the work and labour done by the adjoining tenants: and *calcagium* was the tax or contribution paid by the neighbouring inhabitants towards the making and repairing such common roads; from which some persons were especially exempted by royal charter. *Kennet's Gloss.*

Calefagium, A word signifying a right to take fuel yearly.—*Confirmamus panagium, herbagium & calefagium in foresta nostra. Blount.*

Calendar See 24 *Geo. 2. c. 23.* for the establishment of the new stile, and 25 *Geo. 2. c. 30.* which enacts, that the opening of commons, and doing other things depending on the moveable feasts shall be according to the new calendar.

Calendar of Prisoners. A list of all the prisoners names, in the custody of each respective sheriff. Where prisoners are capitally convicted at the assizes, the judge may command execution to be done, without any writ. And the usage now is, for the judge to sign the calendar, which contains all the prisoners names, with their several judgments in the margin, and this calendar is left with the sheriff. As, for a capital felony, it is written opposite to the prisoner's name, "hanged by the neck." Formerly in the days of Latin and abbreviation, "*sus. per coll.*" for "*suspendatur per collum.*" *Staundford, P. C. 182.* And this is the only warrant that the sheriff has, for so material an act, as the taking away the life of another.

Vide Mr. Justice Blackstone's judicious observations thereon, Com. 4 V. 396, 7.

Calends, (*calenda*) Among the *Romans* was the first day of every month, being spoken of it by it self, or the very day of the new moon, which usually happen together: and if *pridie*, the day before, be added to it, then it is the last day of the foregoing month; as *pridie calend. Septemb.* is the last day of *August*. If any number be placed with it, it signifies that day in the former month, which comes so much before the month named; as the tenth *calends* of *October* is the 20th day of *September*; for if one reckons backwards, beginning at *October*, the 20th day of *September* makes the 10th day before *October*. In *March*, *May*, *July*, and *October*, the *calends* begin at the sixteenth day, but in other months at the fourteenth; which *calends* must ever bear the name of the month following, and be numbered backwards from the first day of the said following months. *Hepton's Concord, p. 69.* In the dates of deeds, the day of the month, by *nonas*, *ides*, or *calends*, is sufficient. 2 *Inst. 675.* See *Ides*.

Caliburne, The famous sword of the great King *Arthur*. *Hoveden and Brompton in Vita R.*

Callico. No person shall wear in apparel any printed or dy'd callico, on pain of forfeiting 5*l.* And drapers selling any such callico, shall forfeit 20*l.* But this doth not extend to callicoes dyed all blue. *Stat. 7 Geo. 1. c. 7.* And persons may wear stuff, made of linen yarn and cotton wool, manufactured and printed with any colours in *Great Britain*; so as the warp be all linen yarn, without incurring any penalty, by *Stat. 9 Geo. 2. c. 4.* See *Linen*.

Calling the Plaintiff. It is usual for a plaintiff, when he or his counsel perceives that he has not given evidence sufficient to maintain his issue, to be voluntarily nonsuited, or withdraw himself: whereupon the crier is ordered to call the plaintiff; and if neither he, nor any one for him, appears, he is nonsuited, the jurors are discharged, the action is at an end, and the defendant shall recover his costs. But this is not (like a *verdict*) a bar to the plaintiff's bringing another action, when he can get better proof, &c.

Calles, The King's highway mentioned in some of our ancient authors.—*Tanta autem gratie inhabitantibus fuit Britannia, quod quatuor in ea Calles a fine in finem construxerunt regia sublimatos auctoritate, &c.* *Huntingdon, Lib. 1.*

Cambrick. By the *Stat. 18 Geo. 2. c. 36.* and 21 *Geo. 2. c. 26.* No one shall wear in any garment or apparel, or vend, utter, sell, or expose to sale, (except for exportation) or for hire make up for, in, or upon, any garment or wearing apparel, any cambrick or *French lawn*, under the penalty of 5*l.* to the informer, on complaint before a justice of peace within six days after the offence committed; the penalty to be levied by distress on the offender's goods. The wearer excused on discovering and giving sufficient proof against the vender, if sold after the 24th of *June* 1748. The importation of cambricks and *French lawns* prohibited but on security of exporting them within three years. See *Stat. 32 Geo. 2. c. 32.* And see 4 *Geo. 3. c. 37.* for the establishment of a linen manufactory at *Winchelsea* in *Suffex*.

Cambridge. The statute 14 *Hen. 8. cap. 2.* to restrain alien artificers, and requiring more of them than denizens, is not to be extended to strangers dwelling in *Cambridge*. See *Stat. 32 H. 8. c. 16.* * And see farther 34 & 35 *Hen. 8. c. 24.*—35 *Hen. 8. c. 15.*—7 *Geo. 2. c. 10.* and 18 *Geo. 2. c. 20.*

Camera, From the old Germ. *Cam. Cammer*, crooked; whence comes our English *kenbo*, arms in *kenbo*. But *camera* at first signified any winding or crooked plat of ground; as *unam cameram terrae, i. e.* a nook of land. *Du Fresne*. Afterwards the word was applied to any vaulted or arched building; and by degrees more particularly restrained to an upper room or chamber: and it is now often used in the law, in the business of a judge, where persons are to be brought before him *apud cameram suam situat.* in *Serjeants-Inn*, &c. The present *Irish* use *cama* for a bed. See *Kennet's Gloss.*

'Tis used in philosophy with the word *obscura*, signifying a dark chamber. But more particularly, *camera obscura*

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obscura is the name of an optic machine; wherein (the light only coming through a double convex glass) objects exposed to broad day-light, and opposite to the glass are represented inverted upon any white surface, placed within the machine in the focus of the glass. The first who observed this phenomenon was *Baptista Porta, lib. 4. c. 2. Magia naturalis*. A darkened chamber may be made to answer the same purposes. By the use of a second glass collecting the rays of light, objects are delineated in their natural position, &c.

Camisia, A garment belonging to priests, called the *Alb*. — *Indutus camisia linea quæ communi nomine dicitur Alb. Pct. Blesensis.*

Camoca, A word used to signify a garment made of silk, or something better: *Unum vestimentum pro serialibus diebus album de camoca.* *Mon. Angl. Tom. 3. pag. 81.*

Campana bajula, A small hand bell, much in use in the ceremonies of the *Roman church*; and retained among us by sextons, parish clerks, and criers.——*Quatuor eas muneribus patriarcha donavit, altari videlicet portatili consecrata, campana bajula, baculo insigni, & tunica ex auro contexta. Reversis in patriam sua quisque dona miraculo percepit, &c.* Girald. Camb. apud Wharton. Angl. Sacr. Par. 2. p. 637.

Campartium, Any part or portion of a larger field or ground; which would otherwise be in grofs or common. — *Rex custodi insularum de Bernſley, &c. In perpetuum reddant decimæ de camptio noſtro in eadem inſula.* Prinne Hiſtor. Collect. Vol. 3. p. 89.

Campertum, Is used for a corn-field. *Pet. in Parl.*
30 Ed. 1.

Campfight, The fighting of two champions or combatants in the field. 3 *Inst.* 221. See *Champion*.

Campus Martii, or **Martii**, Was an assembly of the people every year upon *May Day*, where they confederated together to defend the country against all enemies. *Leges Edw. Confessor*, cap. 35. *Denuo in campo Martii convenere, ubi illi qui sacramentis inter illos pacem confirmavere, et iuraverant, ut non transirent.* Sim. Dunelm. Anno 1094.

Cancelling Deeds. *Vide Black. Com.* 2 V. 308, 309.

Cancelling of Wills. *Vide Black. Com. 2 V. 502.*

Candles and Chandlers. If any chandlers mix with their wares any thing deceitfully, &c. the candles shall be forfeited. *Stat. 23 Eliz. c. 8.* And a tax or duty is granted on candles, of 4*d.* per pound for those made with wax, and one half-penny a pound for all other candles, (besides a duty upon tallow) by 8 *Ann. cap. 9.* The makers of candles are not to use melting-houses without making a true entry, on pain of 100*l.* and to give notice of making candles to the excise officer for the duties, and of the number, &c. or shall forfeit 50*l.* *Stat. 11 Geo. 1. cap. 30. Vide 23 Geo. 2. c. 21. and 26 Geo. 2. c. 32. See Wax-Chandlers.*

Candlemas-Day, The feast of the *purification* of the *Blessed Virgin Mary*, being the second day of *February* instituted in memory and honour of the purification of the said virgin in the temple of *Jerusalem*, the fortieth day after her happy child-birth, according to the law of *Moses*, and the presentation of our blessed Lord; It is called *Candlemas*, or a *Mas* of *candles*, because before mas was said that day, the church consecrated and set apart for sacred use, *candles* for the whole year, and made a procession with hallowed *candles* in remembrance of the divine light, wherewith *Christ* illuminated the whole church at his presentation in the temple, when by old *Simoon* filed, *A light to lighten the Gentiles, and to be the glory of his people Israel*, *St. Luke, cap. 2. ver. 32.* This festival is no day in court, for the judges sit not; and it is the grand day in that term of all the inns of court, whereon the judges usually observe many ancient ceremonies, and the societies which seem to vie with each other, have sumptuous entertainments, accompanied with musick, and almost all kinds of diversions.

Canes opertis. Dogs with whole feet, not lawed.
— *Et debent habere canes opertias ex omni genere canum, & non impediatas.* Antiq. Customar. de Sutton Colfield.

Canestellus, A basket. In the inquisition of serjeancies, and knight's fees, *anno* 12 & 13 of King *John*. for *Essex* and *Hertsford*, it appears that one *John* of *Lisbon* held

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a manor by the service of making the King's baskets.—
Johannes de Lifstone *tenet, &c. per serjeantiam faciendi can-*
nestellos, &c. Ex Libro Rub. Scacc. fol. 137.

Canfara, A trial by hot iron, formerly used in this kingdom. *Si inculpatus fit, & se purgare velit, eat ad ferum calidum, & adlegiet manum ad canfamam quod non falsum fecit.* See Ordeal.

Canipulus. This word hath been taken for a short sword. *Blount.*

Canna, A rod or distance in the measure of ground.—*Papa Clem. IV. concedit, &c. ut nulli seculari vel religioso, &c. infra spatium 300 cannarum ab ipsorum ecclesiis mensurandarum.*—*Volumus quamlibet ipsarum cannarum octo palmarum longitudinem continere.* Ex Registr. Walt. Giffard Archiepisc. Ebor. f. 45.

Canon, Is a law or ordinance of the church; and the Greek word canon, from whence is derived the canon law, signifies a rule, because it leads a man straight, neither drawing him from one side nor the other, but rather correcting him. The canon law consists partly of certain rules taken out of the scripture; partly of the writings of the ancient fathers of the church; partly of the ordinances of general and provincial councils; and partly of the decrees of the Popes in former ages. And it is contained in two principal parts, the decrees and the decretals: the decrees are ecclesiastical constitutions made by the Pope and Cardinals, and were first gathered by *Ivo* bishop of *Carnat*, who lived about the year 1114, but afterwards perfected by *Gratian*, a *benedictine* monk, in the year 1149, and allowed by Pope *Eugenius*, to be read in schools, and alledged for law. They are the most ancient, as having their beginning from the time of *Constantine* the Great, the first christian Emperor of *Rome*. The decretals are canonical epistles written by the Pope, or by the Pope and Cardinals, at the suit of one or more persons for the ordering and determining of some matter of controversy, and have the authority of a law; and of these there are three volumes, the first whereof was compiled by *Raymundus Bartinius*, chaplain to *Gregory* the Ninth, and at his command about the year 1231. The second volume is the work of *Boniface* the Eighth, collected in the year 1298. And the third volume, called the *Clementines*, was made by Pope *Clement* the Fifth, and published by him in the council of *Vienna*, about the year 1308. And to these may be added some novel constitutions of *John* the 22d, and some other bishops of *Rome*.

As the decrees set out the origin of the canon law, and the rights, dignities and decrees of ecclesiastical persons with their manner of election, ordination, &c. So the decretals contain the law to be used in the ecclesiastical courts; and the first title in every of them, is the title of the blessed trinity, and of the catholick faith, which is followed with constitutions and customs, judgments and determinations in such matters and causes as are liable to ecclesiastical cognizance, the lives and conversation of the clergy, of matrimony and divorces, inquisition of criminal matters, purgation, penance, excommunication, &c. But some of the titles of the Canon law are now out of use, and belong to the Common law: and others are introduced, such as trials of wills, bastardy, defamation, &c.

Trials of tithes were anciently in all cases had by the Ecclesiastical law; though at this time this law only takes place in some particular cases. Thus much for the Canon law in general; and as to the Canon laws of this kingdom, by the statute 25 Hen. 8. c. 19. it is declared, that all Canons not repugnant to the King's prerogative, nor to the laws, statutes, and customs of the realm, shall be used and executed. By this statute, Canons made in convocation are to be confirmed by the King, and have the royal assent: and it has been adjudged that Canons made in convocation, and confirmed by the King, do bind as firmly in all ecclesiastical causes, as acts of parliament do in other cases; for by the Common law, every bishop in his diocese, and each archbishop in his province, and the convocation may make Canons, which shall be binding within their jurisdictions. The convocation for the province of Canterbury was held at London, anno 1603. in the first year of the reign of King James I. by

I. by the King's writ, and they had a licence under the great seal, to consult and agree to such Canons as they should think fit; whereupon they made several Canons concerning the government of the church, religion, the clergy, &c. which had the royal assent, and were ratified and confirmed by that King, for him, his heirs, and successors, pursuant to the statute 25 H. 8. c. 19. which Canons thus warranted by act of parliament, are the laws of the land to this day. See *Treatise of Laws*, p. 402 &c. 1 *Nels. Abr.* 416. The general Canon law is no further in force here than it hath been received, and is consistent with the Common or Statute law.

With respect to the effects of the *Canon law* in Europe, in antient times, its forms and maxims, which were become universally respectable from their authority in the spiritual courts, contributed not a little towards the improvement of *jurisprudence*. But, we must not consider it *politically*, with respect to the end for which it was framed, but merely as a *code of laws* respecting the *rights* and *property* of individuals, and attend only to the civil effects of its decisions concerning these. Vide *Robertson's Hist. Emp. C. V.* 1 V. 62, 63.

The plan of ecclesiastical *jurisprudence* was more perfect than that in the civil courts: but this was to dispose the laity to suffer the usurpations of the clergy. Vide *id.* 63.

Vide farther as to the Canon law, in *Black. Com.* 1 V. 14, 19, 78, 82, 83. 4 V. 414, 415.

Canon Religiosorum, A book wherein the *religious of convents* had a fair transcript of the rules of their order, which were frequently read among them as their local statutes; and this book was therefore called *Regula* and *Canon*. The publick books of the religious were the four following. 1. *Missale*, which contained all their offices of devotion. 2. *Martyrologium*, a register of their peculiar saints and martyrs, with the place and time of passion. 3. *Canon* or *Regula*, the institution and rules of their order. 4. *Necrologium* or *Obituarium*, in which they entered the deaths of their founders and benefactors, to observe the days of commemoration of them. *Kennet's Gloss.*

Cantel, (*Cantellum*) Seems to signify the same with what we now call lump, as to buy by measure, or by the lump: but according to *Blount* it is that which is added above measure.—*Nullum genus bladi vendatur per cumulum seu cantellum, præter avenam, brassum & farinam. Stat. de Pistor. cap. 9.* Also a piece of any thing, as a cantel of bread, and the like.

Cantred, (*Cantredus*) A British word from *cant*, or *cantre*, which in the British tongue signifies *centum*, and *tret*, a town or village, is in *Wales* an hundred villages: for the *Welsh* divide their countries into *cantreds*, as the *English* do into hundreds. This word is used 28 H. 8. c. 3.

Capacity, (*capacitas*) An ability, or fitness to receive: and in law it is where a man or body politick, is able to give or take lands, or other things, or to sue actions. Our law allows the King two capacities, a natural and a politick: in the first, he may purchase lands to him and his heirs; in the latter, to him and his successors. An alien born hath sufficient *capacity* to sue in any personal action, and is capable of personal estate; but he is not capable of lands of inheritance; and in a real action, it is a good plea of the defendant to say the plaintiff is an alien born, and pray if he shall be answered. *Dyer* 3. Persons attainted of treason or felony, Idiots, lunaticks, infants, feme coverts without their husbands, &c. are not capable to make any deed of gift, grant, or conveyance, unless it be in some special cases. But all other persons, void of impediments, are capable of making grants and conveyances, and to sue and be sued, being twenty-one years of age; and at fourteen, their age of discretion, they are capable by law to marry, be a witness, &c. 1 *Inst.* 171, 172.

Vide farther as to capacity to purchase, and to convey, *Black. Com.* 2 V. 290. And as to a capacity of guilt, *ib.* 4 V. 20.

Cape, (*Lat.*) Is a writ judicial, touching plea of lands or tenements; so termed, as most writs are, of that word in it, which carries the chief intention or end thereof: and this writ is divided into *cape magnum* and *cape parvum*, both of which take hold of things immoveable.

Cape Magnum, or the *grand cape*, Is a writ that lies before appearance to summon the tenant to answer the default, and also over to the demandant: and in the *Old Nat. Brew.* it is defined to be, where a man hath brought a *præcipe quod reddat* of a thing touching plea of land, and the tenant makes default at the day to him given in the original writ, then this writ shall go for the King to take the land into his hands; and if the tenant came not at the day given him thereby, he loseth his land, &c. See *Reg. Jud. fol. 1. Bract. lib. 3. tract. 3. c. 1.*

Cape Parvum, or *petit cape*, Is where the tenant is summoned in plea of land, and comes on the summons, and his appearance is recorded; if at the day given him he prays the view, and having it granted makes default; then shall issue this writ for the King, &c. *Old Nat. Brew.* 162. The difference between the *grand cape* and *petit cape* is, that the *grand cape* is awarded upon the tenant's not appearing, or demanding the view in such real actions, where the original writ does not mention the particulars demanded; and the *petit cape* is after appearance or view granted: and whereas the *grand cape* summons the tenant to answer for the default, and likewise over to the demandant: *petit cape* summons the tenant to answer the default only: and therefore it is called *petit cape*; though some say it hath its name, not because it is of small force, but by reason it consists of few words. *Reg. Jud. fol. 2. Fleta, lib. 2. c. 44.*

Cape ad Valentiam, This is a species of *cape magnum*, and is where I am impleaded of lands, and vouch to warrant another, against whom the *summons ad avarrantizandum* hath been awarded, and he comes not at the day given; then if the demandant recover against me, I shall have this writ against the vouchee, and recover so much in value of the lands of the voucher, if he hath so much; if not, I shall have execution of such lands and tenements as shall after descend to him in fee; or if he purchases afterwards, I shall have against him a return, &c. And this writ lies before appearance. *Old Nat. Br.* 161.

Capella. Before the word chapel was annexed to an oratory, or depending place of divine worship: it was used also for any sort of chest, cabinet, or other repository of precious things, especially of religious reliques. *Kennet's Paroch. Antiq.* p. 580.

Capellus, A cap, bonnet, or other covering for the head.—*Capite discooperto sine capello, cum una garlanda de latitudine, &c.* Tenures, p. 32.—*Capellus ferreus*, an helmet or iron head-piece, *Quicumque laicus habuerit in catallis ad valentiam decem marcarum habeat halbergellum & capellum ferri, & lanceam.* Hoveden, pag. 61.

—*Capellus militis* is likewise an helmet or military head-piece. *Consuetud. Domus de Farendon, MS. fol. 21.*

Capias, Is a writ of process of two sorts; one whereof is called *capias ad respondendum*, before judgment, where an original is sued out, &c. to take the defendant and make him answer the plaintiff: and the other a writ of execution, after judgment, being of divers kinds, as *capias ad satisfaciendum*, *capias utlagatum*, &c. The *capias ad respondendum* in C. B. is drawn from the *præcipe*, which serves both for the original and *capias*, and the return of the original is the title of the *capias*. If a *capias* be special, in debt, covenant, &c. the cause of action must be recited at large, and you are to set forth the substance of your intended declaration, as you are also in your original. The usual course is to take out the *capias*, and sue out the original after, although it is supposed to be sued out before, because the original cannot be so speedily sued out at all times: and where the cause of action is for debt, and requires bail, the best way is to make an *at etiam capias*, the original to which is only a bare *clausum fregit*; and when you come to judgment, you may file a new original to warrant such judgment. If a *capias* be special, by *Præcipe quod reddat*, &c. and there is any mistake in the name, *alias dicitur*, or sum, it may be pleaded in abatement, and a new original afterwards will not cure it; but you are forced to discontinue our action, or enter a *cassatur*, and to begin *de novo*. There may be an *alias* and a *pluries capias*, bearing title from the return of each other, if the defendant be not taken on the first writ. See *Pract. Solic.* p. 290.

The word *sicut alias*, and *sicut pluries*, distinguish the *alias* and *pluries* from the *capias*.

Capias ad Satisfaciendum. A judicial writ which issues out of the record of a judgment, where there is a recovery in the courts at *Westminster*, of debt, damages, &c. And by this writ the sheriff is commanded to take the body of the defendant in execution, and him safely to keep, so that he have his body in court at the return of the writ, to satisfy the plaintiff his debt and damages. *Vide 1 Lill. Abr. 249.* It is usual to take out this writ, where the defendant hath no lands nor goods, whereof the debt recovered may be levied: and when the body is taken upon a *ca. sa.* and the writ is returned and filed, it is an absolute and perfect execution against the defendant, and no other execution can be against his lands or goods. Where a person dies in execution, his lands and goods are liable to satisfy the judgment, by statute 21 *Jac. 1. c. 24.* See *Roll. Abr. 904.* In case two persons are bound jointly and severally, and prosecuted in two courts, whereupon the plaintiff hath judgment and execution by *cap. ad satisfac.* against one of them; if he after have an *elegit* against the other, and his lands and goods are delivered upon it, then he that is in prison shall have *audita querela.* *Hob. 2. 57.* Where one taken on a *cap. ad satisfaciendum* escapes from the sheriff, and no return is made of the writ, nor any record of the award of the *capias*; the plaintiff may bring a *scire fac.* against him, and on that what execution he will. *Roll. 904.* And if the defendant rescue himself, the plaintiff shall have a new *capias*, the first writ not being returned. *Ibid. 901.*

A defendant being brought into court by virtue of a *cap. ad satisfaciendum*, the plaintiff was asked, whether he would pray that the prisoner might be committed? who answered he would not; because the party was not able to pay, and had escaped from the sheriff, against whom he intended to bring his action; therefore the defendant was discharged. *1 And. ca. 166.* A *capias ad satisfaciendum* lieth not against a peer; nor against his executors or administrators, but where a *devastavit* is returned by the sheriff, &c. *1 Lill. 250.* If the defendant cannot be taken upon a *capias* in the county where the action is laid, there may issue a *testatum ca. sa.* into another county; and so of the other writs.

Capias Utlagatum. Is a writ that lies against a person who is outlawed in any action, by which the sheriff apprehends the party outlawed, for not appearing upon the *exigent*, and keeps him in safe custody till the day of return, and then presents him to the court, there to be ordered for his contempt; who, in the Common Pleas, was in former times to be committed to the *Fleet*, there to remain till he had sued out the King's pardon, and appeared to the action. And by a special *capias utlagatum* in the same writ the sheriff is commanded, to seize all the defendant's lands, goods and chattels, for the contempt to the King; and the plaintiff, (after an inquisition taken thereupon, and returned into the Exchequer) may have the lands extended, and a grant of the goods, &c. whereby to compel the defendant to appear; which when he doth, if he reverse the outlawry, the same shall be restored to him. *Old Nat. Br. 154.* A defendant may appear in person, and reverse an outlawry: and in *B. R.* one may appear by attorney, &c. Also when a person is taken upon a *capias utlagatum*, the sheriff is to take an attorney's engagement to appear for him, where special bail is not required; and his bond with sureties to appear, where 'tis required. *Stat. 4 & 5 W. & M. c. 18.* This writ is either general, against the body; or, as I have before observed, it is special, against the body, lands and goods. See *Outlawry.*

As to the forms of these writs they may be found in the common books of practice.

Capias pro fine. Is where one, who is fined to the King for some offence committed against a statute, does not discharge the fine according to the judgment: whereupon his body is to be taken by this writ, and committed to prison until he pay the fine. 'Tis used in other cases, for not making out some pleas in civil actions. *3 Rep. 12.* By the *Stat. 5 W. & M. c. 12. capiaturs fines* are taken away in several cases. See *Fines for Offences.*

Capias in Withernam. A writ lying for cattle in *Withernam*; which is, where a distress taken is driven out of the county, so that the sheriff cannot make deliverance in replevin, when this writ issues to the sheriff to take as many beasts of the distrainer, &c. *Reg. Orig. 82, 83. Vide Withernam.*

Capiatur. (judgment *quod*) Formerly if final judgment was for the plaintiff, it was also considered that the defendant should be either amerced, for his wilful delay of justice in not immediately obeying the King's writ, by rendering the plaintiff his due, (*5 Rep. 49.*) or be taken up, (*capiaturs*) to pay a fine to the King, in case of any forcible injury. But now by *Stat. 5 W. & M. 12. capias* shall not issue for this fine, but plaintiff shall pay *6s. 8d.* and be allowed it against defendant in costs. Therefore in judgments in *Common Pleas*, they enter that the fine is remitted: in *King's Bench* they take no notice of any fine or *capias*. *Salk. 54. Carth. 390.*

Capita, (distribution by) *i. e.* To every man an equal share of personal estate, when all the claimants claim in their own rights, as in equal degree of kindred, and not *jure representationis*. *Black. Com. 2 V. 517.*

Capita, (succession by) Where the claimants are next in degree to the ancestor, in their own right, and not by right of representation. *Black. Com. 2 V. 217, 218.*

Capitale, Signifies a thing which is stolen, or the value of it. *Leg. H. 1. cap. 59.*

Capitale vivens, Hath been used for live cattle.—*Reddam de meo proprio decimas deo, tam in viventi capitali, quam in mortuis fructibus terræ.* *Leg. Athelstan.*

Capite, (from *caput*, *i. e.* *Rex, unde tenere in capite, est tenere de rege, omnium terrarum capite*) An ancient tenure, whereby a man held lands of the King immediately as of the crown, whether by knight's service, or in socage. This tenure was likewise called, tenure holding of the person of the King: and a person might hold of the King, and not in *capite*; that is, not immediately of the crown, but by means of some honour, castle, or manor belonging to it. According to *Kitcher*, one might hold land of the King by knight's service, and not in *capite*; because it might be held of some honour in the King's hands, descended to him from his ancestors, and not immediately of the King, as of his crown. *Kitch. 129. Dyer 44. F. N. B. 5.*

The very ancient tenure in *capite*, was of two sorts; the one *principal* and *general*, and the other *special* or *subaltern*; the *principal* and *general* was of the King as *caput regni*, & *caput generalissimum omnium feodorum*, the fountain whence all feuds and tenures have their main original: the *special* was of a particular subject, as *caput feudi, seu terræ illius*, so called from his being the first that granted the land in such manner of tenure; from whence he was stiled *capitalis dominus*, &c. But tenure in *capite* is now abolished; and by *Stat. 12 Car. 2. c. 24.* All tenures are turned into free and common socage: so that tenures hereafter to be created by the King are to be in common socage only; and not by *capite*, knight's service, &c. *Blount.*

Capitulum, A word used to signify what we now call poll money.

Capitulum, A covering for the head. 'Tis mentioned in the statute 1 *Hen. 4.* and other old statutes, which prescribe what dresses shall be worn by all degrees of persons.

Capituli Agri, The head-lands, lands that lie at the head or upper end of the lands or furrows.—*Canonici (Burcester) concesserunt hominibus de Wrechwike duas acras prati pro capitibus suarum crostarum tenus rivulum versus molendinum*, &c. *Kennet's Paroch. Antiq. p. 137.*

Capitula Ruralia, Assemblies or chapters held by rural deans and parochial clergy within the precinct of every distinct deanery; which at first were every three weeks; afterwards once a month, and more solemnly once a quarter. *Cowel.*

Capcion, (*capcio*) Is when a commission is executed, the commissioners subscribe their names to a certificate, declaring when and where the commission was executed; which in law is called a *capcion*. And these *capcions* relate chiefly to business of three kinds, *i. e.* to commissions to take fines of lands, to take answers in chancery, and

and depositions of witnesses: on the taking of a fine it is thus: Capt. & cogn. die &c. anno, &c. apud, &c. And on the back, *Executio istius comm. patet in quadam schedul. eidem comm. annex.* On the taking of an answer in Chancery, the caption is at bottom as follows: Capt. fuit hæc respons. super sacram. supranominat. def. Willielmi B. die & anno, &c. apud, &c. coram nobis, &c. And on the back of the commission, *Executio istius com.*, &c. On the taking depositions of witnesses, only the execution on the back is indorsed, as *Executio istius comm. in quad. schedul.* &c. The caption being included in the title of the depositions. Sometimes it is usual to add to the caption, *virtut. commission. dom. regis nobis & al. direct.*, &c. These captions and the executions of the commissions must be now in English, by the late statute, 4 Geo. 2. c. 26. And vide 5 Geo. 2. c. 27. and 6 Geo. 2. c. 14.

Captain, (*capitaneus*) One that leadeth or hath the command of a company of soldiers: and is either general, as he that hath the governance of the whole army: or special, he that leads but one band.—There is also another sort of captains, *Qui urbium præfati sunt*, &c. Blount.

Captives, An act was made for relief of captives taken by Turkish, Moorish, and other pirates, and to prevent taking of others in time to come. Stat. 16 & 17 Car. 2. c. 24. Vide Black. Com. 2 V. 402.

Capture, (*captura*) The taking of a prey, an arrest, or seizure: and it particularly relates to prizes taken by privateers, in time of war, which are to be divided between the captors, &c. St. 14 Car. 2. c. 14. and 4 & 5 W. & M. c. 25. Vide Black. Com. 2 V. 401.

Caput Baronis, Is the castle or chief seat of a nobleman; which descends to the eldest daughter, if there be no son, and must not be divided among the daughters like unto lands, &c.

Caput Anni, New year's day, upon which of old was observed the *festum stultorum*.

Caput Junii, In our records is used for *Ass Wednesday*, being the head, or first day of the beginning of the Lent-Fast. Paroch. Antiq. p. 132.

Caput loci, The head or upper end of any place; ad caput villæ, at the end of the town.

Caput lupinum, Antiently an outlawed felon was said to have *caput lupinum*, and might be knocked on the head like a wolf.—Now the wilful killing of such a one would be murder. 1 Hal. P. C. 497. And vide Bracton, fo. 125.

By the Athenian laws, if a criminal would not surrender himself to justice, he might be capitally condemned, and any one might kill him. See Demosthenes's third Philippic.

Caputagium, Some think this word signifies head or poll money, or the payment of it: but it is rather what we otherwise call *chevageum*.

Car and Char, The names of places beginning with *car* and *char* signify a city, from the Brit. *caer*, viz. *Civitas*, as Carlisle, &c.

Caravana, A *caravan*, or joint company of travellers in the eastern countries, for mutual conduct and defence.—*Egressa caravana nostra de Joppa versus exercitum veniebat onusta victualibus & aliis citellis necessariis.* Gaufrid. Vinefau Richardi Regis, Iter Hierosol. lib. 5. cap. 52.

Carcan, Is sometimes expounded for a pillory: as is *carcannum* for a prison. LL. Canuti Regis.

Carcatus, Signifies laden; a ship with her freight.—*De corpore cujuslibet magnæ navis carcatus cum rebus venalibus 4 denar.* Pat. 10 R. 2.

Cards and Dice, A duty of 6d. per pack on all playing cards, and of 5s. for every pair of dice, shall be paid to the crown for thirty-two years; the cards and dice to be carried to the stamp office and marked, &c. And using them unstamp'd, is liable to a penalty of 5l. Stat. 9 & 10 Ann. c. 19.

Limitation of the time of prosecution upon bonds for exporting cards and dice, 5 Geo. 1. c. 19. sect. 48. Penalty on defacing the stamp of cards or new-spotting dice, 6 Geo. 1. c. 21. sect. 55. An additional duty of 6d. on every pack of cards, and 5s. on every pair of dice, 29 Geo. 2. c. 13. See Stamps.

Careffa and Careffata, A cart and cartload.—*Quinque careffatas claufuræ, ad prædictæ terræ claufuram sustinendam.* Mon. Angl. Tom. 2. f. 340.

Caretarius, or **Careffarius**, A carter. Blount. See Carreta.

Cariffia, Dearth, scarcity, dearthness.—*Rex majori & vic. London, salutem. Querela archiepiscoporum, comitum, quod de bobus, vaccis, mulionibus, &c. Magna, & quasi intollerabilis est cariffia hiis diebus sub, &c.* Pat. 8 Ed. 1.

Caritas, Ad caritatem, poculum caritatis, A grace cup; or an extraordinary allowance of wine, or other liquor, wherein the religious at festivals drank in commemoration of their founders and benefactors. Cartular. Abbat. Glaston. A. S. f. 29.

Carb, A quantity of wool, whereof thirty make a furler. Stat. 27 H. 6. c. 2.

Carnarium, A charnel house, or repository for the bones of the dead.—*In carnario subius capellam, &c. Offa humana, &c. bumata de licentia sacriffæ qui pro tempore fuerit, qui dicti carnarii clavem & custodiam habebit specialem, ut usq; ad resurrectionem generalem honestius conserventur, a carnibus integre denudata reponi volumus & observari.*—Cartular. fundationis capellæ sancti Johannis in oc. id. parte Eccl. Norwic. per Joh. Norwic. Episc. Dat. 4 Oct. 1316.

Carno, This word hath been used for an immunity or privilege, as appears in *Crompt. Jurisd. fol. 191.*

Carpetmalls, Cloth made in the Northern parts of England, of a coarse kind, mention'd in 7 Jac. 1. cap. 16.

Carr, Is a kind of cart with wheels. Vide Caruca.

Carrat, A weight of four grains in diamonds, &c. And this word 'tis said was formerly used for any weight or burden.

Carreta, Hath been taken for a carriage, cart, or wain load; as *Carreta fæni* is used in an old charter for a load of hay. Kennet's Gloss.

Carrels, Closets, or apartments for privacy and retirement.—Three pews or carrels, where every one of the old monks, after they had dined, did resort, and there study.—Davies Mon. of Durham, p. 31.

Carrick or **Carrack**, (*carrucha*) A ship of great burden, so called of the Italian word *carico* or *carco*, which signifies a burden or charge: it is mentioned in the statutes 2 R. 2. c. 4. and 1 Jac. c. 33. They were not only used in trade, but also in war, as *Walsingh. in Hen. 5. f. 394. viz. Galli conduxerant classem magnarum navium carricarum, &c. qua regnum Angliæ molestant.*

Carrier. Is a person that carries goods for others for his hire.

A common carrier having the charge and carriage of goods, is to answer for the same, or the value to the owner, Co. Litt. 78. And where goods are delivered to a carrier, and he is robbed of them, he shall be charged, and answer for them, because of the hire. 1 Roll. Abr. 338.

An hoyman who undertakes to carry goods, must deliver them safe at all events, except damaged by the act of God, or the King's enemies. Dall v. Hall, Wilf. par. 1. fo. 281.—Vide 1 Salk. 18. 1 Vent. 190, 238.

If a common carrier, who is offered his hire, and who has convenience, refuses to carry goods, he is liable to an action in the same manner as an inn-keeper who refuses to entertain a guest, or a smith who refuses to shoe a horse. 2 Show. Rep. 329.

One brought a box to a carrier, in which there was a large sum of money, and the carrier demanded of the owner what was in it, he answered, it was filled with silks, and such like goods, upon which the carrier took it, and was robbed; and adjudged that the carrier was liable to make it good: but a special acceptance, as provided there is no charge of money, would have excused the carrier. 1 Vent. 238. 4 Rep. 83.

A person delivered to a carrier's book-keeper two bags of money sealed up, to be carried from London to Exeter, and told him that it was 200l. and took his receipt for the same, with promise of delivery for 10s. per Cent. carriage and risque: though it be proved that there was 400l. in the bags, if the carrier be robbed he shall answer only for 200l. because there

was a particular undertaking for the carriage of that sum and no more, and his reward which makes him answerable, extends no farther. *Cartbeu's Rep.* 486. If a common carrier loses goods he is intrusted to carry, a special action on the case lies against him, on the custom of the realm; and not trover: and so of a common carrier by boat. 1 *Roll. Abr.* 6. An action will lie against a porter, carrier or bargeman, upon his bare receipt of the goods, if they are lost by negligence. 1 *Sid.* 36. Also a lighterman spoiling goods he is to carry, by letting water come to them, action of the case lies against him on the common custom. *Palm.* 528.

If *A.* and several others take their passage in a ferry-boat, and being upon the water a tempest arises, so that they are in danger of being drowned; upon which, to preserve their lives, several of the goods are cast overboard, among which, a pack of goods of *A.*'s of great value is thrown over; *A.* shall not have an action against the bargemen. 2 *Bull.* 280. If one be not a common carrier, and takes hire, he may be charged on a special *assumpsit*; for where hire is taken, a promise is implied. *Cro. Jac.* 262. A common carrier may have action of trover or trespass for goods taken out of his possession by a stranger; he having a special property in the goods, and being liable to make satisfaction for them to the owner: and where goods are stolen from a carrier, he may bring an indictment against the felon as for his own goods, though he has only the possessory, and not the absolute property; and the owner may likewise prefer an indictment against the felon. *Kel.* 39. If a carrier be robbed of goods, either he or the owner may bring an action against the hundred, to make it good. 2 *Saund.* 380. Where a carrier entrusted with goods, opens the pack, and takes away and disposes of part of the goods, thus shewing an intent of stealing them, will make him guilty of felony. *H. P. C.* 61. And it is the same if the carrier receives goods to carry them to a certain place, and carrieth them to some other place, and not to the place agreed. 3 *Inst.* 367. That is, if he do it, with intent to defraud the owner of them. If a carrier, after he hath brought goods to the place appointed, take them away privately, he is guilty of felony; for the possession which he received from the owner being determined, his second taking is in all respects the same as if he were a meer stranger. 1 *Hawk. P. C.* 90. See *Larceny, &c.*

By the 3 *Car.* 1. c. 1. Carriers are not to travel on the Lord's Day.

By the *Stat.* 3 *W. & M.* c. 12. The justices are to assess the price of land carriage of goods to be brought into any place within their jurisdiction, by any common carrier, who is not to take more under the penalty of 5*l.* And by the *Stat.* 21 *Geo.* 2. c. 28. A carrier is not to take more for carrying goods from any place to London than is settled by the justices for the carrying goods from London to such a place, under the same penalty.

Stat. 24 *Geo.* 2. c. 8. *sect.* 9. Commissioners for regulating navigation of the river *Thames* to rate the price of water carriage.

Stat. 30 *Geo.* 2. c. 22. *sect.* 3. Justices of the city of London to assess the rates of carrying goods between London and Westminster.

Carriers and waggons are to write or paint on their waggons or carts their names and places of abode. See *Cart, Highways.*

Carriages how drawn, &c. Vide *Carts, Waggons.*

Cart-bote, The Saxon word *bote*, is of the same signification with the French word *estovers*, and *cart-bote* is used, to be employed in making and repairing instruments of husbandry. *Black. Com.* 2 *V.* 35.

Carts. By the *Stat.* 2 *W. & M. Stat.* 2. c. 8. §. 19. & 18 *Geo.* 2. c. 33. The wheels of every cart or dray for the carriage of any thing from and to any place where the streets are paved, within the bills of mortality, &c. shall contain six inches in the felly, not be shod with iron, nor be drawn with above two horses, under the penalty of 40*s.* By the *Stat.* 18 *Geo.* 2. c. 33. They may be drawn with three horses and not more, and the wheels being of six inches breadth, when worn may be shod with iron, if the iron be of the full breadth of six inches, made flat, and not set on with rose headed nails: and no

person shall drive any cart, &c. within the limits aforesaid, unless the name of the owner and number of such cart, &c. be placed in some conspicuous place of the cart, &c. and his name be entered with the commissioners of hackney coaches, under the penalty of 40*s.* and every person may seize and detain such cart till the penalty be paid. By the *Stat.* 1 *Geo.* 1. c. 57. 24 *G. 2. c.* 43. 27 *G. 2. c.* 16. The driver of any such cart, &c. riding upon such cart, &c. not having a person on foot to guide the same, shall forfeit 10*s.* any person may apprehend the offender. And by the *Stat.* 6 *Geo.* 1. c. 6. In London, or within ten miles, no person shall carry in any waggon or cart, having the wheels shod with iron, more than twelve sacks of meal, containing five bushels each, nor more than twelve quarters of malt, or seven hundred and a half of bricks, nor one chaldron of coals, under penalty of forfeiting one of the horses to any person who shall seize the same, in manner as by *Stat.* 5 *Geo.* 1. c. 12.

On changing property new owner's name to be affixed, 30 *Geo.* 2. c. 22. *sect.* 5. Carriages travelling with goods for hire to be deemed common stage waggons, 30 *Geo.* 2. c. 28. *sect.* 13. See those statutes, and also see *Highways, Waggons.*

Caruca, (Fr. *charrue*) A plough; from the old Gallic *carr*, which is the present Irish word for any sort of wheel'd carriage: hence *charl* and *carl*, a ploughman or rustick. Vide *Karle.*

Carucage, (*carucagium*) Is a tribute imposed on every plough, for the public service: and as *hidage* was a taxation by hides, so *carucage* was by carucates of land. *Mon. Ang. Tom.* 1. f. 294.

Carucate, or **Carbe of Land,** (*carucata terra*) A plough-land; which in a deed of *Thomas de Arden*, 19 *Edw.* 2. is declared to be one hundred acres, by which the subjects have sometimes been taxed; whereupon the tribute so levied was called *carvagium*, or *carucagium*. *Bract. lib.* 2. cap. 26. But *Skene* says, it is as great a portion of land as may be tilled in a year and a day by one plough; which also is called *bilda*, or *bida terra*, a word used in the old British laws. And now by statute 7 & 8 *W.* 3. c. 29. a plough-land, which may contain houses, mills, pasture, meadow, wood, &c. is 50*l.* per annum. *Littleton*, in his chapter of tenure in socage, saith, that *foca idem est quod carucata*, a foke or plough-land are all one. *Stow* says, King *Hen.* 3. took *carvage*, that is, two marks of silver of every knight's fee, towards the marriage of his sister *Isabella* to the emperor. *Stow's Annals*, page 271. And *Rastal*, in his exposition of words, tells us, *carvage* is to be quit, if the King shall tax all the lands by *carves*; that is, a privilege whereby a man is exempted from *carvage*. The word *carve* is mentioned in the *Stat.* 28 *Ed.* 1. of wards and reliefs, and in *Magna charta*, c. 5. And anno 1200. *Fasta est pax inter Johannem regem Angliæ & P. regem Franciæ, &c. Et mutuavit regi Franciæ 30 millia marcarum, pro quibus collectum est carvagium in Angliâ, scil.* 111*s.* pro quolibet aratro. Ex Reg. Priorat. de Dunstable in Bibl. Cotton. See *Co. Litt.* 69. and *Kennet's Gloss.*

Carucatarius, He that held lands in *carvage*, or plough-tenure. *Paroch. Antiq.* p. 354.

Cafe. See *Actions on the Cafe.* And *Black. Com.* 3 *V.* 51, 122. 4 *V.* 435. *Com. Dig.* 1 *V.* tit. *Action*, and *Actions on the Cafe.*

Cassatum and **Cassata,** By the Saxons called *hide*; by *Bede*, *familia*, is a house with land sufficient to maintain one family; *Rex Angl. Ethelred*, de 310 *Cassatis*, *unum trierem*, &c. Hoveden anno 1008. And *Hen. Huntingdon*, mentioning the same thing, instead of *cassata* writes *bilda*.

Cassite, A Saxon word signifying a mulct. *Blount.*

Casside, Is a little sack, purse, or pocket.—*Præsulit in cassidili toxicum mellitum.* *Mar. Westm.*

Cask, An uncertain quantity of goods; and of sugar contains from eight to eleven hundred weight. There are also *casks* for liquors, of divers contents; and none shall transport any wine *cask*, &c. except for victualling ships under a certain penalty, by *Stat.* 35 *Eliz.* c. 11. §. 2.

Cassock, or **Cassula,** A certain garment belonging to the priest, *quasi minor cassâ.* See *Tassals.*

Castel, or **Castle**, (*castellum*) Is well known to be a fortress in a town; and with us is a principal mansion of a nobleman. In the time of *H. 2.* there were in *England* 1115 castles; and every castle contained a manor: but during the civil wars in this kingdom these castles were demolished, so that generally there is only the ruins or remains of them at this day. 2 *Inst.* 31.

Castellain, (*castellanus*) The lord, owner, or captain of a castle, and sometimes the constable of a fortified house. *Bract. lib. 5. tract. 2. cap. 16.* 3 *Ed. 1. cap. 7.* It hath likewise been taken for him that hath the custody of one of the king's mansion-houses, called by the Lombards *curtes*, in English *courts*; though they are not castles or places of defence. 2 *Inst.* 31. And *Manwood*, in his *Forest Laws*, says there is an officer of the forest called *castellanus*.

Castellarium, **Castellarit**, The precinct or jurisdiction of a castle. — *Et unum tostum juxta castellarium.* *Mon. Angl. tom. 2. f. 402.*

Castellozum Operatio. Castle-work, or service and labour done by inferior tenants, for the building and upholding of castles of defence; toward which some gave their personal assistance, and others paid their contribution. This was one of the three necessary charges, to which all lands among our *Saxon* ancestors were expressly subject. — *Liberi ab omni servitio, excepta trinoda necessitate; pontis & arcis constructione, & expeditione contra hostem.* — And after the conquest an immunity from this burden was sometimes granted. As King *Hen. II.* granted to the tenants within the honour of *Wallingford* — *Ut sint quieti de operationibus castellorum: Paroch. Antiq. pag. 114.* It was unlawful to build any castle without leave of the king, which was called *castellatio*: *hec mittant hominem in misericordia regis, viz. Infractio pacis, infidelitatis & proditio, despectus de eo, castellatio sine licentia.* *Du Fresne.*

Castigatory for *scolds*. A woman, indicted for being a common scold, if convicted, shall be sentenced to be placed on a certain engine of correction, called the trebucket, *castigatory*, or *ducking stool*, which in the *Saxon* language signifies the scolding stool; though now it is frequently corrupted into *ducking stool*, because the residue of the judgment is, that, when she is so placed therein, she shall be plunged in the water for her punishment. 3 *Inst.* 219. *Black. Com. 4 V. 169.* Though this punishment is now disused, the editor (*J. M.*) remembers to have seen the remains of one, on the estate of a relation of his in *Warwickshire*, consisting of a long beam, or rafter, moving on a fulcrum, and extending to the centre of a large pond, on which end the stool used to be placed.

Castleward, (*castlegardum, vel wardum castri*) An imposition laid upon such persons as dwell within a certain compass of any castle, towards the maintenance of such as watch and ward the castle. *Magna Charta, cap. 19, 20.* 32 *Hen. 8. cap. 48.* It is sometimes used for the circuit itself which is inhabited by those that are subject to this service. *Castle guard rents* were paid by persons dwelling within the liberty of any castle, for the maintaining of watch and ward within the same. *Stat. 22 & 23 Car. 2. c. 24. f. 2.*

Castel, and **Chester**: The names of places ending in these words are derived from the Lat. *castrum*; for this termination at the end was given by the *Romans* to those places where they built castles.

Castration, The offence of mayhem by *castration*, is, according to all our old writers, felony: and this, altho' the mayhem was committed upon the highest provocation. *Bract. fo. 144.* 3 *Inst.* 62. *Black. Com. 4 V. 206.*

Casual Ejector, In ejectment, a nominal defendant, and who continues such until appearance by or for the tenant in possession. *Vide Black. Com. 3 V. 202.*

Casu Consimili, Is a writ of entry, granted where tenant by the curtesy, or tenant for life, aliens in fee or in tail, or for another's life; and is brought by him in reversion against the party to whom such tenant so aliens to his prejudice, and in the tenant's life-time. It takes its name from this; that the clerks of the Chancery did, by their common assent, frame it to the likeness of the writ called *in casu proviso*, according to the authority given them by the *Stat. Westm. 2. cap. 24.* which statute, as

often as there happens a new case in Chancery something like a former, yet not specially fitted by any writ, authorises them to frame a new form answerable to the new case, and as like the former as they may. 7 *Rep. 4.* *Sec Fitz. Nat. Br. fo. 206.*

Casu Proviso, A writ of entry given by the statute of *Gloucester, cap. 7.* where a tenant in dower aliens in fee, or for life, &c. and lies for him in reversion against the alienee. *Fitz. N. B. 205.* This writ, and the writ of *casu consimili*, supposes the tenant to have aliened in fee, though it be for life only: and a *casu proviso* may be without making any title in it, where a lease is made by the demandant himself to the tenant that doth alien; but if an ancestor lease for life, and the tenant alien in fee, &c. the heir in reversion must have this writ with the title included therein. *F. N. B. 206, 207.*

Casus Omissus, Is where any particular thing is omitted out of, and not provided against by a statute, &c.

Catals, **Catalla**, Goods and chattels. See *Chattels*.

Catallis capris nomine Distictionis, Is a writ that lies where a house is within a borough, for rent going out of the same; and warrants the taking of doors, windows, &c. by way of distress for the rent. *Old Nat. Br. 66.*

Catallis Reddendis, A writ which lieth where goods being delivered to any man to keep till a certain day, are not upon demand delivered at the day. It may be otherwise called a writ of *detinue*: and is answerable to *adlio depositi* in the Civil law. See *Reg. Orig. 139.* and *Old Nat. Br. 63.*

Catapulta, A warlike engine to shoot darts: but 'tis rather taken for a cross bow. — *Edmundus Willoughby tenet unum messuagium & sex bovatas terræ in Carleton et de manerio de Shelford per servitium unius catapultæ per annum pro omni servitio.* *Lib. Schedul. de Term. Mich. 14 H. 4. Notr. fol. 210.*

Catacopus, This word signifies an archdeacon: *Herefordensis ecclesiæ catacopus.* *Du Cange.*

Catchland. In *Norfolk* there are some grounds which it is not known to what parish they certainly belong, so that the minister who first seizes the tithes, does by that right of pre-occupation enjoy them for that year: and the land of this dubious nature is there called *catchland*, from this custom of seizing the tithes. *Cowel.*

Catchpole, (*quasi* one that catches by the poll.) See *Catchpollus*. Sheriffs officers are commonly so called.

Cathedral, (*ecclesia cathedralis*) Is the church of the bishop, and head of the diocese: wherein the service of the church is performed with great ceremony. Statutes used in the government of cathedral and collegiate churches since the restoration, &c. to be good and valid: but her majesty might alter, or make new statutes for the settling the visitation of them. *Stat. 6 Ann. cap. 21.*

Cathedratick, (*cathedraticum*) Is a sum of 2*s.* paid to the bishop by the inferior clergy, in argumentum subjectionis & ob honorem cathedralis. *Hist. Procurat. & Synodalis, p. 82.*

Catzurus, A hunting horse. — *Willielmus Fitz Alan dat regi duos bonos catzuros, pro habendis duabus feriis apud Norton. Tenures, pag. 68.* *Vide Chacurus.*

Cattle, Shall be bought in open fair or market, and not sold again in the same market, on pain of forfeiture. 3 & 4 *Ed. 6. c. 19.* None may buy any cattle, and sell them again alive, until he hath fed them five weeks in his own ground, or where he hath common, upon pain to forfeit double the value, by *Stat. 5 & 6 Ed. 6. c. 14.* Farmers, graziers, &c. may not have or keep above 2000 sheep, accounting 120 to the hundred, on pain of 3*s.* 4*d.* for every sheep: and he that keeps above 120 sheep, or 20 beasts upon any pasture ground proper for milch kine, and not commonable, shall yearly for every 60 sheep or 10 cattle keep one milch cow, and bring up one calf, &c. under the penalty of 20*s.* *Stat. 25 H. 8. c. 13.* 2 & 3 *P. & M. c. 3.* No cattle may be imported, dead or alive, but shall be liable to forfeiture: but horses, cows, swine, &c. may be transported, paying the duties. 18 *Car. 2. cap. 2.* 22 *Car. 2. cap. 13.* Factors shall not buy cattle, other than swine or calves, within 80 miles of *London*, under penalties; and drovers of cattle are to be licensed by justices of peace, &c. 22 & 23 *Car.*

Car. 2. c. 19. 1 Jac. 2. c. 17. The stealing of sheep, or any other cattle, or wilfully killing them, with intent to steal their carcases, is felony by 14 *Geo. 2. c. 6.* See 15 *Geo. 2. c. 34.*

His majesty, to make regulations for preventing the spreading of the distemper among the cattle, 19 *Geo. 2. c. 5.* 20 *Geo. 2. c. 4.* 23 *Geo. 2. c. 23.* 24 *Geo. 2. c. 54.* 25 *Geo. 2. c. 31.* 26 *Geo. 2. c. 34.* 27 *Geo. 2. c. 14.* 28 *Geo. 2. c. 18.* 29 *Geo. 2. c. 28.* & 30 *Geo. 2. c. 20.*

Tanners to give notice to the officer before they bring in raw hides. 22 *Geo. 2. c. 46.*

His majesty impowered to prevent the killing of cow calves, 22 *Geo. 2. c. 46.*

Regulations for the selling and driving cattle, 22 *Geo. 2. c. 46.* & 30 *Geo. 2. c. 20.*

Salesman, broker, or factor, not to buy cattle on his own account, 31 *Geo. 2. c. 40.*

Allowance of free importation of cattle from Ireland, 32 *Geo. 2. c. 11.* See *Hides.*

See farther on this subject 21 *H. 8. c. 8.* 24 *H. 8. c. 7. c. 9.* 34 & 35 *H. 8. c. 26. f. 105.* 37 *H. 8. c. 6.* 7 *Jac. 1. c. 8.* 5 *El. c. 12.* 15 *Car. 2. c. 7.* 20 *Car. 2. c. 7.* 32 *Car. 2. c. 2.* 3 *W. & M. c. 8.* And *Table to Statutes, tit. Cattle, Sheep, &c.*

By Stat. 22 & 23 *Car. 2. c. 7.* Maliciously, unlawfully, and willingly to kill any horses, sheep, or other cattle in the night-time, is felony; but the felon may make his election to be transported for seven years.

Cauda terræ, A land's end, or the bottom of a ridge in arable land. *Cartul. Abbat. Glasf. fol. 117.*

Caveat, Is a kind of process in the spiritual court to stop the institution of a clerk to a benefice, or probate of a will, &c. When a caveat is entered against an institution, if the bishop afterwards institutes a clerk, it is void; the caveat being a *superseatas*: but a caveat has been adjudged void when entered in the life-time of the incumbent. A caveat entered against a will stands in force for three months; and this is for the caution of the ordinary, that he do no wrong: though 'tis said the temporal courts do not regard these sorts of caveats. 1 *Roll. Rep. 191.* 1 *Nels. Abr. 416, 417.* Vide *Black. Com. 3 V. 98, 246.*

Cabers, Offenders relating to the mines in *Derbyshire*, who are punishable in the *berghmote*, or miners court.

Caulceus, anno 6 *H. 6. cap. 5.* Ways pitched with flint, or other stones. See *Calcetum.*

Caurfines, (*Caurfni*) Were *Italians* that came into England about the year 1235, terming themselves the pope's merchants, but driving no other trade than letting out money; and having great banks in England, they differed little from *Jews*, save (as history says) that they were rather more merciless to their debtors. Some will have them called *Caurfines*, quasi, *causa urfini*, bearish and cruel in their causes; others *Courfni*, or *Corfni*, as coming from the isle of *Corfica*: but *Cowel* says, they have their name from *Caorsium*, *Caorfi*, a town in *Lombardy*, where they first practised their arts of usury and extortion; from whence spreading themselves, they carried their cursed trade through most parts of Europe, and were a common plague to every nation where they came. The then bishop of London excommunicated them: and King *Hen. 3.* banished them from this kingdom in the year 1240. But being the pope's solicitors and money-changers, they were permitted to return in the year 1250, though in a very short time after, they were driven out of the kingdom again for their intolerable exactions. *Mat. Paris. 403.*

Causa Matrimonii prælocuti, Is a writ which lies where a woman gives land to a man in fee-simple, &c. to the intent he should marry her, and he refuseth to do it in any reasonable time, being thereunto required. *Reg. Orig. 66.* If a woman makes a feoffment to a stranger of land in fee, to the intent to infeoff her, and one who shall be her husband; if the marriage shall not take effect, she shall have the writ of *causa matrimonii prælocuti*, against the stranger, notwithstanding the deed of feoffment be absolute. *New Nat. Br. 456.* A woman infeoffed a man upon condition that he should take her to wife, and he had a wife at the time of the feoffment; and afterwards the

woman, for not performing the condition, entered again into the land, and her entry was adjudged lawful, though upon a second feoffee. *Lib. Ass. anno 40 Ed. 3.* The husband and wife may sue the writ *causa matrimonii prælocuti* against another who ought to have married her: but if a man give lands to a woman to the intent to marry him, although the woman will not marry him, &c. he shall not have his remedy by writ *causa matrimonii prælocuti*. *New Nat. Br. 455.*

Causam nobis significes, A writ directed to a mayor of a town, &c. who was by the king's writ commanded to give seisin of lands to the king's grantee, on his delaying to do it, requiring him to shew cause why he so delays the performance of his duty. 4 *Rep.*

Causes and Effects. In most cases the law hath respect to the cause, or beginning of a thing, as the principal part on which all other things are founded: and herein the next, and not the remote cause is most looked upon, except it be in covinous and criminal things: and therefore that which is not good at first will not be so afterwards; for such as is the cause, such is the effect. *Plowd. 208, 268.* If an infant or feme covert make a will, and publish it, and after die of full age, or sole, the will is of no force, by reason of the original cause of infancy and coverture. *Finch 12.* A lord distrains his tenant for rent before due, the tenant may justify to make rescous, the lord having no just cause to distrain. *Co. Lit. 106.* And if a man acknowledge a statute by *duress*, &c. he may have an *audita querela* to avoid it. *Fitz. Abr. 104.* Where the cause ceaseth, the effect or thing will cease. 1 *Co. Inst. 13.*

Cautione admittenda, Is a writ that lies against a bishop, who holds an excommunicated person in prison for contempt, notwithstanding he offers sufficient caution or security to obey the orders and commandment of holy church for the future. *Reg. Orig. 66.* And if a man be excommunicated, and taken by a writ of *significavit*, and after offers caution to the bishop to obey the church, and the bishop refuseth it; the party may sue out this writ to the sheriff to go against the bishop, and to warn him to take caution, &c. But if he stand in doubt whether the sheriff will deliver him by that writ, the bishop may purchase another writ, directed to the sheriff reciting the case, and in the end thereof; *Tibi præcipimus, quod ipsum A. B. a prisona prædictæ nisi in præsentia tua cautionem pignorat. ad minus eidem episc. de satisfaciend. obtuleris, nullatenus deliberes absque mandato nostro, seu ipsius episcopi in hac parte speciali, &c.* When the bishop hath taken caution, he is to certify the same into the Chancery, and thereupon the party shall have a writ unto the sheriff to deliver him. *New Nat. Br. 142.* Vide this subject fully treated of in *British Liberties.*

Cæpgitte, A word derived from the Sax. *cæp*, signifying *pecus*, cattle; and *gild*, i. e. *solutio*; and hence it is *solutio pecudis*: from this Saxon word *gild*, 'tis very probable, we have our English word *yield*; as yield, or pay. *Cowel.*

Ceter Lecti, Is the top, head, or tester of a bed. — *Dedit ad cameram prioris unum lectum cum celere & curtis blodei coloris.* Hist. Elen. apud Whartoni Angl. Sac. par. 1. p. 673.

Celcratius, The butler in a monastery: in the universities they are sometimes called *manicler*, and sometimes *caterer*, and steward.

Cendula, Small pieces of wood laid in form of tiles, to cover the roof of a house. — *Mandatum ad cendulas & lattas nostras carandas de parco ad domus reficiendas.* Pat. 4 Hen. 3. p. 1. m. 10.

Cenegild, This is an expiatory mulct, paid by one who killed another, to the kindred of the deceased. *Spelm.*

Cenellæ, Acorns, from the oak, in our old writings, *persona cenellarum*, is put for the pannage of hogs, or running of swine, to feed on acorns.

Cenninga, Was notice given by the buyer to the seller, that the thing sold was claimed by another, that he might appear and justify the sale: it is mentioned in the laws of *Atelstan apud Brompton, cap. 4.*

Censaria, A farm, or house and land, let *ad censum* at a standing rent: it comes from the Fr. *cense*, which signifies

signifies a farm. — *Henricus Stormy tenet maneria in com Wilts, per servitium custodiendi bullivum totius forestæ de Savernake & censariam, quæ vocatur la ferme in foresta prædicta.* Temp. Ed. 3. Tenures, p. 88.

Censarii, Farmers. — *Ibi sunt nunc 14 censarii, habentes septem carucatas.* Blount.

Censuales, A species or class of the *oblati*, or voluntary slaves of churches or monasteries, i. e. those, who to procure the protection of the church, bound themselves to pay an annual tax or quit-rent out of their estates to a church or monastery. Besides this, they sometimes engaged to perform certain services. *Robert. Hist. Emp. C. V. 1 V. 271, 2. Potgiesserus de Statu Servorum, lib. 1. cap. 1. sect. 6, 7.*

Censure, A custom called by this name (from the Lat. *census*, which has been expounded to be a kind of personal money, paid for every poll) observed in divers manors in *Cornwall* and *Devon*, where all persons residing therein above the age of sixteen are cited to swear fealty to the lord, and to pay 11 *d.* per poll, and 1 *d.* per ann. ever after; and these thus sworn are called *censers*. — *Item erat quædam custodia quæ vocatur censure proveniens de illis qui manent in burgo de Lestreythiel.* Survey of the Duchy of *Cornwall*.

Centeuarii, Were petty judges under sheriffs of counties, that had rule of an *hundred*, and judged smaller matters among them. 1 *Vent.* 211.

There were inferior judges, so called in *France*: in the reign of *Charles the Bald* the highways were so much infested by *banditti*, whose acts of violence were become so common, that by many they were scarce considered as criminal, for which reason these inferior judges, called *centenarii*, were required to take an oath, that they would neither commit any robbery themselves, nor protect such as were guilty of that crime. *Robert. Hist. Emp. Charles V. 1 V. 329. Capital. edit. Balur. Vol. 2. p. 63, 68.* See also *Black. Com. 1 V. 115.*

Ceola, A large ship. The word is mentioned in *Malmesbury. Lib. 1. c. 1.*

Cepi Corpus, Is a return made by the sheriff, upon a *capias*, or other process to the like purpose, that he hath taken the body of the party. *F. N. B. 26.*

Ceppagium, The stumps or roots of trees which remain in the ground after the trees are felled. — *Qui forestarii ceperint coersiones, ceppagia & eschaetas quercuum sive aliarum arborum, &c.* Fleta, lib. 2. cap. 41.

Ceragium, Cerage, a payment to find candles in the church. *Matt. Paris. See Waxfoot.*

Certainty, Is a plain, clear, and distinct setting down of things, so that they may be understood. 5 *Rep.* 121. A convenient certainty is required in writs, declarations, pleadings, &c. But if a writ abate for want of it, the plaintiff may have another writ: 'tis otherwise if a deed become void by incertainty, the party may not have a new deed at his pleasure. 11 *Rep.* 25, 121. *Dyer* 84. That has certainty enough, that may be made certain: but not like what is certain of itself. 4 *Rep.* 97. See *Incertainity*.

In actions that affirm property in the plaintiff, certainty is more necessary than in others, yet after verdict the courts have dispensed with the certainty formerly necessary. *Rep. Temp. Hardwicke, per Annaly, Franklin and Reeves* 118, 119.

Certificando de recognitione Stapule, Is a writ commanding the mayor of the staple to certify to the lord chancellor a statute staple taken before him, where the party himself detains it, and refuseth to bring in the same. *Reg. Orig.* 152. There is the like writ to certify a statute-merchant; and in divers other cases. *Ibid.* 148, 151, &c.

Certificate, Is a writing made in any court to give notice to another court of any thing done therein, which is usually by way of transcript, &c. And sometimes it is made by an officer of the same court, where matters are referred to him, or a rule of court is obtained for it, containing the tenor and effect of what is done. The clerks of the crown, assize and peace, are to make certificates into *B. R.* of the tenor of indictments, convictions, &c. under penalties, by the *Stat. 34 & 35 Hen. 8. c. 14. 3 W. & M. c. 9.*

A judge of *Nisi prius* cannot certify for costs out of court. *Ford v. Parr & al. Wils. par. 2. fo. 21. See*

Tab. to Statutes, tit. Certificate. As to certificate for costs, vide *Black. Com. 3 V. 214.* Into *Chancery, ib. 453.* Of *Bankrupt, id. 2 V. 482.* Of *Poor, id. 1 V. 364.* and *Trial by Certificate, id. 3 V. 333.*

Certification of Writ of Habeas Writellin, (*certificatio assise novæ diffinitione, &c.*) Is a writ granted for the re-examining of a matter passed by assise before justices: and this is used where a man appearing by his bailiff to an assise brought by another hath lost the day; and having something more to plead for himself, which the bailiff did not, or might not plead for him, desires a farther examination of the cause, either before the same justices, or others, and obtains letters patent to them to that effect; whereupon he brings a writ to the sheriff to call both the party for whom the assise passed, and the jury that was impanelled on the same, before the said justices at a certain day and place, when the same is to be examined: and it is called a certificate, because therein mention is made to the sheriff, that upon the party's complaint of the defective examination, as to the assise passed, the king hath directed his letters patent to the justices for the better certifying of themselves, whether all points of the said assise were duly examined. *Reg. Orig.* 200. *F. N. B.* 181. *Brañon, lib. 4. c. 13. Horn's Mirr. lib. 3.*

Certiorari, A writ issuing out of the *Chancery* to an inferior court, to call up the records of a cause there depending, that justice may be done therein, upon complaint that the party who seeks the said writ hath received hard usage, or is not like to have an indifferent trial in the said court. *Fitz. N. B. fol. 242.* A certiorari issues sometimes out of *Chancery*, and sometimes out of the King's Bench, and lies where the king would be certified of a record, in any court of record; and the king may send such writ to any of the said courts, to certify such record before him in *Banco*, or in the *Chancery*, or before such other justices, where he pleases to have the same certified. *F. N. B.* 145.

This writ is either returnable in the King's Bench, and then hath these words, *nobis mittatis*; or in the *Common Bench*, and then has *justiciariis nostris de banco*; or in the *Chancery*, and then hath *in Cancellaria nostra, &c.*

Certiorari lies to the courts of *Wales*; and the cinque ports, counties palatine, &c. 2 *Hawk. P. C.* 287. Indictments from inferior courts, and proceedings of the quarter-sessions of the peace, &c. may be removed into *B. R.* by certiorari: and 'tis said a certiorari to remove an indictment is good, although it bear date before the taking thereof: but on a certiorari the very record must be returned, and not a transcript of it; for if so, then the record will still remain in the inferior court. 2 *Lill.* 253. In *B. R.* the very record itself of indictments is removed by certiorari; but usually in *Chancery*, if a certiorari be returnable there, it removes only the tenor of the record, and therefore if it be sent from thence into the King's Bench, they cannot proceed either to judgment or execution, because they have but such tenor of the record before them. 2 *Hale's Hist. P. C.* 215.

And although on a *habeas corpus* to remove a person, the court may bail or discharge the prisoner: they can give no judgment upon the record of the indictment against him, without a certiorari to remove it, but the same stands in force as it did, and new process may issue upon it: but 'tis otherwise in civil causes. *Ibid.* 211. If an indictment be one, but the offences several, where four persons are indicted together; a certiorari to remove this indictment against two of them, removes it not as to the others, but as to them the record remains below. 2 *Hale's Hist.* 214.

Where a certiorari is by law grantable for an indictment, at the suit of the king, the court is bound to award it, for it is the king's prerogative to sue in what court he pleases: but it is at the discretion of the court to grant or not, at the prayer of the defendant: and the court will not grant it for the removal of an indictment before justices of gaol delivery, without some special cause; or where there is so much difficulty in the case; that the judge desires it may be determined in *B. R.* &c. Also indictments of perjury, forgery, or for heinous misdemeanors, the court will not grant a certiorari to remove at the instance of the defendant. 2 *Hawk. P. C.* 287.

Where issue is joined in the court below, it is a good objection against granting a *certiorari*: and if a person doth not make use of this writ till the jury are sworn, he loses the benefit of it. *Mod. Ca.* 16. *Stat. 43 Eliz. c. 5.* After conviction, a *certiorari* may not be had to remove an indictment, &c. unless there be special cause; as if the judge below is doubtful what judgment is proper to be given, when it may: and after conviction, &c. it lies in such cases where writ of error will not lie. *1 Salk.* 149. The court on motion in an extraordinary case will grant a *certiorari* to remove a judgment given in an inferior court; but this is done where the ordinary way of taking out execution is hindered in the inferior court. *1 Lill. Abr.* 253.

In common cases a *certiorari* will not lie to remove a cause out of an inferior court, after verdict. It is never sued out after a writ of error, but where diminution is alleged: and when the thing in demand does not exceed 5*l.* a *certiorari* shall not be had, but a writ of error or attain. *Stat. 21 Jac. 1. cap. 23.* A *certiorari* is to be granted on matter of law only: and in many cases there must be a judge's hand for it. *1 Lill. 252.* *Certiorari's* to remove indictments, &c. are to be signed by a judge: and to remove orders, the *fiat* for making out the writ must be signed by some judge. *1 Salk.* 150.

In vacation time a *certiorari* may be granted by any of the judges of *B. R.* and security is to be found before it is allowed. By statute no *certiorari* is to be granted out of *B. R.* to remove an indictment before justices of peace at the sessions, before trial, unless motion be made in open court, and the party indicted find security by two persons in 20*l.* each to plead to the indictment in *B. R.* &c. And if the defendant prosecuting the *certiorari* be convicted, the court of *B. R.* shall order costs to the prosecutor of the indictment. *Stat. 5 & 6 W. & M. cap. 11.* If on a *certiorari* to remove an indictment the party do not find manucaptors in the sum of 20*l.* to plead to the indictment, and try it, according to the statute, it is no *superfedeas*. *Mod. Ca.* 33. And a *procedendo* may be granted where bail is not put in before a judge, on a *certiorari*.

It has been ruled that a *certiorari* ought not to be granted to remove any order of justices, where an appeal lies to the sessions, before the matter is determined on the appeal. *1 Salk.* 147. Yet *certiorari* lies to justices of peace, &c. even in cases where they are empowered by statute finally to hear and determine. *1 Mod.* 44. But things may not be removed from before justices of peace, which cannot be proceeded in by the court where removed; as in case of refusing to take the oaths, &c. which is to be certified and inquired into, according to the statute. *1 Salk.* 145. And where the court which awards the *certiorari* cannot hold plea on the record, there but a tenor of the record shall be certified; for otherwise if the record was removed into *B. R.* as it cannot be sent back, there would be a failure of right afterwards. *1 Danv. Abr.* 792. But a record sent by *certiorari* into *B. R.* may be sent after by *mittimus* into *C. B.* *Ibid.* 789. And a record into *B. R.* may be certified into Chancery, and from thence be sent by *mittimus* into an inferior court, where an action of debt is brought in an inferior court, and the defendant pleads that the plaintiff hath recovered in *B. R.* and the plaintiff replies *Nul tiel record*, &c. *1 Saund.* 97, 98.

If a *certiorari* be prayed to remove an indictment out of London or Middlesex, three days notice must be given the other side, or the *certiorari* shall not be granted. *Raym.* 74. The court of *B. R.* will grant a new *certiorari* to affirm a judgment, &c. Though generally one person can have but one *certiorari*. *Cro. Jac.* 369. Returns of *certiorari's* are to be under seal: and the person to whom a *certiorari* is directed may make what return he pleases, and the court will not stop the filing of it, on affidavit of its falsity, except where the publick good requires it: the remedy for a false return is action on the case, at the suit of the party injured; and information, &c. at the suit of the king. *2 Hawk. P. C.* 295.

A *certiorari* being once delivered, makes all subsequent proceedings on the record erroneous; whether the proceedings are before or after its return. It is said the Lord Chancellor, or any judge of the courts of record at

Westminster, may bring a record to one another, without a *certiorari*; but not a judge of an inferior court, &c. *1 Nelf.* 417, 418. A *certiorari* may be had to inferior courts; but not to a court superior, or that has equal jurisdiction, in which case day is given to bring in the record, &c. And on a *certiorari* to remove a record out of an inferior court, the stile of their court, and power to hold plea, and before whom, ought to be shewn on their certificate. *Jenk. Cent.* 114, 232. If a cause be removed from an inferior court by *certiorari*, the pledges in the court below are not discharged; because a defendant may bring a *certiorari*, and thereby the plaintiff may lose his pledges. *Skin. Rep.* 244, 246.

Certiorari not granted to remove an indictment from the Old Bailey, unless on extraordinary occasions. *The King v. Ferguson, Rep. temp. Hardw. per Annaly,* 369.

A *certiorari* to remove an order of bailardy should be applied for in six months, *Rex v. Howlett, Wilf. par.* 1. fo. 35.

Proceedings upon the excise laws shall not be superseded by *certiorari*. *12 Car. 2. c. 23. & 24.*

Indictments for the repair of highways, pavements, &c. not removable but in special cases, *13 & 14 Car. 2. c. 6. 22 Car. 2. c. 12. & 3 W. & M. c. 12.* And *vide tit. Highways.*

A *certiorari* may be granted to remove an indictment touching the highway, bridges, &c. on a suggestion, &c. that the right to repair may come in question. *5 W. & M. c. 11.*

The security to be taken on allowance of a *certiorari*, to remove a conviction of deer-stealing. *3 W. & M. c. 10.* On the game laws, *4 & 5 W. & M. c. 23. & 5 & Ann. c. 14.* On the act to prevent excessive gaming, *12 Geo. 2. c. 28.*

No judgment or order to be removed by *certiorari*, without sureties found. *5 Geo. 2. c. 19.*

Certiorari, to remove proceedings of justices, to be applied for within six calendar months, and upon six days notice to the justices. *13 Geo. 2. c. 18.*

For the several cases in which a *certiorari* is not grantable, see the table to the quarto edition of the *Statutes at Large*.

Form of a *certiorari* to certify the record of a judgment:

GEORGE the Third, &c. To the mayor and sheriffs of our city of E. and to every of them, in our court at the Guildhall there, greeting: Whereas A. B. hath lately in our said court in the said city, according to the custom of the same court, impleaded C. D. late of, &c. in an action of debt upon demand of thirty pounds; and thereupon in our said court before you, obtained judgment against the said C. for the recovery of the said debt: and we being desirous for certain reasons, that the said record should by you be certified to us, do command you, that you send under your seals the record of the said recovery, with all things touching the same, into our court before us at Westminster, on the day, &c. plainly and distinctly, and in as full and ample manner as it now remains before you, together with this writ; so that we on the part of the said A. may be able to proceed to the execution of the said judgment, and do what shall appear to us of right ought to be done. Witnesses, &c.

Cert-Money, (*quasi certain money*) Is head-money, paid yearly by the tenants of several manors to the lords thereof, for the certain keeping of the leet; and sometimes to the hundred: as the manor of Hook, in Dorsetshire, pays cert-money to the hundred of Egerdon. In ancient records this is called *certum letæ*. See *Common Fine*.

Cervisarii. The Saxons had a duty called *drinclean*, that is, *tributio potus*, payable by their tenants; and such tenants were in *Domesday* called *cervisarii*, from *cervisia*, ale, their chief drink: though *cervisarius* vulgarly signifies a beer or ale brewer.

Cetura, A mound, fence, or inclosure. — *Willielmus de Lucy miles, dedit Thomæ S. ministro domus de Thelesford, licentiam domus & portas levare, ædificare, & cum ceruris & muris includere, &c.* Cart. priorat. de Thelesford, MS.

U u

Cestat

Cessat Executio. In trespass against two persons, if it be tried and found against one, and the plaintiff takes his execution against him, the writ will abate as to the other; for there ought to be a *cessat executio* till it is tried against the other defendant. 10 Ed. 4. 11. See *Execution*, &c.

Cessavit. Is a writ that lies in divers cases, upon this general ground, that he against whom it is brought, hath for two years neglected to perform such service, or to pay such a rent, as he is tied to by his tenure, and hath not upon his lands or tenements sufficient goods or chattels to be distrained. *F. N. B.* 280. And if a tenant for years of land at a certain rent, suffers the rent to be behind two years, and there is no such distress to be had upon the land; then the landlord shall recover the land: but if the tenant come into court before judgment given, and tender the arrearages and damages, and find security that he shall cease no more in payment of the rent, then the tenant shall not lose his land. *Terms de Ley.*

By statute, if a free-farmer cease to pay his rent two years, the lessor may have a *cessavit*, and recover the land: and in this case, the heir of the demandant may maintain a *cessavit* against the heir or assign of the tenant. 6 Ed. 1. cap. 4. But in other cases, the heir may not bring this writ for cessure in the time of his ancestor: and it lies not but for annual service, rent, and such like; not for homage or fealty. If a man cease to pay his rent and services for two years, and inclose the land, so as the lord cannot distress, if he lay not open the gates or hedges of the land which make the inclosure, the lord shall have a *cessavit*, although the tenant hath sufficient cattle upon the land to be distrained for the rent: for the land ought to be open, and likewise there should be sufficient to distress for the rent, &c. And where the tenant suffereth the land to lie fresh, not occupied for two years together, it is said this writ will lie. *New Nat. Br.* 463, 464.

The lord shall have a writ of *cessavit* against tenant for life, where the remainder is over in fee to another: but the donor of an estate-tail shall not have a *cessavit* against the tenant in tail: though if a man make a gift in tail, the remainder over in fee to another, or to the heirs of the tenant in tail, there the lord of whom the lands are holden immediate, shall have a *cessavit* against the tenant in tail, because that he is tenant to him, &c. *Ibid.* If the lord distrains pending the writ of *cessavit* against his tenant, the writ shall abate. The writ *cessavit* is directed to the sheriff, *To command A. B. that, &c. he render to C. D. one messuage, which he holds by certain services, and which ought to come to the said C. by force of the statute, &c. because the said A. in doing those services had ceased two years, &c.*

Cessavit de Cantaria. Lies where a man gives land to any house of religion or parson, to say divine service, provide alms for the poor, &c. If the said services be not done in two years, the donor or his heirs shall have this writ against him that holds the land thus given, after such cessure. *Stat. Westm. 2. cap. 41.*

Cesse. Signifies an *assessment* or tax, and is mentioned in the *Stat. 22 Hen. 8. cap. 3.* *Cesse* or *ceasse*, in Ireland, is an exaction of victuals, at a certain rate, for soldiers in garrison. *Antiq. Hibernie.*

Cession. (*cessio*) A ceasing, yielding up, or giving over. And is when an ecclesiastical person is created bishop, or a parson of a parsonage takes another benefice, without dispensation, or otherwise not qualified, &c. In both cases their first benefices become void, and are in the law said to be void by *cession*: and to those benefices that the person had who was created bishop, the king shall present for that time, whoever is patron of them; and in the other case the patron may present. *Cowel.* Not only a benefice with cure may be said to be void by *cession*, when the incumbent thereof accepts of another benefice, but also when such incumbent is made a bishop; for thereby all his ecclesiastical preferments which he had before, whether with, or without cure, are actually void. *Vaugb.* 19. But it is not the election of any one to be a bishop, and confirmation thereof, that doth void his former preferments, until consecration be also had: and by dispensation of retainer, a bishop may retain some, or all of those preferments he was intitled to before he was bishop. *Dyer* 223. The *cession* on promotion of a

bishop, not making an avoidance in the common way, and it being by the king's means that the livings are void, whose presentation in such a case is only as it were an exchange of one life for another, intitles the king to present to those livings, and as he is supreme patron. *Cession* makes a living void, without any resignation, deprivation, &c. Vide *Black. Com.* 1 V. 392.

Cessor. (*Lat.*) A loiterer; but more particularly used for him who *ceaseth*, or neglects so long to perform a duty, that he thereby incurs the danger of the law. *Old Nat. Br.* 136.

Cessure, or cesser. Is used for *ceasing*, giving over; or departing from. *Stat. Westm. 2. c. 1.*

Cestui que Trust. Is he who hath a trust in lands or tenements, committed to him for the benefit of another. *Anno 12 Car. 2. cap. 30.* And lands of *cestui que trust* may be delivered in execution, where any person is seised in trust for another. 29 Car. 2. c. 3. And see 19 H. 7. c. 15. 27 H. 8. c. 10. If the person intrusted doth not perform his trust, he is compellable in the Chancery, &c.

Cestui que Use. (*Fr. cestui à l'usage de qui*) Signifies him to whose use any other man is enfeoffed of lands or tenements. 1 Rep. 133. Feoffees *pro uses* were formerly deemed owners of the lands; but now the possession is adjudged in *cestui que use*, and without any entry he may bring assise, &c. *Stat. 27 Hen. 8. c. 10. Cro. Eliz.* 46. See *Use*.

Cestui que Vie. Is he for whose life any lands or tenements are granted. *Perk.* 97. And if tenant for term of another's life dieth, while *cestui que vie* is living; now, by the Common law, he that first entereth, shall hold the land as occupant during such other person's life. *—diss.* 41, 388. But this is prevented by making leases for the lives of others to the lessees, their heirs or executors, during the life of *cestui que vie*, &c. And the *Stat. 29 Car. 2. cap. 3.* charges such lands for debt. See *Occupant*.

Chace. Is a station of game, more extended than a park, and less than a forest: and is sometimes taken for the liberty of chasing or hunting within such a district. And according to *Blount* it hath another signification, i. e. the way through which cattle are drove to pasture, commonly called in some places a *drove way*; *Ut si quis omnino viam obstruat vel chaceam per quam ingredi solet pasturæ.* *Bracton*, lib. 4. c. 44. Vide *Chase*.

Chaceare ad lepores, vel vulpes: To hunt hare or fox. —*Licet, &c. chaceare ad lepores & vulpes in manerio suo de Dambam.* *Cartular. Abbat. Glaston.* MS. 87.

Chacurus. (from the *Fr. chasseur*) A horse for the chase; or rather a hound or dog, a courser. *Ret.* 7 *Johan.*

Chafe, from the *Fr. chauffer* to heat, whence our *chafing* dish.

Chafetwax. An officer in Chancery, that fitteth the wax for sealing of the writs, and such other instruments as are there made to be issued out: so in *France* calefactores ceræ sunt, qui regis literis in Cancellaria ceram imprimunt. *Corauius.*

Chaffers. Seem to signify wares or merchandise; and we yet use *chaffering* for buying and selling, though we take it to be generally a kind of bartering of one thing for another. It is mentioned in the *Stat. of 3 Ed. 4. c. 4.*

Chains. (*hanging in*). By 25 Geo. 2. c. 37. The judge before whom a murderer is convicted shall, in passing sentence, direct him to be executed on the next day but one, (unless the same shall be Sunday, and then on the Monday following), and that his body be delivered to the surgeons, to be dissected and anatomized; and that the judge may direct his body to be afterwards hung in chains, but in no wise to be buried without dissection. A power is allowed to the judge, upon good and sufficient cause, to respite the execution, and relax the other restraints of this act. *Black. Com.* 4 V. 202.

Chaldron or **Chalder** of coals, contains thirty-six bushels heaped up, according to the bushel sealed for that purpose at Guildhall, London. *Stat. 16 & 17 Car. 2. c. 2.*

Chalasing. The merchants of the staple require to be eased of divers new impositions, as *chalking*, ironage, wharfage, &c. *Ret. Parl.* 50 Ed. 3.

Challenge,

Challenge, Calumnia (from the Fr. *challenger*) is used in the law for an exception to jurors, who are returned to pass on a trial. And this *challenge* to jurors is either made to the *array*, or to the *poll*: to the *array* is, when exception is taken to the whole number impanelled; and to the *poll* is, when some one or more are excepted against, as not indifferent. *Challenge* to jurors is also divided into *challenge principal* or *peremptory*; and *challenge per cause*, i. e. upon cause or reason: *challenge principal* or *peremptory*, is that which the law allows without cause alleged, or further examination; as a prisoner at the bar, arraigned for felony, may *challenge* peremptorily the number allowed him by law, one after another, alleging no cause, but his own dislike, and they shall be put off, and new taken in their places: but yet there is a difference between *challenge principal*, and *challenge peremptory*; this being used only in matters criminal, and barely without cause alleged; whereas that is in civil actions for the most part, and by assigning some such cause of exception, as being found true the law allows. *Staufd. P. C.* 124, 157. *Lamb. Eiren. lib. 4. cap. 14.* In *treason*, and *petit treason*, the number of *thirty-five* jurors may be peremptorily *challenged*, without shewing any cause, in favour of life; and in *murder* and *felony*, *twenty*: and more may be *challenged* shewing cause. *1 Inst.* 155. *22 H. 8. c. 14.* *1 P. & M. cap. 10.*

A person indicted of *treason* may *challenge thirty-five* of those returned on the panel of jurors to try him, without cause shewn; and if two or more are to be tried, they may *challenge* so many each, but then they are to be tried singly, or all may *challenge* that number in the whole, and be tried jointly. *3 Salk. 81.* By *Stat. 3 Hen. 7. c. 14.* *It is treason* for compassing to kill the King, &c. no *challenge* shall be allowed, but for malice. If a prisoner *challenge* peremptorily more than allowed, he is to be dealt with as one standing mute, &c. And some statutes which take away the benefit of clergy from felons, exclude those their clergy who peremptorily *challenge* more than *twenty*, whereby they are liable to judgment of death. *2 Hawk. P. C.* 414. *Vide 22 H. 8. c. 14.* *28 H. 8. c. 1.* *1 Ed. 6. c. 12. §. 11.* *3 & 4 W. & M. c. 9.* But if the offender be within the benefit of the clergy, the *challenge* shall be over-ruled, and the party put upon his trial.

The King cannot *challenge* peremptorily in *murder*, &c. without shewing cause. *Moor 595.* And by *Stat. 33 Ed. 1. St. 4.* if those who prosecute for the King *challenge* a juror, they shall assign the cause; and if they allege not a good cause, the inquest shall be taken. All *peremptory challenges* are to be taken by the party himself; and where there are divers *challenges*, they must be taken all at once. But there can be no *challenge* till the jury is full; and then the *array* is to be *challenged* before one of them is sworn. *Hob. 235.* Where the King is party, if the other side *challenge* a juror above the number allowed by law, he ought to shew the cause of his *challenge* immediately. *1 Bulst. 191.* A defendant shall shew all causes of *challenge*, before the King shall shew any. *2 Hawk. 413.* And the King ought not to shew his cause of *challenge* before all the jurors are called over; for if there are enough besides those *challenged*, there will be no occasion to shew any cause why he *challenged* the rest: but if there are not enough, then he must shew the cause of his *challenge*. *Raym. 473.*

There may be a principal cause of *challenge* to the *array*, and a *challenge* to the favour: a principal cause of *challenge* is in respect of partiality or default of the sheriff, &c. and not in respect of the persons returned; and this partiality in the sheriff, may be by reason of kindred, or affinity to the plaintiff or defendant; or if one of the jury is returned at the nomination of the plaintiff or defendant; if a knight be not returned, when a peer is party, &c. *1 Inst.* 156, 157.

Challenge to the favour is where the plaintiff or defendant is tenant to the sheriff, or if the sheriff's son hath married the daughter of the party, &c. and is also when either party cannot take any principal *challenge*, but sheweth cause of favour; and causes of favour are infinite. But where the King is party, one shall not *challenge* the *array* for favour, though the King may do it. *Wood.*

Inst. 592. Where *challenge* is to the favour, by reason of kindred to the sheriff, you must shew how kin, and then the *challenge* is good. *1 Nels. Abr.* 423. If one of the parties is of affinity to a juror, the juror hath married the plaintiff's daughter, &c. If a juror hath given a verdict before in the cause, matter or title; if one labours a juror to give his verdict: if after he is returned, a juror eats and drinks at the charge of either party; if the plaintiff, &c. be his master, or the juror hath any interest in the thing demanded, &c. these are *challenges* to the favour. *2 Rol. Abr.* 636. *Hob. 294.*

If the juror is convicted and attainted of treason, felony, perjury, adjudged to the pillory, or other punishment, whereby he becomes infamous, or is outlawed, or excommunicate; these are all principal *challenges*: but in these cases and others, he that *challengeth*, is to shew the record, if he will have it take place as a principal *challenge*; otherwise he must conclude to the favour, unless it be a record of the same court. *1 Inst.* 157. A person under prosecution for any crime, may before indicted, *challenge* any of the grand jury, as being outlawed, &c. or returned at the instance of the prosecutor, or not returned by the proper officer, &c. *2 Hawk. P. C.* 215.

As a peer ought not to be sworn on juries, he may be *challenged*: but a peer of the realm tried for treason or felony, shall not *challenge* any of his peers. *Trials per pais* 130. A juror may be *challenged* for defect, as well as for any crime; as defect of birth, where he is an alien born; of age, because a minor; or of estate, for want of ten pounds *per annum* freehold, &c. in the same county, or a tradesman five pounds a year, by *Stat. 4 & 5 W. & M. c. 24.* In corporation towns freemen worth forty pounds in goods; are qualified to be jurors for trying of felonies. *Stat. 23 Hen. 8. c. 13.* But on trials in *London* for high treason, every juror ought to have such freehold, &c. as is required by *4 & 5 W. & M. c. 24.* And common jurors there, are to have lands or goods of one hundred pounds value, &c. by *Stat. 3 Geo. 2. c. 25. §. 19.* A principal *challenge*, being found true, is sufficient without leaving it to triers: but if some of a jury are *challenged* for favour, they shall be tried by the rest of the jury, whether indifferent. *1 Inst.* 158. And where a *challenge* is made to the *array*, the court appoint two triers, who are sworn, and then the cause of favour is shewed to them, which may be called the issue they are to try; and if 'tis proved, then they give their verdict that they are not indifferently impanelled; and this is entered of record: but if the favour is not proved, then they say that the jury was indifferently impanelled, and so the trial goes on, without making any entry of the matter. *1 Bulst.* 114.

If one take a principal *challenge* against a juror, he cannot afterwards *challenge* that juror for favour, and waive his former *challenge*: but a *challenge* may be made to the polls, after made to the *array*. *Wood 592.* A new jury is to be impanelled by the coroner, where the *array* is qualified for partiality, &c. of the sheriff. If there be cause of *challenge* against the sheriff, the process is to be directed to the coroners; and if there is cause of *challenge* against them, the court will appoint certain elisors, against whose return no *challenge* can be taken to the *array*, though it may be to the polls. *Trials per pais* 15.

If a plaintiff or defendant have action of battery, &c. against the sheriff, or the sheriff against them, it is cause of *challenge*: and if either of the parties have action of debt against the sheriff; or if the sheriff hath any parcel of land depending on the same title as the parties; or if he, or his bailiffs who returned the jury, be under the distress of either party, &c. These are good causes of *challenge*. *Ibid.* 154. Where one of the jurors hath a suit at law depending with the plaintiff, 'tis good *challenge*. *Stile 129.* An action depending betwixt either of the parties and a juror, implying malice, is cause of *challenge*: and a juror may be *challenged* for holding lands by the same title as the defendant. *2 Leon.* 40. If a person owes suit of court, &c. to a lord of a hundred who is plaintiff, it is a principal *challenge*, as he is within the distress of the plaintiff. *Dyer* 176. But it is said to be no *challenge* that a person is in debt to either party. *1 Nels. Abr.* 426. A juror returned by a wrong name,

may be challenged and withdrawn, so that the jury shall not be taken; yet a *tales* may be granted. 1 *Lill. Abr.* 260. And if a juror declares the right of either of the parties, &c. it is cause of *challenge*: though it hath been ruled that it is not sufficient cause of *challenge*, that a juror delivered his opinion touching the title of the land in question; because his opinion may be altered on hearing the evidence. *Pasch. 23 Car. B. R.*

If there are two demandants in a real action, or two tenants, and one *challenge* a juror, and the other will not, the juror (the *challenge* being allowed) shall be drawn against the rest. 11 *H. 6. 15. Jenk. Cent.* 114 To say of a person to be tried for any crime, that he is guilty, or will be hanged, &c. is good cause of *challenge*; but the prisoner must prove it by witnesses, and not out of the mouth of the jurymen, who may not be examined: and though a jurymen may be asked upon a *voir dire* whether he hath any interest in the case, or whether he hath a freehold, &c. yet a jurymen or a witness, shall not be examined, whether he hath been convicted of felony, or guilty of any crime, &c. which would make a man discover that of himself which tends to make him infamous, and the answer might charge him with a misdemeanor. 1 *Salk.* 153.

Default of hundredors is cause of *challenge* by the Common law; but by statute 4 & 5 *Ann. c. 16.* every *venire facias* for trial of issues in any court of record, shall be awarded of the body of the proper county; though this extends only to civil causes, and not to appeals of felony, indictments, &c.

In a writ of right, four knights were returned; they must appear with their swords, or it will be good cause of *challenge*. *Moor 67.* If one *challenge* a juror, and the *challenge* is entered, he may not afterwards have him sworn on the jury. And if the defendant do not appear at the trial when called, he loseth his *challenge* to the jurors, though he afterwards appear. 1 *Lill. Abr.* 259. When the jury appear at a trial, before the secondary calls them to be sworn, he bids the plaintiff and defendant to attend their *challenges*, &c. Peremptory *challenge* taken away in *high treason*, per 33 *H. 8. c. 23.* But this seems to be altered or rather repealed by 1 & 2 *Ph. & M. c. 10. §. 7. &c.* Vide these two statutes in the *quarto* edition, with the references, in the margin of the same.—Also vide 10 & 11 *W. 3. c. 23. 24 Geo. 2. c. 18.* And *Tab. to Stat. tit. Challenge, Juries.* See *Jury.*

Challenge to fight, either by word or letter, or to be the bearer of such *challenge*, punishable by fine and imprisonment, on indictment, or information. *Vide Black. Com. 4 V. 149, 150.*

Chamberdekins, or *Chamber-deacons*, were certain poor Irish scholars, clothed in mean habit, and living under no rule; banished England by Stat. 1 *Hen. 5. cap. 7. 8.*

Chamberlain, (*camerarius*) Is variously used in our laws, statutes and chronicles: as first there is Lord Great Chamberlain of England, to whose office belongs the government of the palace at *Westminster*, and upon all solemn occasions the keys of *Westminster-Hall*, and the court of *Requests* are delivered to him; he disposes of the sword of state to be carried before the King when he comes to the parliament, and goes on the right hand of the sword next to the King's person: he has the care of providing all things in the House of Lords in the time of parliament; to him belongs livery and lodgings in the King's court, &c. And the gentleman usher of the black rod, yeoman usher, &c. are under his authority.

The Lord Chamberlain of the Household has the oversight and government of all officers belonging to the King's chamber, (except the bed-chamber, which is under the Groom of the Stole), and also of the wardrobe; of artificers retained in the King's service, messengers, comedians, revels, musick, &c. The sergeants at arms are likewise under his inspection; and the King's chaplains, physicians, apothecaries, surgeons, barbers, &c. And he hath under him a Vice-Chamberlain, both being always Privy Counsellors.

There were formerly Chamberlains of the King's courts 7 *Ed. 6. cap. 1.* And there are Chamberlains of the Exchequer who keep a controlment of the pells of receipts and *exitus*, and have in their custody the leagues

and treaties with foreign princes, many ancient records, the two famous books of antiquity called *Domesday*, and the *Black book of the Exchequer*; and the standards of money, and weights, and measures are kept by them. There are also Under-chamberlains of the Exchequer, who make searches for all records in the treasury; and are concerned in making out the tallies, &c. The office of Chamberlain of the Exchequer is mentioned in the Stat. 34 & 35 *H. 8. cap. 16.* Besides these, we read of a Chamberlain of *North Wales.* *Stow. p. 641.*

A Chamberlain of *Chester*, to whom it belongs to receive the rents and revenues of that city; and when there is no prince of *Wales*, and earl of *Chester*, he hath the receiving and returning of all writs coming thither out of any of the King's courts.

The Chamberlain of *London*, who is commonly the receiver of the city rents payable into the chamber; and hath great authority in making and determining rights of freemen, concerning apprentices, orphans, &c.

Chambers of the King, (*Regie camera*) The havens or ports of the kingdom are so called in our ancient records. *Mare Claus. fol. 242.*

Chambre depint, Anciently *St. Edward's chamber*, now called the *painted chamber.*

Champerty, or *champerty*, (from the Fr. *champ*, a field, and *parti* divided, or the Lat. *campus*, and *partitio*, because the parties in *champerty* agree to divide the thing in question) Signifies a bargain with the plaintiff or defendant in any suit, to have part of the land, debt, or other thing sued for, if the party that undertakes it prevails therein. 1 *Inst.* 368. This seems to have been an ancient grievance in our nation; for notwithstanding the several statutes of 3 *Ed. 1. cap. 25. 13 Ed. 1. c. 49. 28 Ed. 1. c. 11. and 33 Ed. 1. Stat. 2. &c.* and a form of a writ framed to them; yet 4 *Ed. 3. cap. 11. and 32 Hen. 8. c. 9.* enacted, That whereas former statutes provided redress for this evil in the King's Bench only, from henceforth it should be lawful for justices of the Common Pleas, justices of assize, and justices of peace in their quarter sessions, to inquire, hear and determine this and such like cases, as well at the suit of the King, as of the party: and this offence is punishable by Common law and statute; the Stat. 33 *Ed. 1. St. 2.* makes the offenders liable to three years imprisonment, and a fine at the King's pleasure. By the Stat. 28 *E. 1. c. 11.* it is ordained, that no officer, nor any other, shall take upon him any business in suit, to have part of the thing in plea; nor none upon any covenant, shall give up his right to another; and if any do, and be convicted thereof, the taker shall forfeit to the King so much of his lands and goods as amounts to the value of the part purchased, &c. for such maintenance.

In the construction of these statutes, it hath been adjudged, that under the word covenant, all kinds of promises and contracts are included, whether by writing, or parol: that rent granted out of land in variance, is within the statute of *champerty*: and grants of part of the thing in suit made merely in consideration of the maintenance, are within the meaning of this statute; but not such as are made in consideration of a precedent honest debt, which is agreed to be satisfied with the thing in demand when recovered. *F. N. B. 172. 2 Inst.* 209. 2 *Roll. Abr.* 113.

It is said not to be material, whether he who brings a writ of *champerty*, did in truth suffer any damage by it; or whether the plea wherein it is alledged be determined or not. 1 *Hawk.* 257. A conveyance executed hanging a plea, in pursuance of a bargain made before, is not within the statutes against *champerty*: and if a man purchase land of a party, pending the writ, if it be *bona fide*, and not to maintain, it is not *champerty.* *F. N. B. 272. 2 Roll. Abr.* 113. But it hath been held, that the purchase of land while a suit of equity concerning it is depending, is within the purview of the statute 28 *E. 1. St. 3. c. 11. Moor 665.* A lease for life, or years, or a voluntary gift of land, is within the statutes of *champerty*; but not a surrender made by a lessee to his lessor: or a conveyance relating to lands in suit, made by a father to his son, &c. 1 *Hawk. P. C.* 258.

The giving part of the lands in suit, after the end of it, to a counsellor for his wages, is not *champerty*, if there be no precedent bargain relating to such gift: but if it had been agreed between the counsellor and his client before the action brought, that he should have part for his wages, then it would be *champerty*. *Bro. Champert.* 3. And it is dangerous to meddle with any such gift, since it carries with it a strong presumption of *champerty*. *2 Inst.* 564. If any attorney follow a cause to be paid in gross, when the thing in suit is recovered, it hath been adjudged that this is *champerty*. *Hob.* 117. Every *champerty* implies maintenance; but every maintenance is not *champerty*; for *champerty* is but a species of maintenance. *Crom. Jur.* 39. *2 Inst.* 208.

Champertors, By statute, are those who move pleas or suits, or cause them to be moved, either by their own procurement, or by others, and sue them at their proper costs, to have part of the land in variance, or part of the gain. *33 Ed. 1. St. 2.*—*Champertores, vel campi participes, sunt qui per se vel per alios placita movent, vel mouere faciunt, & ea suis sumptibus prosequuntur ad campi partem, vel pro parte lucri habenda.* *Stat. 2. Artic. super Chart.* 11.

Champerty, (*campi-partitio*) Is a species of maintenance, and punished in the same manner. *Black. Com.* 4 V. 134, 5.

Champion, (*campio*) Is taken in the law not only for him that fights a combat in his own cause, but also for him that doth it in the place or quarrel of another. *Bract. lib. 3. Trañ. 2. cap. 21.* And in Sir Edward Rish's notes on *Upton, fol. 36.* you will find that *Henry de Farnberg* for 30 marks fee, did by charter covenant to be *champion* to Roger abbot of *Glastenbury.* *An. 42 Hen. 3.* These *champions*, mentioned in our law books and histories, were usually hired; and any one might hire them, except parricides, and those who were accused of the highest offences: before they came into the field, they shaved their heads, and made oath that they believed the persons who hired them, were in the right, and that they would defend their cause to the utmost of their power; which was always done on foot, and with no other weapon than a stick or club, and a shield: and before they engaged, they always made an offering to the church, that God might assist them in the battle. When the battle was over, the punishment of a *champion* overcome, and likewise of the person for whom he fought, was various: If it was the *champion* of a woman for a capital offence, she was burnt, and the *champion* hanged: if it was of a man, and not for a capital crime, he not only made satisfaction, but had his right hand cut off; and the man was to be close confined in prison, till the battle was over. *Bract. lib. 2. c. 35.* See *Combat.*

Champion of the King, (*campio regis*) Is an ancient officer, whose office it is at the coronation of our Kings, when the King is at dinner, to ride armed cap-a-pie into *Westminster-Hall*, and by the proclamation of a herald make a challenge, *That if any man shall deny the King's title to the crown, he is there ready to defend it in single combat, &c.* Which being done, the King drinks to him, and sends him a gilt cup, with a cover full of wine, which the *champion* drinks, and hath the cup for his fee. This office, ever since the coronation of King *Richard II.* when *Baldwin Froville* exhibited his petition for it, was adjudged from him to Sir *John Dymocks* his competitor, (both claiming from *Marmion*), and hath continued ever since in family of the *Dymocks*; who hold the manor of *Scriwally* in *Lincolnshire*, hereditary from the *Marmions*, by grand serjeanty, viz. That the lord thereof shall be the King's champion, as aforesaid. Accordingly Sir *Edward Dymocks* performed this office at the coronation of King *Charles II.* And a person of the name of *Dymocks* performed it, at the coronation of his present majesty *George the Third.*

Champs des Mars, and les champs de Mai, Assemblies of the ancient *Gaule*, to deliberate on whatever related to the general welfare of the nation. These assemblies were called *champs*, because, according to the custom of all the barbarous nations, they were held in the open air, in some plain, capable of containing the vast number of persons who had a right to be present. They were de-

nominated *champs de Mars* and *de Mai*, from the months in which they were held. Every freeman seems to have had a right to be present in these assemblies. *Robert. Hist. Emp. C. V. 1 V. 357.*

Chance, Where a man commits an unlawful act, by misfortune, or chance, and not by design, it's a deficiency of the will; as here it observes a total neutrality, and doth not co-operate with the deed; which therefore wants one main ingredient of a crime. *Vide Black. Com. 4 V. 26, 7.* See *Homicide.*

Chancellor, (*Cancellarius*) Was at first only a chief notary or scribe under the Emperor, and was called *Cancellarius*, because he sat *infra Cancellor*, to avoid the crowd of the people. This word is by some derived from *Cancellor*, and by others from *Cancellis*, an inclosed or separated place, or chancel, encompassed with bars, to defend the judges, and other officers from the press of the publick. And *Cancellarius* originally, as *Lupanus* thinks, signified only the register in court; *Grapharius, scil. qui conscribendis & excipiendis judicium actis dant operam*: but this name and officer is of late times greatly advanced, not only in this, but in other kingdoms; for he is the chief administrator of justice, next to the sovereign, who anciently heard equitable causes himself.

All other justices in this kingdom are tied to the strict rules of the law, in their judgments; but the Chancellor hath power to moderate the written law, governing his judgment by the law of nature and conscience, and ordering all things *juxta equum & bonum*: and having the King's power in these matters, he hath been called the keeper of the King's conscience. According to a late treatise, the Chancellor originally presided over a political college of secretaries, for the writing of treaties, grants, and other public business; and that the court of equity under the old constitution was held before the King and his counsel in the palace, where one supreme court for business of every kind was kept: and at first the Chancellor became a judge to hear and determine petitions to the King, which were referred to him; and in the end as business increased, the people intitled their suits to the Chancellor, and not the King: and thus the Chancellor's equitable power had by degrees commencement by prescription. *Hist. Chan. p. 3, 10, 44, &c.*

Staunford says, the Chancellor hath two powers; one absolute, the other ordinary; meaning, that although by his ordinary power, in some cases, he must observe the form of proceeding as other inferior judges; in his absolute power he is not limited by the law, but by conscience and equity, according to the circumstances of things. And though *Polydore Virgil*, in his history of *England* makes *William the First*, called the *Conqueror*, the founder of our Chancellors; yet our antiquary *Mr. Dugdale*, has shewn that there were many Chancellors of *England* long before that time, which are mentioned in his *Origines Juridicales*, and catalogues of Chancellors; and Sir *Edward Coke* in his fourth *Institute* saith, it is certain, That both the *British* and *Saxon* Kings had their Chancellors, whose great authority under their Kings were in all probability drawn from the reasonable custom of neighbouring nations, and the Civil law.

He that bears this chief magistracy, is stiled the Lord High Chancellor of *Great Britain*, which is the highest honour of the long robe; being made so *per traditionem magni sigilli sibi per dominum regem*, and by taking his oath: and a Chancellor may be made so at will, by patent, but 'tis said not for life, for being an ancient office, it ought to be granted as hath been accustomed. *2 Inst.* 87. But Sir *Edward Hyde*, afterwards Earl of *Clarendon*, had a patent to be Lord Chancellor for life, though he was dismissed from that office, and the patent declared void. *1 Sid. 338.*

By the *Stat. 5 Eliz. cap. 18.* the Lord Chancellor and Keeper have one and the same power; and therefore since that statute, there cannot be a Lord Chancellor and Lord Keeper at the same time; before there might, and hath been. *4 Inst. 78.* King *Hen. 5.* had a great seal of gold, which he delivered to the Bishop of *Durham*, and made him Lord Chancellor, and also another of silver, which he delivered to the Bishop of *London* to keep; but at this day there being but one great seal, there cannot

be a Lord Chancellor and Lord Keeper at once, and because they are but one office, as is declared by 5 *Eliz. c. 18.* and the taking away the seal determines the office 1 *Sid.* 338. But the Lord *Bridgman* was Lord Keeper and Lord Chief Justice of the *Common Pleas*, at the same time; which offices were held not to be inconsistent *Ibid.* By 1 *W. & M. cap. 21.* Commissioners appointed to execute the office of Lord Chancellor, may exercise all the authority, jurisdiction, and execution of laws, which the Lord Chancellor or Lord Keeper, of right ought to use and execute, &c. since which statute this high office hath been several times in commission; though generally on the dissolution of a Chancellor, till another was appointed.

The Lord Chancellor, now there is no Lord High Steward, is accounted the first officer of the kingdom and he not only keeps the King's great seal, but all patents, commissions, warrants, &c. from the King, are perused by him before signed: and he has the disposal of all ecclesiastical benefices in the gift of the crown under 20 *l.* a year in the King's books, which has occasioned this office to be formerly possessed by a clergyman. He by his oath swears well and truly to serve the King and to do right to all manner of people, &c. In his judicial capacity, he hath divers assistants and officers, *viz.* The Master of the Rolls, the Masters in Chancery, &c. And in matters of difficulty, he calls one or more of the chief justices, and judges to assist him in making his decrees; though in such cases they only give their advice and opinion, and have no share of the judicial authority.

As to the Master of the Rolls, he hath judicial power and is an assistant to the Lord Chancellor when present, and his deputy when absent, but he has certain causes assigned him to hear and decree, which he usually doth on certain days appointed at the chapel of the rolls, being assisted by one or more Masters in Chancery: he is, by virtue of his office, chief of the Masters of Chancery, and chief clerk of the petty-bag office.

The twelve Masters in Chancery sit some of them in court, and take notice of such references as are made to them, to be reported to the court, relating to matters of practice, the state of the proceedings, accounts, &c. and they also take affidavits, acknowledge deeds and recognizances, &c.

The six clerks in Chancery transact and file all proceedings by bill and answer; and also issue out some patents that pass the great seal; which business is done by their under clerks, each of whom has a seat there, and whereof every six clerk has a certain number in his office, usually about ten.

The Curitor of the court, four and twenty in number, make out all original writs in Chancery, which are returnable in *C. B.* &c. and among these the business of the several counties is severally distributed.

The Register is a place of great importance in this court, and he hath several deputies under him, to take cognizance of all orders and decrees, and enter and draw them up, &c.

The Master of the Subpoena Office issues out all writs of *subpoena*.

The Examiners are officers in this court, who take the depositions of witnesses, and are to examine them, and make out copies of the depositions.

The Clerk of the Affidavits files all affidavits used in court, without which they will not be admitted.

The Clerk of the Rolls sits constantly in the rolls to make searches for deeds, offices, &c. and to make out copies.

The Clerks of the Petty-Bag Office, in number three, have great variety of business that goes through their hands, in making out writs of summons to parliament, *conge d'elires* for bishops, patents for customers; *liberates* upon extent of statute-staple, and recovery of recognizances forfeited, &c. And also relating to suits for and against privileged persons, &c. And the clerks of this office have several clerks under them.

The Usher of the Chancery had formerly the receiving and custody of all money ordered to be deposited in court,

and paid it back again by order: but this business hath been of late assumed by the Masters in Chancery.

And *anno 12 Geo. 1. c. 32.* a new officer was appointed by statute, called Accountant-General, to receive the money lodged in court, and convey the same to the Bank, to be there kept for the suitors of the court.

Then there is a Serjeant at Arms, to whom persons standing in contempt are brought up by his substitutes as prisoners.

A Warden of the Fleet, who receives such prisoners as stand committed by the court, &c.

And besides these officers, there is a Clerk of the Crown in Chancery; Clerk and Controller of the Hanaper; Clerk for inrolling letters patent, &c. not employed in proceedings of equity, but concerned in making out commissions, patents, pardons, &c. under the great seal, and collecting the fees thereof. A Clerk of the Faculties, for dispensations, licences, &c. Clerk of the Presentations, for benefices of the crown in the Chancellor's gift; Clerk of Appeals, on appeals from the courts of the Archbishop to the court of Chancery: and divers other officers, who are constituted by the Chancellor's commission.

Chancellor of the Duchy of Lancaster. A great officer, whose office is principally to determine controversies between the King and his tenants of the dutchy land, and otherwise to direct all the King's affairs belonging to that court. The Chancellor is the chief judge of the Dutchy Court, who in difficult points of law is usually assisted by two judges of the Common law, out of one court or other, to decide the matter in question: this court is held in *Westminster-Hall*, and was formerly much used in relation to suits between tenants of dutchy lands, and against accountants and others for the rents and profits of the said lands. Under the Chancellor of the Dutchy, are an Attorney of the Court, one Chief Clerk or Register, and several Auditors, &c. This officer is mentioned in the *Stat. 3 Ed. 6. c. 1.* and 5 *id. c. 26.*

Chancellor of the Exchequer. Is likewise a great officer, who 'tis thought by many was originally appointed for the qualifying extremities in the exchequer: he sometimes sits in court, and in the exchequer-chamber; and with the judges of the court, orders things to the King's best benefit. He hath by the *Stat. 33 H. 8. c. 39.* power with others, to compound for the forfeitures upon penal statutes, bonds and recognizances entered into to the King: he hath also great authority in the management of the royal revenue, &c. which seems of late to be his chief business, being commonly the first commissioner of the treasury. And though the court of equity in the Exchequer-chamber, was intended to be holden before the treasurer, Chancellor, and barons; it is usually before the barons only. When there is a Lord-treasurer, the Chancellor of the Exchequer is Under-treasurer.

Chancellor of the Order of the Garter. Stow's Annals, pag. 706. *Chancellor of the Universities.* See 9 Hen. 5. c. 8. *Chancellor of the Diocese,* 32 Hen. 8. c. 15. *Chancellor in Cathedral Churches:* his office is thus described in the *Monasticon*, and the statute of *Litchfield*, *viz.*—*Lectiones legendas in ecclesia per se vel per suum vicarium audire, male legentes emendare, scholas conferre, sigilla ad causas conferre, litteras capituli facere & consignare, libros servare, quotiescunque voluerit predicationes in ecclesia vel extra ecclesiam prædicare, & cui voluerit predicationis officium assignare.* Mon. Angl. Tom. 3. p. 24, 339.

Chancemedley, (from the Fr. *chance*, hapus, and *mêler*, miscere) Signifies the casual killing of a man not without the killer's fault, though without any evil intention; and is where a person is doing a lawful act, and a person is killed by chance thereby: for if the act be unlawful, it is felony. If a person casts (not intending harm) a stone, which happens to hit one, whereof he dies: or shoots an arrow in a highway, and another that passeth by is killed therewith: or if a workman, in throwing down rubbish from a house, after warning to take care, kills a person: or a school-master in correcting his scholar, a master his servant, or an officer in whipping a criminal, in a reasonable manner, happens on occasion his death: it is chancemedley and misadventure. 3 *Inst.* 56. *Dalt.* 351.

But if a man throws stones in a highway, where persons usually pass: or shoot an arrow, &c. in a market place, among a great many people: or if a workman cast down rubbish from a house, in cities and towns, where people are continually passing: or a school-master, &c. correct his servant or scholar, &c. exceeding the bounds of moderation, it is man-slaughter; and if with an improper instrument of correction, as with a sword or iron bar, or by a kicking, stamping, &c. in a cruel manner, it is murder. *Terms de Ley*, H. P. C. 58, 31, &c. *Kel.* 40, 65, 113. If a man whips his horse in a street to make him gallop, and the horse runs over a child and kills it, it is manslaughter: but if another whips the horse, 'tis manslaughter in him, and chancemedley in the rider. H. P. C. 48, 59. And if two are fighting, and a third person coming to part them is killed by one of them, without any evil intent, yet this is murder in him; and not manslaughter by chancemedley or misadventure: and if they were met with premeditated malice, the one intending to kill the other, then it is murder in both. *Terms de Ley*. In chancemedley the offender forfeits his goods; but hath a pardon of course. *Stat.* 6 Ed. 1. c. 9. See *Homi. ide.*

Chancery, (*cancellaria*) Is the highest court of judicature in this kingdom next to the parliament, and of very ancient institution. The jurisdiction of this court is of two kinds; *ordinary*, or *legal*; and *extraordinary*, or *absolute*. The *ordinary* jurisdiction, is that wherein the Lord Chancellor in his proceedings and judgments, is bound to observe the order and method of the Common law; and in such cases the proceedings have been usually in *Latin*, and filed or inrolled in the petty-bag office: and the *extraordinary* or *unlimited* power, is that jurisdiction which this court exercises in cases of *equity*, wherein relief is to be had by way of *English Bill and answer*.

The *Ordinary Court* holds plea of recognisances acknowledged in the Chancery, writs of *scire facias* for repeal of letters patent, writs of partition, &c. and also of all personal actions, by or against any officer of the court; and by acts of parliament of several offences and causes: all original writs; commissions of bankrupt; of charitable uses; of ideots, and lunacy, &c. issue out of this court, for which it is always open; and sometimes a *superfedeas* or writ of privilege, hath been here granted to discharge a person out of prison: one from hence may have an *habeas corpus*, prohibition, &c. in the vacation; and here a *subpoena* may be had to force witnesses to appear in other courts, when they have no power to call them. 4 *Inst.* 79. 1 *Danv. Abr.* 776.

But in prosecuting causes, if the parties descend to issue, this court cannot try it by jury; but the Lord Chancellor delivers the record into the King's Bench to be tried there; and after trial had, it is to be remanded into the Chancery, and there judgment given: though if there be a demurrer in law, it shall be argued and adjudged in this court.

When there is demurrer upon part, and issue upon part, the record being in *B. R.* that court ought to give judgment, because there can be but one execution; and if the record come thither entirely, they cannot send it back again. 1 *Mod. Rep.* 29. But see 4 *Inst.* 80. Upon a judgment given in this court, a writ of error lies returnable in *B. R.* 4 *Inst.* 83.

Ordinary Court, or **Court of Equity**, proceeds by the rules of equity and conscience, and moderates the rigour of the Common law, considering the *intention* rather than the *words* of the law. It gives relief for and against infants, notwithstanding their minority: and for and against married women, notwithstanding their coverture: in some cases a woman may sue her husband for maintenance; she may sue him when he is beyond sea, &c. and be compelled to answer without her husband: all frauds and deceits, for which there is no redress at Common law: all breaches of trust and confidence; and accidents, as to relieve obligors, mortgagors, &c. against penalties and forfeitures, where the intent was to pay the debt, are here remedied: for in Chancery, a forfeiture, &c. shall not bind, where a thing may be done after, or

compensation made for it. 1 *Danv.* 752. 2 *Vent.* 352: *Rel. Abr.* 373.

Also this court will give relief against the extremity of unreasonable engagements, entered into without consideration: oblige creditors that are unreasonable, to compound with an unfortunate debtor: and make executors, &c. give security and pay interest for money that is to lie long in their hands. 2 *Vent.* 346. Here executors may sue one another, or one executor alone be sued without the rest: order may be made for performance of a will: it may be decreed who shall have the tuition of a child: this court may confirm title to lands, though one hath lost his writings; render conveyances, defective through mistake, &c. good and perfect; but not defects in a voluntary conveyance, unless where intended as a provision for younger children. 2 *Vent.* 265.

In Chancery, copyholders may be relieved against the ill usage of their lords: inclosures of lands that are common be decreed; and this court may decree money or lands given to charitable uses: things in action upon assignment on consideration: oblige men to account with each other: avoid the bar of actions, by the statute of limitations, &c. for debts thus barred, are still debts in equity, and the duty remains. 1 *Danv. Abr.* 749, 750, &c. 1 *Salk.* 154.

But in all cases, where the plaintiff can have his remedy at law, he ought not to be relieved in Chancery: and a thing which may be tried by a jury, is not triable in this court. *Danv.* 763. Also long leases, as for 1000 years; naked promises; verbal agreements not executed; estates deriv'd under conceal'd titles, &c. have been refused relief in this court: and mortgages are not relievable in equity after twenty years, where no demand has been made, or interest paid, or there are not other particular circumstances, &c. 2 *Vent.* 340. A bond, when neither the principal nor interest hath been demanded in 20 years, will be presumed in equity to be satisfied, and be decreed to be cancelled; and a perpetual injunction may be granted to stay proceedings thereon. 1 *Ch. Rep.* 79. *Finch Rep.* 78. A deed appearing to be cancelled, has been decreed to be a good deed, on special circumstances: and a defendant having suppressed a settlement, whereby a remainder in tail was limited, &c. upon proof that the deed came to his hands, the plaintiff had a decree in Chancery to hold the estate. 1 *Ch. Caf.* 249. 2 *Vern. Rep.* 380. Articles of agreement upon marriage reduc'd into writing, though not sign'd by either party, being proved to be agreed to, were decreed to be perform'd. 2 *Vern.* 200. Also an agreement in writing made since the statute of frauds, has been decreed to be discharged by parol. 1 *Vernon's Rep.* 240. An underhand agreement may be set aside as fraudulent: and articles, a deed of conveyance executed, and a fine in pursuance thereof, were set aside in Chancery for fraud, where the party was imposed upon. *Ibid.* 205. A deed not fraudulent at first, may become so afterwards; and if one add a seal to a note, which is good without it, he will lose his security; and a bill of exchange being gained by fraud, equity will relieve against it, and decree that the money shall be repaid, &c. 2 *Vern.* 123, 162.

A release shall be avoided for fraud, where there is *suppressio veri*, or *suggestio falsi*; and a release may be set aside in Chancery by reason of the misapprehension of the party that gave it. 1 *Vern. Rep.* 20, 32. A will concerning lands, may be avoided in a court of equity when obtained by fraud: a mortgage made by a man subsequent to his will shall be a revocation *pro tanto* only in equity, and not of the whole will, &c. 2 *Ch. Rep.* 97. An heir may be relieved in equity against a contingent contract, made during his father's life, to pay a large sum of money, if he outlives his father, when it is unconscionable. 2 *Chan. Rep.* 397. And a broker who had made it his business to sell goods at extravagant rates to young persons, to be paid for one upon the deaths of their fathers, was decreed to deliver up securities thus obtained for great sums, on payment of what he had really paid to the plaintiff, and for his use, &c. 1 *Vern.* 467.

A purchaser of land, without notice of an incumbrance, shall not be hurt thereby in equity; and in pleading a purchase,

purchase, the defendant ought to deny notice of incumbrances, &c. No interest will be allowed in Chancery for book-debts; nor shall interest money be allowed to be made principal on securities, so as to make interest upon interest, unless it be where interest money is reduced to a stated sum, &c. 3 *Ch. Rep.* 65. 1 *Vern.* 169. 2 *Ch. Rep.* 286.

It has been held, that the court of Chancery cannot assess damages for a trespass, &c. but it ought to be ascertained by a jury at law, and not otherwise. 1 *Ch. Rep.* 230. A bill may be brought for discovering the contents of a letter, which would discharge the plaintiff of an action at law, before verdict. 3 *Ch. Rep.* 17. Indentures of apprenticeship have been decreed to be delivered up, and the money given with the apprentice to be paid back by the master, on ill usage of the apprentice, &c. *Finch Rep.* 125. Charity lands being let at a great under-value, as was found by inquisition, on a commission of charitable uses, the lease was avoided in equity, and the lessee decreed to pay the arrears in rent according to the first value, and to yield up the possession. 2 *Vern.* 415.

A grazier's cattle, driving to London, were distrained in grounds for the innkeeper's rent, and in replevin the landlord had judgment at law; but the grazier was relieved in equity against it. 2 *Vern. Rep.* 129. Trials and issues at law are frequently directed out of the court of Chancery; and sometimes it is ordered, that after trial, the parties shall resort to the court on the equity reserved, &c. This court will not retain a suit for any thing under 10*l.* value, except it be in cases of charity; nor for lands, &c. under 40*s.* *per annum*: and refuses relief in suits where the substance of them tends to the overthrow of an act of parliament; or any fundamental point of the Common law.

If a man loses his obligation, he shall not be relieved for his debt, being against a maxim in law. 1 *Danv.* 754. And an executor in a court of equity ought not to be compelled to pay legacies before bonds, &c. for this is against the common law: so in many other cases. *Ibid.* 756. And where a man by his own act destroys his remedy at law, he shall not be relieved in equity: but in case of an apparent fraud, or in a dubious case in law, of which the party could not have conscience, relief may be had in equity against a statute. *Ibid.* 755, 759. Defendants may not be regularly relieved in Chancery, after judgment at law: though decrees are made in such cases: but on persons being committed for non-performance, they have been formerly discharged by *habeas corpus*. *Cro. Elix.* 220. 1 *Rel. Rep.* 252. 1 *Nels. Abr.* 432.

It is common to give relief in Chancery, notwithstanding there is an agreement between the parties that there shall be no relief in law or equity. 1 *Mod.* 141, 305. And where a party hath both law and equity on his side, it will prevail against equity only. 1 *Danv. Abr.* 773, which *vide*. If a portion be given to a woman, provided she marries not without consent of a certain person, although she marries without such consent, she shall be relieved in Chancery, and have her portion: but if the portion, on such marriage, had been limited over to another, it would be otherwise. 1 *Danv.* 752. 1 *Mod.* 300. If a father, on the marriage of his son, take a bond of the son that he shall pay him so much, &c. this is void in equity, being adjudged by coercion while he is under the awe of his father. 1 *Salk.* 158. Also where a son, without privity of the father, treating in equity, gives bond, to return any part of the portion, the match it is void. *Ibid.* 156. A man is not bound to discover the consideration of a bond generally given, which in itself implies a consideration. *Hard.* 200. If a factor to a merchant hath money in his hands, it shall be accounted his own; for equity cannot follow money; but it may goods to make them, the merchant's, which may be known, though money cannot. 1 *Salk.* 260.

Money articulated to be laid out in land, shall be taken as land in equity, and descend to the heir. *Ibid.* 154. Personal estate in the hands of executors, shall be applied in discharge of the heir, where there is sufficient assets to pay the debts and legacies. 1 *Danv.* 770. There shall be no bill in equity against an executor, to discover asset before a suit commenced at law. *Hard.* 115. *Sed qu*

legal assets shall be applied in a course of administration; but equitable assets amongst all the creditors proportionably, on a bill brought, &c. 2 *Vern. Ch. Rep.* 62. Where trustees convert money raised out of land for payment of debts, to their own use, the heir shall have the land discharged, which hath borne its burden, and the trustees are liable to the debts in equity. 1 *Salk.* 153. If lessee for years, without impeachment of waste, about the end of his term cuts down timber-trees, the court of Chancery by injunction may stop the cutting down of the trees, it being against the public good to destroy timber. 1 *Rel. Abr.* 380. And tenant after possibility of issue extinct, or for life, punishable of waste, may be stopped in equity from pulling down houses, &c. 1 *Danv.* 761.

The king cannot create a court of equity at this day; but the same must be done by act of parliament. 4 *Inst.* 84. And though the power of the Chancery is very great, and it may restrain other courts that exceed their jurisdiction, and remove suits to itself by *certiorari*, yet it is no court of record; and therefore 'tis said can bind the person only, and not the estate of the defendant, &c. And if he will not obey the decree of the court, he must be committed to the Fleet till he does. 1 *Danv. Abr.* 749.

There are several statutes relating to the court of Chancery. By 28 *Ed.* 1. c. 5. The court of Chancery is to follow the king. By the 18 *Ed.* 3. *stat.* 5. The oaths of the clerks in Chancery are appointed. The Chancellor and Treasurer may correct errors in the Exchequer. Whosoever shall find himself grieved with any statute shall have his remedy in Chancery. 36 *Ed.* 3. c. 9. 31 *Ed.* 3. *stat.* 1. c. 12. And sec 15 *R.* 2. c. 12. 17 *R.* 2. c. 6. & 4 *H.* 8. c. 9.

No *subpoena* or other process of appearance, shall issue out of Chancery, &c. till after a bill is filed, (except bills for injunctions to stay waste, or suits at law commenced), and a certificate thereof brought to the *subpoena* office. 4 & 5 *Ann.* c. 16. And for preventing vexatious suits, it is enacted, that upon the plaintiff's dismissing his own bill, or the defendant's dismissing the same for want of prosecution, the plaintiff shall pay to the defendant full costs, &c. *Stat. ibid.* Persons in remainder, or reversion of any estate, after the death of another, on making affidavit in the court of Chancery, that they have cause to believe such other person dead, and his death concealed by the guardian, trustees or others, may move the Lord Chancellor to order such guardian, trustees, &c. to produce the person suspected to be concealed; and if he be not produced, he shall be taken to be dead, and those in reversion, &c. may enter upon the estate: and if such person be abroad, a commission may be issued for his being viewed by commissioners. *Stat.* 6 *Ann.* c. 18.

Infants under the age of twenty-one years, seized of estates in trust, or by way of mortgage, are enabled by statute to make conveyances thereof; or they may be compelled thereto, by order of the court of Chancery, &c. upon petition and hearing of the parties concerned. 7 *Ann.* c. 9. See the statute of King George 2. whereby idiots and lunatics seized of estates in trust, &c. may make conveyances by order of the Chancery, &c. 4 *Geo.* 2. c. 10. By the following acts the power of the masters was abridged, on their misemploying the suitors money, which is now to be paid into the bank of England:

is granted for relief of the suitors, and as a common stock of the court of Chancery. 12 *Geo.* 1. c. 32. & 33. All orders and decrees made and signed by the Master of the Rolls, shall be deemed and taken to be good and valid orders and decrees of the court of Chancery; but not to be enrolled till signed by the Lord Chancellor, and subject to reversal, &c. by him. *Stat.* 3 *Geo.* 2. c. 30.

A defendant not appearing after *subpoena* issued, but keeping out of the way to avoid being served with the process; on affidavit that he is not to be found, and suspected to be gone beyond sea, or to abscond, &c. the court of Chancery may make an order for his appearance at a certain day, a copy of which is to be published in the *Gazette*, &c. and then if he do not appear, the plaintiff's bill shall be taken *pro confesso*, and defendant's estate sequestered,

sequestered, &c. But persons out of the kingdom, returning in seven years, may have a rehearing in six months, and be admitted to answer; otherwise to be barred, by final decree. 1 *Geo. c. 25*.

By 1 *Geo. 2. c. 24*. Part of the suitor's cash is to be placed out at interest, for defraying the charge of the *Accountant-General's* office. And see 23 *Geo. 2. c. 25* for making good deficiencies to the clerk of the *Master*, and for augmenting the income of the *Master of the Rolls*.

By 1 *Geo. 3. c. 1*. The king is empowered to grant a sum not exceeding 5000*l.* per annum to the Chancellor.

By 4 *Geo. 3. c. 32*. Part of the suitor's cash is to be placed at interest, to be applied to the *Accountant-General's* third clerk, and other purposes.

The proceedings in Chancery are, first to file the bill of complaint, signed by some counsel, setting forth the fraud or injury done, or wrong sustained, and praying relief: after the bill is filed, process of *subpoena* issues to compel the defendant to appear: and when the defendant appears, he puts in his answer to the bill of complaint, if there be no cause for plea to the jurisdiction of the court, in disability of the person, or in bar, &c. Then the plaintiff brings his replication, unless he files exceptions against the answer as insufficient, referring it to a Master to report, whether it be sufficient or not; to which report exceptions may be also made. The answer, replication, and rejoinder, &c. being settled, and the parties come to issue, witnesses are to be examined upon interrogatories, either in court, or by commission in the country, wherein the parties usually join; and when the plaintiff and defendant have examined their witnesses, publication is to be made of the depositions, and the cause is to be set down for hearing, after which follows the decree.

If the plaintiff dismisseth his own bill, or the defendant dismisseth it by reason of want of prosecution, as already observed, or if the decree is in behalf of the defendant, the bill is dismissed with costs to be taxed by a Master. If the defendant doth not appear, on being served with the process of *subpoena*, in order to answer, upon affidavit of the service of the writ, an attachment will issue out against him: and if a *non est inventus* is returned, an attachment with proclamation goes forth against him; and if he stands further out in contempt, then a commission of rebellion may be issued, for apprehending him, and bringing him to the Fleet prison, in the execution whereof the persons to whom directed may justify breaking open doors. If the defendant stands further in contempt, a serjeant at arms is to be sent out to take him; and if he cannot be taken, a sequestration of his land may be obtained till he appears. And if a decree, when made, be not obeyed, being served upon the party under the seal of the court, all the aforementioned processes of contempt will issue out against him, for his imprisonment till he yields obedience to it.

If a bill in Chancery be exhibited against a peer, the course is for the Lord Chancellor to write a letter to him; and if he doth not put in his answer, then a *subpoena* issues, and then an order to shew cause why a sequestration should not go forth; and if he still stands out, then a sequestration shall be had; for there can be no process of contempt against his person. Where there is any error in a decree in matter of law, there may be a bill of review, which is in nature of a writ of error; or an appeal to the House of Lords. A party grieved with a decree in Chancery, on petition to the king, it hath been adjudged that the matter might be referred by the king to the judges, who may reverse the decree, &c. 3 *Bull. 116*.

But it is now usual to appeal to the House of Lords; which appeals are to be signed by two noted counsel, and exhibited by way of petition: the petition or appeal is lodged with the clerk of the house of Lords, and read in the house, whereon the appellee is ordered to put in his answer, and a day fixed for hearing the cause; and after counsel heard and evidence given on both sides, the lords will affirm or reverse the decree of the Chancery, and finally determine the cause by a majority of votes, &c. Though it is observed on an appeal to the Lords from a decree in Chancery, no proofs will be permitted to be read as evidence, which were not made use of in the Chancery. *Preced. Canc.*

214. If a bill be brought where the Lord Chancellor is party to the suit, it must be directed to the King's Majesty; for no man may be both judge and party in a cause. See *Chancellor*.

And as to the jurisdiction of the court, its modes of proceeding, and the various cases wherein it relieves, &c. vide *Cam. Dig. 2 P. tit. Chancery*, where those subjects are fully and methodically treated of.

Changer. An officer belonging to the king's mint, whose office consists chiefly in exchanging coin for bullion, brought in by merchants or others: it is written after the old way, *chaunger*, Stat. 2 Hen. 6. cap. 12.

Chanter, (*cantor*) A singer in the choir of a cathedral church; and is usually applied to the chief of the singers. This word is mentioned in 13 *Elix. c. 10*. At St. David's cathedral in Wales, the chanter is next to the bishop; for there is no dean. *Camb. Britan.*

Chantry, or Chaunter; (*cantaria*) A little church, chapel, or particular altar, in some cathedral church, &c. endowed with lands, or other revenues, for the maintenance of one or more priests, daily to sing mass, and officiate divine service for the souls of the donors, and such others as they appointed. Stat. 37 Hen. 8. cap. 4. 1 Ed. 6. cap. 14. and 15 Car. 2. cap. 9. Of these chantries mention is made of forty-seven belonging to St. Paul's church in London, by Dugdale, in his history of that church. In an ancient MS. there is this record—*Sciante, &c. quod ego Reginaldus Seward dedi Willielmo Crumpe capellano Cantarie beate Marie de Yarpol, unam parcellam pasture, &c. Dat apud Leominstrie die Martis prox. post festum Sancti Hilarii, An. 7 Hen. 5.*

Chapel, (*capella*, Fr. *chapelle*) Is either adjoining to a church, for performing divine service; or separate from the mother-church, where the parish is wide, which is commonly called a chapel of ease. And chapels of ease are built for the ease of those parishioners who dwell far from the parochial church, in prayer and preaching only; for the sacraments and burials ought to be performed in the parochial church. 2 *Rel. Abr. 340*.—*Ad capellam non pertinet baptisterium neque sepultura.* *Selden of Tithes, p. 265*. These chapels are served by inferior curates, provided at the charge of the rector, &c. And the curates therefore removable at the pleasure of the rector or vicar: but chapels of ease may be parochial, and have a right to sacraments and burials, and to a distinct minister, by custom; (though subject in some respects to the mother-church;) and parochial chapels differ only in name from parish churches, but they are small, and the inhabitants within the district are few. In some places chapels of ease are endowed with lands or tithes, and in other places by voluntary contributions; and in some few districts there are chapels which baptize and administer the sacraments, and have chapel-wardens; but these chapels are not exempted from the visitation of the ordinary, nor the parishioners who resort thither from contributing to the repairs of the mother-church; especially if they bury there; for the chapel generally belongs to, and is as it were a part of the mother-church; and the parishioners are obliged to go to the mother-church, but not to the chapel. 2 *Rel. Abr. 289*. And hence it is said, that the offerings made to any chapel are to be rendered to the mother-church; unless there be a custom that the chaplain shall have them.

Publick chapels, annexed to parish churches, shall be repaired by the parishioners, as the church is; if any other persons be not bound to do it. 2 *Inft. 489*. Besides the fore mentioned chapels, there are free chapels, perpetually maintained and provided with a minister, without charge to the rector or parish; or that are free and exempt from all ordinary jurisdiction; and these are where some lands or rents are charitably bestowed on them. Stat. 37 Hen. 8. cap. 4. 1 Ed. 6. c. 14. Then there are private chapels, built by noblemen, and others, for private worship, in or near their own houses, maintained at the charge of those noble persons to whom they belong, and provided with chaplains and stipends by them; which may be erected without leave of the bishop, and need not be consecrated, though they anciently were so, nor are they subject to the jurisdiction of the ordinary. And also chapels in the Universities, belonging to particu-

lar colleges, which though they are consecrated, and sacraments are administered there, yet they are not liable to the visitation of the bishop, but of the founder. 2 *Inst.* 363.

Chapelry, (capellania) Is the same thing to a chapel, as a parish to a church; being the precinct and limits thereof: it is mentioned in the statute 14 *Car. 2. c. 9.*

Chaperon, (Fr.) A hood or bonnet, anciently worn by the knights of the garter, as part of the habit of that noble order: but in *heraldry* it is a little escutcheon fixed in the forehead of the horses that draw a hearse at a funeral. See *Stat. 1 R. 2. cap. 17.*

Chapters, (Lat. capitula, Fr. chapitres, i. e. chapters of a book) Signify in our Common law a summary of such matters as are to be enquired of, or presented before justices in eyre, justices of assize, or of peace, in their sessions. *Britton, cap. 3.* useth the word in this signification: and chapters are now most commonly called *articles*, and delivered by the mouth of the justice in his charge to the inquest; whereas, in ancient times, (as appears by *Bracon* and *Britton*) they were, after an exhortation given by the justices for the good observation of the laws and the king's peace, first read in open court, and then delivered in writing to the grand inquest, for their better observance; and the grand jury were to answer upon their oaths to all the articles thus delivered them, and not put the judges to long and learned charges to little or no purpose, for want of remembering the same, as they do now, when they think their duty well enough performed, if they only present those few of many misdemeanors which are brought before them by way of indictment. It is to be wished that this order of delivering written articles to grand juries were still observed, whereby crimes would be more effectually punished: in some inferior courts, as the court leet, &c. in several parts of *England*, it is usual at this day for stewards of those courts to deliver their charges in writing to the juries sworn to enquire of offences. *Horne*, in his *Mirror of justices*, expresses what these articles were wont to contain. *Lib. 3. cap. des Articles in Eyre.* And an example of articles of this kind, you may find in the book of assizes. *f. 138.*

Chaplain, (capellanus) Is most commonly taken for one that is depending upon the king, or other noble person, to instruct him and his family, and say divine service in his house, where there is usually a private chapel for that purpose. The king, queen, prince, princess, &c. may retain as many chaplains as they please; and the king's chaplains may hold any number of benefices of the king's gift, as the king shall think fit to bestow upon them. An archbishop may retain eight chaplains; a duke, or a bishop, six; a marquis or earl, five; viscount, four; baron, knight of the garter, or lord chancellor, three; a dutches, marchioness, countess, baroness, the treasurer, and controller of the king's house, the king's secretary, dean of the chapel, almoner, and master of the rolls, each of them two; the chief justice of the king's bench, &c. one; all which may purchase a licence or dispensation, and take two benefices with cure of souls. *Stat. 22 Hen. 8. cap. 13.* Also every judge of the *King's Bench* and *Common Pleas*; and chancellor and chief baron of the *Exchequer*, and the king's attorney and solicitor general, may each of them have one chaplain, attendant on his person, having one benefice with cure, who may be non-resident on the same, by *Stat. 25 Hen. 8. cap. 16.* And the groom of the stole, treasurer of the king's chamber, and chancellor of the dutchy of *Lancaster*, may retain each one chaplain. *Stat. 33 Hen. 8. cap. 28.* If a nobleman hath his full number of chaplains allowed by law, and retains one more, who has dispensation to hold plurality of livings, it is not good. 1 *Cro.* 723.

A person, retaining a chaplain, must not only be capable thereof at the time of granting the instrument of retainer, but he must continue capable of qualifying till his chaplain is advanced: and therefore if a duke, earl, &c. retain a chaplain, and die; or if such a noble person be attainted of treason; or if an officer, qualified to retain a chaplain, is removed from his office, the retainer is determined: but where a chaplain hath taken a second benefice before his lord dieth, or is attainted, &c. the retainer is in force to qualify him to enjoy the benefices.

And if a woman that is noble by marriage, afterward marries one under the degree of nobility, her power to retain chaplains will be determined; though 'tis other wise where a woman is noble by descent, if she marry under degree of nobility, for in such case her retainer before or after marriage is good. A baroness, &c. during the coverture, may not retain chaplains; if she doth, the lord, her husband, may discharge them, as likewise her former chaplains, before their advancement. 4 *Rep.* 118.

A chaplain must be retained by letters testimonial under hand and seal, or he is not a chaplain within the statute; so that it is not enough for a spiritual person to be retained by word only to be a chaplain, by such person as may qualify by the statutes to hold livings, &c. although he abide and serve as chaplain in the family. And where a nobleman hath retained and thus qualified his number of chaplains, if he dismisses them from their attendance upon any displeasure, after they are preferred, yet they are his chaplains at large, and may hold their livings during their lives; and such nobleman, though he may retain other chaplains in his family, merely as chaplains, he cannot qualify any others to hold pluralities while the first are living: for if a nobleman could discharge his chaplain when advanced, to qualify another in his place, and qualify other chaplains, during the lives of chaplains discharged, by these means he might advance as many chaplains as he would, whereby the statutes would be evaded. 4 *Rep.* 90.

Chapter, (capitulum) Is a congregation of clergymen under the dean in a cathedral church: *congregatio clericorum in ecclesia cathedrali, conventuali, regulari vel collegiata.* This collegiate company is metaphorically termed *capitulum*, signifying a little head, it being a kind of head, not only to govern the diocese in the vacation of the bishoprick, but also in many things to advise and assist the bishop when the see is full, for which, with the dean, they form a council. 1 *Inst.* 103. The chapter consists of prebends or canons, which are some of the chief men of the church, and therefore are called *capita ecclesie*; they are a spiritual corporation aggregate, which they cannot surrender without leave of the bishop, because he hath an interest in them; they, with the dean, have power to confirm the bishop's grants; during the vacancy of an archbishoprick, they are guardians of the spiritualties, and as such have authority by the *Stat. 25 Hen. 8. cap. 21.* to grant dispensations; likewise as a corporation they have power to make leases, &c.

When the dean and chapter confirm grants of the bishop, the dean joins with the chapter, and there must be the consent of the major part; which consent is to be expressed by their fixing of their seal to the deed, in one place, and at one time, either in the chapter-house, or some other place; and this consent is the will of many joined together. *Dyer* 233. A chapter is not capable to take by purchase or gift, without the dean, who is the head of the body: but there may be a chapter without a dean, as the chapter of the collegiate church of *Southwell*; and grants by or to them are as effectual as other grants by dean and chapter. Yet where there are chapters without deans, they are not properly chapters: and the chapter in a collegiate church, where there is no episcopal see, as at *Westminster* and *Windor*, is more properly called a college.

Chapters are said to have their beginning before deans; and formerly the bishop had the rule and ordering of things without a dean and chapter, which were constituted afterwards; and all the ministers within his diocese were, as his chapter, to assist him in spiritual matters. 2 *Roll.* 454. 3 *Co.* 75. The bishop hath a power of visiting the dean and chapter: but the dean and chapter have nothing to do with what the bishop transacts as ordinary. 3 *Rep.* 75. Though the bishop and chapter are but one body, yet their possessions are for the most part divided; as the bishop hath his part in right of his bishoprick; the dean hath a part in right of his deanery; and each prebendary hath a certain part in right of his prebend; and each too is incorporated by himself. And deans and chapters have some of them ecclesiastical jurisdiction in several parishes, (besides that authority they have

have within their own body), executed by their officials; also temporal jurisdiction in several manors belonging to them, in the same manner as bishops, where their stewards keep courts, &c. 2 *Roll. Abr.* 229. It has been observed, that though the chapter have distinct parcels of the bishop's estate assigned for their maintenance, the bishop hath little more than a power over them in his visitations, and is scarce allowed to nominate half of those to their prebends, who were originally of his family: but of common right it is said he is their patron. *Roll. ibid.*

Charge of justices in sessions, &c. See *Chapters*, or *Chapitres*.

Charge and Discharge, A charge is said to be a thing done that bindeth him that doth it, or that which is his, to the performance thereof: and discharge is the removal, or taking away of that charge. *Terms de Ley*. Land may be charged divers ways; as by grant of rent out of it, by statutes, judgments, conditions, warranties, &c. Lands in fee simple may be charged in fee; and where a man may dispose of the land itself, he may charge it by a rent, or statute, one way or other. *Lit. sect.* 648. *Moor Ca.* 129. *Dyer* 10. If one charge land in tail, and land in fee-simple, and die; the land in fee only shall be chargeable. *Bro. Cha.* 9. Lands entailed may be charged in fee, if the estate-tail be cut off by recovery: if tenant in tail charge the land, and after levy a fine or suffer a recovery of the lands, to his own use; this confirms the charge, and it shall continue. 1 *Co. Rep.* 61. A tenant for life charges the land, and then makes a feoffment to a stranger, or doth waste, &c. whereby it is forfeited, he in reversion shall hold it charged during his (the tenant's) life: and if one have a lease for life or years of land, and grant a rent out of it; if after he surrenders his estate, yet the charge shall continue so long as the estate had endured, in case it had not been surrendered. 1 *Rep.* 67, 145. *Dyer* 10.

If a feme sole, lessee for years, takes husband, and he charges the land and dies, she may avoid it; for the husband might have given or forfeited, but he may not charge it. *Bro. Cha.* 41. If one jointenant charge land, and after release to his companion and die, the survivor shall hold it charged: but if it had come to him by survivorship, it would be otherwise. 6 *Rep.* 76. 1 *Shep. Abr.* 325. He that hath a remainder or reversion of land, may charge it; because of the possibility that the land will come into possession, and then the possession shall be charged. But where one leases land for life, and grants the reversion or remainder over to A. B. who charges the land, and dies, and the tenant for life is heir to the fee; in this case he shall hold it discharged, for he had the possession by purchase, though he had the fee by descent. *Bro.* 11, 16. 1 *Rep.* 62. If a rent be issuing out of a house, &c. and it falls down, the charge shall remain upon the soil. 9 *E. 4.* 20. But when the estate is gone upon which the charge was grounded, there generally the charge is determined. *Co. Lit.* 349. And in all cases where any executory thing is created by deed, there by consent of all the parties it may be by deed defeated and discharged. 10 *Rep.* 49. *Vide Discharge*.

Charitable Corporation. A society of persons in the late reign obtained a statute to lend money to *industrious poor*, at 5 *l.* per cent. interest on pawns and pledges, to prevent their falling into the hands of the pawn-brokers, and therefore they were called the *Charitable corporation*: but they likewise took 5 *l.* per cent. for the charge of officers, warehouses, &c. And in the fifth year of King Geo. 2. the chief officers of this corporation, by connivance of the principal directors, absconded and broke, and defrauded the public prosecutors of great sums; for relief of the sufferers wherein, as to part of their losses, several statutes were made and enacted. See *Stat.* 5 Geo. 2. cap. 31, 32. 7 Geo. 2. cap. 11.

Charitable Uses, Where any lands, &c. are given to *charitable uses*, commissions of inquiry, and deeds how made and taken, &c. See *Chancery* and *Mortmain*. Stat. 9 Geo. 2. c. 36. Lands given to alms and aliened, may be recovered by the donor, 13 *Ed.* 1. c. 41. Lands, &c. may be given for the maintenance of houses of correction, or of the poor, 35 *Elix.* c. 7. *sect.* 27. Commissioners to inquire of money given to poor prisoners, 22

23 *Car.* 2. c. 20. *sect.* 11. 32 Geo. 2. c. 28. *sect.* 9, 10. Money given to put out apprentices, either by parishes or publick charities, to pay no duty, 8 *Ann.* c. 9. *sect.* 40. Mr. Norton's Will to Charitable Uses, 6 Geo. 2. c. 32. 11 Geo. 2. c. 37. See *Mortmain*. And *vide also Black. Com.* 2 *V.* 273, 376. 3 *V.* 428.

Charcoal, Are pit-coal when charred or charked, so called in *Worcestershire*; as sea-coal thus prepared at *Newcastle* is called coke.

Charge of Lead, Is a quantity of lead consisting of thirty pigs, each pig containing six stone wanting two pounds, and every stone being twelve pounds.—*La charge de plumbo constat ex 30 foinellis, & qualibet foinella continet 6 petras, exceptis duabus libris, & qualibet petra constat ex 12 libris.* *Affisa de ponderibus.* Rob. 3. R. Scot. cap. 22.

Charta, A word made use of not only for a charter, for the holding an estate; but also a statute. See *Magna Charta*.

Charte, A card, chart, or plain which mariners use at sea, mentioned 14 *Car.* 2. cap. 33.

Chartel, (Fr. *cartel*) A letter of defiance, or challenge to a single combat; in use heretofore to decide difficult controversies at law, which could not otherwise be determined. *Blount*.

Charter, (Lat. *charta*, Fr. *chartres*, i. e. *instrumenta*) Is taken in our law for written evidence of things done between man and man: whereof *Bracton*, lib. 2. cap. 26. says thus, *Fiunt aliquando donationes in scriptis, sicut in chartis, ad perpetuam rei memoriam, propter brevem hominum vitam, &c.* And *Britton*, in his 39th chapter, divides charters into those of the king, and those of private persons. *Charters of the king* are those whereby the king passeth any grant to any person or body politick; as a charter of exemption, of privilege, &c. *Charter of pardon*, whereby a man is forgiven a felony, or other offence committed against the king's crown and dignity; and of these there are several sorts, viz. *charta pardonationis utlagaria*, *charta pardonationis se defendendo*, &c. and others mentioned in *Reg. Writs* 287, 288, &c. *Charter of the forest*, wherein the laws of the forest are comprised, such as the *charter of Canutus*, &c. *Kitch.* 314. *Fleta*, lib. 3. c. 14.

Charters of private persons are deeds and instruments for the conveyance of lands, &c. And the purchaser of lands shall have all the charters, deeds and evidences as incident to the same, and for the maintenance of his title. *Co. Lit.* 6. *Charters* belong to a feoffee, although they be not sold to him, where the feoffor is not bound to a general warranty of the land; for there they shall belong to the feoffor, if they be sealed deeds or wills in writing: but other charters go to the tertenant. *Moor Ca.* 687. The charters belonging to the feoffor in case of warranty the heir shall have, though he hath no land by descent, for the possibility of descent after. 1 *Rep.* 1. See *Magna Charta*.

Charteter, In *Cheshire*, a freeholder is called by this name. *Sir P. Ley's Antiq.* fol. 356.

Charter-Governments in America. Our colonies, with respect to their interior policy, are properly of three sorts. 1. *Provincial establishments*, the constitutions of which depend on the respective commissions issued by the crown to the governors, and the instructions which usually accompany those commissions; under the authority of which, provincial assemblies are constituted, with the power of making local ordinances, not repugnant to the laws of England. 2. *Proprietary governments*, granted out by the crown to individuals, in the nature of feudatory principalities, with all the inferior regalities, and subordinate powers of legislation, which formerly belonged to the owners of counties palatine: yet still with these express conditions, that the ends for which the grant was made be substantially pursued, and that nothing be attempted which may derogate from the authority of the mother country. 3. *Charter governments*, in the nature of civil corporations, with the power of making by-laws, for their own interior regulation, not contrary to the laws of England; and with such rights and authorities as are specially given them in their several charters of incorporation. The form of government in most of them is borrowed from that of England. They have a governor named

named by the king (or in some proprietary colonies by the Proprietor) who is his representative or deputy; they also have courts of justice of their own, from whose decisions an appeal lies to the king and council here in England. Their general assemblies, which are their house of commons, together with their council of state, being their upper house, with the concurrence of the king, or his representative the governor, make laws suited to their own emergency. Such is the account given by *Blackstone* in his *Com.* 1 V. 108.

As to the appeal, it may not be improper to observe, that we conceive 'tis only in the nature of a reference, by way of arbitration; the parties entering into bond in America, to abide by the determination of the king in council here, as the editor (*J. M.*) hath been informed by a gentleman well acquainted with the subject.

Charter-land, (*terra per chartam*) Is such as a man holds by charter, that is by evidence in writing otherwise called freehold. *Anno* 19 H. 7. cap. 13. This in the time of the Saxons was called *bockland*, which was held (according to *Lambard*) with more commodious and easy conditions than *fokland* was, i. e. lands held without writing; because that was *hereditaria, libera atque immunis*; whereas, *fundus sine scripto censum pensabat annuum, atque officiorum quadam servitute est obligatus: priorem viri plerumque; nobiles, atque ingenui; posteriorem rustici fere & pagani possidebant: illam nos vulgo freehold & per chartam; hanc ad voluntatem domini appellamus.* *Lamb.* Vide *Black. Com.* 2 V. 90.

Charter-party, (*Lat. charta partita, Fr. chartre parti, i. e.* a deed or writing divided) Is what among merchants and sea-faring men we commonly call a *pair of indentures*, containing the covenants and agreements made between them, touching their merchandise and maritime affairs. 2 *Inst.* 673. And *charter-parties* of affreightment settle agreements, as to the cargo of ships, and bind the master to deliver the goods in good condition at the place of discharge, according to agreement; and the master sometimes obliges himself, ship, tackle and furniture, for performance.

The Common law construes *charter-parties*, as near as may be, according to the intention of them, and not according to the literal sense of traders, or those that merchandise by sea, but they must be regularly pleaded. In covenant by *charter-party*, that the ship should return to the river of *Thames*, by a certain time, *dangers of the sea excepted*, and after in the voyage, and within the time of the return, the ship was taken upon the sea by pirates, so that the master could not return at the time mentioned in the agreement; it was adjudged that this impediment was within the exception of the *charter-party*, which extends as well to any danger upon the sea by pirates and men of war, as dangers of the sea by shipwreck, tempest, &c. *Stile* 132. 2 *Roll. Abr.* 248.

A ship is freighted at so much *per month* that she shall be out, covenanted to be paid after her arrival at the port of *London*; the ship is sent away coming up from the *Downs*, but the lading is all preserved, the freight shall in this case be paid; for the money becomes due monthly by the contract, and the place mentioned is only to ascertain where the money is to be paid, and the ship is intitled to wages, like a mariner that serves by the month, who if he dies in the voyage, his executors are to be answered *pro rata*. *Molloy de Jur. Maritim.* 260. If a part-owner of a ship refuse to join with the other owners in setting out of the ship, he shall not be intitled to his share of the freight; but by the course of the admiralty, the other owners ought to give security if the ship perish in the voyage, to make good to the owner standing out his share of the ship. *Sir Lionel Jenkins*, in a case of this nature, certified that by the law marine and course of the admiralty, the plaintiff was to have no share of the freight; and that it was so in all places, for otherwise there would be no navigation. *Lex Mercat.* 100. See *Freight*.

Forms of *charter-parties* of affreightment are sold ready printed.

Chart's Reddendis. Is a writ which lies against him that hath charters of feoffment entrusted to his keeping, and refuseth to deliver them. *Reg. Orig.* 159.

Chafe, (*Fr. chaffe*) In its general signification is a great quantity of woody ground lying open, and privileged for wild beasts and wild fowl: and the beasts of *chafe* properly extend to the buck, doe, fox, &c. and in common and legal sense to all the beasts of the forest. 1 *Inst.* 233. But if one have a *chafe* within a forest, and he kill or hunt any stag or red deer, or other beasts of the forest, he is fineable. 1 *Jones's Rep.* 278.

A *chafe* is of a middle nature between a forest and a park, being commonly less than a forest, and not endowed with so many liberties, as the courts of attachment, swainmote, and justice-seat; though of a larger compass, and stored with greater diversity both of keepers, and wild beasts or game, than a park. A *chafe* differs from a forest in this, because it may be in the hands of a subject, which a forest in its proper and true nature cannot; and from a park, in that it is not enclosed, and hath a greater compass, and more variety of game, and officers likewise. *Crompt.* in his *Jurisd.* fol. 148. says a forest cannot be in the hands of a subject, but it forthwith loseth its name, and becomes a *chafe*: but fol. 197. he says, a subject may be lord and owner of a forest, which though it seems a contradiction, yet both sayings are in some sort true; for the king may give or alienate a forest to a subject, so as when it is once in the subject, it loseth the true property of a forest, because the courts called the justice-seat, swainmote, &c. do forthwith vanish, none being able to make a Lord Chief Justice in *Eyre* of the forest, but the king, yet it may be granted in so large a manner, as there may be attachment, swainmote, and a court equivalent to a justice-seat. *Manwood, part 2. c. 3. 4.*

A forest and a *chafe* may have different officers and laws: every forest is a *chafe*, & quiddam amplius; but any *chafe* is not a forest. A *chafe* is *ad communem legem*, and not to be guided by the forest laws; and it is the same of parks. 4 *Inst.* 314. A man may have a free *chafe* as belonging to his manor in his own woods, as well as a warren and a park in his own grounds; for a *chafe*, warren and park are collateral inheritances, and not issuing out of the soil; and therefore if a person hath a *chafe* in other men's grounds, and after purchaseth the grounds, the *chafe* remaineth. *Ibid.* 318. If a man have freehold in a free *chafe*, he may cut his timber and wood growing upon it, without view or licence of any; though it is not so of a forest: but if he cut so much that there is not sufficient for covert, and to maintain the game, he shall be punished at the suit of the king: and so if a common person hath a *chafe* in another's soil, the owner of the soil cannot destroy all the covert, but ought to leave sufficient thereof, and also browewood, as hath been accustomed. 11 *Rep.* 22. And it has been adjudged, that within such *chafe*, the owner of the soil by prescription may have common for his sheep, and warren for his conies, but he cannot furchase with more than has been usual, nor make coney-burrows in other places than hath been used. *Ibid.* If a free *chafe* be inclosed, it is said to be a good cause of seizure into the king's hands. It is not lawful to make a *chafe*, park or warren, without licence from the king under the broad seal. See *Black. Com.* 2 V. 38, 416. 4 V. 408.

Chasoy, An hunting horse.—*Dederunt mihi unum chasorem, &c.* *Leg. Will.* 1. cap. 22. And in another chapter it is written *cacorem*.

Chastellaine. A noble woman: *quasi castelli domina*.

Chastity. The Roman law (*Ff.* 48, 9. 1.) justifies homicide in defence of the chastity either of one's self or relations; and so also, according to *Selden*, (de Legib. Hebræor. l. 4. c. 3.) stood the law in the Jewish Republic. The English law likewise justifies a woman, killing one who attempts to ravish her. (*Bac. Elem.* 34. 1 *Hawk. P. C.* 71.) So the husband or father may justify killing a man, who attempts a rape upon his wife or daughter; but not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other. 1 *Hal. P. C.* 485, 6. And without doubt the forcibly attempting a crime, of a still more detestable nature, may be equally resisted by the death of the unnatural aggressor. For the one uniform principle, that runs through our own and all other laws, seems to be this; that where a crime, in itself capital, is endeavoured

to be committed by force, it is lawful to repel that force by the death of the party attempting. *Black. Com.* 4 *V.* 181.

Chattels, or **Catals**, (*catalla*) Comprehend all goods moveable and immoveable, except such as are in nature of freehold, or parcel of it. The *Normans* call moveable goods only, *chattels*; but this word by the Common law extends to all moveable and immoveable goods: and the *Civilians* denominate not only what we call *chattels*, but also land, *bona*. But no estate of inheritance or freehold, can be termed in our law goods and chattels; though a lease for years may pass as goods. *Chattels* are either *personal* or *real*: *personal*, as gold, silver, plate, jewels, household-stuff, goods and wares in a shop, corn sown on the ground, carts, ploughs, coaches, saddles, &c. Cattle, &c. as horses, oxen, kine, bullocks, sheep, pigs, and all tame fowls and birds, swans, turkeys, geese, poultry, &c. and these are called *personal* in two respects, one because they belong immediately to the person of a man; and the other, for that being any way injuriously withheld from us, we have no means to recover them but by *personal* action. *Chattels real* are such as either appertain not immediately to the person, but to some other thing by way of dependency, as a box with charters of land, &c. or such as are issuing out of some immoveable thing to a person, as a lease, or rent for term of years: and *chattels real* concern the *realty*, lands and tenements, leases for years, interest in advowsons, in statutes-merchant, &c. And also include corn cut, trees cut, &c. 1 *Inst.* 118. *Noy's Max.* 49. But deeds relating to a freehold, obligation, &c. which are things in action, are not reckoned under goods and *chattels*; though if writings are pawned, they may be *chattels*: and money hath not been accounted goods or *chattels*; nor are hawks or hounds such, being *feræ naturæ*. 8 *Rep.* 33. *Terms de Ley* 103. *Kitch.* 32.

Personal estate is usually taken for money, goods, bonds, leases for years, &c. And *chattels personal* are not only moveable and immoveable, but some are animate, as horses, &c. and others inanimate, as beds, &c. A collar of SS. garter of gold, buttons, &c. belonging to the dress of a knight of the garter, are not jewels to pass by that name in *personal* estate, but ensigns of honour. *Dyer* 59. The law will not suffer the devise of a *personal chattel*, with a remainder over; but a devise of a *chattel real*, with remainder over, hath been in some cases adjudged good in equity. 2 *And.* 185. The use of *personal* things, such as plate, jewels, &c. may be given to one, and the remainder to another; and in that case the property is veiled in the last devisee. *Owen* 33. But a devise of the use of money has been adjudged a devise of the money itself; and so a devise of the use of books, medals, &c. and limitations over have been declared void. 1 *Chan. Rep.* 129. 2 *Chan. Rep.* 167.

Chattels personal are, immediately upon the death of the testator, in the actual possession of the executor, as the law will adjudge, though they are at never so great a distance from him; *chattels real*, as leases for years of houses, lands, &c. are not in the possession of the executor till he makes an entry, or hath recovered the same; except there be a lease for years of tithes, where no entry can be made. 1 *Nelf. Abr.* 437. Leases for years, tho' for 1000 years; leases at will, estates of tenants by *elegit*, &c. are *chattels*, and shall go to the executor: all obligations, bills, statutes, recognizances and judgments, shall be as a *chattel* in the executor, &c. *Bro. Obl.* 18. *F. N. B.* 120.

But if one be seised of land in fee on which trees and grafs grow, the heir shall have these, and not the executor; for they are not *chattels* till they are cut and severed, but parcel of the inheritance. 4 *Rep.* 63. *Dyer* 273. The game of a park with the park, fish in the pond, and doves in the house with the house, go to the heir, &c. and are not *chattels*: though if pigeons, or deer, are tame, or kept alive in a room; or if fish be in a trunk, &c. they go to the executors as *chattels*. *Noy* 124. 11 *Rep.* 50. *Kelw.* 88. An owner of *chattels* is said to be seised of them; as of freehold the term is, that a person is seised of the same.

Chance-medley, Is of pretty much the same import with *chance-medley*. The former, in its etymology, signifies an affray in the heat of blood, or passion; the latter, a casual affray. The latter is in common speech too often erroneously applied to any manner of homicide by misadventure; whereas it appears by the *Stat.* 24 *H.* 8. c. 5. and our ancient books, (*Staundy. P. C.* 16.) that it is properly applied to such killing, as happens in self-defence, upon sudden rencounter. 3 *Inst.* 55. 57. *Foster* 275. 6. *Black. Com.* 4 *V.* 184.

Chaumpert, A kind of tenure mentioned *Pat.* 35 *Ed.* 3. To the hospital of *Bowes* in the isle of *Guernsey*. *Blount*.

Chaunter, A singer in a cathedral. See *Chanter*.

Chauntry-rents, Are rents paid to the crown by the servants or purchasers of *chauntry-lands*. 22 *Car.* 2. c. 6.

Chats, Are deceitful practices in defrauding or endeavouring to defraud another of his known right, by means of some artful device, contrary to the plain rules of common honesty; as by playing with false dice; or by causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written; or by persuading a woman to execute writings to another as her trustee, upon an intended marriage, which in truth contained no such thing, but only a warrant of attorney to confess a judgment; or by suppressing a will; and such like. 1 *Hawk.* 188.

Stat. 33 *H.* 8. cap. 1. *sect.* 2. If any person falsely and deceitfully get into his hands or possession any money or other things of any other persons by colour of any false token, &c. being convicted, shall have such punishment by imprisonment, setting upon the pillory, or by any corporal pain (except pains of death) as shall be adjudged by the persons before whom he shall be convicted. See the Statute.

Lord Coke observes hereupon, that for this offence the offender cannot be fined, but corporal pain only inflicted. 3 *Inst.* 133.

But Mr. Serjeant *Hawkins* (p. 188.) observes, that a person has been fined 500*l.* for this offence.

As there are frauds which may be relieved civilly, and not punished criminally (with the complaints whereof the courts of equity do generally abound); so there are other frauds, which in a special case may not be helped civilly, and yet shall be punished criminally. Thus, if a minor goes about the town, and pretending to be of age, defrauds many persons, by taking credit for a considerable quantity of goods, and then insuing on his menage; the persons injured cannot recover the value of their goods, but they may indict and punish him for a common cheat. *Barl.* 100.

By 30 *Geo.* 2. c. 24. Persons convicted of obtaining money or goods by *false pretences*, or of sending threatening letters in order to extort money or goods, may be punished by fine and imprisonment, or by pillory, whipping, or transportation. Vide *Black. Com.* 4 *V.* 157. 173.

Exchequer-Roll, Is a roll or book containing the names of such as are attendants on, and in pay to the King or other great personages, as their household servants. *Stat.* 19 *Car.* 2. cap. 1. It is otherwise called the *chequer roll*, and seems to take its etymology from the *Exchequer*. 14 *Hen.* 8. c. 13.

Chelindra, A sort of ship.—*Obligavit se imperator ad 100 chelindras et 50 galleas ducendas ultra mare.* *Mat. Paris*, anno 1238.

Chelsea A College to be erected at *Chelsea*, and a trench made to convey water from the river *Lee* to *London*, to maintain the same, by *Stat.* 7 *Jac.* 1. c. 9. By late statutes concerning the army, one day's pay in a year is to be deducted out of every officer and soldier's pay, for *Chelsea Hospital*. *Stat.* 1. *Will.* 4. *Ann.* and 1. *Geo.* 1. and 2.

Chell, An uncertain quantity of merchandize, wine, &c.

Chesler. Where felony, &c. is committed by any inhabitant of the palatine of *Chesler*, in another county, process

process shall be made to the *exigent* where the offence was done, and if the offender then fly into the county of *Chester*, the outlawry shall be certified to the officers there. 1 H. 4. c. 18. The sessions for the county palatine of *Chester*, is to be kept twice in the year, at *Michaelmas* and *Easter*: And justices of peace, &c. in *Chester* shall be nominated by the Lord Chancellor. Stat. 27 H. 8. c. 5. 3. H. 8. c. 43. Recognizances of statutes merchant may be acknowledged, and fines levied before the Mayor of *Chester*, &c. for lands lying there. 2 & 3 Ed. 6. c. 31. But no writ of protection shall be granted in the county palatine. See County. Palatine. And Black. Com. 1 V. 116. 3 V. 78.

Chebage, (*chevadium*, from the Fr. *chef*, i. e. *caput*.) Is a tribute or sum of money formerly paid by such as held lands in villenage to their lords in acknowledgment, and was a kind of head or poll money. Of which *Bracton*, lib. 1. cap. 10. says thus; *Chevadium dicitur recognitio in signum subjectionis & domini de capite suo*. *Lambard* writes this word *chivage*; but it is more properly *chiefage*: and anciently the *Jews*, whilst they were admitted to live in *England*, paid *chevage* or poll money to the King, as appears by Pat. 8 Ed. 1. par 1. It seems also to be used for a sum of money, yearly given to a man of power for his protection, as a chief head or leader: but the Lord *Coke* says, that in this signification, it is a great misprision for a subject to take sums of money, or other gifts yearly of any, in name of *chevage*, because they take upon them to be their chief heads or leaders. Co. Litt. 140.

Chebantia, A loan or advance of money upon credit; Fr. *chavarice*, goods, stock.—*Idem prioratus pene destructus, & possessionis sue ad plurimos terminos pro plurimis chebantis alienata existunt*. Mon. Ang. Tom. 1. pag. 629.

Cheberil, (*cheverillus*) A young cock, or cockling. Pat. 15 H. 3.

Chebistance, (from the Fr. *chevir*, i. e. *Venir a chief de quelque chose*, to come to the head or end of a business) Signifies an agreement or composition made; an end or order set down between a creditor or debtor; or sometimes an indirect gain in point of usury, &c. In our statutes it is often mentioned, and most commonly used for an unlawful bargain or contract. Stat. 37 Hen. 8. c. 9. 13 Eliz. c. 5 & 8. 21 Jac. 1. c. 17. and 12 Car. 2. c. 13. See Black. Com. 2 V. 474.

Chebitia, and **Chebitia**, Are heads of ploughed lands, *Novem acras terræ cum chevificis ad ipsas pertinentibus*. Mon. Angl. Tom. 2. f. 116.

Chief Rents, The rents of freeholders of manors often so called, i. e. *reditus capitales*.—They are also denominated *quit-rents*, *quieti redditus*; because thereby the tenant goes quit and free of all other services. Black. Com. 2 V. 42.

Chief Pledge, (*pligius vel vas capitalis*) Mentioned 20 Hen. 6. c. 8. See *Borough-head* and *Borough-holder*.

Chief (Tenants in) Tenants in *capite*, holding immediately under the King, in right of his crown and dignity. Black. Com. 2 V. 60.

Children, Are in law a man's issue begotten on his wife. In case land be given by will to a man and his children, who has such alive, the devisee takes only an estate for life; but if there be no child living, it is held to be an estate-tail. 1 Vent. 214, 225. *See qu.* for the intent of the testator should be considered. A devise to one's children. *prima facie*, refers only to such as are alive at the time of making the will; though were the same to children living at his death, a child in *ventre sa mere*, may be looked upon as living. 1 Peer Williams 244, 342. Also a son, with which a wife is *priviment ensent*, is adjudg'd living at the time of the testator's death, to prevent an estate going over to another, &c. Ibid. 486. If a sum of money is given in trust for the children of another person, and he had only one child and several grand-children, the child only shall take; yet it is said if such person had not any child living, the grandchildren might have taken by the name of children. 2 Vern. 106. Abr. Caf. Eq. 202. A father being about to make his will, and thereby intending to have made provisions for his younger children; his son and heir dissuaded him from

doing it, and promised that he would take care his brothers and sisters should have the provisions; upon which the father forbore making them, and they were decreed in Chancery against the heir; his promise being by fraud. *Preced. Canc.* 4. And where a person going to suffer a recovery, in order to provide for younger children, was kept from it by the heir in tail, he promising to do for them himself; it has been ruled he should do it after the father's death. Ibid. 5. See *Administrator*. See also *Posthumous*.

Childwit, (*Sax.*) Is a fine or penalty of a bond-woman unlawfully begotten with child. *Prior habeat gersumam de nativa sua impregnata sine licentia maritandi*. Ex. Reg. Priorat' de *Cokestord*. *Cowel* says, it signifieth a power to take a fine of your bond-woman gotten with child without your consent: and within the manor of *Writtle in Com. Essex*, every reputed father of a base child pays to the lord for a fine 3s. 4d. where it seems to extend as well to free as bond-women; and the custom is there called *childwit* to this day.

Chimin, (Fr. *chemin*, i. e. *via*.) In law phrase is a way; which is of two sorts; the King's highway, and a private way. The King's highway, (*chiminus regius*) is that in which the King's subjects, and all others under his protection, have free liberty to pass, though the property of the soil where the way lies, belongeth to some private person. A private way is that in which one man or more have liberty to pass through the ground of another, by prescription or charter; and this is divided into *chimin in gross*, and *chimin appendant*. *Chimin in gross* is where a person holds a way principally and solely in itself; *chimin appendant* is that way which a man hath as appurtenance to some other thing: as if he rent a close or pasture, with covenant for ingress and egress through some other ground in which otherwise he might not pass. *Kitch.* 117. Co. Litt. 56. It is said a way may not be claimed by prescription as appendant or appurtenant to an house, because it is only an easement and no interest; but a person may prescribe for a way from his house through a certain close, &c. to church, though he himself hath lands next adjoining to his said house, through which of necessity he must first pass; for the general prescription shall be applied only to the lands of others. *Yelu.* 159. 1 Danv. Abr. 785. See *Highway*.

Chiminage, (*chiminagium*) Is toll due by custom for having a way through a forest; and in ancient records it is sometimes called *pedagium*. *Crompt. Jurisd.* 189. Co. Litt. 56.—*Telonium quod in forestis exigebant forestarii a plaustris & equis oneris causa eo venientibus*. Chart. Forest. cap. 14. *Et nullus forestarius qui non sit forestarius de feodo, &c. capiat chiminagium, &c.*

Chimney-Money, Otherwise called *hearth-money*, a duty to the crown on houses. By statute 14 Car. 2. cap. 2. Every fire-hearth and stove of every dwelling or other house within *England* and *Wales* (except such as pay not to church and poor) shall be chargeable with 2s. per annum, payable at *Michaelmas* and *Lady-Day* to the King and his heirs, and successors, &c. which payment was commonly called *chimney-money*. This tax being much complained of, as burthensome to the people, hath been long since taken off, and others imposed in its stead; among which that on windows of houses, laid 7 & 8 W. 3. c. 18. 5 Ann. c. 13. 8 Ann. c. 4. 20 Geo. 2. c. 3. &c. &c. has by some persons been esteemed almost equally grievous. See *Fuage*.

Chimnies. What duty payable for small and large backs of chimnies, 2 Will. & Ma. sess. 2. c. 4.

China and Japan wares, To what duties liable, &c. 3 & 4 Ann. c. 4. 7 Geo. 1. st. 1. c. 21.

Chipp, Cheap, Chipping, Signifies the place to be a market-town, as *Chippenhaw*, &c. *Blount*.

Chippingabel, or *cheapingavel*, Toll for buying and selling.

Chirgemot, *Circgemot chircgemot*, (*Sax.*) *forum ecclesiasticum*.—*Quousque chirgemot discordantes inveniunt, vel amore congregat, vel sequestret judicio*. Leg. Hen. c. 8. 4 Inst. 321.

Chirograph, (*chirographum*, or *scriptum chirographatum*.) Any publick instrument of gift or conveyance, attested by the subscription and crosses of witnesses, was in

the time of the Saxons called *chirographum*; which being somewhat changed in form and manner by the Normans, was by them stiled *charta*: in following times, to prevent frauds and concealments, they made their deeds of mutual covenant in a *script* and *rescript*, or in a part and counter-part, and in the middle between the two copies, they drew the capital letters of the alphabet, and then tallied or cut asunder in an indented manner, the sheet or skin of parchment; which being delivered to the two parties concerned, were proved authentick by matching with and answering to one another: and when this prudent custom had for some time prevailed, then the word *chirographum* was appropriated to such bipartite writings or indentures. Anciently when they made a *chirograph* or deed, which required a counter-part, they ingrossed it twice upon one piece of parchment contrariwise, leaving a space between, in which they wrote in great letters the word *Chirograph*; and then cut the parchment in two, sometimes even, and sometimes with indenture, through the midst of the word: this was afterwards called *dividenda*, because the parchment was so divided or cut; and this said the first use of these *chirographs* was in Henry the Third's time.

Chirograph was of old used for a fine; the manner of ingrossing whereof, and cutting the parchment in two pieces, is still observed in the *chirographer's office*: but as to deeds, that was formerly called a *chirograph*, which was subscribed by the proper hand-writing of the vendor or debtor, and delivered to the vendee or creditor: and it differed from *syngraphus*, which was in this manner, *viz.* Both parties, as well the creditor as debtor, wrote their names and the sum of money borrowed, on paper, &c. and the word *Syngraphus* in capital letters in the middle thereof, which letters were cut in the middle, and one part given to each party, that upon comparing them (if any dispute should arise) they might put an end to the difference. The *chirographs* of deeds have sometimes concluded thus,—*Et in hujus rei testimonium huic scripto in modum chirographi confecto vicissim sigilla nostra apposuimus.* The *chirographs* were called *charta divisa*, *scripta per chirographum divisa*, *charta per alphabetum divisa*; as the *Chirographs* of all fines are at this time. *Kennet's Antiq. 177. Mon. Ang. tom. 2. p. 94.*

Chirographer of fines, (*chirographus finium* & *concordiarum*, of the Greek *Χειρογράφος*, a compound of *Χειρ*, *manus* a hand, and *γράφω*, *scribo*, to write, a writing of a man's hand) Signifies that officer in the *Common Pleas* which ingrosseth fines acknowledg'd in that court into a perpetual record, after they are examined and passed in the other offices, and that writes and delivers the indentures of them to the party: and this officer makes out two indentures, one for the buyer, another for the seller; and also makes one other indented piece, containing the effect of the fine, which he delivers to the *custos brevium*, which is called the *foot of the fine*. The *chirographer* likewise, or his deputy, proclaims all the fines in the court every term, according to the statute, and endorses the proclamation upon the backside of the foot thereof; and always keeps the writ of covenant, and note of the fine: and the *chirographer* shall take but 4*s.* fee for a fine, on pain to forfeit his office, &c. *Stat. 2 Hen. 4. c. 8. 23 Eliz. c. 3. 2 Inst. 468.*

Chirurgion. See *Surgeon*.

Chivalry, (*servitium militare*) Comes from the Fr. *chevalier*, and in our law is used for a tenure of lands by knights service; whereby the tenant was bound to perform service in war unto the King, or the mesne lord of whom he held by that tenure. And *chivalry* was either *general* or *special*; *general*, where it was only in the feoffment that the tenant held *per servitium militare*, without any specification of serjeanty, *escuage*, &c. *Special*, when it was declared particularly by what kind of knight-service the land was held.

For the better understanding of this tenure, it hath been observed, that there is no land but is holden mediately or immediately of the crown by some service; and therefore all our freeholds that are to us and our heirs, are called *feuda* or *feoda*, fees, as proceeding from the King, for some small yearly rent, and the performance of such services as were originally laid upon the land at

the donation thereof; for as the King gave to the great nobles, his immediate tenants, large possessions for ever, to hold of him for this or that service or rent; so they in time parcelled out to such others as they liked the same lands, for rents and services as they thought good: and these services were by *Littleton* divided into two sorts, *chivalry* and *socage*; the first whereof was martial and military, the other rusticall; *chivalry* therefore was a tenure of service, whereby the tenant was obliged to perform some noble or military office unto his lord, being of two kinds, either *regal*, that is held only of the King, or *common*, where held of a common person: that which might be held only of the King was called *franktenure* or *serjeantia*, and was again divided into *grand* and *petit serjeanty*; the *grand serjeanty* was where one held lands of the King by service, which he ought to do in his own person, as to bear the King's banner or spear, to lead his host, or to find a man at arms to fight, &c. *Petit serjeanty* was when a man held lands of the King, to yield him annually some small thing towards his wars, as a sword, dagger, bow, &c.

Chivalry that might be holden of a common person, was termed *scutagium*, *escuage*, that is service of the shield, which was either uncertain or certain; *escuage uncertain* was likewise twofold, *first*, where the tenant was bound to follow his lord, going in person to the king's wars, either himself or sending a sufficient man in his place, there to be maintained at his cost so long as was agreed upon between the lord and his first tenant, at the granting of the fee; and the days of such service seem to have been rated by the quantity of land so holden; as if it extended to a whole knight's fee, then the tenant was to follow his lord forty days; and if but to half a knight's fee, then twenty days; if a fourth part, then ten days, &c. and the other kind of this *escuage* was called *castleward*, where the tenant was obliged by himself or some other, to defend a castle, so often as it should come to his turn; and there were called *escuage uncertain*; because it was uncertain how often a man should be called to follow his lord to the wars, or to defend a castle, and what his charge would be therein.

Escuage certain was where the tenure was set at a certain sum of money to be paid in lieu of such service; as that a man should pay yearly for every knight's fee twenty shillings, for half a knight's fee ten shillings, or some like rate; and this service, because it is drawn to a certain rent, groweth to be of a mixt nature, not merely *socage*, and yet *socage* in effect, being now neither personal service nor uncertain, *Littleton*. The tenure called *chivalry* had other condition annexed to it: but there is a great alteration made in these things by the *Stat. 12 Car. 2. c. 24.* whereby tenures by *knights service* of the king, or any other person, in *capite*, &c. and the fruits and consequences thereof are taken away and discharged; and all tenures are to be construed and adjudged to be free and common *socage*, &c.

See as to the court of chivalry, *Black. Com. 3 V. 68. 4 V. 264.* As to its jurisdiction, *3 V. 103. 4 V. 264.* As to guardian in chivalry, *1 V. 462.* As to tenure in chivalry, *2 V. 62.*

Chocolate. See *Coffee*.

Chop-church, (*ecclesiarum permutatio*) Is a word mentioned in a statute of King *Hen. 6.* by the sense of which, it was in those days a kind of trade, and by the judges declared to be lawful: but *Brooke* in his abridgment says, it was only permissible by law: it was without a doubt a nick-name given to those that used to change benefices; as to *chop* and *change* is a common expression. *9 Hen. 6. cap. 65. Vide Litera missa omnibus episcopis, &c. contra Choppe-Churches, anno 1391. Spelm. de Con. vol. 2. p. 642.*

Choral, (*choralis*) Signifies any person that by virtue of any of the orders of the clergy, was in ancient time admitted to sit and serve God in the choir; which in *Latin* is termed *chorus*: and Mr. *Dugdale* in his history of *St. Paul's Church* says, that there were formerly six *Chorals* belonging to that church.

Chorepiscopi, *Suffragan* or *Rural Bishops*, anciently delegated by the prime diocesan; their authority was restrained by some councils, and their office by degrees abolished;

lished; after whom the *Rural Deans* were so commissioned to exercise episcopal jurisdiction, till inhibited by Pope *Alexander the Third*. *Kennet's Paroch. Antiq.* 639.

Chose, (Fr.) A thing; used in the Common law with divers epithets; as *chose local*, *chose transitory*, and *chose in action*. *Chose local* is such a thing as is annexed to a place, as a mill, and the like: and *chose transitory* is that thing which is moveable, and may be taken away, or carried from place to place: *chose in action* is a thing incorporeal, and only a right; as an annuity, obligation for debt, &c. And generally all causes of suit for any debt, duty, or wrong, are to be accounted *chores in action*: and it seems *chose in action* may be also called *chose in suspense*, because it hath no real existence or being, nor can properly be said to be in our possession. *Bro. Tit. Chose in Action*.

When a man can bring an action for some duty, *viz.* debt upon bond, or for rent; or action of covenant, or trespass for goods taken away, or such like; these are *chores in action*: and as they are things whereof a person is not possessed, but is put to his action for recovery of them, they are therefore called *chores in action*. 1 *Lill. Abr.* 264. A person disseises me of land, or takes away my goods; my right or title of entry into the lands, or action and suit for it, and so for the goods, is a *chose in action*: so a debt on an obligation, and power and right of action to sue for the same. 1 *Brownl.* 33. And a condition and power of re-entry into land upon a feoffment, gift or grant, before the performance of the condition, is of the nature of a *chose in action*. *Co. Litt.* 214. 6 *Rep.* 50. *Dyer* 244. If one have an advowson, when the church becomes void, the presentation is but as a *chose in action*, and not grantable: but 'tis otherwise before the church is void. *Dyer* 296. Where a man hath a judgment against another for money, or a statute, these are *chores in action*. An annuity in fee to a man and his heirs, is grantable over: but it has been held, that an annuity is a *chose in action*, and not grantable. 5 *Rep.* 89. *Fitz. Grant*, 45. A *chose in action* cannot be transferred over; nor is it deviseable: nor can a *chose in action* be a satisfaction, as one bond cannot be pleaded to be given in satisfaction for another; but in equity *chores in action* may be assignable; and the King's grant of a *chose in action* is good. *Cro. Jac.* 170, 371. *Chan. Rep.* 169.

When bonds are assigned, it is done with power of attorney to receive and sue in the assignor's name; so that though in this case a *chose in action* is said to be assignable over, yet it amounts to little more than a letter of attorney to sue for the debt. *Wood's Inst.* 282. A man may authorise another to sue for a debt due by specialty in his name, and by agreement promise it to him when recovered; or he may give, grant or assign the writing, and so deprive himself of the means to recover the debt, though such a debt itself being a *chose in action*, cannot be regularly assigned over. 1 *Shep. Abr.* 337. Charters, where the owner of the land hath them in possession, are grantable: a possibility of an interest or estate in a term for years, is near to a *chose in action*, and therefore may not be granted; but a possibility, joined with an interest, may be a grantable chattel. *Co. Litt.* 265. * 4 *Rep.* 66. *Moor Ca.* 1128. And this the law doth provide to avoid multiplicity of suits, and the subversion of justice, which would follow if these things were grantable from one man to another. *Dyer* 30. *Plowd.* 185.

But by release *chores in action* may be released and discharged for ever: but then it must be to parties and privies in the estate, &c. For no stranger may take advantage of things in action; save only in some special cases; as upon the *Stat. 32 Hen. 8. cap. 8. Co. Litt.* 214. *22w.* 9, 85. A *chose in action*, as an obligation, &c. is not within the *Stat. 21 Hen. 8. c. 7.* concerning larceny by servants, in going away with or imbeziling their master's goods, to the value of 40s. And generally these are of no use to any but the owner. *Hawk. P. C.* 92, 93. But see *Stat. 2 Geo. 2. cap. 25.* And *Black. Com.* 2 *V.* 389, 397, 442. 4 *V.* 434.

Chrism A consecration of oil and balsam consecrated by the bishop, and used in the *Papish* ceremonies of baptism, confirmation, and sometimes ordination.

Chrismale, Chrismal, chrifom, the face-cloth, or piece of linen laid over the child's head at baptism, which in ancient times was a perquisite due to the parish priest.—*Mulieres sequentes debent offerre chrismalia infantum, nec chrismalia debent alienari, nec in aliquos usus mitti debent, nisi in usus ecclesie.* *Statut. Egid. Epif. Salisbur. An.* 1256.

Chrismatis denarii, Chrifom-pence, Money paid to the diocesan, or his suffragan, by the parochial clergy, for the *chrism* consecrated by them about *Easter*, for the holy uses of the year ensuing. This customary payment being made in *Lent* near *Easter*, was in some places called *Quadragesimalis*, and in others *Paschalis* and *Easter-pence*. The bishop's exaction of it was condemn'd by Pope *Pius XI.* for simony and extortion; and thereupon the custom was released by some of our *English* bishops: As *Robert* bishop of *Lincoln*, by express charter.—*Sciatis nos remississe clericis omnibus infra episcopatum Lincolniensem paschalem consuetudinem quam chrismatis denarios vocant.*—*Cartular. Mon. de Bernedy, MS. Cotton.*

Christianitatis Curia, The court christian, or ecclesiastical judicature. See *Court Christian*.

Christianity. As *Dr. Robertson* very justly observes, with respect to *christianity*, when first introduced into *Europe*, it was corrupted. The people did not receive it pure. The presumption of men, had added to the simple and instructive doctrines of *christianity*, the theories of a vain philosophy, that attempted to penetrate into mysteries, and to decide questions which the limited faculties of the human mind are unable to comprehend or to resolve. *Hist. Emp. C. V. 1 V.* 73, 4. However its influence was very great in freeing mankind from the bondage of the feudal policy. *Vide ib.* 208, 9. As to offences against *christianity*, see *Black. Com.* 4 *V.* 44. *Christianity* is part of the law of *England*. *Black. Com.* 4 *V.* 59.

Christians, (primitive) Were averse to the principles of toleration. The reason, as mentioned by *Dr. Robertson*, was, when the christian revelation declared one supreme Being to be the sole object of religious veneration, prescribed the form of worship most acceptable to him, whoever admitted the truth of it held, of consequence, every other mode of religion to be absurd and impious, (which was not the case among the *Heathens*). Hence the zeal of the first converts to the *christian* faith in propagating its doctrines, and the ardour with which they laboured to overturn every other form of worship. *Hist. Emp. C. V. 3 V.* 334.

Church, (ecclesia) Is a temple or building consecrated to the honour of God and religion, and anciently dedicated to some saint, whose name it assumed; or it is an assembly of persons united by the profession of the same christian faith, met together for religious worship; and if it hath administration of the sacraments and sepulture, it is in law adjudged a church. If the King founds a church, he may exempt it from the ordinary's jurisdiction; but 'tis otherwise in case of a subject.

The manner of founding churches in ancient times was, after the founders had made their applications to the bishop of the diocese, and had his licence; the bishop or his commissioners set up a cross, and set forth the church-yard where the church was to be built; and then the founders might proceed in the building of the church, and when the church was finished, the bishop was to consecrate it; and then, and not before, the sacraments were to be administered in it. *Stillingfleet's Ecclesiast. Cases*. But by the Common law and custom of this realm, any person who is a good christian, may build a church without licence from the bishop, so as it be not prejudicial to any ancient churches; though the law takes no notice of it as a church, till consecrated by the bishop, which is the reason why church and no church, &c. is to be tried and certified by the bishop. And in some cases, though a church has been consecrated, it must be consecrated again; as in case any murder, adultery, or fornication be committed in it, whereby it is defiled; or if the church be destroyed by fire, &c.

The ancient ceremonies in consecrating the ground on which the church was intended to be built, and of the church

Church itself after it was built, were thus : when the materials were provided for building, the bishop came in his robes to the place, &c. and having prayed, he then perfumed the ground with incense, and the people sung a collect in praise of that saint to whom the *church* was dedicated ; then the corner-stone was brought to the bishop, which he crossed, and laid for the foundation : and a great feast was made on that day, or on the saint's day to which it was dedicated ; but the form of consecration was left to the discretion of the bishop, as it is at this day.

Some bishops, who have consecrated *churches*, on entering into them have pronounced the place to be holy, *In the name of the Father, &c.* then with their retinue of grave divines went round the *church*, repeating the hundredth psalm, and a form of prayer, concluding, *We consecrate this church, and set it apart to thee, O Lord Christ, as holy ground, &c.* After which, turning to the communion table, and having bowed to it several times, they pronounced blessings on those who should be benefactors, and curses against those who should prophane that place : and then a sermon hath been preached, and the sacrament administered with more than common ceremony of bowing, kneeling, &c.

A *church* in general consists of three principal parts, that is, the belfrey or steeple, the body of the *church* with the isles, and the chancel : and not only the freehold of the whole *church*, but of the *church-yard*, are in the parson or rector ; and the parson may have an action of trespass against any one that shall commit any trespass in the *church* or *church-yard* ; as in the breaking of seats annexed to the *church*, or the windows, taking away the leads, or any of the materials of the *church*, cutting the trees in the *church-yard*, &c.

The property of the bells, books, and other ornaments, and the goods of the *church*, is in the parishioners ; but the custody of them is in the church-wardens, who may maintain action of trespass against such as shall wrongfully take them away. 1 *Roll. Rep.* 255. If a man erect a pew in the *church*, or hang up a bell, &c. therein, they therefore become *church* goods, though not expressly given to the *church* ; and he may not afterwards remove them. The parson only is to give licence to bury in the *church* ; but for defacing a monument in a *church*, &c. the builder or heir of the deceased may have an action. 2 *Cro.* 367. And a man may be indicted for digging up the graves of persons buried, and taking away their burial dresses, &c. The property whereof remains in the party who was the owner when used, and 'tis said an offender was found guilty of felony in this case, but had his clergy. *Co. Lit.* 113.

Though the parson hath the freehold of the *church*, he hath not the fee-simple, which is always in abeyance ; but in some respects the parson hath a fee-simple qualified. *Litt.* 644, 645. The use of the body of the *church*, and the seats fixed to the freehold, is common to all the parishioners that pay to the repairs thereof. The chancel of the *church* is to be repaired by the parson, unless there be a custom to the contrary ; and for these repairs, the parson may cut down trees in the *church-yard*, but not otherwise. 35 *Ed.* 1. The church-wardens are to see that the body of the *church* and steeple are in repair ; but not any isle, &c. which any person claims by prescription, to him or his house : concerning which repairs the Canons require every person who hath authority to hold ecclesiastical visitation to view their *churches* within their jurisdictions once in three years, either in person, or cause it to be done ; and they are to certify the defects to the ordinary, and the names of those who ought to repair them ; and these repairs must be done by the church-wardens, at the charge of the parishioners. *Can.* 86. 1 *Mod.* 236. By the Common law, parishioners of every parish are bound to repair the *church* : but by the Canon law, the parson is obliged to do it ; and so it is in foreign countries. 1 *Salk.* 164. In *London* the parishioners repair both the *church* and the chancel. The Spiritual court may compel the parishioners to repair the *church*, and excommunicate every one of them till it be repaired ; but those that are willing to contribute shall be absolved till the greater part agree to a tax, when the excommunica-

tion is to be taken off ; but the Spiritual Court cannot assess them towards it. 1 *Mod.* 194. 1 *Ventr.* 367. For though this court hath power to oblige the parishioners to repair by ecclesiastical censures ; yet they cannot appoint in what sum, or set a rate, for that must be settled by the church-wardens, &c. 2 *Mod.* 8. Where a *church* is so much out of repair, that 'tis necessary to pull it down, in such case, upon a general warning to the parishioners, the major part, meeting, may make a rate for pulling it down, and rebuilding it on the old foundation, and it shall be good ; and if any parishioner refuse to pay his proportion, they may libel against him in the Ecclesiastical Court. 2 *Mod.* 222. And if a *church* be down, and the parish is increased, the greater part of the parish may raise a tax for the necessary enlarging it, as well as the repairing thereof, &c. 1 *Mod.* 237. But in some of our books it is said, that if a *church* falls down the parishioners are not obliged to rebuild it ; though they ought to keep it in due repair. 1 *Ventr.* 35.

In a case where church-wardens made a rate for repairs of the *church*, it was adjudged that the parishioners ought to assess the rate, and they are bound to repair the *church*. 1 *Salk.* 165. *Church* rates for repairs, are to be made by the church-wardens and the major part of the parishioners, which shall bind the others, after a general notice given ; and if the parishioners refuse or neglect to meet, upon such notice ; or if on meeting they refuse to make a rate, then the church-wardens and overseers of the poor may make a rate, and levy it upon the inhabitants, being first confirmed by the ordinary or archdeacon. And rates for repairing of *churches*, &c. are of ecclesiastical cognisance ; and to be recovered in the Ecclesiastical Court : also if a parish is unequally rated, those who are grieved must plead it in the Spiritual Court, being sued there. 1 *Ventr.* 367. 2 *Roll. Abr.* 291.

These rates must be made upon the whole parish, and not on particular persons ; and the charge is in respect of the land, upon every occupier, &c. If the owner lives in another parish, he shall be rated for repairs in the parish where the lands lie, and not where he liveth ; for though the charge is upon the person, yet 'tis in regard of his lands : if he let the same by lease, then he shall be charged in respect of the rent reserved, and the farmer shall make up the rest. 2 *Roll. Rep.* 270.

For *church* ornaments, utensils, &c. the charge is upon the personal estates of the parishioners ; and for this reason persons must be charged for these, where they live : but though generally lands ought not to be taxed for ornaments, yet by special custom, both lands and houses may be liable to it. 2 *Inst.* 489. *Cro. Eliz.* 843. *Hutley* 131. It has been resolved that no man shall be charged for his land to contribute to the *church* reckonings, if he do not reside in the same parish. *Moor* 554. The communion tables are to be kept in repair in *churches*, and covered in time of divine service with a carpet, &c. And the ten commandments to be set up at the east end of every *church* or chapel, and other chosen sentences of scripture upon the walls. And at the common charge shall be provided a strong chest with a hole in the upper part thereof, having three keys, of which one shall be kept in the custody of the parson, and the other two by the church-wardens severally ; which chest is to be fixed in a proper place in the *church*, to collect the alms for the poor ; and the alms shall be quarterly distributed to the poor, in the presence of the chief of the parish. *Can.* 82, 83.

By statute, *churches* not above six pounds a year, in the King's books, by assent of the ordinary, patron and incumbent, may be united : and in cities and corporations, &c. *churches* may be united by the bishop, patrons, and chief magistrates, unless the income exceeds 100*l.* per ann. and then the parishioners are to consent, &c. 37 *Hen.* 8. cap. 21. 17 *Car.* 2. cap. 3.

For compleading of *St. Paul's Church*, and repairing *Westminster Abbey*, a duty of 2*s.* per chaldron on coals is granted ; and the Archbishop of *Canterbury*, Bishop of *London*, Lord Mayor, &c. are appointed Commissioners : and the *church-yard* is to be inclosed, and no persons build thereon, except for the use of the *church*. 8 & 9 *W.* 3. cap. 14. 1 *Ann.* cap. 2. Fifty new *churches* are to be

be built in or near *London* and *Westminster*, for the building whereof a like duty is granted upon coals, and commissioners appointed to purchase lands, ascertain bounds, &c. The rectors of which churches shall be appointed by the crown, and the first churchwardens and vestrymen &c. are to be elected by the commissioners. 9 *Ann. cap. 22*. A duty is also granted on coals imported into *London*, to be appropriated for maintaining of ministers for the fifty new churches. *Stat. 1 Geo. 1. cap. 23*. A minister, by ordination of priesthood, receives authority to preach in the church, though he is nevertheless to have a licence from the bishop of the diocese, &c. If a layman be admitted and instituted to a benefice, and doth administer the sacraments, marry, &c. these acts performed by him during the time he continues parson in fact, are good. 3 *Cro. 775*.

Ministers are to declare their assent to the thirty-nine articles of religion, &c. and are bound to read morning and evening prayers, on every holyday, on the 5th of *November*, the 30th of *January*, and on the 29th of *May*, as on the Lord's Day. And if any minister shall use any form of church service but such as is in the Book of Common Prayer, &c. he shall forfeit a year's profit of his living, and suffer six months imprisonment for the first offence; and for the second offence be deprived &c. *Stat. 1 Eliz. c. 2*. And if a parson, in reading prayers, stand or sit when he is appointed to kneel, or kneel when he should stand, &c. he is punishable by this statute. If any persons deprave the Book of Common Prayer, &c. they shall be imprisoned six months, and forfeit 100 marks. 13 & 14 *Car. 2. cap. 4*. And vide 2 & 3 *Ed. 6. c. 1*.

Every person is to repair to his parish church every Sunday, on pain of forfeiting 1*s.* for every offence; and being present at any form of prayer used contrary to the Book of Common Prayer, is punished with six months imprisonment, &c. 1 *Eliz. cap. 2*. 23 *Eliz. cap. 1*. Persons above sixteen years of age, who absent from church above a month, are to forfeit 20*l.* per month, &c. But protestant dissenters are exempted from penalties, by 1 *W. & M. c. 18*. And a person is not so bound to go to his parish church, but upon reasonable excuse he may go to another; of which excuse the spiritual courts are judges. 2 *Roll. Rep. 438, 455*. No man shall cover his head in the church in time of divine service, except he have some infirmity, and then with a cap; and all persons are to kneel and stand, &c. as directed by the Common Prayer during service. *Can. 18*.

No ill language is to be used, or noise made in churches or church-yards; and persons striking others there, are to be excommunicated, and lose one of their ears: and a man may not lawfully return blows in his own defence in these cases. 5 & 6 *Ed. 6. cap. 4*. Disturbing ministers officiating divine service, incurs three months imprisonment, and a forfeiture of 20*l.* by *Stat. 1 M. cap. 3*. and 1 *W. & M. c. 18*. Any person may be indicted for indecent or irreverent behaviour in the church; and those that offend against the acts of uniformity, are punishable either by indictment upon the statute, or by the ordinary, &c. See likewise the following statutes concerning this head, *Mag. Chart. 9 Hen. 3. c. 1*.—5 *Ed. 3*.—13 *Ed. 1. stat. 2. c. 6*.—3 *Ed. 1. stat. 2*.—21 *Ed. 1. c. 3*.—9 *Ed. 2. stat. 1. c. 10*.—50 *Ed. 3. c. 5*.—1 *Ric. 2. c. 5*. & 15 *R. 2. c. 15*.—For statutes concerning the churches of particular places, see the Table to the Statutes at Large, quarto edition, title Churches.

An indictment for not coming to church.

Wilts, ff. **T**HE jurors, &c. That A. B. of M. in the said county, gent. on the day of, &c. in the year of the reign, &c. being of the age of sixteen years and upwards, did not repair to his parish church of M. aforesaid, or to any other church, chapel, or usual place of common prayer and divine service, at any time within the space of one month next after the said day of, &c. in the year above-mentioned, but did willingly and obstinately, without any lawful or reasonable excuse, forbear to do the same, contrary to the form of the statute in such case made and provided, in con-

tempt of our said lord the now king and his laws, and against the peace, &c.

Church-wardens, (ecclesie guardiani) Are ancient officers chosen yearly in *Easter* week, by the minister and parishioners of every parish, to look to and take care of the church and church-yard, and the things belonging to the same.

Under this head it will be proper to consider,

- I. Of the election of church-wardens, and of exemptions from being elected.
- II. Of their interest in the things belonging to the church.
- III. Of their power and duty.
- IV. Of their accounts.

I. As to their election.

They are to be chosen by the joint consent of the parishioners and minister; and by custom the minister may choose one, and the parishioners another; or by custom the parishioners alone may elect both, though it be against the canon. 1 *Vent. 267*. For

By *Can. 89*. All church-wardens or questmen in every parish, shall be chosen by the joint consent of the minister and the parishioners, if it may be; but if they cannot agree upon such a choice, then the minister shall choose one, and the parishioners another: and without such a joint or several choice, none shall take upon them to be church-wardens.

But although the greatest part of the parishes in *London* choose the church-wardens by custom; yet in all the new erected parishes the canon shall take place (unless the act of parliament, in virtue of which any church was erected, shall have specially provided that the parishioners shall choose both;) inasmuch as no custom can be pleaded in such new parishes. *Gibf. 215*.

In some cases the lord of the manor prescribeth for the appointment of church-wardens: and this shall not be tried in the ecclesiastical court, although it be a prescription of what appertains to a spiritual thing. *God. 153*.

They are sworn into their offices by the archdeacon; and if the archdeacon refuseth to swear a churchwarden, a mandamus shall issue to compel him. 3 *Cro. 551*. As the parishioners choose churchwardens, who have a trust reposed in them by the parish as temporal officers, they are the proper judges of their ability to serve, and not the archdeacon who swears them. 5 *Mod. 325*.

With respect to exemptions concerning this office.

All peers of the realm, by reason of their dignity, are exempt from the office of churchwarden. *Gibf. 215*. So are all clergymen, by reason of their order. *Id.* In like manner all parliament men, by reason of their privilege. *Id.*

If an attorney be made a churchwarden of a parish, he shall have a writ of privilege, shewing his privilege to be discharged thereof, by reason of his attendance in court.

No person living out of the parish, although he occupies lands within the parish, may be chosen churchwarden; because he cannot take notice of absences from church, nor disorders in it, for the due presenting of them. *Gibf. 215*.

By the 1 *W. & M. c. 18*. Dissenters being chosen churchwardens may act by deputy. And teachers of congregations taking the oaths and subscribing the declaration, are exempted from this office.

By 6 *W. 3. c. 4*. Apothecaries are likewise exempted.

By 10 & 11 *W. 3. c. 23*. All persons who have prosecuted a felon to conviction, are exempted from the office in the parish where the offence was committed.

II. As to their interest.

Churchwardens are a corporation to sue and be sued for the goods of the church; and they may purchase goods, but not lands, except it be in *London*, by custom.

In the city of *London*, by special custom, the churchwardens, with the minister, make a corporation for lands as well as goods; and may as such, hold, purchase and take lands for the use of the church, &c. And there is another

Another custom in *London*, for the parishioners to choose both *churchwardens* exclusive of the minister; who is also there excused from repairing the chancel of the church. 2 *Cro.* 325. 1 *Inst.* 3. 1 *Rel. Abr.* 330. They may have appeal of robbery for stealing the goods of the church. 1 *Rel. Abr.* 393. *Cro. Eliz.* 179.

But the *churchwardens* have no right to, or interest in the freehold and inheritance of the church, which alone belongs to the parson or incumbent. *Comp. Incumb.* 381.

Also *Churchwardens* cannot release to the prejudice of the church; nor can they dispose of the church goods, without the consent of the vestry. If they waste the goods of the church, the new *churchwardens* may have actions against them, or call them to account before the ordinary; though the parishioners cannot have an action against them for wasting the church goods, for they must make new *churchwardens*, who must prosecute the former, &c. 1 *Danv. Abr.* 788. 2 *Cro.* 145. *Bro. Account* 1.

They have such a special property in the organ, bells, parish-books, bible, chalice, surplice, &c. belonging to the church, that for the taking away, or for any damage done any of these, they may bring an action at law, and therefore the parson cannot sue for them in the spiritual court. 1 *New Abr.* 372.

III. In regard to their power.

They have, with the consent of the minister, the placing the parishioners in the seats of the body of the church, appointing gallery-keepers, &c. reserving to the ordinary a power to correct the same: and in *London*, the *churchwardens* have this authority in themselves. Particular persons may prescribe to have a seat, as belonging to them by reason of their estates, as being an ancient messuage, &c. and the seats having been constantly repaired by them: also one may prescribe to any isle in the church, to sit and bury there, always repairing the same. 3 *Inst.* 202. 2 *Cro.* 366. If the ordinary displaces a person claiming a seat in a church by prescription, a prohibition shall be granted, &c. 12 *Rep.* 106. The parson impropriate has a right to the chief seat in the chancel; but by prescription another parishioner may have it. *Noy's Rep.*

Besides their ordinary power, the *churchwardens* have the care of the benefice during its vacancy: and as soon as there is any avoidance, they are to apply to the chancellor of the diocese for a sequestration; which being granted, they are to manage all the profits and expences of the benefice for him that succeeds, plough and sow his glebes, gather in tithes, thrash out and sell corn, repair houses, &c. and they must see that the church be duly served by a curate approved by the bishop, whom they are to pay out of the profits of the benefice. 2 *Inst.* 489. They are to join with the overseers of the poor, in making rates for relief of the poor, setting up trades for employing them, placing out poor apprentices, settling poor persons, &c. And in the execution of their whole office, by statutes 43 *Eliz.* c. 2. 13 & 14 *Car.* 2. c. 12. 3 *W. & M.* c. 11, &c.

The *churchwardens* have no power to make any rate themselves, exclusive of the parishioners, their duty being only to summon the parishioners, who are to meet for that purpose, and when they are assembled, a rate made by the majority present shall bind the whole parish, although the *churchwardens* voted against it. See *Comp. Incumb.* 389.

But if the *churchwardens* give the parishioners due notice, that they intend to meet for that purpose, and the parishioners refuse to come, or being assembled, refuse to make any rate, they may make one without their concurrence; for as they are liable to be punished in the ecclesiastical courts for not repairing the church, it would be unreasonable that they should suffer by the wilfulness and obstinacy of others. 1 *Vent.* 367. 1 *Mod.* 79, 194.

The *churchwardens*, in summoning the parishioners, need not do it from house to house, but a general public summons at the church is sufficient, and the major part of them, that appear upon such summons, will bind the whole parish. 1 *Vent.* 367. *Comp. Incumb.* 389.

There may be select vestries elected in parishes to make rates, and take the *churchwardens* accounts, &c. But those that do not pay to any church-rates have no votes, except the parson or vicar.

Concerning their duty.

The *churchwardens* are to take care of the repairs of the church; and if they erect, or add any thing new to the same, they must have the consent of the parishioners or vestry; and if in the church, the licence of the ordinary. 2 *Inst.* 489. 1 *Vent.* 367.

The *churchwardens* shall suffer no man to preach within their churches, without producing his licence: and they are to keep the keys of the belfrey, and take care that the bells be not rung without good cause, to be allowed of by the minister and themselves. *Can.* 50, 80.

Churchwardens are to see that all the parishioners duly resort to their parish church, and there continue during the time of divine service; they are not to permit any to stand idle, walk, or make any noise in the church, or to contend for places, &c. they may apprehend those that disturb the minister, &c. and justify the appealing any disorder in the church or church-yard; they are to chastise disorderly boys, and take off the hats of those who would irreverently keep them on. 1 *Saund.* 13.

Further, they must search alehouses on *Sundays*, that there be no persons therein, during the divine service; and execute warrants against those who profane the Lord's Day, &c. Also levy penalties on persons not coming to church, against profaners of the Sabbath in pastimes, tippling, &c. and for drunkenness, cursing and swearing, &c. by divers statutes. And they are to present to the ordinary all things presentable by the ecclesiastical laws, which relate to the church, the parson, and parishioners: these *presentments* are made upon oath, and usually twice a year, especially at the visitation: and what relates to the church, is chiefly of repairs, and whether there be a box for alms, in the church, a Bible, Common Prayer Book, and Book of Canons, a desk for the reader, cushion for the pulpit, a communion table, table cloth, cups and covers for bread, flagons and font, a register-book, king's arms set up, Lord's prayer, creed and commandments in fair letters, &c.

What concerns the parson is, whether he reads the thirty-nine articles twice a year, and the canons once in the year, preaches every *Sunday* good doctrine, reads the Common Prayer, celebrates the sacraments, preaches in his gown, visits the sick, catechises children, marries according to law, &c.

And what relates to the parishioners is, whether they come to church, and duly attend the worship of God, if baptism be neglected, women not churched, persons marrying in prohibited degrees, or without banns or licence, alms-houses or schools abused, legacies given to pious uses, &c. They must likewise present crimes and offences, such as drunkenness, fornication, adultery, incest, blasphemy, &c. and by statute popish recusants: and if they refuse to make presentments, the parsons or vicars, &c. may present to the bishop all crimes committed in their parishes. *Can.* 117. 3 *Cro.* 291. 1 *Vent.* 114.

It is their duty to collect the charity-money upon briefs, which are to be read in churches, and the sums collected, &c. to be indorsed on the briefs in words at length, and signed by the minister and *churchwardens*; after which they shall be delivered, with the money collected to the persons undertaking them, in a certain time, under the penalty of 20*l.* A register is to be kept of all money collected, &c. Also the undertakers in two months after the receipts of the money, and notice to sufferers, are to account before a Master in Chancery, appointed by the Lord Chancellor. *Stat.* 4 & 5 *Ann.* c. 14. They are to sign certificates of receiving the sacrament by persons, to qualify them to bear offices, &c. And in *London*, and within the bills of mortality, they must fix fire-cocks, keep engines, &c. in their parishes, under the penalty of 10*l.* For the maintenance whereof the parish is to be assessed: and the first person who brings in a parish engine, or other large engine with a socket, &c. when

any fire happens, shall be paid as an encouragement 30*s.* the person that brings in the second engine 20*s.* and the third 10*s.* &c. *Stat. 6 Ann. c. 31. 7 Ann. c. 17.* They are likewise to levy and receive penalties by particular statutes. 3 *C. 1. c. 3. 9 Geo. 2. c. 23. 22 C. 2. c. 8. 16 C. 2. c. 19. 22 C. 2. c. 8. 6 Ann. c. 31.* And see 32 *Car. 2. c. 2. 9 & 10 W. 3. c. 27. 11 Geo. 2. c. 26. 12 Geo. 2. c. 29. 7 Geo. 3. c. 42.*

IV. Concerning their manner of accounting.

At the end of the year the *churchwardens* are to yield just accounts to the minister and parishioners, and deliver what remains in their hands to the parishioners, or to the new *churchwardens*: in case they refuse, they may be presented at the next visitation, or the new officers may by process call them to account before the ordinary, or sue them by writ of account at Common law. And if all the parish have allowed their accounts of the church goods, the ordinary may nevertheless call them to account before him too, and punish them if he find cause; but in laying out their money, they are punishable for fraud only, not indiscretion. If their receipts fall short of their disbursements, the succeeding *churchwardens* may pay them the balance, and place it to their account. 1 *Rel. Abr. 121. Can. 89, 109, &c.* Disputes arising about *churchwardens* accounts are to be decided before the ordinary: and for disbursements of any sum not exceeding 40*s.* the *churchwardens* oath alone is a sufficient proof; but for all sums above, receipts are to be produced, &c. If *churchwardens* through improvidence, indiscretion or negligence, either waste the church goods in their custody, or much damnify the parish; on proof thereof they may be removed at any time, by the authority of the ordinary. 8 *El. 4. 6. 13 Co. 70.*

By the *Stat. 3 & 4 W. & M. cap. 11.* In all actions to be brought in the courts of *Westminster*, or at the assizes, for money mispent by *churchwardens*, the evidence of the parishioners, other than such as receive alms, shall be taken and admitted.

Churchwardens are comprehended within the purview of the statutes 7 *Jac. 1. cap. 5. and 21 Jac. 1. cap. 12.* as to pleading the general issue to actions brought against them, and as to double costs when they have judgment.

But in action on the case against a *churchwarden* for a false and malicious presentment, though there be judgment for him, yet he shall not have double costs; for the statute does not extend to spiritual affairs. The spiritual court can only order the *churchwardens* accounts to be audited, but cannot make a rate to reimburse them, because they are not obliged to lay out money before they receive it. *Rep. temp. Hardwicke per Annaly. p. 381. Darvson and Wilkinson. Cro. Car. 285, 286. See Church, Highways, Poor.*

Church-reve, Is the same with *churchwarden*, (revere in the Sax. being as much as guardian in the French) the guardian or overseer of the church: the word is now out of use, but is mentioned by *Cbaucer* on the jurisdiction of archdeacons, viz.

*Of church-reves, and of testaments,
Of contracts and of lack of sacraments.*

Churcheslet, or *chirchset*, *ciricseat*, A Saxon word used in *Domesday*, which is interpreted *quasi semen ecclesie*, corn paid to the church. *Fleta* says, it signifies a certain measure of wheat, which in times past every man on St. Martin's day gave to holy church, as well in the times of the Britains as of the English; yet many great persons, after the coming of the Romans, gave that contribution according to the ancient law of Moses, in the name of first fruits; as in the writ of King Canutus sent to the pope is particularly contained, in which they call it *chirchsed*, as one would say church-seed. *Selden's Hist. Tithes, p. 216.*

Church-scot, Customary oblations paid to the parish-priest; from which duties the religious sometimes purchased an exemption for themselves and their tenants.

Churtle, *ceorle*, *carl*. Was in the Saxon time a tenant at will, of free condition, who held some land of the Thanes, on conditions of rents and services: which *ceorles* were of two sorts; one that hired the lord's tenementary

estate, like our farmers; the other that tilled and manured the *demesnes*, (yielding work and not rent) and were thereupon called his *sockmen* or *ploughmen*. *Spelm.*

Cinque Ports, (*quinque portus*) Are those havens that lie towards France, and therefore have been thought by our kings to be such as ought to be vigilantly guarded and preserved against invasion: in which respect they have an especial governor, called *Lord warden of the cinque ports*, and divers privileges granted them, as a peculiar jurisdiction; their warden having not only the authority of an admiral amongst them, but sending out writs in his own name, &c. *Stat. 32 Hen. 8. c. 48. 4 Inst. 222.*

Cambden tells us, that Kent is accounted the key of England; and that William, called *The Conqueror*, was the first who made a constable of Dover castle, and warden of the *cinque ports*, which he did to bring that country under a stricter subjection to his government; but King John was the first who granted the privileges to those ports, which they still enjoy: however, it was upon condition that they should provide a certain number of ships at their own charge for forty days, as often as the king should have occasion for them in the wars, he being then under a necessity of having a navy for passing into Normandy, to recover the dukedom which he had lost. And this service the barons of the *cinque ports* acknowledged and performed, upon the king's summons, attending with their ships the time limited at their proper costs, and staying as long after as the king pleased at his own charge. *Sommer of Rom. Ports in Kent.*

The *cinque ports*, as we now account them, are, Dover, Sandwich, R Romney, Winchelsea, and Rye; and to these we may add Hythe and Hastings, which are reckoned as part or members of the *cinque ports*: though by the first institution it is said that Winchelsea and Rye were added as members, and that the others were the *cinque ports*; there are also several other towns adjoining that have the privileges of the ports. These *cinque ports* have certain franchises to hold pleas, &c. and the king's writs do not run there; but on a judgment in any of the king's courts, if the defendant hath no goods, &c. but in the ports; the plaintiff may get the record certified into Chancery, and from thence sent by *mittimus* to the lord warden to make execution. 4 *Inst. 223. 3 Leon. 3.*

The constable of Dover castle is Lord warden of the *cinque ports*. And there are several courts within the *cinque ports*; one before the said constable, others within the ports themselves, before the mayors and jurats; another, which is called *curia quinque portuum apud Shepway*: there is likewise a court of Chancery in the *cinque ports*, to decide matters of equity; but no original writs issue thence. 1 *Danv. Abr. 793.* The jurisdiction of the *cinque ports* is general, extending to personal, real, and mix'd actions: and if any erroneous judgment is given in the *cinque ports* before any of the mayors and jurats, writ of error lies not in B. R. but it shall be redressed, according to the custom, by bill in nature of a writ of error *coram domino custode seu guardiano quinque portuum apud curiam suam*, &c. And in these cases the mayor and jurats may be fined, and the mayor removed, &c. 4 *Inst. 334. Crompt. Jurisd. 138.*

It has been observed, that the *cinque ports* are not *jura regalia*, like counties palatine, but are parcel of the county of Kent: so that if a writ be brought against one for land within the *cinque ports*, and he appears and pleads to it, and judgment is given against him in the Common Pleas, this judgment shall bind him; for the land is not exempted out of the county, and the tenant may waive the benefit of his privilege. *Wood's Inst. §19.* The *cinque ports* cannot award process of outlawry. *Cro. Eliz. 910.* And a *quominus* lies to the *cinque ports*. *Ibid. 911.* If a man is imprisoned at Dover by the lord warden, an *habeas corpus* may be issued; for the privilege that the king's writ lies not there is intended between party and party, and there can be no such privilege against the king; and an *habeas corpus* is a prerogative writ, by which the king demands an account of the liberty of the subject. *Cro. Jac. 543. 1 Nelf. Abr. 447.* *Certiorari* lies to the *cinque ports*, to remove indictments; and the jurisdiction that *breve dom. regis non currit* is only in civil causes between party and party; but this has been held to extend only to indictments

dictments before the mayors, barons, &c. as justices of peace, on late statutes, &c. *Cro. Car.* 252, 253. 3 *Hawk. P. C.* 286, 287.

Circa, A watch; from which *circutor*; *quatuor circutores monasterii quos alio nomine circas vocant, juxta præceptum sancti Benedicti certis horis circuire debent monasterii officinas.*

Circar, A tribute anciently paid to the bishop or archdeacon for visiting the churches. *De Fresne.*

Circuit, or **Circuitry of Action**, (*circuitus actionis*) Is a longer course of proceeding to recover a thing sued for than is needful: as if a person grant a rent-charge of 10*l.* per annum out of his manor of B. and after the grantee disseiseth the grantor of the same manor, who brings an assise and recovers the land, and 20*l.* damages, which being paid, the grantee brings his action for 10*l.* of his rent due during the time of the disseisin, which he must have had if no disseisin had been: this is called *circuitry of action*, because as the grantor was to receive 20*l.* damages, and pay 10*l.* rent, he might have received but 10*l.* only for damages, and the grantee might have kept the other 10*l.* in his hands by way of retainer for his rent, and so saved his action, which appears to be needless. *Terms de Ley.* This example shews that an action may be rightfully brought for a debt or duty, and yet be wrong; for that it might have been as well otherwise answered and determined.

Circuits, Certain divisions of the kingdom appointed for the judges to go, twice a year, for administering of justice, in the several counties. These circuits are made in the respective vacations, after *Hilary* and *Trinity* terms. See *Black. Com.* 3 *V.* 58. and 4 *V.* 415, 417.

Circumspicte Agatis, Is the title of a statute made anno 13 *Ed. 1.* relating to *prohibitions*, prescribing certain cases to the judges, wherein the king's prohibition lies not. 2 *Inst.* 187.

Circumstantial Evidence, or the *doctrine of presumptions*, Takes place, next to *positive proof*: for when the fact itself cannot be demonstratively evinced, that which comes nearest to the proof of the fact is the proof of such circumstances which either *necessarily* or *usually* attend such facts; and these are called *presumptions*, which are only to be relied upon till the contrary be actually proved. *Co. Lit.* 373. *Black. Com.* 3 *V.* 371.

Circumstantibus, By-standers; and signifies in our law the supplying or making up the number of *jurors*, if any impanelled appear not, or appearing are challenged by either party, by adding to them so many of those that are present or standing by that are qualified as will serve the turn. *Stat.* 35 *H. 8. cap.* 6. The act of supplying is usually called a *tales de circumstantibus*. See *Tales*.

Citation, (*citatio*) A summons to appear, applied particularly to process in the spiritual court. The ecclesiastical courts proceed according to the course of the civil and canon laws, by *citation*, *libel*, &c. A person is not generally to be cited to appear out of the diocese, or peculiar jurisdiction where he lives; unless it be by the archbishop, in default of the ordinary; where the ordinary is party to the suit, in cases of appeal, &c. And by law a defendant may be sued where he lives, though 'tis for subtracting tithes in another diocese, &c. *1 Nels.* 449. By the *Stat.* 23 *Hen. 8. cap.* 9. Every archbishop may cite any person dwelling in any bishop's diocese within his province ~~for any offence~~, if the bishop or other ordinary consents, or if the bishop or ordinary, or judge, do not his duty in punishing the offence. Where persons are cited out of their diocese, and live out of the jurisdiction of the bishop, a prohibition or consultation may be granted: but where persons live in the diocese, if when they are cited they do not appear, they are to be excommunicated, &c. The above statute was made to maintain the jurisdiction of inferior dioceses; and if any person is cited out of the diocese, &c. where the Civil or Canon law doth not allow it, the party grieved shall have double damages. If one defame another within the peculiar of the archbishop, he may be punished there; although he dwell in any remote place out of the archbishop's peculiar. *Godb.* 190.

Citatio ad instantiam Partis, Is mentioned in 22 & 23 *Car. 2. c.* 9. for laying impositions on proceedings at law.

City, (*civitas*) By *Cowel* is a town corporate, which hath a bishop and cathedral church, which is called *civitas*, *oppidum* and *urbs*; *civitas* in regard it is governed by justice and order of magistracy; *oppidum*, for that it contains a great number of inhabitants: and *urbs*, because it is in due form begirt about with walls. But *Crompton*, in his Jurisdictions, where he reckons up the cities, leaveth out *Ely*, although it hath a bishop and cathedral church; and puts in *Westminster*, though it hath not at present a bishop: and Sir *Edward Coke* makes *Cambridge* a city; yet there is no mention that it ever was an episcopal see. Indeed it appears by the *Stat.* 35 *H. 8. cap.* 10. that there was a bishop of *Westminster*; since which, by 27 *Eliz. cap.* 5. it is termed a *city*, or borough: and notwithstanding what the Lord *Coke* observes of *Cambridge*, by the *Stat.* 11 *H. 7. c.* 4. *Cambridge* is called only a town.

Kingdoms have been said to contain as many cities as they have seats of archbishops and bishops: but according to *Blount*, *city* is a word which hath obtained since the conquest; for in the time of the *Saxons* there were no cities, but all great towns were called *burghs*, and even *London* was then stiled *London Burgh*; as the capital of *Scotland* is now called *Edinburgh*. And long after the conquest the word *city* is used promiscuously with the *burgh*, as in the charter of *Leicester* 'tis called both *civitas* and *burgus*; which shews that those writers were mistaken, that tell us every *city* was or is a bishop's fee. And tho' the word *city* signifies with us such a town corporate as hath usually a bishop and cathedral church; yet 'tis not always so. See *Black. Com.* 1 *V.* 114.

As to the antient state of cities and villages, whilst the feudal policy prevailed they held of some great lord, on whom they depended for protection, and were subject to his arbitrary jurisdiction. The inhabitants were deprived of the natural and most unalienable rights of humanity. For various instances thereof, see *Robert's Hist. Em.* *Charles V.* 1 *V.* 31.

The freedom of cities was first established in *Italy*, principally owing to the introduction of commerce. *Ib.* 32.

'Twas afterwards gradually introduced into *France* and other countries of *Europe*, and in our own country many causes contributed, which a work of this kind will not permit us to enumerate.

Citizens, (*cives*) Of *London*, are either freemen, or such as reside and keep a family in the *city*, &c. and some are *citizens* and freemen; and some are not, who have not so great privileges as the others: the *citizens* of *London* may prescribe against a statute, because their liberties are reinforced by statute. 1 *Roll. Rep.* 105.

Civil Law, Is defined to be that law which every particular nation, commonwealth or city, has established peculiarly for itself: *jus civile est, quod quisque populus sibi constituit Just. Inst.* But more strictly the *civil law* is that which the old *Romans* used, compiled from the laws of nature and of nations. The twelve tables were also the foundation of this law; which for its great wisdom is as it were the Common law, or the foundation of it, in all well governed kingdoms, a very few only excepted; and no other laws are esteemed comparable to it for its equity. The *civil law* is either *written* or *unwritten*; and the *written law* is *public* or *private*: *public*, which immediately regards the state of the commonwealth, as the enacting and execution of laws, consultations about war and peace, establishment of things relating to religion, &c. *Private*, that more immediately hath respect to the concerns of every particular person. The *unwritten law* is custom introduced by the tacit consent of the people only, without any particular establishment: the authority of it is great, and it is equal with a written law, if it be wholly uninterrupted, and of a long continuance.

The whole *civil law* is contained in four books or tomes, 1. *The code.* 2. *The pandects or digest.* 3. *The institutes.* 4. *The novels or authenticks.* The *code* is divided into twelve books, and was the first book of the *civil law*, which the Emperor *Justinian* ordered to be collected: it was published in the year 529, and contains the constitutions, &c. of fifty-six Emperors, and their wise councils. The first book of it treats of religion, priests, &c. B b b

℥c. Other books are upon trade, merchandise, the exchequer, &c. *The digest or pandects*, was collected from the works and commentaries of the ancient lawyers, some whereof lived before the coming of our Saviour: this tome is divided into fifty books; and upon a more particular division, the whole digest is divided into seven parts: the first part contains the elements of the law, as what is justice, right, &c. The second part treats of judges and judgments: the third part of personal actions, &c. The fourth part of contracts, pawns and pledges: the fifth part of wills, testaments, &c. The sixth part of the possession of goods: the seventh part of obligations, crimes, punishments, &c. *The institutes* contain a system of the whole body of law, and are an epitome of the digest divided into four books; but sometimes they correct the digest: they are called institutes, because they are of instruction, and shew an easy way to the obtaining a knowledge of the *Civil law*: but they are not so distinct and comprehensive as they might be, nor so useful at this time as they were at first. The *novels or authenticks* were published at several times without any method: they are termed *novels* as they are new laws, and *authenticks*, being authentically translated from the *Greek* into the *Latin* tongue; and the whole volume is divided into nine collations, constitutions or sections, and they again into 168 novels, which also are distributed into certain chapters: the first collation relates to heirs, executors, &c. The second, the state of the church: the third is against bawds: the fourth concerns marriages, &c. The fifth forbids the alienation of the possessions of the church: the sixth shews the legitimacy of children, &c. The seventh determines who shall be witnesses: the eighth ordains wills to be good, though imperfect, &c. And the ninth contains matter of succession in goods, &c.

To those tomes of the *Civil law* we may add the *book of feuds*, which contains the customs and services that the subject or vassal oweth to his prince or lord, for such lands or fees as he holdeth of him. *The constitutions of the Emperor*, are either by a *rescript*, which is the letter of the Emperor in answer to particular persons who enquire the law of him; or by *edict*, which the Emperor establishes of his own accord, that it may be generally observed by every subject; or by *decree*, which the Emperor pronounces between plaintiff and defendant, upon hearing a particular cause. The power of issuing forth rescripts, edicts and decrees, was given to the prince by the *lex regia*, wherein the people of *Rome* wholly submitted themselves to the government of one person, viz. *Julius Caesar*, after the defeat of *Pompey*, &c. And by this submission the prince could not only make laws, but was esteemed above all coercive power of them. The matters wherein the whole *Civil law* is generally exercised, relate either to *persons* in the Common-wealth; or to the *things* belonging or not belonging to them; or to the *actions* whereby men claim such things as are due to them by the law, &c. The *Civil law* is allowed in this kingdom in the two Universities, for the training up of students, &c. In matters of foreign treaties between princes; marine affairs *civil* and *criminal*; in the ordering of martial causes; the judgments of ensigns and arms, rights of honour, &c. Vide *Treatise of Laws*, pag. 243, 396. and *Ferrieries Hist. of Civ. Law*.

Civil list, To defray the extraordinary charge of the *civil list*, viz. for paying debts and arrears due to his majesty's Servants, tradesmen, &c. and other uses of his civil government, 1,000,000*l.* was granted by parliament, by Stat. 11 Geo. 1. c. 16. Vide *King's Household*.

Clack Wool, Is to cut off the sheep's mark, which makes it weigh lighter; as to *force wool*, signifies to clip off the upper and hairy part thereof; and to *bard* it, is to cut the head and neck from the rest of the fleece. Stat. 8 H. 6. cap. 22.

Clades, *Clida*, *cleta*, *cleia*, from the Brit. *clie*, and the Irish *clia*, A wattle or hurdle; and a hurdle for penning or folding of sheep, is still in some counties of England called a *cley*. Paroch. Antiq. p. 575.

Clarendon, (*constitutions* of) Certain *constitutions*, made in the reign of Hen. 2. A. D. 1164, in a parliament held at *Clarendon*, whereby the King checked the power

of the *Pope*, and his Clergy, and greatly narrowed the total exemption they claimed from the secular jurisdiction. *Blak. Com.* 4 V. 415.

Claretum, A liquor made of wine and honey, clarified or made clear by decoction, &c. which the *German*, *French*, and *English*, called *hippocras*: and it was from this, the red wines of *France* were called *claret*.—*Ad hæc etiam in tanta abundantia vinum sic videtur, ut etiam, pigmentum, et claretum mustum et medonem.* Girald. Camb. apud Wharton. Ang. Sax. Par. 2. p. 480.

Claim, (*clameum*) Is a challenge of interest in any thing that is in the possession of another, or at least out of a man's own, as *claim* by charter, by descent, &c. And *claim* is either verbal, where one doth by words *claim* and challenge the thing that is so out of his possession; or it is by an action brought, &c. and sometimes it relates to lands, and sometimes to goods and chattels. *Litt. Sect.* 420. Where any thing is wrongfully detained from a person, this *claim* is to be made; and the party making it, may thereby avoid descents of lands, disseisins, &c. and preserve his title, which otherwise would be in danger of being lost. *Co. Litt.* 250. A man who hath present right or title to enter, must make a *claim*; and in case of reversions, &c. one may make a *claim* where he hath right, but cannot enter on the lands: when a person dares not make an entry on land, for fear of being beaten or other injury, he may approach as near as he can to the land, and *claim* the same; and it shall be sufficient to veil the seisin in him. 1 *Inst.* 25.

If nothing doth hinder a man having right to land, from entering or making his *claim*; there he must do so, before he shall be said to be in possession of it, or can grant it over to another: but where the party who hath right, is in possession already, and where an entry or *claim* cannot be made, it is otherwise. 1 *Rep.* 157. A *claim* will divest an estate out of another when the party must enter into some part of the land; but if it be only to bring him into possession, he may do it in view. By *claim* of lands in most cases is intended a *claim* with an entry into part of the land, or by a near approach to it. *Co. Litt.* 252, 254. *Poph.* 67. One in reversion after an estate for years, or after a statute merchant, staple, or *elegit*, may enter and make a *claim* to prevent a descent, or avoid a collateral warranty. And *claim* of a remainder by force of a condition must be upon the land, or it will not be sufficient. *Co. Litt.* 202.

If a man seised of lands in right of his wife, make a *seoffment* in fee on condition, and the husband dieth, and then the condition is broken, and the heir enters; in this case the wife need not *claim* to get possession of her estate, for the law doth vest it in her without any *claim*. *Co. Litt.* 202. 8 *Rep.* 43. The *claim* of the particular tenant, shall be good for him in reversion or remainder; and of him in reversion, &c. for particular tenant: so *claim* of a copyholder, will be good for the lord, &c. But if tenant for years, in a court of record *claim* the fee of his land, it is a forfeiture of his estate. *Plowd.* 359. *Co. Litt.* 251. A *claim* may be made by the party himself; and sometimes by his servants or deputy: and a guardian in *focage*, &c. may make a *claim* or enter in the name of the infant that hath right, without any commandment. *Co. Litt.* 245.

Claim or entry should be made as soon as may be, and by the Common law it is to be within a year and a day after the disseisin, &c. and if the party who hath unjustly gained the estate, do afterwards occupy the land, in some cases an *assise*, *trespass*, or forcible entry may be had against him. *Litt. Sect.* 426, 430. If a fine is levied of lands, strangers to it are to enter and make a *claim* within five years, or be barred: infants after their age, feme covert after the death of their husbands, &c. have the like time, by Stat. 1 R. 3. cap. 7. If a disseisor levy a fine, and the disseisee enters his *claim* in the record of the foot of the fine, this is not such a *claim* as shall avoid the Statute. 4 Hen. 7. cap. 24. 1 *Lill. Abr.* 270. See the Stat. 4 Ann. c. 16. §. 16. and *Continual Claim*.

Claim of Liberty, Is a suit or petition to the King in the Court of *Exchequer*, to have liberties and franchises confirmed there by the King's Attorney General. *Co. Ent.* 93.

Clamea admittenda in Itinere per Itinomatum, A writ by which the King commands the justices in Eyre to admit a person's claim by attorney who is employed in the King's service, and cannot come in his own person, *Reg. Orig.* 19.

Clap-board, Is board cut in order to make casks or vessels; which shall contain three foot and two inches at least in length: and for every fix ton of beer exported, the same cask, or as good, or 200 of clap-boards shall be imported, by statute 35 *El.* c. 11.

Clarigarius Tringum, An herald at arms. *Blount.*

Claro, A trumpet. *Statimque clangebant clariones & tubæ.* Knighted, anno 1346.

Classarius, A seaman, or soldier serving at sea.—*Omnesque ejus capitaneos, milites & classarios, &c.* Chart. Carol. 5. Imperator. Thomæ Comit. Surr. dat. in urbe Londoniensi, 8 Junii 1522.

Claud, (*Brit.*) A ditch: *Claudere*, to enclose, or turn open fields into inclosures.—*Dedi & concessi totam culturam ad claudendum & faciendum quicquid inde diis canonicis placuerit.* Paroch. Antiq. 236.

Claves Insule, Is a term used in the *Isle of Man*, where all ambiguous and weighty cases are referred to twelve persons, whom they call *claves insule*, i. e. the keys of the island.

Clavia. In the inquisition of serjeanties in the 12th and 13th years of King *John*, within the counties of *Essex* and *Hertford*; *Boydin Aylet tenet quatuor lib. terræ in Bradwell, per manum Willielmi de dono per serjeantiam clavic, viz.* By the serjeanty of the club or mace. *Brady's Append. Introduct. to Eng. Hist.* 22.

Clavigeratus, A treasurer of a church.—*Aliter Willielmus Wallingford clavigeratus.* Mon. Angl. Tom. 1. p. 184.

Claufe Rolls, (*rotuli clausi*) Contain all such matters of record as were committed to close writs: these rolls are preserved in the *Tower*.

Claustura, Bruthwood for hedges and fences. King *Henry 3.* gave to the prior and canons of *Chetwode*, *quinque carucatas claustræ ad prædictæ terræ claustrum sustinendum.* Paroch. Antiq. 247.

Clausum fregit, Signifies in our law as much as action of trespass; and it is a writ so called, because the defendant is summoned thereby to answer *Quare clausum fregit* of the plaintiff, that is why he did such a trespass. It is the course of the *Common Pleas*, to declare in actions (especially upon an *assumpsit* or the like) upon a *quare clausum fregit*, as they do on a *latitat* in the *King's Bench*. 2 *Vent.* 192, 259. But by the Lord *Clarendon's* orders in Chancery, cursitors of that court are not to make writs of *clausum fregit*, &c. in *London*, without special warrant from the Lord Chancellor, or Master of the Rolls, unless it appear by affidavit that the same is the proper cause of action, &c. In *C. B.* a *pone* in trespass, (and here the proceedings are by *præcipe* or *pone*) according to the ancient course, is made out thus: *Wiltis, ff. ff. A. B. sec. &c. tunc pone C. D. nuper de, &c. de placito quare vi & armis clausum & domum ipsius A. fregit & alia enormia ei intulit, ad grave dampn. ipsius A. et contra pacem.* This is delivered to the filizer of the county to draw out the *capias*, &c. And debt may be added to it, viz. *pone, &c. C. D. nuper de, &c. in com. tuo clausum freg. apud, &c. & aliam in debito pro 50 l. &c.*

Clausum Pasche, (*Stat. regim. 1.*) In *crastino clausi pasche*, or in *crastino pasche pasche*, which is all one, that is the morrow of the *utis* of *Easter*. 2 *Inst.* 157. *Clausum pasche*, i. e. *Dominica in albis*; sic dictum, quod pascha claudat. *Blount.*

Clausura Heye, The enclosure of a hedge.—*Johannes Stanley ar. clamat quod ipse & barones sui sunt quieti de clausura heyæ de Macclesfield, scil. clausura unius rodæ terre circiter hayam prædictæ.* Rot. Plac. in itinere apud *Cestriam*, ann. 14 H. 7.

Claw, A close, or final measure of land.—*Unam elawm terræ cum pertinentiis.* Mon. Ang. Tom. 2. pag. 250.

Clepto, This word is taken for a rogue or thief. *Howden* anno 946.

Clergy, (*clerus*) Signifies the assembly or body of clerks or ecclesiasticks, being taken for the whole num-

ber of those who are *de clero domini*, of our Lord's lot or share, as the tribe of *Levi* was in *Juda*; and are separate from the noise and bustle of the world, that they may have leisure to spend their time in heavenly meditation and prayer.

Sometimes *clergy* is used for a plea to an indictment of felony, &c. being an ancient privilege of the church, where a priest or one in orders is arraigned of felony, before a secular judge, who may pray his *clergy*; which is as much as if he prayed to be delivered to his ordinary, to purge himself of the offence objected against him. *Stamf. P. C. lib. 2. cap. 41.* Anciently the *clergy* strongly insisted that by the law of God their persons were so sacred, that they could not, without a violation of that law, be conveyed before, and much less be punished by any secular judge; but it hath been observed that this is not warranted by scripture: though all persons in holy orders have this privilege from the Canon law. 2 *Hawk. P. C.* 337. It is said by Lord Chief Justice *Hale*, that anciently princes converted to christianity, in favour of the *clergy*, and for encouraging them in their offices and employments, did grant to them very bountiful privileges; as 1st, An exemption of places consecrated to religious duties from arrests for crimes, which was the original of sanctuaries. 2dly, The exemption of their persons from criminal proceedings, in some cases capital before secular judges; and this was the true original of the *privilegium clericale*: the *clergy* increasing in wealth, power and interest, afterwards set up for themselves; and that which they obtained by the favour of princes and states at first, they now began to claim as their right, and that of the highest nature *jure divino*; and by their canons and constitutions, procured vast extensions of those exemptions. 2 *Hale's Hist. P. C.* 323.

As to the *clergy* in general, they are *regular* or *secular*: those are *regular*, which live under certain rules, being of some religious order, and are called men of religion, or the *religious*: such as all Abbots, Priors, Monks, &c. The *secular* are those that live not under any certain rules of the religious orders; as Bishops, Deans, Parsons, Vicars, &c. And although the *clergy* claimed an exemption from all secular jurisdiction, yet *Mat. Paris* tells us, that soon after *William the First* had conquered *Harold*, he subjected the bishopricks and abbeyes who held *per baroniam*, that they should be no longer free from military service; and for that purpose he in an arbitrary manner registered how many soldiers every bishoprick and abbey should provide, and send to him and his successors in time of war; and having placed these registers of ecclesiastical servitude in his treasury, those who were aggrieved, departed out of the realm: but the *clergy* were not, till then, exempted from all secular service; because by the laws of King *Edgar* they were bound to obey the secular magistrate in three cases, viz. Upon any expedition to the wars, and to contribute to the building and repairing of bridges, and of castles for the defence of the kingdom. 'Tis probable that by expedition to the wars, it was not at that time intended they should personally serve, but contribute towards the charge: one they must do; as appears by the petition to the King, anno 1267, viz. *Ut omnes clerici tenentes per baroniam vel feudum laicum, personaliter armati procederent contra regios adversarios, vel tantum servitium in expeditione regis invenirent, quantum pertineret ad tantam terram vel tenementum.* But their answer was, that they ought not to fight with the military, but with the spiritual sword, that is with prayers and tears; that they were to maintain peace and not war, and that their baronies were founded on charity; for which reason they ought not to perform any military service. *Blount.*

That the *clergy* had greater privileges and exemptions at Common law than the *laity* is certain; for they are confirmed to them by *Magna Charta*, and other ancient statutes; but these privileges are in a great measure lost, the *clergy* being included under general words in later statutes; so that *clergymen* are liable to all public charges imposed by act of parliament, where they are not particularly excepted. Indeed they are not at this day to undergo temporal offices, as the office of sheriff, constable, &c.

Ec. (though they are sometimes in the commission of the peace, in which commission they may either act as justices, or not act at their pleasure) nor are they to serve on juries, or obliged to appear at turns and leets; or to be pressed to serve in the wars in person, although by statutes they are compellable to contribute to the charge of a war, and to musters of the militia: their bodies are not to be taken upon statutes merchants or staple, *Ec.* for the writ to take the body of the consor is *si laicus sit*; and if the sheriff or any other officer arrest a *clergyman* upon any such process, it is said an action of false imprisonment lies against him that does it, or the *clergyman* arrested may have a *superfedeas* out of the Chancery.

In action of trespass, account, *Ec.* against a person in holy orders, wherein process of *capias* lies, if the sheriff return that the defendant is *clericus beneficiatus nullum habens laicum sedum ubi summoneri potest*; in this case the plaintiff cannot have a *capias* to arrest his body; but the writ ought to issue to the bishop, to compel him to appear, *Ec.* But on execution had against such *clergyman*, a sequestration shall be had of the profits of his benefice. *Clergymen* may not be arrested in the church, or churchyard, while attending on divine service, *Ec.* on pain of imprisonment, and ransom at the King's pleasure, and likewise to make agreement with the party: and he that beats a *clergyman*, may be obliged to do penance in the Spiritual Court. But these are all the privileges remaining on civil accounts: though by the Common law, they were to be free from the payment of tolls, in all fairs and markets, as well for all the goods gotten upon their church livings, as for all goods and merchandises by them bought to be spent upon their rectories; and they had several other exemptions, *Ec.* These privileges, for the most part, have been allowed the *clergy*, that they might with the more freedom attend the service of God and religion, and be respected as they ought; and therefore they are not to undertake any secular business, by which they may be diverted from their duty, or be brought into contempt.

They are used like other men in criminal cases; except as to burning in the hand for felony, from which upon producing of their orders, or the ordinary's certificate, they ought to be freed: and though they have had the privilege of the *clergy* for a felony, yet they may again have their *clergy*, and so cannot a layman. But see *Stat. 28 Hen. 8. c. 1.* In ancient times *clergymen* convicted of crimes, were delivered over to the ordinary, to be punished by the ecclesiastical laws; but this privilege is long since abolished, nor was it ever allowed in treason or sacrilege. *Wood's Inst. 24. Parson's Conc. 145, Ec. 2 Inst. 4, 58, Ec. Black. Com. 4 V. 358.*

Benefit of clergy, we have already said is an ancient privilege, where one in orders claimed to be delivered to his ordinary to purge himself of a felony. And this purgation was to be by his own oath affirming his innocence, and the oaths of twelve compurgators as to their belief of it, before a jury of twelve clerks: if the clerk failed in his purgation, he was deprived of his character, whereby he became a mere layman, or he was to be kept in prison till a pardon was obtained: but if he purged himself, he was set at liberty. Sometimes the delivery to the ordinary was without purgation, as upon attainder by confession of the felony, or by verdict, where the felony was notorious, and then the clerk was to be degraded, or kept in prison by the ordinary, *Ec.* though in these cases the ordinaries would frequently proceed to purgation. But purgation is now taken away by *Stat. 18 Eliz. cap. 7.* which enacts that where an offender is admitted to his *clergy*, after burning in the hand, he shall not be delivered to the ordinary, but shall be enlarged by the court, *Ec.* And the *benefit of clergy*, and burning in the hand, comes in the place of purgation at Common law.

In ancient times in the King's courts where felonies were determined, the bishop or his deputy were to attend to inform the court whether the felon could read as a clerk or not; but the court was still to judge of his sufficiency. Since the *Stat. 18 Eliz. c. 7.* Every man to whom *benefit of clergy* was granted, hath been put to read at the bar after found guilty, and convicted of felony,

and so burnt in the hand, and set free for the first time, if the ordinary's commissioner or deputy standing by did say, — *Legit ut clericus*; or otherwise he was to be hanged. But reading at last, as well as purgation, is wholly laid aside; for by the 5 *Ann. c. 6.* if any person convicted of such felony, for which he ought to have the *benefit of the clergy*, doth pray the *benefit* of this act, he shall not be required to read, but shall be punished ~~as a~~ convicted. A lord of parliament shall have the *benefit of his clergy*, though he cannot read, and without burning in the hand, for the first time only; and the King may pardon the burning of the hand in others, which is not so much in nature of a punishment, as a mark to notify that the person may have his *clergy* but once.

But he shall not be ousted of his *clergy*, by the bare mark in his hand, or by a parol averment, without the record testifying it, or a transcript thereof, according to the following statutes. 2 *H. H. 373.*

By *stat. 34 & 35 H. 8. cap. 14.* The clerk of the crown, or of the peace, or of assize, shall certify a transcript briefly of the tenor of the indictment, outlawry, or conviction, and attainder, into the King's Bench in 40 days: And the clerk of the crown, when the judges of assize, or justices of the peace write to him for the names of such persons, shall certify the same, with the causes of the conviction or attainder.

Another method is given by the *stat. 3 W. & M. c. 9. sect. 7.* which enacts, that the clerk of the crown, clerk of the peace, or clerk of assize, where a person admitted to *clergy* shall be convicted, shall at the request of the prosecutor, or any other on the King's behalf, certify a transcript briefly and in few words, containing the effect and tenor of the indictment and conviction, of his having the *benefit of clergy*, and the addition of the party, and the certainty of the felony and conviction, to the judges where such person shall be indicted for any subsequent offence.

Also it seems, that if the party deny that he is the same person, issue must be joined upon it, and it must be found upon trial that he is the same person, before he can be ousted of *clergy*. 2 *H. H. 373.*

The privilege of *clergy* is said to have its beginning from an encroachment of the Pope upon the temporal power, in behalf of the *clergy*, whom he endeavoured to exempt from the jurisdiction of lay judges in case of life and member; which the temporal courts would not yield to, but only in part: and first they would indict clerks for felony, as well as others, and proceed thereon till the ordinary did demand them; and if the ordinary would not demand them, the King's courts proceeded to conviction, attainder and execution; and if the ordinary did claim clerks before conviction, then an inquisition was taken whether the party was guilty or not; and if acquitted, he was discharged; but if found guilty, then delivered to the ordinary, *Ec.* The privilege so restrained was confirmed and established by the statute of *Westm. 1. cap. 2.* and allowed by divers other acts of parliament; and though originally the *clergy* never intended that any should have that privilege, but those who were in holy orders; yet afterwards they extended it to those who were not strictly in orders, but were assistants to them in doing divine offices. And as to laymen being admitted to this privilege, it hath been observed that in those days few were bred to literature, but those who were actually in orders, or educated for that purpose; and therefore the way of trial whether one was a clerk or no, was by reading, of which the court was judge; for if he could not read, the court would not deliver him as a clerk, though the ordinary did claim him; and if he did read, he should be allowed as a clerk, though the ordinary refused him: and reading being the way of trial, whether a man was a clerk or not, without further examination into any other qualification, by an equitable construction of the statutes that established and extended this privilege, all persons that so approved themselves by reading, were allowed to be clerks. *Linwood 92, 100. Kel. 180.*

It appears by our books that laymen that could read had the privilege of *clergy* since the 25 *Ed. 3.* which allowance never was condemned in parliament, or complained of as a grievance, but rather approved of: and by the 18 *Eliz. c. 7.* all persons as well lay as spiritual, have

have a right to the *benefit* of that statute, for the first offence, in the same manner as *clergymen*. Though it was anciently the usual method for the ordinary to demand the criminal as his clerk, before the court allowed him the *benefit of his clergy*; yet there was no necessity for such demand, but the court might without it admit a person to the *benefit of clergy*, on sufficient evidence of his being a clerk, as upon producing letters of orders, or reading as a clerk, &c. except he appeared to have been guilty of sacrilege, or of breaking the prison of the ordinary; in which cases it is said to have been at the discretion of the ordinary, whether he should have his *clergy* or not: and as there is no necessity that the ordinary should demand the *benefit of the clergy* for a clerk; so neither is there any that the prisoner himself should demand it, where it sufficiently appears to the court that he hath a right to it, in respect of his being in orders, &c. In which case, if the prisoner does not demand it, it is left to the discretion of the judge, either to allow, or not allow it him. 2 Hawk. P. C. 359. Those who demand the *benefit of clergy*, are to plead, and put themselves upon trial; but after a clerk hath put himself upon trial, and the inquest are charged with him, some writers tell us, that he may, if he desire it, be admitted to his *clergy* before the jury come back; and shall not forfeit his goods, unless they find him guilty. Ibid. 358.

This claim of *clergy* might formerly be made on arraignment, or as soon as the prisoner was brought to the bar: afterwards it could not be claimed till after conviction, because it is for the advantage of the King as to the forfeiture of the lands and goods of the criminal convict, and for the advantage of the party himself to make his challenges to the inquest; and perhaps he may be acquitted, and then he will not need this privilege. 2 Inst. 164, 633. At Common law, if the party had not demanded his *clergy* before conviction, he lost it: but in the time of H. 6. an alteration was made in the method of allowing *clergy*, viz. That the party indicted or appealed, was to answer to the felony, and after conviction, upon his demand the judge to allow him his *clergy*; which course has been ever since observed. Kel. 100. *Clergy* may be demanded after judgment given against a person, whether of death, &c. and even under the gallows, if there be a proper judge there, who has power to allow it. 2 Hawk. 357.

Persons admitted to their *clergy*, may be continued in prison as a further punishment, not exceeding one year. 18 El. cap. 7.

By stat. 4 Geo. 1. cap. 11. Persons convicted of offences within benefit of *clergy* (except receivers and buyers of stolen goods) may, instead of being whipped and burnt in the hand, be transported for seven years.

A person admitted to his *clergy*, forfeits all his goods that he hath at the time of the conviction. 2 H. H. 388.

But presently, upon burning in the hand, he ought to be restored to the possession of his lands, and from thenceforth to enjoy the profits thereof. 2 H. H. 388.

Also, it restores him to his credit; and consequently enables him to be a good witness. 2 Hawk. 364.

And it is holden, that after a man is admitted to his *clergy*, it is actionable to call him felon; because his offence being pardoned by the statute, all the infamy and other consequences of it are discharged. 2 Hawk. 365.

Clergy is never allow'd by the Civil law; so that pirates, &c. shall not have *clergy*. 1 Nelf. Abr. 449. The Common law did not deny *clergy* but in certain cases; as in high treason, or sacrilege; where a person was convicted of heresy; was a Turk, Jew, or Infidel, &c. Also women are not allow'd it; but this is altered by Stat. 3 W. & M. c. 9. By statutes, *clergy* is denied in a great many felonies; though it is allowed in all cases where not expressly taken away. And where *clergy* is taken away expressly by any statute, the offence must be laid in the indictment to be against that very statute, and the words of it, or the offender shall have his *clergy*. Kel. 104. H. P. C. 231. In what cases the benefit of *clergy* is yet allowed, and in what cases it is taken away by several statutes, see title *Felony*, &c. and *Table to Statutes*, same title, &c.

Clerico admittendo, Is a writ directed to the bishop, for admitting a *clerk* to a benefice, upon a *ne admittat* tried and found for the party that procures the writ. Reg. Orig. 31. If a parson recover a benefice, the patron may have this writ to the bishop, though the six months are past, if the church is void, &c. And this ancient writ begins thus: *Rex venerabili in Christo patri, &c. Cum A. B. de, &c. in curia nostra recuperasset versus nos presentationem suam ad vicariam de, &c. vobis mandamus quod ad presentat. ipsius A. B. ad vicariam idoneam personam admittatis, &c.*

Upon a presentation to a benefice recovered in a *quare impedit*, or assise of *darrein presentment*, the execution is by this writ; directed not to the sheriff, but to the bishop or his metropolitan, requiring them to admit and institute the clerk of the plaintiff. Black. Com. 3 V. 413.

Clerico infra sacros Ordines constituto, non Eligendo in Officium, Is a writ directed to those who have thrust a bailliwick, or other office upon one in holy orders, charging them to release him. Reg. Orig. 143.

Clerico capto per Statutum Mercatorum, &c. A writ for the delivery of a clerk out of prison, who is taken and imprisoned upon the breach of a statute merchant. Reg. Orig. 147.

Clerico convicto commissio Gaolæ in defectu Ordinarii deliberando, Is an ancient writ that lay for the delivery of a clerk to his ordinary, that was formerly convicted of felony, by reason his ordinary did not challenge him according to the privileges of clerks. Reg. Orig. 69.

Clerk, (clericus) In the most general signification, is one that belongs to the holy ministry of the church; under which, where the Canon law hath full power, are not only comprehended *sacerdotes* and *diaconi*; but also *subdiaconi*, *lectores*, *acolyti*, *exorcistæ* and *ostiarii*: but the word has been anciently used for a *secular priest*; in opposition to a *religious* or *regular*. Paro. b. Antiq. 171. And is said to be properly a minister or priest, one who is more peculiarly called *in sortem domini*. Blount.

Clerk, In another sense denotes a person who practises his pen in any court, or otherwise; of which clerks there are various kinds, in several offices, &c. As the officers of the courts of law were formerly often clergymen, hence it is said they go under the term of *clericus*, or *clerk*. And Temp. Ed. 1. Johannes Sawell, *clericus domini regis*, was supposed to signify secretary or clerk of his council. Antiq. Nottinghamsh. 317.

Clerk of the Mts, Is an officer in the navy office, whose business is to record all orders, contracts, bills, warrants, &c. transacted by the lord high admiral, or lords commissioners of the admiralty, and commissioners of the navy; and is mentioned in the Stat. 16 Car. 2. c. 5. And 22 & 23 Car. 2. c. 11.

Clerk of Affidavits, In the court of Chancery, is an officer that files all affidavits made use of in court.

Clerk of the Assise, Is he that writes all things judicially done by the justices of assise in their circuits. Cromp. Jurisd. 227. This officer is associated to the judge in commission of assise, to take assises, &c.

Clerk of the Bails, An officer belonging to the court of King's Bench. He files the bail pieces taken in that court, and attends for that purpose.

Clerk of the Check, Is an officer in the King's court, so called, because he hath the check and controlment of the yeomen of the guard, and all other ordinary yeomen belonging either to the King, Queen, or prince; giving leave, or allowing their absence in attendance, or diminishing their wages for the same: he also by himself or deputy takes the view of those that are to watch in the court, and hath the setting of the watch. 33 H. 8. c. 12. Also there is an officer of the same name in the King's navy at Plymouth, Deptford, Woolwich, Chatham, &c. 19 Car. 2. c. 1.

Clerk of the Crown, (*clericus coronæ*) An officer in the King's Bench, whose function is to frame, read and record all indictments against offenders there arraigned or indicted of any publick crime. And when divers persons are jointly indicted, the clerk of the crown shall take but one fee, viz. 2s. for them all. Stat. 2 H. 4. c. 10. He

is otherwise termed clerk of the crown-office, and exhibits informations, by order of the court, for divers offences: And on informations exhibited in the crown-office, for trespass, battery, &c. Recognisances are to be entered into for the informer to prosecute with effect, &c. 4 & 5 W. & M. c. 22.

Clerk of the Crown in Chancery, Is an officer in that court who continually attends the Lord Chancellor in person or by deputy: he writes and prepares for the Great Seal, special matters of state by commission, or the like, either immediately from his Majesty's orders, or by order of his council, as well ordinary as extraordinary, viz. commissions of lieutenancy, of justices of assize, *oyer and terminer*, gaol delivery, and of the peace, with their writs of association, &c. Also all general pardons, at the King's coronation; or in parliament, where he sits in the Lords house in parliament time; and into whose office the writs of parliament, with the names of knights and burgesses elected thereupon, are to be returned and filed. He hath likewise the making out of all special pardons; and writs of execution upon bonds of statute staple forfeited; which was annexed to his office in the reign of Queen Mary, in consideration of his chargeable attendance.

Clerk of the Declarations, An officer of the court of King's Bench, that files all declarations in causes there depending, after they are ingross'd, &c.

Clerk of the Deliberies, Is an officer in the Tower of London, who exercises his office in taking of indentures for all stores, ammunition, &c. issued from thence.

Clerk of the Errors, (*clericus errorum*) In the court of Common Pleas, transcribes and certifies into the King's Bench the tenor of the records of the cause or action, upon which the writ of *error*, made by the curfitor, is brought there to be heard and determined. The clerk of the errors in the King's Bench, likewise transcribes and certifies the records of causes in that court into the Exchequer, if the cause or action were by bill: if by original, the Lord Chief Justice certifies the record into the house of peers in parliament, by taking the transcript from the clerk of the errors, and delivering it to the Lord Chancellor, there to be determined, according to the statutes 27 Eliz. c. 8. and 31 Eliz. c. 1. The clerk of the errors in the Exchequer also transcribes the records, certified thither out of the King's Bench, and prepares them for judgment in the court of Exchequer Chamber, to be given by the Justices of C. B. and Barons there. Stat. 16 Car. 2. c. 2. 20 Car. 2. c. 4.

Clerk of the Essoins, Is an officer belonging to the court of Common Pleas, who keeps the *essoins rolls*; and the *essoins roll* is a record of that court: he has the providing of parchment, and cutting it out into *rolls*, marking the numbers thereon: and the delivery out of all the rolls to every officer of the court; the receiving of them again when they are written, and the binding and making up the whole bundles of every term; which he doth as servant of the Chief Justice. The Chief Justice of C. B. is at the charge of the parchment of all the rolls, for which he is allowed; as is also the Chief Justice of B. R. besides the penny for the seal of every writ of privilege and outlawry, the seventh penny taken for the seal of every writ in court under the green wax, or petit seal; the said Lord Chief Justices having annexed to their offices or places, the custody of the said seals belonging to each court.

Clerk of the Excheats, (*clericus excheatorum*) A clerk or officer belonging to the Exchequer, who every term receives the *excheats* out of the Lord Treasurer's Remembrancer's office, and writes them out to be levied for the King: and he makes schedules of such sums *excheated* as are to be discharged.

Clerk of the Hanaper, or Hamper, Is an officer in the Chancery, whose office is to receive all the money due to the King, for the seals of charters, patents, commissions and writs; as also fees due to the officers for inrolling and examining the same. He is obliged to attendance on the Lord Chancellor daily in the term time, and at all times of sealing, having with him leather bags, wherein are put all charters, &c. After they are sealed, those bags, being sealed up with the Lord Chancellor's private seal, are delivered to the controller of the hanaper, who upon receipt of

them, enters the effect of them in a book, &c. This *hanaper* represents what the Romans termed *fiscum*, which contained the Emperor's treasure: and the Exchequer was anciently so called, because in eo reconderentur hanapi & scutrea cateraque vasa quæ in censum & tributum persolvi solebant; or it may be for that the yearly tribute which princes received was in hampers or vessels full of money. There being an arrear of 10,590*l.* 12*s.* 11*d.* of several antient fees and salaries, &c. payable out of this office; and there being a remainder of 13,698*l.* 1*s.* 11*d.* of the six-penny stamp-duty on writs granted for relief of the suitors of the court of Chancery; it was enacted by the Stat. 23 G. 2. c. 25. that thereout the 10,590*l.* 12*s.* 11*d.* should be paid to the creditors of this office. That the said duty should be made perpetual; and thereout 3000*l.* per annum should be paid to the clerk of the hanaper, that the residue of the 13,698*l.* 1*s.* 11*d.* should be laid out in government securities, and the interest paid to the clerk of the hanaper, who should pay 1,200*l.* to the Master of the Rolls. And that in case the revenue of this office to augmented, should be more than sufficient to pay all fees, salaries, &c. the clerk should account for the surplus.

Clerk of the Inrollments, Is an officer of the Common Pleas, that inrolls and exemplifies all fines and recoveries, and returns writs of entry, summons and seisin, &c.

Clerk of the Juries, (*clericus juratorum*) An officer belonging to the court of Common Pleas, who makes out the writs of *habeas corpora* and *distringas*, for the appearance of juries; either in that court, or at the assizes, after the jury or panel is returned upon the *venire facias*: he also enters into the rolls the awarding of these writs; and makes all the continuances from the going out of the *habeas corpora* until the verdict is given.

Clerk Controller of the King's House, Is an officer in the King's court, that hath authority to allow or disallow charges and demands of purfivants, messengers of the Green Cloth, &c. He hath likewise the oversight of all defects and miscarriages of any of the inferior officers; and hath a right to sit in the counting-house, with the superior officers, viz. the lord steward, treasurer, controller, and cofferer of the household, for correcting any disorders. 33 H. 8. c. 12.

Clerk Marshal of the King's House, An officer that attends the marshal in his court, and records all his proceedings, 33 H. 8. c. 22.

Clerk of the King's Silver, (*clericus argenti regis*) Is an officer belonging to the court of Common Pleas, to whom every fine is brought after it hath passed the office of the *custos brevium*, and by whom the effect of the writ of covenant is entered into a paper-book; according to which all the fines of that term are recorded in the rolls of the court. And the entry is in this form: Wills, ff. A. B. dat domino regi dimidiam marcam, &c. pro licentia concordandi cum C. D. pro talibus terris in, &c. & habet per chirographum per pacem admissum, &c. After the King's silver is entered, it is accounted a fine in law, and not before.

Clerk of the King's Great Wardrobe, An officer of the King's household, that keeps an account or inventory of all things belonging to the royal wardrobe. Stat. 1 E. 4. c. 1.

Clerk of the Market, (*clericus mercati hospitii regis*) Is an officer of the King's house, to whom is belongs to take charge of the King's measures, and keep the standards of them, which are examples of all measures throughout the land; as of ells, yards, quarts, gallons, &c. And of weights, bushels, &c. And to see that all weights and measures in every place be answerable to the said standard: of which office you may read in *Flora, lib. 2. cap. 8, 9, 10, &c.* Touching this officer's duty, there are also divers statutes, as 13 R. 2. cap. 4. and 16 R. 2. c. 3. by which every clerk of the market is to have weights and measures with him when he makes assay of weights, &c. mark'd according to the standard; and to seal weights and measures, under penalties. The 16 Car. 1. c. 19. enacts, That clerks of the market of the King's or Prince's household, shall only execute their offices within the verge; and head officers are to act in corporations, &c. The clerks of markets have generally power to hold a court, to which end they may issue out process

process to sheriffs and bailiffs to bring a jury before them; and give a charge, take presentments of such as keep or use false weights and measures; and may set a fine upon the offenders, &c. 4 *Instr.* 274. But if they take any other fee or reward than what is allowed by statute, &c. or impose any fines without legal trial; or otherwise misbehave themselves, they shall forfeit 5*l.* for the first offence, 10*l.* for the second, and 20*l.* for the third offence, on conviction before a justice of peace, &c. *Stat.* 16 *Car.* 1. c. 19.

Clerk of the Nichils, or Nibils (*clericus nibilorum*) An officer of the court of *Exchequer*, who makes a roll of all such sums as are *nibiled* by the sheriffs upon their estreats of green wax, and delivers the same into the remembrancer's office, to have execution done upon it for the king. See *Stat.* 5 *R.* 2. c. 13. *Nibils* are issues by way of fine or amercement.

Clerk of the Ordinance, Is an officer in the Tower, who registers all orders touching the king's ordinance.

Clerk of the Outlawries, (*clericus outlawiarum*) An officer belonging to the court of *Common Pleas*, being the servant or deputy to the King's Attorney General, for making out writs of *capias utlagatum*, after outlawry; the King's Attorney's name being to every one of those writs.

Clerk of the Paper-Office, Is an officer in the court of *King's Bench*, that makes up the paper-books of special pleadings and demurrers in that court.

Clerk of the Papers, An officer in the *Common Pleas*; who hath the custody of the papers of the warden of the Fleet, enters commitments and discharges of prisoners, delivers out day-rules, &c.

Clerk of a Parish. It was held, that a parish clerk is a mere layman, and ought to be deprived by them that put him in, and no other; and if the ecclesiastical court meddle with deprivation of the parish clerk, they incur a præmunire, and the canon, which wills that the parson shall have election of the parish clerk, is merely void to take away the custom that any had to elect him. 2 *Brownl.* 38. *Pasch.* 8 *Jac.* C. B. *Gaudy v. Newman*.

Resolved, that if the parish clerk misdeemean himself in his office, or in the church, he may be sentenced for it in the ecclesiastical court to excommunication, but not to deprivation. 2 *Brownl.* 38. *Pasch.* 8 *Jac.* C. B. *Gaudy v. Newman*.

Parish clerk may sue in court christian for his fees, which are called *largitiones charitativæ*. Arg. cites the Register, fol. 52. for he is *quodam modo* an officer spiritual, cites 21 *Ed.* 4. 47. 2 *Roll. Rep.* 71. *Hill.* 18 *Jac.* B. R. in *Bishop's case*.

Parish clerk nominated by the parson is by Common law an officer, and in *for life*, without deed. 2 *Salk.* 536. pl. 27. *Hill.* 10 *Ann.* B. R. *Parish of Gatten v. Milwick*.

Clerk of the Parliament Rolls, (*clericus rotulorum parliamenti*) Is that person which records all things done in the high court of parliament, and ingrosseth them in parchment rolls, for their better preservation to posterity: of these officers there are two, one in the Lord's House, and another in the House of Commons.

Clerk of the Patents, Or of the letters patent under the Great Seal of England; an office created 18 *Jac.* 1:

Clerk of the Peace, (*clericus pacis*) Is an officer belonging to the sessions of the peace: his duty is to read indictments, enrol the proceedings, and draw the process; he keeps the counter-part of the indenture of armour; records the proclamation of rates for servants wages; has the custody of the register-book of licences given to badgers of corn; of persons licensed to kill game, &c. And he registers the estates of papists and others not taking the oaths. Also he certifies into the *King's Bench* transcripts of indictments, outlawries, attainders and convictions, had before the justices of peace, within the time limited: and by statute, clerks of the peace, &c. are to certify the tenor of every indictment, outlawry, &c. into B. R. within forty days, under a certain penalty. *Stat.* 34 & 35 *H.* 8. cap. 14. And every clerk of the peace is to deliver to the Sheriff within twenty days after Michaelmas yearly an estreat of all fines, &c. 22 *Car.* 2. c. 22. The *custos*

rotulorum of the county hath the appointment of the clerk of the peace, who may execute his office by deputy. 37 *H.* 8. c. 1. And if a clerk of the peace misdeemean himself, the justices of peace in quarter-sessions have power to discharge him; and the *custos rotulorum* is to chuse another resident in the county, or on his default the sessions may appoint one: the place is not to be sold, on pain of forfeiting double the value of the sum given, and disability to enjoy it, &c. *Stat.* 1 *W.* & *M.* sess. 1. c. 21. See the 4 & 5 *W.* & *M.* c. 24. For the oath of the clerk of the peace on delivery of the estreats, and the 3 *Geo.* 1. c. 18. by which the Barons of the Exchequer may amerce the clerk of the peace, for neglecting to return the estreats according to the said two acts of 22 & 23 *Car.* 2. c. 22. and 4 & 5 *Will.* & *M.* c. 24. See *Estreats*.

Clerk of the Pell, (*clericus pellis*) Is a clerk belonging to the *Exchequer*, whose office is to enter every teller's bill into a parchment roll called *pellis receptorum*, and also to make another roll of payments, which is termed *pellis exituum*; wherein he sets down by what warrant the money was paid; mentioned in the *Stat.* 22 & 23 *Car.* 2. c. 22.

Clerk of the Petty-Bag (*clericus parvæ bagæ*) An officer of the court of *Chancery*. There are three of these officers, of whom the Master of the Rolls is the chief. Their office is to record the return of all inquisitions out of every shire; to make out patents of customers, gaugers, controllers, &c. all *conge d'elires* for bishops, the summons of the nobility, and burgesies to parliament; commissions directed to knights and others of every shire, for assessing subsidies and taxes: all offices found *pist mortem* are brought to the clerks of the petty bag to be filed; and by them are entered all pleadings of the Chancery concerning the validity of patents or other things which pass the Great Seal; they also make forth liberates upon extents of statutes staple, and recovery of recognizances forfeited, and all elegits upon them: and all suits for or against any privileged person are prosecuted in their office, &c.

Clerk of the Pipe, (*clericus pipæ*) Is an officer in the *Exchequer*, who having the accounts of debts due to the king, delivered and drawn out of the remembrancer's offices, charges them down in the great roll, and is called *clerk of the pipe* from the shape of that roll, which is put together like a pipe: he also writes out warrants to the sheriffs to levy the said debts upon the goods and chattels of the debtors; and if they have no goods, then he draws them down to the Lord Treasurer's Remembrancer, to write estreats against their lands. The ancient revenue of the crown stands in charge to him, and he sees the same answered by the farmers and sheriffs: he makes a charge to all sheriffs of their summons of the pipe, and green wax, and takes care it be answered on their accounts. And he hath the drawing and ingrossing of all leases of the king's lands; having a secondary and several clerks under him. In the reign of King *Hen.* 6. this officer was called *ingrossator magni rotuli*. See *Stat.* 33 *H.* 8. c. 22.

Clerk of the Pleas, (*clericus placitorum*) An officer in the court of *Exchequer*, in whose office all the officers of the court, upon special privilege belonging unto them, ought to sue or be sued in any action, &c. In this office are also prosecuted actions at law, by other persons as well as officers of the court; but the plaintiff ought to be tenant, or debtor to the King, or some way accountant to him: now it is only matter of form. The clerk of the pleas has under him a great many clerks, who are attornies in all suits commenced or depending in the *Exchequer*.

Clerk of the Privy Seal, (*clericus privati sigilli*) There are four of the officers which attend the Lord Privy Seal: or if there be no Lord Privy Seal, the Principal Secretary of State; writing and making out all things that are sent by warrant from the Signet to the Privy Seal, and which are to be passed to the Great Seal: also they make out *privy seals*, upon a special occasion of his Majesty's affairs, as for loan of money, and the like. He that is now called Lord Privy Seal, seems to have been in ancient times called *clerk of the privy seal*; but notwithstanding

to have been reckoned in the number of the great officers of the realm. *Stat. 12 R. 2. c. 11.* And *27 H. 8. c. 11.*

Clerk of the Rolls, An officer of the Chancery, that makes search for, and copies deeds, offices, &c.

Clerk of the Rules, In the court of King's Bench, is he who draws up and enters all the rules and orders made in court: and gives rules of course on divers writs: this officer is mentioned in the *22 & 23 Car. 2. c. 22.*

Clerk of the Sewers, An officer belonging to the commissioners of sewers, who writes and records their proceedings, which they transact by virtue of their commissions, and the authority given them by Statute *13 El. c. 9.*

Clerk of the Signet, (*clericus signeti*) Is an officer continually attendant on his Majesty's Principal Secretary, who hath the custody of the *privy signet*, as well for sealing his Majesty's private letters, as such grants as pass the King's hand by bill signed: and of these clerks or officers there are four that attend in their course, and have their diet at the Secretary's table. The fees of the clerk of the signet, and privy seal, are limited particularly by statute, with a penalty annexed for taking any thing more. See *27 H. 8. c. 11.*

Clerk of the Supersebas's, An officer belonging to the court of Common Pleas, who makes out writs of *supersebas*, upon a defendant's appearing to the *exigent* on an outlawry, whereby the sheriff is forbidden to return the *exigent*.

Clerk of the Treasury, (*clericus thesaurarii*) Is an officer of the Common Pleas, who hath the charge of keeping the records of the court, and makes out all the records of *Nisi prius*; also he makes all exemplifications of records being in the Treasury; and he hath the fees due for all searches. He is taken to be the servant of the Chief Justice, and removeable at pleasure; whereas all other officers of the court are for life: there is a *secondary*, or *under clerk of the Treasury* for assistance, who hath some fees and allowances: and likewise an *under-keeper*, that always keeps one key of the Treasury door, and the chief clerk of the secondary another; so that the one cannot come in without the other.

Clerk of the Warrants, (*clericus warrantorum*) An officer belonging to the Common Pleas court, who enters all warrants of attorney for plaintiffs and defendants in suits; and inrolls deeds of indentures of bargain and sale, which are acknowledged in the court, or before any judges out of the court. And it is his office to eistreat into the Exchequer all issues, fines and amerciaments, which grow due to the King in that court, for which he hath a standing fee or allowance.

Cleronimus, An old word signifying heir; it is mentioned in *Mon. Angl. tom. 3. p. 129.*

Clipping the coin, An offence pernicious to trade, and an insult on the prerogative. The offence is *high treason*, by *5 Eliz. c. 11.* Also see *18 Eliz. c. 1. & 8 & 9 W. 3. c. 26.* Made perpetual by *7 Ann. c. 25.* against buying, selling, and having in possession any instruments proper only for coining of money. By *15 & 16 Geo. 2. c. 28.* Colouring silver coin to make it resemble gold, or copper to resemble silver, is high treason.

Clitones, The eldest, and all the sons of Kings. In the charter of King *Æthelred*—*Æthelstanus* *Ecbryth*, &c. *cum epitheto clitonis subscribunt.* *Mat. Paris. pag. 153.*—*Ego Edgar, &c. clito legitimus præfati regis, &c.* *Selden's Notes upon Eadmerus.*

Cliffe, Cliff. The names of places beginning or ending with these words, signify a rock from the old Saxon.

Clocks and Watches. Dial-plates and cases not to be exported without the movement, *9 & 10 W. 3. c. 28. sect. 2.*—Makers shall engrave their names on clocks and watches, *9 & 10 W. 3. c. 28. sect. 2.*—Penalties on workmen, &c. imbezilling materials of clocks and watches, *27 Geo. 2. c. 7.*

Cloete, A prison or dungeon; 'tis conjectured to be of British original: the dungeon or inner prison of *Wallingford castle*, temp. *H. 2.* was called *cloete brien*, i. e. *carcer brien*, &c. Hence seems to come the Lat. *clauca*, which was anciently the closest ward or nastiest part of the prison: the old *cloacarius* is interpreted *carceris custos*:

and the present *cloacarius*, or keeper of a *jakes*, is an office in some religious houses abroad, imposed on an offending brother, or by him chosen as an exercise of humility and mortification. *Corwel.*

Cloze Rolls and Cloze Writs, Grants of lands, &c. from the crown are contained in charters or letters *patens*, that is, open letters, *literas patentes*, so called because they are not sealed up, but exposed to open view, with the Great Seal pendant at the bottom; and are usually addressed by the King to all his subjects at large. And therein they differ from other letters of the King, sealed also with his Great Seal, but directed to particular persons, and for particular purposes: which therefore, not being fit for publick inspection, are closed up and sealed on the outside, and are thereupon called writs *close*, *literæ clausæ*; and are recorded in the *close-rolls*, in the same manner as the others are in the *patent-rolls*. *Black. Com. 2 V. 346.*

Closh, Was an unlawful game, forbidden by *Stat. 17 Ed. 4. c. 3.* and *33 H. 8. c. 9.* It is said to have been the same with our *nine-pins*; and is called *clashcayles* by the *33 H. 8. c. 9.* At this time 'tis allowed, and called *kailes*, or *kittles*.

Cloth, No cloth made beyond sea shall be brought into the King's dominions, on pain of forfeiting the same, and the importers to be farther punished. *Stat. 12 Ed. 3. c. 3.*

Clothiers, Are to make broad cloths of certain lengths and breadths, within the lists; and shall cause their marks to be woven in the cloths, and set a seal of lead thereunto, shewing the true length thereof. *4 Ed. 4. c. 1. 27 H. 8. c. 12.* Exposing to sale faulty cloths, are liable to forfeit the same: and clothiers shall not make use of stocks or other deceitful stuff, in making of broad cloth, under the penalty of *5l.* *Stat. 5 & 6 Ed. 6. c. 6.* Justices of peace are to appoint searchers of cloth yearly, who have power to enter the houses of clothiers, and persons opposing them, shall forfeit *10l.* &c. *39 Eliz. c. 20. 4 Jac. 1. c. 2. 21 Jac. 1. c. 18.* All cloth shall be measured at the fulling-mill, by the master of the mill; who shall make oath before a justice for true measuring; and the millman is to fix a seal of lead to cloths, containing the length and breadth, which shall be a rule of payment for the buyer, &c. *10 Ann. c. 16.* By *1 Geo. 1. c. 15.* Broad cloths must be put into water for proof, and be measured by two indifferent persons chosen by the buyer and seller, &c. And clothiers selling cloths before sealed, or not containing the quantity mentioned in the seals, incur a forfeiture of the sixth part of the value. Persons taking off, or counterfeiting seals, forfeit *20l.* And by a late statute, if any weavers of cloth enter into any combination for advancing their wages, or lessening their usual hours of work, or depart before the end of their terms agreed, return any work unfinished, &c. they shall be committed by two justices of peace to the house of correction for three months: and clothiers are to pay their work-people their full wages agreed in money, under the penalty of *10l.* &c. *Stat. 12 Geo. 1. c. 32.* Inspectors of mills and tenter-grounds to examine and seal cloths, are to be appointed by justices of peace in sessions; and mill-men sending clothiers any cloths before inspected, forfeit *40s.* The inspectors to be paid by the clothiers *2d. per cloth.* *13 Geo. 1. c. 23.* If any cloth remaining on the tenters, be stolen in the night, and the same is found upon any person, on a justice's warrant to search, such offender shall forfeit treble value, leviable by distress, &c. or be committed to gaol for three months; but for a second offence he shall suffer six months imprisonment; and the third offence be transported as a felon, &c. *Stat. 15 Geo. 2. cap. 27.* See *Drapery.*

Clove, Is the two and thirtieth part of a weigh of cheese, i. e. eight pounds. *9 H. 6. c. 8.*

Clough, A word made use of for valley, in *Domesday* book. But among merchants, it is an allowance for the turn of the scale, on buying goods wholesale by weight. *Lex Mercat.*

Clunch, In *Staffordshire*, upon sinking of a coal-mine, near the surface they meet with earth and stone, then with a substance called *blue clunch*, and after that they come to coal.

Cluta,

Cluta, (Fr. *clous*) Shoes, clouted shoes; and most commonly horse-shoes: it also signifies the streaks of iron with which cart-wheels are bound. *Consuetud. Dom. de Earend. MS. fol. 16.* Hence clutarium, or cluarium, a forge where the clous or iron shoes are made.—*Tenuit dudu carutatus, de domino rege, in capite, per tale servitium*—*vestiendo palatridum domini regis, super quatuor pedes de Cluario domini regis quotiescunque ad manerium suum de Mansfield venerit, &c.* Mon. Angl. tom. 2. pag. 598.

Clypeus, One of a noble family. *Clypei prostrati*, a noble family extinct.—*Sic nobilis clypeus ille marescal-lorum tot & tantis hostibus Angliæ formidabilis evanuit.* Mat. Paris. 463.

Coach, (*currus*) A convenience well known; and for regulating of hackney coaches in London, there are several statutes. By 9 Ann. c. 23. Eight hundred hackney coaches and two hundred chairs are allowed in London and Westminster; which are to be licensed by commissioners, and pay a duty to the crown: and if any person drive a hackney coach without licence, he shall forfeit 5*l.* and a chair 40*s.* Coachmen and chairmen, giving abusive language, or demanding more than their fare, &c. a justice of peace may order them to pay not exceeding 20*s.* to the poor, and not being able to pay it, send them to the house of correction; and persons not paying coachmen their fare, or cutting or defacing coaches, &c. a justice will order satisfaction to be made, and on refusal, may bind them over to the quarter-sessions. The 1 Geo. 1. c. 57. ordains, That where coachmen refuse to go at, or exact more for their hire than is limited by the act, they shall forfeit not exceeding 3*l.* nor under 10*s.* and the commissioners have power to determine it. The fare of hackney coachmen in London, or within ten miles thereof, is 10*s.* per day, allowing 12 hours to the day; and by the hour not above 1*s.* 6*d.* for the first, and 1*s.* for every hour after: and none are obliged to pay above 1*s.* for the use of any hackney coach for any distance, not mentioned in the act, which is not above one mile and four furlongs; nor above 1*s.* 6*d.* for any distance not exceeding two miles: the fare of a hackney chair is 1*s.* for any distance not exceeding a mile, and 1*s.* 6*d.* for any distance not exceeding a mile and four furlongs. There are certain places and distances mentioned in the act for the extent of the respective fares; and other distances measured and rated by the commissioners, in pursuance of the statutes. Coachmen are to have numbers to their coaches on tin-plates, or shall forfeit 5*l.* and refusing any person to take the number of their coaches, or giving a wrong number, incurs the forfeiture of a sum not exceeding 40*s.* None but licensed coaches shall ply at funerals for hire, under the penalty of 5*l.* Drivers of hackney coaches are to give way to persons of quality, and gentlemen's coaches, on the penalty of 10*s.* On Sundays there were formerly only one hundred and seventy-five coaches to ply, but now we believe there are more. There are several standings of coaches, at the most noted parts of the town, ordered by the commissioners to be in the middle of streets, &c. Vide 5 & 6 W. & M. cap. 22. 9 Ann. c. 23. 10 Ann. c. 19. *sect.* 158. 12 Ann. stat. 1. c. 14. 1 Geo. 1. c. 57. And 12 Geo. 1. c. 12. *sect.* 13. 16 Geo. 2. c. 26. *sect.* 3.

The masters of stage coaches are not liable to an action for things lost by their coachmen, who have money given them to carry the goods; unless where any such master takes a certain price for the same. See 1 Salt. 282. By the Stat. 20 Geo. 2. c. 10. A yearly tax of 4*l.* is laid on every coach, berlin, landau, chariot, calash with four wheels, chaise marine, chaise with four wheels, and caravan kept by any person for his own use, (except such as are licensed by the commissioners for hackney coaches), and of 40*s.* on every calash, chaise and chair with two wheels, drawn by one or more horses, kept by any person for his own use. No person to pay for more than five such carriages on which 4*l.* a year is laid, except kept to be let out for hire. This duty to be under the management of the commissioners of excise. Persons keeping such coaches, &c. yearly to give notice to the excise-office, and then pay the duty. Stage coaches and post-chaises are excepted. Post-chaises are to be entered

at the excise-office, and have a figure or mark of distinction; and so are coaches, &c. let out for hire. Coaches, &c. kept for sale are not to be taxed. If any person, having paid the duty, shall die before the end of the year, no person claiming title to the coach, &c. shall be liable to any tax for the remainder of the year.

Coachmakers. The wares of coachmakers shall be searched, by persons appointed by the saddlers company. Stat. 1 Jac. 1. cap. 22.

Coadjutor, (*Lat.*) A fellow-helper or assistant; particularly applied to one appointed to assist a bishop, being grown old and infirm, so as not to be able to perform his duty.

Coal-mines. Maliciously setting fire to coal-mines, or to any delph of coal, is felony. 10 Geo. 2. c. 32. *sect.* 6.

Coals. The sack of coals is to contain four bushels of clean coals: and sea coals brought into the river Thames, and sold, shall be after the rate of thirty-six bushels to the chaldron: and one hundred and twelve pounds the hundred, &c. The Lord Mayor and court of Aldermen in London, and justices of the peace of the several counties, or three of them, are empowered to set the price of all coals to be sold by retail; and if any person shall refuse to sell for such prices, they may appoint officers to enter any wharfs or places where coals are kept, and cause the coals to be sold at the prices appointed. 7 Ed. 6. cap. 7. 16 & 17 Car. 2. cap. 2. 17 Geo. 2. c. 35. Commissioners are ordained for the measuring and marking of keels, and boats for coals at Newcastle; and vessels carrying coals before measured and marked, shall be forfeited, &c. 30 Car. 2. c. 8. & 6 & 7 W. 3. c. 10. English ships trading in coals may be manned with foreigners during war. 2 W. & M. c. 17. A duty is laid on coals imported, by Stat. 6 & 7 W. 3. c. 18. 9 & 10 W. 3. c. 13. 10 & 11 W. 3. c. 21. 8 Ann. c. 4. 9 Ann. c. 6, 22 & 28. 12 Ann. stat. 2. c. 9. 5 Geo. 1. c. 9. & 30 Geo. 2. c. 19. For the contents of the coal-bushel, see 12 Ann. stat. 2. c. 17.

Contracts between coal owners and masters of ships, &c. for restraining the buying of coals are void; and the parties to forfeit 100*l.* And selling coals for other sorts than they are, shall forfeit 50*l.* Not above fifty laden colliers are to continue in the port of Newcastle, &c. And work people in the mines there shall not be employed who are hired by others, under the penalty of 5*l.* Coal-sacks shall be sealed and marked at Guildhall, &c. and be four feet and two inches in length, and twenty-six inches in breadth, on pain of 20*s.* Also sellers of coals are to keep a lawful bushel, and put three bushels to each sack, which bushel and other measures shall be edged with iron, and sealed; and using others, or altering them, incurs a forfeiture of 50*l.* &c. The penalties above 5*l.* recoverable by action of debt, &c. and under that sum before justices of peace. Stat. 3 Geo. 2. c. 26. Owners or masters of ships shall not enhance the price of coals in the river of Thames, by the keeping of turn in delivering of coals there, under the penalty of 100*l.* &c. 4 Geo. 2. c. 30. The price of sea-coals imported into London and ports adjacent, to be there sold, may be set by the Lord Mayor, &c. for one year; and persons selling coals out of any vessel, yard, or warehouse, for a higher price, shall forfeit 36*s.* per chaldron, to be levied by warrant of two justices. Dealers in coals at Billingsgate, &c. refusing to sign legal contracts, shall forfeit 50*l.* And any person vending coals at New-castle, that refuseth to put a loading on shipboard, on tender of the price they bear, is liable to the forfeiture of 100*l.* to be recovered by action in the courts at Westminster, within six months, by Stat. 11 Geo. 2. c. 15.

By the Stat. 19 Geo. 2. c. 35. Two land coal-meters are to be appointed for the city and liberty of Westminster, and that part of the dutchy of Lan after adjoining thereto, and the several parishes of St. Giles in the Fields, St. Mary le Bon, and such part of the parish of St. Andrew, Holborn, as lies in the county of Middlesex, are to appoint labouring coal-meters. No person, after coals delivered from any ship, is to break bulk, before the time of delivery at the wharf, in the absence of a meter or the consumer, under the penalty of 5*l.* All contracts for coals

coals to be delivered within the limits aforesaid (not being less than five chaldron) shall be for pool measure, including the ingrain, and shall be so understood, though the term pool measure be omitted in the contract; and shall be loaded separately, and delivered without being measured, unless the buyer desire it. All coals sold for wharf measure, above eight bushels, shall be measured in the presence of a labouring coal-meter. The seller to pay 4*d.* per chaldron to the principal coal-meter, who is to deliver to the seller a ticket of the names of the seller and consumer, quantity of coals, &c. the seller is to deliver the same to the consumer, who is to pay for the metage. Penalty of altering or refusing a ticket 5*l.* Penalty of carrying coals without a ticket 50*l.* Penalty on false ticket or false measure 5*l.* Consumer dissatisfied may have coals re-measured. The carman, on notice in writing, that the consumer is dissatisfied, shall not quit the cart till the coals are re-measured. By 23 Geo. 2. c. 26. If either of the principal land coal-meters shall neglect to station labouring coal-meters, he shall forfeit 10*l.* Every labouring coal-meter neglecting to attend forfeits 40*s.* For farther regulations of the coal trade, see 22 Geo. 2. c. 37. 31 Geo. 2. c. 15. 32 Geo. 2. c. 27. & 33 Geo. 2. c. 15.

Coat-armour. Courts of arms were not introduced into seals, nor indeed into any other use, till about the reign of Richard the First, who brought them from the Croisade in the Holy Land; where they were first invented and painted on the shields of the knights, to distinguish the variety of persons of every Christian nation who resorted thither, and who could not, when clad in complete steel, be otherwise known or ascertained. *Black. Com.* 2*V.* 306.

It is the business of the court military, or the court of chivalry, according to Sir Matthew Hale, to adjust the right of armorial ensigns, bearings, crests, supporters, pennons, &c. and also rights of place or precedence, where the King's patent or act of parliament (which cannot be over-ruled by this court) have not already determined it. *Black. Com.* 3*V.* 105.

Cocherings, An exaction or tribute in Ireland, now reduced to chief rents. See *Bonaght*.

Cochineal. The importation of cochineal from ports in Spain was declared lawful during the late war, &c. *Stat.* 6 Ann. c. 33. Any persons may import cochineal into this kingdom, in ships belonging to Great Britain, or other country in amity, from any place whatsoever, by 7 Geo. 2. cap. 18.

Cocket, (*cockettum*) Is a seal belonging to the King's custom-house: or rather a scroll of parchment sealed, and delivered by the officers of the custom-house to merchants, as a warrant that their merchandises are customed: which parchment is otherwise called *litera de coketto*, or *litera testimoniales de coketto*. 11 Hen. 6. *Reg. Orig.* 179, 192. So it is used, 5 & 6 Ed. 6. cap. 14, &c. The word *cockettum* or *cocket*, is also taken for the custom-house or office where goods to be transported were first entered, and paid their custom, and had a *cocket* or certificate of discharge: and *cockettata lana* is wool duly entered and *cocketted*, or authorized to be transported. *Mem. in Scac.* 23 Ed. 1. *Cocket* is likewise used for a sort of measure, as we may read in *Fleta*, lib. 2. cap. 9. *Panis vero integer quadrantalibus frumenti ponderabitur unum cocket & dimidium*; and it is made use of for a distinction of bread, in the statute of bread and ale. 51 H. 3. stat. 1. ord. pro pistor. Where mention is made of *wastel bread*, *cocket bread*, *bread of treet*, and *bread of common wheat*; the wastel bread being what we now call the *finest bread*, or *French bread*; the *cocket bread* the second sort of *white bread*; bread of treet, and of common wheat, *brown*, or *household bread*, &c. What we call *cocket*, (as to the King's seal) was called *coke*, and a part of the King's seal. *Madock Exch.* 1*V.* 783. c. 18. & *ibid.* c. 1. N. S.

Cockletus, A boatman, *cockswain* or *coxon*. *Cowell*.

Cocula, A cogue, or little drinking-cup, in form of a small boat, used especially at sea, and still retained in a cogue of brandy. These drinking cups are also used in taverns to drink new sherry, and other white wines, which look foul in a glass.

Codicil, (*codicillus*, from *codex*, a book, a writing) Is a schedule or supplement to a will, where any thing is omitted, which the testator would add, or he would explain, alter, or retract what he hath done; and it is the same with a testament, but that it is without an executor: and one may leave behind him only ~~or~~ *testament*, by as many codicils as he pleases. *Wed. Symb.* 7. 336. A codicil is taken as part of the will; and the codicils ought to be annexed to the testament, and the executor is to see that they are all performed: if the will or codicils are kept from the executor, he may force the party detaining them to deliver them up by the ecclesiastical law, and recover them in the spiritual court. *Swinb. pag.* 1. *sect.* 1. Some writers, comparing a testament and a codicil together, call a testament a great will, and a codicil a little one.

Coffee, Tea, and Chocolate. The custom duties on coffee, tea, and chocolate, are taken off by statute, and inland duties granted in their stead, payable by druggists, and all persons dealing in coffee, &c. And entries are to be made of all warehouses, under penalties and forfeiture of the goods. *Stat.* 10 Geo. 1. c. 10. The duties to be paid are 2*s.* per pound for coffee, for tea 4*s.* and chocolate 1*s.* 6*d.* But see *post*. And coffee, &c. not to be sold but in places entered; and if above six pounds weight, to have a permit: dealers in coffee and chocolate, coffee-house keepers, &c. shall keep an account of goods sold every day, and deliver their books to the officers on oath, &c. Chocolate shall be stamped, and chocolate-makers are to make an entry of all chocolate made, under the penalty of 50*l.* And persons, mixing other drugs with coffee or tea, shall forfeit 100*l.* *Stat.* 11 Geo. 1. c. 20. See the late statute against sophisticating tea, and exporting cocoa nutshells or husks to make chocolate, &c. 4 Geo. 2. c. 14. See 5 Geo. 2. c. 24. The inland duties on tea altered, 18 Geo. 2. c. 26. Drawback on tea taken off, 18 Geo. 2. c. 26. India Company may import tea by licence from European ports, 18 Geo. 2. c. 26. Tea may be imported to Ireland and the plantations without paying inland duty, 21 Geo. 2. c. 14. Tea above 6*lb.* in British ships, come from abroad and not employed by the India Company, forfeited. 28 Geo. 2. c. 21. Additional duty on coffee and chocolate, 32 Geo. 2. c. 10.

Cofra, A coffer, chest, or trunk. — *Custos collegii & ministri ejusdem, &c. capientes certam summam pecunie de cofris fundatoris.* Munimenta Hospit. SS. Trinit. de Pontefracto, MS. fol. 50.

Cofferer of the King's Household, Is a principal officer of the King's house, next under the controller, who in the counting-house, and elsewhere, hath a special charge and oversight of other officers of the household, to all which he pays their wages: this officer passes his accounts in the Exchequer, and is mentioned in 39 Eliz. c. 7.

Cogge, A small fishing-boat, upon the coasts of Yorkshire: and *cogs*, (*cogones*) are a kind of little ships, or vessels, used in the rivers Ouse and Umler. *Stat.* 23 H. 8. c. 18. — *Preparatis cogonibus, Galleis & aliis Navibus, &c. Matt. Paris. anno* 1066. And hence the *cogmen*, boatmen of seamen, who after shipwreck or losses by sea, travelled and wandered about to defraud the people by begging and stealing, till they were restrained by divers good laws. *Du Fresne*.

Cognati, Relations ~~by the mother,~~ as the *agnati* are relations by the father.

Cognitione, A writ of coufenage. See *Coufenage*.

Cognissance, or cognizance, (*Fr. connaissance*, Lat. *cognitio*) Is used diversly in our law: sometimes it is an acknowledgment of a *fact*, or confession of a thing done; and there is a cognissance of taking a distress: sometimes it is the hearing of a matter judicially; as to take cognissance of a cause: and sometimes it signifies a jurisdiction, as cognissance of pleas is a power to call a cause or plea out of another court; which none can but the King, or by charter. This cognissance of pleas is a privilege granted by the King to a city or town, to hold plea of all contracts, &c. within the liberty of the franchise; and when any man is impleaded for such matters in the courts of Westminster, the mayor, &c. of such franchise may ask cognissance of the plea, and demand that it shall be determined

terminated before them: but if the courts at *Westminster* be possessed of the plea before *cognisance* be demanded, it is then too late. *Terms de Ley*. See *Stat. 9 H. 4. c. 5*. *Cognisance* of pleas extends not to assises; and when granted, the original shall not be removed: it lies not in a *quare*, *adit*, for they cannot write to the bishop, nor of a plea out of the county-court, which cannot award a resumption. *Esc. Jenk. Cent. 31, 34*. This *cognisance* shall be demanded the first day: and if the demandant in a plea of land counterpleads the franchise, and the tenant joins with the claim of the franchise, and it is found against the franchise, the demandant shall recover the land; but if it be found against the demandant, the writ shall abate. *Ibid. 18*.

There are three sorts of inferior jurisdictions, one whereof is *tenere placita*, and this is the lowest sort; for it is only a concurrent jurisdiction, and the party may sue there, or in the King's courts, if he will. The second is *consuance of pleas*, and by this a right is vested in the lord of the franchise to hold the plea, and he is the only person who can take advantage of it. The third sort is an *exempt jurisdiction*, as where the King grants to a great city, that the inhabitants thereof shall be sued within their city, and not elsewhere; this grant may be pleaded to the jurisdiction of this court, if there be a court within that city which can hold plea of the cause, and *no-body* can take advantage of this privilege but a defendant; for if he will bring *certiorari*, that will remove the cause, but he may waive it if he will, so that the privilege is only for his benefit. *3 Salk. 79, 80. pl. 4. Hill. 1 Ann. B. R. Crosse v. Smith*.

King Hen. 8. by letters patent of the 14th of his reign, and confirmed by parliament, granted to the university of Oxford *consuance of pleas*, in which a scholar or servant of a college should be party, *ita quod iusticiarii de utroque banco se non intromittant*. An attorney of C. B. sued a scholar in C. B. for battery; per cur. This general grant does not extend to take away the special privilege of any court without special words, *Litt. Rep. 304. Mich. 5 C. C. B. Oxford (University's) case*.

If a scholar of Oxford or Cambridge be sued in Chancery for a special performance of a contract to lease lands in *Middlesex*, the University shall not have *consuance*, because they cannot sequester the lands. *Gilb. Hist. of C. P. 194. cites 2 Vent. 363*.

Consuance must be demanded before an imparlance, and the same term the writ is returnable, after the defendant appears, because till he appears there is no cause in court, otherwise there would be a delay of justice; for if after imparlance, when the defendant has a day already allowed him, he would have two days, since when the *consuance* is allowed, the franchise prefixes a day to both parties to appear before them, and it is the lord's laches if he does not come soon enough not to delay the parties. *Gilb. Hist. of C. P. 196*.

Consuance was granted to the University of Oxford, (no case being shewn to the contrary), in *Easter Term, 9 Geo. 2.* in the case of *Woodcocks and Brooke*. *Rep. Temp. Hardw. per Annuity, fo. 241*.

Cognisance also signifies the badge of a waterman or servant, which is usually the giver's crest, whereby he is known to belong to this or that nobleman or gentleman. *Vide Black. Com. 3 V. 300. & 4 V. 275*.

Cognitor and *Cognisee*, (or *cognizor*) *Cognitor*, is he that passeth and acknowledged a fine of lands or tenements to another; and *cognisee* is he to whom the fine of the said lands, &c. is acknowledged. *Stat. 32 H. 8. c. 5*.

Cognitiones, Ensigns and arms, or a military coat painted with arms—*Cum viderunt hostes Christi armis, vexillis & cognitionibus picturatis*, &c. *Mat. Paris. 1250*.

Cognitionibus ostendit, Is a writ to one of the King's justices of the *Common Pleas*, or other that hath Power to take a fine, who having taken the fine defers to certify it, commanding him to certify it. *Reg. Orig. 68*.

Cognovit Vincit, Is where a defendant acknowledges or confesses the plaintiff's cause against him to be just and true, and before, or after issue, suffers judgment to be entered against him without trial. And here the

confession generally extends no further than to what is contained in the declaration; but if the defendant will confess more, he may. *1 Roll. 929. Hob. 178*.

Cogware, Is said to be a sort of coarse cloths, made in divers parts of England, of which mention is made in the *13 R. 2. cap. 10*.

Cohuagium, A tribute paid by those who meet promiscuously in the market or fair; *cohua* signifying a promiscuous multitude of men in a fair or market.—*Quieti ab omni thelonio, Passagio, pontagio, cohugio, pallagio*, &c. *Du Cange*.

Coif, (*coisa*) A title given to serjeants at law; who are called *serjeants of the coif*, from the lawn coif they wear on their heads under their caps, when they are created. The use of it was anciently to cover *tonsuram clericalem*, otherwise called *corona clericalis*; because the crown of the head was close shaved, and a border of hair left round the lower part, which made it look like a crown. *Blount*.

Coin, (*cuna pecunia*) Seems to come from the Fr. *coign*, i. e. *angulus*, a corner, whence it has been held, that the ancientest sort of coin was square with corners, and not round as it now is: it is any sort of money coined. *Crompt. Jurisd. 220*. *Coin* is a word collective, which contains in it all manner of the several stamps and species of money in any kingdom: and this is one of the royal prerogatives belonging to every sovereign prince, that he alone in his own dominions may order and dispose the quantity, value, and fashion of his coin. But the coin of one King is not current in the kingdom of another, unless it be at great loss; though our King by his prerogative may make any foreign coin lawful money of England at his pleasure, by proclamation. *Terms de Ley*. If a man binds himself by bond to pay one hundred pounds of lawful money of Great Britain, and the person bound, the obligor, pays the obligee the money in French, Spanish, or other coin, made current either by act of parliament, or the King's proclamation, the obligation will be well performed. *1 Inst. 207*. But 'tis said a payment in farthings, is not a good payment. *2 Inst. 517*. When a person has accepted of money in payment from another, and put the same into his purse, it is at his peril after his allowance; and he shall not then take exception to it as bad, notwithstanding he presently reviews it. *Terms de Ley*. By statute any person may break or deface pieces of silver money suspected to be counterfeit or diminished, otherwise than by wearing: but if such pieces on breaking, &c. are found to be good coin, it will be at the breaker's peril, who shall stand to the loss of it. *9 & W. 3. c. 21*. Coins of gold and silver are to pass notwithstanding some of them are crack'd, or worn, but not if they are clipt. *19 H. 7. c. 5*. Counterfeiting, impairing, or clipping of the King's coin, is made high treason. *25 Ed. 3. c. 14.* and *18 Eliz. cap. 7*. It is also treason to make any stamp, dye, mould, &c. for coining, except by persons employed in the mint, &c. Conveying such out of the mint, is the same; and so is colouring metal resembling coin of gold or silver, marking it on the edges, &c. And if any persons mix blanch'd copper with silver, to make it heavier, and look like gold, or receive, or pay counterfeit milled money, it is felony. *8 & 9 W. 3. c. 26*. Counterfeiting broad pieces of gold, &c. is declared to be treason. *Stat. 6 Geo. 2. cap. 26*. Persons that wash or gild any shilling, or six-pence, or alter the impression, so as to make them resemble a guinea, half guinea, &c. are adjudged guilty of high treason; and those who tender in payment, any counterfeit coin, knowingly, shall be imprisoned six months for a first offence, two years for the second, and a third suffer as felons. *15 Geo. 2. c. 28*. The statutes which ordain milled money to be made, give liberty to any person to refuse hammered silver coin, as not being the lawful coin of this kingdom. *9 W. 3. c. 2*. Counterfeiting of the coin extends only to gold and silver coin; for the coining of farthings or half-pence, or pieces to go for such, of copper, incurs a penalty of 5*l.* for every pound weight, by *Stat. 9 & 10 W. 3. c. 33*. This offence is now punished with two years imprisonment, and surety to be given by the offenders for good behaviour two years more. *15 Geo. 2. c. 28*. Persons apprehending money-

money-coiners, clippers, &c. are to have 40*l.* reward; and a guilty person discovering two others, to be pardoned, &c. 6 & 7 *W. 3. c. 17. §. 9.* 10*l.* is also given as a reward, for apprehending and convicting coiners of copper money. In the seventh year of King William III. an act was made for calling in all the old coin of the kingdom, and to melt it down and recoin it; the deficiencies whereof were to be made good at the public charge: and in every hundred pound coined, 40*l.* was to be shillings, and 10*l.* sixpences, under certain penalties. Persons bringing plate to the mint to be coined, were to have the same weight of money delivered out, as an encouragement: and receivers general of taxes, &c. were to receive money at a large rate per ounce. Our guineas have been raised and fallen, as money has been scarce or plenty, several times by statute: and anno 3 *Geo. 1.* on a scarcity of silver coin, for remedy, guineas were sunk to 11*s.* at which they now pass, by proclamation. See *Money*, and *Black. Com. 4 V. 84, 88, 90, 98, 120.*

Coinage, (*monagium*) Is the stamping and making of money, by the King's authority. And there is a duty of 10*s.* per ton on wine, beer, and brandy imported, called the *coinage duty*, granted for expence of the King's *coinage*, but not to exceed 3000*l.* per ann. *Stat. 18 Car. 2. cap. 5.* This duty for *coinage* hath been continued and advanced, by divers statutes, as 4 & 5 *Ann. c. 22.* 1 *Geo. 1. c. 43.* 9 *Geo. 1. c. 19. &c.* The *coinage duties* are continued for seven years, by a late statute; and the commissioners of the treasury, out of the money arising by this act, or other publick supplies, shall defray the expence of the mints of England and Scotland, not exceeding 75000*l.* a year. *Stat. 4 Geo. 2. c. 12.* By *Stat. 1 Geo. 3. c. 16.* The *coinage-duty* is continued for seven years from March 1, 1761. See *Tab. to Stat. tit. Money.*

Coliberts, (*coliberti*) Were tenants in socage; and particularly such villeins as were manumitted or made freemen. *Domesday.* But they had not an absolute freedom; for though they were better than servants, yet they had superior lords to whom they paid certain duties, and in that respect they might be called servants, though they were of middle condition, between freemen and servants. — *Libertate carens colibertus dicitur esse.* Du Cange.

Collateral, (*collateralis*) from the Lat. *laterale*, sideways, or that which hangeth by the side, not direct: as *collateral assurance* is that which is made over and above the deed itself: *collateral security*, is where a deed is made of other land, besides those granted by the deed of mortgage: and if a man covenants with another, and enters into bond for performance of his covenant, the bond is a *collateral assurance*; because it is external, and without the nature and essence of the covenant. If a man hath liberty to pitch booths or standings, for a fair or market in another person's ground, it is *collateral* to the ground: The private woods of a common person, within a forest, may not be cut down without the King's licence; it being a prerogative *collateral* to the foil. And to be subject to the feeding of the King's deer, is *collateral* to the foil of a forest. *Crompt. Jurisd. 185. Manwood, p. 66.*

Collateral Consanguinity, or *kindred*. *Collateral relations* agree with the lineal in this, that they descend from the same stock or ancestor; but differ in this, that they do not descend from each other. *Collateral kinsmen*, therefore, are such as lineally spring from one and the same ancestor, who is the *stirps* or root, the *stipes*, trunk, or common stock, from whence these relations are branched out. *Vide Black. Com. 2 V. 204, &c.*

Collateral Discent, and **Collateral Warranty**. See *Discent* and *Warranty*.

Collateral Issue. Is where a criminal convict pleads any matter, allowed by law, in bar of execution, as *pregnancy*, the King's *pardon*, an *act of grace*, or *diversity of person*, viz. that he or she is not the same that was attainted, &c. whereon issue is taken, which issue is to be tried, by a jury, *instantly*. *Vide Black. Com. 4 V. 389.*

Collatio Honorum, Is in law where a portion or money advanced by the father to a son or daughter, is brought into *hotchpot*, in order to have an equal distributory share of his personal estate, at his death, accord-

ing to the intent of the *Stat. 22 & 23 Car. 2. c. 10. Abr. Caf. Eq. p. 254.* See *Hotchpot*, and *Black. Com. 2 V. 517.*

Collation of a Benefice, (*collatio beneficii*) Signifies the bestowing of a *benefice* by the bishop, when he hath right of patronage. And it differs from *institution* in this, that institution is performed by the bishop upon the presentation of another, and *collation* is his own act of presentation; and it differeth from a common *presentation*, as it is the giving of the church to the parson, and presentation is the giving or offering of the parson to the church. But *collation* supplies the place of presentation and institution; and amounts to the same as institution, where the bishop is both patron and ordinary. 1 *Lill. Abr. 273.* Anciently the right of presentation to all churches, was in the bishop; and now if the patron neglects to present to a church, then this right returns to the bishop by *collation*: and if the bishop neglects to collate within six months after the lapse of the patron, then the archbishop hath a right to do it; and if the archbishop neglects, then it devolves to the King; the one as superior, to supply the defects of bishops, the other as supreme, to reform all defects of government. As a bishop may neglect to *collate*, so it may happen that he may make his *collation* without title; but such a wrongful *collation* doth not put the true patron out of possession; for after the *collatee* of the bishop is instituted and inducted, he may present his clerk: and *collation* in this case, shall be intended only as a provisional incumbency to perform divine service till presentment is made by the true patron. 1 *Inst. 344.* By *collation* the church is not full; and a right patron may bring his writ at any time to remove the person *collated*; except his right be likewise to *collate*, when *plenary by collation* may be pleaded. *Wood's Inst. 159.* Where a bishop gives a benefice as *patron*, he collates to it *jure pleno*; and when by *lapse*, he doth it *jure devoluto*. The *collation* by *lapse*, is in right of the patron, and for his turn: and in assise of *darrein presentment*, &c. it shall be laid as his possession. 24 *Ed. 3. 26. F. N. B. 31.*

Collatione facta uni post mortem alterius, Is a writ directed to the justices of the *Common Pleas*, commanding them to issue their writ to the bishop, for the admission of a clerk in the place of another presented by the King; who died during the suit between the King and the bishop's clerk: for judgment once passed for the King's clerk, and he dying before admittance, the King may bestow his presentation on another. *Reg. Orig. 31.*

Collatione Heremitagii, A writ whereby the King conferred the keeping of an *hermitage* upon a clerk. *Reg. Orig. 303, 308.*

Collation of Seals. This was when upon the same label, one seal was set on the back or reverse of the other. — *Ad majorem securitatem premissorum sigillum discreti viri officialis domini Batho Well. Episcopi filo medio per modum collationis, sigillo meo apponi procuravi.* Cartular. Abbat. Glaston. MS. 105.

Collative Advowsons. An *advowson collative* is where the bishop and patron are one and the same person: in which case the bishop cannot present to himself; but he does, by the one act of *collation*, or conferring the benefice, the whole that is done in common cases, by presentation and institution. *Vide Black. Com. 2 V. 22, 23.*

Collectors, of money due to the King, not paying the same to whom it ought to be paid, shall answer so much per Cent. to his majesty till payment. *Stat. 20 Car. 2. c. 2.* See *Receivers*.

College, (*collegium*) A particular corporation, company or society of men, having certain privileges founded by the King's licence: and for Colleges in reputation, see 4 *Rep. 106, 108.* The establishment of Colleges or Universities is a remarkable æra in literary history. The schools in Cathedrals and Monasteries confined themselves chiefly to the teaching of grammar. There were only one or two masters employed in that office. But in Colleges, professors were appointed to teach all the different parts of science. The first obscure mention of academic degrees in the University of Paris, (from which the other Universities in Europe have borrowed most of their customs and institutions), occurs, A. D. 1215. *Vide Roberts. Hist. Emp. C. V. 1 V. 323. Vide Leq. 1st.*

See the power of visitors of Colleges well explained in *Dr. Walker's case. Rep. Temp. Hardw. per Annaly, 212. Vide Leases.*

Collegiate Church, Is that which consists of a dean and secular canons; or more largely, it is a church built and endowed for a society, or body corporate, of a dean or other president, and secular priests, as canons or prebendaries in the said church. There were many of these societies distinguished from the religious or regulars, before the reformation: and some are established at this time; as *Westminster, Windsor, Winchester, Southwell, Manchester, &c.*

Colligendum bona defuncti, (letters ad.) In defect of representatives and creditors to administer to an intestate, &c. the ordinary may commit administration to such discreet person as he approves of, or grant him these letters, which neither make him executor nor administrator; his only business being to keep the goods in his safe custody, and to do other acts for the benefit of such as are entitled to the property of the deceased. *Vide Black. Com. 2 V. 505.*

Colloquium, (a colloquendo) A talking together, or affirming of a thing, laid in declarations for words in actions of slander, &c. *Mud. Cas. 203. Cartheau 90.*

Collusion, (collusio) Is a deceitful agreement or contract between two, or more persons, for the one to bring an action against the other, to some evil purpose, as to defraud a third person of his right, &c. This collusion is either apparent, when it shews itself in the face of the act; or which is more common, it is secret, where done in the dark, or covered over with a shew of honesty. And 'tis a thing the law abhors; wherefore when found it makes void all things dependant upon the same, though otherwise in themselves never so good. *Co. Litt. 109, 360. Plowd. 54.* Collusion may sometimes be tried in the same action wherein the covin is, and sometimes in another action, as for lands aliened in mortmain by a *quale jus*: and where it is apparent there needs no proof of it, but when it is secret, it must be proved by witnesses, and found by a jury like other matters of fact. *9 Rep. 33.* The statute of *Westm. 2. 13 Ed. 1. c. 33.* gives the writ *quale jus*, and inquiry in these cases: and there are several other statutes relating to deeds, made by collusion and fraud. The cases particularly mentioned by the statute of *Westm. 2.* are of *quare impedit, assise*, &c. which one corporation brings against another, with intent to recover the land or advowson, for which the writ is brought, held in mortmain, &c. *Vide the statute.*

Colonies, See *Charter-governments in America. Plantation.*

Colonus, An husbandman or villager, who was bound to pay yearly a certain tribute, or at certain times in the year to plough some part of the lord's land; and from hence comes the word *clown*; who is called by the *Dutch boor.*

Colour, (color) Signifies a probable plea, but what is in fact false; and hath this end, to draw the trial of the cause from the jury to the judges: and therefore colour ought to be matter in law, or doubtful to the jury. This colour is used in assises, or action of trespass; and every colour ought to have these qualities following: 1. It is to be doubtful to the *lay gens*, as in case of a deed of feoffment pleaded, and it is a doubt whether the land passeth by the feoffment, without livery, or not. 2. Colour ought to have continuance, though it wants effect. 3. It should be such colour, that if it were effectual, would maintain the nature of the action; as in assise, to give colour of freehold, &c. *10 Rep. 88, 90, a. 91.* Colour must be such a thing, which is a good colour of title, and yet is not any title. *Cro. Jac. 122.* If a man justifies his entry for such a cause as binds the plaintiff or his heirs for ever, he shall not give any colour: but if he pleads a descent in bar, he must give colour, because this binds the possession, and not the right; so that when the matter of the plea bars the plaintiff of his right, no colour must be given. When the defendant entitles himself by the plaintiff; where a person pleads to the writ, or to the action of the writ; he who justifies for tithes, or where the defendant justifies as servant: in all these cases no colour ought to be given. *10 Rep. 91. Lutw. 1343.* Where

the defendant doth not make a special title to himself, or any other, he ought to give colour to the plaintiff. *Cro. Eliz. 76.* In trespass for taking and carrying away twenty loads of wood, &c. the defendant says, that *A. B.* was possessed of them, *ut de bonis propriis*, and that the plaintiff claiming them by colour of a deed after made, took them, and the defendant retook them; and adjudged that the colour given to the plaintiff, makes a good title to him, and confesseth the interest in him. *1 Lill. Abr. 275.* Colour is for this cause, *viz.* Where the defendant justifies by title in trespass or assise, if he do not give the plaintiff colour, his plea amounteth only to Not guilty; for if the defendant hath title, he is Not guilty. *1 Rep. 79, 108. Terms de Ley 140. See Doct. Plac. 72, 73. Black. Com. 3 V. 309.* But colour is now considered only as matter of form.

Colour of Office, (color officii) Is when an act is evilly done by the countenance of an office; and always taken in the worst sense, being grounded upon corruption, to which the office is as a shadow and colour. *Plowd. Comment. 64. See Extortion.*

Colpices, (colpicium, colpiciis) Young poles, which being cut down, make leavers or lifters; and in *Warwickshire* they are called *colpices* to this day. *Blount.*

Colpo, A small wax-candle, à copo de cere: we read in *Hoveden*, that when the King of *Scots* came to the *English* court, as long as he staid there, he had every day, *De liberatione triginta sol. & duodecim vassellos domini os, & quadraginta grossos longos colpones de dominica candela regis, &c. anno 1194.*

Combarones, The fellow barons, or commonalty of the cinque ports: King *Hen. 3.* grants to the barons, or freemen of the port of *Feverham*, *quitantiam de omni thelowie, & consuetudine, sicut ipsi & antecessores sui, & combarones sui de quinque portibus cum melius & plenius habuerunt tempore Regis Edwardi. Placit. temp. Ed. 1. & Ed. 2.* But the title of barons of the cinque ports is now given to their representatives in parliament; and the word *combaron* is used for a fellow member, the *baron* and his *combaron.*

Comba terræ, From Sax. *cumbe*, Brit. *kum*, Eng. *comb*, a valley or low piece of ground or place between two hills; which is still so called in *Devonshire* and *Cornwall*: hence many villages in other parts of *England* have their names of *comb*, as *Wickcomb*, &c. from their situation. *Kennet's Gloss.*

Combat, (Fr.) Is taken with us for a formal trial between two champions, of a doubtful cause or quarrel, by the sword or battons. The last case of the kind in this kingdom was anno 6 Car. 1. between *Donald* lord *Rey*, appellant, and *David Ramsay*, Esq; defendant, both *Scotchmen*, before *Robert* earl of *Lindsey*, lord high constable, *Thomas* earl of *Arundel*, earl marshal, with other lords; when after the court had met several times in the painted chamber, and other formalities, it was at last referred to the King's will and pleasure, who was inclined to favour *Ramsay*. *Co. Litt. 294. Orig. Juridical. fol. 65.* The trial by *combat* was formerly authorized over all *Europe*, but as *Dr. Robertson* justly observes, "the prohibition of this form of trial was a considerable step towards the introduction of such regular government as secured public order and private tranquillity." See *Hist. Emp. C. V. 1 V. 47, 52, 54, 55, 291, 295, &c. See Battel.*

Combinations to do unlawful acts, are punishable before the unlawful act is executed; this is to prevent the consequence of combinations, and conspiracies, &c. *9 Rep. 57. See Confederacy.*

Combustio Pecunie, The ancient way of trying mixt and corrupt money, by melting it down upon payments into the *Exchequer*. In the time of King *Henry 2.* a constitution was made called the *trial by combustion*; the practice of which differed little or nothing from the present method of assaying silver. But whether this examination of money by combustion, was to reduce an equation of money only of *sterling*, *viz.* a due proportion of alloy with copper; or to reduce it to a fine pure silver with alloy, doth not appear. On making the constitution of trial, it was considered, that though the money did answer *numero & pondere*, it might be deficient in value; because mixed with

with copper or brals, &c. Vide *Lowndes's Essay upon Coin*, p. 5.

Comitatus, A county. *Ingulphus* tells us, That *England* was first divided into counties by King *Alfred*; and counties into hundreds, and these again into tithings; and *Fortescue* writes, that *regnum Angliæ per comitatus ut regnum Franciæ per ballivatus distinguitur*. Sometimes it is taken for a territory or jurisdiction of a particular place, as in *Mat. Paris.* anno 1234. *Infra metas illas continentur quedam prædia & etiam civitates & castra, quas comitatui suo assignare præsumunt*. And in *Charta H. 2. apud Hoveden*: *Castellum de Nottingham cum comitatu*, &c. And, *De firmis mortuis & debitis, de quibus non est shes, fiat unus rotulus, & intituletur comitatus, & legatur singulis annis super computum vicecomitum*. *Claus. 12 Ed. 1.* See *County*.

According to Lord *Lyttleton*, in his *history of Hen. 2. lib. 2. fo. 217.* each county was antiently an earldom, so that previous to the reign of K. *Stephen*, there were not any titular earls, nor more earls than counties, tho' there might be fewer. As to the divisions of counties into hundreds and tythings, see *Ld. Lytt. l. 2. fo. 259.* Also see *Bract. l. 3. c. 10.*

Comitatu Commissio, Is a writ or commission whereby a sheriff is authorized to take upon him the charge of the county. *Reg. Orig. 295.*

Comitatu & Castro Commissio, A writ by which the charge of a county, together with the keeping of a castle, is committed to the sheriff. *Reg. Orig. ibid.*

Comitiva, A companion or fellow traveller; 'tis mentioned in *Brompton, Regu. H. 2.* And sometimes it signifies a troop or company of robbers; as in *Walsingham*, anno 1366. *Interpellaverunt auxilium regis Angliæ contra magnas comitivas*, &c.

Commandry, (*præceptoria*) Was any manor or chief messuage, with lands and tenements thereto appertaining, which belonged to the priory of *St. John of Jerusalem in England*; and he who had the government of such a manor or house was stiled the commander, who could not dispose of it but to the use of the priory, and only taking thence his own sustenance, according to his degree. *New Eagle in Lincolnshire* was and still is called the commandry of *Eagle*, and did antiently belong to the said priory of *St. John*: so *Selbach in Pembrokeshire*, and *Sbingay in Cambridgeshire*, were commandries in the time of the knights templars, says *Cambden*: and these in many places of *England* are termed *Temples*, because they formerly belonged to the said templars. *Stat. 26 H. 8. c. 2.* The manors and lands belonging to the priory of *St. John of Jerusalem*, were given to King *Hen. 8.* by the *Stat. 32 Hen. 8.* about the time of the dissolution of Abbeys and monasteries; so that the name only of commandries remains, the power being long since extinct.

Commandment, (*præceptum*) Is diversly taken; as the commandment of the King, when upon his own motion he hath cast any man into prison. *Commandment of the justices*, absolute or ordinary; absolute, where upon their own authority they commit a person for contempt, &c. to prison, as a punishment; ordinary is when they commit one rather for safe custody, than for any punishment: and a man committed upon such an ordinary commandment is replevisable. *Staundf. P. C. 72, 73.* Persons committed to prison by the special command of the King, were not formerly bailable by the court of *King's Bench*; but at this day the law is otherwise declared and settled, as appears under bail. *2 Hawk. P. C. 96.*

In another sense of this word; magistrates may command others to assist them in the execution of their offices, for the doing of justice; and so may a justice of peace to suppress riots, apprehend felons; an officer to keep the King's peace, &c. *Bro. 3.* A master may command his servant to drive another man's cattle out of his ground, to enter into lands, seize goods, distrain for rent, or do other things; if the thing be not a trespass to others. *Fitx. Abr.* The commandment of a thing is good, where he that commands hath power to do it, and a verbal command in most cases is sufficient; unless it be where it is given by a corporation, or when a sheriff's warrant is to a bailiff to arrest, &c. *Bro. 288. Dyer 202.* Commandment is also used for the offence of him that willet another man

to transgress the law, or do any thing contrary to it: and in the most common signification, it is taken where one willet another to do an unlawful act; as murder, theft, or the like: which the civilians called *mandatum*. *Bract. lib. 3. c. 15.*

He that commandeth any one to do an unlawful act, is accessory to it and all the consequences, if it be executed in the same manner as commanded: but if the commander revoke the command; or if the execution varies from it, or in the nature of the offence, in such case he will not be accessory. *3 Inst. 51, 57. 2 Inst. 182.* If a man command another to commit a felony on a particular person, and he doth it on another, as to kill *A.* and he kills *B.* or to burn the house of *A.* but he burns the house of *B.* or to steal one thing, and he steals another; or to commit a felony of one kind, and he commits another: it is said that the commander is not an accessory, because the act done varies in substance from that which was commanded. *1 H. C. P. 436, 452.* And see *2 Hawk. 316. Pleas. 475.* But where a person commands or advises another to kill such a one in the night, and he kills him in the day; or to kill him in the fields, and he kills him in the town; or to poison him, and he stabs or shoots him; these acts being the same felony in substance with that which was intended, and varying only in circumstances, in respect to time, place, &c. the commander is as much an accessory as if there had been no variance at all between the command and the execution of it. *2 Hawk. 316.* If I command a man to rob another, and he kills him in the attempt, though he doth not rob him, I am guilty of the murder; it being the direct and immediate effect of an act done in execution of my command to commit a felony; and if the command be to beat a person, and the person commanded beat him in such a manner that he dies thereof, I am an accessory before to the felony; because it happened in the execution of a command, which tended to endanger the life of the other. Also it is said, that if one command another to burn the house of a certain person, and he by burning it burn likewise the house of another, the commander is equally accessory to the subsequent felony, as to that which was directly commanded. *Ibid. 315, 316.* To command or counsel any one to commit burglary, is felony without benefit of clergy. *Stat. 3 & 4 W. & M.*

In forcible entries, &c. an infant or feme covert may be guilty in respect of actual violence done by them in person; though not in regard to what shall be done by others at their command, because all such commands of theirs are void. *Co. Litt. 357. 1 Hawk. 147.* In trespass, &c. the master shall be charged criminally for the act of the servant, done by his command; but servants shall not be excused for committing any crime, when they act by command of their masters; who have no authority over them to give such command. *Dost. & Stud. c. 42. H. P. C. 66. Kel. 13.* And if a master commands his servant to distrain, and he abuseth the distress, the servant shall answer it to the party injured, &c. *Kitch. 372.*

Commarchio, The confines of the land; from whence probably comes the word *marcbes*.—*Imprimis de nostris landimeris, commarchionibus.* *Du Cange.*

Commendam, (*ecclesia commendata, vel custodia ecclesiæ alicui commissa*) Is the holding of a benefice or church-living, which being void, is commended to the charge and care of some sufficient clerk, to be supplied until it may be conveniently provided of a pastor: and he to whom the church is commended, hath the profits thereof only for a certain time, and the nature of the church is not changed thereby, but is as a thing deposited in his hands in trust, who hath nothing but the custody of it, which may be revoked. When a parson is made bishop, there is a cession or voidance of his benefice, by the promotion; but if the King by special dispensation gives him power to retain his benefice, notwithstanding his promotion; he shall continue parson, and is said to hold it in *Commendam*. *Hob. 144. Latib. 236.* As the King is the means of avoidances on promotions to dignities, and the presentations thereon belong to him, he often on the creation of bishops grants them licences to hold their benefices in *commendam*; but this is usually where the bishopricks are small, for the better support of the dignity

dignity of the bishop promoted: and it must be always before consecration; for afterwards it comes too late, because the benefice is then absolutely void. A *commendam*, founded on the statute 25 H. 8. c. 21. is a dispensation from the supreme power, to hold or take an ecclesiastical living *contra jus positivum*: and there are several sorts of *commendams*, as a *commendam semestris*, which is for the benefit of the church without any regard to the *commendatory*, being only a provisional act of the ordinary, for supplying the vacation of six months, in which time the patron is to present his clerk, and is but a sequestration of the cure and fruits until such time as the clerk is presented: a *commendam retinere*, which is for a bishop to retain benefices, on his preferment; and these *commendams* are granted on the King's mandate to the archbishop, expressing his consent, which continues the incumbency, so that there is no occasion for institution. A *commendam recipere* is to take a benefice *de novo* in the bishop's own gift, or in the gift of some other patron, whose consent must be obtained. Dyer 228. 3 Lev. 381. Hob. 143. Darw. 79.

A *commendam* may be temporary for six or twelve months; two or three years, &c. or it may be perpetual, i. e. for life, when it is equal to a presentation, without institution or induction. But all dispensations beyond six months were only permissive at first, and granted to persons of merit: the *commendam retinere* is for one or two years, &c. and sometimes for three or six years, and doth not alter the estate which the incumbent had before: a *commendam retinere*, as long as the *commendatory* should live and continue bishop, hath been held good. Vaugh. 18. The *commendam recipere* must be for life, as other parsons and vicars enjoy their benefices; and as a patron cannot present to a full church, so neither can a *commendam recipere* be made to a church that is then full. Show. 414. A benefice cannot be *commended* by parts, any more than it may be presented unto by parts; as that one shall have the glebe, another the tithes, &c. Nor can a *commendatory* have a *juris utrum*, or take to him and his successors, sue or be sued, in a writ of annuity, &c. But a *commenda perpetua* may be admitted to do it. 11 H. 4. Compl. Incumb. 360. See 1 Nelf. Abr. 454.

Commendatary, (*commendatarius*) Is he that hath a church living or preferment in *commendam*.

Commendatary Letters, Are such as are written by one bishop to another, in behalf of any of the clergy, or others of his diocese, travelling thither, that they may be received among the faithful: or that the clerk may be promoted; or necessities administered to others, &c. several forms of these letters may be seen in our historians, as in Bede, lib. 2. c. 18.

Commendatus, One that lives under the protection of a great man. Spelm. *Commendati homines* were persons who by voluntary homage put themselves under the protection of any superior lord: for ancient homage was either *predial*, due for some tenure; or personal, which was by compulsion, as a sign of necessary subjection; or voluntarily with a desire of protection: and those, who by voluntary homage put themselves under the protection of any men of power, were sometimes call'd *homines ius commendati*: and sometimes only *commendati*, as often occurs in Domesday. *Commendati dimidii* were those who depended on two several lords, and paid one half of their homage to each: and *sub-commendati* were like under-tenants, under the command of persons that were dependants themselves on a superior lord: also there were *dimidii sub-commendati*, who bore a double relation to such depending lords. Domesday. This phrase seems to be still in use, in the usual complement, *Commend me to such a friend*, &c. which is to let him know, *I am his humble servant*. Spelm. of Feuds, cap. 20.

Commerce, (*commercium*) Traffick, trade or merchandise in buying and selling of goods. See Merchant.

There is a distinction between *commerce* and *trade*; the former relates to our dealings with foreign nations, or our colonies, &c. abroad; the other to our mutual traffick and dealings among ourselves at home.

With respect to the establishment of commerce in Europe, (its first origin in Italy about the beginning of the eleventh century) see Robert's Hist. of the Emperor Charles

V. 1 V. 32, 33, &c. As to the commerce of the ancients, see Montesquieu L'Esprit des Loix, l. 21. c. 6. Vide also An Essay on Maritime Power and Commerce, by Deslandes, published by Vaillant, in 1743.

Commissary, (*commissarius*) Is a title in the ecclesiastical law, belonging to one that exerciseth spiritual jurisdiction, in places of a diocese which are so far from the episcopal city, that the chancellor cannot call the people to the bishop's principal consistory court, without their too great inconvenience. This commissary was ordained to supply the bishop's jurisdiction and office in the out-places of the diocese; or in such places as are peculiar to the bishop, and exempted from the jurisdiction of the archdeacon: for where, either by prescription or composition, archdeacons have jurisdiction within their archdeaconries, as in most places they have, this *commissary* is superfluous and oftentimes vexatious, and ought not to be; yet in such cases a *commissary* is sometimes appointed by the bishop, he taking prebend money of the archdeacon yearly *pro exteriori jurisdictione*, as it is ordinarily called. But this is held to be a wrong to archdeacons and the poorer sort of people. Cowell's Interp. 4 Inst. 338.

There are also *commissaries* in time of war. Persons sent abroad to take care of provisions for the army.—How well they executed the great trust reposed in them, during the late war in Germany, is too well known to the present age, and it is hoped it will be transmitted to posterity.

Commission, (*commissio*) Is taken for the warrant or letters patent, which all men exercising jurisdiction either ordinary or extraordinary, have to authorize them to hear or determine any cause or action: as the *commission* of the judges, &c. *Commission* is with us as much as *delegatio* with the civilians: and this word is sometimes extended farther than to matters of judgment; as the *commission of purveyance*, &c. *Commissions* of inquiry shall be made to the justices of one bench or the other, &c. and to do lawful things, are grantable in many cases: also most of the great officers, judicial and ministerial, of the realm, are made by *commission*. And by such *commissions*, treasons, felonies, and other offences, may be heard and determined; by this means likewise, oaths, cognisance of fines, answers are taken, witnesses examined, offices found, &c. Bro. Abr. 12. Rep. 39. Stat. 42 E. 3. c. 4. And most of these *commissions* are appointed by the King under the Great Seal of England: but a *commission* granted under the Great Seal may be determined by a Privy Seal; and by granting another new *commission* to do the same thing, the former *commission* determines; and on the death or demise of the King, the *commissions* of judges and officers generally cease. Bro. Commis. 2 Dyer 289. There was formerly a *high commission* court founded on 1 Eliz. c. 1. but it was abolished by act of parliament 17 Car. 1. c. 11. And by Stat. 13 Car. 2. c. 2. Of *commissions* you may see divers in the table of the Register of Writs. See 4 Hen. 4. c. 9. 7 Hen. 4. c. 11. And 1 Ann. st. 1. c. 8. 6 Ann. c. 7.

Commission of Intercipation, Was a *commission* under the Great Seal to collect a tax or subsidy before the day. 15 H. 8.

Commission of Association, Is a *commission* to associate two or more learned persons with the justices in the several circuits and counties of Wales, &c. 18 Eliz. c. 9.

Commission of Bankrupt, Where any person is become a bankrupt within any of the statutes against bankrupts, on security given to prove the party a bankrupt, &c. this *commission* issues from the Lord Chancellor to certain commissioners appointed to take order with the bankrupt's lands and goods, for the satisfaction of the creditors. Stat. 34 & 35 Hen. 8. c. 4. 13 Eliz. c. 7. 1 Jac. 1. c. 15, &c. See Bankrupt.

Commission of Charitable Uses, Goes out of the Chancery to the bishop and others, where lands given to charitable uses are misemployed, or there is any fraud or disputes concerning them, to enquire of and redress the abuse, &c. 43 Eliz. c. 4.

Commission of Delegates, Is a *commission* under the Great Seal to certain persons; usually two or three temporal lords, as many bishops, and two judges of the law, to sit upon an appeal to the King in the court of Chancery, where any sentence is given in any ecclesiastical cause by the archbishop. Stat. 25 H. 8. c. 19. Now generally three

three of the Common law judges, and two Civilians, sit as delegates.

Commission to enquire of faults against the Law, Was an ancient commission sent forth on extraordinary occasions and corruptions.

Commission of Lunacy, A commission out of Chancery to enquire whether a person represented to be a lunatic be so or not, that if lunatic, the King may have the care of his estate, &c. 17 Ed. 2. c. 10.

Commission of Rebellion, Otherwise called a writ of rebellion, issues when a man after proclamation made by the sheriff, upon a process out of the Chancery, on pain of his allegiance, to present himself to the court by a day assign'd, makes default in his appearance: and this commission is directed to certain persons, to the end they, three, two, or one of them apprehend the party, or cause him to be apprehended as a rebel and contemner of the King's laws, whosoever found within the kingdom, and bring or cause him to be brought to the court on a day therein assigned: this writ or commission goes forth after an attachment returned, *non est inventus*, &c. *Terms de Ley*.

Commission of Sewers Is directed to certain persons to see drains and ditches well kept and maintained in the marshy and fenny parts of England, for the better conveyance of the water into the sea, and preserving the grass upon the land. *Stat. 23 H. 8. c. 5. 15 Eliz. c. 9.*

Commission of Treaty with foreign Princes, Is where leagues and treaties are made and transacted between states and kingdoms, by their ambassadors and ministers, for the mutual advantage of the kingdoms in alliance.

Commission to take up Men for War, Was a commission to press or force men into the king's service. This power of impressing is much doubted by many; yet, in favour of its legality, much hath been said by a late learned judge. *Vide Post. Rep. 154. Broadfoot's case. And Black. Com. 1 V. 418. Comb. 245.*

Commissioner, (commissionarius) Is he that hath a commission, letters patent, or other lawful warrant to examine any matters, or to execute any publick office, &c. And some commissioners are to hear and determine offences, without any return made of their proceedings; and others to inquire and examine, and certify what is found. 4 Hen. 4. 9. Commissioners by the Common law must pursue the authority of the commission, and perform the effect thereof; and they are to observe the antient rules of the courts whence they come; and if they do any thing for which they have not authority, it will be void. 2 Co. Rep. 25. *Co. Lit. 157.* The office of commissioners is to do what they are commanded; and it is necessarily implied, that they may do that also, without which what is commanded cannot be done: their authority, when appointed on any statute law, must be used as the statutes prescribe. 12 Rep. 32. If a commission is given to commissioners to execute a thing against law, they are not bound to accept or obey it: commissioners not receiving a commission may be discharged, upon oath before the Barons of the Exchequer, &c. and the King by *superfedeas* out of Chancery, may discharge commissioners. Besides commissioners relating to judicial proceedings; there are Commissioners of the Treasury, of the Customs, wine-licences, alienations, &c. of which there is an infinite number.

Committee, Are those to whom the consideration or ordering of any matter is referred, by some court, or by consent of parties to whom it belongs: as in parliament, a bill either consented to and passed, or denied, or neither, but being referred to the consideration of certain persons appointed by the house farther to examine it, they are thereupon called a committee. And when a parliament is called, and the speaker and members have taken the oaths and the standing orders of the house are read, committees are appointed to sit on certain days, viz. the committee of privileges and elections, of religion, of grievances, of courts of justice, and of trade; which are the standing committees. But though they are appointed by every new parliament, they do not all of them act, only the committee of privileges; and this being not of the whole house, is first called in the speaker's chamber, from whence it is adjourned into the house, every one of the house having a vote therein, though not named, which makes the same

usually very numerous: and any member may be present at any select committee; but is not to vote unless he be named. The chairman of the grand committee, who is always some leading member, sits in the clerk's place at the table, and writes the votes for and against the matter referred to them; and if the number be equal, he has a casting voice, otherwise he hath no vote in the committee; and after the chairman hath put the question for reporting to the house, if that be carried, he leaves the chair, and the speaker being called to his chair, (who quits it in the beginning, and the mace is laid under the table) he is to go down to the bar, and so bring up his report to the table. After a bill is read a second time in the House of Commons, the question is put, whether it shall be committed to a committee of the whole house, or a private committee; and the committees meet in the speaker's chamber, and report their opinion of the bill with the amendments, &c. And if there be any exceptions against the amendments reported, the bill may be recommitted: eight persons make a committee, which may be adjourned by five, &c. *Lex Constitutionis 147, 150.* There is a committee of the King, mentioned in *West's Symb. tit. Chancery, sect. 144.* And this hath been used, though improperly, for the widow of the King's tenant being dead, who is called the committee of the King, that is, one committed by the ancient law of the land to the King's care and protection. *Kitch. fel. 160. See Parliament.*

Commitment, Is the sending of a person to prison by warrant or order, who hath been guilty of any crime: here it is to be considered,

- I. *What kind of offenders may be committed, and by whom and in what manner.*
- II. *To what prison they may be committed, and at whose charge.*
- III. *How they may be removed and discharged.*

I. *As to the kind of offenders.*

There is no doubt but that persons apprehended for offences which are not bailable, and also all persons who neglect to offer bail for offences which are bailable, must be committed.—And it is said, that wheresoever a justice of peace is empowered by any statute to bind a person over, or to cause him to do a certain thing, and such person being in his presence shall refuse to be bound, or to do such thing, the justice may commit him to the gaol to remain there till he shall comply.

It seems agreed by all the old books, that wheresoever a constable or private person may justify the arresting another for a felony or treason, he may also justify the sending or bringing him to the common gaol; and that every private person hath as much authority in cases of this kind, as the sheriff, or any other officer, and may justify such imprisonment by his own authority, but not by the command of another. 2 Hawk. P. C. 116, 117.

But inasmuch as it is certain, that a person lawfully making such an arrest, may justify bringing the party to the constable, in order to be carried by him before a justice of peace; and inasmuch as the statutes of 1 & 2 P. & M. cap. 13. and 2 & 3 P. & M. cap. 10. which direct in what manner persons brought before a justice of the peace for felony, shall be examined by him, in order to their being committed or bailed, seem clearly to suppose, that all such persons are to be brought before such justice for such purpose; and inasmuch as the statute of 31 Car. 2. c. 2. commonly called the *Habeas corpus* act, seems to suppose that all persons, who are committed to prison, are there detained by virtue of some warrant in writing, which seems to be intended of a commitment by some magistrate, and the constant tenor of the late books, practice and opinions, are agreeable hereto; it is certainly most advisable at this day, for any private person who arrests another for felony, to cause him to be brought, as soon as conveniently he may, before some justice of peace, that he may be committed or bailed by him. 2 Hawk. P. C. 117. H. P. C. 91, 112. *Dalt. c. 118.*

It is certain, that the privy council, or any one or two of them, or secretary of state, may lawfully commit persons for treason, and for other offences against the state, as in all ages they have done. 2 Hawk. P. C. 117.

As to the manner of commitment, it is enacted by 2 & 3 P. & M. 10. That justices of peace shall examine persons brought before them for felony, &c. or suspicion thereof, before they commit them to prison, and shall bind their accusers to give evidence against them.

A justice of the peace may detain a prisoner a reasonable time, in order, to examine him; and it is said, that three days is a reasonable time for this purpose. 2 Hawk. P. C. 119. *Dalt. c. 125. 2 Inst. 52, 591.*

Every commitment must be in writing, and under the hand and seal, and shew the authority of him that made it, and the time and place, and must be directed to the keeper of the prison. Hawk. P. C. 119. It may be either in the King's name, and only tested by the justice, or in the justice's name. 2 Hawk. P. C. 119.

It may command the gaoler to keep the party in safe and close custody; for this being what he is obliged to do by law, it can be no fault to command him so to do. 2 Hawk. P. C. 119.

It ought to set forth the crime with convenient certainty; whether the commitment be by the privy council, or any other authority, otherwise the officer is not punishable by reason of such *mittimus*, for suffering the party to escape; and the court, before whom he is removed by *habeas corpus*, ought to discharge or bail him; and this doth not only hold where no cause at all is expressed in the commitment, but also where it is so loosely set forth, that the court cannot adjudge whether it were a reasonable ground for imprisonment. 2 Hawk. P. C. 119.

A commitment for high treason or felony in general, without expressing the particular species, has been held good. 2 Hawk. P. C. 119. But now, since the *habeas corpus* act, it seems that such a general commitment is not good; and therefore where A. and B. were committed for aiding and abetting Sir James Montgomery to make his escape, who was committed by a warrant of a secretary of state for high treason, on a *habeas corpus*, they were admitted to bail, because it did not appear of what species of treason Sir James was guilty. *Skinn. 596. 1 Salk. 347. S. C.*

It is safe to set forth that the party is charged upon oath; but this is not necessary, for it hath been resolved, that a commitment for treason, or for suspicion of it, without setting forth any particular accusation or ground of the suspicion, is good. 2 Hawk. P. C. 120.

Every such *mittimus* ought to have a lawful conclusion, *viz.* that the party be safely kept till he be delivered by law, or by order of law, or by due course of law, or that he be kept till further order, (which shall be intended of the order of law) or to the like effect; and if the party be committed only for want of bail, it seems to be a good conclusion of the commitment, that he be kept till he find bail; but a commitment till the person who makes it shall take further order, seems not to be good; and it seems that the party committed by such or any other irregular *mittimus* may be bailed. 2 Hawk. P. C. 120.

Also a commitment grounded on an act of parliament ought to be conformable to the method prescribed by such statute; as where the churchwardens of Northampton were committed on the 43 Eliz. cap. 2. and the warrant concluded in the common form, *viz.* *Until they be duly discharged according to law*; but the statute appointing, that the party should there remain until he should account, for want of such conclusion they were discharged. *Garth. 152, 153.*

II. To what prison, and at whose charge.

With regard to this head it is to be observed, that all commitments must be to some prison within the realm of England. For

By the Stat. 31 Car. 2. cap. 2. it is enacted, "That no subject of this realm, being an inhabitant or resident of this kingdom of England, dominion of Wales, or town of *Burwich-upon-Tweed*, shall or may be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or into any parts, garrisons, islands, or places beyond the seas, which then were, or at any time after should be within or without the dominions of his Majesty."

Also by 14 Ed. 3. c. 10. "In the right of the gaols which were wont to be in ward of the sheriffs, and annexed to their bailiwicks, it is assented and accorded, that they shall be rejoined to the sheriffs, and the sheriffs shall have the custody of the same gaols as before this time they were wont to have, and they shall put in such under-keepers for whom they will answer. And this is confirmed by 19 Hen. 7. cap. 10. Also it is recited by 5 Hen. 4. cap. 10. That divers constables of castles within the realm, being assigned justices of the peace by the King's commission, had, by colour of such commission, used to take people, to whom they bore evil will, and imprison them within the said castles, till they had made fine and ransom with the said constables for their deliverance: and thereupon it is enacted, "That none be imprisoned by any justice of the peace, but only in the common gaol, saving to lords, and others who have gaols, their franchise in this case." And it seems that the King's grant, since this statute, to private persons to have the custody of prisoners committed by justices of peace, is void. And it is said, that none can claim a prison as a franchise, unless he have also a gaol delivery.

Also it hath been held, that regularly no one can justify the detaining a prisoner in custody out of the common gaol, unless there be some particular reason for so doing; as if the party be so dangerously sick, that it would apparently hazard his life to send him to the gaol; or there be evident danger of a rescue from rebels, &c. yet constant practice seems to authorize a commitment to a messenger; and it is said, that it shall be intended to have been made in order for the carrying of the party to gaol. 2 Hawk. P. C. 118.

And it is said, that if a constable bring a felon to gaol, and the gaoler refuse to receive him, the town where he is constable ought to keep him till the next gaol delivery. H. P. C. 114.

If a person arrested in one county for a crime done in it, fly into another county, and be retaken there, he may be committed by a justice of the first county to the gaol of such county. H. P. C. 93. But by the better opinion, if he had before any arrest fled into such county, he must be committed to the gaol thereof by a justice of such county. 2 Hawk. P. C. 118. *Dalt. c. 118.* Also it seems to be laid down as a rule by some books, that any offender may be committed to the gaol next to the place where he was taken, whether it lie in the same county or not. 2 Hawk. P. C. 118.

By Stat. 6 Geo. 1. c. 19. Vagrants and other criminals, offenders, and persons charged with small offences, may for such offences, or for want of sureties, be committed either to the common gaol, or house of correction, as the justices in their judgment shall think proper.

By Stat. 24 Geo. 2. c. 55. If a person is apprehended, upon a warrant indorsed, in another county, for an offence not bailable, or if he shall not there find bail, he shall be carried back into the first county, and be committed, or if bailable, bailed, by the justices in such first county.

As to the charges of commitment, it is enacted by 3 Jac. 1. c. 10. Offenders committed are to bear their own charges, and the charges of those who are appointed to guard them; and if they refuse to pay, the charges may be levied by sale of their goods. And by 27 Geo. 2. c. 3. If they have no goods, &c. within the county where they are apprehended, the justices are to grant a warrant on the Treasurer of the county for payment of the charges. But in *Middlesex* the same shall be paid by the overseers of the poor of the parish where the person was apprehended.

By the 3 Edw. 7. c. 3. The sheriff shall certify the names of all prisoners in his custody to the justices of gaol-delivery.

III. How they may be removed and discharged.

As prisoners ought to be committed at first to the proper prison, so ought they not to be removed thence, except in some special cases; and to this purpose it is enacted by 31 Car. 2. cap. 2. "That if any subject of this realm shall be committed to any prison, or in custody of any officer or officers whatsoever, for any criminal, or supposed

Criminal matter, that the said person shall not be removed from the said prison and custody, into the custody of any other officer or officers, unless it be by *habeas corpus*, or some other legal writ, *and* where the prisoner is delivered to the constable or other inferior officer, to carry such prisoner to some gaol; or where any person is sent by order of any judge of assize, or justice of the peace, to any common workhouse, or house of correction; or where the prisoner is removed from one prison or place to another within the same county, in order to a trial or discharge by due course of law; or in case of sudden fire or infection, or other necessity; upon pain that he who makes out, signs, or countersigns, or obeys or executes such warrant, shall forfeit to the party grieved 100*l.* for the first offence, 200*l.* for the second, &c. 2 *Hawk. P. C.* 118.

As to the manner of their discharge.

A person legally committed for a crime, certainly appearing to have been done by some one or other, cannot be lawfully discharged by any other but by the King, till he be acquitted on his trial, or have an *ignemius* found by the grand jury, or none to prosecute him on a proclamation for that purpose, by the justices of gaol delivery. 2 *Hawk. P. C.* 121.

But if a person be committed on a bare suspicion, without any appeal or indictment for a supposed crime, where afterwards it appears that there was none; as for the murder of a person thought to be dead, who afterwards is found to be alive, it hath been holden that he may be safely dismissed without any farther proceeding; for that he who suffers him to escape, is properly punishable only as an accessory, where there can be no principal; and it would be hard to punish one for a contempt founded on a suspicion appearing in so uncontested a manner to be groundless. 2 *Hawk. P. C.* 121.

If the words of a statute are not pursued in a commitment, the party shall be discharged by *habeas corpus*. *Ibid.* 291. See *Bail, Imprisonment*.

Commoneigne, (Fr.) A word signifying a fellow monk, that lives in the same convent. 3 *Inst.* 15.

Commonalty, (populus, plebs, communitas) In *art. super chartas*, 28 Ed. 1. c. 1. *Tout le Commune d'Angleterre* signifies all the people of England. 2 *Inst.* 539. But this word is generally used for the middle sort of the King's subjects, such of the commons as are raised beyond the ordinary sort, and coming to have the managing of offices, by that means are one degree under burgesses, which are superior to them in order and authority; and in companies incorporated they are said to consist of masters, wardens, and commonalty, the first two being the chief, and the others such as are usually called of the livery. The ordinary people, and freeholders, or at best knights and gentlemen, under the degree of baron, having been of late years called *communitas regni*, or *tota terra communitas*; yet antiently, if we credit *Brady*, the barons and tenants in capite, or military men, were the community of the kingdom; and those only were reputed as such in our most ancient histories and records. *Brady's Gloss. to his Introduc. to Engl. Hist.*

Common, communia. Common is a right or privilege which one or more persons claim to take or use, in some part or portion of that which another man's lands, waters, woods, &c. do naturally produce, without having an absolute property in such land, waters, wood, &c. It is called an incorporeal right, which lies in grant, as if originally commencing on some agreement between lords and tenants, for some valuable purposes, which by age being formed into a prescription continues, although there be no deed or instrument in writing which proves the original contract or agreement. 4 *Co.* 37. 2 *Inst.* 65. 1 *Vent.* 387.

Under this title is to be considered,

I. *The several kinds of commons.*

II. *The interest of the owner of the soil; wherein of approvement and inclosure.*

III. *The commoners interest in the soil; wherein, of apportionment and extinguishment.*

I. *Of the several kinds of commons.*

There is not only common of pasture, but also common of piscary or fishing; common of estovers; common of turbary, which see under their several heads. The word common however, in its most usual acceptation, signifies common of pasture, which is divided into common in gross, common appendant, common appurtenant, and common pur cause de vicinage. Common in gross is a liberty to have common alone, without any lands or tenements, in another person's land, granted by deed to a man and his heirs, or for life, &c. *F. N. B.* 31, 37. 4 *Rep.* 30. Common appendant is a right belonging to a man's arable land, of putting beasts commonable into another's ground. And common appurtenant is belonging to an estate for all manner of beasts commonable or not commonable. 4 *Rep.* 37. *Plowd.* 161. Common appendant and appurtenant, are in a manner confounded, as appears by *Fitzherbert*; and are there defined to be a liberty of common appertaining to or depending on a freehold; which common must be taken with beasts commonable, as horses, oxen, kine, and sheep; and not with goats, hogs, and geese. But some make this difference, that common appurtenant may be severed from the land whereto it pertains; but not common appendant, which, according to *Sir Edward Coke*, had this beginning: when a lord enfeoffed another of arable land, to hold of him in socage, the feoffee, to maintain the service of his plough, had at first, by the courtesy or permission of the lord, common in his wastes for necessary beasts to eat and compost his land, and that for two causes; one, for that it was tacitly implied in the feoffment, by reason the feoffee could not till or compost his land without cattle, and cattle could not be sustained without pasture; so by consequence the feoffee had, as a thing necessary and incident, common in the waste and lands of the lord: and this may be collected from the ancient books and statutes: and the second reason of this common was, for the maintenance and advantage of tillage, which is much regarded and favoured by the law. *F. N. B.* 180. 4 *Rep.* 37. Common pur cause de vicinage, common by reason of neighbourhood, is a liberty that the tenants of one lord in one town have to common with the tenants of another lord in another town: it is where the tenants of two lords have used, time out of mind, to have common promiscuously in both lordships, lying together and open to one another. 8 *Rep.* 78. And those that challenge this kind of common, which is usually called intercommoning, may not put their cattle in the common of the other lord, for then they are distrainable; but they may turn them into their own fields, and if they stray into the neighbouring common, they must be suffered. *Terms de Ley.* The inhabitants of one town or lordship may not put in as many beasts as they will, but with regard to the freehold of the inhabitants of the other: for otherwise it were no good neighbourhood, upon which all this depends. *Ibid.*

If one lord encloses the common, the other town cannot then common; but though the common of vicinage is gone, common appendant remains. 7 *Rep.* 5. 4 *Rep.* 38. Every common pur cause de vicinage is a common appendant. 1 *Danv. Abr.* 799. Common appendant is only to ancient arable land, not to a house, meadow, pasture, &c. It is against the nature of common appendant to be appendant to meadow or pasture: but if in the beginning land be arable, and of late a house hath been built on some part of the land, and some acres are employed to meadow and pasture, in such case it is appendant; though it must be pleaded as appendant to the land, and not to the house, pasture, &c. 1 *Nels. Abr.* 457. This may be common appendant, tho' it belongs to a manor, farm, or ploughland: and common appendant is of common right; but it is not common appendant, unless it has been appendant time out of mind. 1 *Danv.* 746. It may be upon condition; be for all the year, or for a certain time, or for a certain number of beasts, &c. by usage: though it ought to be for such cattle as plough and compost the land, to which it is appendant. *Ibid.* 797. Common appendant may be to common in a field after the common is severed, till the ground is resown: so it may be to have common in a meadow after the hay is carried off the same till Candlemas, &c. *Yelv.* 185. This common, which is in its nature without number, by custom may be limited as to the beasts: common appurtenant ought always to be

for those *levant and couchant*, and may be *sans number*. *Plowd.* 161. A man may prescribe to have *common* appurtenant for all manner of cattle, at every season in the year. 25 *Aff.* 8. *Common* by prescription for all manner of *commonable* cattle as belonging to a tenement, &c. must be for cattle *levant and couchant* upon the land, (which is so many as the land will maintain) or it will not be good: and if a person grants *common sans number*, the grantee cannot put in so many cattle, but that the grantor may have sufficient *common* in the same land. 1 *Danv. Abr.* 798, 799. He who hath *common* appendant or appurtenant, can keep but a number of cattle proportionable to his land; for he can *common* with no more than the lands to which his *common* belongs is able to maintain. 3 *Salk.* 93. *Common* appurtenant may be to a house, pasture, &c. though *common* appendant cannot; but it ought to be prescribed for as against *common* right: and uncommonable cattle, as hogs, goats, &c. are appurtenant: this *common* may be created by grant at this day; so may not *common* appendant. 1 *Inst.* 122. 1 *Roll. Abr.* 398.

If a man grant *common* to another in land wherein he hath nothing, if he afterwards purchases the land, this shall be a good *common* appurtenant: and it is not necessary that he should have the land at the time of the grant. 1 *Danv.* 800.

Common appurtenant for a certain number of beasts may be granted over. 1 *Danv.* 802. A man may use *common* appurtenant to his manor, with cattle which are for his household; though it is said he cannot use it with cattle which are to sell. *Sed qu.*

II. As to the interest of the owner of the soil.

The property of the soil in the *common* is entirely in the lord; and the use of it, jointly in him and the *commoners*.

Lords of manors may depasture in *commons* where their tenants put in cattle; and a prescription to exclude the lord is against law. 1 *Inst.* 122.

The lord may agist the cattle of a stranger in the *common* by prescription: and he may license a stranger to put in his cattle, if he leaves sufficient room for the *commoners*. 1 *Danv.* 795. 2 *Mod.* 6. Also the lord may surcharge, &c. an overplus of the *common*: and if, where there is not an overplus, the lord surcharges the *common*, the *commoners* are not to distrain his beasts; but must commence an action against the lord. *F. N. B.* 125. But it is said, if the lord of the soil put cattle into a close, contrary to custom, when it ought to lie fresh, a *commoner* may take the cattle damage-feasant: otherwise it is a general rule that he cannot distrain the cattle of the lord. 1 *Danv.* 807.

The lord may distrain where the *common* is surcharged; and bring action of trespass for any trespass done in the *common*. 9 *Rep.* 113.

A lord may make a pond on the *common*: though the lord cannot dig pits for gravel or coal; the statutes of *approvement* being only by inclosure. 3 *Inst.* 204. 1 *Roll.* 106. If the lord makes a warren on the *common*, the *commoners* may not kill the conies; but are to bring their action, for they may not be their own judges. 1 *Roll.* 90. 405.

By statute, lords may *approve* against their tenants, *viz.* inclose part of the waste, &c. and thereby discharge it from being *common*, leaving *common* sufficient; and neighbours as well as tenants claiming *common* of pasture, shall be bound by it. 20 *H.* 3. c. 4. If the lord encloses on the *common*, and leaves not *common* sufficient, the *commoners* may not only break down the inclosures; but may put in their cattle, although the lord ploughs and sows the land. 2 *Inst.* 188. 1 *Roll. Abr.* 406.

III. Of the commoners interest in the soil.

A *commoner* hath only a special and limited interest in the soil, but yet he shall have such remedies as are commensurate to his right, and therefore may distrain beasts damage-feasant, bring an action on the case, &c. but not being absolute owner of the soil, he cannot bring a general action of trespass for a trespass done upon the *common*. See *Bridg.* 10, 11. *Godb.* 123, 124. 2 *Leon.* 201, 202.

A *commoner* cannot regularly do any thing on the soil which tends to the melioration or improvement of

the *common*, as cutting down of bushes, fern, &c. 1 *Sid.* 251. 12 *Hen.* 8. 2. 13 *Hen.* 8. 15. Yet *vide post*.

Therefore if a *common* every year in a flood is surrounded with water, the *commoners* cannot make a trench in the soil to avoid the water, because he has nothing to do with the soil, but only to take the grass with the mouth of the cattle. 1 *Roll. Abr.* 405. 2 *Bull.* 116.

Every *commoner* may break the *common* if it be inclosed, and although he does not put his cattle in at the time, yet his right of commonage shall excuse him from being a trespasser. *Lit. Rep.* 38. See 1 *Roll. Abr.* 406. Supposing the inclosure made by the lord, and that there is not sufficient *common*; or that the inclosure is made by any other person than the lord.

If a tenant of the freehold ploughs it, and sows it with corn, the *commoner* may put in his cattle, and therewith eat the corn growing upon the land; so if he lets his corn lie in the field beyond the usual time, the other *commoners* may notwithstanding put in their beasts. 2 *Leon.* 202, 203.

The *commoner* cannot use *common* but with his own proper cattle: but if he hath not any cattle to manure the land, he may borrow other cattle to manure it, and use the *common* with them; for by the loan, they are in a manner made his own cattle. 1 *Danv.* 798. Grantee of *common* appurtenant, for a certain number of cattle, cannot *common* with the cattle of a stranger: he that hath *common* in *gross*, may put in a stranger's cattle, and use the *common* with such cattle. *Ibid.* 803. *Common* appendant or appurtenant, cannot be made *common in gross*: and *approvement* extends not to *common in gross*. 2 *Inst.* 86. A *commoner* may distrain beasts put into the *common* by a stranger, or every *commoner* may bring action of the case, where damage is received. 9 *Rep.* 11. But one *commoner* cannot distrain the cattle of another *commoner*, though he may those of a stranger, who hath no right to the *common*. 2 *Lutw.* 1238. Unless he puts in more than he hath a right for.

Where a *commoner* surcharges the *common*, the other *commoners* may have a writ of *admeasurement*; and *admeasurement* is to be according to the quality and quantity of the freehold, and for all the cattle which are upon the land. It lies only by one *commoner* against another; but not against a *commoner sans number*; nor against the lord, in which case there must be an assise. 1 *Danv.* 809. If a man be disseised of his *common*, he shall have an assise. *New Nat. Br.* 399. If any *commoner* incloses, or builds on the *common*, every *commoner* may have an action for the damage. Where turf is taken away from the *common*, the lord only is to bring the action: but 'tis said the *commoners* may have an action for the trespass, by entering on the *common*, &c. 1 *Roll. Abr.* 89, 398. 2 *Leon.* 201. If a *commoner* who hath a freehold in his *common* be ousted of, or hindered therein, that he cannot have it so beneficially as he used to do; whether the interruption be by the lord or any stranger, he may have an assise against him: but if the *commoner* hath only an estate for years, then his remedy is by action on the case. And if it be only a small trespass, that is little or no loss to the *commoner*, but he hath *common* enough besides, the *commoner* may not bring any action. 8 *Rep.* 79. 4 *Rep.* 37. *Dyer* 316. A *commoner* cannot dig clay on the *common*, which destroys the grass, and carrying it away doth damage to the ground: so that the other *commoners* can't enjoy the *common* in *tam amplo modo* as they ought. *Godb.* 344. Also a *commoner* may not cut bushes, dig trenches, &c. in the *common*, without a custom to do it. 1 *Nelf.* 462. If he makes any thing *de novo*, he is a trespasser: he can do nothing to impair the *common*; but may reform a thing abused, fill up holes, dig down mole-hills, &c. for improvement. 1 *Brownl.* 208. *Sed qu.* *Vide* first case in this column. Yet *vide post*.

No *commoner* can take the grass that grows on the *common*, otherwise than by depasturing it; nor can he meddle with the soil: but if the owner of the soil set up a hedge on the *common*, the *commoner* may throw it down. 15 *H.* 7. A *commoner* may abate hedges erected on a *common*; for though the lord hath an interest in the soil, by abating the hedges, the *commoner* doth not meddle with it. 2 *Mod.*

2 *Mod.* 65: Any man may by prescription have common and feeding for his cattle in the King's high-way, although the soil doth belong to another. *Hill. 42 Eliz.* But the occupation of common by usurpation, will not give title to him that doth occupy it, unless he hath had it time beyond memory. And if a man enfeoffed of land, by reason of which he hath right to common, aliens it to one who doth not take or use the common; and then he makes an alienation to another, the last feoffee may not have it, for he shall not have a better estate in the land than his feoffor had. *Fitz. Abr. Comm.* 255.

Upon agreement between two commoners to enclose a common, a party having interest not privy to the agreement, will not be bound; but one or two wilful persons shall not hinder the publick good. *Chan. Rep.* 48. Commoners must be driven yearly at Michaelmas or within fifteen days after: infected horses, and stone-horses under size, &c. are not to be put into commons, under forfeitures, by *Stat. 32 H. 8. c. 13*. New erected cottages, though they have four acres of ground laid to them ought not to have common in the waste. 2 *Inst.* 740. In law proceedings, where there are two distinct commons, the two titles must be shewn: cattle are to be alledged commonable; and common ought to be in lands commonable: and the place is to be set forth where the messuage and lands lie, &c. to which the common belongs. 1 *Nels.* 462, 463.

Common appendant, because it is of common right, shall be apportioned by the commoner's purchase of part of the land in which he hath such common; but common appurtenant shall be extinct by the commoner's purchase of part of the land, in which, &c. Both common appendant and appurtenant shall be apportioned by alienation of part of the land to which the common is appendant or appurtenant. *Co. Litt.* 122. *Hob.* 235. 8 *Co.* 78. *Owen* 122. 4 *Co.* 37.

A release of common in one acre, is an extinguishment of the whole common. See 4 *Co.* 37.

If A. hath common in the lands of B. as appurtenant to a messuage, and after B. infeoffs A. of the said lands, whereby the common is extinguished; and then A. leases to B. the said messuage and lands, with all commons, &c. occupat' vel usitat' cum præd. messuagio; this is a good grant of a new common for the time. *Cro. Eliz.* 570. Where a person purchaseth part of the land wherein he hath common, the whole common is extinct and gone. *Cro. Eliz.* 594. If several persons are seised of several parts of a common, and a commoner purchases the inheritance of one part, his entire common is extinct. 1 *And.* 159. When a man hath common appendant for a certain number of cattle, and to a certain parcel of land, if he sell part of it, the common is not extinguished; for the purchaser shall have common pro rata: but 'tis otherwise in common appurtenant. 8 *Rep.* 73. 1 *Nels.* 460. See *Fitz. Abr. tit. Comm. per tot.*

Common of Estovers, Is a right of taking wood out of another man's wood, for house-bote, plough-bote, and hay-bote. What botes are necessary, tenants may take, notwithstanding no mention be made thereof in their leases; but if a tenant take more house-bote than is needful, he may be punished for waste. *Terms de Ley.* Tenants for life may take upon the land demised reasonable estovers, unless restrained by special covenant: and every tenant for years hath three kinds of estovers incident to his estate. 1 *Inst.* 41. When a house having estovers appendant or appurtenant, is blown down by wind, if the owner rebuilds it in the same place and manner as before, his estovers shall continue: so if he alters the rooms and chambers, without making new chimnies; but if he erect any new chimnies he will not be allowed to spend any estovers in such new chimnies. 4 *Rep.* 87. 4 *Leon.* 333. If one have a dwelling-house whereunto common of estovers doth belong, and the house by fire is burnt down, and a new one built near the to the place, or in the place in another form, the estovers are gone: but if the old house be only some of it down, it is otherwise; and in all cases where the alterations to a house do no prejudice to the tertenant or owner of the land or wood, the estovers will remain. *F. N. B.* 180. Where a man hath estovers for life, if the owner cut down all the wood, that there is none left for him, he may bring

an assise of estovers; and if the tenant have but an estate for years, or at will, he may have an action of the case. *Moor Ca.* 65. 9 *Rep.* 112. If the tenant who hath common of estovers, shall use them to any other purpose than he ought, he that owns the wood may bring trespass against him: as where one grants twenty loads of wood to be taken yearly in such a wood, ten loads to burn, and ten to repair pales; here he may cut and take the wood for the pales, though they need no amending, but then he must keep it for that use. 9 *Rep.* 113. *F. N. B.* 58, 159.

Common of Piscary, Is a liberty of fishing in another man's water. Common of piscary to exclude the owner of the soil, is contrary to law: though a person by prescription may have a separate right of fishing in such water and the owner of the soil be excluded; for a man may grant the water; without passing the soil: and if one grant *separatam piscariam*, neither the soil nor the water pass, but only a right of fishing. 1 *Inst.* 4, 122, 164. 5 *Rep.* 34. No person shall fish in any river without the owner's consent, under penalties: and nets, angles, &c. shall be seized and destroyed, by *Stat. 22 & 23 Car. 2. c. 25*. See *Fish and Fishing*.

Common of Turbary, Is a licence to dig turf upon the ground of another, or in the lord's waste. This common is appendant or appurtenant to an house, and not to lands; for turfs are to be burnt in the house: and it may be in gross; but it does not give any right to the land, trees, or mines. It cannot exclude the owner of the soil. 1 *Inst.* 4. 4 *Rep.* 37.

There is a common or liberty of digging coals, and gravel, sand, &c. as well as turf.

Common Bench, (*banus communis*, from the Sax. *banc*, bank, and thence metaphorically a bench, high seat or tribunal) The court of Common Pleas was anciently called Common Bench, because *communia placita inter subditos ex jure nostro, quod commune vocant, in hoc disceptantur*: That is, the pleas or controversies between common persons are there tried and determined. *Carob. Britan.* 113. In law books and references the court of Common Pleas is writ C. B. from *Communi Banco*, (or C. P.) And the justices of that court are stiled *Justiciarii de Banco*. See *Common Pleas*.

Common Day of Plea in Law, Signifies an ordinary day in court, as *Obabis Hilarii, Quindena Pasche*, &c. It is mentioned in the *Stat. 51 H. 3. St. 2. & St. 3*. concerning general days in bank.

Common Fine, (*finis communis*) A small sum of money, which the resiants within the liberty of some leets pay to the lords, called in divers places *head silver* or *head pence*, in others *cert money*; and was first granted to the lord, towards the charge of his purchase of the court-leet, whereby the resiants have the ease to do their suit within their own manors, and are not compellable to go to the sheriff's turn: in the manor of *Sheepshead* in the county of *Leicester*, every resiant pays 1 d. per poll to the lord at the court held after Michaelmas, which is there called common fine. For this common fine the lord may distrain; but he cannot do it without a prescription. 11 *Re.* 44. There is also common fine of the county.—*Quod communes misericordie, vel fines comitatum amerciatorum in finibus itinerum justiciariorum, &c.* *Fleta*, lib. 7. c. 48. See *Stat. 3 Ed. 1. c. 18*.

Commons House of Parliament, Is the lower house of parliament, so called, because the commons of the realm, that is, the knights, citizens; and burgesses returned to parliament, representing the whole body of the commons, do sit there. *Crompt. Jurisd.* See *Parliament*.

Common Intendment, Is common meaning or understanding, according to the subject matter, not strained to any extraordinary or foreign sense: bar to common intendment is an ordinary or general bar, which commonly disables the plaintiff's declaration. There are several cases in the law where common intendment, and intendment take place: and of common intendment a will shall not be supposed to be made by collusion. *Co. Lit.* 99. See *Co. Lit.* 303, a, b, &c.

Common Law, (*Lex Communis*) Is taken for the law of this kingdom simply, without any other laws; as it was generally holden before any statute was enacted in parliament to alter the same: and the King's courts of justice

justice are called the *Common Law Courts*. The *Common Law* is grounded upon the general customs of the realm; and includes in it the law of nature, the law of God, and the principles and maxims of the law: it is founded upon reason; and is said to be the perfection of *reason*, acquired by long study, observation and experience, and refined by learned men in all ages. And it is the common birthright, that the subject hath for the safe-guard and defence, not only of his goods, lands, and revenues; but of his wife and children, body, fame, and life also. *Co. Litt.* 97, 142. *Treatise of Laws*, p. 2.

According to *Hale*, the *Common law of England*, is the common rule for administering justice, within this kingdom, and asserts the King's royal prerogatives, and likewise the rights and liberties of the subject: 'tis generally that law, by which the determinations in the King's ordinary courts are guided; and this directs the course of descents of lands; the nature, extent and qualification of estates; and therein the manner and ceremonies of conveying them from one to another; with the forms, solemnities and obligation of contracts; the rules and directions for the exposition of deeds, and acts of parliament: the process, proceedings, judgments and executions of our courts of justice; also the limits and bounds of courts, and jurisdictions; the several kinds of temporal offences and punishments, and their application, &c. Sir *Matthew Hale's Hist. of the Law*, pag. 24, 44, 45.

As to the *rise of the Common law*, this account is given by some ancient writers: after the decay of the *Roman* empire, three sorts of the *German* people invaded the *Britains*, viz. the *Saxons*, the *Angles*, and the *Jutes*; from the last sprung the *Kentish* men, and the inhabitants of the *Isle of Wight*; from the *Saxons* came the people called *East*, *South*, and *West Saxons*; and from the *Angles*, the *East Angles*, *Mercians* and *Northumbrians*: These people having different customs, they inclined to the different laws by which their ancestors were governed; but the customs of the *West Saxons* and *Mercians*, who dwelt in the midland counties, being preferred before the rest, were for that reason called *jus Anglorum*; and by these laws those people were governed for many ages: but the *East Saxons* having afterwards been subdued by the *Danes*, their customs were introduced, and a third law was substituted, which was called *Dane-lage*; as the other was then stiled *West-Saxon-lage*, &c. At length the *Danes* being overcome by the *Normans*, *William* called the *Conqueror*, upon consideration of all those laws and customs, abrogated some, and established others; to which he added some of his own country laws, which he judged most to conduce to the preservation of the peace: and this is what we now call the *Common law*.

But though we usually date our *Common law* from hence, this was not the original of the *Common law*; for *Ethelbert*, the first christian King of this nation, made the first *Saxon* laws, which were published by the advice of some wise men of his council: and King *Alfred* who lived 300 years afterwards, being the first sole Monarch after the heptarchy, collected all the *Saxon laws* into one book, and commanded them to be observed through the whole kingdom, which before only affected certain parts thereof; and it was therefore properly called the *Common law*, because it was common to the whole nation; and soon after it was called the *sole right*. i. e. the *peoples right*.

Alfred was stiled *Anglicarum legum conditor*: and when the *Danes* had introduced their laws on the conquest of the kingdom, they were afterwards destroyed; and *Edward the Confessor* out of the former laws composed a body of the *Common law*; wherefore he is called by our historians *Anglicarum legum reformator*. *Blount*. In the reign of *Edw. 1.* *Britton* wrote his learned book of the *Common law* of this realm, which was done by the King's command, and runs in his name, answerable to the *Institutiones of the Civil law*, which *Justinian* assumes to himself, though composed by others. *Staundf. Prerog.* 6, 21. But *Justinian* ought to be intitled to the honour, as the *Institutes* were composed by his direction. This *Britton* is mentioned by *Gwin* to be bishop of *Hereford*. *Bracon*, a great lawyer, in the time of *Hen. 3.* wrote a

very learned treatise of the *Common law of England*, held in great estimation; and he was said to be Lord Chief Justice of the kingdom. Also the famous and learned *Glanvil*, Lord Chief Justice in the reign of *Hen. 2.* wrote a book of the *Common law*, which is said to be the most ancient composition extant on that subject. Besides these, in the time of *Ed. 4.* the renowned lawyer *Littleton* wrote his excellent book of *English Tenures*. In King *James the First's* reign, the great oracle of the law, Sir *Edward Coke*, published his learned and laborious *Institutes* of our law, and commentaries on *Littleton*. About the same time likewise *Dr. Cowel*, a civilian, wrote a short institute of our laws. In the reign of King *George the First*, *Dr. Tho. Wood*, a civilian and common lawyer, and at last a divine, wrote an institute of the laws of *England*, which is something after the manner of the institutes of the *Civil law*. And to conclude the whole of this head, the learned *Dr. Blackstone*, (now one of his Majesty's Justices of the court of *Common Pleas*) in the reign of *George the Third*, published *Commentaries on the laws of England*, in 4 volumes quarto, the best analytic and most methodic system of our laws which ever was published: 'Tis equally adapted for the use of students, and of those gentlemen who choose to acquire that knowledge of our laws, which is, in fact, essentially necessary for every one.

Common Pleas, (*communia placita*) Is one of the King's courts now constantly held in *Westminster hall*; but in ancient time was moveable, as appears by *Magna Charta*, cap. 11. *Gwyn*, in the preface of his reading, says, That till *Hen. 3.* granted the great charter there were but two courts, called the King's courts, viz. the *King's Bench* and the *Exchequer*, which were then stiled *Curia Domini Regis*, and *Aula Regis*, because they followed the court or the King; and that upon the grant of that charter, the court of *Common Pleas* was erected and settled in one certain place, i. e. *Westminster-hall*; and after that, all the writs ran *Quod sit coram iudiciariis meis apud Westm.* whereas before, the party was required by them to appear *Coram me vel iudiciariis meis*, without any addition of place, &c. as he observes out of the writings of *Glanvil* and *Bracon*. But Sir *Edward Coke* is of opinion in his preface to the eighth report, that the court of *Common Pleas* was constituted before the conquest; and was not created by *Magna Charta*, at which time there were *Iudiciarii de Banco*, &c. Though before this act, *Common Pleas* might have been held in *Banco Regis*; and all original writs were returnable there.

Writs returnable in this court, are now *coram iudiciariis nostris apud Westm.* But original writs, &c. returnable in *B. R.* are, *Coram nobis ubicunque fuerimus in Anglia*. The jurisdiction of this court is general, and extends itself throughout *England*: it holds pleas of all civil causes at *Common law*; between subject and subject, in actions real, personal, and mixed; and it seems to have been the only court for real causes. In personal and mixed actions it hath a concurrent jurisdiction with the *King's Bench*: but it hath no cognizance of pleas of the crown; and *Common Pleas* are all pleas that are not such. This court cannot regularly hold plea in any action, real or personal, &c. but by writ out of *Chancery* returnable here, except it be by bill for or against an officer, or other privileged person of the court. All actions belonging to this court, come hither either by original, as arrears and outlawries; or by privilege or attachment, for or against privileged persons; or out of inferior courts, not of record, by *pone*, *recordare*, *accedas ad curiam*, writ of *false judgment*, &c. Actions popular, and actions penal, of debt, &c. upon any statute, are cognizable by this court: and besides having jurisdiction for punishment of its officers and ministers; the court of *Common Pleas* may grant prohibitions to keep temporal and ecclesiastical courts within due bounds. 4 *Inft.* 99, 100, 118. In this court are four judges, created by letters patent; of whom the chief justice is a lord (i. e. so called) by his office: the seal of the court is committed to the custody of the chief justice.

The other officers of the *Common Pleas* are the *Custos Brevium*, three *Prothonotaries* and their *Secondaries*, the Clerk of the *Warrants*, Clerk of the *Effoins*, fourteen *Filers*, four *Exigenters*, a Clerk of the *Juries*, the *Chirographer*,

Chirographer, Clerk of the *King's Silver*, the Clerk of the *Treasury*, Clerk of the *Seal*, of *Out-lawries*, and the Clerk of the *Inrolment of Fines and Recoveries*, Clerk of the *Errors*, &c. *Prothonotarius Brevium* is the chief clerk in this court, who receives and keeps all writs returnable therein; and all records of *Nisi prius*, which are delivered to him by the clerks of the assize of every circuit, &c. and he files the rolls together, and carries them into the treasury of records: he also makes out exemplifications, and copies of all writs and records, &c. The *Prothonotaries* enter and inrol all declarations, pleadings, judgments, &c. and they make out all judicial writs, writs of execution, writs of privilege, *procedendo's* &c. The *Secondaries* are assistants to the *Prothonotaries* in the execution of their offices; and they take minutes, and draw up all orders and rules of court. The *Filazers*, who have the several counties of *England* divided among them, make out all mesne process, as *capias*, *alias*, *pluries*, &c. between the original writ and the declaration; and they make all writs of view, &c. The *Exigenters*, appointed for several counties, make out all exigents and proclamations in order to outlawry. The *Clerk of the Warrants*, enters all warrants of attorney; inrols deeds of bargain and sale; and estreats all issues. The *Clerk of the Effoins*, keeps the roll of the effoins, wherein he enters them, and nonsuits, &c. The *Clerk of the Juries*, makes out all writs of *habeas corpora juratorum*, for juries to appear; and he enters the continuances till the verdict given. The *Clerk of the Treasury* keeps the records of the court, and makes exemplifications of records, copies of issues, judgments, &c. The *Clerk of the Seals*, seals all writs and mesne process; also writs of outlawry and surperseades, and all patents. The *Clerk of the Outlawries*, makes out the writs of *capias utlagatum*. The *Clerk of the Errors* is for the allowance of writs of error, &c. The *Clerk of the Inrolments of fines and recoveries*, returns all writs of covenant, writs of entry and seisin, and inrols and exemplifies fines, &c. The *Clerk of the King's Silver* enters the substance of the writ of covenant: and the *Chirographer* ingrosseth all fines, and delivers the indentures to the parties, &c. And to these officers may be added, a *Proclamator*; a *Keeper of the court*; *Cryer*; and *Tipstaffs*; besides the *Warden of the Fleet*. There are also *Attornies* of this court, whose number is unlimited; and none may plead at the bar of the court, or sign any special pleadings, but *Serjeants at law*.

Common Prayer, (*Preces Publicæ*) Is the liturgy, or prayers used in our church. It is the particular duty of clergymen every Sunday, &c. to use the publick form of prayer, prescribed by the *Book of Common Prayer*: and if any incumbent be resident upon his living, as he ought to be, and keep a curate, he is obliged by the *act of uniformity* once every month at least, to read the *Common Prayers* of the church, according as they are directed by the book of *Common Prayer*, in his parish church, in his own person, or he shall forfeit 5*l.* for every time he fails therein. *Stat. 14 Car. 2. cap. 4.* Also by that statute the book of *Common Prayer* is to be provided in every parish, under the penalty of 3*l.* a month; and the *Common Prayer* must be read before every lecture; the whole appointed for the day, with all the circumstances, and ceremonies, &c. And by one of the *canons of the church*; ministers before all sermons, are to move the people to join in a short prayer, for the catholick church; and the whole congregation of christian people, &c. for the King and Royal Family; the ministers of God's word, nobility, magistrates, and whole commons of the realm, &c. and conclude with the *Lord's Prayer*. *Can. 55.* Refusing to use the *Common Prayer*; or using any other open prayers, &c. is punishable by *Stat. 1 Eliz. c. 2.* See *Church, Service, and Sacrament*.

Common Weal, Is understood in our law to be *bonum publicum*, and is a thing much favoured; and therefore the law doth tolerate many things to be done for common good, which otherwise might not be done: and hence it is, that monopolies are void in law; and that bonds and covenants to restrain free trade, tillage, or the like, are adjudged void. *11 Co. Rep. 50. Plowd. 25. Shep. Fp. 270.*

Commorancy, (*commerantia*, from *commoro*) An abiding, dwelling or continuing in any place; as an inhabitant of a house in a vill, &c. And *commorancy* for a certain time, may make a settlement in a parish. *Dalt. See Poor.*

Commoroth, or **Comoroth**, (*comorotha*) From the Brit. *cymmorth*, i. e. *subsidium*; a contribution which was gathered at marriages, and when young priests said or sung the first masses, &c. *4 Hen. 4. c. 27.* But the *26 H. 8. c. 6.* prohibits the levying any such in *Wales*, or the *Marches*, &c.

Commote, In *Wales* is half a cantred or hundred, containing fifty villages. *Stat. Wallie, 12 Ed. 1.* *Wales* was anciently divided into three provinces; and each of these were again subdivided into cantreds, and every cantred into commotes. *Doderige's Hist. Wal. fol. 2.* *Commote* also signifies a great seignory or lordship, and may include one or divers manors. *Co. Litt. 5.*

Communance. The commoners, or tenants and inhabitants, who had the right of common, or commoning in open field, &c. were formerly called the *communance*. *Cowel.*

Commune Concilium Regni Angliæ, The common council of the King and people assembled in parliament.

Communia placita non tenenda in Scaccario, Is an ancient writ directed to the treasurer and barons of the *Exchequer*, forbidding them to hold plea between common persons in that court, where neither of the parties belong to the same. *Reg. Orig. 187.*

Communum Custodia, A writ which anciently lay for the lord, whose tenant holding by knight's service died, and left his eldest son under age, against a stranger that entered the land, and obtained the ward of the body. *F. N. B. 89. Reg. Orig. 161.* Since the statute *12 Car. 2. c. 24.* hath taken away wardships, this writ is become of no use.

Community of the kingdom. *Vide Commonalty.*

Companage, (*Fr.*) Is all kind of food, except bread and drink: and the learned *Spelman* interprets it to be *quicquid cibi cum pane sumitur*. In the manor of *Feferton* in the county of *Nottingham*, some tenants when they performed their boons or work-days to the lords, had three boon loaves with *companage* allowed them. *Reg. de Thurgarton* cited in *Antiq. Nottingham.*

Companion of the Garter, Is one of the knights of that most noble order; at the head of which is the King, as sovereign. *24 H. 8. c. 13.*

Compass, An instrument used in navigation, by the direction and assistance whereof vessels are steered to the most distant parts of the world. 'Twas invented soon after the close of the holy war, and thereby navigation was rendered more secure as well as more adventurous, the communication between remote nations was facilitated, and they were brought nearer to each other. See *Robert's Hist. Emp. C. 1. 1 V. 78.*

Compellativum, An adversary or accuser.—*Episcopus in compellativum adlegationem docere ne quis alium persequatur, cogat jurejurando vel in ordalio.* *Leg. Athelstan.*

Compertorium, A judicial inquest in the Civil law, made by delegates, or commissioners to find out and relate the truth of a cause. *Paroch. Antiq. 575.*

Compounding felony, or *best-bote*, Is where the party robbed not only knows the felon, but also takes his goods again, or other amends upon agreement not to prosecute. It was formerly held to make a man an accessory; but is now punished only with fine and imprisonment. *1 Hawk. P. C. 125.* By *Stat. 25 Geo. 2. c. 36.* even to advertise a reward for the return of things stolen, with no questions asked, or words to the same purport, subjects the advertiser and the printer to a forfeiture of 50*l.* each.

Composition, (*compositio*) An agreement or contract between a parson, patron and ordinary, &c. for money or other thing in lieu of tithes. Land may be exempted from the payment of tithes, where *compositions* have been made: and real *compositions* for tithes are to be made by the concurrent consent of the parson, patron and ordinary. Real *compositions* are distinguished from personal contracts; for a *composition* called a personal contract is only an agreement between the parson and the parishioners,

to pay so much instead of tithes; and though such agreement is confirmed by the ordinary, yet (if the parson is not a party) that doth not make it a real *composition*, because he ought to be a party to the deed of *composition*. *Marb's Rep.* 87. The *compositions* for tithes made by the consent of the parson, patron and ordinary, by virtue of 13 *Elix. c.* 10. shall not bind the successor unless made for twenty-one years or three lives, as in case of leases of ecclesiastical corporations, &c. *Compositions* were at first for a valuable consideration, so that though in process of time, upon the increase of the value of the lands such *compositions* do not amount to the value of the tithes, yet custom prevails, and from hence arises what we call a *modus decimandi*. *Hob.* 29. The word *composition* hath likewise another meaning, i. e. *deciso litis*. See *Tithes*.

Compositi were in antient times allowed for crimes and offences, even for murder.—An expedient employed by the civil magistrate, in order to set some bounds to the violence of private revenge. This custom may be traced back to the antient Germans. *Tacit. de Morib. Ger. c.* 21. Vide *Robert's Hist. Emp. Charles V. 1 V.* 278, 299, &c. But see particularly *Lord Kaim's Hist. Law Tr. 1 V.* 41, 42, &c.

Compositio Mensurarum, Is the title of an antient ordinance for measure, not printed.

Compositum, Dung, soil or compost laid on lands. *Registr. Eccl. Cantuar. MS.*

Comprint, Intends a surreptitious printing of another bookseller's copy, to make gain thereby, which is contrary to the *Stat. 14 Car. 2. cap.* 33. and 8 *Ann. c.* 19, &c. and to Common law.

Compromise, (*compromissum*) Is defined to be a mutual promise of two or more parties at difference, to refer the ending of their controversy to arbitrators: and *West* says it is the faculty or power of pronouncing sentence between persons at variance, given to arbitrators by the parties private consent. *West's Symb. jell. 1.* Matters *compromised*, are also matters of law referred, or made an end of.

Compurgator, One that by oath justifies another's innocence. *Compurgators* were introduced as evidence in the jurisprudence of the middle ages.—Their number varied according to the importance of the subject in dispute, or the nature of the crime with which a person was charged. *Du Cange voc. Juramentum, vol. 3. p.* 1599. *Robert's Hist. Emp. Charles V. 1 V.* 49. See *Oath*, and *Black. Com. 3 V.* 342, 3. 4 *V.* 361, 407.

Computation, (*computatio*) Is the true account and construction of time; and to the end neither party to an agreement, &c. may do wrong to the other, nor the determination of time be left at large, it is to be taken according to the just judgment of the law. A deed dated the 20th day of *August*, to hold from the day of the date, shall be construed to begin on the 21st day of *August*: but if in the *habendum* it be to hold from the making, or from thenceforth, it shall begin on the day delivered. 1 *Inft.* 46. 5 *Rep.* 1. If an indenture of lease dated the 4th day of *July*, made for three years from thenceforth, be delivered at four of the clock in the afternoon of the said 4th day of *July*, the lease shall end the 3d day of *July* in the third year: and the law in this *computation* rejects all fractions or divisions of the day. But some have held that rent is not due on the day limited to be paid till the middle of the day, and after noon; in case a tenant for life dies at such a critical juncture, &c. See *Day and Month*.

Computation of stiles after the *English* manner, is allowing 5280 feet, or 1760 yards to each mile; and the same shall be reckoned not by strait lines, as a bird or arrow may fly, but according to the nearest and most usual way. *Cro. Eliz.* 212.

Computo, (*Lat.*) Is a writ to compel a bailiff, receiver or accountant, to yield up his accounts: it is founded on the statute of *Westm. 2. cap.* 12. And also lies against guardians, &c. *Reg. Orig.* 135.

Concealers, (*concelatores*, so called a *concelando*, as *mons a monendo*, by an *antiphrasis*) Are such as find out concealed lands, &c. such lands as are privily kept from the King by common persons, having nothing to shew for their title or estate therein. 39 *Elix. cap.* 22. There

were *concealers of crimes*; and *concealing* treason, &c. when misprision, see *Misprision*.

Concessit, A word of frequent use in conveyances, creating a covenant in law; as *dedi* makes warranty. *Co. Lit.* 384. This word is of a general extent, and said to amount to a grant, seoffment, lease and release, &c. 2 *Saund.* 96.

Concionatores, Common-council men, freemen, called to the hall or assembly, as *worthby*.—*Quodam tempore cum convenissent concionatores apud London, &c.* *Hittor. Elien. edit. Gale, c.* 46.

Conclusion, (*conclusio*) Is when a man by his own act upon record hath charged himself with a duty or other thing, or confessed any matter whereby he shall be concluded: as if a sheriff returns that he hath taken the body upon a *capias*, and hath not the body in court at the day of the return of the writ; by the return, the sheriff is concluded from plea of escape, &c. *Terms d. Lay.* In another sense, this word *conclusion* signifies the end of any plea, replication, &c. and a plea to the writ is to conclude to the writ; a plea in bar, to conclude to the action, &c. *Conclusion* of plea in bar shall be, *et hoc paratus est verificare*: of pleas tendering issue, *et de hoc ponit se super patriam*. *Kitch.* 219, 220. See *Black. Com. 3 V.* 303. and *Co. Lit.* 303. a. b. &c.

Concord, (*concordia*) Is an agreement made between two or more, upon a trespass committed; and is divided into *concord executory* and *concord executed*: and according to *Plowden*, one binds not, as being imperfect, but the other is absolute, and ties the party. Though by some opinions, agreements executory are perfect, and bind no less than agreements executed. *Plowd.* 5, 6, 8. These *concords* and agreements are by way of satisfaction for the trespass, &c. *Concord* is also an agreement between parties, who intend the levying of a fine of lands one to the other, how and in what manner the lands shall pass: it is the foundation and substance of the fine, taken and acknowledged by the party before one of the judges of *C. B.* or by commissioners in the country, and in *Latin* begins thus: *Et est concordia talis scilicet quod præd. A. B. recogn. tenementa præd. cum petiti' esse jus ipsius C. D. ut ill. quæ idem C. D. habet de dono præd. A. B. Et ill. remisit. Et quiet. clam. de se & hæred. suis præfuit. C. & hæred. suis imperpetuum, &c.*

Concubaria, A fold, pen, or place where cattle lie. *Corwel.*

Concubitant, Signifies a lying together. *Stat. 1 H. 7. cap.* 6.

Concubinage, (*concubinatus*) In common acceptation is the keeping of a whore or concubine: but in a legal sense, it is used as an exception against her that sueth for dower, alledging thereby that she was not a wife lawfully married to the party, in whose lands she seeks to be endowed, but his concubine. *Brit. c.* 107. *Brett. lib. 4. tract. 6. cap.* 8. There was a *concubinage* allowed in Scripture to the patriarchs, *secundum legem matrimonii, &c.* *Blount.*

Conders, (from the Fr. *conduire*, to conduct) Are such as stand upon high places near the sea-coast, at the time of herring-fishing, to make signs with boughs, &c. to the fishermen at sea, which way the shoals of herrings passeth; for this may be better discovered by such as stand upon some high cliff on the shore, by reason of a kind of blue colour which the herrings cause in the water; than by those that are in the ships or boats for fishing. These are otherwise called *huers* and *balkers*, *directors* and *guiders*, as appears by the *Stat. 1 Jac. 1. c.* 23.

Condition, (*conditio*) Is a restraint annexed to a thing, so that by the non-performance, the party to it shall receive prejudice and loss; and by the performance, commodity and advantage: or it is a restriction of mens acts, qualifying or suspending the same, and making them uncertain whether they shall take effect or not; also 'tis defined to be what is referred to an uncertain chance, which may happen or not happen. *West's Symb. part 1. lib. 2. sect.* 156. And of conditions there are divers kinds, *viz.* conditions in deed and in law; conditions precedent, and subsequent; conditions inherent, and collateral, &c.

A *condition in deed* is that which is joined by express words to a feoffment, lease, or other grant; as if a man makes a lease of lands to another, reserving a rent to be paid at such a feast, upon *condition* if the lessee fail in payment, at the day, then it shall be lawful for the lessor to enter. *Condition* in law is when a person grants another an office, as that of keeper of a park, steward, bailiff, &c. for term of life; here, though there be no *condition* expressed in the grant, yet the law makes one, which is, if the grantee do not justly execute all things belonging to the office, it shall be lawful for the grantor to enter and discharge him of his office. *Lit. lib. 3. c. 5.*

These *conditions* are also called *condition expressed*, and *condition implied*. *Condition precedent* is when a lease or estate is granted to one for life, upon *condition* that if the lessee pay to the lessor a certain sum at such a day, then he shall have fee simple; in this case the *condition* precedes the estate in fee, and on performance thereof gains the fee-simple. *Condition subsequent* is when a man grants to another his manor of Dale, &c. in fee, upon *condition* that the grantee shall pay to him at such a day such a certain sum, or that his estate shall cease; here the *condition* is subsequent, and following the estate, and upon the performance thereof continues and preserves the same: so that a *condition precedent* doth get and gain the thing or estate made upon *condition* by the performance of it; as a *condition subsequent* keeps and continues the estate by the performance of the *condition*. *1 Inst. 201, 327. Terms de Ley.* If one agree with another to do such an act, and for the doing thereof the other shall pay so much money; here the doing the act is a *condition precedent* to the payment of the money, and the party shall not be compelled to pay till the act is done: but where a day is appointed for the payment of money, which day happens before the thing contracted for can be performed, there the money may be recovered before the thing is done; for here it appears that the party did not intend to make the performance of the thing a *condition precedent*. *3 Salk. 95.*

Inherent conditions are such as descend to the heir with the land granted, &c. And *collateral condition* is that which is annexed to any collateral act. *Conditions* are likewise *affirmative*, which consist of doing; *negative*, and consist of not doing: some are further said to be *restrictive*, for not doing a thing; and some *compulsory*, as that the lessee shall pay the rent, &c. Also some *conditions* are *single*, to do one thing only; some *copulative*, to do divers things; and others *disjunctive*, where one thing of several is required to be done. *Co. Lit. 201.*

Among these several kinds of conditions, the cases which most frequently occur fall under the distinctions of conditions *precedent* and *subsequent*. We shall therefore speak of them more at large under the following divisions, wherein it is to be considered,

I. To what conditions may be annexed: what conditions are good, and by what words they may be created.

II. What shall be a good performance of a condition, and in what manner the breach of it must be taken advantage of.

III. Of conditions precedent and subsequent.

I. To what conditions may be annexed: what are good, and by what words they may be created.

Conditions may be to any estate, whether in fee-simple, fee tail, for life or years: they run with the estate, and bind in the hands of whomsoever they come. *Lit. Rep. 128.* But a *condition* may not be made but on the part of the lessor, donor, &c. For no man may annex a *condition* to an estate, but he that doth create the estate itself. *Conditions* are good to enlarge or limit estates: and there are four incidents, which conditions to create and increase an estate ought to have. 1. They should have a particular estate, as a foundation whereupon the increase of the greater estate shall be built. 2. Such particular estate shall continue in the lessee or grantee, until the increase happens. 3. It must vest at the time the contingency happens, or it shall never vest. 4. The particular estate and increase must take effect by the same deed, or by several deeds delivered at the same time. *8 Rep. 75.* *Conditions* to create estates shall be favourably construed: but

conditions which tend to destroy, or restrain an estate, are to be taken strictly. A feoffment upon *condition*, that the feoffee shall not aliene, is void: but a *condition* in a feoffment not to aliene for a particular time, or to a particular person, may be good. *Hob. 13, 261.* And if a *condition* is, that tenant in tail shall not aliene in fee, &c. or tenant for life or years not aliene during the term, these *conditions* are good: where the reversion of an estate is in the donor, he may restrain an alienation by *condition*. *10 Rep. 39. 1 Inst. 222.* If one make a gift in tail, on *condition* that the donee or his heirs shall not aliene; this is good to some intents, and void to others: for if he make a feoffment in fee, or any other estate by which the reversion is discontinued tortiously, the donor may enter; but 'tis otherwise if he suffer a common recovery. *1 Inst. 223.*

A liberty inseparable from an estate cannot be restrained; and therefore a *condition* that a tenant in tail shall not levy a fine, within the Stat. 4 H. 7. c. 24. or suffer a recovery; or not make a lease, within the Stat. 32 Hen. 8. c. 36. is void and repugnant. But if the *condition* restrain levying a fine at Common law, it may be good. *2 Danv. Abr. 22.* A gift in tail, or in fee, upon *condition* that a feme shall not be endowed; or baron be tenant by the curtesy, is repugnant and void. So is a *condition* in a lease, &c. that the lessee shall not take the profits: and where a man grants a rent-charge out of land, provided it shall not charge the lands. *Co. Lit. 146.* *Conditions* repugnant to the estate, impossible, &c. are void: and if they go before the estate, the estate and *condition* are void; if to follow it, the estate is absolute, and the *condition* void. *1 Inst. 206. 9 Rep. 128.* But if at the time of entering into a *condition*, a thing be possible to be done, and become afterwards impossible by the act of God, the estate of a feoffee (created by livery) shall not be avoided. *2 Mod. 204.*

A feoffment in fee is made upon *condition*, that the feoffee shall within a year go to Rome, &c. if the feoffee dies before the year ended, yet the estate of the feoffee is become absolute; for the estate, once vested by the livery, shall not be divested without default in the feoffee. *Ibid.* Where a *condition* is of two parts, one possible, and the other not so, it is a good *condition* for performing that part which is possible. *Cro. Elix. 780.* Though if a *condition* is of two parts disjunctive, and one part becomes impossible, by the act of God, the person bound is not obliged to perform the other. *1 Rol. 446. l. 45. 2 Mod. 202, 203.* If a *condition* be in the copulative, and is not possible to be performed, 'tis said it may be taken in the disjunctive. *1 Danv. Abr. 73.* Where an estate is to be wholly created upon a *condition* impossible to be performed, there the estate shall never come in effect. *1 Leon. c. 311.* A woman makes a feoffment to a man that is married, upon *condition* that he shall marry her; this *condition* is not impossible, for the man's wife may die, and then he may marry her. *2 Danv. 25.* A reversion may be granted in tail upon *condition*, that if the grantee pays so much, he shall have the fee. *8 Rep. 73.* But if a man grants lands, &c. for years, upon *condition* that if the lessee pay 20s. within one year, that he shall have it for life: and that if he after the year pay 20s. he shall have the fee; though both sums are paid, he shall have but an estate for life; the estate for life, at the time of the grant, being only in contingency, and a possibility cannot increase upon a possibility, nor can the fee increase upon the estate for years. *8 Rep. 79.*

If a lease be made to two, with *condition* to have fee, and one dies, the survivor may perform the *condition*, and have the fee; but if they make partition, the *condition* is destroyed. *8 Rep. 75, 76.* If a feoffee grant the reversion of part of the land, on a lease for years, on which a rent upon *condition* is reserved, all the *condition* is confounded and gone; though if the lessee assign part, the *condition* remains, for he cannot discharge the estate of the *condition*. *2 Danv. Abr. 119.* A man makes a feoffment upon *condition*, and after levies a fine to a stranger, the *condition* is gone. *Ibid. 120.* If a feoffee, upon *condition* to infeoff another, infeoff a stranger; or if it be to reinfeoff the feoffor, and he grant the land to another person, upon *condition* to perform the *condition*,

dition, the condition is broken, because the feoffee hath disabled himself to do it: so where such feoffee, upon condition to re infeoff, &c. takes a wife, that the land is subject to the dower of the wife; and so if the land is recovered, and execution sued out by another, the condition is broken. *Co. Lit.* 221. 1 *Danv.* 79.

If one disseise the feoffee, or any other who hath land by just title, and thereof infeoff a stranger on condition, and the land is lawfully recovered from him that hath the title; by this the condition is destroyed: and if a disseisor make a feoffment in fee upon condition; and after the disseisee doth enter upon the feoffee, this doth extinguish the condition. *Perk. sect.* 821. If the feoffee makes a feoffment of all or part of the land to the feoffor, before the condition is broken; the condition is gone for ever: and if he make a lease for life or years only, then the condition will be suspended for that time. *Co. Lit.* 218. But 'tis otherwise where the feoffment, or lease for life or years, are made to any other but the feoffor. *Ibid.* Where the condition of a feoffment is, that if the feoffor or his heir pay a certain sum of money to the feoffee such a day, and before that day the feoffor dieth without heir: or if the feoffment be made by a woman on condition to pay her 10*l.* or that the feoffee infeoff her by a certain day, and they intermarry before the day, and the marriage doth continue till after it; in these cases the condition is gone. *Perk. sect.* 763, 764.

A condition that would take away the whole effect of a grant, is void; and so it is if it be contrary to the express words of it. Conditions against law are void; but what may be prohibited by law may be prohibited by deed. 1 *Inst.* 220, 206. He that taketh an estate in remainder, is bound by condition in a deed, though he doth not seal it.

As to the proper words to create a condition.

The word *si* will not always make a condition; but sometimes it makes a limitation, as where a lease is made for years, *if A. B. lives so long.* And this is contrary to a condition, for a stranger may take advantage of an estate determined thereby, &c. *Co. Lit.* 236. *Dyer* 300. *Sub conditio*ne is the most proper word to make a condition: *proviso* is as good a word, when not dependant upon another sentence; but in some cases, the word *proviso* may make no condition, but be only a qualification, or explication of a covenant. 2 *Danv.* 1, 2. And neither the word *proviso*, nor any other, makes a condition, unless it is *restrictive*. *Plowd.* 34. 1 *Nelf.* 466.

Regularly the word (*pro*) does not import a condition, tho' it has the force of a condition *when the thing granted is executory, and the consideration of the grant is a service, or some such thing, for which there is no remedy; but the stopping the thing granted, as in the case of an annuity granted pro consilio, or for executing the office of a steward of a court, or the service of a captain or keeper of a fort, here the failure of giving counsel, or performing the service, is a kind of eviction of that which is to be done for the annuity, the grantor having no means either to exact the counsel, or recompence for it, but by stopping the annuity; and in these cases the condition is not precedent, and therefore the performance thereof need not be averred when the annuity is demanded.* *Per Hobart Ch. J. Hob.* 41. *Mich.* 10 *Jac.* in the case of *Cowper v. Andrews.* *Sed qu. as to the nature.*

Of the condition, and the necessity of an averment.

As the intent of the testator chiefly governs in wills, such construction is always made of the words, as will best support his intent, and therefore these words *ad faciendum, faciendo ea intentione, ad effectum,* &c. in a will create a condition. *Co. Lit.* 204. a. See *Dewise, Will.*

A grant to one, to the intent he shall do so and so, is no condition, but a trust and confidence. *Dyer* 138. Some words in a lease do not make a condition but a covenant, upon which the lessor may bring his action. A lease being the deed of lessor and lessee, every word is spoken by both; and a condition may be therein, though it sounds in covenant. 1 *Nelf.* 464. A covenant not to grant, sell, &c. may be a condition; and covenant that paying the rent, the lessee shall enjoy the land, is con-

ditional. 2 *Danv.* 2, 6. Where words are indefinite, and proper to defeat an estate, they shall be taken to have the force of a condition. *Palm.* 163.

II. With regard to the performance of conditions.

A condition may be well performed, when it is done as near to the intent as may be: for if the condition of a feoffment be that the feoffee shall make an estate back to the feoffor and his wife, and the heirs of their two bodies, remainder to the right heirs of the feoffor; in this case, if the feoffor die before, the estate shall be made to the wife without impeachment of waste, the remainder to the heirs of the body of the husband begotten on the wife, &c. *Co. Lit.* 219. 8 *Rep.* 69. If a condition be performed in substance and effect, it is good although it differs in words; as where it is to deliver letters patent, and the party bound having lost them, delivers an exemplification, &c. 2 *Danv.* 40. Though payment of the money before the day, is payment at the day, in performance of a condition; yet a feoffor, &c. cannot re-enter, and re-vest his old estate by force of the condition, till the day whereon the condition gives him power to re-enter. *Ibid.* 121. If a man seised of land in right of his wife, make a feoffment in fee on condition, and dies; if the heir of the feoffor enters for the condition broken, and defeats the feoffment, his estate vanishes, and presently it is vested in the wife. *Co. Lit.* 202. And if a person seised of land, as heir on the part of his mother, makes a feoffment on condition and dieth; tho' the heir on the part of the father, who is heir at Common law, may enter for the condition broken, the heir of the part of the mother shall enter upon him, and enjoy the land. *Ibid.* 12.

Where there is a condition in a feoffment or lease, that if no distress can be found, the feoffor, &c. shall re-enter; if the place is not open to the distress, as if there be only a cupboard in the house, which is locked, &c. it is all one as if there was no distress there, and the feoffor, &c. may enter. 2 *Danv.* 46. When a rent is to be paid upon condition at a certain day, the lessor cannot enter for the condition broken, before demand of the rent. *Ibid.* 98. And the lessor ought to demand the rent at the day, or the condition shall not be broken by the non-payment of the rent. A re-entry may be given on a feoffment, &c. though none be reserved: if one make a lease for life or feoffment upon condition, that if the feoffee or lessee does such an act, the estate shall be void: now although the estate cannot be void before entry, this is a good condition, and shall give an entry to the lessor, &c. by implication. 1 *Rel. Abr.* 408. A lease for life on condition, being a freehold, cannot cease without entry; but if it be a lease for years, the lease is void *ipso facto*, on breach of the condition, without any entry. 1 *Inst.* 214. If a lease for years is, that on breach of the condition, the term shall cease, the term is ended without entry; but where the words are, that the lease shall be void, it is otherwise. *Cro. Car.* 511. 3 *Rep.* 64. Regularly, where one will take advantage of a condition, if he may enter, he must do it; and if he cannot enter, he must make a claim. *Co. Lit.* 218.

No one can reserve the power or benefit of re-entry, on breach of a condition, to any other but himself, his heirs, executors, &c. parties and privies, in right and representation: privies in law, grantees of reversions, &c. are to have no advantage by it. But by the the *Stat.* 32 *H. 8. c.* 28. Grantees of reversions may take advantage against lessees, &c. by action. 1 *Inst.* 214, 215. *Plowd.* 175. Where one doth enter for a condition broken, it generally makes the estate void *ab initio*, and the party comes in of his first estate; and he shall have the land in the same manner it was when he departed with it; and his possession at the time of making the condition: therefore he shall avoid all subsequent charges on the lands. 4 *Rep.* 120. *Plowd.* 186. *Co. Lit.* 233. If one enters on a condition performed, he shall avoid all incumbrances upon the land after the condition made: and a condition when broken, or performed, &c. will defeat the whole estate. So that if there be a lease for life, remainder in fee, on condition that the lessee for life shall pay 20*l.* to the lessor; if he pay not this money, the estate in remainder will be avoided.

avoided also. *Dyer* 127. 8 *Rep.* 90. But this may be otherwise by special limitation to an use: and if tenant for life, and he in remainder join in a feoffment on condition, that if, &c. then the tenant for life shall re-enter, this may be good without defeating the whole estate; tho' regularly a condition may not avoid part of an estate, and leave another part entire, for can the estate be void as to some persons, and good as to others. 8 *Rep.* 190. 1 *Inst.* 214.

Lessee for life makes a feoffment on condition, and enters for the condition broken; by this he shall be restored to his estate for life, and reduce the reversion to the lessor; and the rent due to the lessor shall be revived: but in this case the lessee will not be in the same course as he was before, for his estate is subject to a forfeiture, though he be tenant for life still. *Roll.* 474. *Shep. Abr.* 405.

Tenants by the curtesy, tenant in tail after possibility of issue extinct, tenant in dower, for life, or years, &c. hold their estates subject to a condition in law, not to grant a greater estate than they have, nor to commit waste, &c. 1 *Inst.* 233. And estates made by deed to infants, and feme covert, upon condition, shall bind them, because the charge is on the land. 2 *Danv.* 30. A release of all a man's right may be upon condition; a lessee may surrender upon condition; a contract may be upon condition, &c. But a parson cannot resign upon condition, any more than be admitted upon condition: and a condition cannot be released on condition. 9 *Rep.* 85.

No person shall defeat any estate of freehold upon condition without shewing the deed wherein the condition is contained: but of chattels real or personal, &c. a man may plead that such grants or leases were made upon condition without shewing the deeds; and in the case of a condition to avoid a freehold, though it may not be pleaded without the deed, it may be given in evidence to a jury, and they may find the matter at large. *Lit.* 374. 5 *Rep.* 40. A condition may be apportioned by act of law, or of the lessee. 4 *Rep.* 120. But a man cannot by his own act divide, or apportion a condition, which goes to the destruction of an estate. 1 *Nels. Abr.* 474. A condition in a will is a thing odious in law, which shall not be created without sufficient words. 2 *Leen.* 40. A devise to the heir at law, provided he pay to A. B. 20*l.* is a void condition, because there is no person to take advantage of the non-performance. 1 *Lutw.* 797. Yet conditional devises, as well of lands as of goods, are allowed by our law, and not being performed, the heir or executors shall take advantage of them. 1 *Nels.* 467.

Where there are negative and affirmative conditions, the pleader must shew, not only that he has not broke the negative ones, but also that he has performed the affirmative ones. *Fletcher v. Richardson*, *Rep. Temp. Hardw.* per *Annaly*, 322.

III. With respect to the distinction between conditions precedent and subsequent.

It is to be observed, that conditions precedent are such as must be punctually performed before the estate can vest; but on a condition subsequent, the estate is immediately executed; yet the continuance of such estate dependeth on the breach or performance of the condition. *Co. Lit.* 218. *Fq. Abr.* 108. As if I grant, that if A. will go to such a place, about my business, that he shall have such an estate, or that he shall have 10*l.* &c. this is a condition precedent. 1 *Roll. Abr.* 414. So if I retain a man for 40*s.* to go with me to Rome, this is a condition precedent, for the duty commences by going to Rome. 1 *Roll. Abr.* 914. So if a man, by will, devises certain legacies, and then devises all the residue of his estate to his executor, after debts, legacies, &c. paid and discharged, this is a condition precedent; so that the executor cannot have the residue of the estate before the debts and legacies are discharged. 1 *Roll. Abr.* 415. 1 *Jones* 327. *Cro. Car.* 335.

But if a man devises a term to A. and that if his wife suffers the devisee to enjoy it for three years, that she shall have all his goods as executrix; but if she disturbs A. then he makes B. executor, and dies, his wife is executrix pre-

sently; for though in grants the estate shall not vest till the condition precedent is performed, yet it is otherwise in a will, which must be guided by the intent of the parties; and this shall not be construed as a condition precedent, but only as a condition to abridge the power of being executrix, if she perform it not. *Cro. Eliz.* 219.

Where the one promise is the consideration of the other, and where the performance and not the promise is, must be gathered from the words and nature of the agreement, and depends intirely thereupon; for, if there was a positive promise that one should release his equity of redemption, and on the other side that the other would pay 7*l.* then the one might bring his action without any averment of performance; but where the agreement is, that the plaintiff should release his equity of redemption, in consideration whereof the defendant was to pay him 7*l.* so that the release is the consideration, and therefore being executory, it is a condition precedent, which must be averred. 12 *Mod.* 455, 460. *Pasch.* 13 *Will.* 3. by *Holt Ch. Justice*, in delivering the opinion of the court in the case of *Thorp v. Thorp*.

If there be a day set for the payment of money, or doing the thing which one promises, agrees, or covenants to do for another thing, and that day happens to incur before the time, the thing for which the promise, agreement or covenant is made, is to be performed by the tutor of the agreement, there, tho' the words be, that the party shall pay the money, or do the thing for such a thing, or in consideration of such a thing; after the day is past the other shall have action for the money, or other thing, tho' the thing for which the promise, agreement, or covenant was made, be not performed; for it would be repugnant there to make it a condition precedent; and therefore they are in that case left to mutual remedies, on which, by the express words of the agreement, they have depended. *Per Holt Ch. Justice.* 12 *Mod.* 461. *Pasch.* 13 *W.* 3. in the case of *Thorp v. Thorp*.

M. agrees to give A. so much for the use of a coach and horses for a year, and A. agreed further with M. to keep the coach in repair; it was averred the coach and horses were delivered to M. but nothing of the repair; and *Holt Ch. Justice* held upon this evidence, that repairing was not a condition precedent, and therefore need not be averred. *Per Holt Ch. Justice at Guildhall*, and judgment pro querente. 12 *Mod.* 503. *Pasch.* 13 *Will.* 3. *Atkinson v. Murrice*.

But if the agreement had been that A. had agreed to give M. a coach and horses for a year, and to repair the coach, and that for that M. promised so much money, then the repairing had been a condition precedent necessary to be averred. *Per Holt Ch. Justice.* 12 *Mod.* 503. *Pasch.* 13 *W.* 3. in S. C.

Condition that A. shall do, and for the doing B. shall pay, is a condition precedent, but time fixed for payment will verify the condition; *per Holt Ch. Justice.* 1 *Salk.* 171. *Pasch.* 13 *Will.* 3. *B. R. Thorp v. Thorp*.

Where an award consists of divers things, and one of them is void, and it be expressly said, that upon performance of that void thing, the other party shall do such a thing, there the doing of the void thing is a condition precedent, and must be averred before action against the other for not doing his part; but where there be several things in an award, and some are good, and others not; and it is further said, that upon performance *præmissorum* the other shall release for the purpose, there it suffices to make averment of performance of what is well awarded without more; *per Powell Justice.* 12 *Mod.* 588. *Mich.* 13 *W.* 3. in *C. B. Lee v. Elkins*.

If A. makes a lease for five years to B. upon condition, that if B. pays him 10*l.* within two years, that then he shall have a fee-simple in the lands, and make livery and seisin to B. this passes the freehold immediately, and B. has a fee conditional; because if the freehold was not to vest in B. till the condition performed, it would be difficult to determine in whom the freehold lay; for conditions may be inserted in such deeds as are perfected privately, which might prove greatly prejudicial to strangers. *Lit. seâ.* 350. *Co. Lit.* 216, 217.

But in case of a lease for life, with such a condition, the freehold passes not before the condition performed;

formed, because the livery may presently work upon the freehold. But if a man grants an advowson; &c. (which lie in grant) for years, upon such condition, the grantee shall have no fee till the condition performed. *Co. Lit.*

217.

If *A.* leases to *B.* for years, upon condition, that if *B.* pays money to *A.* or his heirs, at a day, that *B.* shall have the fee, and before the day *A.* is attainted of treason and executed; now though the condition became impossible by the act and offence of *A.* yet *B.* shall not have a fee, because a precedent condition to increase an estate must be performed; and if it becomes impossible, no estate shall rise. *Co. Lit.* 210. Also in equity, with respect to conditions precedent and subsequent, the prevailing distinction seems to be, to relieve against the breach or non-performance, whether the condition be precedent or subsequent, where a compensation can be made. 1 *Vern.* 79, 167. As if *A.* conveys lands to *B.* &c. and their heirs, upon trust, that if *C.* the son of *A.* within six months after the death of *A.* should secure to trustees 500*l.* for the younger children of *C.* then after such security given, to convey to *C.* and his heirs, and until the time for giving such security, in trust for the eldest son of *C.* and in default of such security, to convey to such eldest son and his heirs, if *C.* dies before any such security given, yet this condition, though precedent, being only in nature of a penalty, the intent of the trust shall be regarded, which was to secure 500*l.* for the younger children. 1 *Chan. Ca.* 89.

If a feme covert, having power by will to devise lands, devises them to her executors, to pay 500*l.* out of them to her son; provided, that if the father gives not a sufficient release of certain goods to her executors, that then the devise of the 500*l.* should be void, and go to the executors, and after her death a release is tendered to the father, and he refuses, yet upon making the release after, the money shall be paid to the son; for it was said to be the standing rule of the court, that a forfeiture should not bind, where a thing may be done after, or a compensation made for it; as where the condition is to pay money, &c. and though it is generally binding, where there is a devise over, yet here, it being to go to the executors, it is no more than the law implies. 2 *Vent.* 352. See more concerning conditions under title *Bond*, and *Black. Com.* 2 *V.* 152, 154, 155. And see *Com. Dig.* 2 *V.* tit. *Condition*, (p. 318, &c.) per tot.

Conduits, for water in London, shall be made and repaired, and the Lord Mayor and Aldermen may inquire into defaults therein, &c. by the *Stat.* 35 *H. 8.* c. 10.

Cone and Key. A woman at the age of fourteen or fifteen years might take the charge of her house, and receive cone and key: cone or *clue* in the Sax. signifying *computus*, so that she was then held to be of competent years, when she was able to keep the accounts and keys of the house.—*Famina in tali ætate potest disponere domui suæ & habere cone & key.* *Bract. lib.* 2. cap. 37. And there is something to the same purpose in *Glanv. lib.* 7. c. 9.

Coney-burrows. Places where conies or rabbits breed and haunt, &c. Commoners cannot lawfully dig up coney-burrows in the common. *Cope v. Marshall & al. Wilf. par.* 2. fo. 51.

Confederacy, (*confederatio*) Is when two or more combine together to do any damage or injury to another, or to do any unlawful act. And false confederacy between divers persons shall be punished, though nothing be put in execution: but this confederacy punishable by law before it is executed, ought to have these incidents; first, it must be declared by some matter of prosecution, as by making of bonds, or promises the one to the other; secondly, it should be malicious, as for unjust revenge; thirdly, it ought to be false against an innocent; and lastly, it is to be out of court voluntarily. *Terms de Ley.* Where a writ of conspiracy doth not lie, the confederacy is punishable: and inquiry shall be made of conspirators and confederators, who bind themselves together, &c.

Confession, (*confessio*) Is where a prisoner is indicted of treason or felony, and brought to the bar to be arraigned; and his indictment being read to him, the court demands what he can say thereto; then either he confesses the offence, and the indictment to be true, or pleads *Not*

guilty, &c. Confession may be made in two kinds, and to two several ends: the one is, that the criminal may confess the offence whereof he is indicted openly in the court, before the judge, and submit himself to the censure and judgment of the law; which confession is the most certain answer, and best satisfaction that may be given to the judge to condemn the offender; so that it proceeds freely of his own accord, without any threats or extremity used; for if the confession arise from any of these causes, it ought not to be recorded: as a woman indicted for the felonious taking of a thing from another, being thereof arraigned, confessed the felony, and said that she did it by commandment of her husband; the judges in pity would not record her confession, but caused her to plead *Not guilty* to the felony; whereupon the jury found that she did the fact by compulsion of her husband, against her will, for which cause she was discharged. 27 *Assiz. pl.* 50. The other kind of confession is, when the prisoner confesses the indictment to be true, and that he hath committed the offence whereof he is indicted, and then becomes an approver, or accuser of others, who are guilty of the same offence whereof he is indicted, or other offences with him; and then prays the judge to have a coroner assigned him, to whom he may make relation of those offences, and the full circumstances thereof. There is also a third sort of confession, formerly made by an offender in felony, not in court before the judge, as the other two are, but before a coroner in a church, or other privileged place, upon which the offender, by the ancient law of the land, was to abjure the realm. 3 *Inst.* 129.

Confession is likewise in civil cases, where the defendant confesses the plaintiff's action to be good: by which confession there may be a mitigation of a fine against the penalty of a statute; though not after verdict. *Finch* 387. 2 *Keb.* 408. And there is a confession indirectly implied, as well as directly expressed in criminal cases; as if the defendant, in a case not capital, doth not directly own himself guilty of the crime, but by submitting to a fine owns his guilt; whereupon the judge may accept of his submission to the King's mercy. *Lamb. lib.* 4. c. 9. By this indirect confession, the defendant shall not be barred to plead *Not guilty* to an action, &c. for the same fact: the entry of it is, that the defendant *posuit se in gratiam regis*, &c. And of the direct confession, *quid cognovit indictmentum*, &c. And this last confession carries with it so strong a presumption of guilt, that being entered on record, on indictment of trespass, it estops the defendant to plead *Not guilty* to an action brought afterwards against him for the same matter: but such entry of a confession of an indictment of a capital crime, 'tis said, will not estop a defendant to plead *Not guilty* to an appeal, it being in case of life. And where a person upon his arraignment actually confesses himself guilty, or unadvisedly discloses the special manner of the fact, supposing that it doth not amount to felony, where it doth; the judges upon probable circumstances, that such confession may proceed from fear, weakness, or ignorance, may refuse such a confession, and suffer the party to plead. 2 *Hawk.* 333.

A confession may be received, and the plea of *Not guilty* be withdrawn, though recorded. *Kil.* 11. The confession of the defendant, whether taken upon an examination before justices of peace, in pursuance of the 1 & 2 *P. & M.* c. 13. or 2 & 3 *P. & M.* c. 10. upon a bailment, or commitment for felony; or taken by the Common law, upon an examination before a secretary of state, or other magistrate, for treason or other crimes, is allowed to be given in evidence against the party confessing; but not against others. Also two witnesses of a confession of high treason, upon an examination before a justice of peace, were sufficient to convict the person so confessing, within the meaning of 1 *Ed.* 6. cap. 12. and 5 & 6 *Ed.* 6. cap. 11. which required two witnesses in high treason; unless the offender should willingly confess, &c. But the 7 *W.* 3. cap. 3. requires two witnesses, except the party shall willingly without violence confess, &c. in open court. 2 *Hawk.* P. C. 429.

It has been held, that where-ever a man's confession is made use of against him, it must all be taken together, and not by parcels. *Ibid.* And no confession shall, be-
fore

fore final judgment deprive the defendant of the privilege of taking exceptions in arrest of judgment, to faults apparent in the record. *Ibid.* 333. A demurrer amounts to a *confession* of the indictment as laid, so far, that if the indictment be good, judgment and execution shall go against the prisoner. *Bro.* 86. *S. P. C.* 150. *H. P. C.* 246. And in criminal cases, not capital, if the defendant demur to an indictment, &c. whether in abatement, or otherwise, the court will not give judgment against him to answer over, but final judgment. *2 Hawk.* 334. Where a prisoner confesses the fact, the court has nothing more to do than to proceed to judgment against him. And, *confessus in judicio pro judicato habetur.* *11 Rep.* 30. *4 Inst.* 66.

Confessor, (Lat. *confessor, confessionarius*) Hath relation to private confession of sins, in order to absolution: and the priest, who received the auricular confession, had the title of confessor; though improperly, for he is rather the confessee, being the person to whom the confession is made. This receiving the confession of a penitent, was in old *English* to shrove or shrive; whence comes the word *beshrived*, or looking like a confessed or shrived person, on whom was imposed some uneasy penance. The most solemn time of confessing was the day before *Lent*, which from thence is still called *Shrove-Tuesday*. Cowel.

Confirmation, (*confirmatio*, from the verb *confirmare*, *quod est firmum facere*) Is a conveyance of an estate, or right *in esse*, from one man to another, whereby a voidable estate is made sure and unavoidable; or a particular estate is increased, or a possession made perfect. And 'tis a strengthening of an estate formerly made, which is voidable, though not presently void: as for example; a bishop granteth his chancellorship by patent, for term of the patentee's life; this is no void grant, but voidable by the bishop's death, except it be strengthened by the confirmation of the dean and chapter. Confirmation, *aut est perficiens, crescens, aut diminuens*: *Perficiens*, as if feoffee upon condition make a feoffment, and the feoffor confirm the estate of the second feoffee: *Crescens*, that doth always enlarge the estate of a tenant; as tenant for years, to hold for life, &c. *Diminuens*, as when the lord of whom the land is holden, confirms the estate of his tenant, to hold by a less rent. *9 Rep.* 142.

The lord may diminish the services of his tenant by confirmation; but not reserve new services, so long as the former estate in the tenancy continues: and therefore if he confirm to the tenant, to yield him a hawk, &c. yearly, it is void. *Litt. Sect.* 539. *1 Co. Inst.* 296. Leases for years may be confirmed for part of the term, or part of the land, &c. But it is otherwise of an estate of freehold, which being entire, cannot be confirmed for part of the estate. *5 Rep.* 81. There may be a confirmation implied by law, as well as express by deed; where the law by construction makes a confirmation of a grant made to another purpose: and a confirmation may enlarge an estate, from an estate held at will to term of years, or a greater estate; from an estate for years to an estate for life; from an estate for life, to an estate in tail, or in fee; and from an estate in tail to an estate in fee-simple. *1 Inst.* 305. *9 Rep.* 142. *Dyer* 263. But if the confirmation be made to lessee for life or years, of his term or estate, and not of the land, this doth not increase the estate, though if the lessor confirm the land, to have and to hold the land to the lessee and his heirs, this will enlarge the estate, and so of the rest. *Co. Litt.* 299. *Plowd.* 40.

In every good confirmation, there must be a precedent rightful or wrongful estate in him to whom made, or he must have the possession of the thing as a foundation for the confirmation to work upon; the confirmor must have such an estate and property in the land, that he may be thereby enabled to confirm the estate of the confirmee; the precedent estate must continue till the confirmation come, so that the estate to be increased comes into it; and it is required that both these estates be lawful. *Co. Litt.* 296. *1 Rep.* 146. *Dyer* 109. *5 Rep.* 15. If one have common of pasture in another's land, and he confirms the estate of the tenant of the land, nothing passes of the common, but it remains as it was before: so if a man have a rent out of the land, and he doth confirm the

estate which the tenant hath in the land, the rent remaineth. *Litt. Sect.* 537.

Tenant for life makes a lease for years to a man, and after leases the land to another person for years; and he in reversion confirms the last lease, and after that the first lease, this is not good: the second lessee hath an interest before by the confirmation of him in reversion. But in a like case, confirmation of the first lease, after the second was confirmed, was held good: for the lease takes no interest by the confirmation, but only to make it durable and effectual. *Moor.* c. 180. *1 Inst.* 296. *Plowd.* 10. If a disseisor confirm the land to the disseisor but for one hour, one week, a year, or for life, &c. it is a good confirmation of the estate for ever: and if he confirms the estate of the disseisor without any word of heirs, he hath a fee-simple; and if a disseisor make a gift in tail, and the disseisor doth confirm the estate of the donee, it shall enure to the whole estate: also if the disseisor enfeoffs *A.* and *B.* and the heirs of *B.* and the disseisor confirms the estate of *B.* for his life; this shall extend to his companion, and for the whole fee-simple. *Co. Litt.* 291, 297, 299. But where the estate is divided, it is otherwise; as if there be an estate for life, the remainder over, there the confirmation may be of either of the estates: and if the lessee of a disseisor of a lease for 20 years, make a lease for 10 years; the disseisor may confirm to one of them, and not to the other. *1 Cro.* 472. *5 Rep.* 81. If a disseisor or any other make a lease for years to begin at a day to come, a confirmation to the lessee before the lease begins will not be good; for there is no estate in him. *Co. Litt.* 296.

The tenant in tail of land hath a reversion in fee expectant; in this case, the confirmation of the estate-tail will not extend to the reversion. And if my disseisor make a lease for life, the remainder in fee, and I confirm the estate of the tenant for life; this shall not confirm the estate of him in remainder: but if I confirm the remainder estate, without any confirmation to tenant for life, it shall enure to him also. *Co. Litt.* 297, 298. If lands are given to two men, and the heirs of their two bodies begotten, and the donor confirms their estates in the lands, to have and to hold to them two and their heirs; this shall be construed a joint estate for their lives, and after they shall have several inheritances. *Co. Litt.* 299. Tenant in tail, or for life of land, lets it for years, if after he makes a confirmation of the land to the lessee for years, to hold to him and his heirs for ever, the lessee hath only an estate for the life of the tenant in tail, &c. and therein his lease for years is extinct. *Litt. Sect.* 606.

A freehold for life, and term for years, it is said, cannot stand together of the same land, in the same person. *1 Nels. Abr.* 480. If a feme lessee for years marries, and the lessor confirms the estate of husband and wife, to hold for their lives, by such a confirmation the term will be drowned; and the husband and wife are jointenants for their lives. *Co. Litt.* 300. But if the feme were lessee for life, then by the confirmation to husband and wife for their lives, the husband holdeth only in right of his wife for her life; but shall take a remainder for his life. *Ibid.* 299. Confirmation to lessee for life, and a stranger to hold for their lives, is void, for there is no privity: but 'tis otherwise, if for years. *2 Damv. Abr.* 141. If tenant for life grant a rent-charge, &c. to one and his heirs, he in reversion is to confirm it, otherwise 'tis good only for the life of tenant for life. *Litt.* 529. A tenant for life, and remainder-man in fee, join in a lease, this shall be taken to be the lease of tenant for life, during his life, and confirmation of him in remainder: though after the death of tenant for life, it is the lease of him in remainder, and confirmation of tenant for life. *6 Rep.* 15. *1 Nels. Abr.* 481.

If lessee for years, without impeachment for waste, accepts a confirmation of his estate for life; by this he hath lost the privilege annexed to his estate for years. *8 Rep.* 76. Acceptance of rent in some cases makes a confirmation of a lease: and if a man leases for life, reserving rent upon a condition of re-entry; if after the condition is broken, by non-payment of the rent, the lessor distrains for the said rent, this act shall be a confirmation

of the lease, so as he cannot enter: 2 *Danv.* 128, 129. What a person may defeat by his entry, he may make good by his confirmation. *Co. Litt.* 300. But none can confirm, unless he hath a right at the time of the grant; he that hath but a right in reversion cannot enlarge the estate of a lessee. 2 *Danv.* 140, 141. And where a person hath but *interesse termini*, he hath no estate in him, upon which a confirmation may enure. *Co. Litt.* 290.

As confirmation is to bind the right of him who makes it; but not alter the nature of the estate of him to whom made; it shall not discharge a condition. *Poph.* 51. If *A.* enfeoffs *B.* upon condition, and after *A.* confirms the estate of *B.* yet the condition remains: though if *B.* had enfeoffed *C.* so that the estate of *C.* had been only subject to the condition in another deed, and after *A.* had confirmed the estate of *C.* this would have extinguish'd the condition, which was annexed to the estate of *B.* 1 *Rep.* 147. A confirmation will take away a condition annexed by law: and by confirmation, a condition after broken in a deed of feoffment is extinguish'd. 1 *Co. Rep.* 146. Confirmations may make a defeasible estate good; but cannot work upon an estate that is void in law. *Co. Litt.* 295.

A confirmation of letters patent, which are void as they are against law, is a void confirmation. 1 *Lill. Abr.* 295. If there be lord and tenant, and the tenant having issue is attainted of felony, if the King pardons him, and the lord confirms his estate, and the tenant dies, his issue shall not inherit, but the lord shall have it against his own confirmation: for that could not enable him to take by descent, who by the attainder of his father was disabled. 9 *Rep.* 141. Grants and leases of bishops not warranted by the *Stat.* 32 *H.* 8. c. 28. must be confirmed by dean and chapter: and grants and leases of parsons, &c. by patron and ordinary. 1 *Inst.* 297, 300, 301. Bishops may grant leases of their church-lands for three lives, or twenty-one years, having the qualities required by 32 *H.* 8. c. 28. and concurrent leases for twenty-one years, with confirmation of dean and chapter. See 1 *El.* c. 4. & c. 19. If a prebend leases parcel of his prebendary, and the bishop, who is patron, confirms it; this shall bind the succeeding bishop, without confirmation of dean and chapter, because the patronage is parcel of the possessions of the bishoprick; but it shall bind the present bishop, &c. 2 *Danv.* 139. If a parson grants a rent, the confirmation of the patron and bishop, is sufficient without the dean and chapter, and shall be good against the successor bishop. *Ibid.* 140. The dean of *Wells* may pass his possessions, with the assent of the chapter, without any confirmation of the bishop. *Ibid.* 135. Leases of bishops are affirmed *ex assensu & consensu decani & totius capituli*. A confirmation is in nature of a release, and in some things is of greatest force: and in this deed, it is good to recite the estate of the tenant, as also of him that is to confirm it; and to mention the consideration: the words ratify and confirm, are commonly made use of; but words give, grant, demise, &c. by implication of law, may enure as a confirmation. 1 *Inst.* 295. *West. Symb.* 1. p. 457. As to confirmation of bishops, see *Black. Com.* 1 *V.* 378, 380.

Confiscate, From the Lat. *confiscare*, and that from *fiscus*, which signifies metonymically the Emperor's treasure: and as the *Romani* say, such goods as are forfeited to the Emperor's treasury for any offence are *bona confiscata*, so we say of those that are forfeited to our King's *Exchequer*. And the title to have these goods is given to the King by the law, when they are not claimed by some other: as if a man be indicted for stealing the goods of another person, when they are in truth his own proper goods, and when the goods are brought in court against him, and he is asked what he says to the said goods, if he disclaims them, he shall lose the goods, although that afterwards he be acquitted of the felony, and the King shall have them as confiscated; but 'tis otherwise if he do not disclaim them. It is the same where goods are found in the possession of a felon, if he disavows them, and afterwards is attainted for other goods, and not for them; for there the goods which he disavows are confiscated to the King; but had he been attainted for the same goods, they should have been said to be forfeited and

not confiscate. So if an appeal of robbery be brought, and the plaintiff leaves out some of his goods, he shall not be received to enlarge his appeal; and forasmuch as there is none to have the goods so left out, the King shall have them as confiscate, according to the rule, *Quod non capit christus, capit fiscus*. *Staud.* P. C. lib. 3. cap. 24. Goods confiscated are generally such as are arrested and seized for the King's use: but *confiscare* and *forisfacere* are said to be *synonyma*; and *bona confiscata* are *bona forisfacta*. 3 *Inst.* 227. See *Black. Com.* 1 *V.* 299. 4 *V.* 370.

Conformity, to the church of England. See *Stat.* 1 *Eliz.* c. 2. &c. and *Recusant*.

Confratrie, (*confraternitas*) A fraternity, brotherhood, or society; as the *confratrie de St. George*, or *les chevaliers de la bleu gartier*, the honourable society of the knights of the garter.

Confreres, (*confratres*) Brethren in a religious house; fellows of one and the same society. *Stat.* 32 *Hen.* 8. c. 24.

Confusion, property by—Where goods of two persons are so intermixed, that the several portions can no longer be distinguished, if the intermixture be by consent, 'tis supposed the proprietors have an interest in common, in proportion to their respective shares: but, if one willfully intermixes his money, corn, or hay, with that of another man, without his approbation or knowledge, or cast gold in like manner into another's melting pot or crucible, our law does not allow any remedy in such case; but gives the entire property, without any account, to him; whose original dominion (or property) is invaded, and endeavoured to be rendered uncertain, without his own consent. *Black. Com.* 2 *V.* 405.

Congeable, (from the Fr. *conge*, i. e. leave or permission) Signifies in our law as much as lawful, or lawfully done, or done with permission: as entry congeable, &c. *Lit. Sect.* 420.

Conge d'Accorder, (Fr.) Leave to accord or agree, mentioned in the statute of *finer*, 18 *Ed.* 1. in these words.—When the original writ is delivered in the presence of the parties before justices, a pleader shall say this, Sir justice *conge d'accorder*; and the justice shall say to him, What saith Sir R. and name one of the parties, &c.

Conge d'Esire, (Fr. i. e. leave to choose) Is the King's licence or permission sent to a dean and chapter to proceed to the election of a bishop, when any bishoprick becomes vacant. According to *Gwyn*, in his preface to his *Readings*, the King of England, as sovereign patron of all bishopricks, and other ecclesiastical benefices, had of ancient time free appointment of all church dignities, when ever they became void, investing them first *per baculum & annulum*, and afterwards by his letters patent; and in process of time he made the election over to others; under certain forms and conditions; as, that they should at every vacation, before they choose, demand of the King *conge d'esire*; that is leave to proceed to election, and then after the election, to crave his royal assent, &c. And he affirms that King *John* was the first that granted this; which was afterwards confirm'd by *Stat. West.* 1. 3 *Ed.* 1. cap. 1. And by *Articuli Cleri*, 25 *Ed.* 3. cap. 1. All the prelacies in England were conferred at the pleasure of the King, and the persons invested by the King's delivery of a staff and ring, till Archbishop *Anselm* denied this royal prerogative; and prevailed with Pope *Paschal* to abrogate this custom by a solemn canon: after which, the first bishop who came in by a regular election, was *Roger* bishop of *Salisbury*, anno 3 *H.* 1.

By statute, no man is to be presented to the see of *Rome* for the dignity of a bishop, &c. but election is to be by the King's *conge d'esire*, or licence, to elect the person named by the King; which the dean and chapter must do in twenty days, or they will incur a *premunire*: and if they fail to make election, the King is to nominate, &c. by his letters patent. 25 *H.* 8. c. 20. The 1 *Ed.* 6. c. 6. ousted the writ of *conge d'esire*, and empowered the King to collate to an archbishoprick or bishoprick, absolutely by letters patent. But this statute was repealed by 1 *M.* cap. 2. though the election by *conge d'esire*, as now made, seems to be little more than form. See 8 *El.* c. 1. and 39 *El.* c. 8. and *Black. Com.* 1 *V.* 379, 382. 4 *V.* 414.

Congius, An ancient measure, containing about a gallon and a pint.—*Et reddat quinque congios cere & unum Ydromelli, &c.* Charta Edmondi Regis, anno 946.

Coningeria, A coney-borough, or warren of conies.—*Item dicunt, quod idem dominus potest capere in duabus coningeriis quas habet infra, &c.* 100 cuniculos per annum, & valet quilibet cuniculus 2 d. Inquis. anno 47 H. 3.

Conjugal rights. A suit for restitution of conjugal rights is one of the species of matrimonial causes: and is brought when either the husband or wife is guilty of the injury of *subtraction*, or lives separate from the other without any sufficient reason; in which case the ecclesiastical jurisdiction will compel them to come together again, if either party be weak enough to desire it, contrary to the inclination of the other. *Black. Com.* 3 V. 94.

Conjuratio, Is an oath; and *conjuratus*, the same with *conjurator*, viz. one who is bound by the same oath. *Conjurare* is where several affirm a thing by oath. *Mon. Angl. Tom.* 1. p. 207.

Conjuratio, (*conjuratio*) Signifies a plot or compact made by persons combining by oath, to do any publick harm: but it is more especially used for the having personal conference with the devil, or some evil spirit, to know any secret, or effect any purpose. The difference between *conjuratio* and *witchcraft* is, that a person using the one endeavours by prayers and invocations to compel the devil to say or do what he commands him; the other deals rather by friendly and voluntary conference, or agreement with the devil or familiar, to have his desires served, in lieu of blood or other gift offered. And both differ from *enchantment* or *sorcery*; because they are personal conferences with the devil, and these are as were but medicines and ceremonial forms of words usually called *charms*, without apparition. *Cowel. Hawkins, in his Pleas of the Crown, lib.* 1. pag. 5. says that *conjurers* are those who by force of certain magick words, endeavour to raise the devil, and oblige him to execute their commands. *Witches* are such who by way of conference bargain with an evil spirit, to do what they desire of him: and *sorcerers* are those who by the use of certain superstitious words, or by the means of images, &c. are said to produce strange effects, above the ordinary course of nature. All which were anciently punished in the same manner as *hereticks*, by the writ *de heretico comburendo*, after a sentence in the ecclesiastical court: and they might be condemned to the pillory, &c. upon an indictment at Common law. 3 *Inst.* 44. *H. P. C.* 38. The Stat. 1 Jac. 1. c. 12. against *conjuratio* and *witchcraft* is repealed; and no prosecution shall be commenced on the same: but where persons pretend to exercise any kind of *witchcraft* or *conjuratio*, &c. Or undertake to tell fortunes, or from their skill in any crafty science to discover where goods stolen or lost may be found; upon conviction, shall be imprisoned a year, and stand in the pillory once in every quarter, in some market-town, and may be ordered to give security for their good behaviour, by Stat. 9 Geo. 2. c. 5. See 3 *Inst.* 45, 46. *H. P. C.* 6, 7. *Black. Com.* 4 V. 60, 429.

Conquest, Countries got by, what laws to have for government. See *King*, and *Black. Com.* 2 V. 48, 242.

Confanguineo, Is a writ mentioned in *Reg. Orig. de viro, proavo & confanguineo*, &c. f. 226.

Confanguineus frater, A brother by the father's side. *Black. Com.* 2 V. 232.

Confanguinity, (*confanguinitas*) Is a kindred by blood or birth: as *affinity* is a kindred by marriage: and it is considerable in the descent of lands, who shall take it as next of blood, &c. And also in administrations, which shall be granted to the next of kin. Vide *Black. Com.* 1 V. 434. 2 V. 202. and a very excellent table of confanguinity, *Black. Com.* 2 V. 203.

Conscience, courts of. These are courts for recovery of small debts, constituted by act of parliament, in London, and Westminster, &c. and other trading and populous districts. See *Black. Com.* 3 V. 81, &c.

Consecration, See *Bishops, Church*.

Consent. In all cases when any thing executory is created by deed, it may, by consent of all persons that were parties to the creation of it by their deed, be *defeased* and annulled, and therefore it was said, that

warranties, recognizances, rents, charges, annuities, covenants, leases for years, uses at Common law, &c. may, by a *Release* made with the mutual consent of all that were parties to the creation of them by deed, be annulled, discharged, and defeated. 1 *Rep.* 113. *Hill.* 28 *Elix.* in *Albany's Case*.

A consent *ex post facto* is not of any signification; for it cannot be had for things which cannot be otherwise; per *Vaughan Ch. J.* *Mod.* 312. *Pasch.* 22 *Car.* 2. in *Chanc.* in *case of Fry v. Porter*.

The consent of the heir makes good a void devise. *Chanc. Cases, Trin.* 23 *Car.* 2. *Lord Cornbury v. Middleton.* 1 *C. C.* 208. Consent of remainder-man for life, tho' but verbal, is binding, and decreed to confirm building leases accordingly. 2 *Chanc. Cases* 28. *Pasch.* 32 *Car.* 2. *Sidney v. The Earl of Leicester.* Consent to a trial of a title to land in another county than where the land lies will not help, it being an error, though such consent be of record; agreed *per cur.* 2 *Show.* 98. pl. 97. *Pasch.* 32 *Car.* 2. *B. R.* *Lord Clare v. Reach.*

A burges of a corporation consenting to be turned out from his burges's place, and the common council of the corporation removing him accordingly, does not amount to a resignation, and a peremptory *mandamus* was granted to restore him. *Holt's Rep.* 450. *Hill.* 8 *Ann.* *B. R.* *The Queen v. Mayor of Gloucester.*

Consequential losses or damages. It is a fundamental principle in law and reason, that he that does the first wrong shall answer for all consequential damages. 12 *Mod.* 639. *Per cur.* *Hill.* 13 *Will.* 3. in *case of Roswell v. Prior*; (but this admits of limitation.) Though a man does a lawful thing, yet if any damage do thereby befall another, he shall answer if he could have avoided it; and this holds in all civil cases. As if a man lops a tree, and the boughs fall upon another *ipso invito*, yet an action lies. So if a man shoots at butts, and hurts another unawares. So if I have land thro' which a river runs to your mill, and I lop the fallows growing on the river side which accidentally stop the water so as your mill is hindered. So if I am building my own house, and a piece of timber falls on my neighbour's house, and breaks part of it. So if a man assaults me, and I lift up my staff to defend myself, and strike another in lifting it up; but 'tis otherwise in criminal cases, for there *actus non facit reum nisi mens sit rea.* *Per Raymond J.* *Arg. Raym.* 422, 423. *Hill.* 33 & 34 *Car.* 2. *B. R.*

If I have a pond, I cannot so let it out that it shall drown my neighbour's land. *Arg. Het.* 119. cites 6 *Ed.* 4. 6. If a stranger drives my cattle upon your land, whereby they are distressed by you, I shall recover against the stranger for this distress by you; per *Baron Altham, Arg. Lane* 67. cites 9 *Ed.* 4. 4. A smith pricks the horse of a servant being on his journey to pay money for his master to save the penalty of a bond, both the master and servant may have their several actions on the case for the several wrongs they have thereby sustained; per *Coke Ch. J.* 2 *Buls.* 344. *Hill* 12 *Jac.* in *Case of Everard v. Hopkins.*

Where one is party to a fraud, all which follows by reason of that fraud, shall be said as done by him. *Arg. Cro. J.* 469. *Hill.* 15 *Jac.* *B. R.* in *Case of Southern v. How.* Action lies for threatening workmen to maim and prosecute them, whereby the master loses the selling of his goods, the men not daring to go on with their work. *Cro. J.* 567. pl. 4. *Pasch.* 28 *Jac.* *B. R.* *Garret v. Taylor.* A. breaks the fence of B. by which cattle get into C.'s ground, C. shall have case against A. but not trespass. *Per Roll. Str.* 131. *Mich.* 24 *Car.* *B. R.* in the *Case of Sir A. A. Cowper v. St. John.* If A. beats my horse by which he runs on B. A. is the trespasser, and not I. 2 *Salk.* 638. *Per cur.* *Pasch.* 7 *W.* 3. *B. R.* in *Case of Gibbon v. Pepper.*

He that makes a fire in his field must see that it does no harm, and answer the damage if it does; but if a sudden storm riseth which he cannot stop, it is a matter of evidence, and he must shew it. 1 *Salk.* 13. pl. 4. *Mich.* 9 *Will.* 3. *B. R.* *Turbervil v. Stamp.* If a man keeps a beast of a savage nature, as a lion, &c. it is at his peril to keep him up, and he is answerable for all the consequences of his getting loose; per *Raymond Ch. J.* *Gilb.*

187. *Mich. 4 Geo. 2. B. R. in the Case of The King v. Huggins.* See *Black. Com.* 3 V. 153.

Conservator, (*Lat.*) A protector, preserver, or maintainer; or a standing arbitrator, chosen and appointed as a guarantee to compose and adjust differences that should arise between two parties, &c. *Paroch. Antiq. p.* 513.

Conservator of the Peace, (*conservator vel custos pacis*) Is he that hath an especial charge to see the King's peace kept: and of these conservators *Lambard* saith, That before the reign of *Ed. 3.* who first created justices of the peace, there were divers persons that by the Common law had interest in keeping the peace; some whereof had that charge by tenure, as holding lands of the King by this service, &c. And others as incident to their offices which they bore, and so included in the same, that they were nevertheless called by the name of their office only: also some had it simply, as of itself, and were thereof named *custodes pacis*, wardens or conservators of the peace. The chamberlain of *Chester* is a conservator of the peace in that county, by virtue of his office. 4 *Inst.* 212. Sheriffs of counties at Common law are conservators of the peace; and constables, by the Common law were conservators, but some say they were only subordinate to the conservators of the peace, as they are now to the justice.

The King's majesty is, by his Office and dignity royal, the principal conservator of the peace within all his dominions; and may give authority to any other to see the peace kept, and to punish such as break it: hence it is usually called the King's peace. The Lord Chancellor or Keeper, the Lord Treasurer, the Lord High Steward of England, the Lord Marechal, and Lord High Constable of England, (when any such officers are in being) and all the justices of the court of *King's Bench*, (by virtue of their offices), and the Master of the Rolls, (by prescription), are general conservators of the peace throughout the whole kingdom, and may commit all breakers of it, or bind them in recognizances to keep it: the other judges are only so in their own courts. The Coroner is also a conservator of the peace within his own county; as is also the Sheriff, and both of them may take a recognizance or security for the peace. Constables, tything-men, and the like, are also conservators of the peace within their own jurisdictions; and may apprehend all breakers of the peace, and commit them till they find sureties for their keeping it. *Black. Com.* 1 V. 350.

Conservator of the Truce and Safe Conducts, (*conservator induciarum & saluorum regis conductuum*) Was an officer appointed by the King's letters patent, whose charge was to inquire of all offences done against the King's truce and safe conducts upon the main sea, out of the liberties of the cinque ports, as the admirals customably were wont to do, and such other things as are declared 3 *Hen. 5. c. 6.* Two men learned in the law were joined to conservators of the truce as associates; and masters of ships sworn not to attempt any thing against the truce, &c. And letters of request and of marque were to be granted when truce was broken at sea, to make restitution. *Stat. 4 H. 5. c. 7.* See *Black. Com.* 4 V. 69.

There was anciently a conservator of the privileges of the *Hospitallers and Templars.* *West. 2. c. 43.* And the corporation of the great *livel of the fens* consists of a governor, six bailiffs, twenty conservators, and commonalty. *Stat. 15 Car. 2. c. 17.*

Consideratio Curie, Is often mentioned in law pleadings, and where matters are determined by the court. *Ideo consideratum est per curiam, i. e.* Therefore it is considered and adjudged by the court; for *consideratio curie* is the judgment of the court. In the entry of a judgment for debt, it concludes thus: *Ideo consideratum est per cur. quod præd. A. recuperet versus præfat. B. debitum suum, necnon, &c. pro dampnis suis, &c. quam pro mis. & custag', &c. et præd. B. in mia', &c.*

Consideration, (*consideratio*) Is the material cause, or *quid pro quo*, of any contract, without which it will not be effectual or binding. This consideration is either expressed; as when a man bargains to give so much, for a thing bought; or to sell his land for 100*l.* or grants it in exchange for other lands; or where I promise that if

one will marry my daughter, or build me a house, &c. I will give him a certain sum of money; or one agrees for 20*s.* to do a thing. Or it is *implied*; when the law itself enforces a consideration; as where a person comes to an inn, and there staying eats and drinks, and takes lodging for himself and horse, the law presumes he intends to pay for both, though there be no express contract for it; and therefore if he discharge not the house, the host may stay his horse: and so if a tailor makes a garment for another, and there is no express agreement what he shall have for it; he may keep the clothes till he is paid, or sue the party for the same. 5 *Rep.* 19. *Plowd.* 308. *Dyer* 30, 337. Also there is a consideration of nature and blood; and valuable consideration in deeds and conveyances: but if a man be indebted to divers others, and in consideration of natural affection, gives all his goods to his son, or other relation, this shall be construed a fraudulent gift, within the *Stat. 13 Eliz. c. 5.* because that act intends a valuable consideration. *Terms de Ley.*

Considerations of natural love, affection, marriage, &c. are good to raise uses to a man's family: if the uses are limited to a stranger, then it must be for a valuable consideration, not for love, affection, &c. 1 *Inst.* 271. 1 *Rep.* 176. A sale can never be without a valuable consideration: though the law establishes free gifts without the same. *Noy's Max.* 87. *Hob.* 230. A consideration ought to be matter of profit and benefit to him to whom it is done; by reason of the charge or trouble of him who doth it. *Cro. Car.* 8. If a person hath disbursed several sums for another, without his request, and afterwards such other says, that in consideration he hath paid the said sums for him, he promises to pay them: this is no consideration, because it was executed before. But it will be otherwise, if the sums were paid at the request of the other. *Moor* 220. *Cro. Eliz.* 282. A mere voluntary curtesy will not be a good consideration of a promise: but the value and proportion of the consideration is not material, to maintain an action; for a shilling or a penny, is as much binding as 100*l.* Though in these cases, the jury will give damages proportionably to the loss. *Hob.* 4. 10 *Rep.* 76.

A consideration that is void in part, is void in the whole: and if two considerations be alledged, and one of them is found false by the jury, the action fails. *Hob.* 126. *Cro. Eliz.* 848. But if there be a double consideration, for the grounding of a promise, for the breach whereof an action is brought; though one of the considerations be not good, yet if the other be good, and the promise broken, the action will lie upon that breach: for one consideration is enough to support the promise. 1 *Lill.* 297. A consideration must be lawful, to ground an *assumpsit*. 2 *Lev.* 161. Where considerations are valuable, and consist of two or more parts, there the performance of every part ought to be shewn. *Cro. El.* 579. If a deed express a consideration of money, on a purchase, it is said this will be no proof on a trial that the money was actually paid; but it is to be made out by proof of witnesses. *Style's Rep.* 169. In case a deed of feoffment be made of lands & or a fine and recovery be passed, and no consideration is expressed in the deed, &c. for the doing thereof, it shall be intended by the law, that it was made in trust, for the use of the feoffor or conusor; for it shall be presumed he would not part with his land without a consideration, and yet the deed shall be construed to operate something, and that which is most reasonable. 1 *Lill. Abr.* 299.

Consign, Is a word used by merchants, where goods are assigned or delivered over to a factor, &c. *Lex Mercat.*

Consilium, (*dies consilii*) Was a time allowed for one accused to make his defence, and answer the charge of the accuser. *In aliis querat accusatus consilium, & habeat ab amicis & paribus suis, quod nullo jure debet defendi, &c.* *H. 1. c. 46.* It is now used for a speedy day appointed to argue a demurrer; which the court grants after the demurrer joined on reading the record of the cause, &c. See *Black. Com.* 4 V. 349.

Consimili casu, writ of entry in: A writ of entry. This and the writ in *casu proviso* lay not at Common law, but are given by statute, *Gloc. 6 Ed. 1. c. 7.* and *Westm. 2.*

13 *Ed. 1. c. 24.* for the reverfioner after alienation; but during the life of the tenant in dower, or other tenant for life, see *F. N. B. 205, 206. Black. Com. 3 V. 183. n.*

Confistor, A magiftrate fo called: *teftibus Rogero de Gant, Willielmo confiftore Ceftria, &c. Blount.*

Confiftory, (*confiftorium*) Signifies as much as *prætorium*, or tribunal: it is commonly used for a council-house of ecclefiaftical perfons, or place of juftice in the fpiritual court; a feflion or afsembly of prelates. And every archbifhop and bifhop of every diocefe hath a confiftory court, held before his chancellor or commiffary in his cathedral church, or other convenient place of his diocefe, for ecclefiaftical caufes. 4 *Inf. 338.* The bifhop's chancellor is the judge of this court, fupposed to be skilled in the Civil and Canon law: and in places of the diocefe, far remote from the bifhop's confiftory, the bifhop appoints a commiffary (*commiffarius foraneus*) to judge in all caufes within a certain diftrict, and a register to enter his decrees, &c. 2 *Roll. Abr. 286. Seld. Hift. of Tithes, 413, 414.*

Consolidation, (*confolidatio*) Is used for the uniting of two benefices into one. *Stat. 37 H. 8. c. 21.* Which union is to be by the affent of the ordinary, patron and incumbent, &c. and to be of fmall churches lying near together. *Vide Church.* This word is taken from the Civil law, where it fignifies properly an uniting of the poffeffion, occupancy or profit of lands, &c. with the property. See *Extinguifhment.*

Conspiracy, (*conspiratio*) Is used for an agreement of two or more perfons falfly to indict one, or to procure him to be indicted of felony; who, after acquittal, fhall have writ of *conspiracy*. See 33 *Edw. 1. stat. 2. 4 Ed. 3. c. 11. 3 Hen. 7. c. 13. 1 Hen. 5. c. 3. 18 Hen. 6. c. 22.* And writ of conspiracy lies for him that is indicted of a trefpafs, and acquitted, though it was not felony: alfo upon an indictment for a riot. 2 *Mod. 306. 5 Mod. 405.* Where a man is falfly indicted of any crime, which may prejudice his fame or reputation; and though it doth not import flander, if it endangers his liberty; or if the indictment be injurious to his property, &c. writ of conspiracy lieth. 3 *Salk. 97.* But though a conspiracy to charge falfly be indictable, yet the party ought to fhew himfelf to be innocent; and the writ of conspiracy lies not without an acquittal. *Mod. Caf. 137, 185, 186.* Not only writ of conspiracy, which is a civil action at the fuit of the party; but alfo action of the cafe in the nature of a writ of conspiracy, doth lie for a falfe and malicious accusation of any crime, whether capital or not capital, even of high treason; and though the bill of indictment is found *ignoramus*, or it does not go fo far as an indictment. And the fame damages may be recovered in fuch action, as in a writ of conspiracy, where the party is lawfully acquitted by verdict. 1 *Roll. Abr. 111, 112. 9 Rep. 56. See Gilb. Ca. 185. 10 Mod. 148, 214. Salk. 15.* And an action on the cafe is preferable, as being more in ufe, and the proceedings eafier, and not attended with fuch niceties as conspiracy.

If one falfly and maliciously procure another to be arrefted, and brought before a juftice of peace to be examined concerning a felony, &c. on purpofe to vex and difgrace him, and put him to charges and trouble, although he is not indicted for the fame, yet he may have an action of the cafe; in which he need not aver that he was lawfully acquitted, as he ought to do in a writ of conspiracy: but he muft aver that the accusation was *falfe & malitiofe*, which words are neceffary in the declaration; and it muft appear that there was no ground for it. And as action on the cafe may be profecuted againft one perfon, where the writ of conspiracy or indictment doth not lie but againft two, this action is moft commonly brought. 1 *Danv. Abr. 208, 213. 2 Inf. 562, 638.*

Conspirators may be indicted at the fuit of the King; and at the Common law, one may prefer an indictment againft confpirators, who only confpire together, and nothing is executed: though the conspiracy ought to be declared by fome act, or promife to ftand by one another, &c. But a bare conspiracy will not maintain a writ of conspiracy, at the fuit of the party, becaufe he is not damaged by it; though it is a ground for an indictment. 9 *Rep. 56. 2 Roll. Abr. 77.* If the defendants can fhew any foundation or probable caufe of fufpicion,

they fhall be difcharged: and if a man hath good caufe of fufpicion that a perfon is guilty of felony, and caufes him to be indicted, in profecution of juftice, action of conspiracy will not lie: but 'tis otherwife if the profecutor impofes the crime of felony, where no felony was committed. 1 *Roll. Abr. 115. and Rep. 438.*

An action lies not againft a juftice of peace, who fends out his warrant upon a falfe accusation; but it lies if he makes it out without any accusation. 1 *Leon. 187.* Conspiracies ought to be out of court; for if a profecution be ordered in a courfe of juftice, and witneffes appear againft a party, &c. there fhall be no punifhment: and if perfons acted only as jurors in a criminal matter; or judges in open court, there is no ground for profecution. *S. P. C. 173. 12 Rep. 24.* If all the defendants but one are acquitted on indictment for conspiracy, that one muft be acquitted alfo; becaufe one perfon alone cannot be indicted for this crime: and husband and wife, being but one perfon, may not be indicted for a conspiracy. 2 *Roll. Abr. 708.* The acquittal of one perfon is the acquittal of another upon indictment of conspiracy. 3 *Mod. 220.* Though where one is found guilty, according to the opinion of the Lord Chief Juftice Hale; if the other doth not come in upon procefs, or if he dies pending the fuit, judgment fhall be had againft the other. 1 *Vent. 234.* Writ of conspiracy was brought againft two perfons, and one found Not guilty; the other fhall not have judgment: but in action on the cafe, it had been good. *Cro. Eliz. 701.* If the parties are found guilty of the conspiracy, upon an indictment of felony, at the King's fuit; the judgment is, that they fhall lofe their *frank law* (which difables them to be put upon any jury, to be fworn as witneffes, or to appear in perfon in any of the King's courts) and that their lands, goods and chattels be feifed as forfeited, and their bodies committed to prifon; which is called a *villainous judgment*. 2 *Inf. 143, 222. Crompt. Juft. 156.*

The matter of the conspiracy ought to touch a man's life, where this judgment is impofed. 1 *Hawk. P. C. 193.* For confpiring to charge a perfon with poifoning another, &c. one of the parties was fined 1000*l.* and fome others had judgment of the pillory, and to be burnt in the cheek with the letters *F.* and *G.* to fignify falfe confpirators. *Moor 816.* Fine and imprifonment is the ufual punifhment at this day on indictment for *conspiracy*: and on writ of conspiracy, &c. the party fhall be fined, and render damages. There is a conspiracy to maintain fuits and quarrels; and of victuallers, to fell their victuals at certain prices; of labourers and artificers, &c. punifhable by ftatutes 33 *Ed. 1. ft. 2. 2 & 3 Ed. 6. c. 15.*

Conspirators, (*conspiratores*) By 33 *E. 1. ft. 2.* are defined to be thofe that do bind themfelves by oath, covenant, or other alliance, that every of them fhall aid the other falfly and maliciously to indict perfons; or falfly to move or maintain pleas, &c. And fuch as retain men in the country, with liveries, or fees, to maintain their malicious enterprifes, which extends as well to the takers as the givers; and ftewards and bailiffs of great lords, who by their office or power, undertake to bear and maintain quarrels, pleas or debates, that concern other parties than fuch as relate to the eftate of their lords or themfelves. 2 *Inf. 384, 562.* And againft confpirators, falfe informers and imbracers of inqueft, the King hath provided a writ in the *Chancery*; and the juftices of either bench and juftices of affize, fhall, on every plaint, award inqueft thereupon. *Stat. 28 E. 1. c. 10.* From the defcription of confpirators, in feveral of our old law books, conspiracy is taken generally, and confounded with *maintenance* and *champerty*. Befides thefe, there are confpirators in *treafon*; by plotting againft the government, &c. See *Treafon.*

Conspiration, Is a writ that lies againft confpirators. *Reg. Orig. 134. F. N. B. 114.*

Constable, (*constabularius*) is a Saxon word, compounded of *coning*, i. e. king, and *ftaple*, which fignify the ftay or hold of the king. This word is diversly ufed in our law; firft for the lord *constable* of England, whose power was anciently fo extenfive, that fome time fince, that office hath been thought too great for any fubject; unlefs at the King's coronation to compleat the grandeur of that ceremony,

mony; and for the ancient trials by combat, &c. In the reign of Henry the Fourth, the Lord North was made Lord constable for life: and this office being formerly of inheritance, by tenure of certain manors, the line of the *Bobuns*, Earls of Hereford and Essex, enjoyed it in right of the manors of *Harlefield*, *Newman*, and *Witenburst*, and afterwards it came to the *Staffords*, and Dukes of *Buckingham*, as heirs general of them; but Edward Duke of *Buckingham* being attainted of high treason, anno 13 H. 8. this office became forfeited to the crown, and since that time it was never granted but *pro hac vice*, to be exercised at a coronation, &c.

The power and jurisdiction of the lord high constable, was the same with the earl marshal, and he sat as judge, having precedence of the earl marshal in the marshal's court: but the constable of England is by some of our books also called marshal; who takes cognizance of all matters of war and arms, and had originally several courts under him; but has now only the *Marshalsea*; and his office is in force both in time of peace and war, so that though the lord constable had the precedence, yet the court held before them was called the marshal's court. See *Lex Constitutionis*, p. 175, 176. Of this officer or magistrate, *Gwyn* saith to this effect: The court of the constable and marshal determineth contracts touching deeds of arms out of the realm upon land, and handleth things concerning war within the realm, as combats; blazons of armory, &c. which cannot be determined by the Common law; and in these matters is commonly guided by the Civil law.

By statute, the constable of England hath cognizance of things concerning arms and wars, which cannot be discussed by the Common law: and when a plea is commenced before the constable and marshal, which may be tried at the Common law, the party grieved shall have a privy seal to cause the constable and marshal to cease, until it be decided by the King's counsel whether it may be tried there or at the Common law. 13 R. 2. c. 2. The constable and marshal shall not have cognizance of pleas or suits that ought to be tried at Common law. Stat. 8 R. 2. c. 5. Appeals of things done out of the realm, are to be tried by the constable and marshal of England. 1 H. 4. c. 14. And if a man be wounded on the high sea, and die of the same wound in a foreign country, though this be done in the seas belonging to England, yet it cannot be inquired of by the Common law, because it is not within any of the counties of the realm: neither can the admiral hear and determine this murder; for though the stroke was within his jurisdiction, the death was *infra corpus comitatus*, whereof he cannot inquire: nor is it within the Stat. 27 H. 8. c. 4. because the murder was not committed on the sea. But by Stat. 13 R. 2. §. 1. c. 5. The constable and marshal may hear and determine the same. And vide the 2 Geo. 2. c. 21. Justices of gaol delivery and oyer and terminer may try the offender.

The office of constable of England is said to consist in the care of the common peace of the land, in deeds of arms and matters of war: and there is a constable of the Tower; a constable of *Dover castle* and of divers other castles; but these are more properly called *castellanes*. Out of the high magistracy of the constable of England (says *Lambard*) were drawn those inferior constables, which we call constables of hundreds and franchises; and the statute of *Winchester*, 13 E. 1. appoints for conservation of the peace, and view of armour, two constables in every hundred and franchise, who in Latin are called *constabularii capitales*, high constables; because continuance of time, and increase of people and offences, have under these made others necessary in every town, called petty constables, in Latin *sub-constabularii*, which are of like nature, but of inferior authority to the other. And there are other officers, whose duty is much the same with constables, as headboroughs, tithingmen, &c. of which the petty constable seems to be the principal officer, but in his absence, or where there is no petty constable, their duty is the same. It has been held, that both high constables and petty constables were officers at Common law, before the statute of *Winton*, 13 Ed. 1. cap. 6. And that by the Common law they might arrest persons for a breach of the peace, and carry them before a justice to find sureties for their good behaviour, &c. But

my Lord Coke says, That they were created by 13 Ed. 1. §. 2. c. 6. and their duty was thereby limited, though subsequent statutes have enlarged their power; but being created by act of parliament, they have no more authority than the act that created them, or some other acts have given them, and cannot prescribe as officers at the Common law may. 4 Inst. 267. 2 Davv. Abr. 148.

Under this head is to be considered,

I. Their election.

II. Their power and duty.

I. Of their election.

Anciently high and petty constables were appointed by the sheriff in his tourn, and sworn there as well as in the leet: and by the Common law, they ought to be chosen in the tourn or leet. *Dalt. cap. 21*. Of common right, a constable is to be chosen by the jury in the leet; and if he be present, and refuse to be sworn, the steward may fine him; if he be absent, he shall be sworn before justices of peace; and if such constable refuses to be sworn, the jury must present his refusal at the next court, and then he shall be amerced, for the steward of the leet may not fine him if he is absent. 1 Salk. 175. 5 Mod. 130. A high constable may be chosen at a court-leet by the steward, on presentment of the jury, when custom warrants it; but where such courts are not kept, or there is a neglect in choosing him, the justices at their quarter-sessions may chuse and swear a high constable; and this is the usual way observed at this time. *Mich. 21 Car. 1. Mod. Just. 133*. And he may be sworn out of sessions, by warrant from thence; and be elected out of the sessions, by the greater number of justices in the division. *Ibid.* If one that is elected to the office of constable refuse to take the oath to serve in that office, a writ of *mandamus* may be had to compel him to do it. 1 Lill. Abr. 303. The justices of peace may appoint a constable in such place where there was never any before. 1 Mod. 13.

If constables, headboroughs, &c. die or go out of the parish, two justices of peace are to swear new ones till the lord of the manor hold a court-leet, or till the next quarter-sessions, who shall approve of them or appoint others: and if any of them continue above a year, the justices of peace may discharge them, and put in others till the lord of the manor holds a court. By Stat. 13 & 14 Car. 2. cap. 12. a constable's oath runs thus: "You shall well and truly serve our sovereign lord the King, and the lord of this leet (if sworn in a court leet) in the office of constable, in and for the hundred of, &c. or parish of, &c. for the year ensuing, or until you shall be thereof discharged according to due course of law: you shall well and truly do and execute all things belonging to the said office, according to the best of your knowledge. So help you God." Formerly the oath of a constable was very long, he being sworn to several articles which included his particular duty. High constables are generally chosen and sworn by the justices of peace in their sessions: and petty constables, who are their assistants, in each town, parish or vill, the choice of them properly belongs to the court-leet; but at this day they are usually elected by the parishioners, and sworn by a justice of peace, who on just cause may remove them. 4 Inst. 267. These constables are appointed yearly; and are to be men of honesty, knowledge and ability, not infants, lunatics, &c. And if they refuse to serve, they may be bound over to the sessions, and indicted, and fined and imprisoned. 8 Rep. 41. 5 Mod. 96. But physicians, apothecaries, surgeons, &c. are excused by statute from bearing the office of constable, or other parish office. See 5 H. 6. c. 6. 5 H. 8. c. 6. 3 H. 8. c. 43. & 6 W. & M. c. 4. Also attorneys and officers of the courts at Westminster, barristers at law, aldermen of London, &c. are privileged from serving the office of constable; and if a gentleman of quality be chosen constable, where there are sufficient persons beside, and no special custom concerning it; 'tis said such persons may be relieved in B. R. 2 Harw. P. C. 63, 64.

A constable may make a deputy; but the constable is answerable, and his deputy must be sworn. *Sid. 355*. Dissenters chosen to the office of constables, &c. scrupling

to take the oaths, may execute the office by deputy, who shall comply with the law in this behalf. 1 *W. & M. c.* 18. *Constables* may appoint a deputy, or person to execute a warrant when by reason of sickness, &c. they cannot do it themselves. A woman made *constable*, by virtue of a custom, that the inhabitants of a town shall serve by turns, on account of their estates or houses, may procure another to serve for her, and the custom is good. 2 *Hawk. P. C.* 63.

II. Of their power and duty.

The high *constable* has the direction of the petty *constables*, headboroughs, and tithing-men, within his hundred: his duty is to keep the peace, and apprehend felons, rioters, &c. to make hue and cry after felons; and take care that the watch be duly kept in his hundred; and that the statutes for punishing rogues and vagrants be put in execution. He ought to prevent unlawful games, tippling, and drunkenness; bloodshed, affrays, &c. He is to execute precepts and warrants, directed to him by justices of the peace, and make returns to the sessions of the peace to all the articles contained in his oath, or that concern his office: and shall also cause the petty *constables* to make their returns. He is to return all victuallers and alehouse-keepers that are unlicensed; and all such persons as entertain inmates, who are likely to be a charge to the parish. He must likewise present the faults of petty *constables*, headboroughs, &c. who neglect to apprehend rogues, vagrants and idle persons, whores, night-walkers, mothers of bastard children like to be chargeable to the parish, &c. And also all defects of highways and bridges, and the names of those who ought to repair them: scavengers who neglect their duty; and all common nuisances in streets and highways; bakers who sell bread under weight; brewers selling beer to unlicensed alehouses; forestallers, regrators, ingrossers, &c. And at every quarter-sessions they are to pay to the treasurer of the county all such money as hath been levied and received by them, of the churchwardens, &c. for the relief of prisons and hospitals. *Dalt. Ca.* 28. *Lamb.* 125. By statute, high *constables* now collect a general county rate, made by the justices in sessions, and assessed upon every parish, &c. which the churchwardens and overseers, out of the money raised for the poor, shall pay to them within thirty days, or may be levied by distress; and then they pay the same to the treasurers appointed, as the publick stock for repairing bridges, gaols, houses of correction, &c. *Stat. 12 Geo. 2. cap.* 29.

The authority of petty *constables*, in their several towns, tithings, and boroughs, is generally the same as the high *constable* hath in his hundred: they are to keep the peace in the absence of the high *constable*; and assist him in making presentments at the assizes and quarter-sessions, of every thing that is amiss: they may command affrayers to keep the peace, and depart, &c. And may break into a house to see the peace kept; make fresh pursuit into another county, &c. Also they may command all persons to assist them, to prevent a breach of the peace; justify beating another if assaulted; and if they happen to be killed, doing their duty, it will be taken to be premeditated murder. They may, without warrant from a justice of peace, take into custody any persons whom they see committing a felony or breach of the peace; but if it be out of their sight, as where a person is seized by another, &c. they may not do it without a warrant from a justice. A *constable* cannot detain a man at his pleasure; but only stay him to bring him before a justice to be examined, &c. And this detaining of an offender by the *constable* may be for a day, without warrant, and be justified. *Dalt. c.* 1, 8. *Lamb.* 125. *H. P. C.* 135. 1 *Leon.* 307. *Moor* 408.

If one abuses a *constable* in the execution of his office, he cannot commit him to prison there to remain till punished for the offence; but must carry him before a justice, who may commit him, &c. 2 *Darv. Abr.* 149. But 'tis said, by the original power in the *constable*, he may for breach of the peace, and some other misdemeanors, less than felony, imprison a man: and if an offence be committed, for which a *constable* may arrest, he may convey the offender to the sheriff or his gaoler; though the safest way in all cases is to bring them to a

justice, to be bailed or committed, as the case shall require. 2 *Hale's Hist. P. C.* 88, 90. The *constable's* office being ministerial and relative to the justices of peace, coroners, sheriffs, &c. their precepts ought to be executed by him, or on default he may be indicted and fined. *Ibid.*

Petty *constables* are to execute all warrants of justices, and not dispute it where the justice hath jurisdiction, and the warrant is lawful: and being sworn officers, they need not shew their warrants when they come to arrest any one. 10 *Rep.* 76. If any justice sends his warrant to a *constable*, &c. to bring a person before him to answer all such matters as shall be objected against him by another, and doth not set forth the special matter in the warrant, the warrant is unlawful, because it doth not give the offender time and opportunity to find sureties; and the *constable*, if he executes it, is liable to an action of false imprisonment. 2 *Inst.* 521. So if a justice of peace sends a warrant to a *constable* to take up one for slander, &c. the justices having no jurisdiction, in such cases, the *constable* ought not to execute it.

The *constable* is the proper officer to a justice of peace, and bound to execute his lawful warrants; and therefore where a statute authorises a justice to convict a person of any crime, and to levy the penalty, &c. without saying to whom such warrant shall be directed, the *constable* is the officer to execute the warrant, and must obey it. 5 *Mod.* 130. 1 *Salk.* 381. If a warrant be directed to a *constable* by name, commanding him to execute it, tho' he is not compellable to go out of his own parish, yet he may if he will, and execute it in any place in the county, and shall be justified by the warrant for so doing; but if the warrant be directed to all *constables*, &c. generally, no *constable* can execute the same out of his precinct. 1 *Salk.* 175. 3 *Salk.* 99. It is at the election of a *constable* to carry an offender before any other justice than him who issued the warrant; if the warrant be not special, to bring the offender before the justice that granted it. 5 *Rep.* 59. By the *Stat. 24 G. 2. c.* 55. A *constable* may execute a warrant in any other county, &c. if indorsed by a justice of such other county, &c. and carry the offender before a justice of such other county, &c. and if the offender shall give bail, the *constable* is to deliver the recognizance, examination or confession of the offender, and all other proceedings relating thereto to the clerk of assizes, or clerk of the peace of the county, &c. where the offence was committed, under the penalty of 10 *l.* But if the offence shall not be bailable, or the offender shall not give bail, the *constable* shall carry the offender before a justice of the county where the offence was committed. A *constable* is not obliged to return a justice's warrant to the justice, but may keep the same for his own justification, in case he should be questioned for his acting; but he must give the justice an account of what he hath done upon it. 2 *Ld. Raym.* 1196. And by *Hale* Chief Justice, where the *constable* returns want of distress upon a warrant to distrain; the justice ought to make a record of it, and then give judgment for corporal punishment. *Ibid.*

Constables, headboroughs, &c. out of purse in their offices, they and the inhabitants may tax all persons chargeable, by the 43 *El. c.* 2. as every occupier of land, &c. which rate being confirmed by two justices, the *constables* may levy it by distress and sale of goods. *Stat. 13 & 14 Car. 2.* A *constable*, by warrant from a justice of peace, may sell the goods of an offender apprehended, to discharge the expence of carrying him to prison: if the offender hath no goods, then the town where he was apprehended must be at the expence, and the *constable* with three or four of the principal inhabitants, may impose a tax on every inhabitant, &c. which being allowed by a justice, the *constable* by his warrant may levy it: and if the inhabitants refuse to make a tax, two justices may by warrant compel them to do it. 3 *Jac. 1. c.* 10. See 27 *Geo. 2. c.* 3.

The particular duty of *constables* is further as follows: they are not only to command affrayers to depart, but call others to their assistance to suppress affrays; and they may put affrayers in the stocks, till they can convey them before a justice, &c. *Dalt.* 33. *Lamb.* 135, 141. *Constables* are to levy the penalties on persons keeping alehouses without

without licence, selling less than measure, &c. or forfeit 40*s*. &c. 1 *Jac.* 1. c. 9. They are to stop such persons as go or ride unlawfully armed, in terror of the people; take away their arms, and carry them before a justice of peace. *Dalt.* 338. To take up artificers going out of the kingdom, by justice's warrant. 5 *Geo.* 1. c. 27. Constables shall levy penalties on bakers, making or selling bread wanting weight, deficient in goodness, &c. and selling large bread at a higher price than set by mayors, &c. 1 *Geo.* 1. c. 26. 3 *Geo.* 2. c. 29. The constable of a parish is to apprehend mothers of bastard children. *Dalt.* A constable may, with others called to his assistance, enter *hawdy-houses*, and arrest persons with lewd women, for breach of the peace. *Mich.* 13 *Hen.* 7. The constable, and two most able inhabitants in the parish, are to make an assessment for the repairs of bridges, to be allowed by justices. 22 *H.* 8. c. 5. The forfeiture for mixing corrupt butter with good, and opening casks, &c. is leviable by constables. 13 & 14 *Car.* 2. c. 26. 4 & 5 *W. & M.* c. 7. By a justice's warrant, constables shall levy penalties for using cloth buttons, &c. upon clothes. 4 *Geo.* 1. c. 7. 7 *Geo.* 1. c. 12. Constables shall provide carriages on the marching of soldiers, by virtue of a justice of peace's warrant, being allowed by the officers 1*s*. a mile for a waggon, &c. See the Table to the Statutes, tit. Soldiers. They may seize cattle brought from Ireland, and cause them to be killed, and the flesh distributed among the poor. 18 *Car.* 2. c. 2. High constables may hear and determine complaints of clothiers, and their work-people; search for and seize ropes, engines, &c. for the stretching of cloth: spinsters, &c. imbeziling wool from clothiers, shall make satisfaction, or be whipped by constables, &c. and constables, by warrant of two justices, may enter and search houses of clothiers for ends and refuse of yarn, which may not be worked up again, under penalties leviable by the constables; and they also levy by distress the forfeiture for taking away cloth from the tenters, or yarn, wool, &c. left abroad to dry in the night. 4 *E.* 4. c. 1. 39 *Eliz.* c. 20. 7 *Jac.* 1. c. 16. 13 *Geo.* 1. c. 23. 14 *Geo.* 2. c. 35, &c. Where coals are sold by sacks not lawful measure, &c. constables shall levy the forfeiture inflicted. 3 *Geo.* 2. c. 26. Also the penalty for selling coals, at higher price than appointed, by justice's warrant, &c. 11 *Geo.* 2. c. 15.

Constables, headboroughs, &c. are to levy the fines imposed on those who shall be present at unlawful conventicles; and by virtue of a justice's warrant may enter such places, break open doors upon their being refused entrance, and take into custody persons unlawfully assembled, &c. 22 *Car.* 2. c. 1. To levy penalties on curriers who do not curry leather sufficiently, or that neglect the same within certain times. 1 *Jac.* 1. c. 22. 12 *Geo.* 2. c. 25. They are to be assisting to all persons appointed by the King for the collecting and management of the customs; and to persons having a warrant from the lord treasurer, &c. to make a search for goods that have not paid the customs. 12 *Car.* 2. c. 19. 13 & 14 *Car.* 2. c. 11. 9 *Geo.* 2. c. 35, &c. The penalties on deer-stealers are to be levied by constables, by virtue of a justice's warrant: and the penalties are 20*l*. for hunting deer in any place inclosed; and 30*l*. for each deer killed, &c. And they may enter any suspected place, and carry away venison, skins of deer, tails, &c. 13 *Car.* 2. *stat.* 1. c. 10. 3 & 4 *W. & M.* c. 10. By a justice's warrant to levy the penalty on distillers, &c. selling brandy about the streets, on any bulks or sheds, &c. 6 *Geo.* 2. c. 17. And constables, and other officers of the peace, are to carry unlawful retailers of spirituous liquors before a justice, &c. and refusing to be aiding in executing the acts against distillers, shall forfeit 20*l*. 11 *Geo.* 2. c. 26. Constables are to assist landlords in taking distresses for rent in arrear; and in the appraisement of the goods, sale, &c. if the same are not replevied in five days. 2 *W. & M.* c. 5. They shall give assistance to searchers of dyed cloths, in entering and examining whether the cloths or stuffs are deceitfully dyed, &c. 13 *Geo.* 1. c. 24. They are to levy the penalty of 5*s*. on drunkards, for the use of the poor; or shall forfeit 10*s*. 4 *Jac.* 1. c. 1. Constables are to attend officers of the excise, and enter with them into

brewhouses, private houses, &c. for discovery of frauds: and by warrant from justices, they are to levy the penalties on offenders against any law of excise, by distress, &c. See *Excise Laws*.

A constable, permitting a felon to escape, before arrested, is guilty of a misdemeanor, for which he may be indicted and fined; and if the felon be actually in custody, and then he voluntarily permits him to escape, 'tis felony in the constable; but if the escape be involuntary, it is only fineable: he may put a felon in the stocks, and lock him in; or put irons upon him, or pinion him, to prevent an escape. A constable may discharge any person arrested on suspicion of felony, where no felony is actually committed. *Dalt.* 272. *Cro. Eliz.* 202, 752. Constables ex officio are to apprehend felons, may call other persons to their assistance therein, and apprehend any upon suspicion, and carry them before a justice, &c. A constable, upon complaint or common fame of a felony, may search suspicious houses, both for the felon and goods stolen; and may justify breaking open a house to take a felon; and if the felon fly, he is to make an inventory of his goods, send hue and cry after him, &c. *Dalt.* 289, 340. 27 *El.* c. 13. Constables must levy the penalty of 10*s*. for fishing in a river, without the owner's consent; and search for unlawful nets, engines, &c. Also levy forfeitures for using engines to destroy the breed of fish; and selling sea fish under certain lengths. 22 & 23 *Car.* 2. c. 25. 3 *Jac.* 1. c. 12. 1 *Geo.* 1. c. 18, &c. They are to give assistance to justices of the peace, in removing forcible entries, &c. or shall be committed and fined. 5 *Rep.* 2. To prevent forefallers of markets, ingrossers, &c. 5 & 6 *Ed.* 6. c. 14. Constables are to carry higlers, chapmen, victuallers, &c. before a justice, who have in their custody any hare, or other game; and by a justice's warrant are to search suspected houses for game, &c. They may carry persons, not qualified to kill game, before a justice, for keeping greyhounds, setting-dogs, &c. See the Game Acts. They are to make a search monthly for gaming-houses, where unlawful games shall be kept; and they may commit the masters of such houses, and the gamesters found therein; though it is best to carry them before a justice of peace: Constables neglecting their duties in this particular, forfeit 40*s*. They likewise levy penalties on persons for playing at unlawful games, ace of hearts, faro, &c. adjudged to be a kind of lotteries. 33 *Hen.* 8. c. 9. 12 *Geo.* 2. c. 28. If gaolers refuse to receive a felon, the constable may either secure the prisoner in his house, or carry him back to the town where apprehended: and to defray the charge of carrying him to gaol, &c. Constables have power to sell the offender's goods, &c. or the same may be levied by a tax. 10 *H.* 4. *Dalt.* 340. 3 *Jac.* 1. c. 12. In London and Westminster the constables, &c. shall make a search for gunpowder, in the houses of persons keeping a greater quantity than allowed by statute, and remove the same. 5 *Geo.* 1. c. 26. 11 *Geo.* 1. c. 23. And they are to levy the penalty for putting gunpowder on board ships, &c. above Blackwall in the river Thames. 5 *Geo.* 1. c. 26. If any constable refuse to assist in putting the laws in execution against hawkers and pedlars, that travel without licences, and are thereby liable to penalties, he shall forfeit 40*s*. 8 & 9 *W.* 3. c. 25. The penalties of selling trusses of hay, &c. under due weight in the Hay-market, are leviable by constables. 2 *W. & M.* *stat.* 2. c. 8. Constables are to whip hedge-breakers, &c. for not making satisfaction ordered by a justice: they may apprehend persons suspected of hedge-breaking, or of having in their possession any underwood, poles, gates, fules, &c. and carry them before a justice, &c. 43 *El.* c. 7. 15 *Car.* 2. c. 2. To be aiding and assisting in putting the acts in execution relating to the repairing of the highways; under the penalty of 40*s*. And they are to return lists of persons qualified for the office of surveyor, to the justices in their sessions on the 3d of January yearly, under the penalty of 20*s*. See the Highway Acts, and 22 *Car.* 2. c. 12, &c. To levy the penalty for privately conveying away hops, to avoid paying duty; and forfeiture for adulterating hops, &c. 9 *Ann.* c. 12. 1 *Geo.* 1. c. 12. 7 *Geo.* 2. c. 19. Constables are to be assisting in driving off commons, forests, &c.

Ec. horses and cattle; on pain of 40*s.* 32 *H. 8. c. 13.* They are to make *hue and cry* after offenders where a felony or robbery is committed: to call upon the parishioners to assist in the pursuit; and if the criminal be not found in the precinct of the first *constable*, he is to give notice to the next *constable*, and he to the next, who are to do as the first, and continue the pursuit from town to town, and county to county, *Ec.* 13 *Ed. 1. St. 2. c. 6.* 27 *Eliz. c. 13.* Pursuers of the hue and cry may search suspected houses, and arrest all suspicious persons. And where offenders are not taken, constables shall levy the tax to satisfy an execution, on recovery against a hundred, and pay the same to the sheriffs, *Ec.* and neglecting to make *hue and cry*, shall forfeit 5*l.* 8 *Geo. 2. c. 16.* A *constable*, on complaint, is to cause an *innkeeper* to be indicted and punished, for refusing to lodge a traveller, or to provide him victuals, *Ec.* who offers to pay for the same. See 1 *Jac. 1. c. 9.* and *Wood's Inst.* 460, 461. *Constables* must give in to the justices at *Michaelmas* sessions yearly, a list of persons qualified to serve on juries; and neglecting to return lists, incurs a forfeiture of 5*l.* 7 & 8 *W. 3. c. 32. s. 4.* And see 8 & 9 *W. 3. c. 10.* 3 & 4 *Ann. c. 18. s. 5.* & 3 *Geo. 2. c. 25.* These lists of jurors are to be made from the rates of each parish; and *constables*, *Ec.* wilfully omitting persons qualified, or interting wrong persons, shall forfeit 20*s.* 3 *Geo. 2. c. 25.* In the time of harvest a *constable* may set labourers, artificers, and ordinary tradesmen on work, and put those in the stocks who refuse. 5 *El. c. 4.* To levy the forfeiture for breaking down *lamps*, set up in the streets of *London*, by virtue of a justice's warrant. 9 *Geo. 2. c. 20.* But see 17 *Geo. 2. c. 29.* *Constables* are to give their assistance in collecting the *land tax*; and take distresses for it, *Ec.* when refused payment. See the *Land tax Acts.* By warrant from justices *constables* are to levy the penalties and forfeitures for selling insufficient leather, *Ec.* 1 *Jac. 1. c. 22.* They have power to search for bad malt, and if they find any bad mingled with good, they may, with the advice of a justice, cause the same to be sold at reasonable rates. 2 & 3 *Ed. 6. c. 10.* And there are divers penalties for making bad malt, and frauds concerning the duty, leviable by *constables.* 9 & 10 *W. 3. c. 22.* 1 *Geo. 1. stat. 2. c. 2.* But see 3 *Geo. 2. c. 7. s. 13.* & 6 *Geo. 1. c. 21.* & 2 *Geo. 2. c. 1.* *Constables* are to search and examine if any persons use other measures than such as are *Winchester* measure, and agreeable to the standard. 22 *Car. 2. c. 8.* By warrant from the lieutenant *constables* are to commit persons to gaol, refusing to provide arms for horse and foot soldiers, for the militia, if no distress can be taken. See the *Militia Acts.* *Night walkers* of ill fame may be taken up by *constables*, and carried before a justice of peace, who may bind them to the good behaviour, *Ec.* See 5 *Ed. 3. c. 14.* Robbers of orchards, *Ec.* shall be whipped, by order of a justice, by the *constable* of the place. See the 43 *El. c. 7.* 9 *Geo. 1. c. 22.* *Constables* may complain to, and carry before a justice of peace, persons suspected to be *papists.* See the *Statutes against Papists.* In the city of *London* they are to be assisting to the college of physicians, *Ec.* in putting their laws in execution. 14 & 15 *H. 8. c. 5.* They may command and oblige persons infected with the plague to keep within their houses, *Ec.* And are to levy money, appointed by justices, for relief of poor persons infected. 1 *Jac. 1. cap. 31.* *Constables* shall present *popish recusants*, within their liberties, *Ec.* and certify to the sessions, such *popish* recusants convict, who within twenty days after the arrival at the place of their birth, give in their names to the parson of the parish; and neglecting, to forfeit 20*s.* 35 *Eliz. c. 2.* 7 *Jac. 1. c. 6.* To levy money due for postage of letters, under 5*l.* by justice's warrant. 9 *Ann. c. 10.* They are at the quarter-sessions to take presentment of all things against the peace, and belonging to their offices, *Ec.* The *constables* shall levy a tax on parishes, for relieving poor parishioners. 43 *Eliz. c. 2.* *Constables* are to suppress riots, and they may *ex officio* commit offenders, *Ec.* 17 *R. 2. c. 8.* And by 1 *Geo. 1. c. 5.* Rioting, where twelve rioters continue together an hour after proclamation, is made felony. They are to make a

tax and assessment by warrant from two justices on the inhabitants of their parishes where a robbery on the highway is committed in the hundred. 27 *Eliz. c. 13.* See 8 *Geo. 2. c. 16.* *Constables* are to whip wandering rogues, *Ec.* by stripping them from the middle upwards, and causing them to be lashed till their bodies be bloody. 1 *Jac. 1. c. 7.* The penalties for selling salt under weight, *Ec.* and not entering *salepits*, are to be levied by *constables.* 9 & 10 *W. 3. c. 6.* & 44. 7 *Geo. 2. c. 6.* *Scavengers* rates in *London* shall be made by *constables* and church-wardens, *Ec.* and the *constables* to levy forfeitures for defaults of scavengers in not carrying away dirt, *Ec.* 2 *W. & M. St. 2. c. 8.* 1 *Geo. 1. St. 2. c. 52.* *Constables* and two householders of towns, parishes, *Ec.* by an old law were to give testimonials to servants: and servants not procuring such were not to be retained, but punished as vagrants. 5 *Eliz. c. 10.* By virtue of a justice's warrant *constables* shall search after shoes, leather, *Ec.* imbezilled or pawned by journeymen shoemakers in *London*, who shall make satisfaction, *Ec.* 9 *Geo. 1. c. 27.* *Constables* are to quarter soldiers in inns, alehouses, victualling houses, *Ec.* Refusing to billet soldiers, they are to be fined not exceeding 40*s.* nor less than 10*s.* and receiving any reward to excuse quarterage; or if victuallers, *Ec.* refuse soldiers quartered, they shall forfeit not above 5*l.* nor under 40*s.* If they quarter the wives, children, or servants of officers or soldiers, in any house, without consent of the owner, they forfeit 20*s.* The *constables*, *Ec.* shall give in lists to the justices of the houses and persons obliged to quarter soldiers, with their names and signs, and the number of officers and soldiers billeted on them. 1 *Geo. 1. c. 47.* 7 *Geo. 1. c. 6.* See the statutes concerning soldiers. Persons suspected of desertion, may be taken up by *constables*, and carried before a justice: and 20*s.* reward is given for taking up a deserter. They are to levy the penalty of 5*s.* on persons resorting to wrestling, dancing, or other sports on a Sunday; and on persons doing any worldly labour on that day, *Ec.* Also 6*s.* 8*d.* on butchers killing meat; and 20*s.* upon carriers, drovers, *Ec.* travelling on Sunday, 1 *Car. 1. c. 1.* 29 *Car. 2. c. 7.* On receiving a *superseas* from another justice, *Ec.* *Constables* shall discharge a person taken up by warrant. *D. It.* To levy the penalty for profane swearing; which is 1*s.* for a servant labourer, *Ec.* and 2*s.* for others; and as the crime is repeated, the penalty is to be doubled. 6 & 7 *W. 3. c. 11.* 19 *Geo. 2. c. 21.* *Constables* shall levy the penalty of 5*l.* on tailors giving greater wages than allowed; likewise the wages of journeymen by distress, by a justice's warrant. 7 *Geo. 1. St. 1. c. 13.* By warrant from two justices, *constables*, *Ec.* are to levy small tithes, refused payment, by distress and sale. See 7 & 8 *W. 3. c. 6.* and the statutes concerning tithes. *Constables*, on information, are to destroy tobacco planted contrary to the Stat. 22 & 23 *Car. 2. c. 26.* or be liable to a forfeiture of 5*s.* for every rod not destroyed: and upon warrant to make search, and present offences of planting tobacco, *Ec.* See 12 *Car. 2. c. 34.* 15 *Car. 2. c. 7. s. 18.* 22 & 23 *Car. 2. c. 26.* 5 *Geo. 1. c. 11. s. 19.* and the statutes concerning tobacco. To execute warrants of commissioners for turnpikes; and levy the penalty for passing through them without paying the toll, *Ec.* See 1 *Geo. 1. St. 2. c. 19.* 5 *Geo. 2. c. 33.* *Constables*, *Ec.* are to apprehend vagrants, and carry them before a justice; and to convey them by the justice's pass and certificate, to their place of birth or settlement, *Ec.* being paid the allowances mentioned in the certificates: they are to pay 10*s.* to any person apprehending a vagrant by order of justices, which is to be repaid by the high constable, *Ec.* and refusing to pay it shall forfeit 20*s.* Vagrants lodging in houses or barns are also to be apprehended by *constables*, *Ec.* And if they refuse or neglect to do their duty, they shall forfeit not above 5*l.* nor less than 40*s.* See 13 & 14 *Car. 2. c. 18.* 11 & 12 *W. 3. c. 18.* 12 *Ann. St. 2. c. 23.* 13 *Geo. 2. c. 24.* 17 *Geo. 2. c. 25.* 13 *Geo. 1. c. 23.* *Constables* of towns, shall see that night watches be kept, from sun-setting to sun-rising, who must be able persons, inhabitants of the place, and watch by turns; and not doing it, may put them in the stocks, *Ec.* 13 *Ed. 1. St. 2.*

And constables in the large parishes of *Westminster* are twice or oftener in every night to go their rounds, and see that the watch do their duty, and use endeavours to prevent fires, murders, robberies, &c. and apprehend malefactors; and persons suspected. See 2 *Geo. 2. c. 11. 8 Geo. 2. c. 15. 9 Geo. 2. c. 8. c. 13. c. 17. c. 19. 23 Geo. 2. c. 35. 25 Geo. 2. c. 23. 26 Geo. 2. c. 97. 29 Geo. 2. c. 53.* They are to execute all warrants of justices, being lawful, and not out of the justices jurisdiction. See the statutes relating to *justices of the peace*. Constables being head officers of places, shall have in their custody sealed weights, &c. under penalties: persons buying or selling by false weights or measures, forfeit 5*s.* leviable by constables. 8 *H. 6. c. 5. 16 Car. 1. c. 19.* And constables are to call together assistance to save ships from wreck; and no persons shall enter any such ships, without leave from the commander, constable, &c. 12 *Ann. cap. 18.*

By the *Stat. 26 Geo. 2. c. 31.* Constables, by the order of the high constable, are to give notice to the several inn-keepers and alhouse-keepers, within their respective constablewicks, of the day and place appointed by the justices for granting licences.

If a constable doth not his duty, he may be indicted and fined by the justices of peace; on the other hand, he is protected by law, in the execution of his duty.

By 7 *Jac. 1. cap. 5.* If any action is brought against a constable, for any thing done by virtue of his office, he, and also all others who in his aid, or by his command, shall do any thing concerning his office, may plead the general issue, and give the special matter in evidence, and if he recovers he shall have double costs. And see 21 *Jac. 1. c. 5.*

By the *Stat. 24 Geo. 2. c. 44.* No action shall be brought against any constable, or other officer, or any person acting by his order, and in his aid, for any thing done in obedience to any warrant of a justice of peace, until demand hath been made, or left at the usual place of his abode, by the party intending to bring such action, or his attorney or agent, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected by the space of six days after such demand; and in case after such demand and compliance therewith, by shewing the said warrant to, and permitting a copy to be taken thereof by the party demanding the same, any action shall be brought against such constable or other officer, or such person acting in his aid, for any such cause as aforesaid, without making the justice who signed or sealed the said warrant, a defendant; then on producing and proving such warrant at the trial, the jury shall give a verdict for the defendant, notwithstanding any defect of jurisdiction in such justice; and if such action, be brought jointly against such justice, and also against such constable or other officer, or other person acting in his aid, then on proof of such warrant, the jury shall find for such constable, or other officer, and other person so acting, notwithstanding such defect of jurisdiction as aforesaid; and if the verdict shall be given against the justice, the plaintiff shall recover his costs against him, to be taxed in such manner, as to include such costs as such plaintiff shall be liable to pay to such defendant or defendants, for whom such verdict shall be found as aforesaid. No action shall be brought against any constable, or other officer, or other person acting as aforesaid, unless commenced within six calendar months after the act committed.

Stat. 27 Geo. 2. cap. 20. sect. 2. The constable executing a justice's warrant for levying a penalty, or other sum of money directed by any act of parliament; by distress, may deduct his own reasonable charges of taking, keeping, and selling the goods distrained; returning the overplus on demand, after such penalty or sum of money, and charges deducted. See *Commitment, County-rates, Justices of peace.*

Penalty on constables taking money to excuse from quartering soldiers, 4 *Geo. 3. c. 3. sect. 26 & 66.*—High constable to obey the orders of the court to be held in pursuance of 31 *Geo. 2. c. 17. sect. 12.*—One to be constables who are sixty-three or upwards. 31 *Geo. 2. c. 17. sect. 13.*

Constables of *London*, (which city is divided into twenty-six wards, and every ward into the like number of precincts; in each whereof is a constable), are nominated by the inhabitants of each precinct on *St. Thomas's day*, and confirmed, or otherwise, at the court of wardmote; and after they are confirmed, they are sworn in their offices at a court of aldermen, on the next *Monday* after twelfth day. The substance of their oath is, to keep the King's peace to the utmost of their power; to arrest attorneys, rioters, and such as make contests to the breach of the peace, and carry them to the house of correction or comptor of one of the sheriffs; and in case of resistance, to make outcry on them, and pursue them from street to street; and from ward to ward; till they are arrested; to search for common nuisances, in their respective wards, being required by scavengers, &c. and upon request to assist the beadle and raker in collecting their salaries and quarterage; to present to the Lord Mayor and ministers of the city, defaults relating to the ordinances of the city; to certify once a month into the mayor's court, the names and surnames of all freemen deceased; and also of the children of such freemen, being orphans: and by the articles of the wardmote inquest, constables are to certify the names, surnames, place of dwelling, possession and trade of every person, who shall newly come to inhabit in their precincts, and to keep a roll thereof; in order to which, they are to make inquiry at least once a month into what persons are come to lodge and sojourn there; and if they find by their own confessions, or the record of the aldermens books, that such new comers are ejected from any other ward for bad living, or any misdemeanor, and refuse to find sureties for their good behaviour, warning is to be given to them and their landlords, that they depart; and on refusal, they may be imprisoned, and the landlords fined a year's rent agreed for by such new comers. *Calth. Rep. 129, 138.*

Constables of *London*, in each ward, are to attend the watch by turns, and go the rounds; and with the beables every night are to warn such persons as are to serve upon the watch in their several precincts; and if they refuse to appear, the constable may hire others in their stead, and they shall pay him according to the custom of the city: but the common council appoint the watchmen. Watchmen are to apprehend night walkers, vagabonds, persons going armed, &c. and may arrest strangers in the night, and carry them before the constable to be examined, and finding cause of suspicion secure them till the morning; and whether they are horsemen or footmen, or drivers of carriages, or persons that carry burdens, the watch may stay them till the morning, unless they can render a good account of themselves, their company, and carriage, &c. and constables, &c. are to be aiding and assisting to the watch; and the watchmen are to obey their orders, in conveying offenders to the comptor, which is the common prison for offenders for the breach of the peace, till they are examined, and punished by the Lord Mayor, &c. But constables ought to be careful whom they send to the comptor, for fear of action for false imprisonment; prosecution for damages, &c.

If any will not obey the arrest of the watch, they may make hue and cry after them; and for such arrest of a stranger, (especially one suspected), none is liable to punishment. *Dalt. 240.* The court of common council are to meet the first of *October* yearly, and order a proper number of watchmen, beables and nightly constables for the city of *London* and liberties, and determine sums to be levied to bear the charge thereof upon each ward; and for raising money, the aldermen and common-councilmen of wards, shall make a rate and assessment upon the inhabitants, leviable by distress; and shall appoint their watchmen, set down in writing their stands and number of rounds, and make orders for regulating the watch, &c. Constables to keep watch and ward, from the 10th of *Sept.* to the 10th of *March*, from nine in the evening, till seven the next morning, and from 10th of *March* to 10th of *September*, from ten in the evening till five next morning. The constables shall use their best endeavours, for preventing fires, robberies and disorders, and arrest malefactors; and go twice or oftener about their wards, in every night; and the watchmen are to apprehend all

suspected persons, &c. and deliver them to the constable of the night, who shall carry them before a justice of peace; constables misbehaving themselves, to forfeit 20s. and the Lord Mayor, or two justices for the city, may hear and determine offences, and levy penalties by distress and sale of goods, &c. *Stat. 10 Geo. 2. c. 22.*

Constables are to certify to the Lord Mayor, and common council of the city, the names of all such persons as shall interrupt them in the discharge of their offices: and a constable of London has power to execute warrants, &c. throughout the whole city, upon occasion. Such as are chosen into the office are obliged to place the King's arms, and the arms of the city over their doors; and if they reside in alleys, at the end of such alleys, towards the streets, to signify that a constable lives there, and that they may be the more easily found when wanted. See *Comp. Parish Officer, 6 Edit. p. 7, 8, &c.*

Constat, (Lat.) Is the name of a certificate, which the clerk of the pipe, and auditors of the Exchequer, make at the request of any person who intends to plead or move in that court, for the discharge of any thing: and the effect of it, is the certifying what does *constare* upon record, touching the matter in question. 3 & 4 Ed. 6. c. 4. and 13 Eliz. c. 6. A *constat* is held to be superior to an ordinary certificate, because it contains nothing but what is evident on record. And the exemplification under the great seal, of the enrolment of any letters patent, is called a *constat*. Co. Litt. 225.

Construative Treason. The Stat. 25 Ed. 3. c. 2. was made to define treason, and prevent the subject from being condemned for *construive treason*. See *Black. Com. 4 V. 75, 76, 85, &c.*

Conuetudinarius, A ritual or book, containing the rites and forms of divine offices, or the customs of abbeys and monasteries: 'tis mentioned in *Brompton*.

Conuetudinibus & Seruiciis, Is a writ of right close, which lies against the tenant that desorceth his lord of the rent or service due to him. *Reg. Orig. 159. F. N. B. 151.* When the writ is brought by the party in the right only, he shall count of the seisin of his ancestor, and the writ be in the *debet*; but when he counts of his own seisin, then the writ is in the *debet & solet, &c.* And if the party say in the writ *ut in redditibus & arreragiis*, these words prove that the demandant himself was seised of the services; and then if he count in such writ of seisin of his ancestors, and not of his own seisin, the writ shall abate: so that if he will bring a writ of customs and services of the seisin of his ancestors, he ought to leave these words *ut in redditibus, &c.* out of the writ. Where a person brings a writ of customs and services against any tenant, and by count demands homage, the writ ought to make special mention thereof; as *ut in homagio, &c.* or the writ shall abate. *New Nat. Brev. 338.* If this writ be brought against tenant for life, where the remainder is over in fee, there the tenant may pray in aid of him in the remainder, &c.

Consul, (Lat.) In our law books signifies an earl. *Bract. lib. 1. c. 8.* tells us, that as *comes* is derived from *comitatu*, so *consul* is derived from *consulendo*; and in the laws of Edward the Confessor, mention is made of *vicecomes* and *viceconsules*. Blount. Consuls among the Romans, were chief officers, of which two were yearly chosen, to govern the city of Rome: but this government of Rome has long since been abrogated. Our Consuls abroad take care of the affairs and interests of merchants, in foreign kingdoms where they are appointed by the King; as at *Lisbon, &c.*

Consulta Ecclesia, A church full, or provided for, according to *Council*.

Consultation, (consultatio) Is a writ whereby a cause being removed by prohibition from the ecclesiastical court, to the King's court, is returned thither again; for if the judges of the King's court, upon comparing the libel with the suggestion of the party, find the suggestion false, or not proved, and therefore the cause to be wrongfully called from the ecclesiastical court, then upon this *consultation* or deliberation they decree it to be returned; whereupon the writ in this case obtained is called a *consultation*. *Reg. Orig. 44, &c.* Statute of writ of consultations, 24 Ed. 1. This writ is in nature of a *procedendo*; but pro-

perly a *consultation* ought not to be granted, but in case where a man cannot recover at the Common law, in the King's courts. *New Nat. Br. 119.* Causes of which the ecclesiastical or spiritual courts have jurisdiction, are of administrations, admissions of clerks, adultery, appeals in ecclesiastical causes, apostacy, general bastardy, blasphemy, solicitation of chastity, dilapidations and church repairs, celebration of divine service, divorces, fornication, heresy, incest, institution of clerks, marriage rites, oblations, obventions, ordinations, commutation of penance, pensions, procurations, schism, simony, tithes, probate of wills, &c. and where a suit is in the ecclesiastical court, for any of these causes, or the like, and not mixed with any temporal thing; if a suggestion is made for a prohibition, a *consultation* shall be awarded. 5 Rep. 9. To move for a prohibition in another court, after motion in the Chancery, &c. on the same libel which is granted, is merely vexatious, for which a *consultation* shall be had. *Cro. Eliz. 277.* Where a *consultation* is granted upon the right of the thing in question, there a new prohibition shall never be granted on the same libel; but where granted upon any default of the prohibition, in form, &c. there a prohibition may be granted upon the same libel again. 1 Nels. Abr. 485. A *consultation* must be pursuant to the libel, &c. Vide *Prohibition*. See *Black. Com. 3 V. 114.*

Contempt, (contemptus) Is a disobedience to the rules and orders of a court, which hath power to punish such offence: and one may be imprisoned for a contempt done in court; but not for a contempt out of court, or a private abuse. *Cro. Eliz. 689.* Attachment also lies against one for contempt to the court, to bring in the offender to answer on interrogatories, &c. and if he cannot acquit himself, he shall be fined. 1 Lill. 305. If a sheriff, being required to return a writ directed to him, doth not return the writ, it is a contempt: and this word is used for a kind of misdemeanor, by doing what one is forbidden; or not doing what he is commanded. 12 Rep. 36. And as this is sometimes a greater, and sometimes a lesser offence; so it is punished with greater or less punishment, by fine, and sometimes imprisonment. *Dyer 128, 177. 1 Bulst. 85.* See *Attachment*. See *Black. Com. 4 V. 280.*

An attachment of contempt may issue against a bishop, or other peer: but for not returning a *sermone de bonis ecclesiasticis*, it is proper to move against the chancellor, commillary, or official. *Rex v. Bishop of St. Asaph, Wils. par. 1. p. 332.*

One committed for a contempt of the House of Commons cannot be bailed by the court of King's Bench, the Honourable Alexander Murray's case, *ib. p. 299, 300.*

It is a contempt to institute a suit fictitiously, though the demand is real, either to hurt any person, or to get the opinion of the court. *Coxe and Phillips. Rep. Temp. Hardw. per Annaly, 237, 239.*

Contentement, (contentementum) Is said to signify a man's countenance or credit, which he hath together with, and by reason of, his freehold: in which sense, it is used in the statute of 1 Ed. 3. and other statutes: and *Spelman* in his *Glossary* says, *Contentementum est assimatio & conditionis forma, qua quis in rebus subsistit.* But contentment is more properly that, which is necessary for the support and maintenance of men, agreeable to their several qualities, or states of life: and seems to be freehold land, which lieth to a man's tenement, or dwelling-house, that is in his own occupation. For by *Magna Charta, cap. 14.* it is enacted, that a freeman shall not be amerced, but *secundum magnitudinem delicti, salvo sibi contentemento suo*; & mercator *eodem modo, salva merchandisa*; & villanus *salvo wainagio*; that is, as *Glanvil* tells us, he should be amerced, *secundum quantitatem feodorum suorum & secundum facultates, ne nimis gravari inde videantur vel suum contentementum amittere.* Lib. 9. c. 8.

Contingent Legacy. If a contingent legacy be left to any one; is, when he attains, or if he attains the age of twenty-one, and he dies before that time; it is a *lapsed legacy*. *D. 59. 1 Eq. Caf. Abr. 255.* But a legacy to one, to be paid when he attains the age of twenty-one years, is a *vested legacy*, an interest which commences in *presenti*, although it be *solvendum in futuro*: and if the legatee

legatee dies before that age, his representatives shall receive it out of the testator's personal estate, at the same time it would have become payable, in case the legatee had lived. *Black. Com. 2 V. 513.*

Contingent Remainder, Contingent or *executory* remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect, either to a dubious and uncertain person, or upon a dubious and uncertain event; so that the particular estate may chance to be determined, and the remainder never take effect. *3 Rep. 20. Black. Com. 2 V. 169. And see 10 Rep. 85.*

Contingent Use, Is a use limited in a conveyance of land, which may, or may not happen to vest, according to the contingency expressed in the limitation of such use: a use in contingency is such which by possibility may happen in possession, reversion or remainder. *1 Rep. 121.* A remainder contingent is said to be an estate vested; but on such remainder in executory devises, the estate descends till the contingency happens, and nothing is vested till then. *1 Vent. 189.*

Continual Claim, Is a claim made from time to time, within every year and day, to land, or other thing, which in some respect we cannot attain without danger: as if a person be disseised of land, into which, though he hath a right of entry, he dare not enter for fear of beating, &c. it behoves him to hold on his right of entry at his best opportunity, by approaching as near it as he can, once a year, as long as he lives, and to save the right of entry to his heir. *Lit. lib. 3. c. 7.* Continual claim is where it is made, and repeated yearly, so as to be within a year and a day before the death of him that hath the lands; and if after he dies seised, so that his heir is in by descent, yet he that makes the claim may enter, &c. but if no claim be made, then the entry of the person disseised, &c. is taken away. *32 H. 8. cap. 33.* Though by the statute the disseisor is to have peaceable possession for five years, without entry or continual claim, for a descent on his death, to take away the entry of the disseisee, or his heir; after the five years, the disseisee is to make continual claim, as before the statute: the feoffee of a disseisor, abators, &c. are out of the statute. As to this claim, though the tenant die within the year and day, and it be but once made, it shall preserve the entry of him that maketh it: and if the ancestor claim, and the disseisor die, and then the ancestor dieth, now his heir may enter: but if an ancestor or predecessor make a continual claim, and dieth, and the son or successor make no continual claim, and within the year and day after the claim made by the ancestor, the disseisor dies; this shall take away the entry of the son or successor, for the descent was cast in his time. *Co. Lit. 250, 251.* If there be tenant for life, remainder for life, the remainder in fee, and the tenant for life alien in fee: if he in remainder for life maketh continual claim, before the dying seised of the alienee, and after the alienee die seised, and after that the remainder-man for life dieth before any entry made by him: in this case he in remainder in fee shall have benefit by the claim of tenant for life, and he may enter upon the heir of the alienee, &c. *Lit. Sect. 416.* This claim shall not avoid a descent, unless it be made by him that hath title to enter, and in whose life the dying seised was: and so it is for the continual claim of a tenant for life, to give him in remainder advantage, except the disseisor, &c. die in the life-time of tenant for life. *Co. Lit. 250. See Black. Com. 2 V. 316. 3 V. 175.*

Continuance, Is the continuing of a cause in court, by an entry upon the records there for that purpose. There is a continuance of the assize, &c. And continuance of a writ or action is from one term to another, in case where the sheriff hath not returned a former writ, issued out in the said action. *Kitch. 262.* Continuances and essoins are amendable upon the roll, at any time before judgment: they are the acts of the court, and at Common law they may amend their own acts before judgment, though in another term; but their judgments are only amendable in the same term wherein they are given. *3 Lev. 431.* Upon an original, a term or two or three terms may be mesne between the teste and the return; and this shall be a good continuance; for the defendant is not at any prejudice by it,

and the plaintiff may give a day to the defendant beyond the common day if he will: but a continuance by *capias* ought to be made from term to term, and there cannot be any mesne term, because the defendant ought not to stay so long in prison. *2 Darw. Abr. 150.* If a man recovers upon demurrer, or by default, &c. and a writ of inquiry of damages is awarded, there ought to be continuances between the first and second judgment, otherwise it will be a discontinuance; for the first is but an award, and not compleat till the second judgment upon the return of the writ of inquiry of damages. *Ibid. 153.* If the plaintiff be nonsuit, by which the defendant is to recover costs; if the plaintiff will not enter his continuances, on purpose to save the costs, the defendant shall be suffered to enter them. *Cro. Jac. 316, 317.* The course of the court of King's Bench is to enter no continuance upon the roll, till after issue or demurrer, and then to enter the continuance of all upon the back, before judgment: and if it is not entered, it is error. *Trin. 16 Jac. B. R. Vide Discontinuance.*

Continuando, Is a word used in a special declaration of trespass, when the plaintiff would recover damages for several trespasses in the same action: and to avoid multiplicity of suits, a man may in one action of trespass recover damages for many trespasses, laying the first to be done with a *continuando* to the whole time, in which the rest of the trespasses were done; which is in this form, *Continuando transgressionem prædictam, &c. a prædicto die, &c. usque talem diem*, including the last trespass. *Terms de Ley.* In trespass with a *continuando* of divers things, though of some of those things there could be no *continuando*; yet it shall be good for those things for which the *continuando* could be, and not for the others: but if the *continuando* had been particularly of such things whereof a *continuando* could not be, then it had been naught. *3 Lev. 94.* Every day's trespass is said to be a several trespass; though a *continuando* may not be of men's continuing a trespass day and night, for some time together; for mankind must take some rest: where cattle do trespass upon ground, they are continually trespassing night and day, and therefore the *continuando* in that case is good. *1 Lill. Abr. 307.* Trespass for breaking an house with a *continuando*, is good; and until a re-entry is made, the continuation of the possession, is a continuing of the trespass. *Lutw. 1312.*

Contraband Goods, (from *contra*, and the Ital. *banda*, an edict or proclamation) Are those which are prohibited by act of parliament, or the King's proclamation to be imported into, or exported out of this into any other nation: as during the late war with France, French wines, &c. were prohibited by statute to be imported here from thence: and wool, &c. is not to be exported from hence to other kingdoms. *Stat. 27 E. 3. c. 3. 13 & 14 Car. 2. 7 & 8 W. 3. &c.*

Contracausatoz, A criminal, or one prosecuted for a crime: this word is mentioned in *Leg. H. 1. cap. 61.*

Contract, (*contractus*) Is a covenant or agreement between two or more persons, with a lawful consideration or cause. *West. Symb. part 1.* As if a man sells his horse or other thing to another, for a sum of money; or covenants, in consideration of 20*l.* to make him a lease of a farm, &c. these are good contracts, because there is a *quid pro quo*, or one thing for another: but if a person make promise to me, that I shall have 20*s.* and that he will be debtor to me therefore, and after I demand the 20*s.* and he will not give it me, yet I shall never have any action to recover this 20*s.* because this promise was no contract, but a bare promise, or *nudum pactum*; though if any thing were given for the 20*s.* if it were but to the value of a penny, then it had been a good contract. Every contract doth imply in itself an *assumpsit* in law, to perform the same; for a contract would be to no purpose, if there were no means to enforce the performance thereof. *1 Lill. Abr. 308.* Where an action is brought upon a contract, and the plaintiff mistakes the sum agreed upon, he will fail in his action: but if he brings his action on the promise in law, which arises from the debt, there, although he mistakes the sum, he shall recover. *Aleyn 29. Assumpsit in deed must be fully proved. Gilb. Law of Evid. 193. Assumpsit in law, proof of any part good. Ib. 172. See Gilb. Law of Evidence, 204, 205. 2 Vent. 154.*

There

'There is a diversity where a day of payment is limited on a *contract*, and where not; for where it is limited, the *contract* is good presently, and an action lies upon it, without payment; but in the other not: If a man buys 20 yards of cloth, &c. the *contract* is void, if he do not pay the money presently; but if day of payment be given, there the one may have an action for the money, and the other trover for the cloth. *Dyer* 30, 293. Where a seller says to a buyer, he will sell his horse for so much, and the buyer says he will give it; if he presently tell out the money it is a *contract*; but if he do not it is no *contract*. *Nov's Max.* 87. *Hob.* 41. The property of any thing sold is in the buyer immediately by the *contract*; though regularly it must be delivered to the buyer, before the seller can bring his action for the money. *Noy* 88. If one *contract* to buy a horse or other thing of me, and no money is paid, or earnest given, nor day set for payment thereof, nor the thing delivered; in these cases, no action will lie for the money, or the thing sold, but it may be sold to another. *Plowd.* 128, 309.

All *contracts* are to be certain, perfect, and compleat: For an agreement to give so much for a thing as it shall be reasonably worth, is void for uncertainty; so a promise to pay money in a short time, &c. or to give so much, if he likes the thing when he sees it. *Dyer* 91. 1 *Bulst.* 92. But if I *contract* with another to give him 10*l.* for such a thing, if I like it on seeing the same; this bargain is said to be perfect at my pleasure: Though I may not take the thing before I have paid the money; if I do, the seller may have trespass against me; and if he sell it to another, I may bring an action of the case against him. *Noy* 104. If a *contract* be to have for cattle sold 10*l.* If the buyer do a certain thing, or else to have 20*l.* it is a good *contract*, and certain enough: And if I agree with a person to give him so much for his horse, as J. S. shall judge him to be worth, when he hath judged it, the *contract* is compleat, and an action will lie on it; and the buyer shall have a reasonable time to demand the judgment of J. S. But if he dies before his judgment is given, the *contract* is determined. *Perk. Sect.* 112, 114. *Shep. Abr.* 294.

In *contracts*, the time is to be regarded, in and from which the *contract* is made: The words shall be taken in the common and usual sense, as they are taken in that place where spoken; and the law doth not so much look upon the form of words, as on the substance and mind of the parties therein. 5 *Rep.* 83. 1 *Bulst.* 175. A *contract* for goods may be made as well by word of mouth, as by deed in writing; and where it is in writing only, not sealed and delivered, it is all one as by word. But if the *contract* be by writing sealed and delivered, and so turned into a deed; then it is of another nature, and in this case generally the action on the verbal *contract* is gone, and some other action lies for breach thereof. *Plowd.* 130, 309. *Dyer* 90. *Contracts*, not to be performed in a year, are to be in writing, signed by the party, &c. or no action may be brought on them: But if no day is set, or the time is uncertain, they may be good without it. *Stat.* 29 *Car.* 2. c. 3. And by the same statute, no *contract* for the sale of goods for 10*l.* or upwards, shall be good, unless the buyer receive part of the goods sold; or gives something in earnest to bind the *contract*; or some note thereof be made in writing, signed by the person charged with the *contract*, &c. If two persons come to a draper, and one says, let this man have so much cloth, and I will pay you; there the sale is to the undertaker only, though the delivery is to another by his appointment: But if a *contract* be made with A. B. and the vendor scruples to let the goods go without money, and C. D. comes to him and desires him to let A. B. have the goods, and undertakes that he shall pay him for them, that will be a promise within the statute 29 *Car.* 2. c. 3. and ought to be in writing. *Mod. Caf.* 249. A *contract* made and entered into upon good consideration, may for good considerations be dissolved. See *Agreement and Sale. Usurious Contracts, vide Usury.*

Contrafaction, (Contrafactio) A counterfeiting; as *contrafactio sigilli Regis*, counterfeiting the King's seal. *Blount.*

Contra formam Collationis, Is a writ that lay where a man had given lands in perpetual alms, to any late houses of religion, as to an abbot and convent, or to the warden or master of any hospital and his convent, to find certain poor men with necessaries, and do divine service, &c. If they aliened the land, to the disherison of the house and church, then the donor, or his heirs, should bring this writ to recover the lands. It was had against the abbot, or his successor; not against the alienee, though he were tenant of the land: And was founded upon the statute of *West.* 2. c. 1. *Reg. Orig.* 238. *F. N. B.* 210.

Contra formam Feoffamenti, A writ that lies for the heir of a tenant enfeoffed of certain lands or tenements, by charter of feoffment from a lord to make certain services and suits to his court, who is afterwards distrained for more services than are mentioned in the charter. *Reg. Orig.* 176. *Old Nat. Br.* 162.

Contra formam Statuti, Is the usual conclusion of every indictment, &c. laid on an offence created by statute.

If one statute be relative to another, as where the former makes the offence, the latter adds a penalty, as the statutes of 1 & 23 *Eliz.* the indictment ought to conclude *contra formam statutorum*. 2 *Hale's Pl. C.* 173. cap. 24. cites *Pajsb.* 42 *Eliz.* *B. R. Croke, n. 6. Dingley v. Moore.*

Where there are several statutes, and it does not appear on which the information is founded, the concluding *contra formam statuti* is ill. *Cro. J.* 142. pl. 19. *Mich.* 4 *Jac.* *B. R. Broughton v. Moore*, cites as is adjudged in the case of *Talbot & al.*

Where one act makes the offence, and another gives the penalty, an information must be *contra formam statutorum*, and cited 33 *Eliz.* *Talbot v. Sheldon*, who was indicted for recusancy *contra formam statuti*, 23 *Eliz.* c. 1. and the judgment was reversed because the penalty was demanded; for the 10 *Eliz.* made the offence, and the 23d gave the penalty; but if the information be for the offence only, it had been good; per *Coke. Ow.* 135. *Trin.* 9 *Jac.* See 5 *Vin. Abr.* 552—556.

Contramandatio Placiti, Signifies a respiting or giving a defendant further time to answer; or a countermand of what was formerly ordered. *Leg. H.* 1. c. 59.

Contramandatum, Is said to be a lawful excuse which the defendant in a suit by attorney alledgeth for himself, to shew that the plaintiff hath no cause of complaint. *Blount.*

Contrapositio, A plea or answer.—*Si quis in placito per justitiam posito sui vel suorum causum injustis conterminacionibus vel contrapositionibus difforciat, hanc perdat.* *Leg. Hen.* 1. c. 34.

Contrariens. In the reign of King *Edw.* 2. *Thomas Earl of Lancaster* taking part with the Barons against the King, it was not thought fit, in respect of their great power, to call them rebels or traitors, but *contrariens*: And hence we have a record of those times, called *Rotulum Contrarientium*.

Contratenere, To with-hold. *Si quis decimas contratenat.* *Leg. Alfredi apud Brompton,* c. 9.

Contribules, Contribunales, kindred or cousins. *Lamb. page 75.*

Contribution, (Contributio) Is where every one pays his share, or contributes his part to any thing. One parcener shall have contribution against another; one heir have contribution against another heir, in equal degree: And one purchaser have contribution against another. Also co-nusors in a statute shall be equally charged, and not one of them solely extended. 3 *Rep.* 12, 13, &c. On a statute or recognizance, there is a contribution and stay till the full age of the heir, &c. and this doth extend to the lessee for life, or years of the co-nusor, who has part of the land liable, and the heir within age the residue; for the land of every one of them ought to be charged equally, because the whole is liable to the judgment; and this cannot be, if during the nonage, the burden shall fall upon one only. *Jenk. Cent.* 36. If lands are mortgaged, and then devised to one person for life, with remainder to another; both devisees shall make contribution to payment of the mortgage-money. *Chan. Caf.* 224, 271. Where goods

goods are cast into the sea, for the safe-guard of a ship, or other goods, &c. aboard in a tempest; there is a *contribution* among merchants, towards the loss of the owners. 32 H. 8. c. 14. And where a robbery is committed on the highway, and damages are recovered against one or a few persons, in action against the hundred, the rest of the inhabitants shall make *contribution* to the same. 27 Eliz. c. 13.

Contributio facienda, Is a writ that lieth where there are tenants in common, that are bound to do one thing, and one is put to the whole burden; or who jointly hold a mill *pro indiviso*, and take the profits equally, and the mill falling into decay, one of them will not repair the mill; now the other shall have a writ to compel him to *contribute* to the reparations. And if there be three coparceners of land, that owe suit to the Lord's court, and the eldest performs the whole; then may he have this writ to compel the other to make their contribution. So where one suit is required for land, and that land being sold to divers persons, suit is demanded of them all, or some of them by distress, as entirely as if all the land were still in one. Reg. Orig. 175. F. N. B. 162.

Controller, (Fr. *Contrôleur*, Lat. *Contratulator*) Is an overseer or officer relating to public accounts, &c. And we have divers officers of this name; as *controller* of the King's Household; of the Navy; of the Customs; of the Excise; of the Mint, &c. And in our courts, there is the controller of the *Hamper*; of the *Pipe*, and of the *Pell*, &c. The office of *Controller of the Household* is to control the accounts of the Green Cloth; and he sits with the Lord Steward and other Officers in the counting-house, for daily taking the accounts of all expences of the household. The *Comptroller of the Navy* controls the payment of wages; examines and audits accounts; and inquires into rates of stores for shipping; &c. *Controllers of the Customs and Excise*, their office is to control the accounts of those revenues: And the *Controller of the Mint* controls the payment of wages, and accounts relating to the same. *Controller of the Hamper* is an officer in the Chancery attending the Lord Chancellor daily in term-time; and upon seal days; whose office is to take all things sealed from the Clerk of the *Hamper*, inclosed in bags of leather, and to note the just number and effect of all things so received; and enter the same in a book, with all the duties appertaining to his *Magistracy*, and other officers for the same. The *Controller of the Pipe* is an officer of the Exchequer, who writes out summons twice every year to the sheriffs to levy the farms and debts of the Pipe; and keeps a controlment of the Pipe, &c. *Controller of the Pell* is also an officer of the Exchequer; of which sort there are two, who are the Chamberlains clerks, that do or should keep a controlment of the Pell; of receipts and goings out: And this officer was originally such as took notes of other officers accounts or receipts, to the intent to discover if they dealt amiss, and was ordained for the Prince's better security. *Fleta*, lib. 1. cap. 18. Stat. 12 Ed. 3. cap. 3. This last seems to be the original use and design of all *Controllers*.

Controverser, (*Controveur*) Signifies in our law one that of his own head devises or invents false news. 2 Inst. 227.

Convenable, (Fr.) Agreeable. Stat. 27 Ed. 3. c. 21. See *Covenable*.

Convenient, (*Conveniens*) Of the use of this word, the Lord Coke in his institute says,—*Non solum quod licet sed quod est conveniens est considerandum, nihil quod est inconveniens est licitum*. 1 Inst. 66.

Convent, (*Conventus*) Signifies the fraternity of an abbey or priory; as *societas* doth the number of fellows in a college. *Brañ*, lib. 2. c. 35.

Conventicle, (*Conventiculum*) A private assembly or meeting for the exercise of religion; first attributed in disgrace to the meetings of *Wickliff* in this nation, above two hundred years since: and now applied to the illegal meetings of the *Nonconformists*: It is mentioned in the statutes 2 Hen. 4. c. 15. 1 H. 6. c. 3. and 16 Car. 2. c. 4. which statute was made to prevent and suppress *conventicles*: And by 22 Car. 2. cap. 1. It is enacted, that if any persons of the age of sixteen years, subjects of this kingdom, shall be present at any *conventicle*, where there are five or more assembled, they shall be fined 5 s.

for the first offence, and 10 s. for the second; and persons preaching incur a penalty of 20 l. Also suffering a meeting to be held in a house, &c. is liable to 20 l. penalty. Justices of peace have power to enter such houses, and seize persons assembled, &c. And if they neglect their duty, they shall forfeit 100 l. And if any constable, &c. know of such meetings, and do not inform a justice of peace, or chief magistrate, he shall forfeit 5 l. But the 1 W. & M. c. 18. ordains, that protestant dissenters shall be exempted from penalties: Though if they meet in a house, with the doors lock'd, barr'd, or bolted, such dissenters shall have no benefit from 1 W. & M. Officers of the government, &c. present at any *conventicle*, at which there shall be ten persons, if the Royal Family be not prayed for in express words, shall forfeit 40 l. and be disabled. Stat. 10 Ann. c. 2. See *Herefy*.

Conventio, Is a word used in ancient law-pleadings, for an agreement or covenant: As *A. B. queritur, &c. de C. D. &c. pro eo quod non teneat conventionem, &c.* There is a pleasant record of the court of the manor of *Hatfield*, in *Com. Ebor.* held Anno 11 Ed. 3. which runs thus: Robertus R. qui obtulit se versus Johannem J. de eo quod non teneat conventionem inter eos factam, & unde queritur, quod certo die & anno apud, &c. convenit inter prædictum Robertum & Johannem, quod prædictus Johannes vendidit prædicto Roberto diabolum ligatum in quodam ligamine pro iii d. ob. & prædictus Robertus tradidit prædicto Johanni quoddam obolum earles (i. e. earnest-money) per quod proprietas dicti Diaboli commoratur in persona dicti Roberti ad habend. deliberationem dicti Diaboli, infra quartam diem prox. sequent. Ad quam diem idem Robertus venit ad præfatum Johannem, & petit deliberationem dicti Diaboli, secundum conventionem inter eos factam; sed Johannes prædictum Diabolum deliberate noluit, nec adhuc vult, &c. ad grave dampnum ipsius Roberti lx. sol. Et inde producit Johannem, &c. Et prædictus Johannes venit, &c. Et non dedit conventionem prædictam. Et quia videtur curia quod tale placitum non jacet inter Christianos, Ideo partes prædicti adjournantur usque in infernum, ad audiendum judicium suum, & utraque pars in Misericordia, &c.

Conventione, Is a writ that lies for the breach of any covenant in writing, whether real or personal: And it is called a *Writ of Covenant*. Reg. Orig. 115. F. N. B. 145.

Convention, Is properly where a parliament is assembled, but no act is passed, or bill signed, &c. See *Parliament*.

Convention Parliament. On the abdication of King James II. Anno 1689. The assembly of the states of the kingdom, to take care of their rights and liberties, and who settled King William and Queen Mary on the throne, was called the *Convention*: And the Lords and Commons thus convened were declared the two houses of parliament, notwithstanding the want of any writ of summons, &c. Stat. 1 W. & M.

Conventuals, Are those religious men who are united together in a *convent* or religious house. *Cowel*.

Conventual Church, Is a church that consists of regular clerks, professing some order of religion; or of Deacon and Chapter, or other societies of Spiritual Men.

Conversion, Is where a person finding or having the goods of another in his possession, converts them to his own use, without the consent of the owner; and for which the proprietor may maintain an action of *Trover* and *Conversion* against him.—And refusal to restore goods is, *prima facie*, sufficient evidence of a conversion, tho' it does not amount to a conversion. 10 Rep. 56. *Black Com.* 3 V. 152.

Conversos. The Jews here in England were formerly called *Conversos*, because they were converted to the Christian religion. King Hen. 3. built an house for them in London, and allowed them a competent provision or subsistence for their lives; and this house was called *Dominus Conversorum*. But by reason of the vast expences of the war, and the increase of those converts, they became a burden to the crown; so that they were placed in abbeys and monasteries for their support and maintenance. And the Jews being afterwards banished, King Ed. 3. in the 51st year of his reign, gave this house which had been used for the converted Jews, for the keeping of the Rolls, and

and it is said to be the same which is at this time enjoyed by the Master of the Rolls. *Blount*.

Conveyance, Is a deed which passes land from one man to another. *Conveyance* by *feoffment*, and *livery*, was the general *conveyance* at common law; and if there was a tenant in possession, so that livery could not be made, then was the reversion granted, and the tenant always attorned: Also upon the same reason, a *lease* and *release* was held to be a good *conveyance*, to pass an estate; but the lessee was to be in actual possession, before the release. But the lease is now considered as operating so as to give the possession, which it does in point of law. By the common law, when an estate did not pass by feoffment, the vendor made a lease for years, and the lessee actually entered; and the lessor granted the reversion to another, and the lessee attorned: Afterwards, when an inheritance was to be granted, then likewise was a lease for years usually made, and the lessee entered (as before) and then the lessor released to him: But after the *statute of uses*, it became an opinion, that if a *lease for years* was made upon a valuable consideration, a *release* might operate upon it without an actual entry of the lessee; because the statute did execute the lease, and raised an use presently to the lessee: And Serjeant *Moor* was the first who practised this way. 2 *Mod.* 251, 252. The most common *conveyances* now in use are *deeds of gift*, *bargain and sale*, *lease and release*, *uses and recoveries*, *settlements to uses*, &c. A son did give and grant lands to his mother, and her heirs; though this was a defective *conveyance* at common law, yet it was adjudged good by way of *use*, to support the intention of the donor, and therefore by these words an use did arise to the mother by way of covenant to stand seised. 2 *Lev.* 225. A feoffment without *livery and seisin*, will not enure as a grant; but where made in consideration of a marriage, &c. it has been adjudged, that it did enure as a covenant to stand seised to uses. 2 *Lev.* 213.

Tenant in fee, in consideration of marriage, *covenanted, granted, and agreed* all that messuage to the use of himself for life, then to his wife for life, for her jointure, then to their first son in tail male, &c. Now by these words it appeared, that the husband intended some benefit for his wife, wherefore the court supplied other words to make the *conveyance* sensible. 1 *Lutw.* 782. The words *give and grant*, &c. are proper for a *conveyance* at common law; but it has been held, that though some books warrant that *conveyances* shall operate according to the words; yet of late the judges have a greater consideration of the passing the estate, than the manner by which 'tis passed. 2 *Lutw.* 1209. A *conveyance* cannot be fraudulent in part, and good as to the rest: For if it be fraudulent and void in part, it is void in all, and it cannot be divided. 1 *Lill. Abr.* 311. Fraudulent *conveyances* to deceive creditors; defraud purchasers, &c. are void, by *Stat.* 50 *Ed.* 3. cap. 6. 13 *Eliz.* cap. 5. 27 *Eliz.* cap. 4. Vide *Deeds*.

Convict, (*Convictus*) Is he that is found guilty of an offence by verdict of a jury. *Staud.* P. C. 186. *Crompton* saith, That *conviction* is either when a man is outlawed, or appeareth and confesseth, or is found guilty by the inquest: And when a statute excludes from clergy persons found guilty of felony, &c. it extends to those who are convicted by confession. *Crompt. Just.* 9. The law implies a *conviction*, before punishment, though not mentioned in a statute: And where any statute makes a second offence felony, or subject to a heavier punishment than the first, it is always implied that such second offence ought to be committed after a *conviction* for the first. 1 *Hartk.* P. C. 13, 107. Judgment amounts to *conviction*; though it doth not follow that every one who is *convict*, is adjudged. *Ibid.* 14. A *conviction* at the King's suit may be pleaded to a suit by an informer, on a penal statute; because while in force it makes the party liable to the forfeiture, and no one ought to be punished twice for the same offence: But *conviction* may not be pleaded to a new suit by the King. *Ibid.* 18. A person convicted or attainted of one felony, may be prosecuted for another, to bring accessaries to punishment, &c. *Fitz. Coron.* 379. On a joint indictment or information, some of the defendants may be acquitted, and others convicted. 2 *Hartk.* 240. Persons convicted of felony by verdict, &c. are not

to be admitted to *bail*, unless there be some special motive for granting it; as where a man is not the same person, &c. for bail ought to be before trial, when it stands indifferent whether the party be guilty, or not. *Ibid.* 99, 114. *Conviction* of felony, and other crimes, disables a man to be a juror, witness, &c. By our books, *conviction* and attainder are often confounded.

Conviction, before justices of peace. When an act of parliament orders the *conviction* of offenders by justices of peace, &c. it must be intended after summons to bring them in, that they may have an opportunity of making their defence; and if it be otherwise, the *conviction* shall be quashed. *Mich.* 2 *Ann.* B. R. *Mod. Caf.* 41.

Convict Recusant, According to the statutes. See *Recusants*.

Convivium, Signifies the same thing among the laity, as *procuratio* doth with the clergy, viz. When the tenant by reason of his tenure is bound to provide meat and drink for his lord once or oftener in the year. *Blount*.

Convocation, (*Convocatio*) Is the assembly of all the clergy, to consult of ecclesiastical matters in time of parliament: And as there are two houses of parliament, so there are two houses of *convocation*; the one called the *Higher or Upper House*, where the archbishops and all the bishops sit severally by themselves; and the other the *Lower House of Convocation*, where all the rest of the clergy sit, i. e. All deans and archdeacons, one proctor for every chapter, and two proctors for all the clergy of each diocese, making in the whole number one hundred and sixty-six persons. Each *convocation* house hath a prolocutor, chosen from among themselves, and that of the lower house is presented to the bishops, &c. The Archbishop of *Canterbury* is the President of the *Convocation*, and prorogues and dissolves it by mandate from the King. The *convocation* exercises jurisdiction in making of canons, with the King's assent: For by the *Stat.* 25 *H.* 8. c. 19. the *convocation* is not only to be assembled by the King's writ; but the canons are to have the royal assent: They have the examining and censuring of heretical and schismatical books, and persons, &c. But appeal lies to the King in Chancery, or to his delegates. 4 *Inst.* 322. 2 *Roll. Abr.* 225. The clergy called to the *convocation*, and their servants, &c. have the same privileges as members of parliament. *Stat.* 8 *H.* 6. c. 1.

Consuance of Pleas. A privilege that a city or town hath to hold pleas. See *Cognisance*.

Consuant, (*Fr. Connoissant*) Knowing or understanding: As if the son be *consuant*, and agreed to the feoffment, &c. *Co. Litt.* 159.

Coopers. Shall make their vessels of seasonable wood, and mark them with their own marks, on pain of 3 s. 4 d. forfeiture; and the contents of vessels are appointed to be observed under like penalty, as the beer barrel shall contain 36 gallons, a kilderkin 18, and firkin 9, &c. The wardens of the *Coopers* company in *London*, with an officer of the mayor, are to search all vessels for ale, beer, and soap to be sold there; and to mark them that are right, and they may burn those that be not so: And if any *Cooper*, &c. diminish a vessel by taking out the head, or a staff thereof, it shall be burnt, and the offender forfeit 3 s. 4 d. Also *Coopers* are to sell their vessels at such rates as shall be ordained by justices, mayors, &c. 23 *H.* 8. c. 4. This last clause is repealed by 8 *Eliz.* cap. 9.

Coopertio, The head or branches of a tree cut down; though *Coopertio Arborum* is rather the bark of timber trees felled, and the chumps and broken wood. *Corwel*.

Coopertura, A thicket or covert of wood. *Chart. de Foresta*, cap. 12.

Coparceners, (*Participes*) Otherwise called *Parceners*, are such as have equal portion in the inheritance of an ancestor; and by *law* are the issue female, which, in default of heirs male, come in equality to the lands of their ancestors. *Bract. lib.* 2. cap. 30. They are to make partition of the lands; which ought to be made by *coparceners* of full age, &c. And if the estate of a *coparcener* be in part elected, the partition shall be avoided in the whole. *Lit.* 243. 1 *Inst.* 173. 1 *Rep.* 87. The crown of *England* is not subject to *coparcenary*; and there is no *coparcenary* in dignities, &c. *Co. Litt.* 27. *Stat.* 25 *H.* 8. c. 22. Vide *Parceners*.

Copartnership,

Copartnership, Is a deed of covenants between merchants, or others, for carrying on a joint trade, &c.

Cope, Is a custom or tribute due to the King, or lord of the soil, out of the *lead mines* in some part of *Derbyshire*; of which *Manlove* saith thus:

*Egrefs and regrefs to the King's highway,
The miners have; and lot and cope they pay:
The thirteenth dish of ore within their mine,
To the lord, for lot they pay at measuring time;
Six-pence a load for cope the lord demands,
And that is paid to the berghmatter's hands, &c.*

Agreeable to this you may find in *Sir John Pettus's Fodine Regales*, where he treats on this subject. This word, by *Domejday-Book*, as *Mr. Hagar* hath interpreted it, signifies a hill: and *cope* is taken for the supreme cover, as the *cope of heaven*. Also it is used for the roof and covering of a house; the upper garment of a priest, &c.

Copia Libelli deliberanda, Is a writ that lies where a man cannot get the copy of a libel at the hand of a judge ecclesiastical, to have the same delivered to him. *Reg. Orig.* 51.

Coppa, A cop or cock of grafs, hay or corn divided into titheable portions; as the tenth cock, &c. This word, in strictness, denotes the gathering or laying up the corn in *copes* or heaps, as the method is for barley or oats, &c. not bound up, that it may be the more fairly and justly tithed: and in *Kent* they still retain the word, a *cop* or *cap* of hay, straw, &c. *Thorn in Chron.*

Copper and Copper Die. Copper plates and copper fully wrought, to what duties liable, 4 & 5 *W. & M. c. 5. sect. 2.* All copper may be exported paying the lawful duties and customs, 5 *W. & M. c. 17.*

Copy (*copia*) Is in a legal sense the transcript of an original writing; as the copy of a *patent*, of a *charter*, deed, &c. A clause out of a patent, taken from the chapel of the Rolls, cannot be given in evidence; but you must have a true copy of the whole charter examined: it is the same of a record. And if upon a trial, you will give part of a copy of an office in evidence to prove a deed, which deed is to prove the party's title to the land in question that gives it in evidence; if that part of the office copy given in evidence, be not so much of it as doth any way concern the land in question, the court will not admit of it: for the court will have a copy of the whole given, or no part of it shall be admitted. 1 *Lill. Abr.* 312, 313. Where a deed is inrolled, certifying an attested copy is proof of the inrolment; and such copy may be given in evidence. 3 *Lev.* 387. A common deed cannot be proved by a copy or counterpart, when the original may be procured. 10 *Rep.* 92. And a copy of a will of lands, or the probates is not sufficient; but the will must be shewn as evidence. 2 *Roll. Abr.* 74. Copies of court rolls admitted as evidence. See *Evidence*.

Coppyhold, (*tenura per copiam rotuli curie*) Is a tenure for which the tenant hath nothing to shew but the copy of the rolls, made by the steward of the lord's court; on such tenant's being admitted to any parcel of land or tenement belonging to the manor. 4 *Rep.* 25. It is called *base tenure*, because held at the will of the lord: And *Fitzherbert* says, it was anciently *tenure in villenage*, and that *copyhold* is but a new name. Some *copyholds* are held by the *verge* in *ancient demesne*; and though they are by *copy*, yet are they a kind of freehold; for if a tenant of such *copyhold* commit felony, the King hath *annum diem & waifum*, as in the case of freeholders: some other *copyholds* are such as the tenants hold by common tenure, called *meer copyhold*, whose land, upon felony committed, escheats to the lord of the manor. *Kitch.* 81. But *copyhold* land cannot be made at this day; for the pillars of a *copyhold* estate are, That it hath been demised time out of mind by copy of court-roll; and that the tenements are parcel of or within the manor. 1 *Inst.* 58. 4 *Rep.* 24. A *copyhold* tenant had originally in judgment of law but an estate at will; yet custom so established his estate, that by the custom of the manor it was descendible, and his heirs inherited it: and therefore the estate of the *copyholder* is not merely *ad voluntatem domini*, but *ad voluntatem domini secundum consuetudinem manerii*; so that the custom of the

manor is the life of *copyhold* estates; for without a custom, or if *copyholders* break their custom, they are subject to the will of the lord: and as a *copyhold* is created by custom, so it is guided by custom. 4 *Rep.* 21. A *copyholder*, so long as he doth his services, and doth not break the custom of the manor, cannot be ejected by the lord; if he be, he shall have trespass against him: but if a *copyholder* refuses to perform his services, it is a breach of the custom, and forfeiture of his estate.

Copyholds descend according to the rules and maxims of the Common law, (unless in particular manors, where there are contrary customs, of great antiquity); but such customary inheritances shall not be assets, to charge the heir in action of debt, &c. *Ibid.* Though a lease for one year of *copyhold* lands, which is warranted by the Common law, shall be assets in the hand of an executor. 1 *Vent.* 163. *Copyholders* hold their estates free from charges of dower, being created by custom, which is paramount to title of dower. 4 *Rep.* 24. *Copyhold* inheritances have no collateral qualities, which do not concern the descent; as to make them assets; or whereof a wife may be endowed; a husband be tenant by the curtesy, &c. But by particular custom, there may be dower and tenancy by the curtesy. *Cro. Eliz.* 361. There may be an *estate-tail* in *copyhold* lands by custom, with the cooperation of the statute *W. 2.* And as a *copyhold* may be entailed by custom, so by custom the tail may be cut off by surrender. 1 *Inst.* 60. A *copyhold* may be barred by a recovery, by special custom; and a surrender may bar the issue by custom. A fine and recovery at Common law will not destroy a *copyhold* estate; because Common law assurances do not work upon the assurance of the *copyhold*: though *copyhold* lands are within the *Stat. 4 H. 7.* of fines and proclamations, and five years non-claim, and shall be barred. 1 *Roll. Abr.* 506.

A plaint may be made in the court of the manor, in the nature of a real action, and a recovery shall be had in that plaint against tenant in tail, and such a recovery shall be a discontinuance to the estate-tail. 1 *Brownl.* 121. And the suffering a recovery by a *copyholder* tenant for life in the lord's court is no forfeiture, unless there is a particular custom for it. 1 *Nelf. Abr.* 507. *Copyholders* may entail *copyhold* lands, and bar the entails and remainders, by committing a forfeiture, as making lease without licence, &c. and then the lord is to make three proclamations, and seize the *copyhold*, after which the lands are granted to the *copyholder*, and his heirs, &c. This is the manner in some places, but it must be warranted by custom. 2 *Dunw. Abr.* 191. *Sid.* 314.

Customs ought to be time out of memory; to be reasonable, &c. And a custom in deprivation or bar of a *copyhold* estate, shall be taken strictly; but when for making and maintaining it, shall be construed favourably. *Comp. Cop. sect.* 33. *Cro. El.* 879. An unreasonable custom, as for a lord to exact exorbitant fines; for a *copyholder* for life to cut down and sell timber-trees, &c. is void. A *copyholder* for life pleaded a custom, that every *copyholder* for life might, in the presence of two other *copyholders*, appoint who should have his *copyhold* after his death; and that the two *copyholders* might assise a fine, so as not to be less than had been usually paid; and it was adjudged a good custom. 4 *Leon.* 238. But a custom to compel a lord to make a grant, is said to be against law; though it may be good to admit a tenant. *Moor* 788.

By the custom of some manors, where *copyhold* lands are granted to two or more persons for lives, the person first named in the copy may surrender all the lands. 1 *Nelf. Abr.* 497. There are customs *ratione loci*, different from other places: but though a custom may be applied to a particular place; yet 'tis against the nature of a custom of a manor to apply it to one particular tenant. 1 *Nelf.* 504. 1 *Lutw.* 126.

There are usually *custom rolls* of manors, exhibited on oath by the tenants; setting forth the bounds of the manor, the royalties of the lord, services of the *copyhold* tenants, the tenures granted, whether for life, &c. concerning admittances, surrenders, and the rights of the *copyholders*, as to taking timber for repairs, fire-boot, &c. Common belonging to the tenants, payment of rent,

rent, suing in the court of the manor, taking heriots, &c. All which customs are to be observed. *Comp. Court Keep.* 21.

When an act of parliament altereth the service, customs, tenure, and interest of land, in prejudice of the lord or tenant, there the general words of such an act shall not extend to *copyholds*. 3 *Rep.* 7. *Copyholders* are not within the *Stat.* 27 *H. 8. c.* 10. of jointures; nor the 32 *H. 8. c.* 36. of leases, *copyholds* being in their nature demisable only by *copy*: they are not within the statute of uses; nor are *copyholds* extendible in execution: but *copyholds* are within the statute of limitation of actions; and the 13 *Eliz. c.* 7. &c. against bankrupts. The lord shall have the custody of the lands of ideots, &c. And a *copyholder* is not within the act 12 *Car. 2. c.* 24. to dispose of the custody and guardianship of the heir; for if there be a custom for it, it belongs to the lord of the manor. 3 *Lev.* 395. 1 *Nels. Abr.* 492, 522.

Copyholders not to vote for knights of the shire. 31 *Geo. 2. c.* 14. *sec.* 1. Assignees of insolvent debtors to pay fines *copyholds*. 1 *Geo. 3. c.* 17. *sec.* 14. *Copyholders* shall neither *implead* nor be *impleaded* for their tenements by writ, but by plaint in the lord's court held within the manor: and if on such plaint, erroneous judgment be given, no writ of false judgment lies, but petition to the lord in nature of a writ of false judgment, wherein errors are to be assigned, and remedy given according to law. *Co. Lit.* 60. Where a man holds *copyhold* lands in trust to surrender to another, &c. if he refuses to surrender to the other accordingly, he may be compelled by bill exhibited in the lord's court, who, as chancellor has power to do right. 1 *Leon.* 2. A *copyholder* may have a *formedon* in descender in the lord's court. Lessee of a *copyholder* for life for one year, shall maintain an ejectment: but ejectment will not lie for a *copyhold*, unless the plaintiff declare on the custom, upon a lease, &c. 4 *Rep.* 26. *Moor* 679. *Jed qu.* A manor is lost when there are no customary tenants or *copyholders*: and if a *copyhold* comes into the hands of the lord in fee, and the lord leases it for one year, or half a year, or for any certain time, it can never be granted by *copy* after: but if the lord aliens the manor, &c. his alienee may re-grant land by *copy*. If the lord keeps the *copyhold* for a long time in his hand, it is no impediment but that he may after grant it again by *copy*. 2 *Danv. Abr.* 176, 177. A *copyholder* in fee accepts of a lease, grant, or confirmation of the same land from the lord, this determines his *copyhold* estate. 2 *Cro.* 16. *Cro. Jac.* 253. If a *copyholder* bargains and sells his *copyhold* to a lessee for years, &c. of the manor, his *copyhold* is extinguished. 2 *Danv.* 205. A *copyholder* may grant his estate to his lord, by bargain and sale, release, &c. for between lord and tenant the conveyance need not be according to custom. 1 *Nels.* 504. A *copyholder* in other cases cannot alien by deed: though he that hath a right only to a *copyhold* may release it by deed. And if a *copyholder* surrenders upon condition, he may afterwards release the condition by deed. 2 *Danv.* 205. *Cro. Jac.* 36. Also one joint *copyholder* may release to another, which will be good without any admittance, &c. *Ibid.*

A *copyholder* cannot convey or transfer his *copyhold* estate to another otherwise than by surrender; which is the yielding up of the land by the tenant to the lord, according to the custom of the manor, to the use of him that is to have the estate: or it is in order to a new grant, and further estate in the same.

As to *copyhold grants*; which are made either in fee, or for three lives, &c. the lord of the manor that hath a lawful estate therein, whether he be tenant for life or years, tenant by statute merchant, &c. or at will, is *dominus pro tempore*, and may grant lands, herbage of lands, a fair, mill, tithes, &c. and any thing that concerns lands, by *copy of court-roll*, according to custom; and such grants shall bind those in remainder: the rents and services reserved by them shall be annexed to the manor, and attend the owner thereof after their particular estates are ended. 4 *Rep.* 23. 11 *Rep.* 18. And if a lord of the manor for the time being, lessee for life, years, &c. take a surrender, and before admittance he dieth, or the years or interest determine, though the next lord

comes in above the lease for life or years, or other particular interest, yet he shall be compelled to make admittance according to the surrender. *Co. Lit.* 59. But a lord at will, of a *copyhold* manor, cannot license a *copyhold* tenant to make a lease for years; though he may grant a *copyhold* for life, according to the custom: if a lord for life gives licence to a tenant to make a lease for years, this lease shall continue no longer than the life of the lord. 2 *Danv. Abr.* 202.

If he that is *dominus pro tempore* of the manor admits one to a *copyhold*, he dispenses with all precedent forfeitures; not only as to himself, but also as to him in reversion; for such grant and admittance amount to an entry for the forfeiture, and a new grant; but a lord by tort cannot by such admittance purge the forfeiture as to the rightful lord. 1 *Lev.* 26. Grants by *copy of court-roll* by infants, &c. will be binding: and if a guardian in socage grants a *copyhold* in reversion, according to the custom of the manor, this shall be a good grant; for he is *dominus pro tempore*. 2 *Roll. Abr.* 41. If baron and feme seized of a manor in right of the feme grant a *copyhold*, this shall bind the feme notwithstanding her coverture. 4 *Rep.* 23. An executor may make grants of *copyhold* estates, according to the custom of the manor, where a devise is made that the executor shall grant copies for payment of debts. 2 *Danv.* 178.

A manor may be held by *copy of court-roll*, and the lord of such manor grant copies; and such customary manor may pass by surrender and admittance, &c. A customary manor may be holden of another manor, and such customary lord may grant copies and hold courts: but a *copyholder* lord of such a manor cannot hold a court baron to have forfeitures, and hold pleas in a writ of right, &c. 1 *Nels. Abr.* 524.

All grants of *copyhold* estates are to be according to the custom of the manor; and rents and services customary must be reserved; for what acts of the lord in granting *copyholds* are not confirmed by custom, but only strengthened by the power and interest of the lord, have no longer duration than the lord's estate continueth. *Comp. Court Keeper* 421. If by the custom, a *copyhold* may be granted for three lives, and the lord grants it to one for life, remainder to such woman as he shall marry, and to the first son of his body; both these remainders are void: and a remainder limited upon a void estate in the creation, will be likewise void. But if by custom it is demisable in fee, a surrender may be to the use of one for life, remainder in tail, remainder in fee. 2 *Danv. Abr.* 203. *Cro. Eliz.* 373. It is held, where by the custom of a manor the lord can grant a *copyhold* for three lives, he may grant it for an estate coming within the intent of the custom; as to A. B. and his assigns, to hold to him and his assigns for the lives of three others, and of the longer liver of them successively, &c. 2 *Ld. Raym.* 994, 1000.

The lord of a manor may himself grant a *copyhold* estate at any place out of the manor; but the steward cannot grant a *copyhold* at a court held out of the manor. 4 *Rep.* 26. Though the steward may take surrenders out of the manor, as well as the lord. 2 *Danv. Abr.* 181. A steward is in place of the lord, and without a command to the contrary may grant lands by *copy*, &c. But if a lord command a steward that he shall not grant such a *copy*, if he grants it, it is void: and if the steward diminishes the antient rents and services, the grant will be void. *Cro. Eliz.* 699.

Things of necessity done by a steward, who is but in reputed authority, are good if they come in by presentment of the jury; as the admittance of an heir upon presentment, &c. Though acts voluntary, as grants of *copyhold*, &c. are not good by such stewards. *Ibid.* If an under-steward hold a court without any disturbance of the lord of the manor, though he hath no patent nor deputation to hold it, yet it is good; because the tenants are not to examine what authority he hath, nor is he bound to give them an account of it. *Moor* 110. A deputy steward may authorise another to do a particular act; but cannot make a deputy to act in general. 1 *Salk.* 95.

In *admittances*, in court upon voluntary grants, the lord is proprietor; in *admittances* upon surrender, the lord is not proprietor of the lands, but only a necessary instrument

ment of conveyance; and in admittances by descent the lord is a meer instrument, not being necessary to strengthen the heir's title, but only to give the lord his fine. 4 Rep. 21, 22. The heir of a copyholder may enter, and bring trespass, before admittance, being in by descent; and he may surrender before admittance: but he is not compleat tenant to be sworn of the homage, or to maintain a plaint in the lord's court. And if the heir do not come in and be admitted, on the death of his ancestor, where the same is presented and proclamation made, he may forfeit his estate. Cro. El. 90. 4 Rep. 22, 27.

On a surrender of a copyhold, the surrenderor or person making the same, continues tenant till the admittance of the surrenderee; and the surrenderee may not enter upon the lands, or surrender before admittance, for he hath no estate till then; though 'tis otherwise of the heir by descent, who is in by course of law, and the custom casts the possession upon him. Comp. Court Keep. 436. A surrender is not of any effect until admittance, and yet the surrenderee cannot be defrauded of the benefit of the surrender; for the surrenderor cannot pass away the land to another, or make it subject to any other incumbrances; and if the lord refuse the surrenderee admittance, he is compellable in Chancery. Comp. Cop. sect. 39. A grantee hath no interest vested in him till he is admitted: but admittance of a copyholder for life is an admittance of him in remainder, for they are but one estate; and the remainder man may, after the death of tenant for life, surrender without admittance. 3 Lev. 308. Cro. El. 504. Every admittance upon a descent or surrender may be pleaded as a grant; and a person may alledge the admittance of his ancestor as a grant; and shew the descent to him, and that he entered, &c. But he cannot plead that his father was seised in fee, &c. and that he died seised, and the land descended to him. 2 Danv. 208. Admittance on surrender must, in all respects, agree with the surrender; the lord having only a customary power to admit *secundum formam et effectum sursum redditionis*. 4 Rep. 26. If any are admitted otherwise, they shall be seised according to the surrender: yet where a voluntary surrender is general, without saying to whose use, a subsequent admittance may explain it. 2 Danv. 187, 204. In voluntary admittances, if the lord admits any one contrary to custom, it shall not bind his heir or successor. If a copyholder surrender to the use of another, and after the lord having knowledge of it, accepts the rent of such other out of court, this is an admittance in law: and any act, implying the consent of the lord to the surrender, shall be adjudged a good admittance. 1 Nels. Abr. 493. If the steward accept a fine of a copyholder, it amounts to an admittance. 2 Danv. 189. But delivering a copy is no admittance.

Where a widow's estate is created by custom, that shall be an admittance in law: and her estate arising out of that of her husband's, his admittance is the admittance of her. Hut. 18. And she who hath a widow's estate by the custom of the manor, upon the death of her husband, need not pay a fine to the lord for the estate; for this is only a branch of the husband's. Hob. 181. When a custom is, that the wife of every copyholder for life shall have her free bench, after the death of the baron, the law casts the estate upon the wife, so that she shall have it before admittance, &c. 2 Danv. 184. But if a wife is entitled to her free bench by custom, and a copyholder in fee surrenders to the use of another, and then dies; it has been adjudged that the surrenderee should have the land, and not the wife; because the wife's title doth not commence till after the death of her husband; but the plaintiff's title begins with the surrender, and the admittance relates to that. 1 Inst. 59. 1 Salk. 185.

The widow's title commenceth not by the marriage; if it did, then the husband could do nothing in his life time to prejudice it: but 'tis plain he may alien or extinguish his right, so as to bind the estate of the widow: the free bench grows out of the estate of the husband; and 'tis his dying seised which gives the widow a title, and as the husband has a defeasible estate, so the wife may have her free-bench defeated. 4 Mod. Rep. 452, 453. Admittances are never by attorney, for the tenant ought to do fealty; though surrenders are oftentimes by attorney.

2 Danv. 189. A copyholder in fee may surrender in court, by letter of attorney: but not out of court, without a special custom. 9 Rep. 75, 76. If one cannot come into court to surrender in person, the lord may appoint a special steward to go to him, and take the surrender. 1 Leon. 36. A copyholder being in Ireland; the steward of a manor here made a commission to one to receive a surrender from him there, and it was held good. 2 Danv. 181.

The intent of surrenders is, that the lord may not be a stranger to his tenant, and the alteration of the estate. As a copyholder cannot transfer his estate to a stranger, by any other conveyance than surrender; so if one would exchange a copyhold with another, both must surrender to each other's use, and the lord admit accordingly: and if any person would devise a copyhold estate, he cannot do it by his will: but he must surrender to the use of his last will and testament, and in his will declare his intent. Comp. Cop. sect. 36, 39. Also where a copyholder surrenders to the use of his will, the lands do not pass by the will, but by the surrender; the will being only declaratory of the uses of the surrender. 1 Bull. 200. But in case of a will, the Chancery will supply the defect of a surrender, in the behalf of children, if not to disinherit the eldest son; and for the benefit of creditors, where a copyhold estate is charged by will with the payment of debts, though there is no surrender to those uses, it will be good in equity. 4 Rep. 25. 1 Salk. 187. 3 Salk. 84. Yet 'tis held, that equity shall not supply the want of such surrender in favour of a grandchild; or bastard, who is not considered as a child; or a wife against the heir; nor in behalf of legatees: but where the surrender is refused, a will of a copyhold may be sufficient without it. Abr. Cas. Eq. 122, 124.

A *cestui que trust* may devise an interest in land, &c. without surrender; and if copyhold lands are in mortgage, the mortgagor can dispose of the equity of redemption by will, without any surrender made; because he hath at that time no estate in the land, whereof to make a surrender. Peced. Canc. 320, 321. One jointenant may surrender his part in the lands to the use of his will, &c. And where there are two jointenants of a copyhold in fee, if one of them make a surrender to the use of his will, and die, and the devisee is admitted, the surrender and admittance shall bind the survivor. 2 Cro. 100. A surrender may not be to commence *in futuro*; as after the death of the surrenderor, &c. though copyholds may be surrendered to the use of a man's will. March 177. A copyholder cannot surrender an estate absolutely to another, and leave a particular estate in himself: though he may surrender to uses, &c. A copyholder surrendered to the use of his wife and younger son, without mentioning what estate; and adjudged that they had an estate for life. 4 Rep. 29. If a man having bought a copyhold to himself, his wife and daughter, and their heirs, afterwards surrenders it to another and his heirs, for securing a sum of money; after his death, the surrenderee shall not be intitled to the land, it being an advancement for the wife and daughter. 2 Vern. 120.

A feme covert may receive a copyhold estate, by surrender from her husband, because she comes not in immediately by him, but by the admittance of the lord, according to the surrender. 4 Rep. A feme covert is to be secretly examined by the steward, on her surrendering her estate. Co. Lit. 59. An infant surrendered his copyhold, and afterwards entered at full age, and it was held lawful, though the surrenderee was admitted. Moor 597. By the general custom of copyhold estates, copyholders may surrender in court, and need not alledge any particular custom to warrant it: but where they surrender out of court, into the hands of the lord by customary tenants, &c. custom must be pleaded. 9 Rep. 75. 1 Roll. Abr. 500. And surrenders out of court are to be presented at the next court; for it is not an effectual surrender till presented in court. Where a copyholder in fee surrenders out of court, and dies before it is presented, yet the surrender, being presented at the next court, will stand good, and *cestui que use* shall be admitted: so if *cestui que use* dies before it is presented, his heir shall be admitted. But if the surrender be not presented

sented at the next court, it is void. *Co. Lit.* 62: 2 *Danv.* 188. If the tenants by whose hands the surrender was made shall die, and this upon proof is presented in court, it is well enough. 4 *Rep.* 29.

Tenants refusing to make presentment, are compellable in the lord's court. And by surrender of copyhold lands to the use of a mortgagee, the lands are bound in equity, though the surrender be not presented at the next court. 2 *Salk.* 449. When a copyholder surrenders upon condition, and this is presented absolutely, the presentment is void: but where a conditional surrender is presented, and the steward omits entering the condition, on proof thereof the condition shall not be avoided; but the rolls shall be amended. 4 *Rep.* 25. A copyholder may surrender to the use of another, reserving rent with a condition of re-entry for non-payment, and in default of payment may re-enter. *Ibid.* 21.

If a copyholder of inheritance takes a lease for years of his copyhold estate, it is a surrender in law of his copyhold. Where there is a tenant for life, and remainder in fee, he in remainder may surrender his estate, if there be no custom to the contrary. 3 *Leon.* 329. If a surrender is made with remainders over, case lies for him in remainder against a copyholder for life, who commits waste, &c. 3 *Lev.* 128. A surrenderee of a reversion of a copyhold is an assignee within the equity of the *Stat.* 32 *H.* 8. to bring action of debt or covenant against a lessee, &c. 1 *Salk.* 185. A copyholder in fee surrenders to the use of one for life, with remainder to another for life, remainder to another in fee; as the particular estates and remainders make but one estate, there is but one fine due to the lord. 2 *Danv.* 191.

Fines are paid to the lord on admittances; and may be due on every change of the estate by lord or tenant: in case of a surrender, the lord may make what fine he pleases; but fines are to be reasonable; they are either certain, by custom, or uncertain; a fine certain is to be paid presently; but if it be uncertain, the copyholder is to have notice, and time to pay it. The lord may have an action of debt for his fine; or may distrain by custom. 4 *Rep.* 27. 13 *Rep.* 2.

A heriot is a duty to the lord, rendered at the death of the tenant, or on a surrender and alienation of an estate: and is the best beast or goods, found in the possession of the tenant deceased, or otherwise, according to custom. And for heriots, reliefs, &c. the lord may distrain, or bring action of debt. *Plowd.* 96. Relief is a sum of money which every copyholder in fee, or freeholder of a manor pays to the lord, on the death of his ancestor; and is generally a year's profits of his land. Services signify any duty whatsoever accruing unto the lord from tenants; and are not only annual, and accidental; but corporal, as homage, fealty, &c. *Comp. Court Keep.* 7, 8, 9, &c.

Copyholds escheat, and are forfeited in many cases; escheat of a copyhold estate, is either where the lands fall into the hands of the lord for want of an heir to inherit them; or where the copyholder commits felony, &c. But before the lord can enter on an estate escheated, the homage jury ought to present it. Forfeitures proceeding from treason, felonies, alienation by deed, &c. a presentment of them must be also made in court, that the lord may have notice of them. A copyholder refusing to do suit of court, being sufficiently warned, is a forfeiture of his estate; unless he be prevented by sickness, inundations of water, &c. If the lord demandeth his rent, and the copyholder being present denies to pay it at the time required, this is a forfeiture; but if the tenant be not upon the ground when demanded, the lord must continue his demand upon the land, so that by continual denial in law, it may amount to a denial in fact: though it is said there must be a demand from the person of the copyholder, and a wilful denial, to make a forfeiture.

A copyholder, not performing the services due to his lord; or if he sue a replevin against the lord, upon the lord's lawful distress for his rent or services, these are forfeitures. If the lord upon admittance of a copyholder, the fine by the custom of the manor being certain, demandeth his fine, and the copyholder denieth to pay it upon demand, this is a forfeiture.

Upon the descent of any copyhold of inheritance, the heir by the general custom is tied, upon three solemn

proclamations, made at three several courts, to come in and be admitted to his copyhold; or if he faileth therein, this failure worketh a forfeiture; but if an infant come not in to be admitted at three proclamations, it is no forfeiture: so of one beyond sea, &c.

An idiot, lunatick, &c. though able to take copyholds, yet they are unable to forfeit them: and in respect to others, forfeitures may be mitigated by custom, and the copyholder only amerced. By *Stat.* 9 *Geo.* 1. c. 29. On default of infants and feme coverts appearing to be admitted tenants to copyhold lands, the lord or his steward may name a person to be guardian or attorney for them, and by such guardian, &c. admit them: and if the usual fine thereon be not paid in three months, being demanded in writing, the lord may enter on the copyhold, and receive the rents, &c. till the fine is paid with all charges. And by this statute, no infant or feme covert shall forfeit any copyhold lands for their neglect to come to court to be admitted, or refusal to pay any fine.

The general custom of copyholds allows a copyholder to make a lease for one year of his copyhold estate, and no more, without incurring a forfeiture: but a copyholder may make a lease for one year, and covenant with the lessee, that after the end of that year, he shall have the same for another year, and so *de anno in annum* during the space of seven years, &c. and be no forfeiture. *Cro. Jac.* 300. Though a copyholder may not make a lease to hold for one year, and so from year to year during his life, excepting one day yearly, &c. which will be a forfeiture, being a mere evasion. But a licence to lease may be had. A woman who was a copyholder in fee married, her husband made a lease for years, not warranted by the custom, which was a forfeiture; the husband died; and adjudged that the lord shall not take advantage of this forfeiture after his death, but the wife shall enjoy the estate. *Cro. Car.* 7. And see 4 *Rep.* 21 to 25, &c.

Livery upon any conveyance of a copyhold estate amounts to a forfeiture. And yet if a copyholder for life surrender to another in fee, this is no forfeiture; for it passeth by the surrender to the lord, and not by livery.

If copyholder for life cuts down timber-trees, it is a forfeiture of his copyhold: though such copyholder may take house-boot, hedge-boot, and plough-boot, upon his copyhold, of common right, as a thing incident to the grant; if he be not restrained by custom, to take them by the assignment of the lord or his bailiff. Where a copyholder for life sells timber-trees, the lord may take them, and the estate is forfeited: but if under-lessee for years of a copyholder cut down timber, this shall not be a forfeiture of the copyhold estate, but the lord is put to his action of the case against the lessee. 1 *Bulst.* 150. *Style* 233. A copyhold granted to two for their lives successively, where the custom of the manor is, that they shall not fell trees; if the first copyholder for life cut down trees, &c. 'tis not only a forfeiture of his own estate for life, but of him in remainder. *Moor* 49. In other cases, a copyholder for life, committing waste, shall not forfeit the estate of him in remainder. *Cro. Eliz.* 880. If copyholder for life, where the remainder is over for life, commits a forfeiture by waste, &c. he in remainder shall not enter, but the lord. 2 *Danv.* 198. A copyholder committing waste voluntary, or permissive, this is a forfeiture: voluntary, as if he pull down any house, though built by himself; lop trees, and fell them, plough up meadow, whereby the ground is made worse, &c. Permissive, if he suffer the roof of the house to let in rain, or the house to fall; or if he permit his meadow ground to be surrounded with water, so that it becomes marshy, or his arable land to be thus surrounded and become unprofitable, &c. these and the like are forfeitures. See 2 *Danv.* *Abr.* 192, 193, 196, &c. 1 *Nelf.* *Abr.* 509, 510, &c. But it must be by his wilful default.

If a feme copyholder for life takes husband, who commits waste, and dies, the estate of the feme is forfeited: Though not if a stranger commit the waste, without the assent of the husband. 4 *Rep.* 37. Most forfeitures are caused by acts contrary to the tenure: But a succeeding lord

lord of a manor, shall not have any advantage of a forfeiture, by waste done by a copyholder in the time of his predecessor. 2 Sid. 8. And if a present Lord doth any thing whereby he acknowledges the person to be his tenant after forfeiture, this acknowledgment is a confirmation of his estate. *Coke's Cop.* 61.

The Court of Chancery will not relieve a copyhold tenant, against a voluntary forfeiture, on committing waste, &c. But it doth for permissive waste; and when the estate is forfeited for non-payment of rent, a fine, or such things, where a value may be set on them, and compensation made the Lord on any laches of time, the tenant may be relieved; for there the land is but in nature of a security for those sums. *Preced. Chanc.* 569, 572.

In case of making a lease for years, without licence, and not warranted by custom, found to be a forfeiture at law, equity has nothing to do with it, to give any remedy; it is like to a feoffment made, or fine levied by particular tenants, against which there can be no relief. *Ibid.* 574. Where copyhold lands are purchased in fee, in trust for an alien, the lands are not seizable by the King; nor is the trust forfeited to him; for if the lands were forfeited as purchased for such alien, then the lord of the manor would lose his fines and services, &c. *Hard.* 436. Copyhold estates of poor prisoners, assigned to creditors, and assignees admitted by the Lord, on paying the usual fine due on a surrender, &c. See *Stat.* 10 Geo. 2. c. 26. See *Comp. Court. Keeper, 3d Edit.* throughout. *Nelson's Lex Monerior*, 2d Edit. *Coke's Compleat Copyholder.* & 4 Rep. 21 to 25, &c.

Corage, (*Coragium*) is a kind of extraordinary imposition, growing upon some unusual occasion, and seems to be of certain measures of corn: For *corus tritici* is a measure of wheat. *Braet. lib.* 2. c. 116. Numb. 6. Who in the same chapter, Numb. 8. hath these words.—*Sunt etiam quedam communes praestationes, quae servitia non dicuntur, nec de consuetudine veniunt, nisi tamen necessitas intervenierit, vel cum Rex venerit: sicut in Antidagia, Corragia, & Carvagia, & alia plura de necessitate, & ex consensu communi totius Regni introducta, &c.* Blount.

Coracle, A small boat used by fishermen on some parts of the river Severn, made of an oval form, of split sally twigs interwoven, and on that part next the water covered with leather, in which one man being seated in the middle, will row himself swiftly with one hand, while with the other he manages his net or fish-tackle: and coming off the water, he will take the light vessel on his back, and carry it home. This boat is of the same nature as the Indian canoes; though not of the same form, or employed to the like use. But *quere* if not long out of use?

Coram non Iudice, Is when a cause is brought and determined in a court whereof the judges have not any jurisdiction; then it is said to be *Coram non Iudice*, and void. 2 Cro. 351.

Corbel Stones, Arc stones wherein images stand: The old English Corbel, was properly a nich in the wall of a church, or other structure, in which an image was placed for ornament or superstition; and the Corbel stones were the smooth polished stones, laid for the front and outside of the Corbels or niches. The niches remain on the outside of very many churches and steeples in England, though the little statues and reliques are most of them broken down. *Paroch. Antiq.* 575.

Corb of Wood Is a quantity of wood eight foot long, four foot broad, and four foot high, ordained by the statute.

Corbidge, (*Fr.*) Is a general appellation for all stuff to make ropes, and for all kinds of ropes belonging to the rigging of a ship: It is mentioned in 15 Car. 2. c. 13.

Corbinder, From the Fr. *Cordonannier*, a shoemaker; we call him vulgarly a *Cordwainer*; and so this word is used in divers statutes; as 3 H. 8. c. 10. 5 H. 8. c. 7. 27 H. 8. c. 14. 5 & 6 Ed. 6. c. 13. 1 Jac. 1. c. 22, &c. By which last statutes the Masters and Wardens of the Cordwainers Company in London, &c. are to appoint searchers and triers of leather; and leather is not to be sold before searched and sealed, &c.

Corbubaniarius, Also signifies a shoemaker. *Cowel.*

Cozettes, From the Brit. *Cored*, pools, ponds, &c.—*Et cum suis Piscibus & Coretibis anguillarum & cum toto territorio suo.* Du Fresne.

Corium forisfacere, Was where a person was condemned to be whipped; which was anciently the punishment of a servant. *Si quis corium suum forisfaciat & ad ecclesiam incurrat, sit ei verberatio condonata.* *Corium* perdere, the same: And *corium redimere* is to compound for a whipping.

Corn, No corn was formerly to be transported, without the King's licence; except for the victualling of ships, and in some special cases, from some ports only: And none may buy corn to sell again, without licence from justices, &c. *Stat.* 5 El. c. 12. But now corn, as wheat, barley, oats, &c. may be transported to states in amity when they exceed not such and such prices, by many statutes; and the exporters of it shall pay no duty or custom, but be intitled to bounty-money or a certain allowance for exportation. 3 Car. 1. 12. 15 & 22 Car. 2. 2 W. & M. &c. The transportation of corn to foreign parts, was prohibited by 8 Ann. c. 2. See 2 Geo. 2. cap. 18. A custom-duty is granted on foreign corn imported; to be paid according to the price of English corn, and no foreign corn shall be transported from one port of Great Britain to another, on pain of forfeiture, and 20 s. a bushel. *Stat.* 5 Geo. 2. cap. 12. If any person use violence on another person to hinder him from buying, or carrying corn to any sea-port town to be transported, &c. he shall be imprisoned by two justices, not exceeding three months, and be publicly whipped, &c. and committing a second offence, or destroying granaries, or corn in any boat or vessel, to be adjudged a felon, and transported for seven years: And the hundred to make good the damage, if not above 100 l. as in cases of robbery; where an offender is not apprehended and convicted within twelve months; but notice must be given to the constable in two days, &c. by 11 Geo. 2. c. 22. For no sort of corn, meal, flour, bread, biscuit, beef, &c. may be exported, on pain of forfeiting 20 s. for every bushel of grain, and 12 d. every pound weight of bread, &c. But his Majesty before a certain time may permit the exportation of corn by proclamation, and notice in the *Gazette.* *Stat.* 14 Geo. 2. c. 3. See further, 24 Geo. 2. c. 56. which ordains the bounty, &c. The bounty on ground corn to be regulated by weight, 24 Geo. 2. c. 56. Interest to be paid on debentures for the bounty of corn exported. 26 Geo. 2. c. 15. Corn market established at Westminster. 31 Geo. 2. c. 25. sec. 1. Forms of the returns of prices of grain. 31 Geo. 2. c. 29. sec. 11. Penalty of adulterating corn or flour. 31 Geo. 2. c. 29. sec. 22. Explained and amended by 3 Geo. 3. c. 11.

Cornage, (*Cornagium*, from the Lat. *Cornu*) a horn, was a kind of tenure in grand serjeanty; the service of which was to blow a horn when any invasion of the Scots was perceived: And by this tenure many persons held their lands northward, about the wall commonly called the *Piars Wall.* *Camd. Britan.* 609. This old service of horn blowing was afterwards paid in money, and the sheriffs accounted for it under the title of *Cornagium*.—*Memorandum quod cum vicecomes Cambriae fideret compotum ad seaccarium apud Salop, idem vicecomes fecit tallagium sub nomine suo lx. lib. tam de Cornagio, quam de aliis debitis.* *Mem. in Scacc.* 6 Ed. 1. Sir Edward Coke in his first institute, pag. 107. says *cornage* is also called in the old books *Horngeld*; but they seem to differ much. See *Horngeld*.

Cornare, To blow in the horn.—*Faciāt cornare ne videatur furtive facere.* *Mat. Paris.* page 181.

Corn-Rents. By 18 El. c. 6. On college leases, one third of the old rent to be reserved in wheat or malt, &c. The invention of Lord Treasurer Burleigh, and Sir Tho. Smith, who observed the value of money to sink much, and the price of provisions to rise greatly, on our communication with the Indies; and therefore devised this method for upholding the revenues of the colleges. *Black. Com.* 2 V. 322.

Cornwall, A royal duchy belonging to the Prince of Wales, abounding with mines, and having Stannary courts, &c. It yields a great revenue to the Prince; and how

how leases are to be made of lands in the duchy of Cornwall, for three lives, or thirty-one years, under the ancient rents, &c. See Stat. 13 Car. 2. c. 4. and 12 Ann. c. 22. 24 Geo. 2. c. 50. and 1 Geo. 3. c. 11. Assizes for Cornwall not confined to Launceston. 1 Geo. 1. c. 45. Leases of Prince of Wales of lands in Cornwall where good. 10 Geo. 2. c. 29. sec. 9, 10 & 11. What leases and grants by the King shall be good. 33 Geo. 2. c. 10.

Corody, (*Corodium*) Signifies a sum of money or allowance of meat, drink, and cloathing due to the King from an abbey, or other house of religion, whereof he was founder, towards the sustentation of such a one of his servants as he thought fit to bestow it upon. The difference between a *corody* and *pension* seems to be, that a *corody* was allowed towards the maintenance of any of the King's servants in an abbey: A pension is given to one of the King's chaplains, for his better maintenance, till he may be provided of a benefice: And of both these you may read Fitz. Nat. Br. fol. 250. where are set down all the *corodies* and pensions that our abbeys, when they were standing, were obliged to pay to the King. *Corody* is ancient in our laws: And it is mentioned in *Stauf. Prærog.* 44. And by the stat. of *Westm.* 2. c. 25. it is ordained, that an assise shall lie for a *corody*. It is also apparent by 34 & 35 H. 8. cap. 26. that *corodies* belonged sometimes to bishops, and noblemen, from monasteries: And in the *New Terms of Law*, it is said that a *corody* may be due to a common person, by grant from one to another; or of common right to him that is a founder of a religious house, not holden in *Frank Almoin*; for that tenure was a discharge of all *corodies* in itself: By this book it likewise appears, that a *corody* is either certain or uncertain, and may be not only for life or years, but in fee. *Terms de Ley.* 2 Inst. 630. See the *Monasticon Anglicanum*, for the form of a grant of a *corody*.

Corodio Habendo, A writ to exact a *corody* of an abbey or religious house. *Reg. Orig.* 264.

Corona Mala, or **Mala Corona**, The clergy who abused their character, were formerly so called. *Blount*.

Coronare Filium, To make one's son a priest. Anciently, Lords of Manors, whose tenants held by *Villengage*, did prohibit them *coronare filios*, lest such Lords should lose a vassal by their entering into holy orders: For ordination changed their condition, and gave them liberty, to the prejudice of the Lord, who could before claim them as his natives or born servants—*Homo Coronatus* was one who had received the first tonsure, as preparatory to superior orders; and the tonsure was in form of a *corona*, or crown of thorns. *Cowel*.

Coronatoe Eligendo, Is a writ which lies on the death or discharge of any Coroner, directed to the Sheriff out of the Chancery, to call together the freeholders of the county, for the choice of a new coroner; and to certify into the Chancery, both the election and the name of the party elected, and also to give him his oath, &c. *Reg. Orig.* 177. *F. N. B.* 163. There are usually four coroners in a county, in some counties fewer, and in some but one, according as the usage is; and if any of them dieth, or is discharged, then shall issue this writ.

Coronatoe exonerando, Is a writ for the discharge of a coroner, for negligence, or insufficiency in the discharge of his duty: and where coroners are so far engaged in any other public business, that they cannot attend the office; or if they are disabled by old age or disease, to execute it; or have not sufficient lands, &c. they may be discharged by this writ. 2 Inst. 32. 2 Hawk. P. C. 44. But if any such writ be grounded on an untrue suggestion, the coroner may procure a commission from the Chancery to inquire thereof; and if the suggestion be disproved, the King may make a *superfedeas* to the sheriff, that he do not remove the coroner; or if he have removed him, that he suffer him to execute the office. *Reg. Orig.* 177, 178. *F. N. B.* 164.

Coroner, (*Coronator*, a *Corona*) is an ancient officer of this realm. Mention is made of him in King *Askelstan's* charter to *Beverly*, Anno 925: and he is so called, because he deals wholly for the King and Crown.

Herein is to be considered:

I. The Election and Jurisdiction of the Coroner.

II. His Power and Duty, with his Fees for the Execution of his Duty, and his Punishment for the Breach of it.

I. Of the Election and Jurisdiction of the Coroner.

This officer, by the stat. of *Westm.* c. 10. ought to be a sufficient person, that is the wisest and discreetest knight, that best would and might attend upon such an office: and there is a writ in the register, *Nisi sit Miles*, &c. whereby it appears it was good cause to remove a coroner chosen, if he were not a knight, and had not an hundred shillings rent of freehold (now obsolete.) Coroners are to be men of good ability, and have lands in fee in the county where chosen, to answer all people: and if insufficient, the county shall answer for them. 2 Inst. 174. The Lord Chief Justice of the King's Bench, is the *sovereign coroner* of the whole kingdom in person wheresoever he is. 4 Rep. 57. There are also special coroners, within divers liberties, as well as the ordinary officers in every county; as the *Coroner of the Verge*, which is a certain compass about the King's court; who is likewise called *Coroner of the King's House*. *Crompt. Juris.* 102.

The King's Coroner shall execute his office within the Verge. 32 H. 8. c. 20. sec. 7. And some corporations and colleges are licensed by charter to appoint their coroners within their own precincts. 4 Inst. 271. And for what arises on the high sea, we read of coroners appointed by the King or his Admiral. 2 Hale's Hist. P. C. 53. See *Coroner of the King's Household*.

II. Of the Coroners Power, Duty, and Fees, &c.

The office of coroners especially concerns the pleas of the crown; and they are conservators of the peace in the county where generally elected. Their authority is *judicial* and *ministerial*: *Judicial*, where one comes to a violent death, and to take and enter appeals of murder, pronounce judgment upon outlawries, &c. And to inquire of lands and goods, and escapes of murderers, treasure trove, wreck of the sea, deodands, &c. The *Ministerial* power is where the coroners execute the King's writs, on exception to the sheriff, as being party to a suit, kin to either of the parties, on default of the sheriff, &c. 4 Inst. 271. 1 Plowd. 73. And the authority of coroners does not determine by the demise of the King. 2 Inst. 174. Where coroners are empowered to act as judges, as in taking an inquisition of death, or receiving an appeal of felony, &c. The act of one of them is of the same force as if they had all joined; but after one of them has proceeded to act, the act of another of them will be void: And where they are authorized to act only *ministerially*, in the execution of a process directed to them upon the incapacity of the sheriff, their acts are void if they do not all join. 2 Hawk. P. C. 52. Hob. 70. So that coroners as *ministers* must all join; but as *judges*, they may divide. But two coroners ought to be judges in redress; and though one serves to pronounce an outlawry, the entry ought to be in the name of all of them: And so of all processes directed to the coroners. *Stauf. f.* 53. *Jenk. Cent.* 85.

If the sheriff is either plaintiff or defendant, or one of the cognisees, the writ must be directed to the coroner. *Cro. Car.* 300. But the coroner is not the officer of *B. R.* but where the sheriff is improper; not where there is no sheriff; for if the sheriff die, the coroner cannot execute a writ. In case of two coroners, if one is challenged, the other may execute the writ, &c. yet both make but one officer: It is the same of two sheriffs of a city, &c. 1 Salk. 144. A *venire facias* shall go to the coroner, where the sheriff is a party, or the defendant is a servant to the sheriff, &c. but it ought to be on a principal challenge to the favour. *Moor* 470.

On defaults of sheriffs, coroners are to impanel juries, and return issues on juries not appearing, &c. 2 H. 5. cap. 8. As the sheriff in his turn might inquire of all felonies by the common law, saving the death of a man; so the coroner can inquire of no felony but of the death of a person, and that *super visum corporis*. 4 Inst. 271. By *magna charta*, cap. 17. no sheriff, &c. or coroner, shall hold pleas of the crown: But by stat. *Westm.* 1. 3 Ed. 1. c. 10. it is enacted, that coroners shall lawfully attach and present pleas of the crown; and that sheriffs shall have

have counter-rolls with the coroners, as well of appeals, as of inquests, &c.

Coroners, before the stat. *Magna Charta*, might not only receive accusations against offenders, but might try them: But since that statute, they cannot proceed so far; and appeals before them, are removable into *B. R.* &c. by *certiorari*, directed to the coroners and sheriffs, &c. Though process may be awarded by the sheriff and coroner, or the coroner only, in the county-court on appeals, till the exigent, &c. 2 *Hawk. P. C.* 51.

By the statute *de Officio Coronatoris*, 4 *Ed. 1.* The coroner is to go to the place where any person is slain or suddenly dead, and shall by his warrant to the bailiffs, constables, &c. summon a jury out of the four or five neighbouring towns, to make inquiry upon view of the body; and the coroner and jury are to inquire into the manner of killing, and all circumstances that occasioned the party's death, who were present, whether the dead person was known, where he lay the night before, &c. Examine the body if there be any signs of strangling about the neck, or of cords about the members, &c. Also all wounds ought to be viewed, and inquiry made with what weapons, &c. And the coroner may send his warrant for witnesses, and take their examination in writing; and if any appear guilty of the murder, he shall inquire what goods and lands he hath, and then the dead body is to be buried. A coroner may likewise commit the person to prison who is by his inquisition found guilty of the murder; and the witnesses are to be bound by recognisance to appear at the next assizes, &c.

When the jury have brought in their verdict, the coroner is to inroll and return the inquisition, whether it be brought in murder, manslaughter, &c. to the justices of the next gaol delivery of the county, or certify it into *B. R.* where the murderers shall be proceeded against. 2 *Roll. Abr.* 32. Upon an inquisition taken before the coroner, he must put into writing the effect of the evidence given to the jury before him; and bind them to appear, &c. which is to be certified to the court with the inquisition; and neglecting it shall be fined. 1 & 2 *P. & M. cap.* 13. 1 *Lill. Abr.* 327.

The word *Murdravit* is not necessary in a coroner's inquisition; though 'tis in an indictment for killing another person. 1 *Salk.* 377. It is not necessary that the inquisition be taken in the place where the body was viewed. 2 *Hawk.* 48. But a coroner has no authority to take an inquisition of death without a view of the body; and if the inquest be taken by him without such view, it is void. 2 *Lev.* 140.

The coroner may in convenient time take up a dead body that hath been buried, in order to view it; but if it be buried so long that he can discover nothing from the viewing it; or if there be danger of infection, the inquest ought not to be taken by the coroner, but by justices of peace, by the testimony of witnesses; for none can take it on view, but the coroner. *Bro. Coron.* 167, 173. If the body is buried, the town shall be amerced; as it shall be if the body is suffered to lie so long that it stinks. 2 *Danv. Abr.* 209, &c. Where the body hath lain for some time, that it cannot be judged how it came by its death, that must be recorded, that at the coming of the justices of assize, the town where, &c. may be amerced on sight of the coroner's rolls.

A coroner may find any nuisance by which the death of a man happens; and the township shall be amerced on such finding. 1 *Nelf. Abr.* 536. If one is slain in the day, and the murderer escapes, the town where done shall be amerced, and the coroner is to inquire thereof on view of the body. 3 *Hen. 7. c.* 1. A coroner may take an indictment upon view of the body; as also an appeal, within a year after the death of one slain. *Wood's Inst.* 491. But a coroner, *super visum corporis*, cannot make an inquisition of an accessory after the murder; though he may of accessories before the fact. *Meor* 29.

Coroners ought to sit and inquire on the body of every prisoner that dies in prison: They have no jurisdiction within the verge of the King's courts; nor of offences, committed at sea, or between high and low water mark when the tide is in; though they have in arms and creeks of the sea. 3 *Inst.* 134. If a body is drowned, and can-

not be found to be viewed, the inquisition must be taken by justices of peace, on the examination of witnesses, &c. 5 *Rep.* 110.

Where a coroner's inquest is quashed, he must make a new one *super visum corporis*: And a coroner may attend and amend his inquisition in matters of form: But if he misbehaves himself, and a *melius inquirendum* is granted upon it, that inquisition must be taken by the sheriffs or commissioners, upon affidavits, and not *super visum corporis*; because none but a coroner can take inquisition *super visum*, &c. and he is not to be trusted again. 1 *Salk.* 190. 2 *Danv. Abr.* 210.

A coroner's inquisition being final, the coroner ought to hear counsel and evidence on both sides. 2 *Sid.* 90, 101. The coroner must admit evidence, as well against the King's interest, as for it; but it hath been held, that if a person be killed by another, and it is certainly known that he did it, the coroner's jury are to hear the evidence only for the King; and inquire whether the killing were by malice, or without malice, &c. *Per Hale C. J.* Where a coroner would not admit of evidence against the King, to prove a *felo de se* to be *non compos mentis*, his inquisition was set aside; and a new inquisition taken, whereby it was found that the party was *non compos*. 2 *Hale's Hist. P. C.* 60. If there be an inquisition of manslaughter or murder, and also an indictment by the grand jury against one, and he is arraigned, and found Not Guilty on the indictment; here it is necessary to quash the coroner's inquisition, or to arraign the party upon it, and acquit him on that also: For otherwise it stands as a record against him, whereon he may possibly be outlawed. 2 *Hale* 65. And where a person found guilty by the coroner's inquest, pleads, and is acquitted by the petit jury; they must give in who it was that killed the man, which serves as an indictment against that other person, and if they cannot tell who, they may mention some fictitious name. *Ibid.*

As to the Fees due for the Execution of his Office.

By the Stat. 3 *Ed. 1. cap.* 10. Coroners shall demand or take nothing for doing their offices: And by the ancient law of England, none having any office concerning the administration of justice, could take any fee for doing his office; and therefore this statute was only in affirmance of the common law. By 3 *Hen. 7. cap.* 1. upon an inquisition taken on view of the body, the coroner shall have 13 s. 4 d. fee of the goods of the murderer; and if he be gone, out of the amercement of the town for the escape. Though the 1 *H. 8. c.* 7. enacts, that where a person is slain by misadventure, the coroner is to take no fee, on pain of 40 s.

Justices of assize and of peace have power to inquire of and punish extortions of coroners, and also their defaults. *Stat. Ibid.* By the Stat. 25 *Geo. 2. c.* 29. for every inquisition, not taken upon the view of a body dying in gaol, which shall be taken by any coroner in any township or place contributory to the rates directed by Stat. 12 *Geo. 2. c.* 29. the sum of 20 s. and for every mile which he shall travel from the place of his abode, the further sum of 9 d. shall be paid him out of the money arising by the said rates. And that for every inquisition taken upon the view of a body dying in gaol, so much money not exceeding 20 s. shall be paid him as the justices at sessions shall think fit to allow, out of the money arising from the said rates. Provided that over and above the recompence hereby appointed for inquisitions taken as aforesaid, the coroner who shall take an inquisition upon the view of a body slain or murdered, shall have the fee of 13 s. 4 d. payable by Stat. 3 *H. 2.* payable out of the goods of the slayer or murderer, or out of the amercements upon the township, if the slayer or murderer escape. Coroner taking further fees guilty of extortion. Provided, that no coroner of the King's household, and of the verge of the King's palaces, nor any coroner of the Admiralty, nor of the County Palatine of Durham, nor of the city of London and borough of Southwark, or of any of the franchises belonging to the said city, nor any coroner of any city, borough, town, liberty or franchise not contributory to the rates directed by Stat. 12 *G. 2. c.* 29.

or within which such rates have not been usually assessed, shall be intitled to any fee, recompence or benefit given by this act.

With regard to the Punishment of Coroners for Misbehaviour.

If a coroner be remiss in coming to do his office, when he is sent for, &c. he shall be amerced by virtue of the above mentioned statute *De coronatoribus*. 8. P. C. 51. Salk. 377. H. P. C. 170.

If a coroner hath been guilty of any corrupt practice, bribery, &c. in taking the inquisition, *amelius inquirendum* may be awarded for taking a new one by special commissioners, &c. Coroners concealing felonies, &c. are to be fined, and suffer one year's imprisonment. 3 Ed. 1. cap. 9. Also for mismanagement in the coroner, filing the inquisition may be stopped. 1 Mod. 82. A coroner's inquisition is not traversable: If it be found before the coroner *super visum corporis*, that one was *felo de se*, the executors or administrators of the deceased, it is said, cannot traverse it. 3 Inst. 55. But it has been held that the inquest being moved into B. R. by *certiorari*, may be there traversed by the executor or administrator of the deceased. 2 Hawk. 54. And it hath been adjudged, that the inquisition of *felo de se* is traversable; though *sugam fecit* is not. 2 Leo. 152.

If a coroner be convicted of extortion, wilful neglect of duty or misdemeanor in his office, the court before whom he shall be so convicted, may adjudge that he shall be removed from his office.

Coroner of the King's Household, Hath an exempt jurisdiction within the verge, and the coroner of the county cannot intermeddle within it; as the **Coroner of the King's House** may not intermeddle within the county out of the verge. 2 Hawk. 45. If an inquisition be found before the coroner of the county, and the coroner of the verge, where the homicide was committed in the county, and it is so entered and certified, it will be error. 4 Rep. 45. But if a murder be committed within the verge, and the King removes before any indictment taken by the **Coroner of the King's Household**; the coroner of the county, and the **Coroner of the King's House** shall inquire of the fame: And according to Sir Edw. Coke, the coroner of the county might inquire thereof at the common law. 2 Hawk. 45. 2 Inst. 550. If the same person be coroner of the county, and also of the **King's House**, an indictment of death taken before him as coroner, both of the **King's House**, and of the county, is good. 4 Rep. 46. 2 Inst. 134.

By the Stat. 33 H. 8. 12. Par. 1 & 3. It is ordained, That all inquisitions made upon the view of persons slain, within any of the King's palaces or houses, or any other house or houses wherein his Majesty shall happen to be abiding in his royal person, shall be taken by the Coroner for the time being of the King's Household, without any assisting of another coroner of any shire within this realm, by the oaths of twelve or more of the yeoman officers of the King's Household, returned by the two Clerks Controllers, the Clerks of the Checks, and the Clerks Marshal, or one of them, of the said Household, to whom the said Coroner of the Household shall direct his precept; and the said Coroner shall certify under his seal, and the seals of such persons as shall be sworn before him, all such inquisitions before the Master or Lord Steward of the Household; who hath the appointment of such coroner, &c.

Coroner of London. By the charter of King Ed. 4. the mayor and commonalty of London may grant the office of coroner to whom they please; and no other coroner but he that belongs to the city, shall have any power there: Also the Lord Mayor, &c. may chuse two coroners in Southwark. When any one is killed, or comes to an untimely death in London, the coroner upon notice shall attend where the body is, and forthwith cause the beadles of the ward to summon a jury to make the necessary inquiry, how such person came by his death: And after inquisition taken, he shall give a certificate to the churchwarden, clerk, or sexton of the parish, to the intent the corpse may be buried: The coroner's fees here formerly amounted to 25 s. now to above double that sum; unless the friends of the deceased are poor, and then he shall execute his office for nothing. Cit. Lib. 46, 47. The

coroners in London and Middlesex, and in other Cities, &c. may bail felons and prisoners in such manner as hath been heretofore accustomed. 1 & 2 P. & M. c. 13. sect. 6. 1 Lill. Abr. 327. What anciently belonged to coroners, you may read at large in *Bracton*, lib. 3. tract. 2. cap. 5, 6, 7 & 8. *Britton*, cap. 1. and *Fleta*, lib. 1. c. 18.

Corone, (Fr.) All matters of the crown, were heretofore reduced to this law head or title; they are the things that concern treason, felony, and divers other offences, by the common law, and by statute; of which some are greater, and others less, according to their nature. *Sh. p. Epit.* 367.

Corporal Oath, And how it is administered. See *Oath*.

Corporation, (*Corporatio*) Is a body politick or incorporate, so called, as the persons are made into a *body*, and of capacity to take and grant, &c. Or it is an assembly and joining together of many into one fellowship and brotherhood, whereof one is head and chief, and the rest are the body; and this head and body knit together, make the *corporation*: Also it is constituted of several members like unto the natural body, and framed by fiction of law to endure in perpetual succession. And of *corporations* some are *sole*, some *aggregate*; *sole*, when in one single person, as the King, a Bishop, Dean, &c. *Aggregate*, which is the most usual, consisting of many persons, as Mayor and Commonalty, Dean and Chapter, &c. Likewise *corporations* are *spiritual* or *temporal*; *spiritual*, of Bishops, Deans, Archdeacons, Parsons, Vicars, &c. *Temporal*, of Mayors, Commonalty, Bailiffs and Burgeesses, &c. and some *corporations* are of a *mixt nature*, composed of spiritual and temporal persons, such as heads of colleges and hospitals, &c. All *corporations* are said to be *Ecclesiastical*, or *Lay*.

Herein is to be considered:

- I. How they are created.
- II. Their Interest and Jurisdiction.
- III. How far their Acts are binding.
- IV. How they are dissolved.

I. How Corporations are created.

Bodies politick or incorporate may commence and be established three manner of ways, *viz.* by *prescription*, by *letters patent*, or by *act of parliament*; but are most commonly by patent or charter. 1 Inst. 250. 3 Inst. 202. 3 Rep. 73.

In making *aggregate corporations*, there must be, 1. Lawful authority. 2. Proper persons to be incorporated. 3. A name of incorporation. 4. A place, without which no *corporation* can be made. 5. Words sufficient in law to make a *corporation*. 10 Rep. 29, 123. 3 Rep. 73. The words *incorpora*, *funcla*, &c. are not of necessity to be used in making *corporations*; but other words equivalent are sufficient: And of ancient time, the inhabitants of a town were incorporated, when the King granted to them to have *Guillem Mercatoriam*. 2 Danv. Abr. 214. He that gave the first possessions to the *corporation*, is the founder. The parishioners or townsmen of a parish or town; and tenants of a manor, are to some purposes a *corporation*. Co. Lit. 95, 342. If the King grants lands to the inhabitants of B. *hereditibus & successoribus suis*, rendering a rent, for any thing touching these lands, this is a *corporation*; though not to other purposes: But if the King grants lands *inhabitantibus de B.* and they be not incorporated before, if no rent be reserved to the King, the grant is void. 2 Danv. 214. If the King grants *Hominibus de Islington* to be discharged of toll, this is a good *corporation* to this intent; but not to purchase, &c. And by special words the King may make a limited *corporation*, or a *corporation* for a special purpose. *Ibid.*

London is a *corporation* by prescription; but though a *corporation* may be by prescription, it shall be intended that it did originally derive its authority by grant from the King; for the King is the head of the commonwealth, and all the commonwealth, in respect of him, is but one *corporation*; and all other *corporations* are but limbs of the greater body. 1 Lill. Abr. 330. A mayor and commonalty or *corporation*, cannot make another *corporation*, or commonalty. 1 Sid. 290. The city of London cannot make a *corporation*, because that can only be created by the

the crown; but *London*, or any other corporation, may make a fraternity. 1 *Salk.* 193.

No persons shall bear office in any corporation, &c. but such as have received the sacrament of the church, and taken the oaths. *Stat.* 13 *Car.* 2. c. 1. But see the *Stat.* 5 *Geo.* 1. c. 6. confirming officers in corporations. See *By-Laws*.

What persons are capable of being elected members of a corporation, see *Rep. Temp. Hardw. per Annaly*, p. 23.

II. Of the interest and jurisdiction of corporations.

When a corporation is duly created, all incidents, as to purchase and grant, sue and be sued, &c. are tacitly annexed to it; and although no power to make laws is given by a special clause to a corporation, it is included by law in the very act of incorporating. 1 *Inst.* 264. A new charter doth not merge or extinguish any of the ancient privileges of the old charter. And if an ancient corporation is incorporated by a new name, yet their new body shall enjoy all the privileges that the old corporation had. *Raym.* 439. 4 *Rep.* 37. There are usually granted in charters to corporations, divers franchises; as felons goods, waifs, estrays, treasure trove, deodands, courts, and cognizance of pleas, fairs, markets, assize of bread and beer, &c. 4 *Rep.* 65. Actions arising in corporations may be tried in the corporation courts; but if they try actions which arise not within their jurisdictions, and encroach upon the Common law, they shall be punished for it. *Lutw.* 1571, 1572.

There may be a corporation without a head: but where there is a head, all acts ought to be by and to the head; nor can they sue without such head; and if he dies, nothing can be done in the vacancy. 10 *Rep.* 30, 32. 1 *Inst.* 264. If land be given to a mayor and commonalty for their lives, they have an estate by indentment not determinable: so it is, if a feoffment be made of land to a dean and chapter, without mention of successors. In case of a sole corporation, as bishop, dean, parson, &c. no chattel, either in action or possession shall go in succession; but the executors or administrators of the bishop, parson, &c. shall have them: but it is otherwise of a corporation aggregate, as a dean and chapter, mayor and commonalty, and the like: for they in the judgment of law never die. And yet the case of the chamberlain of London differs from all these; his successor, in his own name, may have execution of a recognizance acknowledged to his predecessor for orphanage money; and the reason is, because the corporation of the chamberlain is by custom, which hath enabled the successor to take and have such recognizances, obligations, &c. that are made to his predecessor. *Terms de Ley*.

Though a sole corporation cannot generally take in succession goods and chattels, &c. yet it may take a fee-simple in succession, by the word successors. 1 *Inst.* 8, 9, 46. Aggregate corporations may take not only goods and chattels, but lands in fee-simple, without the word successors, for the reason afore mentioned. 4 *Inst.* 249. And succession in a body politick, is as inheritance in a body private. If a lease for years be made to a bishop and his successors, 'tis said his executors shall have it *in autre droit*; for regularly no chattel can go in succession in case of a sole corporation, no more than if a lease be made to a man and his heirs, it can go to his heirs. 1 *Inst.* 46.

Grants of corporations are to be by deed, under their common seal, and are good without delivery; for the common seal gives perfection to corporation deeds. *Daw.* 44. An obligation sealed with the common seal of a corporation, if the mayor signs it, he is suable if the corporation be dissolved: but if two of the members sign it, the particular persons are not bound by it. 2 *Lev.* 137. *Raym.* 152. A release of a mayor for any sum of money due to the corporation, made in his own name, is not good in law; the corporation must join and do it by their common seal. *Terms de Ley*.

A corporation which hath a head, may make a personal command without writing; but a corporation aggregate without a head cannot. *Lutw.* 1497. A corporation aggregate may employ any one in ordinary services, without deed; though not to appear for them, in any act which concerns their interest or title. 1 *Ventr.* 47, 48.

Such a corporation may appoint a bailiff to take a distress, without deed or warrant. 1 *Salk.* 191. But cannot without deed command a bailiff to enter into lands for a condition broken; for such command without deed is void. *Cro.* 815.

Though a corporation cannot do an act *in pais* without their common seal, they may do an act upon record; and the reason is, because they are stopped by the record to say it is not their act. 1 *Salk.* 192. A promise to a corporation is good without deed. 2 *Lev.* 252. The head of a corporation aggregate may not be charged with the act of his predecessor if it be not by common seal, or for such things as come to the use of the whole body or society. 1 *And.* 23, 196.

A corporation may do an act in that capacity, to one of themselves in his natural capacity; and any member in his natural capacity may perform an act to the corporation in its politic capacity; and so they may sue one another, in their distinct capacities. 1 *Shep. Abr.* 436. Trespas for an assault and battery, &c. will not lie against a corporation; but it must be brought against the persons that do the trespass by their proper names: though if the heads of the corporation trespass on a man in his ground, action of trespass lies against them for this: process of outlawry will not lie against a corporation; nor *capias* or exigent, but distress. 22 *Aff.* 67. 39 *Ed.* 3. 13. 21 *Ed.* 4.

A corporation cannot sue, or appear in person, but by attorney: they cannot commit treason or felony, or be excommunicate, &c. They may not be executors, or administrators, be jointenants, trustees, &c. Nor shall the members of a corporation be regularly witnesses for the corporation. 10 *Rep.* 32. 11 *Rep.* 98. 1 *Inst.* 134. But they may be disfranchised, and then be witnesses; though not surrender by consent. Yet in some cases the judges now admit their testimony without disfranchisement, where the interest is remote. Attachment doth not lie against a corporation. *Raym.* 152.

Corporations may have power not only to infranchise freemen, but to disfranchise a member, and deprive him of his freedom; if he doth any act to the prejudice of the body, or contrary to his oath, &c. Though for conspiring to do any thing contrary to his duty; or for words of contempt against the chief officers, he may not be disfranchised, but he may be committed till he find sureties for his good behaviour. 11 *Rep.* 98. 5 *Mod.* 257. A corporation cannot disfranchise for breach of a by-law. 1 *Lill.* 331. And one wrongfully disfranchised may be restored, and have his remedy by *mandamus*, &c. in *B. R.* An alderman or freeman of a corporation cannot be removed from his freedom or place without good cause, and a custom to remove them *ad libitum* is void, because the party hath a freehold therein. *Cro. Jac.* 540.

A person may be bound to the good behaviour for words spoke against mayors, &c. but he may not be indicted for it: and if justices of a corporation duty to do right, it is a forfeiture of their exemption from the inquiry of the justices of the county. *Mod. Caf.* 125, 164. Head officers of corporations are to redress abuses of merchant-strangers, &c. or the franchise shall be seized, *Stat.* 9 *Eliz.* c. 3. *sect.* 1. and have authority in many cases by statute; for which see *Mayers*.

No strangers shall sell by retail any woollen or linen cloth, or mercery wares, in corporate towns, except at fairs, on pain of forfeiture, &c. But such persons may sell wares by wholesale, and cloth of their own making by retail. 1 *Ed.* 2 *P. & M. cap.* 7. Bodies politick ecclesiastical may make leases for three lives, or twenty-one years, under the restrictions in the acts 1 *Ed.* 13 *Eliz.* &c. If land is given in fee to a dean and chapter, or to a mayor and commonalty, &c. and after such body politick or incorporate is dissolved, the donor shall have the land again, and not the lord by escheat. 1 *Inst.* 31.

The corporation of the city of London is to answer for all particular misdemeanors, which are committed in any of the courts of justice within the city; and for all other general misdemeanors committed within the city: so 'tis conceived of all other corporations. 1 *Lill. Abr.* 329. If a common officer of a town doth any thing for their common

nse, it is reasonable the corporate town should be answerable for it. 1 *Leon.* 215.

III. How far the acts of corporations are binding.

A corporation is properly an investing the people of the place with the local government thereof, and therefore their laws shall be binding to strangers; but a fraternity is some people of a place united together in respect of a mystery and business into a company, and their laws and ordinances cannot bind strangers, for they have not a local power. *Salk.* 193.

No masters and wardens, &c. of any mystery, or other corporation, shall make any by-laws or ordinances in diminution of the King's prerogative, or against the common profit of the people; except the same be approved by the Lord Chancellor, or Chief Justices, &c. on pain of 40*l.*

And such bodies corporate shall not make any acts or ordinances for the restraining persons to sue in the King's courts for remedy, &c. under the like penalty. *Stat.* 19 *Hen.* 7. cap. 7. Ordinances made by corporations, to be observed on pain of imprisonment, or of forfeiture of goods, &c. are contrary to *Magna Charta.* 2 *Inst.* 47, 54.

But penalties may be inflicted by by-laws, which may be recovered by distress or action of debt: and a custom for the Lord Mayor and Aldermen of London, to commit a citizen for not accepting of the livery, &c. was held a good custom, being for the good government of the city. 5 *Mod.* 320.

Corporations may not, by bond, or otherwise, restrain any apprentice, &c. from keeping shop in the corporation under the penalty of 40*l.* *Stat.* 28 *H.* 8. c. 5. In acts done by corporations, the consent of the major part shall be binding, by 33 *H.* 8. cap. 27.

IV. How corporations are dissolved.

A corporation may be dissolved, for it is created upon a trust; and if that be broken 'tis forfeited. 4 *Mod.* 58.

Corporations are dissolved by forfeiture of their charter, misuser, &c. upon the writ *quo warranto* brought; by surrender, or by act of parliament; and if they neglect to choose officers, or make false elections, &c. it is a forfeiture of the corporation. 4 *Rep.* 77.

But by *Stat.* 11 *Geo.* 1. c. 4. No corporation shall be dissolved, for any default to choose a mayor, &c. but the electors are still to proceed to election; and if no election be made, the court of King's Bench shall issue a *mandamus* requiring the electors to choose such mayor, &c.

By 2 *Ann.* c. 20. Where persons intrude into the office of mayor, &c. of a corporation, a *quo warranto* shall be brought against the usurpers, who shall be ousted, and fined: and none are to execute an office in a corporation for more than a year. See further *Black. Com.* 1 *V.* 467, 476, 477, 479, 484. 2 *V.* 430. 3 *V.* 80. 4 *V.* 57, 432. And the *Index to Rep. Temp. Hardw. per Annals.*

With respect to corporations, or communities of old, as observed by *Robertson*, the forming of cities into communities, corporations, or bodies politic, and granting them the privilege of municipal jurisdiction, contributed more than any other cause to introduce regular government, police and arts, and to diffuse them over Europe. *Louis the Great*, in France, to counterbalance his potent vassals, conferred new privileges on the towns situated within his domaine, called *Charters of community*, and formed the inhabitants into corporations, or bodies politic, to be governed by a council and magistrates of their own nomination. About the same period the great cities in Germany began to acquire like immunities; and the practice quickly spread over Europe, and was adopted in Spain, England, Scotland, and all the other feudal kingdoms. See *Hist. Emp. C. V.* 1 *V.* 32, 34, &c.

Corporal Inheritance, In houses, lands, &c. Vide *Inheritance.*

Corpe, *stealing of.* If any one in taking up a dead body steals the shroud, or other apparel, it will be felony. 3 *Inst.* 110. 12 *Rep.* 113. 1 *Hal. P. C.* 515. But stealing the corpe itself, only, is not felony. *Black.*

Com. 4 *V.* 236. But 'tis punishable as a misdemeanor by indictment at Common law.

Corpus Christi Day, Is a feast instituted in the year 1264, in honour of the blessed sacrament: to which also a college in Oxford is dedicated. It is mentioned in the *Stat.* 32 *Hen.* 8. cap. 21.

Corpus cum Causa, Is a writ issuing out of the Chancery, to remove both the body and record, touching the cause of any man lying in execution upon a judgment for debt, into the King's Bench, &c. there to lie till he have satisfied the judgment. *F. N. B.* 251. See *Habeas Corpus.*

Correktor of the Staple, Is a clerk belonging to the staple, that writeth and recordeth the bargains of merchants there made. 27 *Ed.* 3. *stat.* 2. cap. 22 & 23.

Corredium and Conredium, The same with *corrodium*. See *Corody.*

Corruption of Blood, (*corruptio sanguinis*) Is an infection growing to the state of a man, and to his issue; and is where a person is attainted of treason or felony, by means whereof his blood is said to be corrupted, and neither his children, nor any of his blood, can be heirs to him or any other ancestor: also if he is of the nobility, or a gentleman, he and all his posterity by the attainder are rendered base and ignoble: but by pardon of the King, the children born afterwards may inherit the land of their ancestor, purchased at the time of the pardon or after; but so cannot they, who were born before the pardon. *Terms de Ley.*

If a man that hath land in right of his wife hath issue, and his blood is corrupt by attainder of felony, and the King pardons him; in this case, if the wife dies before him, he shall not be tenant by the curtesy, for the corruption of the blood of that issue: though it is otherwise, if he hath issue after the pardon; for then he should be tenant by the curtesy, although the issue which he had before the pardon be not inheritable. 13 *H.* 7. c. 17.

A son attainted of treason or felony in the life of his ancestor, obtains the King's pardon before the death of his ancestor, he shall not be heir to the said ancestor, but the land shall rather escheat to the lord of the fee by the corruption of blood. 26 *Ass.* pl. 32 *H.* 8. But if a man seised of lands hath issue two sons, and the eldest is attainted in the life-time of his father, and after the father dies seised; the youngest son shall inherit the lands as heir unto his father, if the eldest son leaves no issue alive: *Contra*, if he hath issue, which should have inherited but for the attainder; then the land shall escheat. 1 *Inst.* 8, 391. *Dyer* 48. 3 *Inst.* 211.

If the father of a person attainted die seised of an estate of inheritance, during his life, no younger brother can be heir; for the elder brother, though attainted, is still a brother, and no other can be heir to his father, while he is alive; but if he die before the father, the younger brother shall be heir. 2 *Hawk. P. C.* 457.

Corruption of blood from an attainder is so high that it cannot be absolutely saved but by act of parliament; for the King's pardon doth not restore the blood so as to make the person attainted capable either of inheriting others, or being inherited himself by any one born before the pardon. 1 *Inst.* 391, 392. 2 *Hawk.* 458. A statute which saves the corruption of blood, impliedly saves the descent of the land to the heir; and it prevents the corruption of blood so far: also it saves the wife's dower, &c. But nevertheless the land shall be forfeited for the life of the offender. 3 *Inst.* 47. 1 *Hawk.* 107. For counterfeiting the coin or clipping, there is no corruption of blood. *Stat.* 5 *Eliz.* cap. 11. So on attainder of piracy, &c. And in felony by imbezilling the King's ordnance, armour, &c. 22, 23 *Car.* 2. c. 23. And therefore it shall not make any disinheritance of an heir, &c. See *Attainder*. And *Black. Com.* 2 *V.* 251. 4 *V.* 381, 406, 431, 433.

Corselet, (*Fr.* in Lat. *corpuleum*) Signifies a little body: and it is used with us for an armour to cover the body or trunk of a man, wherewith pikemen commonly set in the front and flanks of the battle were formerly armed, for the better resistance of the assaults of the enemy, and the surer guard of the soldiers placed behind, who

were more slightly armed for their speedier advancing to and retreating from fire. 4 & 5 P. & M. c. 2.

Cossepent, (from the Fr. *corps present*) Is a word signifying a mortuary: and the reason why it was thus termin'd seems to be, that where a mortuary became due on the death of any man, the best or second best was, according to custom, offered or presented to the priest, and carried with the *corps*.—Ego Brianus de Brompton, &c. *Volo corpus meum sepeliri in prioratu majoris Malverniae inter predecessores meos, & cum corpore meo Palefridum meum cum hernefo & equum summarium, cum lesto meo, &c.* In Cusack MS. penes Gul. Dugdale, Mil. See Stat. 21 H. 8. c. 6. *Mortuary*. And Black. Com. 2 P. 425.

Corsued Bread, (*panis conjuratus*) Ordeal bread: it was a kind of superstitious trial used among the Saxons, to purge themselves of any accusation, by taking a piece of barley bread, and eating it with solemn oaths and execrations, that it might prove *poison*, or their last morsel, if what they asserted or denied were not punctually true. These pieces of bread were first execrated by the priest, and then offered to the suspected guilty person to be swallowed by way of purgation: for they believed a person, if guilty, could not swallow a morsel so accursed; or if he did, it would choke him. The form was thus: *We beseech thee, O Lord, that he who is guilty of this theft, when the execrated bread is offered to him in order to discover the truth, that his jaws may be shut, his throat so narrow that he may not swallow, and that he may cast it out of his mouth, and not eat it.* Du Cange. The old form, or *exorcismus panis herdeae vel casei ad probationem veri*, is extant in Lindenbrogius, pag. 107. And in the laws of King Canute cap. 6.—*Si quis altari ministrantium accusatur, & amicis destitutus sit, cum sacramentalibus non habeat, vadat ad iudicium quod Anglice dicitur corsued, & fiat sicut Deus velit, nisi super sanctum corpus Domini permittatur ut se purget*: from which it is conjectured, that *corsued bread* was originally the very sacramental bread, consecrated and devoted by the priest, and received with solemn abjuration, and devout expectance that it would prove mortal to those who dared to swallow it with a lie in their mouths; till at length the bishops and clergy were afraid to prostitute the communion bread to such rash and conceited uses, when to indulge the people in the superstitious fancies, and idle customs, they allowed them to practise the same judicial rite, in eating some other morsels of bread, blest or curs'd to the like uses.

It is recorded of the perfidious Godwin Earl of Kent, in the time of King Edward the Confessor, that on his abjuring the murder of the King's brother, by this way of trial, as a just judgment of his solemn perjury, the bread stuck in his throat, and choked him.—*Cum Godwinus comes in mensa regis de nece sui fratris impetretur, ille post multa sacramenta, tandem per buccellam deglutendam abjuravit, & buccella gustata continuo suffocatus interiit.*—Ingulph. This, with other barbarous ways of purgation, was by degrees abolished: though we have still some remembrance of this superstitious custom in our usual phrases of abjuration; as, *I will take the sacrament upon it*;—*May this bread be my poison*;—or, *May this bit be my last*, &c.

Cortis, (*curtis*) A court or yard before a house. Blount.

Cortilatum, (*curtilagium*) Is also a yard adjoining to a country farm. Cartul. Glaston. MS. f. 42.

Corus, A certain corn-measure heaped up, from the Hebr. *cora*, a *bill*: eight bushels of wheat in a heap, making a quarter, are of the shape of a little hill; and probably a *corus* of wheat was eight bushels; for we read in Braithon, *Decem coros tritici five decem quarteria*. Braith. lib. 2. c. 6.

Cordus, An ancient word for custom or tribute. Mon. Angl. tom. 1. p. 562.

Cosenage, (Fr. *cousinage*, i. e. kindred, cousinship) Is used for a writ that lies where the *tresail*, that is, the father of the *besail*, or great grandfather, being seised of lands and tenements in fee at his death, and a stranger enters upon the heir and abates; then shall his heir have his writ of *cosenage*. Brit. c. 89. F. N. B. 221. A man shall not have a writ of *cosenage* of the seisin of his great grandfather, but shall be put to his writ of *besail*:

and if a person may have a writ of *aiel*, he shall not bring a writ of *cosenage*. Also on the death of an uncle, writ of *cosenage* doth not lie, because *assise of mort d'ancestor* may be had of his seisin: and *cosenage* lies not between privies in blood, no more than *assise of mort d'ancestor*, but the party must bring *nuper obiit*. New Nat. Br. 492. In writs of *cosenage*, *aiel* and *besail*, the tenant's answer that the plaintiff is not next heir, of the same ancestor by whose death he demandeth his lands, shall be admitted and inquired; and according to the same inquisition, the justices shall proceed to judgment. Stat. 13 Ed. 3. c. 20. See *Booth on Real Actions*. But now ejectments are generally used.

Cosening, Is an offence where any thing is done deceitfully, whether belonging to contracts or not, which cannot be properly termed by any special name. West Symb. pag. 2. sect. 68.

Coshering. As there were many privileges inherent by right and custom, allowed in the feudal laws; so were there several grievous exactions imposed by the lords on their tenants, by a sort of prerogative or seigniorial authority, as to lie and feast themselves and their followers at their tenants houses, &c. which were called *coshering*. Spelm. of Parliaments. MS.

Cosinus, A word mentioned by Blount for clean.

Costard, Apple, whence *costard-monger*, i. e. Seller of apples. Cartular. Abbat. Rading. MS. fol. 916.

Costera, Coast, sea-coast. — Richardum T. ad custodiam costeræ maris in com. Essex, per literas nostras patentes assignavimus, &c.—Memor. in Scaccar. Pasch. 24 Ed. 1.

Costs, Are *expense litis*, recovered by the plaintiff in a suit, together with his damages: and if the plaintiff be nonsuit or overthrown by lawful trial in any action, the defendant shall have costs. 4 Jac. 1. c. 3. Also putting off trials, insufficient pleas, &c. on their amendment, are liable to costs: but it has been held costs ought not to be paid for the putting off a trial, where no fault was in the party against whom it is moved; for costs are only to be paid by such persons which by their occasion have caused the other party to have been at extraordinary charges: and no costs shall be allowed for unreasonable motions, but only for such as the party was necessarily put unto. 1 Lill. Abr. 335, 337. The Common law doth not give costs in any case; but they are given by statute. See Stat. of Gloucester, 6 Ed. 1. c. 1.

For the defendant on a writ of error, brought to delay execution, if judgment be affirmed, costs are allowed. 3 Hen. 7. c. 10. So in actions of waste; debt upon the statute for tithes; in all suits by *scire facias*, for malicious trespasses, &c. 13 Car. 2. cap. 2. And by some statutes double and treble costs, and damages, are given: but in personal actions, actions of trespass, assault and battery, actions on the case for words, &c. if the debt or damage amount not to 40s. or the judge do not certify that the battery was sufficiently proved, &c. no more costs shall be allowed than damages. 43 Eliz. c. 6. 21 Jac. 1. c. 16. 22 & 23 Car. 2. c. 9. s. 136. Where several are made defendants in action of trespass, assault, &c. and one or more is acquitted, all of them shall have costs; unless the judge certify there was reasonable cause for making them defendants. 8 & 9 W. 3. cap. 11.

In an action of trespass removed out of an inferior court into B. R. by *habeas corpus*, the plaintiff shall have full costs, though the damages are under 40s. And so it has been held in action of the case for words, where special damage is received, &c. 1 Ld. Raym. 395. 2 Ld. Raym. 1588. On a judgment on demurrer upon a plea in abatement, costs are not allowed; they are given only where the merits of the cause are determined on the demurrer. Ibid. 992. No costs shall be allowed the defendant where the suit is commenced for the use of the King. 24 H. 8. cap. 8. And costs are not awarded against executors or administrators. Ibid. Nor for or against one that sues *in forma pauperis*. Though it has been adjudged that the King shall pay costs for an amendment; but *contra* for not going to trial, &c. 1 Salt. 193. And if executors bring an action in their own right, as for conversion or trespass, &c. in their own time, and a verdict pass against them, they shall pay costs. 2 Danv. Abr. 224.

Also if a plaintiff, being admitted *in forma pauperis*, be afterwards nonsuited, the usual course is to tax *costs*, and if not paid, to punish the plaintiff by whipping; but it is in the discretion of the court to spare both. 2 *Sid.* 261. Where a *pauper* plaintiff has a decree to recover with *costs*; he shall be allowed no more than he is out of pocket. *Præced. Canc.* 219. *Sed qu.*? An executor, defendant in equity pays no *costs*. *Abr. Cas. Eq.* 125.

An heir at law, suing for the family estate, where he shall not pay *costs*, see 1 *Peer Williams* 482. If a sum certain is given to a stranger by statute, as where 'tis given to the prosecutor, he shall have no *costs*, as he had no right of action till he commenced it; so in popular actions, whether the penalty is certain or not, there shall be no *costs*. 1 *Salk.* 206. 1 *Lutw.* 201. Where *costs* are allowed, it is not necessary that the jury should give the *costs*; but they may leave it to the court to do it, who are best able to judge of what *costs* are fitting to be given. 23 *Car. B. R.*

It is the course of the court of B. R. to refer the taxing of the *costs* to the secondary of the office, and not to make any special rules for such matters; except it be in extraordinary cases. 1 *Lill. Abr.* 338. Attachment lies where *costs* are refused payment: and where a plaintiff is nonsuited, action of debt may be brought for the *costs*; also the defendant may have a *capias ad satisfaciendum* against him. 1 *Nelf. Abr.* 550. Where *costs* are given after a verdict, the court will stop proceeding in the same court till they are paid, on motion made: but when *costs* are given for not going on to trial, a party may proceed, tho' they are not paid. *Sid.* 279. *Sed. qu.* if on a motion, the court would not stop proceedings till *costs* paid?

The awarding of *costs* (in equity) is always discretionary in the court: and in case of a great fraud, a person may be obliged to pay such *costs* as shall be ascertained by the injured party's oath. 2 *Vern.* 123. Where damages were before recoverable, and a statute increases them to double or treble the value, the plaintiff shall recover his double or treble damages; and *costs* also, as parcel of the damages, shall be trebled. 10 *Co.* 116. a. 2 *Inst.* 289. *Hard.* 152. *Carth.* 297.

But where a new statute gives either single, double or treble damages, where there were no damages recoverable before, there no *costs* shall be allowed, because the party can have nothing more than such new statute has already given, and that is damages only; for the statute of Gloucester cannot operate to add *costs* to what is given by a subsequent statute; because the new statute must be construed from itself, which gives damages only. 2 *Inst.* 285. 1 *Salk.* 205. *Carth.* 297. See *Damages*, &c. And see the Table to the Statutes at Large, 4th edition, in what cases double and treble *costs* are given. Also see a small octavo volume relating to *costs*, lately published by Mr. Serjeant Sayer, containing the general law of *costs*, with cases on all the statutes, very useful for practitioners, &c.

N. B. *Costs* are given on informations for not going to trial. *The King v. James, Rep. Temp. Hardw. per Annals*, fo. 159. Statutes which give *costs* are to be taken strictly. *Ibid. The King v. The Inhabitants of Glastonby*, 357. Where a cause of action arises in the time of an executor, he is liable for *costs* (as plaintiff); but where he is obliged to name himself executor, he is not bound to pay *costs*. *Ibid. Harris and Ux' v. Hanna*, fo. 204, 205. There shall be no more *costs* than damages, where the judge certifies on *Stat.* 43 *Eliz.* c. 6. *Walker v. Robinson. Wilf. par. 1. fo. 93.* 2 *Stra.* 1232. S. C. See *Wilf. par. 2.* 258.

Costs shall follow the verdict upon a trial by consent, or on a feigned issue. *Rex v. Phillips. Wilf. par. 1. fo. 261.* *Herbert v. Williamson. Id.* 324. *Costs* to be allowed when a cause goes off and remains untied for want of jurors. *Sparrow v. Turner, C. B. Wilf. par. 2. fo. 366.* See *Index to Wilf. Rep.*

Costs are allowed in Chancery, for failing to make answer to a bill exhibited; or making an insufficient answer: and if a first answer be certified by a master to be insufficient, the defendant is to pay 40s. *costs*; 3l. for a second insufficient answer; 4l. for a third, &c. But if the answer be reported good, the plaintiff shall pay the

defendant 40s. *costs*. An answer is not to be filed, (till when, it is not reputed an answer) until *costs* for contempt in not answering are paid. *Præf. Attorn.* 1 edit. pag. 210, 212. If a plaintiff in Chancery dismisses his bill, or the defendant; or if a decree be obtained for the defendant, *costs* are allowed by *Stat.* 4 & 5 *Ann.* c. 16.

Cot. In the old Saxon signifies cottage, and so is still used in many parts of England.

Cotarius, A cottager: the *cotarii*, or cottagers, are mentioned in *Domesday*.

Cote and *Cot.* The names of places which begin or end with these words or syllables, have the signification of a little house or cottage: there are likewise *dove-cotes*, which are small houses or places for the keeping of doves or pigeons. *Game Law*, 2 *par. fol.* 133, 135. See *Pigeon-House*.

Cotellus, *Cotetia*, Both signify a small cottage, house or homestead. *Cowel.*

Coterellus. *Cotarius* and *coterellus*, according to *Spelman* and *Du Fresne*, are servile tenants: but in *Domesday* and other ancient MSS. there appears a distinction as well in their tenure and quality, as in their name. For the *cotarius* had a free socage-tenure, and paid a stated firm or rent in provisions or money, with some occasional customary services; whereas the *coterellus* seems to have held in mere villenage, and his person, issue and goods, were disposable at the pleasure of the lord.—*Edmund* Earl of Cornwall, gave to the *bon-hommes* of *Asherugge*, his manor of *Chesterton* and *Ambrosden*—*una cum villanis, coterellis, eorum catallis, serviciis, scetis, & omnibus suis ubicunque pertinentibus*. *Paroch. Antiq.* 310.

Coteswold, Is used for sheep cotes and sheep feeding on hills: from the Sax. *cote* and *wold*, a place where there is no wood.

Cotgare, A kind of refuse wool, so clung or clotted together, that it cannot be pulled asunder. By *Stat.* 13 *R. 2. cap. 9.* It is provided, that neither denizen nor foreigner shall make any other refuse of wools but *cotgare* and *willen*.

Cotland and *Cotsethland*, Land held by a cottager, whether in socage or villenage.—*Dimidia acra terra jacet ibidem inter cotland, quam Johannis Goldering tenet, ex una parte, & cotland quam Thomas Webb tenet ex altera*. *Paroch. Antiq.* 532.

Cotsethla, *Cotsetle*, The little seat or mansion belonging to a small farm. — *Ego Thomas de C. dedi Deo & ecclesie Malmibury unam Cotsetle in Culern, cum omnibus pertinentiis*. *Cartular. Malmibur. MS.*

Cotsethus, A cottage-holder, who, by servile tenure, was bound to work for the lord. *Cowel.* *Cotseti* are the meanest sort of men, now termed cottagers, And *cotseti* are those who live in cottages.—*Villani vero vel cotiet, vel perdingi, vel qui sunt hujusmodi viles, vel inopes personæ, non sunt inter legum judices numerandi*. *Leg. Hen. 1. c. 30.*

Cottage, (*cotagium*) Is properly a little house for habitation, without lands belonging to it. *Stat.* 4 *Ed. 1.* But by a later statute, the 31 *El. cap. 7.* No man may build a cottage, unless he lay four acres of land thereto; except it be in market-towns or cities, or within a mile of the sea, or for the habitation of labourers in mines, sailors, foresters, shepherds, &c. and cottages erected by order of justices of peace, &c. for poor impotent people, are excepted out of the statute. The four acres of land to make it a cottage within this law, are to be freehold, and land of inheritance: and four acres of ground holden by copy, or for life or lives, or for any number of years, will not be sufficient to make it a lawful cottage. 2 *Inst.* 737. Also the four acres in fee-simple, or fee-tail, must lie near the cottage, and be occupied therewith, so long as the cottage shall be inhabited. 2 *Roll. Abr.* 159.

But this statute doth not extend to houses that are copyhold. 1 *Bull.* 50. The penalty of erecting cottages contrary to the statute, is 10l. for every erection, and 40s. a month for the continuance of it; which is inquirable in the leet, or the offenders may be punished by indictment at the quarter-sessions of the peace, &c. And no owner or occupier of any cottage shall suffer any inmates, or more families than one to inhabit therein, on pain to forfeit to the lord of the leet 10s. a month: but in

in cottages built for the poor, more families than one may be placed.

Cottages are oftentimes erected on the waste at the charge of parishes, for poor impotent persons, by the churchwardens and overseers of the poor, having obtained leave of the lord of the manor in writing under hand and seal; but then it must be confirmed by the justices in sessions. *Mod. Just.* 152. Cottagers of new erected cottages within the memory of man, ought not to have common in the lord's waste, though they have four acres of land laid to them. *Wood's Inst.* 445. Every cottager, &c. is obliged to work towards the repairs of the highways, or to hire an able labourer to work on the days appointed by the statute, on pain of forfeiting 1s. 6d. per day. *Stat.* 22 Car. 2. But see 7 Geo. 3. c. 42. And title *Highways*.

Cotton Library, For better settling and preserving the library kept in the house at Westminster, called Cotton-house, in the name and family of the Cottons for the benefit of the publick, a statute was made 12 W. 3. c. 7. See *Stat.* 5 Ann. c. 30. & 26 Geo. 2. c. 22.

Cottons. Not within 27 Hen. 8. concerning the true making of cloth, 27 H. 8. c. 12. f. 3. See the *Table to the Statutes*, title *Cottons*.

Cotuca, Coat armour. *Ad arma profiliunt & milites quidem super armatura cotucas induerant, vocat.* *Quartelois.* *Walsing.* 114.

Cotuchans, Boors or husbandmen, of which mention is made in *Domesday*.

Coucher, or **Courther**, Signifies a factor that continues abroad in some place or country for traffick; as formerly in *Gascoign*, for buying of wines. *Stat.* 37 Ed. 3. c. 16. This word is also used for the general book wherein any corporation, &c. register their particular acts. 3 & 4 Ed. 6. c. 10.

Covenable, (Fr. *covenable*, Lat. *rationabilis*) Is what is convenient or suitable.—Every of the same three sorts of goods, &c. shall be good and covenable, as in old time hath been used. *Stat.* 31 Ed. 3. cap. 2. Covenably indowed, that is, indowed as is fitting. 4 H. 8. c. 12. See *Plowd.* 472.

Covenant, (*conventio*) Is the consent and agreement of two or more persons to do or not to do some act or thing, contracted between them. Also it is the declaration the parties make, that they will stand to such agreement, relating to lands or other things; and is created by deed in writing, sealed and executed by the parties, or otherwise it may be implied in the contract as incident thereto. 2 *Mod. Entr.* 91. And if the persons do not perform their covenants, a writ or action of covenant is the remedy to recover damages for the breach of them. *Ibid.*

Under this head is to be considered,

- I. The several kinds of covenants, and by what words they are created.
- II. What covenants are good and binding, and by whom they may be made.
- III. Who shall take advantage of covenants, and who are bound by them.
- IV. What shall be a performance, and what a breach of covenant.

- I. Of the several kinds of covenants, and by what words they are created.

A covenant is generally either in fact or in law: in fact is that which is expressly agreed between the parties, and inserted in the deed; and in law, is that covenant which the law intends and implies, though it be not expressed in words; as if a lessor demise and grant to his lessee a house or lands, &c. for a certain term, the law will intend a covenant on the lessor's part, that the lessee shall, during the term, quietly enjoy the same against all incumbrances. 1 *Inst.* 384.

There is also a covenant real, and covenant personal: a real covenant is that whereby a man ties himself to pass a thing real, as lands or tenements; or to levy a fine of lands, &c. And covenant personal, is where the same is annexed to the person and merely personal; as if a person

covenants with another by deed to build him a house, or to serve him, &c. *F. N. B.* 145. 5 *Rep.* 10.

Covenants are likewise inherent, that tend to the support of the land or thing granted; or are collateral to it; and are affirmative, where somewhat is to be performed; or negative; executed, of what is already done, or executory: but a covenant being to bind a man, to do something in futuro, is for the most part executory. 1 *Vent.* 176. *Dyer* 112, 271. And where a covenant shall be construed dependent upon another, and when distinct by itself, see *Winch* 74. 3 *Cro.* 107.

As to the words by which covenant may be created.

'Tis held in all cases where words that begin any sentence are conditional, and give another remedy, they shall not be construed a covenant; and yet if words of condition and covenant are coupled together in the same sentence, as *Provided always, and it is covenanted, &c.* in that case they may be adjudged both a condition and covenant. *March* 103.

The law does not seem to have appropriated any set form of words, which are absolutely necessary to be made use of in creating a covenant; and therefore it seems that any words will be effectual for that purpose, which shew the parties concurrence to the performance of a future act; as if lessee for years covenants to repair, &c. *Provided always, and it is agreed, that the lessor shall find great timber, &c.* this makes a covenant on the part of the lessor to find great timber, by the word *agreed*, and it shall not be a qualification of the covenant of the lessee. 1 *New Abr.* 527.

There is this difference however between a covenant and condition; a condition gives entry, and covenant gives an action only. *Owen* 54. A person cannot have action of covenant upon a verbal agreement, for it cannot be grounded without writing, except by special custom. *F. N. B.* 145.

II. What covenants are good and binding, and by whom they may be made.

All covenants between persons must be to do what is lawful, or they will not be binding; and if the thing to be done be impossible, the covenant is void. *Dyer* 112. But where the thing is lawful at the time of the covenant made, and afterwards the matter agreed to be done is prohibited by act of parliament, yet such covenant will be binding. 3 *Mod.* 39. And if a man covenants to do a thing before a certain time; and it becomes impossible by the act of God, this shall not excuse him, inasmuch as he hath bound himself precisely to do it. 2 *Danv. Abr.* 84.

If a person covenants expressly to repair a house, and it is burnt down by lightning, or any other accident, yet he ought to repair it; for it was in his power to have provided against it by his contract. *Allyn* 26, 27. 1 *Lill. Abr.* 149. But he is not so bound by covenant in law. Where houses are blown down by tempest, the law excuses the lessee in action of waste; though in a covenant to repair and uphold, it will not. 1 *Plowd.* 29. If a lessee for years, rendering rent, covenants for him and his assigns to repair the house, and after the lessee assigns over the term, and the lessor accepts the rent from the assignee, and then the covenant is broken; notwithstanding acceptance of rent from the assignee, action of covenant lies against the first lessee, on his express covenant to repair: and this personal covenant cannot be transferred by the acceptance of the rent. 2 *Danv. Abr.* 240.

Action of covenant also lies on covenant for payment of rent against such lessee; but not action of debt after acceptance. 3 *Rep.* 24. In covenant upon a demise, rendering rent, the defendant cannot say, that part of it was to be allowed; for this is a covenant against a covenant. *Comb.* 21.

An infant within age may bind himself apprentice; but neither at Common law nor by statute may be bound by covenant for his apprenticeship, so as to make him liable to an action of covenant, if he depart, &c. By the custom of London he may bind himself by his covenant at fourteen years old. 1 *Cro.* 129. *Winch* 63.

III. Who shall take advantage of covenants, and who are bound by them.

There may be an agreement and covenant, only to be performed by the parties themselves; and there are some covenants which none but the party and his heirs may take advantage of, being such as concern the inheritance, and descend to the heir; as knit to the estate: Covenants in gross go to the executors, &c. 1 Roll. Abr. 520. 2 Danv. 235. Not only parties to deeds, but their executors and administrators, shall take advantage of inherent covenants, though not named; and every assignee of the land may have the benefit of such covenants: Likewise executors and assigns are bound by them, although not named, as a covenant to repair, &c. 5 Rep. 16, 17. 1 Cro. 552. If a man covenants with another to do any thing, his heir shall not be bound, unless he be expressly named: And yet where a lessee covenants to repair, the heir shall have the benefit of the covenant, though not named, because it runs with the land. 2 Lev. 92. 5 Rep. 8.

The grantee of reversion may bring action of covenant against a lessee, as well in the county where the demise was made, as in the county where the lands lie. Cartbaw 183. And grantees of reversions have the like remedy by action of covenant against termors, as the lessors and their heirs, &c. by Stat. 32 H. 8. c. 28. A person covenants with another, to pay him money at a time to come, and doth not say to his executors, &c. if the covenantee die before the day, yet his executors or administrators shall have the money. Dyer 112, 257. And in every case where the testator is bound by a covenant, the executor shall be bound by it; if it be not determined by his death. 48 Ed. 3. 2. 2 Danv. 232. Assignees shall not have an action upon breach of any covenant, before their time. Cro. Eliz. 863. An assignee shall be charged in a writ of covenant for breach, after the death of the first lessee; as it is a charge on the land, i. e. in case of repairs. 2 Danv. 238.

If A. seised of land in fee, conveys it to B. and covenants with B. his heirs and assigns, to make any other assurance upon request; and after B. conveys it to C. who conveys it to D. and then D. requires A. to make another assurance, according to the covenant; if he refuses, D. shall have action of covenant against him, as assignee to B. Ibid. 236. A lessor made a lease of an house for years, excepting two rooms, and free passage to them; the lessee assigned the term, and the lessor brought covenant against the assignee for disturbing him in his passage to those rooms; and adjudged that the action lies: For the covenant goes with the tenement, and binds the assignee. (N. B. This relates to the passage.) 1 Salk. 196. If a man who leases for years, ousts the lessee, he shall have covenant against him. 48 Ed. 3. 2. But if, where a person leases lands for years, a stranger enters before the lessee, such lessee shall not have an action of covenant upon this ouster, because he was never a lessee in privity to have the action. 2 Danv. 234. A man grants a watercourse, and afterwards stops it; for this voluntary misfeasance, covenant lies. 1 Saund. 322. Though where the use of a thing is demised, and it runs to decay, so that the lessee cannot have the benefit of it, for this nonfeasance no action of covenant lieth: Nor may covenant be brought for a thing which was not in esse at the making of the lease. 2 Danv. 233.

If one makes a lease for years, reserving a rent, action of covenant lies for non-payment of the rent; for the redendum of the rent is an agreement for payment of it, which will make a covenant. Ibid. 230. A lease is made to two, and one seals the deed, but the other doth not; if he accepts the estate and occupies the land, he is bound to perform the covenants for payment of the rent, reparations, and the like. 1 Shep. Abr. 458. Where there is an agreement under hand and seal, action of covenant may be brought on it: and if a man is party to a deed, his agreement to pay amounts to a covenant, tho' formal words are wanting. 2 Mod. 91, 269. Action of covenant lies on a deed indented, or poll: also on a bond, it proving an agreement. 2 Danv. 228. 1 Lill. Abr. 346. And if one man covenants to pay another 20 l. at a day; although he may have action of debt for the 20 l. yet 'tis

said he may have a writ of covenant at his election. 2 Danv. 229.

It is agreed that A. B. shall pay to C. D. 100 l. for lands in E. this is a mutual covenant, whereon action of covenant may be brought if C. D. will not convey. 1 Sid. 423. But where there are mutual covenants, and the one not to be performed before a precedent covenant, in such case the covenant is not suable till the other is performed: Though if the covenants are distinct and mutual, several actions may be brought by and against the parties. 1 Lill. Abr. 350. 2 Mod. 74. In a covenant to pay another so much money, he making him an estate in such land, &c. It has been adjudged, that if he tender the covenantor a feoffment, and offer to make livery, he may have action of covenant for the money, as if he had made a title. 3 Salk. 107. If a person covenants that he hath good right to grant, &c. and he hath no right, it is a breach of covenant, for which action of covenant lies. 2 Bul. 12. Where a man covenants that he hath power to grant, and that the grantee, shall quietly enjoy notwithstanding any claiming under him; these are distinct covenants, for one goes to the title, and the other to the possession. 1 Mod. 101. A covenant for the lessee to enjoy against all men; this extends not to tortious acts and entries, &c. for which the lessee hath his proper remedy against the aggressors. Vaugh. 111, 120.

Where there is a covenant to save harmless against a certain person, there the covenantor must save the covenantee harmless against the entry of that person, be it by wrong or rightful title: But if it be to save harmless against all persons, the entry and eviction must be by lawful title. Cro. Eliz. 213. Covenant that lands shall continue of such a value notwithstanding any act done, or to be done, extendeth only to the time of the covenant made; and 'tis said cannot extend as well to that time, as to the time future. Ibid. 43, 479. 1 Lill. 352. Where the covenant is to do a thing, and no time appointed for it, it must be done in convenient time: If it be inserted in a deed among other covenants, that the lessee shall repair, provided the lessor allows timber, &c. this will be a good covenant on both sides. 2 And. 73. Dyer 57, 150. Hob. 28.

But a covenant must wait upon and join with the grant; so that if it be to make such assurance as shall be reasonably devised, it must be of an assurance that differs not from the bargain: and when the estate to which a covenant is annexed is at an end, the covenant is gone. Hob. 276. 1 Leon. 179. In an indenture, the word covenant, is a word both of lessor and lessee; and therefore if the lessee covenants to pay the rent, this is a reservation. Tho' when there is a covenant for a lessee to repair, and he makes an under-lease to one who is in possession, the under lessee is not liable to that covenant, in law or equity. 1 Roll. Rep. 80. 1 Vern. 87.

An express covenant in a deed, will qualify the general covenant of law: though on a covenant in law, the lessee cannot charge the executors or administrators of the lessor; as he may upon an express covenant for quiet enjoyment. Dyer 257. See 4 Rep. 80. If a lessor covenant with the lessee that he shall have housebote, &c. by assignment of his bailiff, this is a good covenant; and yet it doth not restrain the power that the lessee hath by law to take those things without assignment: But if a lessee covenants, that he will not cut any timber, without the leave or assignment of the lessor; by this he will be restrained. Dyer 19, 115. A man makes a lease, wherein are divers covenants to be performed by the lessee; and after the lessee doth covenant that if any of the covenants are broken, the lessor shall enter upon the land demised, and hold it till the lessee make him amends, &c. it is good, and the lessor may take advantage thereof. Fitz. Cov. 3.

IV. What shall be a performance, and what a breach of covenants.

Not any duty or cause of action arises on a covenant, till it is broken: and as to breaches of covenant, if a person by his own act disables himself to perform a covenant, it is a breach thereof. 5 Rep. 21. Though there can be no covenant or breach, where a lease, &c. is void. Telv. 18, 19. But here although when a covenant concerns the

the interest of the lease, as where 'tis for paying rent; it is void, if the lease be so: yet where covenants are collateral to the lease and interest, though that be void; the covenants may be good. *Owen* 136. And if a covenant to do a thing is performed in substance, and according to the intent, it is good, though it differs from the words; and on the other hand, although the covenantor performs the letter of his covenant, if he does any act to defeat the intent and use of it, he is guilty of a breach. *Mod. Ent. Engl.*

In covenant that a person shall hold land free from all incumbrances, and be kept indemnified from arrears of rent; there, till an action is brought, or distress made, he is not damnified: and a suit in Chancery is no breach in such case; but where a jointure, or dower is recovered, it is. *Skin.* 397. *Moor* 859. *Palm.* 339. If covenants perpetual are once broken, and an action is brought, and recovery thereon; upon a new breach, a *scire facias* shall be had on that judgment, and the plaintiff need not bring a new writ of covenant. *Cro. Eliz.* 5. When the intention of the parties can be collected out of a deed for the doing, or not doing of the thing, covenant shall be had thereupon. *Chanc. Rep.* 294. A covenant being one part of a deed, is subject to the general rules of exposition of all parts of the deed: And in a covenant the last words, that are general, shall be expounded by the first words, which are special and particular. *Vent.* 218. Also a later covenant cannot be pleaded in bar to a former.

When a covenant is to two persons jointly, one of them may not bring action of covenant, or plead alone, but both must join. *1 Nelf.* 558. If a man is bound to perform all the covenants in an indenture, and they are all in the affirmative, he may plead performance generally. *Co. Lit.* 303. Covenants in the negative must be pleaded specially. *Ibid.* 330. When some covenants are in the negative, and some in the affirmative, the defendant is to plead specially to the negative covenants, that he had not done the thing, and performance generally as to the affirmative: (*sed. qu. and vide post.*) And where the negative covenants are against law, and the affirmative agreeable to law, performance generally may be pleaded. *Moor* 856. If any of the covenants are in the disjunctive, so that 'tis in the election of the covenantor to perform the one, or the other, the performance ought to be specially pleaded, that it may appear what part hath been performed. *Cro. Eliz.* 23. *1 Nelf.* 573. And commonly where an act is to be done, according to a covenant, he who pleads performance ought to do it specially. *1 Leon.* 136.

In debt upon bond for performance of covenants, one whereof for peaceable enjoyment, and free from all incumbrances, and another for farther assurance, &c. the defendant should plead specially, that the house was free from incumbrances at the time of the conveyance made, and not charged at any time since, and that no farther assurance had been required, or such an assurance which he had executed, &c. yet where a defendant pleaded generally, in this case it was held good. *1 Lutw.* 603.

Covenants are generally taken most strongly against the covenantor, and for the covenantee. *Plowd.* 287. But it is a rule in law, that where one thing may have several intendments, it shall be construed in the most favourable manner for the covenantor. *1 Lut.* 490. The common use of covenants is for assuring of land; quiet enjoyment free from incumbrances; for payment of rent reserved; and concerning repairs, &c. And in deeds of covenant, sometimes a clause for performance with a penalty, is inserted in the body of the deed: Other times, and more frequently bonds for performance, with a sufficient penalty, are given separate; which last being sued, the jury must find the penalty; but on covenant, only the damages. *Wood's Inst.* 250.

Covenant for non-payment of rent, was referred to the master as to the rent, and on payment thereof process to stay as to that, but there being another breach as to not repairing, the plaintiff might proceed for that. *Ann. Wilf. Rep. Par.* 1. p. 75. In an action of covenant, it is not necessary to aver that the plaintiff performed his covenants. *Jedderell v. Cowell. Rep. Temp. Hardw.* 343-4.

By the 8 & 9 W. 3. c. 11. In actions on bonds, &c. plaintiff may assign as many breaches as he pleases, and the jury may assess damages: on defendant's paying damages, execution may be stayed, but judgment shall remain to answer any farther breach, and plaintiff may have a *scire facias* against the defendant.

It is held an action of covenant may be laid in London, for non-payment of rent on a lease of lands in any other place. *1 Sid.* 401. And if in this action, a sum be mislaid, either too little or too much; it is amendable; and not like to the action of debt, which if alledged less than it is; without shewing the rest to be satisfied, it is ill. *3 Keb.* 39. *2 Cro.* 247. In action of covenant, the plaintiff must have recourse to the deeds or writings, and the circumstances of time, place, &c. and take notice what particular covenant in the deed it is best to insist upon, to lay a breach right, &c. the words of covenanting are, covenant, grant, promise, and agree, &c. but there needs no great exactness in words to make a covenant. See *Bonds.*

Further, this word is taken for the solemn league and covenant; which was a seditious conspiracy, invented in Scotland; voted illegal by parliament, and provision is made against it, by stat. 14 Car. 2. cap. 4.

Covenant to stand seised to Uses, Is when a man that hath a wife, children, brother, sister, or kindred, doth by covenant in writing under hand and seal agree that for their or any of their provision or preferment, he and his heirs will stand seised of land to their use; either in fee-simple, fee-tail, or for life. The use being created by the stat. 27 H. 8. c. 10. which conveyeth the estate as the uses are directed; this covenant to stand seised is become a conveyance of the land since the said statute. The considerations of these deeds, are natural affection, marriage, &c. and the law allows in such cases consideration of blood and marriage, to raise Use, as well as money and other valuable consideration when a use is to a stranger. *Plowd.* 302. There are no considerations now to raise uses upon covenants to stand seised, but natural love and affection, which is for advancement of blood; and consideration of marriage, which is the joining of the blood and marriage together: other considerations, as money, &c. for land, though the words in the deed are *stand seised*, yet they are bargains and sales, and without inrolment they raise no use. *Carter* 138. *Lill. Abr.* 353.

The usual covenant to stand seised to uses need not be by deed indented and inrolled: And where a man limits his estate to the use of his wife for life, this imports a sufficient consideration in itself: Also if a person covenants to stand seised to the use of his wife, son, or cousin it will raise an use without any express words of consideration, for sufficient consideration appears. *7 Rep.* 40. In case of a covenant to stand seised, so much of the use as the owner doth not dispose of, remains still in him. *1 Vent.* 374. And where an use is raised by way of covenant, the covenantor continues in possession; and there the uses limited, if they are according to law, shall rise and draw the possession out of him: but if they are not, the possession shall remain in him until a lawful use ariseth. *1 Leon* 197. *1 Mod.* 158, 160.

If on a covenant to stand seised to uses, no use doth arise, yet it may be good by way of covenant and give remedy to the covenantee in an action; as if the covenant be future, that in consideration of a marriage, lands shall descend or remain to a son and the heirs of his body on the body of his wife; in this case the covenantee may have writ of covenant upon the covenant against the covenantor. But if a covenant be that a man and his heirs, shall from henceforth stand and be seised to such and such uses, and the uses will not arise by law: here no action of covenant lies on the covenant, for this action will never lie upon any covenant but such as is either to do a thing hereafter, or where the thing is already done, and not when it is for a thing present. *Plowd.* 307, 398. *Finb's Law* 49. See *Baron and Feme.*

Covert Baron, A married woman. *Stat.* 27 Eliz. cap. 3. See *Black. Com.* 1 V. 442. and *Com. Dig.* 1 V. tit. *Baron and Feme.*

Coverture, (Fr.) Any thing that covers; as apparel, a coverlet, &c. but it is by our law particularly applied

to the state and condition of a *married* woman, who is *sub potestate viri*; and therefore disabled to contract with any to the damage of herself or husband, without his consent and privy, or his allowance and confirmation thereof. *Brañ. lib. 1. c. 10. lib. 2. c. 15, &c. Bro. Abr.* When a woman is married, she is called a *Feme Covert*; and whatever is done concerning her, during the marriage, is said to be during the *coverture*: All things that are the wife's, are the husband's; nor hath the wife power over herself, but the husband: And if the husband alien the wife's land, during the *coverture*, she cannot gainsay it during his life; but after his death, she may recover by *cui in vita*. *Terms de Ley. See Baron and Feme.*

Covin, (Covina) Is a deceitful compact between two or more to deceive or prejudice others, as if tenant for life or in tail, conspires with another, that he shall recover the land which he the tenant holds, in prejudice of him in reversion. *Plowd. 546.* *Covin* is commonly conversant in and about conveyances of land by fine, feoffment, recovery, &c. And then it tends to defeat purchasers of the lands they purchase, and creditors of their just debts; and so it is used in deeds of gift of goods: It may be likewise sometimes in suits of law, and judgments had in them. But wherever *covin* is, it shall never be intended, unless it appears and be particularly found: for *covin* and fraud though proved, yet must be found by the jury, or it will not be good. *Brownl. 188. Bridgm. 112.*

If one make a lease to a person by *covin*, and after grant another lease to another *bona fide*, but without any fine or rent; in this case the second lessee may not avoid the first lease, because he is not a purchaser that comes in for money. *3 Rep. 83.* On recovery by a good title, there may be *covin*; as where tenant for life by assent, &c. suffers a recovery by *Nil dicit*, without making any defence: And if a man hath a rightful and just cause of action, and of *covin* and consent shall raise up a tenant by wrong against whom he may recover; the *covin* doth so suffocate the right, that the recovery, although it be upon good title, shall not bind. *Bro. Covin. 47. Co. Litt. 357. 1 Shep. Abr. 365.* A is tenant for life, remainder in tail to B. and a *præcipe* is brought against them as jointenants, by *covin* between the demandant and A. and an answer procured for B. as jointenant, and they join the mise, (or issue) and after make default, whereby final judgment is given; this shall not defeat the estate of B. who may bring a writ of *disceit* and shall be restored to his land. *Roll. Abr. 621.*

If a man that has a right to certain lands, by *covin* causes another to oust the tenant of the land, to the intent to recover it from him, and he recovers accordingly against him by action tried; yet he shall not be remitted to his ancient right; but is in of the estate of him who made the ouster; and an assize lies against him. *2 Danv. Abr. 305.* Land is aliened, pending a writ of debt, by *covin*, to avoid the extent thereof for the debt; the land so aliened shall be extended, when the *covin* appears upon the return of the *elegit* by the sheriff. *Ibid. 311.* If a man makes a deed of gift, &c. of his goods in his life-time by *covin*, to oust his creditors of their debts, after his death the donee or vendee shall be charged for them. See *50 H. 3. c. 6.* and the several statutes of *frauds*. If goods are sold in market overt by *covin*, on purpose to bar him that hath right, this shall not bar him thereof. *2 Inst. 713.*

Council. In the city of *London*, there are common *council-men* chosen in every ward at a court of wardmote held by the aldermen of the respective wards on *St. Thomas's* day yearly: They are to be chosen out of the most sufficient men; and sworn to give true *council* for the common profit of the city, &c. *Lex Londonien. 117.* In the court of *common council*, are made laws for advancement of trade; and committees yearly appointed, &c. But acts made by them, are to have the assent of the Lord Mayor and Aldermen, by stat. *11 Geo. 1. c. 18.* and sec *19 Geo. 2. c. 8.*

Counsellor, (Consiliarius) Is a person retained by a client to plead his cause in a court of judicature. A *counsellor* at law hath a privilege to enforce any thing which is informed him by his client, if pertinent to the matter, and is not to examine whether it be true or false; for it is

at the peril of him who informs him. *Cro. Jac. 90.* But after the court hath delivered their opinions of the matter in law depending before them, the *counsell* at the bar are not to urge any thing further in that cause. *1 Lill. Abr. 355.* A *counsellor* must not set his hand to a frivolous plea, to delay a trial; which argues ignorance or foul practice. *Ibid.* And as *counsellors* have a special privilege to practice the law, they are punishable by attachment, &c. for misbehaviour. *1 Hawk. P. C. 157.* No recusant convict, or non-juror, shall practice the law, as a *counsellor*, or otherwise, under penalties, by stat. *3 Jac. 1. c. 5. 13 & 14 W. 3. c. 6.*

Counsell; for prisoners. No *counsell* is allowed a *prisoner* upon a general issue, on indictment of felony, &c. unless some doubtful point of law arise: The court is the prisoner's only *counsell*; and the behaviour of the prisoner in his own defence, is one means of discovering the truth. In appeals, and upon special pleas, &c. the prisoner shall have *counsell* assigned him by the court: tho' *counsell* is not to prompt the prisoner in matters of fact. *2 Hawk. 400, 401.* Provision is made for *counsell* for prisoners in treason, by stat. *7 & 8 W. 3. c. 3.* which is extended to trials, upon impeachments, by *20 Geo. 2. c. 30.*

Count, Signifies the original declaration of complaint in a real action. As declaration is applied to personal; so *count* is applicable to real causes: but *count* and declaration are oftentimes confounded, and made to signify the same thing. *F. N. B. 16, 60.* In passing a recovery at the common pleas bar, a serjeant at law *counts* upon the *præcipe*, &c. See *Counters and Declarations.*

Countee, (Fr. Comte) Was the most eminent dignity of a subject, before the conquest; and those who in ancient times were created *countees*, were men of great estate: for which reason, and because the law intends that they assist the King with their counsel for the publick good, and preserve the realm by their valour, they had great privileges; as they might not be arrested for debt or trespass; or be put on juries, &c. Of old the *countee* was *præfectus*, or *præpositus comitatus*, and had the charge and custody of the county; but this authority the sheriff now hath. *9 Rep. 46.* A *countee* or *count*, is an earl, in the law *French.* *Law Fr. Dict.*

Countenance. This word seems to be used for credit or estimation. *Old Nat. Br. 111.* And in the stat. *1 Ed. 3. c. 4.* See *Contentment.*

Counter, (Computatorium from the Lat. Computare) Is the name of two prisons in *London*, the *Poultry-counter*, and *Woodstreet-counter*, for the use of the city, to confine debtors, peace-breakers, &c. wherein if any enter, he is like to *account* before he gets out. *Corwel.*

Counterfeits. Persons obtaining any money, goods, &c. by *counterfeit* letters or false tokens, being convicted before justices of assize, or justices of peace, are to suffer such punishment as shall be thought fit, under death; as imprisonment, pillory, &c. Stat. *33 H. 8. cap. 1.* It was the opinion of Sir *Edward Coke*, that upon this statute the offender could not be fined; and that only corporal pains ought to be inflicted: But it hath been otherwise adjudg'd in *Terry's* case, who by a false note in the name of another obtain'd into his hands a wedge of silver, of the value of two hundred pounds; and on conviction thereof, was sentenced to stand in the pillory, pay a fine of five hundred pounds to the King, and be imprisoned during the King's pleasure. *Cro. Car. 407.* The obtaining of money from one man to another's use, upon a false pretence of having a message and verbal order to that purpose, is not (at common law) punishable by criminal prosecution; it depending on a bare naked lie, against which common prudence and caution may be a security. *6 Mod. 105. 1 Hawk. P. C. 188.* Now per Stat. *30 Geo. 2. c. 24.* Obtaining money, goods, &c. by false pretences, (a very vague expression) the offender is liable to fine or imprisonment, or pillory, or transportation for seven years. *Counterfeiting the King's seal*, or money, &c. which is treason, vide *Treason*: And *counterfeiting Exchequer bills*, bank-bills, lottery-orders, &c. which are felony. See *Felony, Fraud.*

Countermand, Is where a thing formerly executed, is afterwards by some act or ceremony made void by the party that first did it. And it is either actual, by deed; or implied;

implied: *Actual*, where a power to execute any authority, &c. is by a formal writing for that very purpose put off for a time, or made void: and *implied*, is where a man makes his last will and testament, and thereby devises his land to *A. B.* if he afterwards enfeoffs another of the same land, here this feoffment is a *countermand* to the will, without any express words for the same, and the will is void as to the disposition of the land: Also if a woman seised of land in fee-simple, makes a will and deviseth the same to *C. D.* and his heirs, if he survives her; and after she intermarries with the said *C. D.* there by taking him to husband, and coverture at the time of her death, the will is *countermanded*. *Terms de Ley*. But if a woman makes a lease at will, and then marries, this marriage is no *countermand* to the lease, without express matter done by the husband to determine the will.

Where land is devised, and after a lease made thereof for years only; it shall not be a *countermand* of the will, which is good notwithstanding for the reversion after the lease for years is ended: But in case a man have a lease for years, and gives it by his will, and after surrenders it; it is a *countermand* of the devise, and the devisee shall not have his lease. *Dyer* 47. *Goldsb.* 93. If a copyholder like to die, do surrender his estate to the use of his wife or children, without any consideration of money, &c. and he recover before the presentment and admittance, it may be *countermanded*: 'Tis otherwise if it be to the use of a stranger. *Kitch.* 82. If there be a feoffment with letter of attorney to make livery and seisin; and before it is made the feoffor makes a feoffment, or bargain and sale of the land, or lease to another, it will be a *countermand* in law of the authority given by the letter of attorney. *2 Brownl.* 291. A person may *countermand* his command, authority, licence, &c. before the thing is done; and if he dies, it is *countermanded*. There is a *countermand* of notice of trial, &c. in law proceedings.

Counterpart. When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the *original*, and the rest are *counterparts*: tho' of late it is most frequent (and better) for all the parties to execute every part; which renders them all originals. *Black. Com.* 2 *V.* 296.

Counterplea. Is when the tenant in any real action, tenant by the curtesy, or in dower, in his answer and plea, vouches any one to warrant his title, or prays in aid of another, who hath a larger estate; as of him in reversion, &c. Or where one that is a stranger to the action, comes and prays to be received to save his estate; then that which the demandant alledgeth against it, why it should not be admitted, is called a *counterplea*: In which sense it is used *stat. 25 Ed. 3. cap. 7.* So that *counterplea* is in law a replication to *Aid Prier*; and is called *counterplea* to the voucher: But when the voucher is allowed, and the vouchee comes and demands what cause the tenant hath to vouch him, and the tenant shews his cause, whereupon the vouchee pleads any thing to avoid the warranty; that is termed a *counterplea of the warranty*. *Terms de Ley. Stat. 3 E. 1. cap. 39.* If on demurrer to a *counterplea* of the voucher upon a warranty, it be found against the vouchee, judgment shall not be peremptory, but only *set vocare*: 'Tis otherwise upon a plea to the writ tried by the country. *Rep.* 34. *4 Rep.* 80.

Counter-Rolls. Are the rolls which *sheriffs* of counties have with the *coroners* of their proceedings, as well of appeals, as of inquests, &c. *Stat. 3 Ed. 1. c. 10.*

Countors, (Fr. *Contours*) Have been taken for such *serjeants* at law, which a man retains to defend his cause, and speak for him in any court, for their fees. *Horn's Mirror, lib. 2.* And as in the court of *C. B.* none but *serjeants* at law may plead; they were anciently called *Serjeant Countors*. *1 Inst.* 17.

County, (*Comitatus*) Signifies the same with *shire*, the one coming from the *French*, the other the *Saxons*; and contains a circuit or portion of the realm, into which the whole land is divided, for the better government of it, and the more easy administration of justice: So that there is no part of this kingdom that lies not within some county; and every county is governed by a yearly officer whom we call a *sheriff*. *Fortescue, cap. 24.* Of these

counties, there are in *England* forty, besides twelve in *Wales*, making in all fifty-two.

County Palatine. There are four counties of special note, which are therefore term'd *Counties Palatine*; as *Lancaster, Chester, Durham, and Ely*; and we read anciently of the counties palatine of *Pembroke* and *Hexam*, though they have long since lost their privileges. The chief governors of the counties palatine, by special charter from the King, heretofore did all things touching the administration of justice as absolutely as the prince himself in other counties, only acknowledging him their superior and sovereign: But by the *stat. 27 H. 8. cap. 24.* their power is abridged. *4 Inst.* 204, 221. The counties palatine are reckoned among the superior courts: And are privileged as to pleas, so as no inhabitant of such counties shall be compelled by any writ to appear or answer out of the same; except for error, and in cases of treason, &c. and the counties palatine of *Chester* and *Durham*, are by prescription, where the King's writ ought not to come, but under the seal of the counties palatine; unless it be writs of proclamation. *Crompt. Juris.* 137. *1 Danv. Abr.* 750.

But *certiorari* lies out of *B. R.* to justices of a county palatine, &c. to remove indictments, and proceedings before them. *2 Hawk. P. C.* 286. There is a court of Chancery in the counties palatine of *Lancaster* and *Durham*, over which there are Chancellors; that of *Lancaster* called Chancellor of the Duchy, &c. and there is a court of Exchequer at *Chester*, of a mixt nature, for law and equity, of which the *Chamberlain of Chester* is judge. There is also a Chief Justice of *Chester*; and other justices in the other counties palatine, to determine civil actions and pleas of the crown.

The Bishops of *Durham* and *Ely*, have those counties palatine; and if any erroneous judgment be given in the courts of the bishoprick of *Durham*, a writ of error shall be brought before the bishop himself; and if he give an erroneous judgment thereon, a writ of error shall be sued out returnable in *B. R.* *4 Inst.* 218. But it has been held, that *Ely* is not a county palatine, only a royal franchise, having cognisance of pleas like unto the *Cinque Ports*. *Carthew* 109. Infants in counties palatine enabled to convey by order of the respective courts belonging to those counties. *4 Geo. 3. c. 16.*

Counties palatine, with *Jura Regalia*, were probably erected at first, because they were adjacent to the enemies countries heretofore; as *Lancaster* and *Durham* to *Scotland*, and *Chester* to *Wales*; that the inhabitants might have administration of justice at home, and remain there to secure the country from incursions. *1 Vent.* 155. The King may make a county palatine by his letters patent without parliament. *4 Inst.* 201.

Counties Corporate. Besides the counties above mentioned, there are counties corporate. *Stat. 3 E. 4. c. 5.* And they are certain cities, with lands and territories, having liberties and jurisdiction by grant from the King: As the county of *Middlesex* annexed to the city of *London* by King *Hen. 1.* The county of the city of *York*, anno 32 *H. 8.* The county of the city of *Chester*, 42 *Elix.* The county of the city of *Bristol*, *Norwich*, *Worcester*, &c. and the county of the town of *Kingston upon Hull*, *Newcastle*, &c. *Lamb. Eiren. lib. 1. Crompt. Juris.* 59. And county in another signification, is used for the county-court, kept by the sheriff within his charge, or by his deputy. *Stat. 2 Ed. 6. cap. 25. Bract. lib. 3. cap. 7.* See *Comitatus*.

County-Court, (*Curia Comitatus*) Is by *Lambard* called *Conventus*, in his explication of *Saxon* words, and divided into two sorts; one retaining the general name, as the county-court held every month, by the sheriff or his deputy: the other called the *turn*, held twice in every year, viz. within a month after *Easter* and *Michaelmas*; of both which you may read in *Crompt. Juris.* fol. 241. All administration of justice was at first in the King's hands; but afterwards when by the increase of the people the burden grew too great for him; as the kingdom was divided into counties, hundreds, &c. so the administration of justice was distributed amongst divers courts; of which the sheriff had the county-court for government of the county, and lords of liberties had their *leets* and *law-days*, for the speedier and easier administering justice therein, &c.

Before

Before the *courts* at *Westminster* were erected, the *county-courts* were the chief courts of the kingdom: And among the laws of King *Edgar* it is ordained, that there be two *county-courts* kept in the year, in which there shall be a bishop and an alderman, or earl, as judges; one to judge according to the common law, and the other according to the ecclesiastical law: But these united powers of a bishop and earl, to try causes, were separated by *William* the First, called the *Conqueror*; and soon after the business of ecclesiastical cognisance was brought into its proper courts, and the common law business into the *King's Bench*. *Blount*.

That the *county-court* in ancient times, had the cognition of great matters, appears by *Glanv. lib. 1. cap. 2, 3, 4.* by *Bracton*, and *Briton*, in divers places, and *Fleta, lib. 2. c. 62.* But the power of this court was much reduced by *Magn. Chart. c. 17.* and by *1 Ed. 4. cap. 1.* It had formerly, and now hath the determination of certain trespasses, and debts under 40 s. And this court holdeth not plea (*de jure*) of any debt or damage to the value of 40 s. or above; nor of trespass *vi & armis*, &c.

But of debt and other actions personal above that sum, the sheriff may hold plea by force of a writ of *justices*, which is in nature of a commission to him to do it. *4 Inst. 266.* Here the plaintiff takes out a summons, and if the defendant do not appear, an attachment or *distingas* is to be made out against him; but if the defendant appears, the plaintiff is to file his declaration, and after the defendant is to put in his answer or plea; and the plaintiff having joined issue, the trial proceeds, &c. whereupon, if verdict is given for the plaintiff, judgment is entered, and a *fiat facias* may be awarded against the defendant's goods, which may be taken by virtue thereof, and be appraised and sold to satisfy the plaintiff: But if the defendant hath no goods, the plaintiff is without remedy in this court; for no *capias* lies therein, but an action may be brought at common law, upon the judgment entered. *Greenwood of Courts, p. 22.*

No sheriff is to enter in the *county-court*, any plaint in the absence of the plaintiff; nor above one plaint for one cause, under penalties: The defendant in the *county-court* is to have lawful summons; and two justices of peace are to view the estreats of sheriffs, before they issue them out of the *county-court*, &c. By stat. *11 Hen. 7. c. 15.* Causes are removed out of the *county-court*, by *recordare*, *pone*, and writ of *false judgment*, into *B. R.* &c. See *Stat. 23 G. 2. c. 33.* for preventing delays and expences in the proceedings in the *county-court* of *Middlesex*, and for the more easy and speedy recovery of small debts in the said *county-court*.

County-Rates. Are those ordered by justices of peace at their quarter sessions, who may make one general rate, to answer all former distinct rates, which shall be assessed on every parish, &c. and collected and paid by the high constables of hundreds to treasurers appointed by the justices; which money shall be deemed the publick stock, and be laid out in repairing of bridges, gaols, or houses of correction, on presentment made by the grand jury, at the assizes or quarter sessions, of their wanting reparation; but appeal lies by the churchwardens and overseers of the poor of the parishes to the justices at the next sessions, against the rate on any particular parish. *12 Geo. 2. c. 29.*

Counting-House of the King's Household. (*Domus Computus Hospitii Regis*) Is usually called the *Green Cloth*; where sit the Lord Steward, and Treasurer of the King's House, the Comptroller, Master of the Household, Cofferer, and two Clerks of the *Green Cloth*, &c. for daily taking the accounts of all expences of the Household, making provisions, and ordering payment for the same; and for the good government of the King's Household servants, and paying the wages of those below stairs. *Stat. 39 Eliz. cap. 7.*

Courier. (from the Fr. *Courir* to run) An express messenger of haste.

Couracier. A French word signifying a horse courier. *2 Inst. 719.*

Court. (*Curia*) Signifies the King's palace, or mansion; and is more especially the place where justice is judicially administered. The *superior courts* are those at *Westminster*; and of courts, some are of record, and some not; which

are accounted *base courts*, in respect of the rest: a court of record is that court which hath power to hold plea, according to the course of the common law, of real, personal, and mixed actions, where the debt or damage is 40 s. or above; as the *King's Bench*, *Common Pleas*, &c.

A court not of record is where it cannot hold plea of debt or damages amounting to 40 s. but of pleas under that sum; or where the proceedings are not according to the course of the common law, nor inrolled; as the *county-court*, and the *court-baron*, &c. *1 Inst. 117, 260. 4 Rep. 52. 2 Roll. Abr. 574.*

Every court of record is the *King's Court*, though his subjects have the benefit of it; and the free use of all courts of record and not of record, is to be granted to the people: The lect and tourn are the *King's courts*, and of record. *2 Darw. 259.* The rolls of the *superior courts* of record are of such authority, as no proof will be admitted against them; and they are only triable by themselves. *3 Inst. 71.* But as the *county-court*, *court-baron*, &c. are not courts of record, the proceedings therein may be denied, and tried by a jury: And upon their judgments, a writ of error lies not; but writ of false judgment. *1 Inst. 117.*

In the courts at *Westminster*, the plaintiff need not shew at large in his declaration, that the cause of action arises within their jurisdiction, it being general: *Inferior courts* are to shew it at large, because they have particular jurisdictions. *1 Lill. Abr. 371.* Also nothing shall be intended to be within the jurisdiction of an inferior court, but what is expressly so alledged: And if part of the cause arises within the inferior jurisdiction, and part thereof without it, the inferior court ought not to hold plea. *1 Lev. 104. 2 Rep. 16.* An inferior court, not of record cannot impose a fine, or imprisonment: But the courts of record at *Westminster* may fine, imprison, and amerce. *11 Rep. 43.*

The King being the supreme magistrate of the kingdom, and intrusted with the executive power of the law, all courts superior and inferior ought to derive their authority from the crown. *Staundf. 54: 2 Hawk. P. C. 2.* Though the King himself cannot sit in judgment in any court upon an indictment, because he is one of the parties to the suit. *Hawk. Ibid.* The King hath committed all his power judicial to one court or other. *4 Inst. 71.* And by statute it is enacted, that all persons shall receive justice in the *King's court*, and none take any distress, &c. of his own authority, without award of the *King's courts*. *Stat. 52 Hen. 3. cap. 1.*

It is said the customs, precedents, and common judicial proceedings of a court, are a law to the court: And the determinations of courts, make points to be law. *2 Rep. 16. 4 Rep. 53. Hob. 298.* All things determinable in courts, that are courts by the common law, shall be determined by the judges of the same courts; and the King's writ cannot alter the jurisdiction of a court. *6 Rep. 11.* The court of *B. R.* regulates all the inferior courts of law in the kingdom, so that they do not exceed their jurisdictions, nor alter their forms, &c. *22 Car. B. R.* And as the court of *King's Bench* hath a general superintendency over all inferior courts, it may award an attachment against any such court, usurping a jurisdiction not belonging to it: But it is sometimes usual first to award a writ of prohibition, and afterwards an attachment, upon its continuing to proceed. *2 Hawk. 149, 150.*

If a court, having no jurisdiction of a cause depending therein, do nevertheless proceed, the judgment in such court is *coram non judice*, and void; and an action lies against the judges who give the judgment, and any officer that executes the process under them: Though where they have authority, and give an ill judgment, there the party who executes the process, &c. upon the judgment, shall be excused. *1 Lill. Abr. 370.* Judges of inferior courts may be punished for misbehaviour either by information or attachment. *Moravias Case. Rep. Temp. Hardw. per Annaly, 135.* Any defects in the proceedings of an inferior court cannot be amended, by the return which is not part of the record. *Ibid.* The *King v. Holmes*, 365. Where an inferior court returns its proceedings, no diminution can be alledged. *Ibid.* *Sayer v. Curtis*, 367.

Action on the case lies against the plaintiff in an action for suing one in an inferior court, where the cause of action is out of its jurisdiction. 1 *Vent.* 369. And if a plaintiff on a contract for a large sum, splits it into several actions for small sums to give an inferior court jurisdiction, a prohibition shall go. *Mod. Caf.* 90. Lord *Harwicke* said, he had seen good opinions, that an action of debt by original will lie in *B. R.* *Bounds v. Allen*, *Rep. Temp. Hardw. per Annaly*, 317. And now 'tis every day's practice.

Striking, in the courts at *Westminster*, is punished by cutting off the right hand, and forfeiture of goods, &c. How contempts to courts are punishable by fine and imprisonment, &c. Vide *Attachment*. See more of Courts under *Judges*.

Court of Admiralty. (*curia admiralitatis*) Was erected as generally held, by King *Ed.* 3. for deciding maritime causes; and the title of its judge is *Suprema curia admiralitatis Angliæ locum tenens, judex sine præfidentis*. The admiralty court is not allowed to be a court of record, because it proceeds by the civil law; and the judge has no power to take such a recognisance, as a court of record may: the process and proceedings are in the name of the Lord *Admiral*, and by libel; and the plaintiff and defendant enter into a stipulation, or bond, for appearance, and to abide the sentence. 4 *Inst.* 134, 135. This court hath jurisdiction to determine all causes arising wholly upon the sea, out of the jurisdiction of a county: and a judgment of a thing done upon land is void. 1 *Inst.* 260. If the court of admiralty hold a plea of an agreement made at sea, but put in writing and sealed in foreign lands, a prohibition may be granted; but not if only a bare remembrance had been made of it at land. *Hob.* 69, 211. See *Latch* 11. By the custom of the admiralty, goods may be attached in the hands of a third person in *causa civili & maritima*. March 204.

Court-Baron. (*curia baronis*) Is a court which every lord of a manor hath within his own precinct: it is an inseparable incident to the manor; and must be held by prescription, for it cannot be created at this day. 1 *Inst.* 58. 4 *Inst.* 268. A court-baron must be kept on some part of the manor: and is of two natures. 1. By *Common law*, which is the *barons or freeholders court*, of which the freeholders being suitors are the judges; and this cannot be a court-baron without two suitors at least. 2. By *custom*, which is called the *customary court*: and concerns the customary tenants and copyholders, whereof the lord, or his steward is judge. The court-baron may be of this double nature, or one may be without the other: but as there can be no court-baron at *Common law* without freeholders; so there cannot be a customary court without copyholders or customary tenants. 4 *Rep.* 26. 6 *Rep.* 11, 12. 2 *Inst.* 119. The freeholders court, which hath jurisdiction for trying actions of debt, trespasses, &c. under 40*s.* may be had every three weeks; and is something like a *county-court*, and the proceedings much the same: though on recovery of debt, they have not power to make execution, but are to distrain the defendant's goods, and retain them till satisfaction is made. The other court-baron, for taking and passing of estates, surrenders, admittances, &c. is held but once or twice in a year, (usually with the court-leet) unless it be on purpose to grant an estate; and then it is holden as often as requisite. In this court the homage jury are to inquire that their lords do not lose their services, duties, or custom; but that the tenants make their suits of court; pay their rents and heriots, &c. and keep their lands and tenements in repair; they are to present all common and private nuisances, which may prejudice the lord's manor; and every publick trespass must be punished in this court, by amercement, on presenting the same. By statute, It shall be inquired of customary tenants, what they hold, by what works, rents, heriots, services, &c. And of the lord's woods, and other profits, fishings, &c. *Stat. Extent. Manerii*, 4 *Ed.* 1. See *Complete Court-Keeper*.

Court of Chivalry. (*curia militaris*) Otherwise called the *marshal-court*; the judges of it are the Lord *Constable of England*, and the *Earl Marshal*: this court is said to be the fountain of the *martial law*, and the *Earl Marshal* hath both a judicial and ministerial power; for he is not

only one of the judges, but to see execution done. 4 *Inst.* 123. See *Constable*.

Court-Christan. (*curia Christianitatis*) Is an ecclesiastical judicature, opposed to the civil court, or lay tribunal: and as in secular courts, human laws are maintained; so in the *Court Christian*, the laws of *Christ* should be the rule. And therefore the judges are divines; as archbishops, bishops, archdeacons, &c. 2 *Inst.* 488. *Courts Christian* are so called, because they handle matters especially appertaining to *Christianity*; and were held heretofore by our bishops from the *pope*, as he challenged the superiority in all causes spiritual: but since his ejection, they hold them by the King's authority, *virtute magistratus sui*, &c. and as the appeal from these courts did lie to *Rome*, now by the *Stat.* 25 *H.* 8. *cap.* 19. it lies to the King, in his *Chancery*. 4 *Inst.* 339, &c. These courts were complained against long before the reformation; the bishops having extended their jurisdiction so far, that they had left very little business for the secular judges; for they assumed an authority over the clergy, even in criminal cases, tho' they had no legal power, but only in the execution of the sentence of degradation, &c. and took upon them to judge in a great many other things that did not belong to them.

Court of Conscience. (*curia conscientie*) In the 9th year of King *Hen.* 8. the court of conscience in *London* was erected: there was then made an act of common council, that the Lord Mayor and Aldermen should assign monthly two Aldermen and four discreet Commoners, to be commissioners to sit in this court twice a week, to hear and determine all matters brought before them between party and party, between citizens and freemen of *London*, in all cases where the debt or damage was under 40*s.* And this act of Common Council is confirmed by *Stat.* 1 *Jac.* 1. c. 14. which impowers the commissioners of this court to make such orders between the parties touching such debts, as they shall find stand to equity and good conscience. Also the *Stat.* 3 *Jac.* 1. c. 15. further establishes this court; the course and practice whereof is by summons, to which if the party appear, the commissioners proceed summarily; examining the witnesses of both parties, or the parties themselves on oath, and as they see cause give judgment. And if the party summoned appear not, the commissioners may commit him to the Compter prison till he does; also the commissioners have power to commit a person refusing to obey their orders, &c.

By a late statute, the proceedings of the court of conscience are regulated; and in case any person affront or insult any of the commissioners, on their certifying it to the Lord Mayor, he shall punish the offender by fine, not exceeding 20*s.* or may imprison him ten days. 14 *Geo.* 2. c. 10.

There are many other courts of conscience established of late years by act of parliament, too many to enumerate. See the *Table to the Statutes*.

Court of Delegates. (*curia delegatorum*) Is so called, because the judges are *delegated*, and sit by force of the King's commission, under the Great Seal, upon appeals to the King, in three cases. 1. When a decree or sentence is given in an ecclesiastical cause, by the archbishop, or any of his officials. 2. When any decree or sentence is given in an ecclesiastical cause in places exempt, or peculiar, belonging to the king, or an archbishop. 3. When a sentence is given in the court of admiralty in a civil and marine cause, according to the Civil law. 4 *Inst.* 339. *Stat.* 25 *Hen.* 8. c. 19. If the *delegates* in ecclesiastical causes are spiritual persons, they may proceed to excommunication, &c. This is the highest court for civil affairs that concern the church. See *Appeal to Rome*.

Courts Ecclesiastical. (*curiæ ecclesiasticæ*) Are those courts which are held by the King's authority as supreme governor of the church, for matters which chiefly concern religion. 4 *Inst.* 321. And the *laws and constitutions* whereby the church of *England* is governed, are, 1. Divers immemorial customs. 2. Our own provincial constitutions; and the *canons* made in convocations, especially those in the year 1603. 3. Statutes or acts of parliament concerning the affairs of religion, or causes of ecclesiastical cognizance; particularly the *rubrics* in our *Common Prayer-Book*, founded upon the statutes of uniformity. 4. The

articles of religion, drawn up in the year 1562, and established by 13 Eliz. cap. 12. And 'tis said, by the general Canon law, where all others fail. See the 25 Hen. 8. c. 28. As to suits in spiritual or ecclesiastical courts, they are for the reformation of manners, or for punishing of heresy, defamation, laying violent hands on a clerk, and the like; and some of their suits are to recover something demanded, as tithes, a legacy, contract of marriage, &c. And in causes of this nature the courts may give costs, but not damages: things that properly belong to these jurisdictions are matrimonial and testamentary; and defamatory words, for which no action lies at law; as for calling one adulterer, fornicator, usurer, or the like. 11 Rep. 54. Dyer 240. The proceedings in the ecclesiastical courts are according to the Civil and Canon law, by citation, libel, answer upon oath, proof by witnesses, and presumptions, &c. and after sentence, for contempt, by excommunication: and if the sentence is disliked, by appeal. The jurisdiction of these courts is voluntary, or contentious: and the punishments inflicted by them are censures and punishments *pro salute animæ*, by way of penance, &c. They are not courts of record. Vide Consultation and Prohibition.

Court of Hustings, (*curia hustingi*) Is the highest court of record, holden at Guildhall, for the city of London, before the Lord Mayor and Aldermen, the Sheriffs, and Recorder. 4 Inst. 247. This court determines all pleas real, personal, and mixt: and here all lands, tenements, and hereditaments, rents and service, within the city of London and suburbs of the same, are pleadable in two *hustings*; one called *hustings of plea of lands*, and the other *hustings of common pleas*. In the *hustings of plea of lands*, are brought writs of right patent directed to the sheriffs of London, on which writs the tenant shall have three summonses at the three *hustings* next following; and after the three summonses there shall be three *essoins* at three other *hustings* next ensuing; and at the next *hustings* after the third *essoins*, if the tenant makes default, process shall be had against him by *grand cape*, or *petit cape*, &c. If the tenant appears, the demandant is to declare in the nature of what writ he will; without making protestation to sue in nature of any writ: then the tenant shall have the view, &c. and if the parties plead to judgment, the judgment shall be given by the Recorder: but no damages, by the custom of the city, are recoverable in any such writ of right patent. *Practif. Solic.* 416, 417. In the *hustings of common pleas* are pleadable writs *ex gravi querela*, writs of *gavellet*, of *downer*, *waste*, &c. also writs of *exigent* are taken out in the *hustings*; and at the fifth *hustings* the outlawries are awarded, and judgment pronounced by the recorder. If an erroneous judgment is given in the *hustings*, the party grieved may sue a commission out of Chancery, directed to certain persons to examine the record, and thereupon do right. 1 *Rel. Abr.* 745.

Court Leet, (*leta*, *visus franci plegii*) Is a court of record, ordained for punishing offences against the crown; and is said to be the most ancient court of the land. 2 *Danv. Abr.* 289. It enquires of all offences under high treason; but those which are to be punished with loss of life or member, are only inquirable and presentable here, and to be certified over to the justices of assize. *Stat. 1 Ed. 3.* And this court is called the *view of frankpledge*, because the King is to be there certified by the view of the steward, how many people are within every leet, and have an account of their good manners, and government; and every person of the age of 12 years, who hath remained there for a year and a day, may be sworn to be faithful to the King, and the people are to be kept in peace, &c. Also every one from the age of twelve to sixty years, that dwells within the leet, is obliged to do suit in this court; except peers, clergymen, &c. unless they are under the sheriff's turn. 4 *Inst.* 261, 263, &c.

A leet is incident to a hundred, as a court-baron to a manor; for by grant of a hundred, a leet passeth, and a hundred cannot be without a leet. *Kitch.* 70. Leets may be held by charter or prescription; but are commonly claim'd by prescription; and are to be kept twice a year, one time within a month after Easter, and the other within a month after Michaelmas, at a certain place within the precinct: these are the usual times of holding

the leet; but if it hath been a custom to keep this court at any other time of the year, it is good if due warning be given. 1 *Inst.* 115. 2 *Inst.* 72. The steward is the judge of this court, as the sheriff is in the turn: and he hath power to elect officers, as constables, tithingmen, &c. as well as punish offenders. 6 *Rep.* 12. 2 *Inst.* 199.

A presentment in a court-leet, or sheriff's turn, after the day of presentment, subjects the party to a fine or amercement; and is not traversable, except it toucheth the party's freehold; as that one ought to cleanse the highways, &c. by reason of his tenure: though such presentment may be removed into B. R. by *certiorari*, where it may be traversed. *Dyer* 13. 2 *Inst.* 52. *Kitch.* 86. 91, &c.

A court-leet may fine, but not imprison: a steward may impose a reasonable fine for a contempt in court; or commit those who make an assay before him, in the execution of his office, or bind them to the peace or good behaviour: but he may not grant surety of the peace, unless by prescription. 8 *Rep.* 38. 1 *Saund.* 135.

The usual method of punishment in the court-leet, is by fine and amercement; the former assessed by the steward, and the latter by the jury: for both of which, the lord may have an action of debt, or take a distress, &c. Twelve freeholders, or repleaders, are to be of the jury: and the particular articles to be inquired into, by statute, are, if all that owe suit of court are present; of customs withdrawn; purprestures in lands, woods, &c. of houses set up or beat down, cottages erected contrary to law, and other annoyances; of bounds taken away; ways or waters turned or stopped; of thieves, and hues and cries not pursued; of bloodshed, escapes, persons outlawed, money coined, treasure found; abuse of bread and ale, persons keeping alehouses without licence; false weights and measure, unlawful games, offences relating to the game; offences of tanners in selling insufficient leather, of trestlers, &c. of markets, victuallers and labourers, unlawful fishing, idle persons, &c. by several statutes. All these articles are drawn up in form, and given in charge by the steward. The lord of the leet ought to have a pillory and tumbrel, to punish offenders; and for want thereof the lord may be fined, or the liberty seized. 2 *Danv.* 289. Also all towns in the leet are to keep stocks in repair; and the town that hath none shall forfeit 5 *l.* *Ibid.* Stewards of leets, &c. are not to receive profits to their own use, belonging to the lord, on pain of 40 *l.* *Stat. 1 Jac. 1. c. 5.* Vide *Complete Court-Keeper*.

Court of Marshalsea, (*curia palatii*) A court of record to hear and determine causes between the servants of the King's household and others within the verge; and hath jurisdiction of all matters within the verge of the court, and of pleas of trespass, where either party is of the King's family; and of all other actions personal, wherein both parties are the king's servants; and this is the original jurisdiction of the court of marshalsea. But the *curia palatii*, erected by King Charles I. by letters patent, in the 6th year of his reign, and made a court of record, hath power to try all personal actions, as debt, trespass, slander, trover, actions on the case, &c. between party and party, the liberty whereof extends twelve miles about Whitehall; which jurisdiction hath since been confirmed by King Charles the Second: and the judges of this court are the steward of the King's household, and knight-marshal for the time being, and the steward of the court, or his deputy, being always a lawyer. *Crompt. Jurisd.* 102. *Kitch.* 199, &c. 2 *Inst.* 548.

This court is kept once a week, in Southwark: and the proceedings here are either by *capias* or attachment; which is to be served on the defendant by one of the knight marshal's men, who takes bond with sureties for his appearance at the next court; upon which appearance, he must give bail, to answer the condemnation of the court; and the next court after the bail is taken, the plaintiff is to declare, and set forth the cause of his action, and afterwards proceed to issue and trial by a jury, according to the custom of the Common law courts. If a cause is considerable, it is usually removed into B. R. or C. B. by an *habeas corpus cum causa*: otherwise causes are here brought to trial in four or five court-days. *Practif. Solic.* 409, 410.

By statute, the steward and marshal of the King's house are not to hold plea of freehold, &c. 28 Ed. 1. c. 3. Error in the *marshalsea* court may be removed into the *King's Bench*. 10 Ed. 3. And the fees of the *marshalsea* are limited by the Stat. 2 H. 4. c. 23. This *marshalsea* is that of the household; not the *King's marshalsea*, which belongs to the *King's Bench*.

Court Martial, (*curia martialis*) Is a court for punishing the offences of officers and soldiers in time of war. And it appears by our books, that if any person in commission, in time of peace, put to death any man by martial law, it is against *Magna Charta*, and murder. 3 Inst. 52. Though temporal acts of parliament have of late enabled our Kings to hold courts martial in time of peace, &c. By 4 & 5 W. & M. c. 13. Desertion and mutiny is punishable by a court martial: and the King, or the General of the army, may grant commissions to any field officer, &c. to call a court martial, of thirteen at least commission officers, who are to take an oath for trying truly; and sentence of death is not to be given unless nine concur: and a field-officer is not to be tried by any under the degree of a captain. By a subsequent act, courts martial may be called within the realm, for trying offenders against the laws of war out of the realm; or a deserter abroad may be sent back to his regiment to be proceeded against. And an acquittal or conviction in a court martial is a good bar to an indictment. Stat. 7 Ann. c. 4. See 1 Geo. 1. c. 9. 7 Geo. 1. c. 6. Court martial at Sea, vide Navy.

Court of Piepowders, (*curia pedis pulverisati*) Is a court held in fairs, to do justice to buyers and sellers, and for redress of disorders committed in them: so called, because they are most usual in summer, when the suitors to the court have dusty feet; and from the expedition in hearing causes proper thereunto, before the dust goes off the feet of the plaintiffs and defendants. 4 Inst. 272. It is a court of record incident to every fair; and to be held only during the time that the fair is kept. Doct. & Stud. c. 5. As to the jurisdiction, the cause of action for contract, slander, &c. must arise in the fair or market, and not before at any former fair, nor after the fair: it is to be for some matter concerning the same fair or market; and be done, complained of, heard and determined the same day. Also the plaintiff must make oath that the contract, &c. was within the jurisdiction and time of the fair. Stat. 17 Ed. 4. c. 2. 2 Inst. 220.

The court of piepowders may hold a plea of a sum above 40s. and 'tis said, judgment may be given at another fair, at a court held there, and a writ of error lies upon a judgment given. Dyer 133. F. N. B. 18. This court may not meddle with any thing done in a market, without a special custom for it; but for what is done in a fair only: and not there for slanderous words, unless they concern matter of contract in the fair; as where it is for slanderous words of another, and not of his person in the same fair. Moor, ca. 854. The steward before whom the court is held, is the judge: and the trial is by merchants and traders in the fair; and the judgment against the defendant shall be *quod amercietur*. If the steward proceeds contrary to the statute 17 Ed. 4. he shall forfeit 5 l.

Court of Requests, (*curia requisitionum*) Was a court of equity, of the same nature with the court of Chancery, but inferior to it; principally instituted for the relief of such petitioners, as in conscientious cases addressed themselves by supplication to his Majesty. Of this court, the Lord Privy Seal was chief judge, assisted by the Masters of Requests; and it had beginning about the 9 H. 7. according to Sir Julius Caesar's Treatise on this subject: though Mr. Gwynn, in his Preface to his Readings, saith it began from a commission first granted by King Hen. 8.

This court having assumed great power to itself, so that it became burdensome, Mich. anno 40 & 41 Eliz. in the court of Common Pleas it was adjudged upon solemn argument, that the court of Requests was no court of judicature, &c. And by the Stat. 16 & 17 Car. 1. c. 10. it was taken away. 4 Inst. 97. See Court of Conscience.

Court of the Lord Steward of the King's House. The lord steward, or in his absence, the treasurer and controller of the King's house, and steward of the mar-

shalsea, may inquire of, hear and determine in this court, all treasons, murders, manslaughters, bloodtheds, and other malicious strikings, whereby blood shall be shed, in any of the palaces and houses of the King, or in any other house where his royal person shall abide. And this jurisdiction was given by the Stat. 33 H. 8. c. 12. 3 Inst. 140. But this court was at first intended only to inquire of and punish felonies, &c. by the King's servants, against any lord or other person of the King's council. 3 H. 7. c. 14.

Court of Star-Chamber, (*curia camera stellata*) A court erected by 3 H. 7. c. 8. which ordained, That the Lord Chancellor, Treasurer, and Lord Privy Seal, calling a Bishop, and Lord of the King's Council, and the two Chief Justices to their assistance, on bill or information might make process against maintainors, rioters, persons unlawfully assembling, and for other misdemeanors, which through the power and countenance of such as did commit them lifted up their heads above their faults, and punish them as if the offenders had been convicted at law, by a jury, &c. But this act was repealed, and the court dissolved by Stat. 17 Car. 1. c. 10.

Courts of Universities. The courts of universities of Oxford and Cambridge are of a particular nature: they were granted by charters, and confirmed by authority of parliament. See Stat. 13 Eliz. c. 29. 4 Inst. 227. These courts are called the *chancellor's courts*, and are kept by the vice-chancellors of the universities: their jurisdiction extends to all causes ecclesiastical and civil, (except for maihem, felony, and relating to freehold) where a scholar, servant, or minister of the universities is one of the parties to the suit. The causes are managed by advocates and proctors: and they proceed in a summary way, according to the practice of the Civil law; and the judges, in their sentences follow the justice and equity of the Civil law, or the laws, statutes and customs of the universities, or the laws of the land, at their discretion. 3 Cro. 73. If any erroneous judgment be given in these courts, appeal lies to the congregation; thence to the convocation; and thence to the King in Chancery, by his delegates Wood's Inst. 526. See Cognizance.

Courts of Wales, (*curia principatus Wallie*) The courts of the principality of Wales, and their jurisdiction, are settled by acts of parliament: and besides county courts, hundred-courts, courts-leet, &c. by 34 & 35 H. 8. c. 26. it is enacted, that there shall be a court of grand sessions, kept twice in every year in every of the twelve counties of Wales; and the justices of those courts may hold pleas of the crown in as large a manner as the King's Bench, &c. And also pleas of assises, and all other pleas and actions real and personal, in as large a manner as the Common Pleas, &c. And errors in judgment before any of the justices in the great sessions, shall be redressed by writ of error out of the Chancery of England returnable in B. R. The proceedings in these courts are according to the laws of England: and the King's writs ought not to go into Wales; though a *quo minus* out of the Exchequer is often sent thither. Sed qu. if a *latitat* or *capias* will not run into Wales?

For further satisfaction, as to the several courts within this kingdom, see 4 Inst. and Black. Com. in many places.

Court-Lands, Demains, or lands kept in the lord's hands, to serve his family. See *Curtiles Terræ*.

Cousenage, The writ of and proceedings therein. See *Cosenage*.

Couthutlaugh, (from the Sax. *couth*, i. e. *fiens*, and *utlagh*, *exlex*) Is a person that willingly and knowingly receives a man outlawed, and cherishes or conceals him: for which offence he was, in ancient time, to undergo the same punishment as the outlaw himself. Bract. lib. 3. tra. 2. cap. 13.

Cows, One milch cow is to be kept to every ten beasts, and sixty sheep, by farmers, &c. on pain of 20s. Stat. 2 & 3 P. & M. c. 3.

Crafter, (*crazer*) A small vessel of lading; a hoy or smack. Pat. 2 R. 2. 14 Car. 2. cap. 27.

Crail, An engine made use of to catch fish. Blount.

Crane, (*cranagium*) Is a liberty to use a crane for drawing up of goods and wares of burden from ships and vessels,

vessels, at any creek of the sea or wharf, unto the land, and to make profit of it: it also signifies the money paid and taken for the same. *Stat. 22 Car. 2. c. 11.*

Crannock, An ancient measure of corn.—*Quilibet debet flagellare dimidium crannock frumenti ad Semen, & duos buffellos, &c. in firma sua.* Catular. Abbot. Glaston. MS. f. 39.

Craspicis, Is a word signifying a whale, viz. *piscis crassus*.

Crastino Sancti Vincentii, The morrow after the feast of St. Vincent the Martyr, i. e. the 22d of January; which is the date of the *statutes* made at Merton, anno 20 Hen. 3. There are likewise certain *return days* of writs in terms, in the courts at Westminster, beginning with *Crastino*, &c. as *Crastino animarum* in Michaelmas term; *Crastino Purificationis beatæ Mariæ Virginis*, in Hilary term; *Crastino Ascensionis Domini*, in Easter term; and *Crastino Sanctæ Trinitatis*, in Trinity term. See *Stat. 32 H. 8. c. 21. 16 Car. 1. c. 6. 24 Geo. 2. c. 48.*

Crates, (Lat.) Is an iron grate before a prison, used in the time of the Romans. 1 *Vent. 304.*

Crabare, To impeach. *Si homicida divadietur ibi vel cravetur, &c.* Leg. H. 1. c. 30.

Craben, or **Cravent**, Was a word of obloquy, where in the ancient trial by battel, the victory should be proclaimed, and the vanquished acknowledge his fault, or pronounce the word *cravent*, in the name of *Recreantise*, &c. and thereupon judgment was given forthwith; after which the *recreant* should become infamous, &c. 2 *Inst. 248.* If the appellant join'd battel, and cried *cravent*, he should lose *liberam legem*; but if the appellee cried out *cravent*, he was to be hanged. 3 *Inst. 221.* See *Black. Com. 3 V. 340. 4 V. 342.*

Creamer, A foreign merchant; but generally taken for one who hath a stall in a fair or market. *Blount.*

Creansor, *creditor* (of the Fr. *croiance*) Signifies him that trusts another with any debt, money, or wares: in which sense it is used in *Old Nat. Br. 66. and 38 Ed. 3. c. 5.*

Creast, or **Creff**, (*criffa*) Any imagery, or carved work, to adorn the head of wainscot, &c. like our modern cornice: but this word is now applied by the heralds to their devices set over a coat of arms. *Kennet's Paroch. Antiq. 573.*

Creation-Money. This is mentioned in *Stat. 12 Car. 2. c. 1.*

Creche, A drinking-cup. *Mon. Angl. tom. 1. pag. 104.*

Creditors, Shall recover their debts of executors or administrators, who in their own wrong waste, or convert to their use the estate of the deceased, &c. *Stat. 30 Car. 2. c. 7.* Wills and devises of lands, &c. as to *creditors* on bonds or other specialties, are declared void; and the *creditors* may have actions of debt against the heir at law and devisees. 3 *Ed. 4 W. & M. c. 14.* And in favour of *creditors*, whenever it appears to be the testator's intent, in a will, that his lands should be liable for paying his debts; in such case equity will make them subject, though there are not express words; but there must be more than a bare declaration, or it shall be intended out of the personal estate. 2 *Vern. Rep. 708.* Where one devises that all his debts, &c. shall be first paid; if his personal estate is not sufficient to pay the *creditors*, it shall amount to a charge on his real estate for that purpose. *Preced. Canc. 430.* See *Debtors and Executor.*

Crech, (*creca, crecca*) Is a part of a haven where any thing is landed from the sea: so that it is observed, if when you are out of the main sea within the haven, you look round and see how many landing places there are, so many creeks may be said to belong to that haven. *Crompt. Jurisd. fol. 110.* It is also said to be a shore or bank whereon the water beats, running in a small channel from any part of the sea; from the Lat. *crepido*. This word is used in the *Stat. 4 H. 4. c. 20. and 5 Eliz. c. 5.*

Cremetum Comitatus, The sheriffs of counties anciently answered in their accounts for the improvement of the King's rents above the ancient *vicontiel* rents, under the title of *Cremetum Comitatus*, or *Firma de Cremeto Comitatus*, *Hale's Sher. Acco. p. 36.*

Crepare Oculum, To put out an eye; which had a pecuniary punishment annexed to it.—*Si quis alii crepat oculum solvatur ei sexaginta solidi.* Leg. H. 1. c. 78.

Cretinus, (*cretena*) A sudden stream or torrent. *Histor. Croyland contin. 485, 617.*

Crocard, A sort of old base money. See *Pallards.*

Crocia, The crozier or pastoral staff, so called a *similitudine crucis*, which bishops, &c. had the privilege to carry as the common ensign of their religious office; and being invested in their prelaties, by the delivery of such a crozier: hence the word *crocia* did sometimes denote the collation to, or disposal of bishopricks and abbies, by the donation of such pastoral staff; so as when the King granted large jurisdictions, *exceptis crociis*, it is meant, except the collation or investiture of episcopal sees, &c. *Addit. to Cowell.*

Crociarius, The crociary or cross-bearer, who like our virger, went before the prelate, and bore his cross.—Robertus de Wycombe, *clericus episcopi Dunelm. quem vulgo crociarium ejus vocant.* Liber de Miraculis Tho. Episc. Heref. MS. anno 1290.

Croft, (Sax. *croftum* and *crosta*) A little close adjoining to a dwelling-house; and enclosed for pasture or arable, or any particular use. In some old deeds *crosta* occurs as the Latin word for a *croft*; but *cum toftis* & *croftis*, is most frequent. *Ingulph.* It seems to be derived from the old English word *craft*, signifying *handy craft*; because such grounds are usually manured and extraordinarily drest by the hand and skill of the owner.

Croises, and *croisado*, Are mentioned in our ancient law books. See *Croyses.*

Crok, (*crocus*) Turning up the hair into curls or corks; whence comes *crook*, *crooked*, &c.—*Sciatis quod potestatem vobis dedimus sciendendi capillos clericorum nostrorum, longas crines habentium, & ad crocos capillorum suorum deponendos, &c.* Pat. 21 H. 3.

Crop, (*croppa*) The seeds or products of the harvest in corn, &c. *Fleta, lib. 2. cap. 82.*

Cross-Bows, None shall shoot in, or keep any cross-bow, hand-gun, hagbut, &c. but those who have lands of the value of 100 *l. per annum*: and no person shall travel with a cross-bow bent, or gun charged, except in time of war; or shoot within a quarter of a mile of any city, or market-town, unless for defence of himself or his house, or at a dead mark, under the penalty of 10 *l.* *Stat. 33 H. 8. cap. 6.*

Crosses. By *Stat. 13 Eliz. c. 2.* Crosses, beads, &c. used by the Roman Catholics, are prohibited to be brought into this kingdom, on pain of a *præmunire*, &c. And it was usual in former times for men to erect crosses on their houses, by which they would claim the privileges of the *Templars* to defend themselves against their rightful lords; but this was condemned by the *Stat. Westm. 2. c. 37.* It was likewise customary in those days to set up crosses in places where the *corps* of any of the nobility rested, as it was carried to be buried, that a *transseuntibus pro ejus anima deprecetur.* *Walsing. anno 1291.* There were several of these crosses erected over England, especially in honour to the resting-places of our Kings, on their bodies being transmitted to any distant place for burial: but these superstitious sunk in this kingdom with the *Romish religion.*

Croyses, (*cruce signati*) Is used by Britton for pilgrims, because they wear the sign of the cross upon their garments. Of these and their privileges, *Bracton* hath treated, *lib. 5. par. 2. cap. 2. and par. 5. cap. 9.* Under this word are also signified the *Knightes of St. John of Jerusalem*, created for the defence of pilgrims; and all those persons who in the reigns of K. Hen. 2. Ric. 1. Hen. 3. and Ed. 1. *cruce signati* took upon them the *croisado*, dedicating and lifting themselves to the wars, for the recovery of Jerusalem and the Holy Land. *Greg. Syntag. lib. cap. 13, 14.*

Croy, Signifieth marsh land. — *Et quia palustris hujus Croyland ipsam vocem indicat, nam crudam terram & caruam significat.* *Ingulphus, p. 853.*

Crown, (*corona*) Signifies the possessions and dignity of a King of any kingdom. The crown of England, according to Dr. Blackstone, is, by Common law and constitutional

tion custom hereditary; and this in a manner peculiar to itself: but the right of inheritance may, from time to time, be changed or limited by act of parliament; under which limitations the crown still continues hereditary. *Black. Com.* 1 V. 191. which *vide*. Sometimes our Kings, for political reasons, have conferred their principalities on whom they pleased, esteeming it lawful to appoint their successors after them. For *Edward the Confessor* appointed the crown after his decease, at several times, to *William* called the *Conqueror*, and *Edgar* and *Harold*, and *Harold*, after the decease of his father, upon the title left him, was crowned by the Archbishop of *York*; but *William of Normandy* having slain *Harold* at the battle of *Hastings*, he claimed the kingdom as well by the nomination of *Edward the Confessor*, as by right of conquest, and he was crown'd and enjoyed the kingdom for his time. *Rac. Coron.* 4. 27.

And to come further down, we find that the parliament, (which had the best right) have asserted their authority in these cases: the crowns of *England* and *France* were entail'd on King *Henry the Fourth*, and his four sons by act of parliament. *Stat.* 7 H. 4. c. 2. And the parliament entail'd the crown on *Henry the Sixth*, and his issue; also *Richard the Third* was recognised by parliament. But the most extraordinary instance of this nature was, the nomination and appointment of King *Henry the Eighth*, to whom the parliament granted power by his last will and testament to make conditions and limitations at his pleasure, for settling the inheritance of the crown; and he by his will ordained, that his son *Edward* should succeed him, and he dying without issue, his daughter *Mary*, and for her want of issue, his daughter *Elizabeth* to enjoy the crown in succession; with remainders to such as the King by his letters patent, &c. should appoint. *Stat.* 35 Hen. 8. c. 1.

After the death of King *Henry 8.* his son *Edward the Sixth* succeeded; and he was prevailed upon to appoint the Lady *Jane*, daughter to the Duke of *Suffolk*, (who married King *Henry's* sister) a protestant lady, by his letters patent to succeed him: but this appointment, soon after the death of K. *Edward*, was vacated by Queen *Mary*; the Lady *Jane* beheaded, and the protestant reformed religion eclipsed during her reign; but it revived again and received perfection, by her successor the glorious Q. *Elizabeth*.

By the *Stat.* 1 Eliz. c. 1. the parliament acknowledged the Queen to be right heir to the crown; and by this act the limitation of the crown contained in 35 H. 8. is declared to stand and remain law for ever. And when King *James the First* came to the crown, the parliament made a recognition, that upon Queen *Elizabeth's* death, the crown of *England*, and all the kingdoms, dominions, and rights belonging to the same, did by lawful birthright and succession descend to King *James*. *Stat.* 1 Jac. 1. c. 1.

After this we do not find that the parliament intermeddled in settling the succession of the crown till the abdication of King *James the Second*; when the Lords Spiritual and Temporal, and Commons, lawfully representing all the estates of the people of the realm, invited over *William, Prince of Orange*, and the Princess *Mary*, (eldest daughter of King *James II.*) to take care of their rights and liberties; whom they declared to be King and Queen of *England*. And by *Stat.* 1 W. & M. c. 2. reciting the declaration of the Lords and Commons for securing the liberties of the kingdom, upon which the Prince and Princess of *Orange* accepted the crown, the said Prince and Princess were recognised King and Queen of *England*, &c. for their lives, and the life of the survivor of them; and after their deaths, the crown was settled on the heirs of the body of the said Princess; and for want of such issue, to the Princess *Anne of Denmark*, sister to the Queen, and the heirs of her body.

Also by 12 W. 3. c. 2. (after the decease of Q. *Mary* without issue) the Princess *Sophia of Hanover* (daughter of *Elizabeth*, eldest daughter of King *James the First*) was declared next in succession after King *William*, and the Princess *Anne*, and their issue; and the crown to remain to the Princess *Sophia*, and the heirs of her body being protestants. By virtue of which last statute, his Majesty King

George the First, eldest son of the Princess *Sophia*, on the death of her Majesty Queen *Anne* without issue, the said Princess *Sophia* being likewise dead, came to the possession of the crown of these realms: by these last acts, papists are rendered incapable to inherit the crown of *England*; and subjects are absolved from their allegiance to such persons coming to the crown, and are to join in the communion of the church of *England*.

And this nation is not to be engaged in a war for defence of dominions not belonging to the crown.

Persons endeavouring to deprive the next in succession to the crown from succeeding, and who attempt it by any overt act, are guilty of high treason. *Stat.* 1 Ann. c. 2. And if any affirm by writing, &c. that the King or Queen of *England* cannot make laws by the authority of parliament to bind the crown, they are guilty of treason: and preaching or speaking it incur a *præmunire*. 4 Ann. c. 3. Affirming by writing or printing, that any other person hath a right to the crown, otherwise than according to the *Stat.* 1 W. & M. &c. is declared high treason. *Stat.* *Ibid.* There is no interregnum in this kingdom; for when the crown descends to the right heir, he is *Rex* before coronation, as there must always be a King in whose name laws are to be maintained and executed. *Hill.* 1 Jac. See *Descent of the Crown and King*.

Crown-Office. This is an office under the King's Bench, of which the King's Coroner or Attorney there is commonly Master. The Attorney General, and Clerk of the Crown exhibit informations in this office, for crimes and misdemeanors; the one *ex officio*, and the other usually by order of court; and here informations may be laid for offences and misdemeanors at Common law, as for *batteries*, *conspiracies*, *libelling*, *nuisances*, *contempt*, *seditions words*, &c. wherein the offender is liable to pay a fine to the King. *Finch* 340. *Shew.* 109. By *Stat.* 4 & 5 W. & M. c. 18. The Clerk of the Crown in B. R. is not to receive or file any information for *trespass*, *battery*, &c. without express order of court; nor to issue any process without taking a recognisance in 20 l. penalty to prosecute with effect; and if the party appear, and the plaintiff do not procure a trial in a year, or if verdict pass for the defendant, &c. the court shall award the defendant costs: but this act doth not extend to informations in the name of the King's Coroner or Attorney, &c. When a *battery* is committed privately, so that the person injured can make no proof thereof by witnesses at law; it is usual to bring an information in this office, or to prefer an indictment, the most legal method, where the party may be a witness for the King; it being his suit. Informations in the nature of *quo warranto's* brought by the Attorney General, against corporations, &c. *Vide Quo Warranto*.

Cruetum, Was a garment of purple, mix'd with many colours. — *Duas patenas argentas auro ornatas cum duobus urceolis & cructo auro.* *Mon. Ang.* tom. 1. pag. 210.

Cry de Pais, On a robbery or other felony done, hue and cry may be raised by the country in the absence of the constable, which is called *cry de pais*. 2 Hule's Hist. P. C. 100.

Crypta, A chapel or oratory under ground: *egresse toto conventu, accepta absconsa si nox est vadit per cryptam.* *Du Cange*.

Cuckingstool, (*tumbrellum*) Is an engine invented for the punishment of *scolds*, and unquiet women, by ducking them in water, called in ancient time a *tumbrel*; and sometimes a *trebuchet*. *Lamb. Eiren. lib.* 1. c. 12. And *Bracton* writes this word *tymborella*. In *Domesday* it is called *cathedra stercoris*: and it was in use even in the Saxons time, by whom it was described to be *cathedra*, in qua *rixosæ mulieres sedentes aquis demergebantur*. It was anciently also a punishment inflicted upon brewers and bakers, transgressing the laws; who were thereupon in such a stool immersed over head and ears in *stercore*, some sinking water. Some think it is a corruption from *ducking stool*; others from *choaking stool*; *quia hoc modo demersæ aqua fere suffocantur*. *Blount.* See *Cassigatory*.

Cude. A *cude cloth* is a chrysom or face-cloth for a child baptized. *Vide Chrysmale*.

Cui aute Divortium, Is a writ that a woman divorced from her husband hath to recover her lands and tenement, which she had in fee simple, or in tail, or for life, from him

him to whom her husband did alienate them during the marriage, when he could not gainsay it. *Reg. Orig.* 233. *F. N. B.* 240. And the heir shall have a *sur cui ante divorcium*, where the wife dieth before the action brought; as well as she shall have a *sur cui in vita*: But of an estate-tail, the heir shall not have *sur cui in vita ante divorcium*, but shall be put to his *formedon* in the descender. *New Nat. Br.* 454. See *Black. Com.* 3 *V.* 183.

Cui in Vita, Is a writ of entry, which a widow hath against him to whom her husband alienated her lands or tenements in his life-time; which must contain in it, that during his life she could not withstand it. *Reg. Orig.* 232. *F. N. B.* 193. If husband and wife be jointenants before the coverture, and the husband alieneth all the land, and dieth, she shall have a *cui in vita* for a moiety, and no more: But if they are joint purchasers, during the coverture, and he alien all the land, and dieth, his wife shall have a *cui in vita* of the whole land; because that during the coverture, as to purchase, they are but one person in law. *F. N. B.* 187. And from this reason, if husband and wife, and a third person, purchase jointly, and the husband alieneth all in fee, and dieth, the wife shall have a *cui in vita* of a moiety. *Ibid.*

Where the husband and wife exchange the lands of the wife for other lands, if the wife agree unto the exchange after the husband's death, she shall not have a *cui in vita*. Also if the wife do accept of parcel of the land in dower, of which she hath a *cui in vita*, by that acceptance she shall be barred of the residue. *New Nat. Br.* 430. If the husband and wife lose by default the wife's lands, after the death of her husband, she shall have a *cui in vita* to recover those lands so lost by default. *F. N. B.* 187. By Stat. 13 *Ed. 1. c. 3.* *Cui in vita* is given to the wife where the deceased husband lost her lands by default in his life-time: And she shall be admitted to defend her right during his life, if she come in before judgment. Likewise if tenant in dower, by the curtesy, or for life, do make default, &c. the heirs and they to whom the reversion belongeth, shall be admitted to their answer, if they come before judgment: And if on default judgment happen to be given, such heirs, &c. shall have a writ of entry for recovery of the same, after the death of such tenants. See *Booth* on real actions, and *F. N. B.* and *Black. Com.* 3 *V.* 183.

Culagium, Is when a ship is laid up in the dock to be repaired. *MS. Arb. Trevor. Arm. de Plac. Edw.* 3.

Culpit, Is a reply of a proper officer in behalf of the King, affirming a criminal to be guilty, after he hath pleaded Not guilty, without which the issue to be tried is not joined: It is compounded of two words, *viz.* *Cul* and *pri*; the one an abbreviation of *culpabilis*, and the other derived from the French word *prest*, *i. e.* ready; and 'tis as much as to say, That he is ready to prove the offender guilty. See *Black. Com.* 4 *V.* 333.

Cultura, This word is often found in old writings, and signifies a parcel of arable land. *Blount.*

Culvertage, (*Culvertagium*) Is said by some persons to be derived from *Cutum & Vertere*, to turn tail: And in this sense, *sub nomine culvertagii*, was taken to be on pain of cowardice, or being accounted cowards. But in the opinion of others, it rather signifies some base slavery, or the confiscation of an estate; being a feudal term for the lands of the vassal forfeited and escheating to the lord: and *sub nomine culvertagii*, in this signification, was under pain of confiscation. *Matt. Paris. Anno* 1212.

Culward and **Culverd**, Words used for a coward, or cowardice. *Chart. Temp. E.* 1.

Cuna Cervisia, A tub of ale. *Domesday.* But this word is truly *Cuva*.

Cuneus, A mint or place to coin money: *Cuneum moneta* signifies the King's stamp for coinage; and from the word *cune*, is derived coin. See *Coin*.

Cunty=Cunty, Is a kind of trial, as appears by *Bracton*, in these words: *In brevi de recto, negotium terminabitur per Cunty-Cunty*, &c. which is taken to be the ordinary jury. *Bract. lib. 4. tract. 3. c. 18.*

Curagulus, One who taketh care of a thing. *Mon. Ang. Tom.* 2.

Cura Monasterii, An officer so called, who had the charge of a monastery.

Curate, (*Curatus*) Is he who represents the incumbent of a church, parson or vicar, and officiates divine service in his stead: And in case of pluralities of livings, or where a clergyman is old and infirm, it is requisite there should be a curate to perform the cure of the church. He is to be licensed and admitted by the bishop of the diocese, or by an ordinary, having episcopal jurisdiction: and when a curate hath the approbation of the bishop, he usually appoints the salary too; and in such case, if he be not paid, the curate hath a proper remedy in the ecclesiastical court, by a sequestration of the profits of the benefice; but if he hath no licence from the bishop, he is put to his remedy at common law, where he must prove the agreement, &c. *Right. Clerg.* 127.

By statute, where curates are licensed by the bishop, they are to be appointed by him a stipend not exceeding 50*l.* per ann. nor less than 20*l.* a year, according to the value of the livings, to be paid by the rector or vicar: And the same may be done on any complaint made. *Stat. 12 An. c. 2.* One person cannot be curate in two churches, unless such may satisfy the law, by reading both morning and evening prayers at each place: Nor can he serve one cure on one Sunday, and another cure on the next; for he must not neglect to read morning and evening prayer in his church every Lord's day; if he doth he is liable to punishment. *Comp. Incumb.* 572. But it is otherwise where a church or chapel is a member of the parish-church; and where one church is not able to maintain a curate. *Can.* 48.

A curate having no fixed estate in his curacy, not being instituted and inducted, may be removed at pleasure by the bishop or incumbent. *Noy.* But there are perpetual curates, as well as temporary, who are appointed where tithes are impropriate, and no vicarage endowed: These are not removeable; and the impropriators are obliged to find them, some whereof have certain portions of the tithes settled on them. *Stat. 29 Car. 2. c. 8.* Every clergyman that officiates in a church, (whether incumbent or substitute) is in our liturgy called a curate: Curates must subscribe the declaration, according to the act of uniformity, or are liable to imprisonment, &c.

Curfeu, (of the Fr. *Cowrir*, *i. e.* *Tegere*, and *Feu*, Ignis,) signifies the ringing of a bell, or evening peal, by which William the First, called the Conqueror, commanded every person to rake up or cover over his fire, and put out his light: And in many places of England at this day, where a bell is customarily rung towards bed-time, it is said to ring curfew. *Stow's Annals.*

In the Welch language, *curfa*, signifies a beating; also, a stroke. *Richard's Antiquæ Linguae Britannicæ Thesaurus.*

Curia, The word was sometimes taken for the persons, as feudatory and other customary tenants, who did their suit and service at the court of the lord. *Kennet's Paroch. Antiq.* 139. And it was usual for the Kings of England, in ancient times, to assemble the bishops, peers, and great men of the kingdom to some particular place, at the chief festivals in the year; and this assembly is called by our historians *curia*; because there they consulted about the weighty affairs of the nation. And it was therefore called *Solemnis Curia*, *Augustalis Curia*, *Curia Publica*, &c. See *Court*.

Curia advisare vult, Is a deliberation which a court of judicature sometimes takes, where there is any point of difficulty, before they give judgment in a cause. *New Book Entr.* And when judgment is staid, upon motion to arrest it; then 'tis entered by the judges *curia advisare vult*. *Shep. Epit.* 682.

Curia Curus Aquæ, A court held by the lord of the manor of *Gravesend* for the better management of barges and boats using the passage on the river *Thames* from thence to *London*, and plying at *Gravesend* bridge, &c. mentioned in the *Stat. 2 Geo. 2. c. 26.*

Curia Claudenda, Is a writ to compel another to make a fence or wall, which he ought to make between his land and the plaintiff's, on his refusing or deferring to do the same. *Reg. Orig.* 155. This writ doth not lie but against him who hath a close adjoining to the plaintiff's land, who is obliged to inclose it; and it lieth not but for him who hath a freehold, &c. It may be sued before the

the sheriff in the county-court, or in the common pleas : And the judgment is to recover the inclosure and damages. *New Nat. Br.* 282, 283.

Curia Domini, The lord's house, hall or court, where all the tenants attend at the time of keeping courts.

Curia Penticiarum, Is a court held by the sheriff of *Chester*, in a place there called the *Pendice* or *Pentice* : And 'tis probable its being originally kept under a *Pent-house*, or open shed covered with boards, gave it its denomination.

Curnock, A measure containing four bushels, or half a quarter. *Flata, lib. 2. c. 12.*

Curriculus, The year, or course of a year : *Altum est hoc annorum Dominice incarnationis quatuor quinquagenis & quinq̄tes, quinis lustris, & tribus curriculis.* This is the year 1028 ; for four times 50 make 200, and five times 200 make 1000. Then five *lustra* are twenty-five years, and three *Curriculi*, three years, making in all the very year.

Curriers, Are persons that curry and dress leather. No currier shall use the trade of a butcher, tanner, &c. or shall curry skins insufficiently tanned, or gash any hides of leather, on pain of forfeiting for every hide or skin 6 s. 8 d. And persons in *London* putting leather to be curried to any but freemen of the Curriers Company ; and such curriers not currying the leather sufficiently, shall forfeit the ware or the value, &c. *Stat. 1 Jac. 1. c. 22.* The clause relating to freemen is repealed ; but if any currier do not curry leather sent him, within sixteen days between *Michaelmas* and *Lady-Day*, and in eight days at other times, on conviction before a justice, he shall forfeit 5 l. to be levied by distress, &c. yet subject to mitigation. 12 *Geo. 2. c. 25.* Curriers and such as deal in leather, may cut and sell it in small pieces in their shops to any persons whatsoever. *Stat. Ibid.* See *Leather, Skins, &c.*

Curstors, (*Clerici de Cursu*) Clerks belonging to the Chancery, who make out original writs ; and are called *Clerks of Course*, in their oath appointed 18 *Ed. 3. stat. 5.* There are of these clerks twenty-four in number, which make a corporation of themselves ; and to each clerk is allotted a division of certain counties, in which they exercise their functions. 2 *Inst.* 670.

Curtones terræ, Is used for ridges of land. 14 *Ed. 2.*

Curtoziæ, A sort of light ships or swift sailers : This word is mentioned in *Howden, R. 1. Applicuerunt ibi Navæ & Bufciæ 500. exceptis Galeis & curtoziis, &c.*

Curtsey of England, (*Jus Curialitatis Angliæ*) Is where a man taketh a wife seised in fee-simple, or fee-tail general, or as heiress in special tail, and hath issue by her, male or female, born alive, which by any possibility may inherit, and the wife dies ; the husband holds the lands during his life ; and is called *Tenens per legem Angliæ*, or *tenant by the curtesy of England* ; because this privilege is not allowed in any other country, except *Scotland*, now belonging to *England*.

Four things are requisite to give an estate by the *curtesy*, viz. Marriage, seisin of the wife, issue, and death of the wife. 1 *Inst.* 30. If land descend to the wife after the husband hath issue by her ; or if the issue be dead at the time of her death, being born alive ; the husband shall be tenant by the *curtesy*. Also if a child is born alive, 'tis not material whether 'tis baptised, or ever heard to cry, to make the husband tenant by the *curtesy* ; for if 'tis born alive, 'tis enough. 1 *Nels. Abr.* 578. But the child must be such as by possibility may inherit ; and therefore if land be given to a woman, and the heirs male of her body, and she takes husband and hath issue a daughter, and dies ; as this issue cannot possibly inherit, the husband shall not be tenant by the *curtesy*. *Terms de Ley.*

If the child is rip'd forth of the mother's belly, after her death, tho' it be alive, it will not entitle tenancy by the *curtesy* ; for this ought to begin by the issue, and be consummate by the death of the wife, and the estate of tenant by the *curtesy* should avoid the immediate descent. *Ibid.* A man shall not be tenant by the *curtesy* of a bare right, title, use, reversion, &c. expectant upon an estate

of freehold, unless the particular estate is determined during the coverture ; nor of a seisin in law : But if a wife dies before a rent becomes due ; or in the case of an advowson, before the church becomes void ; the husband shall be tenant by the *curtesy*, though the wife had only a seisin in law ; for in this case no other seisin could be attained. *F. N. B.* 149. 1 *Inst.* 29, 30, 40.

There is no tenancy by the *curtesy* of copyhold lands, except there be a special custom for it. And where a husband is entitled to this tenancy, if after the wife is an idiot, and her estate in the land sound : when she dies, he shall not be tenant by the *curtesy*, for the King's title by relation prevents it. *Plowd.* 263. If the wife be seised in fee of lands, and attaint of felony, but have issue by her husband, and she is hanged, &c. 'tis said the husband shall be a tenant by the *curtesy* : But yet the land will be forfeited according to *Kitch.* 159. 21 *Ed. 3.* 49.

A woman seised of land had two daughters, and covenanted to stand seised to the use of *E.* her eldest daughter in tail ; on condition that she should pay to her other daughter within a certain time 300 l. And if *E.* made default, or died without issue before such payment, then the land to go to the second daughter ; the mother dying, *E.* took a husband, and had issue, and died afterwards without any issue living, before the day of payment : It was here held, that her husband should be tenant by the *curtesy*. 1 *Leon. ca.* 233. See *Kitch.* 159.

Curteyn, (*Curstana*) Was the name of King *Edward the Confessor's sword* ; which is the first sword carried before the Kings of *England* at their coronation : And it is said the point of it is broken as an emblem of mercy. *Mat. Paris. in Hen. 3.*

Curtilage, (*Curtilagium*, from the *Fr. Cour, Court*, and *Sax. Leagb locus*) Is a court-yard, back-side, or piece of ground lying near and belonging to a dwelling-house. 4 *Ed. 1. cap. 1.* 35 *H. 8. c. 4.* 39 *Elix. c. 10.* 6 *Rep.* 64.—*Mibi dici videtur curtilagium à curtillum & ago, scil. locus ubi curtis vel curtilli negotium agitur. Spelm.* And though it is said to be a yard or garden, belonging to a house ; it seems to differ from a garden, for we find, cum quodam gardino & curtilagio. 15 *Ed. 1. n.* 34.

Curtilles Terræ, Court lands. It is recorded, that among our *Saxon* ancestors, the *Thanes* or nobles who possessed *Bockland*, or hereditary lands, divided them into *Inland* and *Outland* : The *Inland* was that which lay most convenient for the lord's mansion-house ; and therefore the lords kept that part in their own hands, for the support of their families, and for hospitality : Afterwards the *Normans* called these lands *Terras Dominicales*, the demains, or lord's lands : The *Germans* term'd them *Terras Indominicatas*, lands in the lord's own use : And the *Feudists*, *Terras Curtilles*, lands appropriate to the court or house of the lord. *Spelm. of Feuds, c. 5.*

Custantia, The same with *Custagium*, which signifies costs.

Custode admittendo, and **Custode amovendo**, writs for the admitting or removing of guardians. *Reg. Orig.*

Custodes Libertatis Angliæ Auctoritate Parliamenti, Was the style in which writs and all judicial process did run during the grand rebellion, from the murder of King *Charles I.* till the usurper *Oliver* was declared Protector, &c. mentioned and declared traitorous, by statute 12 *Car. 2. c. 3.*

Custodiam dare, Was taken for a gift or grant for life. *Du Cange.*

Custom, (*Consuetudo*) Is a law not written, established by long usage, and the consent of our ancestors. No law can oblige a people without their consent : So where-ever they consent and use a certain rule or method as a law, such rule, &c. gives it the power of a law ; and if 'tis universal, then 'tis common law : if particular to this or that place, then 'tis custom. 3 *Salk.* 112. And as to the rise of customs, when a reasonable act once done was found to be good and beneficial to the people, then they did use it often, and by frequent repetition of the act, it became a custom ; which being continued without interruption time out of mind, it obtained the force of a law, to bind the particular places, persons, and things concerned therein.

therein. Thus a custom had beginning and grew to perfection: And a good custom must be grounded on antiquity, continuance, certainty, and reason: *Antiquity*, for that it hath been time out of memory, or threescore years, as limited by statute; and time out of mind is where no man then living hath heard or known any proof to the contrary: If two or more witnesses can depose that they heard their fathers say it was a custom all their time; and that their fathers heard their grandfathers say it was so also in their time; it is enough for the proof of a custom. *Blount. Davis Rep. 32.* Continuance of a custom ought to be without any interruption time out of memory; for if it be discontinued within time of memory, the custom is gone. *Certainty*, a custom must be certain, because an uncertain thing may not be continued time out of mind: And custom must be *reasonable*, for unreasonable things are unlawful. 'Tis otherwise said that,

Customs have four inseparable incidents: They are to have a *reasonable commencement*, to be *certain*, and *not ambiguous*; to have *uninterrupted continuance*; and *not be against the King's prerogative*. And the two pillars of custom, are *common usage*, and that they be *time out of mind*. *Davies 32. 4 Leon. 384.* A custom contrary to the public good; or injurious to a multitude, and beneficial only to some particular persons, is repugnant to the law of reason, and consequently void. *2 Danv. 424, 427.* Customs ought to be beneficial to all, but may be good where against the interest of a particular person, if for the public good. *Dyer 60.* A custom is not unreasonable for being injurious to private persons or interests, so as it tends to the general advantage of the people. *3 Salk. 112.* which *vide*.

A custom may be good in some cases, where a prescription is not: But customs that are good for the substance and matter of them, may yet be bad for the manner; if they are uncertain, or mix'd with any other custom that is unreasonable, &c. *2 Bulst. 166. 2 Brownl. 198.* A custom extends over some place or will: A prescription extends only to particular persons. *Rep. Temp. Hardw. per Anally. Sharp v. Lowther, f. 293.* A prescription must always be had by way of *que estate*. *Ibid.* Custom that every one who passeth over such a bridge, within the lord's manor, and which the lord doth repair, shall pay him one penny, is a good custom; but if it be to pay the lord 12 d. it will be naught, for it is unreasonable. *Calib. Cop. 35. 1 Bulst. 203.*

A custom that a lord shall have within his manor *liberam fildam*, or *free-fold* throughout the village; and that no other shall have it but by agreement with him, and if any take it, the lord may abate the same; this hath been held a good custom. *1 Rol. 560.* The custom of a place, for all the inhabitants of the parish, to have common in a great waste of the lord's for all manner of beasts all the year; and to have liberty to water them in such a pond, and when the pond was foul to cleanse it, was adjudged good. *Mich. 4 Jac. 1. 2 Brownl. 293.* *Contra* as to common, for an inhabitant, as such, cannot have it. *Gafward's Case. 6 Co. 60.* A custom, that tenants of a manor shall grind all the corn they spend in their own houses, in the lord's mill, &c. is good: But a custom that every inhabitant of a house held of the lord, shall grind the corn that he spends, or shall sell, at his mill, is void. *Moor, ca. 1217. Hob. 149.* Custom to have a common bakehouse in a manor or parish, for all the tenants or inhabitants, is a good custom. *2 Bulst. 198.*

Custom is, and must always be alledged to be in many persons, and so it may be claimed by copyholders, or the inhabitants of a place, and when it is claimed, it must be as within such a county, hundred, city, borough, manor, parish, hamlet, &c. *Co. Litt. 110, 113. 4 Rep. 31.* A good custom or prescription hath the force of a grant; as where one and his ancestors have had a rent time out of mind, and used to distrain, &c. But a custom that begins by extortion of lords of manors, is judged wanting a lawful commencement, and therefore void: And where custom is amongst many, and they are all dead but one, the custom is gone. *Plowd. 322. Dyer 199.* Customs must be construed according to vulgar apprehension: And are to be taken strictly, being in derogation of

the common law. *2 Rol. Abr. 270.* They are not good which are merely in the negative; but if mixed with an affirmative, they may be good. *1 Rol. 565.*

A custom which may be intended to have had lawful beginning, is a good custom; otherwise not: nor will continuance of time make *malum in se* good. *1 Lill. Abr. 375.* Customs against common right and the rule of law, are held good. *8 Rep. 126.* The law takes notice of customs of *Gavelkind*, &c. which alter descents from the common law, in favour of all the sons, &c.

A custom may extend to and give an infant a power of doing that, which by the rules of the common law he could not do; as an infant at the age of 15, may make a feoffment of lands of the nature of gavelkind; but this, like all other customs, is to be construed strictly, and in such manner as that no prejudice may accrue to the infant thereby; and therefore such feoffment must be for valuable consideration, must be made in person, and not by attorney, cannot be with warranty, must be of lands which descend to him in gavelkind, and not of lands by purchase; and must be of lands in possession, not in remainder or reversion. *1 New Abr. 670, 671.*

And customs for an eldest daughter to inherit, or a youngest son, may be good: For these, though contrary to a particular rule of law, may have a reasonable beginning. *Nelf. Abr. 579.* And by custom a woman may be endowed of a moiety of the husband's lands, &c. Also by custom, infants may bind themselves apprentices, &c. *2 Danv. Abr. 438.*

Regularly a man cannot alledge a custom against a statute, because that is the highest matter of record in law: But a custom may be alledged against a negative statute, which is made in affirmance of the common law. *1 Inst. 115.* And acts of parliament do not always take away the force of customs. Custom pleaded against custom is not good. *2 Danv. Abr. 436.* A custom is to be positively alledged, by usage in fact. *Lutw. 1319.* General customs which are used throughout England, and are the common law, are to be determined by the judges: But particular customs, such as are used in some certain town, borough, city, &c. shall be determined by jury. *Doct. & Stud. c. 7, 10. 1 Inst. 110. Consuetudo pro lege servatur, &c. saith Bracton, lib. 3. c. 3.* And custom is said to be *altera lex*: But the judges of the court of B. R. or C. B. can over-rule a custom though it be one of the customs of London, if it be against natural reason, &c. *1 Mod. 212.*

As to the manner of laying a custom, and the difference between alledging a thing by way of custom, or by way of prescription. See *6 Co. 60. Hob. 113. Cro. Eliz. 441. Poph. 201. Style 477. 1 Lev. 176. 1 Vent. 386. 3 Lev. 160. Currb. 192.*

Custom of London. The city of London hath divers particular customs, different from any other place. By the custom of London, when a citizen and freeman dies, his goods and chattels shall be divided into three parts; the wife to have one part, the executors another, to discharge legacies, &c. and the children unprovided for the other third part. *2 Danv. Abr. 311, 312.* If a freeman of London hath no wife, but children, the half of his personal estate goes to them, and he may dispose of the other moiety; so if he have a wife and no children, the half belongs to her; but if he have both wife and children, then one third part belongs to the wife, another third to the children, and he may dispose of the other third; and if he dies intestate, the remaining third is to be distributed according to the statute. *2 Nelf. Abr. 1139.* But see *11 Geo. 1. c. 18.*

An after-born child shall come in with the others, for a customary share of a freeman's estate. And where any child dies, before one and twenty, his share survives to the other children; but in case he die after that age, at which time he might make a will of it, there on his dying intestate, it shall go according to the statute of distributions. *Preced. Can. 499, 537.* A devise or settlement of lands, does not bar a child of his part of the personal estate by the custom: but where a wife is to have a certain sum out of the husband's estate, it shall be intended

tended in satisfaction of her share. 2 Vern. 753. 1 Chan. Caf. 160.

A freeman of London dies without issue, his widow is to have her widow's chamber, and a moiety of the rest of the estate; and in an extraordinary case, she was allowed the benefit of the other moiety for life by virtue of her husband's will. 1 Vern. 132. 2 Vern. Rep. 110. By the statute 11 Geo. 1. c. 18. Freemen, by will, may now give and dispose of their personal estates, to whom they think fit; yet if they die intestate, such estates shall be subject to, and be distributed agreeable to the custom of the city. Where a freeman dies, and leaves orphan children under age, unmarried, the court of orphans hath the custody of their bodies and goods, by the custom of London: It is also the same, though he dies, or the children were born out of London. 1 Mod. 80.

By the city custom, action on the case lies for calling a married woman a whore; for in London such woman may be carted: And this reaches to all the inhabitants within London. 2 Dawv. 310. 1 Lill. 378. A woman that useth a trade in London, without her husband, is chargeable without him as a *feme sole* merchant: She shall plead as sole, and if condemned, be put in prison till she pay the debt; also the bail for her are liable, if she absent herself; and the husband shall not be charged. *Privil. Londini*. And if action of trespass be brought against a man and his wife, and the wife only arrested, &c. by the custom of London, the plaintiff may proceed against the wife. *Sed qu.* It is the custom of the city of London, that where a person is educated in one trade, he may set up another. 1 Saund. 312. If a debtor be fugitive, he may be arrested by the custom of London, before the day, to find better security. *Hib.* 86. Where two persons are bound as sureties for another, and recovery is had against one of them, he may have contribution against the other, by the city laws. 2 Dawv. Abr. 310. Debts on simple contract will maintain an action in London, as well as debts on specialty: And it is the custom of the city that action of debt shall be maintained upon such a contract against executors or administrators, who shall be chargeable therewith, as if it were upon a bond or obligation. 8 Co. Rep. 126. 5 Rep. 82.

There is a foreign attachment, by the custom of London, of money, &c. in the hands of a third person, where one man owes another any debt, &c. See *Attachment*.

By a custom of London, every tenant at will of any house above 40 s. *per ann.* in the city, ought to give, or to have, half a year's warning, on leaving it: And a landlord recovered half a year's rent, where the tenant had left the house, &c. without such warning. *Comber.* 384. If any custom of London be pleaded and denied, it shall be tried by writ to the Lord Mayor and Aldermen, to certify whether there be such a custom; who shall make certificate by the mouth of their recorder. *Cro. Car.* 516. The courts at Westminster of course take notice of the customs of London; but not of any other place, without being alledged. 1 Roll. Rep. 106.

Custom of Merchants, Merchants giving characters of strangers to those who sell them goods, are liable to the debts of such strangers for the goods sold; by the custom of merchants. *Lex Mercat.* c. 10. f. 69. *Sed qu.* If two persons be found in arrear, upon an account grounded on the custom of merchants, any one of them may be charged to pay the whole sum, that both were found in arrear. 1 Lill. Abr. 376. And if two joint merchants occupy their stock and merchandise in common, one of them naming himself a merchant, shall have an account against the other, and charge him as receiver. *Co. Litt.* 172. By the custom of merchants, where a merchant orders his factor to buy goods of a particular person, there the merchant is debtor, and not the factor: but 'tis otherwise where the merchant orders his factor to buy goods generally, without saying of whom; here the factor is debtor, though the goods come to the use of the merchant. 1 Lill. 376. The custom of merchants as to bills of exchange, that the indorsee shall charge the first drawer before the indorser, &c. See *Bill of Exchange*.

Customs (Custuma) Are used for the tribute or toll that merchants pay to the King, for carrying out and

bringing in merchandise. *Stat.* 14 Ed. 3. c. 21. They are duties payable to the crown for goods exported and imported, and are due to the King of common right; first because the subject hath leave to depart the kingdom, and to export the commodities thereof; secondly, for the interest which the King hath in the sea, and as he is guardian of, and maintains all the ports, wherein the commodities are exported or imported; and lastly, for that the King protects merchants from enemies and pirates. *Dyer* 43.

The word custom comprehends *Magna & Antiqua Custuma*, which is payable out of our own native commodities, as for wool, woodfells, and leather; and *parva custuma*, which are customs payable by merchants, strangers, and denizens; and these began in the reign of *Edw.* 1. when the parliament granted him 3 d. in the pound for all merchandises exported and imported. *Ibid.* 165. But that which is granted by parliament, is properly called a *subsidy*; and sometimes granted to the King for life; and there are several sorts of these subsidies, as *tonnage*, a duty granted out of every ton of wine imported, which was first granted by parliament to King *Edward III.* And *poundage*, a subsidy granted for all goods exported and imported, except wines, &c. and is usually the twentieth part of the value of the goods, or 12 d. in the pound; and this was first given to *Hen.* 6. for life. 1 *Nels. Abr.* 583, 584.

In the reign of *Edward III.* the great charter for free traffick was confirm'd: And anno 6 Ed. III. it was enacted, that no new customs could be levied, nor ancient increased, but by authority of parliament. 2 *Inst.* 60. But though the King cannot lay any imposition on merchandise without consent of parliament; yet by his prerogative he may restrain merchants from trading without his royal licence. In the 14th year of *Ed.* 3. it was enacted in parliament, that a mark should be paid as custom for a sack of wool. Anno 4 H. 8. Collectors were appointed of the subsidy of cloth of gold, silver, velvet, &c. And 1 *Eliz.* Duties were granted on sweets, wines, &c. And anno 12 Car. 2. c. 4. The subsidies of *tonnage* and *poundage*, &c. were granted to King *Charles* during his life; as they have been since to his royal successors, down to his Majesty King *George III.* And many and various are the duties of customs granted on foreign goods and merchandise, in the reigns of King *James II.* *K. William,* *Q. Anne,* and his late and present Majesty.

The *tonnage* duty granted to King *Charles II.* was for every ton of *French* wine, brought into the port of London, by merchants natural subjects, 4 l. 10 s. by alien strangers, 6 l. for *Malmseys, Tents, Alicants, Sacks, Canaries, Malagas, Maderass,* and all other sweet wines, by native subjects, 2 l. 5 s. the ton; by strangers and aliens 3 l. &c. The *poundage* duty was 12 d. in the pound value for all merchandise goods, according to the book of rates, except woollen cloths made in England, and for all woollen broad cloths, to be paid after the rate of each 64 pounds in weight, by subjects 3 s. 4 d. and strangers 6 s. 8 d. *Stat.* 12 Car. 2. c. 4.

If goods and merchandise are brought by a merchant to a port or haven, and there part thereof sold but never put on land, they must pay the customs; and discharging them out of the ship into another upon the sale, amounts in law to a putting them upon the land, so that if the custom duties are not paid, the goods will be forfeited. *Hill.* 24 *Eliz.* 12 Co. Rep. 18.

By the statute 21 Geo. 2. c. 2. over and above all subsidies of *tonnage* and *poundage*, and other duties whatsoever already payable on any goods or merchandises imported, a farther subsidy of *poundage* of 12 d. in the pound is given to his Majesty, his heirs and successors, payable by the importer according to the rate of the fine goods, as valued in the book of rates. Unrated *East India* goods are to pay 5 d. *per cent.* of the gross price, for they shall be sold at the candle.

By the *Stat.* 19 Geo. 2. c. 34. If any persons, to the number of three or more, armed with offensive weapons, shall be assembled in order to be aiding in the illegal exportation of goods prohibited to be exported, or the running uncustomed goods, or the illegal relanding any goods, or rescuing the same, after seizure, from any officer,

er, or from the place where they shall be lodged, or in the rescuing any person apprehended for any offence made felony by any act relating to the customs or excise, or preventing the apprehending any person guilty of any such offence; or in case any persons to the number of three or more, so armed, shall be so assisting, or if any person shall have his face blacked, or wear any mask, or other disguise, when passing with such goods, or shall forcibly hinder, obstruct, assault, oppose, or resist any officer of his Majesty's revenue, in seizing such goods, or shall maim or dangerously wound any such officer in his attempting to go on board any vessel, or shoot at or dangerously wound any such person when on board and in the execution of his office, every such person shall be guilty of felony, and suffer death. On information on oath of any person's being guilty of any of the above offences, the justice may certify the information to one of the Secretaries of State, who is to lay it before his Majesty; whereupon his Majesty may make an order, requiring the offender to surrender himself in forty days after publication thereof in the *Gazette*; and in default thereof, the order being published twice in the *Gazette*, and proclaimed in two markets near where the offence was committed, and a copy thereof affixed up in some public place there, the offender shall be attainted of felony and suffer death. Any person harbouring or aiding any such offender after the time for his surrender expired, knowing him to have been so required to surrender, being prosecuted within a year, shall be transported for seven years. Offences made felony by this act, may be sued in any county.

If any officer, &c. in the seizing, &c. such goods, or in the endeavouring to apprehend any such offender, shall be beat, wounded, maimed or killed, or the goods be rescued, the inhabitants of the rape, lath or hundred, unless the offender be convicted within six months, shall forfeit 100*l.* to the executors of any officer killed; and pay damages to any officer beat, &c. not exceeding 40*l.* and for any goods rescued, not exceeding 200*l.* A reward of 500*l.* for apprehending any offender; a person wounded in apprehending an offender to have 50*l.* extraordinary, and the executors of a person killed to have 100*l.* Ships and vessels outward-bound, are not to take in any goods, till the vessel, &c. is entered with the collector of the customs; and before departure, the contents of the lading is to be brought in under the hands of the laders, &c. Also when ships arrive from beyond sea, the masters are to make a true entry upon oath, of the lading, goods, ship, &c. under the penalty of 100*l.* And if any concealed goods are found after clearing, for which the duties have not been paid, the master of the vessel shall be subject to the like penalty. Stat. 13 & 14 Car. 2. c. 11. Officers of the customs may search ships. 13 & 14 Car. 2. c. 11. sec. 4. Having writ of *assistance*, may search houses, sec. 4. The penalty of abusing officers, sec. 6. Keepers of wharfs, keys, &c. landing or shipping goods, without the presence of some officer of the customs, shall forfeit 100*l.* And resisting officers of the customs, in the execution of their office, is liable to a fine not exceeding 100*l.* Stat. *Ibid.* But by 6 Geo. 1. c. 21. Where officers of the customs are hindered in the execution of their duty, by persons armed to the number of eight, the offenders are to be transported for seven years. If any goods are put into any vessel to be carried beyond sea; or be brought from beyond sea, and unshipped to be landed, the duties not being paid, nor agreed for at the custom house; the same shall be forfeited, one moiety to the King, the other to the seizer, &c. And by late statutes, foreign goods taken in at sea, by any coasting vessel, &c. shall be forfeited, and treble value. To prevent clandestine running of goods, foreign brandy, &c. imported in vessels under forty tons, the vessel and brandy to be forfeited: If any person conceal run goods, he shall forfeit them, and treble value; and the like penalty is inflicted for offering such goods to sale. 8 Geo. 1. c. 18. & 11 Geo. 1. c. 7. The commissioners of the customs, &c. shall cause all goods seized for unlawful importation, or non-payment of duties, to be publicly sold; and damaged wines for distillation, &c. And one or more justices of peace, of the county where any seizure shall be made by officers of run goods, &c. mentioned in informa-

tions before them, may administer an oath to any person skilled in the nature and quality of the goods, to view the same, and make a return of the species and value; and after they shall be condemned and sold. Stat. 12 Geo. 1. cap. 26.

By a late act, where three persons are assembled and armed with fire-arms, &c. to be assisting in the running of goods, they shall be guilty of felony and transported, and 50*l.* to be paid for apprehending such offenders; also the like reward to any of them for discovering others. All persons two or more in company, found passing within five miles from the sea-coasts, with any horses, cart, &c. wherein are put above six pounds of tea, or five gallons of brandy, or other foreign goods of 30*l.* value, landed without entry, and not having permits, and who shall carry offensive weapons, &c. or assault any of the officers of the customs, shall be adjudged runners of goods, and be transported as felons, and all the goods to be seized and forfeited: And suspected persons lurking near the coasts, not giving a good account of themselves, may be sent by a justice to the house of correction for a month; and informers to have 20*s.* for every offender so taken. If any person offers any tea, brandy, &c. to sale, without a permit, the persons to whom offered may seize and carry it to the next warehouse belonging to the customs or excise; and the seizers shall have a third part, &c. And watermen, carmen, porters, &c. in whose custody run goods are found, shall forfeit treble value, or be committed for three months. Ships and vessels from foreign parts, having on board tea, or brandy, rum, &c. in casks under sixty gallons, (except for the use of seamen) found at anchor, or hovering near any port, or within two leagues of the shore, and not proceeding in their voyages, unless in cases of unavoidable necessity, all such tea, &c. shall be forfeited. Persons offering any bribe to officers of the customs, to connive at the running of goods, to forfeit 50*l.* and obstructing such officers in entering or searching ships, incurs a forfeiture of 100*l.* And if an officer be wounded or beaten on board any ship, the offenders to be transported, &c. Stat. 9 Geo. 2. c. 35. There is a *draw-back* allowed merchants for some goods and merchandize; and they have allowances of so much *per cent.* out of the customs, where goods are defective, or receive damage, &c.

By statute, no customer or comptroller of the customs, shall have any ships of his own, or meddle with the freight of ships. 14 R. 2. c. 10. And no searcher, surveyor, &c. or their clerks, deputies, or servants, may have any such ships of their own; nor shall use merchandize, keep a wharf, inn or tavern, or be factor, attorney, &c. to a merchant, under the penalty of 40*l.* Stat. 20 H. 6. c. 5. Customers, collectors, or comptrollers, shall not conceal customs duly entered and paid, on pain to forfeit the treble value of merchandize so customed, and to make fine and ransom to the King. 3 H. 6. c. 3. If any persons employed about the customs and subsidies take a bribe, or connive at any false entry, they shall forfeit 100*l.* and be incapable of any employment under the King. Stat. 13 & 14 Car. 2. c. 11. Also if any officer of the revenue, shall make any collusive seizure of foreign goods, to the intent the same may escape payment of the duties, he is to forfeit 500*l.* and be incapable of serving his Majesty; and the importer and owner shall forfeit treble the value of the goods so collusively seized, &c. 5 Geo. 1. c. 11. Officers of the customs, &c. are not to trade in brandy, coffee, &c. or any exciseable liquor, on pain of 50*l.* and forfeiture of offices. 12 Geo. 1. c. 28. For farther particulars concerning customs, see *Table to statutes at large*, 4th Edit. and see *Information*.

Customs and Services, Belonging to the tenure of lands, are such as tenants owe unto their lord; which being withheld from the lord, he may have a writ of *customs and services*. See *Consuetudinibus & Servitiis*.

Customs-Exchequer, Is the principal clerk belonging to the court of *Common Pleas*, whose office is to receive and keep all the writs returnable in that court, and put them upon files, every return by itself; and to receive of the *prothonotaries* all the records of *Nisi prius*, called the *Pysses*; for they are first brought in by the clerk of assize of every circuit to the prothonotary, who enters the issue

in the causes, to enter the judgment: And four days after the return thereof, the prothonotary enters the verdict and judgment thereupon, into the rolls of the court; whereupon he afterwards delivers them over to the *custos breviarum*, who binds them into a bundle. He makes entry likewise of all writs of covenant, and the concord upon every fine; and maketh forth exemplifications, and copies of all writs and records in his office, and of all fines levied. The *finis* after they are engrossed, are divided between the *custos breviarum* and the *chirographer*; the *chirographer* always keeps the writ of covenant and the note, and the *custos breviarum* the concord and foot of the fine; upon which foot of the fine, the *chirographer* causeth the proclamations to be indorsed, when they are proclaimed. This officer is made by the King's letters patent: And in the court of King's Bench, there is also a *custos breviarum & rotulorum*, who fileth such writs as are in that court filed, and all warrants of attorney, &c. and whose business it is to make out the records of *Nisi prius*, &c.

Custos Placitorum Coronæ, An officer which seems to be the same with him we now call *custos rotulorum*. *Bract. lib. 2. c. 5.*

Custos Rotulorum, Is he who hath the custody of the rolls or records of the sessions of the peace, and also of the commission of the peace itself. He is always a justice of the peace of the *quorum* in the county where appointed, and usually some person of quality: But he is rather termed an officer or minister, than a judge. *Lamb. Eiren. lib. 4. cap. 3. p. 373.* The *custos rotulorum* in every county, is appointed by a writing signed by the King's hand, which shall be a warrant to the Lord Chancellor to put him in commission: And he may execute his office by deputy; and hath power to appoint the clerk of the peace, &c. *Stat. 37 H. 8. cap. 1.* By *stat. 1 W. & M. c. 21.* The *custos rotulorum* is to nominate and appoint the clerk of the peace; but not to sell the place, on pain of forfeiting the office of *custos rotulorum*, and other penalties, &c. The *custos rotulorum*, two justices of peace, and the clerk of the peace, are to enroll deeds of bargain and sale of lands of papists, &c. by *3 Geo. 1. cap. 18.*

Custos of the Spiritualities, (*Custos Spiritualitatis*) Is he that exerciseth the spiritual or ecclesiastical jurisdiction of a diocese, during the vacancy of any see; who with us in England is the archbishop by prescription: But (according to *Gwyn*) some deans and chapters challenge this right by ancient charters from the Kings of this land. *Cowel.*

Custos of the Temporalities, (*Custos Temporalium*) The person to whose custody a vacant see or abbey was committed by the King, as supreme Lord; who as a steward of the goods and profits, was to give an account to the *Escheator*, and he into the *Exchequer*: His trust continued till the vacancy was supplied, and the successor obtained the King's writ *De Restitutione Temporalium*, which was usually after consecration.

Cut-purse. If any person *clam & secreta*, and without the knowledge of another, cut his purse or pick his pocket, and steal from thence to the value of 12 d. it is felony excluded clergy. *8 Eliz. c. 14.* See *Black. Com. 4 V. 241. 3 Inst. 68.* See *Felony.*

Cutts, Flat-bottomed boats, built low and commodiously, used in the channel for transporting of horses. *Stow. Annal. p. 412.*

Cutter of the Tullies, Is an officer of the Exchequer, to whom it belongs to provide wood for the *tullies*, and to cut the sum paid upon them, &c.

Cube, Is a French word, in English *kever*, from whence comes *keever*, a tub or vat for brewing. *Cowel.*

Cyclas, A long garment close upwards, and open or large below. *Matt. Paris. Anno 1236.* speaking of the citizens of London, tells us, they were *sericis vestimentis ornati*, *Cycladibus auri textis circumdati.*

Cynbott. This word signifies the same with *Cenegild*. *Blount.*

Cypthyce, (Sax.) *Irruptio in Ecclesiam*. *Leg. Ecel. Canoni Regis.*

D.

D, (Fr.) A word affirmative for yes. *Law Fr. Dia.*

Dag, A gun; *un Dag*, a small gun, or hand-gun. See *Hagus.*

Dagenham-Breach, A duty is granted on coals imported in London to repair the walls, and barks thereof; to be collected and disposed by trustees, &c. *Stat. 12 Ann. St. 2. c. 17.* See *7 Geo. 1. c. 20. sec. 32.*

Dagus or Dais, The chief or upper table in a monastery; from a cloth called *dais*, with which the tables of Kings were covered.

Dakir. The *stat. 51 H. 3. St. 1. De compositione ponderum & mensurarum* ascertains a *last* of hides to consist of twenty *dickers*, and every *dicker* of ten hides. See *Dicker.*

Dalmatica, A garment with large open sleeves, at first worn only by bishops, tho' since made a distinction of degrees; so called, because it came originally from *Dalmatia*.

Dalus, Dailus, Daila, A certain measure of land. — *Et totam Dailam marisci tam de rossi quam de prate*, &c. *Mon. Ang. tom. 2. p. 211.* In some places it is taken for a ditch or *vale*, whence comes *dale*. The *dalt-prati* have been esteemed such narrow slips of pasture, as are left between the ploughed furrows in arable land; which in some parts of England are called *doles*: The present *Welsh* use this word for low meadow by the river side. And this seems to be the original name and nature of *Deal* in Kent, where *Cæsar* landed, and fought the *Britains*: *Cæsar ad Dole bellum pugnavit.* *Nennius.*

Damage, (*Dammum*) Signifies generally any hurt or hindrance that a man receives in his estate: But particularly, a part of what the jurors are to enquire of and bring in, when an action passeth for the plaintiff: For after verdict given of the principal cause, the jury are asked touching *costs* and *damages*, which comprehend a recompence for what the plaintiff hath suffered, by means of the wrong done him by the defendant. *Co. Litt. 257.* This word *damage* is taken in law, in two several significations, the one *properly* and *generally*, the other *relatively*: *Properly*, as it is in cases wherein *damages* are founded upon the statute of *2 H. 4. c. 1.* and *8 H. 6. c. 9.* where *costs* are included within the word *damages*, and taken as *damages*: But when the plaintiff declares for the wrong done to him, to the *damage* of such a sum, this is to be taken *relatively* for the wrong which passed before the writ brought, and is assessed by reason of the foregoing trespass, and cannot extend to *costs* of suit, which are future, and of another nature. *10 Rep. 116, 117.* Greater *costs* may be given in some cases, than the *damages* laid in the plaintiff's declaration; for the plaintiff's declaration is only for the *damage* done him by the defendant: But the *costs* are given in respect of the plaintiff's suit to recover his *damages*, which may be sometimes greater than the *damages*. *1 Lill. Abr. 384.*

Herein is to be considered,

- I. In what actions damages may be recovered, and against whom.
- II. How damages are to be assessed, increased, and mitigated.

- I. In what actions damages may be recovered, and against whom.

In personal and mixed actions, *damages* were recovered at common law: But in real actions, no *damages* were recoverable, because none were demanded by the count or writ: Whereas in actions personal, the plaintiff counts *ad dampnum* for the injury; and if he recovers no *damages*, he hath no *costs*, *10 Rep. 111, 117.* In a *personal* action, the plaintiff shall recover *damages* only for the tort done before the action brought; and therein he counts for his *damages*: In a real action, he recovers his *damages* pending the writ; and therefore never counts for his *damages*: *10 Rep. 117.* By the *stat. of Glouc. 6 Ed. 1. cap. 1. Damages*

damages are given in real actions, assises of *novel disseisin*, *mort d'ancestor*, &c. and shall be recovered against the alienor of a disseisor, as well as against the disseisor himself; and the demandant shall have of the tenant likewise costs of suit; but not expenses for trouble and loss of time. 2 *Inst.* 288. If the disseisor make a feoffment in fee, and the disseisee dieth, the heir of the disseisee shall not recover *damages* against the alienor, because that branch of the Stat. 6 Ed. 1. c. 1. only provides for the disseisee's remedy against the alienor, and not for his heirs; though if a person be disseised, and the disseisee dies, his heirs shall recover *damages* against the disseisor, from the death of his ancestor. 2 *Inst.* 286. And it is a rule upon this statute, that in none of the writs or actions therein mentioned, the demandant shall recover *damages* but from the death of his next immediate ancestor. *Ibid.* 288. For the insufficiency of the disseisor, the tenant shall answer the *damages* by this act: And if the disseisor be able to yield part and not the whole *damages*, both the disseisor and tenant shall be charged; and judgment is given against the disseisor and against the tenant generally. 2 *Inst.* 284. 2 *Danv. Abr.* 448.

No *damages* could be recovered at the common law, but against the wrong doer, and by him to whom the wrong was done. 2 *Inst.* 284. *Damages* shall be recovered in writ of admeasurement of dower; but not in a writ of admeasurement of pasture. 2 *Danv.* 457. In writ of partition, by one coparcener against another, it is said no *damages* shall be had: In a formedon, no *damages* shall be recovered; so in a *nuper obiit*, writ of account, writ of execution, &c. *Ibid.* 455, 456. *Damages* and costs are due in a writ of annuity; and if the jury find for the plaintiff, and do not assess *damages*, it will be error; though he may after verdict release the *damages*, and take judgment for the annuity. 11 *Rep.* 56. *Dyer* 320, 369.

In battery, imprisonment, and taking of goods, against three persons; one commits the battery, another the imprisonment, the third takes the goods, all at one time, all are guilty of the whole, and to be charged in *damages*. 3 *Lev.* 324. See 10 *Rep.* 66, 69.

II. How damages are to be assessed, increased, and mitigated.

In real actions, *damages* are assessed by writ of enquiry: When the jury find the issue for the plaintiff, they are to assess the *damages*. And in actions upon the case, &c. where *damages* are uncertain, it is left to the jury to inquire of them: In debt, which appears certain to the court what it is, the *damages* assessed by the jury are small; and the master in B. R. taxeth the costs; which is added thereto, and called *damages*. 1 *Lill.* 390. When judgment is given by default, in action of debt, the court is to assess the *damages*, and not the jury: So if judgment by *nil dicit*, in action of debt. And if on demurrer for taking goods, &c. it is adjudged for the plaintiff, though *damages* are found by writ of enquiry, the court may increase or mitigate the *damages*, because the court might have awarded them without such writ. 2 *Danv.* 452. In writ of trespass *de clauso fracto*, and when there is a writ to inquire of *damages* in trespass; in action on the case for slander, where the jury tax *damages*, or in an assise, the judges cannot increase or abridge the *damages*: It is otherwise on a writ of enquiry in debt, detinue, covenant, mayhem and battery; the court may increase or diminish the *damages*. *Fitz. Damage* 28. *Dyer* 105. *Jenk. Cent.* 68. In batteries and wounding, the court may increase *damages* given by the jury, on view of the wound, or upon affidavits made thereof, &c. But it is said the courts at *Wexminster*, only, can increase *damages* in action of assault and wounding on view, &c. and not justices of *Nisi prius*; though they may indorse the evidence on the *posse*, and on such evidence the *damages* may be increased in the courts above. 3 *Salk.* 115. If *damages* are too small, the court hath power to increase them: Or if the jury assess no *damages*, where verdict is found for the plaintiff in action of debt on bond, &c. the court may tax the *damages*; though it is otherwise in action on the case, &c. 2 *Inst.* 200. 2 *Danv.* 449.

It hath been holden that the judges may increase, but not decrease *damages*; and this is, because the party may

have an attain. 2 *Danv.* 452. But where excessive *damages* have been given, or there hath been any misdemeanor in executing a writ of enquiry; the court hath sometimes relieved the defendant by a new writ of enquiry. 2 *Danv.* 464. And where *damages* are excessive, on motion the defendant may have a new trial. *Style* 465. 1 *Nels. Abr.* 587. In trespass against two, one comes and pleads Not guilty, and it is found against him; and afterwards another comes and pleads the like, and is found Guilty by another inquest; in this case, the first jury shall assess all the *damages* for the trespass. *New Bat. Br.* 236. Trespass against divers defendants, they plead Not guilty severally, and the jury finds them all Guilty: The jury must assess the *damages* jointly, for it is but one intire trespass, and made joint by the declaration: But if in trespass against two, the jury finds one Guilty of the trespass at one time, and the other guilty thereof at another time, there several *damages* may be assessed. If the plaintiff himself confesses that they committed the trespass severally, then the writ shall abate. 11 *Rep.* 5.

Damages may be several, where one action of trespass is brought for two several trespasses: And in action on the case, *damages* are divisible, and may be apportioned according to the wrong. 1 *Saund.* 248. Also in an action on the case upon two promises, intire *damages* may be given; though it be insisted that *damages* should be several upon each promise. 1 *Roll. Rep.* 423. But if action is brought for two several causes of action, one of which is not actionable, if intire *damages* are given, the verdict is void: *Contra* if the *damages* are several. And where *damages* are intirely assessed, and they ought not to be given for some part; no judgment can be given on the verdict. 10 *Rep.* 130. Where *damages* are awarded for delay of execution, and being kept out of the money, they are usually assessed by allowing the party what lawful interest he might have. 1 *Salk.* 208. Where the plaintiff shall have no more costs than *damages*, unless the jury finds more than 40 s. in actions of trespass, on the case, &c. See Stat. 43 *Eliz.* c. 6. 21 *Jac.* 1. c. 16. 22 & 23 *Car.* 2. c. 9. *sec.* 136. 11 & 12 *W.* 3. c. 9. but in *willful trespass* certified by the judge, plaintiff shall have costs. *Per* 8 *W.* 3. c. 11. *f.* 4. In action upon the case the jury may find less *damages* than the plaintiff lays in his declaration; though they cannot find more than is laid therein; if they do, it is error; but costs may be increased beyond the sum mentioned in the declaration for *damages*: Also the plaintiff may release part of the *damages*, upon entering up his judgment. 10 *Rep.* 115. In actions upon any bond, &c. for non-performance of covenants, the jury shall assess *damages* for those the plaintiff proves broken; and the plaintiff may assign as many breaches as he thinks fit. 8 & 9 *W.* 3. c. 11. *Damages* are not to be given for that which is not contained in the plaintiff's declaration; and only for what is materially alleged. 1 *Lill.* 381. When *damages* double or treble are given in an action newly created by statute; if no *damages* were formerly recoverable, there the demandant or plaintiff shall recover those *damages* only, and shall not have costs, being a new creation in recompence where there was none before: As upon stat. 1 & 2 *P. & M.* c. 12. for driving of distresses out of the hundred, &c. whereby *damages* are given, the plaintiff shall recover no costs, only his *damages*, because this action is newly given. But in an action upon the stat. 8 *H.* 6. c. 9. of forcible entry, which giveth treble *damages*, the plaintiff shall recover his *damages* and his costs to the treble, by reason he was entitled to single *damages* before by the common law; and the statute, as part of the *damages*, increases the costs to treble; and when a statute increases *damages*, costs shall likewise be increased. 2 *Inst.* 289. 10 *Rep.* 116. In some cases double, treble *damages*, &c. are allowed: For not setting forth tithes; distresses wrongfully taken; rescous, &c. Treble *damages* are incurred by statute. Though if it be not found by the jury, that the plaintiff hath sustained some damage in cases where treble *damages*, &c. are inflicted by law, no *damages* can be awarded. 2 *Danv. Abr.* 449.

The *damages* laid in the declaration are to be considered as the cause of action, i. e. the cause of action ought to be taken from the sum laid in the count. *Horton and Kilmere, Rep. Temp. Hardw. per Annals*, 5, 6.

How *damages*, given to a person sued for an act done in the execution of his office, are to be assessed and recovered, see *Valentine and Fawcett*, *id.* 138, 139.

Plaintiff may take judgment *de melioribus damnis*, where several *damages* are given, or enter a *remittitur*. *Sabin v. Long*, *Will. Rep.* par. 1. fo. 30.

The court in their discretion may increase the *damages* in *mayhem*. *Id.* *Brown v. Seymour*, par. 1. fo. 5. In debt for a penalty in articles of agreement, the jury ought to assess *damages* on the breach assigned, according to the *Stat.* 8 & 9 *W.* 3. c. 10. and shall not find the debt; if they do, a *venire facias de novo* shall issue. *Id.* *Drage, Esq. v. Brand*, par. 2. fo. 377.

In what cases double, treble, and quadruple *damages* are given, see *Table to Statutes at Large*, quarto edition, title *Damages*.

Damage-clear, (*damna clericorum*) Was a fee assessed of the tenth part in the *Common Pleas*, and the twentieth part in the *King's Bench* and *Exchequer*, out of all *damages* exceeding five marks, recovered in those courts, in actions upon the case, covenant, trespass, battery, &c. wherein the *damages* were uncertain; which the plaintiff was obliged to pay to the *prothonotary*, or the chief officer of the court wherein recovered, before he could have execution for the *damages*: this was originally a gratuity given to the *prothonotaries* and their clerks, for drawing special writs and pleadings; but it is taken away by statute, and if any officer in the *King's* courts, take any money in the name of *damage-clear*, or any thing in lieu thereof, he shall forfeit treble the value. *Stat.* 17 *Car.* 2. c. 6.

Damage-feasant, or *faisant*, Is when a stranger's beasts are found in another person's ground without his leave or licence, and there doing *damage*, by feeding, or otherwise, to the grass, corn, woods, &c. In which case, the tenant whom they *damage* may distrain and impound them, as well by night as in the day, lest the beasts escape before taken; which may not be done for rent, services, &c. only in the day-time. *Stat.* 51 *H.* 3. stat. 4. 1 *Inst.* 142. If a man take my cattle, and put them into the land of another, the tenant of the land may take these cattle *damage-feasant*, though I who am the owner, was not privy to the cattle's being there *damage-feasant*; and he may keep them against me till satisfaction of the *damages*. 2 *Danv. Abr.* 364. But if one comes to distrain *damage-feasant*, and to seize the cattle, and the owner drives them out before they are taken, he cannot distrain them *damage-feasant*, but is put to his action of trespass; for the cattle ought to be actually upon the land *damage-feasant*, at the time of the distress. 1 *Inst.* 161. 9 *Rep.* 22. He that hath but the possession of, and no title to the land, may justify taking a distress *damage-feasant*. *Plowd.* 431. If a man puts cattle to pasture at so much a week with another, who after gives notice that he will not have them there any longer; in this case the owner of the ground may distrain them *damage-feasant*, though the cattle be in lawfully at first: so where a lessee holds after his estate is ended. 43 *Edw.* 3. *Kelw.* 69. Beasts belonging to the plough, or beasts of husbandry, sheep, horses joined to a cart, and 'tis said a horse with a rider on it, may be distrained *damage-feasant*, though not for rent. 1 *Sid.* 422, 440. But the owner may tender amends, before the cattle are impounded; and then the detainer is unlawful: also if when impounded the pound-door is open, the owner may take them out. 5 *Rep.* 76. A greyhound may be taken *damage-feasant*, running after conies in a warren: so a man may take a ferret that another hath brought into his warren, and taken conies with. If a person bring nets and gins through my warren, I cannot take them out of his hands. 2 *Danv.* 633. But if men are rowing up my water, and endeavouring with nets to catch fish in my several piscary, I may take their oars and nets, and detain them as *damage-feasant*, to stop their further fishing; though I cannot cut their nets. *Cro. Car.* 228. See *Black. Com.* 3 *V.* 6.

Dam, A boundary, or confinement; as to dam up, or dam out: *infra damnum suum*, within the bounds or limits of his own property or jurisdiction. *Bract. lib.* 2. c. 37.

Damifella, A light damofell or misf. *Stat.* 12 *Ed.* 1. See *Pimp Feure*.

Dammum absque injuria. If one man keeps a school in such a place, another may do so likewise in the same place, though he draw away the scholars from the other school; and this is *dammum absque injuria*: but he must not do any thing to disturb the other school. 3 *Salk.* 10.

Dan. Anciently the better sort of men in this kingdom had the title of *Dan*; as the *Spaniards* *Don*, from the *Lat. Dominus*.

Danegelt, or *Dane-geld*, (*danegildum*) Is compounded of the words *dane* and *gelt*, the latter in *Dutch* signifying money; and was a tax or tribute of 1 s. and after of 2 s. upon every hide of land through the realm, laid upon our ancestors the *Saxons* by the *Danes*, when they lorded it here. *Camb. Brit.* 83, 142. According to some accounts, this tax was levied for clearing the seas of *Danish* pirates; which heretofore greatly annoyed our coasts: but King *Ethelred* being much distressed by the continual invasions of the *Danes*, to procure his peace, was compelled to charge his people with very heavy payments called *danegelt*, which he paid to the *Danes* at several times. *Hoveden par. post. Annal.* 344. *Ingulph.* 510. *Sclden's Mare Claus.* 190. This *danegelt* was released by St. *Edward the Confessor*; but levied again by *William the First* and *Second*: then it was released again by King *Henry the First*, and finally by King *Stephen*. It is probable that this ancient tax might be a precedent for our *land tax* of 3 s. and 4 s. in the pound, when first granted.

Danclage, Was the law of the *Danes* when they governed a third part of this kingdom. See *Merchenluge*, and *Black. Com.* 1 *V.* 65. 4 *V.* 405.

Dangeria, A payment in money made by forest tenants, that they might have liberty to plough and sow in time of *pannage* or mast-feeding. *Manw. For. Law.*

Dapifer, (*a dapes ferendo*) Was at first a domestic officer, like unto our steward of the household; or rather clerk of the kitchen: but by degrees it was used for any fiduciary servant, especially the chief steward or head bailiff of an honour or manor. There is mention made in our ancient records of *dapifer regis*; which is taken for steward of the *King's* household. *Cowel*.

Dardus, i. e. A dart: in *Wales* an oak is called a *dar*.

Dare ad Remanentiam, To give away in fee, or for ever. *Glanv. lib.* 7. cap. 1. This seems to be only of a remainder.

Darrein, Is a corruption from the *Fr. dernier*, viz. *ultimus*, the last; in which sense we use it: as *darrein continuance*, &c.

Darrein Presentment, (*ultima presentatio*). See *Affise of Darrein Presentment*, and *Black. Com.* 3 *V.* 245.

Date of a deed, Is the description of the time, viz. the day, month, year of our Lord, year of the reign, &c. in which the deed was made. 1 *Inst.* 6. But the ancient deeds had no *dates*, only of the month and the year; to signify that they were not made in haste, or in the space of a day; but upon longer and more mature deliberation. *Blount*. If in the *date* of a deed, the year of our Lord is right, though the year of the *King's* reign be mistaken, it shall not hurt it. *Cro. Jac.* 261. A deed was dated 30th *March* 1701, without *anno Domini* and *anno Regni*; and it was adjudged that both the year of the Lord and of the *King* were implicitly in the deed. 2 *Salk.* 658. A deed is good, though it hath no *date* of the day or place, or if the *date* be mistaken, or though it hath an impossible *date*, as the 30th of *February*, &c. But he that doth plead such a deed, without any *date*, or with an impossible *date*, must set forth the time when it was delivered. 2 *Rep.* 5. 1 *Inst.* 46. If no *date* of a deed be set forth, it shall be intended that it had none; and in such case it is good from the delivery; for every deed or writing hath a *date* in law, and that is the day on which it is delivered: and a deed is no deed till the delivery, and that is the *date* of it. *Mod. Ca.* 244. * 1 *Nelf. Abr.* 525.

An impossible *date* of a bond, &c. is no *date* at all; but the plaintiff must declare on the bond as made at a certain time: and if the express *date* be insensible, the real *date* is the delivery. 2 *Salk.* 463. Where there is none, or an impossible *date*, the plaintiff may count of any *date*. 1 *Lill. Abr.* 393. If there be a mistaken *date*, or

a date be impossible, &c. the plaintiff may surmise a legal date in the declaration, whereupon the defendant is to answer to the deed, and not to the date. *Yelv.* 194. If a deed bears date at a place out of the realm, it may be averred that the place mentioned in the deed is in some county in England; and here the place is not traversable; without this the deed cannot be tried. *1 Inst.* 261. A deed may be dated at one time, and sealed and delivered at another: but every deed shall be intended to be delivered on the same day it bears date, unless the contrary is proved. *2 Inst.* 674. Though there can be no delivery of a deed before the day of the date; yet after they may. *1 elv.* 138. So that a deed may be dated back on a time past, but not at a day to come. See *Deed*, and *Black. Com.* 2 *V.* 304.

Datibe, or Datif, (dativus) Signifies that which may be given or disposed of at will and pleasure. *Stat.* 9 *R.* 2. *11* 4.

Dabata terra, Dalwath, A portion of land so called in *Scotland*. *Skene*.

Day, (dies) Is a certain space of time, containing twenty-four hours; and if a fact be done in the night, you must say in law proceedings *in nocte ejusdem diei*. *Dicrum alii sunt naturales, alii artificiales: dies naturalis consistat de 24 horis, & continet diem solarem & noctem, & est spatium in quo sol progreditur ab oriente in occidentem, & ab occidente iterum in orientem: dies artificialis, sive solaris, incipit in ortu solis & definit in occasu.* *1 Inst.* 135. By this description, the natural day consists of twenty-four hours, and contains the solar day and the night: and the artificial day begins from the rising of the sun, and ends when it sets. Day, in legal understanding, is the day of appearance of the parties, or continuance of the suit where a day is given, &c. And there is a day of appearance in court by the writ, and by the roll; by writ, when the sheriff returns the writ; by roll, when he hath a day by the roll, and the sheriff returns not the writ, there the defendant, to save his freehold, and prevent loss of issues, imprisonment, &c. may appear by the day he hath by the roll. *1 Inst.* 135.

In real actions there are *dies communes*, common days; and in all summons there must be 15 days after the summons before the appearance: and before the statute of *articuli super chartas*, in all summons and attachment in plea of land, there should be contained 15 days. *1 Inst.* 134. As to offences in *B. R.* if the offence be committed in another county than where the court sits, and the indictment be removed by *certiorari*, there must be fifteen days between every process and the return thereof; but if it be committed in the same county where the bench sits, they may sit *de die in diem*; but this they will very rarely do. *Ibid.* There is a day called *dies specialis*, as in an assize in the King's Bench or Common Pleas, the attachment need not be 15 days before the appearance; otherwise it is before justices assigned: but generally in assizes the judges may give a special day at their pleasure, and are not bound to the common days; and these days they may give as well out of term as within.

There is also a day of grace, *dies gratia*, and generally this is granted by the court at the prayer of the demandant or plaintiff, in whose delay it is: but it is never granted where the King is party, by *aid prier* of the tenant or defendant; nor where any lord of parliament, or peer of the realm is tenant or defendant. And sometimes the day that is *quarto die post*, is called *dies gratia*, for the very day of return is the day in law, and to that day the judgment hath relation, but no default shall be recorded till the fourth day be past; unless it be in a writ of right, where the law alloweth no day but the day of the return. *1 Inst.* 135.

There are several return days in the terms; and if either of them happen upon a Sunday, the day following is taken instead of it; for Sunday is *dies non juridicus*; and so is *Ascension-day* in Easter term, *St. John Baptist* in Trinity term, *All Saints* and *All Souls* in Michaelmas term, and the *Purification of the Virgin Mary* in Hilary term. *2 Inst.* 264.

Days in Bank are days set down by statute, or order of the court, when writs shall be returned, or when the party shall appear upon the writ served. *Stat.* 51 *H.* 3. *Stat.* 2. & *Stat.* 3. 32 *Hen.* 8. *cap.* 21. And by the

statute *de anno bissextili* 21 *H.* 3. the day increasing in the leap-year, and the day next going before are to be accounted but one day. It is commonly said that the day of *Nisi prius*, and the day in Bank, is all one day; but this is to be understood as to pleading, not to other purposes. *1 Inst.* 135. If a defendant appears, and the court gives a day to another term; at which day he makes default, no judgment shall be given, but process shall be awarded in this case. *2 Danv. Abr.* 476. But after issue found for the plaintiff at the *Nisi prius*, if a day be given in Banco, and the defendant makes default, judgment shall be given against him. *Ibid.* 477.

To be dismissed *without day*, is to be finally dismissed the court: and when the justices before whom causes were depending, do not come on the day to which they were continued, whether such absence be occasioned by death, or otherwise, they are said to be *put without day*: but may be revived, or recontinued by re-summmons, re-attachment, &c. *2 Hawk. P. C.* 300. *Vide* 1 *El.* 6. *c.* 7. Also by the Common law, all proceedings upon any indictment, &c. whereon no judgment had been given, were determined by the demise of the King, and nothing remained but the indictment, original writ, &c. which were *put without day*, till re-continued by re-attachment to bring in the defendants to plead *de novo*: though this is remedied by *Stat.* 4 & 5 *W.* 3. *c.* 18. and 1 *Ann.* *c.* 8. by which such process, &c. are to continue in the same force after the King's demise, as they would have done if he had lived.

In action of trespass, if the day laid in the declaration be either before or after the actual day on which the trespass is committed, it is not material, if a trespass be proved. *Co. Lit.* 283. *a.* But *N. B.* The day laid must be before the first day of that term of which the declaration is intitled, or if the trespass be committed within the term, there must be a special memorandum of some particular day, (if by bill) or of some general return day, (if in *C. P.* or *B. R.* by original writ) subsequent to the day whereon the trespass was committed: and so as to other actions, where the cause of action arises within the term.

See further as to *Day in Bank*, *Black. Com.* 3 *V.* 277. *Day in Court*, *id.* 316. *Day of Grace*, *id.* 278.

Day-light. In respect to day-light, before sun-rising and after sun-setting, is accounted part of the day by the Common law; as to robberies committed in the day-time, when the hundred is liable. *7 Rep.* 6. The law regularly rejects all fractions and divisions of a day, for the uncertainty. *5 Rep.* 1. *1 Inst.* 135. See *Computation*.

Day-rule. See *Day-writ*.

Day-writ. The King may grant writ of *warrantia diei* to any person, which shall save his default for one day, be it in plea of land, or other action, and be the cause true, or not; and this by his prerogative, *quod nota.* *Br. Prerogative*, *pl.* 142. cites *F. N. B.* 7.

'Tis against law to grant liberty to prisoners in execution, by other writs than day-writs, (or rules); but they shall have as many day-writs as shall be needful for attendance on commissioners, to whom the cause being matter of account was referred, and that without paying any fees, either for making or sealing them. *Chan. Rep.* 67. *9 Car.* 1. *Regault v. Cloberry*.

No prisoner committed by *B. R.* ought to have the benefit of the day-rule of going abroad in term time, for their imprisonment is their punishment for their contempt, or misbehaviour. *2 Show.* 88. *pl.* 80. *Hill.* 31 & 32 *Car.* 2. *B. R.* *The King v. Dvane*.

One in execution had a *habeas corpus* from the Lord Keeper (which they call a day-writ) returnable three or four days after its teste. By virtue of this writ, he went to the wine-licence office, but never to any inn of court or Chancery, or to the Lord Keeper's, and this in the vacation. *Per Pemberton Ch. J.* This is a *habeas* out of Chancery, which they may send at any time, and by virtue of the King's writ, the party was brought out of the prison-house, and that is justifiable. Then all the day, so long as there was a keeper with him, he was in custody still, and returning to prison at night, it is well enough, and no escape; though Chancery may examine the contempt, that is nothing to *B. R.* *2 Show.* 202.

298. pl. 299. *Pasch.* 35 Car. 2. B. R. *Harwood v. Manlows.*

A prisoner taken on an *escape warrant* before the sitting of the court the same day, shall be discharged, if his name was entered with the clerk the night before; but not if it was entered the same morning only; and in the first case the prosecutor shall be committed. 8 Mod. 80. *Trin.* 8 Geo. *Wilkinson v. Matthews.*

Entry of the name in the petition for a day-rule, signifies little, unless it be read in court. 8 Mod. The King v. Dunbar. 240, 241.

Days-man, In the North of England, an arbitrator, or elected judge, is usually termed a *dies-man*, or *days-man*: and Dr. Hammond saith, that the word *day* in all idioms signifies judgment.

Dayeria, Dairy, from *day*, *deie*, Sax. *dag*, was at first the daily yield of milch-cows, or profit made of them. In Lorrain and Champaign they use the word *dayer*, for the meeting of the day-labouring people to give an account of their daily work, and receive the wages of it. A dairy in the North is called *milkness*; as the dairy-maid is in all parts a *milk-maid*: she is termed *androchia* by Fleta, lib. 2. cap. 87. — *Comptrol. Henrici D. & Johanne uxoris sue de omnibus exitibus & proventibus de dayri domini prioris de Burnceffte. Paroch. Antiq.* 548.

Daywere of Land. As much arable land as could be plough'd up in one day's work; or one journey, as the farmers still call it. Hence any young artificer who assists a master workman in daily labour, is called a *journeyman*. — *Confirmavi abbati & conventui de Rading, tres acras & sexdecim daywere de terra arabili. Cartular. Rading.* MS. f. 90.

Deadly Feud, Is a profession of an irreconcilable hatred, till a person is revenged even by the death of his enemy. It is mentioned in *Star.* 43 El. c. 13. And such enmity and revenge were allowed by the old Saxon laws; for where any man was killed, if a pecuniary satisfaction was not made to the kindred of the slain, it was lawful for them to take up arms against the murderer, and revenge themselves on him: and this is called *deadly feud*; which it is conjectured was the original of an *appeal*. *Blount. Vide Feud, and Black. Com.* 4 V. 243.

Dead Pledge, (*mortuum vadium*) A pledge of lands or goods. See *Mortgage*.

Deaf, dumb, and blind. A man who could neither speak nor hear committed felony, and was arraigned and therefore was commanded to prison. *Br. Corone, pl.* 216. cites 26 Edw. 3.

One was indicted for the death of a man, who could neither speak nor hear, and the court was in doubt what to do with him, &c. wherefore they thought that he should be remanded to prison. *Theil. Dig.* 6. lib. 1. c. 7. cites 26 Aff. 27.

One who had made his will, and became ill, and (as it seems) had left his speech; the same will was delivered into his hands, and it was said to him, that he should deliver it to the vicar, if it should be his last will, otherwise he should retain it; and he delivered it to the vicar, and this was held a good will. *Theil. Dig.* 6. lib. 1. cap. 7. f. 8. cites 44 Aff. 36.

It appearing by oath that the defendant was both senseless and dumb, and therefore could not instruct his counsel to draw his answer; it was ordered that no attachment, or other process of contempt, should be awarded against the defendant for not answering, without special order of the court. *Cary's Rep.* 132. cites 22 Eliz. *Altam v. Smith.*

One that is deaf and wholly deprived of his hearing cannot give, and so one that is dumb and cannot speak. Yet (according to the opinion of some) they may consent by signs and nods; but it is generally held, that he that is dumb cannot make a gift, because he cannot consent to it. *Co. Inst.* 107. But generally those who are deaf and dumb can, in some measure, converse with people acquainted with them by signs, with the fingers, &c. therefore qu. if a gift by such a one would not be good, if deposed to, by persons acquainted with his signs, if such persons are uninterested? See the last case under this head.

If a blind man has understanding, he may deliver a deed sealed by him. *Fent.* 222. pl. 75. *ad suum.*

The lord shall have the custody of a copyholder that is deaf and dumb; for else he shall be prejudiced in his rents and services, and adjudged for the grantee of the lord against the prochein amy of the copyholder. *Cro. J.* 105. pl. 43. *Mich.* 3 Jac. B. R. *Eavers v. Skinner.*

A dumb man ordered to answer upon interrogatories, by Mr. Colchester. *Totb.* 237. cites 14 Car. *Harcourt v. Roberts.*

One born deaf and dumb, who signified by signs that she understood what she was about to do, was allowed to levy a fine of lands; by *Bridgman Ch. J. & al' justices.* *Cart.* 53. *Trin.* 18 Car. 2. C. B. *Martha Elliot's case.*

Deafforested, This word signifies discharged from being forest; or that is freed and exempted from the forest laws. 17 Car. 1. c. 16. — *Johannes Dei gratia, &c. Volumus & firmiter precipimus quod foresta de Brierwood & homines in illa manentes & heredes eorum sint deafforestati imperpetuum, &c. Dat.* 13 Martii anno Regni nostri 5. — There is likewise *deawarrenata*, as well as *deafforestata*; which is when a warren is diswarrened, or broke up and laid in common. King Henry the Third, in a charter to the citizens of London, grants to them, — *Quod tota warrena de Stanes cum pertin. suis sit dewarrenata & deafforestata in perpetuum.* *Placit. temp.* Ed. 1. and Ed. 2. MS. fol. 144.

Dean, (*decanus*, from the Greek *Δίκα*, *decem*) Is an ecclesiastical governor or dignitary, so called, as he presides over ten canons or prebendaries at the least. And we call him a *dean*, that is next under the bishop, and chief of the chapter, ordinarily in a cathedral church, the rest of the society being called *capitulum*, the chapter. As there are two foundations of cathedral churches in England, the old and the new, the new erected by King Henry VIII. so there are two means of creating those *deans*: for those of the old foundation, as the *dean of St. Paul's, York, &c.* are exalted to their dignity much like bishops; the King first sending out his *conge d'elire* to the chapter to choose such *dean*, and the chapter then choosing, the King afterwards yielding his royal assent, and the bishop confirming him, and giving his mandate to install him: those of the new foundation, whose deaneries were translated from priories and convents, to dean and chapter, as the *deans of Canterbury, Durham, Ely, Norwich, Winchester, &c.* are donative, and installed by a shorter course, by virtue of the King's letters patent, without either election or confirmation; and are visitable only by the Lord Chancellor, or by special commission from the King: but the letters patent are presented to the bishop for institution, and a mandate for instalment goes forth. 1 *Inst.* 95. *Davis* 46, 47.

There are some cathedral churches which never had a *dean*; as that of *St. David and Landaff*, where the bishop is head of the chapter, and in his absence the archdeacon: and there is also a *dean* without a chapter, such as the *dean of Battel* in *Suffex*: then there is a *dean* without a jurisdiction, as the *dean of the Chapel Royal, &c.* in which sense this word is applied to the chief of certain peculiar churches or chapels. *Spelm.*

There are four sorts of *deans*; a *dean* who hath a chapter, such as the *dean of Canterbury, &c.* A *dean* without a chapter, as the *dean of Bocking*, who hath a court and jurisdiction to hold plea of all ecclesiastical matters arising in several parishes within his peculiar; and who is constituted by commission from the archbishop of *Canterbury*, like to the *dean of the arches*. The *dean of Battel*, founded by William the First, filed the Conqueror, who hath ecclesiastical jurisdiction within the liberty of *Battel*, and is presentable by the Duke of *Montagu*, and instituted and inducted by the bishop of *Chichester*; but not subject to his visitation. And *rural deans*, who had first jurisdiction over deaneries, as every diocese is divided into archdeacons and deaneries; but afterwards their power was diminished, and they were only the bishops substitutes to grant letters of administration, probate of wills, &c. And now their office is wholly extinguished, for the archdeacons and chancellors of bishops execute the authority which *rural deans* had through all the dioceses of England. 1 *Nell. Abr.* 596, 597. There are likewise deputy

deputy deans and *commendatory deans*, who cannot confirm any grants, &c. But a *commendatory dean* may, with the chapter, choose a bishop. And if a *dean* be elected bishop, and before consecration doth obtain dispensation to hold his deanery in *commendum*, such *dean* may well confirm, &c. for his old title remains, and therefore confirmations, and other acts done by him, as *dean*, are good in law. *Litch* 237, 250. *Palm. Rep.* 460.

A *dean* and chapter are the bishop's council, to assist him in the affairs of religion, &c. to consult in deciding difficult controversies, and consent to every grant which the bishop shall make to bind his successors, &c. A *dean* that is solely seized of a distinct possession, hath an absolute fee in him as well as a bishop. *1 Inst.* 325. A *deanery* is a spiritual promotion, and not a temporal one, though the *dean* be appointed by the King: and the *dean* and chapter may be in part secular, and in part regular. *Dyer* 10. *Palm.* 500. As a *deanery* is a spiritual dignity, a man cannot be *dean* and prebendary in the same church. *Dyer* 273. See *Chapter*.

Death of Persons. There is a *natural death* of a man, and a *civil death*: *natural*, where nature itself expires, and extinguishes; and *civil*, is where a man is not actually dead, but is adjudged so by law; as where he enters into religion, &c. If any person for whose life any estate hath been granted, remain beyond sea, or is otherwise absent seven years, and no proof made of his being living, such person shall be accounted naturally dead; though if the party be after proved living at the time of eviction of any person, then the tenant, &c. may re-enter, and recover the profits. *Stat. 19 Car. 2. c. 6.* And persons in reversion or remainder, after the death of another, upon affidavit that they have cause to believe such other dead, may move the Lord Chancellor to order the person to be produced; and if he be not produced, he shall be taken as dead; and those claiming may enter, &c. *6 Ann. c. 18.*

A man seized in fee of lands, made a lease in reversion to L. D. for ninety-nine years, to commence after the deaths of J. D. and E. D. who had then a lease in possession for the like term, if they or either of them so long lived: the plaintiff positively proved the death of J. D. but as to the death of E. D. the proof was that he had been reputed dead, and no body had heard of him for fifteen years past, and the defendant not being able to prove that he was alive at any time within seven years, this case was adjudged within the act *19 Car. 2. c. 6.* *Carthew* 246. In law proceedings, the death of either party, between the verdict and judgment, shall not be error; so as judgment be entered in two terms. *17 Car. 2. c. 8.*

A corporation never dies. *Wils. par. 1. fo. 184.*

Where the plaintiff dies after a verdict and before the day in *bank*, though the entry of the judgment be right, yet a *scire facias* must be sued out before execution issue. *Wils. par. 1. fo. 302.* *Earl v. Brown.*

Warrant of attorney to confess a judgment to two, one dies before the judgment entered, leave given to the survivor to enter it up. *Id. par. 1. fo. 312.* *Todd v. Dodd.*

If defendant dies before the time given to plead expires, judgment signed afterwards is irregular. *Id. par. 1. fo. 315.* *Wallop v. Irwin.*

Where on the death of parties to a suit, the writ, &c. shall abate, see *8 & 9 W. 3. c. 11.* and *Abatement, Death of Judges, &c. vide Day.*

De bene esse. To take or do any thing *de bene esse*, is in law signification to accept or allow it as well done for the present; but when it comes to be more fully examined or tried, to stand or fall according to the merit of the thing in its own nature. As in *Chancery*, upon motion to have one of the less principal defendants in a cause examined as a witness, the court (not then thoroughly examining the justice of it, or not hearing what may be objected on the other side) will often order such a defendant to be examined *de bene esse*, viz. That his depositions shall be taken, and allowed or suppressed at the hearing of the cause, upon the full debate of the matter, as the court shall think fit; but in the interim they have a *well being*, or conditional allowance. *3 Cro. 68.* Where a complainant's witnesses are aged, or sick, or going beyond sea, whereby the plaintiff thinks he is in danger of losing their testimony,

the court of *Chancery* will order them to be examined *de bene esse*; so as to be valid, if the plaintiff hath not an opportunity of examining them afterwards; as if they die before answer, or do not return, &c. In either of which cases, the depositions taken may be made use of in the court of *Chancery*, or at law: but if parties are alive and well, or do return, &c. after answer, these depositions are not to be of force, for the witnesses must be re-examined. *Practif. Attorn. edit. 1. p. 232.*

So also at Common law, the judges frequently take bail *de bene esse*, that is, to be allowed or disallowed upon the exception, or approbation of the plaintiff's attorney; however, in the interim, they are good, or have a conditional allowance. *Corvel.* Declarations likewise are sometimes delivered *de bene esse*. See the books of practice. And see further *Black. Com. 3 V. 383.*

Debenture. A soldier's debenture, (*stipendia debita*) is in the nature of a bond or bill, to charge the government to pay the soldier creditor, or his assigns, the sum due upon the auditing the account of his arrears: it was first ordained by an act made during *Oliver's* usurpation, anno 1649, and is mentioned in the act of oblivion, *12 Car. 2. cap. 8.* They use debentures likewise in the *Exchequer*; and debentures are given to the King's servants, for the payment of their wages, board wages, &c. Also there are custom-house debentures, &c.

Debet & detinet. Are Latin words used in the bringing of writs and actions. And an action shall be always in the *debet & detinet*, when he who makes a bargain or contract, or lends money to another, or he to whom a bond is made, bringeth the action against him who is bounden, or party to the contract and bargain, or unto the lending of the money, &c. But if a man sells to another a horse, &c. if he brings debt for the horse, the writ must be in the *detinet* only. *New Nat. Br. 119.* In debt against husband and wife, for a debt due from the wife before coverture, the writ shall be in the *debet & detinet*: so in debt against or for successors, in respect of obligations made to the predecessor, &c. *Ibid.* Debt against an heir, is to be in the *debet & detinet*, or it will be naught; if an heir be to bring debt, it shall be in the *detinet*: and if a man be bound to another, and makes his executor, and dies, if the money due in the time of the testator be refused to be paid by the executor, the action must be brought against him only in the *detinet*; and so in all actions brought by executors as executors, though the duty accrued in their own time. But *debet & detinet* lies by an executor on his own contract: and if a lessee for years makes his executor and dies, for rent due after the testator's death, there the action shall be in the *debet & detinet*. It is the like law in cases of administrators, as it is not certain what shall be recovered, only according to the assets. *5 Rep. 31.* An executor upon a *devisavit* shall be charged in the *debet & detinet*, the action being upon a judgment. *1 Lill. Abr. 395.* In action grounded on privity of contract; or action of escape, it must be brought in the *detinet*. *Cro. Jac. 545, 685.* But for an escape on mesne process, case lies. See *Debt and Executor.*

Debet & solet. Are also formal words made use of in writs: and some writs have these words in them, which ought not to be omitted. Likewise according to the diversity of the case, both *debet* and *solet* are used, or *debet* alone: as a *quod permittat* may be in the *debet & solet*, or in the *debet* only, as the demandant claims. And if a person sues to recover any right, whereof his ancestor was disseised by the tenant of his ancestor, then he useth the word *debet* alone in his writ, because his ancestor only was disseised, and the estate discontinued: but if he sue for any thing that is now first of all denied him, then he useth *debet & solet*, by reason his ancestor before him, and he himself usually enjoyed the thing sued for, until the present refusal of the tenant. *Reg. Orig. 140.* The writ of *secta molendini* is a writ of right, in the *debet & solet*, &c. *F. N. B. 98.*

Debt, (debitum) In common parlance is a sum of money due from one person to another. And if an action be brought, and plaintiff recovers judgment, he may by our law take either the person, or his real or personal estate in execution, i. e. the moiety of his real estate, or the whole of the personal, if not more than sufficient for

payment of the sum recovered and charges. It may not be improper to observe, that the first hint of attaching *movables*, for the recovery of a debt was taken from the Canon law. *Robert. Hist. Emp. Charles V. 1 V. 316.*

In the legal sense of the word, *debt* is said to be an action which lieth where a man oweth another a certain sum of money, by obligation, or bargain for a thing sold, or by contract, &c. and the debtor will not pay the debt at the day agreed; then the creditor shall have action of debt against him for the same. And if money be due upon any specialty, action of debt only lies; for no other action may be brought for it: if a man contract to pay money for a thing which he hath bought; and the seller takes bond for the money, the contract is discharged, so that he shall not have action of debt upon the contract, but on the bond. *New Nat. Br. 268.*

Herein it is to be considered,

- I. In what cases it will lie, and by whom, and against whom, it may be brought.
- II. In what manner it may be brought, as where in the debt and detinet, and where in the detinet only.
- III. How it may be extinguished.

- I. In what cases debt will lie, and by whom, and against whom, it may be brought.

If one binds himself in a single obligation, or with condition, to pay money at a day; or to deliver corn, or the like, and do not perform it accordingly, the obligee may bring action of debt for it. *F. N. B. 120.* A man acknowledges by deed, that he hath so much of the money of J. S. due to him in his hands; here debt may be brought: and debt will lie on a talley sealed. *F. N. B. 122. 1 H. 6. 55.* A. delivers 20*l.* to B. to buy goods, and B. gives a receipt to A. testifying the delivery and receipt of the 20*l.* but doth not promise to deliver the goods, &c. A. may maintain debt upon this receipt. *Dyer 20. 2 Bulst. 256.* If a man be bound by bond to pay 20*l.* in manner following; viz. 10*l.* at one day; and 10*l.* at another day; action of debt will not lie till after the last day, it being an entire duty: but if one binds himself to pay A. B. 10*l.* at one day; and 10*l.* at another, after the first day action of debt lies for 10*l.* being a several duty. *2 Danv. Abr. 501. Sed qu.* as to the first part of the proposition? for if it be a bond for payment of 20*l.* (or of 40*l.* double the sum) conditioned for payment of 10*l.* at one day, and 10*l.* at another, the bond is forfeited in law, on nonpayment of the first 10*l.* Therefore the nature of the bond, and of the condition, (if there is any) must be carefully attended to; and see *Co. Lit. 292. b.*

If I agree with a taylor for a certain price to make me a suit of clothes, the taylor may have a general action of debt against me for the money; though if the price is not agreed on, there lies action of the case only, or special action of debt upon the special contract, which the law may imply on a *quantum meruit*. *Wood's Inst. 544.* And debt may be made action on the case, by proving money lent, or goods delivered, &c. whereupon promise of payment is implied in law. A man owes another a sum of money, and hath his note under hand, without seal, action of debt on a *mutuus* lies; but the defendant may wage his law: in action of the case brought upon promise of payment, the defendant cannot wage his law. *4 Rep. 93.* Action of debt lies upon a parol contract, and so doth action on the case. *1 Lill. 403.* If goods or money are delivered to a third person for my use, I may have action of debt or account for them. *2 Danv. 404.* Where money is delivered to a person, to be re-delivered again, the property is altered, and debt lies: but where a horse, or any goods are thus delivered, there *detinne* lies, because the property is not altered; and the thing is known, whereas money is not. *Owen 86. 1 Nels. Abr. 603.*

Debt will lie against him that lodges or tables with another; by an inn-keeper for the lodging and victuals of his guest, &c. A servant for his wages, though he do his service beyond sea. *9 Rep. 87.* Debt lieth not against a master upon the buying of the servant, unless it come to the master's use, or be by his agreement. *Doct.*

& Stud. 137. Action of debt lies against the husband, for goods which were delivered or sold to the wife, if they come to the use of the husband. *1 Lill. 400.* If one delivers meat, drink, or clothes, to an infant, and he promises to pay for them, action of debt, or on the case, will lie against the infant. Though debt may not be brought on an account stated with an infant: and what is delivered must be averred to be for the necessary use of the infant. *1 Lill. Abr. 401.* That is in the plaintiff's replication, supposing the defendant pleads *infancy*. An attorney shall have action of debt against his client, for money, which he hath paid to any person for the client, for costs of suit, or unto his counsel, &c.

On a bond, debt lies against the heir of an obligor, who has lands by descent, if the executors have not sufficient; and the obligee may bring his action against the heir or executor, although the executor have assets. *Anderf. 7.* An heir mediate may be sued in debt as if he were immediate heir, &c. Though the heir may not bring action of debt for a debt due to his ancestor; if it be by specialty, by which the party is bound to pay it to him and his heirs, the executor shall nevertheless have the action. *Dyer 368. F. N. B. 120.* Action of debt lies not against executors, upon a simple contract made with the testator. *9 Rep. 87.* But debt will lie for the arrearages of an account against executors; of receipts by the testator. *2 Danv. 497.*

Before the statute 32 H. 8. c. 37. the heirs or executors of a man seised of a rent-service, rent-charge, &c. in fee-simple, or fee-tail, had no remedy for the arrearages incurred in the life-time of the owner of such rents: but by that statute, the executors and administrators of tenants in fee-simple; fee-tail, or for life, of any rent, shall have action of debt for all arrearages of rent due in the life of the testator. *1 Inst. 162. 2 Danv. 492.*

A feme sole seised of a rent in fee, &c. which is behind and unpaid, takes husband, and the rent is behind again, and then the wife dieth; the husband by the Common law should not have the arrearages before the marriage, but for the arrears becoming due during the coverture, he might have action of debt. Now by the Stat. 32 Hen. 8. c. 37. the husband shall have the arrears due before marriage, and he hath a double remedy for the same. *1 Inst. 162.* At the Common law, debt lies not for rent upon a lease for life, (though it doth on a lease for years) but the remedy is assise, if the plaintiff have seisin, or by distress. *3 Rep. 65.*

But by Stat. 8 Ann. cap. 17. Any person having rent in arrear upon any lease for life or lives, may bring action of debt for such rent, as where rent is due on a lease for years. Action of debt will lie against a lessee, for rent due after the assignment of the lease; for the personal privity of contract remains, notwithstanding the privity of estate is gone. *3 Rep. 22.* But after the death of the lessee, it is then a real contract, and runs with the land. *Cro. Eliz. 555.* When a lease is ended, the duty in respect of the rent remains, and debt lieth by reason of privity of contract between lessor and lessee. *2 Cro. 227. 1 Nels. Abr. 604.* If debt be brought by an executor for arrears of rent ended, it is local still, and must be laid where the land lies. *Hob. 37.* Action of debt may be had against the lessee in any place; but if it be brought against an assignee, it must be where the land lieth: and upon the privity of contract, it is to be brought against the lessee where the land is. *Latch 197, 271. 2 Leon. c. 28.*

Debt for rent on a lease against assignee is local. See the case of *Barker v. Dormer, Shower, 1 V.* (the 2d in point of time) *fo. 191.* &c. an excellent case, containing much useful learning on the locality of actions; & *contra* in debt and covenant.

In some cases action of debt will lie, although there be no contract betwixt the party that brings the action, and him against whom brought; for there may be a duty created by law, for which action will lie. *2 Saund. 343, 366.* Debt lieth against a sheriff, for money levied in execution. *1 Lill. Abr. 403.* Action of debt lies against a gaoler for permitting a prisoner committed in execution to escape; because thereupon the law makes the gaoler debtor:

debtor: but where the party is not in execution, there action on the case only lies for damages suffered by the escape. 1 Saund. 218. 1 Lill. Abr. 402.

A person may have debt upon an arbitrament: also debt lies for money recovered upon a judgment, &c. And upon a recovery in the superior courts at Westminster, he must bring the action in Middlesex, the record being there; but a *sci. fac.* to execute judgment, must be where the original was, and follow it. New Nat. Br. 267, 268, &c. When judgment is had in the King's Bench, and a writ of error brought in the Exchequer chamber, or in Parliament; yet an action of debt will lie on the judgment: in this case, if the plaintiff levies part of his money by *elegit*; he may likewise bring debt for the residue. 1 Sid. 236, 184. If a man recovers debt or damages in London, on action brought there by the custom of the city, which lies not at Common law; when it is become a debt by the judgment, action of debt lies in the courts at Westminster upon this judgment. 2 Danv. 449.

Action of debt will lie for breach of a by-law; or for amercement in a court-leet, &c. 1 Lill. 400. And action of debt is sometimes grounded on an act of parliament; as upon the 2 Ed. 6. c. 13. for not setting out tithes: the 27 El. c. 13. against the hundred for a robbery, &c. Against physicians in London, for practising without licence, by 14 & 15 H. 8. c. 5. By assignees of a commission of bankrupt. 1 Jac. 1. c. 15, &c. A college shall have action of debt for commons of any student, adjudged Pasch. 9 Jac. B. R. The inns of court, particularly the Inner and Middle Temple, take bonds in the name of their treasurer, &c. of students, in which, generally, two gentlemen of the society are bound as sureties. For debt to a bishop, or parson, after his death, his executors shall have the action: but of a dean and chapter, mayor and commonalty, &c. the successors are intitled to the action of debt. F. N. B. 120. Action of debt lies on a recognisance; so upon a statute merchant, it being in nature of a bond or obligation: but it is otherwise in case of a statute staple. 2 Danv. 497.

In bringing this action, it is the general rule, that the party himself to whom the debt is originally due, whilst he doth live must bring the action; and after his death, his executors, &c. And the action must be brought against the party himself that doth originally owe the debt, whilst he is living; and after his death, it may be brought against the executor, if he make any; or otherwise against the administrator; and if the ordinary appoint none, against the ordinary himself; and if he die possessed of the goods, against his executor, &c. And also against executors of executors in infinitum. Dyer 24, 471. 3 Rep. 9. 2 Brownl. 207.

II. In what manner it may be brought, as where in the *debet & detinet*, and where in the *detinet* only. See Division I.

In debt, if it be demanded by original, the process is summons, attachment and distress; and upon a default of sufficiency, on a *nihil* returned, process to the outlawry, &c. And the judgment in debt, where the demand is in the *debet & detinet*, is to recover the debt, damages and costs of suit; and the defendant in *miseria cordia*: but if a defendant denies his deed, then a *capias pro fine* issues. 1 Shep. Abr. 523. (now out of use.) The defendant in debt pleads a release, if at the trial he makes default, the plaintiff shall have judgment for his debt, without a verdict: *contra*, if duress, or payment had been pleaded. Jenk. Cent. 68. Where the plaintiff in debt declares on some specialty, or contract for a sum of money, it must be certainly demanded, and no other; and the demand can't be of a lesser sum, but it must be shewn how the remainder was satisfied: but in an action upon a statute, that gives a certain sum for the penalty; though less be recovered than the plaintiff lays, it will be good. Cro. Jac. 498. If action of debt is brought on a specialty, bill, bond, lease, &c. the several writings must be well considered by which the plaintiff warrants his action, and the sum due is to be rightly set forth; and if it be debt for rent, the time of commencement, and ending, &c. Also in debt on account, the attorney must know when the accounts were

made up, and before whom, what the party was to account for, and time when, which are to be laid in the declaration, &c. Comp. Attorn. 28. In debt on single bill the defendant may plead payment (before the action brought) in bar: and pending an action, on bond, &c. the defendant may bring in principal, interest and costs; and the court shall give judgment to discharge the defendant. Stat. 4 & 5 Ann. c. 16.

If the action be brought for money, it must be in the *debet & detinet*; but if goods or chattels, it must be in the *detinet* only. 50 E. 3. 16. 1 Rol. Abr.—If an executor brings debt for any thing in right of his testator, it must be in the *detinet* only. Moor 566. 1 Rol. Abr. 602, 603.

So if an executor recovers in an action of debt upon a contract, and afterwards brings debt upon the judgment, it must be in the *detinet*. 1 Rol. Abr. 603. This must be understood if he sues in such second action, as executor.

If an executor brings an action upon an obligation made to the testator, where the day of payment incurred after the death of the testator, yet the writ shall be in the *detinet* only, for he brings the action as executor. Lane 80. S. P. 20 H. 6. 5. 1 Rol. Abr. 602. S. C.

So if a man binds himself to the testator to pay him 100l. when such a thing shall happen; if it happens after the death of the testator, yet the writ by the executor shall be in the *detinet* only. 20 H. 6. 6. 1 Rol. Abr. 602.

If a rent be granted to another for years, the executor of the grantee shall have an action for the arrearages of this rent incurred after the death of the testator in the *detinet* only, for he had it as executor. 11 H. 6. 36. 1 Rol. Abr. 602.

So if lessee for 20 years leases for 10 years rendering rent, and dies, his executor or administrator shall have action for the rent incurred after the death of the testator in the *detinet* only. 1 Rol. Abr. 603.

If in an account an executor recovers a debt due to his testator, in action for the arrearages thereupon, the writ shall be in the *detinet* only, for though the action is converted into a debt by the account, yet it is the same thing which was received in the life of the testator. Cro. Eliz. 326. Cro. Jac. 545. 5 Co. 31.

If the executor sells the goods of the testator for a certain sum, he shall have action for this in the *debet & detinet*. 1 Rol. Abr. 602.

If an executor having lands by an extent upon a statute made to the testator, and naming himself executor, &c. deed leases them for three years, rendering rent, &c. if an action is afterwards brought by him for this rent, it must be in the *debet & detinet*, because it is founded upon his own contract. Lane 80. Cro. Jac. 685. Winch 80. S. C. Brown 205. 1 Mod. 185. S. P.

So an executor, being lessee for years of a rectory in the right of the testator, may have action upon 2 E. 6. c. 13. for not setting out tithes in the *debet & detinet*, because founded upon a wrong in his own time, and by the statute it is given to the party grieved. Cro. Jac. 545.

Also action against an executor shall be in the *detinet* only, for he is chargeable no farther than he has assets. 11 H. 4. 16. 1 Rol. Abr. 603.

In an action against an executor for rent, incurred in the life of the testator, the writ shall be in the *detinet* only. 11 H. 6. 36. 1 Rol. Abr. 603.

But if an action be brought against an executor for the arrearages of a rent, reserved upon a lease for years, and incurred after the death of the testator, the writ shall be in the *debet & detinet*, because the executor is charged of his own possession. 1 Rol. Abr. 603. Cro. Eliz. 711. Moor 566. 1 Brownl. 56. Cro. Jac. 411.

If an action is brought against *baron and feme*, upon an obligation entered into by the *feme* before marriage, it shall be in the *debet & detinet*; for by the marriage all the personal goods and power of disposing of the real estate are by law given the husband, which he has to his own use, and not as executors, who have them only to the use of another. 5 Co. 36. 3 Leon. 206. S. C.

So if an action is brought upon a bond against the *heir* of the obligor, it shall be in the *debet & detinet*, because he hath the assets in his own right. 5 Co. 36.

III. How a debt may be extinguished.

If a man accepts an obligation for a debt due by simple contract, this extinguishes the contract, but the acceptance of an obligation, for a debt due by another obligation, is no bar of the first obligation. 13 H. 4. c. 1. 1 Roll. Abr. 604. i. e. if between the same parties.

In debt upon an obligation, the defendant cannot plead *nil debet*, but must deny the deed by pleading *non est factum*, for the seal of the party continuing, it must be dissolved *eo ligamine quo ligatum est*. Hard. 332.

But if the debt be due by simple contract, then he may plead *nil debet*, for it does not appear that there is any debt continuing. Hob. 218.

In debt for rent, if it be by deed, the proper plea is *non est factum*; but if it be without deed, the defendant may plead *non dimisit*, nothing in arrear, or that he never entered; also by the better opinion of the books, if the rent be due by indenture, the defendant may plead *nil debet*; for an indenture does not acknowledge a debt like an obligation, since the debt accrued by subsequent enjoyment. 2 Inst. 651. Hard. 332.

In debt for the arrears of an annuity granted for life, *nil debet* is no good plea, for the action is merely founded upon the deed, for without it no action can be maintained, and tho' by the death of the grantee the nature of the action is changed, the annuity being determined; yet this proves not but that the action is founded upon the deed. Keilw. 147.

But in debt for the arrears of a rent-charge, by will devised to the plaintiff's wife for life, against the administrator of the occupier of the land, *nil debet* is a good plea, for the will is no deed, nor wants any delivery; adjudged; and said the action was not so much grounded upon the will itself as upon the statute, by which men are enabled by will to dispose of their lands and rents issuing out thereof. Hard. 322.

In debt upon 2 & 3 E. 6. c. 13. for not setting forth tithes, Not guilty, or *nil debet* are good issues. 2 Inst. 651. Cro. Eliz. 621. S. P.

The reason why *Not guilty* is a good plea in this case is, because by the action the defendant is charged with a tort, and if he is not guilty of the tort; he does not owe the debt. So on the coal act, for not measuring with a lawful measure, or not delivering the ingrain, &c. &c.

In debt upon a contract, the defendant cannot plead the contract was for a less sum; or otherways than the plaintiff has declared, and traverse the contract in the declaration laid, but may wage his law. Moor 49. See farther Black. Com. 2 V. 464. 3 V. 153, &c. 158, 9.

Debt to the King. Under this word *debitum*, all things due to the King are comprehended; as all rents, fines, issues, amercements, and other duties received or levied by the sheriff; for debt in the larger sense signifies whatever any man owes. 2 Inst. 198. The King's debt is to be satisfied before that of a subject, and until his debt be paid, he may protect the debtor from the arrest of others. 1 Inst. 130. But by statute, notwithstanding the King's protection, creditors may proceed to judgment against his debtor, with a *cesset executio* till the King's debts be paid. 25 Ed. 3. St. 5. c. 19. Lands, &c. of the King's debtor and accountant, may be sold as well after his death, as in his life-time: But if the accountant or debtor to the King had a *quietus* during his life, his heir shall be discharged of the debt. 27 Eliz. cap. 3. A person being in debt to the King, purchases a lease to him and his wife, and dies: the term in the wife's hands is liable to the debt. 2 Rol. Abr. 157. Though it is said if he purchase lands to him and his wife for life, and to their heirs; such lands in the hands of the wife, are not extendible after the husband's death, for the King's debt. Dyer 255.

If a tenant in tail, becomes indebted to the King, by receipt of the King's money, or otherwise; unless it be by judgment, recognisance, obligation, or other specialty originally due to the King, or some other to his use; and then dies, the land in the hands of the issue in tail shall not be extended: But it may, in either of those four cases. 7 Rep. 21, 22. By the Common law, the King for his debt had execution of the body, lands, and goods of the debtor: By Magna Charta, 9 H. 3. c. 8. the King's debt

shall not be levied on lands, where the goods and chattels of the debtor are sufficient to levy the debt; for in such case, the sheriff ought not to extend the lands and tenements of the King's debtor, or of his heir, &c. 2 Inst. 19. Also pledges shall not be distrained, when the principal is sufficient: Though in both cases it must be made appear to the sheriff; in the one, that there are goods and chattels enough, and in the other, that the sheriff may levy the King's debt on the principal. Ibid. Sheriffs having received the King's debts, upon their next account are to discharge the debtors, on pain to forfeit treble value; and the sheriffs are to give tallies to the King's debtors on payment. Stat. 3 Ed. 1. c. 19. See Execution, and Black. Com. 3 V. 420.

The King's debtor committed by the court of Exchequer to the Fleet, brought into B. R. by *habeas corpus*, and surrendered in discharge of his bail, may be removed again to the Fleet by an *habeas corpus* from the Exchequer. Wilf. Rep. Par. 1. fo. 248. Cbitty's Case.

Debtor's Executor. If a person indebted to another makes his creditor or debtee his executor; or if such creditor obtains letters of administration to his debtor; he may retain sufficient to pay himself before any other creditors whose debts are of equal degree. 1 Rol. Abr. 922. Plowd. 543. Black. Com. 3 V. 18, &c.

Debtors. It is here held, that debt follows the person of the debtor, being on simple contract; and not of the creditor, as to actions brought, &c. 3 Keb. 163. Where a debtor is made executor of a will, the debt is said to be assets, because it is extinguished not by release, but in the way of legacy. 1 Salk. 303. By statute 8 & 9 W. 3. c. 18. Two thirds in number and value of creditors might make compositions with debtors, and bind all the rest; making oath before a master in Chancery how their debts became due, &c. But this act was repealed by 9 & 10 W. 3. c. 29. and see 10 Ann. c. 20. There have been several statutes for discharging poor insolvent debtors out of prison, where they have had no estate or effects to pay their creditors, &c. See Prisoners. And see Robert. Hist. Emp. Char. V. 1 V. 254, 5, &c. for an history of the various antient modes of proceeding, by creditors, against their debtors.

Debts, priority of. An executor or administrator in payment of debts, must observe the rules of priority; otherwise, on deficiency of assets, he must answer those of a higher nature out of his own estate. And, first, He may pay funeral charges and expences of proving the will, or taking letters of administration, and the like. Secondly, Debts due to the King on record or specialty. Thirdly, Such debts as are by particular statutes to be preferred to all others; as the forfeitures for not burying in woollen, money due on pools rates, for letters to the post-office, and some others. Fourthly, Debts of record; as judgments, (docketed according to the statute 4 & 5 W. & M. c. 20.) statutes and recognisances. Fifthly, Debts due on special contracts; as for rent, (for which the lessor hath often a better remedy in his own hands, by distraining) or upon bonds, covenants, and the like under seal. Lastly, Debts on simple contracts, viz. Upon notes unsealed, and verbal promises. Among these simple contracts, servants wages are, by some, with reason, preferred to any other. Black. Com. 2 V. 511.

Deceit, (Deceptio) Is a subtle trick or device, whereunto may be drawn all manner of craft and collusion, used to deceive and defraud another, by any means whatsoever, which hath no other or more proper name than *deceit* to distinguish the offence. West. Symb. Scit. 68. And there is a writ called *Breve deceptionis* that lies for one that receives injury or damage from him that doth any thing deceitfully in the name of another person; which writ is either original or judicial. Reg. Orig. 112. Old Nat. Br. 50. *Deceit* is an offence at Common law, and by statute: And all practices of defrauding or endeavouring to defraud another of his right, are punishable by fine and imprisonment; and if for cheating, pillory, &c. Serjeants, counsellors, attornies, and others, doing any manner of *deceit*, are to be imprisoned a year and a day; also pleaders by *deceit* shall be expelled the court. Stat. 3 Ed. 1. cap. 29. For obtaining money, &c. by false pretences, see 30 Geo. 2. c. 24.

If a fine be levied by *deceit*; or if one recover land by *deceit*, the fine, and the recovery, shall be void. 3 Rep. 77. And if a man be attorney for another in a real action against the demandant, and afterwards by covin between such attorney and the demandant, the attorney makes default, by which the land is lost, the tenant who lost the land shall have a writ of *deceit* against the attorney. F. N. B. 96.

In a *præcipe quod reddat*, if the sheriff return the tenant summoned, where he was not summoned, by which the defendant loseth his land by default at the grand cape returned; the tenant shall have a writ of *deceit* against him who recovered, and against the sheriff for his false return; and by that writ the tenant shall be restored unto his land again: And the sheriff shall be punished for his falsity. *Ibid.* 97. If a man bring a writ of *deceit* against him that recovers in the first action, and the sheriff return him summoned, upon which for non-summons in that action on finding the same the recovery is reversed; in this case the defendant shall not have writ of *deceit* to recover the land again, if he were not summoned: But he shall have his remedy against the sheriff. *Rel. Abr.* 621. And where *debt* was brought, and the defendant pleaded in abatement, and the plea was over-ruled; the attorneys on both sides by *deceit* between them, to the end the plaintiff might recover his debt, entered another judgment when it should have been a *respondeas ouster*; and it was held that the writ of *deceit* would not lie to reverse the record, but only to recover damages. *Ibid.* 622.

If in a suit or action, another person shall come into court and pretend he is party to the suit, and so let judgment be had, or some other damage done to the party himself; or if I have cause to have an action, and another brings it in my name, and lets judgment go against me by nonsuit, or the like; I may have this writ of *deceit* against him. F. N. B. 96. March 48.

If any one forge a statute, &c. in my name; and sueeth a *capias* thereupon, for which I am arrested; I shall have a writ of *deceit* against him that forged it, and against him who sued forth the writ of *capias*, &c. *Ibid.* And if a person procure another to sue an action against me to trouble me, I shall have a writ of *deceit*.

There are many frauds and *deceits* provided against by statute, relating to artificers, bakers, brewers, victuallers, false weights and measures, &c. which are liable to penalties and punishment in proportion to the offence committed. And writ of *deceit* lies in various cases, for not performing a bargain; or not selling good commodities, &c. 1 *Inst.* 357. See *Action on the Case*. A writ of *disceit* lies to set aside a fine and recovery in C. B. of lands in *antient demesne*. *Wils. Rep. Par.* 2. fo. 17. *Rex v. Sergeant Mead & al.* See *Black. Com.* 3 V. 165-6.

Decennary. A town or tithing consisting (originally) of ten families of freeholders. Ten tithing composed an *hundred*. The institution of *decennaries* (or *frankpledges*) is imputed to *Alfred*. In these decennaries the whole neighbourhood or tithing of freemen were mutually pledges for each other's good behaviour. *Black. Com.* 1 V. 114. 4 V. 249.

Decem Tales, Is when a full jury doth not appear at a trial at bar; then a writ goes to the sheriff *apponere decem tales*, &c. whereby a supply is made of jurymen to proceed in the trial.

Decies tantum, Is a writ that lies against a juror, who hath taken money of either party for giving his verdict; so called, because it is to recover ten times as much as he took: And every person that will may bring this writ and recover the same, one half whereof shall be to the prosecutor, and the other to the King. This writ also lies against *embraceors* that procure such an inquest; who shall be further punished by imprisonment for a year. *Reg. Orig.* 188. F. N. B. 171. *Stat.* 38 Ed. 3. cap. 13. But *decies tantum* doth not lie against the embraceor, if he embrace and take no money; for he ought to take money, and also embrace. Yet it lies against the jurors, although they do not give a verdict, if they take money; and so, 'tis said, if they give a true verdict, *decies tantum* lies, if they take money. *Dyer* 95. *New Nat. Br.* 300.

Decimation, (Decimatio) The punishing every tenth soldier by lot, was termed *decimatio legionis*: It likewise signifies tithing, or paying a tenth part. There was a *decimation* during the time of the *Usurper* 1655.

Deciners, Decenniers, or Doziners, (Decennarii) Derived from the Fr. *Dixaine*, i. e. *Decas*, *Ten*, signify in our ancient law, such as were wont to have the oversight of the *Friburghs*, or views of *frank-pledge*, for the maintenance of the King's peace; and the limits or compass of their jurisdiction was called *Decenna*, because it commonly consisted of ten households; as every person bound for himself and his neighbours to keep the peace, was stiled *Decennier*. *Bract. lib.* 3. *Traçt.* 2. cap. 15. These seemed to have large authority in the time of the Saxons, taking knowledge of causes within their circuits, and redressing wrongs by way of judgment, and compelling men thereunto, as appears in the laws of King Edward the Confessor, published by *Lambard*, Numb. 32. But of late times *decennier* is not used for the chief man of a *Dixain*, or *Dozein*; but he that is sworn to the King's peace, and by oath of loyalty to the Prince, is settled in the society of a *dozein*. A *dozein* seemed to extend so far as a leet extendeth; because in leets the oath of loyalty is administered by the steward, and taken by all such as are twelve years old, and upwards, dwelling within the precinct of the leet where they are sworn. F. N. B. 161. There are now no other *dozains* but leets; and there is a great diversity between the ancient and these modern times, in this point of law and government. 2 *Inst.* 73. See *Black. Com.* 4 V. 249.

Declaration, (Declaratio, Narratio) Is a shewing in writing the cause of complaint of the plaintiff in an action against the defendant; wherein the party is supposed to have received some wrong. And this ought to be plain and certain, because it impeacheth the defendant, and compels him to answer thereunto; it must set forth the plaintiff's and defendant's names; the nature and cause of the action; the manner thereof, &c. and the damage received. 1 *Inst.* 17. A count or declaration ought to contain *demonstration*, *declaration*, and *conclusion*: In demonstration, are included three things; *Quis queritur, contra quam, & pro qua causa*; in declarations, there ought to be comprised, *Quomodo inter partes actio accrevit, quando & qua die, anno & loco, & cui dabitur*: And in the conclusion, should be averred and offered to prove the suit and damage, &c. sustained. *Terms de Ley.* See *Co. Lit.* 303. a. &c. A declaration is an exposition of the writ, with the addition of time, circumstances, &c. and must be true and clear, for the court is not to take things in it by implication: but it is not necessary to set forth matters of fact, as in a bill in Chancery, because they are to be tried by a jury. *Wood's Inst.* 582. The law requires four things in declarations and pleadings, viz. 1. Truth. 2. Certainty. 3. Order. 4. Congruity. In personal actions, the day, year, and place ought to be expressed in the declaration; but not in real actions: And if in trespass the plaintiff declares, that it was committed such day, &c. and continued *diversis diebus & vicibus*, without shewing the days of the continuance of it, this is good: For that is to be proved in evidence, for the increase of damages. *Jenk. Cent.* 124.

In action of debt, upon a bond, the plaintiff in his declaration must alledge a place where the bond was made, because the jury should come from that place; and if this be omitted, the declaration is ill. *Dyer* 15, 39. 1 *Nelf. Abr.* 619. In action of covenant, no more of the deed need be mentioned in the declaration, than the covenant where the breach is assigned: And if a defendant pleads *non est factum* to a deed, he allows a covenant therein to be broken, as laid in the declaration, and makes the declaration good, tho' the breach be too generally assigned. 2 *Cro.* 369. *Sed qu.* But a defendant seldom relies on the plea of *non est factum* only, unless the deed is not in reality his, but, by leave of the court, pleads also some other plea, or pleas. In slander there should be no more inducement than is necessary: The like is to be observed in actions upon general statutes, concluding *contra formam statuti*, &c. But in declarations for words, the words spoke are to be laid expressly and positively; not with

with an *hac verba vel consimilia*, nor with a *quorum tenor sequitur*, &c. *Cro. Eliz.* 645, 857. 5 *Mod.* 72. And where the plaintiff declares on, and recites a statute, he must recite it truly, and 'tis erroneous to misrecite it; though as to the substance of the declaration, the plaintiff might have omitted to recite it all. 1 *Nelf.* 616.

In action on the case upon *assumpsit*, the plaintiff is to declare upon the whole promise made, and not on a part of it; or on trial he will be nonsuited. 1 *Danv. Abr.* 266, &c. It is good to lay large and sufficient damages in declarations: And damages shall not be given for that which is not contained in the declaration, and only for what is materially alledged. 10 *Rep.* 115. 1 *Lill. Abr.* 381. If one declare upon an obligation, with an *hic in curia prolatus*, he must on *oyer* pray'd of it, shew the obligation, or the declaration will not be good. And a plaintiff declaring as executor or administrator, ought to set forth the probate of the will, and letters of administration granted, with a *profert in curia*; or the declaration will be naught. 2 *Lill. Abr.* 412.

Where there are two counts in a declaration for things of the same kind, and not averred to be different, it is not good; for the defendant is twice charged for the same thing: But on arrest of judgment in such a case, it was adjudged good after verdict, and the court will not intend them to be the same. 1 *Salk.* 213. If a declaration is bad, and the defendant demurs, the plaintiff may, on application to a judge, or by motion in court, (but the most usual method is by summons before a judge) obtain leave to amend on paying the costs of the demurrer, &c. But if the defendant do not take advantage of it, but pleads in bar, and the plaintiff proceeds to issue thereon, if the right is found for the defendant, the plaintiff is estopp'd by the verdict from bringing a new action: And so it is if he had demurred to the plea in bar. 1 *Mod.* 20, 207. Where a declaration is defective, it is sometimes aided by the statutes of *jeofails*, &c. but they help only matters of form, not matters of substance; for uncertainty in a declaration, which is matter of substance, is not aided by statute after verdict, as in case of trespass for taking fish, where their number or nature are not set forth. 5 *Rep.* 35.

The plaintiff hath two terms to exhibit his declaration against the defendant, that term being reckoned one wherein the writ was returnable: And if no declaration comes in before the rising of the court, the last day of the second term, the defendant may sign a *non. prof.* whereupon he shall have costs. If the defendant appears in person, the plaintiff is to declare in three days after appearance in *B. R.* and in other courts, at the next court. As to *B. R.* the plaintiff hath now two terms: and more time in taking a rule. The plaintiff's attorney is to file his warrant the term wherein he declares. *Stat. 4 Ann. c.* 16. If one be in custody of the marshal of the court, any plaintiff may file a declaration against him, and he is obliged to plead thereto; it is the same when he is out upon bail, any other may declare against him: For when a man is in custody of the law, he is bound to answer every one's suit; and on *hab. corp.* a stranger to the writ by which the prisoner is arrested, may take notice of the prisoner when he is turned over to the marshal, though at the suit of another, and declare against him, without taking out process. 1 *Lill. Abr.* 413.

By statute, when a defendant is taken or charged in custody, upon any writ out of the courts at *Westminster*, or imprisoned for want of sureties for appearance, the plaintiff must declare against him before the end of the next term, and cause a copy to be delivered to the prisoner or gaoler; to which declaration the prisoner is to plead, or the plaintiff shall have judgment. 4 & 5 *W. & M. cap.* 21. But if the declaration be not enter'd, or left in the office, before the end of the next term; and *affidavit* is made thereof, and filed, before the end of twenty days after, &c. the prisoner, on entering his appearance shall be discharged by *superseas*. If a person is in custody of the marshal, &c. and the plaintiff would charge him either with an action or execution, (if in term-time) he must file a bill against him, and deliver a declaration to the turn-key, &c. and he shall lie in custody two terms, &c. but if in vacation, the plaintiff is to go to the mar-

shall's book in the office, and make an entry *quod defendens remaneat in custodia ad se* &c. *A. B. &c.* 1 *Salk.* 213. And in declarations against prisoners by virtue of any process out of *B. R.* it shall be alledged in custody of what sheriff, bailiff, &c. such prisoner is at the time of the declaration delivered: which allegation shall be as effectual as if the prisoner was in custody of the marshal. 4 & 5 *W. & M. c.* 21. 8 & 9 *W. 3. c.* 21. All declarations are to be filed; for 'tis filing that makes them authentick, as the foundation of the cause depending; and before filed, they are not of record to warrant a judgment: and if the plaintiff's attorney cannot find the defendant's attorney to deliver him the declaration, filing it in the office will be a good delivery; but notice thereof must be given either to the defendant or his attorney, when they are to be found; and if the defendant do not plead, judgment shall be had against him. *Pasch.* 13 *Car. B. R.*

On filing declarations, copies thereof are served on the defendants, or their attorneys, &c. And by an order of all the judges, anno 12 *W. 3.* the plaintiff's attorney is not obliged to deliver the defendant's attorney the original declaration; but instead of it, is to deliver a true copy of the declaration; upon delivery or tender whereof, the defendant's attorney shall pay for such copy after the rate of 4 *d.* per sheet, &c. and if any person refuse to pay for the copy tendered, the said copy is to be left in the office, with the clerk that keeps the files of declarations, and thereupon the plaintiff's attorney giving rule to plead, may for want of a plea sign judgment; and before any plea shall be received, the defendant's attorney is to pay for the copy of the declaration. 1 *Lill.* 417.

And by a late order, in every cause, where special or common bail is filed, and notice given to the plaintiff, a copy of the declaration shall be delivered to the attorney for the defendant, who shall pay for it according to the usual rate; but if the defendant's attorney, or his clerk in his absence, refuses to pay for such copy; or if it happens the habitation of the attorney for the defendant, be unknown to the attorney for the plaintiff; then it shall be lawful to leave the copy with the officer of the court appointed for filing declarations, which shall be good, giving notice, &c. *Ord. Cur. Trin.* 2 *Geo.* 2.

On the first day of the following term after delivery of the declaration, the paper of rules is to be made up, writing on the top the attorney's name and the term, and under that the names of the plaintiff and defendant, as *A. B. against C. D. &c.* and the paper of rules must be carried to the secondary, who will give one peremptory rule to plead in eight days, &c. A plaintiff's attorney, may amend his declaration in *B. R.* in matter of form, after the general issue pleaded, before entry thereof, without paying costs, or giving imparlance: But if he amend in substance, he is to pay costs, or give imparlance: And if he amend in substance, after a special plea pleaded, though he would give imparlance, he must pay costs. 1 *Lill. Abr.* 409.

A mistake in a declaration, the plaintiff may amend in *C. B.* on notice before the *essoins* day, and the defendant shall have no advantage of it: Also before demurrer, or issue joined, the plaintiff may amend, paying 13 *s.* 4 *d.* costs; and force the defendant to plead presently, or give him a further imparlance without paying costs: But after demurrer, or issue joined, and when the pleadings are entered on the roll, the plaintiff cannot amend his declaration, but is to enter a discontinuance, and proceed *de novo*. *Practif. Attorn. Edit.* 1. p. 147. But the courts will often give leave to amend, on motion for that purpose, plaintiff paying such costs as shall be taxed by the proper officers.

On a *latitat* in *B. R.* you may declare against the defendant in as many actions as you think fit; but you must have one original, for every action in *C. B.* The declaration is grounded upon the writ in the Common Pleas, and bill of *Middlesex* in the King's Bench: And in *C. B.* it is usual to declare in actions on *Quare clausum fregit*, as is practised on a *latitat* in *B. R.* 2 *Vent.* 259. One may not regularly declare in *B. R.* against a person that is not in custody of the marshal, or hath not filed bail; unless he be a privileged person. 21 *Car. B. R.* If a

claration begins *Queritur de Placito Transg. pro eo quod, &c.* it may be a declaration in case, or it will serve for either trespass, or case. *Cro. Car.* 325.

The plaintiff's attorney is not obliged to set his hand to his declaration; for the defendant's attorney must receive it without, if he knows him to be the attorney in the cause. By statute, no man shall be prejudiced by the ancient forms; so that the matter of the action be fully shewn in the declaration, &c. which shall be good, though the terms are not perfectly proper. 35 *Ed.* 3. c. 15. Vide 27 *El.* c. 5. 16 & 17 *Car.* 2. c. 8. & 4 *Ann.* c. 16.

A decree in Chancery is of the like nature with a judgment at Common law. *Chan. Rep.* 234. 14 *Car.* 2. *Nanny v. Martin.*

Decree. The judgment of a court of equity on any bill preferred, is so called.

By the laws of England a decree (notwithstanding any contempts thereof) shall not bind the goods or moveables, but only charge the person. *Chan. Rep.* 193. 12 *Car.* 2. *Howard v. Suffolk.*

A defendant lay in the Fleet for breach of a decree, the plaintiff nevertheless prefers a bill to discover an estate; defendant demurred because a double execution; yet overruled. *Toth.* 137, 138. cites *Hill.* 1630. *Audley v. Harris.*

A sequestration may be granted in the Exchequer, as it has always been practised in Chancery where a decree is for a personal duty, otherwise the jurisdiction of the court of equity would be to little purpose, if it had not authority sufficient to see its decrees executed; per three Barons; but the Lord Chief Baron doubted, because the Lord Chief Baron Hale could never be prevailed upon to grant it, nor the Lord Montague, to whose learning, he said, he must subscribe; but by the opinion of the other three it was granted. 2 *Freem. Rep.* 99. pl. 109. *Trin.* 1687. in the Exchequer, *Gawver v. Fountaine.* See 7 *Vin. Abr.* 394, 402.

Where there is a remedy at law for one thing in a bill, which is complicated with other matters which are proper in equity, in such case equity will determine the whole matter; per Lord Chancellor. 2 *Freem. Rep.* 58. in pl. 64. *Trin.* 1680.

Where there is but one witness against the defendant's answer, the plaintiff can have no decree. *Vern. R.* 161. pl. 151. *Pasch.* 1683. *Alam v. Jourdon.*

Where no ordinary process upon the first decree will serve for the execution thereof, there must be a new bill to pray execution of the first decree by a second decree. 2 *Chan. Rep.* 127, 128. 29 *Car.* 2. *Lawrence v. Bernety.*

Verbal agreement, though subsequent to the decree, yet shall not stay the execution of it, but the remedy must be by original bill. 2 *Chan. Cases* 8. *Mich.* 31 *Car.* 2. *Waklin v. Walball.*

Whenever a decree is entered by consent, the merits after shall never after be enquired into, unless there be an objection, that the word *consent* be struck out of the order. *MS. Tab.* February 1702. *Norcot v. Norcot.*

On a new bill to carry a decree into execution, court may vary and alter what is thought proper; but on a rehearing, no further than the petition extends; but if the petition be against the decree in general, though particular reasons are given, the whole is open; but otherwise it is, if the petition be only against one or two particulars. *See Cases in Chan. in Lord King's time* 13, 14. *Pasch.* 11 *Geo.* 1. *Colchester v. Colchester.*

The rule of court is, that on appeal the whole cause is open; but on a rehearing, only so much as is petitioned against; if all do not petition, it is open only to the petitioners. *See Cases in Chan. in Lord King's time* 24. *Trin.* 11 *Geo.* 1. *Hayward v. Colley.*

Decree may be altered upon proper application the same term it is so pronounced, without a rehearing. *MS. Tab.* May 1725. *Vaughan v. Blake.* No original bill can be to vacate a decree signed and inrolled. *G. Equ. R.* 185. *Hill.* 12 *Geo.* *Floyd v. Mansell.* Matters proper to be excepted to upon the master's report, shall never be objected to a decree after the report confirmed. *MS. Tab.* April 28, 1726. *Parker v. Stanley.* All appeals from the Rolls are to be made to the Lord Chancellor, and decrees made

at the Rolls must be signed or approved of by the Chancellor to make them decrees of the court of Chancery. *MS. Tab.* March 13, 1727. *Morse v. Dubois.*

A decree gained by fraud, may be set aside by petition, as well as a judgment at law by motion; a fortiori may such decree be set aside by bill. 3 *Wms's Rep.* 111. *Pasch.* 1731. *Seldon v. Fortescue Aland.* If a decree be obtained and inrolled, so that the cause cannot be reheard, then there is no remedy but by bill of review, which must be an error appearing on the face of the decree, or on matters subsequent thereto, as a release, or a receipt discovered since. 3 *Wms's Rep.* 371. *Trin.* 1735. *Taylor v. Sharp.* See *Black. Com.* 3 *V.* 451.

Decretals. (*Decretales*) Are a volume or books of the Canon Law, so called, containing the decrees of sundry Popes; or a digest of the canons of all the councils that pertained to one matter under one head. See *Canon Law.*

Decurfare, Signifies to bring into order. *Mon. Aug. Tom.* 1. p. 243.

Dedbania, Ded bane, Sax. An actual homicide, or manslaughter. *Leg. H.* 1. c. 85.

Dedi, Is a warranty in law; as if it be said in a deed or conveyance, That A. B. hath Given, &c. to C. D. it is a warranty to him and his heirs. *Co. Lit.* 304. Also dedi imports a power of giving any thing. *Heb.* 12.

Dedication-Day, (*Festum Dedicacionis*) the feast of dedication of churches, or rather the feast-day of the saint and patron of a church; which was celebrated not only by the inhabitants of the place, but by those of all the neighbouring villages, who usually came thither; and such assemblies were allowed as lawful: It was usual for the people to feast and drink on those days; and in many parts of England, they still meet every year in villages for this purpose, which days are called *Fasts* or *Wakes.*

Edictum Potestatem, Is a writ or commission given to one or more private persons, for the speeding some act appertaining to a judge, or some court: And it is granted most commonly upon suggestion, that the party who is to do something before a judge, or in court, is so weak that he cannot travel; as where a person lives in the country, to take an answer in Chancery; to examine witnesses in a cause depending in that court; to levy a fine in the Common Pleas, &c.

Edictum Potestatem de Retorno faciendo. As the words of writs do command the defendant to appear, &c. anciently the judges would not suffer the parties to make attorney in any action or suit, without the King's writ of *Dedimus Potestatem*, to receive their attorney: But now by statutes, the plaintiff or defendant may make attorney in suits without such writs. *New Nat. Br.* 55, 56. See the Table to the 4th Edit. of the Stat. tit. *Attornies.*

Deed, (*Factum*) Is an instrument in parchment, or paper, but chiefly in parchment, comprehending a contract or bargain between party and party; or an agreement of the parties thereto, for the matters therein contained: And it consists of three principal points, writing, sealing, and delivery; writing, to express the contents; sealing, to testify the consent of the parties; and delivery, to make it binding and perfect. *Terms de Ley.* Some have enumerated ten things as necessarily incident to a deed. (1) Writing. (2) In parchment (*vellum*) or paper. (3) A person able to contract. (4) By a sufficient name. (5) A person able to be contracted with. (6) By a sufficient name. (7) A thing to be contracted for. (8) Apt words required by law. (9) Sealing. And (10) Delivery. *Co. Litt.* 35. b.

The word *scriptum* or writing doth not import a deed; for a contract may be in writing, and not by deed, and if so, it is but a parol agreement: But a deed may be effectual, although it does not mention, in the beginning, by or to whom it is made. 1 *Ed. Raym.* 28.

1. As to the writing of a deed. All the matter and form thereof must be written before the sealing and delivery of it; for if a man seals and delivers an empty piece of parchment or paper, although he therewithal gives commandment that an obligation or other matter shall be written in it, which is done accordingly, yet this will not make it a good deed. *Co. Litt.* 171. *Perk. S.* 118, 119. See *Moor* 28. *Healey* 136, 7.

A deed may be written in any hand, as in text, court or Roman hand; or in any language, as in Latin or French,

• *French*, and is as good as a deed writtten in *English* and in a secretary hand. 2 Co. 3.

If there be any alteration, rasure, or interlining made in any part of the deed before the delivery of it, this will not hurt the deed.

But in such cases it is policy to make a memorandum of it upon the back of the deed, and to give the witnesses notice of it, (this is now usually done in the attestation of the deed thus: *Sealed and delivered, the word — being first interlined, &c.*) For otherwise, if it be in any place material, as in the name of the grantor, grantee, in the limiting of the estate, or the like, and it cannot be proved to be done before the sealing and delivery of it, especially if it be a deed poll, it is very suspicious. Co. Litt. 37, 225. Perk. S. 125, 126, 127, 128, 155.

It may be written either in a piece of loose paper or parchment, or in a paper or parchment sewed in a book. Bro. Oblig. 67. Co. Litt. 137, 139. But the paper or parchment must in most cases be stamped.

As to the parties contracting.

It is to be observed, That some persons are disabled by Common law, and some by statute; some are absolute, and some are *secundum quid* only; as in case of infants, feme covert, ideots, persons *non compos mentis*, aliens, tenants in tail, ecclesiastical persons, and others, some of which may not make any deeds or estates by them at all; others but so and so limited and qualified. Stat. 32 Hen. 8. cap. 28.

Disabilities to make deeds, &c. are chiefly amongst persons of none-sane memory, infants, aliens, women who have husbands, men who have wives, &c. persons born deaf and dumb, persons attaint of treason or felony, or in a *præmunire*, clerk convict, tenant in tail, ecclesiastical persons, as bishops, parsons, and the like, with respect to lands, &c. they hold as such, joint-tenants, tenants in common, coparceners, disseisors, disseisees, &c.

And this in some of them is in part, and temporal only, but in others of them, it is absolute, universal, and perpetual.

He who has but an estate-tail in land, can only make a lease of it for his own life by deed, or such a lease as is within the stat. 32 Hen. 8. c. 28.

Ecclesiastical persons cannot make a lease of their ecclesiastical lands for longer than their own lives, or such a lease as is warrantable by the statute of 13 Eliz. cap. 10. and 1 Jac. 1. cap. 3. and others.

And he who has only an estate for his own or another's life, or a lease for years of land, may give, grant or charge it at his pleasure for so long as his estate lasts; and it will be good to all purposes, and against all persons for that time.

And a man who has an estate in land to him and his wife, and his heirs, may make what estate he will of it, and this will be good against all but his wife, and that for her life only. 7 Co. 12. Co. Litt. 42. Perk. f. 182.

As to the naming and description of the parties and persons in deeds:

The names of the parties to deeds serve only to distinguish persons, and to make the person intended certain; and therefore it is safe to describe the person intended by his true and proper names of baptism and surname; and if it be a corporation, by the true name whereby it was made; yet mistakes in this, unless they be very gross, will not hurt, *nilil facit error nominis cum de corpore constat*. Bulst. 21, 22. 2 Bulst. 302, 303. Co. Litt. 3. Perk. f. 36.

But if the name of baptism or surname be mistaken, as *John* for *Thomas*, or *Adderley* for *Adderby*, this is dangerous. Moor 407, 897. And see 2 Bulst. 70. Perk. f. 39.

'Tis also prudent to add the addition of each party, as to the place of residence, with his or her degree, profession, or mystery.

There are many descriptions of grantors and grantees; as (1) Proper names of baptism and surnames, and the names of corporations, or bodies politick or corporate.

(2) Names of dignities, office, and the like. And these (of both sorts) will admit a description made good by reputation. And so land will pass to one, by the name of a son, who is a bastard; so to one by the name of a wife, who is not a wife, if they be reputed or known by that name. Hob. 32.

There must be such a person *in esse* at the time of the deed made as is named, and he must be able to give, and capable to receive that which is given or granted by the deed. Plowd. 345. Co. Litt. 2, 3. Perk. 43, 52.

And therefore if an annuity be granted to the right heirs of J. S. he being then living, this is void; for there is none such, nor can be whilst he lives. Perk. f. 52.

So *primogenit. proli* of A. and B. and they have no issue yet born. Cro. Car. 22.

If a man gets another name by common esteem than his right name, and he is known by his other name, his deed made by this other name may be good. 6 Co. 36. Co. Litt. 3. Perk. f. 41.

The mistake is less dangerous where any other part of the deed, or some other addition, shall make the person intended certain. 6 Co. 36. Co. Litt. 3. Perk. f. 40.

With respect to the capacity of the person to be contracted with:

All persons male or female, ecclesiastical or temporal, and all bodies natural or politick, are capable to take by grant, or to be contracted with, unless disabled by their being *non compos mentis*, &c. as before, as to the disabilities to grant, &c.

The King, for the greatness of his person, is disabled to take by deed *in pais*; and therefore if a feoffment be made to him there, and livery of seisin be made upon it, this will be void; but he is to take by matter of record, which is of a higher nature than a deed. Fitz. Fait and Feoffment 21.

Leases made to him by colleges, deans and chapters, or any other having a spiritual or ecclesiastical living, against the statute 13 Eliz. c. 10. are restrained by the same act, as well as leases made to common persons. 5 Co. 14.

If a lease is made to husband and wife for their lives, the remainder to the heirs of the survivor; this is a good remainder notwithstanding the uncertainty. Godb. Case, 167.

If a lease be made to the husband, *habendum* to the wife, the *habendum* to her is void, for she is a stranger to the premises of the deed. 3 Leon. 32, 33, 34.

Concerning the name of the grantee:

It is to be remarked, That grantees, &c. must not only be persons in being, and capable to take by grant, &c. by the name in the deed mentioned, but they must also be sufficiently named and described one way or other, and he himself, and not a stranger, must take by the deed; and some that cannot grant or give, yet may take or receive. And a grant made to two, three, or twenty such persons, is good. Co. Litt. 2, 3. Perk. f. 43.

If a grant be in all other respects well made, except the omission of the name of the grantee, if it does not express who shall take by it, it is void.

There are divers sorts of names and nominations of persons, or bodies politick or corporate, that may take, whereof there are divers sorts; as first, the proper names or surnames, wherein notwithstanding there may be ambiguity of a gift or grant to my son *John*, (having two of that name,) perhaps it may be made good by an averment which *John* is meant.

There are also other names or descriptions, as by some dignity, office, or the like; as the Earl of *Hertford*, Lord Treasurer, and the like: And this will admit of a description made good by reputation, though not by truth; as land will pass even by conveyance to one by the name of son who is a *bastard*, by the name of wife who is not such, if he or she be so reputed or known by that name. 27 Edw. 3. 85. Bulst. 3.

But the safe way in the cases of common persons is, to name the parties grantor or grantee, &c. by their names of baptism and surname, &c. Co. Litt. 3.

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For where the grant intends to describe the person of the grantee by his proper name, and omits or mistakes his Christian name or surname; commonly the deed is void, unless there be some special matter to help it.

And yet if the grant does not intend to describe the grantee by his known name, but by some other matter, there it may be good, by a description of the person, without either name of baptism or surname. *Co. Litt. 3.*

A bishop by the name of Bishop of London, may take without any other name. *Co. Litt. 3. Bult. 21.*

As to the thing to be contracted for:

All corporeal and immoveable things, such as are said to lie in livery, as honours, offices, villages, manors, messuages, cottages, lands, meadows, pastures, woods, advowsons, moors, marshes, furzes, heaths, mines, quarries, and the like; and some incorporeal things that are incident and appendant to them, are grantable from any man to another man in fee-simple, fee-tail, for life or years at first, and transmissible and assignable afterwards by the grantee thereof *in infinitum* at pleasure. *Co. Litt. 20.*

A grant may be of a moiety, third, fourth, or fifth, or other certain part of a manor, or of land, by the name of a third, fourth, fifth, or other certain part, and good. *Co. Litt. 190.*

So of a third or fourth part of tithes, and the like. *Dyer 84.*

And all incorporeal things, such as are said to lie in grant, as rents and services; and of these not only such as are reserved upon any estate made of land, but such as are granted out of land, feignories, commons, vicarages, advowsons in gross, estovers, dignities, ways, waters, fishings, franchises, ferries, leets, waifs, estrays, and some offices. All these and the like things are grantable by one to another in fee-simple, fee-tail, for life or for years at first, and *de novo*, but they are grantable and assignable over *in infinitum*. But these things may not be granted otherwise than by deed. *Co. Litt. 144. Fitz. Grant, 145. Perk. f. 87, 91, 103. Bro. Grant, 3. 3 H. 6. 20. 9 H. 6. 12.*

And if a man has a rent reserved on a particular estate, he may grant over parcel of it.

And of whatsoever a fine may be levied, a grant by deed of the same thing may be made.

A grant of an acre of land covered with water, is good. *Co. Litt. 4.*

Rents and services reserved upon any estate, and rents granted out of land (it is said) are grantable over *in infinitum*; but one may not grant rent out of a rent, nor may one grant over a rent which he has till he has seisin of it. *Perk. f. 88, 89. Bro. Grant, 171.*

With regard to the words requisite in a deed:

They depend upon the estate intended to be conveyed. If a man would purchase lands or tenements in fee-simple it behoves him to have these words in his purchase, *To have and to hold to him and to his heirs*; for these words, *his heirs*, (only) make the estate of inheritance, in all feoffments and grants. But this is to be understood of natural bodies: For if lands be given to a sole body politick or corporate, (as to a bishop, parson, vicar, master of an hospital, &c.) there to give him an estate of inheritance in his politick or corporate capacity, he must use these words, *To have and to hold to him and his successors*. *Co. L. 8. &c.*

If an estate-tail is intended to be created, the words must be, *To have and to hold to him and to the heirs of his body*. See title *Fee*.

The necessity of the word *heirs* or *successors*, as the case requires, is therefore absolutely necessary in conveyances of estates of inheritance; for if a man purchases lands by these words, *To have and to hold to him for ever*; or by these words, *To have and to hold to him and his assigns for ever*: In these two cases he has but an estate for term of life. See *Co. Litt. 8. b. &c.*

As to sealing and delivery:

A deed sealed and delivered, 'tis said may be good without signing; for the seal is the essential part of the deed: But 'tis usual to have deeds signed; and there must be

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witnesses to the sealing and delivery, who are to indorse or under-write their names thereon. *1 Inst. 7. 10 Rep. 93.* The signing is of great use, for the subscribing witnesses to the deed may be dead, when proving their death, and the hand-writing of the party executing the deed, will be sufficient to establish the same. If a writing is not sealed, it cannot be a deed: And if the print of the seal be utterly defaced, the deed is insufficient, so that it cannot be pleaded; but it may be given in evidence. *3 Inst. 169. 5 Rep. 23.*

If any deed be read false to an illiterate person, though he sign, seal, and deliver it, it shall not be his deed, to bind him: Though if he does not require the deed to be read, and seal and deliver it, he is bound by the same. *2 Rep. 3. 2 Rol. Abr. 28.* And if he that is to seal the deed, cause a stranger covinously to read it false, to make the same void; this will not hurt the deed. *12 Rep. 90. Hob. 96.* If another person seal my deed, and I take it after sealed and deliver it as my deed; it is held to be good. *Perk. Sect. 130. See Co. Litt. 171.*

If two make a deed, and one of them seals it at one time, and the other at another time; this is as good as if they sealed it together. *Lane 32.*

If a deed concludes with these words, *In witness whereof I have hereunto set my hand*; and the party writes his name, and puts his seal; this is a good deed, although no mention be made of putting his seal to it. *Hethy 75.*

If I have sealed my deed, and after I deliver to him to whom it is made, or to some other by his appointment, and say nothing, this is a good delivery.

So if I take the deed in my hand, and use these, or the like words, *here take him, or this will serve*; or *I deliver this as my deed, or I deliver him you*; these are deliveries.

So if I make a deed of land to another, and being upon the land, I deliver the deed to him in the name of seisin of the land; this is a good delivery.

So if the deed be sealed, or lying in a window, or on a table, and I use these, or the like words, *There be it, take it as my deed*: this is a good delivery, and perfects the deed; for as a deed may be delivered by words without acts, so may it also be delivered by acts without words. *9 Co. 137. Dyer 167, 192. Co. Litt. 36, 49. 35 Aff. pl. 6.*

Regularly there may not be two deliveries of a deed, for where the first doth take effect, the second is void: Unless it be where the deed is delivered to a stranger as an escrow; or when a deed, good at first, becomes void afterwards by the breach of the seal; or a feme covert seals a deed, and after being sole delivers it again, &c. *Perk. Sect. 154. Co. Litt. 48. 5 Rep. 119.* The delivery of any deed may be alleged at any time after the date; but not before. *Dyer 315.* A deed may be good without all the orderly and formal parts; but without delivery by the party himself, or his attorney lawfully authorized, to the party to whom made, or some other to his use, it is no deed: And the delivery may be either absolute or on condition. *1 Inst. 35. 2 Rep. 5.*

If a deed sealed, lieth on the table, and the grantor saith to the grantee, *Take that as my deed, or this will serve, &c.* it is a good delivery: But if it be thus left when sealed, and the party to whom made takes it up, this is no delivery, without some words. Though where parties have come for that purpose, and done every thing but delivery; it has been adjudged a good delivery in law. *Cro. Eliz. 7. 1 Leon. 140.* Of deeds there are two sorts, *deeds indented*, and *deeds poll*; which names principally arise from the form of them, the one being cut in and out at top, dentwise, and the other plain: that is shaved close, from whence it takes the name of *deed poll*. See *Black. Com. 2 V. 296.* A deed indented is defined to be a deed consisting of two parts, or more, for there are *deeds tripartite*, *quadripartite*, *sextipartite*, &c. in which it is expressed, that the parties have to every part thereof interchangeably set their several seals; and for that it contains more parts than one, each part is *indented*, or cut one of them into the other, that thereby it may appear they belong to one business or contract. *West. Symb. Sect. 47.*

A deed poll is said to be a deed testifying that only one of the parties to the agreement hath put his seal to the same, where such party is the principal or only person, whose consent or act is necessary to the deed: And it is therefore a plain deed, without indenting, and is used when the vendor, for example,

example, only seals, and there is no need of the vendee's sealing a counterpart, because the nature of the contract is such, as it requires no covenant from the vendee, &c. *Co. Litt.* 55.

The several parts of deeds by indenture, are belonging to the feoffor, grantor, or lessor, who have one; the feoffee, grantee, or lessee, who have another; and some other persons, as trustees, a third, &c. and the deed-poll which is single, and of but one part, is delivered to the feoffee, or grantee, &c. All the parts of a deed *indented*, in judgment of law, make but one intire deed; but every part is of as great force as all the parts together, and they are esteemed the mutual acts of either party, who may be bound by either part of the same, and the words of the indenture are the words of either party, &c. But a deed poll is the sole deed of him that makes it, and the words thereof shall be said to be his words, and bind him only. *Plowd.* 134, 421. *Lit. sect.* 370. And there are other divisions of deeds; some are *absolute*, and some *conditional*; some *inrolled*, and others not inrolled; some concerning the *realty*, some the *personalty*, &c. and some have in them matter of *gift or grant*; and others matter of *discharge*.

There are several kinds of deeds, by which lands pass from one man to another; as of *bargain and sale*, *feoffment*, *lease and release*, *indentures to lead the uses of fines and recoveries*, *settlements*, *leases*, *assignments*, *exchanges*, *mortgages*, &c. And deeds have several formal parts, *viz.* The *premises*, *habendum*, *reddendum*, *condition*, *covenants*, *warranty*, *date*, *sealing*, &c. The premises set forth the proper names of the parties, with their additions of place and quality; and comprehend the certainty of the lands and tenements to be conveyed, with the consideration of the deed, as money, natural love, &c. the premises also contain the *exceptions*, if there be any, out of the land granted; as of timber, mines, &c. and in many deeds there may be an occasion of a *recital* of former deeds in the premises, particularly in assignments of leases, mortgages, &c. The *habendum* names the certainty of the estate granted, for what time the grantee is to have it, and to what use: and it sometimes qualifies the estate, so that the general implication of it, which by construction of law passes in the premises, by the *habendum* may be controlled; but not if the estate is expressed in the premises. Likewise an *habendum* may explain the premises, to prevent wrong; and sometimes the premises are thereby enlarged. A freehold cannot be granted by deed with *habendum* at a day to come: and a deed or lease; *habendum* from henceforth, includes the day on which it was dated: but *habendum a die datus* excludes it. The *reddendum* is that clause in the deed which reserveth some new thing to the grantor; as rent, suit, service, &c. and is usually made by the words *yielding*, *paying*, *doing*, &c. A lessor cannot reserve to any but himself, his heirs and executors, &c. nor can he reserve to himself parcel of the annual profits, such as the herbage of the land; for that would be repugnant to the grant, it being a part thereof.

Conditions and covenants in deeds are for the holding or not holding of the estate granted, on performance of some act: and a condition relating to a real estate, is a quality annexed by him that hath the estate, interest or right in the same, whereby the estate granted may be defeated, enlarged, or created, upon an uncertain event. Conditions are expressed by these words, *viz.* upon *Condition*, *Provided*, *So that*, &c. and *Provided* always, and it is *covenanted*, is a condition, by force of the *proviso*, and a covenant, by virtue of the other words; though sometimes a proviso shall amount to a covenant, and sometimes be taken for a *limitation*, *exception*, *reservation*, *explanation*, &c.

The *warranty* in deeds is to secure the estate to the grantee and his heirs, &c. and is a covenant real, annexed to the land granted, by which the grantor and his heirs are bound to warrant the same to the grantee and his heirs, and that they shall quietly hold and enjoy it; or upon voucher, &c. the grantor shall yield other lands, to the value of what shall be evicted. Where a feoffor grants away all his estate in the land, and is not bound to warrant the title, but the feoffee is to defend it at his peril; the feoffee shall have all the deeds, as incidents to the land, although not granted in express words: but where

the feoffor warrants the land, it is otherwise: the feoffor shall have them to defend the title; and the feoffee must trust to his warranty, and have only such deeds as concern the possession, &c.

In *quitrents* *whereof*, &c. ascertains the date of the deed; and is as well part of it, as what is written before. *1 Inst.* 6, 47, 201, 365. *Plowd.* 152. *Wood's Inst.* 224, 225, &c. *1 Nels. Abr.* 624, &c. Deeds of bargain and sale are to be *inrolled*, by *Stat. 27 Hen. 8. c. 16*. A copy of a bargain and sale inrolled shall be as sufficient as the original deed, by *Stat. 10 Ann. c. 18. sect. 3*. But estates in fee are now generally granted and conveyed by indentures of *lease and release*. And all deeds are to be *registered* in the counties of *York* and *Middlesex*. *Stat. 2 & 3 Ann. c. 4. 5 Ann. c. 18. 6 Ann. c. 35. 7 Ann. c. 26. 8 Geo. 2. c. 6. 25 Geo. 2. c. 4*. And it is much to be wished that registers were universally established throughout the kingdom.

In deeds, the *consideration* is a principal thing to give them effect: and the foundation of deeds ought always to be honest. That a deed was executed upon a corrupt agreement *debors*, the deed may be averred in pleading. See the case of *Collins and Blantern*, a new and very peculiar case. *Wilf. Rep. per. 2. fo. 341, &c.* The plea was settled both by Mr. Serjeant *Howitt* (now Lord *Lyfford*, Chancellor of Ireland) and Mr. Serjeant *Glyn*. *Passe Latin*, or *false English*, will not make a deed void: but *raiture* or *interlineation* in a material part, will render the same void; unless some *memorandum* be made thereof on the back of the deed, testifying its being done before sealing. *1 Rol. Rep.* 40. If words are blotted out in a deed, by a grantee or lessee himself, although it be not in a place material, it will make the deed void. *Dyer* 261. This must mean *after execution*. It has been adjudged, where an estate cannot have its essence without a deed, there if the deed is rased in any material part, after the delivery, it makes the estate void: but if the estate may have essence without a deed, then notwithstanding it is created by deed, and that deed is rased, it shall not destroy the estate, but the deed. *1 Nels. Abr.* 625. When a chose in action is created by deed, the destruction of such deed is the destruction of the duty itself; as in case of a bond, bill, &c. though it is not so, where an estate or interest is created by a deed. *3 Salk.* 120.

If a deed be suppressed, on proof made that it came to the party's hands, and of its contents, the person injured, will have the same benefit to hold the estate, as if the deed could be produced. *2 Vern. Rep.* 280. A person committed for burning a deed, see *2 Vern.* 561. *Abr. Cas. Eq.* 169. An indorsement on a deed, at the time of the sealing and delivery, is a part of the same: but if an indorsement be after the delivery, it is a new deed. *Mod. Cas.* 237. Deeds, if *fraudulently* made; when got by *corrupt agreement*, as on usurious contract; and when made by *force* or *duress*, &c. are void: so they are for uncertainty, and by reason of infancy, coverture, or other disability in the makers, &c. *2 Rol. Abr.* 28. *1 Inst.* 253. *11 Rep.* 27. A deed may be good in part, and void in part; or good against one person, and void as to another: if all the parts of a deed made by law stand together, no one part shall make the whole void. And if a deed by any *construction* of law can be construed to have legal operation, the law will not make it utterly void, though it may not operate according to the purport of the deed: also the law will transpose and marshal clauses in deeds, to come at their true meaning; but not to confound them. Where the words of a deed may have a double intendment, one standing with law, and the other contrary to it; the intendment that standeth with law shall be taken. *1 Lill. Abr.* 421. *1 Inst.* 42, 217. *1 Slep. Abr.* 540.

There are four grounds for the *exposition* of deeds. 1. That they may be beneficial to the taker. 2. That where the words may be employed to some intent, they shall never be void. 3. That the words be construed according to the intention of the parties, and not otherwise; and the intent of the parties shall take effect, if it may possibly stand with law. 4. That they are to be consonant to the rules of the law. And deeds shall have a reasonable exposition, without injury against the grantor, to the greatest advantage

age of the grantee. They are to be expounded upon the whole, and if the second part contradicts the first, such second part shall be void; but if the latter part expounds or explains the former, which it may do, both of them shall stand. *Plowd.* 160. *Raym.* 142. 6 *Rep.* 36. 1 *Inst.* 313. 1 *Rel. Rep.* 375. The first deed of a person, and last will, stand in force. In deeds indented, all parties are estopped, or concluded, to say any thing against what is contained in the deed. 1 *Inst.* 45. And where a deed is by indenture between parties, none can have an action upon that deed, but he who is a party to it; but where 'tis a deed poll, one may covenant with another who is not a party to it, to do certain acts, for the non-performance whereof he may bring an action. 2 *Lew.* 74. Where a man justifies title under a deed, he is to produce the deed: if a deed is alledged in pleading, it must be shewed to the court, that the court may judge of the validity of it, and whether there are sufficient words to make a good contract; and when it is shewn to the court, the deed shall remain in court all the term, in the hands of the *custos brevium*; but at the end of the term, it shall be delivered to the party. If the deed is denied, it must remain in court till the plea is determined. 10 *Rep.* 88. *Wood* 235. A deed set forth with a *proferat hic in curia*, remains in court in judgment of law all that term; and any person may, during that term, have benefit by it, though he hath it not ready to shew: the adverse party may take any advantage by the deed that it will afford him. 5 *Rep.* 74. 1 *Nelf.* 625. But now the deed is not actually brought into court, but generally remains in the hands of the party's attorney, who gives oyer and copy of it to the attorney of the other party, if demanded. Deeds sealed and delivered cannot be pleaded, &c. if not stamped according to law. 5 & 6 *W. & M. cap.* 21. Every deed that is pleaded, shall be intended to be a deed poll; except it be alledged to be indented: and if it begins, *This indenture made*, &c. though it be not indented, it may be a good deed poll. 5 *Rep.* 20. The indenting is now considered as only matter of form, and many deeds are called indentures, beginning with the words, *This indenture*, though not actually indented. Besides, there are articles of various kinds which do not begin with these words, and yet are called deeds or articles of agreement, &c. and that is good in law. A deed poll commonly begins thus: *To all people to whom these presents shall come*, &c. Or, *Know all Men by these presents*, &c. See *Accomplished Conveyancer*, Vol. I. edit. 2.

Deeds, stealing of. At Common law, bonds, bills, and notes, which concern mere *choses in action*, were held not to be such goods whereof larceny might be committed: but by *Sat.* 2 *Geo.* 2. c. 25. they are put upon the same footing, with respect to larcenies, as the money they were meant to secure. *Black. Com.* 4 *P.* 234.

Deemsters, (from the Sax. *dema*, a judge or umpire) Are a kind of judges in the *isle of Man*, who without process, or any charge to the parties decide all controversies in that island; and they are chosen from among themselves. *Camb. Brit.*

Deer-fold, A park or deer-fold; Sax. *deer*, *fera*, and *fald*, *stabulum*. *Cowel.*

Deer-hayes, Are engines, or great nets made of cords to catch deer; and no person not having a park, &c. shall keep any of these nets, under the penalty of 40s. a month. *Stat.* 19 *H.* 7. *cap.* 11.

Deer-stealers, There are several laws, for the punishment of deer-stealers; as by 3 *Jac.* 1. c. 13. None shall kill or chase any deer, in any park or inclosed ground, on pain of suffering three months imprisonment, and to pay treble damages: and persons not having 40l. *per ann.* in lands, or worth 200l. in goods, &c. are not to use any gun, bow, dog, &c. to kill deer; and their guns, &c. may be taken from them. By the 13 *Car.* 2. *cap.* 10. It is ordained, That whoever shall course, kill, hunt, or take away any red, or fallow deer, from any parks, &c. shall be liable to a penalty of 20l. And the *Stat.* 3 & 4 *W. & M. c.* 10. inflicts a penalty of 20l. for unlawful hunting and coursing of any deer; and 30l. for taking, wounding, or killing, to be levied by distress; which is to be divided into three parts; one whereof to go to the informer, another to the poor, and the other to the owner of the

deer; and if no distress can be had, the offenders shall be imprison'd a year, and set on the pillory, &c.

Pulling down pales or walls of parks, &c. where deer are inclosed, by this act is punished with three months imprisonment: and the offences are determinable by justices of peace of the county where committed. Also by 5 *Geo.* 1. c. 15. & 28. Persons guilty of deer-stealing may be indicted before a judge of gaol delivery, and in that case be transported to the plantations for seven years: and persons otherwise convicted before they are discharged, are to enter into bond of 50l. Penalty, to the person injured for future good behaviour; keepers of parks, killing deer without consent of the owners, incur a forfeiture of 50l. and others pulling down walls and fences of parks, are liable to the penalties inflicted by 3 & 4 *W. & M. c.* 10. for killing of deer.

Thus stood our laws till the great insolences of the *Waltham Blacks* made a further provision necessary, when by *Stat.* 9 *Geo.* 1. c. 22. it was enacted, That if any persons armed with swords, fire-arms, or other weapons, and having their faces *blacked*, or being otherwise disguised, shall appear in any forest, park, &c. and unlawfully hunt or kill any deer; rob any warren, &c. or shall set fire to any house, or shoot at any person in a dwelling-house, or other place; or send any letter without a name subscribed, or with a fictitious name, demanding money of any person, &c. they shall be guilty of felony without benefit of clergy: and 50l. reward is given for the apprehension of the offenders. This statute is continued for five years, by 12 *Geo.* 1. *cap.* 30. and made perpetual by 31 *Geo.* 2. c. 42.

Persons convicted a second time of hunting, or taking away deer in uninclosed forests, &c. or coming armed with an intent to hunt or take them, who shall beat or wound any keeper, &c. shall be transported for seven years. 10 *Geo.* 2. c. 32. Before the *charta de foresta*, 9 *H.* 3. to hunt the King's deer, in any forest or park was felony; but that charter ordained, that none should lose either life or member for killing the King's deer. 2 *Rel. Rep.* 120. And the hunting in any forest, &c. with visors or painted faces in the day-time, or in the night, with or without such visors, if the party conceal the same, it is felony by *Stat.* 1 *H.* 7. c. 7. So that we may observe there is some agreement between our antient laws and modern statutes. A person was convicted on the statute of deer-stealing, and it appearing by the conviction, that the deer were not in a park inclosed, &c. upon motion in *B. R.* the conviction was quashed. *Mieb.* 9 *W.* 3. *Mod. Just.* 161. A conviction of deer-stealing may be removed by *certiorari* into *B. R.* but the party doing it is to give bond in the penalty of 60l. to the justice of peace before whom convicted, to prosecute such *certiorari*, and pay the forfeiture due by the conviction, or render his person in a month after the conviction confirmed, &c. 5 *Geo.* 1. c. 15. c. 28. See *Game*.

De essendo quietum de Celonio, Is a writ that lies for those who are by privilege free from the payment of toll; on their being molested therein. *F. N. B.* 226.

De expensis militum, A writ commanding the sheriff to levy the expences of a knight of the shire for attendance in parliament, being 4s. *per diem* by statute: and there is a like writ *de expensis civium & burgenfium*, to levy 2s. *per diem*, for the expences of every citizen and burges of parliament. *Stat.* 23 *Hen.* 6. *cap.* 11. 4 *Inst.* 46.

De facto, Signifies a thing actually done; that is done indeed. A King *de facto* is one that is in actual possession of a crown, and hath no lawful right to the same; in which sense it is opposed to a King *de jure*, who hath right to a crown, but is out of possession. 3 *Inst.* 7.

Defamation, (*defamatio*) Is when a person speaks scandalous words of another, or of a magistrate, &c. whereby they are injured in their reputation; for which the party offending shall be punished according to the nature and quality of his offence; sometimes by action on the case at Common law, sometimes by statute, and sometimes by the ecclesiastical laws. *Defamation* is also punishable by the spiritual courts; in which courts it ought to have three incidents, *viz.* First, It is to concern matters spiritual, and determinable in the ecclesiastical courts; as for

for calling a man heretick, schismatick, adulterer, fornicator, &c. Secondly, That it be a matter spiritual only; for if the *defamation* concern any thing determinable at the Common law, the ecclesiastical judges shall not have cognisance thereof. And Thirdly, Although such *defamation* be merely spiritual, yet he that is defamed cannot sue for damages in the ecclesiastical courts; but the suit ought to be only for punishment of the fault, by way of penance. *Terms de Ley*. See *Action on the Case for Words*, also *Prohibition*.

Default, (Fr. *default*) Is commonly taken for non-appearance in court, at a day assigned; though it extends to any omission of that which we ought to do. *Braet. lib. 5. tract. 3. Co. Lit. 259*. If a plaintiff makes *default* in appearance in a trial at law, he will be nonsuited; and where a defendant makes *default*, judgment shall be had against him by *default*. In action of debt upon bond, if the defendant pleads a release, and issue is thereupon joined, if at the trial the defendant makes *default*, the plaintiff may pray judgment by *default*; because by the plea the duty is confessed, and therefore no inquest need be taken by *default*: but if the defendant plead *Non est factum*, by that plea the duty is denied, and therefore the plaintiff must prove the bond, whereupon he will be intitled to a verdict for the penalty, with costs of suit. In trespass, if the defendant plead a release, and then make *default*, the plaintiff cannot pray judgment by *default*; but an inquest is to be taken, because damages are uncertain. *1 Salk. 216*.

Tenant in tail, tenant in dower; by the curtesy, or for life, losing their lands by *default*, in a *præcipe quod reddat* brought against them; they are to have remedy by the writ *quod ei deforciat*, &c. *Stat. Westm. 2. c. 4*. And in a *quod ei deforciat*, where the tenant joined issue upon the mere right, and the jury appearing, the defendant made *default*; it was adjudged, that in such case final judgment shall be given: but if the tenant had made *default*, it would be otherwise, for then a *petit cape* must issue against him, because it may so happen that he may save his *default*. *1 Nels. Abr. 627*. By *default* of a defendant, he is said to be generally out of court to all purposes, but only that judgment may be given against him: and no judgment can be afterwards given for the defendant. *Ibid. 628*.

When two are to recover a personal thing, the *default* of one is the *default* of the other: *contra*, where they are to discharge themselves of a personalty; where the *default* of the one is not the *default* of the other. *6 Rep. 25. 1 Lill. Abr. 425*. In an action against two, if the process be determined against one, and the other appears; he shall be put to answer, notwithstanding the *default* of his companion. *2 Danv. Abr. 480*. Where the baron is to have a corporal punishment for a *default*, there the *default* of the wife shall not be the *default* of the husband: but otherwise it is where the husband is not to have any corporal punishment by the *default*. *Ibid. 472, 473*.

If a defendant imparl to another day in the same term, and make *default* at the day, this is a departure in despite of the court: and when the defendant after appearance, and being present in court, upon demand makes departure, it is in despite of the court, and the entry is, *Et præd. tenens, licet solemniter exactus, non revent, sed in contemptum curiæ recessit, & defaultam fecit, &c.* *Co. Lit. 139*. Before a verdict is taken by *default*, the cryer of the court calls the defendant three times; and if he doth not appear, the plaintiff's counsel prays, that the inquest may be taken by *default*: he is called three times, to shew if he hath any challenge to the jurors; and if he doth not appear upon the cryer's calling, then the *capiatur per default* is indorsed on the back of the panel. *1 Lill. 425*.

Suffering judgment to go by *default*, is an admission of the contract declared on. *Sira. 612*. After the inquest is taken by *default*, the defendant can make no suggestion on the roll. *Sir. 46*. *Default*, and sayer of *default*, made a large title in the old books of law. See *52 H. 3. c. 9, 13, 18, & 24. 3 Ed. 1. c. 1. & 42. & 12 Ed. 1.*

Default in criminal Cases, An offender indicted appears at the *capias*, and pleads to issue, and is let to bail to attend his trial, and then makes *default*; here the inquest in case of felony shall never be taken by *default*, but a

capias ad audiendam juratam shall issue; and if the party is not taken, an *exigent*; and if he appear on that writ, and then make *default*, an *exigi facias de novo* may be granted: but where upon the *capias* or *exigent* the sheriff returns *capi corpus*, and at the day hath not his body, the sheriff shall be punished, but no new *exigent* awarded, because in custody of record. *2 Hale's Hist. P. C. 202*.

Default of Jurors. If jurors make *default* in their appearance for trying of causes, they shall lose and forfeit issues, unless they have any reasonable excuse proved by witnesses, in which case the justices may discharge the issue for *default*. *Stat. 35 H. 8. c. 6*.

Defeasance, (from the Fr. *desfaire*, to defeat) Signifies a condition relating to a deed, which being performed, the deed is defeated, and rendered void, as if it never had been made. The difference between a common condition and a *defeasance* is, that the condition is annexed to, or inserted in the deed; and a *defeasance* is a deed by itself, concluded and agreed on between the parties, and having relation to another deed. The *defeasance* may generally (as in the case of a bond, &c.) be indorsed on the back of the deed. To make a good *defeasance* it must be, 1. By deed, for there cannot be a *defeasance* of a deed without deed; and a writing under hand doth not imply it to be a deed. 2. It must recite the deed it relates to, or at least the most material part thereof, (unless it be on the back, as mentioned before.) 3. It is to be made between the same persons that were parties to the first deed. 4. It must be made at the time, or after the first deed, and not before. 5. It ought to be made of a thing *defeasible*. *1 Inst. 236. 3 Lev. 234*. Inheritances executed by livery, such as estates in fee, or for life, cannot be subject to *defeasance* afterwards, but at the time of making the feoffment, &c. only: but executory inheritances, such as leases for years, rents, annuities, conditions, covenants, &c. may be defeated by *defeasance* made after the things granted. And it is the same of obligations, recognisances, statutes, judgments, &c. which are most commonly the subject of *defeasance*, and usually made after the deed whereto they have relation. *Plowd. 137. 1 Rep. 113*.

If a man acknowledge a statute to another, and enters into a *defeasance*, that if his lands in such a county should be extended, the statute should be void; the *defeasance* will be good, and not repugnant, because it is by another deed: but the condition of a bond not to sue the obligation, is void for repugnancy, being in the same deed. *Moor 1035*. Although the condition of an obligation, where it is repugnant to it, be void; it is otherwise in case of a *defeasance*, made after the bond, for this shall be good notwithstanding: as where the obligee afterwards grants by deed to the obligor, that he will not sue thereon at all; or not till such a time, or that it shall be discharged, &c. *20 H. 7. 24. Fitz. Bar. 71*.

Where a proviso goes by way of *defeasance* of a covenant, it must be pleaded on the other side, otherwise, where by way of explanation, or restriction of the covenant; *per Holt Ch. J. 2 Salk. 574. pl. 2. Hill. 10 Will. 3. B. R. Clayton v. Kinsman*.

If A. be bound in a bond to B. in 20l. and he makes a *defeasance* to C. that if he pay him the like sum, the obligation made by A. shall be void; this is no good *defeasance*, because it is not made between the same parties: though if a statute be entered into, to husband and wife, and the husband alone make a *defeasance*, it may be good. *14 H. 8. 101. 2 Sbe. Abr. 488*. It has been held, that if a disseisor release his right to the tenant of the land, and after there is a *defeasance* between them, that if the releasor shall pay so much, the release to be void; by this it will not be defeated: and yet such a release may be avoided by a condition or *defeasance* made at the time of making it. *Bro. Defas. 6. Plowd. 137. 1 Inst. 236*. A statute, &c. may be *defeasant* condition of performing a will, and paying legacies to other persons. *1 Cro. 837*. If a *defeasance* of a statute be made, and after another *defeasance* is made by the same parties, the first *defeasance* becomes void thereby; and the second only is in force, as in a will. *2 Danv. Abr. 481*.

Where a statute is acknowledged to two persons, and one of them makes a *defeasance*, it is said to be a good discharge. *Ibid. 480*. If execution be sued out before the

time in a *defeasance* is past, it shall be set aside. 1 Lill. 426. In a *defeasance* of a deed of lands, the person to whom made covenants that on payment of a certain sum, on such a day, he will transfer and reconvey the estate back again: and that the maker shall enjoy till default, &c. If the *defeasance* be of a judgment, he covenants that on payment of the money, he will enter satisfaction on the record: if of a statute or bond, that on payment it shall be void, &c. Law of Securities 144, 146, 148, &c. Vide Mortgage.

Defence, In a legal signification, is applicable to a plea, and is that which the defendant ought to make immediately, after the count or declaration, viz. That he defends all the wrong, force, and damages, where and when he ought, &c. And by defending the force and wrong, he excuses himself of the wrong furnished against him, and makes himself party to the plea; and by defending the damage, he affirms the plaintiff able to be answered unto: so that if he will shew any disability in the plaintiff, then he ought to omit the defence of the damage, and demand judgment if the party shall be answered unto: for the residue of the defence, the defendant admits the power of the court to hear and determine their pleas. *Terms de Ley*.

A *defence* is sometimes a full defence, and that is where the plea begins with these words, *Venit & defendit vim & injuriam quando*, &c. and this is usual in personal actions: but there is another defence in real actions, where the plea begins *Venit & dicit*, &c.

After the defendant has made a full defence in trespass, by adding the words *quando*, &c. to the *venit & defendit vim & injuriam*, he cannot plead in disability, that the plaintiff is an alien born, &c. but he ought to omit the *quando*, because by that word the defendant hath admitted that the plaintiff hath capacity to sue. *Carth. 230. Pasch. 4 W. & M. in B. R. Jentree v. Jenkins. See 7 Vin. Abr. tit. Defence.*

In every *præcipe*, where land is demanded, the defence must be *venit & defendit jus suum*, &c. As in a writ of intrusion, writ of formedon, &c. 1 Nelf. Abr. 629. A defendant cannot plead any plea, before he hath made a defence; though this must not be intended absolutely, for in a *scire facias*, a defence is never made. 3 Lev. 182. See the subject of defence in pleading well treated of, *Black. Com. 3 V. 296, 7.*

Defend, (*defendere*) In our ancient laws and statutes signifies to forbid: and there is a statute intitled, *Statutum de defensione portandi arma*, &c. 7 Ed. 1. In divers parts of England we commonly say, God defend, instead of God forbid. Blount.

Defendant, (*defendens*) Is the party that is sued in a personal action; as tenant is he that is sued in action real.

Defendemus, Is an ordinary word used in grants and donations; and hath this force, that it binds the donor and his heirs to defend the donee, if any one go about to lay any incumbrance on the thing given, other than what is contained in the deed of donation. *Braet. lib. 2. c. 16. See Warranty.*

Defender of the Faith, (*fidei defensor*) Is a peculiar title belonging to the King of England, as Catholicus, to the King of Spain; and Christianissimus, to the King of France, &c. These titles were given by the Popes of Rome; and that of *Defensor Fidei* was first conferred by Pope Leo the Tenth, on King Henry the Eighth, for writing against Martin Luther, and the bull for it bears date quinto Idus Octob. 1521. Lord Herbert's Hist. Hen. 8. 105. But the Pope, on King Henry's suppressing the houses of religion, at the time of the reformation, foolishly sentenced him to be deprived of his title, and deposed from his crown; though in the 35th year of his reign his title, &c. was confirmed by parliament; which hath continued to be used by all succeeding Kings to this day. *Lex Constitutionis*, 47, 48.

Defendere se per Corpus suum, To offer duel or combat as a legal trial and appeal. *Braet. lib. 3. cap. 26.*

Defendere unca manu, Words signifying to wage law, and a denial of the accusation upon oath. See Manus.

Defensa, A park or place fenced in for deer, and defended as a property for that use and service.—Idem

dux facit instaurare prædictam parcam de feris defensæ Leicestrensis. H. Knighton, sub ann. 1352.

Defensiva, The Lords or Earls of the Marches, who were the wardens or defenders of their country, had the title of *Defensiva*. Cowel.

Defenso, That part of any open field or place that was allotted for corn and hay, and upon which there was no common or feeding, was antiently said to be in *defenso*: so of any meadow ground, that was laid in for hay only. It was likewise the same of a wood, where part was inclosed and fenced up, to secure the growth of the underwood from the injury of cattle. *Mon. Angl. Tom. 3. p. 306.*

Defensum, An inclosure of land, or any fenced ground. *Mon. Angl. tom. 2. p. 114.*

Deficiencies, Act for making good the deficiencies, and preserving the publick credit, &c. Stat. 1 Ann. c. 13.

Deforcement, (*deforciamētum*) Is where any one is cast out of his lands or possessions by force: or it is a withholding lands or tenements by force from the right owner. *Co. Lit. 331.* A *deforcor* is one that overcomes and casts forth by force and violence, and differs from *disseisor*; first, because a man may disseise another with force; and next, for that a person may *deforce* another, who never was in possession; as if several have right to lands; as common heirs, and one entering keeps out the rest, the law saith he *deforceth*, not disseiseth them. And (according to Littleton) he who is enfeoffed by tenant in tail, and put in possession, by keeping out the heir of him in reversion who hath right to the land, the tenant in tail being dead doth *deforce* the heir, though not disseise him, because he entered during the life of the tenant in tail, when the heir had no present right. Also a *deforcor* differs from an intruder, by reason a man is made an intruder by a wrongful entry only into land void of a possessor: and a *deforcor* is he that holds out against the right heir. *Braet. lib. 4. c. 1. Britt. c. 33. Litt. 138. F. N. B. 118.* As force and violence are opposite to the peace and justice of the kingdom; and it is a disgrace to the law, that any person should presume to enter forcibly into the possession of another, before the law hath decided his title therein; therefore divers statutes have been made for reformation of these abuses, as among others the Stat. 5 R. 2. cap. 7. See Forcible Entry.

Deforcor, *deforciator*, (from the French *forceur*, *expugnator*) Signifies one that overcometh, and casteth out by force. *Britton, cap. 53. Old Nat. Brew. fol. 118. Littleton*, in his chapter of *Discontinuance*, fol. 117. *Braet. lib. 4. cap. 1.* See more of this in *Pulton de Pace Regis*, fol. 34, 35. And see Deforcement.

Deforciant, Mentioned in the Stat. 23 El. c. 3. is the same with a *deforcor*. See *Black. Com. 2 V. 350. 3 Vs 174.*

Deforciatio, Is used for a distress, or holding of goods for satisfaction of a debt. *Paroch. Antiq. 293.*

Degradation, (*degradatio*) Is an ecclesiastical censure, whereby a clergyman is divested of his holy orders, and there are two sorts of *degrading*, by the Canon law; one summary, by word only; the other solemn, by stripping the party degraded of those ornaments and rights which are the ensigns of his order or degree. *Selden's Titles of Hon. 787.* Degradation is otherwise called deposition; and in former times the *degrading* of a clerk was no more than a displacing or suspension from his office: but the Canonists have since distinguished between a deposition and a *degradation*; the one being now used as a greater punishment than the other, because the bishop takes from the criminal all the badges of his order, and afterwards delivers him to the secular judge, where he cannot purge himself of the offence whereof he is convicted, &c.

There is likewise a *degradation* of a Lord, or a Knight, &c. at Common law; when they are attainted of treason; as Hill. 18 Ed. 2. Andrew Harcla, Earl of Carlisle, who was also a Knight, was degraded, and when judgment of treason was pronounced against him, his sword was broken over his head, and his spurs hewn off his heels, &c. And there is a *degrading* by act of parliament; for by Stat. 13 Car. 2. cap. 16. William Lord Monson, Sir Henry Mildmay, and others, were degraded from all titles of ho-

nour, dignities, and preheminences, and none of them to bear or use the title of Lord, Knight, Esquire, or Gentleman, or any coat of arms for ever after. See as to Peer, *Black. Com.* 1 V. 403.

Dehors, (Fr.) A word used in ancient pleading, when a thing is without the land, &c. or out of the point in question. *Vide Hors de son fee.*

De injuria sua propria, absque tali causa, Are words used in replications, in actions of trespass, or on the case. 1 *Litt. Abr.* 427. *De injuria sua propria* is a good plea, where it comes in excuse of an injury alledged to be done to the person of the plaintiff; or where a defendant justifies in defence of his possession, if the title doth not come in question. 8 *Rep.* 86. When one justifies by command or authority derived from another; or if a defendant justifies by authority at Common law, as a constable by arrest for breach of the peace; or if he justifies by act of parliament, &c. *De injuria sua propria* is a good replication. *Cro. Eliz.* 539. 2 *Salk.* 628. See *De son Tort Demesne.*

Dei Juvicium. The old Saxon trial by ordeal was so called; because they thought it an appeal to God, for the justice of a cause, and verily believed that the decision was according to the will and pleasure of Divine Providence. *Domesd.*

Deis, The high table of a monastery. See *Dagus.*

Delatūra, A Saxon word, signifying an accusation: and sometimes it hath been taken for the reward of an informer. *Leges H.* 1. c. 46. *Leges Inæ* 20, apud *Brompton.*

Delegates, Are commissioners of appeal appointed by the King under the Great Seal; in cases of appeals from the ecclesiastical court, &c. by *Stat.* 25 *Hen.* 8. c. 19. See *Court of Delegates.*

Delf, (from the Sax. *delfan*, to dig, of delve) Is a quarry or mine, where stone or coal, &c. are dug. *Stat.* 31 *Eliz.* cap. 7. We still retain the word *delves* for dig, in some parts of this kingdom.

Deliverance. When a criminal is brought to trial, and the clerk in court asks him whether he is *Guilty*, or *Not guilty*, to which he replies *Not guilty*, and puts himself on God and his country, the clerk wishes him a *good deliverance.*

Delivery of Deeds, On executing them, to give them perfection, &c. See *Deed.*

Demand. (Fr. *demande*, Lat. *postulatum*) Signifies a calling upon a man for any thing due. And there are two manner of demands, the one in deed, the other in law: in deed, as in a *præcipe quod reddat*, there is an express demand: in law, every entry on land, distress for rent, taking of goods, &c. which may be done without words, is a demand in law. 8 *Rep.* 153. Mr. Nelson, in his *Abridgment of the Law*, vol. 1. pag. 630. says, there are three sorts of demands; one in writing, without speaking, and that is in every *præcipe*; one without writing, being a verbal demand of the person, who is to do or perform the thing; and another made without either word or writing, which is a demand in law, in cases of entries on lands, &c. And an entry on land, and taking a distress, are a demand in law of the land and rent; so the bringing an action of debt for money due on an obligation is a demand in law of the debt. 1 *Litt.* 432. Debts, claims, &c. are to be demanded and made in time, by the statute of limitations, 21 *Jac.* 1. c. 16. and other statutes; or they will be lost by law.

Where there is a duty, which the law makes payable on demand, no demand need be made; but if there is no duty till demand, in such case there must be a demand, to make the duty. *Fris.* 3 *Ann.* 1 *Litt.* 432. Debt on bond, to be paid presently upon demand, is a duty presently, and requires no demand. *Cro. Eliz.* 548. And upon a penalty the party need not make a demand, as he must in the case of a *nomine pænæ*; for if a man be bound to pay 20*l.* on such a day, and in default thereof to pay 40*l.* the 40*l.* must be paid without demand. 1 *Mod.* 89. If a man leases land by indenture for years, reserving a rent payable at certain days, and the lessee covenants to pay the said rent at the days limited; the lessor is intitled to his rent, without demand, for the lessee is obliged to pay it at the days, by force of his covenant. 2 *Danv. Abr.* 101. But if a lessor makes

a lease rendering rent, and the lessee covenants to pay the rent, being lawfully demanded, the lessee is not bound to pay the rent, without a demand. *Ibid.* 102.

A person makes a lease for life, or years, reserving a rent upon condition, that if the lessee doth not pay the rent at the day, that then without any demand it shall be lawful for the lessor to re-enter; by this special agreement of the parties, the lessor may enter on non-payment of the rent, without any demand. *Ibid.* 100. A lease for years, with condition to be void, on non-payment of the rent, is not void unless the rent be demanded, and an entry made: and an interest shall not be determined, without an actual demand. *Hob.* 67, 331. 2 *Mod.* 264. But now by the statutes relative to rents, an ejectment may be maintained without an actual entry. See 4 *Geo.* 2. c. 28. *sect.* 2. & 11 *Geo.* 2. c. 19. *sec.* 16.

A demand is to be legal, and made in such manner as the law requires: if it be for rent of a messuage and lands, it ought to be made at the messuage, at the fore door of the house, the most notorious place: where lands and woods are let together, the rent is to be demanded on the land, as the most worthy thing, and on the most publick part thereof: if wood only be leased, the demand must be made at the gate of the wood, &c. 1 *Inst.* 201. *Poph.* 58. *Vide Dyer* 51. 1 *Leon.* 425. *Cro. Eliz.* 209. He that would enter for a condition broken, which tends to the destruction of an estate, must 1. Demand the rent. 2. Upon the land, if there is no house. 3. If there is a house, at the fore door; though it is not material whether any person be in the house or no. 4. If the appointment is at any other place off from the land, the demand must be at that place. 5. The time of the demand is to be certain, that the tenant may be there, if he will, to pay the rent: and the last time of demand of the rent, must be such a convenient time before the sun-setting of the last day of payment, as the money may be numbered. Also the lessor or his sufficient attorney is to remain upon the land, the last day on which the rent due ought to be paid, until it be so dark that he cannot see to tell the money: and if the money thus demanded is not paid, this is a denial in law, though there are no words of denial; upon which a re-entry may be made, &c. 1 *Inst.* 201, 202. 4 *Rep.* 73. A demand ought to be in the presence of witnesses: and demands are released by a release of all demands; which discharges all freeholds, rights of entry, actions, &c. But see 4 *Geo.* 2. c. 28. *sect.* 2. before referred to. *N. B.* Leases are now generally so made, as to render any demand unnecessary, i. e. with a proviso that if the rent shall be in arrear for such a certain space of time, it shall be lawful for the lessor to re-enter, &c.

As a release of suits is more large than of quarrels or actions; so a release of demands is more large and beneficial than either of them. By a release of all demands all executions, and all freeholds, and inheritances, executory, are released: by a release of demands to the disseisor, the right of entry in the land, and all that is contained therein, is released. And he that releaseth all demands, excludes himself from all actions, entries, and seizures; but a release of all demands, is no bar in a writ of error to reverse an outlawry. *Coke*, lib. 8. fol. 153, 154.

Demandant, (*petens*) All civil actions are prosecuted either by demands or plaints, and the pursuer is called demandant, in actions real; and plaintiff, in personal actions: in a real action, lands, &c. are demanded. *Co. Litt.* 127.

Demeine, Demajn, or Demesne, (*dominium, domanium*) Is a French word otherwise written *domaine*, and signifieth *patrimonium domini*. *Demajns*, according to common speech, are the lord's chief manor-place, with the lands thereto belonging; which he and his ancestors have from time to time kept in their own manual occupation, for the maintenance of themselves and their families: and all the parts of a manor, except what is in the hands of freeholders, are said to be *demajns*. Copyhold lands have been accounted *demajns*, because they that are the tenants hereof are judged in law to have no other estate but at the will of the lord; so that it is still reputed to be in a manner in the lord's hands: but this word is oftentimes used for a distinction

distinction between those lands that the lord of the manor hath in his own hands, or in the hands of his lessee demised at a rack rent, and such other land appertaining to the manor, which belongeth to free or copy-holders. *Bracl. lib. 4. tracl. 3. c. 9. Fleta, lib. 5. cap. 5.* As *demains* are lands in the lord's hands manually occupied, some have thought this word derived from *de manu*; but it is from the Fr. *demaine*, which is used for an inheritance, and that comes from *dominium*, because a man has a more absolute dominion over that which he keeps in his hands, than of that which he lets to his tenants. *Blount.*

Domanium properly signifies the King's lands in France, appertaining to him in property: and in like manner do we in some sort use it here in England; for all lands, it is said, are either mediately or immediately from the crown; and when a man in pleading would signify his land to be his own, he saith, that he is seised thereof in his *demain*, (or rather *demesne*) as of fee; whereby is meant, that although his land be to him and his heirs, it depends upon a superior lord, and is held by rent or service, &c. *Litt. lib. 1. cap. 1.* From this it hath been observed, that lands in the hands of a common person cannot be true *demains*: and certain it is, that lands in the possession of a subject, are called *demains* in a different sense from the *demain* lands of the crown. For *demains*, or *domains*, in the hands of a subject, have their derivation a *domo* because they are lands in his possession for the maintaining of his house: but the *domains* of the crown are held of the King, who is absolute lord, having proper *dominion*; and not by any feudal tenure of a superior lord as of fee. *Wood's Inst. 139.*

Demain is sometimes taken in a special signification, a opposite to frank-fee: for example, 'Those lands which were in the possession of King Edward the Confessor are called *ancient demains*, and all others *frank fee*; and the tenants which hold any of those lands are called *tenant in ancient demain*, and the others *tenants in frank fee*, &c. *Kitch. 98. See Ancient Demesne. See further Black. Com. 2 V. 90, 286.*

Demise, (*dimissio*) Is applied to an estate either in fee for term of life, or years, but commonly the latter: it is used in writs for any estate. *2 Inst. 483.* The word *demise*, in a lease for years, implies a warranty to the lessee and his assignee; and upon this word action on the covenant lies against the heir of the lessor, if he oust the lessee: it binds the executors of the lessor, who has fee simple, or fee-tail; where any lessee is evicted, and the executor hath assets; but not the lessor for life's executors without express words, that the lessee shall hold his whole term. *Dyer 257. Jenk. Cent. 35.* The King's death is in law termed the *demise of the King*, to his royal successor, of his crown and dignity, &c.

Demise and Redemise, The conveyance by *demise* and *redemise* is where there are mutual leases made from one to another on each side, of the same land, or something out of it; and is proper upon the grant of a rent charge, &c.

Demurrer, (in Latin *demorare*, from the Fr. *demeurer*) Is a kind of pause or stop, put to any action upon point of difficulty, which must be determined by the court, before any farther proceedings can be had therein: for in every action the controversy consists either in *fact* or in *law*; in *fact*, that is tried by the jury; but if in *law*, the judge with his associates, proceeds to judgment; and whatever they conclude stands firm without any appeal. *Smith d. Repub. Angl. lib. 2. c. 13.* But error lies. This *demurrer* is in our records expressed in Latin by *moratur in lege*: and when any action is brought, and the defendant saith that the plaintiff's declaration is not sufficient for him to answer unto: or when the defendant pleads, and the plaintiff says, that it is not a sufficient plea in law, and the defendant says, that it is a good plea; and thereupon both parties submit to the judgment of the court, this is a *moratur in lege*. *1 Lil' Abr. 435.* So that a *demurrer* is an issue joined upon matter of law, to be determined by the judges; and is a *abiding in point of law*, and a referring to the judgment of the court, whether the declaration or plea of the adverse party is sufficient in law to be maintained. *Finch, lib. 4. cap. 40. 1 Inst. 71.*

A *demurrer* may be to the writ, count, or declaration, or to any part of the pleadings: also a *demurrer* may be to a *demurrer*, as where the *demurrer* is double, and he that demurs assigns one error in fact, and another in law, which is ill, and may be demurred unto on the other side. *1 Lil' 438.* But it is now a dubious point whether a *demurrer* may be demurred unto. In the case mentioned is example, *qu. if 'tis demurrable*, as the *demurrer* is good for the cause assigned in law, though it may be bad for the fact?

A *demurrer* is admitting the matter of fact, since it refers the law arising on the fact, to the judgment of the court; and therefore the fact is taken to be true on such *demurrer*, or otherwise the court has no foundation on which to make any judgment. *Gillb. Hist. of C. P. 55.* But a *special demurrer* admits only facts well pleaded.

As a *demurrer* at Common law did confess all matters formally pleaded; so now by the statute a general *demurrer* does confess all matters pleaded though informally, according to the forms meant by the statute 27 Eliz. 5. for such forms are now not material, not being expressed in *demurrer*. *Hob. 233. at the end of pl. 295. Mich. 12 Jac. in the case of Hoard v. Bukeroville.*

Demurrers to pleas, &c. are general, without shewing any particular causes; or special, where the causes of *demurrer* are particularly set down: and the judgment of the court is not to be prayed upon an insufficient declaration or plea, otherwise than by *demurrer*; when the matter comes judicially before the court. If in pleadings, &c. a matter is insufficiently alledged, that the court cannot give certain judgment upon it, a general *demurrer* will suffice; and for want of substance, a general *demurrer* is good: but for want of form, there must be a *special demurrer*, and the causes specially assigned. *Pract. Antenn. edit. 1. p. 84.* And as he that demurs generally, confesseth all matters of fact that are well and sufficiently pleaded; so he that makes a *special demurrer*, can take no advantage of any other matter of form, but what is expressed in his *demurrer*; though he may take advantage of matter of substance, if the *demurrer* be special, and the causes not set down. *10 Rep. 88.* The practice is now, on a *special demurrer*, to take advantage of any real error, though not expressed, in the causes assigned. *Demurrers* likewise are either in actions at law, or in suits in equity.

It is allowed a good cause of *demurrer* in Chancery, that a bill is brought for part of a matter only, which is proper for one intire account, because the plaintiff shall not split causes, and make a multiplicity of suits. *Vern. 29. pl. 24. Hill. 1681. in case of Purefoy v. Purefoy.*

If an original bill be brought for matters, part of which are in a former bill and decree, and part new, or by way of supplemental bill; the court will on a *demurrer*, to so much as was contained in the former decree, send it to a master to see what was, and what was not in the first bill, and allow the *demurrer* accordingly. *G. Eq. R. 184. Hill. 12 Geo. 1. in Canc'.*

By statute, judges are to proceed to give judgment in actions, according to the right of the cause, after *demurrer* joined, without regard to defects of proceedings, except such as are expressed with the *demurrer*; but this not to extend to indictments, &c. in criminal prosecutions, &c. *Stat. 27 Eliz. cap. 5.* See note preceding as to the modern practice and usage. By 4 & 5 Ann. c. 16. The causes of *demurrer* are to be specially set down, or the judges shall give judgment without regarding any imperfections in writs, declarations, pleadings, &c. if sufficient matter appear, upon which to give judgment. A defendant is to demur where he may do it; for if the defendant pleads in any case, where he can demur, he shall not afterwards take advantage in arrest of judgment, writ of error, &c. *Plowd. 182.* Unless in cases not aided by the statutes of amendments and *rescuits*; as to which see *Com. Dig. 1 V. tit. Amendment.* There cannot be a *demurrer* in abatement; and where a defendant demurs only in abatement, the court may give final judgment: but it may be to a plea in abatement. *1 Salk. 220. 1 Nelf. Abr. 634.*

After the plaintiff and defendant have joined issue, which goes to the whole, neither of them can demur, without consent of the other: but defendant may demur to one part

of a declaration, and plead to the other part thereof, with a *quoad*, &c. And where there is an issue to part of the defendant's plea, and a *demurrer* to other part of it, the plaintiff, before or after judgment given on the *demurrer*, may try the issue; though it is usual to give judgment on the *demurrer* first. 1 *Lill. Abr.* 437. 1 *Inst.* 71. 1 *Saund.* 80. See *infra*. But there may be a *demurrer* to evidence. Though now 'tis usual to take exceptions to evidence at the bar at *Nisi prius*, *ore tenus*, which is tantamount to a *demurrer*. If doubts arise, cases are made, or points reserved, and a verdict taken, subject to the opinion of the court. See tit. *Demurrer to Evidence*. If a defendant pleads to part, and *demurs* to part; the *demurrer* shall first be determined, and the issue last; because upon the trial of the issue, the jury may assess damages as to both. *Palm.* 517. Where there is a *demurrer* in part, and issue is joined upon the other part, and the plaintiff hath judgment on the *demurrer*; here he may enter a *Non. Prof.* as to the issue, and proceed to a writ of inquiry upon the *demurrer*: But otherwise he cannot have such writ of inquiry. 1 *Salk.* 219.

A *demurrer* is to be signed, and argued on both sides by counsel; and if a party be delayed in his proceedings by *demurrer*, he may move the court to appoint a short day after, to hear counsel on the *demurrer*, and the court will grant it. *Trin.* 23 *Car. B. R.* After a *demurrer* is joined, the plaintiff having entered it in the roll, delivers the roll to the secondary, and makes a motion for a *Consilium* or day to argue it, which the court grants of course, on the secondary's reading the record; then the *demurrer* must be entered by the plaintiff in the court-book with the secondary, who on his rule sets down the day appointed for argument, at least four days before the *demurrer* is argued: And paper-books are made and delivered to the judges.

The *demurrant* argues first, and the court will hear but two counsel on a day, *viz.* one of a side, and seldom give judgment the same day; and if desired on either side, (unless the case be very plain), the court will hear further arguments the next term. The whole record is not to be read, on opening the *demurrer*; except the same be to the declaration only: But where it appears to be for delay, the whole record will be heard by the court, though there be a plea, &c. And if it be found merely for delay, judgment shall be given presently. If the major part of the judges of the court cannot determine the matter on the *demurrer*, it is to be sent into the Exchequer Chamber to be determined by all the judges of England. 1 *Inst.* 71. *Practif. Attorn. Edit.* 1. p. 154.

When the court gives judgment on *demurrer* in debt for the plaintiff in the action, the judgment is for the plaintiff to recover his debt, costs and damages; but if it be in action of the case, a writ of inquiry of damages must be awarded, before the plaintiff can have final judgment. If judgment on the *demurrer* is for the defendant in the action, the judgment is, that the plaintiff *Nihil capiat per breve*, or *per billam*, and that the defendant *eat sine die*. *Wood's Inst.* 603. General *demurrer* being entered, it cannot be afterwards waved, without leave of the court, but a special *demurrer* generally may, unless the plaintiff hath lost a term, or the affizes by the defendant's *demurring*. In C. P. if defendant *demurs* to the plaintiff's replication, merely for delay, the plaintiff may sign judgment by default. But that practice does not yet prevail in B. R. The general formal words of a *demurrer* are, *Quod breve vel nar. vel placitum, &c. Materiaque in eodem content. minus sufficiens in lege quæst.*, &c. 1 *Lill.* 435.

Demurrer to Evidence, Is where a question of law doth arise thereupon: As if the plaintiff produces in evidence, any records, deeds, writings, &c. upon which a question of law arises, and the defendant offers to *demur* upon it; and then the plaintiff must join in *demurring*, or waive his evidence. So if the plaintiff brings witnesses to prove a fact, and a matter of law ariseth upon it; if the defendant admits their testimony to be true, there also the defendant may *demur* in law: And so may the plaintiff *demur* upon the defendant's evidence. And in these cases, the counsel for the plaintiff and defendant agree the matter of fact in dispute; and the jury are discharged; and the matter of law is referred to the judges to determine. But

where evidence is given for the King, in an information or other suit, and the defendant offers to *demur* upon it, the King's counsel are not obliged to join therein; but the court ought to direct the jury to find the special matter. And indeed because juries of late usually find a doubtful matter specially, *demurrers upon evidence* are now seldom used. 5 *Rep.* 104. 1 *Inst.* 72. 2 *Inst.* 426. If the court doth not agree to a *demurrer*, to the insufficiency of evidence in a civil cause; they ought to seal a bill of exceptions, &c. 9 *Rep.* 13. See preceding note on this subject.

Demurrer to Indictments, If a criminal joins issue upon a point of law in an indictment or appeal, allowing the fact to be true, as laid therein, this is a *demurrer* in law: And if the indictment or appeal proves good in law, in the opinion of the judges, they proceed to judgment and execution, as if the party had been convicted by confession or verdict. And though by the criminal's *demurrer*, he refuseth to put himself upon trial by jury, yet he shall not, as in other cases, be put under the *pain first & dure*; for a *demurrer* is allowed to be tried by the judges, and not by the inquest. And he that is condemned on *demurrer*, is said to be convicted; for whoever is adjudged, is convicted by law. 2 *Inst.* 178. H. P. C. 243. S. P. C. 150. 1 *Hawk. P. C.* 14. But see 2 *Hawkins* 334.

Demy Sanguine, Is the half blood: Where a man marries a woman, and hath issue by her a son, and the wife dying he marries another woman, by whom he hath also a son; now these two sons, though they are called *brothers*, are but *brothers of the half blood*, because they had not both one father and mother: And therefore by law they cannot be heirs to one another; for he that claims as heir to another by descent, must be of the whole blood to him from whom he claimeth. *Terms de Ley*.

The half blood are intitled under the statutes of *distribution* to any equal share of the personal estate with the whole blood.

Den. The name of places ending in *den*, as *Biddenden*, &c. signify the situation to be in a valley, or near woods; from the Sax. *Den*, i. e. *Vallis*, *Locus*, *Sylvestris*. *Blount*.

Den and Strond, Is a liberty for ships or vessels to run or come ashore; and K. Ed. 1. by charter granted this privilege to the Barons of the *Cinque Ports*. *Placit. temp. Ed. 1.*

Dena tetræ, A hollow place between two hills; and the word *dena* is used for a little portion of woody ground, commonly called a coppice.—*Et una parva dena sylvæ*. *Domesd.*

Denarii, A general term for any sort of *pecunia numerata*, or ready money. *Paroch. Antiq.* 320.

Denarii de Caritate, Customary oblations made to *Cathederal Churches* about the time of *Pentecost*, when the parish priests and many of their people went in procession to visit their mother church: This custom was afterwards changed into a settled due, and usually charged upon the parish priest; though at first it was but a gift of *charity*, or present, to help to maintain and adorn the bishop's see. *Cartular. Abbat. Glaston MS. f. 15.*

Denarius, An English penny: it is mentioned in the *Stat. Ed. 1. De compositione mensurarum*, &c.

Denarius Dei, God's penny, or earnest money given and received by the parties to contracts, &c. *Cart. Ed. 1.* The earnest money is called *Denarius Dei*; or God's Penny, because in former times, the piece of money so given to bind the contract, was given to God, i. e. To the church, or the poor.

Denarius S. Petri, An annual payment of one penny from every family to the Pope; during the time that the Roman Catholic religion prevailed in this kingdom, paid on the feast of S. Peter. *Stat. 25 H. 8. c. 25.* See *Peter-Pence*.

Denarius tectius Comitatus. Of the *finæ* and other profits of the county-courts, originally when those courts had superior jurisdiction before other courts were erected, two parts were reserved to the King, and a third part or penny to the *Baron of the county*; who either received it in specie at the assize and trials, or had an equivalent composition for it out of the *Exchequer*. *Paroch. Antiq.* 418.

Denbera,

Denbera, (From the Sax. *Den*, a vale, and *berg*, a barrow or hog.) A place for the running and feeding of hogs, wherein they are penn'd; by some called a *Swine-comb*. Cowel.

Denizen, (Fr. *Donation*) Is an alien enfranchised, and made a subject by the King's letters patent; and is called *denizen*, because his legitimation proceeds *ex donatione Regis*, from the King's gift. Such a one is enabled in many respects, to do as the King's native subjects do, to purchase and possess lands, enjoy any office or dignity; and when he is thus enfranchised, he is said to be under the King's protection, or *esse ad fidem Regis Angliæ*; before which time he can possess nothing in England. But notwithstanding this, it is short of naturalization; for a stranger naturalized may inherit lands by descent, which a *denizen* cannot: and in the charter, whereby a person is made a *denizen*, there is commonly contained some clause that expressly abridges him of that full benefit which natural subjects enjoy. *Bract. lib. 5. tract. 5. cap. 25. 2 Inst. 741*. When the King makes a *denizen* by letters patent, he may purchase lands, and his issue born afterwards may inherit them; but those he had before shall not; and though a *denizen* is enabled to purchase, he cannot inherit the lands of his ancestors; but as a purchaser he may enjoy them; and he may take lands by devise. *1 Inst. 8. 11 Rep. 67. 5 Rep. 52*. Aliens made *denizens* are incapable of offices in the government, to be members of parliament, &c. by *Stat. 12 W. 3. cap. 2. 1 Geo. 1. c. 4*. It is so high a prerogative to make aliens subjects and *denizens*, that the King cannot grant this power over to any other. *7 Rep. Wood's Inst. 22. See Co. Litt. 8. a. 129. a.* the subject fully treated, and *Black. Com. 1 V. 374. 2 V. 249*.

Denfiring o' Land, Is the casting parings of earth, turf, and stubble into heaps, which when dried are burnt into ashes, for a compost on poor barren land. This method of improvement is used on taking in and inclosing common and waste ground; and in many parts of England is called *burn-beating*, but in *Staffordshire* and other counties, they term it *denfiring of land*.

De non Detinendo, To be discharged of tithes. See *Moccus Detinendi*.

De non Residentis Clerici Regis, Is an ancient writ where a parson is employed in the King's service, &c. to excuse and discharge him of *non-residence*. *2 Inst. 624*.

Dentrix, A fish with many teeth. *Chart. Hen. 6. Monast. Ramsey*.

Deoband, (*Deo dandum*) Is a thing given as it were to God, to appease his wrath, where a person comes to a violent death by mischance, not by any reasonable creature; and is forfeited to the King, or grantee of the crown; and if to the King, his almoner disposes of it by sale, and the money arising thereby he distributes to the poor: Altho' if forfeited to the lord of a liberty, it ought to be thus distributed. *3 Inst. 57. 5 Rep. 110. 1 Nels. 635*. The original of *deobands* is said to come from the notion of *purgatory*; for when a person came to a sudden and untimely death, without having time to be *shrived* by a priest; and to have the extrem unction administered to him, the thing which had been the occasion of his death, became *deoband*; that is, was given to the church, to be distributed in charity, and to pray for the soul of such deceased person out of *purgatory*. *1 Lill. 443*.

There are several examples of forfeitures in cases of *deobands*; as if a man in driving a cart, falls so as the cart-wheel runs over him, and presseth him to death; the cart-wheel, cart, and horses are forfeited to the lord of the liberty: for *omnia quæ movent ad mortem sunt deobanda*. *Bract. lib. 3. tract. 2. cap. 5*. But it hath been observed, that at this day, if a man be killed by the wheel of a cart drawn with horses, the jury find that, only, *deoband* which was the immediate cause of his death, *viz.* the wheel; which is then seized by the lord of the manor, and converted to his own use. *1 Nels. 639*. For in the present enlightened age, juries are not much pleased with this obsolete law. If a man riding over a river, is thrown off his horse by the violence of the water, and drown'd, his horse is not *deoband*; for the death was caused *per cursum aquæ*. *2 Co. 483*. Where one under fourteen years of

age, falls from a cart, horse, &c. they are not *deoband*; but if a horse strikes and kills such a person, it is *deoband*. *3 Inst. 57*. And if a person wounded by any accident, as of a cart, horse, &c. die within a year and a day after, what did it, is *deoband*: So that if a horse strikes a man, and afterwards the owner sells the horse, and then the party that was stricken dies of the stroke, the horse, notwithstanding the sale, shall be forfeited as *deoband*. *Plowd. 260. 5 Rep. 110*.

If one falls out of a vessel in salt water, the vessel is not *deoband*, as accidents at sea are frequently happening; but if one fall out of a vessel in fresh water, it is said to be otherwise. *Wood's Inst. 212*. Things fixed to the freehold; as a bell hanging in a steeple, a wheel of a mill, &c. unless severed from the freehold, cannot be *deobands*. *2 Inst. 281*. And there is no forfeiture of a *deoband*, till the matter is found of record, by the jury that finds the death; who ought also to find and appraise the *deoband*. *5 Rep. 110. 1 Inst. 144*. After the coroner's inquisition, the sheriff is answerable for the value, where the *deoband* belongs to the King; and he may levy the same on the town, &c. Wherefore the inquest ought to find the value of it. *1 Harok. 67*.

Grants of *deobands* how to be enrolled, *3 & 4 Will. & Ma. c. 22. sect. 1*: *Deobands* were likewise the goods and chattels of *felo de se*, &c. *1 Lill. 443. See Black. Com. 1 V. 300*.

De onerando pro rata Portionis, Is a writ that lies where a person is distrained for rent, that ought to be paid by others proportionably with him. *F. N. B. 234*. If a man hold twenty acres of land, by scalty and twenty shillings rent; and he aliens one acre to one person, and another acre to another, &c. the lord shall not distrain one alienee for the whole rent, but for the rate and value of the land he hath purchased, &c. And if he be distrained for more, he shall have this writ. *New Nat. Br. 586*.

Departure, Is a word in our law properly applied to a defendant, who first pleading one thing in bar of an action, and being replied unto, in his rejoinder, he quits that and shews another matter, contrary to, or not pursuing his first plea, which is called a *departure from his plea*: Also where a plaintiff in his declaration sets forth one thing, and after the defendant hath pleaded, the plaintiff in his replication shews new matter different from his declaration, this is a *departure*; as in *Coke's Institutes*, *The defendant demurred, because it was a departure from the declaration*. *Plowd. 7, 8. 2 Inst. 147*. But if a plaintiff in his replication *depart* from his count, and the defendant takes issue upon it; if it be found for the plaintiff, the defendant shall take no advantage of that *departure*: Though it would have been otherwise, if he had demurred upon it. *Raym. 86. 1 Lill. Abr. 444*.

If a man plead a general agreement in bar, and in his rejoinder alledge a special one, this is a *departure* in pleading: And if an action is brought at Common law, and the plaintiff by his replication would maintain it by virtue of a custom, &c. it hath been held a *departure*. *1 Nels. Abr. 638*. Where a matter is omitted at first, it is a *departure* to plead it afterwards. *Ibid.* If in covenant, the defendant pleads performance; and after rejoins that the plaintiff *ousted* him, it is a *departure* from his plea. *Raym. 22*. In debt upon bond for performance of covenants in a lease, the defendant pleaded performance; and afterwards in his rejoinder set forth that so much was paid in money, and so much in *gages*, &c. upon demurrer it was adjudged a *departure* from the plea; because he had pleaded performance, and afterwards set forth other matter of excuse, &c. *1 Salk. 221*.

Debt upon bond for performance of an award, made for payment of money; if the defendant plead performance, and the plaintiff having replied and assigned a breach of non-payment, &c. the defendant rejoins that he is ready to pay the money at the day, &c. this is a *departure* from his plea; for performance is payment of the money, and payment, and ready to pay, are different issues. *Sid. 10. 4 Leon. 79*. In debt upon bond for non-performance of an award, the defendant pleads that the award was, that he should release all suits to the plaintiff, which he had done; the plaintiff replies that such an award was made,

made, but that the award was further, that the defendant should pay to the plaintiff such a sum, &c. the defendant rejoins that true it is, that by the award he was to pay the plaintiff the said sum, but that the award was also, that the plaintiff should release to the defendant all actions, &c. which he had not done; on demurrer this was held a *departure* from the plea, being all new matter. 2 *Bulst.* 39. *Godb.* 155. 1 *Nelf.* 637.

After *nullum fecerunt arbitrium*, the defendant cannot plead that the award is void, without being a *departure* from the former plea: And if where *nullum* award is pleaded; then the award is set forth, and a joinder that it was not tendered, it is a *departure*. 1 *Lev.* 133. *Lut.* 385. A *departure* must be always from something that is *material*; or it will not be allowed: if in trespass for taking goods, the plaintiff reply, that after the taking, the defendant converted them to his own use, this being an abuse makes a trespass; and the conversion is either trover or trespass at the plaintiff's election, so that by his replication he may make it trespass, and be no *departure*. 1 *Selt.* 221, 222. In *circumstances of time*, &c. laid as to promises, the plaintiff is not tied to a precise day; for if the defendant by his plea, force the plaintiff to vary, it is no *departure* from his declaration. 1 *Nelf.* 640, 641. And if another place be mentioned in the replication, in action of debt; as this is a personal thing, 'tis no *departure*, because he who is indebted to another in one place, is so in every place. *Sid.* 228.

If new matter which explains or fortifies the *bar* be rejoined by the defendant, it is not a *departure*. *Wils. Rep. Par.* 2. fo. 8. *Long v. Jackson*. See farther as to *departure*, *Id. Par.* 2. fo. 97, 98, &c. *Palmer v. Stone and another*. And *Co. Litt.* 304. a. A *departure* being a denial of what is before admitted, is a saying and unsaying, and for that one issue cannot be joined upon it, 'tis naught for the uncertainty. 1 *Lill.* 444. See *Black. Com.* 3 V. 310.

Departure in Despite of the Court, and entry of it. See *Default*.

Departures of Gold and Silver, The *parters* or dividers of those metals, from others that are coarser. *Stat.* 4 H. 7.

Depopulation, (Depopulatio) Is a wasting or destruction; a desolation or unpeopling of any place, by fire, sword, pestilence, &c. 12 *Rep.* 30.

Depopulatores Agroium, These were great offenders, by the ancient Common law; so called, because by prostrating and ruining of houses of habitation of the King's people, they as it were *depopulated* towns and villages, leaving them without inhabitants. *Stat.* 4 Hen. 4. cap. 2. 3 *Inst.* 204.

Depopulatio Agroium, Destroying and ravaging country, an offence where the benefit of clergy was denied at Common law. 2 *Hal. pl.* 333. *Black. Com.* 4 V. 366.

Deposition, (Depositio) Is the testimony of a witness otherwise called a *deponent*, put down in writing by way of answer to interrogatories exhibited for that purpose, in *Chancery*, &c. Proof in the High Court of *Chancery* is by *depositions* of witnesses; and the copies of such regularly taken and published, are read as evidence at the hearing: And *depositions* taken in one cause, may be used at the hearing of another cause, when they are between the same parties, &c. without motion; but in a cause between other parties, though touching the same matters this will not be allowed, without special order of court neither will *depositions* in other courts be permitted to be read, without such order. *Practis. Attorn.* Edit. 1. 233, 234.

After a witness is fully examined, the examinations are read over to him, and the witness is at liberty to alter, or amend any thing, after which he signs them, and then and not before, the examinations are complete, and good evidence. *Wms. Rep.* 415. *Pasch.* 1718. by the reporter. The same practice prevails in the Commons, in Ecclesiastical causes.

Where a witness was examined in a cause in Chancery and before signing his examination died, the Master of the Rolls upon advising with a Master in Chancery then in court, denied the making use of the *depositions*, as being

not perfect. *Wms. Rep.* 414. *Pasch.* 1718. *Copland v. Stanton*.

But where after an order for publication, defendant examined a witness, and then perceiving the irregularity (it being after publication) the defendant on the usual affidavit by himself, his clerk in court, and solicitor, that they had not, nor would see any of the *depositions*, got an order to re-examine this witness; but before re-examination the witness died; upon affidavit of this, *Ld. Ch. Parker* ordered, that the defendant might make use of the *depositions*, the re-examination of him being prevented by the act of God. *Wms. Rep.* 415. cites *Mich.* 1720. *Debvox v. —*.

Depositions in the *Chancery* after a cause is determined, may be given in evidence in a trial at bar in *B. R.* in a suit for the same matter, between the same parties, if the party that *deposed* be dead; but not otherwise, for if he be living, he must appear in person in court to be examined, &c. 1 *Lill. Abr.* 445. And where witnesses in a cause are going to sea, or long journies, the court of *B. R.* will give leave to examine them on interrogatories, at a judge's chamber, in the presence of the attorneys on both sides; which *depositions* in such case shall be admitted to be good evidence. *Ibid.* And we apprehend the court of *Common Pleas* will do the same.

Depositions of informers, &c. taken upon oath before a coroner, upon an inquisition of death; or before justices of peace on a commitment or bailablement of felony, may be given in evidence at a trial for the same felony, if it be proved on oath that the informer is dead, or unable to travel, or kept away by the procurement of the prisoner; and oath must be made that the *depositions* are the same that were sworn before the coroner or justice, without any alteration. 2 *Harek. P. C.* 429.

In the case of Sir John Fenwick, against whom a bill of attainder was passed, in the 8th of William the Third, the Commons resolved that what one Goodman (a witness who was gone away, and as supposed by Sir John's procurement) had sworn on a former trial, should be read against him. — Tho' it was strenuously opposed in the house, by 110 against 181. See *Chandler's Debates*, 3. 45. *ante & post.* In the House of Lords there was protest against this proceeding (the bill passing in the Lords House, 68 against 61.) *Debates in the House of Lords*, 1 V. 463, 4.

Depositions taken before a coroner, cannot be given in evidence upon an appeal for the same death; because it is a different prosecution from that wherein they were taken: And it has been adjudged, That the evidence given by a witness at one trial, could not in the ordinary course of justice be made use of against a criminal, on the death of such witness, at another trial. 2 *H. P. C.* 430.

It was adjudged in the Earl of Strafford's trial, that where witnesses could not be produced, by reason of sickness, &c. their *depositions* might be read, for or against the prisoner on a trial of High Treason; but not where they could be produced in person: And that *depositions* by a witness before a justice of peace, might, at the prisoner's desire, be read at the trial; in order to take off the credit of the witnesses, by shewing a variance between such *depositions* and the evidence given in court. *Ibid.*

But let us caution the student how he takes for law, some peculiar determinations, as to evidence in the cases of Lord Strafford, and Sir John Fenwick.

Deposition is used in the law in another sense, viz. To signify the depriving a person of some dignity: And *deposition* is also taken for death; and *dies depositionis*, the day of one's death. *Littleton's Dict.*

Deprivation, (Deprivatio) Is a depriving or taking away; as when a bishop, parson, vicar, &c. is deposed from his preferment. Of *deprivations* there are two sorts, *deprivatio a beneficio*, and *ab officio*; the deprivation a *beneficio* is when for some great crime, &c. a minister is wholly deprived of his living: And *deprivation ab officio* is where a minister is for ever deprived of his orders, which is also called *deposition* or *degradation*; and is commonly for some heinous offence meriting death, and performed by the bishop in a solemn manner. *Blount.* *Deprivatio a beneficio* is an act of the spiritual court, grounded upon some crime or defect in the person deprived, by which he

is discharged from his spiritual promotion or benefice, upon sufficient cause proved against him. 1 Nelf. Abr. 641.

Deprivation may also be by a particular clause in some act of parliament: the deprivation of bishops, &c. is declared lawful by statute 39 Eliz. c. 8. And by the King's commission, as he hath the supremacy lodged in him, a bishop may be deprived: for since a bishop is vested with that dignity by commission from the King, 'tis reasonable he should be deprived, where there is just cause, by the same authority: but the canons direct, that a bishop shall be deprived in a synod of the province; or if that cannot be assembled, by the archbishop; and twelve bishops at least, not as his assistants, but as judges: though *quæ*, if this canon was ever received in England? *Young Clergyman's Lawyer* 105.

It has been adjudged, that an archbishop may deprive a bishop for simony, &c. for he hath power over his suffragans, who may be punished in the archbishop's court for any offence against their duty. 1 Salk. Rep. 134. The causes of deprivation are many: if a clerk obtains a preferment in the church, by simoniacal contract; if he be an excommunicate, a drunkard, fornicator, adulterer, infidel, schismatick or heretick; or guilty of murder, manslaughter, perjury, forgery, &c. If a clerk be illiterate, and not able to perform the duty of his church; if he be a scandalous person in his life and conversation; or basely is objected against him; if one be a mere layman, and not in holy orders; or under age, *viz.* the age of twenty-three years, be disobedient and incorrigible to his ordinary; or a nonconformist to the canons; if a parson refuse to use the common prayer, or preach in derogation of it; do not administer the sacraments, or read the articles of religion, &c.

If any parson, vicar, &c. have one benefice with cure of souls, and take plurality, without a faculty or dispensation: or if he commit waste in the houses and lands of the church, called dilapidations; all these have been held good causes for deprivation of priests. *Degg's Parson's Counsellor*, 98, 99, &c. 3 Inst. 204. And refusing to use the common prayers of the church; plurality of livings, &c. are causes of deprivation *ipso facto*, in which case the church shall be void, without any sentence declaratory; and avoidances by act of parliament need no declaratory sentence: But in other cases there must be a declaratory sentence. *Dyer* 275.

Where a benefice is only voidable, but not void before sentence of deprivation, the party must be cited to appear; there is to be a libel against him, and a time assigned to answer it, and also liberty for advocates to plead, and after all a solemn sentence pronounced: Though none of these formalities are required, where the living is made *ipso facto* void. *Can.* 122. If a deprivation be for a thing merely of ecclesiastical cognizance, no appeal lies; but the party has his remedy by a commission of review, which is granted by the King of mere grace. 26 H. 8. *Moor* 781.

Deputy, (*Deputatus*) Is he that exercises an office, &c. in another man's right: whose forfeiture or misdemeanor, shall cause him, whose deputy he is, to lose his office. The Common law takes notice of deputies in many cases, but it never takes notice of under-deputies; for a deputy is generally but a person authorized, who cannot authorize another. 1 Lill. Abr. 446. A man cannot make his deputy in all cases; except the grant of the office justify him in it, and where it is to one, to execute by deputy, &c.

And there is great difference between a deputy and assignee of an office; for an assignee hath an interest in the office itself, and doth all things in his own name; for whom his grantor shall not answer, unless in special cases. But a deputy hath not any interest in the office, but is only the shadow of the officer, in whose name he doth all things. And where an officer hath power to make assigns, he may implicitly make deputies, for *cui licet quod majus est, non debet quod minus est non licere*. And a sheriff may make a deputy, or under-sheriff, although he have not such express words in his patent. *Corwel*.

A deputy cannot make a deputy; because it implies an assignment of his whole power, which he cannot assign over; but he may empower another to do a particular act. 1 Salk. 96. *Pasch.* 13 Will. 3. B. R. per Holt Ch. J. in

delivering the opinion of the court in the case of *Parker v. Kett.* Litt. 379.

Judges cannot act by deputy, but are to hold their courts in person; for they may not transfer their power over to others. 2 Hawk. P. C. 3. But it has been adjudged, that recorders may hold their courts by deputy. 1 Lev. 76. 1 Nelf. 643. The office of *Custos Brevirum* and Chirographer in C. B. cannot be executed by deputy. 1 Nelf. Abr. 644. A steward of a court may make a deputy; and acts of an under-steward's deputy have been held good in some cases. *Cro. Eliz.* 534.

A sheriff may make a deputy; it is incident to his office, though no express power is given by his patent; and he hath equal power with the High Sheriff. 9 Rep. 49. A coroner ought not to execute his office by deputy, it being a judicial office of trust; and judicial offices are annexed to the person. 1 Lill. 446. If the office of parkerhip be granted to one, he may not grant this to another; because it is an office of trust and confidence. *Terms de Ley*.

A bailiff of a liberty, may make a deputy. *Cro. Jac.* 240. And a constable may make a deputy, who may execute the warrant directed to the constable, &c. 2 *Danv.* 482.

When an office descends to an infant, idiot, &c. such may make a deputy of course. 9 Rep. 47. Where an office is granted to a man and his heirs, he may make an assignee of that office; and by consequence a deputy. 9 Rep. A deputy of an office, hath no interest therein, but doth all things in his master's name, and his master shall be answerable; but an assignee hath an interest in the office, and doth all things in his own name, for whom his grantor shall not answer, unless in special cases. *Terms de Ley*.

A superior officer must answer for his deputy in civil actions, if he is not sufficient: but in criminal cases it is otherwise, where deputies are to answer for themselves. 2 Inst. 191, 466. *Doct. & Stud.* c. 42.

De quibus sur Disseisin, Is a writ of entry, mentioned in our books treating of writs. *F. N. B.* 191.

Det, (From the Sax. *Deor*, *Fera*) The names of places beginning with this word, signify that formerly wild beasts herded there together.

Deraign or *Dereyn*, (*Disfractio*) Seems to be derived literally from the Fr. *De frayer*, i. e. To confound and disorder, or to turn out of course or displace; as *deraignment* or departure out of religion. *Stat.* 31 H. 8. cap. 6. And *deraignment* and discharge of their profession. 33 H. 8. c. 29. Which is spoken of those religious men that forsook their orders or profession; and so doth *Kitchen* use it, where he says the lessee entered into religion, and afterwards was *derained*, p. 152. In our *Common Law* this word is used diversely; but generally to prove any thing, *viz.* to *deraign* that right, *deraign* the warranty, &c. *Glanv. lib.* 2. cap. 6. *F. N. B.* 146. If a man hath an estate in fee with warranty, and enfeoffs a stranger with warranty, and dies; and the feoffee vouches the heir, the heir shall *derain* the first warranty, &c. *Plowd.* 7. And jointenants and tenants in common shall have aid, to the intent to *deraign* the warranty paramount. 31 H. 8. cap. 1. See *Bracton*, lib. 3. traB. 2. cap. 28. *Britton* applieth this word to a summons that they be challenged as defective, or not lawfully made, cap. 21. And *Skene* confounds it with our waging and making of law. See *Lex Deraignia*.

Dereleft, (*Dereleftus*) Is any thing forsaken or left; or wilfully cast away. *Dereleft* lands left by the sea belong to the King. 2 Nelf. Abr. 903.

If the sea shrink back so slowly that the gain be by little and little, i. e. by small and imperceptible degrees, it is said it shall go to the owner of the lands adjoining. *Black. Com.* 2 V. 262. So that the former part of the position must be understood to mean, where an island in the sea is formed, or a large quantity of new land appears. See *Black. Com.* ib.

Descender, Writ of *formedon* in. A writ which lieth, where a gift in tail is made, and the tenant in tail alienes the lands entailed, or is disseised of them and dies; the heir in tail shall have this writ against him, who is then the actual tenant of the freehold. *F. N. B.* 211, 212. *Black. Com.* 3 V. 192.

Descent of lands, tenements, &c. See *Discent*.

Description.

Description, (descriptio) In deeds and grants there must be a *certain description* of the lands granted, the *places* where the lands lie, and of the *persons* to whom granted, &c. to make them good. But wills are more favoured than grants as to those *descriptions*; and a wrong *description* of the person will not make a devise void, if there be otherwise a sufficient certainty what person was intended by the testator. 1 *Nelf. Abr.* 647. If there are *several descriptions* of one person in a will, they must all agree at the time of the will executed, in name, circumstances, &c. or the devise to such is void. *Ibid.* And where a first *description* of land, &c. is false, though the second is true, a deed will be void: *contra* if the first be true, and second false. See 3 *Rep.* 2, 3, 8, 10, 28, 33, 34, &c.

Desertion. If any one deserts from the King's armies in time of war, whether by land or sea, in *England* or in parts beyond the seas, is by the standing laws of the land (exclusive of the annual acts of parliament to punish mutiny and desertion) and particularly by *Stat.* 18 *Hen.* 6. c. 19. & 5 *Eliz.* c. 5. guilty of felony, but not without benefit of clergy. But by *Stat.* 2 & 3 *Ed.* 6. c. 2. Clergy is taken away from such deserters, and the offence is made triable by the justices of every shire. *Black. Com.* 4 *V.* 101.

De son tort Demesne. Are certain words of form used in actions of trespass, &c. by way of replication to the defendant's plea: *i. e.* that he did it *de son tort demesne*, &c. *modo & forma*. That he did it of his own wrong, without any such cause, &c. in manner and form, &c. When the defendant *in jure proprio*, or as a servant to another, claims any interest in a common, or to a way, &c. *De son tort* generally is not good: but if the defendant justifies as servant, there it may be good, with a traverse of the commandment, it being material; for the general replication *de son tort* is properly when the defendant's plea consists merely of matter of excuse, and no matter of interest. 8 *Rep.* 67. 1 *Lil. Abr.* 428. There ought to be a conclusion to the country, in a replication of *de son tort*; because the replication should make an issue of it. 3 *Lev.* 65. But there cannot be variety of matter put in issue; as matter of record, and matter of fact, &c. 3 *Lev.* 65. 2 *Leon.* 108.

Despitus. Signifies, in our antient law books, a contemptible person. *Fleta*, lib. 4. cap. 5. par. 4.

Desubito. To weary a person with continual barkings, and then to bite; which is provided against by old laws. — *Si canis hominem desubitet, aut mordeat tacitus, in prima culpa reddantur sex sol.* Leg. Alured. 26.

Detachare. To seize or take into custody another person's goods, &c. by attachment or other course of law. *Corwel.*

Detainer. See *Forcible Entry and Detainer.*

Determination of will. The exertion of any act of ownership by the lessor, puts an end to, or determines an estate at will. See *Black. Com.* 2 *V.* 146.

Detinet. A word used in writs, which is necessary in the writ of *detinue*, &c. See *Debet & Detinet.*

Detinue, (detinendo) In the Common law is like *actio depositi* in the Civil law, and is a writ which lies against him, who having goods or chattels delivered to keep, refuseth to re-deliver them. In this action the thing detained is generally to be recovered, and not damages; but if one cannot recover the thing itself, he shall recover damages for the thing, and also for the *detainer*. *Wood's Inst.* 542. *Detinue* lies for any thing certain and valuable, wherein one may have a property or right; as for a horse, cow, sheep, hens, dogs, jewels, plate, cloth, bags of money, sacks of corn, &c. It must be laid so certain, that the thing *detained* may be known and recovered; and therefore for money out of a bag, or corn out of a sack, &c. it lies not; for the money or corn cannot in this case be known from other money or corn; so that the party must have an action on the case, &c. 1 *Inst.* 226. *F. N. B.* 138. Yet *detinue* may be brought for a piece of gold, of the price of 22s. tho' not for 22s. in money; for here is a demand of a certain particular piece. 2 *Danv. Abr.* 510.

If a man receiving money from a banker, put part thereof into his bag, and while he is telling the rest the bag is stolen; no action of *detinue*, &c. lies; because by putting up the money, he had appropriated it to his own

use. *Comb.* 475. A man lends a sum of money to another, *detinue* lies not for it, but debt: but if *A.* bargains and sells goods to *B.* upon condition to be void if *A.* pays *B.* a certain sum of money at a day; now if *A.* pays the money he may have *detinue* against *B.* for the goods, though they came not to the hands of *B.* by bailment, but by bargain and sale. *Cro. Eliz.* 867. 2 *Danv.* 510.

If a man delivers goods to *A.* to deliver to *B.* *B.* may have *detinue*, for the property is in him: and where he delivers them to *B.* and after grants them to *D.* he shall not have *detinue* after the grant, but the grantee shall have it. *Telv.* 241. 1 *Bulst.* 69. When goods are delivered to one, and he delivers them over to another, action of *detinue* may be had against the second person, and if he delivers them to one that has a right thereto, yet it is said he is chargeable: also if a person to whom a thing is delivered dieth, *detinue* lieth against his executors, &c. or against any person to whom the thing comes. 2 *Danv. Abr.* 511.

A man may have a general *detinue* against another that finds his goods: though if he deliver any thing to *A.* to re-deliver, and he loses it, if *B.* finds it and delivers it to *C.* who has a right to the same, he is not chargeable to me in *detinue*, because he is not privy to my delivery. 7 *H.* 6. 22. 9 *H.* 6. 58. Though *trover* is the common action for goods found, or wrongfully detained, where there was at first a legal possession.

In actions of *detinue*, the thing must be once in the possession of the defendant; which possession is not to be altered by act of law, as seizure, &c. And the nature of the thing must continue, without alteration, to intitle this action. *F. N. B.* 138. If I find goods, and before the owner brings his action, I sell them; or they are recovered out of my hands upon an execution, or outlawry against the owner, &c. he cannot have *detinue* against me. 12 *E.* 4. 8. 27 *H.* 8. 13. or *trover*. But action of *detinue* will lie against him that finds goods, if they are waited by wilful negligence. *Dr. & Stud.* 129.

A man buys cloth or other things of another, on a good and perfect contract; if the seller keeps the things bought, *detinue* lieth. *Dyer* 30, 203. Where one takes my goods into his custody to keep them for me, and refuses to restore them; although he have nothing for the keeping of them, this action will lie. 4 *Rep.* 84. 29 *Aff. pl.* 28. If I deliver to one a trunk that is locked with things in it, and keep the key myself, and something be taken out of it, writ of *detinue* lieth not for this: but if the trunk and all that is in it be taken away, there it lies. 11 *Rep.* 89. 4 *E.* 3.

This action will not lie, where a man delivers goods to me, and I bid him take them again, if he refuses to do it: or where one takes my goods or cattle by wrong as a trespasser; or by way of distress for rent or as damage feasant, &c. Nor for a horse sick, when it is taken or lent; if he dies of that sickness. *Bro. Detin.* 242. 43 *E.* 3. 21. 21 *E.* 4. And if it be a ring that is delivered to another, and he breaks it, it is doubted whether action of *detinue* may lie; because the thing is altered, and cannot be returned as it was: but action on the case lieth. And although where goods are found, and sold, &c. *detinue* lies not: yet action upon the case of *trover* and *conversion* may be brought. 12 *E.* 4. 8. 18 *E.* 4. 22.

To bring *detinue*, the plaintiff is to set forth the time and thing delivered, to what use the same was delivered, and the time appointed for the re-delivery thereof, with its value, &c. If for a thing bought, he must shew when he bought it, and what he paid, and the time for delivery: also in *trover*, the nature and value of the things are to be shewn, the time and place when and where the plaintiff was possessed of them, and how they came to the defendant's hands, with the conversion, &c. *Practif. Solic.* Actions of *detinue* are not so frequently brought as formerly; for actions of *trover* and *conversion* are had in their stead, where the conversion changes the *detinue* to action of the case; and thereby the tedious proceedings as to garnishment, &c. are now out of use. 10 *Rep.* 57. 1 *Inst.* 286. See *Trover*.

Detinue of Charters. A man may have *detinue* for deeds and charters concerning land; but if they concern the freehold, it must be in *C. B.* and no other court. Action of *detinue* lies for charters which make the title

of lands; and the heir may have a *detinue of charters*, although he hath not the land: if my father be disseised, and die, I shall have detinue for the charters, notwithstanding I have not the land; but the executors shall not have the action for them. *Nere Nat. Br.* 308. If a man keep my charters from me, concerning the inheritance of my land, and I know the certainty of them, and the land; or if I be in a chest, &c. and I know not their certainty, I may recover them by this writ: so where lands are given to me and J. S. and my heirs, and he dies, if another gets the deeds; and if tenant in tail give away the deed of entail, and then die, his issue may bring a writ of *detinue of charters*. *Co. Lit.* 286. *1 Rep.* 2. *T. N. B.* 128. But if the tenant in fee simple do give away his deeds of land, his heir may not have this action: and in case a woman great with child by her deceased husband's charters from his daughter and heir that concern the land during the time she is with child; this writ will not lie against her. *21 E.* 3. 17.

Detinue was brought for a deed, and the plaintiff had a verdict, that the defendant detained the deed, and the jury gave 20*l.* damages, but did not find the value of the deed; and then there issued out a *disfringas* to deliver the deed, or the value, and afterwards a writ of inquiry was awarded for the value: whereupon the jury found a different value from what the first verdict found; and it was adjudged good. *Raym.* 124. *1 Nelf. Abr.* 649. In *detinue of charters*, if the issue be upon the detinue, and it is found that the defendant hath burnt the charters, the judgment shall not be to recover the charters, which it appears cannot be had; but 'tis said it shall be for the plaintiff to recover the land in damages. *2 Rol. Abr.* 101. *2 Danc. Abr.* 511. For detaining of deeds and charters concerning the inheritance of lands, or an indenture of lease, the defendant shall not wage law; but in a common action of *detinue* he may do it. *1 Inst.* 295.

Detinue of Goods in Frank-marriage, Is on a divorce betwixt a man and his wife; after which, the wife shall have this writ of detinue for the goods given with her in marriage. *Mich.* 35 *E.* 1. *New Nat. Br.* 308.

Detrahere, Signific a punishment to be torn in pieces with horses. — *Apostata, sacrilegi, & hujusmodi, detrahere debent & comburi.* *Ficta*, lib. 1. cap. 37. But we know not, now, of any such punishment by our laws.

Detunicare, To discover or lay open to the world. *Matth. Westm.* 1240.

Devadivatus, Is where an offender is without sureties or pledges. *Si homo in villa delinquit & devadivatus fuerit, nil inde babeat prepositus regis.* *Domesday.*

Devastabit, or *Devastaverunt bona Testatoris*, Is a writ that lies against executors or administrators, for paying debts upon simple contract, before debts on bonds and specialties, &c. for in this case they are liable to action as if they had squandered away the goods of the deceased or converted them to their own use; and are compellable to pay such debts by specialty out of their own goods, to the value of what they so paid illegally. *Dyer* 232. But if an executor pays debts upon simple contract, before he hath any notice of bonds, it is no *devastavit*; and regularly this notice is by an action commenced against him for the debt, which doth not oblige him to take notice of it himself, nor of a judgment against his testator, because he is not privy to acts done either by or against him. *1 Mod.* 175. *1 Lev.* 215. *Sed qu.* as to a judgment docketed, if the law doth not presume that sufficient notice?

Where an executor, &c. payeth legacies before debts, and hath not sufficient to pay both, 'tis a *devastavit*. Also where an executor sells the testator's goods at an undervalue, it is a *devastavit*; but this is understood where the sale is fraudulent; for if more money could not be had, it is otherwise. *Kelov.* 59. *1 Nelf. Abr.* 649. Executors keeping the goods of the deceased in their hands, and not paying the testator's debts; or selling them, and not paying off debts, &c. or not observing the law which directs them in the management thereof; or doing any thing by negligence or fraud, whereby the estate of the deceased is misemployed, are a *devastavit*, or waste; and they shall be charged for so much *de bonis propriis*, as if for their own debt. *8 Rep.* 133. But the

fraud or negligence of one executor is not chargeable on the rest, where there are several executors. *1 Rol. Abr.* 929.

There are some cases in the old books, in which it hath been held, if an executor wastes the goods of the testator, and afterwards makes his executor, and dies, leaving assets, that an action of debt will not lie against the executor of the wasting executor, upon a suggestion of a *devastavit* or waste by the first executor; because 'tis a personal wrong which died with him. *3 Leon.* 241. But in this case there is a difference between a lawful executor and an executor *de son tort*; for as an executor *de son tort* possesses himself of the goods wrongfully, if he afterwards wastes them, and dies, leaving assets, his executor shall be charged upon the suggestion of a *devastavit* in his testator, because he came wrongfully by the goods, and therefore the wrong shall not die with his person. *2 Lev.* 133. And before the statute 30 *Car.* 2. c. 7. it has been decreed in equity against the executor of a lawful executor, who had wasted the goods, and died, that such executor should be liable to make good to the creditors of the testator, so much as the first executor had wasted, and so far as he had assets of the said first executor. *1 Chanc. Rep.* 257.

By that statute 'tis enacted, That if an executor *de son tort* wastes the goods, and dies, his executors shall be liable in the same manner as their testator would have been if he had been living. And it has been since adjudged, that a rightful executor, who wastes the goods of the testator, is in effect an executor *de son tort* for abusing his trust; and therefore his executor or administrator may be liable to a *devastavit*. *3 Mod.* 113.

Debt lies against an executor in the *debit* and *detinet*, where there is a judgment against his testator, upon a suggestion only, that he had wasted the goods; and this is a more expeditious way than the old method of *sci. fac. inquiry*, which was issued to shew cause why the plaintiff should not have execution against the executor *de bonis propriis*, and thereupon the sheriff returned a *devastavit*, &c. *1 Lev.* 147. *1 Nelf.* 653.

A husband is to be charged for waste done by his wife *dum sola*: but the husband is not chargeable after the death of a wife executrix, on suggestion of a *devastavit* in a declaration against him. *Cro. Car.* 603. *Lutw.* 672. And it has been adjudged, that a feme covert executrix cannot do any waste during the coverture; though for waste done by the husband she shall be charged, if she survive him; but then it must be on a judgment obtained against him, and not on a bare suggestion of a *devastavit*, &c. *2 Lev.* 145. If an executor or administrator confesses judgment, or suffers it to go by default, he thereby admits *assets*, and is estopped to say the contrary in an action on such judgment suggesting a *devastavit*. *Will. Rep.* par. 1. fol. 258. *Skelton v. Hawling, Executor.* See *Debit & Detinet*, and *Executor*.

Devenerunt, A writ heretofore directed to the escheator on the death of the heir of the King's tenant under age and in custody, commanding the escheator that by the oaths of good and lawful men he inquire what lands and tenements by the death of the tenant came to the King. *Dyer* 360. This writ is now disused; but see *Stat.* 14 *Car.* 2. c. 11. for preventing frauds and abuses in his Majesty's Customs.

Devest, (*devestire*) Is opposite to *invest*. As *invest* signifies to deliver the possession of any thing to another; so *devest* signifieth the taking it away. *Fend.* lib. 1. cap. 7.

Devise, (from the Fr. *deviser*, to divide or sort into parcels) Is properly where a man gives away any lands or tenements by will in writing. And he who gives away his lands in this manner, is called the *devisor*; and he to whom the lands are given, the *devisee*. A *devise* in writing is, in law construction, no deed; but an instrument by which lands are conveyed. And antiently where lands were deviseable, it was by custom only; for at Common law, in favour of heirs, no lands or tenements in fee simple were deviseable by will; nor could they be transferred from one to another but by solemn livery and seisin; matter of record, or sufficient deed, or writing. *Inst.* 111. *2 Inst.* 386; &c. But now it is otherwise by

by Stat. 32 Hen. 8. c. 1. And see 34, 35 H. 8. c. 5. 'Tis said, that words of recommendation and desire in a will are always held to be a *devise*; as where the testator gives a legacy to one, willing him to do such a thing. *Ec. Preced. Canc.* 201, 202.

Devise to the first and eldest son not heir at law to his father, is a good devise to the second son. *Rep. Temp. Hardw. per Annyl.* 96. *Marwood ex dim. Fennel & al' v. Darrel.*

A general introductory clause is a key to explain particular devises in the will. *Id.* 143. *Maudy & Maudy.*

Negative words in a will, will not disinherit the heir, but they are proper to explain other parts of the will *Id. ib.* See *Will.*

Devoires of Calais, Were the customs due to the King, for merchandise brought into or carried out of Calais, when our staple remained there. 2 R. 2. stat. 1. c. 3. *Devoir*, in French, signifies a duty; *paying their custom and devoirs to the King.* Stat. 34 Ed. 1. c. 18.

Dextrarius, Is understood to take the right hand of another. And the word *dextrarios* has been used for light horses, or horses for the great saddle; from the Fr. *desfrrier*, a horse for service. — *Willielmus de B. dedit Regi tres dextrarios, quinque chacuros, &c. pro habenda seiscina Castr. de Grosfunt, &c. Rot. Chart. in Tur. London, Anno 7 Joh. n.* 38.

Dextras Date, Shaking of hands in token of friendship; or a man's giving up himself to the power of another person. *Walsingb.* p. 332.

Diarium, Is taken for daily food; or as much as will suffice for the day. *Du Cange.*

Dispersatus, Stain'd with many colours. *Man. tom.* 3. pag. 314.

Dita, A tally for accounts, by number of *tailles*, cuts or notches. — *Et præter hoc debet magister mariscallicus habere dicas de donis & liberationibus que fuerint in thesauro Regis, &c. Lib. Rub. Scaccar. fol.* 30. And in an ancient record, — *Institutum est ut diligenter per dicam notetur quantum ex omni genere bladi vel leguminis expenditur in semine. — Et dica illa dividatur in duo, & una pars deputabitur custodiæ hospitalis fratris, &c. altera grangiariorum.* Statut. Ord. de Sempringham, p. 748.

Dicker, or **Dicker of Leather**, Is a certain quantity, consisting of ten hides, by which leather is bought and sold: there are also *dickers* of iron, containing ten bars to the *dicker*. This word is thought to come from the Greek *δίζας*, which signifies ten. *Domesday.*

Dittores and **Ditium**: The one signifies an arbitrator; and the other the arbitrament. — *Protulit dictum suum & sententiam pro Rege Angliæ.* *Malmf. p.* 384.

Ditum de Kenelworth, An edict or award, between King Henry the Third and his Barons and others, who had been in arms against him: so called, because it was made at *Kenelworth castle* in *Warwickshire*, anno 51 Hen. 3. It contained a composition of those who had forfeited their estates in that rebellion, which composition was five years rent of the lands and estates forfeited.

Ditum clausum extremum, Was a writ issued out of the court of Chancery to the escheator of the county, upon the death of any of the King's tenants *in capite*, to inquire by a jury of what lands he died seised, and of what value, and who was the next heir to him; and the same ought to be granted at the suit of the next heir, &c. for upon that, when the heir came of age, he was to sue livery of his lands out of the King's hands. *F. N. B.* 251.

Dies. There are several sorts of days, *i. e.* days natural, artificial, and legal; and Sunday is not only *dies non juridicus* as to legal proceedings, but also as to contracts. 2 Inst. 264. See *Day.*

Dies datus, Is a day or time of respite given to the defendant in a suit by the court. *Brake.*

Dies Marchie, Was the day of congress or meeting of the English and Scotch, appointed annually to be held on the marches or borders, to adjust all differences between them, and preserve the articles of peace. — *Conveniantur ad diem marchie & conventum fuit inter eos pro commodo pacis, &c. Tho. Walsingham, in Ric. 2. p.* 307.

Dieta, A day's journey. — *Omnis rationabilis dieta constat ex viginti miliaribus.* *Fleta, lib.* 4. c. 28. And in this sense it is used by *Bracton, lib.* 3. *trad.* 2. c. 16.

Diet, (*conventus*) An assembly; as the diet of the Empire, of *Ratisbon*, &c.

The diets of the empire of Germany were the same with the assemblies of *March* and of *Man*, held by the Kings of France. They meet at least once a year. Every freeman had a right to be present. They were assemblies in which a monarch deliberated with his subjects, concerning their common interest. But when the princes, dignified ecclesiasticks, and barons, acquired territorial and independent jurisdiction, the diet became an assembly of the separate states, which formed the confederacy of which the Emperor was the head. While the constitution of the empire retained its primitive form, attendance on the diet was a duty; and a neglect to attend, punishable with loss of vote, and heavy penalty: but when the members became independent states, the right of suffrage was annexed to the territory or dignity, not to the person. *Robert. Hist. Emp. Charles V. 1 V. 383, &c.* which see.

Among the Anglo Saxons here, in England, there was from time to time an assembly of the whole nation (*i. e.* of all freemen) called *wittena gemot*, similar to the diets of the empire. In this assembly was lodged the whole legislative power of the community; here was the supreme authority, over all persons and in all causes, ecclesiastical as well as civil. *Squire's Anglo Sax. Government, 165, &c.*

Dieu & mon Droit, God and my Right, the motto of the royal arms, intimating that the King of England holds his empire of none but God; first given by King *Rich. 1.*

Dieu son Rit, Are words often used in our old law: and it is a maxim in law, That the act of God shall prejudice no man. Therefore, if a house be blown down by tempest, thunder or lightning, the lessee or tenant for life or years, shall be excused in waite: likewise he hath by the law a special interest to take timber, to build the house again for his habitation. 4 Rep. 63. 11 Rep. 82. So when the condition of a bond consists of two parts in the disjunctive, and both are possible at the time of the obligation made, and afterwards one of them becomes impossible by the act of God, the obligor is not bound to perform the other part. 5 Rep. 22. And where a person is bound to appear in court, at a certain day, if before the day he dieth, the obligation is saved, &c. See *Bond.*

Difacere, To destroy: and *diffactio* is a maiming any one. *Leg. H. 1. c.* 64, 92.

Difforciare Rectum, To take away, or deny justice. *Matt. Paris. anno* 1164.

Digest, The book of Pandects of the Civil law; which hath its name from its containing *Legalia præcepta excellenter Digesta.* *Du Cange.*

Dignity, (*dignitas*) Signifies honour and authority; reputation, &c. And dignity may be divided into superior and inferior: as the titles of Duke, Earl, Baron, &c. are the highest names of dignity; and those of Baronet, Knight, Serjeant at Law, &c. the lowest. Nobility only can give so high a name of dignity, as to supply the want of a surname in legal proceedings: and as the omission of a name of dignity may be pleaded in abatement of a writ, &c. so it may be where a peer, who has more than one name of dignity, is not named by the Most Noble. 2 Hawk. P. C. 185, 239. No temporal dignity of any foreign nation can give a man a higher title here than that of Esquire. 2 Inst. 667. See *Addition* and *Discent.*

Dignity Ecclesiastical, (*dignitas ecclesiastica*) Is defined by the Canonists to be *administratio cum jurisdictione & potestate aliqua conjuncta*; of which there are several examples in *Duarenus, de Sacris Eccles.* lib. 2. c. 6. *Dignities ecclesiastical* are mentioned in the Stat. 26 H. 8. c. 31 & 32. And of church dignities, *Cambden* in his *Bri-tannia, p.* 161. reckons in England 544.

Dignitaries, (*dignitarii*) Are those who are advanced to any dignity ecclesiastical; as a Bishop, Dean, Archdeacon, Prebendary, &c. But there are simple Prebendaries, without cure or jurisdiction, which are not dignitaries. 3 Inst. 155.

Dilapidation, (dilapidatio) Is where an incumbent on a church living suffers the parsonage house or outhouses to fall down, or be in decay for want of necessary reparation: or it is the pulling down or destroying any of the houses or buildings, belonging to a spiritual living, or destroying of the woods, trees, &c. appertaining to the same; for it is said to extend to the committing or suffering any wilful waste, in or upon the inheritance of the church. *Dugg's Parf. Counf.* 89. It is the interest of the church in general to preserve what belongs to it for the benefit of the successors; and the old canons, and our own provincial constitutions require the clergy sufficiently to repair the houses belonging to their benefices; which if they neglect or refuse to do, the bishop may sequester the profits of the benefice for that purpose, &c. *Rights Clerg.* 143. And by the Canon law, dilapidations are made a debt, which is to be satisfied out of the profits of the church; but the Common law prefers debt on contracts, &c. before debt for dilapidations. *Hern.* 136.

The prosecution in these cases may be brought either against the incumbent himself, or against his executors or administrators; and the executor or administrator of him in whose time it was done or suffered, must make amends to the successor: and if you proceed against the incumbent, then it is proper in the spiritual court: likewise you may proceed in that court against an executor, or the successor may have an action of the case or debt at the Common law, in which action he shall recover damages in proportion to the dilapidations. *1 Nels. Abr.* 656.

By statute, if any Parson, &c. shall make a gift of his goods and personal estate to defraud his successor, as to dilapidations, such successor may have the same remedy in the spiritual court against the person to whom such gift is made, as he might have against the executors of the deceased Parson. *13 Eliz. cap. 10.* And money recovered for dilapidations, is to be employed in the reparations of the same houses suffered to be in decay, or the party recovering shall forfeit double the value of what he receives, to the king, by *Stat. 14 Eliz. cap. 11.*

Where in our books it is said, that dilapidations are suable for only in the ecclesiastical court, that is to be intended when the suit is grounded upon the Canon law; for an action of the case might have been brought at Common law, by the successor against the executors of the dilapidator. *Parf. Counf.* 97, 98. If a Parson suffers dilapidations, and afterwards takes another benefice, whereby his former benefice becomes void, his successor may have an action against him, and declare that by the custom of the kingdom he ought to pay him *tantas denariorum summas quantæ sufficient ad reparandum*, &c. *3 Lev. 268.* In case a Parson comes to a living, the buildings whereof are in decay by dilapidations, and his predecessor did not leave a sufficient personal estate to repair them, so that he is without remedy; he is to have the defects surveyed by workmen, and attested under their hands in the presence of witnesses, which may be a means to secure him from the incumbrance brought upon him by the fault of his predecessor. *Country Parson's Companion*, 60.

Dilatory Pleas, Are such as are put in merely for delay; and there may be a demurrer to a dilatory plea, or the defendant shall be ordered to plead better, &c. The truth of dilatory pleas is to be made out by affidavit of the fact, &c. by *Stat. 4 Ann. c. 16. sect. 11.* See *Plea.*

Outlawed, i. e. de lege ejus. Leg. Hen. 1. c. 45.

Willigout, Pottage formerly made for the King's table, on his coronation day: and there was a tenure in serjeanty, by which lands were held of the king, by the service of finding this pottage, at that great solemnity. *39 H. 3.*

Disinherited, Is used in our records for a moiety, or one half. — *Sciant quod ego Matilda filia Willielmi le F. dedi Waltero de S. dimidietatem illius burgagii, &c.* — *Sine dat. ex libro Chart. Priorat. de Leominster.*

Diminishing the coin, A species of treason. See *18 Eliz. c. 1.* and *Coin.*

Diminution, (diminutio) Is where the plaintiff or defendant in a writ of error alledges to the court that part

of the record is omitted and remains in the inferior court not certified; whereupon he prays that it may be certified by *certiorari*. *Co. Ent.* 232, 242. Of course diminution is to be certified on a writ of error; though if issue be joined upon the errors assigned, and the matter is entered upon record, which is made a *confilium*, in this case there must be a rule of court granted for a *certiorari* to certify diminution, *1 Lill. Abr.* 245. Diminution cannot be alledged of a thing which is fully certified; but in something that is wanting, as want of an original, or a warrant of attorney, &c. *2 Lev. 206.* *1 Nels. Abr.* 658. And if on diminution alledged, and the plaintiff in error certify one original, &c. which is wrong; and the defendant in error certifies another that is true; the true one shall stand. *Cro. Jac.* 597. *Cro. Car.* 91. After a writ of error brought, and the defendant hath pleaded *in nullo est erratum*, he cannot afterwards alledge diminution; because by that plea he affirmeth or alloweth the record to be such as is certified upon the writ of error. *Godb.* 266. But in some cases, diminution hath been alledged, after *in nullo est erratum* pleaded, *ex gratia curiæ*; though not *ex rigore juris*. *Palm.* 85. And there is an instance, that the court in such a case hath awarded a *certiorari*, to inform their conscience of the truth of the record in *C. B.* where the defendant in error had not joined *in nullo est erratum*. *1 Nels.* 658.

Dismissory Letters, (literæ dimissorie) Are such as are used where a candidate for holy orders has a title in one diocese, and is to be ordained in another: the proper diocesan sends his *letters dimissory* directed to some other ordaining bishop, giving leave that the bearer may be ordained, and have such a cure within his district. *Cowel.*

Diocese, (diocesis) Signifies the circuit of every bishop's jurisdiction. For this realm hath two sorts of divisions; one into shires or counties, in respect to the temporal state; and another into dioceses, in regard to the ecclesiastical state, of which we reckon twenty-one in England, and four in Wales. *1 Inst.* 94. Also the kingdom is said to be divided in its ecclesiastical jurisdiction into two provinces of Canterbury and York; each of which provinces is divided into dioceses, and every diocese into archdeaconries, and archdeaconries into parishes, &c. *Wood's Inst.* 2.

The bounds of dioceses are to be determined by witnesses and records, but more particularly by the administration of divine offices. To which purpose, there are two rules in the Canon law: in one case, upon a dispute between two bishops upon this head, the direction is, that they proceed in the business, by ancient books or writings, and also by witnesses, reputation, and other sufficient proof: in the other case, where the question was, by whom a church built upon the confines of two dioceses should be consecrated, the rule laid down is, that it should be consecrated by the bishop of that city, who before it was founded, baptized the inhabitants, and administered to them other divine offices. *Gibf.* 133.

The jurisdiction of the city is not included in the name of diocese, so saith the Canon law: and accordingly, in citations to general visitations, directed to the clergy, it is ordered to cite the clergy of the city and diocese. *Gibf.* 133.

A bishop may perform divine offices, and use his episcopal habit, in the diocese of another, without leave; but may not perform therein any act of jurisdiction, without permission of the other bishop. *Gibf.* 133.

A clergyman dwelling in one diocese, and beneficed in another, and being guilty of a crime, may, in different respects, be punished in both; that is, the bishop in whose diocese he dwells, may prosecute him; but the sentence, so far as it affects his benefice, must be carried into execution by the other bishop. *Gibf.* 134.

Disability, (disabilitas) Is when a man is disabled, or made incapable to inherit any lands, or take that benefit which otherwise he might have done: which may happen four ways; by the act of an ancestor, or of the party himself, by the act of God, or of the law. 1. *Disability* by the act of the ancestor, is where the ancestor is attainted of treason, &c. which corrupts the blood of his children; so that they may not inherit his estate. 2. *Disability*

lity by the act of the party, is where a man binds himself by obligation, that upon surrender of a lease, he will grant a new estate to the lessee; and afterwards he grants over the reversion to another, which puts it out of his power to perform it. 3. *Disability* by the act of God, is where a person is *non sane memorie*, whereby he is incapable to make any grant, &c. So that if he passeth an estate out of him, it may after his death be made void; but it is a maxim in law, *That a man of full age shall never be received to disable his own person.* 4. *Disability* by the act of the law, is where a man by the sole act of the law, without any thing by him done, is rendered incapable of the benefit of the law; as an alien born, &c. *Terms de Ley.* 5 Rep. 21. 4 Rep. 123, 124. 8 Rep. 43.

There are also other *disabilities*, by the common law, of *ideocy*, *infancy*, and *coverture*, as to grants, &c. And by statute in many cases: as *papists* are disabled to make any presentation to a church, &c. *Officers* not taking the oaths, are incapable to hold offices: *Foreigners*, though naturalized, to bear offices in the government, &c. 11 Rep. 77. Stat. 12th & 13th W. 3. c. 2. 1 Geo. 2. st. 2. c. 4. A person shall not be admitted to *disable* himself to avoid an office of charge, &c. no more than a man shall be allowed to say that he was an *Idiot*, &c. to avoid an act done by himself. *Cartbrow's Rep.* 307. And the statutes do not exempt and *disable* dissenters from bearing offices; but they must submit to a fine, if they do not qualify themselves. *Hill.* 6 Will. 3. *Skinner* 576, 577. But it hath lately been solemnly determined in the House of Lords, in the case of the Chamberlain of London, and that a dissenter was not finable for refusing the office of Sheriff. See *Capacity*.

Disabdicare, To deny, or not acknowledge a thing: It is mentioned in *Hengham Magna*, cap. 4.

Disagreement, Will make a nullity of a thing, that had essence before: And *disagreement* may be to certain acts, to make them void, &c. *Co. Lit.* 380. See *Agreement*.

Disalt, According to *Littleton*, is to disable a person. *Lit. tit. Discontinuance*.

Disboscatio, A turning wood ground into arable or pasture.

Disccarcare, (From *Dis* and *Cargo*) Is to unlade a ship or vessel by taking out the cargo or goods. — *Et prædictum*, &c. *Carcare* & *disccarcare* fecit *ibidem* *mercandis* & *denariis* *quæstunque*. *Placit. Parl.* 18 Ed. 1.

Disceit, A writ or action for fraud and deceit. See *Deceit*.

Discent, (Lat. *Descensus*, Fr. *Discent*) Is an order or means whereby lands or tenements are derived unto any man from his ancestors; And is either by *common law*, *custom* or *statute*: By *common law*, as where one hath land of inheritance in fee-simple, and dieth without disposing thereof in his life-time, and the land goes to the eldest son and heir of course, being cast upon him by law. 1 *Inst.* 13, 237. *Discent* of fee-simple by *custom*, is sometimes to all the sons, or to all the brothers, where one brother dieth without issue; as in *gavelkind*: Sometimes to the youngest son, as in *Borough English*; and sometimes to the eldest daughter, or the youngest, &c. according to the customs of particular places. 1 *Inst.* 110, 140, 175. *Litt.* 210, 211. And *discent* by *statute* of fee-tail, is as directed by the manner of the settlement or limitation, pursuant to the *Stat. West.* 2. 13 Ed. 1. cap. 1.

Discent at common law is *lineal*, or *collateral*: *Lineal* is a *discent* downward in a right line, from the grandfather to the father, the father to the son, son to the grandson, &c. and the lineal heir shall first inherit. *Collateral* is a *discent* which springeth out of the side of the whole blood, as another branch thereof; such as the grandfather's brother, father's brother, and so downward. 1 *Inst.* 10, 11. Therefore if a man purchaseth lands in fee-simple, and dies without issue, for default of the right line, he which is next of kin in the collateral line of the whole blood, though never so remote, comes in by *discent* as heir to him; for there is a next of kin by right of

representation, and by right of *propinquity* or nearness of blood. *Litt.* 2. 1 *Ventr.* 415. 3 *Rep.* 40.

To have land in fee-simple by *discent*, a person must be heir of the *whole blood*; he is to be the *next*, and *most worthy* of blood, to the ancestor; and he ought to be heir to him that was last *actually seized*. Where lands descend to the son from the father, and he enters on the lands, and dies seized thereof, without having any issue, this land will descend to the heirs of the part of the father, who are of the whole blood; and if there are none such, the land shall escheat: so where lands descend on the part of the mother. *Litt. Sect.* 4. 1 *Inst.* 13. And there is a maxim in law, that *where lands descend on the part of the father, the heirs of the mother shall never inherit; and when lands descend on the part of the mother, the heirs of the father shall never inherit.* 1 *Inst.* 14. But it has been resolved, that a *fine* and *render* of lands, claimed by a party, as heir at law *ex parte materna*, will alter the quality of the estate; so that it shall descend to the heir *ex parte paterna*. 6 *Rep.* 63. *Cartbrow* 141.

Also if a man seized of land, as heir of the part of his mother, make a *feoffment*, and take back an estate to him and his heirs; this as a purchase alters the *discent*, and if he die without issue, the heir of the part of the father shall inherit it. 1 *Inst.* 12. There is a difference between *discents* from father and mother to their children, and *discents* between brothers and sisters; for a son or a daughter need be only of the blood of either the father or mother, which hath the inheritance, to inherit them: Though the brothers and sisters must be of the same father and mother, to inherit one another. *Nov* 68.

If a man hath issue two sons by divers venters, the younger brother of the half blood shall not have land purchased by the elder brother, on his dying without issue; but the elder brother's uncle or next cousin shall have it. 1 *Inst.* 14. The elder brother of the whole blood shall have land by *discent*, purchased by a middle or younger brother, if such die without issue; (for as to *discents* between brethren, the eldest is the most worthy of blood to inherit to them as well as to the father). And if there be no brother or sister, the uncle shall have it as heir, and not the father: And yet it may afterwards come to the father, as heir to the uncle; likewise if the father hath issue another son or daughter, after the *discent* to the uncle, that issue may enter upon the uncle, and hold the estate. *Lit.* 3. 3 *Rep.* 40. The next and *most worthy of blood* are the *male*, and all descendants from him, before the females; and the female on the part of the father, before the male or female of the part of the mother: And the eldest brother, and his posterity, shall have lands in fee-simple before any younger brother: Also a sister of the whole blood shall be preferred, and take before the younger brother, which is of the half blood; but such a younger brother, though he may not be heir to a brother, for want of the whole blood, yet he may be heir to his father, or his uncle. 1 *Inst.* 14. 3 *Rep.* 41.

All the descendants from a person who by our laws might have been heir to another, hold the same right as that common root from whom they are derived: so that the son, or grandchild, whether son or daughter of the eldest son, takes before the youngest son; and a son or grandchild of the eldest brother before the youngest brother: And so it is through all degrees of *discents*; by representation, the proximity is transferred from the root to the branches, and gives them the same preference, as next and worthiest of blood. *Hale's Hist. L.* 237.

The great grandchild of the elder brother, whether it be a son or a daughter, shall here be preferred as the heir before the younger brother; for though a female be less worthy than the male, yet she stands in right of representation of the eldest brother, who was more worthy than the younger. *Hale's Hist. L.* 237.

As to being heir to him that was last *seized*: If tenant in fee-simple hath a son and a daughter by one woman or venter, and a son by another venter, and dies seized, and the eldest son dies without issue, before *actual seisin*, the younger brother as heir to the father shall have the estate; but

but if the elder brother had entered on the lands, the sister would have it as heir to him. 1 *Inst.* 11, 15. *Lit.* 8. None can inherit any lands as heir, but only the blood of the first purchaser; as if the father make a purchase, the blood of the mother shall not have the estate: But if a son purchases, and there is no heir on the side of the father, the land shall go to the heirs on the side of the mother; for they are of the blood of the son of the first purchaser, and he had the blood of both father and mother. *Lit.* 4. 1 *Inst.* 12. So that there is a difference where the son purchases lands in fee-simple, and where he cometh to them by descent. Land thus purchased may go to the heirs of the father and mother of the purchaser; unless it be once attached in the heir of the part of the father, for then the heirs of the mother cannot have it, because they are not of the blood of him who was last seised. 49 *E.* 3. 12. *Finch* 119. Where for want of heirs of a purchaser, of the part of his father, or when such heir had not entered, the lands descend to the line of the mother; there the heirs of the mother of her father's side, shall take in succession, before her heirs of the part of her mother. *Hale's Hist. L.* 247. *Plowd.* 444.

The law takes no notice of the disability of the father in case of descent, but only of the immediate relation of brothers and sisters, as to their estates; so that the inability of the father doth not hinder the descent between them: for example, A man had issue a son and a daughter, and was attainted of treason, and died; the son purchased lands, and died without issue; and it was adjudged that, notwithstanding the attainder of the father, the daughter shall take by descent from her brother, because the descent between them was immediate, and the law doth not regard the disability of the father. 4 *Leon.* 5. 1 *Nelf. Abr.* 645.

If there be father and son, and the son is attainted of treason or felony in the father's life time, and yet outlive his father, the land by descent shall not come to such son, nor any of his issue; but if he die before the father, it will descend to his other children. 4 *Rep.* 31, 124. And where a person seised of lands, hath issue two daughters, if one of them commits felony, after the father's death, both daughters being alive, a moiety shall descend to one daughter, and the other shall escheat. 1 *Inst.* 163.

Inheritances may descend but not ascend: And in the right line, children inherit their ancestors without limitation; but the ancestors may not take from their children, for the father can never come to the lands which his son hath purchased, by lineal ascent; though he may by collateral ascent, where the son's lands come to the uncle, and then to the father. In the collateral line, the uncle inherits the nephew, and the nephew the uncle. *Lit.* 3. 3 *Rep.* 40. *Vaugh.* 244.

Lands and tenements in fee-simple descend, first, to the eldest son as heir, and to his issue; the sons first, in order of birth; and for want of sons, to the daughters equally, who inherit as one heir; if the eldest son hath no issue, then to his next eldest brother of the whole blood, and his heirs, and for want of a brother, to his sister or sisters of the whole blood, and their issue; if there be no brother or sister, to the uncle and his issue; and for want of an uncle, to an aunt or aunts, and their issue and if there be none such, then to cousins in the nearest degree of consanguinity. *Bacon's Elem.*

And in case of lands purchased by brethren; after uncles and aunts, the lands shall descend to the father, and the half blood, and their issue, (who come in after the father, being of the whole blood to him, though not to one another) and for want of uncle, father, and half blood, to the next of kin in the collateral line. *Wood's Inst.* 218.

In descent of estates-tail, half blood is no hindrance; because the issue are in *per formam doni*, and always of the whole blood to the donee. 3 *Rep.* 41. A man hath issue an elder son, born out of the King's allegiance, and after hath another son within the realm; the younger son shall have lands by descent from his father in this case, and not the elder who had never any inheritable blood in him. 1 *Co. Inst.* 8. which *vide*. If one die seised of land, in which ano-

ther hath right to enter, and it descends to his heir; such descent shall take away the other's right of entry, and put him to his action for recovery thereof. *Stat.* 32 *Hen.* 8. *cap.* 33. *Co. Litt.* 237. But a descent of such things as lie in grant, as advowsons, rents, commons in gross, &c. puts not him who hath right to his action. 1 *Inst.* 237. 2 *Danv. Abr.* 561. And a descent shall not take away the entry of an infant; nor of a feme covert, where the wrong was done to her during the coverture. 2 *Danv.* 563.

For farther information concerning the rules of descent, see an excellent treatise on this subject by Dr. Blackstone, entitled, *The Law of Descents*. And see his *Commentaries*, 1 *V.* 193, 4. 2 *V.* 201. and 4 *V.* 406, 414. And a perfect *Table of Descents*, by which the course of descent appears at one view. 2 *V.* 240. See *Kindred and Heir*.

Descent being created by law, and the most ancient title, an heir is in by that, before a grant, or devise, &c. 'Tis a rule in law, that a man cannot raise a fee-simple to his own right heirs, by the name of heirs, as a purchase, either by conveyance or devise; for if he devise lands to one who is heir at law, the devise is void, and he shall take by descent. *Dyer* 54, 126. And 'tis the same where the lands will come to the heir, either in a direct or collateral line; or where the heir comes to an estate by way of limitation, when the word heirs is not a word of purchase. *Ibid.* A father hath two sons by several venters, and devises his land to his wife for life, and after her decease to his eldest son; tho' the son doth not take the estate presently on the death of his father, he shall be in by descent, and not by purchase, and the devise shall be void as to him. *Style* 148. 1 *Nelf. Abr.* 645. But 'tis said he may make his election, and take by devise, if he pleases.

A man being seised of lands which he had by the mother's side devised them to his heirs on the part of his mother; and it was adjudged that the devisee shall take by descent. 3 *Lev.* 127. And when the heir takes that which his ancestor would have taken if living, he shall take it by descent, and not by purchase. 2 *Danv.* 557. But generally where an estate is devised to the heir at law, attended with a charge, as to pay money, debts, &c. in such case he takes by purchase, and not by descent. Tho' conditions to pay money have been construed only a charge in equity; and that they do not alter the descent at Common law. 1 *Lut.* 593. 1 *Salk.* 241. A man can have lands no other way than by descent or purchase. And descent is the worthiest means whereby land can be acquired.

Descent of Crown-Lands. All the lands whereof the King is seised *in jure coronæ*, shall *secundum jus coronæ* attend upon and follow the crown; so that to whomsoever the crown descends, those lands and possessions descend also. And if the heir to the crown be attainted of treason; yet shall the crown descend to him, and without any reversal the attainder is avoided. *Plowd.* 247. *Co. Litt.* 15. *Sed qu.* tho' a doctrine laid down, when Henry the Seventh came to the crown? However 'tis a nice point, the doctrine will hold good, if the Prince can support himself on the throne. He may take the French King's motto, *Ultima ratio regum*, as proof demonstrative, and positive.

The dignity of the crown of England, for want of heirs male, is descendible immediately to the eldest daughter, and her posterity; and so it has been declared by act of parliament: And by *Stat.* 25 *H.* 8. *cap.* 22. *Regnum non est divisibile*. The eldest sister of a King, as well as the eldest daughter, shall inherit all his fee-simple lands by descent: And half blood is no impediment to the descent of lands of the crown. *Co. Litt.* 15, 165. But a daughter of the whole blood shall not inherit where there is a son of the half blood; as where the King hath issue a son and a daughter by one venter, and a son by another venter, and purchases lands, and dies; afterwards the eldest son enters and dies also without issue, the daughter shall not have these lands, or any other fee-simple lands of the crown, but they shall descend to the younger brother. *Plowd.* 245. 34 *H.* 6. A person coming to be King by descent of the part of his mother, makes a purchase of land to him and his heirs, and dies without issue, this land shall descend to the heir on the part of the mother;

nuances, because there is a mean or immediate estate. 1 Rep. 140. Co. Lit. 335. 3 Danv. 575.

If there be tenant in tail, remainder to his right heirs, and he makes feoffment in fee, this is a *discontinuance*; though such tenant that made the feoffment, hath the fee in him. 2 Danv. 572. A man is tenant for life, the remainder in tail, remainder in fee, and the tenant for life makes a feoffment to him in remainder in fee; this is such a *discontinuance* of the estate-tail, as produceth a forfeiture. 3 Rep. 59. If a tenant in tail be disseised, and after release with warranty to the disseisor, it will be a *discontinuance*: so if he release or confirm to tenant for life. Lit. Sect. 135. 1 Rep. 44. And if, where there is a tenant for life, and remainder in tail, the tenant for life levies a fine to his own use; and after tenant for life, and he in remainder join in a feoffment by letter of attorney, this is a *discontinuance* of the estate-tail and the fee. Dyer 327.

If tenant in tail makes a feoffment in fee upon condition, and the condition is broken, the issue may enter notwithstanding this *discontinuance*. Litt. 632. Tenant in tail grants all his estate to another, though with livery and seisin; and if that other person make a feoffment in fee, it will not be a *discontinuance* to take away the entry of him in reversion or remainder. Litt. 145. 1 Rep. 46. 10 Rep. 97. A lease is made for life, remainder in tail; and he in remainder in tail disseises the tenant for life, and makes a feoffment in fee, and dies without issue, and then tenant for life dieth; this is no *discontinuance* to him in reversion. Litt. 146. 1 Brown 36. And if tenant in tail of a rent, common, advowson, or the like, grant it in fee, it is not a *discontinuance*: nor where such tenant granteth any thing out of land, &c. Litt. 138. Finch's Law 193.

Where a tenant in tail of a manor makes a lease for life, not warranted by Stat. 32 Hen. 8. c. 28, of part of the demesnes, this is a *discontinuance* of this parcel; and it is said makes it no parcel of the manor. 2 Rol. Abr. 58. By statute, a husband is restrained from alienation, and discontinuing of the wife's land. 32 H. 8. cap. 28. And a wife, tenant in tail with the husband; or having an estate in dower, &c. from making any *discontinuance* of the lands of the husband, after his death. 11 H. 7. cap. 20. Likewise ecclesiastical persons, as bishops, deans, &c. from alienating or discontinuing their estates. 13 Eliz. cap. 10. 1 Jac. 1. cap. 3.

There can be no *discontinuance* by tenant in tail of the gift of the crown, 34 & 35 H. 8. c. 20. Nor by tenant in tail of fee farm rents, to bar the remainder vested by the statute, 22 & 23 Car. 2. c. 24. s. 6. And some *discontinuances* at Common law are now made bars as to the issue in tail; though still *discontinuances* in some cases, to him in remainder, &c. such as fines, with proclamations by statute 4 H. 7. cap. 24. 32 H. 8. cap. 36. If the husband levy a fine with proclamations, and dieth, the wife must enter, or avoid the estate of the conveyee within five years, or she is barred for ever, by the Stat. 4 Hen. 7. c. 24. For the Stat. 32 Hen. 8. cap. 28. doth help the *discontinuance*, but not the bar. 1 Inst. 326. Husband and wife tenant in special tail, the husband alone levied a fine to his own use, and afterwards he devised the land to his wife for life, the remainder over, rendering rent, &c. The husband dies, the wife enters and pays the rent, and dies: in this case it was adjudged, that the fine had barred the issue in tail, but not the wife. Dyer 351. The entry of the wife in this case was a disagreement to the estate of inheritance, and an agreement to the estate for life: but if the wife had not waived the inheritance, the estate tail as to the wife had remained. 9 Rep. 135.

If lands be given to the husband and wife, and to the heirs of their two bodies, and the husband maketh a feoffment in fee, and dieth; the wife is helped by the statute 32 H. 8. c. 28. and so is the issue of both their bodies. 1 Inst. 326. The husband is tenant in tail, the remainder to the wife in tail, the husband makes a feoffment in fee; by this, the husband, by the Common law, did not only discontinue his own estate tail, but his wife's remainder: but by statute 32 Hen. 8. c. 28. after the death of the husband without issue, the wife may enter by the said act.

Though if the husband hath issue, and maketh a feoffment in fee of his wife's land, and his wife dieth; the heir of the wife shall not enter during the husband's life, neither by the Common law nor by the statute. *Ibid.*

A *discontinuance* may be defeated, where the estate that worked it is defeated; as if a husband make a feoffment of the wife's land upon condition; and after his death, his heir enters on the feoffee for the condition broken; now the *discontinuance* is defeated, and a feme may enter upon the heir. 1 Inst. 336. The titles of *discontinuance* of estates and reverses, were formerly large titles in our books; but they are abridged by the statute law.

Discontinuance of Plea, Is where divers things should be pleaded to, and some are omitted; this is a *discontinuance*. 1 Nelf. Abr. 660, 661. If a defendant's plea begin with an answer to part, and answers no more, it is a *discontinuance*: and the plaintiff may take judgment by *nil dicit*, for what is not answered: but if the plaintiff plead over, the whole action is discontinued. 1 Salk. 139. Debt upon bond of 500*l.* the defendant as to 225*l.* part of it, pleads payment, &c. And upon demurrer to this plea, it was adjudged that there being no answer to the residue, it is a *discontinuance* as to that, for which the plaintiff ought to take judgment by *nil dicit*. 1 Salk. 180. Where no answer is given to one part, if the plaintiff pleads thereto, he cannot have judgment according to his declaration; for which reason it may be a *discontinuance* of the whole. 1 Nelf. 660. But this is helped after verdict by 32 H. 8. c. 30.

Discontinuance of Process, Is when the opportunity of prosecution is lost for that time; or the plaintiff is dismissed the court, &c. And every suit, whether civil or criminal, and every process therein, ought to be properly continued from day to day, &c. from its commencement to its conclusion; and the suffering any default or gap herein, is called a *discontinuance*: the continuance of the suit by improper process, or by giving the party an illegal day, is properly a *miscontinuance*. 2 Hawk. 298. Where an action is long depending, and continued from one term to another, the *continuances* must be all entered, otherwise there will be a *discontinuance*; whereupon a writ of error may be brought, &c. 1 Nelf. Abr. 660. If the plaintiff in a suit doth nothing, it is a *discontinuance*, and he must begin this suit again: and where it is too late to amend a declaration, &c. or the plaintiff is advised to prosecute in another court, he is to discontinue his suit, and proceed *de novo*. Com. Law Cam. Plac. 171. But a *discontinuance* of an action is not perfect till it is entered on the roll, when it is of record. Cro. Car. 236.

The plaintiff cannot discontinue his action after a demurrer joined, and entered; or after a verdict, or a writ of inquiry, without leave of the court. Cro. Jac. 35. 1 Lill. Abr. 473. In actions of debt or covenant, after a demurrer joined, the court will give leave to discontinue, if there be an apparent cause, as if the plaintiff through his own negligence is in danger of losing his debt: but if the demurrer be argued, then he shall not have leave to discontinue; nor where he brings another action for the same cause, and this is pleaded in abatement of the first action. Sid. 84. It has been ruled, upon a motion to discontinue, that the court may give leave after a special verdict; which is not compleat and final; but never after a general verdict. 1 Salk. 178. 1 Nelf. 663.

An appeal may as well be discontinued by the defect of the process or proceeding in it, as it may be by the insufficiency of the original writ, &c. For by such defect, the matter depending is as it were out of court. 1 Lill. 473. A *discontinuance* or *miscontinuance*, at Common law reverses a judgment given by default, and *discontinuance* upon a demurrer is error; but a *miscontinuance* after appearance is not so. 8 Rep. 150. 46 E. 3. 30.

Discontinuance of process is helped at Common law by appearance; and by Stat. 32 H. 8. cap. 30. All *discontinuances*, *miscontinuances* and negligences therein, of plaintiff or defendant, are cured after verdict. 2 Danv. 352. The death of the King is not a *discontinuance* of any suit; and no suit before justices of assize, or justices of peace, &c. will be discontinued by a new commission.

Stat. 1 Ed. 6. cap. 3. See 4 & 5 W. & M. c. 18. 1 Ann. Stat. 1. c. 8. On the discontinuance of suits, it is usual to give the defendant costs. See Continuance.

The plaintiff hath been allowed to *discontinue* after a special verdict, and argument thereon; and after the court have delivered their opinion; but it is discretionary in the court, and in hard actions they will not allow it. *Rep. Temp. Hardw. per Annyl, 200, 201. Beecher and Lawson.*

Discobert, Is used in the law for a woman unmarried or widow, one not within the bonds of matrimony. *Law Fr. Di.*

Discovery, Is the act of revealing or disclosing any matter by defendant in his answer to a bill filed against him in a court of equity.

A man is *not bound* to discover what may subject him to the penalty of an act of parliament. *Vern. 109. pl. 98. Mich. 1682. Bird v. Hardwick.*

But, where several are *parties in an unlawful or clandestine trade*, and one of them brings a bill of discovery against the other, it is no good plea that their answer may subject them to the penalty of an act of parliament, for by their going on in such trade, they seem to have entirely waived that unlawfulness as between themselves; so the plea was disallowed, and they were ordered to answer. *G. Equ. R. 186. Hill. 12 Geo. 1. Galsworthy v. Sidwell.*

Defendant shall not discover any thing against himself to charge himself with the penalty of a bond of arbitration. *Chanc. Rep. 142. 15 Car. 1. Bishop v. Bishop.*

The husband devised to his wife an estate and more in several goods and things, to be held and enjoyed by her during her widowhood. On a bill brought against her to discover, whether married or not, in order to prove a forfeiture of her estate, she demurred, and the bill was dismissed. *2 Chanc. Rep. 68. 24 Car. 2. Manning v. Monning.*

The difference is between *causes criminal and civil*; if an offender be once legally convicted of an offence, whereby he ought to forfeit his estate, then it is lawful and proper to prefer a bill to discover what estate in lands and goods he then had; as in case of an *outlawry* or *attainder*, &c. for that the effect of such a bill is only to discover what is forfeited already, and not to discover a cause of forfeiture. *Arg. Hard. 145.*

Discretion. (*Discretio*) When any thing is left to any person to be done according to his discretion, the law intends it must be done with sound discretion, and according to law: And the court of B. R. hath a power to redress things that are otherwise done, notwithstanding they are left to the discretion of those that do them. *1 Lill. Abr. 477. Discretion* is to discern between right and wrong; and therefore whoever hath power to act at discretion, is bound by the rule of reason and law. *2 Inst. 56, 298.* And though there be a latitude of discretion given to one, yet he is circumscribed, that what he does be necessary and convenient; without which no liberty can defend it. *Hob. 158.* The assignment of fines on offenders committing affrays, &c. And the binding of persons to the good behaviour, are at the discretion of our judges and justices of peace. *1 Hawk. P. C. 132, 138.* And in many cases, for crimes not capital, the judges have a discretionary power to inflict corporal punishment on the offenders. *1 Hawk. 445.* Infants, &c. under the age of discretion, are not punishable for crimes; and want of discretion is a good exception against a witness. *Ibid. 434. See Arg.*

Disfranchisement, Is to take away one's freedom or privileges. It is the contrary to *enfranchisement*. And corporations have power to *disfranchise* members, for doing any thing against their oaths; but not for contempts, &c. *11 Rep. 98. See Corporation.*

Disinherit, Is an old word which signifies as much as *disfranchising*; mentioned in the Stat. 20 Ed. 1. and 8 R. 2.

Disinherit, One that *disinheriteth*, or puts another out of his inheritance. *Stat. 3 Ed. 1. cap. 39.*

Dismes, (Decime) Are *tithes*, or the tenth part of all the fruits of the earth, and of beasts, or labour, due to the clergy. It signifieth also the *tenths* of all spiritual livings given to the prince, which is called a *perpetual dime*. *Stat. 2 & 3 Ed. 3. cap. 35.* And formerly this word signified a tax or tribute levied of the temporality. *Hollingsh. in H. 2. f. 111.* The laws of *dismes* or *tithes*; See *Tithes*.

Disparagement, In a legal sense was used for matching an heir in marriage under his degree, or against decency. *Co. Lit. 107. Magn. Chart. c. 6.*

Dispauper When a person by reason of his poverty, is admitted to sue *in forma pauperis*; if afterwards, before the suit is ended, the same party have any lands or personal estate fallen to him, or be guilty of any thing whereby he is liable to have this privilege taken from him, then he is put out of the capacity of suing *in forma pauperis*, and is said to be *dispaupered*. See *Forma Pauperis*.

Dispensation. By the 25 Hen. 8. cap. 21. The Archbishop of Canterbury has power of dispensing in any case, wherein dispensations (not contrary to the law of God) were formerly granted by the see of Rome; and may grant dispensations to the King, as well as to his subjects: But such dispensations shall not be granted out of the realm, &c. And during the vacancy of the see of Canterbury, the guardian of the spiritualities may grant dispensations. The Archbishop of Canterbury grants dispensations, not only in his own province, but in the province of York; and the Archbishop of York, and other bishops, dispense as they were wont to do, by the common law and custom of the realm. *Wood's Inst. 26.* Every bishop of common right has the power of institution into benefices, and of dispensing in common cases, &c. *Ibid. 505. Dispensations* to hold pluralities; see *Chaplain*.

Dispensations of the King. If a dispensation by the Archbishop of Canterbury, is to be in extraordinary matters, or in a case that is new, the King and his Council are to be consulted; and it ought to be confirmed under the broad seal. The King's authority to grant dispensations remains as it did at common law; notwithstanding the Stat. 25 H. 8. c. 21. *1 Cro. 342, 601.* The dispensation of the King, &c. makes a thing prohibited, lawful to be done by him who hath it: But *malum in se* will not admit of a dispensation. *March Rep. 213.* Where the subject hath an immediate interest in an act of parliament, the King cannot dispense with it; but where the King is intrusted with the management thereof, and the subject interested by way of consequence only, he may. *March 214, 216.* This must be where the King is, by the act itself impowered to dispense with it. When an offence wrongs none but the King; or if the suit is only the King's for the breach of a penal law, that is not to the damage of a third person, the King may dispense: But in case the suit is the King's, for the benefit of another, he cannot. *Faugh. 334, 339, 344, &c.*

The dispensing power of the King is fully considered by Dr. Blackstone. See *Com. 1 V. 142, 185, 342. 4 V. 429, 433.*

Dispensation by non obstante. Formerly if any statute tended to restrain some prerogative incident to the person of the King, as the right of pardoning, or of commanding the service of the subject for the publick weal, &c. which were inseparable from the King, by a clause of non obstante, he might dispense with it. *2 Hawk. 390.* But as in the reign of King James II. the dispensing power was carried so high as to render the execution of our necessary laws in a manner dependent on the pleasure of the Prince; by Stat. 1 W. & M. Sess. 2. cap. 2. It is enacted, That no dispensation by non obstante, of, or to any statute, or any part thereof, shall be allowed; but that the same shall be held void, and of none effect, except a dispensation be allowed in such statute. The dispensation by non obstante was brought into this kingdom by the Pope; and first used by Hen. 3. *Fryn's Animadver. on 4 Inst. fol. 129.*

Disparage, Is to scandalize or disparage. *Blount.*

Disseize, To break open a seal.—*Sepulto patre testamentum disseizatum est.* Neubrigenensis, lib. 2. c. 7.

Disseisin, (From the Fr. *Disseisin*) Signifies an unlawful dispossessing a man of his right. As where a person enters into lands or tenements, and his entry is not lawful, and keeps him that hath the estate from the possession thereof. *Bract. lib. 4. c. 3.* And *disseisin* is of two sorts; either *single disseisin*, committed without force of arms; or *disseisin by force*, but this latter is more properly *deforcement*. *Brit. cap. 42, 43.* By *Magna Charta*, 9 Hen. 3. c. 29. No man is to be *disseised* or put out of his freehold, but by lawful judgment of his peers, or the law: And by statute, the dying seised of any *disseisor* of or in any lands, &c. having no right therein, shall not be a dissein in law, to take away an entry of a person having lawful title of entry; except the *disseisor* hath had peaceable possession five years, without entry or claim by the person having lawful title. 32 Hen. 8. c. 33. But if a *disseisor* having expelled the right owner, hath such peaceable possession of the lands five years without claim, and continues in possession so as to die seised, and the land descends to his heirs, they have a right to the possession thereof till the person that is owner recovers at law; and the owner shall lose his estate for ever, if he do not prosecute his suit within the time limited by the statute of limitations. *Bac. Elem.* And if a *disseisor* levy a fine of the land whereof he is *disseised*, unto a stranger, the *disseisor* shall keep the land for ever; for the *disseisee* against his own fine cannot claim, and the converse cannot enter, and the right which the *disseisee* had, being extinct by the fine, the *disseisor* shall take advantage of it. 2 Rep. 56. But this is to be understood, where no use is declared of the fine by the *disseisee*; when it shall enure to the use of the *disseisor*, &c. by *Bridgman, C. J.* 1 Lev. 128.

If a feme sole be seised of lands in fee, and is *disseised*, and then taketh husband; in this case, the husband and wife, as in right of the wife, have right to enter, and yet the dying seised of the *disseisor*, shall take away the entry of the wife, after the death of the husband. 1 Inst. 246. If a person *disseises* me, and during the *disseisin*, he or his servant cut down the timber growing upon the land, and afterwards I re-enter into the land, I shall have action of trespass against him; for the law, as to the *disseisor* and his servants, supposes the freehold to have been always in me: But if the *disseisor* be *disseised*, or if he makes a feoffment, gift in tail, lease for life or years, I shall not have an action against the second *disseisor*, or against those who come in by title: For all the mesne profits shall be recovered against the *disseisor* himself. 11 Rep. 52. *Keilw. 1.*

A *disseisor* in assise, where damages are recovered against him, shall recover as much as he hath paid in rents chargeable on the lands before the *disseisin*. *Jenk. Cent. 189.* But if the *disseisor* or his feoffee sows corn on the land, the *disseisee* may take it whether before or after severance. *Dyer 31, 173.* 11 Rep. 46. Where a man hath a house in fee, &c. and locks it, and then departs; if another person comes to his house, and takes the key of the door, and says that he claims the house to himself in fee, without any entry into the house, this is a *disseisin* of the house. 2 *Danv. Abr. 624.* If the feoffor enters on the land of the feoffee, and makes a lease for years, &c. it is a *disseisin*, though the intent of the parties to the feoffment, was, that the feoffee should make a lease to the feoffor for life. 2 Rep. 59. If lessee for years is ousted by his lessor; this is said to be no *disseisin*. *Cro. Jac. 678.*

A man who enters on another's land, claiming a lease for years, who hath not such lease, is a *disseisor*: though if a man enters into the house of another by his sufferance, without claiming any thing, it will not be a *disseisin*. 9 H. 6. 21, 31. 2 *Danv. 625.* If a person enters on lands by virtue of a grant or lease, that is void in law, he is a *disseisor*. 2 *Danv. 630.* A lessee at will, makes a lease for years, it is a *disseisin*, at the election of the lessor at will: But it is the *disseisin* of the lessee at will, not of the lessee for years. *Hill. 7 Car. B. R.* If a man enters into the land of an infant, though by his assent; this is a *disseisin* to the infant, at his election. 11 Ed. 3. *Aff. 87.* And if a person commands another to enter upon lands, and make a *disseisin*, the commander is a *disseisor*, as well as such other; unless the command be

conditional, when it may be otherwise. 22 *Aff. 93.* 3 *Danv. 631.*

If a man forces another to swear to surrender his estate to him, and he doth so, it will be a *disseisin* of the estate. So forcibly hindring a person from tilling his land, is a *disseisin* of the land. 1 *Inst. 161.* But if one enter wrongfully into the lands of another, and he accepts rent from such person, he shall not afterwards be taken for a *disseisor*. *Dyer 173.* Where any person is disturb'd from entering on land, it is a *disseisin*: A denial of a rent, when lawfully demanded, is a *disseisin* of the rent. 1 *Inst. 153.* Also hindring a distress for rent, by force; or making rescous of a distress, are a *disseisin* of the rent. 2 *Danv. 624, 625.* An infant, or feme covert, may be a *disseisor*; but it must be by actual entry on lands, &c. A feme covert shall not be a *disseisor*, by the act of the baron: If he *disseises* another to her use, she is not a *disseisor*; nor if the wife agrees to it during the coverture: Yet if after his death, she agrees to it, she is a *disseisor*. *Ibid. 626, 627.* Assizes that lie against *Disseisors* are called *writs of disseisin*; and there are several writs of entry *in disseisin*, of which some are in the *per*, and others in the *pet*, &c. But writs of *assise on disseisin*, are now disused; and the feigned action of ejectment is introduced in their place. 'Tis not amiss to be acquainted with this learning; but *trespass* and *ejectment* supply the place of almost every kind of *assise*. See *Assise of Novel Disseisin*, and *Em.*

Disseisor, is in general he that *disseises* or puts another out of his land, without order of law: And a *disseisee* is he that is so put out. 4 H. 4. As the King in judgment of law can do no wrong, he cannot be a *disseisor*. 1 E. 3. 8. A *disseisor* is to be fined and imprisoned; and the *disseisee* restored to the land, &c. by Stat. 20 H. 3. c. 3. Where a *disseisor* is *disseised*, it is called *disseisin* upon *disseisin*.

Disseisers, Are separatists from the church, and the service and worship thereof. At the Revolution a law was enacted, That the statutes of Q. Eliz. and K. James I. concerning the discipline of the church, should not extend to *Presbyterian disseisers*: But the persons dissenting, are to subscribe the declaration of 30 Car. 2. c. 1. and take the oaths, or the declaration of fidelity, &c. And they must not hold their meetings, till their place of worship is certified to the bishop, &c. or to the justices at their quarter-sessions, and registered there; also they are not to keep the doors of their meeting-houses locked, &c. If any person disturbs them in their worship, on conviction at the sessions, he shall forfeit 20 l. Stat. 1 W. & M. c. 18. f. 18. And there are a great many statutes relating to *disseisers* besides the toleration act: As the 5 & 6 Ed. 6. c. 1. 23 Eliz. c. 1. 3 Jac. 1. c. 24. 13 Car. 2. c. 1. 17 Car. 2. c. 2. and 22 Car. 2. c. 1. 1 W. & M. c. 18. 10 Ann. c. 2. 1 Geo. 3. c. 6, &c. See *Church*, &c.

Distillers, Of strong waters and spirits, setting up any tun, cask, &c. or using any private warehouse or cellar, without notice given to the officer of excise, shall forfeit 20 l. and 10 l. for working stills, but at such appointed hours, to be levied by warrant of two justices of peace. Stat. 3 W. & M. c. 13. 10 & 11 W. 3. c. 4. 21. If any distiller shall use a private pipe for conveyance of distilled liquor, he forfeits 100 l. And private stills to be seized, for which a search may be made by officers of excise by virtue of a justice's warrant. 10 & 11 W. 3. c. 4. *Distillers*, &c. are to make an entry of all warehouses for keeping brandy, on pain of 20 l. and forfeiture of the liquors; and brandy shall not be sold but in warehouses and places entered, under the penalty of 40 s. per gallon, by Stat. 6 Geo. 1. c. 20. All mixed or compound waters or spirits, commonly called *cordons*, &c. in the possession of *distillers*, are liable to a duty of 5 s. per gallon; and enow to be made of stills, &c. under penalty of 20 l. And none of the said mixed liquors shall be exposed to sale, but in some place that is entered, on pain of forfeiting 20 s. a gallon; and if any *distiller*, *distill*, or sells any spirits, not of full proof he shall pay the like forfeiture: Also sellers or retailers of any compound liquors, in less quantities than a gallon, are to take out a licence at the excise-office for the same, and

and pay down 20*l.* and selling without such licence, to forfeit 50*l.* Selling brandy about streets, in any wheelbarrow, or on a shed, or other place, incurs a penalty of 10*l.* leviable by justices of peace: But this act shall not extend to arrack, rum, citron water, Irish usquebaugh, &c. *Stat. 6 Geo. 2. c. 17.*

The duty on compound waters or spirits, and French brandy, &c. taken off, and duties granted of 1*s.* and 2*s.* per gallon, to be raised in the same manner as excise upon beer, and ale, &c. And distillers or other persons may export spirits, drawn from corn of Great Britain, on oath, and that duties are paid, and shall be allowed a drawback of 4*l.* 18*s.* per ton, &c. Cyder used in distillation, is exempted from duty; but distillers using it otherwise, shall forfeit 5*l.* *Stat. 6 Geo. 2. cap. 17.* No distillers or others, shall retail any brandy, rum, arrack, Geneva, &c. by any name, in any less quantities than two gallons, without taking out a licence, and paying 50*l.* to the next office of excise, &c. on pain of forfeiting 100*l.* and shall pay 20*s.* per gallon: And the retailers to make a true entry of all their warehouses, shops, cellars, and the liquors therein, under the penalty of 20*l.* and 40*s.* for every gallon concealed, or making any clandestine increase, &c.

Officers for the duties may enter warehouses, &c. and take an account of liquor; and persons refusing them entrance shall forfeit 50*l.* None may contract with any workman or servant, to pay him his wages, so much in money, and the rest in brandy, &c. And hawkers and sellers of brandy about the streets, &c. to forfeit 10*l.* or be committed for two months. But physicians and apothecaries, may use spirituous liquors in medicines for sick persons; and distillers may exercise any other trade. *9 Geo. 2. c. 23.* Where any persons are not able to pay the fines, commissioners of excise to advance the rewards for information out of money in their hands; and the offenders to be committed to the house of correction, and there stript naked from the middle and whipped, &c. *Stat. 10 Geo. 2. c. 17.* Occupiers of any house or place, where any spirituous liquors shall be sold less than two gallons, if privy thereto, are to be deemed retailers thereof, and forfeit 100*l.* And if any persons to the number of five or more, in a riotous manner assemble to rescue offenders, or to assault, beat or wound informers, they shall be adjudged guilty of felony, and be transported. *11 Geo. 2. c. 26.*

By the 16 *Geo. 2. c. 8.* Great duties laid on spirituous liquors by former statutes, and on licences for retailing the same, are repealed, and other duties granted; and no persons shall retail any distilled spirituous liquors, or strong waters, in publick or private, without taking out a licence from the commissioners of the excise, &c. and paying 20*s.* yearly, on pain of forfeiting 10*l.* or to be committed to the house of correction, and there kept to hard labour two months. These licences are not granted to any persons, but those only that keep taverns, inns, ale houses or coffee-houses; and they must be first licensed to sell ale or spirituous liquors by two or more justices of peace, to be enabled to retail such liquors: But none shall be deem'd a retailer, who does not sell it to be drank in any place belonging to him, or send it abroad, in less quantities than a pint. *Stat. 16 Geo. 2. cap. 8.* By the *Stat. 17 Geo. 2. c. 17.* All penalties by the *Stat. 16 Geo. c. 8.* and by this act imposed, may be sued for, recovered, levied, and mitigated by such ways and means as any penalty may be sued for by any law of excise: But the justice may, if he think proper, instead of levying the penalty, commit the offender to the house of correction, to be kept to hard labour for two months, and be whipt before discharged.

Licences granted as aforesaid to any person, who shall afterwards, during the continuance of his licence, exercise the trade of a distiller, grocer, or chandler, or keep a distillery shop for sale of spirituous liquors, shall be void, and the offender forfeit 10*l.* Every person, who shall retail spirituous liquors to be drank in his house, &c. or retail or send the same abroad in less quantities than two gallons, without a licence, shall be deemed a retailer, and forfeit 10*l.* for every offence. Where offenders are

not able to pay the penalties, but in lieu thereof are sent to the house of correction, the commissioners of excise may order a reward to the informer, not exceeding 5*l.* by the *Stat. 20 Geo. 2. c. 39.*

Distillers within the bills of mortality may have licences on payment of 5*l.* yearly. Distillers in partnership to have but one licence. And no distiller shall have a licence, unless, inhabiting in the city of London, he pay to church and poor rates, for the value of 20*l.* and in any other parts for the value of 10*l.* in the parish he exercises his said trade: And he shall not, by virtue of such licence, retail spirituous liquors but in his own shop, under the penalty of 10*l.* And if he sells any spirituous liquors to be drank, or suffer it to be drank in his shop, he shall forfeit 10*l.* All such penalties to be sued for, &c. as above is mentioned. And every person found tipling in a distiller's shop, shall forfeit 20*s.* And by the *Stat. 19 Geo. 2. c. 12.* additional duty is laid on spirituous liquors.

By *Stat. 24 Geo. 2. c. 40.* No distiller shall have a licence to sell spirituous liquors. And no person shall be licensed: but such as pay to church and poor. By *Stat. 26 Geo. 2. c. 13.* Commissioners, &c. within the limits of the head office of excise in London, may grant licences for retailing spirituous liquors to persons renting houses of 12*l.* per annum, though not rated to the poor's rate. By the *Stat. 24 Geo. 2. c. 40.* Distillers selling spirituous liquors to be unlawfully retailed, or to unlicensed retailers, shall forfeit treble the value of the liquors. And for the laying an additional duty upon spirituous liquors, and restraining the retailing of spirituous liquors; see farther in the said *Stat. 24 Geo. 2. c. 40.* and *26 Geo. 2. c. 13.* See also *Stat. 33 Geo. 2. c. 9.* who are to be deemed common distillers, and for the penalty on malt distillers making gin.

N. B. On the *Stat. 16 Geo. 2. c. 8.* there were many debates in the House of Lords, and the Bishops strongly opposed the bill, it being to lay a small duty per gallon, on the liquor at the still head, and a licence to cost but 20*s.* to be granted only to such as had licences to sell ale, whereby greater opportunities were given to the poor, to come at pernicious spirituous liquors, contrary to the end proposed by those who favoured the bill. See *Debates in the house of Lords, 8 Vol. from fo. 349, to 415, inclusive.*

Distress, (Distressio). Signifies most commonly any thing which is taken and distrained for rent behind, or other duty: And by the common law, distresses for rent were not to be sold, but only detained for enforcing payment of the rent; but this is altered by statute. A man may take a distress for homage, fealty, or any services; for fines and amercements; and for damage-feasant, &c. And the effect of it is to compel the party either to replevy the distress, and contest the taking in an action against the distrainer; or, which is more usual, to compound and pay the debt or duty, for which he was distrained.

There are likewise distresses in actions compulsory to cause a man to appear in court: And of these there is a distress personal, of a man's moveable goods, and profits of lands, &c. for contempt in not appearing after summon'd; and distresses real, upon immoveable goods. And none shall be distrained to answer for any thing touching their freeholds, but by the King's writ. *52 Hen. 3. c. 1.*

Distress is also divided into finite and infinite: Finite, is that which is limited by law, how often it shall be made to bring the party to trial of action, as once, twice, &c. And infinite, is without limitation, until the party appears; which is likewise applicable to jurors not appearing: Then it hath had a further division into a grand distress, and ordinary distress; the former whereof extends to all the goods and chattels which the party hath within the county. *F. N. B. 904. Old Nat. Br. 43, 113. Brit. c. 26. p. 52.*

Hervin is to be considered:

- I. Who may distrain, and for what.
- II. At what time and in what manner the distress should be made.

I. Who may distrain, and for what.

Of common right a person may distrain for rents, and all manner of services; and for rent reserved upon a gift in tail, lease for life, years, &c. though there be no clause of *distrain* in the deed, so as the reversion be in himself: But on a feoffment in fee, a *distrain* may not be taken, unless expressly reserved in the deed. 1 *Inst.* 57, 205. *Doctor and Student*, cap. 9. See *Co. Lit.* 204.

A man grants a rent out of the manor of D. and further, that if the rent be behind, the grantee shall distrain for it in the manor of S. this is a rent of the manor of D. and only a penalty on the other manor. 1 *Shep. Abr.* 567. If a person seised of land in fee, demise it to one upon condition to pay his wife 5 l. a year rent, and if it be behind and in arrear, that he shall distrain for it; the wife may take a *distrain* for the rent. *Dyer* 3, 48. There is a lord and tenant by 3 l. rent and fealty, the lord dies, and his wife is endowed of the thirds of the feignory; here she may distrain for one pound, and the heir for two pounds: So if a rent be divided amongst parceners, each of them may have a *distrain* for her part; but this may not be till the partition is made. *Bro.* 45.

If one jointenant make a gift in tail, of the land, reserving a certain rent, and the rent be in arrear; he may not distrain the beasts of the other jointenant. 33 *H. 6.* 35. But if A. and B. are tenants in common, and A. leases his moiety to C. for years, rendering rent, and C. lease it to B. if the rent is behind, A. may take a *distrain* of the cattle of B. his fellow tenant in common. 7 *Rep.* 23. *Moor* 558. To justify taking a *distrain*, the party must see he hath good cause to distrain; that he have power to take the *distrain*, and from the person from whom he takes it; that the thing for the quality of it, be distrainable, and he distrain it in due time and place, &c. He who takes a *distrain* for another, ought to have good warrant for doing of it; and must do it in his name: And a bailiff or servant, may distrain for his master. 1 *Cro.* 748. 2 *Cro.* 436. *Godb.* 110. A *distrain* ought to be made of such things whereof the sheriff may make replevin, and deliver again in as good plight and condition as they were at the time of the taking. 1 *Inst.* 47.

Distraints are to be of a thing valuable, whereof some body hath a property; things *feræ naturæ*, as dogs, conies, &c. may not be distrained. 1 *Roll. Abr.* 664, 666. It is the same of cattle of the plough, beasts of husbandry, sheep, or horses joined to a cart, with a rider upon it. 1 *Vent.* 36. This means a *distrain* for rent, &c. contra of a *distrain* *damage feasant*.

But it has been adjudged that horses may be taken from a cart loaded; though it has been a disputed case, whether they could be separated. *Sid.* 422. *Raym.* 18. A horse with a rider upon his back; or a horse in an inn, or put into a common; an ax in a man's hand, cutting down wood; or any thing a person carries about him; utensils and instruments of a man's trade or profession, or the books of a scholar; corn in a mill, or goods in a market to be sold for the use of the publick; materials in a weaver's shop, for making of cloth; another person's garment in the house of a tailor, &c. are not distrainable: Nor is any thing that is fixed to the freehold of a house, as a furnace, doors, windows, boards, &c. 1 *Sid.* 422. 440. 1 *Inst.* 47. 2 *Danv. Abr.* 641.

But goods, cattle, not of the plough, &c. sheaves of corn; corn in the straw, or threshed; and carts with corn, (but not victuals) hay in a barn, or ricks of hay, money in a bag sealed, though not out of a bag, &c. may be distrained for rent: And so may cattle or goods driving to market, if put into a pasture by the way, and beasts of a stranger, in the landlord's ground, being *levant and couchant*, and having well rested themselves there. 1 *Inst.* 47. 1 *Lutw.* 214. *Mod.* 385. If a driver of cattle asks leave of the lessor to put his cattle into ground for a night, and he gives leave, as well as the lessee; yet 'tis said he is not concluded from distraining them for rent. 2 *Vent.* 59. 2 *Danv.* 642.

Relief given in equity in these cases. See *Chancery.* 2 *Vern.* 129. But the goods of a carrier are privileged, and cannot be distrained for rent, though the waggon wherewith loaded, is put into the barn of a house, &c. on the road. 1 *Salk.* 249. If the fences of another man's

ground be out of repair, and the neighbour's cattle escape there, and are *levant and couchant*, without any fresh pursuit after them, they may be distrained for rent; for the land is debtor for the rent, and the landlord must resort thither, and is not to inquire whose cattle they are which he finds therein. 1 *Roll. Rep.* 124. 1 *Nelf. Abr.* 667. But if the owner freshly pursues the cattle, they are not distrainable; because they are supposed to be always in his view and possession.

If the owner of the cattle is to maintain the fences, in such case, if they escape into another's ground, they may be distrained before *levant and couchant*, and notwithstanding fresh pursuit. 1 *Nelf. Ibid.* And *distraints* for rent are to be reasonable, and not excessive; and not to be taken in the King's highway, or the common street; or in the ancient fees of the church. 51 *H. 3.* 4. 52 *H. 3.* c. 15. 9 *Ed. 2.* 1. c. 9. And where a *distrain* is taken, it may be replevied in five days; if the tenant and owner of the goods do not in that time after taken, and notice given, and of the cause, left at the dwelling-house, &c. replevy the same according to law; then the person distraining may with the under sheriff of the county, or constable of the place, &c. (who are required to be assisting) cause the goods to be appraised by two sworn appraisers, and sold to satisfy the rent, &c. leaving the overplus in the constable's hands for the use of the owner. *Stat. 2 W. & M. c. 5.*

All *distraints* for rent must be made on the premises, by the common law; But by statute, if any tenant fraudulently removes goods from off the premises, the landlord may in five days seize such goods wheresoever found, as a *distrain* for the rent in arrear; unless the goods are sold for a valuable consideration before the seizure. 8 *Ann. c. 17.* By 11 *Geo. 2. c. 19.* thirty days allowed. And whereas before that statute, for rent due the last day of the term, the lessor could not distrain; because the term ended before the rent was due; (and the lessee had the whole day to pay it); and it was the same, where the lessee held over his term, for rent incurred during the term. *Co. Litt.* 47. Now by the stat. 8 *Ann. c. 17.* where leases are expired, a *distrain* may be taken, provided it be done within six months, and during the landlord's title and tenant's possession.

Distraints for services are to be on the land: But for an amercement in a leet, the *distrain* may be taken any where within the hundred, as well out of the land, as on it, wherever the cattle are of him that is amerced; for the amercement charges only the person, and not the land; and for this a *distrain* may be taken in the high street. 2 *Danv. Abr.* 644, 645. The lord cannot distrain for amercements in a court-baron, without a prescription; though he may in the leet: And the goods and cattle of another, may not be taken in *distrain* on any ground, for an amercement, &c. set upon me in a court-leet or court-baron. 11 *Rep.* 44. 12 *H.* 7. 13. For services a *distrain* cannot be taken but where the services are certain; or may be reduced to a certainty. *Ca. Litt.* 96.

II. At what time, and in what manner, the *distrain* should be made.

A *distrain* for rent cannot be made in the night: Nor may gates, &c. be broke open to make a *distrain*; or the landlord enter into the tenant's house for that purpose, unless the doors are open. 1 *Inst.* 142, 161. One may break an inner door of a house, &c. to take the *distrain*; if the outer doors be open. *Camb.* 17. *Rep. Temp. Hardw.* *Annals.* p. 168. *Browning v. Darn* and others. Where a landlord comes to distrain cattle, which he sees on the tenant's ground, if the tenant, or any other, to prevent the *distrain*, drives the cattle off the land, the landlord may make fresh pursuit, and distrain them: Tho' if before the *distrain*, the owner of the cattle renders his rent, and a *distrain* is taken afterwards, it is wrongful. 1 *Inst.* 107, 160.

Two *distraints* cannot be taken for one rent, if there were sufficient goods when the first *distrain* was made; but if there were not then a sufficient *distrain*, there may. *Cro. El.* 13. *Lutw.* 1536. But by stat. 17 *Car. 2. cap. 1.* When the value of cattle distrained shall be found not to be of the value of the arrears of rent, for which the

distress taken, the person distraining, his executors, &c. may take further *distresses*, for such arrears. 1 *Nelf.* 670.

A *distress* of cattle must be brought to the common pound, or be kept in an open place; and if they are put into a common pound, the owner is to take notice of it at his peril; but if in any other open place, notice is to be given to the owner, that he may feed them; and then if the cattle die for want of food, the tenant shall bear the loss; and the landlord may distrain again for his rent. 5 *Rep.* 90. 1 *Inst.* 47, 96. See *infra*. Where one impounds cattle distrained, he cannot justify the tying them in the pound: If he ties a beast, and it is strangled, he must answer it in damages. 1 *Salk.* 248. If the person distraining put the *distress* in a broken pound, and the *distress* escapes, he can have no action for the same: 'tis otherwise if from another pound, without his default, when he may have action of trespass. *Salk.* *Ibid.* By statute, none shall drive a *distress* out of the county, on pain to be fined and amerced: and no *distress* of cattle shall be driven out of the hundred where taken to any pound, except to a pound overt in the same county, and not above three miles distant; nor shall any *distress* be impounded in several places under the penalty of 5*l.* and treble damages. 32 *H. 3. c. 4.* 1 *P. & M. cap. 12.*

After a *distress* is in the pound, it is said to be in *custodia legis*, so that the owner of it hath no absolute property therein; and therefore he cannot sell or forfeit it, nor may the same be taken in execution, &c. but it must be as a pledge or means to help the party distraining to his debt or duty. *Co. Litt.* 190. *Finch's Ley* 135. Cattle distrained may not be used, because by law they are only as a pledge; unless it be for the owner's benefit, by milking, &c. 2 *Cro.* 148.

When a *distress* is taken of household goods, or other dead things, they are to be impounded in a house, or other pound covert, &c. And if the *distress* is damaged, the distrainer must answer it. *Wood's Inst.* 191. And they are to be removed immediately; except corn or hay, by Stat. 2 *W. & M. sess. 1. cap. 5.* But if a landlord doth not remove goods immediately, but quits them till another day, during which time they are taken away, it is not a rescous, for want of possession. *Mod. Ca.* 215. 1 *Nelf.* 672. See the next head.

Where goods are unlawfully distrained, the owner may rescue them, before they are impounded; but not afterwards. 1 *Inst.* 47. But the safest way is to replevy, as there are few cases in law, where a man is allowed to be his own judge, if any. If lands lie in several counties, a *distress* may be made in one county for the whole rent. 1 *Inst.* 154. And if a landlord comes into a house, and seizes upon some goods as a *distress*, in the name of all the goods in the house; this is a good seizure of all. 6 *Mod.* 215. If any *distress* and sale be made where there is no rent due, the owner of the goods distrained shall recover double the value of the goods, and full costs, by 2 *W. & M. Sess. 1. c. 5.* Also by the Common law, if a lord or other person shall distrain several times for his service or rent, when none is in arrear, the tenant may have an *assise de sovrein distress*, &c. *F. N. B.* 176. See *Recapition, Replevin and Rescous*.

By the Stat. 27 *Geo. 2. c. 20.* Justices in their warrants of *distress*, are to limit a time for the sale of the goods; the constable making such *distress* may deduct the reasonable charges of detaining, keeping, and selling such *distress*, out of the money arising by the sale; and the overplus, if any, after such charges, and also the penalty or sum of money, shall be fully paid, shall be returned to the owner of the goods distrained; and the constable, if required, shall shew the warrant to the party whose goods are distrained, and suffer a copy thereof to be taken.—This act not to alter, or repeal the statutes, 7 & 8 *W. 3. c. 34.* and 1 *Geo. 1. c. 6.* relating to *Distresses on Quakers for Tithes and Church Rates*. See the Statutes 2 *W. & M. sess. 1. c. 5.* 6 *Ann. c. 14.* 8 *Ann. c. 14.* and 11 *Geo. 2. c. 19.*

Distress for rent by 11 *Geo. 2. c. 19.* which has much altered our law in this case: if any tenant of lands or tenements shall fraudulently carry away his goods, to prevent *distress*, the landlord may, within thirty days after,

distrain them where-ever they shall be found, as if they had been on the premises; but no such goods shall be distrained, if sold *bona fide* for valuable consideration before seizure, to any person nor privy to the fraud. Tenants committing such fraud, or others assisting, shall forfeit double the value of the goods carried off, to be recovered by action of debt, &c. And where they shall not exceed 50*l.* value, the landlord may exhibit a complaint before two justices of peace, who are to examine the fact, and enquire into the value of the goods, and thereupon order the offender to pay double value, leviable by *distress* and sale; and for want thereof, commit the offender to the house of correction for six months. Landlords, or their agents, may, with the assistance of a constable, seize any goods fraudulently concealed in any house, outhouse, &c.

And in case of a dwelling-house, on oath first made to some justice, of reason to suspect that such goods are therein, may break open the same, and distrain them: they may also distrain for rent and cattle, or stock of their tenants, feeding in any common; or corn, grass, hops, fruits, &c. growing on the land, which they shall cut, gather, cure and lay up when ripe, in any proper place, giving notice to the tenant within a week where lodged, and dispose thereof towards the satisfaction of the rent and charges; the appraisement to be taken when cut or cured: but if after a *distress* so taken, before the product be ripe and gathered, the tenant shall pay the rent, and charges of the *distress*, the said *distress* shall cease. Persons may secure *distresses* lawfully taken, and sell them upon the premises in like manner as may be done off the same, by 2 *W. & M. Sess. 1. c. 5.* And any persons may go to and from the premises, to view, appraise, buy, or take away the goods of the purchaser; and if a rescous be made for the *distress*, the persons aggrieved shall have the remedy given by the said statute. *Distresses* made for rent justly due, shall not be unlawful, nor distrainers, trespassers *ab initio*, for any irregularity in the disposition thereof; but the parties grieved to have satisfaction for special damage, in an action of the case, &c. But no tenant shall recover by such action, if tender of amends hath been made before the action brought. And in all actions of trespass, or on the case relating to the entry, *distress*, or sale, made by landlords for rents, the defendants may plead the general issue, and if the plaintiffs become non-suit, &c. shall recover double costs of suit. Stat. 11 *Geo. 2. c. 19.* See *Least*. Vide the Statute.

Distress of the King. By the Common law no subject can distrain out of his fee or seignory; unless cattle are driven to a place out of the fee, to hinder the lord's *distress*, &c. But the King may distrain for rent service, or fee-farm, in all the lands of the tenant where-soever they be; not only on lands held of himself, but of others: where his tenant is in actual possession, and the land manured with his own beasts, &c. 2 *Inst.* 132. 2 *Danv. Abr.* 643.

Distress of a Town. If a town be assessed to a certain sum, a *distress* may be taken in any part, subject to the whole duty. 2 *Danv.* 643.

Distribution of intestates estates, according to the 22 & 23 *Car. 2. c. 10.* may be sued for as well in the Chancery, as in the Ecclesiastical Court: and if the persons appointed to have it, die before a *distribution* made, their shares go to their executors, &c. 2 *Chan. Rep.* 374. Where the remainder or surplus of an estate, not disposed of by will, shall go and remain to the next of kin, by the statute of *distributions*. Vide 2 *Fern.* 361, 676. See *Administrator*, also *Executor* and *Intestates*, and 29 *Car. 2. c. 3.* 1 *Jon.* 2. c. 17. and 14 *Geo. 2. c. 20.*

Distributione Saccarid. A Statute so called. 51 *H. 3. c. 4.*

Distress (*districus*). A territory, or place of jurisdiction: the circuit wherein a man may be compelled to appear; also the place in which one hath the power of distraining: and where we say *hery de seu fee*, out of the fee, it has been used for *extra districtum suum*. *Brit. c.* 120.

Distringas. Is a writ directed to the sheriff, or other officer, commanding him to distrain a man for a debt to the King, &c. or for his appearance at a day. There is a great

a great diversity of this writ; which was sometimes of old called *constringas*. F. N. B. 138. There is also a *distingas* against persons intitled to privilege of parliament.

Distingas Juratores, Is a writ directed to the sheriff, to distrain upon a jury to appear; and return issues on their lands, &c. for non appearance. Where an issue in fact is joined to be tried by a jury, which is returned by the sheriff in a panel upon a *venire facias* for that purpose; thereupon there goes forth a writ of *distingas jurator*, to the sheriff, commanding him to have their bodies in court, &c. at the return of the writ. 1 Lill. Abr. 483. And the writ of *distingas jur* ought to be delivered to the sheriff so timely, that he may warn the jury to appear four days before the writ is returnable, if the jurors live within forty miles of the place of trial; and eight days if they live farther off. *Ibid.* 484. There may be an *alias*, or *pluries distingas jur* where the jury doth not appear.

Dividends of Bankrupts Effects. Assignees within twelve months after commission issued, to give twenty-one days notice of a meeting for a dividend, then produce their accounts, and verify them on oath if required, when the commissioners are to direct a dividend. Within eighteen months after the commission, a final dividend is to be made. See *Black. Com.* 2 P. 487, 488, and the statutes concerning Bankrupts.

Dividend in the Exchequer, Is taken for one part of an indenture. 10 Ed. 1. c. 11.

Dividend in the University, Is that part or share which every one of the fellows do justly and equally divide among themselves of their annual stipend.

Dividend in Law Proceedings, A dividing of fees and perquisites between officers arising from writs, &c. *Practif. Solic.*

Dividend of Merchants, Is where a just share of profits in trade, is assigned to any one.

Dividend in Stocks, A dividable proportionate share of the interest of stocks, erected on publick funds; as the South Sea, India, Bank, and African stocks, &c. payable to the adventurers half yearly.

Divisa, Hath various significations: sometimes it is used for a device, award or decree: sometimes for devise of a portion or parcel of lands, &c. by will: and sometimes it is taken for the bounds or limits of division of a parish, or farm, &c. As *divisas perambulare*, to walk the bounds of a parish; in which sense it has been extended to the division between countries, and given name to towns, as to the *Devises*, a town in Wiltshire, situate on the confines of the West Saxon and Mercian kingdoms. *Leg. H. 2. cap. 9. Leg. Inæ, c. 44. Leg. H. 1. c. 57. Cowel.*

Distil on the Neck. A tormenting engine made of iron, straitening and winching the neck of a man with his legs together, in a horrible manner, so that the more he stirreth in it the straiter it presseth him; formerly in use among the persecuting papists. Fox's Acts sub R. H. 8.

Divorce, (*divortium a divorcendo*) Is a separation of two, de facto married together, made by law: it is a judgment spiritual; and therefore if there be occasion, it ought to be reverfed in the spiritual court. *Co. Lit.* 335. And besides sentence of divorce; in the old law, the woman divorced was to have of her husband a writing called a bill of divorce, which was to this effect, viz. *I promise that hereafter I will lay no claim to thee, &c.*

There are many divorces, mentioned in our books; as *causa præcontractus*; *causa frigiditatis*; *causa consanguinitatis*; *causa affinitatis*; *causa professionis*, &c. But the usual divorces are only of two kinds, i. e. a *mensa & thoro*, from bed and board; and a *vinculo matrimonii*, from the very bond of marriage. A divorce a *mensa & thoro* dissolveth not the marriage; for the cause of it is subsequent to the marriage, and supposes the marriage to be lawful: this divorce may be by reason of adultery in either of the parties, for cruelty of the husband, &c. And as it doth not dissolve the marriage, so it doth not debar the woman of her dower; or bastardise the issue, or make void any estate for the life of husband and wife, &c. 1 *Inst.* 235. 3 *Inst.* 89. 7 *Rep.* 43. The woman under separation by this divorce, must sue by her next friend; and she may sue her husband in her own name for alimony. *Wood's Inst.* 62.

A divorce a *vinculo matrimonii*, absolutely dissolves the marriage, and makes it void from the beginning, the causes of it being precedent to the marriage; a præcontract with some other person, consanguinity or affinity, within the Levitical degrees, impotency, impuberty, &c. On this divorce dower is gone; and if by reason of præcontract, consanguinity, or affinity; the children begotten between them are bastards. 1 *Inst.* 335. 2 *Inst.* 93, 687. But in these divorces, the wife, 'tis said, shall receive all again that she brought with her, because the nullity of the marriage arises through some impediment; and the goods of the wife were given for her advancement in marriage, which now ceaseth: but this is where the goods are not spent; and if the husband give them away during the coverture without any collusion, it shall bind her: if she knows her goods unspent, she may bring action of detinue for them; and as for money, &c. which cannot be known, she must sue in the spiritual court. *Dyer* 62. *Nelf. Abr.* 675. This divorce enables the parties to marry again. But in the other cases, if either party wants to marry any other person, a power for so doing must be obtained by act of parliament.

Where lands were formerly given to husband and wife, and the heirs of their bodies in frank marriage; if they had been afterwards divorced, the wife was to have her whole lands; and by divorce an estate tail of baron and feme, 'tis said, may be extinct. *Godb.* 18. After sentence of divorce is given in the spiritual court *causa præcontractus*, the issue of that marriage shall be bastards, so long as the sentence stands unrepealed: and no proof shall be admitted at Common law to the contrary. 1 *Inst.* 235. 1 *Nelf.* 674. And issue of a second marriage in such case, may inherit until the sentence is repealed. 2 *Leon.* 207. Though it is not so where the divorce is a *mensa & thoro*, for adultery, &c. in which case the marriage still continues. *Cro. Car.* 462. And if after a divorce a *mensa & thoro*, either of the parties marry again, the other being living, such marriage is a mere nullity; and by sentence to confirm the first contract, she and her first husband become husband and wife to all intents, without any formal divorce from the second. 1 *Leon.* 173. Also on this divorce, as the marriage continues, marrying again while either party is living, hath been held within the statute, 1 *Jac.* 1. c. 11. Felony, for having married a second husband or wife, the former being alive; where a woman was divorced, and inhibited by the statute not to marry during her husband's life. *Cro. Car.* 333. 1 *Nelf.* 674.

A divorce for adultery was anciently a *vinculo matrimonii*; and therefore in the beginning of the reign of Queen Elizabeth, the opinion of the church of England was, that after a divorce for adultery, the parties might marry again; but in *Foliambe's* case, *H. 44. El.* in the star-chamber, that opinion was changed; and archbishop Bancroft, by the advice of divines, held, that adultery was only a cause of divorce a *mensa & thoro*. 3 *Salk.* 138.

On a divorce a *vinculo matrimonii*, by reason of præcontract, &c. the parties may marry again: and in divorces for adultery, several acts of parliament have allowed the innocent party to marry again. Sentence of divorce must be given in the life of the parties, and not afterwards: but it may be repealed in the spiritual court, after the death of the parties. 1 *Inst.* 33, 244. 7 *Rep.* 44. 5 *Rep.* 98. Upon the divorce of a man and his wife, equity will not assist the wife in recovering dower, at the husband's death, but shall leave her to the law; neither ought the spiritual court to grant her administration, she not being such a wife as is intitled to it; nor will the Chancery decree her a distributive share. *Preced. Canc.* 111, 112. A divorce shall be tried by the bishop's certificate; and not by a jury.

Disturnal, Signifies as much land as can be ploughed in a day, with an ox; in some authors, it is written *diuturna*. Blount.

Docket, or Dogget, Is a brief in writing on a small piece of paper or parchment, containing the effect of a greater writing. 2 *U. 3 P. & M. cap.* 6. *West Symbol.* par. 2. *feff.* 106. And when rolls of judgments are brought into C. B. they are docketed, and entered on the docket of that term; so that upon any occasion you may soon find

out a judgment, by searching these *dockets*, if you know the attorney's name. Exemplification of decrees in Chancery are also *docketed*. See *Practif. Astorn* edit. 1. p. 155. 166.

Dogs. The law takes notice of a greyhound, mastiff dog, spaniel and tumbler; for wrover will lie for them. 1 Cro. 125. 2 Cro. 46. A man hath a property in a mastiff, and where a mastiff falls on another dog, the owner of that dog cannot justify the killing the mastiff, unless there was no other way to save his dog, as that he could not take off the mastiff. 1 S. 84. 3 Salk. 139. The owner of a dog is bound to muzzle him if mischievous, but not otherwise; and if a man doth keep a dog, that useth to bite cattle, &c. if after notice given to him of it, his dog shall do any hurt, the master shall answer for it. *Ibid.* By Stat. 18 Geo. 3. c. 18. Very severe penalties are inflicted on dog-stealers.

Doctrines, illegal, affecting, or publishing. Several statutes have been made on this subject, as to the publication of news, &c. See 13 Car. 2. c. 1. 1 Edm. c. 3. 13 Eliz. c. 1. 6 Ann. c. 7. And also see *Blount* P. C. 60. as to misprison against the King's person and government, by speaking or writing against them, &c. and *Black. Com.* 2. p. 123.

Dog-Days, (die caniculares). Are the hottest time of the year, by reason the sun is then in Leo: they are reckoned sixty-four in all, *tertius idus Julii usque ad idus Septembris*.

Dog-days. Is a manifest depredation of an offender against venison in a forest, when he is found drawing after a deer, by the scent of a hound led by his master, or where a person hath wounded a deer, or wild beast, by shooting at him, or otherwise, and is caught with a dog drawing after him to receive the fangs. *Mansfield*, par. 2. cap. 8.

Dogger. A light ship or vessel; as a Dutch dogger, &c. Stat. 31 Ed. 3. cap. 1.

Dogger-ships. Are ships brought in these ships. Stat. *ibid.*

Dogger-ships. Fishermen that belong to dogger-ships. 25 H. 8. c. 2.

Doggin, or dait. Was a base coin of small value, prohibited by the Stat. 3 Off. 5. c. 1. We still retain the phrase, in common saying, when we would undervalue a man, *that he is not worth a dait*.

Do Latu, (facere legem) Is the same with to make law. Stat. 23 H. 8. c. 12.

Dole, (dole) A Saxon word signifying as much as part or portion in the law; and anciently where a meadow was divided into several shares, it was called a *dole meadow*. 4 Jac. 1. cap. 13. See *Dalus*.

Doleful, Dole is to be the share of *gab*, which the *gabmen*, yearly employed in the North Sea, do customarily receive for their allowance. Stat. 35 H. 8. c. 7.

Dolehouse, (law) A recompence or amends, for a feat or wound. Stat. Dist. Lib. *Mansf. Reg.* cap. 23.

Dolus, A piece of foreign coin, going for about 47. 6d. *See Mansf.*

Domicellus, (Sax.) Signifies *liber judicialis*, as appears by the laws of K. Ed. 1. This, 'tis said, was a book of *summe* of the English *Saxons*, wherein the laws of the ancient Saxon Kings were contained. *Leg. Hen. c. 20.*

Dome, or Domes, (from the Sax. dom) A judgment, sentence, or decree. And several words and in *law*, as *Allegem, condemn, &c.* from whence they may be applied to a jurisdiction of a lord, or a king. *Mon. Ang. tom. 1. fol. 154.* Also *dome* is a *dim* of a church; such as St. Paul's, &c.

Dome-book, or Liber judicialis. A book composed under the direction of *Alfred*, for the general use of the whole kingdom, containing the local customs of the several provinces of the kingdom. This book is now lost. *Black. Com.* 1. p. 62. 65. See *ibid.* p. 404.

Domesday, (liber judicialium vel consuetudinum Anglie) Is a most ancient record, made in the time of William I. called the *Conqueror*, and now remaining in the Exchequer fair and legible, consisting of two volumes; a greater and a less; the greater containing a survey of all the lands in England, except the counties of Northumberland, Cumberland, Westmorland, Durham, and part of Lancashire, which it is

said were never surveyed, and excepting Essex, Suffolk, and Norfolk; which three last are comprehended in the lesser volume. There is also a *third book*, which differs from the others in form more than matter, made by the command of the same King. And there is a *fourth book* kept in the Exchequer which is called *Domesday*; and though a very large volume, is only an abridgment of the others. Likewise a *fifth book* is kept in the Remembrancer's office in the Exchequer, which has the name of *Domesday*, and is the very same with the fourth before mentioned. Our ancestors had many *dome-books*: King Alfred had a roll which he called *Domesday*; and the *Domesday* book made by Will. I. referred to the time of Edward the Confessor, as that of King Alfred did to the time of Ethelred. *Vide ante.* The fourth book of *Domesday* having many pictures, and gile letters in the beginning, relating to the time of King Edward the Confessor, this led him who made notes on *Finsbury's Register* into a mistake in p. 14. where he tells us, that *liber Domesday factus fuit tempore regis Edwardi*.

The book of *Domesday* was begun by six justices, assigned for that purpose in each county, in the year 1081, and finished *anno* 1086. And it is generally known, that the question whether lands are *ancient demesne*, or not, is to be decided by the *Domesday* of Will. I. from whence there is no appeal; and it is a book of that authority, that even the Conqueror himself submitted some cases, wherein he was concerned, to be determined by it. The addition of *day* to this *Dome-Book* was not meant with any allusion to the *final day of judgment*, as most persons have conceived; but was to strengthen and confirm it, and signifieth the judicial decisive record or book of *damning judgment* and justice. *Hammond's Annales*. Camden calls this book *Gubermis Libere Consuetudinis*, the *Tax Book* of King William; and it was further called *Magna Rollo Winton*. The dean and chapter of York have a register styled *Domesday*; so hath the bishop of Worcester; and there is an ancient roll in Chester castle, called *Domesday Roll*. *Blount*. The editor (J. M.) hath been informed, that two learned gentlemen are transcribing *Domesday* for publication, which will be a very valuable acquisition to the publick.

Doms-men, Judges, or men appointed to doom, and determine suits and controversies: hence *apud me, I deem, or judge*. *Vide Doms-men*.

Domicellus. Is an old obsolete Latin word, anciently given as an appellation or addition to the King's natural sons in France, and sometimes to the eldest sons of noblemen there; from whence we borrowed these additions: as several natural children of John of Gaunt, Duke of Lancaster, are styled *domicelli* by the charter of legitimation. 20 R. 2. But according to *Thorn*, the *domicelli* were only the better sort of servants in monasteries.—*Domicellus Abbas et Domicelli et Servientes Monasterii*, p. 1748, 1750.

Domicellum. Is sometimes used to signify danger; but otherwise, and perhaps more properly, it is taken for power over another; *sub domigerio alicujus vel manu esse*. *Bract.* lib. 4. tract. 1. cap. 19.

Domsina. A title given to honourable women, who anciently in their own right of inheritance held a barony. *Paroch. Antiq.*

Dominica in Ramis Dalmatarum, Palm Sunday. Anno 23 Ed. 1.

Dominium. Signifies right or regal power. *Paroch. Antiq.* 498.

Dominus. This word prefixed to a man's name, in ancient times usually denoted him a knight, or a clergyman; and sometimes a gentleman, not a knight, especially a lord of a manor.

Domo Negrande. Is a writ that lies for one against his neighbour, by the fall of whose house he fears a damage and injury to his own. *Reg. Orig.* 153.

Domus Conversorum. Was an ancient house built or appointed by King Hen. 3. for such Jews as were converted to the Christian faith; but King Ed. 3. who expelled the Jews from this kingdom, deputed the place for the custody of the rolls and records of the Chancery. See *Rolls*.

Domus Dei. The hospital of St. Julian in Southampton, so called. *Mon. Ang. tom. 2. 440.*

Donatio Mortis Causa, A death-bed disposition of property so called, viz. when a person in his last sickness, apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods, (under which have been included bonds, and bills drawn by the deceased upon his banker) to keep in case of his decease. This gift, if the donor dies, needs not the assent of his executor; yet it shall not prevail against creditors: and is accompanied with this implied trust, that, if the donor lives, the property thereof shall revert to himself, being only given in contemplation of death or *mortis causa*. Prec. Chan. 269. 1 P. Wms. 406. 411. 3 P. Wms. 357. Black. Com. 2 V. 514.

Donative, (*donativum*) Is a benefice merely given and collated by the patron to a man, without either presentation to, or institution by the ordinary, or induction by his order. F. N. B. 35. And *donatives* are so termed, because they began only by the foundation and erection of the donor. Clergym. Law 120. The King might of ancient time found a church or chapel, and exempt it from the jurisdiction of the ordinary: so he may by his letters patent give licence to a common person to found such a church or chapel, and make it *donative*, not presentable; and that the incumbent or chaplain shall be deprived by the founder and his heirs; and not by the bishop, which seems to be the original of *donatives* in England. *Gwin's Readings*.

When the King founds a church, &c. *donative*, it is of course exempted from the ordinary's jurisdiction, though no particular exemption is mentioned; and the Lord Chancellor shall visit the same: and where the King grants licence to any common person to found a church or chapel, it may be *donative*, and exempted from the jurisdiction of the bishop, so as to be visited by the founder, &c. 1 Inst. 134. 2 Roll. Abr. 230. The resignation of a *donative* must be to the donor or patron, and not to the ordinary; and *donatives* are not only free from all ordinary jurisdiction, but the patron and incumbent may charge the glebe to bind the successor; and if the clerk is disturbed, the patron may bring *quare impedit*, &c. Also the patron of a *donative* may take the profits thereof when it is vacant. 1 Inst. 344. Cro. Jac. 63.

If the patron of a *donative* will not nominate a clerk, there can be no lapse: but the bishop may compel such patron to nominate a clerk by ecclesiastical censures; for though the church is exempt from the power of the ordinary, the patron is not exempted: and the clerk must be qualified like unto other clerks of churches; no person being capable of a *donative*, unless he be a priest lawfully ordained, &c. Yelv. 61. Stat. 14 Car. 2. cap. 4. 1 Lill. 483.

There may be a *donative* of the King's gift with cure of souls, as the church of the Tower of London is: and if such *donative* be procured for money, it will be within the statute of simony. Mich. 9 Car. B. R. A parochial church may be *donative*, and exempt from the ordinary's jurisdiction. Godolph. 262. The church of St. Mary le Bone in Middlesex is *donative*, and the incumbent being cited into the spiritual court, to take a licence from the bishop to preach, pretending that it was a chapel, and that the parson was a stipendiary; it was ruled in the King's Bench that it was a *donative*; and if the bishop visit, the court of B. R. will grant a prohibition. 1 Med. 90. 1 Nels. Abr. 676.

If a patron of a *donative* doth once present his clerk to the ordinary, and the clerk is admitted, instituted, and inducted, then the *donative* ceaseth; and it becomes a church presentative. 1 Inst. 344. But when a *donative* is created by letters patent, by which lands are settled upon the parson and his successors, and he is to come in by the donation of the King, and his successors; in this case, though there may be a presentation to the *donative*, and the incumbent come in by institution and induction, yet that will not destroy the *donative*. 2 Salk. 541. All bishopricks, being of the foundation of the King, they were in ancient time *donatives*. 3 Rep. 75.

Donis, Statute *de*, The statute of Westm. 2. viz. 13 Ed. 1. c. 1. called the statute *de donis conditionalibus*. This statute revives, in some sort, the ancient feudal re-

straints which were originally laid on alienations, by enacting, that from thenceforth the will of the donor be observed; and that the tenements so given, (to a man and the heirs of his body) should at all events go to the issue, if there were any; or if none, should revert to the donor. See very judicious observations, &c. on this statute, Black. Com. 2 V. 112.

Donor, and **Donce**. *Donor* is he who gives lands or tenements to another in tail, &c. And the person to whom given is the *donee*.

Dormitory, (*dormitorium*) Is the common room or chamber, where all the *freres*, or religious of one convent sleep and lay all night. Stat. 25 H. 8. c. 11.

Dossal, A word used for hangings or tapestry. — *Dossile seu Tapeſtum*. Mat. Par.

Dote Assignanda, Is a writ that lay for a widow, where it was found by office, that the King's tenant was seised of lands in fee, or fee tail at the day of his death, and that he held of the King in chief, &c. In which case, the widow came into the Chancery, and there made oath, that she would not marry without the King's leave; whereupon she had this writ to the escheator, to assign her dower, &c. But it was usual to make the assignment of the dower in the Chancery, and to award a writ to the escheator, to deliver the lands assigned unto her. Stat. 15 Ed. 4. cap. 4. Reg. Orig. 297. F. N. B. 263. See *Dower*.

Dote unde nihil habet, Is a writ of *dower*, that lies for the widow against the tenant who bought land of her husband in his life-time, whereof he was solely seised in fee-simple or fee-tail, and of which she is dowable. F. N. B. 247. See *Dower*.

Doris Mensuratione, *Admeſurement of dower*, where the widow holds more than her share, &c. See *Admeſurement*. See *Dower*.

Double Plea, (*duplex placitum*) Is where a defendant alledgeth for himself two several matters, in bar of the plaintiff's action, when one of them is sufficient; which shall not be admitted: as if a man plead several things, the one not depending upon the other, the plea is accounted *double*, and will not be allowed; but if they mutually depend on each other, and the party may not have the last plea without the first, then it shall be received. Kirch. 223. And where a *double* plea that is wrong, is pleaded; if the plaintiff reply thereto, and take issue of one matter; if that be found against him, he cannot afterwards move in arrest of judgment; for by the replication it is allowed to be good. 13 Ed. 4. 17.

If a man pleads two or more matters, when he is compelled to shew them, it makes not the plea *double*; so it is where two distinct things are pleaded, which require but one answer: and in case a man pleads two several matters or things, and only one is material, the other being surplusage, or but matter of inducement, and needing no answer, the plea is not *double*. Hob. 197. Where there are several inducements to a plea, they shall not make the plea *double*: and *double* pleas are allowable in assizes of novel disseisin, &c. but not in other actions. *Just. Cant.* 75.

By Stat. 4 Ann. c. 16. ſect. 4. It shall be lawful for any defendant or tenant in any action or suit, or for any plaintiff in replevin, in any court of record, with the leave of the same court, to plead as many several matters thereto, as he shall think necessary for his defence. That is, in so many separate and distinct pleas, and where there are more pleas than one. By virtue of this statute defendant is said to plead *double*, by leave of the court.

An heir shall not have leave to plead *non per defectum* with another plea, except he make affidavit that he has *non per defectum*; nor shall an administrator have leave to plead *plene administravit*, and *no assets*, without an affidavit that he has no assets. 10 Mod. 334. Trin. — *Gr. B. R. Carrington v. Warren*. See *gr*. If this practice of making an affidavit in these cases is now in use? Yet see Notes in C. B. 228. 234.

A motion was made for liberty to *rejoyn double*, as being within the equity of the act, which allows pleading double. But the court said, that they thought that this would be intirely inconvenient, and out of the reason of the act, and

and therefore refused it. *2 Barnard. Rep. 6. Trin. 5. Geo. 4. Anon.*

After a judge's order for time to plead, pleading an *issuable plea*, defendant moved to plead double matter, and the question was, whether a rule for that purpose ought to be granted or not? The court took time to consider, and after conferring with the judges of other courts, gave defendant leave to plead double, pleading issuable pleas, and taking short notice of trial. *Notes in C. B. 244. Mich. 210 Geo. 2. Leighton v. Leighton.*

Defendant had pleaded *non assumpsit infra sex annos*, and moved to add to that plea, *non assumpsit generally*, which was denied. After defendant had pleaded a single plea, he cannot have leave to plead double. *Notes in C. B. 245. Hill. 10 Geo. 2. Nevill v. Fisher.*

The court gave defendant leave to plead double, viz. *a distress for damage feasant and for time in arrears*. This is not stronger than *Nec gully* and *liberam testamentum, solviti ad diem*, and a *marital debt*, which have been granted. *Notes in C. B. 247. Trin. 11 & 12 Geo. 2. Baynes v. Lutwidge.*

All pleas ought to be single, that the jury may not be troubled and perplexed with too many things at once. *Smith's Rep. Angl. lib. 2. c. 13.*

Double Quarrel. (*duplex querela*) Is a complaint made by any clerk, or other to the archbishop of the province, against an inferior ordinary for delaying or refusing to do justice in some cause ecclesiastical; as to give sentence, institute a clerk, &c. and seems to be termed a *double quarrel*, because it is most commonly made against both the judge, and him at whose suit justice is denied or delayed: the effect whereof is, that the archbishop taking notice of the delay, directs his letters under his authentical seal to all clerks of his province, commanding them to admonish the ordinary within a certain number of days to do the justice required, or otherwise to appear before him or his official, and there alledge the cause of his delay: and to signify to the ordinary, that if he neither perform the thing enjoined, nor appear and shew cause against it, he himself, in his *ex parte* of audience, will forthwith proceed to do the justice that is due. *Corwell.*

Doubles. (*Fr.*) Signify as much as letters patent. *Stat. 14 H. 6. c. 6.*

Doyen Peters. Were *trivialis poets*, assigned at the instance of the barons in the reign of K. H. 1. to be privy counsellors to the King, or rather conservators of the kingdom.

Dover Castle. The constable of *Dover castle* shall not hold plea of any foreign county within the castle gates, except it concern the keeping of the castle; nor shall he distrain the inhabitants of the ports, to plead elsewhere or otherwise than as they ought, according to the charters, &c. *2 Ed. 1. c. 7.*

Dowry. To give or endow, from the Latin word *do*.

Dowager. (*Latinata, dotissa*) A widow endowed; applied to the widows of Princes, Dukes, Earls, and other great personages.

Dowager. (*Queen*) Is the widow of the King, and as such enjoys most of the privileges belonging to her as Queen consort. Betwixt her and high treason to conspire her death, or violent her chastity; because the succession to the crown is not thereby endangered. But no man can marry her, without special licence from the King, on pain of forfeiting his lands and goods. *2 Inst. 18. See Riley's Pleas. Park. 672. and Black. Com. 1. p. 264.*

Dowry. (*dotarium*) Is a portion which a widow hath of the lands of her husband after his death, for the sustentance of herself, and education of her children. *1 Inst. 30.*

Under this head is to be considered,

- I. The several kinds of dowry.
- II. What women shall be endowed, and of what estate.
- III. Of the assignment and administration of dowry.
- IV. What shall be allowed a bar of dowry.
- V. Of the proceedings in dowry.

I. Of the several kinds of dowry.

There were formerly five kinds of dowry in this kingdom. 1. *Dowry by the Common law*, which is a third part of such lands or tenements whereof the husband was sole seised in fee-simple, or fee-tail, during the coverture; and this the widow is to enjoy during her life.

2. *Dowry by custom*, which is that part of the husband's estate to which the widow is intitled after the death of her husband, by the custom of any manor or place, so long as she lives sole and chaste, and this is more than one third part, for in some places she shall have *half* the land, as by the custom of *garthland*; and in divers manors the widow shall have the *whole* during her life, which is called her *free bench*: but as custom may enlarge; so it may abridge dowry to a 4th part. *1 Inst. 33.*

3. *Dowry ad ostium ecclesie*, made by the husband himself immediately after the marriage, who named such particular lands of which his wife should be endowed; and in ancient time it was taken, that a man could not by this dowry, endow his wife of more than a third part, though of less he might: and as the certainty of the land was openly declared by the husband, the wife after his death might enter into the land of which she was endowed without any other assignment. *1 Inst. 34. Litt. Sect. 39.*

4. *Dowry ex assensu patris*, which likewise was of certain lands named by a son who was the husband, with the consent of his father, and always put in writing as soon as the son was married; and if a woman thus endowed, or *ad ostium ecclesie*, after the death of her husband, entered into the land allotted her in dowry, and agreed therein, she was concluded to claim any dowry by the Common law. *Litt. Sect. 41.*

5. *Dowry de la plus belle*, which was where the wife was endowed with the fairest part of her husband's estate; but of all these writs of dowry, the two first are now only in use. *1 Nels. Abr. 679.*

II. What women shall be endowed, and of what estate.

Dowry is much favoured in law, being for the benefit of widows: wherefore the wife of one *non compos mentis*, of an idiot, outlaw, or one attainted of felony, may be endowed: but not of a person attainted of treason; nor the wife of an alien, Jew, &c. *1 Inst. 33, 37. Stat. 1 Ed. 6. cap. 12. 5 Ed. 6. c. 11.*

The wife of a man who is banished shall have dowry in his life-time; 'tis held otherwise, if he is profess'd in religion: and a jointress of a banish'd husband, shall enjoy her jointure, in his life. *1 Inst. 333. Park. 5, 307.*

If a woman be of the age of nine years, at the death of her husband, she shall be endowed of whatsoever age he be; because after the death of the husband, the marriage is adjudged lawful. *1 Inst. 33.* Where the husband's estate is such, that by no possibility issue begotten on his wife might inherit as heir to him; there the wife may not be endowed: as if lands are given to a man and the heirs he shall beget on his present wife, and she dies; and then he takes another wife, she shall not have dowry: but in case land be given to the husband and wife in tail, the remainder in tail to the husband, and the first wife dying without issue, he marries another wife; this second wife will be entitled to dowry, after his death. *Litt. Sect. 53. 40 E. 3. 4. 2 Shep. Abr. 63.* For here he hath an estate in tail. The wife of a tenant in common, but not a jointenant, shall have dowry; and she shall hold her part in common with the tenants in common. *Kitch. 160.*

The wife of a *fel de se* shall have dowry. *Plow. 261. a. 262. a.* So if the husband be outlawed in trespass, or any civil action, for this works no corruption of blood, or forfeiture of lands. *Bro. 82. Perk. 388. Co. Litt. 31. a.*

If a woman being a lunatick kill her husband, or any other, yet she shall be endowed, because this cannot be felony in her who was deprived of her understanding by the act of God; so though she be of sound mind, and refused to bring an appeal of his death, when he is killed by another, yet she shall be endowed; for this is only a waiver of that privilege the law has given her to be avenged of her husband's murderer; so it seems if she refuses to visit and assist her husband in his sickness, yet she shall be endowed, for this is only undutifulness, which

which the law does not punish with the loss of her entire subsistence. *Perk.* 364, 365.

With respect to the estate whereof a woman is dowable.

By our law, all the goods and chattels of the wife, are the husband's; and if she be an inheritrix, the husband holds her land during her life; also if he hath issue by her, he shall hold it for his own life, by the *curtesy of England*: And if he have any land in fee, whereof he is possessed during the marriage, she is to have a third part thereof for her life, as her *dower*; though she bring nothing to the husband, and whether she have issue by him or not. *Lit.* 36.

There are three things to intitle *dower*, *viz.* *Marriage, seisin, and death of the husband*: the marriage, must be good and lawful; and continue to the husband's death; and a wife shall be endow'd of a seisin in law, as well as of a seisin in deed; as where lands and tenements descend to the husband, before entry, he hath but a seisin in law, and yet the wife shall be endow'd although it be not reduc'd to an actual possession. *1 Inst.* 31, 32, &c. And it is not necessary that seisin should continue during the coverture; for if the husband alien the lands, &c. the wife shall be nevertheless endow'd. *Ibid.* 32, 33. If lands are exchange'd by the husband for other lands, the wife may be endow'd of which lands she will, as the husband was seised of both; though she may not be endow'd of the lands given and taken in exchange. *1 Inst.* 31.

Where the estate, which the husband hath during the marriage, is ended, there the wife shall lose her *dower*. *New Nat. Br.* 333. But of an estate-tail in lands determined, a woman shall be endow'd; in like manner as a man may be tenant by the *curtesy* of her lands. *1 Inst.* 31. And if a wife be endow'd of her third part, and afterwards evicted by an elder title; she shall have a new writ of *dower*, and be endow'd of the other lands. *2 Danv. Abr.* 670. Though this is, where it is the immediate estate descended to the heir; and not when it is the estate of an alienee. *9 Rep.* 17. The wife is *dowable* where lands were recovered against the husband by default or covin: and a woman deforced of her *dower* shall recover damages, *viz.* the value of her *dower* from her husband's death. *13 E. 1.* 20 *H.* 3. If the husband doth not die seised, after demand and refusal to assign *dower* to her, she shall have damages from the time of the refusal. *Fink. Cent.* 45. She shall be endow'd of a reversion, expectant on a term of years; and of a rent reserved thereon. *Lutw.* 729. If the husband hath only an estate for life, remainder to another in tail, though the remainder over is to his heirs, the wife shall not be endow'd. *2 Danv.* 656. A woman shall not be endow'd of the goods of her husband; nor of a castle, or capital messuage: But of all other lands and tenements she may. *1 Inst.* 35.

A grantee of a rent in fee or tail, dies without heir, his wife shall be endow'd: But not where the rent arises upon a reservation to the donor and his heirs, on a gift in tail, and the donee dies without issue; for this is a collateral limitation. *Plowd.* 156. *F. N. B.* 149. If during the coverture, the husband doth extinguish rents by release, &c. yet she shall be endow'd of them; for as to her *dower*, in the eye of the law, they have continuance. *1 Inst.* 32. And where a rent is descended to the husband, but he dies before any day of payment; notwithstanding the wife shall be endow'd of it. *1 H.* 7. 17. If lands are given to the husband and wife in tail, and after the death of the husband, the wife disagrees, she may recover her *dower*; for by her waving her estate, her husband in judgment of law was sole seised *ab initio*. *3 Rep.* 27. If lands are improved, the wife is to have one third according to the improved value. *1 Inst.* 32. And if the ground delivered her be sowed, she shall have the corn. *2 Inst.* 81.

Dower is an inseparable incident to an estate in tail or fee that cannot be taken away by condition: If one seised in fee of lands make a gift in tail, on condition that the wife shall not have *dower*, the condition is void. *6 Rep.* 41. If tenant in tail die without issue, so that the land reverts to the donor; or in case he covenants to stand seised

to uses, and dies, his wife will be endow'd: And a wife of land by the husband to his wife by will, is no bar of her *dower*, but a benevolence. *2 Rep.* 34. *Yelp.* 51. *Bro. Dower* 69. It is held, that land devised to a man's wife, who is intitled to *dower* of his lands (it not being mentioned in satisfaction of her *dower*) shall be taken as a voluntary gift, and not any recompence or bar of *dower*: And in this case the widow brought a writ and recover'd, against which the heir could have no relief. *Preced. Canc.* 152. A person grants and conveys land to D. and his heirs, on condition, to redeem the same back, &c. which afterwards he does, and dies; here D.'s widow may nevertheless be endow'd. *Ab. Cas.* 217. A. is tenant in tail of lands, the remainder to B. in tail, remainder to A. in fee; if A. bargains and sells the land to C. and his heirs, the wife of the bargainee shall have *dower*, determinable upon the death of the tenant in tail. *10 Rep.* 96. And if a feoffment be made upon condition to reassign; and the feoffee take a wife, she may have her *dower* till reassignment, or an entry made for not doing it: And so 'tis of other defeasible estates. *2 Rep.* 59. *Perk. Stat.* 428. If one be disinherited, and after marry, if he die before entry, his wife shall not have *dower*: And where a person recovers land in a real action, and before his entry or execution made he dieth, the wife shall not be endow'd of this land. *2 Rep.* 56. *Perk.* 397. In these cases the husband was not actually seised, *sed in re*, as before observed, where there is a seisin in law, she shall be endow'd. *1 Inst.* 31, 32, &c. So that these rules depend on the construction of what is, and what is not a seisin, in law. And see *Diz.* IV. towards the end, and *Perk.* 379, 380.

Of copyhold lands a woman shall not be endow'd, unless there be a special custom for it; but if there be a custom to be endow'd thereof, then she shall have the assistance of such laws as are made for the more speedy recovery of *dower* in general, being within the same mischief, and therefore shall recover damages within the statute of *Merton*. *4 Co.* 32. *Hob.* 216. *5 Co.* 116.

Of times women were not dowable till 32 *H.* 8. c. 7. for before that statute times were not a lay fee, but now they are dowable of them. *Seyl's P. R.* 122. 11.

Of an advowson, be it appendant or in gross, a woman shall be endow'd, for this may be divided as to the fruit and profit of it, *viz.* to have the third presentation. See *Perk.* 343, 344. *F. N. B.* 148, 150. *Ca. Lit.* 32. *Cre. Jac.* 621. *Cre. Elic.* 360. *1 Rel. Abr.* 683. *Ca. Lit.* 379. *3 Lam.* 155. *Cre. Jac.* 691.

The estate, of which the husband must be seised, must be an estate in fee-simple, fee-tail general, or where the husband is seised as heir of the special tail, which necessarily excludes defendible freeholds; therefore if a man makes a lease for life, rendering rent to him and his heirs, and after marry, and die, his wife shall not be endow'd of this rent, because it is but a defendible freehold; nor of the land, because not seised during the coverture. *1 Rel. Abr.* 676. *Plow.* 256. *10 Co.* 98. See a *Dow.* 656.

III. Of assignment and administration of *dower*.

At common law, *dower* is assigned by the sheriff, by the King's writ, or by the heir, &c. by agreement among themselves: And the wife cannot enter otherwise into her *dower*. *1 Inst.* 15. By the ancient law of England, till *Magna Charta*, a woman was to continue a whole year in her husband's house, for the assignment of her *dower*. *2 Inst.* 17. By our Statute, a widow shall immediately after her husband's death leave her marriage inheritance; and remain in his chief house forty days, within which time *dower* is to be assign'd her of the third part of all his lands. &c. *3 H.* 1. c. 7. The assignees of the lands is so be for her life; and if lands are assign'd to a woman for years, in recompence of *dower*; this is no bar of *dower*; for it is not such an estate therein as she should have. *2 Danv. Abr.* 681. Also where other land is assigned to the woman, that is no part of the lands wherein she claims *dower*; that assignment will not be good or binding: And there must be certainty in what is assigned; otherwise though it be by agreement, it may be void.

void. 4 Rep. 2. 1 Inst. 34. If a wife accept and enter upon less land than the third of the whole, on the sheriff's assignment, she is barred to demand more. *Moor* 679. But if where a wife is intitled to dower of the lands of her first husband; her second husband accepts of this dower less than her third part, after his death she may refuse the same, and have her full third part. *Fitz. Dower*, 121.

If a wife having right of dower in the land, accept of a lease for years thereof after the death of her husband, it suspends the dower; though not such acceptance of a lease before the husband's death. *Ec.* for then the wife has only a title to have dower, and not an immediate right of dower. *Bro. ca.* 372. *Fitz. Cent.* 15. A widow accepting of dower of the heir, against common right, shall hold it subject to the charges of her husband; but otherwise it is if she be endowed against common right by the sheriff. 2 *Danw.* 672. By provision of law, the wife may take a third part of the husband's lands, and hold them discharged. *Ibid.* If dower be assign'd a woman on condition, or with an exception; the condition and exception are void. *Cro. Eliz.* 541. Detaining of charters concerning the same land of which the widow demands her dower, is a good plea by the heir in delay of her dower: But if she delivers up the evidences, she shall have judgment; though if she denies the demand, and it is found against her, she loses her dower. *Ec.* 109. 9 Rep. 19.

Where there are three manors, one of them may be assign'd to the wife in dower in lieu of all the rest, though it is said that a third part of every manor ought to be assign'd. *Moor* 12, 47. The sheriff may assign a rent out of the land in lieu of dower; and her acceptance of the rent will bar dower out of the same land, but not of other lands. 2 *And.* 31. *Dyer* 91. 1 *Nell.* Abr. 680. When no division can be made of what the wife is dowerable, dower is to be assigned in a special manner; as of the third presentation to a church, the third toll-dish of a mill; common certain, a third year; the third part of the profits of an office, fair, market, &c. 1 *Roll. Abr.* 678.

A woman intitled to dower cannot enter till it be assigned to her, and set out either by the heir, tenant or sheriff in certainty. 1 *Roll. Abr.* 681. *Dyer* 343. *Plowd.* 529. *Bro.* 16. *Ca. Lit.* 34. b. 37. a. b.

None can assign dower but those who have a freehold, or against whom a writ of dower lies; therefore a tenant by statute merchant, statute staple, or *elegit*, or lessee for years cannot assign dower, for none of these have an estate large enough to answer the plaintiff's demand. *Perk.* 403, 404. *Ca. Lit.* 35. *Bro.* 63, 94. 1 *Roll. Abr.* 681. 6 *Co.* 57.

If a woman be dowerable of land, meadow, pasture, wood, &c. and any of these be assigned in lieu of dower of all the rest, it is good, though it be against common right, which gives her but the third part of each; for the heir's enjoyment of the residue sufficiently accounts for her title to what she has. 1 *Roll. Abr.* 683. *Macr.* pl. 42. 66.

If lands whereof a woman hath no right to be endowed, or a rent out of such lands be assigned in lieu of her dower, this does not bar her demand of dower, for she having no manner of title to those lands, cannot without livery and seisin be any more than tenant at will, which is no sufficient recompence for an estate for life, which her dower was to be. *Perk.* 407. *Ca. Lit.* 34. 4 *Co.* 1. *Ca. Lit.* 169. *Bro.* 3.

As to admeasurement of dower.

If the husband at age assign to the wife more land in dower than she ought to have, he himself shall have a writ of admeasurement of dower at full age by the Common law; so if too much be assigned in dower by the heir within age, or his guardian in chivalry; and the heir dies, his heir shall have such writ, to rectify the assignment; but the heir, in whose time the assignment of too much was by the guardian, cannot have such writ till his full age, because till then the interest of the guardian continues; and if any wrong be done, it is to the guardian himself, and not to the heir; if a disseisor assigns too

much, the heir of the disseisor shall have admeasurement by the Common law. *F. N. B.* 148. *Co. Lit.* 39. a. 2 *Inst.* 367.

If the heir within age, before the guardian enters, assigns too much in dower, the guardian shall have a writ of admeasurement of dower by the statute of *W. 2. c. 7.* before which statute the guardian had no remedy, because the writ of admeasurement being a real action, lay not for the guardian, who had but a chattel; also by the same statute it is provided, that if the guardian pursue such writ feintly, or by collusion with the wife, the heir at full age shall have a writ of admeasurement, and may allege the feint pleading or collusion generally. 2 *Inst.* 367.

If the wife after assignment of dower improves the lands, so as thereby they become of greater value than the other two parts, no writ of admeasurement lies; so if they be of greater value, by reason of mines open at the time of the assignment, no writ of admeasurement lies, because the land in quantity was no more than she ought to have; and then 'tis lawful to work the mines, which were open at the time of such assignment. *F. N. B.* 149. 2 *Inst.* 368. 5 *Co.* 12.

IV. What shall be deemed a bar of dower.

If a wife levies a fine with her husband, she debars herself of her dower: And if a common recovery be had against the husband and wife, of the husband's lands, it shall bar the wife of her dower. 2 *Rep.* 74. *Plowd.* 514. Where a woman releases her right to him in reversion, her dower may be extinguish'd. 8 *Rep.* 151. If a wife commits treason or felony; or if she elope from her husband, and live with the adulterer willingly, without being reconciled to the husband, she shall lose and forfeit her dower; but if the husband be reconciled to her, and she lives with him again, she shall be endow'd. 2 *Inst.* 453. *Dyer* 106. And if after elopement of the wife, her husband and the demean themselves as husband and wife, it is evidence of reconciliation. *Dyer* 106. If a man grants his wife with her goods to another, and the wife by virtue of the grant lives with the grantee during the life of the husband, this shall forfeit her dower; for she lived in adultery, notwithstanding the grant. 1 *Inst.* 135. 2 *Danw.* 662. 2 *Inst.* 435.

When a jointure is made of lands after marriage, the wife may waive it, and demand her dower: But it is otherwise when made before marriage, according to the statute 27 *Hen. 8. c. 10.*

If a jointure be made to the wife during the coverture, and after the husband and wife levy a fine thereof; yet this is no bar to her dower of any other lands of her husband's, because the jointure being made after the marriage, she had election after the death of the husband to refuse it, and claim dower, and not before, and then the fine levied of the jointure before her time for election of dower was come, can be no bar for electing of dower when it is come. 1 *Bull.* 173. 1 *Leon.* 285. *Dyer* 358.

If a woman takes a lease for life of her husband's lands after his death, she shall have no dower, because she cannot demand it against herself; and if she takes a lease for years only, yet she shall not sue to have dower during these years, because it was her own act to suspend the fruit and effect of her dower during that time. *Perk.* 350. *F. N. B.* 149. *Mo.* pl. 193.

If a recovery be had against the husband by collusion, this shall not bar the wife of dower; as if the recovery be by confession, or reddition, which are always understood to be by collusion, the husband always acting and concurring in obtaining of them; but it seems to have been a very great doubt, whether a recovery by default should not be a bar: and the better opinion being that such recovery was a bar at Common law; therefore the statute of *W. 2. cap. 4.* was made, which ordains that notwithstanding such recovery by default, &c. pleaded, the tenant shall moreover in bar of the dower shew his right to the woman recovered; and if it be found that he had no right, then shall the demandant recover her dower, notwithstanding such recovery by default against her husband. 2 *Inst.* 349. *Perk.* 376.

By the statute of *W. 2. cap. 4.* it appears that if the recoverer had right, then the wife is barred; therefore if the heir of the disseisor be in by descent, and the disseisor enters upon him, and marries, and the heir of the disseisor recovers by default, or reddition, in a writ of entry, in nature of an assise, and the husband dies, his wife shall not have *dower*, because he, who recovered, had right to the possession by the descent; *aliter*, if this disseisin, descent, &c. were *after* marriage, because the husband was seised before of a rightful estate during the coverture, whereof his wife had title of *dower*, which cannot be defeated by the disseisin, descent and recovery, which all happened during the coverture. *Perk. 379, 380.*

If the husband levy a fine with proclamation of his lands, and dies, his wife is bound to make her claim within five years after his death; otherwise she shall be barred of her *dower*; for though her title of *dower* was not consummate at the time of the fine levied; yet it being initiate by the marriage and seisin of the husband, the fine begins to work upon it presently after the husband's death; and if she does not claim it within five years after, she shall be barred. *2 Co. 93. 10 Co. 49, 99. 3 Inst. 216. Hob. 265. Mo. pl. 154, 879. Dyer 224. 13 Co. 20.*

V. Of the proceedings in dower.

The wife is, as soon as she can after the decease of her husband, to demand her *dower*, lest she lose the value from the time of his death: And in action of *dower*, the first process is *summons* to appear: And if the tenant or defendant do not appear, nor call an effoin, a grand *cap* lies to seize the lands, &c. But on the return of the writ of summons, the attorney for the tenant or defendant may enter with the filazer that the tenant appears, and prays *view*, &c. Then a writ of view goes out, whereby the sheriff is to shew the tenant the land in question; upon the return of which writ of view, the tenant's attorney takes a declaration, and puts in a plea; the most general one is, *ne unques seixie*, &c. viz. that the husband was never seised of any estate, whereof the wife can be endowed; and when issue is join'd, you must proceed to trial, as in other actions: Upon trial, the jury are to give damages for the mean profits from the death of the husband (if he die seised) for which execution shall be made out; and then you have a writ to the sheriff to give possession of a third part of the lands. *Pract. Soli. p. 335, 336.* A widow may recover her *dower* *in cessat executio*, in case there be any thing objected precedent to the title of *dower*, &c. till that is determined. *1 Nelf. 684, 687. 1 Salk. 291.* Judgment in *dower* is to recover a third part of lands and tenements *per Metas & Bendas*. A wife may have her *writ of dower* against an heir, an alienage, a disseisor, &c. or against any one that has power to assign *dower*; if the lord enters on the land for an escheat, she may bring it against him, but to the King she must sue by petition. *9 Rep. 10. Plowd. 141. Dyer 263. 1 Inst. 59.* This writ was brought against eight persons feoffees of the husband after marriage, two confessed the action, and the other six pleaded to the issue; here the demandant had judgment to recover the third part of two parts of the land, in eight parts to be divided: And after the issue being found for the demandant against the six, she recovered against them the third part of the six parts of the same land as her *dower*. *Dyer 187. 1 Co. Inst. 32.*

At the Common law, before the statute of *W. 2. c. 39.* if a woman had accepted any part of her *dower*, though never so small, of any one tenant in any one county or town, she had no other remedy for the residue, but by a writ of right of *dower*; for if she brought a writ of *dower unde nihil habet*, it was a good plea in abatement, that she had accepted such a part of such a tenant, in such a town or county; which being a great mischief to the woman is remedied by that statute, which provides that it shall be no plea in abatement, to say that she hath received part of her *dower* of any other person before the writ purchased; and this extends as well to guardian in chivalry as to the tenant of the land, because such guardian is to render her *dower*. *2 Inst. 261.*

As to damages in *dower* they are given by the statute of *Merton, c. 1.* but that statute extends only to the possessory action of *dower unde nihil habet*, and not to the writ of right of *dower*, because they are intended to be given for the detention of the possession; and on writs of right, where the right itself is questionable, no damages are given, because no wrong done till the right be determined; also that statute extends only to lands, whereof the husband died seised; and therefore judgment for the damages was reversed, because the jury did not find that the husband died seised; for otherwise she shall have no damages; as if the husband aliens and takes back an estate for life, the wife shall recover *dower*, but no damages; because this dying seised was only of an estate of freehold; but if he makes a lease for years only, rendering rent, she shall recover a third part of the reversion with a third part of the rent and damages, because there he died seised as the statute speaks. *Co. Lit. 32. Dyer 284. pl. 33. Yelv. 112. Dr. and Stud. lib. 2. c. 13. f. 166. 2 Inst. 80.*

Damages must be after demand of *dower*, for the heir is not bound to assign this provision till demanded, because the law casts the freehold of the whole upon him, which he cannot divide without the concurrence of the wife; but a demand *in pais* before good testimony is sufficient; and if the heir appear the first day on summons, and plead that he hath been always ready, and still is, to render her *dower*; she may plead such request, and issue may be taken upon it, but the feoffee of the heir cannot plead *non tempus pretit*, because he had not the land all that time since the death of the ancestor, and therefore she shall recover the mesne profits, and damages against him, and if he hath not provided his indemnity and recompence against the heir, it is his own folly. *Co. Lit. 32.*

If the heir or feoffee assign *dower*, and the wife accepteth thereof, she loses her damages, because having the *dower*, which is the principal, she cannot sue for the damages, which are but consequential or accessory. *Co. Lit. 33. a.*

Damages are given in *dower* from the death of the husband, and to the return of the writ of enquiry, though the writ of seisin issued a year before, but was not executed. *Dobson v. Dobson and others. Rep. Temp. Hardw. per Annals 19, &c.* Where there are two jointenants in *dower*, and one dies after judgment for damages, and his heir and the other jointenant bring error, the value from the time of the judgment to the affirmance, cannot be recovered against the surviving plaintiff in error only. *Id. Kent & Kent, 50. See 2 Stra. 971.* On a writ of *dower*, damages cannot be awarded by the 16. Car. 2. without speeding a writ of enquiry. Same case, *Annals 51.*

As in great estates jointures of lands are usually made in lieu and satisfaction of *dower*, these actions of *dower* are not so frequently brought as they were formerly.

Dowle and Deal, A division: From the Brit. *Dal. divisio*, from the Sax. *dalan*, i. e. *divident*, and from thence comes the word *dealing*. So the stones which are laid to the boundaries of lands, are called *dowle stones*, i. e. Such as divide the lands. *Covent.*

Dowry, (*Dot Mulieris*) Was in ancient time applied to that which the wife brings her husband in marriage; otherwise called *maritagium*, or marriage goods: But these are termed more properly, goods given in marriage, and the marriage portion. *2 Inst. 31.* This word is often confounded with *dower*; though it hath a different meaning from it.

Dowry Bill. Among the Jews, the bridegroom at the time of the marriage, gave his wife a *dowry bill*. *Blount. Cowel cites Moses and Aaron, 235.*

Dowles, A sort of kersey made in Devonshire, in length twelve yards. *Covent.*

Dwelling, A territory or jurisdiction, mentioned in the stat. of *View and Frankpledge*. 15 Ed. 2. See *Decretes*.

Dragon Regis, The standard ensign, or military colours, borne in war by our ancient Kings, having the figure of a dragon painted on them. — *Res Anglie fixisset signum suum in medio, & tradidisset draconem suum Po-*

tro de P. ad portandum, &c. — Rog. Hoved. sub ann. 1191.

Dracum, Drag; A coarser sort of bread corn: In Staffordshire they use a kind of malt, made of oats mixed with barley, which they call *drag*, or *drag malt*; and in Essex, &c. they have a grain called *drag*. Tuller's Husband. p. 32.

Drags, Seem to be floating pieces of timber so joined together, that by swimming on the water they may bear a burden or load of other things down a river. 6 H. 6. c. 15.

Diana, A drain or water-course; sometimes written *drecca*. Cartular. Abb. Rad. MS.

Dinperg, (Pannaria) Is used as a head in our old statute-books, extending to the making and manufacturing of all sorts of woollen cloths. Stat. 25 Ed. 3. §. 4. c. 1. 4 Ed. 4. c. 1. 1 R. 3. c. 9. 27 H. 8. &c. c. 13. See *Clothiers*.

Drangere Signifies any harness belonging to cart-hories, for drawing a waggon, or other carriage. *Paroch. Antiq.* p. 549.

Droog-latches, Were thieves and robbers: Lambert in his *Eiren. lib. 4. cap. 6.* calls them *thieves, waspers,* and *robertsmen*; words grown out of use. They are mentioned in 5 E. 3. c. 14. and 7 R. 2. c. 5.

Droegment, Are fishers for oysters, &c. Stat. 2 Geo. 2. c. 19.

Dreit-Dreit, or Dreit, Are words signifying formerly a double right, viz. of possession, and of property or interest. *Bract. lib. 4. cap. 27. Co. Litt. 264.*

Drenche, An old word, used where a person was overcome, from the Germ.

Drenches, or Drenge, (Dringt) Are tenants in gville, says an ancient MS. *Mon. Angl. Tem. 2. fol. 598.* And according to *Spelman*, they are such as at the coming of Will. 1. called the Conqueror, being put out of their estates, were afterwards restored thereunto; on their making it appear that they were owners thereof, and neither in *auxilio*, or *consilio*, against him. *Spelm.*

Drengage, (Drengagium) The tenure by which the *drenches* or *drenge*s held their lands. *Trin. 21 Ed. 3. Ebur. & Northumb. Rot. 191.*

Drift of the Forest, (Agitatio animalium in Foresta) Is a view or examination of what cattle are in the forest, that it may be known whether it be surcharged or not; and whose the beasts are, and whether they are commonable, &c. These *drifts* are made at certain times in the year by the officers of the forest; when all the cattle of the forest are driven into some pound or place inclosed, for the purposes afore-mentioned; and to the end it may be discovered whether any cattle of strangers be there, which ought not to be common. *Manu. par. 2. c. 15. Stat. 32 H. 8. c. 13. 4 Inst. 309.*

Drinklean, (in some records *Potura Drinklean*) Was a contribution of tenants, in the time of the Saxons, towards a *potation*, or ale, provided to entertain the lord, or his steward.

Drodenne, Signified with our Saxon ancestors, a grove, or woody place, where cattle were kept; and the keeper of them was called *Drofnan*. *Domelday.*

Drofland, or Drofland, Another Saxon word, signifying a tribute or yearly payment made by some tenants to the King, or their landlords, for driving their cattle through a manor to fairs or markets. *Cowel.*

Droit, Right, Is the highest writ of all other real writs whatsoever, and hath the greatest respect, and the most assured and final judgment; and therefore is called a *writ of right*, and in the old books *droit*. *Co. Litt. 138.* There are divers of these writs used in our law, such as the following.

Droit de Ransom.

Droit de Retour.

Droit de Vaine.

Droit de Vaine.

Droit de Vaine.

Droit de Vaine.

All these several writs of right, and their various uses, see *Refts.* and *Writs*, and the several titles to which these writs belong.

Dromones, Dromes, Dromunda, Signified at first high ships of great burden, but afterwards those which

we now call men of war. *Walsing. Anno 1292.* — *Tres majores naves subsequenter, quas vulgo dromones appellant.* — *Mat Paris.* sub ann. 1191.

Drobers, Are those that buy cattle in one place to sell in another: They are to be married men and householders, and be licensed by statute, 5 *Eliz. c. 12.* And if they drive their cattle on the Lord's day, they shall forfeit 20 s. by 1 *Car. 1. c. 1.*

Druggeria, A place of drugs, or druggists shop: And druggists and their wares. *Vide Coffie.*

Drunkenness, Is an offence for which a man may be punished in the Ecclesiastical court; as well as by justices of peace by statute: And by 4 *Jac. 1. c. 5.* And 21 *Jac. 1. c. 7.* If any person shall be convicted of drunkenness by the view of a justice, oath of one witness, &c. he shall forfeit five shillings for the first offence, to be levied by distress and sale of his goods; and for want of a distress shall sit in the stocks six hours: And for the second offence, he is to be bound with two sureties in ten pounds each, to be of the good behaviour, or be committed. And he who is guilty of any crime, through his own voluntary drunkenness, shall be punished for it as if he had been sober. *Co. Litt. 247. 1 Hawk. P. C. 2.* It has been held, that drunkenness is a sufficient cause to remove a magistrate: And the prosecution for this offence by the statutes of 4 *Jac. 1. c. 5.* was to be, and still may be, before justices of peace in their sessions, by way of indictment, &c. Equity will not relieve against a bond, &c. given by a man when drunk, unless the drunkenness is occasioned through the management or contrivance of him to whom 'tis given. *Johnson v. Medlicott, n. 3 P. Wall. 130. See 1 Inst. 247. Plovid. 19. & Black. Com. 4 V. 25. 26.*

Dry Exchange, (Cambium Siccum) Is a term invented in former times for the disguising and covering of usury; in which something was pretended to pass on both sides, whereas in truth nothing passed but on one side, in which respect it was called *dry*. Stat. 3 H. 7. c. 5. See *Cowel.*

Dry Rent, A rent reserved without clause of distress. See *Rent feck.*

Duces tecum, Is a writ commanding a person to appear at a certain day in the court of Chancery, and to bring with him some writings, evidences, or other things which the court would view. *Reg. Orig.* So *subpoenas duces tecum*, are often sued out at Common law, to compel witnesses, to produce, on trials, at *Nisi prius*, deeds, bonds, bills, notes, books, &c. memorandums, &c. which are in their custody or power, and which relate to the issue in question. But if they are in the possession or power of the adverse party or his attorney, 'tis customary, to give notice to the attorney to produce them, and on proof made in open court, before the judge of *Nisi prius*, of such notice, the court generally compels the attorney, or his client, to produce the same, if material.

Duces tecum lites languidus, A writ directed to the sheriff, upon a return that he cannot bring his prisoner without danger of death, he being *adeo languidus*; then the court grants a *babeas corpus* in the nature of a *duces tecum lites languidus*. *Book. Entr.* But this is now out of use; and certainly where the person's life would be endangered by removal, the law would never permit it to be done.

Ducking-Stool. See *Castigatory.*

Dues, ecclesiastical, nonpayment of. Various dues to the clergy, are cognizable in the spiritual court; which makes decrees for their actual payment. *Offerings, oblations,* and *oblationes*, not exceeding the value of 40 s. may be recovered in a summary way, before two justices of peace. By 7 & 8 W. 3. c. 6. *Black. Com. 3 V. 89, 90.*

Duel, (Duellum) in our ancient law is a fight between persons in a doubtful case, for the trial of the truth. *Plac.* But this kind of duel is disused; and what we now call a *duel* is a fighting between two, upon some quarrel precedent: Wherein, if a person is killed, both the principal and his seconds are guilty of murder, and whether the seconds fight or not. *H. P. C. 47, 51.* But this cannot mean as to the principals, where a quarrel arises, and they suddenly draw and fight, without deliberating. It is said by some, that the seconds of the

the person killed are equally guilty, by reason of the encouragement which they give by joining with him: But this is contradicted by others. 1 Hawk. 82. Where two persons in cool blood meet and fight upon a precedent quarrel, and one of them is killed, the other is guilty of murder; and cannot excuse himself by alledging that he was first struck by the deceased, or that he had declined to meet him, was prevailed upon to do it by his importunity, or that it was not his intent to kill, but only to vindicate his reputation, &c. 1 Hawk. P. C. 81.

If two persons quarrel over night, and appoint to fight the next day; or quarrel in the morning, and agree to fight in the afternoon; or such a considerable time after, by which it may be presumed the blood was cooled; and then they meet and fight a *duel*, and one kill the other, it is murder. 3 Inst. 52. H. P. C. 48. Kel. 56. And whenever it appears, that he who kills another in a *duel*, or fighting on a sudden quarrel, was master of his temper at the time, he is guilty of murder; as if after the quarrel he fall into another discourse, and talk calmly thereon; or alledge that the place where the quarrel happens is not convenient for fighting; or that his shoes are too high, if he should fight at present, &c. Kel. 56. 1 Lev. 180.

If one challenge another, who refuses to meet him, but tells him that he shall go the next day to such a place about business and then the challenger meets him on the road, and assaults the other; if the other in this case kill him, it will be only manslaughter; for here is no acceptance of the challenge, or agreement to fight: And if the person challenged refuseth to meet the challenger, but tells him that he wears a sword, and is always ready to defend himself; if then the challenger attack him, and is killed by the other, it is neither murder nor manslaughter, if necessary in his own defence. Kel. 56.

It is a very high offence to challenge another, either by word or letter, to fight a *duel*; or to be the messenger of such a challenge; or even barely to endeavour to provoke another to send a challenge, or to fight, or by dispersing letters for that purpose, full of reflection, &c. 1 Sid. 186. 3 Inst. 158. And persons convicted of barely sending a challenge, have been adjudged to pay a fine of 100 l. to be imprisoned for a month, and make a public acknowledgment of their offence, and to be bound to their good behaviour. 1 Hawk. P. C. 135. 138. The court of King's Bench hath often granted informations against persons sending or giving challenges.

See Lord Bacon's charge touching *duels*, in his works, quarto edit. 2 V. 563. And a decree of the Star-chamber against *duels*, 2 V. 571. See farther as to *duels*, Black. Com. 4 V. 145, 185, 199. and Robert. Hist. Emp. Char. V. 2 V. 303, 4.

Duke, (Lat. *Dux*, Fr. *Duc*, a *Ducendo*) Signified among the ancient Romans, *duxorem exercitus*, such as led their armies; since which they were called *duces*, and were governors of provinces, &c. In some nations, the sovereigns of the country are called by this name; as the Duke of Savoy, &c. In England, the title of Duke is the next dignity to the Prince of Wales: And the first Duke we had in England was Edward the Black Prince, so famed in our English histories for heroick actions; who was created Duke of Cornwall in the 11th year of King Edw. 3. After which, there were more made in such manner as that their titles descended to their posterity; and during the late reigns their number hath been greatly increased. They are created with solemnity, *per insigniam gladii, cappæ & circuli aurei in capite impositionem*. Catod. Brit. p. 166. See Black. Com. 1 V. 397, 408.

Dum fuit infra ætatem, Is where an infant maketh a feoffment of his lands; when he cometh of full age, he may have this writ to recover those lands and tenements which were so aliened: And within age, he may enter into the land and take it back again, and by his entry he shall be remitted to his ancestor's right. New Nat. Br. 426. If the husband and wife alien the wife's land, during the nonage of both of them, the wife at her full age after the death of the husband, shall have a writ of *dum fuit infra ætatem*. M. 14 E. 3. By this writ to

the sheriff, he shall command A. that he render to B. who is of full age, two messuages and lands, &c. which B. demised to him, while he was within age, as he saith; or into which the said A. hath not entered, but by C. to whom he said B. the same demised; and unless, &c. F. N. B. 477.

Dum non fuit compos mentis, Is a writ that lies where a man that is not of sound memory aliens any lands or tenements, then he shall have this writ against the alienee. And he shall alledge that he was not of *sane memory*, but being visited with infirmity, lost his discretion for a time, so as not to be capable of making a grant, &c. New Nat. Br. 429. But see *Disability*. The law seldom allows a man to falsify himself. As to the writ, see F. N. B. 202.

Dun, Down, In which termination it hath ended into *den*, signifies a mountain or high open place; so that the names of those towns which end in *dun*, or *den*, as *Ashden*, &c. were either built on hills, or near them in open places. *Domsday*.

Dunsetts, Those who dwell on hills or mountains. **Dunum** and **Duna**, A down or hill: And *dunarium* is used in the same sense. Char. dat. 25 Ed. 3. Penns. Decret. & Cap. Eccl. Cant. Christ. Onan.

Duodena, A jury of twelve men—*Tunc Justiciar. ad duodena foris alia duodena*. Walsing. 126.

Duobus manu. Twelve witnesses to purge a criminal of an offence. See *Jurasse duodecim manu*, and Black. Com. 2 V. 343.

Duobus Quarta, A process ecclesiastical; double quarrel.

Duplicate, Is used for the second letters patent, granted by the Lord Chancellor, in a case wherein he had before done the same; which were therefore thought void. *Crompt. Juris. fol. 215*. But it is more commonly a copy or transcript of any deed or writing, account, &c. or a second letter, written and sent to the same party and purpose as a former, for fear of miscarriage of the first, or for other reasons: This word is mentioned in the Stat. 14 Car. 2. c. 20. 'Tis also the name of a prisoner's discharge, given by the quarter sessions, &c. to an *exigent debtor*, who takes the benefit of an act, for relief of *imprisoned debtors*, with respect to the imprisonment of their persons.

Duplicity in pleading. This must be avoided, as it begets confusion. Every plea must be simple, intire, connected, and confined to one single point: It must never be entangled with a variety of distinct independent answers to the same matter; which must require as many different replies, and introduces a multitude of issues upon one and the same point. The Stat. of 4 & 5 Ann. c. 16. which gives leave to plead several pleas by permission of the court, is, for this reason of great service; because, a man may plead a variety of matters in single pleas, in bar to the action. See Black. Com. 3 V. 311. See also *Montesquieu De L'Esprit des Loix. Liv. vi. ch. 4*.

Durante absentia, Administration. An administration granted when the executor is out of the realm, to continue in force till his return.

Durante minore ætate, Administration. An infant can't act as executor till seventeen, during which minority this administration is granted.

Durden, A thicket of wood in a valley. *Cowel*.

Durety, (*Duritia*) Is where one is wrongfully imprisoned or restrained of his liberty contrary to law, till he seals a bond or other deed to another; or threatened to be killed, wounded, or beaten if he doth not do it: And a bond or deed so obtained is void in law. *Bract.* in his Abridgment, joins *durety* and *minors* together, i. e. hard-ship and threatnings: If one under a just cause of being imprisoned, killed, &c. enters into a bond so fit, that threatens him, it is *durety per minas*, and may be pleaded to avoid the bond: But it must be a threatening of life or member, or of imprisonment, and not of a charge only; or to take away goods, &c. 1 Inst. 166. 2 Inst. 483. But it has been adjudged, that if a man makes a deed by *durety* done to him by taking of his cattle, tho' there be no *durety* to his person, yet then shall avoid the deed. 2 Darv. Abr. 686. If a person threaten another

to make a deed to a third person, it is by *duress*, and void; as if such third person had made the threatening. 2 Inst. 482. 3 Inst. 92. 4 Inst. 97. And where a man is imprisoned until he makes a bond at another place; if afterwards he doth it when at large, the bond is by *duress*, and void.

But if a person be arrested upon an action at the suit of another, and the cause of action is not good, if he make a bond to a stranger, it is not *duress*; though if he make it to the plaintiff, it is, and being sued upon the bond, he may plead it was made by *duress*, and so avoid it: Also the party shall have an action for the false imprisonment itself. 1 Rep. 119. Park. Sess. 16. Crompt. Jur. 296. 1 Lill. Abr. 494. If one imprisoned make an obligation by *duress*, and after he is at large takes a defeasance upon it; this will stop him to say it was made *per duress*. And where A. and B. by *duress* to B. seal a bond or deed, it may be good as to A. that was never threatened. 3 H. 6. 15. Bro. 19. Mich. 7 Jac. 7. If a man be lawfully in prison, and makes an obligation against his agreement and will, he may avoid it by *duress*: Though it is otherwise if he do it of his good will. 43 E. 3. 10. 2 Baro. 686.

A man shall not avoid a deed by a *duress* to a stranger. For it hath been hold that none shall avoid his own deed for the imprisonment or danger of any other than of himself only. Cas. Jac. 187. And yet a son shall avoid a deed by *duress* to the father: And the husband shall avoid a deed made by *duress* to the wife; though a stranger shall not avoid a deed made by *duress* to his master, or the master the deed sealed by *duress* of his servant. 2 Baro. 686. If a man is taken by virtue of a process issuing out of a court that hath not power to grant it; or in custody on a false charge of felony, &c. and for his deliverment and discharge gives bond, &c. this may be avoided, as taken by *duress*. Cra. El. 646. 4 Inst. 93. Allen 92.

A statute merchant may be avoided by *audita mendaciis*, because it was made by *duress*, or imprisonment. A will shall be avoided by *duress* or menace of imprisonment. A fioffment made by *duress* is voidable; but not void. But no averment shall be taken against a deed inrolled, that it was made by *duress*. 1 Roll. Abr. 862. 2 Baro. 686. A marriage had by *duress* is voidable: And by statute, obligations, statutes, &c. obtained of women by force, to marry the persons to whom made, or otherwise, unless for a just debt, are declared void. 31 H. 6. c. 9. If a person executes a deed by *duress*, he cannot plead *non est factum*, because it is his deed; though he may avoid it by special pleading, and judgment of *assise*, &c. 5 Rep. 119. Records may not regularly be said to be made by *duress*, and therefore shall not be avoided by this plea or pretence. 2 Shep. Abr. 319.

Durham. The bishoprick of *Durham* was dissolved, and the King to have all the lands, &c. by stat. 7 Ed. 6. But this act was afterwards repealed, and the bishoprick new elected, with all jurisdiction ecclesiastical and temporal annexed to the county palatine. The justices of the county palatine of *Durham* may levy rates of lands in the county: And writs upon proclamation, &c. are to be directed to the bishop. 3 Elm. c. 27. 31 Elm. c. 2. Also writs to elect members of parliament in the county palatine of *Durham* shall go to the bishop or his chancellor, and be returned by the sheriff, &c. Stat. 21 Car. 2. c. 9.

As in the county palatine of *Durham*, see Black. Com. 1. 7. 116. As to its courts, see Black. Com. 3. 7. 78 and 4 Inst. 206. 213. 215.

Durety. Signifies *spem* without wounding or bloodshed, vulgarly *spem* without.

Dutty Feet. *Dutty Feet*; pedlars or traders who have no settled habitation, and they give their name from their feet being covered with dirt, by their continual travelling. See *Superior Court*.

Dutty of Lancaster. Is a court of the *Dutty Chamber of Lancaster* held at *Westminster* before the Chancellor, for matters concerning the lands and franchises of the *dutty*. And the proceedings in this court are by *English bill*, as in Chancery. 4 Inst. 204. The original of

it was in *Henry the Fourth's* days, who obtaining the crown of *England* by deposing *Richard II.* and having the *dutty of Lancaster* by descent in right of his mother, was seized thereof as King, and not as Duke. But at length by authority of parliament he passed a charter, whereby the possessions, liberties, &c. of the said *dutty* were severed from the crown, and so left to posterity.

Of this court, *Gwin* (in his preface to his *Readings*) says thus: The court of the *dutty of Lancaster* grew out of the grant of King *Edward III.* who gave that *dutty* to his son *John of Gaunt*, and endowed it with royal rights and privileges; and for as much as it was afterwards extinct in the person of King *Henry IV.* by reason of the union thereof with the crown, the same King (suspecting himself to be more rightfully Duke of *Lancaster*, than King of *England*) determined to save his right in the *dutty*, whatever should befall the kingdom; and therefore he separated the *dutty* from the crown, and settled it in the natural persons of himself and his heirs, as if he had been no King. In which estate it continued during the reigns of *Hen. 5.* and *Hen. 6.* But when *Edw. 4.* recovered the crown, and recontinued the right of the *House of York*, he appropriated that *dutty* to the crown again, so that he suffered the court and officers to remain as he found them; and in this manner it came together with the crown to *Hen. 7.* who approving the policy of *Henry*, and by whose right he obtained the kingdom, made a like separation of the *dutty*, and so left it. It is now under the superior county palatine. Vide *Lancaster Office of this Court*, see *Chancellor of the Dutty of Lancaster*.

The court of the *dutty chamber of Lancaster*, (according to *Blackstone*) is a special jurisdiction, held before the Chancellor of the *dutty* or his deputy, concerning all matters of equity relating to the lands holden of the King in right of the *dutty of Lancaster*, which is a thing very distinct from the county palatine, and comprizes much territory which lies at a vast distance from it; as particularly a very large district within the city of *Westminster*. It seems that the courts of Chancery and Exchequer, on the same side have a concurrent jurisdiction with this court. 4 Inst. 206. 1 Chanc. Rep. 55. Tubb. 145. Hardr. 171. Black. Com. 3. 7. 78.

Duties of person. Allegiance is the duty of the people, protection the duty of the magistrate; but they are reciprocally the rights, as well as duties of each other. Allegiance is the right of the magistrate, and protection the right of the people. Black. Com. 3. 7. 123.

Duty. Any thing that is known to be due by law, and thereby recoverable, is a *duty* before it is recovered; because the party interested in the same hath power to recover it. 1 Lill. 495.

Dwelling house. A man may assemble people together lawfully (at least if they do not exceed eleven) without danger of raising a riot, rout, or unlawful assembly, in order to protect and defend his house; which he is not permitted to do in any other case. 1 Hal. P. C. 547. Black. Com. 4. 7. 224.

Dwindle. signifies any thing consumed; from whence comes the word *dwindle*.

Dyers. No *dye* may dye any cloth with orchel; or with *Brazil*, to make a false colour in cloth, wool, &c. on pain of 20 s. Stat. 3 & 4 E. 6. c. 21. Dyers are to fix a seal of lead to cloths, with the letter M. to show that they are well washed, &c. or forfeit 3 s. and not to use logwood in dying, on pain of forfeiting 20 s. Stat. 21 Elm. c. 9. Repealed 13 & 14 Car. 2. c. 31. 26. And penalties are inflicted on *dyers*, who dye any cloths deceitfully, and not being dyed throughout with wool, indico and mather; also marks shall be put to the cloths dyed, &c. Dyers in *London* are subject to the inspection of the *Dyers Company*, who may appoint searchers; and out of their limits, justices of the peace are persons to appoint them: Opposing the searchers, entails 10 s. penalty, by stat. 13 Geo. 1. c. 24.

Dynges. An officer that hath the care and oversight of the *dutty* and *drains* in fenny countries; as of *Dynges* *fen*, &c. mentioned in the stat. 16 & 17 Car. 2. c. 71.

Drage or Drong. A misanthropic flag over the dead; from the Teutonic *drang* to drudge and drudge, whence it is a laudatory term. *Quint.*

Drengum. A dier or dog. *—Faint can totu at ples dytend, to sing harvest home. Paroch. Antiq. 320.*

E.

Ealeus. From the Sax. *Eale*, Cervisia, & *Hui*, Domus. An ale-house: In the law of King Alfred we often find this word.

Ealtes. The privilege of assising and selling ale and beer. It is mentioned in a charter of King Hen. 2. to the abbot of Glashbury.

Ealderman. (or *Ealdorman*). Among the Saxons was as much as Earl with the Danes. *Camd. Brit. 107.* Also an elder, senator, &c. *Ealdermen* or *aldermen*, are now those that are associated to the mayor or chief officer in the common council of a city or borough town. *Stat. 24 H. 8. c. 13.* See *Aldermen*, and *Black. Com. 1 V. 398.* and *Squire's Ang. Sax. Gov. 161, 197, 220, n. and 257, n.* and Lord *Lyt. Hist. H. 2. V. 2. 215.*

Earl. (Sax. *Eorle*, Lat. *Comes*) This title was a great title among the Saxons, and is the most ancient of the English peerage, there being no title of honour used by our present nobility that was likewise in use by the Saxons except this of *Earl*; which was usually applied to the First in the Royal Line. *Verfagan* deriveth this word from the Dutch *Ear*, i. e. Honour, and *Estel*, which signifies Noble: But whence soever it is derived, the title *Earl* was at length given to those who were associates to the King in his council and martial actions; and the method of investiture into that dignity was *per cincturam gladii*, without any formal charter of creation. *Dugdale's Warwicksh. 302.* William the First, called the Conqueror, gave this dignity in fee to his nobles, annexing it to this or that county or province; and allotting them for the maintenance of it a certain portion of money arising from the prince's profits, for the pleadings and forfeitures of the provinces. *Camd.* And formerly one Earl had divers shires under his government, and had lieutenants under him in every shire, such as are now *sheriffs*; as appears by divers of our old statutes. *Quint.* But about the reign of King John and ever since, our Kings have made *Earls* of counties, &c. by charter, giving them no authority over the county, nor any part of the profits arising out of it; only sometimes they have had an annual fee out of the Exchequer, &c. An *Earl Comes*, was heretofore correlative with *comitatus*; and anciently there was no *Earl*, but had a shire or county for his earldom; but of late times the number of *Earls* very much intreating, several of them have chosen for their titles some eminent part of a county, considerable town, village, or their own seats, &c. Then, besides those local *Earls*; there are some personal and honorary; as *Earl Marshal of England*, and others nominal, who derive their titles from the names of their families. *Lex Constitutionis, p. 78.* Their place is next to a Marquis, and before a Viscount: And as in very ancient times, those who were created *Count* or *Earl*, were of the blood royal; our British monarchs to this day call them in all publick writings, Our most dear Cousin: They also originally did, and still may use the style of *Nor. Sec. Countess*; and the references after the word *Ealdorman*.

Earnest. Money paid in part of a larger sum, or part of the goods delivered, on any contract, &c. which being done, by way of *earnest*, the property of the goods is absolutely bound by it: And the lender may recover the goods by action, as well as the vendor may the price of them. And by 29 Car. 2. c. 3. No contract for sale of goods, to the value of 10 l. or more, to be valid, unless such *earnest* is made or given. *Black. Com. 2 V. 447. 448.*

Easement. *Affamentum*, from the Fr. *Aije*, (i. e. Commoditas) Is denoted to be a service or convenience, which one neighbour hath of another, by charter or prescription,

without profit; as a way through his land, a sink, or such like. *Quint. 105.* A person may prescribe to an easement in the freehold of another, as belonging to some ancient house, or to land, &c. And a way over the land of another; a gate-way, water-course, or washing place in another's ground, may be claimed by prescription as easements. But a multitude of persons cannot prescribe; though for an easement they may plead custom. *Cre. Jar. 170. 3 Leon. 254. 3 Mod. 294.* To allege an easement by custom only, is the best way: And things of necessity shall not be extinguished by unity of possession; but a way of *easement* may be thus extinguished. *Litt. Abr. 496.* See *Prescription*.

Easter. Was the name of a goddess which the Saxons worshipped in the month of April, and so called, because she was the goddess of the East. *Blount.* But in our church it is the feast of the *Easter*, in commemoration of the sufferings of our Saviour Christ.

Callintus. (Sax. *Eap-Tyde*) Is an eastern coast or country; also the east promontory side of a river, &c. *—Si sit estintus, & p. p. northintus amendet—* Leg. K. Edw. 1.

Call India Company. of Merchants, and their privileges, began in the reign of Queen Elizabeth, when they obtained divers charters and charters to carry on their trade, as *Blax. 1. c. 2.* The company to have the sole trade to the East Indies; and others trading there without licence, shall forfeit their ships and goods, and double value. Continuance of ships and goods trading to India under new foreign commissions prohibited. 25 Car. 2. c. 26.

Many acts of parliament have been made, and many new regulations, &c. too numerous to insert, and too particular for a treatise of this kind: we must therefore refer to the statutes, and to the *Merchants Lawyer*, *How. 1. c. 1.*

Calves-droppers. Persons that listen under walls or windows, or the eaves of a house, to hearken after discourse, and thence to frame slanderous and mischievous tales, are a common nuisance, and presentable at the court-leet; or are indictable at the sessions, and punishable by fine, and finding sureties for good behaviour. *Relich. of Courts, 20. 1 Hawk. P. C. 132. Black. Com. 4 V. 169.*

Chorodarius. An *chorodarius* or officer appointed weekly in cathedral churches, to supervise the regular performance of divine service, and prescribe the particular duties of each person attending in the choir, as to reading, singing, praying, &c. To which purpose the *chorodarius* at the beginning of his week drew in form a bill or writing of the respective persons and their several offices, called *tabula*; whereupon the persons there entered were filed *intabulati*: This is manifested in the Statutes of the Cathedral Church of St. Paul, digested by Dr. Ralph Baldock, Dean of St. Paul's, anno 1295, MS. penes Joh. Episc. Norw.

Cherishment. or *Cherishment*, (Sax.) Bare, or downright murder. *Leg. H. 1. c. 12.*

Cherishment. (*Aperum Mordrum*) Was one of those crimes, which by King Henry the First's laws, cap. 13. *Emendari non possunt, nec ex seculum genere sunt ulla poenae expiationem, &c.* Speim.

Cherish. (Lat.) Is commonly said for that place where God is served, which is commonly called a church: But in law proceedings, according to *Fincher's*, this word intends a parsonage; for so he expresses it in a question, whether a benefice was ecclesia, *an* chapel, &c. *P. N. E. 32. 2 Inst. 362.*

Cherish Sculpture. The image or sculpture of a church in ancient times, which was often cut out or cast in plate or other metal, and preserved as a religious treasure in relique, and to perpetuate the memory of its famous churches. *Mon. Ang. Tom. 1. p. 100.*

Cherish. Denotes something belonging to, or set apart for the church; as distinguished from *secular* or *worldly*, with regard to the world.

Cherish Conventions. Are where the members that compose it are *spiritual persons*. They were erected in the furtherance of religion, and perpetuating the rights of the church. *Black. Com. 1 V. 470.*

Ecclesiastical Courts. Are various, as the archbishop's, the consistory, the court of archdeacons, the pro-rogative, and the great court of appeal in all ecclesiastical causes, viz. the court of appeals, appointed by the King's commission, under his great seal, &c. See Black. Com. 3 P. 61, St. Barn's Hal. Lond. Wood's Inst. of Com. Law, and Oughles's *Ordo Judiciorum*. Also see *Courts Ecclesiastical*. Also Black. Com. 3 P. 87, 4 P. 408, 414, 418.

N. B. Ecclesiastical jurisprudence, in the middle ages, was much more perfect in its plan, more just, and more equitable than the civil courts: It therefore became such an object of adoration and respect, that exemption from civil jurisdiction was counted as a privilege, and conferred as a reward. Robert. Hist. Eng. Char. V. 1 P. 64, &c.

Ecclesiastical Jurisdiction. The doctors of the civil law, although they be laymen, &c. may exercise ecclesiastical jurisdiction, by Stat. 17 Ed. 8. c. 17.

Ecclesiastical Laws. See Canon, and Courts Ecclesiastical.

Ecclesiastical Persons or Ecclesiastics, (Ecclesiastici) Are church men, persons whose functions consist in performing the service, and keeping up the discipline of the Church. See Clergy.

Ecclesia, Procu. Actus, used for buildings. *quod ego Adam de M. concessit Johanni de B. pro servitibus suis totum servitium cum ecclesia, et omnibus pertinentiis, &c.* Regist. Priorat. de Wormley.

Ecclesia, Adm. or Rectory. Thus Du Fresne interprets it, *Couvent* says it signifies *Euse*.

Edict, (Edictum) An ordinance or command; a statute. Lat. Low Dict.

Edictates, Are a fry or bread of eels. Stat. 12 H. 8.

Efficialiter, Is used for military force. *Efficialiter venit cum equis & armis.* Mat. Paris. Anno 1213.

Effraiores, (Lat.) Breakers applied to burglars, that break open houses to steal. *Quod sitandi causa domus effraingunt, &c.* MS.

Efferts, (Sax.) Ways, walks or hedges. Blount.

Effusio Sanguinis, The murder, fine, or penalty imposed by the old English laws for the shedding of blood; which the King granted to many lords of manors: And this privilege, among others, was granted to the abbot of Cisterciensis. Cartular. Abbat. Glasston. MS. fol. 87.

Egyptians, (Egyptum) Commonly called *Cypriotes*, are by our laws and statute a counterfeit kind of rogues, who disguising themselves in strange habits, changing their faces and bodies, and flaming to themselves a canting unknown language, wander up and down; and under pretence of telling fortunes, curing diseases, and such like; abuse the ignorant common people, by stealing and pilfering from them every thing that is not too heavy for their carriage, and with which they may go off undisturbed. There are several statutes for suppressing these impostors; as by statute 22 H. 8. c. 10. *Egyptians* coming into England, are to depart the realm in fifteen days, or be imprisoned. And by 1 & 2 P. & M. c. 4. If any person shall import any *Egyptians* into this kingdom, he shall forfeit 40 *l.* And if the *Egyptians* remain in England above a month, they shall be guilty of felony. Also comforting with *Egyptians* is made felony by 5 Eliz. c. 20. See Black. Com. 4 P. 165.

Eia, (from the Sax. Eige) signifies an island. Mat. Paris. Anno 883, See Eya.

Ejesta, A woman ravished or deflowered; or cast forth from the virgins. Ejesta, a whore-monger. Blount.

Ejectione Reple, (Ejectione de Garde) Is a writ which lieth against him that casteth out the guardian from any land, during the minority of the heir. Reg. Orig. 162. *E. N. B.* 239. There are two other writs not unlike this; the one termed *replevment de garde*, and the other *de de gard*.

Ejectione Firma, or Ejectment. Is a writ or action that lies for the lessee for years, who is ejected before the expiration of his term, either by the lessor, or a stranger: Also *ejectment* may be brought by the lessor against the lessee, for rent in arrear, or holding over his term.

See Reg. Orig. 227. A copyholder may not bring action of *ejectment*; but the lessee of a copyholder for one or more years, may bring it, 4 Rep. 26. And the executors of a lessee, shall have this writ. *Lit. Rem. 195.* In these cases, *ejectment* is either an actual *ejectment*, as when the lessee is actually put out of land let unto him; or it is an *ejectment* by implication of law, viz. where such an act is done by one which doth amount to an *ejectment*, although he doth not really enter upon the land let, and oust the lessee. 1 Lill. Abr. 496. Anciently writs of entry and assize were the usual means of recovery of the possession of lands, and lay only against freeholders; but anno 14 H. 7. it was resolved that an *habere facias possessionem* would lie to recover the term in *ejectment*, and the land itself. Astorn. Compan. 170. The action of *ejectment firma* was never known to remove a possession till the reign of King Hen. 8. before which time an action of trespass, *quare clausum fregit*, &c. was made use of: Though in action of trespass, damages were only to be recovered; whereas in *ejectment firma*, the thing or term itself is recovered, as well as damages. 3 Leon. 49.

But *ejectment* is now become an action in the place of many real actions; as writs of right, *formedon*, &c. which are very difficult as well as tedious and chargeable: And this is the common action for trying of titles, and recovering of lands, &c. illegally kept from the right owner; though where entry is taken away by descents, fines and recoveries diffinies, &c. *Ejectment* may not be brought; so that all titles cannot be tried by this action. Wood's Inst. 547, 548. Nor where there is 20 years possession against the claimant. See the statutes of Limitations, Stat. St. Merton, 20 H. 3. c. 8. St. Westminster. 1. 3 Ed. 1. c. 13. 32 H. 8. c. 2. and 21 Jac. 1. c. 16.

Herein is to be considered,

I. For what things an *ejectment* will lie.

II. Of the method of proceeding in *ejectment*.

I. For what things an *ejectment* will lie.

Ejectment ought to be brought for a thing that is certain; and if it be of a manor, *manerium de A. cum pertinentiis*; if of a rectory, *rectoriam de B. &c.* And so many messuages, cottages, acres of arable land, meadow, &c. cum pertin. in paroch. &c. For land must be distinguished, how much of one sort, and how much of another, &c. Cro. Eliz. 339. 3 Leon. 13. *Ejectment* lies of a church, as *de una domo vocat. The parish church of, &c.* And a church is a messuage, by which name it may be recovered; and the declaration is to be served on the parson who officiates divine service. 11 Rep. 25. 1 Salk. 256. It lies not of tithes only; but may be of a rectory, chapel, &c. and the tithes thereto belonging. 2 Dav. Abr. 752.

It lies *De uno messuagio five burgagio*; but not *De uno messuagio five tenemento*, unless it have a *vocat* A. & c. to make it good, because of the uncertainty of the word *tenement*. 1 Sid. 295. It will lie for a moiety, or third part, of a manor or messuage, &c. And for a chamber or room of a house well set forth. 11 Rep. 55, 59. 3 Leon. 210. It lieth *de domo*, which hath convenient certainty for the sheriff to deliver possession, &c. Cro. Jac. 654. It lies of a cottage or curtilage; of a coal mine, &c. but not of a common, piscary, &c. Cro. Jac. 150. For underwood it lies, though a *præcipe* doth not. 2 Roll. Rep. 482, 483. But for *una clausa*, or *una pecia terre*, &c. without certainty of the acre, and their nature, it doth not lie. 11 Rep. 55. 4 Mod. 1. It lieth of a close, containing three acres of pasture, &c. Also of so many acres of land covered with water; though not *de aqua cursum*. 2 Cro. 435. 1 Brownl. 242. *Ejectment* lies for a *prebendal stall*, after collation to it W. J. Rep. Par. 1. Jo. 14. The King and The Bishop of London.

In this action the law requires, that the thing demanded be so particularly specified, that the sheriff may certainly know what to give the possession of, if the plaintiff should recover; for the judgment is in order to execution, and the judgment would be vain, if execution could not be had

had of the thing specifically demanded; but in this action the judges did not confine themselves to those rules which govern the *præcipe*, but allowed some things to be recovered in this action, which could not be demanded in a *præcipe*; because since the establishment of that real action, many things have been added and improved by art, and acquired new appellations that are perfectly understood now by the law, which are not found in the ancient law-books; and as men began to contract by new names which were not known in the old law, so it was reasonable to suffer the remedy to follow the nature of such contracts. 2 New Abr. 168.

II. As to the method of proceeding.

The method of proceeding in *ejectment*, is made more easy than formerly; when a lease was to be sealed and delivered on the premises to the lessee, &c. In ancient times, the *ejector* in law was any person that came upon any part of the land, &c. mentioned in the lease of *ejectment*, though he were there without any intent to disturb the lessee of the possession, after the sealing of the *ejectment* lease; and such *ejector* was a good *ejector* against whom an action of *ejectione firmæ* might be brought to try the title of the land in question: but now the law is altered, for there is no occasion for a lease to be made and sealed upon the premises to the lessee, who hath a mind to try the title, and to leave the lessee in possession, to be ousted and ejected by the tenants in possession, &c.

As the plaintiff could not proceed to recover his lands against the casual *ejector*, without delivering to the tenant in possession a declaration, and making him a proper defendant, if he thought fit: after this, the Lord Ch. Ju. Rolls invented the rule now in use; which is, that if the defendant comes in the room of such *ejector*, he should enter into a rule to confess lease, entry and actual ouster, and insist on the title only. See *Attorn. Compan.* 170, 173.

The usual course at this time is to draw a declaration, and therein feign a lease for three, five, or seven years, to him that would try the title, and also feign a casual *ejector* or defendant in the declaration, and then serve the same, by delivering a copy thereof to the tenant in possession, or his wife, (for a delivery to a son or servant, &c. is not good) and give notice in writing at the bottom for him to appear and defend his title; which must be read to the tenant, and the person serving it, is to tell him, that if he do not procure some attorney to appear for him and defend his title, in default thereof, that he (the defendant) will suffer a judgment to be had against him, whereby he, (the tenant) will be turned out of possession: the declaration being thus served, the tenant is to appear the beginning of the next term by his attorney, and consent to a rule to be made defendant instead of the casual *ejector*, and take upon him the defence; wherein he may confess a lease, entry, and ouster, and at the trial stand upon the title only: but if the tenant in possession doth not appear and enter into the aforementioned rule in time, after the declaration served; then on affidavit made of the service of the declaration, with notice to appear as aforesaid, the court will order that judgment be entered against the casual *ejector* by default; and the tenant in possession will, by an *habere facias possessionem* upon such judgment, be turned out of possession. 1 Lill. 499.

If at the trial the defendant will not appear and confess lease, entry and ouster, it is usual to call him or his attorney, and then call the plaintiff and nonsuit him: and upon return of the *posse*, judgment will be given against the casual *ejector*. 1 Salk. 250. But in this case, though the plaintiff be nonsuit, he shall not pay any costs; for the rule for confessing lease, entry, and ouster is to be carried to the secondary, who taxes costs upon it to be paid by the defendant; and if the same are not paid, the court on affidavit and motion will grant an attachment against the defendant; but this is where the defendant appears, and not where it goes wholly against him by default. 1 Lill. 503, 504.

If the tenant doth appear, having by his attorney filed common bail, and entered into the rule abovementioned, he is made defendant in the declaration, and put into the same in the place of the casual *ejector*; and then the

defendant's attorney must plead *Not guilty*: and the plaintiff's attorney draws up the issue, a copy whereof and of the declaration is to be delivered to the attorney for the defendant; whereupon notice is given of trial: in order to which the *venire*, &c. is to be made out and returned, and the record made up by the plaintiff's attorney, beginning with the declaration; which being sealed, the *breviate* is to be prepared, in which, after a short recital of the declaration and plea, the plaintiff's title is to be set forth. After trial the proceedings are as in other cases. But as to the mode of proceeding, see, for further instructions, the books of practice, now in use, as *Richardson, Harrison, &c. Practif. Solic.* 328, 329.

The plaintiff is not allowed to amend his declaration in *ejectment* after delivery: he must stand by it, or deliver a new declaration. As many demises may be laid in a declaration, as shall be thought fit; and if the plaintiff recovers upon one, it is sufficient for the whole. 3 Lec. 117, 334. No arrest is to be made in this action, as now usually prosecuted. But if there is not any tenant in possession; as where a house or land is empty, and the person that was last in possession is run away, so that you cannot find any person to deliver the declaration to, then the process must be in the old way, by sealing a lease upon the ground; and an original is to be sued out against the person who ejected the lessee, &c. And *heretofore* rules are to be given to *pleas*, though there cannot be judgment against the casual *ejector*, without a reason for that purpose, after the rules for pleading are out. 1 Lill. 499. See 1 Salk. 332. But note, by *Stat. in Geo. 2. c. 19. § 16*. If premises are held at a rack rent, and one year's rent being in arrear, the tenant deserts the premises, and there is not any sufficient distress, two justices of peace may put the landlord in possession.

In *C. B.* the common rule is, that the defendant shall forthwith appear, and receive a declaration, and therefore this *superfides* the necessity of an original writ; and no advantage can be taken for want thereof, unless it be in a writ of *error*; but when error is brought, an original must be filed: and as in the *Common Pleas* there needs no original, so in the *King's Bench* there needs not be a *latitat*; but the party is to file a bill of *ejectment*, beside the plea-roll, if a writ of error be brought before the errors are assigned; and he must file bail before he can proceed.

In *ejectment*, where there are divers defendants, and the freeholds are several, no defendant may defend for more than is in his own possession; and the plaintiff may take judgment against his *ejector* for what remains. 1 Vent. 355. 2 Keb. 524, 531. And if there are several defendants in *ejectment*, that are severally concerned in interest, to whom the plaintiff delivers declarations; if he moves to join them all in one declaration, the court will not agree to it, for several declarations must be delivered to each of the defendants; because if any are found *Not guilty*, each of them must have a remedy for his costs. 2 Keb. 524.

In Lord Raymond's Reports, it is held if there are two defendants in *ejectment*, and one of them appears and confesses lease, entry, and ouster, but the other doth not appear, in that case the plaintiff may enter a *non pros*, or *verdict* against him, and go to trial, and have judgment against the other defendant. 1 Lord Raym. 717, 718. Also if an *ejectment* be brought against two persons, and after issue joined, one dies, and a *venire* is awarded as to the two defendants, and a verdict against two; here upon suggestion of the death of one of them upon the roll, judgment shall be given for the plaintiff against the other for the whole: for 'tis said this action is grounded upon torts, which are several in their nature, and one may be found guilty and the other acquitted. *Ibid.*

Where one brings *ejectment* of land in two parties, and the whole lies in one, he shall recover: if a person brings *ejectment* of one acre in *B.* and part of it lies in *A.* he shall recover for such part as lies in *B.* And if one having title to a part only of lands, bringeth an *ejectment*

ejectment for the whole, he shall recover his part of the lands. *Plowd.* 429. 3 *Cro.* 13.

A plaintiff shall recover only according to the right which he hath at the time of bringing his action: and one who hath title to the land in question, may on motion be made a defendant in the action with the tenant in possession, to defend his title. 1 *Nels. Abr.* 694. 1 *Lill.* 497, &c. As the possession of the land is primarily in question, and to be recovered, that concerns the tenant; and the title of the land, which is tried collaterally, that is concerning some other, who may be admitted to be a defendant with the tenant: but none other is to be admitted a defendant, but he that hath been in possession, or receives the rents, &c.

When there is a recovery in *ejectment*, against the tenant in possession, action of trespass may be brought to recover the *mesne* profits of the lands, from the time of the defendant's entry laid in the declaration: and this action may be brought either by the plaintiff in *ejectment*, or by the lessor of the plaintiff. In which case the plaintiff need not prove a title, but it is sufficient to produce the judgment in *ejectment* and the writ of possession executed, and to prove the value of the profits, and thereupon he shall recover from the time of the demise laid in the declaration. *Asplin and Parker, Mic.* 32 *Geo.* 2. *per omnes Jussic.* on a case reserved. *Ville Burrow, part 4.* 668. *Black. Com.* 3 *V.* 205. *Bath. Ni. Pri.* 83. If judgment in *ejectment* was against the tenant in possession, *i. e.* *per verdict*, it does not seem necessary to prove the writ of possession executed: *contra*, if against the casual *ejector*. *Thorp and Fry. Stra.* 5. *Bath. Ni. Pri.* 83.

If the plaintiff can prove his title accrued before the time of the demise, and that defendant hath been longer in possession, he shall recover antecedent profits; but in such case defendant will be at liberty to controvert his title. *Decosta and Atkins, per Eyre Ch. J.* *Hil.* 4 *Geo.* 2. *Bath. Ni. Pri.* 83.

The plaintiff in *ejectment* is a mere nominal person, and a trustee for the lessor; and if he release the action, the court may set aside the release, and he shall be committed for a contempt; so likewise if he release an action brought in his name for the *mesne* profits. 1 *Salk.* 260. *Skinn.* 247. It has been held a great abuse, that nominal lessees in *ejectment* were persons not in being, or not known to the defendant; and attorneys who have made such lessees, have been ordered to pay costs, and put to answer on interrogatories, &c. *Med. Ca.* 309. If a man is made plaintiff in *ejectment* without his knowledge, and the defendant appearing, the plaintiff thereupon becomes nonsuit, after which execution is sued out against him; if it appears by his oath that he was made plaintiff without his knowledge or order, he shall be discharged. 34 *Car. B. R.* 5 *An.* 1 *Lill.* 500.

In *ejectment*, the time of entry of the plaintiff must be shewn, that it may appear, he was not a disseisor, by entering on the lands before the commencement of his term, &c. If it appears that the lessor of the plaintiff had not any title at the time of the demise, upon which the plaintiff declared, this will be fatal: and the court will not give leave to alter the declaration as to the time of the demise, which would make it a new demise. *Carth.* 179. See *Cro. Jac.* 311.

As to lands in the lease, and declaration, &c. being different, and not exactly the same, or the term different from that in the declaration, &c. See *Yelv.* 166. 2 *Lutw.* 963. The declaration must assign a place where the lease was made. See *Moor, ca.* 710, 673. 1 *And.* 283. 9 *Rep.* 78. If there be a verdict and judgment against the plaintiff, he may bring another action of trespass and *ejectment* for the land, it being only to recover the possession, &c. wherein judgment is not final; and it is not like a writ of right, &c. where the title alone is tried. *Wood's Inst.* 547. *Trin.* 23 *Car. B. R.* And an *ejectment* being a mixed action, after a judgment therein has lain some considerable time, execution may not be had upon it without a *scire fac.* for the tenant may be changed, &c. But formerly it was held otherwise. *Sid.* 351. *Comberb.* 250.

An *ejectment* was brought for non-payment of rent; and the court was moved to stay proceedings, upon payment of the rent and costs, to be adjudged by a secondary, which the court granted; and also ordered a new lease to be made at the defendant's charge. *Micb.* 8 *H.* 3. 1 *Lill.* 501.

And by a late statute, in all cases between landlord and tenant, when half a year's rent shall be in arrear, the landlord, having lawful right to re-enter for non-payment, may serve a declaration in *ejectment* on the tenant, without a formal demand or re-entry; or he may affix such declaration on the door of the demised messuage, or notorious place of the lands, which shall be deemed a legal service: and upon proof that half a year's rent was due before the declaration was served, and no sufficient distress on the premises, the lessor shall have judgment and execution; which if the lessee suffer, without paying the arrears and costs, and without filing a bill in equity to be relieved within six months, he shall be barred from all relief, other than by writ of error; and the lessor shall hold the premises discharged from the lease: but if the tenant or lessee tender to the lessor, or bring into court the rent in arrear, together with costs, all further proceedings shall cease; and if the lessee be relieved in equity, he shall enjoy the demised premises, according to his lease, without obtaining a new one. See *Stat.* 4 *Geo.* 2. c. 28. & 11 *Geo.* 2. c. 19.

Tenants, to whom declarations in *ejectment* are generally delivered for any lands, &c. shall give their landlords, or their bailiffs, notice thereof, under the penalty of three years rack rent, to be recovered by action of debt, &c. And the court where such *ejectment* shall be brought, shall suffer the landlord to make himself defendant, by joining with the tenant, unto whom the declaration is delivered, if he appears; but if not, judgment shall be signed against the casual *ejector*, for want of such appearance: but if the landlord shall desire to appear by himself, and consent to enter into the like rule, that the tenant, if he had appeared, ought to have done; the court may permit him so to do, and order a stay of execution, till they make a further order therein. 11 *Geo.* 2. c. 19.

If by any intendment a judgment in *ejectment* after a verdict can be made good, the court will do it. *Morris v. Barry, Wilf. Rep. par. 1. fo. 1.* Where the landlord is made defendant, the plaintiff must prove the landlord's tenants in possession of the premises in question. *Smith on Demise of Taylor v. Mann. Id.* 220.

As to the forms of process, &c. in *ejectment*, they are in the common books of practice.

See further the *Law of Ejectments*, by Gilbert.

Ejectum, Ejectus maris, quod e mari ejicitur: Jet, Jetson, Wreck, &c. See *Wreck*.

Eigne, (Fr. *aîné*) Eldest or first born; as *bastard eigne*, and *mulier puîné* are words used in our law for the elder a bastard, and the younger lawful born.

Etincia, (from the Fr. *aîné*, *i. e.* *primogenitus*) Signifies eldership. Statute of Ireland, 14 *Hen.* 3. See *Ejmeu*.

Eyre, or *Eyre*, (Fr. *cire*, viz. *iter*, as a *grand cire*, that is, *magnis itineribus*) Is the court of justices *itinerant*; and justices in *eyre* are those whom *Bracton* in many places calls *justiciarios itinerantes*. These justices, in ancient time, were sent with a general commission into divers counties to hear such causes as were termed *pleas of the crown*: and this was done for the ease of the people, who must else have been hurried to the King's Bench, if the cause were too high for the county court: it is said they were sent but once in every seven years. *Bract. lib.* 3. c. 11. *Horn's Mirror, lib.* 2. The *eyre of the forest* is the justice-feast; which, by an ancient custom was held every three years by the justices of the forest, journeying up and down for that purpose. *Bract. lib.* 3. *tract.* 2. c. 1 & 2. *Britt. c.* 2. *Crompt. Jurisd.* 156. *Manw. par.* 1. p. 121.

Election, (*electio*) Is when a man is left to his own free will to take or do one thing or another, which he pleases. And if it be given of several things, he who is the first agent, and ought to do the first act, shall have the election: as if a person make a lease, rendering rent, or a garment, &c. the lessee shall have the election, as being

the first agent, by the payment of the one, or delivery of the other. *Co. Litt.* 144. And if *A.* covenant to pay *B.* a pound of pepper or sugar, before *Easter*; it is at the election of *A.* at all times before *Easter*, which of them he will pay: but if he pays it not before the said feast, then afterwards it is at the election of *B.* to demand and have which he pleaseth. *Dyer* 18. 5 *Rep.* 59. 11 *Rep.* 51.

If I give to you one of my horses in my stable, there you shall have the election; for you shall be the first agent, by taking or seizure of one of them. *C. Litt.* 145. If things granted are annual, and to have continuance, the election (where the law gives it him) remains to the grantor, as well after the day as before; but it is otherwise when to be performed at once. *Ibid.* When nothing passes to the feoffee or grantee before election to have the one thing or the other, the election ought to be made in the life of the parties; and the heir or executor cannot make the election: but where an estate or interest passes immediately to the feoffee, donee, &c. there election may be made by them, or their heirs or executors. 2 *Rep.* 36, 37. And when one and the same thing passeth to the donee or grantee, and such donee or grantee hath election in what manner he will take it, there the interest passeth immediately, and the party, his heirs, &c. may make election when they will. *Co. Litt.* 145. 2 *Danv. Abr.* 761.

Where the election creates the interest, nothing passes till election; and if no election can be made, no interest will arise. *Hob.* 174. If the election is given to several persons, there the first election made by any of the persons shall stand: as if a man leases two acres to *A.* for life, and remainder of one acre to *B.* and of the other acre to *C.* Now *B.* or *C.* may elect which of the acres he will have, and the first election by one binds the other. *Co. Litt.* 145. 2 *Rep.* 36. If a man leases two acres for life, the remainder of one in fee to the same person; and after licenses the lessee to cut trees in one acre, this is an election that he shall have the fee in the other acre. 2 *Danv.* 762. A real election concerning lands is defendible; and election of a tenant in tail may prejudice his issue. He in remainder may make an election, after the death of tenant for life; but if the tenant for life do make election, the remainder-man is concluded. *Moor*, ca. 247, 832.

A person grants a manor, except one close called *N.* and there are two closes called by that name, one containing nine acres, and the other but three acres; the grantee shall not in this case choose which of the said closes he will have, but the grantor shall have election which close shall pass. 1 *Leon.* 268. But if one grants an acre of land out of a waste or common, and doth not say in what part, or how to be bounded, the grantee may make his election where he will. 1 *Leon.* 30. If a man hath three daughters, and he covenants with another, that he shall have one of them to dispose of in marriage; it is at the covenantor's election which of his daughters the covenantee shall have, and after request she is to be delivered to him. *Moor* 72. 2 *Danv.* 762. Where there are three coparceners of lands, upon partition the eldest sister shall have the election: though if she herself make the partition, she loseth it, and shall take last of all. *Co. Litt.* 166.

In consideration that a person had sold another certain goods, he promised to deliver him the value in such pipes of wine as he should choose, the plaintiff must make his election before he brings his action. *Style* 49. An election which of two things shall be done, ought not to be made merely by bringing an action; but before, that the defendant may know which he is to do, and it is said he is not bound to tender either before the plaintiff hath made his choice which will be accepted. 1 *Mod.* 217. 1 *Nelf. Abr.* 697.

A condition of a bond is, that the obligor shall pay 30*l.* or twenty nine, at the obligee's election, within such a time; the obligee at his peril is to make his election within the time limited. 1 *Leon.* 69. Though in debt upon bond to pay 10*l.* on such a day, or four cows, at the then election of the obligee, it was adjudged, that it was not enough for the defendant to plead that he was always ready, &c. if the obligee had made his election; for he ought to tender both at the day, by reason the

word then relates to the day of payment. *Moor* 246. 1 *Nelf.* 694, 695.

If a man hath an election to do one of two things, and he cannot by any default of a stranger, or of himself, or the obligee, or by the act of God, do the one; he must at his peril do the other. 1 *Lill. Abr.* 506.

Where the law allows a man two actions to recover his right, it is at his election to bring which he pleaseth: and when a man's act may work two ways, both arising out of his interest, he hath election given him to use it either way. *Dyer* 20. 2 *Roll. Abr.* 787. Action of trespass upon the case, or action of trespass *vi et armis*, may be brought against one that rescues a prisoner, at the election of the party damnified by the rescous. And an action of the case, or an assise lies against him that surcharges a common, at the election of him that is injured thereby. 1 *Lill.* 504, 505. Also for a rent charge out of lands, there may be a writ of annuity or distress, at the election of the grantee: but after the death of the grantor, if the heir be not charged, the election to bring annuity ceaseth. *Dyer* 344.

A man was indicted of felony for entering an house and taking away money, and found guilty, and burnt in the hand; after which the person who lost the money brought an action of trespass against the other for breaking his house, and taking away his money; and it was held that the action would lie; for though it was at his election at first, either to prefer an indictment or bring an action, yet by the indictment he had made no election, because that was not the prosecution of the party, but of the crown. *Style* 347.

If a bargain and sale be made of lands, which is enrolled, and at the same time the bargainor levies a fine thereof to the bargainee, he hath his election to take by one or the other. 4 *Rep.* 72. A wife hath her election which to take, of a jointure made after marriage, or her dower, on the death of the husband, and not before. *Dyer* 358. When a lessor hath election to charge the lessee, or his assignee, for rent; if he accepts the rent of the assignee, he hath determined his election. 3 *Rep.* 24.

If a person hath election to pay or perform one of two things at a day, and he do neither of them at that day, his election is gone: and where a grant is made of two acres of land, the one for life, the other in fee, or in tail, and before any election the feoffee makes a feoffment of both; in this case the election will be gone, and the feoffor may enter upon which he will for the forfeiture. 2 *Rep.* 37. If money on a mortgage be to be paid to a man, his heirs, or executors, the mortgagor hath election to pay it to either: and if in a feoffment it be to pay to the feoffee, his heirs or assigns, and he enfeoff another, the feoffor may pay the money to the first or second feoffee, &c. *Co. Litt.* 210.

In some cases, where one hath cause of suit, he may sue one person or another at his election; for there is an election of persons, as well as of things. *Dyer* 204, 207. A man by deed binds himself and his heirs to pay money, and dies; the obligee may chuse to sue the heir, or the executors, although both of them have assets. *Poph.* 151. One may have election when he hath recovered a debt, to have his execution by *elegit*, *seri facias*, or *cap. ad satisfaciendum*; but where he takes an *elegit*, and hath no fruit of it, he may resort to another writ, though the election be entered on record. *Hob.* 57. *Dyer* 60, 369. There is no election against the King in his grants, &c. 1 *Leon.* 30. And an act becoming void, will determine an election. *Hob.* 452. As to election with respect to one action or another, see *Com. Dig.* 1 *V. tit. Action.*

Election of a Clerk of Statutes-Merchant. Is a writ that lies for the choice of a clerk assigned to take bonds called *statutes merchant*; and is granted out of the *Chancery*, upon suggestion that the clerk formerly assigned is gone to dwell at another place, or is under some impediment to attend the duty of his office, or hath not lands sufficient to answer his transgressions, if he should act amiss, &c. *F. N. B.* 164.

Election of Ecclesiastical Persons. There is to be a free election for the dignities of the church, by 9 *Ed.* 2. c. 14. And none shall disturb any person from making free

free election, on pain of great forfeiture. If any persons that have a voice in elections, take any reward for an election in any church, college, school, &c. the election shall be void: and if any of such societies resign their places to others for reward, they incur a forfeiture of double the sum; and the party giving it, and the party taking it, is incapable of such place. *Stat. 31 Eliz. c. 6. Election of Bishops. Vide Bishops.*

Election of a Verderor of the Forest, (*electione viridarii foreste*) Is a writ which lies for the choice of a verderor, where any of the verderors of the forest are dead, or removed from their offices, &c. It is directed to the sheriff; and, as appears by the ancient writs of this kind, the verderor is to be elected by the freeholders of the county, in the same manner as coroners. *New Nat. Br. 366.*

Election of Members of Parliament. See *Parliament.*

Eleemosyna, Alms; *dare in puram & perpetuam eleemosynam*, to give in pure and perpetual alms; or *frank-almoigne*; as lands were commonly given in ancient times to religious uses. *Convel.*

Eleemosynary Corporations, Are corporate bodies appointed over hospitals, &c. constituted for the perpetual distribution of the free alms, or bounty of the founder of them. *Black. Com. 1 V. 471.*

Eleemosyna Regis, or *eleemosyna aratri*, Is a penny which King *Aethelred* ordered to be paid for every plough in England, towards the support of the poor: it is called *Eleemosyna Regis*, because it was at first appointed by the King. *I.eg. Aethelred. cap. 1.*

Eleemosynaria, The place in a religious house, where the common alms were repositied, and thence by the almoner distributed to the poor.

Eleemosynarius, The almoner or peculiar officer who received the *eleemosynary* rents and gifts, and in due method distributed them to pious and charitable uses. There was such a chief officer in all the religious houses: and the greatest of our English bishops had anciently their almoners, as now the King hath. *Linwood's Provincial, lib. 1. tit. 12. See Almoner.*

Eleemosynae, Hath been used for the possessions belonging to churches. *Blount.*

Elegit, (from the words in it, *elegit sibi litem*) Is a writ of execution that lies for him who hath recovered debt or damages, or upon a recognizance in any court, against one not able in his goods to satisfy the same; directed to the sheriff, commanding him to make delivery of a moiety of the party's land, and all his goods, beasts of the plough excepted. And the creditor shall hold the said moiety of the land so delivered unto him, until his whole debt and damages are paid and satisfied; and during that term he is tenant by *elegit*. *Reg. Orig. 299. Co. Litt. 289.* Upon an *elegit*, the sheriff is to deliver one half of all houses, lands, meadows and pastures, rents, reversions, and hereditaments wherein the defendant had any sole estate in fee, or for life, into whose hands soever the same do afterwards come; but not of a right only to land, an annuity, copyhold lands, &c. *Dyer 206. 7 Rep. 49. Plowd. 224.* This writ is given by the statute of *Westm. 2. 13 Ed. 1. c. 18.* And by it, the plaintiff, &c. elects *omnia bona & catalla* of the defendant, *prater boves & asinos de caruca sua*; and a moiety of all the lands which the defendant had at the time of the judgment recovered: but it ought to be sued within a year and a day after the judgment. *F. N. B. 267.*

But tho' by this statute, the lands of the debtor are made liable, as well as his personal estate; yet if the creditor takes out an *elegit*, and it appears to the sheriff, that there are goods and chattels sufficient of the debtor's, to satisfy the debt, he ought not to extend the lands. *2 Inst. 395.* But an *elegit* executed upon goods only, is not a *ferri facias*, for a *ferri facias* is executed by sale by the sheriff; but the *elegit* by the appraisement of the goods by a jury, and delivery to the party. *1 Sid. 184. 1 Lew. 92. 1 Keb. 105, 261, 465, 556, 692.*

Upon this writ, the sheriff is to impanel a jury, who are to make inquiry of all the goods and chattels of the debtor, and to appraise the same, and also to inquire as to his lands and tenements; and upon such inquisition

the sheriff is to deliver all the goods and chattels (except the beasts of the plough) and a moiety of the lands to the party, and must return his writ, in order to record such inquisition in that court, out of which the *elegit* issued: and when the jury have found the tenu and value of the land, the sheriff, and not the jury, is to set out and deliver a moiety thereof to the plaintiff, by metes and bounds. *Cro. Car. 319.*

All writs of execution may be good, though not returned, except in *elegit*; but that must be returned, because an inquisition is to be taken upon it, and that the court may judge of the sufficiency thereof. *4 Rep. 65, 74.* It has been ruled, that if more than a moiety of the lands is delivered on an *elegit* by the sheriff, the same is void for the whole. *Sid. 91. 2 Salk. 563.* And the sheriff cannot sell any thing, but what is found in the inquisition; and therefore if he sell a term for years, &c. mis-recited in the inquisition, as to the commencement thereof, the sale is void. *4 Rep. 74.*

In debt upon bond, the defendant before the trial conveyed his lands to another, &c. but he himself took the profits; notwithstanding this conveyance, a moiety of his lands was extended on an *elegit*. *Dyer 294. 3 Rep. 78.* If two persons have each of them a judgment against one debtor, and he who hath the first judgment brings an *elegit*, and hath the moiety of the lands delivered to him in execution; and then the other judgment creditor, sues out another *elegit*, he shall have only a moiety of that moiety, which was not extended by the first judgment. *Cro. Eliz. 483.* But this is contrary to the year-book 10 *Ed. 2.* where 'twas held, that the intire moiety left should be delivered in execution. *1 Nels. Abr. 698.*

When lands are once taken in execution on an *elegit*, and the writ is returned and filed, the plaintiff shall have no other execution. *1 Lew. 92.* And if the defendant hath lands in more counties than one, and the plaintiff awards an *elegit* to one county, and extends the lands upon the *elegit*, and afterwards files the writ, he cannot after that, sue out an *elegit* into the other counties: but he may immediately after entry of the judgment upon the judgment-roll, award as many *elegits*, into as many counties as he thinks fit, and execute all, or any of them, at his pleasure. *1 Lill. Abr. 509. Cro. Jac. 246.* And it has been held, that a person may have several *elegits* into several counties, for the intire sum recovered; or that he may divide his execution, and have it for part in one county, and part in another. *Moor 24.*

A man had lands in execution, upon an *elegit*, and afterwards moved for a new *elegit*, upon proof that the defendant had other lands, not known to the creditor, at the time when the execution was sued out; and it was adjudged, that if he had accepted of the first by the delivery of the sheriff, he could not afterwards have a new *elegit*; but when the sheriff returns the writ, he may waive it, and then have a new extent. *Cro. Eliz. 310. 1 Nels. Abr. 699. Sed qu.*

If the defendant dies in prison, so that there is no execution with satisfaction, the plaintiff shall have an *elegit* afterwards. *5 Rep. 86.* And if all the lands extended on an *elegit* be evicted by a better title, the plaintiff may take out a new execution. *4 Rep. 66.* Where one having land by *elegit*, is wholly evicted out of it, he may have a further execution, either against the defendant's lands or goods, as he might have had at first; save only, he must bring a *scire facias* against the defendant, or him that comes in under him; but if the eviction be of part of the land, or for a time only, so that the plaintiff may take his full execution by holding it over; there he cannot have any new execution, by the statute 32 *H. 8. c. 5. 2 Shep. Abr. 115.*

After a void *elegit* sued out and filed, a new writ may be had: and if one sue an *elegit* upon a recovery, and the sheriff returns that he hath made inquisition of the lands of the defendant, by twelve jurors; but he cannot deliver the moiety to the party, according to the writ, for that all the land is extended to another on a statute; the plaintiff shall have a *cap. ad satisfaciend.* *Rel. Abr. 905.*

Where

Where an *elegit* is sued upon a judgment, the levying of goods thereon for part only, is no impediment, but the plaintiff may bring another *elegit pro residuo*, and take the lands. 1 *Lev.* 92. On a *nihil* returned upon an *elegit*, there may be brought a *capias ad satisfaciendum*, or *feri facias*. 1 *Leon.* 176. And an *elegit* may be sued, after a *fiat facias* returned *nulla bona*, or where part is levied by it; and after a *capias ad satisfaciendum* returned *non est inventus*. *Hob.* 57.

If on recovery by writ of debt, a *feri facias* is sued out, and the sheriff return *nulla bona*; then the plaintiff shall have a *capias* or *elegit*, &c. *Terms de Ley*. There is another sort of *elegit* upon adjudging execution against tenants, whereon only a moiety of the lands, against which execution is awarded, is extended by the sheriff; and nothing is mentioned therein of any goods and chattels. *Ibid.* A person in execution is suffered to effect, and then he did; the land which he had at the time of the judgment may be extended, by *elegit*, upon a *fiat facias* brought against his heir, as tenant. *Dyer* 271.

A man may have an assize of the land which he hath in execution by *elegit*, if he be deforced thereof. *Westm.* 2. c. 18. And if tenant by *elegit* alien the land in fee, &c. he who hath right shall have against him and the alienee, an assize of *novel disseisin*. *Ibid.* At a trial at bar in C. B. the court delivered for law, that where lands are actually extended, and delivered upon an *elegit*, a fine levied on those lands, and nonclaim, will bar the interest of the tenant by *elegit*; and upon the inquisition found, the party is in possession before actual entry, for in such case he may bring an ejectment, or trespass, &c. 1 *Mod.* 217.

If tenant by *elegit*, be put out of possession before he hath received satisfaction for his debt, by the heir at law, &c. he may bring action of trespass, or re-enter and hold over till satisfied: but after satisfaction received, the defendant may enter on the tenant by *elegit*. 4 *Rep.* 28, 67. Tenants by *elegit*, statutes-merchant, &c. are not punishable for waste by action of waste; but the party, against whom execution is sued, is to have a writ of *venire facias ad computandum*, &c. and there the waste shall be recovered in the debt: though 'tis said there is an old writ of waste in the Register, for him in reversion against tenant by *elegit*, committing waste on lands which he hath in execution. 6 *Rep.* 37. *New Nat. Er.* 130. On tenant by *elegit*'s accounting, if the money recovered by the plaintiff is levied out of the lands, the defendant shall recover his land; and if more be received by waste, &c. he shall have damages. *Terms de Ley*. See *Extent*, *Execution*. See *Black. Com.* 2 *V.* 161. 3 *V.* 418. 4 *V.* 419.

Elf-Stricks, Were flint-stones sharpened on each side in shape of arrow heads, made use of in war by the ancient Britains; of which several have been found in England, and greater plenty in Scotland, where 'tis said the common people imagine they drop from the clouds.

Elisors, To impanel juries, &c. See *Elisors*.

Elke, A kind of yew to make bows of. *Stat.* 32 *H. S.* cap. 9. Also the name of the wild beast somewhat like a deer.

Eloine, (from the Fr. *espoigner*) Signifies to remove or send a great way off: in this sense it is used by statute; if such as are within age be *eloined*, so that they cannot come to sue personally, their next friends shall be admitted to sue for them. 13 *Ed.* 1. cap. 15.

Elongata, Is a return of the sheriff that cattle are not to be found, or removed, so that he cannot make deliverance, &c. in *replevin*. 2 *Lill. Abr.* 454, 458.

Elopement, (derived from the Belg. *E*, viz. *matrimonium* & *loopen*, *currere*) Is where a married woman of her own accord, goes away and departs from her husband, and lives with an adulterer. A woman thus leaving her husband, is said to *elope*; and in this case, her husband is not obliged to allow her any alimony out of his estate; nor shall he be chargeable for necessaries for her, as wearing apparel, diet, lodging, &c. And where the same is notorious, whoever gives her credit, doth it at his peril: but on *elopement*, the putting a wife in the *Gazette*, or other news-paper, is no legal notice to persons in general not to trust her; though personal notice to particular per-

sons given by the husband, will be good not to be chargeable to them. 1 *Rel.* 350. 1 *Vent.* 42. By *Stat.* 13 *Ed.* 1. cap. 34. If the wife goes away from the husband, and tarrieth with the adulterer, without returning and being reconciled to her husband, this continual *elopement* forfeits her dower; according to these old verses:

*Sponte virum mulier fugiens, & adultera facta,
Dote sua carcat, et per seipso spente retracta.*

Action lies against the adulterer for carrying away another person's wife, and detaining her; and large damages are usually given in these cases to the injured husband.

Emp, A royal franchise or county palatine. See *County*, and *Black. Com.* 1 *V.* 118. 3 *V.* 78.

Embarge, A prohibition upon shipping, not to go out of any port, on a war breaking out, &c.

Emblements, from the Fr. *emblemence de bled*, viz. corn sown on a plot upon a lease for years. Signify properly the profits of sown land: but the word is sometimes used for any profit that naturally grows on a plot of ground, as grass, fruit, &c. In some cases he who sows the corn shall have the *emblements*; and in others not: a lessee at will sows the land, he shall have the *emblements*; though if the lessee determines the will himself, he shall not have them, but the lessor. 5 *Rep.* 116. If lessee at will sows the land with grain, or other thing yielding annual profit, and the lessor enters before severance; yet the lessee shall have it: but where the lessee plants young fruit-trees, or other trees, or sows the land with acorns, he shall not have these: and if such tenant by good husbandry make the grass to grow in greater abundance; or sow the land with hay-seed, by which means it is increased, if the lessor enters on the lessee, the lessee shall not have it, because *grois* is the natural profit of the soil. *Co. Litt.* 55, 56.

Where tenant for life sows the land, and dies, his executors shall have the *emblements*, and not the lessor or him in reversion; by reason of the uncertainty of the estate. *Cro. Eliz.* 463. And if a tenant for life plants hops, and dies before severance, he in reversion shall not have them, but the executors of tenant for life. *Cro. Car.* 515. If tenant for years, (if he so long live) sow the ground, and die before severance; the executor of the lessee shall have the corn: and where lessee for life leases for years, if the lessee for years sow the land, and after lessee for life dies before severance, the executor of lessee for years shall have the *emblements*. 2 *Dunv. Abr.* 765.

But if tenant for life sows his land with corn, and afterwards grant over all his estate and right to another; if the grantee dies before severance, it is said his executors shall not have the corn, but he in reversion. *Cro. Eliz.* 464. If tenant for years sows ground, and before his corn is severed, the term which is certain expires; the lessor or he in reversion shall have the *emblements*; but he must first enter on the lands. 1 *Lill. Abr.* 511. A lessee for life or years sows the land, and after surrenders, &c. before severance, the lessor shall have the corn. 2 *Dunv.* 764. If there be lessee for years upon condition that if he commit waste, &c. his estate shall cease; if he sows the ground with corn, and after doth waste, the lessor shall have the corn. *Co. Litt.* 55. And where a lord enters on his tenant for a forfeiture, he shall have the corn on the ground. 4 *Rep.* 21.

A feme copyholder for her widowhood sows the land, and before severance takes husband, so that her estate is determined, the lord shall have the *emblements*. 1 *Lill.* 511. Though if such a feme copyholder *durante widowhood*, leases for one year according to custom, and the lessee sows the land, and afterwards the copyholder takes husband, the lessee shall have the corn. 2 *Dunv.* 764. If a husband hold lands for life, in right of his wife, and sow the land, and after she dies before severance, he shall have the *emblements*. *Dyer* 316. 1 *Nelf. Abr.* 701. And where the wife hath an estate for years, life, or in fee, and the husband sows the land, and dieth, his executors shall have the corn. 1 *Nelf.* 702. But if the husband and wife are jointenants, though the husband sow the

the land with corn, and dies before ripe, the wife and not his executor shall have the corn, she being the surviving jointenant. *Co. Litt.* 199.

When a widow is enowled of lands sown, she shall have the *emblements*, and not the heir. *2 Inst.* 81. And a tenant in dower may dispose of corn sown on the ground; or it may go to her executors, if she die before severance. *2 Inst.* 80, 81. And if a parson sows his glebe, and dies, his executors shall have the corn: likewise such parson may by will dispose thereof. *1 Rel. Abr.* 655. *Stat.* 28 *H. 8. cap.* 11.

If tenant by statute-merchant sows the land, and before severance a casual profit happens, by which he is satisfied, yet he shall have the corn. *Co. Litt.* 55. Lands sown are delivered in execution upon an extent, the person to whom delivered shall have the corn on the ground. *2 Leon.* 54. And judgment was given against a person, and then he sowed the land, and brought a writ of error to reverse the judgment; but it was affirmed; and adjudged that the recoveror shall have the corn. *2 Bulfl.* 213.

If a disseisor sows the land, and afterwards cuts the corn, but before 'tis carried away, the disseisee enters; the disseisee shall have the corn. *Dyer* 31. *11 Rep.* 52. A person seised in fee of land dies, having a daughter, and his wife *provenient coesent* with a son; the daughter enters and sows the land, and before severance of the corn, the son is born; in this case the daughter shall have the corn, her estate being lawful, and defeated by the act of God; and it is for the publick good that the land should be sown. *Co. Litt.* 55.

A man seised in fee-simple sows land, and then devises the land by will, and dies before severance; the devisee shall have the corn; and not the devisor's executors. *Winch* 52. *Cro. Eliz.* 61. If a person devises his lands sown, and says nothing of the corn, the corn shall go with the land to the devisee: and when a man seised of land, sows it, and dies without will, it goes to the executor, and not the heir. *1 Lill.* 512. A devisee for life dies, he in remainder shall have the *emblements* with the land. *Hob.* 132.

Tenant in fee sows the land, and devises it to *A.* for life, remainder to *B.* for life, and dies; *A.* dies before severance, *B.* in remainder shall have the corn, and not the executor of the first tenant for life. *Cro. Eliz.* 61, 464. Where there is a right to *emblements*, ingress, egress and regress are allowed by law, to enter, cut and carry them away, when the estate is determined, &c. *1 Inst.* 56.

Emblers de Gentz, (*Fr.*) A stealing from the people: The word occurs in our old rolls of parliament.——Whereas divers murders, *emblers de gentz*, and robberies are committed, &c. *Rot. Parl.* 21 *Ed.* 3. *n.* 62.

Embrazor, (*Fr.* *embrajour*) Is he that when a matter is in trial between party and party comes to the bar with one of the parties, having received some reward so to do, and speaks in the case; or privately labours the jury, or stands in the court to survey and overlook them, whereby they are awed or influenced, or put in fear or doubt of the matter. *Stat.* 19 *H. 7. cap.* 13. And the penalty of this offence is 20*l.* and imprisonment, at the discretion of the justices, by the said statute: also a person may be punished by fine, &c. on indictment at Common law, as well as by action on the statute. *Com. Law Com. Plac'd.* 186. But lawyers, attornies, &c. may speak in the case for their clients, and not be *embracers*: also the plaintiff may labour the jurors to appear in his own cause; but a stranger must not do it: for the bare writing a letter to a person, or parol request for a juror to appear, not by the party himself, hath been held within the statutes against *embrazery* and maintenance. *1 Inst.* 369. *Hob.* 294. *1 Saund.* 391. If the party himself instruct a juror, or promise any reward for his appearance, then the party is likewise an *embracer*. And a juror may be guilty of *embrazery*, where he by indirect practices gets himself sworn on the *tales*, to serve on one side. *1 Lill.* 513. There are divers statutes relating to this offence and maintenance, as 5 *Ed.* 3. *c.* 10. 34 *Ed.* 3. *c.* 8. 32 *H. 8. c.* 9, &c.

Embrazery, Is the act or offence of *embracers*: and to attempt to influence a jury, or any way incline them to be more favourable to the one side than the other, by pro-

mises, threatenings, money, treats, &c. whether the jurors upon whom any such attempt is made, give any verdict or no, or whether the verdict pass on his side or on this is *embrazery*. *1 Inst.* 369. *Nov.* Reg. 10.

Embrizing Days, (*from* *embury*, *emury*) So called either because our ancestors, when they *fasted*, sat in ashes, or strewed them on their heads, are those which the ancient fathers called *Quatuor Tempora jejuniis*, and of great antiquity in the church: they are observed on *Wednesday*, *Friday* and *Saturday* next after *Quadragesima Sunday*, (or the first *Sunday* in *Lent*) after *Whitunday*, *Michaelmas day* in *September*, and *St. Lucy's day* about the middle of *December*. These days are mentioned by *Britton*, *cap.* 53. and other writers; and particularly in the *Stat.* 2 *c.* 3 *Ed.* 6. *c.* 19. and are kept with great zeal by the *Roman Catholics*; our almanacks call them the *Ember Weeks*.

Embroidery. By the *Stat.* 22 *Geo.* 2. *c.* 36. No foreign *embroidery*, or gold or silver brocade, shall be imported, upon pain of being forfeited and burnt, and penalty of 100*l.* for each piece. No person shall sell or expose to sale any foreign *embroidery*, gold or silver thread, lace, fringe, brocade, or make up the same into any garment, upon pain of having it forfeited and burnt, and penalty of 100*l.* All such *embroidery*, &c. found, may be seized and burnt, and the mercer, &c. in whose custody it was found, shall forfeit 100*l.*

Emendals, (*emenda*) Is an old word still made use of in the accounts of the society of the *Inner Temple*; where so much in *emendals* at the foot of an account, on the balance thereof, signifies so much money in the bank or stock of the houses, for reparation of losses, or other emergent occasions: *quod in restitutionem damni tributur*. *Spelm.*

Emendare, *Emendam solvere*, To make *amends* for any crime or trespass committed. *Leg. Edv. Consuet.* *c.* 35. Hence a capital crime not to be atoned by fine, was said to be *inmendabile*. *Leg. Canut.* *p.* 2.

Emendatio, Hath been used for the power of amending and correcting abuses, according to stated rules and measures; as *emendatio panni*, the power of looking to the assize of cloth, that it be of just measure; *emendatio tantis & cervisie*, the assizing of bread and beer, &c. a privilege granted to lords of manors, and executed by their officers appointed in the court-leet, &c. *Ad nos spectat emendatio panni & panis & cervisie, & quicquid regis est, excepto murthero & latrocinio*, &c.—*Paroch. Antiqu.* 196.

Emeralds. Exempt from duties, by 6 *Geo.* 2. *c.* 7.

Empanel a jury, *Ponere in officio & juratis*, &c. See *Impanel*.

Emperor, (*imperator*) The highest ruler of large kingdoms and territories, a title anciently given to renowned and victorious generals of armies, who acquired great power and dominion. And this title is not only given to the *Emperor of Germany*, as *Emperor of the Romans*; but was formerly belonging to the *Kings of England*, as appears by a charter of King *Edgar*, *viz.* *Ego Edgarus Anglorum Basileus, omniumque Regum Insularum Oceani quæ Britanniam circumjacent*, &c. *Imperator & Dominus*.

Enbiber, (*Fr.*) To write down in short. *Britton.* 56.

Enchelson, A *French* word used in our law books and statutes, signifying as much as occasion, or the cause or reason wherefore any thing is done. *Stat.* 5 *Ed.* 3. *c.* 3.

Endebavour. Where one who has the use of his reason *endebavours* to commit felony, &c. he shall be punished by our laws, but not to that degree as if he had actually committed it: as if a man assault another on the highway, in order to a robbery, but takes nothing from him, this is not punished as felony, because the felony was not accomplished; though as a misdemeanour, it is liable to fine and imprisonment. *3 Inst.* 68, 69, 161. *11 Rep.* 98. And in this case, the offender shall be transported, by a late statute, 7 *Geo.* 2. *cap.* 21. *Vide Intendment*.

Endowment, Signifies the bestowing or alluring of dower on a woman; but it is sometimes used metaphorically for the settling a provision upon a parson, or building of a church or chapel; and the severing a sufficient portion of tithes, &c. for a vicar, towards his perpetual maintenance,

maintenance, when the benefice is appropriated. *Stat. 15 R. 2. c. 6. 4 H. 4. cap. 12.*

Enemy, (*inimicus*) Is properly an alien or foreigner, who in a publick capacity, and in an hostile manner, invades any kingdom or country; and whether such persons come hither by themselves, or in company with *English* traitors, they cannot be punished as traitors, but shall be dealt with by martial law. *H. P. C. 10, 15. 1 Hawk. 35.* But the subjects of a foreign prince coming into *England*, and living under the protection of the King, if they take up arms, &c. against the government, they may be punished as traitors, not as alien enemies. *1 Hawk. ibid.* If a prisoner be rescued by enemies, the gaoler is not guilty of an escape; as he would have been if subjects had made the rescue, when he might have a legal remedy against them. *2 Hawk. 130.* Adhering to and succouring the King's enemies. See *Treason*.

Enfranchise, (*Fr. enfranchir*) To make free, or incorporate a man in any society, &c. It is also used where one is made a free *denizen*, which is a kind of incorporation in the commonwealth.

Enfranchisement, (*Fr. from franchise, i. e. libertas*) Is when a person is incorporated into any society or body politick, and signifies the act of incorporating. He that by charter is made a *denizen*, or freeman of *England*, is said to be *enfranchised*, and let into the general liberties of the subjects of the kingdom: and he who is made a citizen of *London*, or other city, or free burghers of any town corporate, as he is made partaker of those liberties that appertain to the corporation, is in the common sense of the word a person *enfranchised*. So Villein was *enfranchised*, when he was made free by his lord, and rendered capable of the benefits belonging to freemen. And when a man is *enfranchised* into the freedom of any city or borough, he hath a freehold in his freedom during life; and may not, for endeavouring any thing only against the corporation, lose and forfeit the same. *11 Rep. 91.*

Englecery, or **Engleschire**, (*Engleeria*) Is an old word signifying the being an *Englishman*. When *Canutus* the Dane came to be King of *England*, he at the request of the nobility sent back his army into *Denmark*, but kept some Danes behind to be a guard to his person; and he made a law for the preservation of his Danes (who were often privately made away by the *English*) that if an *Englishman* killed a Dane, he should be tried for the murder; or if he escaped, the town or hundred where the fact was done, was to be amerced *sixty-six marks* to the King: so that after this law, whenever a murder was committed, it was necessary to prove the party slain to be an *Englishman*, that the town might be exempted from the amercement; which proof was called *Englecery*, or *Engleschire*. And whereas if a person were privately slain, he was in ancient time accounted *Francigena*, which word comprehended every alien, especially the Danes: it was therefore, that where any person was murdered, he should be adjudged *Francigena*, unless *Englecery* were proved, and that it was made manifest he was an *Englishman*. The manner of proving the person killed to be an *Englishman*, was by two witnesses who knew the father and mother, before the coroner, &c. *Bract. lib. 3. tract. 2. cap. 15. Fleta, lib. 1. c. 30. 7 Rep. 16.* This *Englecery*, by reason of the great abuses and trouble that afterwards were perceived to grow by it, was utterly taken away by *Stat. 14 Ed. 3. ff. 1. c. 4.*

Englith. Pleas, records, bonds, and proceedings in courts of justice, to be in *Englith*. *4 Geo. 2. c. 26.* And see *5 Geo. 2. c. 27. 6 Geo. 2. c. 14.*

Englishmen, The names of, to be certified into the *Chancery* who are abroad in *Holland* and *Flanders*, &c. and shall pay such impositions as *aliens* do. *Stat. 14 & 15 H. 8. c. 4.*

Engravers, That shall invent, design and engrave prints, to have the sole right of printing them for fourteen years, which shall be engraved with the names of the proprietors; and others copying, and selling such prints, though by varying, &c. without their consent, shall forfeit *5 l.* for every print, and also the plates and sheet, &c. *Stat. 8 Geo. 2. c. 13.*

Enhance, To raise the price of goods or merchandize. See *Forestaller*.

Enpleet, Was anciently used for *implead*.—They may *impleet* and be *enpleeted* in all courts. *Mon. Ang. tom. 2. fo. 412.*

Enscent, or **Enscent**, Is the being with child. *Law Fr. Dist.*

Ententure, Of any woman condemned for a crime, is no ground to stay judgment; but it may be afterwards alledged against execution. *2 Hale's Hist. P. C. 413.*

Entail, (*Fr. entaille, i. e. incisus*) Is fee entailed, viz. abridged, limited, and tied to certain conditions, at the will of the donor; where lands are given to, or settled on others. See *Fee* and *Tail*.

Enterpleader, (*Fr. enterplaidier, Lat. interplacitare*) Signifies to discuss or try a point incidentally happening as it were between, before the principal cause can be determined. And *enterpleader* is allowed, that the defendant may not be charged to two severally, where no default is in him: as if one brings detinue against the defendant upon a bailment of goods, and another against him upon a trover, there shall be *enterpleader*, to ascertain who hath right to his action. *2 Danv. Abr. 779.* If two bring several detinues against *A. B.* for the same thing, and the defendant acknowledges the action of one of them, without a prayer of *enterpleader*, they shall not interplead on the request of the other; for the *interpleader* is given for the security of the defendant, that he may not be twice charged, and he hath waived that benefit. *18 Ed. 3. 22.*

If one brings detinue against *B.* and counts upon a delivery of goods, &c. to re-deliver to him, and another brings detinue against him also, and counts so likewise; if there be not any privy of bailment between them, yet they shall *interplead*, to avoid the double charge of the defendant; and also because the court cannot know to whom to deliver the thing detained, if both should recover. *Br. Enterplead. 3.* And upon such several detinues, if the defendant says that he found it, and traverses the bailment, they shall *enterplead*; for then he is chargeable as well to the one as the other: so if he says that they delivered jointly, *absque hoc*, that they delivered it as they have counted: but it is otherwise if the defendant doth not traverse the bailment, because if there was a bailment, he is chargeable only to the bailor, and may plead in bar against the others. *2 Danv. 782.*

Where two bring several detinues for one thing, and the defendant prays that he may *enterplead*, and delivers the thing to the court, and before the award of the *enterpleader*, one discontinues the suit, the other shall not have judgment; but if he discontinues his suit after the *enterpleader*, the other may have judgment. *11 H. 6. 19.*

If a recovery be had upon an *enterpleader*, judgment shall be given to recover the thing demanded against the defendant; and not against the garnishee, in case of garnishment, &c. *2 Danv. 783.* When two have *enterpleaded* in detinue, he that recovers shall recover damage against the other. *Br. Damage 68.* There was formerly *enterpleader* relating to delivery of lands by the King to the right heir, where two persons out of wardship were found heirs, &c. *7 Rep. 45. Staund. Prer. cap. 17. Bro. tit. Enterplead.* And anciently the head *enterpleader* made a great title in the law. There is also a bill of *interpleader* in *Chancery*.

Entierite, (from the French *entierete*, *entirenes*) Is a contradistinction in our books to moiety, denoting the whole: and a bond, damages, &c. are said to be *entire*, when they cannot be divided or apportioned.

Entire Tenancy, Contrary to *several tenancy*, and signifying a sole possession in one man; whereas the other is a joint or common possession in more. *Brook.*

Entry, (*ingressus, Fr. entree, i. e. introitus*) Signifies the taking possession of lands or tenements, where a man hath title of *entry*: and it is also used for a writ of possession. This *entry* into lands, is where any man enters into or takes possession of any lands, &c. in his proper person; and is an actual *entry* when made by a man's self, or by attorney by warrant from him that hath the right; or it is an *entry in law*, for a continual claim is an *entry* implied by law, and has the same force with it. *Litt. ff. 419.* There is a right of *entry*, when the party claiming may for his remedy either enter into the land, or have an action

action to recover it: and a *title of entry*, where one hath lawful *entry* given him in the lands, which another hath, but has no action to recover till he hath entered. *Plowd.* 558. 10 *Rep.* 48. *Finch's Law* 105.

The *writs of entry* concern the right of property, and are of divers kinds, distinguished into four degrees, according to which the writs are varied. The first degree is a writ of *entry sur disseisin*, that lieth for the disseisee against a disseisor; upon a disseisin done by himself; and this is called a writ of *entry* in the nature of an assise. Second, a writ of *entry sur disseisin in le per*, for the heir by descent, who is said to be in the *per*, as he comes in by his ancestor; and so it is if a disseisor make a feoffment in fee, gift in tail, &c. the feoffee and donee are in the *per* by the disseisor. Third, A writ of *entry sur disseisin in le per & cui*, where the feoffee of a disseisor maketh a feoffment over to another, when the disseisee shall have this writ of *entry sur disseisin*, &c. of the lands in which such other had no right of *entry*, but by the feoffee of the disseisor, to whom the disseisor demised the same, who unjustly and without judgment disseised the demandant. Fourth, A writ of *entry sur disseisin in le post*, which lieth when after a disseisin the land is removed from hand to hand beyond the degrees, in case of a more remote feisin, whereunto the other three degrees do not extend. 1 *Inst.* 238.

In these four degrees, are comprehended generally all manner of writs of *entry*. And the writ of *entry in le post* is so called, because the words of the writ are, *Post disseisinam quam B. injuste & sine judicio fecit*, &c. Britton observes, that the words, *In le per*, *In le per & cui*, and *In le post*, signify nothing but divers forms of this writ, applied to the case whereupon it is brought; and each form taking its name from the words contained in the writ. *F. N. B.* 193. But if any writ of *entry* be conceived out of the right cause, so that one form is brought for another, it is abatable. A writ of *entry* in the *per* and *cui*, shall be maintained against none, but where the tenant is in by purchase or descent; for if the alienation or descent be put out of the degree upon which no writ may be made in the *per* and *cui*, then it shall be made in the *post*. *Terms de Ley*.

There are five things which put the writ of *entry* out of the degrees, viz. *intrusion*; *disseisin* upon *disseisin*; *succession* where the disseisor was a person of religion, and his successor enters; *judgment*, when a person hath had judgment to recover against the disseisor; and *escheat*, on the disseisor's dying without heir, or committing felony, &c. on which the lord enters, &c. In all these cases, the disseisee or his heir, shall not have a writ of *entry* within the degrees of the *per*, but in the *post*; because they are not in by descent, or purchase. *Ibid.*

Having explained the nature of an *entry*, it remains to consider in what cases an *entry* is lawful, and by what means it is taken away.

Degrees as to *entries* are of two sorts, either by *act* in law, as in case of a descent; or by *act* of the party by lawful conveyance; and by the Common law, if the lands were conveyed out of the degrees, the demandant was driven to his *writ of right*, in respect of such long possession, and so many alterations in different hands; wherefore by the statute of *Marlbridge*, 52 *Hen.* 3. *cap.* 29. the writ of *entry in le post* is given. But no estate gained by wrong doth make a degree; so that *abatement*, *intrusion*, &c. work not a degree; nor doth every change by lawful title, or an estate of tenant by the curtesy, by judgment, &c. or of any others that come in the *post*; though a tenancy in dower by assignment of the heir doth work a degree, because she is in by her husband: and so doth not assignment of dower by a disseisor, by reason she is in the *post*. 1 *Inst.* 239.

Entry on lands is taken away by descent on *disseisins*, or *discontinuance*, &c. But a descent shall not take away the *entry* of lessee for seven years, nor of tenant by *elegit*, &c. who have but a chattel, and no freehold; otherwise it is of any estate for life, or any higher estate. 1 *Inst.* 249. Where a disseisor dieth seised, and the law casteth the lands upon his heir; this is a descent which tolls an *entry* at Common law: by statute, it is only

where the disseisor had peaceable possession five years; for if he had not possession peaceably during that time, the descent to his heir shall not take away an *entry*. 32 *H.* 8. c. 33.

If a disseisor leases for years, and dies seised of the reversion, the *entry* of the disseisee is taken away, because he died seised of the fee and freehold: but if he had leased for life, &c. the *entry* of the disseisee would not be taken away. 1 *Inst.* 239. Where the disseisor of an infant dies seised, and after the infant comes of age, and the heir of the disseisor dies before *entry*; though he died not seised of an actual feisin, but a feisin in law; yet his dying seised takes away the *entry* of the disseisee. *Ibid.* If a disseisor makes a feoffment upon condition, and the feoffee dies seised, and the feoffor enters upon the heir for the breach of the condition, the disseisee may enter upon him; for by the *entry* of the disseisor, the descent is utterly defeated. *Litt. sect.* 409.

The title of *entry* in a feoffor, &c. that hath but a condition, cannot be taken away by any descent, because he has no remedy by action to recover the land; so that if a descent should take away his *entry*, it would bar him of his right for ever: and the condition remains, and cannot be devested and put out of possession, as the lands, &c. 1 *Inst.* 240. If a man recovers lands, and after a stranger to the recovery dies seised, this shall not take away the *entry* of the recoveror; as it was but a title. 2 *Danv. Abr.* 561. But where a person recovers against another, and enters and sues execution, and after the recoveree disseises him, and dies seised; this descent shall take away the *entry* of the recoveror, for the recovery was executed. *Ibid.*

If after recovery against tenant for life, he dies, and he in remainder enters before execution, and dies seised, the *entry* of the recoveror is not taken away. 1 *Inst.* 238. The *entry* of the tenant for life, shall be good for him in remainder: and if tenant for life make a feoffment in fee, and a stranger enters for the forfeiture in the name of the reversioner, this will be good to veil the reversion in him. *Litt.* 128. 9 *Rep.* 106. If an infant under age, makes a deed of feoffment, and after his full age the feoffee dies seised; or a lessee for life aliens the land, and the alienee dies seised thereof; or a devisee be of lands upon condition, and the heir of the disseisor enters and dies seised: in these cases the *entry* is gone, and the parties shall be put to their action. *Litt.* 96. 9 *H.* 6. 25.

If there be tenant for life, remainder to the right heir of *J. S.* and the tenant for life is disseised; a descent is cast, and after *J. S.* dies, and tenant for life also dies: by this the *entry* of the heir of *J. S.* is not taken away, for his remainder was *in cust. dia legis*. 1 *Rep.* 134. Where an infant has cause of *entry*, and the descent happens while he is within age, it will not bar him of his *entry*: he that hath the right of *entry*, must be of age, within the four seas, of sound memory; and if it be a woman, she must be sole; and if the party be under age, beyond the seas, *non compos mentis*, in prison, or a feme covert, at the time of the descent, it shall not bar. *Litt.* 147, 402. 21 *H.* 6. 17.

The whole time from a disseisin is considerable; as where feme covert is disseised, and her husband dieth, and she takes another husband, and then a descent is cast; or if one *ultra mare* be disseised, and he return into *England*, and then go beyond sea again, and there is a descent; here the descent will bar the *entry*, because of the *interim*. 9 *H.* 7. 24. *Dyer* 143. 32 *H.* 8. c. 33.

A woman tenant in tail took husband, who made a feoffment in fee, and died, and the wife without *entry* made a lease for years; and it was held, that the freehold was not reduced by the lease, without an *entry* made. 1 *Leon. ca.* 165. The *entry* of a disseisee, when he duly makes it, shall avoid all the mesne charges by the disseisor upon the land: but right of *entry* may be lost divers ways; as by acceptance of rent, by him who hath it, and the like. 1 *Anderson* 133. *Noy Rep.* 7. If a man is disseised of land whereunto a common is appendant, the disseisee cannot use the common till he enters on the land to which the common is appendant; for if the disseisee might use it, so might the disseisor, which would be

a double charge on the common: yet if a person be disseised of a manor, to which an advowson is appendant, he may present to the advowson before entry on the manor. *1 Inst.* 122.

A disseisee enters into the land, and continues therein with the disseisor, and manures it with him, claiming nothing of his first estate; or if the disseisee enters, and takes the profit, as lessee, &c. of the disseisor, 'tis said there will be an entry that will reduce the first estate. *2 Daw.* 790. If the disseisee commands a stranger to put in the cattle of such stranger in the land to feed there; this is an entry in law on the land. *1 Inst.* 245. And if a person enters by command of him who hath title, he by virtue thereof may gain a title to himself. *1 Nels. Abr.* 705.

Where entry may be made into land, or any thing, it shall not be in the party before entry: if entry cannot be made, but only claim, then it shall be in him by claim; and when neither entry nor claim can be made, it shall be in him by act of law. *1 Plowd.* 133. In case the possession of land is in no man, but the freehold in law is in the heir that enters, his general entry into one part reduces all into his actual possession: but if an entry is to devise an estate, a general entry into parcel, is good only for that part. *1 Id.* 15. Where an entry is in any parts, it must be in the name of all: if I enfeoff a person of an acre of ground upon condition, and of another acre on condition, and both conditions are broken; here entry into one in name of both acres is not good to reduce both: but if a man make a feoffment of divers parcels upon condition that is broken, there entry into part in the name of all the rest is sufficient. *Co. Lit.* 252. *9 H.* 7. 25.

A man hath right to enter into lands in divers villages in one county, if he enter upon part of it in one village in the name of all in that county; by this he shall have possession of the whole. *1 Inst.* 252. *Dyer* 227, 337. If a man disseise me of one acre at one time, and another acre at another time in the same county; my entry into one of them in the name of both is good: though it will not be good, if the disseisin be by two several persons, or if the acres lie in several counties, when there ought to be several entries and actions. *1 Inst.* 252.

If he who hath right of entry into a freehold, enters into part of it, it shall be adjudged an entry into all possessed by one tenant; but if there be several tenants possessed of the freehold, there must be several entries on the several tenants. *1 Lill. Abr.* 515, 516. Special entry into a house with which lands are occupied, claiming the whole, as a good entry as to the whole house and lands. *Ibid.* If a husband enters to the use of his wife; or a man enters to the use of an infant, or any other, where the entry is lawful; this settles the possession before agreement of the parties: though it is otherwise where a person enters to the use of one whose entry is not lawful; for this vests nothing in him till agreement, and then he shall be a disseisor. *2 Daw.* 787. If two jointenants are disseised, and the disseisor aliens, and one jointenant enters upon the alienance to the use of both; this settles the freehold in both of them. *Ibid.* 788. But if one coparcener, &c. enters especially claiming the whole land, she gains the part of her companion by abatement; and it shall not settle any possession in the other. *1 Inst.* 243.

The heir is to enter into lands descended to him, to entitle him to the profits. *1 Inst.* 214. If a younger son enters on lands in fee, where the eldest son dies leaving issue; though many discentments are cast in his line, yet the heirs of the eldest son may make an entry on the lands; but if the youngest son convey away the lands in fee, and the feoffee dies seised, they may not enter; nor may they enter where the younger son disseises the eldest, and dies seised. *1 Inst.* 237, 241. *Lit. Seis.* 597.

A tenant in tail hath issue two sons, and the eldest dies, leaving his wife *præmunt* essent of a son, and the younger brother enters, and then the wife of the eldest is delivered of a son, he may enter upon the younger brother. *2 Daw.* 557. An estate of freehold will not cease, without entry or claim: also a remainder of an estate of freehold cannot cease without entry, &c. no more than estate of freehold in possession. *Cro. Eliz.* 360. A right of entry preserves a contingent remainder. *2 Lev.* 35. And a

grantee of a reversion, may enter for a condition broken. *Plowd.* 176. If a person will take advantage of a condition, he must either enter, or make a claim: and for a condition broken there must be actual entry, to bring ejectment for recovery of the estate; but where a man is intitled to enter by descent, or for non-payment of money due on a mortgage, &c. Entry and ouster confessed in the rule in ejectment, without actual entry, is sufficient to make the lease to entitle the action. *1 Lill. Abr.* 516.

A lessee must enter into lands demised to him; and tho' the lessor dies before the lessee enters, yet he may enter: and if the lessee dies before entry, his executors or administrators may enter. The lessee may assign over his term before entry, having *interesse termini*; but he may not take a release to enlarge his estate; or bring trespass, &c. till actual entry. Though if there be words *bargain and sell* in a lease, &c. for consideration of money, the lessee or bargainee is in possession on executing the deed, to make a release, &c. *Lit.* 59, 454. *1 Inst.* 46, 57, 270.

Where a lessor enters on his lessee for years, the rent is suspended. *1 Leon.* 110. But without entry and expulsion, the lessee is not discharged of his rent to the lessor; unless it be where the lessor is attainted of treason, &c. that the rent is to be paid to the King, who is in possession without entry. *Sid.* 399. *1 Nels. Abr.* 706.

There is no need of entry to avoid an estate in case of a limitation, because thereby the estate is determined without entry or claim; and the law casts it upon the party to whom it is limited. If A. devises lands to B. and his heirs, and dies, it is in the devisee immediately; but till entry he cannot bring a possessory action: and where a possession vests without entry, a reversion will vest without claim. *2 Mod. Rep.* 7, 8. A bare entry on another, without an expulsion, makes only a seisin; so that the law will adjudge him in possession who hath the right. *3 Salk.* 135.

If a person who hath title of entry, finds an house open with nobody in it, and enters into it, and keeps in possession; this is no forcible entry; *contra* if any body is in it. *Common Law Com. Plac'd* 186. Where a person is in a house with goods, &c. the house may be entered when the doors are open, to make execution. *Cro. Eliz.* 759. But it must be averred that the goods were in the house. *Lutw.* 1428, 1434. And a man cannot enter into a house, the doors being open, to demand a debt, unless he aver that the debtor is within the house at the same time. *Cro. El.* 8. 6. Entry may be made on a tenant where rent is in arrear, to take a distress, &c. in order to regain possession of lands by entry, &c. The manner of entry is thus: If it be a house, and the door is open, you go into it, and say these words.—*I do here enter, and take possession of this house.* But if the door be shut, then set your foot on the groundsel, or against the door, and say the before words: and if it be land, then go upon the land, and say. *I here enter, and take possession of this land, &c.* If another do it for you, he must say, *I do here enter, &c. to the use of A. B.* And it is necessary to make it before witnesses, and that a memorandum be made of it. *Lit.* 385. *1 Inst.* 237, 238. In actions for recovery of lands, &c. entry is to be made within twenty years after the title accrued. *Stat. 21 Jac. 1. cap.* 16. But where a fine of lands is passed, the entry is to be in five years. *1 R. 3. c. 7.* *4 H. 7. c. 24.* Also an action is to be commenced in one year after the entry. *4 & 5 Ann. c. 16.* Demand how made of rent, &c. to entitle entry, see *Demand.* By *32 H. 8. c. 33.* No descent to the heir of the disseisor shall take away the entry of him that hath title to the land, unless the disseisor had peaceable possession five years next after the disseisin. See *Black. Com. 2 V.* 312. *3 V.* 176, 177. See also *Claim and Forcible Entry, and Detainer.*

Entry ad Communem Legem, Is the writ of entry which lies where tenant for term of life, or for term of another's life, or by the curtesy, &c. aliens and dies, when he in the reversion shall have this writ against whomsoever is in possession of the land. *New Nat. Br.* 461.

Entry ad terminum qui præterit, A writ of entry brought against a tenant for years, who holdeth over his term, and thereby keeps out the lessor; and if the husband and wife lease the wife's land for years, and the husband

husband dieth, and the termor holds over his term, the wife may have a writ of *entry ad terminum qui praterit*, &c. but she must count that she and her husband leased the land, &c. Also the grantee in reversion may have this writ against the lessee, or his assignee, &c. *New Nat. Br.* 447, 448. An ejectment is now the common mode of proceeding; and by 4 Geo. 2. c. 28. Tenants for term of years, &c. holding over after demand made, are subject to double rent.

Entry in casu confusum, Is a writ that lies where tenant for life, or tenant by the curtesy, aliens in fee, &c. he in reversion may have this writ by *Stat. Westm. 2. cap. 24.* See *Casu Confusum*.

Entry in casu Doweris, Lies where a tenant in dower aliens in fee, or for term of life, or of another's life; then he in the reversion shall have this writ, provided by the *Stat. of Glouc. 6 Ed. 1. cap. 7.* By which statute, it is enacted, "that if a woman alien her dower in fee, or for life, the next heir, &c. shall recover by writ of entry." And the writ may be brought against the tenant of the freehold of the land, on such alienation, during the life of the tenant in dower, &c. *New Nat. Br.* 456. These writs of entry may be all brought either in the *per*, or in the *cui* or *post*.

Entry sine assensu Capituli, Is a writ of entry that lies where a bishop, abbot, &c. aliens lands or tenements of the church, without the assent of the chapter or convent. *F. N. B.* 195.

Enure, Signifies in the law to take place or be available; and is as much as *effectum*: as for example; a release made to tenant for life, shall enure, and be of force and effect to him in the reversion. *List.*

Eoroburce, (from the Sax. *eorod*, a hedge, and *burce*, *ruptura*), Hath been used for hedge-breaking: in which sense it is mentioned in the laws of King Alfred, cap. 45.

Esote, Sax. for *earl*, &c. though made use of by the *Danes* for *barons*. See *Earl*.

Epimonia, A word signifying expenses or gifts. *Blount.*

Epiphany, The day when the star appeared to the Wise-men at Christ's nativity, generally called *Twelfth-Day*.

Episcopalia, Synodals, or other customary payments from the clergy to their bishop or diocesan; which were formerly collected by the rural deans, and by them transmitted to the bishop. — *Episcopalia reddat, vel reddere faciat de ecclesiis decanatus sui*, &c. *Mon. Ang. tom. 3. pag. 61.* These customary payments have been otherwise called *onus episcopale*; and were remitted by special privilege to free churches and chapels of the King's foundation, which were exempt from episcopal jurisdiction. *Skennet's Gloss.*

Episcopus Pistorum. It was a custom in former times, that some lay person about a certain feast should plait his hair, and put on the garments of a bishop, and in them exercise episcopal jurisdiction, and do several ludicrous actions, for which reason he was called *episcopus of the boys*; and this custom obtained here long after several constitutions were made to abolish it. *Mon. Ang. tom. 3. pag. 169.*

Equality, The law delights in equality; so that when a charge is made upon one, and divers ought to bear it, he shall have relief against the rest. *2 Rep. 25.* And where a man leaves a power to his wife, to give an estate among three daughters, in such proportions, as she shall think fit: it has been held she must divide it equally; unless good reason be given for doing otherwise. *Pratt. Com. 256.* See *Contributio*. In equity it is said, that "EQUA-
LITY IS EQUITY." See *Francis's Maxims*, fol. 9, 10.

Equus, (Lat.) is taken for a knight; because anciently some knights were allowed to bear arms and gild their mantles with gold; but this word is rather used by the lawyers than lawyers; for *equus armatus* is not a word in our law for knight, but *miles*, and formerly *Chevalier*. *1 Inst. 5.*

Equity, (*equitas, quasi equalitas*) is defined to be a correction, or modification, of the law generally made in that part wherein it failerh, or is too severe. And likewise signifies the extension of the words of the law to cases

unexpressed, yet having the same reason; so that where one thing is enacted by statute, all other things are enacted that are of the like degree: for example; the statute of *Glouc.* gives action of waste against him that holds lands for life or years; and by the equity thereof, a man shall have action of waste against a tenant that holds but for one year, or half-year, which is without the words of the act, but within the meaning of it; and the words that enact the one, by equity enact the other. *Terms de Ley.* So that equity is of two kinds; the one doth abridge and take from the letter of the law; and the other enlarge and add thereto. *Equitas est perfecta quedam ratio, que jus scriptum interpretatur & emendat.* *1 Inst. 24.* And statutes may be construed according to equity; especially where they give remedy for wrong, or are for expedition of justice, &c. *1 Inst. 24, 54, 76. 2 Inst. 106, 107, &c.* Equity seems to be the interposing law of reason, exercised by the Lord Chancellor in extraordinary matters, to do equal justice, and by supplying the defects of the law, gives remedy in all cases. See *Chancery*. See *Black. Com. 1 P. 61, 91. 3 P. 49, 429, 436. 4 P. 435.* the subject well treated.

Equity of Redemption, on mortgages. If where money is due on a mortgage, the mortgagee is desirous to bar the equity of redemption, he may oblige the mortgagor either to pay the money, or be foreclosed of his equity; which is done by proceedings in the court of Chancery. But the Chancery cannot shorten the time of payment of the mortgage money, where it is limited by express covenant; though it may lengthen it: and then upon nonpayment, the practice is to foreclose the equity of redemption of the mortgagor. *2 Vent. 364.*

To foreclose the equity, a bill in Chancery is exhibited; to which an answer is put in, and a decree being obtained, a Master in Chancery is to certify what is due for principal, interest and costs, which is to be paid at a time prefixed by the decree, whereupon the premises are to be reconveyed to the mortgagor; or in default of payment, the mortgagor is ordered to be foreclosed from all equity of redemption, and to convey the premises absolutely to the mortgagee. *Law of Securities, p. 129, 133.*

A fine or nonclaim will bar equity of redemption: but in a common mortgage, a covenant to restrain it shall not be regarded in Chancery. *2 Vent. 365.* If the condition of a mortgage is, that the mortgagor only should redeem during life, or that he and the heirs of his body shall do it; yet the general heir shall have the equity of redemption, for if the principal and interest be offered, the land is free. *Vern. 33, 190.* And it is held, though a bond be conditioned, that if the money be not paid at such a time, then for a further sum the mortgagee shall have the land absolutely, as a purchaser, &c. in such case a man may also redeem. *Ibid. 488.*

A person who has mortgaged lands to one man, in case he mortgages the same land with some others to another, and this appears to be a contrivance to evade the statute, the mortgagee shall not take advantage thereof. *2 Vern. Rep. 589.* See *Barnardist. 101.* Where persons having once mortgaged lands, mortgage the same a second time, without discovering the first mortgage, they forfeit their equity of redemption, and the second mortgagee may redeem, &c. And it is the same where any persons borrowing money, enter a judgment, &c. for security, and afterwards borrow more money, and mortgage lands to the second lender, without giving notice of the judgment, or paying the same off in six months, &c. by *Stat. 4 & 5 W. & M. cap. 16.*

Equivalent, Commissioners are appointed by statute to examine and rate the debts due to Scotland on the Union by way of *equivalent*, and provision is made for payment of the same by a yearly annuity, &c. *1 Geo. 1. c. 25. 5 Geo. 1. c. 25.* See *Scotland*.

Equipage, A horse equipped with saddle and furniture. — *Instrumentum pro quolibet feodo unum equum et duo coopertos*, &c. *Inq. 16 E. 1.*

Escheat, In the *French* law, in case of murder, the king's right is compounded between the murderer and the heirs of the deceased who prosecuted, by causing the murderer to give unto them, or to the child or wife of him that was slain, a recompence, which was called an

triach. Spenser's State of Ireland, p. 1513. Edit. Hughes. Black. Com. 4 V. 309.

Ermins, (From the Fr. *Ermine*) A fur of great value, much used in robes of state.

Ern, The names of places ending in *Ern*, is said to signify a melancholy situation; from the Sax. *Ern*, i. e. *Locus Secretus*.

Ernen, The loose scattered ears of corn, that are left on the ground, after the binding or cocking of it: It is derived from the old Teuton. *Ernde*, Harvest; *Ernden*, to cut or mow corn; hence to *ern* is in some places to glean. Kennet's Gloss.

Errant, (*Itinerant*) Is applied to justices of the circuit, and bailiffs at large, &c. See *Eyre*.

Erraticum, A waif, or stray; erring or wandering beast. *Confit. Norman. A. D. 1080.*

Error, (Fr. *Erreur*) Signifies something wrong in pleading, or process, &c. whereupon a writ is brought for remedy thereof, called a *Writ of Error*, in Lat. *De errore corrigendo*. And a writ of error is a writ which issues out of Chancery, and lies where any one is grieved by the proceedings and judgment in any court of record, having power to hold plea of *debt*, or *trespass* above 40 s. It is returnable in the King's Bench; and if upon the transcript of the record into B. R. it appears to the court that there is error in the record or process, or in giving of judgment, then the judgment is reversed: But if there appear to be none, then is the judgment affirmed with double costs. 1 *Lill. Abr.* 518.

A writ of error is a commission to judges of a superior court, by which they are authorized to examine the record, upon which a judgment was given in an inferior court, and on such examination to affirm or reverse the same, according to law. *Jenk. Rep.* 25. 2 *Inst.* 40. *Yelv.* 209. *Rep. Temp. Hardw. per Annot.* 346. But yet if by the writ of error the plaintiff therein may recover, or be restored to any thing, it may be released by the name of an action. *Co. Lit.* 288. b. See *Post*, Divisions II. and V. Also there is a writ of error to reverse a fine, &c.

Herein is to be considered,

- I. By whom, against whom, and at what time, this writ may be brought.
- II. In what cases it will lie, and how it is to be brought.
- III. In what court it is to be brought.
- IV. How errors are to be assigned.
- V. What defence may be made by a defendant in error.
- VI. Of the judgment to be given on a writ of error.

- I. By whom, against whom, and at what time, this writ may be brought.

Any person damaged by error in a record, or that may be supposed to be injured by it, may bring a writ of error to reverse it, whether he be party or no; but principal and bail cannot join in a writ of error. And where there are several defendants, if one of them release the errors, he may be summoned and severed, and the others may reverse the judgment. 6 *Rep.* 26. *Hob.* 72.

No person can reverse a thing for error, unless the error be to his prejudice. 5 *Rep.* 38. One in remainder may have writ of error upon judgment given against tenant in tail: But he in reversion or remainder shall not have writ of error, in the life-time of tenant for life, on judgment given against such tenant, because they cannot be parties grieved in his time. 2 *Nels. Abr.* 712.

No person can bring a writ of error to reverse a judgment, who was not party or privy to the record, or who was not injured by the judgment, and therefore to receive advantage by the reversal thereof. 1 *Rel. Abr.* 747. *Dyer* 90.

So a writ of error does not lie against any but him, who is party or privy to the first judgment, his heirs, executors, or administrators. 1 *Rel. Abr.* 747. *Dyer* 90.

And therefore, on a judgment for recovery of land, the writ must be brought against him who was party to the judgment, although he hath nothing in the land,

and not against the tenant, and on such writ the judgment may be reversed; but there must go a *fiere facias* against all the tenants. 1 *Rel. Abr.* 749. 1 *Rel. Rep.* 302.

Upon this rule, that none shall have a writ of error to reverse a judgment, but he who is privy to, or hath some prejudice thereby; it hath been resolved, that if one hath lands on the part of his mother, and loseth them by erroneous judgment, and dies, the heir of the part of the mother shall have the writ of error. 1 *Leon.* 261. 2 *Sid.* 56. See *Owen* 68. *Godd.* 377.

So the younger son, when intitled to the land by the custom of *Horough-English*, shall bring the writ of error, and not the heir at Common law; for this remedy descends with the land. *Owen* 68. 1 *Leon.* 261. 4 *Leon.* 5.

So if there be an erroneous judgment, tenant in tail female, the issue female, and not the son, shall bring a writ of error. *Dyer* 90. 1 *Leon.* 261. 1 *Rel. Abr.* 747.

So if a man settles land to the use of himself and the heirs of his body, the remainder to his own right heirs, and dies, leaving issue only a daughter, who levies a fine, and dies without issue, and J. S. brings a writ of error as cousin and collateral heir of the daughter, yet he shall never reverse the fine; for there could no right descend to him from the daughter, because she had but an estate tail, which determined by her death without issue; and it does not appear, that the remainder in fee was in the daughter as right heir, wherefore J. S. shall not reverse the fine, *quia de non apparentibus et non existentibus eadem est ratio*, especially in a court of judicature, where the judges can take notice of nothing that does not come judicially before them, and appear in the pleadings. *Dyer* 89. *Cro. Eliz.* 469. 3 *Lev.* 36.

If there be several parties to an erroneous fine, they shall all join with the party that is to enjoy the land, though they themselves can have nothing; and this is said to be necessary only by way of conformity. 1 *Rel. Abr.* 747. *Dyer* 89. *Sed qu.* If any refuse to join, whether they may not be summoned and severed? See 6 *Rep.* 26. *Hob.* 72. *et infra*.

But if tenant for life, and he in remainder in fee, (being an infant) join in a fine, the infant alone may bring error for the error in respect of the person of the infant, which is the cause of the action for him, and for no other. 1 *Leon.* 317. *Cro. Eliz.* 115.

A writ of error may be brought by him that is made party by the law, though he was not originally party to the suit, as he who comes in as a vouchee. 1 *Rel. Abr.* 748, 755.

Judgment against two, one brought a writ of error, and held it should be quashed with costs; that it could not be amended, and that if the other party would not join, the defendants who chose to bring a writ of error, must proceed by summons and severance. *Ratcliff and Burton, Rep. Temp. Hardw. per Annot.* 135, 136.

If a man is indicted for felony, and thereupon a *captias* and *exigent* are awarded, but he dies before attainder, his administrators may have error upon this award of the *exigent*, because by the award of the *exigent*, his goods were forfeited; and this is *ad gravi damnum*, &c. tho' the principal judgment can never be given. 11 *Co.* 41. b. Writ of error lies in B. R. to reverse a fine levied in the Common Pleas, and to cancel the same if it be erroneous: And if there be not an original; or not proper writs of covenant, or if there be any fraud, &c. writ of error may be brought to make the fine void. 1 *Inst.* 9.

With respect to the time of bringing this writ.

It was formerly holden, that a writ of error could not be brought before the judgment given; and if it bore *teste* before, it was no *superfedeas*, for the words of the writ are, *Et judicium redditum sit*, &c. 1 *Rel. Abr.* 749. But it seems now agreed, that a writ of error that bears *teste* before the judgment is good; and this is the usual course for preventing and superseding execution; but the judgment must be given before the return of it. *March* 140. 1 *Ventr.* 255. *Moor* 461. 3 *Keb.* 308. 1 *Ventr.* 96. *Latch* 133.

But a writ of *error*, that bears *teste* before any plaint entered, is not good. *March* 140.

So where the defendant, upon an indictment of *barretry*, brought a writ of *error*, bearing *teste* before the assise: it was disallowed, because if such practice should obtain, it would disappoint all proceedings there. *1 Vent. 255. 3 Keb. 308.*

By the 10 *Edw. 3. cap. 14.* It is enacted, "That no fine or common recovery, nor any judgment in any real or personal action shall be reversed or avoided for any error or defect therein, unless the writ of *error*, or suit for the reversing such fine, recovery or judgment be commenced or brought, and prosecuted with effect, within *twenty years* after such fine levied, or such recovery suffered, or judgment signed or entered of record." *Note*, in this statute, are the usual savings as to infants, feme covert, persons *non compos*, in prison, or beyond sea.

A writ of *error* may not be brought to reverse a judgment by default, before a writ of enquiry of damages issues and is executed, that the verdict of the jury and interlocutory judgment may be made a perfect final judgment, upon which alone a writ of *error* must be brought. *1 Lill. 522.* The plaintiff in *error* may cause the attorney of the defendant in *error*, to be summoned before a judge, or may move the court for a rule to shew cause, why final judgment should not be signed before return of the writ of *error*. On judgment in default in ejectment, it lies before a writ of inquiry of damages, and judgment thereupon; because in this case the judgment already is perfect to recover the term. *Latch 212.*

A writ of *error* cannot be brought after 20 years. *Street v. Hopkinson, Rep. Temp. Hardw. per Anselm. 345.* The statute of limitation must be pleaded to a writ of *error*, as well as to an original action. *Id. 346.*

II. In what cases a writ of *error* will lie, and how it is to be brought.

Writ of *error* will not lie in the Exchequer chamber upon a judgment in *B. R.* but in actions of debt, detinue, trespass on the case, covenant and ejectment; which are the actions mentioned in the stat. 27 *Eliz. c. 8.* A writ of *error* lies not in the Exchequer chamber on judgment in replevin in *B. R.* nor on judgment in action of *scandalum magnatum.* *2 Nelf. 702, 709.* But on judgment in replevin in *C. B.* there may be writ of *error* brought in *B. R.* The stat. 27 *Eliz. c. 8.* is only to relieve on the merits of the cause, as it stood on the first judgment.

Error de recorde quod coram vobis residet lies in the court of *B. R.* for *errors* in fact in the judgment of the same court, as nonage of the parties, want of an original, &c. which doth not proceed from the error of the judges; and this writ is allowed without bail: But a writ of this kind doth not lie for *error* in matter of law, when it would be reversing their own judgments. *Cro. Jac. 254.* And *errors* in fact may be corrected in *C. B.* the same term, without this writ, which lies not in the Exchequer chamber. *Ibid. 620.* If judgment is given in *B. R.* in civil actions, a writ of *error* will not lie in the same court, only for *errors* in fact triable by a jury; but upon a judgment in criminal cases, *error* will lie in *B. R.* whether the *error* be in fact or in law; though it lies also in parliament. *3 Salk. 147.* Where a judgment in *C. B.* is affirmed upon a writ of *error* in *B. R.* and afterwards a *scire facias* is brought on that judgment, and the plaintiff hath judgment thereon; no writ of *error* lieth in the Exchequer chamber, because the record was not in *B. R.* by bill, but by writ of *error.* *1 Roll. Rep. 262. 3 Salk. 142.* See *1 Salk. 263.* On judgment given in the court of King's Bench in *England*, even after *error* brought and determined there, writ of *error* may be sued in the King's Bench in *England.* *2 Nelf. 730.* Writ of *error* cannot be brought on any record which is not a judgment. *1 Salk. 145.* And *error* lies not on an interlocutory judgment; it must be a final judgment after verdict, &c. The want of a bill in *B. R.* is *error* upon a judgment by confession, or default, (but not after a verdict) because the bill is the original process there. *Ibid. Sed qu.* If a bill may not be filed, &c. before assignment of *error*? *Error* lies for

variance between the original writ and declaration; or want of an original: And where proceedings are *de erroneis*, as not to be amended; for faults in verdicts, executions, &c. And when any thing material is omitted in a judgment, writ of *error* lies, and the judgment shall be reversed: So where the files of inferior courts are wrong or insufficiently named, &c. their judgments may be reversed. But where faults are small, they sometimes pass as *vitium clerici.* *2 Nelf. Abr. 714, 715, 721, &c. 728.*

By the practice of the court of *Common Pleas*, a defendant coming in by *capias ulagatum* the same term in which an *exigent* is returnable, may avoid the outlawry without a writ of *error*, by shewing that he purchased a *superfedeas* out of the same court, and delivered it to the sheriff before the *quinto exactus*, &c. or by shewing any other matter apparent on record, which makes the outlawry erroneous, as the want of an original, or the omission of process, or want of form in a writ of proclamation, &c. or a return by a person appearing not to be sheriff, or a variance between the original and *exigent*, or other process, or the want of such addition as is required by the *1 H. 5. c. 5. 2 Hawk. P. C. 458—9. 1 Rol. Abr. 742—3.* And see *5 Eliz. c. 23. sec. 13 & 14.*

If one be attainted upon an erroneous indictment, he cannot be relieved but by writ of *error*, for the judgment being *quod suspendatur*, &c. which is the judgment of law due for the offence, it must be presumed to have been given, for that he was guilty of the offence; but if judgment of acquittal is given upon such indictment, the King need bring no writ of *error*; but the offender may be newly indicted, for the judgment being *quod cat sine die*, &c. may be given as well for the insufficiency of the indictment, as for the party's innocence. *3 Inst. 214.*

Also any judgment whatsoever, given by persons who had no good commission to proceed against the person condemned, may be falsified, by shewing the special matter, without writ of *error*, because it is void; as where a commission authorizes to proceed on an indictment taken before *A. B. C.* and twelve others, and by colour thereof the commissioners proceed on an indictment taken before eight persons only. *3 Inst. 231. Hawk. P. C. 459.*

If one is attainted of felony, and after by relation of a general pardon, the felony is pardoned, he shall be discharged, for he hath no remedy by writ of *error*, to reverse the attainder. *6 Co. 5. a.*

No writ of *error* will lie of any judgment that is not given in a court of record; nor of a judgment given in an inferior court, as the county-court, &c. *Co. Lit. 288. b.* Nor of a decree or sentence in Chancery proceeding according to equity. *37 Hen. 6. Bro. Error 95. 1 Rol. Abr. 744.* But of a judgment given in the limited court of Chancery, called the Petty-bag, which proceeds according to the Common law, and holds plea of *scire facias* for repeal of the King's letters patent, &c. a writ of *error* lies in *B. R.* *1 Rol. Abr. 744. Dyer 315. 4 Inst. 80. Plow. 393.*

Wherever a new jurisdiction is erected by act of parliament, and the court or judge, that exercises this jurisdiction, acts as a court or judge of record, according to the course of the Common law, a writ of *error* lies on their judgments; but where they act in a summary method, or in a new course different from the Common law, there a writ of *error* lies not, but a *certiorari.* *1 Salk. 263.*

As to the manner of bringing it.

Error in the King's Bench is thus prosecuted: The clerk of the county makes out the writ of *error*, from a *præcipe* or copy of the declaration left with him; which is to be allowed with the clerk of the errors, who has a fee of *5 s. 6 d.* and a certificate of the allowance of the writ must be sent on the defendant's attorney in *error*; also the plaintiff's attorney in the action, is to procure an original warrant his judgment; and warrants of attorney must be filed, and bail put in, where required, &c. And then the proceedings are by *scire facias ad audiendum errorem* against the plaintiff in the action, whercon

whereon judgment was obtained; and the writ of *error* being received by the sheriff to whom directed, he is to give notice to the plaintiff in *error* to shew cause why execution should not be on the judgment, and make a return to that purpose; then a rule is to be given with the clerk of the rules for the plaintiff in *error* to assign his errors by such a day, which if he shall not do before the rule is out, the plaintiff in the original action may take out execution against him.

If the plaintiff in *error* assign errors in the record, then the defendant must plead *In nullo est erratum*, and thereupon enter the cause with the clerk of the papers, for the errors to be argued; and paper books for the counsel and judges, are to be made out, &c. If some part of the record be not returned, a *certiorari* must be prayed to bring it into court; and if matters of fact are alledged in *error*, as nonage, death of the plaintiff, &c. a proper plea must be made thereto, and issue thereupon taken and tried as in any other issue: But if only matters of law are assigned, the errors are argued by counsel on both sides, and the judgment is either reversed or affirmed: And when judgment is affirmed, the defendant in *error* may proceed against the defendant in the action, by taking out execution on the *affirmetur*, or bringing action of debt on the judgment; or he may prosecute the bail by *scire facias* upon their recognisance. 2 Vol. Mod. Ent. Eng. 373. 378. But 'tis said by some, that an assignment of errors in *fact* and in *law*, is bad on demurrer; by others, that the assignment of *error* in law may stand, and the fact be considered as nothing. *Sed qu.* Where there is an *error* in fact, if the writ of *error* ought not to be *coram vobis residens*, i. e. in the court where the judgment was given. In this case, however, we must except the *writs of warrants of attorney*, &c. which are *facts*; and 'tis every day's practice to assign such, with errors in law, and the usual course is, if defendant in *error* does not pray a *certiorari*, for the plaintiff to pray it.

When a judgment is reversed or affirmed in the Exchequer chamber, the transcript of the record thereof will be remitted back to this court, to be entered up at the end of the judgment here: and if such judgment shall be affirmed in the Exchequer chamber, yet a writ of *error* may be brought thereupon returnable in parliament. *Præf. Solic.* 252, 253.

If you would bring a writ of *error* in parliament to reverse a judgment in B. R. there must be a petition to the King for his warrant, which petition has the allowance of the Attorney General, and then the King writes on the top of it *Fiat Justitia*; whereupon a writ of *error* is made out by the clerk of the errors, (who hath 4 l. fee, and the King's warrant costs 5 l.) And then the Lord Chief Justice of this court carries the record, and a transcript thereof, up to the House of Lords in full Parliament, and after they are examined there, leaves the transcript with the Lords, but brings back the record: And this being done, the attorney for the defendant in errors, gets some Lord to move that the plaintiff in errors may assign his errors; but if for the plaintiff, motion is to be made that upon his assigning errors, the defendant may appear and make his defence, and counsel be heard on both sides: then, after the judgment is either affirmed or reversed, the clerk of the parliament remands the transcript of the record into B. R. with the affirmation or reversal thereof, to be entered upon the record of the said court, which court, if affirmed, awards execution, &c. *Dyer* 385. *Præf. Aitorn. Edit.* 1. p. 117.

A writ of *error* in parliament is made returnable immediately; or on a prorogation *ad proximum parliamentum*: and it doth not determine by a prorogation. But if a parliament is dissolved before the errors are heard, it is otherwise. And on motion, execution hath been granted in B. R. on a judgment in such a case, the record being never out of the court. *Razm.* 2 N. 731.

To bring a writ of *error* in the King's Bench here in England to reverse a judgment given in the King's Bench in Ireland, a writ must be procured from the curitor, directed to the Chief Justice of the court of B. R. in Ireland, requiring him to summon the plaintiff in the ac-

tion there, to appear here in this court, to answer the errors; whereupon a transcript of the record is sent over, (not the record itself of the judgment, which remains in Ireland) and when the errors are argued, if the judgment is reversed, there must go a writ to the Chief Justice of Ireland to reverse it; so that the judgment is not actually reversed here, but there. And where the judgment in Ireland is affirmed here, there can be no writ of execution granted here; but on affirmance of the judgment a writ goes, reciting all the proceedings, directed to the judges of B. R. in Ireland, commanding them to issue process of execution. *Cro. Car.* 368. 1 *Salk.* 321.

The party bringing the writ of *error* is to cause the roll where the judgment is entered, to be marked with the word *error* in the margin, that the other party may have notice on the record that the writ of *error* is brought, and this marking of the roll, on giving notice thereof, is as it were a *superfedeas* in itself to hinder execution: Though a *superfedeas* is to be made out, allowed and left with the sheriff of the county: And the plaintiff's attorney is not obliged to search the record, whether writ of *error* is brought or not; but may make out execution upon the judgment, if no *superfedeas* be taken forth, or he hath no notice of the writ of *error*. *Trin.* 24 *Car. B. R.*

On a writ of *error* of a judgment in the Common Pleas, or other inferior court, in every adversary suit, the record itself shall be removed, that it may remain as a precedent and evidence of the law in the like cases. 1 *Rel. Abr.* 753. 5 *Co.* 39.

But in the case of a fine the transcript only is removed, for fines are only a more solemn acknowledgment or contract of the parties, and therefore are no memorials of the law, and need only be affirmed or vacated; if the former, the contract stands as it was: If the latter, the justices of B. R. may send for the fine itself, and reverse it, or they may send a writ to the treasurer and chamberlain to take it off the file; besides, should the record itself be removed and affirmed, it could not be ingrossed for want of a chirographer in B. R. 1 *Rel. Abr.* 752. 1 *Benl.* 51. *Dyer* 89. *Gudb.* 248. 2 *Rel. Rep.* 233. *F. N. B.* 20.

If the judges of the Common Pleas, or other judges, upon a writ of *error*, will not certify all the record, the party that sues the writ of *error* may alledge diminution of the record, and pray a writ to the justices that certified the record before, to certify the whole record. *F. N. B.* 25.

But diminution cannot be alledged upon a writ of *error* brought upon a judgment in any inferior court. 1 *Sid.* 40. But see *infra*.

By statute, he that brings writ of *error*, to reverse a judgment in a superior court, in all cases after a verdict, or in any action of debt, upon bond for payment of money only, or on a contract, must put in good sureties to prosecute his writ of *error* with effect, and pay the debt and damages if judgment be affirmed: But inferior courts, as well upon verdicts as other judgments, by default, &c. have their writs of *error* allowed without putting in bail, they being only in the statute. 3 *Jac.*

8. If bail be not put in, on the writ of *error* brought upon a judgment in the courts at Westminster, in cases where bail is required, the writ of *error* is no *superfedeas* to the execution, though such writ is in being, until a *habeas corpus* is entered, or judgment affirmed, &c. And it is the same where insufficient bail is given, on rule to put in better bail, or justify those put in, which if the plaintiff doth not do, execution is ordered upon the judgment, with a *non obstante* to the writ of *error*, &c. *Mils. g. v. 1. B. R.*

A plaintiff in *error* is, in the time appointed by the rule for that purpose, to certify the record into B. R. or the court will grant a *habeas corpus* on the writ of *error*. *Mils. 22 Car. B. R.* A writ of *error* is a commission, it is not an action. But see *ante*, previous to the Division. And see *Division V.*

Error in process by the fault of clerks in B. R. is not reversible, though in the same term, without writ of *error*: It is otherwise in C. B. But writs of *error* remove only the record and process, not the original, which remains filed with the *custos brevium*. *Jenk. Cent.* 116.

25. In *error* it was said that *B. R.* could not reverse a judgment given in another court; unless they could give the same judgment that court should have given; which in this case they might not; by reason the plaintiff in the original action was dead: but by *Holt C. J.* If this court cannot give like judgment, as that below should have done, it is because the suit by the death of the plaintiff there is abated; but the judgment may nevertheless be reversed here, and by reversal the executor is restored to his action. *Trin. 5 Ann.*

The court will not let the plaintiff in *error* quash his own writ of *error*; though they may grant leave to discontinue it. *5 Mod. 67.* If a verdict is for a defendant in *error*, and judgment is affirmed, costs are allowed by *Stat. 3 Hen. 7. c. 10. occasione dilationis executionis.* And by *4 & 5 Ann. c. 16.* Upon quashing writs of *error*, for defect or variance from the record, &c. the defendant is to have costs as if judgment were affirmed. When a writ of *error* is not in *dilationis executionis*, as where it is brought after the execution is executed, the plaintiff shall not have damages and costs. *Cro. Jac. 636.*

When a writ of *error* is brought to reverse a judgment in an inferior court, though the record is not certified as it ought, yet execution cannot be sued; but on certificate of the neglect, &c. a writ of *executionis judicii* may be issued. *1 Lill. Abr. 526.* Upon a writ of *error*, if the clerk below will certify the record wrong, action of the case lies against him; and if he make no return, the plaintiff may have the writ *executionis judicii* out of Chancery. *Mod. Caf. 245.*

If erroneous judgment be for the defendant in an inferior court, and it is reversed in *B. R.* and the merits appear for the plaintiff, he shall have judgment, but if the merits be against the plaintiff, the defendant shall have new judgment, in like manner as in the Exchequer chamber; for the judges are to reform, as well as to affirm or reverse. *Farell. Rep. 2, 3.* If a writ of *error* to reverse a judgment be discontinued for want of prosecution; execution cannot be had upon the judgment, until the discontinuance is certified from the court where discontinued. *1 Lill. 518.* If a writ of *error* is brought to remove a record of a judgment given in *C. B.* and the plaintiff in *error* leaves the record there, without removing it before the return of the writ; or in case there be a longer return-day than is convenient in the writ of *error*, as if it is purchased the beginning of *Michaelmas* term, and made returnable in *Hilary* term; the court may award execution, although the writ of *error* be delivered. *Jenk. Cent. 180, Dyer 245.*

III. In what court error is to be brought.

Erroneous judgments given in the court of *B. R.* were only reformed by the parliament till stat. *27 Eliz. cap. 8.* By that statute, a writ of *error* lies out of the Chancery upon all judgments given in the *King's Bench*, when the suit is by bill, (except the King is a party to the suit) returnable in the *Exchequer chamber*, before the judges of the Common Pleas, and Barons of the Exchequer, &c. who may examine the errors, and reverse or affirm the judgment; other than for errors, concerning the jurisdiction of the court, or want of form in writs, pleadings, &c. and after the errors are examined, and judgment affirmed or reversed, the record is sent back to the *King's Bench*, to proceed and award execution; but if the suit is by original writ, or on *qui tam*, &c. where the King is party, writ of *error* lies only in parliament. *Stat. Ibid.*

Not only on reversing or affirming a judgment, the Exchequer chamber is to send back the record into *B. R.* but also if the plaintiff in the writ of *error* is nonsuit, or if the suit is discontinued in the court of Exchequer chamber, the record shall be sent back: And the court of Exchequer shall give costs and damages to the plaintiff in the original action for his delay, &c. though if the plaintiff in *error* was plaintiff in the original action, there no costs can be given. *2 And. 122. 2 Nels. Abr. 707.* Where a writ of *error* determines in the Exchequer chamber, by abatement or discontinuance, the judgment is not again in *B. R.* till a *remittitur* is entered. *1 Salk. 261.* The Exchequer chamber doth not award a *sci.*

fac. ad audiend. errores; but notice is given to the parties concerned. *1 Vent. 34.*

The court of parliament is the supreme court, where anciently causes of great consequence, as between the *Magnates Regni*, were heard and determined; hence the lords is the *dernier resort*; to which a writ of *error* lies; and therefore, if a writ of *error* be brought of a judgment in the *King's Bench* into the Exchequer chamber, and there the judgment is reversed; yet a writ of *error* lies of such judgment into parliament, and the lords may reverse such second judgment. *Shew. Parl. Ca. 24, 110. 1 Vent. 334. Raym. 330. 2 Jon. 99. 2 Lev. 232.*

So a writ of *error* lies into parliament upon a judgment in *B. R.* either in a cause brought there by writ of *error*, or originally commenced there. *1 Rol. Abr. 745.*

And tho' upon a judgment in the *King's Bench*, since the *27 Eliz. cap. 8.* the party may elect either to bring a writ of *error* in the Exchequer chamber, or in parliament; yet if the cause commenced in the *King's Bench* by original writ there lies no writ of *error* but into parliament; also if he elects to bring *error* in the Exchequer chamber, regularly he cannot after bring *error* in parliament upon the first judgment. *1 Saund. 346. Carth. 180. S. P.*

And therefore it seems, that if a writ of *error* be brought upon a judgment in the Exchequer chamber, where the judgment is affirmed, and after *error* is brought upon the same judgment in the parliament; this writ of *error* is no *superfedeas*; but if the writ of *error* be brought upon the judgment in the Exchequer chamber, it is a *superfedeas*. See *2 Rol. Abr. 492. 2 Lev. 232.*

To reverse a judgment given in the court of *Common Pleas*, the writ of *error* is made returnable in the *King's Bench*, and *error* is not to be brought in parliament; Though where a writ of *error* is brought in *B. R.* upon a judgment given in *C. B.* and the judgment is reversed or affirmed in *B. R.* the party grieved may have writ of *error* returnable in parliament. *31 Eliz. c. 1. 1 Lill. Abr. 519, 521.* Erroneous judgment in the court of *Exchequer*, is to be examined by the Lord Chancellor, &c. with some of the justices, and such other sage persons as they think fit; and if any *error* be found, they shall correct the rolls, and send them into the Exchequer, in order to make execution, &c. *Stat. 31 Ed. 3. cap. 12.*

If an erroneous judgment be given in *London*, or other place, which is a court of record, the party grieved shall have a writ of *error*, and this writ may be returned into the *Common Pleas*, or into the *King's Bench*, at the pleasure of him who sueth the same. *F. N. B. 44.*

No writ of *error* lies in *Banco* or *Banco Regis*, upon a judgment given within the five ports; but by custom such judgment is examinable by bill in nature of a writ of *error coram domino custode seu gardiano quinque portuum apud curiam suam de Shepway.* *4 Inst. 224.*

If a judgment be given in the court of stannaries of the duchy of *Cornwall*, no writ of *error* lies upon this in *Banco* or *Banco Regis*, because it hath not been used; but of this there may be an appeal to the guardian of the stannaries, and from him to the Prince; and when there is no Prince, to the *King's counsel.* *1 Rol. Abr. 745.*

A writ of *error* lies in the *Common Pleas* upon a judgment given before the judges of assize. *1 Rol. Abr. 745.* But see *1 Leon. 55. 3 Leon. 55, 159. Dyer 250. Moor 78. 1 And. 12. Cro. Eliz. 26. Carter 222.*

Upon a judgment given in the *Hustings* in *London*, a writ of *error* lies at *St. Martin's* before certain justices. *1 Rol. Abr. 745. 1 Lev. 309. 2 Saund. 253. S. P.* and that upon a judgment of the said justices, a writ of *error* lies in parliament. See *2 Leon. 107.*

In *Wales*, at the Great Sessions there, a writ of *error* lies on personal actions to the council of the *Marches of Wales*; and if they give an erroneous judgment, it is final, for the statute *34 H. 8. c. 26.* ordains this writ to the council there; and since that act, no writ of *error* has been granted of such erroneous judgment; Upon *er-*

ters in real or mixed actions in *Wales*, writ of *error* lieth into the *King's Bench*. *Jenk. Cent.* 71. And so in *personal* actions now by 1 *W. & M. c.* 27.

In some cases a writ of *error* lies in the same court wherein the record is.

If upon a judgment in *B. R.* there be *error* in the process, or through the default of the clerks, it shall be reversed in the same court by writ of *error* sued there before the same justices. *F. N. B.* 21. *Poph.* 181. 1 *Rel. Abr.* 746.

So if one is indicted of treason or felony in *B. R.* or being indicted elsewhere, the indictment is removed in *B. R.* and by process of that court he is erroneously outlawed, and so returned; a writ of *error* may be brought in *B. R.* for the reversal thereof. 3 *Inst.* 214.

Also if an erroneous judgment in point of law be given in *B. R.* upon an indictment in *London*, a writ of *error* may be brought in the same court; for though in civil cases *error* does not lie in the same court, unless for a matter of fact; yet in criminal cases it lies as well for an *error* in law as fact. 1 *Sid.* 208.

But if an erroneous judgment be given, and the *error* lies in the judgment itself, and not in the process, a writ of *error* does not lie in *B. R.* of such judgment. 1 *Rel. Abr.* 746.

If a record is removed by writ of *error* out of the Common Pleas into the *King's Bench*, and the writ of *error* for insufficiency is quashed in the *King's Bench*, the plaintiff in *error* may have a writ *coram vobis rescind.* But such new writ is not a *superfedeas* in itself as the first writ was, and therefore he must move the court for a *superfedeas*, and put in bail thereon. *Carth.* 368—9.

So if such second writ be quashed for insufficiency, yet the court will grant a new or second writ of *error coram vobis rescind.* As also a *superfedeas* on putting in bail; for such second writ being void, is as if there had been none before. *Carth.* 369, 370.

IV. How errors are to be assigned.

In writ of *error*, when the record comes into court, if the plaintiff all that term doth not assign his *errors*; or if he do it, and omit to sue a *scire facias ad audiendum errores*, against the defendant in *errors*, returnable the same term, or the next, all the matter is discontinued; and the next term a new writ of *error* is to be sued out upon the record directed to the same justices, &c. *F. N. B.* 20. If he that brings writ of *error*, discontinues before the defendant in the writ of *error* pleads to it, he may have a new writ of *error*; but if he discontinue after the defendant hath pleaded *In nullo est erratum*, he may not have a new writ. 1 *Lill.* 522. The parties, upon the removal of the record by the writ of *error*, have no day in court given to either of them; so that if the plaintiff in *error* delay to sue forth his *sci fac. ad audiend. errores*, the defendant hath no way to compel him, but by suing out a *scire facias quare executionem non*, &c. And if thereupon the plaintiff in *error* doth not plead that his *errors* are assigned, but suffer judgment to pass upon two *nibils*, no *errors* afterwards assigned shall prevent execution. *Cartwright's Rep.* 41. As before observed, the *sci fac. ad audiend. errores* is only used in *B. R.* In the Exchequer chamber notice is given. It is said the usual practice is, that the defendant in the writ of *error*, by consent doth voluntarily take notice of the assignment of *errors*, and this consent is testified by his pleading *In nullo est errat.* and then there is no occasion for a *scire facias ad audiend. error.* *Ibid.*

Errors are to be assigned in the term, or the writ of *error* will be quashed. 1 *Lill. Abr.* 524. When the record is in court by writ of *error*, the plaintiff in *error* is to assign his *errors*; and may have a *scire facias* before the record is entered: And the manner of assigning *errors*, according to the ancient practice, is to put a bill into court, and say in the bill, *in hoc erratum est*, &c. shewing in certain in what things. *F. N. B.* 20. The assignment of *error*, in *omnibus erratum* is not good; for the judgment is founded upon the original writ, count, pleading, issue, process, trial, and so is manifold. *Jenk. Cent.* 84. *Errors* not assigned in the record, may be assigned after a *scire facias ad audiend. errores*; as the record

is in court; but it is not so of a warrant of attorney, which is an *error* in fact, and not upon record. *Ibid.* 140. 5 *Rep.* 37.

If one in execution brings *error*, he ought to assign the *errors* in his proper person: And in cases of outlawry for felony, *errors* sufficient must be certainly alledged in writing, before the writ of *error* is allowed. *Jenk. Cent.* 165, 179. Where a recovery is had, and *error* brought, if the original writ doth not abate by death; but is abatable only, as by entry into the land pending the writ, or coverture, acquisition of a dignity, a partial array returned, aid denied, &c. that should have been pleaded, and were not: These shall not be assigned for *error*; for they are waved, because no exception was taken to the writ. 9 *Rep.* 47. 21 *H. 6.* 29.

The assigning general *errors* is to say that the declaration, &c. is not sufficient in law; and that judgment was given for the plaintiff, where it ought to have been for the defendant: And the *errors* of a judgment are now to be assigned on the record, to appear with it to the court. It must appear in the record, that judgment was given for a matter out of the jurisdiction of the court, for the plaintiff in *error* to assign that for *error*. And that shall never be assigned for *error* which might have been pleaded to the action. *Roll. Rep.* 50, 88. 1 *Lill.* 523.

The plaintiff in *error* cannot assign *error* in fact, and *error* in law together, for these are distinct things, and require different trials. 9 *Rel. Abr.* 761. 1 *Sid.* 147. 1 *Leon.* 105. But *vide ante*.

If the plaintiff in *errors* assigns *errors* in fact, and *errors* in law, which are not assignable together, and the defendant in *error* pleads *in nullo est erratum*; this is a confession of the *error* in fact, and the judgment must be reversed, for he should have demurred for the duplicity. *Style* 69. 1 *Lev.* 76. *Salk.* 268. 6 *Mod.* 113, 206.

Also if an *error* in fact be well assigned, *in nullo est erratum* is a confession of it, for the defendant ought to have joined issue upon it, so as to have it tried by the country. 1 *Sid.* 93. *Raym.* 59.

But if an *error* in fact be ill assigned, *in nullo est erratum* is no confession of it; as if it be assigned, that such a one at the time of the return of the *venire* was not sheriff, and the record be removed into *B. R.* by *certiorari*, there *in nullo est erratum* is no confession of that *error*, because the record is not in court, that being no part of the record, for the plea is *in nullo est erratum in recordo*. *Cro. Jac.* 12, 29, 521. *Raym.* 231. *Cro. Car.* 421. 1 *Rel. Abr.* 758.

So if the plaintiff in *error* assigns an *error* in fact, *viz.* that the defendant, who was an infant, did not appear by guardian, but by attorney, and concludes with *hoc paratus est verificare*, instead of concluding to the country, as he ought to do, though the defendant in *error* pleads *in nullo est erratum*; yet it shall not amount to a confession, but shall be taken only for a demurrer. *Yelv.* 58.

Also if an *error* in fact, that is not assignable, be assigned, and *in nullo est erratum* be pleaded, it is no confession; as if it be assigned, that such a day there was no court of Common Pleas sitting, because that is against the record, and in such case *in nullo est erratum* is only a demurrer; so if a man says he did not appear, and the record says he did, *in nullo est erratum* is no confession, but a demurrer, because it is against the record. *Cro. Car.* 12, 29, 52. *Yelv.* 58. *Raym.* 231. 1 *Vent.* 252. 3 *Keb.* 259. 1 *Lev.* 76.

It has been held, that an *error* in fact cannot be assigned in the Exchequer chamber: Though by some authorities, *errors* in fact may be assigned as *errors* in law. 2 *Mod.* 194. 2 *Nels. Abr.* 708.

By 30 *Car. 2. c. 6.* In actions real, personal, and mixed, the death of either party between verdict and judgment, shall not be alledged for *error*.

It seems a general rule, that nothing can be assigned for *error* that contradicts the record; for the records of the courts of justice being things of the greatest credit, cannot be questioned but by matters of equal notoriety with themselves; wherefore, though the matter assigned for

for error should be proved by witnesses of the best credit, yet the judges would not admit of it. 1 Rol. Abr. 757.

Hence it is, that in a writ of error to reverse a fine, the plaintiff cannot assign, that the *conusor died before the teste of the dedimus*, because that contradicts the record of the conusance taken by the commissioners, which evidently shews that the conusor was then alive, because they took his conusance after they were armed with the commission, and the *dedimus* issued. Dyer 89. 1 Rol. Abr. 757.

V. What defence may be made by a defendant in error.

The defendant in error may plead a release of all errors, or a release of all suits, and these pleas, if found for him, will for ever bar the plaintiff in error. 1 Rol. Abr. 758.

So where by a writ of error the plaintiff shall recover, or be restored to any personal thing, as debt, damage, or the like, a release of all actions personal is a good plea; and when land is to be recovered or restored in a writ of error, a release of actions real is a good bar; but where by a writ of error the plaintiff shall not be restored to any personal or real thing, a release of all actions real or personal is no bar. Co. Lit. 288. b. 8 Co. 152. 1 Rol. Abr. 788. 2 Rol. Abr. 405.

Also if a man loses in a real action, and he releases all his right to the land, this shall bar him of his writ of error, for no person can bring a writ of error to reverse a judgment that is not intitled to the land, &c. for the courts of law will not turn out the present tenant, unless the demandant can make out a clear title; *possession always carrying with it the presumption of a good title, till the right owner appears.* 1 Rol. Abr. 747, 788. Dyer 90. a. 3 Leo. 36.

Hence it is, that if a man releases all his right of the land of which a fine was levied, he has thereby barred himself of his writ of error; for his release having for ever excluded him from the land, he can have no writ of error, because nobody is intitled who cannot have the land, of which the fine was erroneously levied. Cro. Eliz. 469. 1 Rol. Abr. 789.

If the tenant, pending a *præcipe* against him, aliens in fee, and after judgment is given against him, and he brings a writ of error; this feoffment is not any bar to the writ, because he was privy to the judgment after. 1 Rol. Abr. 788. Bridg. 77. 1 Rol. Rep. 306.

In a writ of error to reverse a common recovery, it is no good plea, that the plaintiff pending the writ of error hath entered into part, for before the possession was taken from him, he might have error to reverse the judgment, thought not to have restitution. 1 Lev. 72.

In a *scire facias* against a tertenant, he may plead a release of error, though he be not privy to the judgment. 9 Hen. 6. 48. Bro. 9. S. C.

But the tertenants cannot plead in abatement of the writ of error, but only in bar as a release, &c. in maintenance of their title. 1 Lev. 72.

After *in nullo est erratum* pleaded, the party affirms the record to be perfect, and he is foreclosed to say there is error in it: Though the court is not restrained from examining into it. 1 Salk. 270. The judges are not bound to search for errors in the record, which were not assigned; but may if they will; and if they find error they ought to reverse the judgment. Jenk. Cent. 159.

VI. Of the judgment to be given on a writ of error.

A judgment cannot be reversed in part, and stand good as to other part; or be reversed as to one party, and remain good against the rest: Though if there be error in awarding execution, the execution only shall be reversed, and not the judgment. Hob. 90. The judgment is an *intire thing*, and therefore it cannot be reversed in part, and affirmed in part; but if it is erroneous as to any part, the intire judgment must be reversed. Carib. Rep. 235. If judgment is entered against joint defendants, when one of them is dead, the judgment shall be reversed for error as to all of them; for in such case the plaintiff ought to make a special entry of the death of the party

with *Nil ulterius versus cum fiat*, and then take judgment only against the others. Ibid. 149.

The court of Exchequer chamber have not any authority, but to reverse or affirm the judgment, &c. for they cannot make execution. Cro. Eliz. 108. But where judgment is given for the defendant, and the plaintiff brings a writ of error; if the judgment is reversed, the court which reverses the judgment shall give judgment for the plaintiff, as the other court ought to have done. Telov. 117, 118. In the Exchequer chamber, after reversal of a judgment, &c. in B. R. the court gave judgment, *quod quer. recuperet*, &c. but because they wanted power to award a writ of inquiry which was necessary, being on a demurrer, therefore it was sent back into B. R. for the execution of that writ, and thereupon to give final judgment: But if the judgment is against the plaintiff in B. R. upon a special verdict, and that judgment is reversed in the Exchequer chamber, there being no writ of inquiry requisite, the court of Exchequer chamber doth not only give judgment of reversal, but a complete judgment for the plaintiff in the action. Carib. 181. If erroneous judgment be had by consent of parties, it may be reversed in the Exchequer chamber; *for consent of parties may not change the law*; but if the consent is entered upon and made part of the record, it may be good. Hob. 5. Cro. Eliz. 664. The reversal in the Exchequer chamber, is *res judicata*: No writ of error lies upon such judgment, except in parliament; and it is by six judges at least, by the statute 27 Eliz. c. 8. and 31 Eliz. c. 1.

When judgment is given in B. R. for the plaintiff in errors, there shall be only a *judicium revocetur*, &c. entered with costs: If for the defendant in errors, that the plaintiff *nil capiat per breve suum de errore*. The Chief Justice of B. R. &c. or the eldest judge ought to allow a writ of error which is in judgment of law a *superseas* until the errors are examined, and the judgment affirmed or reversed. Cro. Jac. 534. As a plaintiff having erroneous judgment may reverse it; and new judgment may be given for him: So if a judgment is reversed, the plaintiff may bring a new action for the same cause. 1 Lev. 310. Where a judgment is pleaded in bar of another action, &c. and judgment given on that plea; writ of error may be had to reverse the second judgment. Cro. Eliz. 503. Jenk. Cent. 259. And debt lies upon a judgment in B. R. after a writ of error brought; which is only a *superseas* to the execution. 1 Lev. 153.

In a writ of error upon a judgment in trespass against several, if the judgment be erroneous, because one of the defendants was within age, and appeared by attorney, the judgment shall be reversed *in toto* against all. 1 Rol. Abr. 776. Cro. Jac. 289. S. C. and 303. S. P. adjudged. Allen 74, 75. S. C. and S. P. adjudged. Style 121, 125, 406. S. P. adjudged.

By stat. 5 Geo. 1. c. 13. it is enacted, That all writs of error, wherein there shall be any variance from the original record, or other defect, may be amended by the court, and made agreeable to the record: And where any verdict hath been given, in any action, suit, &c. in any of his Majesty's courts at Westminster, or other court of record, the judgment thereon shall not be stayed or reversed for any defect or fault in form or substance, in any bill, writ, &c. or for variance in any such writs from the declaration and other proceedings: but this is not to extend to any appeal of felony, or process on indictment, informations, and appeals. See Judgment.

Etymologum, An ancient word for a meeting of the neighbourhood to compromise differences among themselves; which was customary in former days; it is mentioned in Leg. H. 1. c. 57.

Esbranchatura, (from the Fr. *esbrancher*) Cutting off branches or boughs in forests, &c. Hoved. 784.

Escaldare, To scald: *Escaldare porcos*, was one of our ancient *tenures in serjeanty*; as appears by the inquisition of the serjeancies and knights fees in the 12th and 13th years of King John, within the counties of Essex and Hertford. Lib. Rub. Scaccar' MS. 137.

Escambio, (derived from the Span. *cambiar* to change) Was a licence granted to make over a bill of exchange to another

another beyond the sea: for by the *Stat. 5 R. 2. c. 2.* No merchant ought to exchange or return money beyond sea, without the King's licence. *Reg. Orig. 194.* See *Exchange.*

Escape, (*escapium*, from the Fr. *eschapper*, i. e. *effugere* to fly from) Signifies a violent or privy evasion out of some lawful restraint; as where a person is arrested or imprisoned, and gets away before delivered by due course of law. *Staundf. P. C. cap. 26, 27.*

Escapes are either in *civil* or in *criminal* cases. As to escapes in *civil* cases it is to be considered,

- I. *Where the party shall be said to be legally committed, so that the suffering him to go at large will be adjudged an escape; and what degree of liberty, or going at large, shall be deemed an escape, as also what persons are answerable for an escape.*
- II. *Of the difference between voluntary and negligent escapes, as also between escapes on mesne process and execution.*
- III. *Of the nature of the action to be brought for an escape, and of the manner of laying it.*
- IV. *Of the party's defence sued for the escape, and therein of pleading fresh suit.*

I. *Of legal commitment, what shall be deemed an escape, and who answerable.*

It seems agreed as a general rule, that where-ever a sheriff or other officer hath a person in custody, by virtue of an authority from a court which hath jurisdiction over the matter, that the suffering such a person to go at large is an escape, for he cannot judge of the validity of the process or other proceedings of such court, and therefore cannot take advantage of any errors in them; hence the law allows him, in an action of false imprisonment, to plead such authority, which will excuse him, tho' it be erroneous; but if the court has no jurisdiction of the matter, then all is void, and consequently the officer not punishable for suffering a person taken upon such void authority to escape. *Moor 274. Dyer 175. Popb. 203. 1 Leon. 30. 8 Co. 141. b. 5 Co. 64. Cro. Jac. 280, 289. 2 Bulst. 64, 256.* Therefore, if a *ca. sa.* issue after a year and a day, without suing out a *scire facias*, this error will not excuse the sheriff in an escape. *2 Cro. 288. Salk. 273.* But though a sheriff may not take advantage of an erroneous process; yet he shall of a void process, on which it is no escape to let a prisoner go.

If at the petition of *A.* and the rest of the creditors of *B.* a commission upon the statute against bankrupts is issued out against *B.* and thereupon the commissioners sit and offer interrogatories to *C.* and he refuses to be examined, and by them is thereupon committed to prison, and the gaoler suffers him to escape, as the commissioners had sufficient authority to commit, and *A.* was prejudiced by the escape, he may maintain an action against the gaoler. *1 Rol. Rep. 47. Moor 834. pl. 1123. S. C.*

The sheriff cannot be charged with an escape before he had the party in actual custody by a legal authority; and therefore if an officer, having a warrant to arrest a man, see him shut up in a house, and challenge him as his prisoner, but never actually have him in his custody, and the party get free, the officer cannot be charged with an escape. *Bro. Escape, 22.*

But if *A.* is arrested, and in the actual custody of the sheriff, and afterwards another writ is delivered to him at the suit of *J. S.* upon the delivery of the writ, *A.* by construction of law is immediately in the sheriff's custody, without an actual arrest; and if he escapes, the plaintiff may declare, that he was arrested by virtue of the second writ, which is the operation it has by law, and not according to the *fact.* *5 Co. 89.*

If a person out upon bail renders himself in discharge of his bail, and a *redditis* is entered in the judge's book, and a *committitur* filed in the office, and the prisoner afterwards escapes; yet if no notice was given to the marshal of such render, nor no entry made of the commitment in his book, the prisoner shall not be deemed in custody so as to charge the marshal with an escape; but it seems this matter cannot be insisted upon after trial. *1 Salk. 272—3.*

It hath been held, that entering a *committitur* upon the roll was not sufficient to charge the marshal with any escape, without proving an actual imprisonment; but that proving the party to be actually in prison, though there be no entry made in the marshal's book (without which he pretends he knows not how to take charge of them) is sufficient. *1 Sid. 220. 1 Keb. 775.*

And now for the greater security of creditors, and the better to enable them to prove the actual custody of the prisoner, by *Stat. 8 & 9 Will. 3. cap. 27. sect. 9.* it is enacted, "That if any one, desiring to charge any person with any action or execution, shall desire to be informed by the marshal or warden, or their respective deputies, or by any other keeper of any other prison, whether such person be a prisoner in his custody, or not, the said marshal or warden, or such other keeper, shall give a true note in writing thereof, to the person so requesting the same, or to his lawful attorney, upon demand, at his office for that purpose, or in default thereof, shall forfeit the sum of 50*l.* and if such marshal or warden, or their respective deputy, &c. exercising the said office, or other keeper, &c. of any other prison, shall give a note in writing, that such person is an actual prisoner in his or their custody, every such note shall be taken as a sufficient evidence, that such person was at that time a prisoner in actual custody."

A *committitur* upon the roll is good evidence in escape, without an entry in the marshal's book. *Ld. Raym. 705.*

As to the degree of liberty which may be deemed an escape.

Every person in prison by process of law is to be kept in *salva & arcta custodia*, in order to compel them the more speedily to pay their debts, and make satisfaction to their creditors. *Plow. 36. 3 Co. 44. 2 Inst. 381. 1 Rel. Abr. 806.*

Persons in the *King's Bench* and *Fleet* prisons, are to be actually detained within the said prisons; and if they escape, action of debt lies against the warden, &c. *1 R. 2. c. 12.* But now the marshal or warden grant the liberty of the rules to such as they think proper, (not criminally charged) on proper security. Keepers of those prisons suffering prisoners either upon contempt or mesne process, or in execution, to be out of the rules (except on rule of courts, &c.) is an escape; and persons conniving at an escape shall forfeit 50*l.* &c. by *8 & 9 W. 3. c. 27.* And by this statute where any prisoner in execution escapes, the creditor may have any other new execution against him. By *Stat. 5 Ann. c. 9.* If any person in custody, for not performing any decree in Chancery, &c. escape, the party for whom the money is decreed may have the same remedy against the sheriff, as if the prisoner had been in custody on execution. A prisoner in execution should not be allowed to go out of the gaol; for if he goes out, tho' he returns again, it is an escape. *3 Rep. 43, 44. 2 Inst. 260, 381.* If a sheriff or gaoler suffer his prisoner in execution to go abroad, unless it be by licence of the *Lord Chief Justice*, and of the plaintiff; this will be an escape in law, although he come to prison again. *Plowd. 37.* And yet in *London*, by special custom there, in some cases the prisoner may go abroad with his keeper, and it will be no escape. *Ibid.* See *Hob. 202.* Where the justice of the court, and plaintiff in the suit, agree that the prisoner shall be at liberty, and he go out and return at his time; it is no escape: but this may not be without the sheriff's consent. *Dyer 275.*

If a plaintiff by word license the sheriff to deliver the prisoner, no action will lie for this as an escape. *27 H. 8. 24.* If the King, or any great man shall require a sheriff, &c. to set his prisoner at liberty, or threaten him if he do not so; if he do it accordingly, it will be an escape in him. *Dyer 278, 297.* But where there is no good imprisonment at the time of the escape; as if a man be imprisoned by a court that hath not power to imprison him, &c. there can be no escape. *14 H. 7. 1. Dyer 66, 306. 2 Bulst. 237.* A plaintiff having judgment, it was ruled that the defendant should pay so much money before such a day, and if he failed, then the plaintiff to take him in execution; on failure of payment, he was taken,

taken, and then sent an *audita querela* in the Chancery, where on a suggestion he had an injunction and *superfidei*, and was bailed and set at large, the plaintiff not being paid his debt: as this was done after judgment and execution, it was said to be an *escape* in law. *Midd. 1. Jac. 1. 2 Bull. 120. 2 Step. Abr. 318.*

If there be an *escape* by the plaintiff's consent, when he did not intend it, the law is hard that the debt should be thereby discharged; as where one was in execution in *B. R.* and some proposals being made to the plaintiff in behalf of the prisoner, seeing there was some likelihood of an accommodation, the plaintiff consented to a meeting in a certain place in *London*; and desired the prisoner might be there, who came accordingly: this was held to be an *escape*, with the plaintiff's consent, and he could never after be in execution at his suit for the same matter. *2 Mod. 136.* It hath been adjudged no *escape* to let a prisoner go where the sheriff hath the prisoner in custody, if it be before the return of the writ: his sufficient if the officer hath the party at the return of the writ. *Ex. Moor. 299. 1 Salk. 201. 2 Mod. 139. 720.* Yet it hath been held, that where a *sheriff* or *bailliff* is granted to bring a person in a county, if he sends him on the way, he him go at large in the county, or cause him to be about a great way, *Ex. it will be an escape.* *2 Mod. 136.* And an *escape* in this place is an *escape* in all places: for a prisoner being once *escaped*, *Ex. it is large.* It hath been intended he is confined to no place, so that for *escape* action may be brought against the prisoner in any county. *1 Lill. Abr. 537.* Committing the *custody* of the prisoner to prison, where an *escape* in law of all the prisoners there. See *Style 375.*

If a woman warden of the *Fleet* prison, having a prisoner, or if a sheriff, *Ex. makes a woman in execution with him, in either case he will be deemed an escape in law.* *Plowd. 17.*

If a man hath judgment against two persons, and both are taken in execution, if the sheriff suffer one of them to escape, he shall be answerable for the whole debt, though he hath one of them in custody. *1 Rol. Abr. 816.*

By the *Stat. 8 & 9 Will. 3. cap. 27. Sec. 2.* It is enacted, "That if the sheriff or warden for the time being, or their respective deputy or deputies, or other keeper or keepers of any other prison or prisons, shall, after one day's notice in writing given for that purpose, refuse to show any prisoner committed in execution to the creditor at whose suit such prisoner was committed or charged, or to his attorney, every such refusal shall be adjudged to be an *escape* in law."

It is said that the person answerable for an escape. In civil actions the sheriff is to answer for the escape of his bailiffs, or the sheriff is for the sheriff, and action on the case lies against the sheriff for an escape upon *meine process*; *Ex. the plaintiff is privileged in his suit by it.* *Ex. Elia. 611. 615.* *Down. Abr. 281.* But if he is arrested, and *Ex. before brought to bail*, the sheriff is not chargeable, though if a *detendant* in execution is rescued, the sheriff is liable for the whole debt; and is to have his remedy against the *rescuer*. *2 Co. 419. Dyer 241. See 2 Roll. No. 10. 10. 60.* Where a person is in custody on *meine process*, and being outlawed after judgment at the suit of another, the plaintiff may create a writ of *habeas corpus*, and deliver it to the sheriff's officer, who hath him in custody; if the officer afterwards permits the person to escape, though he refuse to execute the writ, the sheriff is chargeable in action on the case. *1 Roll. 10.*

Where one has the custody of a part of a reversion or inheritance, and conveys it to another person, who is insufficient, the donor is answerable for all escapes committed by his officers, and the inferior is bound to answer the donor must be answerable for them, and not the superior. See *9 Co. 94. 1 Jac. 60. 1 Lill. 121. 1 Pler. 312. 2 Mod. 136.*

Also by the *Stat. 8 & 9 Will. 3. cap. 27. Sec. 1.* It is enacted, "That the officer or officers of the King's Bench prison and warden of the *Fleet*, shall be assigned by the several persons to whom the inheritance of the

prisons, prison-houses, *Ex. of the said prisons*, or either of them, shall then belong respectively, in his or their respective proper person, *Ex. or by their sufficient deputies*, for which deputies, and for all forfeitures, escapes, and other misdemeanors in their offices by such deputies permitted, *Ex. the said person in whom the aforesaid inheritances respectively are*, shall be answerable; and the profits and inheritances of the said offices shall be sequestered, *Ex. to make satisfaction for such forfeitures*; escapes, *Ex. respectively*, as if permitted, *Ex. by the persons themselves*, in whom the respective inheritances of the said prisons shall then be."

If a person that hath the fee of a prison makes a lease of it for life or years to another, who suffers an escape; the party grieved thereby must prosecute the lessee for it, and if he be not sufficient to answer, he may sue the lessor. *4 Rep. 98.* A prisoner escapes out of the *King's Bench*, or *Marshalsea*, or the *Fleet*; the keeper of the prison out of which he escaped is to be charged with it; but if the escape be from either of the *Counties*, the action must be brought against the *sheriff of London*. *Dyer 278. 3 Rep. 120.*

Action of escape against the warden of the *Fleet* for an escape upon *meine process*; the prisoner returns to the sheriff the same day, and the plaintiff afterwards proceeds to an action against him; yet the action lies against the warden. *Ravencroft v. Ryles, Esq. Wilf. Rep. par. 1. 1. 1. 1.* In an escape upon *meine process* out of the *County*, brought in *B. R.* against the bailiff thereof, the defendant shall not take advantage in *B. R.* of any error in the process below. *Id. Bull. v. Steward, par. 1. 1. 1. 1.*

Action of escape will not lie against the executor or administrator of a sheriff, *Ex. for an escape*, because it was personal, and *Ex. per person*; but it may be otherwise if there be a judgment recovered against the sheriff before he died. *Dyer 322.*

If there are two sheriffs of the same place, and an action of escape is brought against them both, if one of them dies, yet the writ shall not abate; for it being in nature of a trespass, and merely personal, the party can only have remedy against the survivor. *Ex. Elia. 625.*

An old sheriff commits turning over a prisoner in execution to the new sheriff, *Ex. to be an escape*; so where there are two executions against a man, and in the indenture of turning over mention is made but of one, *Ex. 1 Rep. 71.*

*Of the difference between negligent and voluntary escapes, and also between escapes in *meine process* and execution.*

There are two kinds of escapes; *voluntary* and *negligent*. *Voluntary* is when one arrests another for felony, or other crime, and lets him go by consent; in which case the party that permits the escape is esteemed guilty of the crime committed, and must answer for it: *Negligent* is when one is arrested, and afterwards escapes against the will of him that arrested him, or had him in custody; and is not pursued by fresh suit, and taken again before the party pursuing hath lost sight of him. *Ex. 1 Rep. 10.* And for these negligent escapes, the *statute*, *Ex. is to be fined*. One negligent escape will not amount to a forfeiture of a *sheriff's* office, as one voluntary one will; but every negligent escape will do so; and the fine for suffering a negligent escape of a person attached, was by the *Common law* of course 100*l.* and in other cases at the discretion of the court. *3 Lev. 288. 1 Lev. 22.*

It was formerly said, that where the sheriff suffered a prisoner in execution to make a voluntary escape, the prisoner was in law still attached, discharged from the creditor, and that the right of action was entirely transferred against the sheriff, who by means of such escape became *debtor in law*. *1 Lev. 23. Hob. 203. S. P.* But now, if the prisoner escapes who was in execution, his creditor may sue him by *captia facias*, or bring action against him on the *statute*, or a *scire fac* against him, *Ex. 1 Pler. 312. 1 Salk. 160. And see 8 & 9 W. 3. c. 27.* A prisoner taken in execution makes a tortious escape, the party at whose suit he was taken in execution

execution shall have an *alias ca. sa.* to take him in execution again; or action on the case against the sheriff: but if the sheriff voluntarily permit the escape, action of debt is to be brought against the sheriff; and on such a voluntary escape, the plaintiff may have a new execution. 1 *Lill. Abr.* 536. 3 *Lev.* 211. If a man escapes, with the consent of the gaoler in a civil case, he cannot retake him. 3 *Rep.* 32. For 'tis said the execution is discharged, so as the party may not be taken again, or judg'd in execution by law. *Hob.* 202. And if he be allowed to go with a keeper into another county, it is such an escape and discharge, that if he be there detained, out of the power of the sheriff, it will be false imprisonment. *Flou.* 36. *Dyer* 166. Though if a person be permitted to escape by the sheriff, he may be taken by the party: for it may be the sheriff is insufficient to answer. 1 *Paut.* 4. If the plaintiff permit the prisoner to escape, he cannot afterwards retake him; and if the body and goods, &c. of a consignor are taken in execution upon a statute-merchant, if the consignor agree that he shall go at large, it is a discharge of the whole execution, and the consignor shall have his lands again: 'tis otherwise if the sheriff had permitted him to escape; the execution on the lands would not be discharged. 2 *Nelf. Abr.* 737. A difference is to be observed between *permissive* and *negligent* escapes; for if a sheriff suffers a prisoner voluntarily to go at large, the sheriff cannot retake him even upon fresh writs; and if he does, the prisoner may have an action of trespass against him. *Lev.* 212.

If the marshal of the *King's Bench*, or warden of the *Fleet*, or any other who hath the keeping of prisoners in fee, suffer a voluntary escape, it is a forfeiture of the office. 3 *Med.* 146. *Cart.* 212. And there is likewise a farther penalty of 500*l.* added by 8 & 9 *W.* 3. c. 27. abovementioned.

If the sheriff suffer a person arrested on mesne process to escape, an action lies against him at Common law, from the delay and prejudice which the party suffers thereby. 1 *Roll. Abr.* 99. 807. *Moor* 252. *Cre. Blin.* 623, 652, 868. *Cre. Jac.* 280.

But there is this difference between an escape on *mesne process* and *execution*, if the sheriff arrests a person on mesne process, and he is released by J. S. he may return the rescue, and such return is good, and no action of escape lies against him after such return; but the court will issue process against such rescuer, or fine him; for in this case, tho' the sheriff may, yet he is not obliged to raise the *posse comitatus*. 1 *Roll. Abr.* 807. 1 *Jon.* 207. 1 *Roll. Rep.* 388. 3 *Lev.* 26.

But after judgment, on a *capias ad satisfaciendum*, the sheriff cannot return a rescue, for in such case the sheriff is obliged to raise the *posse comitatus*, if needful, and therefore, if he return a rescue, an action of escape lies, or a new *capias*, for the return of an ineffectual execution is as none. 1 *Roll. Abr.* 809. *Cre. Car.* 240, 255. 3 *Car.* 42. See *Burb. N. Pri.* 59. 60.

It will not be a good plea, for the sheriff in action upon an escape, that the prisoner rescued himself, &c. for the sheriff may command the *posse comitatus* to help him; but this has been held to be only in case of executions. 6 *Rep.* 51. 1 *Cre.* 868.

III. Of the nature of the action to be brought for an escape, and the manner of laying it.

At Common law the plaintiff had no remedy against the sheriff for an escape, whether upon mesne process, or in execution, but by special action upon the case. 2 *Inst.* 382. 1 *Shew.* 176. 3 *Saund.* 12. *Moor* 30.

But now, by an equitable construction of *Stat. 2. cap. 11.* Action of debt is given against the sheriff, and by the 1 *Rich. 2. cap. 12.* against the warden of the *Fleet* (which extends to all gaolers and keepers of prisons, though infants or feme covert. 2 *Inst.* 382.) for escapes in execution.

Also the plaintiff, at his election, may maintain either an action upon the case, or debt, for an escape in execution. *Cre. Jac.* 361, 533, 619. *Cre. Blin.* 873. *Dyer* 278. b. See 1 *Jon.* 144. 1 *Sid.* 364. S. C.

If a prisoner in custody upon a *capias ulagatum* is suffered to escape, the plaintiff may either maintain an ac-

tion *qui tam* against the sheriff, or bring an action of debt against him in his own right. *Cre. Jac.* 361, 533, 619. *Cre. Blin.* 877.

An action of escape is not a local action, and therefore if one escapes out of the *Marshalsea*, which is in *Surry*, the action against the marshal may be laid in *Middlesex*. *Dyer* 278. b. See 1 *Jon.* 144. 1 *Sid.* 364. S. C.

Where two persons are in execution for debt, if one of them escape, debt will lie. 14 *H.* 6.

If a man is in execution upon a judgment in C. B. and there is a judgment before against him in B. R. in this case, he shall be in execution for both in the *King's Bench*; and if the marshal then suffer him to escape, he is chargeable with both debts. *Dyer* 151, 153.

'Tis usual now, when a man escapes on *mesne process*, to declare against the sheriff, &c. in such an execution, in debt.

As to the manner of laying the action.

In this action it is not necessary to set forth all the formalities required by law in other cases. *Cre. Blin.* 877. See a *Form.* 222.

Where there is upon a judgment obtained by the plaintiff, the return brings a *return facias*, and has judgment, execution a *capias ad satisfaciendum*, and B. is arrested, and returned to court, the plaintiff, in an action against the sheriff for this escape, may declare briefly upon the judgment in the *first writ*, without shewing the gradual proceedings at length, as is usually done in an action of debt upon a judgment. *Cart.* 246, 149. 3 *Med.* 146. b. c. *Cre. Blin.* 877.

Should a defendant be arrested on a *special capias*, founded on an original returnable in B. R. in action for his escape, it is not necessary to set forth the original.

If the plaintiff declares that he sued out a writ of execution against J. S. without setting forth any judgment, and that the defendant suffered him to escape; this is an incurable fault; for by this means he lost the benefit of pleading *nil in record*, which he might do if the plaintiff had set forth the judgment. 1 *Saund.* 37—38. 1 *Lev.* 191. and 1 *Sid.* 366. S. C.

If A. recovers against B. an execution, and has him in execution, and the sheriff suffers him to escape, the action must be brought as executor in the *assize* only, and not in the *debt and damns*. 1 *Intw.* 293. *Comb.* 112. S. C.

If the plaintiff declares, that the prisoner was committed, and escaped, but does not say, *Præsumitur per recordum*; yet upon a general demurrer this shall be good; for the gist of the action was the escape, and the commitment only inducement. 2 *Salk.* 365. 3 *Med.* 8. S. C. See 1 *Lev.* 193.

If in escape the plaintiff declares, that he had J. S. and him with in execution, and that the defendant suffered him to escape, and the jury find specially, that the prisoner only was taken in execution (for being for a debt due from the wife before coverture) and that he escaped; this is sufficient, and the plaintiff shall have judgment; for the substance of the declaration is found, though not pertinent to the declaration. 1 *Sid.* 3.

So in question on the case for the escape of A. where the jury found that A. was taken by J. S. the former sheriff, and not by the defendant, the present sheriff; but finding that he was legally in his custody, and that he suffered him to escape, the plaintiff had judgment. *Cre. Jac.* 180.

By the *Stat. 2. cap. 11. sec. 2. sub. 2. sec. 12.* it is enacted, That it shall be lawful for any person, having cause of action against the warden of the *Fleet* prison, or any jail, stock, or the warden and Comptroller of Execution, against the warden, and a rule being given to the warden to be on his oath, or at most other thing to be said, to have judgment against the warden, unless he pleads to the said writs three days after such rule is out.

IV. As to the manner of the defence of the party.

If the prison was fire, by means whereof the prisoner escape, this shall excuse the sheriff, and he may plead it. 1 *Sid.* 368.

So if the prison is broke by the King's enemies, this shall excuse the sheriff, for he can have no remedy over against them. *4 Co. 84. 1 Rel. Abr. 808.*

But if the prison was broke by rebels and traitors, the King's subjects, this shall not excuse him, for he may have his remedy over against those. *Ibid.*

If a prisoner in execution escapes without the assent of the sheriff, &c. and he make fresh pursuit, and retake him before any action brought against him, this shall excuse the sheriff. *Cror. Jar. 657. 1 Jan. 144. 1 Rel. Abr. 808.*

When a prisoner tortiously escapes from the custody of the gaoler, he may be retaken; and the sheriff, &c. may pursue a person escaping into that or any other country; and if he retakes the prisoner in fresh pursuit before action brought, it shall excuse the sheriff, for there the prisoner shall be said to be in execution still. *3 Rep. 14.* And where the sheriff is to answer the debt and damages for such escape, he shall have his common remedy against the party escaping; and may take him at any time and place, and imprison him, until he hath satisfied the sheriff as much as he hath paid to the plaintiff, or he may bring an action upon the case against the prisoner, and so return himself. *5 Rep. 525. Cro. Jac. 304.*

It was formerly held, that the sheriff, &c. might give fresh pursuit in evidence, and need not have proved it. See *1 Med. 26. 1 Sid. 13.*

But now by the *5 & 6 W. 3. cap. 27. §. 1.* it is enacted, "That no retaking on fresh pursuit shall be given in evidence, unless the same be specially pleaded; nor shall any special plea be allowed, unless writ be first made in writing by the defendant, and filed in the proper office of the respective courts, that the prisoner, &c. hath escape such action is brought, and without the express privity or knowledge, make such escape; and if such affidavit shall at any time afterwards appear to be false, and the defendant shall be convicted thereof by due course of law, he shall forfeit the sum of 100*l.*" See *Star.*

We are next to consider escapes in criminal cases; and herein is to be enquired,

- I. *What shall be deemed an escape, and where it shall be adjudged voluntary, and where negligent.*
- II. *When the prisoner may be retaken after an escape, and where the escape is excused by such a retaking, or by killing the prisoner, if he cannot be retaken.*
- III. *How the officer suffering an escape is to be punished, and the escape is forgiven and absolved.*
- IV. *Of the punishment of voluntary and negligent escapes, and of persons aiding and assisting prisoners to attempt their escape.*

- I. *What shall be deemed an escape, and where it shall be adjudged voluntary, and where negligent.*

A man must be committed to prison by lawful authority, or breach of prison and escaping is no felony. If a party is committed for ransom, or to break prison and escape is but felony; but if a prisoner by any means or without reason, *5 P. C. reg. 2. §. 1. 100.* Where a man is imprisoned for great felony, by killing a man, &c. to break prison and escape is but felony; and if a prison be taken free, not by the taking of the prisoner, he may break prison for the taking of his life. *2 Inst. 200.* A gaoler refusing to receive a person arrested by the constable for felony, whereby he is guilty of an escape, but there must be an actual act, which avert makes it feasible, to make an escape; for if it be for a supposed crime, where no crime was committed, such a party is neither indicted nor punished. *U. C.* It is an escape to suffer a person to go at large. *Fitz. Cress. 204. Bon. 1. 2. 27. 28.* If a person be taken another for suspicion of felony, he is to deliver him to a person of good name, who ought to keep the custody of him; for if he let him go, it will be an escape. *2 Hawk. 136.* And if one will receive him, he is to deliver him to the lordship where needed, to get him bailed.

A more private man, known to have committed felony, and thereupon arrest him, he is bound in

custody of A. till he be discharged, by delivering him to a constable or common gaol; and therefore if he voluntarily suffers such person to escape, though he were no officer, nor B. indicted, it is felony in A. But 'tis otherwise if he never takes him nor attempts it, and lets him go. *1 Hale's Hist. P. C. 594.* Justices of peace in their sessions are empowered to inquire of escapes of persons arrested, and imprisoned for felony. *Stat. 1 R. 3. c. 3.*

As to the second point, viz. Where such escape is to be deemed voluntary, and where negligent.

There can be no doubt, but that where ever an officer, who hath the custody of a prisoner, charged with and guilty of a capital offence, doth knowingly give him his liberty, with an intent to save him, either from his trial or execution, he is guilty of a voluntary escape, and thereby involved in the guilt of the same crime of which the prisoner was guilty, and stood charged with. And it seems to be the opinion of Sir *Matthew Hale*, that in some cases an officer may be adjudged guilty of such escape, who hath not such intent, but only means to give his prisoner that liberty which by the law he hath no colour of right to give him.

It is to be held a person not bailable by law is a negligent escape. *2 Hawk. 476.* And it is said that the crime is made by a justice of peace, for taking a felon out of prison, without bail; or suffering him to go at large without commitment, &c. where the offender confesseth the felony, as it is in the case of a gaoler's permitting an escape. *Dalt. 322.*

As to the point to closely pursue the prisoner, who flies from him, that he retake him without losing sight of him, the law looks on the prisoner so far in his power, all the time, or not to lose sight from a flight to amount at all to an escape; but if the gaoler once lose sight of the prisoner, and afterwards retake him, he seems in strictness to be guilty of an escape; and a *felony* therefore, if he kill him in the pursuit, he is in like manner guilty, tho' he never lost sight of him, and could not otherwise take him, not only because the King loses the benefit he might have had from the attachment of the prisoner, by the forfeiture of his goods, &c. but also because the public justice is not so well satisfied by the killing him in such an extrajudicial manner. *2 Hawk. 130. See post. Chap. 2.*

- II. *When the prisoner may be retaken after an escape, and where the escape is excused by such a retaking, or by killing the prisoner if he cannot be retaken.*

It seems to be clearly agreed by all the books, that an officer making a fresh pursuit after a prisoner, who hath escaped through his negligence, may retake him at any time after, whether he find him in the same or in a different country. And it is said generally in some books, that an officer who hath negligently suffered a prisoner to escape, may retake him where ever he finds him, without mentioning any fresh pursuit; and indeed, since the liberty gained by the prisoner is wholly owing to his own wrong, there seems to be no reason he should take any manner of advantage from it. But where a gaoler hath voluntarily suffered a prisoner to escape, it is said by some, that he can no more justify the retaking him, than if he had never had him in custody before, because by his own free consent he hath admitted that he hath nothing to do with him.

Where ever a prisoner, by the negligence of his keeper, gets so far out of his power, that the keeper loses sight of him, the keeper is liable at the discretion of the court, notwithstanding, to retake him immediately after; for it seems agreed, that this is to be adjudged a negligent escape, which is a felony, and consequently that it may be punished. It is also said, that in an action against a gaoler, for suffering one arrested in a civil action to escape, the gaoler may excuse the gaoler, that before the action brought, he retake the prisoner upon fresh suit; which is to be understood by showing that he pursued him immediately after notice of the escape, though it were some hours after, and retake him; but it does not from hence follow, that the like excuse will serve for the negligent escape of a criminal, because this is an offence against

against the publick, but the other is only a private damage to the party: neither will it be an hardship to the officer, to be exposed to such punishment as the court, in discretion, shall think fit to impose upon him for the negligent escape of a criminal, as it would be to be liable to an action of escape, for suffering a person in his custody, in a civil action, to escape; for that in the former case the court would moderate his fine according to the circumstances of the whole matter, and would certainly mitigate, if not wholly excuse it, if he should appear to have taken all reasonable care: but in the other case, if he should be liable to an action, his judgment would not lie in the discretion of the court, but he would be bound to pay the whole debt, for which the party was in custody, if the escape should be adjudged against him. However it is certain, that it will be no advantage to a gaoler to retake his prisoner, after he has been fined for the escape, as hath been shewn in the precedent section; also it is clear, that he cannot excuse himself by killing a prisoner in the pursuit, though he could not possibly retake him; but must, in such case, be contented to submit to such fine as his negligence shall appear to deserve. 2 Hawk. P. C. 132.

III. With regard to the indictment for an escape, whether such escape be negligent or voluntary.

The indictment must expressly shew, that the party was actually in the defendant's custody for a crime, action, or commitment for it; and that it is not sufficient to say, that he was in the defendant's custody, and charged with such a crime; for that a person in custody may be so charged, and yet not be in custody by reason of such charge: and it seems also, that every such indictment must expressly shew that the prisoner went at large. Also it seems necessary, to shew the time when the offence was committed, for which the party was in custody, not only that it may appear, that it was prior to the escape, but also that it was subsequent to the last general pardon. Also it seems clear, that every indictment for a voluntary escape must allege that the defendant felonically & voluntarily *A. B. ad largum ire permisit*; and must also shew the species of the crime for which the party was imprisoned; for it is not sufficient to say in general, that he was in custody for felony, &c.

The crime of the prisoner escaping, for which the gaoler is answerable, must be such as it was at the time of the escape; as where a person is committed for dangerously wounding another, it is trespass only, and not felony, till the party wounded is dead: and he who suffers another to escape who was in custody for felony, cannot be arraigned for such escape as for felony, until the principal is attainted, but he may be indicted and tried for misprision before the attainder of the principal. And in high treason 'tis said the escape is immediately punishable, whether the party escaping be ever convicted, or not. 2 Hawk. 135.

In respect to the manner of trying escapes.

Where persons, being present in a court of record, are committed to prison by such court, the keeper of the gaol is bound to have them always ready, whenever the court shall demand them of him; and if he shall fail to produce them at such demand, the court will adjudge him guilty of an escape, without any farther inquiry, unless he have some reasonable matter to alledge in his excuse, as that the prison was set on fire, or broke open by violence, &c. for he shall be concluded, by the record of the commitment, to deny that the prisoners were in his custody. 2 Hawk. P. C. 133.

As to other prisoners who are not so committed, but are in the custody of a gaoler, sheriff, constable, or other person, by any other means whatsoever, it seems agreed, that the person who has them in custody is in an escape punishable for their escape, except in some special cases, until it be presented for by Stat. West. 1. c. 3. It is enacted, that "Nothing be demanded nor taken, nor levied by the sheriff, nor by any other, for the escape of a thief, or felon, until it be judged for an escape by the justices in eyre; and that he who does otherwise, shall restore to him or them that have paid it, as much as he or

they have taken or received; and as much also unto the King."

It hath been adjudged, that this statute restrains not the court of King's Bench from receiving such presentments, for that its jurisdiction includes in it that of justices in eyre, and this court is itself the highest court of eyre. 2 Hawk. P. C. 134.

It is farther enacted by Stat. 31 Ed. 3. c. 14. "That the escape of thieves and felons, and the chattels of felons, and of fugitives, and also escapes of clerks convicted, and of their ordinary's prison, from thenceforth to be judged before any of the King's justices, shall be levied from time to time, as they shall fall, as well of the time past as time to come." By which it seems to be implied, that other justices, as well as those in eyre, may take cognizance of escapes; and it is certain, that justices of gaol-delivery may punish justices of peace for a negligent escape, in admitting persons to bail, who are not bailable. 2 Hawk. P. C. 134.

And it is farther enacted, by Stat. 1 Rich. 3. cap. 3. "That justices of peace shall have authority to inquire, in their sessions, of all manner of escapes of every person arrested and imprisoned for felony."

Wherever an escape is possible, the presentment of it is traversable; but where the offence is amerciable only, there the presentment is of itself conclusive; such amercements being reckoned among those *minima de quibus non curat lex*; and this distinction seems to be well warranted by the old books. 2 Hawk. P. C. 134.

IV. Of the punishment of voluntary and negligent escapes, and of persons aiding and assisting in such escapes; and first, as to the punishment of voluntary escapes.

Such escape amounts to the same kind of crime, and is punishable in the same degree, as the offence of which the party was guilty, and for which he was in custody, whether it be treason, felony, or trespass; and whether the person escaping were actually committed to some gaol, or under an arrest only, and not committed; and whether he were attainted, or only accused of such crime, and neither indicted nor appealed: and it is said to be no excuse of such escape, that the prisoner had been acquitted on an indictment of death, and only committed till the year and day be passed, to give the widow, or heir of the deceased, an opportunity of bringing their appeal. 2 Hawk. 134.

Also such an escape, suffered by one who wrongfully takes upon him the keeping of a gaol, seems to be punishable in the same manner as if he were never so rightfully intitled to such custody, for that the crime is in both cases of the very same ill consequences to the publick; and there seems to be no reason that a wrongful officer should have greater favour than a rightful, and that for no other reason, but because he is a wrongful one. 2 Hawk. P. C. 134.

Also if the warrant of a commitment do plainly and expressly charge the party with treason or felony, but in some other respect be not strictly formal, yet it seems, that it may be properly argued, that the gaoler suffering an escape, is as much punishable as if the warrant were perfectly right. 2 Hawk. P. C. 134, 135.

None shall suffer capitally for the crime of another, so that a principal gaoler is only answerable for a voluntary escape suffered by his deputy. 2 Hawk. P. C. 135.

As to negligent escapes.

Whoever *de facto* occupies the office of gaoler is liable to answer for such an escape; and that it is no way material whether his title to the office be legal or not. 2 Hawk. P. C. 135. A sheriff is as much liable to answer for an escape suffered by his bailiff, as if he had actually intitled it himself, and the court may charge either the sheriff or bailiff for such an escape; and if a deputy gaoler be not sufficient to answer a negligent escape, his principal shall answer for him; but if the gaoler who suffers an escape have an estate for life, or years in the office, it is not agreed how far he is severally liable to be punished. 2 Hawk. P. C. 135, 136.

One negligent escape will not amount to a forfeiture of the gaoler's office, as one voluntary one will; yet if a gaoler suffer many negligent escapes, it is said, that he puts it in the power of the court to oust him of his office by its discretion. 2 Hawk. P. C. 136.

Where-ever a person is found guilty, upon an indictment, or presentment, of a negligent escape of a criminal actually in his custody, he ought to be condemned in a certain sum to be paid to the King, which seems most properly to be called a fine.

It hath been holden, that a negligent escape may be pardoned by the King before it happens, but that a voluntary one cannot so be pardoned. 2 Hawk. P. C. 136.

And it seems by the Common law, the penalty for suffering the negligent escape of a person attainted, was of course 100*l.* and for suffering such escape of a person indicted, and not attainted, was 5*l.* but if the person escaping were neither attainted nor indicted, it seems that it was left to the discretion of the court to assess such a reasonable forfeiture as should seem proper; and if the party had twice escaped, it seems, that the penalties above mentioned were of course to be doubled; yet it seems, that the forfeiture was to be no greater for suffering a prisoner, committed on two several accusations, to escape, than if he had been committed but on one. 2 Hawk. P. C. 136.

As to the manner offences of this kind are punishable by statute, it is recited by 5 Ed. 3. *ch.* 8. "That persons indicted of felonies in times past, had removed the indictments before the King, and there yielded themselves, and by the marshals of the King's Bench had been incontinently let to bail, and after had done many evil deeds, &c." And thereupon it is enacted, "That if any such prisoner be found wandering out of prison, by bail, or without bail, and that he be found at the King's suit, or at the suit of the party, the marshal which shall be found thereof guilty, shall have half a year's imprisonment, and be ransomed at the King's will; and the justices shall thereof make inquiry when they see time; and as to the marshals, it shall be done within the verge that which reason will. And in case that the marshals suffer by their assent such prisoners to escape, they shall be at law, as before the time of the statute they had been. And the King intendeth not by this statute to lose the escape, where he ought to have the same."

Also it is enacted by 19 H. 7. *c.* 10. "That every sheriff have the custody of the King's common gaols, during the time of his office, except all gaols whereof any person or persons have the keeping of estate of inheritance. And that for every negligent escape from any sheriff, having the keeping of any gaol, or from any constable of castle, or other, being keeper of any gaols where such prisoners accusomably have been, or shall be kept, of persons indicted of high treason being in their keeping, that *no less fine* be set or made for every such escape, than 100 marks, and *more*, by the discretion of the justices that shall assess such fines: and for every escape of persons escaping, being in their keeping for suspicion of high treason, *no less fine* to be set ne made than 40*l.* and for every escape of persons indicted of murder, or petit treason, 20*l.* at least, and *more*, by the discretion of the justices that shall assess such fines: and for every person escaping, being in their keeping, indicted of felony, other than murder or treason, 10*l.* and for every person suspected of felony, other than murder or treason, 100 shillings, or *more*, by the discretion of the justices, after the manner and quantity of their demerits; saving to every person such right and title to any such escapes, and fines for the same, as to be quit of such escapes, or of any other escapes, as they had, or ought to have had at the time of making of the said act."

Concerning the punishment of persons aiding and assisting prisoners to attempt their escape.

It is enacted, That persons who any ways assist a prisoner, committed for treason, or felony, to attempt his escape from any gaol, shall be adjudg'd guilty of felony and be transported; and if the prisoner be committed for

any other crime; or upon process for 100*l.* debt, &c. the offenders are liable to fine and imprisonment. 16 Geo. 2. *c.* 31. And where any person conveys any arms, instrument or disguise, to a prisoner in gaol for felony, &c. or for his use, in order to an escape, 'tis likewise felony and transportation. Also if one assist any prisoner to escape from any constable, or other officer or person in whose custody he is, by virtue of a warrant of commitment for felony, it is declared to be the like offence. *Ibid.*

Escape-warrant. If any person committed or charged in custody in the King's Bench or Fleet prison, in execution, or on mesne process, &c. go at large; on oath thereof before a judge of the court where the action was brought, an escape-warrant shall be granted, directed to all sheriffs, &c. throughout England, to retake the prisoner, and commit him to gaol where taken, there to remain till the debt is satisfied; and a person may be taken on a Sunday upon an escape-warrant. Stat. 1 Ann. *c.* 6. And the judges of the respective courts may grant warrants, upon oath to be made before persons commissioned by them to take affidavits in the county, (such oath being first filed) as they might do upon oath made before themselves. 5 Ann. *c.* 9. A sheriff ought not to receive a person taken on escape-warrant, &c. from any but an officer; not from the rabble, &c. which is illegal. Pasch. 3 Ann. 3 Salk. 149. A person being arrested and carried to Newgate by virtue of an escape-warrant, moved to be discharged, because he said he was abroad by a day-rule when taken; but it appearing by affidavit, that he was taken upon the escape-warrant before the court of B. R. sat that morning, they refused to set him at liberty. 2 Ld. Raym. 927.

Escapio Quietus, Is an escape of beasts in a forest; and he by that charter is *quietus de escapio*, is delivered from that punishment which by the laws of the forest lieth upon those whose beasts are found within the land where forbidden. Crompt. Jurisd. 196.

Escapium, Hath been used for what comes by chance or accident. Cowel.

Esceppa, A *scapp*, or measure of corn. Mon. Ang. tom. 1. p. 283. See *Sceppa*.

Escheat, (*escheta*, from the Fr. *eschecoir*, i. e. *accidere*.) Signifies any lands or tenements that casually fall to a lord within his manor, by way of forfeiture, or by the death of his tenant, leaving no heir general or special. Mag. Chart. cap. 31. Escheat is also used sometimes for the places or circuit, in which the King, or other Lord, hath escheats of his tenants. Bract. lib. 3. tract. 2. cap. 2. And it is likewise applied to a writ, which lies where the tenant having an estate in fee-simple in any lands or tenements holden of a superior lord, dies without heir; in which case the lord brings this writ against him that is in possession of the lands after the death of his tenant, and shall thereby recover the same in lieu of his services. F. A. B. 144.

In our law escheats were of two sorts: 1. *Regal*, Those forfeitures which belong to our kings by the ancient rights and prerogative of the crown. 2. *Feudal*, which accrue to every Lord of the fee as well as the King, by reason of his feignior. Where a person commits treason, his estate shall escheat and be forfeited to the King; and when a tenant in fee-simple committeth felony, and is attainted, the King shall have year, day, and waite in his lands, (or rather year and day in lieu of waite) and afterwards it comes to the lord by escheat. And the lord may compound with the King, and have the estate presently. 3 Inst. 111. It has been holden, that a saving against the corruption of blood in a statute concerning felony, doth by consequence save the land to the heir, so as not to escheat; because the escheat to the lord for felony is only *pro defectu tenentis*, occasioned by the corruption of blood: but it hath been adjudged, that a saving against the corruption of blood, in a statute concerning treason, doth not save the land to the heir: for in treason the land goes to the King by way of immediate forfeiture. 3 Inst. 47. 1 Salk. 85.

Inheritances of things not lying in tenure, as of rents, commons, &c. cannot escheat to the lord, because there is no tenure: nor descend, by reason the blood is corrupted: though they are forfeited to the King by an attainder of treason, and the profits of them shall be also forfeited to

the King on attainder of felony, during the life of the offender; and after his death it is said the inheritance shall be extinguished. 2 *Havok. P. C.* 449.

A person is *seised* of lands in fee holden of a lord, his son is attainted of treason, and the father dieth, the land shall *escheat* to the lord, and not to the King; who cannot have the land, because the son who was attainted never had any thing to forfeit: but the King shall have the *escheat* of all the lands whereof the person attainted of high treason was seised, of whomsoever they were holden. 1 *Inst.* 13. Husband and wife, tenants in special tail; the husband is attainted of treason and executed, leaving issue; on the death of the wife the lands shall *escheat*, because the issue in tail ought to make his conveyance by father and mother, and from the father he cannot by reason of the attainder. *Dyer* 322. If tenant in fee-simple is attainted of treason, and executed, upon his death the fee is vested in the King, without office found; yet he must bring a *scire facias* against the tenants; lands shall never *escheat* to a lord of whom they are holden, until office found. 3 *Rep.* 10.

Escheat seldom happens to the lord for want of an heir to an estate; but when it doth, before the lord enters, the homage jury of the lord's court ought to present it. 2 *Inst.* 36. Land shall *escheat* to the lord, where heirs are born after attainder of felony. 3 *Rep.* 40. Though if the King pardons a felon before conviction, the lord shall not have his lands by *escheat*; for the lord hath no title before attainder. *Over* 87. 2 *Nels. Abr.* 744. If on appeal of death or other felony, process is awarded against the party, and hanging the process he conveyeth away the land, and after is outlawed, the conveyance is good to defeat the lord of his *escheat*: but if where a person is indicted of felony, hanging the process against him, he conveys away his land, and afterwards is outlawed, the conveyance shall not prevent the lord of his *escheat*. 1 *Inst.* 13. See *Corruption of Blood*.

Escheator, (eschætor) Was an officer appointed by the Lord Treasurer, &c. in every county, to make inquests of titles by *escheat*; which inquests were to be taken by good and lawful men of the county, impanelled by the sheriff. *Stat.* 14 *Ed.* 3. c. 8. 34 *Ed.* 3. c. 13. 8 *H. 6.* c. 16. These *eschætors* found offices after the death of the King's tenants, who held by knight-service, or otherwise of the King; and certified their inquisitions into the Exchequer, and Fitzherbert called them officers of record. *F. N. B.* 100. No *eschætor* could continue in his office above one year: and whereas before the statute of *Westm.* 1. cap. 24. *Escheators*, sheriffs, &c. would seize into the King's hands the freehold of the subjects, and thereby disseise them; by this act it is provided that no seizure can be made of lands or tenements into the King's hands, before office found. 2 *Inst.* 206. And no lands can be granted before the King's title is found by inquisition. 18 *H. 6.* c. 6. The office of *eschætor* is an ancient office, and was formerly of great use to the crown; but having its chief dependance on the court of wards, which is taken away by act of parliament, it is now in a manner out of date. 4 *Inst.* 225. There was antiently an officer called *eschætor of the Jews*. *Claus.* 4 *Ed.* 1. m. 7.

Escheccum, A jury or inquisition. *Matt. Paris.* Anno 1240.

Eschîpare, To build or equip.——*Navæ bene eschîpatas bonis & probis marinellis.* Du Cange. See *Esquipamentum*.

Escrow, Is a deed delivered to a third person, to be the deed of the party making it, upon a future condition, when such a thing is performed; and then it is to be delivered to the party to whom made. It is to be delivered to a stranger, mentioning the condition; and has relation to the first delivery. 2 *Roll. Abr.* 25, 26. 1 *Inst.* 31. A delivery as an *escrow* signifies, in fact, as a *scrowl* or writing, which is not to take effect as a deed, till the condition be performed. *Co. Lit.* 36. *Black. Com.* 2 *V.* 307.

Escuage, (scutagium, from the Fr. *escu*, a shield) Is a kind of knight-service, called *service of the shield*, whereby the tenant was bound to follow his lord into the wars at his own charge. Also it has been sometimes taken for that duty or payment, which they who held lands under this tenure, were bound to make to the lord, when they

neither went to the wars, nor provided any other in their places; being in lieu of all services. And sometimes *escuage* signified a reasonable aid, demanded and levied by the lord of his tenants who held in knight-service, &c. *Stat.* 12 *Car.* 2. c. 24. *F. N. B.* 8. See *Chivalry*, and *Black. Com.* 2 *V.* 74. 4 *V.* 415.

Eſcurare, To scour or cleanse.——*Purgare vel eſcurare totam aquam ſiſſatorum,* &c. *Charta Tho. Episcop.* B. W. dat. 29 Oct. 4 *Ed.* 4.

Eſgliſe, (Fr.) A church, in the old books a law head. *L. Fr. Dict.*

Eſſing, The Kings of Kent, so called from the first King Oſta, who was surnamed *Eſe*: he was grandfather of King Ethelbert.

Eſſetores, (from the Fr. *escher*) Robbers or destroyers of other men's lands and fortunes.——*Juratores dicunt etiam quod latrones, & eſſetores de terra de,* &c. *Intraverunt,* &c. *Plac. Parl.* 20 *Ed.* 1.

Eſhipper, (Fr.) To ship, and *eshipped* is used for shipped. *Crompt. Jur. Cur.*

Eſhippamentum, Skippage, tackle, or ship furniture: the sea port towns were to provide certain ships, *ſumptibus propriis & duplici eſhippamento.* *Sir Rob. Cott.*

Eſhippeſon, Shipping, or passage by sea. Humphrey, Earl of Bucks, in a deed dated 13 Feb. 22 *H. 6.* covenants with Sir Philip Chetwind, his lieutenant of the castle of Calais, to give him allowance for his soldiers, *ſhippeſon* and *re-ſhippeſon*, viz. passage and re-passage by ship.

Eſnece, (aſnece, dignitas primogeniti) Is a private prerogative allowed to the eldest coparcener, where an estate is descended to daughters for want of heir male, to choose first after the inheritance is divided. *Fleta, lib.* 5. c. 10. *Jus aſnece* is *jus primogenituræ*; in which sense it may be extended to the eldest son, and his issue, holding first: In the statute of Marlbridge, cap. 9. it is called, *initia pars hæreditatis.* *Co. Litt.* 166.

Eſperons, Spurs, *eſperons de or*, guilt spurs. 7 *Co. Rep.* 13.

Eſpervarius, (Fr. eſpervier) A sparrow hawk. *Chart. Forest.* cap. 4. — *Reddit ſolus. Wilhelmo T. ad manerium ſuum de,* &c. *pro omnibus ſerviitiis unum eſpervarium ad feſtum,* &c. Anno 35 *H. 6.*

Eſples, (expletia, from expleo) Are the products which ground or land yield; as the hay of the meadows, the herbage of the pasture, corn of the arable; rent and services, &c. And of an advowson, the taking of tithes in gross by the parson; of wood, the selling of wood; of an orchard, the fruits growing there; of a mill, the taking of toll, &c. These and such like issues are termed *esples*. And it is observed, that in a writ of right of land, advowson, &c. the demandant ought to alledge in his count, that he or his ancestors took the *esples* of the thing in demand; otherwise the pleading will not be good. *Terms de Ley.* Sometimes this word hath been applied to the farm, or lands, &c. themselves.——*Diminus E. habebit omnia expletia & proficua de corona emergentia.* *Plac. Parl.* 30 *Ed.* 1.

Eſpouſals, (ſponſalia) Are a contract or mutual promise between a man and a woman to marry each other; and where marriages may be consummated, *espouſals* go before them. Marriage or matrimony is said to be an *espouſal de præſenti*, and a conjunction of man and woman in a constant society. *Wood's Inst.* 57. See *Matrimony*.

Eſquire, (from the Fr. Eſcu, and the Lat. Scutum, in Greek οὐτος) which signifies an hide of which Shields were anciently made and afterwards covered: For here in the time of the Saxons, the shields had a covering of leather; so that an *esquire* was originally he who attending a knight in the time of war, did carry his shield, whence he was called *Eſcuier* in French, and *ſcutifer* or *Armiger*, (i. e. armour-bearer) in Latin. *Hotoman* saith, that those which the French call *Eſquires*, where a military kind of vassals, having *jus ſcuti*, viz. Liberty to bear a shield, and in it the ensigns of their family, in token of their gentility or dignity: But this addition hath not of long time had any relation to the office or employment of the person to whom it hath been attributed, as to carrying of arms, &c. but been merely a title of dignity, and next in degree to a knight. Those to whom this title is now of right due, are all the younger sons of noblemen, and the eldest sons

of such younger sons; the eldest sons of knights, and their eldest sons; the officers of the King's courts and of the King's household; counsellors at law; justices of peace, &c. But these latter, are *esquires* in reputation; and he who is a justice of peace, has this title only during the time he is in commission, and no longer, if he be not otherwise qualified to bear it. A sheriff of a county being a superior officer, retains the title of *Esquire* during his life; in respect of the great trust he has in the commonwealth. The chief of some ancient families are *esquires* by prescription; and in late acts of parliament for poll money, many wealthy persons (commonly reputed to be such) were ranked among the *esquires* of this kingdom. *Blount.*

Esquires of the King. Are such who have the title by creation: These, when they are created, have put about their necks a collar of S S, and a pair of *silver spurs* is bestowed on them: And they were wont to bear before the Prince in war, a *shield* or lance. There are four *esquires of the King's body*, to attend on his Majesty's person. *Camb. 111.*

Exendi quietum de Tolonio. A writ to be quit of toll; and lies for citizens and burghesses of any city or town that by charter or prescription ought to be exempted from toll, where the same is exacted of them. *Reg. Orig. 258.*

Exorsors, or Exorsors. Are persons appointed by a court of law, to whom a writ of *venire facias* is directed to impanel a jury, on challenge to the sheriff and coroners; who return the writ in their own names, with a panel of the jurors names. 15 *Ed. 4. 24. pl. 4. Black. Com. 3 V. 355.*

Effoin, (Effonium, Fr. Effoine) Signifies an excuse for him that is summoned to appear and answer to an action, or to perform suit to a court baron, &c. by reason of sickness and infirmity, or other just cause of absence. It is a kind of imparlance, or craving of a longer time, that lies in real, personal and mixed actions: And the plaintiff as well as the defendant shall be *effoined*, to save his default. 1 *Inst. 131.* The causes that serve to *effoin*, and the *effoins* are divers under these heads. 1. *Effoin de ultra mare*, whereby the defendant shall have forty days. 2. *De terra sancta*, where the defendant shall have a year and a day. 3. *De malo veniendi*, which is likewise called the common *effoin*. 4. *De malo lecti*, wherein the defendant may by writ be viewed by four knights. 5. *De servitio Regis.* *Bratt. lib. 5. Britton, cap. 122. Fleta, lib. 6.* And besides the common *effoin*, *de malo veniendi*, i. e. by falling sick in coming to the court, and other *effoins* abovementioned; there were several other excuses, to save a default in real actions; as constraint of enemies, the falling among thieves, floods of water, and breaking down of bridges, &c. 2 *Co. Inst. 125.* After issue joined in dower, *quare impedit*, &c. one *effoin* only shall be allowed. *Stat. 52 H. 3. c. 13.* And in writs of assise, attainments, &c. after the tenant hath appeared, he shall not be *effoined*; but the inquest shall be taken by default. 3 *Ed. 1. c. 42.* *Effoin ultra mare* will not be allowed, if the tenant be within the four seas; but it shall be turned to a default, c. 44. There is no *effoin* permitted for an appellant. 13 *Ed. 1. c. 28.* Nor doth *effoin* lie where any judgment is given; or the party is distrained by his lands; the sheriff is commanded to make him appear; after the party is seen in court, &c. 12 *Ed. 2. st. 2.* And *effoin de servitio Regis* lies not when the party is a woman; in a writ of dower; where the party hath an attorney in his suit, &c. *Ibid.* The *effoin day* in court is regularly the first day of the term; but the fourth day after is allowed of favour. 1 *Lill. 540.*

An *effoin* is entered thus: A. B. offers himself on the fourth day against C. D. in a plea or action of, &c. and he did not appear, and was summoned, &c. Therefore let him be attached, that he be here on the day, &c. And be it known, that the said A. hath the same day to appear by his *effoin*, &c. *Rast. 520.*

Effoin Day of the Term. The first return in every term; is, properly speaking, the first day in that term: And thereon the court sits to take *effoins*, or excuses for such as do not appear according to the summons of the

writ: wherefore this is usually called the *effoin day* of the term. But the person summoned hath three days grace, beyond the return of the writ in which to make his appearance, and if he appears on the fourth day inclusive, the *quarto die post*, it is sufficient. *Black. Com. 3 V. 278.*

Effoin de Malo Villæ. Is when the defendant is in court the first day; but gone without pleading, and being afterwards surprised by sickness, &c. cannot attend, but sends two *effoiners*, who openly protest in court that he is detained by sickness in such a *village*, that he cannot come, *pro lucrari* & *pro perdere*; and this will be admitted, for it lies on the plaintiff to prove whether the *effoin* is true or not.

Coins and Proffers. Words used in the statute 38 H. 8. c. 21. See *Profer.*

Establishment of Dower. Is the assurance or settlement of dower, made to the wife by the husband, on marriage: And *assignment of dower*, signifies the setting it out by the heir afterwards, according to the establishment. *Brit. cap. 102, 103.*

Estache. (From the Fr. *Estacher*, to fasten) Is used for a bridge, or stank of stone and timber. *Cowel.*

Estandard, or standard. An ensign for horsemen in war. See *Standard.*

Estate. (Fr. *Estat*. Lat. *Jus*) Signifies that title or interest which a man hath in lands or tenements, &c. And *estates* are acquired divers ways, viz. by descent from a father to the son, &c. Conveyance, or grant from one man to another; by gift or purchase; dead or will: And a fee-simple is the largest estate that can be in law. 1 *Lill. 541.* *Estates* are real, of lands, &c. or personal, of goods or chattels; otherwise distinguished into *freeholds*, that descend to the heir, and chattels which go to the executors: Some *estates* are made by the words of deeds, and others made by law; as an estate in *frank marriage* given to a cousin, makes a gift in tail. Also there is an estate that is implied, where tenant in tail bargains and sells his land to a man and his heirs; by this he hath an estate *descendible*, and determinable upon the death of the tenant in tail. *Co. Lit. 10 Rep. 97.* If I give lands in *Dale* to a certain person for life, and after to his heirs or right heirs, he hath the fee-simple; and if it be to heirs males, he will have an estate-tail. 1 *Rep. 66.* A man grants to one and his heirs and assigns for his life, and a year over; this is an estate for life only. 39 *E. 3. 25. Litt. 46.* If a lease be made, and not expressed for what number of years, it is an estate at will. 2 *Shep. Abr. 81.*

The word estate generally in deeds, grants, and conveyances, comprehends the whole in which the party hath an interest or property, and will pass the same. 3 *Mod. 46.* A person in possession of an estate mortgaged in fee, by will gave it to his two daughters, and their heirs; one of them married, and then died: And it being a question, whether her share should be held real or personal estate, and go to the heir, or her husband administrator? It was adjudged for the heir; for here the mortgaged lands shall descend as other lands of inheritance, and be subject to the same rules. *Preced. Canc. 266.* In such case, if the mortgage in fee be paid off, the money shall be considered as land, and belong to heirs, as the estate in the land would have done. *Ibid.* Personal estate was devised by a man to his wife for life, and what she left at her death to be divided between his kindred: He died, and the widow married again; this devise over was held good in equity, on a bill brought to have an inventory taken of the estate, and security given not to imbezil it. But if the same were of small value, that the widow could not live thereupon, without spending the stock, it would be otherwise. *Ibid. 71, 72.* One by will gives to his wife, all his goods and furniture at such a place; the goods that are there, at the time of his death shall pass, tho' they were not there on making of the will; for the personal estate is fluctuating until the testator's death. 2 *Vern. 688.* Some hold, that where goods of a house or chamber are devised, there ought to be a particular inventory of them, to make those pass that were there when the will was made. See titles *Fee-Estate* and *Tail.*

Estoppel. (From the Fr. *Estouper*, i. e. *Oppilare*, ob-
stipare) Is an impediment or bar of an action arising from a man's own fact: Or where he is forbidden by law, to
speak

ſpeak againſt his own deed; for by his aſt or acceptance, he may be eſtopped to alledge or ſpeak the truth. *F. N. B.* 142. *Co. Lit.* 352. If a perſon is bound in an obligation by the name of *A. B.* and is afterwards ſued by that name on the obligation; now he ſhall not be received to ſay in abatement, that he is miſnamed, but ſhall answer according to the obligation, though it be wrong; and forasmuch as he is the ſame perſon that was bound, he is eſtopped and forbidden in law to ſay contrary to his own deed; otherwiſe he might take advantage of his own wrong, which the law will not ſuffer. *Terms de Ley.* If a man enters into a bond, with condition to give to another all the goods which are deviſed to him by the father; in this caſe the obligor is eſtopped to plead that the father made no will, but he may plead that he had not any goods deviſed to him by his father. *1 Nelf. Abr.* 751.

In a deed, all the parties are eſtopped to ſay any thing againſt what is contained in it: It eſtops a leſſee to ſay that the leſſor had nothing in the land, &c. And parties and privies are bound by eſtoppel. *Lit.* 58. *1 Inſt.* 357. *4 Rep.* 53. None but privies and parties ſhall regularly have advantage by eſtoppels: But if a man makes a leaſe of part of a term whereby he is eſtopped; and after aſſign away the term, the aſſignee will be eſtopped alſo. *30 H. 6. 2. 4 Rep.* 56. In eſtoppels, both parties muſt be eſtopped; and therefore where an infant or ſome covert makes a leaſe, they are not eſtopped to ſay that it is not their deed, becauſe they are not bound by it; and as to them it is void. *Cro. Eliz.* 35. And tho' eſtoppels conclude parties to deeds to ſay the truth; yet jurors are not concluded, who are ſworn *ad veritatem de & ſuper præmiſſis dicendam*: For they may ſay any thing that is out of the record; and are not eſtopped to find truth in a ſpecial verdict. *4 Rep.* 53. *Lut.* 570.

An eſtoppel ſhall bind only the heir, who claims the right of him to whom the eſtoppel was. *8 Rep.* 53. Acceptance of rent from a diſſeiſor by the diſſeiſee, may be an eſtoppel: And a widow accepting leſs than her thirds for dower, is an eſtoppel, &c. *2 Davd. Abr.* 130, 671.

Our books mention three kinds of eſtoppel, viz. By matter of record, by matter in writing, and by matter in pais. *Co. Lit.* 352. If a feoffment be made to two, and their heirs, and the feoffor afterwards levies a fine to them, and the heirs of one of them; this will be an eſtoppel to the other to demand fee ſimple according to the deed; for the fine ſhall enure as a releaſe. *6 Rep.* 7, 44. Tenant in tail ſuffers a recovery, that his iſſue may avoid; he himſelf ſhall be eſtopped and concluded by it, and may not demand the land againſt his own recovery. *3 Rep.* 3. The taking of a leaſe by indenture of a man's own land, whereof he is ſeiſed in fee, is an eſtoppel to claim the fee during the term. *Moor, ca.* 323. *And.* 121. A leaſe is made to one man for eighty years, and then to another by deed indented for the ſame term, this ſecond leaſe may be good by way of eſtoppel: And if the firſt determine by ſurrender, forfeiture, &c. the ſecond leſſee ſhall have the land. But if the ſecond leaſe be by deed poll, it will be void. *Co. Rep.* 155. If a leſſor at the time of making the leaſe hath nothing in the land, but after he gets it by purchaſe or diſcent, it is a good leaſe by eſtoppel. *Dyer* 256. *Pleud.* 344. *1 Inſt.* 47. A recital in a deed ſhall not eſtop a perſon, unleſs it be of a particular fact, or where it is material, when it may be an eſtoppel. *Cro. Eliz.* 362.

The lord by deed indented, reciting that his tenant holds of him by ſuch ſervices, whereas he doth not, confirms to the tenant, ſaving his ſervices; tis no eſtoppel to the tenant. *35 H. 6. 25. Pleud.* 150. If one make a deed by *curtesy*, of impropriety, and when he is at large makes a diſſeigniſment to it; he is eſtopped to ſay it was *per curiam*. *1 Bro. Abr.* 17. Where the condition of a bond is in the particularity, as to enſeoff J. S. of the manor of D. or to pay ſuch a ſum of money as he ſtands bound to pay to H. S. or to ſtand to the ſentence of J. S. in a matter of tithes in queſtion between them; here the party is eſtopped to deny any of theſe things, which in the condition he did grant: But if a condition be in the generality, to enſeoff one of all his lands in D. or to be nonſuit in all actions, &c. it is no eſtoppel. *Dyer* 196. *18 Ed.* 4. 54.

If a man in pleading confeſs the thing he is charged with, he cannot afterwards deny it: Though a plaintiff ſhall not be eſtopped to alledge any thing againſt that which before he hath ſaid in his writ, or declaration; and one may not be eſtopped by the record upon which he was conſulted. *21 H. 7. 24. 2 Leon.* 3. 17. An eſtoppel ought to be certain and affirmative, and a matter alledged that is not traverſible, ſhall not eſtop; one may not be eſtopped by acceptance, before his title accrued; an eſtoppel muſt be inſiſted and relied on; and where there is eſtoppel againſt eſtoppel, it puts the matter at large. *1 Inſt.* 352. *Hob.* 207. Eſtoppels are to be pleaded relying on the eſtoppel; without demanding judgment *ſi actio*, &c. *4 Rep.* 53. See *Black. Com.* 2 V. 295, 308.

Eſtovers, (Fr. *Eſtower*, from the verb *Eſtoffer*) Signifies to ſupply with neceſſaries; and is generally uſed in the law for allowances of wood made to tenants, comprehending *houſe-bote*, *bedge-bote*, and *plough-bote*, for repairs, &c. And in ſome manors, the tenants pay a certain ſmall annual rent, for eſtowers out of the lord's woods. *Westm.* 2. c. 25. *20 Car.* 2. c. 3. This word hath been taken for ſuſtenance; as *Bracton* uſes it, for that ſuſtenance or allowance, which a man committed for felony is to have out of his lands or goods for himſelf and his family during his imprisonment. *Bract. lib.* 3. *traſt.* 2. *cap.* 18. And the Stat. 6 Ed. 1. *cap.* 3. applies it to an allowance in meat, cloths, &c. In which ſenſe it has been uſed for a wife's alimony. See *Common of Eſtowers*.

Eſtoverius habendis, Writ de. A writ at Common law, for a woman divorced from her huſband, *a menſu & thoro*, to recover her alimony, ſometimes called her eſtowers. *1 Lev.* 6. *Black. Com.* 1 V. 441.

Eſtray, (*Extrayura*, from the old Fr. *Eſtrayeur*) Is any beaſt that is not wild, found within a lordſhip, and not owned by any man; *pecus quod eleſum a cuſtode campos pererrat, ignoto domino*: In which caſe if it be tried and proclaimed according to law in the two next market-towns on two market-days, and is not claimed by the owner within a year and a day, it belongs to the lord of the liberty. *Brit. cap.* 17. And ſwans may be eſtray, as well as beaſts, and are to be proclaimed, &c. *1 Rol. Abr.* 878. If the beaſt ſtray to another lordſhip within the year, after it hath been an eſtray, the firſt lord cannot retake it, for until the year and day be paſt, and proclamation made as aforeſaid, he hath no property; and therefore the poſſeſſion of the ſecond lord is good againſt him. *Wood's Inſt.* 213. *Cro. Eliz.* 716. If the cattle were never proclaimed, the owner may take them at any time: And where a beaſt is proclaimed as the law directs, if the owner claims it in a year and a day, he ſhall have it again; but muſt pay the lord for keeping. *1 Rol. Abr.* 879. *Finch* 177.

An owner may ſeize an eſtray, without telling the marks, or proving the property, (which may be done at the trial, if conteſted) and tendering amends generally is good in this caſe, without ſhewing the particular ſum; becauſe the owner of the eſtray is no wrong doer, and knows not how long it has been in the poſſeſſion of the lord, &c. which makes it different from treſpaſs, where a certain ſum muſt be tendered. *2 Salk.* 686. In caſe of an eſtray, the lord ought to make a demand of what the amends ſhould be for the keeping; and then if the party thinks the demand unreaſonable, he muſt tender ſufficient amends; but if what he tenders is not enough, the lord ſhall take iſſue, and 'tis to be ſettled by the jury. *Now* 144. *Trin.* 5 Ann. A beaſt eſtray is not to be uſed in any manner, except in caſe of neceſſity; as to milk a cow, or the like; but not to ride an horſe. *Cro. Jac.* 148. *1 Rol.* 673. Eſtrays of the Forreſt are mentioned in the ſtatute of 27 H. 8. *cap.* 7. The King's cattle cannot be eſtrays or forfeited, &c.

Eſtreat, (*Extraſtrum*) Is uſed for the true copy or note of ſome original writing or record, and eſpecially of fines, amercements, &c. impoſed on the rolls of a court, to be levied by the bailiff or other officer. *F. N. B.* 57, 76. *Stat. Westm.* 2. c. 8. Juſtices, commiſſioners, &c. are to deliver their eſtreats into the Exchequer yearly after Michaelmas: And fines to have writs, which ſhall be entered in the eſtreat, in order as they are entered in the Chan-
cery

cery Rolls, &c. 51 H. 3. *ft.* 5. 16 Ed. 2. These *estreats* relate to fines for crimes and offences, defaults and negligences of parties in suits and officers, non-appearance of defendants, and jurors, &c. And all forfeited recognizances are to be first *estreated* into the Exchequer, by sheriffs of counties; on which process issues to levy the same to the use of the King. Stat. 22 & 23 Car. 2. *cap.* 22. *Estreats* are to be levied on the right persons: And sheriff's *estreats* must be in two parts, indented and sealed by the sheriff, and two justices of the peace; who are to view them, and one of them is to remain with the sheriff, and the other with the justices. 11 H. 7. *c.* 15. The *estreats* of fines, at the quarter-sessions, are to be made by the justices; and to be double, one whereof is to be delivered to the sheriff by indenture. 14 R. 2. *cap.* 11. Fines, post-fines, forfeitures, &c. must be *estreated* into the Exchequer twice a year, on pain of 50*l.* And officers are to deliver in their returns of *estreats* upon oath. 22 & 23 Car. 2. *c.* 22. 4 & 5 W. & M. *c.* 24. 'Tis the course of the court of B. R. to send the *estreats* twice a year into the Exchequer, viz. on the last day of the two *issuable terms*; but in extraordinary cases there may be a rule to *estreat* them sooner. 1 Salk. 45. Amercements are not usually discharged on motion, and there ought to be a *constat* of the *estreat*; though the court may give leave to the sheriff to compound them. *Ibid.* 54. 1 Nels. Abr. 207. See 3 Ed. 1. *c.* 45. 13 Ed. 1. *c.* 8. 27 Ed. 1. *c.* 2. 3 Geo. 1. *c.* 15. *ft.* 12.

Estreclatus, Is a word signifying streightened. — *Inquirendum est de viis Domini Regis estreclatis.* R. Hoveden, p. 783.

Estrepe, (Fr. *Estropier*) To make spoil in lands to the damage of another, as of the reversioner, &c.

Estrepiement, (*Estrepiementum*, from the Fr. *Estropier*, *mutilare*, or from the Lat. *Extirpare*) Is where any spoil is made by tenant for life, upon any lands or woods, to the prejudice of him in reversion; and also signifies to make land barren by continual ploughing. Stat. 6 Ed. 1. *cap.* 13. It seems by the derivation, that *estrepiement* is the unreasonable drawing away the heart of the ground, by plowing and sowing it continually, without manuring or other good husbandry, whereby it is impaired: And yet *estropier* signifying *mutilare*, may no less be applied to the cutting down trees, or lopping them further than the law allows. In ancient records, we often find *vassum & estrepiamentum facere*: And this word is used for a writ, which lies in two cases; the one, when a person having an action depending, as a *formedon*, writ of right, &c. sues to prohibit the tenant from making waste, during the suit; the other is for the demandant, who is adjudged to recover seisin of the land in question, before execution sued by the writ *habere facias possessionem*, to prevent waste being made till he gets into possession. Reg. Orig. 76. Reg. Judic. 33. F. N. B. 60, 61.

The writ of *estrepiement* lies properly where the plaintiff in a real action, shall not recover damages by his action; and it as it were supplies damages; for damages and costs may be recovered for waste, after the writ of *estrepiement* is brought. See Moor 100. 2 Inst. 328. If tenants commit waste in houses assigned a feme for dower, on her bringing action of dower, writ of *estrepiement* lies. 5 Rep. 115. See Cro. Eliz. 114. Moor 622. But pending a writ of partition between coparceners, if the tenant commit waste, this writ will not be granted; because there is equal interest between the parties, and the writ will not lie, but where the interest of the tenant is to be disproved. Goldsb. 50. 2 Nels. Abr. 754. Writ of *estrepiement* is directed to the tenant and his servants, or to the sheriff: and if it be directed to the tenant and his servants, and they are duly served with it, if they afterwards commit waste, they may be committed to prison: But it is said not to be so, when directed to the sheriff, because he may raise the *posse comitatus* to resist them who make waste. Hob. 85. Though it hath been adjudged, that the sheriff may likewise imprison offenders, if he be put to it; and that he may make a warrant to others to do it. 5 Rep. 115. 2 Inst. 329. In the Chancery, on filing of a bill, and before answer, the court will grant an injunction to stay waste, &c. 1 Lill. 547.

Etheling or Ætheling, (Sax.) Signifies noble, and among the English Saxons, it was the title of the Prince, or the King's eldest son. Camden. See *Adeling*.

Evafion, (*Evafio*) Is a subtle endeavouring to set aside truth, or to escape the punishment of the law; which will not be indured. If a person says to another that he will not strike him, but will give him a pot of ale to strike first; and accordingly he strikes, the returning of it is punishable; and if the person first striking be killed, it is murder; for no man shall evade the justice of the law, by such a pretence to cover his malice. 1 H. P. C. 81. No one may plead ignorance of the law to evade it, &c.

Evenings, The delivery at even or night of a certain portion of grass or corn, &c. to a customary tenant, who performs the service of cutting, mowing, or reaping for his lord, given him as a gratuity or encouragement. Kennet's Gloss.

Evesdroppers, Are such persons as stand under the eves or walls, or windows of a house, by night or day, to hearken after news, and carry it to others, and thereby cause strife and contention in the neighbourhood. *Terms de Ley*. They are called evil members of the commonwealth; and by the stat. of Westm. 1. *c.* 33. they may be punished, either in the court-leet by way of presentment, and fine; or in the quarter-sessions by indictment, and binding to good behaviour. Kitch. 11. See *Eavesdroppers*.

Eviscion, (From *Evinco* to overcome) Is a recovery of land, &c. by law. If land is evicted, before the time of payment of rent on a lease, no rent shall be paid by the lessee. 10 Rep. 128. Where lands taken on extent are evicted or recovered by better title, the plaintiff shall have a new execution. 4 Rep. 66. If a widow is evicted of her dower or thirds, she shall be endowed in the other lands of the heir. 2 Danv. Abr. 670. And if on an exchange of lands, either party is evicted of the lands given in exchange, he may enter on his own lands. 4 Rep. 121.

Evidence, (*Evidentia*) Is used in the law for some proof, by testimony of men on oath, or by writings or records. It is called *evidence*, because thereby the point in issue in a cause to be tried, is to be made *evident* to the jury; for *probationes debent esse evidentes & perspicuae*. Co. Lit. 283. The evidence to a jury ought to be upon the oath of witnesses; or upon matters of record, or by deeds proved, or other like authentic matter. 1 Lill. Abr. 547. And evidence containeth testimony of witnesses, and all other proofs to be given and produced to a jury for the finding of any issue joined between parties. 1 Inst. 283. If the substance of an issue be proved it is sufficient. *Alcorn executor v. Westbrook*. Wils. Rep. par. 1. p. 115.

The system of evidence, as now established in our courts of Common law, is very full, comprehensive and refined. Far different from, and far superior to any thing known in the middle ages;—as far superior in that as in all other improvements and refinements in science, arts, and manners.

The nature of evidence, during the ages of ignorance was extremely imperfect, and the people were incapable of making any rational improvement. See this subject very judiciously treated, in *Robert. Hist. Emp. C. V.* 1 V. 48, 49, &c. 'Twas the imperfection of human reason, that caused the invention and introduction of the *ordeal*, as an appeal to the Supreme Being. The reader will readily excuse the insertion of the following passage from that author:

As men are unable to comprehend the manner in which the Almighty carries on the government of the universe, by equal, fixed, and general laws, they are apt to imagine that in every case which their passions or interest render important in their own eyes, the Supreme Ruler of all ought visibly to display his power, in vindicating innocence and punishing vice. It requires no inconsiderable degree of science and philosophy to correct this popular error. 1 V. 51.

But to proceed more immediately to our subject.

Under this head it is material to consider the several kinds of evidence which may be divided into

- I. Written evidence: *Wherein of matters of record, as also of writings under seal, and other writings.*
- II. Unwritten evidence: *Wherein—*
 1. *Who may be witnesses.*
 2. *Of the number of witnesses, and of compelling them to appear, as also of the manner of their giving evidence.*
 3. *Of parol, presumptive, and hear-say evidence.*
 4. *Where depositions in another court may be given in evidence.*

- I. Of written evidence: *Wherein of matters of record, as also of writings under seal, and other writings.*

Evidence by records and writings. Is where acts of parliament, statutes, judgments, fines and recoveries, proceedings of courts, and deeds, &c. are admitted as evidence; and need not be pleaded; and of these the printed statute-book is good evidence: But in the case of a private act, a copy of it is to be examined by the records of parliament, and it is to be pleaded. *Trials per pais* 177, 232. The statute of limitations, &c. may be given in evidence. 1 *Salk.* 278. On *nil debet* pleaded, this statute may be given in evidence; but 'tis said not upon *non assumpsit*. 3 *Salk.* 154. Journals and other proceedings in the House of Commons have been held to be no evidence. *State Trials*, Vol. 3. 470. Though it is otherwise, Vol. 3. 800. A history of England, or printed trial, may not be read as evidence. 1 *Lill.* 557. *Candens Britannia* was not allowed as evidence: But it has been held, that an history may be evidence of the general history of the realm, though not of a particular custom, &c. *Mich.* 7 *W.* 3. *B. R.* *Skinner's Rep.* 623.

An exemplification of the enrolment of letters patent under the Great Seal, may be pleaded in evidence. 3 *Inst.* 173. Records and enrolments prove themselves; and a copy of a record or enrolments sworn to, may be given in evidence. 1 *Inst.* 117, 262. A transcript of a record in another court, may be given in evidence to a jury. 1 *Lill. Abr.* 551. There is a difference between pleading a record, and giving the record in evidence; if it be pleaded, it must be *sub pede sigilli*, or the judges cannot judge thereof: Though where it is given in evidence, if it be not under the seal, the jury may find the same, if they have other good matter of inducement to prove it. *Style's Rep.* 22.

A fine or recovery may be given in evidence, without vouching the roll of the recovery; for the part indented is the usual evidence that there is such a fine: But it is said the fine ought to be shown with the proclamations under seal. 10 *Rep.* 92. 2 *Roll. Abr.* 574. A record of an inferior court, hath been rejected in evidence, and the party put to prove what was done: And proceedings of county courts, courts barons, &c. may be tried by a jury; for it hath been adjudged that they cannot be proved by the rolls, but by witnesses. *Lit.* 75. But court-rolls of a court baron, when shown are good evidence; and in some cases, copies of the court-rolls have been allowed as evidence; and in others not. *Trials per pais* 178, 228. A copy of copyhold lands may be given in evidence, where the rolls are lost. *Mich.* 15 *Car.* *B. R.*

Enrolment of a deed is proved on certifying it by an examined attested copy; though enrolment of a deed which needs no enrolment, or the estate doth not pass by it, is only evidence to some purposes. 3 *Lev.* 387. An ancient deed proves itself, where possession has gone accordingly: But later deeds must be proved by witnesses. 1 *Inst.* 6. If all the witnesses to a deed are dead, continual and quiet possession is presumptive evidence of the truth of it; yet it may receive farther credit by comparison of hands and seals. *Wood's Inst.* 599. When witnesses to deeds are dead, their hand-writing must be proved. 2 *Inst.* 118. And where there are several witnesses to a deed, and they are all dead but one, a *suborn* must be taken out against the living man, and strict inquiry made after him, and affidavit is to be made that he cannot be found; before the dead men's hands are to be proved. 1 *Lill.* 556.

An old deed proved to have been found among deeds and evidences of land, may be given in evidence to a jury; though the executing of it cannot be proved and made out. *Trin.* 9 *W.* 3. *B. R.* 3 *Salk.* 153. A deed may be good evidence, though the seal is broken off: And where a deed is burnt, &c. the judges may allow it to be proved by witnesses, that there was such a deed, and this be given in evidence. 1 *Lev.* 25. But the court will not allow the jury on a trial at bar to carry deeds, writings or books with them out of court, as evidence to consider of, but such as have been proved: Though by the assent of parties, or by assent of the court without the parties, they may be delivered to the jurors. *Cro. Eliz.* 421. All deeds or writings under seal, and given in evidence, they may have; and nothing which was not given in evidence, for the court gives their direction to the jury upon the evidence given in court. 1 *Lill.* 313.

It is dangerous to suffer any who by law ought to shew forth any deed, to prove in evidence, that there was such a deed, which they had seen or read, &c. For there might be imperfections in the deed, or it may be on condition, with limitation, &c. 10 *Rep.* 92. A deed though sealed and delivered, if not stamped according to act of parliament, cannot be pleaded or given in evidence in any court. *Stat.* 5 & 6 *W. & M. cap.* 21. A deed cannot be proved by a counterpart of it or copy, if the original is in being, and may be had; though it may be when the original cannot be procured. 1 *Inst.* 225. 10 *Rep.* 92. The counterpart of an ancient deed hath been allowed to be given in evidence. *Mod. Caf.* 225. But it hath been held that the counterpart of a deed, without other circumstances, is not sufficient evidence; unless in a case of fine, when a counterpart is good evidence of itself. 1 *Salk.* 287.

Where a deed was cancelled by practice, that being proved, it was allowed to be evidence in an action under the deed. *Heil.* 138. The recital of a deed is no evidence without shewing the deed; or proving that there was such a deed, and it is lost. 1 *Inst.* 352. *Vaugh.* 74. Recital of a lease, in a deed of release, is good evidence that there was such a lease against the releasor, and those claiming under him; but not against others, except there be proof that there was such a lease. 1 *Salk.* 286. A settlement set forth in a bill in Chancery, and admitted in the answer; and where it was proved that the deed was in the possession of such a one, &c. hath been judged a good evidence of the deed of settlement where not to be found. 5 *Mod.* 384.

The probate of a will, when it concerns personal estate only, may be given in evidence: But where real estate is claimed under a will, the will must be shewn, not the probate: Though if the will be proved in the Chancery, copies of the proceedings there will be evidence. 2 *Roll. Abr.* 678. *Trials per pais* 234. A bill in Chancery has been admitted as slight evidence against the complainant: An answer in Chancery is evidence against the defendant himself, though not against others. 1 *Vent.* 66. *Trials per pais* 167. But when a party gives an answer in Chancery in evidence at a trial, though he insist to read only such a part of it; yet the other side may require to have the whole read. 5 *Mod.* 10. As in case of a writing permitted to be read to prove one part of an evidence, which may be read to prove any other part of the evidence given to the jury. Depositions of witnesses in Chancery between the same parties, may be given in evidence at law, especially if the witnesses are dead, and the bill and answer proved. *Trial per pais* 167, 207, 234.

Regularly depositions in Chancery, of a witness, may not be given in evidence, if he be alive; unless he be in France, or in another kingdom, not subject to the dominion of our King. *Ibid.* 359. But depositions in Chancery, after answer, between the same parties, may be read as evidence, though the witnesses are not dead, if they cannot be found on search. *Shower* 3. 1 *Salk.* 270. Depositions in Chancery in *perpetuum rei memoriam*, are not to be given in evidence, so long as the parties are living. 1 *Salk.* 286. And it hath been adjudged that the depositions to perpetuate testimony, in a bill exhibited, shall not be admitted as evidence at a trial at law, unless an answer be put in. *Raym.* 335. If deposition taken out of the realm, he who makes them is sup

* there still, and they shall be read as evidence; but if it appears he is in *England*, they cannot be read, but he must come in person. 1 *Lill.* 555. Things done beyond sea may be given in evidence to a jury; and the testimony of a publick notary of things done in a foreign country, will be good evidence. 6 *Rep.* 47.

Depositions in the ecclesiastical courts may not be given in evidence to a jury at a trial; but a sentence may in a cause of tithes, &c. And the sentence of the spiritual court is conclusive evidence in causes within their jurisdiction. 1 *Salk.* 290. 2 *Nelsf.* 761.

Depositions before a coroner are admitted as evidence, the witnesses being dead. 1 *Lev.* 180. Likewise they have been admitted where a witness hath gone beyond sea. 2 *Nelsf. Abr.* 760. The confession of a prisoner before a magistrate, &c. may be given in evidence against him: And the examination of an offender need not to be on oath, but must be subscribed by him, if he confesses the fact; and then be given in evidence upon oath by the justice of the peace who took the same. The examination of others must be on oath, and proved by the justice, or his clerk, &c. as to their evidence, if they are dead, unable to travel, or kept away by the prisoner. *H. P. C.* 19, 162. *Kel.* 18, 55. *Wood's Inst.* 647.

The examination of an informer before a justice, taken on oath, and subscribed, may be given in evidence on a trial, if he be dead, or not able to travel, &c. which is to be made out on oath. 2 *H. P. C.* 429. A verdict against one, under whom either the plaintiff or defendant claims, may be given in evidence against the party so claiming; but not if neither claim under it. *Mich.* 1656. *B. R.* In ejectment where the plaintiff hath title to several lands, and brings action of ejectment against several defendants, if he recovers against one, he shall not give that verdict in evidence against the rest. 3 *Mod.* 141. In a court of common law, a decree in Chancery is no evidence: Affidavits are not evidence. Letters may be produced as evidence against a man, in treason, &c. Similitude of hands sworn to, has been allowed as evidence: But since the attainder of *Algernon Sidney*, it hath not been admitted in any criminal case. 2 *Hawck.* 431. Although a witness swear to the hand and contents of a letter, if he never saw the party write, he shall not be allowed as evidence. *Mich.* 8 *H.* 3. *Skim.* 673.

Since no witnesses are present when goldsmiths notes are given, such notes are allowed as evidence of the receipt of money, or other thing. 1 *Salk.* 283. A shop-book is evidence; but it may not be given in evidence for goods sold, &c. after one year, before the action brought; unless there be a bill, &c. for the debt; though this extends not to any buying or selling, or trading between tradesmen and tradesmen. *Stat.* 7 *Jac.* 1. c. 12. To make these books evidence, there ought to be the hand of the person to the books that delivered the goods, which must be proved. 1 *Salk.* 285. A church-book some writers say is not to be admitted as evidence; though others say it may. 1 *Cro.* 411. It is said copies of publick books of corporations, &c. shall be evidence. 1 *Lev.* 25. 1 *Lill.* 551. But as to books of corporations where things are entered not of record, the originals are to be produced as evidence.

A pedigree drawn by a herald at arms, will not be admitted for evidence, without shewing the records or ancient books from whence taken; for the entries in the herald's office are no records, but only circumstantial evidence: But a copy of an inscription on a grave-stone, has been given in evidence in such a case. 2 *Rel. Abr.* 686, 687. An almanack wherein the father had writ the day of the nativity of his son, was allowed an evidence to prove the nonage of the son. *Raym.* 84.

Matter in law ought not to be given in evidence at a trial, but only matters of fact, unless it be in case of a special verdict; matter in law is disputable, and reserved to be spoken to in arrest of judgment. *Vaugh.*

13, 147. In debt the defendant may give in evidence, that he paid money on an obligation before the day, &c. *Rel. Abr.* 75. And a release may be given in evidence on nil debet. 5 *Mod.* 18. Though in indebitatus the plaintiff shall not give any specialty in evidence to prove his debt, as a bond, indenture, &c. be-

cause he may bring action of debt upon that specialty. *Moor* 340.

Entry and expulsion may be given in evidence in debt for rent: Coverture may be given in evidence to avoid a deed, &c. *Mod. Caf.* 230. Usurious contracts, &c. may be given in evidence. 2 *Nelsf.* 756. Fraud may be given in evidence, on the general issue: And tampering with witnesses may be given in evidence against a party, &c. 5 *Rep.* 60. But many things are to be pleaded; as justifications without title, in trespasses, &c. and cannot be given in evidence upon Not guilty. *Trials per pais* 404. If in trespass, Not guilty be pleaded; a licence may not be given in evidence to excuse the trespass; for it must be pleaded. *Kel.* 59. And if the issue in detinue is non detinet, it shall not be given in evidence that the goods were pledged for money, and the money not paid; this is not good without pleading it: But a gift of the goods by the plaintiff may be given in evidence. 1 *Inst.* 283.

So in an issue in waste, no waste done, the defendant may give in evidence, that it came by lightning, tempest, or enemies; but that he repaired before action brought, must be specially pleaded, &c. *Ibid.* 282. If an issue be taken on the cutting of 20 oaks, evidence may be for ten; because either is a breach of covenant not to do waste. 2 *Shep. Abr.* 142. In *ejectione firmæ*, the plaintiff declares for 100 acres of land, and gives evidence only for forty, it will be good for so much. 1 *Cro.* 13. On issue, if *J. S.* was taken by a *capias*, and evidence that he was taken by *alias capias*, this will maintain the issue. *Hob.* 54, 55. *Plowd.* 8. But if the point in issue be the sealing and delivery of a lease, and the witness prove sealed and delivered, but did not know the lessor that sealed it: Or where proof is not made of *livery and seisin*, on issue of a lease for life: Or if on an issue upon a taking by *capias ad satisfaciend.* Evidence be of taking by *capias utlagatum*, &c. in these cases the evidence will not be good to maintain the issue. *Plowd.* 14. *Kelw.* 55, 59. *Hob.* 55. Issue was upon a prescription for common appendant to 300 acres in four towns; on the evidence the jury found it appendant to 250 acres in two towns; and a manor was given in evidence in another county, &c. and they were held insufficient. *Hob.* 188, 209. Where justices of peace, sued for things done in their offices, may give special matter in evidence. *Stat.* 21 *Jac.* 1. c. 12. Vide *Justice*. See *Copy*, *Depositions*, &c. And for farther particulars respecting written evidence, see *Vin. Abr.* title *Evidence*, and *Table to Wilson's Reports*.

II. As to unwritten evidence, we are under this head to consider,

1. *Who may be witnesses*: Wherein it is to be observed, That the King cannot be a witness under his sign manual, &c. 2 *Rel. Abr.* 686. Though it has been allowed he may, in relation to a promise made in behalf of another. *Hob.* 213. A peer produced as an evidence, ought to be sworn. 3 *Keb.* 631. It is no exception to an evidence, that he is a judge, or a juror, to try the person; for a judge may give evidence going off from the Bench. 2 *Hawck. P. C.* 432. And a juror may be an evidence as to his particular knowledge; but then it must be on examination in open court, not before his brother juror. 1 *Lill.* 552. Members of corporations shall be admitted or refused to give evidence in actions brought by corporations, as their interest is small or great; whereby it may be judged whether they will be partial or not. 2 *Lev.* 231, 241. But they will not generally be admitted; though inhabitants not free of the corporation may be good witnesses for the corporation, as their interest is not concerned; and members may be disfranchised on these occasions. *Ibid.* 236.

In actions against church-wardens and overseers of the poor for recovery of money mispent on the parish account, the evidence of the parishioners, not receiving alms, shall be allowed. *Stat.* 3 & 4 *W. & M. cap.* 11. And in informations or indictments for not repairing highways and bridges, the evidence of the inhabitants of the town, corporation, &c. where such highways lie shall be admitted

ted. 1 *Ann. cap.* 18. A party interested in the suit; or a wife for or against her husband, a husband against the wife, (except in cases of treason) may not be witnesses. 4 *Inst.* 279. Yet it has been adjudged, that a wife may be admitted as an evidence for the husband on her being seduced to live with an adulterer, against the adulterer; and she may be a witness to prove a cheat upon her and her husband. *Sid.* 431.

By stat. 21 *Jac.* 19. *f.* 6. "The commissioners shall have power to examine the wife of a bankrupt upon oath for the discovery of his estate, goods and chattels, and such wife refusing to appear, or to answer interrogatories, shall incur the same penalties as are provided against other persons in the like cases."

Kinsmen, though never so near, tenants, servants, masters, attorneys for their clients, and all others that are not infamous, and which want not understanding, or are not parties in interest, may give evidence in a cause; though the credit of servants is left to the jury. 2 *Kel.* *Abr.* 685. 1 *Vent.* 243. A counsellor, attorney, or solicitor, is not to be examined as an evidence against their clients, because they are obliged to keep their secrets; but they may be examined, as to any thing of their own knowledge before retained, not as counsel or attorney, &c. 1 *Vent.* 97. The bail cannot be an evidence for his principal. *Stat. Tr.* If the plaintiff makes one a defendant in the suit, on purpose to impeach his testimony, under a pretence of his being a party in interest, he may nevertheless be examined *de bene esse*; and if the plaintiff prove no cause of action against him, his evidence shall be allowed in the cause. 2 *Lill. Abr.* 701. Also if where a man makes himself a party in interest, after a plaintiff or defendant has an interest in his evidence, he may not by this deprive them of the benefit of his testimony. *Skinner's Rep.* 586.

One that hath a legacy given him by will, is not a good witness to prove the will; but if he release his legacy, he may be a good evidence. *Ibid.* 704. It is the same of a deed; he that claims any benefit by it, may not be an evidence to prove that deed, in regard of his interest: And a person any ways concerned in the same title of land in question, will not be admitted as evidence. *Ibid.* 705. But it has been held, that an heir apparent may be a witness concerning a title of land; and yet a remainder-man, who hath a present interest, cannot. 1 *Salk.* 385. A legatee cannot be a witness to the will, because the legacy is devised to him; though if such legatee be permitted to be sworn and examined, the counsel cannot afterwards except against his evidence. 1 *Ld. Raym.* 730. Creditors, &c. are made competent witnesses to wills, by *Stat.* 25 *Geo.* 2. *c.* 6. and witnesses competent at law, are competent to prove a nuncupative will, by *Stat.* 4 *Ann.* *c.* 16. *f.* 14. See those two statutes. The son of a legatee, is no witness to a will in the spiritual court; nevertheless it is held, he may be a good evidence to prove a nuncupative will, within the intent of the statute of frauds. *Ibid.* 85.

A grantee who is a bare trustee, it is said, is a good witness to prove the execution of the deed made to himself. 1 *P. Will.* 290. If an action is brought against many persons for taking of goods, one of them concerned may be admitted as an evidence against the rest. *Comberb.* 367. See 1 *Mod.* 282. In criminal cases, as of robbery on the highway, in action against the hundred; in rapes of women, or where a woman is married by force, &c. a man or a woman may be an evidence in their own cause. 1 *Vent.* 243. And in private notorious cheats, a person may give evidence in his own cause, where no body else can be a witness of the circumstances of the fact, but he that suffers. 1 *Salk.* 286. Upon an information on the statute against usury, he that borrows the money, after he hath paid it, may be an evidence; but not before. *Raym.* 191.

An alien infidel, may not be an evidence; but a Jew may, and be sworn on the *Old Testament*. 1 *Inst.* 6. A quaker shall not be permitted to give evidence in any criminal cause, (unless he will take an oath): Though on other occasions, his solemn affirmation shall be accepted instead of an oath. *Stat.* 7 & 8 *W.* 3. *cap.* 34. Persons *non sane memoriae*; those that are attaint-

ed of conspiracy, or in a *præmunire* upon the statute 5 *Elix.* *c.* 1. *Papists* recusants convicted, on the *Stat.* 3 *Jac.* 1. *c.* 5. are disabled to give evidence. So persons convicted of felony, perjury, &c. And if one by judgment hath stood on the pillory, or been whipped; for this infamy he shall not be admitted to give evidence, whilst the judgment is in force: But the record of conviction must be produced, on objecting against his testimony; and the witness shall not be asked any question to accuse himself, though his credit may be impeached by other evidences, as to his character in general; so as not to make proof of particular crimes, whereof he hath not been convicted. 3 *Inst.* 108, 219. 3 *Lev.* 426. If after a man hath stood in the pillory, &c. he be pardoned, he may be an evidence: And notwithstanding judgment of the pillory infers infamy at common law; by the civil and canon law it imports no infamy, unless the cause for which the person was convicted was infamous; and therefore such may be a good witness to a will, if not convicted of any infamous act. 3 *Lev.* 426, 427. It has been held, that it is not standing in the pillory, disables a person to give evidence; but standing there upon a judgment for an infamous crime, as forgery, &c. If for a libel, a man may be a witness. 5 *Mod.* 74. 3 *Nels. Abr.* 557.

A man is convicted of felony, and afterwards pardoned, he may be a good evidence. *Raym.* 369. So where burnt in the hand, which is quasi a statute pardon; and it is said it is burning in the hand restores the offender to his credit. *Ibid.* 330. A person who was condemned to be hanged for burglary, but having a pardon for transportation, hath been allowed to be a good evidence. 5 *Mod.* 18. One outlawed for treason and pardoned, may be an evidence. *State Trials, Vol.* 3. 515. Persons acquitted, or guilty of the same crime, (while they remain unconvicted) may be evidence against their fellows. *Kel.* 17. Though no evidence ought to be given of what an accomplice hath said, who is not in the same indictment. *State Trials, Vol.* 2. 414. An informer may be a witness, though he is to have part of the forfeiture, where no other witnesses can be had. *Wood's Inst.* 598. Members of either House of Parliament may be witnesses on impeachments. *State Trials, Vol.* 2. 632.

2. As to the number of witnesses.

The Common law required no certain number of witnesses, though they are required by statute in some cases: The testimony of one single evidence is sufficient for the King in all causes, except for treason; where there must be two witnesses to the same overt-act, &c.

There must be one witness to one, and another witness to another overt-act of the same species of treason, or at least one witness to an overt-act; and another to a material circumstance to prove it. 2 *Hawk. P. C.* 428. In all other criminal matters, one evidence is enough; and to a jury one witness is sufficient. 3 *Inst.* 20. *Mich.* 23 *Car. B. R.* *Stat.* 7 *W.* 3. *cap.* 3.

Also it is required by the 29 *Car.* 2. *cap.* 3. "That all devises of lands shall be attested and subscribed in the presence of the testator, by three or four credible witnesses, or else shall be void."

With respect to the compelling witnesses to appear.

If a witness served with process in a civil cause refuse to appear, being tendered reasonable charges, and having no lawful excuse, action on the case lies against him, whereon damages shall be recovered: And a feme covert not appearing, action may be brought against the husband and her. *Stat.* 5 *Elix.* *cap.* 9. 1 *Lev.* 112. Where any witness accepts of a shilling, and has a promise of the payment of his charges, such acceptance is sufficient to maintain any such action: But without that the party cannot support an action upon the statute, for not giving evidence, but must tender the witness his reasonable charges, at a reasonable time before the trial. *W. Jones* 433.

If there is a doubt that a witness will not attend, the best way is to serve him with the original subpoena, keeping a copy, and if he is at any distance from the place

of trial, tender reasonable charges: If he does not appear at the trial, call him three times on his *subpoena*, and then, if occasion requires, the party may bring his action.

In a criminal cause, if a witness refuse to appear and give evidence, being served with process, the court will put off the trial, and grant attachment against him; and as refusing to give evidence is a great contempt, the party may be committed and fined. 1 *Salk.* 278.

Preventing evidence to be given against a criminal, is punishable by fine and imprisonment; and a person was fined one thousand marks in such a case. *Hill.* 1663. B. R. Persons dissuading a witness from giving evidence, &c. And jurors or others disclosing evidence given, are likewise offences punished by fine and imprisonment. 1 *Hawk.* 59.

In regard to the manner of their giving evidence.

Where necessity requires, witnesses may be examined apart in court, till they have given all they have to say in evidence; so that what one has deposed, may not induce another to give his evidence to the same effect. *Forster.* 54.

A witness shall not be examined where his evidence tends to clear or accuse himself of a crime. *State Trials*, Vol. 1. 557. And a witness shall not be cross examined till he hath gone through the evidence on the side whereon produced. *Ibid.* Vol. 2. 772. The court is to examine the witnesses, and not the prisoner or prosecutors. *Ibid.* Vol. 1. 143. An evidence shall not be permitted to read his evidence, but he may look in his notes to refresh his memory. *Ibid.* Vol. 4. 45. In evidence may not recite his evidence to the jury, after gone from the bar, and he hath given his evidence in court; if he doth, the verdict may be set aside. *Cro. Elms.* 159. One that is to be an evidence at a trial, ought not to be examined before the trial, but by the consent of both parties, and a rule of court for that purpose: but if a witness is not able to attend the trial, a judge may excuse his non-appearance, and certify his examination; though an examination ought not to be read, where the evidence himself may be produced. *State Trials*, Vol. 1. 526.

No evidence ought to be produced against a man in a trial for his life, but what is given in his presence. *Ibid.* Vol. 4. 227. And evidence shall not be given against the prisoner for any other crime than that for which prosecuted. *Ibid.* Vol. 3. 947. A prisoner may bring evidence to prove that the witnesses gave a different testimony before a justice of peace, or at another trial: though he may not call witnesses to disprove what his own evidence have sworn. *Ibid.* Vol. 2. 623, 792. And no objection can be made to the evidence after verdict given. Vol. 4. 35. It is justifiable to maintain or subvert an evidence, but not to give him any reward; for this, if proved, will avoid his testimony. *Ibid.* Vol. 2. 470.

A witness shall not be examined to any thing that does not relate to the matter in issue. *Ibid.* Vol. 2. 343. And where an issue is not perfect, no evidence can be applied, nor can the justices proceed to trial. *Bregunl.* 42, 47, 435. If evidence doth not warrant and maintain the same thing that is in issue, the evidence is defective, and may be demurred upon; but proving the substance is sufficient. *Trials per Pais* 425. Evidence may be given of facts before and after the time they are laid in the indictment. And where a place is laid only for a venue in an indictment, or an appeal, (and not made part of the description of the fact) proof of the same crime may be made at any other place, in the same county; and after a crime hath been proved in the county where laid, evidence may be given of other instances of the same crime, in another county, to satisfy the jury. 2 *Hawk.* P. C. 436.

But where a certain place is made part of the description of the fact against the defendant, the least variation as to such place between the evidence, and indictment is fatal. *Ibid.* 437. It hath been also adjudged, that where an indictment sets forth all the special matter, in respect whereof the law implies malice, variance between the indictment and evidence as to the circumstances of the fact doth vitiate the trial; so that the substance of the matter be

found by the evidence. 2 *Hawk.* 438. An evidence against the King in treason, or felony, for the criminal, was not to be examined on oath by the Common law; but by statute, witnesses for a prisoner are to be sworn, as in case for the King, and process for their appearance is to be taken out. 3 *Inst.* 79. *Stat.* 7 W. 3. 1 *Ann.* 8. 2. c. 9.

The burthen of proving lies on the plaintiff; and the presumption shall stand, until the contrary appear: though that which plainly appeareth, need not be given in evidence. 7 *Rep.* 40. 1 *Inst.* 233. The defendant's counsel is to conclude by way of answer to the evidence given to the jury by the plaintiff's: but he who doth begin to maintain the issue to be tried, ought to conclude and sum up the evidence given, which is no more than to put the jury in mind how he hath proved his cause. 1 *Lill.* 551.

3. Of parol, presumptive, and hear-say evidence.

It seems to have been agreed, as a general rule, (even before the statute of frauds and perjuries) that no parol evidence could be admitted to controul what appeared on the face of a deed or will, not only from the danger of perjury, but from a presumption, that whatever the parties at that time had in contemplation, was reduced into writing. 5 Co. 68. a. b. 8 Co. 155. a. *Kelw.* 49.

But this rule has received a relaxation, especially in the courts of equity, where a distinction has been taken between evidence, that may be offered to a jury, and to inform the conscience of the court; viz. that in the first case no such evidence should be admitted; because the jury might be inveigled thereby; but that in the second it could do no hurt, because the court were judges of the whole matter, and could distinguish what weight and stress ought to be laid on such evidence. 2 *Vern.* 98, 337, 625.

Also to ascertain a fact, parol evidence hath been admitted to explain the intent of the testator; as where the testator had two sons both named John, and he devised lands to his son John; here parol evidence was admitted, to shew which of his sons he meant; and it being proved, that one of his sons of that name had been absent several years beyond sea, and that the testator apprehended that he was dead, the devise was held good, and that the other should take; for without such evidence the will must be void. 2 *Vern.* 98, 337, 625.

Parol evidence to prove that a bond was given, in lieu of dower, refused. *Finney v. Finney*, in *Chanc. Wils. Rep.* par. 1. fo. 34. parol proof admitted that the testator intended his wife executrix should have the residue undisposed of. *Id.* *Lake v. Lake* in *Chanc.* fo. 313. Debt upon bond with condition for payment of money to Lydia Dovey, who is a third person, she declares the defendant owes her nothing, and upon proof thereof, a verdict was for the defendant; such declaration was properly given in evidence, for Lydia Dovey is to be considered as the real plaintiff. *Id.* *Hanson v. Parker*, fo. 257.

As to presumptive proof.

Sometimes violent presumption will be admitted for evidence without witnesses; as where a person is run thro' the body in a house, and one is seen to come out of the house with a bloody sword, &c. But on this the court ought not to judge hastily. 1 *Inst.* 6, 673. And tho' presumptive and circumstantial evidence may be sufficient in felony, it is not so in treason. *State Trials*, Vol. 4. p. 307.

Persons once in being shall be intended still living, if the contrary is not proved. 2 *Roll. Rep.* 461. But now by *Stat.* 19 Car. 2. c. 6. it is enacted, "That if any person or persons, for whose life or lives estates have been, or shall be granted, shall remain beyond the seas, or elsewhere absent themselves in this realm, by the space of seven years together, and no sufficient and evident proof made of the life or lives of such person or persons respectively, in any action commenced for the recovery of such tenements by the lessors or reversioners, in every such case the person or persons, upon whose life or lives such estate depended, shall be accounted as naturally dead;

dead; and in every action brought for the recovery of the said tenements, by the lessors or reversioners, their heirs or assigns, the judges, before whom such action shall be brought, shall direct the jury to give their verdict, as if the person so remaining beyond the seas, or otherwise absenting himself, were dead." But the statute contains a proviso for those who are evicted, and not actually dead, at the time of the eviction, on due proof, &c. to re-enter, &c.

By the Stat. 21 Jac. 1. cap. 27. it is enacted, "That if any woman be delivered of an issue, which being born alive should, by the laws of this realm, be a bastard, and endeavour privately, either by drowning or secret burying, or any other way, either by herself, or the procuring of others so to conceal the death thereof, as that it may not come to light, whether it were born alive or not, but be concealed; in every such case, the mother so offending shall suffer death, as in case of murder, unless she can prove by one witness at least, that such child was born dead."

As to hearsay evidence, it seems agreed, that what another has been heard to say, is no evidence, because the party was not on oath; also, because the party, who is affected thereby, had not an opportunity of cross-examining; but such speeches or discourses may be made use of by way of inducement or illustration of what is properly evidence. 1 Mod. 383. Skin. 402.

Also what a witness hath been heard to say at another time, may be given in evidence, in order either to invalidate or confirm the testimony he gives in court. 2 Hawk. P. C. 431.

So what a person accused of a crime hath been heard to say at another time, may be given in evidence at his trial, for, or against him. 2 Hawk. P. C. 431.

A witness by hearsay of a stranger shall not be allowed, except perhaps to confirm the evidence of a witness that spoke of his knowledge. Wood's Inst. 644.

4. Where depositions in another court may be given in evidence.

If a person who gave evidence in a former trial, be dead; upon proof of his death, any person who heard him give evidence, may be admitted to give the same evidence between the same parties; but a copy of the record of the trial when the evidence was given ought to be produced. 3 Inst. 2. Lill. Abr. 705.

And evidence given at one trial, has been held not to be evidence at another's trial. State Trials, Vol. 2. 308, 337. Though that was over-ruled in the case of Sir John Fenwick, on a bill of attainder. See title Bill of Attainder, and Chandler's Debates in the House of Commons, 3 V. 30, &c. Debates in the House of Lords, 1 V. 463, &c.

Depositions cannot be given in evidence against any person who was not party to the suit; and the reason is, because he had not liberty to cross-examine the witnesses; and it is against natural justice that a man should be concluded in a cause to which he never was a party. Hardr. 22, 472. Bunb. 50. pl. 84.—91. pl. 148.—321. pl. 403. 9 Mod. 229. Carth. 181. Fern. 113. Gilb. Evid. 62. Ch. Proc. 212.

No evidence is necessary in passing a bill of attainder, but private satisfaction to every one's conscience is sufficient. State Tri. Vol. 1. 676. But the same evidence is requisite on an impeachment in parliament, as in private courts. State Trials, Vol. 4. 311, 318.

With respect to depositions in Chancery, see how far they may be given in evidence under the first head touching Written Evidence. See further as to Evidence, New Abr. V. 2. tit. Evidence. Com. Dig. 3 V. same title, and V. 5. tit. Testimony. Gilbert's Law of Evidence, and Theory of Evidence. Also Barb. Ni. Pri. 207, &c.

EWAGE, (*ewagium*) Is the same with *aquage*, from the Fr. *eau*, water; and signifies toll paid for water-passage. — *Charta Regis Johannis*, &c. *hominibus de B. quod sint quieti de thelonio, scutagio, passagio, lastagio, & de wrec & lagan, de ewagio*, &c. Hill. 14 Hen. 3. In Thesauro Reg. Scacc. Ebor. Rot. 15.

EWYCE, (Sax. *ew*, i. e. *conjugium*, and *bryce*, *fractio*) Adultery or marriage breaking: from this Saxon word *ew*,

marriage, we derive our present English word, to *ew* a dame.

EW, (*euwa*) A German word signifying law; it is mentioned in Leg. W. 1.

EXACTION, Is defined to be a wrong done by an officer, or one in pretended authority, by taking a reward or fee for that which the law allows not. And the difference between *exaction* and *extortion* is this: extortion is where an officer extorts more than his due, when something is due to him; and *exaction* is, when he wrests a fee or reward, where none is due; for which the offender is to be fined and imprisoned, and render to the party twice as much as the money he so takes. Co. Litt. 368. 10 Rep. 100. V. 32 Geo. 2. c. 28. And see *Extortion*.

EXACTOR Regis, The King's exactor or collector: sometimes taken for the sheriff: but generally, *quicumque publicas pecunias, tributa, vectigalia & res fisco debitas exigit, propriis nominatur exactor Regis*. Niger liber Scacc. par. 1. cap. ult.

EXAMINATION, (*examinatio*) A searching after, or cognizance of a magistrate. By Stat. 1 & 2 P. & M. c. 13. & 2 & 3 P. & M. c. 10. Justices of peace are to examine felons apprehended, and witnesses, before the felon is committed; and the accusers must be bound over to appear and give evidence at the next assizes, &c. to which the examinations are to be certified. Mod. Justice 176, 177. See *Evidence*.

With respect to examinations touching church benefices, see title *Benefice*.

EXAMINERS in the Chancery, (*examinatores*) Are two officers of that court, who examine upon oath, witnesses produced by either side, in London, or near it, on such interrogatories as the parties to any suit exhibit for that purpose: and sometimes the parties themselves are, by particular order, likewise examined by them. In the country, witnesses are examined by commissioners, (usually attorneys not concerned in the cause) on the parties joining in commission, &c.

EXAMINAL ROLL. In the old way of exhibiting sheriffs accounts, the illeivable fines and desperate debts were transcribed into a roll under this name; which was yearly read, to see what might be gotten. Hale's Sher. Acco. 67.

EXCAMBATORS, A word used anciently for *exchangers* of land: but Cowel supposes them to be such as we now call *brokers*, that deal upon the *Exchange* between merchants.

EXCEPTION, (*exceptio*) Is a stop or stay to an action; and divided into *dilatory* and *peremptory*. Bract. lib. 5. tract. 5. In law proceedings, it is a denial of a matter alleged in bar to the action: and in *Chancery* it is what is alleged against the sufficiency of an answer, &c. The counsel in a cause are to take all their exceptions to the record at one time; and before the court hath delivered any opinion thereon. 1 Lill. Abr. 559. And on an indictment for treason, &c. exception is to be taken for misnaming, false Latin, &c. before any evidence is given in court; or the indictment shall be good. Stat. 7 W. 3. c. 3. Where by a general pardon, any particular crime is excepted; if a person be attainted, &c. of that offence, he shall have no benefit of the pardon. 6 Rep. 13. 2 Nels. Abr. 765. And when a pardon is with an exception as to persons, the party who pleads it ought to shew, that he is not any of the parties excepted. 1 Lev. 26. A negative expression may be taken to enure to the same intent as an exception; for an exception in its nature is but a denial of what is taken to be good by the other party, either in point of law or pleading. And *exceptio in non exceptis firmit regulam*. 1 Lill. 559.

Exception to Evidence, &c. See Bill of Exceptions.

Exception in Deeds and Writings, Keeps the things from passing thereby, being a saving out of the deed, as if the same had not been granted: but it is to be a particular thing out of a general one, as a room out of an house, a ground out of a manor, timber out of land, &c. And it must not be of a thing expressly granted in a deed: it must be of what is severable from, and not inseparably incident to the grant. 1 Inst. 47. 1 Lev. 26. Cro. 244. Where an exception goeth to the whole thing granted or

demised, the exception is void. *Cro. El. 6.* A man makes a lease of a manor, excepting all courts, &c. the exception is void as to the courts; for having leased the manor, it cannot be such without courts. *Hob. 108. Moor 870.* A lease was made of all a man's lands in L. excepting his manor of H. and he had no lands in L. but the said manor; it was adjudged that the manor passed, and that the exception was void. *Hob. 170. 2 Nels. Abr. 764.* A lease of an house and shops, except the shops; though this may extend to other shops, it is void as to the shops belonging to the house demised, because it is repugnant to the lease. *Dyer 265.*

If an exception crosses the grant, or is repugnant to it, the same is void: and if there be a saving or exception out of an exception, it may make a particular thing as if never excepted; as if a lease be made of a rectory, excepting the parsonage-house, saving to the lessee a chamber; this chamber not being excepted out of the lease, shall pass by the lease of the rectory. *Hob. 72, 170. Cro. El. 372. Owen 20.* By exception of trees, the soil is not excepted, but only sufficient nutriment for the trees: for the lessee shall have the pasture growing under them, though the lessor shall have all the benefit of the trees, masts, fruit, &c. and the trees are parcel of the inheritance. *11 Rep. 48, 50. 5 Rep. 11.* But it has been adjudged, that by an exception of woods, underwood and coppices, that the soil of the coppices is excepted. *Poph. 146. 2 Cro. 487.* If a lessee for years assign over his term, excepting the trees, &c. the exception is not good; because no one can have such a special property in the trees, but the owner of the land. *2 Nels. 764.* Tho' where lessee for life makes a lease for years excepting the wood, &c. this may be a good exception, although he hath not any interest in it but as lessee, in regard he is chargeable in waste, &c. and hath not granted his whole term. *Cro. Jac. 296. 1 Lill. Abr. 560.* These exceptions are commonly in leases for life and years; and must be always of a thing in esse. *Co. Lit. 47.*

Exchange, (*excambium* or *cambium*) Signifies generally as much as *permutatio* with the Civilians; as the King's exchange, which is the place appointed by the King for exchange of plate or bullion for the King's coin, &c. These places have been divers heretofore; but now there is only one, viz. the Mint in the Tower. *Stat. H. 6. c. 4. See 9 Ed. 3. c. 7. 25 Ed. 3. c. 12. 5 & 6 Ed. 6. c. 19.*

There is a Royal Exchange of Merchants in London, and exchange among merchants is a commerce of money, or a bartering or exchanging of the money of one city or country for that of another; money in this sense, is either real or imaginary; real any real species current in any country at a certain price, at which it passes by the authority of the state, and of its own intrinsic value: and by imaginary money, is understood all the denominations made use of to express any sum of money, which is not the just value of any real species. *Lex Mercatoria, or Merch. Comp. 98.*

The methods of exchange for money used in England ought to be *par pro pari*, according to value for value; and our exchange is grounded on the weight and fineness of our own money, and the weight and fineness of that of other countries, according to their several standards, proportionable in their valuation; which being truly and justly made, reduces the price of the exchange of money of any nation or country to a certainty. But this course of exchange is of late abused, and money is become a merchandise, that rises and falls in its price in regard to the plenty and scarcity of it. *Ibid.* At London, all exchanges are made upon the pound sterling of 20 s. In the Low Countries, France and Germany, upon the French crown; Spain and Italy, &c. upon the ducat; and at Florence, Venice, and other places in the Straights, by the dollar and florin. See *Bill of Exchange*, and *Cunningham's Law of Bills of Exchange*, &c.

Exchanges of Goods and Merchandise, Were the natural and natural way of commerce, precedent to buying and selling; for there was no buying till money was invented; in exchanging, both parties are as buyers and sellers, and both equally warrant. *3 Salk. 157.*

Exchange of Lands, Is a mutual grant of equal interest in lands or tenements, the one in exchange for the other: and is used peculiarly in our Common law for that compensation which the warrantor must make to the warrantee, value for value; if the land warranted be recovered from the warrantee. *Bract. lib. 2. cap. 16. Accompl. Conv. 1 Vol. 170.* Also there is a tacit condition of re-entry in this deed, on the lands given in exchange, in case of eviction; and on the warranty to vouch and recover over in value, &c. For if either of the parties is evicted, the exchange is defeated. *4 Rep. 121.* If A. B. gives five acres of land in exchange to C. D. for five other acres, and afterwards C. D. is evicted of one acre, in this case all the exchange is defeated, and C. D. may enter on his own again. *4 Rep. 121. Cro. El. 903.*

An exchange may be made of lands in fee-simple, fee-tail for life, &c. The estates granted are to be equal, as fee-simple for fee-simple, &c. tho' the lands need not be of equal value; or of the like nature: for a rent in fee issuing out of land, may be exchanged for land in fee; but annuities which charge the person only, are not to be exchanged for lands. *Lit. 63, 64. 1 Inst. 50, 51.* If an exchange be made between tenant for life, and tenant in tail after possibility of issue extinct, the exchange is good; because their estates are equal. *11 Rep. 80. Moor 665.* An exchange made between tenant in tail; and another, of unequal interest, may be good during his life; but his issue, when of full age, shall avoid it. And exchanges made by infants; by persons *non sane memoriae*; a husband of the wife's lands, &c. are not void, but voidable only, by the infant at his full age, the heir of the person *non sane memoriae*; and the feme after the death of the husband, who may waive the possession and disagree to them. *Perk. Sect. 277, 281.*

Jointenants and tenants in common, after they have made partition, may exchange their lands; and by this deed, freeholds pass without livery and seisin; but the word exchange is to be used, and there must be execution of the exchange, by entry on the lands in the life of the parties, or the exchange will be void. *1 Inst. 50. 1 Mod. 91.* Sometimes lands intended to pass by exchange, not having the qualities and incidents of exchanged lands, may pass by way of gift or grant: as if two persons are seised of two acres of land, and one of them by deed gives his acre to the other, and the other his acre to him, and each of them give livery of seisin upon his acre given in exchange; here the acres will pass from one to the other, but not in a way of exchange, because there was no word of exchange in the deed. *Litt. Sect. 62. Perk. 253.*

A man grants to another lands in fee-simple, for lands in tail by way of exchange; or land in tail, for lands for life, &c. these deeds will not take effect as exchanges. *Fine. Exchange 15, 64. Co. Lit. 64.* If tenant in tail give his land in exchange, for other land of the same estate-tail, the issue in tail may make it good if he will, or avoid the exchange. *1 Rep. 96.* A scoffment is made to A. and B. and the heirs of A. and they exchange the land for other lands; this will be good, and they shall hold the lands in the same nature that the land given in exchange was held. *Perk. Sect. 277.*

If a lord release to the tenant his services in tail, in exchange of land given to the lord in exchange in tail also, it is ill: but if lessee for life of one acre, give another acre to his lessor in tail, in exchange for a release from him, of that acre, *habendum* in tail in like manner, it is a good exchange. *Ibid. 219, 276, 283.* In case two persons make an exchange of land, and limit no estate; each shall have an estate for life, by implication: but if an express estate be limited to one for life, and none to the other, it will be void. *19 H. 6. 27.* And to make a good exchange, both the things must be in esse at the time of the exchange: therefore if I grant the manor of A. to another in exchange for the manor of B. which he is to have by descent after his father's death, this is void, because it is not in him. *1 Inst. 50. 3 Ed. 4. 10.*

But an exchange may be made to take effect in futuro, as well as presently; for if it be, that after the feast of Easter

East A. B. shall have such lands in D. in exchange for his lands in S. this is good. *Perk. Stat.* 265. Exchange of lands in divers countries; and it is said of land in Ireland, for land in England, may be good. *Latch* 234. By a special kind of agreement, an exchange may be of unequal estates. *Moor*, c. 209. The condition and warranty in exchanges run to the parties in privity; not to an assignee, &c. And if after two have exchanged lands, one of them releases to the other the warranty in law; it will not destroy the exchange. 4 *Rep.* 122. 1 *Rel. Abr.* 815. The parties themselves, and all privies and strangers for the most part, may take advantage of exchanges void by any defect or accident: *contra* if they are voidable, &c. 1 *Rep.* 103. *Dyer* 285. See *Exchanges of Lands, Accompl. Conveyancer*, Vol. 1. p. 358.

Exchange of Church Livings. Exchanges are now seldom used, except that parsons sometimes exchange their churches, and resign them into the bishop's hands: and this is not a perfect exchange till the parties are inducted; for if either dies before they both are inducted, the exchange is void. *Wood's Inst.* 284.

By the 31 *El.* c. 6. s. 8. If any incumbent of any benefice with cure of souls, shall corruptly resign or exchange the same; or corruptly take for or in any respect of the resigning or exchanging the same, directly or indirectly, any pension, sum of money, or other benefit whatsoever; as well the giver as the taker, shall lose double the value of the sum; half to the Queen, and half to him that shall sue for the same.

If two parsons by one instrument agree to exchange their benefices, and in order thereto resign them into the hands of the ordinary, such exchange being executed on both parts, is good; and each may enjoy the other's living: but the patrons must present them again to each living; and if they refuse to do so, the ordinary will not admit them respectively, *but* the exchange is not executed; and in such case either of them may return to his former living, even though one of them should be admitted, instituted and inducted to the benefice of the other; which is expressed in the exchange itself, and the protestation usually added to it. *Rights Clerg.* 2 *Co. Rep.* 74. *Rel. Abr.* 814.

Exchanges. Are those that return money by bills of exchange. See *Excambiators.* 5 *R.* 2. c. 2.

Exchequer, (*scaccarium*, from the Fr. *eschequier*, i. e. *abacus*, *tabula lusoria*, or from the Germ. *schatz*, viz. *the-treasure*) is an antient court of record, wherein all causes touching the revenue and rights of the crown are heard and determined; and here the revenues of the crown are received. *Camden* in his *Britan.* p. 113. saith, This court took its name *a tabula ad quam affidebant*, the cloth which covered it being partly coloured, or *chequered*: we had it from the Normans, as appears by the *Grand Customary*, cap. 56. where it is described to be an assembly of high justiciars; to whom it appertained to amend that which the inferior justiciars had mis-done, and unadvisedly judged, and to do right to all as from the Prince's mouth.

Some persons think there was an Exchequer under the Anglo-Saxon Kings; but our best historians are of opinion, that it was erected by King William the First, called *The Conqueror*, its model being taken from the transmarine Exchequer, established in Normandy long before that time. *Madox's Hist. Excheq.*

In the reign of Henry the First, there was an Exchequer, which has continued ever since: and the judges of the court were at that time styled *Barones Scaccarii*, and administered justice to the subjects. In antient times the Barons of the Exchequer dealt in affairs relating to the state, or publick service of the crown and realm: and were greatly concerned in the preservation of the prerogative, as well as the revenue of the crown; for at the Exchequer it was the care of the Treasurer and Barons to see that the rights of the crown were no ways invaded. *Lex Constitutionis* 198.

For the authority and dignity of the court of Exchequer, antiently it was held in the King's palace; and the acts thereof were not to be examined or controlled in any other of the King's ordinary courts of justice: the Exchequer was the great repository of records, wherein the records of the other courts at *Westminster*, &c. were brought

to be laid up in the Treasury there. And writs of the Chancery were sometimes made forth at the Exchequer; writs of summons to assemble parliaments, &c. *Ibid.*

The Exchequer has been commonly held at *Westminster*, the usual place of the King's residence; but it hath been sometimes holden at other places, as the King pleased; as at *Winchester*, &c. And in the Exchequer there are reckoned seven courts, viz. the court of *Pleas*; the court of *Accounts*; the court of *Receipts*; the court of the *Exchequer Chamber* (being the assembly of all the judges of England for difficult matters in law); the court of *Exchequer Chamber for Errors* in the court of *Exchequer*; for *Errors in the King's Bench*; and the court of *Equity* in the *Exchequer chamber.* 4 *Inst.* 119.

But according to the usual division for the dispatch of all common business, the Exchequer is divided into two parts; one whereof is conversant especially in the judicial hearing and deciding of causes pertaining to the Prince's coffers, anciently called *Scaccarium Computorum*; the other is the *Receipt of the Exchequer*, which is properly employed in the receiving and payment of money. And it has been observed, that about the time of the Conquest there was very little money in specie in the realm; for then the tenants or knights fees answered their lords by military services: and till the reign of King Hen. 1. the rents or farms due to the King were generally rendered in provisions and necessaries for his household; but in this reign the same were charged into money; and afterwards in succeeding times, the crown revenue was changed or paid into the Exchequer chiefly in gold and silver. *Lex Constitutionis*, p. 208.

By statute, all sheriffs, bailiffs, &c. are to account in the Exchequer before the Treasurer and Barons: and annual rolls are to be made of the profits of counties, &c. Also inquisitors shall be appointed in every county, of debts due to the King. 51 *H.* 3. *Stat.* 5. 10 *Ed.* 1. *Stat. Rutl.* And all fines of counties for the whole year are to be sent into the Exchequer. *Stat. de Vicecom.* 14. *Ed.* 2. Persons impeached in the Exchequer, may plead in their own discharge; and there shall be writs for discharging persons, &c. 5 *R.* 2. c. 9, 14. Any person to whom money is due from the Exchequer, having an order registred for payment, may assign the same by indorsement. 19 *Car.* 2. c. 12. And the officers of the Receipt may receive and take for their fees 1 *d.* in the pound for sums issued out, &c. 5 & 6 *W.* & *M.* cap. 20.

Officers of the Exchequer are without delay to receive money brought thither: and the money in the receipt is to be kept in chests under three different locks and keys; kept by three several officers, *viz.* 8 & 9 *W.* 3. c. 28. The Tellers of the Exchequer were allowed 15, 144 *l.* to make good the deficiency in their offices by the reduction of guineas. *Stat.* 10 *Geo.* 1. c. 5. See 2 *Geo.* 2. c. 16.

In the lower part of the Exchequer, called the *Receipt*, the debtors of the King, and their debtors, the King's tenants, and the officers and ministers of the court, &c. are privileged to sue and implead one another, or any stranger, and to be sued in the like actions as are prosecuted in the *King's Bench* and *Common Pleas*. The judicial part of the Exchequer is a court both of law and equity; the court of common law is held in the office of *Pleas*, after the course of the Common law, *coram Baronibus*; and here the plaintiff ought to be a tenant or debtor to the King, or some way accountant to him; but this is now become a meer fiction, and the court is open to all. The leading process is either a writ of *subpoena*, or *quo minus*. The court of Equity is holden in the Exchequer chamber *coram Thesaurario, Cancellario & Baronibus*, but usually before the Barons only; the Lord Chief Baron being the chief Judge to hear and determine all causes in law or equity; the proceedings are by *English bill* and answer, agreeable to the practice of the High Court of Chancery; but the plaintiff must likewise set forth, and it he is debtor to the King, tho' it is not material, whether he be so or not, it being, as above observed, a matter of form.

In this court the clergy usually exhibit bills for redress of very of their tithes, &c. And here the Attorney General, 244.

brings bills for any matters concerning the King; and any person grieved in any cause prosecuted against him on behalf of the King, may bring his bill against the Attorney General to be relieved in equity, in which case the plaintiff must attend the King's Attorney with a copy of the bill, and procure him to answer the same; and Mr. Attorney may call any that are interested in the cause, or any officer or others, to instruct him in the making of his answer, so as the King be not prejudiced thereby, and his answer is to be put in without oath. 4 Inst. 109, 112, 118.

The practice and proceedings generally in use at the *Exchequer Bar*, where anciently there was very much business and very various, are chiefly relating to debtors, farmers, receivers, accountants, &c. for debts and duties due to the crown: and all penal punishments, intrusions, forfeitures, upon popular actions, &c. are matters cognisable by this court. *Practif. Attorn. edit. 1. p. 292, 293.*

The Exchequer is now said to be the last of the four courts at *Westminster*; governed by the Chancellor of the Exchequer, the *Lord Chief Baron*, and three other *Barons*, who are the sovereign auditors of England, and the judges of the court. There also sits in this court a *Puisne Baron*, who administers the oath of all high-sheriffs, under-sheriffs, bailiffs, auditors, receivers, collectors, controllers, surveyors, and searchers of all the customs in England. The Chancellor or Under Treasurer hath the custody of the seal of this court. The King's Attorney General is made privy to all manner of pleas that are not ordinary and of course, which rise upon the process of the court; and he puts into court in his own name, informations of concealments of customs, seizures, &c. And also for intrusions, wastes and incroachments upon any of the King's lands; or upon penal statutes, forfeitures, &c.

The Remembrancers keep the records of the court betwixt the King and his subjects, and enter the rules and orders there made: one is called the King's Remembrancer, and the other the Lord Treasurer's Remembrancer; the Remembrancer for the King hath all manner of informations upon penal statutes used in his office only; and he calls to account, in open court, all the great Accountants of the Crown, Collectors of Customs, &c. he makes out writs of privilege, enters judgments of pleas; and all matters upon English bill are remaining in his office.

The Remembrancer for the Lord Treasurer makes out all the eitrements; he sets down in his book the debts of all sheriffs, and takes their foreign accounts; and issues out writs and process in many cases, &c. And these Remembrancers have several attorneys to do business under them: who by statute are not to issue out of the Remembrancer's office, any writs upon supposition, but upon just grounds, &c. 1 Jac. 1. c. 26.

There are two Chamberlains that keep the keys of the Treasury, where the records lie, with the book of Domestday, &c. They may sit in court if they please, but not intermeddle with any thing; unless it be relating to the Sheriffs, in the pricking whereof they have a vote. And besides the Chamberlains, there is a Clerk of the Pipe, in whose custody are conveyed out of the King's and Treasurer's, Remembrancer, &c. as water through a pipe, all accounts and debts due to the King. The Controller of the Pipe; which is said to be the Chancellor of the Exchequer. The Clerk of the Eitrements, who receives the eitrements from the Remembrancer's office, and writeth them out to be served for the King, &c. The Foreign Opposer, who opposes or makes a charge on all sheriffs, &c. of their green wax, i. e. fines, issues, amerciaments, recognisances, &c. certified in eitrements annexed to the writ, under the seal in green wax, and delivereth the same to the Clerk of the Eitrements to be put in process. The Auditors, that take the accounts of the King's Receivers, Collectors, &c. and perfect them. The four Tellers, whose business is to receive and pay all money is well known. The Clerk of the Pells, from his parchment rolls, called *Pellis Receptorum*. The Clerk of the Nibils, who makes a roll of such sums as the sheriff upon process returns *Nihil*, &c. The Clerk of the Pleas, in whose office all officers and privileged persons are to sue and be sued; and here are divers Under Clerks employed in suits commenced or depending in this court. Then there is a Clerk of the Summons; Under Chamberlains of the Exchequer; *Secondaries* in the offices of the Remembrancers;

Secondaries of the Pipe; the *Usher* of the Exchequer, *Marshal*, &c. For the statutes relating to the Exchequer, see the Table to the 4to edition of the *Statutes at Large*, title *Exchequer*.

Exchequer Bills. By Statute 5 Ann. c. 13. The Lord Treasurer may cause *Exchequer Bills* to be made of any sums not exceeding 1,500,000*l.* for the use of the war; and the duties upon houses were made chargeable with 4*l.* 10*s.* per centum per annum to the Bank for circulating them. The Bank not paying the bills, actions to be brought against the Company, and the money and damages recovered: and if any Exchequer bills be lost, upon affidavit of it before a Baron of the Exchequer, and certificate from such Baron, and security given to pay the same if found, duplicates are to be made out: also when bills are defaced, new ones shall be delivered. *Ibid.* The King, or his officers in the Exchequer, by former statutes, might borrow money upon the credit of bills, payable on demand, with interest after the rate of 3*d.* per diem for every 100*l.* bill. 7 & 8 W. 3. cap. 31. And by 8 & 9 W. 3. c. 20. An interest of 5*d.* a day was allowed for every 100*l.* But 12 W. 3. c. 1. lowered the interest on these bills to 4*d.* a day per cent. And by 12 Ann. cap. 11. it is sunk to 2*d.* a day. Forging Exchequer bills, or the indorsements thereon, is felony. See *Felony*.

Excise, (from the Belg. *accise*, tributum) Is a duty or imposition laid upon beer, ale, and other liquors which had its beginning in the reign of King Charles the Second. 12 Car. 2. c. 23. One principal office of excise to be erected in London, &c. and the commissioners and sub-commissioners appointed to levy this duty, may, under their hands and seals, appoint so many gaugers as shall be needful; who are to enter the houses of brewers, innkeepers, &c. to gauge all the coppers, fats, and vessels in the same, and make returns to the commissioners of excise, &c. under whose office and limits they live: and upon refusal, may forbid the parties to sell any beer, under 5*l.* forfeiture, &c. by this act. And by subsequent statutes, additional duties have been granted on low wines, spirits, or brandy drawn from corn: also a duty of excise is laid upon malt, and upon sweets, &c. which is annually continued. An officer of the excise in the day-time, or in the night with a constable, may enter into a house or brewhouse, and stay there during the time of brewing, &c. Brewers erecting or altering any back, cooler, copper, &c. or keeping any private store-house; and malsters keeping any private vessels for steeping of barley, without giving notice to the officers of the excise; in either case, forfeit 50*l.* and bribing a gauger incurs the penalty of 10*l.* 15 Car. 2. c. 11. 2 W. & M. 4 W. & M. 7 & 8 W. 3. 8 & 9 W. 3. c. 19. See 1 Geo. 3. whereby the excise on beer and ale, &c. is granted to King George the Third for life. Officers of excise may go on board ships, and search for rum, arrack, and other exciseable liquors, as officers of the customs may do, and seize commodities forfeited, &c. Stat. 11 Geo. 1. c. 30. And three of the commissioners of excise have power to determine all complaints and informations concerning the excise duties; as well as justices of peace at their sessions, &c. Stat. 1 Geo. 2. c. 21. Vide 9 Geo. 2. c. 35. See Stat. 10 Geo. 2. c. 17. 24 Geo. 2. c. 40. and 26 Geo. 2. c. 32. See farther Table to the 4to edition of the *Statutes at Large*: and also an account of the method of charging the duties of excise, &c. and of the names and business of some of the officers employed therein, at the end of *Gillb. Exib. edit. 1758, p. 293.*

Exclusa, Exclusagium. A sluice for the carrying off water; and the payment to the lord for the benefit of such a sluice. *Et duo molendina in eodem manerio cum aquis exclusagiis*, &c. Mon. Ang. tom. 1. p. 398. 537.

Excommunication. Is in *Law French* the same with *excommunication* in *English*. Stat. 23 Hen. 8. c. 3.

Excommunication. (*excommunicatio*) An ecclesiastical censure, by which a person is excluded from the communion of the church, and from the company of the faithful. It hath been thus defined: *excommunicatio est nihil aliud quam censura a canonibus vel iudice ecclesiastico prolata et inflicta privans legitimam communionem sacramentorum et quoadq; hominum.* And it is divided into *majorem* and *minorem*; *minor est, per quam quis a sacramentorum participatione conscientia*

sententia arceatur: major est, quæ non solum in sacramentorum, verum etiam fidelium communione excludit, & ab omni actu legitimo separat & dividit. Venatorius de sent. Excom. The form of an excommunication was of old: *Auctoritate Dei Patris omnipotentis & Filii & Spiritus Sancti, & Beatæ Dei Genetricis Mariæ, omniumque Sanctorum, excommunicamus, anathematizamus, & a limitibus Sanctæ Matris Ecclesiæ sequestramus, &c.* Leg. Will. 1.

The sentence of excommunication was instituted originally for preserving the purity of the church; but ecclesiastics did not scruple to convert it into an engine for promoting their own power, and inflicted it on the most frivolous occasions. *Robert. Hist. Emp. Charles V. 2 V. 109, &c.*

Herein is to be considered,

- I. In what cases and by whom persons may be excommunicated.
- II. Of the disabilities the excommunicated are under.
- III. Of the proceedings in excommunications, and how the excommunicated are absolved.

- I. In what cases and by whom persons may be excommunicated.

This excommunication is generally for contempt in not appearing, or not obeying a decree, &c. And in other respects the causes of it are many; as for matters of heresy, refusing to receive the sacrament, or to come to church; incontinency, adultery, simony, &c. A man may not be excommunicated for matter of defamation, &c.

In some cases persons incur excommunication *ipso facto* by act of parliament; but they are to be first convicted of the offence by law, and the conviction is transmitted to the ordinary. *Dyer 275. 1 Vent. 140.*

By 6 Edw. 6. c. 4. "If any person shall smite, or lay violent hands upon any other, either in any church or churchyard, that then *ipso facto* every person so offending shall be deemed excommunicate, and be excluded from the fellowship and company of Christ's congregation."

And it is further enacted by the said statute, "That if any person shall maliciously strike any person with any weapon, in any church or churchyard, or shall draw any weapon in any church or churchyard, to the intent to strike another with the same weapon, that then every person so offending shall stand *ipso facto* excommunicated as aforesaid."

By the Stat. 3 Jac. 1. cap. 5. sect. 11 & 12. it is enacted, "That every popish recusant convict shall stand to all intents and purposes disabled, as a person lawfully excommunicated."

None but the bishop is to certify excommunication, unless the bishop be beyond sea, or *in remotis*; or except the certificate be by one that hath ordinary jurisdiction, &c. And if the ordinary excommunicates a person for any thing where he hath not cognisance of the cause; the party may bring an action against him, or the ordinary it is said may be indicted. 1 Inst. 134. 2 Inst. 527. *Wood's Inst. 508.*

Anno 38 H. 3. Boniface archbishop of Canterbury, and the other bishops, with burning tapers in their hands, in Westminster-Hall before the King, and the other estates of the realm, denounced a curse and excommunication against the breakers of the liberty of the church: and by Stat. 9 E. 3. Bishops may excommunicate not only all perturbors of the peace of the church, but also felons, and other offenders, &c. And by the ecclesiastical laws, excommunicated persons are not permitted to have Christian burial.

- II. Of the disabilities the excommunicated are under.

An offender excommunicated is disabled to do any judicial act, as to sue any action at law, be a witness, &c. though he may be sued: but every excommunication doth not disable one; for if a mayor and commonalty bring an action, an excommunication of the mayor shall not disable them, because they sue and answer by attorney: and if a bishop is defendant, an excommunication by that bishop shall not disable the plaintiff: and an excommunication against an appellant, while the appeal is

depending, is void. 1 Inst. 134. 4 Inst. 340. *Wood 508.* Popish recusants convict are disabled as persons excommunicated, &c. Stat. 3 Jac. 1. c. 5.

Excommunication is a good plea to an executor or administrator, though they sue in *auter droit*, for an excommunicated person is excluded from the body of the church, and incapable to lay out the goods of the deceased to pious uses: also it is one of the effects of excommunication, that he cannot be a procurator or attorney for any other person, and therefore cannot represent the deceased. 43 E. 3. 13. Co. Lit. 134.

Excommunication is no plea on a *qui tam*, because it is for example; and the statute having given the informer an ability to sue, and not excepted excommunicated persons from the liberty of informing, he is enabled to sue by the statute, notwithstanding the censures of the church. 12 Co. 61.

When excommunication is pleaded in the plaintiff, he shall not reply, that he has appealed from the sentence, for the sentence is in force until it is repealed; and whilst it is in force, he cannot appear in any of the courts of justice, but he may reply, *he is absolved*; for then his disability is taken away. Bro. Excommunication 3. 3 Bulst. 72. 20 H. 6. 25. Placita. Gen. 10, 72.

- III. Of the proceedings in excommunications, and how the excommunicated are absolved.

Excommunication is published in the church, and if the offender do not submit in forty days, then the bishop is to certify the excommunication into the temporal court, setting forth specially the cause of excommunication, that the judges may see whether the ecclesiastical court hath cognisance of the matter; and thereupon the party may be taken and imprisoned by virtue of the writ *significavit* or *capias excommunicatum*, and is to remain in prison till he submits and is absolved; when the bishop likewise certifying the same, another writ issues to the sheriff to discharge him. 2 Inst. 139. 8 Rep. 68. 2 Nelj. Abr. 768.

The bishop's certificate, if he die before the return of the writ, shall not be received, for his successor shall certify; the *significavit* must mention that the party lived within the diocese where he was excommunicated, and by what bishop; if it be pleaded, the time when is to be shewed; and excommunication must be declared in the ecclesiastical court before they proceed, &c. 8 Rep. 68. 2 Cro. 84. Moor, ca. 667. Latch 174. Heiley 86.

It hath been adjudged, that the spiritual court hath not power to meddle with the body of any persons whatsoever, or to send process to take them; for if a person is excommunicated for contempt, &c. they ought to certify it into the Chancery, whence it is sent into B. R. and thence issues process. Cro. Eliz. 741. See the next article, *Excommunicato Capiendo*.

- As to the method by which persons excommunicated may be absolved.

If a person be unjustly excommunicated for a matter of which the spiritual court hath not cognizance, and he is taken on a writ of *excommunicato capiendo*, the party grieved shall have a writ out of Chancery to the sheriff, to deliver him out of prison. 2 Inst. 623. 12 Co. 76. F. N. B. 141.

So if the spiritual court proceeds *inverso ordine*, as if they refuse a copy of the libel, &c. a prohibition shall go, with a clause to absolve and deliver the party injured. 1 Sid. 232.

Also if a man be excommunicated, and offers to obey and perform the sentence, and the bishop refuse to accept it, and to absolve him, he shall have a writ to the bishop, requiring him, upon performance of the sentence, to absolve him; and the reason thereof is, for that by the excommunication the party is disabled to sue any action, or to have any remedy for any wrong done unto him, so long as he shall remain excommunicated; and also the party grieved may have his action upon his case against the bishop, in like manner as he may when the bishop doth excommunicate him for a matter which belongeth not to the ecclesiastical cognizance; also the bishop, in those

those cases, may be indicted at the suit of the King: *z Inst.* 623.

But if the excommunication be for a just cause, the party must make present satisfaction before he can be absolved, or he must put in caution, that he will hereafter perform that which the bishop shall reasonably and according to law enjoin him; which caution, in the Civil law, is of three sorts. 1. *Fidejussoria*, as when a man bindeth himself with sureties to perform somewhat. 2. *Pignoratia*, or *realis cautio*, as when a man engageth goods or mortgageth lands for the performance. 3. *Juratoria*, when the party who is to perform any thing, taketh a corporal oath to do it; which last is now the most frequent method.

This method of taking caution was held to be against law. *1 Bull.* 122. — But was afterwards on great debate held to be good; and that the bishop having a discretionary power herein, it was much in his option to take caution by obligation as by either of the two other methods. *2 Lev.* 36. *Raym.* 225.

If after a person is excommunicated, there comes a general act of pardon, which pardons all contempts, &c. it seems that this offence is taken away without any formal absolution. See *Cro. Car.* 199. *Cro. Jac.* 212. *8 Co.* 68. *1 Jon.* 227. *2 Lev.* 36. *Gibb. Cod.* 1110.

Excommunicato Capiendo, Is a writ directed to the sheriff for apprehending him who stands obstinately excommunicated forty days; for the contempt of such a person not seeking absolution, being certified or signified into the Chancery; this writ issues for the imprisoning him without bail or mainprize until he conforms. *F. N. B.* 62. By the *Stat. 5 Eliz. c. 23*. Writs *de excommunicato capiendo* shall issue out of the court of Chancery in term-time, and be returnable in *B. R.* &c. They shall be brought sealed into the King's Bench, and there opened and delivered of record to the sheriff, and there must be twenty days between the *teste* and the return: and if the sheriff return a *non est inventus* on the writ, a *capias* with proclamation is to be granted for the party to yield his body to gaol under the penalty of 10*l.* And if he do not appear on the first *capias* and proclamation, a second is to go forth, and he is to forfeit 20*l.* &c. But by this statute, if in the *excommunicato capiendo*, the party excommunicated hath not a sufficient addition, as to his place of dwelling, &c. according to *1 H. 5. c. 6*. Or if in the *significavit* it is contained, that the excommunication proceeds upon a cause of contempt or some original matter of *heresy*; for refusing to have a child baptized, to receive the sacrament, to come to divine service, or for error in matters of religion and doctrine, for incontinency, *usury*, *simony*, *perjury* in the ecclesiastical courts, or *idolatry*; he shall not incur the penalties in this act, for his contempt in not rendering himself prisoner upon the *capias*, &c. So that the statute doth not require the *capias* with proclamations, and the penalties in other cases, besides the ten cases mentioned. *2 Inst.* 664. And it has been adjudged where a person has been excommunicated, and none of those causes were contained in the *significavit*, that the person excommunicated should be discharged of the penalties; but not of the excommunication. *3 Mod.* 89. It has also been held, that for any of the causes expressed in the statute, there ought to go a *capias* with a penalty, and be an addition to the writ: in other cases it is not necessary; and if then the *capias* be with a penalty, the court will not discharge the party, but the penalty only: but for want of addition, in cases where that is required, the party shall be discharged upon motion. *1 Bull.* 294, 295. See a very full Comment on the *Stat. 25 Eliz. c. 23*, for the due execution of this writ, and the mode of proceeding, which the party who is taken ought to pursue, in *British Liberties*, *fr.* 224. &c.

Excommunicato Deliberando, Is a writ to the sheriff for delivery of an excommunicate person out of prison, upon certificate from the ordinary of his conformity to the ecclesiastical jurisdiction. *F. N. B.* 63. *Reg. Orig.* 67. And where a man is unduly excommunicated, he may be delivered in some cases by an *habeas corpus*; and sometimes by pleading, as well as by an *excommunicato deliberando*; also sometimes by prohibition, &c. And on a general pardon, the party may have a writ to the bishop to absolve him. *12 Rep.* 76. *Latch* 205. *God.* 272.

If a plaintiff in an action be excommunicate, and after he gets letters of *absolution*; on shewing them in court, he may have a re-summons, &c. upon his original. *1 Inst.* 133.

Excommunicato Recipiendo, Is a writ whereby persons excommunicated being for their obstinacy committed to prison, and unlawfully delivered, before they have given caution to obey the authority of the church, are commanded to be sought after and imprisoned again. *Reg. Orig.* 67.

Executio, (*executio*) Signifies the last performance of an act, as of a judgment, &c. And is the obtaining of possession of any thing recovered by judgment of law. *1 Inst.* 389. Sir *Edw. Coke*, in his Reports, makes two sorts of executions; one final, another with a *quousque*, tending to an end: an execution final is that which makes money of the defendant's goods, or extends his lands, and delivers them to the plaintiff, which he accepts in satisfaction, and is the end of the suit, and all that the King's writ requires to be done: the other writ with a *quousque*, though it tendeth to an end, is not final: as in case of a *capias ad satisfaciendum*, which is not a final execution, but the body of the party is to be taken, to the intent the plaintiff be satisfied his debt, &c. and the imprisonment of the defendant not being absolute, but until he do satisfy the same. *6 Rep.* 87.

Under this head it is material to consider,

- I. Of the nature and several kinds of executions, and what things were liable thereto at Common law, &c.
- II. Of the judgments on which the several executions may be taken out, and where the party shall be concluded by the election of one of them, &c.
- III. By whom, against whom, and at what time execution may be sued, and by whom they shall be executed, and how they are to be released and discharged.
- IV. To what time executions shall relate, so as to avoid alienation, and of the King's prerogative in respect of executions.
- V. Of the party's remedy against irregular executions, and of the offence of obstructing execution.

- I. Of the nature and several kinds of executions, and what things were liable thereto at Common law, &c.

The writs of execution at Common law were only a *fi. fa.* on the goods and chattels; and a *levari factas* to levy the debt or damages upon the land and chattels: afterwards a *ca. ad satisfac.* was given by *Stat. 25 Ed. 3. c. 17*. And an *elegit* by *Stat. Westm. 2. c. 18*. which makes the body liable, and the future profits of lands, &c. *1 Inst.* 154. *2 Inst.* 394.

The reason why by the Common law, where a subject had execution for debt or damages, he could not have the body of the defendant, or his lands in execution, (unless it were in special cases) was, that the defendant's body might be at liberty, not only to follow his own affairs and business, but also to serve his King and country; and taking away the possession of his lands would hinder the following of his husbandry and tillage. *2 Inst.* 394.

Though neither the body, nor lands of the debtor on a judgment could be taken in execution at Common law, but only his goods; yet in action of debt against an heir, upon the bond of his ancestor, his land which he had by descent was subject to be taken in execution. *3 Rep.* 11. In action of debt against the heir upon his ancestor's bond, there was judgment by *nil dicit*: and it was held that the plaintiff should have execution against the heir, of any of his own lands or goods. *Dyer* 89, 149. Judgment was had against the heir by *nil dicit*, and a *fi. fa.* being brought against him to have execution, he pleaded *riens per dicit*; it was adjudged that this plea was too late after the judgment by *nil dicit*, and the execution shall be on his own lands. *Dyer* 344.

But there is a difference between a *fi. facias* and an action of debt brought against an heir upon a bond of his ancestor, in which the heir is named. *Poph.* 193. On a judgment for the debt of an ancestor, where the heir hath made over lands descended to him, execution may be taken against such heir to the value of the land, &c. for

the debt of his ancestor, as if his own debt. *Stat. 3 & 4 W. & M. c. 14.*

If a person have judgment given against him for debt or damages, or be bound in a recognizance and ditch, and his heir be within age, no execution shall be sued of the lands during the minority; and against an heir within age, no execution shall be sued upon a statute merchant or staple, &c. *1 Inst. 290.* There is an execution on body, lands and goods, upon a statute merchant, staple and recognizances. *1 Inst. 289. 2 Inst. 678.*

In *personal actions*, execution is either by *capias ad satisfaciendum*, or *fiat facias* against the body or goods; or *elegit* against the lands, &c. In *real and mixed actions* the writs of execution are *habere facias seisinam*, to put the party in possession of his freehold recovered by judgment of law; and *habere facias possessionem*, to put him in possession of his term, &c. And after judgment, issues process of execution; for it begins where the action ends. No execution for damages recovered in a real action, shall be had by *capias ad satisfaciendum*: but where a man hath judgment to recover lands and damages, he may have execution of both together. *8 Rep. 141.*

Whatever may be *assigned or granted* may be taken on an execution. *Francis and Nash's Rep. temp. Hardw. per Annaly 53.* Nothing can be taken in execution that cannot be sold, as deeds, writings, &c. *Id. Banknotes, &c.* cannot be taken in execution, as they remain, in some measure, *choses in action*. *Ib.*

II. Of the judgments on which the several executions may be taken out, and where the party shall be concluded by the election of one of them, &c.

When a judgment is signed, execution may be taken out immediately upon it, and need not be delayed till it is entered, it being a perfect judgment of the court before entered. *Co. Litt. 505.* And if the judges of the court of B. R. see one against whom there is a judgment of that court walk in Westminster hall, they may send an officer to take him up, if the plaintiff desire it, without a writ of execution. *Farrell's Rep. 52.* If execution be not sued within a year and a day after judgment, where there is no fault in the defendant, as if writ of error be not brought, &c. there must be a *fiat facias* to revive the judgment, which in that time may be had without moving the court; but if it be of longer standing, the court is to be moved for it. *1 Inst. 290. 2 Inst. 771.* But if the defendant be outlawed after judgment, (as he may where he cannot be taken in execution, or hath no lands or goods to pay the debt, &c. when the suit is commenced by original) the plaintiff need not renew the judgment by *fiat facias* to obtain execution after a year. *1 Inst. 290.*

It hath been adjudged, that by the Common law, if a man was outlawed after judgment in debt, the plaintiff was at the end of his suit, and he could have no other process after that personally; but was put to his new original, &c. *2 Nels. Abr. 772.* If the plaintiff does not proceed upon the *fiat facias*, he may bring an action upon the judgment: and after judgment against the defendant, an action where special bail hath been given, the plaintiff may have execution against the defendant, or prosecute his bail. *Common Law Com. placed 206.* If one be arrested upon process in B. R. and puts in bail; and afterwards the plaintiff recovers, and the defendant renders not himself according to law, in safe-guard of his bail, the plaintiff may at his election take execution against the principal, or his bail; but if he takes the bail, he shall never afterwards meddle with the principal. *Cro. Jac. 320.*

Execution may not be sued forth against the bail, till a default returned against the principal. *Goldsb. 175.* That is, by getting the sheriff to return a *non est inventus*, on a *ca. sa.* sued out against the principal. If one recovers jointly against two in debt, the execution must be joint against them: the court cannot divide an execution, which is intire, and grounded on the judgment. *Mich. 24 Car. B. R.* A man and his wife recovered in an action of debt against the defendant 100*l.* and damages; then the wife died, and the husband prayed to have execution upon this judgment: the court at first inclined, that it should not survive to the husband, but that ad-

ministration ought to be committed of it, as a thing in action; but at last, they agreed that the husband might take out execution, for that by the judgment it became his debt due to him in his own right. *Cro. Car. 608. 1 Mod. Rep. 179, 180.*

If judgment be against two, on the death of one, the plaintiff shall have execution by *fiat facias* against the survivor; and though he pleads, that the other defendant has an heir alive, &c. it will not prevent it. *Raym. 26.* And where two persons recover in debt, and before execution one of them dies; it has been held, that execution may be sued in both their names by the survivor, and it will be no error; which may be done without a *fiat facias*. *Noy 150.* An execution may be executed after the death of the defendant; for his executor being privy, is bound as well as the testator: and where execution is once begun, it cannot be delayed, unless there appears irregularity; an *audita querela* is no *superfedeas* to it, nor shall any thing stop the sheriff from selling, &c. *Cro. 73. Comberb. 33, 389.*

A man can have but one execution; but it must be intended an execution with satisfaction; and the body of the defendant is no satisfaction, only a pledge for the debt. *5 Rep. 86.* When a person dies in execution, it is without satisfaction; so that the plaintiff may have a *fiat facias* against the goods, or *elegit* against the lands. It was not so at Common law. *Hob. 57.* But 'tis given by *Stat. 21 Jac. 1. c. 24.* *Where a person was taken on a *capias utlagatum*, and died in prison, the plaintiff having chosen this execution, which is the highest in law; it has been held that the defendant dying, the law will adjudge it a satisfaction. *Cro. Eliz. 850.* By statute, if a person in execution dies, a new execution shall issue against the lands, &c. as if he had never been taken in execution. *21 Jac. 1. c. 24.* If an execution be executed and filed, the party can have no other execution upon that judgment; because there can be but one execution with satisfaction upon one judgment. *1 Lill. Abr. 565.* If the execution be not returned and filed, another execution may be had: and if only part of the debt be levied on a *fiat facias*, another writ of execution may be sued out for the residue thereof. *Ibid.*

But if you once charge the body of the defendant in execution on a *capias satisfaciendum*, you may not have any other execution against his goods, &c. except the defendant make an escape, or is privileged, or die in execution. *Practis. Solec. 248.* Though if one take out any writs of execution, and they have no effect, he may have other writs on their failure. *Hob. 57.* If a person taken by *ca. sa.* escapes, the plaintiff may have a new execution. *Cro. Car. 174.* In case any prisoner committed in execution shall escape, any creditor, at whose suit he stands charged, may retake him by a new *capias ad satisfaciendum*, or sue forth any other kind of execution, as if the body of such prisoner had never been taken in execution. *Stat. 8 & 9 W. 3. c. 27.* Where two are bound jointly and severally, and judgment is had against both of them; if one in execution escapes, the creditor may take out execution against the other: but if he go by licence of the creditor, then the other will be discharged. *Cro. Car. 53.* If one in execution be delivered by privilege of parliament, when the privilege ceases, the plaintiff may sue out a new execution against him. *1 Jac. 1. c. 13.*

III. By whom, against whom, and at what time execution may be sued, and by whom they shall be executed, and how they are to be released and discharged.

See ante Division II.

No person is intitled to, or can sue out execution, who is not privy to the judgment, or intitled to the thing recovered, as heir, executor, or administrator to him who has judgment. *1 Rol. Abr. 889.*

If one have judgment to recover lands, and die before execution, his heir shall have it; and where tenant in tail recovers and dies before the execution without issue, he in remainder may sue out execution: an heir is to have execution for lands, and the executor or administrator for damages. *Co. Litt. 251. Dyer 26.* The executors of executors may sue out execution of a judgment; but

but an administrator getting judgment in behalf of the intestate, and then dying, neither his executor, or administrator shall take out the execution, but the administrator *de bonis non administratis* of the first intestate. 5 Rep. 9. And see 17 Car. 2. c. 18.

But if an administrator, *durante minori etate* of an executor, recovers in debt, and before execution the executor comes of age, he shall have a *scire facias* on this judgment; for carrying on the suit in right of the executor, made the executor privy thereto. 1 Rol. Abr. 888-9.

If a man has judgment for the arrears of rent, and dies, his executor shall sue out execution, and not the heir; for by the recovery it becomes a chattel vested, to which the executor is intitled. 1 Rol. Abr. 880.

If a statute be entred into to husband and wife, and the husband dies, the wife shall take out execution. 1 Rol. Abr. 889.

So if husband and wife recover lands and damages, and the husband dies, the wife shall have execution of the damages, and not the executors of the husband. 1 Rol. Abr. 342, 889, 890.

If there be judgment in debt against two, and one dies, a *scire facias* lies against the other alone, reciting the death; and he cannot plead, that the heir of him that is dead has assets by descent, and demand judgment, if he ought to be charged alone; for at Common law, the charge upon a judgment being personal survived, and the statute of *Westm. 2.* that gives the *elegit*, does not take away the remedy of the plaintiff at Common law; and therefore the party may take out his execution which way he pleases, for the words of the statute are, *fit in electione*; but if he should, after the allowance of this writ and revival of the judgment, take out an *elegit* to charge the land, the party may have remedy by suggestion, or else by *audita querela*. Raym. 26. 1 Lev. 30. S. C. 1 Keb. 92, 123. S. C.

By the Common law, if judgment be given against a man for debt, or damages, and the defendant dies before execution sued, his heir within age is not liable to execution during his minority; but the parol must demur in such case till he comes of age. Co. Litt. 290. a. 1 Rol. Abr. 140.

And this privilege of infancy does not only protect the infant, but all others who are affected by the judgment; as if there be father and two daughters, and judgment be given for debt against the father, who dies, one of the daughters being within age, partition being made, the eldest shall not be charged alone, but shall have the benefit of her sister's minority, which puts a stop to the execution. Co. Litt. 290. a.

There can be no execution taken out against a member of parliament during privilege of parliament: also no *capias* can issue against a peer; for even in the case of a private person at Common law, the body was not liable to creditors; and the statute of *Ed. 3.* which subjects the body, does not extend to peers, because their persons are sacred; as also the law supposes, that persons thus distinguished by the King, have wherewithal otherwise to satisfy their creditors. 6 Co. 52. Hob. 61. Cro. Car. 205.

If a writ of execution be taken out against a clerk in holy orders, on a judgment obtained against him; or upon a statute staple, or recognizance in nature of it, which he has entred into; and the sheriff returns, *that he is a clerk*, he ought to extend his lay fee and chattels, or return that he hath neither; but if he returns, *quod clericus sit beneficiatus nullum habens laicum seculum, sed quod beneficiatus est* in such a diocese, then a writ of requestration shall issue to the bishop to sequester the living. 2 Rol. Abr. 474. 1 Rol. Abr. 891. 2 Inst. 472. Jenk. 207.

A *capias ad satisfaciendum* may be executed upon a prisoner in prison for felony; and if he be acquitted of the felony, the sheriff is to keep him. 1 Lill. Abr. 567. But where a person is in prison for criminal matters, he ought not to be charged with a civil action without leave of the court; yet if he be charged, he shall not be discharged. Raym. 58. Where not allowed, on a pardon, see *Farest.* 153. A *ca. sa.* will lie against a man who is outlawed for felony, and he may be taken in execution at

the suit of a common person. Owen 69. And if he was taken upon a *capias utlagat*, which was at the King's suit, he shall be in execution at the suit of the party, if he will. Moor 566. But this is not without prayer of the party: and if after a judgment given, the judges of their own heads, or at the request of any person, without prayer of the plaintiff, commit the defendant to prison; by this he shall not be said to be in execution for the plaintiff. Dyer 297. If one arrested be in prison for debt, and judgment is had against him; though it be in arrest on a *latitat*, or *capias*, he shall not be in execution upon the judgment, unless the plaintiff prays it of record; or sues a *capias ad satisfaciendum*, and delivers it to the sheriff. Dyer 197, 306. Jenk. Cent. 165.

With respect to the time of suing execution.

At Common law, in real actions, where land was recovered, the demandant, after the year, might take out a *scire facias* to revive his judgment, because the judgment being particular in the real action, *quoad* the lands with a certain description, the law required, that the execution of that judgment should be entred upon the execution of that judgment should be entred upon the roll, that it might be seen, whether execution was delivered of the same thing of which judgment was given; roll, a *scire facias* issued to shew cause, why execution should not be. 2 Inst. 471. 5 Co. 88. Cro. Eliz. 416. 6 Mod. 288.

But if the plaintiff, after he had obtained judgment in any personal action, had lain quiet, and had taken no process of execution within the year, he was put to a new original upon his judgment, and no *scire facias* was issuable at law on the judgment, because there was not a judgment for any particular thing in the personal action, with which the execution could be compared; therefore after a reasonable time, which was a year and a day, it was presumed to be executed, and therefore the law allowed him no *scire facias* to shew cause why there should not be execution; but if the party had slipped his time, he was put to his action on the judgment, and the defendant was obliged to shew how that debt, of which the judgment was an evidence, was discharged. 2 Inst. 469. Carth. 30, 31. 1 Sid. 351.

To remedy this, and to make the forms of proceeding more uniform in both actions, the statute of *Westm. 2. cap. 45.* gave the *scire facias* to the plaintiff to revive the judgment, where he had omitted to sue execution within the year after judgment obtained.

A *scire facias* lies on a judgment in ejectment, for the words of the act are, *Sive servitia sive consuetudines sive alia quaecunque irrotulata*, which comprehend all judgments, and give the like remedy on them by *scire facias*, as the demandant had on a judgment in a real action at Common law. 1 Sid. 351. 2 Salk. 600.

But tho' the general rule be, that the plaintiff cannot take out execution after the year and day without a *scire facias*, yet the rule must be understood with these restrictions.

That if the defendant brings a writ of error, and thereby hinders the plaintiff from taking his execution within the year, and the plaintiff in error is not suit, or the judgment affirmed, the defendant in error may proceed to execution after the year without a *scire facias*, because the writ of error was a *superseades* to the execution, and the plaintiff must acquiesce till he hears the judgment above; besides, while the cause is still *sub judice*, whether the plaintiff shall recover, or not, and the year for the execution ought to be accounted from the final judgment given. Cro. Jac. 364. Yelv. 7. 1 Rol. Abr. 899. 4 Leon. 197. 5 Co. 88. Carth. 236-7. 6 Mod. 288.

So if the plaintiff hath a judgment, with stay of execution for a year, he may, after the year, take out his execution without the *scire facias*, because the delay is by consent of parties, and in favour of the defendant; and the indulgence of the plaintiff shall not turn to his prejudice, nor ought the defendant to be allowed any advantage of it, when it appears to be done for his advantage, and at his instance. 6 Mod. 288. 1 R. 1. 104.

But if the defendant had been tied up by an injunction out of Chancery for a year, yet he cannot take out execution without a *scire facias*, because the courts of law do not take notice of Chancery injunctions, as they do of writs of error; besides, in that case it had been no breach of the injunction to have taken out the execution within the year, and continued it down by *vis non misit brevis*, which cannot be done in the case of a writ of error, because that removes the record out of the court where the judgment was; and therefore there can be no proceedings below till it be affirmed, and returned to the inferior courts. 1 Salk. 322. 6 Mod. 288. S. C.

In debt, if defendant acknowledge the action for part, and as to the remainder pleads to issue, and the plaintiff hath judgment for that he confesseth; here he may not have execution till the issue is tried for that which he is to recover damages: though if he releases the damages, he may have execution presently for the rest. Roll. 897.

All judgments of courts in debt are to be executed in the peculiar jurisdictions where given, and cannot be removed to be executed by the superior courts. Cro. Car. 34. But if a judgment given in another court be affirmed, or reversed for error in B. R. because the proceedings in the court below are entered upon record in the King's Bench, the party shall have execution in that court: And so if a judgment of debt, &c. in the Common Pleas be affirmed in B. R. on a writ of error. 5 Rep. 88. Though where the record of a judgment given in C. B. is removed into B. R. the party cannot take out execution upon it, without a *scire facias quare executionem habere non debeat*. 1 Lill. Abr. 562. And where a writ of error is brought in the Exchequer Chamber, to reverse a judgment in B. R. if the judgment is affirmed there, yet that court cannot make out execution upon the judgment affirmed; but the record must be transmitted back to the court of King's Bench, where execution must be done. 1 Lill. 565.

As an execution is an entire thing, he who begins must end it; a new sheriff may distrain an old one to sell the goods on a *distringas nuper vicecom*, and to bring the money into court, or sell and deliver the money to the new sheriff; and the authority of the old sheriff continues by virtue of the first writ, so that when he hath seized, he is compellable to return the writ, and liable to answer the value according to the return; likewise by the seizure the property of the goods, &c. is divested out of the defendant, and he is discharged, whereby no further remedy can be had against him. 1 Salk. 322. 3 Salk. 159.

A sheriff shall have his fees for executions, upon a writ of *capias satisfaciendum* for the whole debt; upon a *feri fac*, according to the sum levied; and on an *elegit* it is held by some, that he shall have fees according to what is levied, and by others for the whole debt recovered, because the plaintiff may keep the land till he is satisfied the entire debt. 1 Salk. 333. If a sheriff in doing of execution at the suit of a common person, break open any man's house, the execution may be good; but the party shall have his action of trespass against him for it: And where the sheriff hath a *feri facias* or *ca. sa.* against a man, and before execution, he pays him the money, execution may not be done afterwards; if it be, trespass or false imprisonment lies. 5 Rep. 93. 12 Car. B. R.

It is laid down as a general rule in our books, that the sheriff in executing any judicial writ, cannot break open the door of a dwelling-house; this privilege which the law allows to a man's habitation, arises from the great regard the law has to every man's safety and quiet, and therefore protects them from the inconveniences which must necessarily attend an unlimited power in the sheriff and his officers in this respect: hence, every man's house is called his castle. 5 Co. 91, &c. 3 Inst. 162. Moor 668. Yelv. 28. Cro. Eliz. 908. Dall. Sherr. 350.

Yet in favour of executions, which are the life of the law, and especially in cases of great necessity, or where the safety of the King and commonwealth are

concerned, this general case hath the following exceptions:

1. That whenever the process is at the suit of the King, the sheriff or his officer may, after request to have the door opened, and refusal, break and enter the house to do execution, either on the party's goods, or take his body, as the case shall be. 5 Co. 91. b.

2. So in a writ of *seisin* or *habere facias possessionem* in ejectment, the sheriff may justify breaking open the door, if denied entrance by the tenant; for the end of the writ being to give the party full and actual possession, consequently the sheriff must have all power necessary for this end; besides, in this case the law does not, after the judgment, look upon the house as belonging to the tenant, but to him who has recovered. 5 Co. 91.

3. Also this privilege of a man's house relates only to such execution as affects himself; and therefore if a *feri facias* be directed to the sheriff to levy the goods of A. and it happens that A.'s goods are in the house of B. if after request made by the sheriff to B. to deliver these goods, he refuses, the sheriff may well justify the breaking and entering his house. 5 Co. 93. a. 1 Sid. 186.

4. Also this privilege extends to a man's dwelling-house, or out-house adjoining thereto, and therefore it hath been adjudged, that the sheriff, on a *feri facias*, may break open the door of a barn, standing at a distance from the dwelling-house, without requesting the owner to open the door, in the same manner as he may enter a close, &c. 1 Sid. 186. 1 Keb. 698. S. C.

5. So on a *feri facias*, when the sheriff or his officers are once in the house, they may break open any chamber-door or trunks for the completing execution. 2 Sherr. 87.

6. So if the sheriff's bailiffs enter the house, the door being open, and the owner locks them in, the sheriff may justify breaking open the door, for the setting at liberty the bailiffs; for if in this case he were obliged to stay till he could procure a *homine replegiando*, it might be highly inconvenient; also it seems, that in this case, the locking in the bailiffs is such a disturbance to the execution, that the court will grant an attachment for it. Palm. 52. Cro. Jac. p. 555. S. C. 2 Rol. Rep. 132. S. C.

7. That if the sheriff in executing a writ, breaks open a door, where he has no authority for so doing by law, yet the execution is good, and the party has no other remedy but an action of trespass against the sheriff. 5 Co. 93. a.

If the sheriff refuses to execute any judicial writ; this is a contempt to the court, for which an attachment will be granted. 1 Salk. 323.

So if he executes the writ, and makes a false return, the party injured may have an action on the case against him. 1 Salk. 323.

As to the manner of releasing and discharging executions.

By a release of all suits, execution is gone; for no one can have execution without prayer and suit, but the King only, in whose case the judges ought to award execution *ex officio*, without any suit: And a release of all executions, bars the King. By release of all debts or duties, the defendant is discharged of the execution, because the debt or duty on which it is founded is discharged: But if the body of a man be taken in execution, and the plaintiff release all actions, yet he shall remain in execution. 1 Inst. 291. If a judgment is given in action of debt, and the defendant taken in execution, the plaintiff releaseth the judgment, the body shall be discharged of the execution: And if the plaintiff after judgment releaseth all demands, the execution is discharged. Ibid. Where one is in execution at my suit, and I bid the sheriff let him go; this is a good discharge and release both to the party and sheriff. Poph. 207. But if the plaintiff make a release to the defendant being in execution, or other act amounting to a discharge; it will not be a discharge *ipso facto*, but by this means he may have the same. 5 Rep. 86. Dyer 152. A person in execution shall not be delivered out of prison, but by

by writ of *superfedeas*. 1 Lill. Abr. 565. And if a sheriff proceeds after a *superfedeas* to stay execution on goods, &c. it is a great contempt; and a writ of restitution may be awarded. 2 Bullf. 194.

Persons charged in execution for any sum not exceeding 100*l.* in any gaol, who are willing to satisfy their creditors as far as they are able, may exhibit a petition to the court whence the process issued, with an account of their whole estate upon oath, praying to be discharged, &c. And thereupon the court shall order the prisoner to be brought up, and his creditors summoned at a certain day, when the court in a summary way is to examine into the same, &c. and order the estate and effects of the prisoner to be assigned to the creditors by indorsement on the back of the petition; whereupon the prisoner shall be discharged out of prison; but if creditors are dissatisfied with the truth of the prisoner's oath, he is to be remanded till another day, and then if his creditors cannot discover any effects omitted, he shall be released; unless the creditors insist on the prisoner's being detained in prison, and agree by writing to pay him 2*s.* 4*d.* a week, &c. Stat. 2 Geo. 2. c. 22.

Prisoners in execution *ut supra* in any prison (except in London and Westminster) before they petition any of the courts from whence the process issued for a rule to be brought up, are to give notice to their creditors in writing, that they design to petition, and also a true copy of the account or schedule of their whole estates which they intend to deliver into the court, &c. And then upon such petition, the prisoners shall have a rule of court to be brought to the next assizes for the county, at an expence not exceeding 12*d.* a mile, to be paid to the officer out of the effects of the prisoners, &c. And the creditors must be summoned to appear at the said assizes by order served on them, or left at their houses thirty days before; and at the assizes, the judges on examination shall determine the matter, and give judgment and relief; a record of which judgment is to be returned and certified to the court whence the process issued, on which the prisoners were taken in execution. 3 Geo. 2. c. 27. No person charged in execution, shall be allowed to exhibit a petition to any court at law to be discharged, pursuant to the above acts, unless it be done before the end of the next term after he is charged; and those statutes shall not relate to any one taken on a *ca-pias* for running customable goods, &c.

IV. *To what time executions shall relate, so as to avoid alienation, and of the King's prerogative in respect of executions.*

Writs of execution bind the property of goods only from the time of the delivery of the writs to the sheriff; who upon receipt thereof indorses the day of the month when received: But land is bound from the day of the judgment. Stat. 29 Car. 2. c. 3. Cro. Car. 149. But the judgment must be docketed, by 4 & 5 W. & M. c. 20. See *Post*. Notwithstanding this statute, if after the writ delivered to the sheriff, and before execution is executed, the defendant becomes bankrupt, that will hinder execution. 3 Salk. 159. The plaintiff takes out execution by *fi. facias* against the defendant; all the goods and chattels that he had at the time of the execution, will be liable to it: And where debt or damages are recovered, the plaintiff shall have execution of any land the defendant had at the time of the judgment; not of the lands he had the day when the first writ was purchased. Roll. Abr. 892. Sheriffs may deliver in execution all lands whereof others shall be seised in trust for him against whom execution is had, on a judgment, &c. 29 Car. 2. c. 3. If there are chattels sufficient, the sheriff ought not to take the lands; nor may things fixed to the freehold, goods bought *bona fide*, goods pawned, &c. be taken in execution. 8 Rep. 143. And if a defendant hides his goods in secret places, so that the plaintiff cannot take them in execution, it is said no action will lie against him. 5 Rep. 92, 93.

The sale of goods for a valuable consideration, after judgment, and before execution awarded, is good: And if judgment be given against a lessee for years,

and afterwards he selleth the term before execution, the term assigned *bona fide* is not liable; also if he assign it by fraud, and the assignee sells it to another for a valuable consideration, it is not liable to execution in the hands of the second assignee. Godb. 161. 2 Nels. Abr. 783. If a person has a bill of sale of any goods, in nature of a security for money, he shall be preferred for his debt to one who hath obtained a judgment against the debtor before those goods are sold; for till execution lodged in the sheriff's hands, a man is owner of his goods, and may dispose of them as he thinks fit, and they are not bound by the judgment. *Preced. Chan.* 286.

But where a man generally keeps possession of goods after sale, it will make the same void against others, by the statute of fraudulent conveyances. And where on an execution, the owner of the goods by agreement was to have the possession of them upon certain terms; afterwards another got judgment against the same person, and took those goods in execution: It was adjudged they were liable, and that the first execution was by fraud, and void against any subsequent creditor; because there was no change of the possession, and so no alteration of property. *Ibid.* 287. A *fi. facias* being executed fraudulently, a *fi. facias* at the suit of another person afterwards shall stand good, and be preferred; and on trial, it is a matter proper to be left to a jury. *Bradley v. Wyndham, Sheriff of Hampshire.* Wilf. Rep. Par. 1 fo. 44.

Execution may be made of lands that the defendant hath by purchase after the judgment; although he sell the same before execution. Roll. 892. Where there is an execution against goods or chattels, of a tenant for life, or years, the plaintiff before removal of the goods by the execution is to pay the landlord the rent of the land, &c. so as there be not above a year due; and if more be due, paying a year's rent, the plaintiff may proceed in his execution, and the sheriff shall levy the rent paid, as well as the execution money. Stat. 8 Ann. c. 17.

For the greater security of purchasers, it is enacted by the 4 & 5 W. & M. c. 20. That the clerk of the escheins of the court of C. B. the clerk of the doggets of the court of King's Bench, and the master of the office of pleas in the court of Exchequer, shall make and put into an alphabetical dogget, by the defendant's names, a particular of all judgments by confession, *non sum informatus, nihil dicit*, entred in their several courts, &c. and that no judgment not doggeted, and entred in the books as aforesaid, shall effect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors or administrators, in their administration of their ancestors, testators or intestates estates."

With respect to the King's prerogative.

The King by his prerogative, may have execution of the body, lands, or goods of his debtor, at his election. Hob. 60. 2 Inst. 19. 2 Rol. Abr. 472.

And here we must observe, that the King's execution relates, as to land, to the time of becoming in debt to the King; for as to debts that were of record, they always bound the lands and tenements; for all lands being held mediately, or immediately from the King, when any debt was returned of any person, it laid the estate as liable to such debt, as if it had been a reservation on the first grant. 8 Co. 171. 2 Rol. Abr. 156, 157.

And as to debts not of record, they bind the lands from the time they are entred into; but this is by force of the statute 33 H. 8. cap. 39.

As to the King's execution of goods, the same relates to the time of the awarding thereof, which is the *teste* of the writ, as it was in the case of a common person at law; for so by the 29 Car. 2. c. 3. No execution shall bind the property of goods, but from the time of the delivery of the writ to the sheriff; yet as this act does not extend to the King, an extent of a later *teste* supercedes an execution of the goods by a former writ; because by the King's prerogative at Common law, if there had been an execution at the subjects suit, and afterwards an extent,

extent, the execution was superseded till the extent was executed, because the publick ought to be preferred to private property. 2 *New Abr.* 363.

If the King's debt be prior on record, it binds the lands of the debtor, into whose hands soever they come, because it is in the nature of an original charge upon the land itself, and therefore must subject every body that claims under it; but if the lands were aliened in whole, or in part, as by granting a jointure before the debt contracted, such alienee claims prior to the charge, and in such case the land is not subject. See 2 *Rol. Abr.* 156-7. *Moor* 126. 3 *Leon.* 239, 240. 4 *Leon.* 10.

V. Of the party's remedy against irregular executions, and of the offence of obstructing execution.

An execution may be set aside as irregular, by *superfedeas*; and the party have restitution, &c. *Caribben* 460, 461, 468. It hath been resolved, that a writ of error is a *superfedeas* from the time of the allowance: though if a writ of execution be executed before the writ of error is allowed, it may be returned afterwards. 1 *Salk.* 321. No writ of execution shall be stayed by any writ of error or *superfedeas*, after verdict and judgment, in any action upon the case for payment of money, covenant, detinue, trespass, &c. until recognisance be entered into as directed by 3 *Jac.* 1. c. 8. *Stat.* 13 *Car.* 2. c. 2. And judgment was had against a person at *Bristol*, and his goods attached there; and the court of *B. R.* being moved to stay the execution until a writ of error brought should be determined, they granted a *habeas corpus*, but nothing to stay the execution. 1 *Bull.* 268.

If, where two are jointly bound, they are sued severally; and several judgments are had against them, as an *elegit* is sued against one, and executed and returned, and a *ca. sa.* against the other, he may bring *audita querela*: For there must be the same kind of process against both. *Cro. Jac.* 338. 2 *Nell. Abr.* 772. See *qu.* A defendant cannot plead to any writ of execution, (tho' he may in bar of execution to a *fiere facias* brought;) but if he hath any matter after judgment to discharge him of the execution, he is to have *audita querela*. 1 *Inst.* 290. If husband and wife are taken in execution for the debt of the wife, the wife shall be discharged; for the husband being in execution, the wife shall not be so also, and because the wife hath nothing liable to the execution. 1 *Lev.* 51. The execution of a *liberate* is good without being returned; and where a man is taken upon a *ca. sa.* the execution is good, though the writ is not returned: And so in all cases where no inquest is to be taken, but only lands delivered, or *seisin* had, &c. which are only matters of fact. 4 *Rep.* 67. 5 *Rep.* 89.

With regard to the obstructing of execution.

There were anciently castles, fortresses and liberties, where they resisted the sheriff in executing the King's writs, which creating great inconvenience, the statute of *Westm.* 2. cap. 39. (13 *Ed.* 1.) hindered the sheriff from returning rescuers to the King's writ of execution, and directed him to take the *posse comitatus*. See the *Stat.* and 2 *New Abr.* 368.

The judges construed the words of the statute to extend only to executions, and not to writs on mesne process, that the sheriff was not obliged to carry the *posse comitatus* where the man was bailable, for they did not presume, that in such cases the King's writ would be disobeyed. 2 *New Abr.* 368.

The original of commitment for contempts seems to be derived from this statute; for since the sheriff was to commit those who resisted the process, the judges who awarded such process, must have the same authority to vindicate it; hence, if any one offers any contempt to his process, either by word or deed, he is subject to imprisonment during pleasure, viz. from whence they shall not be delivered without the King's special commandment; so that, notwithstanding the statute of *Magna Charta*, that none be imprisoned without judgment of their peers; or by the law of the land, this is one part of the law of the land to commit for contempts, and confirmed by this statute. 2 *New Abr.* 368. See tit. *Debt-Error*.

Execution for the King's debt, or prerogative execution, is always preferred before any other executions. 7 *Rep.* 20. And if a defendant is taken by *capias ad satisfaciendum*, and before the return thereof a prerogative writ issues from the *Exchequer*, for the debt of the King, tested a day before he was taken, here he shall be held in execution for the King's debt, and that of the subject. *Dyer* 197. Lands *intailed* in the hands of the issue in tail, when subject to the King's extent, and where not, see 7 *Rep.* 21. See also *King*.

Execution of Criminals. Must be according to the judgment, and the King cannot alter a judgment from hanging to beheading, because no execution can be warranted unless it be pursuant to the judgment. 3 *Inst.* 52, 211. *H. P. C.* 272. But there are ancient precedents, wherein men condemned to be hanged for felony, have been beheaded by force of a special warrant from the King. *Bract.* 104. *Staudf.* 13. And the King may pardon part of the execution in judgment for treason, viz. all but beheading. The court may command execution to be done without any writ: though sometimes execution is commanded by writ. 2 *Haw.* P. C. 463. Judgment belongs to the judge; but the execution must be done by the sheriff, &c. And an execution cannot be lawfully made by any but the proper officer; who may do it on the precept of the judge under his seal: And if the sheriff, or other officer, alters the execution, or any other executes the offender, or if he is killed without authority of law, it is felony. 2 *Haw.* *Ibid.*

It is said by *Hale* Chief Justice, That there is no warrant for the execution of persons condemned, but a calendar directing it left, with the sheriff under the hand of the justice that sits; though anciently there was a precept, or warrant, under their hands and seals: And where the prisoner is in custody of the sheriff, the open pronouncing and entering the judgment *suspendatur*, is a warrant for the execution. 2 *Hale's Hist.* P. C. 31, 409. See ante tit. *Calendar of Prisoners*.

Subsequent justices have no power by the *Stat.* 1 *Ed.* 6, c. 7. to award execution of persons condemned by former judges; but if judgment has not been passed on the offenders, the other justices may give judgment, and award execution, &c. 2 *Haw.* 27. Execution ought to be in the same county where the criminal was tried and convicted; except the record of the attainer be removed into *B. R.* which may award execution in the county where it sits. 3 *Inst.* 31, 211, 217. Where a person attainted hath been afterwards at large, if on the court's demanding why execution should not be awarded against him, he denies he is the same person, it shall be tried by a jury for that purpose, and then he is to be executed. 1 *H. P. C.* 463.

If upon a record removed, an outlawed person confess himself to be the same person, execution shall be had; but if he deny it, and the King's Attorney confesses he is not, he shall be discharged; though if the Attorney-General take issue upon it, the same shall be tried. 2 *Hale's Hist.* P. C. 402. If a person, when attainted, stands mute to a demand why execution shall not go against him, the ordinary execution (and not penance) shall be awarded. 2 *Haw.* 462. In case a man condemned to die, come to life after he is hanged, as the judgment is not executed till he is dead, he ought to be hung up again. *Fitch* 389.

If a woman quick with child be condemned either for treason, or felony, she may allege her being with child in order to get the execution respited, and thereupon the sheriff, or marshal shall be commanded to take her into a private room, and to impanel a jury of matrons to try and examine whether she be quick with child or not; and if they find her quick with child, the execution shall be respited till her delivery. But it is agreed, that a woman cannot demand such respit of execution by reason of her being quick with child more than once; and that she can neither save herself by this means from pleading upon her arraignment, nor from having judgment pronounced against her upon her conviction. Also it is said, both by *Staudford* and *Coke*, that a woman can have no advantage from being found with child, unless she be also found quick with child. 2 *Haw.* P. C. 462, 463, 464.

The

The body of a traitor or felon is forfeited to the King by the execution; and he may dispose of them as he pleases. The execution of persons under the age of discretion is usually respited, in order to a pardon. *1 Hawk. 2.* By the *Stat. 25 Geo. 2. c. 37.* Persons convicted of murder are to be executed the day after sentence, and their bodies delivered to surgeons to be anatomised. The judge may stay the sentence, and appoint the body to be hung in chains or anatomised, but not buried.

Execution of Statutes. The court of *Star Chamber* erected in the reign of King *Hen. 7.* was said to be for the execution of Statutes, &c. *Stat. 3 H. 7. c. 1.*

Executione facienda. Is a writ commanding execution of a judgment, and diversely used. *Reg. Orig.*

Executione facienda in Wiltshernantum. A writ that lies for taking his cattle, who hath conveyed the cattle of another out of the county, so that the sheriff cannot replevy them. *Reg. Orig. 82.*

Executione Judicii. Is a writ directed to the judge of an inferior court to do execution upon a judgment therein, or to return some reasonable cause wherefore he delays the execution. *F.N.B. 20.* If execution be not done on the first writ, an *alias* shall issue, and a *pluries* with this clause, *quod causam nobis significet quare, &c.* And if upon this writ execution is not done; or some reasonable cause returned why it is delayed, the party shall have an attachment against him who ought to have done the execution, returnable in *B.R.* or *C.B.* *New Nat. Br. 43.* If the judgment be in a court of record, this writ shall be directed to the justices of the court where the judgment was given, and not unto the officer of the court; for if the officer will not execute the writs directed unto him, nor return them as he ought, the judges of the court may amerce him. *Ibid.* One may have a writ *de executione judicii* out of the Chancery to execute a judgment in an inferior court, although a writ of error be brought to remove the record, and reverse the judgment; if he that brings the writ of error do not take care to have the record transcribed, and the writ of error returned up in due time. *1 Lill. Abr. 562.*

Executive Power. The supreme executive power of these kingdoms is vested by our laws in a single person, the King, or Queen, for the time being. *Black. Com. 1 P. 190, &c.*

The executive power, in this state, hath a right to a negative, in parliament, i. e. to refuse assent to any acts offered, or otherwise the other two branches of the legislative power would, or might, become despotic. See *Montesquieu's L'Esprit des Loix Liv. XII. chap. 6. De la Constitution d'Angleterre.*

Executors, (Lat.) Is one that is appointed by a man's last will and testament, to have the execution thereof after his decease, and the disposing of all the testator's substance according to the tenor of the will: he is as much as *heres designatus* or *testamentarius* in the Civil law, as to debts, goods, and chattels of his testator. *Terms de Ley.*

Herein is to be considered,

- I. The different kinds of executors, &c.
- II. Who may make executors, as also who may be appointed executor, and in what manner.
- III. Of the probate of wills, with the power, interest, and duty of executors.
- IV. Of actions by, and against executors, and therein of devastavit.

I. Of the different kinds of executors, &c.

Under this head might be considered, administrations during the minority of an infant executor, and administrations *de bonis suis*; but for these see title *Administrator*. It will suffice in this place to treat of executors *de son tort*. An

Executor de son tort. Or executor of his own wrong. Is he that takes upon him the office of an executor by intrusion, i. e. being so constituted by the testator; or for want thereof, appointed by the ordinary to administer. *577 1661.* If an executor of his own wrong takes upon himself the office of an executor without a lawful authority, he is chargeable to the rightful executor, and to all the creditors of the testator, and likewise to the legatees, so far as the goods amount unto which he wrongfully possessed:

and such an executor is made by any act of acquisition, transferring or possessing himself of any of the estate or goods of the deceased; but not by acts of necessity, piety or charity. *2 Nels. Abr. 793.* Where a person gets the goods of the intestate into his hands; he is chargeable for them as executor *de son tort*, until he gives satisfaction for them to the true administrator; or satisfies the true debts of the intestate to the value. *Cro. Eliz. 88.* And such a one cannot retain for his own debt, against another creditor. *5 Rep. 31.* And by statute, persons obtaining any goods or debts of an intestate by fraud, or procuring administration to be granted to a stranger, &c. are chargeable as executors in their own wrong, to the value of the goods or debts, &c. And executors and administrators of executors in their own wrong, shall be liable to pay the debts of the testator; in like manner as their testator or intestate. *43 Eliz. cap. 8. 30 Car. 2. cap. 7.*

If a man who is neither executor nor administrator; acts as executor, as when he takes into his hands the goods of the deceased for his own use, or alters the property by sale, &c. or delivers goods of the deceased to creditors or legatees, receives any debt due to the intestate, &c. he is executor in his own wrong, and shall answer as far as he acts. *5 Rep. 31, 32. 8 Rep. 135. 9 Rep. 39.* Tho' every taking of the goods of the deceased is not enough to make one chargeable; as if a person take away his own goods in the house of the deceased, or use some of the deceased's goods in the necessary occasions of his family; bury the deceased, and sell some of the goods for that purpose; or if he take them by the delivery of another, &c. *Dyer 166, 167. Noy's Max. 102.*

When there is a rightful executor, and a stranger possesses himself of the testator's goods, without doing any further act as executor, he is not an executor *de son tort*; but a trespasser: but where there is neither an executor or administrator, it is otherwise; for there the creditors have no person against whom they may bring any action but him who hath possessed himself of the goods. *Dyer 105. Roll. Abr. 918. See 5 Rep. 82.* An executor of his wrong may be sued as executor; and he shall be sued for legacies, as well as a rightful executor. *Noy 13.* Tho' an executor *de son tort* cannot maintain any suit or action because he cannot produce any will to justify it: and he will be severely punished for a false plea, for in such case the execution shall be awarded for the whole debt, though he meddled with a thing of very small value. *Noy 69.*

Debt was brought against an executor of his own wrong, who pleaded that he never was executor, nor administered as such; it was held, not to be material whether he had assets or no, but to prove that he had administered any thing was enough; for this would make him chargeable with the debt: but if he had not pleaded falsely, he would have been liable for no more than the value of the goods of the deceased. *Style 120.* If a plaintiff alleges that the defendant administered of his own wrong, and the defendant demurs, it is a confession of it to be true; and then the action may be brought against the defendant as executor *de son tort*. *5 Mod. 136. 1 Salk. 298.* An executor of his own wrong possesses himself of goods, and afterwards administration is granted him, he may by virtue thereof retain goods for his own debt. *5 Rep. 30.* And where a man took possession of an intestate's goods wrongfully, and sold them to another, and then took out administration, it was adjudged that the sale was good by relation. *Moor 126.* But where an executor *de son tort* delivered goods to one to whom administration was afterwards granted, it was held that if the administration had been granted to himself, it would not have purged the tort, much less where granted to another; for he having once made himself liable to an action as executor *de son tort*, he shall never after discharge himself by matter *ex post facto*. *Mob. 49.* An executor *de son tort* shall be allowed in equity, all such payments which a rightful executor ought to have paid. *2 Chanc. Rep. 31.*

II. Who may make executors, and who may be appointed an executor, and in what manner.

A man attainted of felony cannot make executors; because he hath forfeited all that he had: but a person outlawed may make executors; so may an excommunicate person,

person, &c. 1 *Leon.* 326. *Cro. Eliz.* 577. All persons capable of making a will, are capable of being executors. 3 *Cro.* 9. And a woman covert may be an executor, and do any lawful act which another executor may do; but she may not damage her husband thereby, by assenting to a legacy before debts are paid, &c. 5 *Rep.* 27. A feme covert executrix cannot release a debt of her testator's, or give away the goods she hath as executrix, without the husband; but the husband may do it, and yet the goods which the wife hath as executrix are not divested out of her, as her own goods are; nor if she dies, shall they go to the husband, but to her executors, or the next of kin, being administrator of her testator. *Offic. Exec. c.* 17. Husband and wife must be named in actions brought for goods which the wife is intitled to as executrix. *Ibid.* A woman may be executrix to her husband, and the husband executor to his wife; and by this means he may recover all the debts due to her before marriage, &c. *Fitz. Executor* 24, 47, 87. An infant may be an executor; though he cannot act till he is seventeen years of age; and till that time administration *durante minori etate* is to be granted. 6 *Rep.* 67. 4 *Inst.* 335. If two are executors, one whereof is under age, he of full age may solely prove the will. 1 *Lev.* 181.

A traitor, or felon, bastard begotten in incest, or a notorious usurer, 'tis said, may not be executor to another. *Swinb.* 222. A popish recusant convict cannot be an executor. 9 *Rep.* 37. A mayor and commonalty may be executors. 1 *Rel. Abr.* 915. And if the King is made executor, he appoints others to take the execution of the will upon them, and to take account. 5 *Rep.* 29. Where executors are appointed, they may accept of, or refuse the executorship; but they may not refuse after acceptance, nor on the other hand accept after refusal. 9 *Rep.* 37.

It seems agreed, that by our law, an alien, or one born out of the allegiance of our King, may be an executor or administrator; also it hath been adjudged, that such a one shall have administration of leases as well as personal things, because he hath them *in auter droit*, and not to his own use. *Off. of Ex.* 17.

But it has been long doubted, whether an alien enemy should maintain an action as executor, for on the one hand it is said, that by the policy of the law, alien enemies shall not be admitted to actions to recover effects, which may be carried out of the kingdom to weaken ourselves and enrich the enemy, therefore publick utility must be preferred to private convenience; but on the other hand it is said, that those effects of the testator are not forfeited to the King by way of reprisal, because they are not the alien enemy's, for he is to recover them for others; and if he allows such alien enemies to possess the effects as well as an alien friend, he must allow them power to recover, since in that there is no difference, and by consequence he must not be disabled to sue for them; if it were otherwise, it would be a prejudice to the King's subjects, who could not recover their debts from the alien executor, by his not being able to get in the assets of the testator. *Cro. Eliz.* 683. *Moor* 431. *Carrier* 49, 191. *Skin.* 370.

There are few or none, who, by our law, are disabled, on account of their crimes, from being executors; and therefore it hath been always holden, that persons attainted or outlawed may sue as executors or administrators; because they sue *in auter droit*, and for the benefit of the party deceased. *Co. Lit.* 128. *Cro. Car.* 8, 9. 1 *Rel. Abr.* 914. 1 *Pern.* 184.

But an excommunicated person cannot be an executor or administrator, for by the excommunication he is excluded from the body of the church, and is incapable to lay out the goods of the deceased to pious uses. *Co. Lit.* 134. *Swinb.* 349. *Godolph.* 85.

It is laid down as a general rule, that if a creditor makes his debtor executor, it is an extinguishment of the debt, for he cannot sue himself. 1 *Rel. Abr.* 920-1. 5 *Co.* 30. *Offic. of Ex.* 30. *Godolph.* 113.

But if a person dies intestate, and the ordinary commits administration to a debtor, the debt is not thereby extinguished, for he comes into the administration by the act of law, whereas the other is the act of the party. 5 *Co.* 136. 1 *Salk.* 306. *Offic. of Ex.* 31.

An executor may be appointed either by express words, or words that amount to a direct appointment; as if the testator declares by his will, that a certain person shall have his goods to pay debts, and otherwise dispose of; &c. And executors may be made upon condition; for a fixed time; or some part of the estate. *Wood's Inst.* 320. A man that can make an executor, may either make one, two, three, or more his executors; and he may appoint one person his executor for one year, and another man for another year, &c. If he make a will, and appoint an executor for seven years; after that the ordinary may grant administration of the goods; so till the power of executor takes place: and where one makes an executor as to part of his estate, he shall die intestate as to the residue. 4 *Shep. Abr.* 66, 67, 68. If there is no executor, there is properly no will; and where there is no will, there can be no executor: but this is understood of goods; for where lands in fee are devised, this is good, tho' no executor be named: executors having nothing to do with land, which is not testamentary but by act of parliament. *Offic. Exec.* 3, 4. *Finch.* 167.

III. Of the probate of wills, with the power, interest, and duty of executors.

When a will with executors is made, the ordinary may send out process against the executors to come in and prove it; and if they do not come in, they are to be excommunicated; but if they come in, and refuse to take upon them the execution of the will, then the ordinary is to commit administration: and the refusal must be by some act registered in the Spiritual Court. *Offic. Exec.* If an executor hath administered, he cannot refuse; but the ordinary is to compel him to take upon him the executorship. *Offic. Exec.* 38. Executors cannot refuse for a time, but for ever; but they may have time to advise upon it, and the ordinary is to grant letters *ad colligendum*, not administration. *Cro. Eliz.* 92. See *Dyer* 160.

If there are many executors of a will, and one of them only proves the will, and takes upon him the executorship, it is sufficient for all of them; but the rest after may join with him, and intermeddle with the testator's estate: but if they all of them refuse the executorship, none of them will ever afterwards be admitted to prove the will; the ordinary in this case grants administration with the will annexed, and the testator is in law adjudged to die intestate, and without executor. 9 *Rep.* 37. 1 *Rep.* 113. *Perk.* 485. If an executor dies before probate, it is the same; for such an executor's executor cannot prove the will, because he is not named therein, and no one can prove a will but he who is named executor in it; but if the first executor had proved the will, then his executor might have been executor to the first testator, there requiring no new probate. 1 *Salk.* 299.

An executor of an executor may be executor to the first testator; but he may take upon him the executorship of his own testator, and refuse to intermeddle with the estate of the other: and if the first executor refuses, or dies before probate, his executor shall not administer to the first testator: nor can an executor of an administrator take administration of the goods of his intestate. *Dyer* 372. A testator having thought the executor appointed a proper person to be intrusted with his affairs, the ordinary cannot adjudge him disabled or *incapax*; but a *mandamus* shall issue from B. R. for the ordinary to grant probate of the will, and admit the executor, if he refuse him: neither can the ordinary insist upon security from the executor, as the testator hath thought him able and qualified. 1 *Salk.* 299.

And altho' an executor becomes bankrupt, yet 'tis said the ordinary cannot grant administration to another: but if an executor becomes *non compos*, the Spiritual Court may commit administration for this natural disability. 1 *Salk.* 307. If an executor takes goods of the testator, and convert them to his own use; or if he either receives, or pay debts of the testator, or give bond for payment; make acquittances for them, or demand the testator's debts as executor; or give away the goods of the testator, &c. these are an administration, so that he cannot afterwards refuse the executorship: and it has been held, that if the wife

of the testator take more apparel than is necessary, it is an administration. *Offic. Exec.* 39.

It is usual, when there is a contest about a will, or when the right of administration comes in question, to enter a caveat in the Spiritual Court, which by their law is said to stand in force for three months. *Godolph.* 258. *Goldsb.* 119, 2 *Rel. Rep.* 6. *Cro. Jac.* 463-4.

But it is said, that our law takes no notice of a caveat, and that it is but a mere cautionary act done by a stranger, to prevent the ordinary from doing wrong, and that therefore if administration be granted pending a caveat, this is valid in our law, tho' by the law in the Spiritual Court, it may be such an irregularity as will be sufficient to repeal it. 1 *Rel. Rep.* 191. *Cro. Jac.* 463. 2 *Rel. Rep.* 6.

As to their interest and power.

All goods and chattels which belonged to the testator at the time of his death, in any part of the world, come to the executor as assets, and make him chargeable to creditors and legatees; and debts, &c. recovered by the executor, by action after the death of the testator, are to be accounted as assets, but not before recovered. 6 *Rep.* 47. *1 Inst.* 374. If an executor never recover, or get in a debt, he shall never be charged, provided he hath used his utmost endeavours to recover it, and cannot do it. 1 *Rep.* 98. And where an executorship is controverted in the Spiritual Court by another executor who sets up another will; an injunction may be granted to the testator's debtors not to pay any money till the title to the executorship is settled. *Chanc. Rep.*

The chattels real and personal of the testator coming to the executor, are leases for years, rent due, corn growing and cut, grass cut and severed, &c. cattle, money, plate, household goods, &c. *Co. Lit.* 118. *Dyer* 130, 537. An executor having a lease for years of land in right of the deceased, if he purchase the fee, whereby the lease is extinct; yet this lease shall continue to be assets, as to the creditors and legatees. 1 *Rep.* 87. *Bro. Lease* 63. Though a plantation be an estate of inheritance, yet being in a foreign country, it is a chattel in the hands of executors to pay debts. 1 *Vent.* 358. The executor is not only intitled to all personal goods and chattels of the testator, of what nature soever they are; but they are also accounted to be in his possession, though they are not actually so; for he may maintain an action against any one who detains them from him: he is likewise intitled to things in action; as right of execution on a judgment, bond, statute, &c. Also to money awarded on arbitration, where the party dies before the day, &c. 1 *Inst.* 207. 2 *Vent.* 249. 1 *Danv. Abr.* 549.

If goods of the testator are kept from the executor, he may sue for them in the Spiritual Court, or at common law; and if one seized of a messuage in fee, &c. hath goods in the house, and makes a will and executors, and dies, the executors may enter into the house, and carry away the goods. *Lit.* 60. An executor may in convenient time after the testator's death, enter into a house descended to the heir, for removing and carrying away the goods; so as the door be open, or the key be in the door. *Offic. Exec.* 8. He may take the goods and chattels to himself, or give power to another to seize them for him, 9 *Rep.* 38. An executor with his own goods redeems the goods of the testator; or pays the testator's debts, &c. the goods of the testator shall, for so much, be changed into the proper goods of the executor. *Jenk. Cent.* 188.

Executors having their power wholly by the will, may release an action, debt, or duty, or do any thing as executors before probate of the will, so as afterwards they prove it; except it be bringing actions for debts, &c. but to maintain these they must shew the testament proved, and the probate is to be brought into court before the defendant will be bound to plead. *Rowd.* 277. 1 *Inst.* 207. 1 *Rel. Abr.* 917, 926. Where a man by will desires that his lands shall be sold for payment of debts, executors shall sell the land, to whom it belongs to pay the debts. 2 *Leam. c.* 276. And if lands are devised to executors to be sold for payment of the testator's debts, those executors that act in the executorship, or that will

sell, may do it without the others. 1 *Inst.* 113. By statute 21 H. 8. c. 4. Bargains and sales of lands, &c. devised to be sold by executors, shall be as good, if made by such of the executors only as take upon them the execution of the will, as if all the executors had joined in the sale: if lands are thus devised to pay debts, a surviving executor may sell them; but if the devise be, that the executors shall sell the land, and not of the land to them to be sold, here being only an authority, not an interest, if one dies, the other cannot sell. 1 *Lev.* 203.

When lands are devised or disposed for paying debts, goods in the hands of an executor shall not be liable; though in case of an administrator it is otherwise. *Ibid.* Each executor hath the whole of the testator's goods and chattels, and each may sell or assign the whole: (but one of them cannot assign or release his interest to the other, if he doth it will be void.) If one executor grant his part of the testator's goods, all passeth, and nothing is left in the other, each having the whole; and there are no parts or moieties between executors: yet one executor may demise or grant a moiety of the land, for the whole term, and so may the other; and this way they may settle in friends trusted for them a moiety for each. *Offic. Exec.* c. 9.

With regard to their duty.

The duty and office of an executor is to bury the testator in a decent manner, according to his rank and quality, and with a due regard to the estate left after debts are satisfied; for whatever an executor lays out extravagantly in funeral charges, if there be not enough to pay debts, he must bear it at his own expence. *Wood's Inst.* 325. The common sum allowed for a funeral of an insolvent is 40s. But all reasonable and necessary funeral charges must be allowed before debts and legacies. 1 *Rel. Abr.* 926. The executor is to make an inventory of all the goods and chattels of the deceased, with their values, and of all debts due to the testator; and this inventory ought to be made and appraised in the presence of the executor, by two or more of the creditors, or two next of kin to the testator; or in their default, by two or more of the neighbours or friends of the deceased: and then the executor must deliver the same upon oath to the ordinary. *Doll. & Stud.* c. 10. 21 H. 8. c. 5.

The inventory shews the charge of the executor, and his account must be his discharge, for so much as he can prove to be laid out in the payments for funeral charges, making the inventory, probate of the will; debts and legacies: this account will discharge him of all suits in the Spiritual Court; but will not discharge him of suits at the common law; for there each particular must be again proved. *Wood.* 328. An executor is to pass his account before the ordinary, for the goods and chattels of the testator; but the ordinary may not call executors to account *ex officio.* 9 *Rep.* 39.

By statute no executor or administrator shall be cited into any Ecclesiastical Court to render an account, otherwise than by inventory, unless at the instance of a creditor, &c. 1 *Jac.* 1. c. 17. It has been held, an executor is bound to account; and the ordinary must take the executor's account, when he is summoned by any creditor, and cannot hold plea of it, because 'tis made upon oath: but if a legatee comes, he may unravel the account, though if the executor will pay him his legacy, then he cannot compel him to exhibit an inventory or to account, he having the end of his suit. 2 *Inst.* 600. *Raym.* 407. *Hill.* 6 Ann.

The executor is to prove the will before the ordinary in common form, by his own oath, or by witnesses, if required by those who have a right to question it; and being exhibited in the register's office of the Ecclesiastical Court, a copy in parchment is delivered the executor under the ordinary's seal, which is called the probate. *Perk.* 486. 9 *Rep.* 37. 1 *Inst.* 488. One may prove a will before the ordinary, which contains goods and lands; though formerly a prohibition was granted as to the lands: and a will of freehold land is to be proved by witnesses in the Chancery. 1 *Vent.* 207. 6 *Rep.* 23. The proving of the will is necessary for goods and chattels, to give the

the executor power to bring actions, and confirm the acts he did as executor before: when this is done, the executor is to pay all the testator's debts before any legacies. For the order of paying them, see *Administrator*, also *1 Rol. Abr.* 927. *Plowd.* 543. See *Jenk. Cent.* 274. And if the executor pays the debts in any other order, he is liable to the payment of the debts of a higher degree, though out of his own estate. *Doct. & Stud.* c. 10. The executor, &c. paying debts on contract, shall not be relieved against a bond-debt, although he had no manner of notice of it; for this would be to alter the course of the law. *Preced. Chan.* 534. An executor is allowed to retain his own debt in preference to others of equal degree. *Preced. Chan.* 179. *Noy Max.* 104. 3 *Lein. cap.* 364. If no suit is begun against the executor, he may pay the whole debt to any one creditor in equal degree, though there be nothing left to pay another any part of his debt. *Wood's Inst.* An executor pays a debt upon bond before a statute broken, and afterwards the statute is broken, the payment of the debt upon bond is a good plea against the statute. *Cro. Jac.* 9. Pending a bill in equity against an executor, he may pay any other debt of a higher nature, or of as high a nature, where he has legal assets: but where there is a final decree against an executor, if he pays a bond, it is a mispayment; for a decree is in nature of a judgment. 2 *Salk.* 507.

If there be several debts due on several bonds from the testator, his executor may pay which bond debt he pleases, except an action of debt is actually commenced against him upon one of those bonds; and in such case, if pending an action; another bond-creditor brings another action against him, before judgment, obtained by either of them, he may prefer which he will by confessing a judgment to one and paying him, which judgment he may plead in bar to the other action. *Vaugh.* 89. See *Sid.* 21.

Executors sometimes confess judgment presently to a friend for his debt, for they are not bound to stand suit; and plead dilatory pleas to a stranger's debt, that the friend may be first paid upon the execution: and executors may give precedence as they please before execution: but if judgment for 100*l.* is suffered, and the plaintiff compounds for 60*l.* the judgment for the whole sum shall not be allowed to keep off other creditors. 8 *Rep.* 133. In action of debt against an executor, he may plead a judgment obtained against him by another, *ultra quod* he hath not assets, which judgment is in force; though judgments are not to be kept on foot by fraud. *Sid.* 230. 1 *Vent.* 76. On a *Sci. fac.* against an executor, he cannot plead fully administered, but must plead specially that no goods of the testator came to his hands, whereby he might discharge the debt; for he may have fully administered, and yet be liable to the debt, where goods of the testator's afterwards come to his hands. 1 *Lill.* 568. *Cro. Eliz.* 575. In *Scire facias* against executors, upon a judgment against their testator, they pleaded *Plene Administravit*, by paying debts upon bonds *ante Notitiam*: It was adjudged no plea, for at their peril they ought to take notice of debts upon record, and first pay them; and though the recovery be in another county than that where the testator lived: but where an action is brought against executors in another county than where they live, and they not knowing thereof, pay debts upon specialty, it is good. *Cro. Eliz.* 793. Where day of payment is past, the penalty of a bond is the sum due at law, but where the day of payment is not come the sum in the condition is the debt, and the executor cannot cover the assets any further. *The Bank of England v. Morrice Widow, Rep. Temp. Hardw. Per Annull.* 224.

If a surety pay the debt of his principal, who is dead, 'tis said the executor is not liable at law to repay him, without a promise; but he is liable in equity. *Sid.* 89. 3 *Salk.* 96. A bill may be exhibited in the Chancery against an executor, to discover the testator's personal estate; and thereupon he shall be decreed to pay debts and legacies. *Abr. Ca. Eq.* 238. If a person being executor, and his testator greatly indebted, be desirous to pay the assets as far as they will go, and that his payments may not be afterwards questioned, he may bring a bill in equity against all the testator's creditors, in order that they may, if they will, contest each other's debts, and dis-

pute who ought to be preferred in payment. 2 *Vent.* 37.

Where there are only *equitable assets*, they must be equally paid amongst all the creditors; for a debt by judgment, and simple contract is in conscience equal. 2 *Peer Williams* 416. As to what are legal, and what equitable assets, see *Vin. Abr.* title *Payment*. And it is held, that bonds, and other debts, shall be paid equally, by executors, where a person has devised lands to them, to be sold, for the payment of his debts. 1 *Peer Will.* 430. A debt devised by the testator, is not to be paid by the debtor to the legatee, but to the executor, who can give a sufficient discharge for it, and is answerable to the legatee if there be sufficient assets. If an executor pays out the assets in legacies, and afterwards debts appear, of which he had no notice, which he is obliged to pay; the executor by bill in Chancery may force the legatees to refund. *Chan. Rep.* 136, 149. One legatee paid shall refund against another, and against a creditor of the testator, that can charge the executor only in equity: but if an executor pays a debt upon simple contract, there shall be no refunding to a creditor of a higher nature. 2 *Vent.* 360.

Executors are not bound to pay a legacy, without security to refund. *Chan. Rep.* 149, 257. And if sentence be given for a legacy in the Ecclesiastical Court, a prohibition lies, unless they take security to refund. 2 *Vent.* 358. If an executor pays legacies, and seven years after covenant is broken, for which action is brought against the executor; the court inclined that it was a *Devastavit*, and that the executor ought to have taken security for his indemnity upon payment of the legacies. *Allen* 38. Though it has been adjudged, that a covenant is no duty till broken; and therefore since it is uncertain, whether it will be broken or not; it shall be presumed it will not; and the legacies being a present duty shall be paid by the executor, notwithstanding any covenant not actually broken. *Style* 37. 1 *Nelf. Abr.* 786. If one binds himself and his executors in an obligation, &c. to perform a certain thing, and in his will gives divers legacies and dies, leaving goods only sufficient to pay the obligation when forfeited; this obligation shall be no bar to the legacies, because it is uncertain whether the same may ever be forfeited: though the executor may therefore make a delivery upon condition, *viz.* to return the legacies if the obligation becomes forfeit, and the penalty be recovered. 1 *Rol. Abr.* 928. 2 *Vent.* 358.

The executor is to pay the legacies, after the debts; and he may prefer a legacy to himself, if nothing remains to discharge the other legacies. *Plowd.* 545. *Offic. Exec.* 204. But executors cannot in equity pay their own legacies first, where there is not enough to pay all of them; but shall have an equal proportion with the rest of the legatees. *Chan. Rep.* 354. An executor has election, where any chattel is given to him, to have and take in one right or the other, *viz.* as executor, or legatee; which is to be made by a special taking or declaration, &c. 10 *Rep.* 47. *Plowd.* 519. *Dyer* 277. After the executor hath his own legacy, he may pay what legacies he pleases first; or pay each legatee a part in proportion, if there be not enough to pay every one his whole legacy; and he is not bound to order, as he is in the payment of debts due from the testator. 2 *Vent.* 358, 360.

If there be a specific legacy given of any thing, as a horse, silver cup, &c. it must be delivered before any other legacy, provided there be assets. *Offic. Exec.* 317. And if there be enough to pay all the legacies, after the debts are satisfied, the legacies shall all be paid; but if there is not sufficient to pay debts or more, the legatees must lose their legacies. *Plowd.* 526. See 1 *Lill. Abr.* 579. *Wood's Inst.* 322. 4 *Ann.* in *B. R.*

A testator made one executor who was no relation to him, and gave him 50*l.* And the next of kin exhibited a bill in Chancery for the *Residuum* of the estate; and it was determined that the executor should not have the residue, but the next of kin to the testator; but if the executor had been nearly related to the testator, it might be otherwise; though in such case, if there were other relations in equal degree, poor and indigent, equity would give the residue among them. 3 *Salk.* 82. I

there be an express legacy given to an executor, and no devise of the surplus estate, that shall generally go to the next kindred according to the statute of distributions. And where two persons were appointed executors, having legacies given them; it was decreed in equity, that the executors should be only trustees as to the residue of the estate, after the legacies paid, which should remain to the testator's next of kin, &c. 2 Vern. Rep. 361, 677.

In a case of the like nature, the surplus of the testator's personal estate, has been adjudged to be in trust for his children, though they had particular legacies. 1 Vern. 473. *Abr. Cas. Eq.* 244. Also a man by his will gave legacies to relations, near the value of his estate, and made a certain person executor, to whom he gave a small legacy, and desired him to take the trouble of the executorship; after the making of which will, the testator lived ten years, and acquired a considerable additional estate, and then died; on a bill brought by his relations, against the executor, to have an account of the personal estate, and the surplus distributed amongst them; here the new acquired estate was decreed to go to the legatees, in proportion of each one's legacy. *Preced. Canc.* 12. The surplusage of an estate, given to pay debts, &c. after debts, legacies and portions paid, hath been ordered by the Court of Chancery to go to the heir. *Chan. Rep.* 189. *Overseers* of a will have nothing to do with the execution of it, but are only to give advice to the executors; and if they will not do their duty, to complain of them to the spiritual court, &c.

IV. Of actions by and against executors and therein of *De-rapavit*.

For the goods of the testator, taken from them, or for trespass upon the land, &c. Executors may before the will proved bring action of trespass, detinue, &c. And if they sell cattle, or other goods of the testator, before the will is proved, they may have actions for the money payable, before the same is proved: and an executor may be sued for the debts of the testator before probate of the will, if he be executor by his own act of administering, which makes him liable to actions. *Offic. Exec.* 35. It has been ruled, that an executor may commence an action before probate; but he cannot declare upon it, without producing in court the letters testamentary: he is not like an administrator, who hath no right till administration committed; for his right is the same before, as after probate of the will, and the not proving it, is only an impediment to the action. 1 Salk. 303.

Executors may maintain action of trover for goods converted in the life of the testator. *Cro. Eliz.* 377. And by the statute, executors shall have a writ of account, and the like action and process, as the testator might have had. 13 Ed. 1. c. 23. The executors may bring actions for trespass done to their testator, as for goods and chattels carried away in his life, and shall recover their damages in the same manner as he should have done. *Stat. 4 Ed. 3. c. 7.* Also executors of executors shall have actions of debt, account, and of goods taken away of the first testator's; and have execution of statutes, &c. and shall answer to others, so far as they recover goods of the first testator, as the first executors. 25 Ed. 3. c. 5.

The word executor is a word collective, and doth comprehend in it the executor of an executor; for he is accountable for the first testator's goods, and is as it were his executor for such goods as remain unadministered by the first executor. 1 Lill. Abr. 568. Formerly, if an executor wasted goods and left an executor, and died leaving assets, his executor should not be chargeable, because it was a personal tort. 2 Lev. 120. But now it is otherwise by the statute 30 Car. 2. cap. 7. made perpetual by 4 & 5 W. & M. c. 24. And see *Cam. Dig.* 1 P. 276. (I. 3.) The law subjects the executors to every person's claim and action, which he had against the testator; for which reason the executor is said to be the testator's assignee, and to represent the person of the testator: but for personal wrongs done by the testator to the person, or goods, &c. of another, the executor doth

not represent him; because personal actions die with the person. 1 Inst. 209. 9 Rep. 89.

Nothing can be debt in the executor, which was not debt in the testator. *Cro. Eliz.* 232. A promise to pay to an executor, when the testator is not named, is not good. *Cro. Jac.* 570. But a testator may bind his executors as to his goods, though he himself is not bound, *Ibid.* And an executor may recover a duty due to the testator, though he be not named. *Dyer* 14. Action lies against an executor upon a collateral promise made and broke by the testator. *Cro. Jac.* 663. The testator's *Assumpsit* to do any collateral thing, as to build an house, &c. which is not a debt, binds executors. *Jenk. Cent.* 290, 336. *Assumpsit* lies upon a contract of the testator; and the reason is the same upon a promise, where the testator had a valuable consideration. *Palm.* 329. Though a debt upon a simple contract of the testator, cannot be recovered of the executor by action of debt; yet it may by *Assumpsit*. 1 Lev. 200. 9 Rep. 87.

If two persons are jointly bound, and one of them dies, the survivor only shall be charged, and not the other's executor. *Pasch.* 16 Car. 2. Also when there are two executors, if one of them dies, action is to be brought against the surviving executor, and not the executor of the deceased: but in equity, the testator's goods are liable in whosoever's hands they are. 1 Leon. 304. *Chan. Rep.* 57. Bills in equity for debts without specialty, have been allowed to be brought against executors, with an averment that they had assets; and no difference has been made where the party seeks for relief either before or after a judgment given against him at law. *Moor* 566.

Assets shall be always intended, till the executors alledge the want of them in excuse. 9 Rep. 90, 94. If an obligee makes the obligor executor, this is a release in law of the debt; but it shall be assets in his hands; if there be no assets beside to pay other creditors. 8 Rep. 136. 2 Roll. Abr. 920. When an obligor is made executor by the obligee, by administering some of the goods, he hath accepted the executorship, and 'tis that which makes the release; because by being executor he is the person who is to receive the money due on the bond, and he is likewise the person to pay it; and the rule is, that where the same hand is to receive and pay, that amounts to an extinguishment. 1 Salk. 305.

But a person who owed the testator 400 l. was made executor, where debts, legacies, and a residuary estate were devised; and though it was insisted that the debt was discharged by the debtor's being made executor, and that there was sufficient to pay the debts and legacies, yet it was decreed in equity against the executor, that he should pay the 400 l. to the residuary legatee. 1 Chan. Rep. 292. It has been adjudged, that an obligee making the wife of an obligor executrix, had suspended the action on the bond so long as the executorship continued; and that a personal action being suspended by the act of the party himself, is quite extinguished: this was in a case where the testator devised all his goods to the wife of the obligor, and made her sole executrix. *Moor* 855. *Hutt.* 128. If an obligee is made executor by the obligor, the debt is not released, but the obligee may still sue for the debt, unless he administers, when if he sues he must sue himself, which cannot be, and in this case he may retain the goods of the obligor testator in satisfaction of his debt. 2 Lev. 73. 2 Nels. Abr. 785. And if there be no assets, the obligee executor may sue the heir of the obligor testator in action of debt upon his bond. 1 Salk. 304. 1 Lill. Abr. 575.

If an executor releases all actions, suits and demands, it extends only to demands in his own right, not such as he hath as executor. *Shew* 153. And where an executor grants *omnia bona sua*, though some are of opinion that the goods which he hath as executor will pass; yet others hold the contrary. *Noy* 106. 4 Leon. 70. An executor shall be charged with rent in the *detinet*, if hath assets; and if he continues the possession, he shall be charged in the *debet* and *detinet*, in respect of the perception of the profits, whether he hath assets or not. 1 Lev. 127. But an executor is not suable in the *debet* and *detinet* for part, and in the *detinet* for the other part; because they require several judgments, viz. *De bonis propriis* for the

debit and *detinet*, and *de bonis testatoris* for the *detinet*. 3 Lev. 74. See title *Debit and Detinet*.

If an executor has a term, and the rent reserved is more than the value of the premises, in action brought against him for it in the *debit* and *detinet*, he may plead the special matter, *viz.* That he hath no assets, and that the land is of less value than the rent, and demand judgment if he ought not to be charged in the *detinet tantum*: and he cannot waive the lease; without renouncing the whole executorship. 1 Salk. 297. It hath been held, that if an executor alters the property of things from the testator to himself, by paying a debt to the value; or by paying the rent of a lease, and receiving the profits, or part of the profits equal to the rent, the things and profits received are his own. Dyer 187, 885. 5 Rep. 31.

One executor cannot regularly sue another at law; but he may have relief in equity: In the eye of the law all are but as one executor; and most acts done by, or to any of them, are esteemed acts done by, or to all of them. 1 Rol. Abr. 918. If where one executor is sued, he plead that there is another executor, he ought to shew that he hath administered. 1 Lev. 161. And he only that administers is to be sued in actions against executors; but actions brought by executors are to be in the name of all them, though some do not take upon them the executorship. 1 Roll. 924. Jenk. Cent. 106, 107. If any executor refuses to join in an action, with his co-executors, he must be summoned and sequestered.

An executor is not disabled by outlawry, to sue for the debts of the testator. Special bail is not required of executors, &c. in any action brought for the testator's debt: and executors, or administrators are not liable to costs. *i. e.* Where they sue in right of the testator. Hur. 69. Cro. Eliz. 503. Yel. 168. Dal. 96. Bend. pl. 28. 2 Rol. 87. Com. Dig. 2 V. 439.

If an executor brings a writ of error, though the judgment is affirmed, he shall not pay any costs; because as he is executor, it is *in outer droit*: also an executor shall not put in bail on a writ of error, *causa supra*. Mich. 5 W. & M. Executors are excused from paying costs, as being presumed to have no knowledge of the affairs of the testator; and therefore they shall pay costs for not going on to trial, or where the cause of action arises to the executor himself, &c. 1 Salk. 207. 3 Salk. 106. No action shall charge an executor to answer damages out of his own estate, upon any promise to another, unless there be some writing thereof signed by the party to be charged therewith. 29 Car. 2. c. 3.

On any judgment after verdict, had by or in the name of an executor, or administrator; an administrator *de bonis non* may sue forth a *Scire facias*, and take execution upon such judgment. Stat. 17 Car. 2. c. 8. Before this statute it was not so; where an executor, &c. died, for want of privacy, the administrator was to begin again. 2 Nels. Abr. 789. If an executor makes himself a stranger to the will of the testator, or pleads *Ne unques* executor, or any false plea, and it is found against him, judgment shall be *de bonis propriis*: in other cases, *de bonis testatoris*. Cro. Jac. 447. If on a *Scire facias* against an executor, the sheriff return a *Devasavit*; the plaintiff shall have judgment and execution *de bonis propriis* of the defendant: and if *nulla bona* be returned, he may have either a *Capias Satisfaciend.* or an *Elegit*. 2 Nels. 791. Dyer 185. But one executor shall not be charged with a *Devasavit* made by his companion; for the act of one shall charge the other no further than the goods of the testator in his hands amount to. Cro. Eliz. 318. If an executor does any waste, or misemploys the estate of the deceased, or doth any thing by negligence or fraud, &c. it is a *Devasavit*, and he shall be charged for so much out of his own goods. 8 Rep. 133. And a new executor may have an action against a former executor, who wasted the goods of the deceased; or the old one may remain chargeable to creditors, &c. Hob. 266.

If an executor takes an obligation in his own name, for a debt due by simple contract to the testator, this shall charge him as much as if he had received the money; for the new security hath extinguished the old

right, and is *quasi* a payment to him. Off. of Ex. 158. Yelv. 10. 1 Lev. 189.

So if the executor sues a person by trover and conversion, in which he has a right to recover; and afterwards he and the defendant come to an agreement, that he shall pay the executor such a sum at a future day, and the party fails, this is a *Devasavit*; and he shall answer *ad valorem*. 2 Lev. 189. 2 Jon. 88. S. C. 1 Vern. 474. S. C.

It is a *Devasavit* to permit interest to run in arrear, and then suffer judgment for it; and want of assets to pay before the incurring of it; by the administrator shall not be intended unless it be expressly pleaded. 2 Lev. 40. Hill. 23 & 24 Car. 2. B. R. Seaman v. Dee.

An executor in case of a *Devasavit* is in nature of a trustee of an estate. Chanc. Cases 304. Mich. 29 Car. 2. in Vanacre's case. See more of Executors, under Administrators, Assets, Joint Executors, Wills, &c.

Executory, is where an estate in fee created by deed or fine, is to be afterwards executed by entry, livery, writ, &c. And leases for years, rents, annuities, conditions, &c. are called inheritances *executory*. Wood's Inst. 293. Estates executed are when they pass presently to the person to whom conveyed, without any after-act. 2 Inst. 513.

Executory Devise, is said to be where a future interest is devised, that vests not at the death of the testator, but depends on some contingency which must happen before it can vest. 1 Eq. Cas. Abr. 186.

These executory devises may be,

I. Of lands of inheritance.

II. Of terms for years.

I. With respect to the former.

If a particular estate is limited, and the inheritance passes out of the donor, this is a contingent remainder; but where the fee by a devise is vested in any person, and to be vested in another upon contingency, this is an executory devise: and in all cases of executory devises, the estates descend until the contingencies happen. Raym. 28. 1 Lutw. 798. Where a contingent estate limited, depends upon a freehold, which is capable of supporting a remainder, it shall never be construed an executory devise, but a remainder. And so it is, if the estate be limited by words *in presenti*, as when a person devises his lands to the heirs of A. B. who is living, &c. Though if the same were to the heir of A. after his death, it would be as good as an executory devise. 2 Saund. 380. 4 Mod. 255.

One by will devises land to his mother for life, and after her death, to his brother in fee; provided, that if his wife, being then *ensuit*, be delivered of a son, then the lands to remain to him in fee, and dies, and the son is born; in this case it was held, that the fee of the brother shall cease, and vest in the son, by way of executory devise, on the happening of the contingency; and here such fee estate enures as a new original devise to take effect when the first fails. Dyer 33, 127. Cro. Jac. 592. A remainder of a fee may not be limited by the rules of law after a fee simple; for when a man hath parted with his whole estate, there cannot remain any thing for him to dispose of: but of late times a distinction hath been made between an absolute fee-simple and a fee-simple which depends upon a contingency, or is conditionally limited; especially where such a contingency may happen in the course of a few years, or of one or two lives; and where such a remainder is limited by will, it is called an executory devise. 2 Nels. Abr. 797.

An estate devised to a son and his heirs, upon condition that if he did not pay the legacies given by the will within such a time, that then the land should remain to the legatees, &c. and their heirs: this limitation of a fee in remainder, after a fee limited to the son, being upon the contingency, of the son's failing in payment of the legacies, was adjudged good by way of executory devise. Cro. Eliz. 833. And where the father devised his lands to his youngest son and his heirs, and if he died without issue,

issue, the eldest son being alive, then to him and his heirs; this was held a good remainder in fee to the eldest brother, after the conditional contingent estate in fee to the youngest, as depending upon the possibility that he might be alive when his youngest brother died without issue; and his dying without issue, was a collateral determination of his estate, whilst the other was living. *Godb. 282. 2 Nels. Abr. 798.*

There can be no executory devise after an estate-tail generally limited, because that would tend to a perpetuity; and a contingency is too remote where a man must expect a fee upon another's dying without issue, generally: But dying without issue, living another, may happen in a little time, because it depends upon one life; and therefore a devise of a fee-simple to one, but to remain to another upon such a contingency, is now held good by executory devise. *2 Cro. 695.* Sometimes cross remainders in tail by implication, have been pleaded against executory devises.

II. As to executory devises of terms.

Formerly where a term of years, (which is but a chattel) was devised to one; and that if he died, living another person, it should remain to the other person, during the residue of the term, such a remainder was adjudged void. For a devise of a chattel to one for an hour, was a devise of it for ever. *Dyer 74.* But since it has been held, that a remainder of a term to one, after it was limited to another for life, was good: In a case where a testator having a term, devised that his wife should have the lands for so many years of the term as she should live; and that after her death the residue thereof should go to his son and his assigns; and this was the first case wherein an executory remainder of a term for years was adjudged good. *Dyer 253, 358.*

A person possessed of a term, devised it to his wife for eighteen years, and after to his eldest son for life, after to the son's eldest issue male during life; though he have no such issue, at the time of the devise, and death of the deviser, if he has before his own death, he shall have it as an executory devise. *1 Roll. 612.* But if one devise a term to his wife for life; the remainder to his first son for life, and if he dies without issue, to his second son, &c. the remainder to the second son is void, and no executory devise; yet where he dying without issue living at a person's death, may be confined to one life, it hinders not a remainder over. *Abr. Ca. Eq. 194.*

Executory devises, as to terms for years, are not extended beyond a life or lives; they ought to arise within the compass of one life. *1 Salk. 229.* Where there is an executory devise, there needs not any particular estate to support it; and because the person who is to take upon contingency, hath not a present but future interest, his estate cannot be barred by a common recovery; and for that it was a remainder not in being when the recovery was suffered, it has been adjudged it could not be barred by such a recovery. *2 Nels. Abr. 797, 798.* It is held executory devises, and limitations of the trust of a term, are governed alike. *1 Vern. 234.*

It is material to observe, that distinctions have been made where the devise was of the *occupation and profits of the land, &c.* in lease, and where the devise was of the *lease, or term itself*; as for instance, the husband being possessed of a lease for years, devised the *occupation of the lands* to his wife, for so many years as she should live, the residue to his son, and made her sole executrix, and died; the widow sold the lease, and died; adjudged, this was not a devise of the whole term to the wife; for she had it only conditionally, if she lived so long as the term continued, and her interest was to determine upon her death, so that her sale thereof was void against her son, because the remainder was to vest in him, upon the contingency of her dying before the term expired, therefore the devise to him shall be expounded to preclude the devise to her, that both may stand, and the rather, because there was no express estate for life devised to her; for if it had, then she would have a title to the whole term, because an estate for life, is in judgment of law more valuable than an estate for years. *Plow. Com. 519. Welken versus Elkington.*

Lessee for years devised all his term to his son, and his will was, that his wife should have the *occupation and profits of the lands*, during the minority of his son, &c. and he made her sole executrix, and died; the afterwards proved the will, then she sold the term, and died; adjudged, that this sale was void against her son, because it shall be intended that the devise to the wife, shall preclude the devise to the son, though it followed in words, and then she will not have the whole term, but only so much thereof for so long time as she should live, before her son came of age; and that the remainder was to vest in him, upon the contingency of his living till he came of full age. *Plow. Com. 53. Paramour versus Yardley.*

The husband being possessed of a term for years, devised the lease itself to his wife for her life, and after her death to her children unpreferred; it was insisted for the wife, that she had the whole term, for this was not like either of the cases last mentioned; it was not like the first, for that was a devise of the lands to the wife, for so many years as she should live; and it was not like the second, for that was a devise of the profits of the lands unto the wife, until her son came of age; but here the devise is of the lease itself, and the lands are not mentioned throughout the will; but adjudged that the wife had only an estate for so many years of the lease as she should live, and that so much as remained unexpired at her death, was to vest in the children upon the contingency of their living at that time. *1 And. 61. Amner versus Ladington. 2 Leon. 92. S. C. 3 Leon. 89. S. C. Gold. 26. S. C.*

In these three cases, (as ought to be in all) the court hath regarded the intent of the testator: and it seems so to have done, without much regard to the niceties in law. And with respect to devises, much greater latitude is allowed in the construction of wills, than of deeds.

What shall be construed an executory devise, and what a remainder, see *Wealby on the devise of Manley v. Boswells. Rep. Temp. Hardw. per Anny, 258, &c.*

Exemplification of Letters Patent. Is a copy or transcript of letters patent, made from the enrolment thereof, and sealed with the Great Seal of England, which exemplifications may be shewed or pleaded, as the letters patent themselves. But neither an exemplification nor *constat* was pleadable at Common law, because there was only the tenor of an enrolment, and the tenor of a record is not pleadable: Though by the statutes 6 R. 2. c. 4. 3 & 4 Ed. 6. c. 4. and 13 Eliz. c. 6. they are pleadable. *5 Rep. 53.* By the last mentioned statute, exemplifications of the enrolment of grants by letters patent, shall be of as good force in pleading for the patentees, &c. as if the patents were produced. One may exemplify a patent under the Great Seal in Chancery; and also any record or judgment, in any of the courts at *Westminster*, under the proper seal of each court; and such an exemplification may be given in evidence to a jury, &c. *1 Lill. 583. Shep. Abr. 134.* A rule made, or writ filed in any court at *Westminster*, may be exemplified in the court where made, or filed. *1651. C. B.* But nothing but matter of record ought to be exemplified. *3 Inst. 173.* Attested copies of records on stamped paper, are in general good evidence. The person who examines them proving the examination, and that the copy in question is a true copy.

Exemplification, Is a writ granted for the exemplification of an original record. *Reg. Orig. 290.*

Exemption, (*Exemptio*) Signifies a privilege to be free from service or appearance; as knights, clergymen, &c. are exempted to appear at the county-court by statute; and Peers from being put upon inquests. *6 Rep. 23.* Persons seventy years of age, apothecaries, &c. are also exempted by law from serving on juries: And justices of peace, attorneys, &c. from parish offices: *2 Inst. 247.* There is an exemption from tolls, &c. by the King's Letters Patent: And a writ of exemption, or of ease, to be quit of serving on juries, and all publick service. *Shep. Epitome 1029.*

Exercisable, Was anciently used for a heriot; being paid only in arms and military accoutrements. *Exercisable Viscontis filii Baronis Regis, qui erit proximus si, quatuor equi. Leg. Edw. Conf. 1.*

Exeter. By letters patent under the Great Seal, the site of the castle of *Exon* (part of the duchy of Cornwall) to be granted to some persons appointed by the justices in quarter-sessions for the county of *Devon*, for the term of 99 years, to the use of the said county and for other publick uses; under the ancient yearly rent of 10 l. *per annum*, payable to the crown. *Stat. 9 Ann. c. 19.*

Exfrediare, (From the Sax. *Frede, Frið, Peace*, and *Frithian*) To break the peace, or commit open violence. *Leg. H. 1. c. 13.*

Ex gravi Querela, Is a writ that lies for him to whom any lands or tenements in fee are devised by will, (within any city, town or borough, wherein lands are devisable by custom) and the heir of the devisor enters, and detains them from him. *Reg. Orig. 244. Old Nat. Br. 87.* And if a man devises such lands or tenements unto another in tail, with remainder over in fee, if the tenant in tail enter, and is seised by force of the intail, and afterwards dieth without issue; he in remainder shall have the writ *ex gravi querela* to execute that devise. *New Nat. Br. 441.* Also where tenant in tail dies without issue of his body, the heir of the donor, or he who hath the reversion of the land, shall have this writ in the nature of a *formedon in the reverter*. *Ibid.* If a devisor's heir be ousted by the devisee, by entry on the lands; he may not after have this writ, but is to have his remedy by the ordinary course of the common law. *Co. Lit. 111.*

Exennium or Exennium, A gift or present, and more properly a new year's gift.—*In expensis domini Regis & exennis eidem factis apud, &c. lxxv. fol.*—*Ex Compt. Dom. de Farend. MS.*

Exhibit, (Exhibitum) A word mentioned in the statute 14 *Car. 2. cap. 14.* And where a deed, or other writing is in a suit in Chancery exhibited to be approved by witnesses, and the examiner or commissioners appointed certify on the back of it, that the deed or writing was shewed to the witness, to prove it at the time of his examination, and by him sworn to; this is called an exhibit in law proceedings. The same, under a commission of bankruptcy.

Exhibito, An allowance for meat and drink, such as was customary among the religious appropriators of churches, who usually made it to the depending vicar; and the benefactions settled for the maintaining of scholars in the universities, not depending on the foundation, are called *exhibitions*. *Paroch. Antiq. 304.*

Exigendaries of the Common Pleas, (Exigendarii de Banco Comuni) Are otherwise called *Exigenters*, by *Stat. 10 H. 6. c. 4.*

Exigent, (Exigenda) Is a writ that lies where the defendant in an action personal cannot be found, nor any thing of his, within the county, whereby to be attached or distrained; and is directed to the sheriff, to proclaim and call him five county-court days, one after another, charging him to appear upon pain of outlawry: It is called *exigent*, because it *exaltat* the party, i. e. requires his appearance or forth-coming to answer the law; and if he come not at the last day's proclamation, he is said to be *quinqvies exaltus*, and is outlawed. *Crompt. Juris. 188.* The statutes requiring proclamations on exigents awarded in civil actions, are 6 *Hen. 8. c. 4.* and 31 *Elix. cap. 3.* Exigents are to be awarded against receivers of the King's money, who detain the same; and against the conspirators, rioters, &c. *Stat. 18 Ed. 3. c. 1.* And a writ of proclamation shall be issued to the sheriff to make three proclamations in the county where the defendant dwells, for him to yield himself, &c. by the *Stat. 31 Elix. c. 3.* The writ of exigent also lies in an indictment of felony, where the party indicted cannot be found: And upon suing out an exigent for a criminal matter before conviction, there shall be a writ of proclamation, &c. 3 *Inst. 31. 4 & 5 W. & M. c. 22.* If a person indicted of felony absent so long that the writ of exigent is awarded, his withdrawing will be deemed a flight in law, whereby he will be liable to forfeit his goods; and though he renders himself upon the exigent, after such withdrawing, and is found Not guilty, it is said the forfeiture shall stand. 5 *Rep. 110. 3 Inst. 232.* After a *capias* directed to the sheriff to take and imprison a person, &c. if he cannot be taken, an exigent is awarded: And after a

judgment in a civil action, the exigent is to go forth after the first *capias*; but before judgment, there must be a *capias*, alias and *pluries*. 4 *Inst. 177.* If the defendant be in prison, or beyond sea, &c. he or his executors may reverse the award of the exigent. See *Outlawry*.

Exigenter, (Exigendarius) Is an officer of the court of Common Pleas; of which officers there are four in number: They make all exigents and proclamations, in actions where process of outlawry doth lie; and also writs of *superseatas*, as well as the *prothonotaries*, upon such exigents made out in their offices. 18 *H. 6. c. 9.* But the issuing writs of *superseatas* is taken from them by an officer in the same court, constituted by letters patent by King James the First.

Exigi facias, The exigent is so called. See *Black. Com. 3 V. 283.* and *Exigent*.

Exile, A banishment or driving out of a person. *Lit. Diæ.* And this exile is either by restraint, when the government forbids a man, and makes it penal to return; or it is voluntary, where he leaves his country upon disgust, but may come back at pleasure. 2 *Lev. 191.*

Exilium, Signifies in law construction, a spoiling: And by the statute of *Marlbridge* it seems to extend to the injury done to tenants, by altering their tenure, ejecting them, &c. and this is the sense that *Fleta* determines; who distinguishes between *vassum*, *destructio* and *exilium*; for he tells us that *vassum* and *destructio* are almost the same, and are properly applied to houses, gardens or woods; but *exilium* is when servants are infranchised, and afterwards unlawfully turned out of their tenements.—*Vassum & destructio fere equipollent, & convertibiliter se habent in Domibus, Boscis & Gardinis; sed exilium dici poterit, cum servi manumittuntur, aut à tenementis suis injuriose ejiciuntur.* *Fleta, lib. 1. cap. 11.*—*Venditionem vel exilium non faciunt de Domibus, Boscis, vel hominibus, &c.* *Stat. Marl. c. 25.*

Exitus, Issue or off-spring: and applied to the issues or yearly rents and profits of lands.—*Et sciat vicecomes, quod redditus, blada in grangia, & omnia mobilia, præter equetaturam, indumenta & utensilia domorum, continentur sub nomine exituum.* *Stat. Westm. 2. c. 45.*

Exlegalitus, Is he who is prosecuted as an outlaw. *Leg. Edw. Confess. c. 38.*

Ex mero motu, Are words used in the King's charters and letters patent, to signify that he grants them of his own will and motion, without petition or suggestion of any other: And the intent and effect of these words, is to bar all exceptions that might be taken to the charters or letters patent, by alledging that the King in granting them was abused by false suggestions. *Kitch. 352.* When the words *ex mero motu* are made use of in any charter, they shall be taken most strongly against the King. 1 *Co. Rep. 451.*

Ex Officio, Is so called from the power a person has by virtue of an office, to do certain acts, without being applied to: As a justice of peace may not only grant surety of the peace, at the complaint or request of any person, but he may demand and take it *ex officio* at discretion, &c. *Dalt. 270.*

Ex Officio Informations, Are informations at the suit of the King, filed by the Attorney-General, as by virtue of his office, without applying to the court wherein filed, for leave, or giving the defendant any opportunity of shewing cause why it should not be filed. Add to this, the subject hereby loses the benefit intended by *Magna Charta*, i. e. of one jury, out of two, in criminal charges. How long this mode of proceeding will be admitted, in this free country, time must discover.

Exoneratone festin, Was a writ that lay for the King's ward, to be free from all suit to the county-court, hundred court, leet, &c. during wardship. *F. N. B. 158.*

Exoneratone festin ad Curiam Baron. A writ of the same nature, sued by the guardian of the King's ward, and directed to the sheriff or stewards of the court, that they do not distrain him, &c. for not doing suit of court. *New Nat. Br. 352.* And if the sheriff distrain tenants in ancient demesne to come to the sheriff's torn or leet, they may have a writ commanding the sheriff to *sequestrare*, &c. *Ibid. 359.* Likewise if a man have lands in divers

divers places in the county, and he is constrained to come to the leet where he is not dwelling, when he resides within the precinct of any other leet, &c. then he shall have this writ to the sheriff to discharge him from coming to any other court-leet than in the hundred where he dwelleth. *Ibid.* 357. By the Common law, parsons shall not be distrained to come to court-leets, for the lands belonging to their churches; and if they be, they may have the writ *exoneracione seclæ*, &c. *F. N. B.* 394. So shall a woman holding land in dower, if she is distrained to do suit of court for such land; when the heir has lands sufficient in the same county. *Ibid.*

Ex parte, Of the one part; as a commission in Chancery *ex parte*, is that which is taken out and executed by one side or part only, on the other party's neglecting or refusing to join: When both plaintiff and defendant proceed, it is a joint commission.

Ex parte talis, Is a writ that lies for a *bailiff* or *receiver*, who having auditors assigned to take his account, cannot obtain of them reasonable allowance, but is cast into prison: And the course in this case is to sue this writ out of the Chancery, directed to the sheriff to take four mainpernors to bring his body before the Barons of the *Exchequer* at a certain day, and to warn the lord to appear at the same time. *F. N. B.* 129.

Expectant, Having relation to or depending upon; and this word is used in the law with *fee*, as *fee-expectant*. If land is given to a man and his wife, to hold to them and their heirs; in this case they have a *fee-simple*. *Kitch.* 153.

Expectancy, *Estates in*; Are of two sorts; one created by act of the parties, called a *remainder*; the other by act of law, called a *reversion*. *Black. Com.* 2 *V.* 163, 4, &c.

Expeditate, (*Expeditare*) In the laws of the *forest*, signifies to cut out the ball of the dogs fore-feet, for the preservation of the King's game: But the ball of the foot of a mastiff is not to be taken out, but the three claws of the fore-foot on the right side are to be cut off by the skin. *Crompt. Jurisd.* 152. *Manswood, cap.* 16. This relates to every man's dog who lives near the forest; and was formerly done once in every three years: And if any person keeps a great dog not expeditated, he forfeits to the King 3 s. 4 d. 4 *Inst.* 308.

Expeditate Arbores, Trees rooted up or cut down to the roots.—*Inquiratur de arboribus expeditatis in foresta.* *Fleta*, lib. 2. c. 41.

Expeditores, Are the persons appointed by commissioners of *sewers* to pay, disburse or expend the money collected by the tax for the repairs of sewers, &c. when paid into their hands by the collectors, on the reparations, amendments and reformations ordered by the commissioners, for which they are to render accounts when thereunto required. *Laws of sewers* 87, 88. These officers are mentioned in the statute 37 *H. 8. c.* 11. and other statutes: the steward who supervises the repair of the banks and water-courses in *Romney-Marsh* is called the *Expeditor*.

Expensis Litis, Costs of suit allowed a plaintiff or defendant recovering in his action. See *Costs*.

Expensis militum non levandis, &c., Is an ancient writ to prohibit the sheriff from levying any allowance for knights of the shire, upon those that hold lands in ancient demesne. *Reg. Orig.* 261. For there is a writ *de expensis militum levandis*, for levying expences, for knights of the parliament, &c. *Reg. Orig.* 191.

Expleses, The rents or profits of an estate, &c. Vide *Esplees*.

Explorator, A scout; also a huntsman or chaser.—*In memoriam Henrici Croft equitis aurati, exploratoris in Hibernia generalis, qui obijt anno 1609.*

Exportation, Is the shipping or carrying out the native commodities of England for other countries; mentioned in the statutes relating to the *customs*. See *Importation*.

Expofition of Deeds, It shall be favourable, according to the apparent intent; and be reasonable and equal, &c. *Co. Lit.* 313. See *Deed*.

Courts will go great lengths in the construction of words to support the party's right, especially after verdict. *Rep. Temp. Hardw. per Anstwy 21.*

Ex post facto, Is a term used in the law, signifying something done after another thing that was committed before. And an act done, or estate granted, may be made good by matter *ex post facto*, that was not so at first, by election, &c. As sometimes a thing well done at first, may afterwards become ill. 8 *Rep.* 146. 5 *Rep.* 22.

Extend, (*Extendere*) Is to value the lands or tenements of one bound by a statute, who hath forfeited his bond, at such an indifferent rate, as by the yearly rent the creditor may in time be paid his debt. *F. N. B.*

Extendi facias, A writ of extent, whereby the value of lands is commanded to be made and levied, &c. *Reg. Orig.*

Extent, (*Extenta*) Signifies a writ or commission to the sheriff for the valuing of lands or tenements; and sometimes the act of the sheriff or other commissioner upon this writ. *Bro.* 313. *Stat.* 16 & 17 *Car.* 2. *cap.* 5. It hath been held more frequently to be the estimate or valuation of lands, which when done to the utmost value, is said to be the full extent; whence come our extended rents, or rack-rents. And if one bound to the King by specialty, or to others by statute, recognisance, &c. hath forfeited it; so that by the yearly rent of the debtor's lands, the creditor is to be paid his debt; upon this the creditor may sue a writ to the sheriff out of the Chancery to deliver him the lands and goods to the value of the debt, which is termed a *liberate*. *F. N. B.* 131. This is after the extent directed to the sheriff to seize and value the lands, &c. of the debtor, to the utmost extent. 4 *Rep.* 67. Lands and goods are to be appraised and extended by the inquest of twelve men, and then delivered to the creditor, in order to the satisfaction of his debt: Every extent ought to be by inquisition and verdict, by the *Stat. West.* 2. And the sheriff without an inquisition cannot execute the writ. *Cro. Jac.* 569.

The body of the cognisor, and all lands and tenements that were his at the time of the statute, &c. entered into, or afterwards, into whose hands soever they come, are liable to the extent. 2 *Inst.* 396. But copyhold lands are chargeable only during the life of the cognisor; and may not be extended by *elegit*, so as to admit a stranger to have interest in the lands held by copy, without the admittance of the lord. Lands in ancient demesne, annuities, rents, &c. are extendible. 1 *Roll. Abr.* 88. Two parts of an intire rent, may be delivered upon an extent by the sheriff. 1 *Cro.* 742. But if the cognisor of a statute have a rent-charge, and before the extent he purchase parcel of the land; the rent is gone, and shall not be in execution: 'Tis otherwise if he purchases after extent of the rent. *Dyer* 206. A reversion of lands, &c. may not be extended; but a plaintiff had judgment for his debt and damages *de reversione cum acciderit*, and a special *elegit* to extend the moiety, &c. 2 *Sid.* 86. *Dyer* 373.

An advowson in gross is not extendible on *elegit*, &c. *Stat. Westm.* 2. *cap.* 18. An office of trust cannot be extended, because 'tis not assignable; and nothing shall be extended, but what may be assigned over. *Dyer* 7. Though an office is extendible in equity. *Chanc. Rep.* 39. Goods and chattels, as leases for years, cattle, &c. in the cognisor's own hands, and not sold for valuable consideration, are subject to the extent. As the lands are to be delivered to the party at a reasonable yearly value, so the goods shall be delivered in extent at a price that is reasonable: And on a *seire facias ad computand.* the cognisee is to account according to the extended value; not the real value of the land. *Hardr.* 136. If the extenders appraise and value the lands too high, the cognisee at the return of the writ may pray that they may take and retain the lands at the rate appraised; and then 'tis said he may have execution against their lands for the debt; but this may not be on *elegit*. *Cro. Jac.* 12. It has been adjudged, that at the return of the writ, the cognisor may refuse the lands, &c. extended, if over-valued. *Cro. Car.* 148.

Where lands are extended at under-value, and delivered in execution; the cognisee hath an interest in the land, which cannot be divested by finding of surplussage.

1 Cro. 266. 2 Cro. 85. The cognisor cannot enter upon the cognisee, when satisfaction is received for the debt, but is put to his *scire facias* on an extent: Though on an *elegit*, the defendant may enter because the land is only awarded, till the debt, which is certain, is satisfied; whereas on extent, the land is to be held until the debt, damages and costs, &c. are satisfied: And the cognisee being in by matter of record, shall not be put out but by matter of record, viz. a *scire facias* brought against him. 4 Rep. 67. *March's Rep.* 207, 208. *See qu.* Where is the difference? Is not the tenant by *elegit* in by matter of record?

The cognisee hath no absolute property in lands by the extent, till the delivery upon the *liberate*; but notwithstanding, by the very extent they are in *custodia legis* for his benefit. *Cro. Car.* 106, 148. No actual seisin can be on an extent, and a cognisee of a statute staple, &c. cannot bring ejectment before the *liberate*; nor can the sheriff upon the *liberate* turn the tertenant out of possession, as he may upon a *hab. fac. possessionem*. 1 Vent. 41. Where there is an extent upon a statute, and a *liberate* thereupon, but not returned, yet it is good; though regularly when inquisitions are taken, the writ ought to be returned. 4 Rep. 67. 1 Lill. Abr. 592. The sheriff may be charged to make a return of his writ, if he put the cognisee in possession of part only; and so the cognisee may have possession of the whole. 2 Nels. Abr. 774. But if a person suing out an extent, die before the return of a writ, the sheriff may not proceed in his inquisition, &c. afterwards; for there must be a prosecution *de novo*. 1 Cro. 325.

After a full and perfect execution had by extent, returned, and of record, there shall never be any re-extent upon an eviction: But if the extent be sufficient in law, there may be a new extent. *Stat. 32 Hen. 8. cap. 5.* 1 Inst. 200. So if lands be extended upon a mistake, &c. and see *Dyer* 299. If part of the lands is evicted, the cognisee is to hold over the residue of the land till the debt is satisfied. 4 Rep. 66. When lands are delivered in extent, it is as if the cognisee had taken a lease thereof for years, until the debt is satisfied; and he shall never afterwards take out a new execution: The cognisee having accepted the land upon the *liberate*, the law presumes the debt to be satisfied. 1 Lutw. 429. An extent was filed, and tho' it was discovered that lands were omitted, the court would not grant a re-extent. *Sid.* 356. Lands or goods, &c. are not to be sold on an extent; but delivered. See *Statute*.

Extinguishment, (From *Extinguo*) Signifies a consolidation: For example; If a man hath an yearly rent out of lands, and afterwards purchases the lands whereout it ariseth, so that he hath as good an estate in the land as the rent; now both the property and rent are consolidated or united in one possessor; and therefore the rent is said to be extinguished. Also where a person has a lease for years, and afterwards buys the property; this is a consolidation of the property and fruits, and is an extinguishment of the lease: But if a man have an estate in land for life or years, and hath a higher estate as a fee-simple in the rent; the rent is not extinguished, but in suspense for a time; for after the term, the rent shall revive. *Terms de Ley.*

Extinguishment of a rent is a destroying of the rent by purchase of the land; for no one can have a rent going out of his own land; though a person must have as high an estate in the land, as in the rent, or the rent will not be extinct. 1 Inst. 147. If a person hath a rent-charge to him and his heirs, issuing out of lands, and he purchaseth any part of the land to him and his heirs; as the rent is intire and issuing out of every part of the land, the whole rent-charge is extinguished: Though it is not so where one hath a rent-service, and purchaseth part of the land out of which it issues; rent-service being apportionable according to the value of the land, so that it shall only extinguish the rent for the land purchased. *Litt.* 222. 1 Inst. 148. And if the grantee of a rent-charge, purchases parcel of the lands, and the grantor by his deed granteth that he may distrain for the rent in the residue of the land, this amounts to a new grant. 1 Inst. 147.

If a man be seised of a rent-charge in fee, and grants it to another and his heirs, and the tenant attorns; the

grantor is without remedy for the rent in arrear before his grant; and such arrears become as it were extinct. *Vaugh.* 40. 1 Lill. Abr. 594. A. B. made a lease for years of lands to another, and afterwards granted a rent-charge to C. D. who devised the said rent to the said A. B. till 100 l. should be levied; then to B. G. and died: Adjudged that by the devise to A. B. the rent was suspended, and that a personal thing once suspended by the act of the party, is extinguished for ever. *Dyer* 140. But if a man in contemplation of marriage gives a woman a bond, to leave her at his death, if she survive him, so much, and afterwards marries her, dies, and she survives him, yet tho' the bond was by the marriage, in some sort, extinguished, yet 'tis said (and we think with justice) that on his death, the bond is revived.

If tenant for life, makes a lease for years, rendering rent, and after the reversion descends to the tenant for life; this is not an extinguishment of the term; but it is otherwise if he have the reversion by purchase. 1 Co. Rep. 96. A jointenant for life purchases the land in reversion, it will extinguish the estate for life for a moiety, and sever the jointure. 2 Rep. 60. Lands are given to two men, and the heirs of their bodies; though they have an estate for life jointly, and several inheritances, yet the estate for life is not extinct: *Contra*, if it be by several conveyances; as where a lease is made to two for their lives, and after the lessor grants the reversion to them and their heirs, &c. here the life estate will be extinguished. 1 Inst. 182. If one after his title begun to be tenant by the curtesy, make a feoffment in fee upon condition, and enter for the condition broken; the estate is extinct, so that if his wife die, he shall not be tenant by the curtesy. 1 Rep. 18. Where a man hath an estate for his own life, and for another's life at once; the estate *pur autre vie* will be extinguished in the estate for his own life, which is greater in law than the other. 11 Rep. 87. *Dyer* 11. See *Bro.* 409. *Moor* 94. 2 Nels. Abr. 821. When the freehold cometh to the term, the estate for years is extinct. *Nels. Ibid.* 820. Where the remainder of a term is granted over to another, if the party in possession purchase the fee-simple, though by this means his interest is extinguished; yet that shall not defeat the reversionary interest. 10 Rep. 52. 2 Nels. 820. A fine, &c. of lands, will extinguish a term: And by purchase of an estate in fee-simple, an estate-tail in land is extinct. 9 Rep. 139. But if a fee-simple and fee-tail meet together by descent, the estate-tail will not be extinguished. 3 Rep. 61. Descent of lands to the same person who has a term, will extinguish the term. *Moor* 286. When a lessor enters tortiously upon the lessee against his consent, the rent is extinguished. 2 Lev. 143. But it has been adjudged, that rent is not extinct by the entry of the lessor, but only suspended; and revives by the lessee's re-entry. *Dyer* 361. An infant has a rent, and purchases the land out of which it is issuing; by this the rent will be suspended, but not extinct. *Bro. Extinguish.* A man lessee for years takes a wife, or woman lessee a husband, that hath the reversion after the lease; here the term is not extinguished. 12 Rep. 81.

There are likewise extinguishments of other kinds, which comes next in their order. As

Extinguishment of Common. By purchasing lands wherein a person hath common appendant, the common is extinguished. *Cro. Eliz.* 594. A commoner releases his common in one acre, it is an extinguishment of the whole common. *Show. Rep.* 350. And where a person hath common of vicinage, if he incloses any part of the land, all the common is extinct. 1 Brownl. 174.

But if one hath common appendant in a great waste, belonging to his tenant, and the lord improve part of the waste leaving sufficient; if he after make a feoffment to the commoner of the land improved, this will be no extinguishment. *Dyer* 339. *Hobd* 172. A commoner aliens part of his land, to which the common doth belong; the common is not extinct, but shall be divided. 2 Shep. Abr. 152. Vide *Common*.

Extinguishment of Copyhold. As to the extinguishment of copyholds, it is laid down as a general rule, that any act of the copyholder's, which denotes his intention

to hold no longer of his lord, and amounts to a determination of his will, is an extinguishment of his copyhold. *Hutt.* 81. *Cro. Eliz.* 21. 1 *Jon.* 41.

As if a copyholder in fee accepts a lease for years of the same land from the lord, this determines his copyhold estate; or if the lord leases the copyhold to another, and the copyholder accepts an assignment from the lessee, his copyhold is extinct. *Moor* 184. 2 *Co.* 16. b. *Godb.* 11. 101.

So if a copyholder bargains and sells his copyhold to the lessee for years of the manor, his copyhold is thereby extinguished; or if he joins with his lord in a feoffment of the manor, his copyhold is thereby extinct, for these are acts which denote his intention to hold no longer by copy. *Hutt.* 65. 1 *Jon.* 41. *S. C.* *Godb.* 11.

So if a copyholder accepts to hold of his lord, by bill under the lord's hand, this determines his copyhold; so if he accepts an estate for life by parol, if livery, this is an extinguishment; otherwise not; for without livery nothing but an estate at will passes, which cannot merge or extinguish an estate at will. 1 *And.* 199. *Latch.* 213.

If one seised of a manor in right of his wife lets lands by indenture for years; this doth not destroy the custom as to the wife; for after the death of her husband she may demise it again by copy. *Cro. Eliz.* 459.

So if a copyhold is in the hands of a subject, who after becomes King, the copyhold is extinct, for it is below the Majesty of a King to perform such servile services; yet after his decease the next that hath right shall be admitted, and the tenure revived. 2 *Sid.* 82. 4 *Co.* 24. *Cro. Eliz.* 257. See 2 *Leon.* 208. 4 *Co.* 26. b. *Cro. Eliz.* 103. And a copyhold estate is extinct whenever it becomes not demisable by copy. *Coke's Copyhold* 62.

Extinguishment of Debt. If feme sole debtee take the debtor to husband; or there be two joint obligors in a bond, and the obligee marries one of them; or in case a person is bound to a feme sole and another, and she takes the obligor to husband; in these cases, the debt will be extinguished. 8 *Rep.* 136. And if a debtor makes the debtee his executor, or him and another executors, and they take the executorship upon them; or if the debtee makes his debtor executor, &c. it is an extinguishment of the debt, and it shall never revive. *Plowd.* 184. 1 *Salk.* 304. But where a debtee or debtor executor legally refuseth; or he and others being made executors they all refuse, then the debt is revived again. *Plowd.* 185.

It seems to be agreed as a general rule, that a creditor's accepting a higher security than he had before, is an extinguishment of the first debt; as if a creditor by simple contract accepts an obligation, this extinguishes the simple contract debt. 1 *Roll. Abr.* 470, 471, 604. 6 *Co.* 44.

So if a man accepts a bond for a legacy, he cannot after sue for his legacy in the spiritual court; for by the deed the legacy is extinct, and it is become a mere debt at Common law. *Yelv.* 38.

So if a bond creditor obtains judgment on the bond, or has judgment acknowledged to him, he cannot afterwards bring an action on the bond; for the debt is drowned in the judgment, which is a security of a higher nature than the bond. 6 *Co.* 44. b.

But these cases must be understood where the debtor himself enters into these securities; and therefore if a stranger give bond for a simple contract due by another, this does not extinguish the simple contract debt; but if upon making the contract, a stranger gives bond for it, or being present, promises to give bond for it, and after does so, the debt by simple contract is extinguished, the obligation being made upon, or pursuant to the contract. 2 *Leon.* 110.

But the accepting a security of an inferior nature is by no means an extinguishment of the first debt; as if a bond be given in satisfaction of a judgment. *Cro. Jac.* 579. 2 *Brownl.* 29. *Cro. Jac.* 649, 650.

Also the accepting a security of equal degree is no extinguishment of the first debt; as where an obligee has a second bond given to him; for one deed cannot determine the duty upon another. *Cro. Eliz.* 304, 716, 727. 1 *Brownl.* 74. *Lit. Rep.* 58. *Cro. Car.* 86.

Though a bond is taken for a simple contract debt, yet if it is after an act of bankruptcy, the simple contract is not extinguished. *Stran.* 1042.

A person hath 20*l.* due by contract, if he take an obligation for 10*l.* of it, the debt is extinct; and by release of part of a debt due on bond, the whole is gone, and the obligation extinguished. *Bro. Contract* 80. 1 *And.* 235.

Extinguishment of Liberties. As to liberties and franchises granted by the King, sometimes they may be extinguished, and sometimes they shall not. *Moor* 474. When the King grants any privileges, liberties or franchises, which were in his own hands, as parcel of the flowers of the crown; such as *bona felenum*, *fugitivorum* & *urlagatorum*, waifs, strays, deodand, wreck on the sea, &c. if they come to the crown again, they are drowned and extinct in the crown, and the King is seised of them *jure coronæ*: but if liberties of fairs, markets or other franchises, and jurisdictions, be erected and created by the King, they will not be extinguished, nor their appendances severed from the possessions. 9 *Rep.* 25. A man has liberties by prescription, if he takes letters patent of them, the prescription will be gone and extinct; for things of a higher determine those of a lower nature 2 *H.* 7. 5.

Extinguishment of Services. The lord purchases or accepts parcel of the tenancy, out of which an intire service is to be paid or done; by this the whole service will be extinct: but if the service be *pro bono publico*, then no part of it shall be extinguished; and homage and fealty are not subject to extinguishment, by the lord's purchasing part of the land. 6 *Rep.* 1, 105. *Co. Lit.* 149. If the lord and another person do purchase the lands, whereout he is to have services, they are extinct: also by severance of the services, a manor may be extinguished. *Co. Lit.* 147. 1 *And.* 257.

Extinguishment of Ways. If a man hath a highway as appendant, and after purchases the land wherein this way is, the way is extinct. *Terms de Ley.* Though a way of necessity to market, or church or to arable land, &c. is not extinguished by purchase of ground, or unity of possession. 11 *H.* 7. 25. 1 *Inst.* 155.

Extirpation. Is a judicial writ, either before or after judgment, that lies against a person who when a verdict is found against him for land, &c. doth maliciously overthrow any house, or extirpate any trees upon it. *Reg. Jud.* 13, 56.

Extorcate. To grub up lands, and reduce them to arable or meadow. *Mon. Ang.* tom 2. p. 71.

Extortion. (*extorsio*, from *extorqueo*, to wrest away) Is an unlawful taking by an officer, &c. by colour of his office, of any money, or valuable thing, from a person where none at all is due, or not so much is due, or before it is due. 1 *Inst.* 368. 10 *Rep.* 102. At the Common law, which was affirmed by the statute of *Westm.* 1. c. 26. it was extortion for any minister of the King, whose office did any way concern the administration and execution of justice, or the common good of the subject, to take any reward for doing his office, except what he received from the King: though reasonable fees for the labour and attendance of officers of the courts of justice are not restrained by statute, which are stated and settled by the respective courts; and it has been thought expedient to allow these officers to take certain immediate fees in many cases. 2 *Inst.* 209. 3 *Inst.* 149. 1 *Hawk. P. C.* 170, 171. The taking of money by virtue of an office, implies the act to be lawful; but to take any money by colour of an office, implies an ill action: and the taking being for expedition of business, is judged by colour of the office, and unlawful. 2 *Inst.* 206. 1 *Inst.* 368.

Yet according to some it seems that an officer, who takes a reward which is voluntarily given to him, and which has been usual in certain cases, for the more diligent or expeditious performance of his duty, cannot be said to be guilty of extortion; for without such a *premium* it would be impossible in many cases to have the laws executed with vigour and success. 2 *Inst.* 210. 3 *Inst.* 149. *Co. Lit.* 368.

But it has been always held, that a promise to pay an officer money for the doing of a thing, which the law will not suffer him to take any thing for, is merely void, however

however freely and voluntarily it may appear to have been made. 1 Rol. Abr. 16. 1 Rol. Rep. 313. Noy 76. 1 Jon. 65. Cro. Eliz. 654. Moor 468. Cro. Jac. 103.

There must be a positive charge in cases of extortion, and that the person charged with it took so much extorsive or *colore officii*; which words are as essential as *proditorie* or *felonice* for treason or felony. 2 Salk. 680. Extortion by the Common law is severely punished on indictment by fine and imprisonment, and removal of officers from the offices wherein committed. By the Stat. 3 Ed. 1. c. 30. Officers of justice, &c. guilty of extortion, are to render treble value; and there are divers statutes for punishing extortions of sheriffs, bailiffs, gaolers, clerks of the assize, and of the peace, attornies and solicitors, &c. 23 Hen. 6. c. 7. c. 9. 33 Hen. 8. c. 24. 3 Jac. 1. c. 7. 10 & 11 H. 3. c. 23. The extortion of officers of the customs, distraining merchants for undue charges, &c. See Stat. 28 H. 6. c. 5. Officers may be jointly indicted of extortion, as they may be jointly guilty of the offence. 1 Salk. 382. Against attornies for extortion, action may be brought, and the party grieved shall have treble damages and costs; but information will not lie on the Stat. 3 Jac. 1. cap. 7. Sid. 434. 2 Nels. 822. If an officer by terrifying another in his office, take more than his ordinary fees or duties, he is guilty of extortion; which may be compared to unlawful usury, &c. And Crompton says, that wrong done by any man is a trespass; but excessive wrong is properly extortion. Crompt. Just. 8. And extortion has been deemed more odious than robbery, because it carries an appearance of truth; and is often accompanied with perjury in officers, &c. by breaking their oaths of office.

The place where the extortion was committed should be set down in the declaration. See Pl. C. 200. Stradling v. Morgan.

The sum certain extorted must be particularly set forth, and he cannot say, that the defendant did extort divers sums from divers men generally; and so it was adjudged in *Reynold's* case; per *Richardson* Ch. J. *Godb.* 438. pl. 583. *Micb.* 4 Car. in the Star-Chamber; *Floyd v. Cannon.*

Extortion, in a large sense, is taken for any oppression by power or pretence of right. 1 Hawk. P. C. 170. See *Exaction.*

Extracta Curia. The issues or profits of holding a court, arising from the customary fees, &c. *Paroch. Antiq.* 572.

Extracts of writings or records, being notes thereof. See *Extracts.*

Extrajudicial. Is when judgment is had in a cause, not depending in that court where given; or wherein the judge has not jurisdiction.

Extra-parochial. Signifies to be out of any parish; and where any thing is privileged and exempt from the duties of a parish.

If a place be a reputed parish, and have churchwardens and overseers of the poor, it is within 43 Eliz. c. 2. though in truth it be no parish; but if it be merely extraparochial, as the justices cannot send to such a place, so they cannot send from it; as it is exempt from receiving, so it shall not have the benefit of removing, for they have not proper persons to complain; persons in extraparochial places must subsist on private charity, as all persons did at Common law before 43 Eliz. c. 2. which enacts, That every parish shall keep their own poor; and that act does not extend to extraparochial places. Per Holt Ch. J. 2 Salk. 487. pl. 48. Trin. 12 W. 3. B. R. *Inhabitants of the Forest of Dean v. The Parish of Linton.* Sed vide post.

By virtue of 13 & 14 Car. 2. cap. 12. sect. 21. The justices may exercise the powers given by 43 Eliz. c. 2. and that act, in all extraparochial places containing more houses than one, so as to come under the denomination of a vill or township. Adjudged by Parker Ch. J. and tot. cur. 2 Salk. 486. pl. 44. in Marg. cites 11 Ann. B. R. *Stoke-Lane Inhabitants v. Doling.*

The statute of 43 Eliz. c. 2. extends to extraparochial places, and so do all poor acts, when such places are within the same mischief as other parishes, and shall be

subject to the controul of the justices of peace, and the penalty for not meeting in the church shall never be inflicted on the overseers of the poor, because the inhabitants of such places have no church to meet in. Most of the forests in England are extraparochial, and so is *Christ-Church* in Oxford; but they ought to maintain their own poor. 8 Mod. 39. Pasch. 7 Geo. Rufford parish's case.

Extrabagants. Are certain constitutions of popes, so called, because they are *extra corpus canonicum gratiani*, five extra decretorum libros vagantur. Du Cange.

Extum. Reliques in churches and tombs.—*Cartular. Abbat. Glasston. MS. f. 15.*

Exuperare. To overcome; and it sometimes signifies to apprehend or take, as, *exuperare vivum vel mortuum.* Leg. Edm. c. 2.

Ey. *Insula*, an island: and where the names of places end in ey, it denotes them an island. As *Ramsey*, is the island of Rams; *Sheppy*, the island of Sheep; *Hersey*, the island of Harts, &c.

Every of hawks. See *Aery.*

Eyre. Vide *Eire*, and *Justices in Eyre.*

F.

F Is a letter wherewith *felons*, &c. are branded and marked with an hot iron, on their being admitted to the benefit of clergy. See the Stat. 4 H. 7. c. 13.

Fabrick Lands. Are lands given towards the rebuilding or repairing of cathedral and other churches; for in ancient times, almost every person gave by his will, more or less, to the *fabrick* of the cathedral or parish church where he lived; and lands thus given were called *fabrick lands*, being *ad fabricam reparandum*: these lands are mentioned in the Stat. 12 Car. 2. c. 8.

Facta Armorum. Feats of arms, jousts, tournaments, &c. —*Rex Ricardus in Angliam transfens statuit facta armorum, quæ vulgo torneamenta dicuntur; in Angliâ exerceri.* Hist. Joh. Brompton, in R. 1. p. 1261.

Fatto. In fact; as where any thing is actually done, &c. See *De fatto.*

Factor. Is a merchant's agent residing beyond the seas, or in any remote parts, constituted by letter or power of attorney: if the principal give the *factor* a general commission to act for the best, he may do for him as he thinks fit; but otherwise he may not. Though in commissions at this time, it is common to give the *factor* power in express words, to dispose of the merchandize, and deal therein as if it were his own; by which the *factor's* actions will be excused, though they occasion loss to his principal. Leg. Mercat. 151.

A bare commission to a *factor* to sell and dispose of merchandize, is not a sufficient power for the *factor* to entrust any person, or to give a further day of payment than the day of the sale of the goods; for in this case, on the delivery of the one he ought to receive the other: and by the general power of doing as if it were his own, he may not trust an unreasonable time, viz. beyond one or three months, &c. the usual time allowed for the commodities disposed of; if he doth, he shall be answerable to his principal out of his own estate. 1 Bull. 103. 7 Jar. 1. B. R.

If a *factor* buys goods on account of his principal where he is used so to do, the contract of the *factor* shall oblige the principal to a performance of the bargain; and he is the proper person to be prosecuted, on non-performance; but if the *factor* enters into a charter-party of affreightment with a master of a ship, the contract obliges him only; unless he lades aboard generally his principal's goods, when both the principal and lading become liable for the freight, and not the *factor*. Goldb. 137.

Goods remitted to a *factor* ought to be carefully preserved; and he is accountable for all lawful goods which shall come to his hands; yet if the *factor* buy goods for his principal, and they receive damage after in his possession, thro' no negligence of his, the principal shall bear the loss; and if a *factor* be robbed, he shall be discharged in account brought against him by his principal. 4 Rep. 83. If the *factor* has orders from his principal not to

sell any goods but in such a manner, and he breaks those orders, he is liable to the loss or damage that shall be received thereby: and where any goods are bought, or exchanged without orders, it is at the merchant's curtesy whether he will accept of them, or turn them on his factor's hands. *Lex Mercat.* 154, 155.

When a factor has bought, or sold goods pursuant to orders, he is immediately to give advice of it to his principal; lest the former orders should be contradicted before the time of his giving notice, whereby his reputation might possibly suffer: and where a factor has made a considerable profit for his principal, he must take due care in the disposition of the same; for without commission, or particular orders, he is answerable. *Ibid.* A factor shall suffer for not observing of orders; and no factor acting for another man's account in merchandize, can justify receding from the orders of his principal, though there may be a probability of advantage by it: if he make any composition with creditors without orders, he shall answer it to his principal. *Ibid.*

Factors ought to observe the contents of all letters from their principals, or written to them by their order. A merchant is answerable in action upon the case for the deceits of his factor, in selling goods abroad: and as somebody must be a loser by such deceit, it is more reason that he who employs, and puts confidence in the deceiver, should lose, than a stranger. 1 *Salk.* 289.

Factors are liable to the statutes concerning bankruptcy, 5 *Geo.* 2. c. 30. *sect.* 39. Factor not to buy cattle on his own account, 31 *Geo.* 2. c. 40. *sect.* 11.

It was held by *Lee Ch. J.* that though a factor has power to sell, and thereby bind his principal, yet he cannot bind or affect the property of the goods by pledging them as a security for his own debt, though there is the formality of a bill of parcels and a receipt. *Stran.* 1178. Where goods are sold by a factor at his own risque, the vendee is not answerable to the owner. *Stran.* 1182.

It hath been ruled in equity, that if one employs a factor, and intrusts him with the disposal of merchandize, and the factor receives the money, and dies indebted, to debts of a higher nature, and it appears by evidence, that this money was vested in other goods, and remains unpaid, those goods shall be taken as part of the merchant's estate, and not as the factor's; but if the factor have the money, it shall be looked upon as the factor's estate, and must first answer the debts of his creditors, &c. for as money has no ear-mark, equity will follow that in behalf of him who employed the factor. 1 *Salk.* 160.

If a person doth employ a factor to sell goods, who sells them on credit, and before the money is paid dies indebted, more than his assets will pay; this money shall be paid to the principal merchant, and not to the factor's administrator, but thereout must be deducted what was due for commission: for a factor is in nature only of a trustee for his principal, 2 *Vern.* 638.

Factorage, Is the wages or allowance paid and made to a factor by the merchant. The gain of factorage is certain, however the success proves to the merchant; but the commissions and allowances vary according to the customs and distance of the country, in the several places where factors are resident: in the *West-Indies*, the commission runs at about 8 per cent. but in *France* and *Spain*, &c. not above 2 per cent. and in *Holland* but one and a half per cent. *Lex Mercat.* 155.

Fatum, A man's own act, fact, or feat, and particularly used in the Civil law, for any thing stated and made certain. See *Fait*.

Faculty. (*facultas*) As restrained from the original and active sense, to a particular understanding in law, is used for a privilege granted to a man by favour and indulgence, to do that which by law he ought not to do. And for the granting of these, there is an especial court under the *Archbishop of Canterbury*, called the *Court of the Faculties*; and the chief officer thereof the *Master of the Faculties*; who has power by the *Stat.* 25 *H.* 8. cap. 21. to grant dispensations; as to marry persons without the banns first asked, (and every diocesan may make the like grants) to ordain a deacon under age, for a son to succeed the fa-

ther in his benefice, one to have two, or more benefices incompatible, &c. And in this court are registered the certificates of bishops and noblemen granted to their chaplains, to qualify them for pluralities and non-residence. 4 *Inst.* 337.

Fasting-men, In *Mon. Ang.* tom. 1. pag. 100. are rendered to signify vassals: but *Corwel* thinks they rather mean pledges or bondsmen; which, by the customs of the *Saxons*, were fast bound to answer for one another's peaceable behaviour. See *Festing-men*.

Fag, A knot or excrescency in cloth; and in this sense it is used in the statute 4 *Ed.* 4. cap. 1.

Faggot, A badge wore in the times of popery, by persons who had recanted and abjured what the then powers adjudged heresy: those poor wretches that opposed the doctrine of the arbitrary priesthood, were condemned not only to the pittance of carrying a faggot, as an emblem of what they had merited, to such an appointed place of solemnity; but for a more durable mark of infamy, they were to have the sign of a faggot embroidered on the sleeve of their upper garment: and if this badge or faggot was at any time left off, it was often alledged as the sign of apostacy.

Faiba, Malice or deadly feud. *Leg. H.* 1. c. 88.

Failure of Record, Is when an action is brought against a man, who alleges in his plea matter of record in bar of the action, and avers to prove it by the record; but the plaintiff saith, *Nul tiel record*, viz. denies there is any such record: upon which, the defendant hath day given him by the court to bring it in; and if he fails to do it, then he is said to fail of his record, and the plaintiff shall have judgment to recover. *Terms de Ley.* In debt upon an escape, the plaintiff declared, that he had obtained a judgment in an inferior court, upon which the defendant was taken, and the sheriff suffered him to escape; the defendant pleaded *Nul tiel record*, and being at issue, the record was certified at the day; by which it appeared that there were several variances in the continuances and process; but because the plaint, count, and judgment certified, agreed with the plaintiff's declaration, it was held that those variances made no failure of record. *Hob.* 179. 2 *Nels. Abr.* 823.

In *formedon* for the manor of *Isfield*, the defendant pleaded in bar a common recovery of the said manor against the donee in tail, who replied *Nul tiel record*, and the defendant having brought in the record, it appeared that the recovery was of the manor of *Isfield*; and adjudged, that this being in a common recovery, shall be no failure being the mispleading small variance, but shall be amended, a fine with proclamations &c. 5 *Rep.* 46. And where *Nul tiel record*, on which it was brought upon an issue of the year of the King was left out in the proclamation made in one term, as it was expressed in the proclamations of the other two terms, they were held to be right, and the omission no failure of record. *Dyer* 234. If a judgment, &c. be reversed for error, *Nul tiel record* may be pleaded. 8 *Rep.* 142. And where a tenor only of a record, &c. is brought in, it is a failure of record. *Dyer* 187. 2 *Nels.* 824.

Faine-Don, (*Fr. feinte*) A feigned action; such that altho' the words of the writ are true, yet for certain causes the plaintiff hath no title to recover thereby; but a false action is properly where the words of the writ are false. 1 *Inst.* 361.

Faint-Pleader, Is a fraudulent, false or collusory manner of pleading, to the deceit of a third person; against which, among other things, was made the *Stat.* 3 *Ed.* 1. c. 19.

Fair-Pleader, Or not pleading fairly, &c. See *Beau-pleader*.

Fair, (*Fr. feire*, *Lat. nundina*) A solemn or greater sort of market, granted to any town by privilege, for the more speedy and commodious providing of such things as the subject needeth; and the utterance of what commodities we abound in above our own uses and occasions: and both our *English* and the *French* word seems to come from *seria*, because it is incident to a fair that persons shall be privileged from being molested or arrested in it, for any other debt, or contract than what was contracted in the same,

same, or at least was promised to be paid there. *Stat. 17 Ed. 4. c. 2. And 1 R. 3. c. 6.*
 Herein is to be considered,

- I. *The right to a fair, and the manner of holding it.*
- II. *The duty, power, and interest of the owners of fairs.*
- III. *How far a sale in a fair changes the property of a thing therein sold.*

I. *Of the right to a fair, and the manner of holding the same.*

The first institution of fairs and markets seems plainly to be for the better regulation of trade and commerce, and that merchants and traders may be furnished with such commodities as they want, at a particular mart, without that trouble and loss of time, which must necessarily attend travelling about from place to place; and therefore as this is a matter of universal concern to the commonwealth; so it hath always been held, that no person can claim a fair or market, unless it be by grant from the King, or by prescription, which supposes such a grant. *2 Inst. 220. 3 Mod. 123.*

And therefore if any person sets up any such fair or market, without the King's authority, a *quo warranto* lies against him; and the persons who frequent such fair, &c. may be punished by fine to the King. *3 Mod. 127.*

Also it seems, that if the King grants a patent for holding a fair or market, without a writ of *ad quod damnum* executed and returned, that the same may be repealed by *scire facias*; for though such fairs and markets are a benefit to the commonwealth; yet too great a number of them may become nuisances to the publick, as well as a detriment to those who have more antient grants. *3 Lev. 222.*

Fairs are generally kept once or twice in the year; and it has been observed, that fairs were at first occasioned by the resort of people to the feast of dedication, and therefore in most places the fairs, by old custom, are on the same day with the wake or festival of that saint to whom the church was dedicated; and for the same reason kept in the church-yard, till by authority restrained. *2 Inst. 221. Blount.* The court of Piepowder is incident to every fair, &c. By the statute *2 Ed. 3. cap. 15.* Fairs are not to be kept longer than they ought by the lords thereof, on pain of their being seized into the King's hands, until such lords have paid a fine for the offence; and proclamation is to be made how long fairs are to continue: also no merchant shall sell any goods, under the dise at a fair after the time of the sale of the goods sold, penalty of forfeiting to the prosecutor, and the rest to one fourth. *5 Ed. 3. c. 5.* Any citizen of London may carry his goods or merchandise to any fair or market in England at his pleasure. See *3 Hen. 7. c. 9.*

It seems clearly agreed, that if a person hath a right to a fair or market, and another erects a fair or market so near his, that it becomes a nuisance to his fair, &c. that for this detriment and injury done to him, an action on the case lies; for it is implied in the King's grant, that it should be no prejudice to another. *2 Rol. Abr. 140.*

Also, although the new market be held on a different day, yet an action on the case lies; for this, by forestalling the antient market, may be a greater injury to the owner, than if held on the same day with his. *2 Saund. 172. 1 Mod. 69.*

If a man hath a fair or market, and a stranger disturbs those who are coming to buy or sell there, by which he loses his toll, or receives some prejudice in the profits arising from his fair, &c. an action on the case lies. *1 Rol. Abr. 106. 2 Vent. 26, 28.* So if upon a sale in a fair a stranger disturbs the lord in taking the toll, an action upon the case lies for this. *1 Rol. Abr. 106.*

The King is the sole judge where fairs and markets ought to be kept; and therefore it is said, that if he grants a market to be kept in such a place, which happens not to be convenient for the country, yet the subjects can go to no other; and if they do, the owner of the soil where they meet is liable to an action at the suit of the grantee of the market. *3 Mod. 123.* But if no

place be limited for keeping a fair by the King's grant, the grantees may keep it where they please, or rather where they can most conveniently and if it be so limited, they may keep it in what part of such place they will. *3 Mod. 108.*

By the *13 Ed. 1. st. 2. c. 6.* No fairs or markets shall be kept in churchyards.

At what time fairs are to be held, see *27 H. 6. c. 5. 1 Car. 1. c. 1. 29 Car. 2. c. 7. A. also 11 & 12 W. 3. c. 21. 9 Ann. c. 23.*

II. *Of the duty, power, and interest of the owners of fairs.*

Owners and governors of fairs are to take care that every thing be sold according to just weight and measure, who for that and other purposes may appoint a clerk of the fair or market, who is to mark and allow all such weights, and for his duty herein can only take his reasonable and just fees. See *4 Inst. 274. Moor 523. 1 Salk 327.*

Fairs and markets are such franchises as may be forfeited, as if the owners of them hold them contrary to their charter, as by continuing them a longer time than the charter admits, by disuse, and by extorting fees and duties where none are due, or more than are justly due. *2 Inst. 220. Finch 164. 3 Mod. 108.*

As to their interest, it arises chiefly from tolls. Toll payable at a fair or market is a reasonable sum of money due to the owner of the fair or market, upon sale of things tollable within the fair or market, or for stallage, pikeage, or the like. *2 Inst. 222. 2 Jon. 207.*

But this is not incident to a fair or market without special grant; for where it is not granted, such a fair or market is accounted a free fair or market. *2 Inst. 220. Cro. Eliz. 559.*

Toll is a matter of private benefit to the owner of the fair or market, and not incident to them; therefore if the King grants a fair or market, and grants no toll, the patentee can have none, and such fair or market is counted free. *Cro. Eliz. 558. 2 Inst. 220. S. P. 2 Lutw. 1336. S. P. resolved.*

Also if the King, at the time he grants a fair or market, grants a toll, and the same is outrageous and excessive, the grant of the toll is void, and the same becomes free. *2 Inst. 222. Lutw. 1336.* But the King, after he has granted a fair or market, may grant that the toll may have a reasonable toll; but this must be in consideration of some benefit accruing from it to those who trade and merchandise in such fair or market. *2 Inst. 221.*

No toll shall be paid for any thing brought to the fair or market, before the same is sold, unless it be by custom time out of mind, and upon such sale the toll is to be paid by the buyer; and therefore my Lord Coke says, that a fair or market by prescription is better than one by grant. *2 Inst. 221.*

And by *Westm. 1. cap. 31.* "Touching them that take outrageous toll, contrary to the common custom of the realm in market towns, it is provided, that if any do so in the King's town, which is let in fee-farm, the King shall seize into his own hand the franchise of the market; and if it be another's town, and the same be done by the lord of the town, the King shall do in like manner; and if it be done by a bailiff, or any mean officer, without the commandment of his lord, he shall restore to the plaintiff as much more, for the outrageous taking, as he had of him, if he carried away his toll, and shall have forty days imprisonment."

But where by custom a toll is due upon the sale of any goods in a fair or market, and he who ought to pay it refuses, an action on the case lies against him. *1 Rol. Abr. 103, 104, 106.* But see *3 Lev. 400.* where this point is doubted, because toll is quasi a debt, for which debt, or an assumpsit lies.

Some persons however are exempt from payment of toll, and if the King or any of his progenitors have granted to any to be discharged of toll, either generally, or specially; this grant is good to discharge him of all tolls to the King's own fairs or markets, and of the tolls, which, together with any fair or market have been granted after

such grant of discharge; but cannot discharge tolls formerly due to subjects either by grant or prescription, 2 Inst. 221.

Also the King himself shall not pay toll for any of his goods; and if any be taken, it is punishable within the statute *Westm. 1. cap. 31. 2 Inst. 221*. So tenants in ancient demesne are free and quit from all manner of tolls in fairs and markets, whether such tenants hold in fee, or life, years, or at will. *4 Inst. 269. 2 Inst 221. 1 Rel. Abr. 321.*

But this privilege does not extend to him who is a merchant, and gets his living by buying and selling, but is annexed to the person in respect of the land, and to those things which grow and are the produce of the land. *F. N. B.* 228. 2 *Leon.* 191. *Cro. Eliz.* 227. 2 *Inst.* 221. 1 *Rob. A'r.* 321-2.

Owners of *fairs* and markets are to appoint toll-takers or book-keepers, on pain of 40*s.* and they shall enter and give account of horses sold, &c. 2 & 3 P. & M. c. 7. and 31 Eliz. c. 12.

III. *How far a sale in a fair changes the property of a thing therein sold.* See under title *Market*.

Fait, (factum) Is in law signification, a deed or writing, lawfully executed to bind the parties thereto. *Vide* *Deed*.

Faît enrôlle, (Fr.) Is a deed of bargain and sale, &c. and forging the inrollment of it is a great misdemeanor, but not forgery within the *Stat. 5 Eliz.* 1. Keb. 568.

Faitours, (*Fr.*) In the statute 7 R. 2. cap. 5. is used for evil doers; and may be interpreted idle livers, from *faitardise*, which signifies a kind of sleepy disease, proceeding of too much sluggishness: and in the same statute it seems to be synonymous with vagabonds. *Terms de Ley.*

Salang, A jacket or close coat. *Blount.*

falcatura, One day's mowing of grafs; a customary service to the lord by his inferior tenants: *falcata* was the grafs fresh mowed, and laid in *swathes*; and *falcator* the servile tenant performing the labour. *Kennet's Gloss.*

Falco, a falcon.—**King John**, in his 14th year of his reign, granted to **Owen Fitz David**, and others, *omnes accipitres & falcones gentiles & spurarios, &c.*—**Pat. 14 Joh.**

Falda, A sheepfold.—*Et quod oves sint levantes*
cubantes in propria falda, &c. Chart. 6 Hen. 3.
 m. 6.

Falbage, (Faldagium) Is a privilege which lords and lords antiently reserved to themselves, of setting up *folds* for sheep in any fields within their manors, for the better manurance of the same; and this was usually done not only with their own, but their tenant's sheep, which they call *setla faldæ*. This *faldage* is termed in some places a *fold course*; and in old charters *faldsoca*, i. e. *libertas faldæ*, or *faldagii*.

Falducursus, A sheep walk, or feed for sheep. *Vent. Rep.* 139.

Faldbrey, Faldbreye. A fee or rent paid by some customary tenants for liberty to fold their sheep upon their own land.

Faldor, (Sax.) The highest seat of a bishop, inclosed round with a lettrice. *Cowel.*

Faldworth, A person of age, that he may be reckoned of some decennary. *Du Fresno.*

Palatæ, (Lat. *phaleræ*) The tackle and furniture of a cart or wain. *Mon. Aug. dem.* 2. f. 256.

Malesta, A great rock, bank or hill by the sea side.

Domest.
Fallow Land, Vide *Warreſum* & *Terra Warreda*.

Fallum, Is a sort of land, as appears by the *Monasticon Anglicanum*.—*De duobus acris & viginti fallis in, &c.*
Mon. tom. 2. 425.

falmotum, or *falkmote*, The same with *folkemote*.

False Witness, If brought against one, whereby he is cast into prison, and dies pending the suit, the law giveth no remedy in this case, because the truth or *falsehood* of the matter cannot appear before 'tis tried: and if the plaintiff be barred or nonsuited, at Common law, regularly all the

punishment is amercement. *Jenk. Cent.* 161. See *Faint-Action*.

Falſe Claim, By the foreſt laws, is where a man claims more than is his due, and is amerced and puniſhed for the ſame. A perſon had a grant by charter of the tenth of all the veniſon in the foreſt of Lancaſter, viz. *In carnis tantum, ſed non in corio*; and becauſe he made a *falſe claim*, by alledging that he ought to have the tenth of all veniſon within the foreſt, as well in *carne*, as in *corio*, therefore he was in *miſericordia de decima venationis ſuæ in corio non percipiendo*. Manwood, cap. 25. num. 3.

False form, In proceedings at law, is aided by a verdict; though not where there is want of certainty, *6 C. 1 Keb. 734, 876.*

False Imprisonment, (*falsum imprisonamentum*) Is a trespass committed against a person, by arresting and imprisoning him without just cause, contrary to law; or where a man is unlawfully detained without legal process: and it is also used for a writ which is brought for this trespass. If a person be any way unlawfully detained, it is *false imprisonment*; and considerable damages are recoverable in these actions. 1 *Inst.* 124. The law favours liberty, and the freedom of a man from imprisonment, so that *false imprisonment* is a great offence; and lawful imprisonment is so far pitied, that by several statutes, as well as by the Common law, defaults are saved on that account. *Wood's Inst.* 16.

The King cannot give any power to imprison, where imprisonment may not be awarded by the Common law. 2 *Brownl.* 18. And if a person is imprisoned on any by-law of a corporation, &c. it is *false imprisonment*: because a by-law to imprison is against *Magna Charta, quod nullus liber homo imprisonetur*, &c. 5 *Rep.* 64. It is the same of a custom to imprison persons; but 'tis incident to a court of record to imprison. 2 *Nelf. Abr.* 827.

If a justice of peace, &c. commits a person without just cause, it is *false imprisonment*; and a constable cannot imprison a man at his pleasure, to compel him to do any thing required by law; but is to carry him before a justice. *Ibid.* 1 Leon. 327. Where any justice sends for a man, and commits him to gaol without any examination, the party may have action of *false imprisonment* against him; and if a justice of peace sends a general warrant to arrest a person, and say not for what; action lies against him, but not against the officer. *Mich. 8 Jac. B. R.*

In *false imprisonment* brought against an officer of an inferior court, if he justify an arrest by virtue of their warrant, he must intitle the court to jurisdiction, or the action lies against him. *Marsh, pl. 195.* If erroneous process issues out of a court that hath jurisdiction of the matter, and the ^{clerk} or officer executes it, whereby the party is imprisoned: but ^{he} shall be excused in action of *false imprisonment*: but ^{if} *he* shall be excused in action of *false issues* hath no cognizance wth out of which the process for in such case the whole proceeding is it is otherwise; and the officer will not be excused. 10 *Rep. 730* *judice,*

An officer hath a warrant upon a *capias ad satisfaciendum* against an earl, or countess, &c. who are privileged in their persons, and he arreſts them; 'tis ſaid action of *faſe imprisonment* will not lie againſt the officer, becauſe he is not to examine the judicial act of the court, but to obey. 6 Rep. 56. 10 Rep. 75.

obey. 6 Rep. 50. 13 Rep. 75.
If an arrest is made by one who is no legal officer, it is *false imprisonment*, for which action lies. 1 Inst. 69. An action of *false imprisonment* lies against a bailiff for arresting a person without warrant, though he afterwards receives a warrant: and so it is if he arrest one after the return of the writ is past; for it is then without writ. 2 Inst. 53. If a sheriff or any of his bailiffs arrests a man out of his county, &c. or after the sheriff is discharged of his office; or a person arrests one on a justice's warrant after his commission is determined, &c. it will be *false imprisonment*. Dyer 41. And if the sheriff, after he hath arrested a man lawfully, when a legal discharge comes to him, as a *superfedeas*, or the like, do not then discharge the party, he may be sued in this action. 2 R. 1. 12. Fitzb. 253.

In cas the plaintiff in a suit brings an unlawful warrant to a sheriff, and shews him the defendant, requiring him to make the arrest; or if he bring a good warrant, and

and direct the sheriff to a wrong man, &c. for this the action of *false imprisonment* will lie against both. *Bro. Tresp.* 99. 307. *Faux Impr.* 19. 1 *Brownl.* 211. If a warrant be granted to arrest, or apprehend a person, where there are several of the name, and the bailiff or other officer arrests a wrong person, he is liable to action of *false imprisonment*; and he is to take notice of the right party at his peril. *Dyer* 244. *Moor* 457.

A man arrested on a Sunday may bring his action of *false imprisonment*; but one has been refused to be released in such a case. 5 *Mod.* 95. If a bailiff demand more than his just fees, when offered him, and keep a person in custody thereupon, it is *false imprisonment* and punishable: and if a sheriff, or gaoler, keeps a prisoner in gaol, after his acquittal, for any thing except for fees, it is unlawful imprisonment. 2 *Inst.* 482. *Wood* 16. If a man falsely imprisons A. B. and the gaoler detains him till he pays so much money, he shall have action of *false imprisonment*, and taking so much money from him against such person: and it is illegal to use a lawful means for oppression. *Mod. Caf.* 179.

Unlawful or *false imprisonment* is sometimes called *duress of imprisonment*, where one is wrongfully imprisoned till he seals a bond, &c. 2 *Inst.* 482. If a person bind himself to pay money; and if he do not pay it, that the other shall imprison him; if he pays it not, and the other doth imprison him, it is *false imprisonment*. 23 *E.* 3. 3. And where a man owes me money, or hath done any trespass, &c. and I imprison him for it, without order of law, he may bring *false imprisonment* against me. *F. N. B.* 88.

An imprisonment will be unlawful, and give this action, altho' the cause be good, when he that makes it doth the same without any colour of authority; or if he has a colour, yet no good authority, from the court, &c. or where a court or officer hath power, but do not well make it out; or when the authority is well made forth, and not rightly pursued and executed. 4 *Rep.* 64. 8 *Rep.* 67. *Dyer* 242. And all persons male or female, that have a hand in a wrong imprisonment, shall be sued in action of *false imprisonment*; and the party grieved may sue any one of them for it. 1 *Inst.* 57. *Bro. Tresp.* 113. 256. But if the imprisonment be by the agreement and consent of him that is arrested, it may be justifiable. *Bro. Faux Impr.* 18.

If a man arrested or apprehended be committed to a private prison, where he should be sent to the common gaol; action will lie for it, as a *false imprisonment*. 2 *Brownl.* 41. A man under arrest, or in stocks, &c. is said to be in prison: And in a common arrest, where lawful, the officer may make any place his *locus coram*, cause the writ commands that *Habeas* authority. 1 *Salk.* &c. *apud Westm.* which is -

401. *Habeas Corpus*, where a man is falsely imprisoned,

In criming a *Habeas Corpus*, and upon return of the writ, setting forth the cause of the commitment, if it appears to be against law, he shall be discharged; or he may be bailed, if it be doubtful, &c. 4 *Inst.* 182. See *Arrest, Imprisonment*.

False Judgment, (Falsum Judicium) It is a writ that lieth where *false judgment* is given in the county-court, court baron, or other courts not of record *F. N. B.* 17. 18. This writ may be brought on a judgment in a plea, real or personal: and for errors in the proceedings of inferior courts; or where they proceed without having jurisdiction, writ of *false judgment* lieth: though the plaintiff assign errors in a writ of *false judgment*, he shall not say, *In hoc erratum est*, &c. but *unde queritur diversimodo sibi falsum judicium factum fuisse* (*Judicium in hoc*, &c. *Moor* 73. 2 *Nell.* Abr. 829. If writ of *false judgment* abate for any fault in the writ, the plaintiff shall not have *Scire facias ad audiend.* *Errores*, upon the record certified, because it comes without an original: but if the plaintiff dies, and *false judgment* is given in the inferior court, his heir shall have a *Sci. fac. ad audiend.* Error against him who recovered upon that record which is removed into C. B. And where the plaintiff in a writ of *false judgment* is nonsuit, it was formerly a question, whether the other party shall sue execution upon this record so removed against the plaintiff, without

suing out a *Scire facias*; but it has been adjudged, that he may do it. *Hill.* 23 *Hen.* 6. *New Nat. Br.* 39.

When a record is removed into B. R. by writ of *false judgment*, if the party alleges variance between the record removed, and that on which judgment was given, the trial shall be by those who were present in court when the record was made up. 2 *Lutw.* 957. *Stat.* 1 *Ed.* 3. c. 4. A man shall not have a writ of *false judgment* but in a court where there are suitors; for if there be no suitors, there the record cannot be certified by them. *New Nat. Br.* 40. A tenant at will, according to the custom of the manor, which is tenant by copy of court roll, shall not have a writ of *false judgment* upon a judgment given against him: but where *false judgment* is given on a writ of *justicies*, directed to the sheriff, the party grieved shall have a *faux judgment*; although the judgment be for debt, or trespass above the sum of 40 s. *Ibid.*

Where a record of a judgment in the county-court was vicious, and the judgment reversed in C. B. the suitors were ordered to be amerced a mark, and the county clerk fined 5 l. And if a plaintiff in an inferior court declare for more than 40 s. Judgment shall be reversed by writ of *false judgment*: but where damages are laid under that sum, costs may make it amount to more. 1 *Mod.* 249. 2 *Mod.* 102, 206.

Upon *false judgment* before bailiffs, or others who hold plea by prescription, in every sum in debt by bill before them, a party shall not have a writ of *false judgment*; but a writ of error thereupon. *M.* 4 *E.* 4. For defaults of tenants for life, in writs of right, &c. *Faux judgment* lies by him in reversion: and this writ may be brought against a stranger to the judgment, if he be tenant of the land. A judgment shall be intended good till reversed by writ of *false judgment*, &c. See *Accedas ad Curiam*, and *Attaint*.

False Latin. Before the late statute for turning law proceedings into English, if a Latin word was significant though not good Latin, yet an indictment, declaration, or fine, should not be made void by it: but if the word was not Latin, nor allowed by the law, and it were in a material point, it made the whole vicious. 5 *Rep.* 121. 2 *Nell.* 830. Vide *Latin*.

False News. Spreading false news, to make discord between the King and nobility, or concerning any great man of the realm, is punished by common law, with fine and imprisonment, which is confirmed by statutes *Westm.* 1. 3 *Ed.* 1. c. 34. 2 *Ric.* 2. st. 1. c. 5. And 12 *Ric.* 1. c. 11. See 2 *Inst.* 226. 3 *Inst.* 198.

False Oath. See *Perjury*.

False Plea. In *præcipe quod reddat* against two, if the one comes and takes the intire tenancy upon him, upon which they are at issue, and it is found against the tenant, by this he shall lose his moiety; for it is found against the tenant for his part, because it is tried *per pais* upon issue; contra of plea to the writ by demurrer. Note the difference. *Br. Peremptory*, pl. 73. cites 8 *Ed.* 3. 17.

Plaintiff in a suit in Chancery against an executor, shall have the same advantage thereof, as if the same plea were found false by verdict at law; and shall have all the same consequences here, as follow on a false plea at law to all intents. *Mich.* 26 *Car.* 2. 2 *Chanc. Cases* 201. *Parker v. Dee.* See *Plea*.

False Prophecy. See *Prophecy*.

False Return. On a false return by a mayor, &c. to a *mandamus*, or by a sheriff, &c. to a writ, a special action on the case will lie. See *Black Com.* 3 *V.* 111, 163.

False tokens. As where persons get money or goods into their hands, by forged letters, or other counterfeit means, is punishable by imprisonment, &c. by *Stat.* 35 *H.* 8. c. 1. See *Cheats and Counterfeits*.

False Verdict. A writ of *attaint* lieth, to inquire whether a jury of 12 men have given a false verdict; that so the judgment following thereupon may be reversed. It is allowed in almost every action except in a writ of right. See statutes 1 *Ed.* 3. c. 6. 5 *Ed.* 3. c. 7. 28 *Ed.* 3. c. 8. 34 *Ed.* 3. c. 7. 9 *Ric.* 2. c. 3. *Black. Com.* 3 *V.* 403. *Quær.* If it would

would not lie on a verdict, upon an information, as the defendant hath only the benefit of one jury? consequently is found guilty only by one jury.

Falsify, Seems to signify as much as to prove a thing to be false. *Perk.* 383.

Falsifying a Record. A person that purchases land of another, who is afterwards outlawed of felony, &c. may falsify the record, not only as to the time wherein the felony is supposed to have been committed, but also as to the point of the offence: but where a man is found guilty by verdict, a purchaser cannot falsify as to the offence; though he may for the time, where the party is found guilty generally in the indictment, &c. because the time is not material upon evidence. 2 *Illok. P. C.* 456. And any judgment given by persons who had no good commission to proceed against the person condemned, may be falsified by shewing the special matter, without writ of error. *Ibid.* Also where a man is attainted of treason or felony, if he be afterwards pardoned by parliament, the attainder may be falsified, by him or his heir, without plea. *Ibid.*

Falsifying a Recovery, Issue in tail may falsify a recovery suffered by tenants for life, &c. And it has been held, that a person may falsify a recovery had by the issue in tail, where an estate tail is before bound by a fine. 2 *Nils. Abr.* 831. But where there was tenant for life, remainder in tail, and reversion in fee, tenant for life suffered a common recovery, in which he in remainder was vouched, and the uses were declared to him, who had the remainder in tail; it was adjudged, that by the recovery all remainders and reversions were barred, and that they could not falsify this recovery. 10 *Rep.* 43.

He in reversion suffered a common recovery, and declared the uses; his heir shall not falsify it by pleading that his father had nothing at the time of the recovery, because he is estopped to say he is not tenant to the præcipe. *Godb.* 189. An infant brought an assise in B. R. Pending which action the tenant brought an assise against the infant in C. B. for the same land, and had judgment by default, which he pleaded in bar to the assise brought by the infant; who set forth all this matter in his replication, and that the demandant at the time of the second writ brought was tenant of the land, and prayed that he might falsify this recovery; and it was held that he might, because he could not have writ of error, or attain. *Godb.* 271. 2 *Cro.* 264. It has been determined, that a recovery is not so firm, but it may be falsified in point of recovery of the thing itself, between the same parties. *Ibid.*

Falsifying a Verdict. Where in any real action, there is a verdict against tenant in tail, the issue can never falsify such verdict in the point directly tried; but only in a special manner, as by saying that some evidence was omitted, &c. 2 *Ld. Raym.* 1050.

Falsionarius. A forger. — *Et quod Falsionarios Chartam, &c. detegent.* Hoveden 424.

Falso retorno Brebium. Is a writ that lieth against the sheriff who hath execution of process, for false returning of writs. *Reg. Jud.* 43.

Familia, Signifies all the servants belonging to a particular master; but in another sense, it is taken for a portion of land, sufficient to maintain one family: it is sometimes mentioned by our writers to be a Hide of land, which is also called a *Manse*; and sometimes *Carucata* or a plough-land. *Blount.*

Fanaticus, Are persons pretending to be inspired, and being a general name for *Quakers*, *Anabaptists*, and all other sectaries, and factious Dissenters from the church of England. *Stat.* 13 *Car.* 2. cap. 6.

Fanatio, (*Menfis Fanationis*) Is the sawning season or fence-month in forests. *Kenner's Gloss.*

Farandman, (*Sax.*) A traveller or merchant stranger, to whom by the laws of Scotland justice ought to be done with all expedition, that his business or journey be not hindered. *Skene*, c. 104.

Fardel of Land, (*Fardelle Terræ*) Is generally accounted the fourth part of a *Yard-Land*; but according to *Noy*, (in his *Compleat Lawyer*, p. 57.) It is an eighth part

only, for there he says that two *fardels* of land make a *nook*, and four *nooks* a *yard-land*.

Farding-deal, (*Quadrantata terræ*) Is the fourth part of an acre: and besides *quadrantata terræ*, we read of *obolata*, *denariata*, *solidata*, and *librata terræ*, which probably arise in proportion of quantity from the *farding-deal*, as an half-penny, penny, shilling, or pound in money, rise in value; and then mult *obolata* he half an acre, *denariata* an acre, *solidata* twelve acres, and *librata terræ* twelve score acres of land: but some hold *obolata* to be but half a perch, and *denariata* a perch; and I find *viginti libratis terræ vel redditus*, *Reg. Orig.* 94, 248. whereby seems it that *librata terræ* is so much as yields 20s. per annum. *F. N. B.* 87. *Spelm. Gloss.*

Fart, (*Sax.*) A voyage or passage by water; but more commonly the money paid for such passage, in which sense we now use it, 3 *P. & M. cap.* 16. So for what we pay an hackney, or stage-coachman for our carriage.

Farinagium, Toll of meal or flour — *Et quod de cætero molendinarius non capiat Farinagium, &c.* *Ordin. Intul. de Jersey* 17 *Edw.* 2.

Fartcu, L. money paid by tenants in the west of *Eng-land* in lieu of a *beriot*: and in some manors in *Devon-shire*, *fartcu* is distinguished to be the best goods; as *beriot* is the best beast, payable at the death of a tenant. *Cowel.*

Farlingarti, Are whoremongers and adulterers. *Saxon.*

Farm, or **Ferm**, (*Lat. firma*, from the *Sax. ferum*. i. e. Food, and *fermain* to feed or yield victuals) signifies a large messuage and land, taken by lease under a certain yearly rent, payable by the tenant; and in former days, about the time of *William the First*, called the Conqueror, these rents were reserved to the lords in victuals and other necessaries arising from the land; but afterwards in the reign of *King Hen. 1.* were altered and converted into money. *Terms de Ley.* A farm is most properly the chief messuage in a village; and it is a collective word, consisting of divers things gathered into one, as a messuage, land, meadow, pasture, wood, common, &c. *Locare ad firmam* is sometimes taken for as much as to let or set to farm; and the reason of it may be in respect of the firm or sure hold the tenants thereof have above tenants at will. A farm in *Lancashire*, is called *Ferm-holt*; in the north a *Tuck*, and in *Essex* a *Wike*: And *ferm* is taken in various ways. *Flowerd.* 195.

Farmer, Is he that tenants a farm, or is lessee thereof. *Terms de Ley.* And it is said generally every lessee for life or years, although it be but of a small house and land, is called *Farmer*, as he is that occupieth the farm: as this word implies no mystery, except it be that of husbandry, husbandman, is the proper addition of a farmer. 2 *Hawk.* 188. By statute, no parson or spiritual person may take farms or leases of land, on pain of forfeiting 10 l. per month, &c. 21 *Hen.* 8. c. 13. And no person whatsoever shall take above two farms together, and they to be in the same parish, under the penalty of 3 s. 4 d. a week. 25 *H.* 8. c. 13. 32 *H.* 8. c. 28. s. 4.

Farthing, Was the fourth part of a *Saxon* penny, as it is now of the *English* penny.

Farthing of Gold, (*Quasi* fourth thing) A coin used in ancient times, containing in value the fourth part of a *Noble*. It is mentioned in the stat. 9 *H.* 5. c. 7. where it is ordained, that there shall be good just weight of the *Noble*, *Half Noble*, and *Farthing of Gold*, &c.

Farthing of Land, Seems to differ from *Farthing-deal*; for it is a large quantity of land: in a survey book of the manor of *West Slapton* in *Com. Devon* is entered thus: *A. B.* holds six *farthings* of land at 126 l. per annum.

Farundel of land, the same with *farding-deal*.

Fassus, (*Fr. Faisseau*) A faggot of wood. *Mod. Ang. Tom.* 2. p. 238.

Fast-Days, Are days of fasting and humiliation, appointed to be observed by publick authority. There are fixed days of fasting enjoined by our church, at certain times in the year, mentioned in ancient statutes, particularly the 2 & 3 *Ed.* 6. c. 19. and 5 *El.* c. 5. And by

12 Car. 2. c. 14. the 30th of January is ordained to be a day of fasting and repentance, for the murder of King Charles I. Other days of fasting which are not fixed, are occasionally appointed by the King's Proclamation. Though abstinence from eating of flesh is required on those days, by our laws; it is made penal to affirm that any forbearing of flesh, is necessary to salvation. 1 Hawk. P. C. 8. See *Embring Days*.

Fastermans, Among the Saxons were pledges. *Leg. Ed. Confess. cap. 38. Vide Fastingsmen.*

Fat, or **Wate**, Is a large wooden vessel used by maltsters and brewers, for measuring of malt with expedition, containing eight bushels or a quarter. *Stat. 1 H. 5. c. 10. and 11 H. 6. c. 8.* It is also a leaden vessel or pan, made use of by brewers to run their wort into, and by others for the making of salt at *Droitwich* in the county of Worcester.

Fatua mulier, A whore. *Cum quadam fatua muliere nudus in lecto cum nuda extitit deprehensus. Du Fresne.*

Faufetum, A faucet, musical pipe or flute.—*Organum & decentum faufetum in divino officio omnibus nostris, &c. interdicimus.*

Fautors, Are favourers or supporters of others; abettors of crimes, &c.

Feal. The tenants by knight service did swear to their lords to be *feal* and *leal*, i. e. to be faithful and loyal. *Spel. de Parliament 59.*

Fealty, (*Fidelitas*) *Fr. Feaulte*, i. e. *Fides* Signifies an oath taken at the admittance of every tenant, to be true to the lord of whom he holds his land: and he that holds land by the oath of *fealty*, has it in the freest manner; because all persons that have *fee* hold per *fidem* and *fiduciam*, that is, by *fealty* at the least. *Smith de Repub. Ang. lib. 3. c. 8.* This *fealty*, which is used in other nations, as well as *England*, at the first creation of it bound the tenant to *fidelity*; the breach whereof was the loss of his *fee*.

It is usually mentioned with *homage*, but differs from it; being an obligation permanent, which binds for ever: and these differ in the manner of the solemnity, for the oath of *homage* is taken by the tenant kneeling; but that of *fealty* is taken standing, and includes the six following things, *viz.* 1. *In elume*, that he do no bodily injury to the lord. 2. *Tutum*, that he do no secret damage to him in his house, or any thing which is for his defence. 3. *Honestum*, that he do him no injury in his reputation. 4. *Utile*, that he do no damage to him in his possessions. 5. *Facile*, and 6. *Possibile*, that he render it easy for the lord to do any good, and not make that impossible to be done, which was before in his power to do: all which is comprised in *Leg. Hen. 1. c. 5.*

Fealty has likewise been divided into *general* and *special*; *general*, to be performed by every subject to his prince; and *special*, required only of such as in respect of their *fee*, are tied by oaths to their lords. *Grand Custom. Normand. Fealty special* is with us performed either by freemen, or by villains. The particulars of the oath of *fealty*, as it is used by the *Feudists*, is well expressed by *Zafius*, in his *Traetat. de Feudis. Part 7. Numb. 15, 16.* which is worth comparing with the usual oath taken here in *England*.

By *stat. 17 Ed. 2. st. 2.* the form of this oath is appointed, and as now observed, it runs as follows, *viz.* I A. B. will be to you my lord C. true and faithful, and bear to you fealty and faith for the lands and tenements which I hold of you: and I will truly do and perform the customs and services that I ought to do to you. So help me God. The oath is administered by the lord or his steward; the tenant holding his right hand upon the book, and repeating after the lord, &c. the words of the oath; and then kissing the book. *Terns de Ley.*

This oath is in some manors neglected; but in copyhold manors, where courts are kept, and copyhold estate granted, it is generally used: lessees for life or years, ought to do *fealty* to their lords, for the lands they hold; and there can be no tenure without some service. *Wood's Inst. 183.* But a bare tenant at will, shall not do *fealty*, because he hath no certain estate; and the matter of

an oath ought to be certain. *Lit. 131, 132. 1 Inst. 93.*

Fealty is incident to all manner of tenures, except *frankalmoign* and tenancy at will. *Ibid.* *Fidelitas est fidei, obsequii et servitii ligamen quo particulariter vassalus domino astringitur. Spelm.*

Feasts, Anniversary times of feasting and thanksgiving, as *Christmas*, *Easter*, *Whitsuntide*, &c. The four feasts which our laws especially take notice of, are the feasts of the annunciation of the blessed Virgin Mary, of the nativity of St. John the Baptist, of St. Michael the Archangel, and of St. Thomas the Apostle; on which quarterly days, rent on leases is usually reserved to be paid. See the *Statutes 5 & 6 Ed. 6. c. 3. 3 Jac. 1. c. 1. 12 Car. 2. c. 30.*

Fee, (*Feodum*, or *Feudum*) *Fee*, comes of the French *Fief*, i. e. *Prædium beneficiarium, vel res clientelaris*, or from the Sax. *Feb*, *viz. Merces, stipendium, quasi dicitur status Beneficiarius*; it is said to be that estate which we hold by the benefit of another, and for which we do service or pay rent to the chief lord; and is applied to all those lands and tenements which are held by perpetual right, by an acknowledgment of any superiority to a higher lord. The writers on this subject, divide all lands wherein a man hath a perpetual estate to him and his heirs, into *allodium* and *feudum*.

Allodium they define to be every man's land, &c. which he possesseth merely in his own right, without acknowledgment of service or payment of any rent to another; and this is a property in the highest degree:

But *feudum* is such land as is held of another, for which service is done or rent is paid, as an acknowledgment thereof. All the land in *England*, except the crown-lands in the King's own hands in right of his crown, are in the nature of *feudum*, or *fee*; for though many have lands by descent from their ancestors, and others have bought land, it cannot come to any either by descent or purchase, but with the burden that was laid upon him who had *novel fee*, or first of all received it from his lord; so that there is no person hath *directum dominium*, i. e. the very property of *domain* in any land but the King, in right of his crown: and notwithstanding he that hath *fee*, hath *jus perpetuum et utile dominium*, yet he owes a duty for it, and therefore it is not simply his own; and he that can say most of his estate, saith thus: *I am seised of this or that land or tenement, in my domain, as of fee; seistus inde in dominio meo ut de feodo*, which is as much as if he had said, it is my domain or proper land to me and my heirs for ever; but yet I hold it in nature of a benefit of and from another. *Camb. Britan. 93.* By this doctrine is to be understood that every man in society, holds his estate, subject to the laws of that society, and must be supposed to hold of the community, as what he possesses is supposed to have been taken out of the common stock. When he neglects to fulfil the duties of society, he forfeits to the community, the estate he hath received. The King is the trustee for that community. He, as such, is the superior lord: and in that sense every one may be said to hold mediately, or immediately of the King. This is what the editor (*J. M.*) supposes is meant by the doctrine in question.

All that write *de feudis*, hold that *feudatarius* hath not an entire property in his *fee*: and as *fee* cannot be without *fealty*, sworn to a superior, the lands of the crown are not properly *fee*; for no man may grant that our King or crown oweth *fealty* to any superior on earth.

The word *fee* is sometimes used for the compass or circuit of a lordship or manor, as we say the *lord of the fee*, &c. as well as the particular estate of the tenant: and also for a perpetual right incorporeal; as to have the keeping of prisons, &c. in *fee*. *Bract. Lib. 2. c. 5. Old Nat. Br. 41.* And when a rent or annuity is granted to one and his heirs, it is a *fee personal*. 1 *Inst. 1, 2.* *Fee* is commonly divided into *fee absolute*, otherwise called *fee simple*; and *fee conditional*, termed otherwise *fee-tail*. See *Tail*.

Fee-

Fee-simple (feodum simplex) is where a man hath lands or tenements, to hold to him and his heirs for ever : *fee-tail* is an estate whereof one is seised with limitation, to him and the heirs of his body, &c. *Litt.* 14, 16. All estates at the common law were *fee-simple* ; and all other estates and interests are derived out of it, wherefore there must be a *fee-simple* at last in some body. *Litt.* 647.

Under this head it may be proper to consider,

- I. *In what things a man may have a fee-simple.*
- II. *By what means such an estate may be acquired.*
- III. *By what words it may be created.*

I. *In what things a man may have a fee-simple.*

A man may have an estate, in *fee-simple* of all lands or tenements, or other things real. *Co. L.* 1. b. Of hereditaments, advowsons, commons, cisterns, and all hereditaments. *Co. L.* 4. a. So he may have a *fee-simple* in things mixt ; as in franchises, liberties, &c. *Co. L.* 2. a.

So if a man grants to another and his heirs all woods, underwood, timber-trees or others in such a part of a forest, saving the soil ; the grantee has a fee to take in *alieno solo*. *R.* 8 *Co.* 137. b.

So, in things personal ; as in annuity. *Co. L.* 2. a. In a dignity granted to him and his heirs. *Co. L.* 2. a. In a squau-mark. 7 *Co.* 17. In a part or share of the *New River* water. *Ca. Parl.* 207.

So, in the patronage of an hospital, or other thing created *de novo*, in which there was not a precedent estate, a man may have a fee to him and his heirs, qualified in a particular manner : as if a Queen consort institutes an hospital, and reserves the patronage *sibi & reginis Angliæ succedentibus*. *R. Ca. Ch.* 214.

But in estates in *esse* before such defaultory inheritance it cannot be : as the duchy of *Cornwall* limited to the prince & *filiis regis Angliæ primogenitis*, shall not be good except when limited by act of parliament. *R.* 8 *Cl.* 16.

II. *By what means such an estate may be acquired.*

A man may take a fee by descent, or by purchase.

In what manner a man may take by descent, see under title *Descent*.

With respect to purchasers it is to be noted, that some are incapable of purchasing.

An alien cannot purchase any lands in *England*. *Vaugh.* 227, 291. 7 *Co.* 16, 17, 18. *Dyer* 2 pl. 8. See *Alien*.

All persons attainted of treason or felony are incapable of purchasing. 2 *New Abridge*. 249. *Co. Lit.* 8. a. See *Dig. Feud. lib.* 2. tit. 23, 24. *Vigellius* 242, 350. *Spelman's Gloss.* 214, 215.

If a man be attainted of felony, and after purchase land, and dies, the King shall have it by his prerogative, and not the lord of the fee ; because his person being forfeited to the King, he cannot purchase but for the King. *Co. Lit.* 2. b.

A monster not having human shape cannot purchase or inherit, but an hermaphrodite shall inherit or purchase *secundum prævalentiam sexus incalcentis* ; one born deaf and dumb may inherit ; so may one born deaf, dumb and blind, because it is for their advantage ; but they cannot contract, because they cannot understand the signs of contracting ; an infant, an idiot, and a person of *non sane memory* may inherit, because the law in compassion to their natural infirmities, presumes them capable of property ; so also an infant or a person of *non sane memory* may purchase, because it is intended for his benefit, and the freehold is in him till he disagree thereto, because an agreement is presumed, it being for their benefit, and because the freehold cannot be in the grantor, contrary to his own act, nor can be in abeyance, for then a stranger would not know against whom to demand his right ; if at full age, or after recovery of his memory they agree thereto, they cannot avoid it ; but if they die during minority or lunacy, the heirs may avoid it ; for they shall not be subject to the contracts of persons who wanted ca-

capacity to contract ; so if after his memory recovered, the lunatick or person *non compos* die without agreement to the purchase, their heirs may avoid it. *Co. Lit.* 8. 1 *Inst.* 2. 2 *Vent.* 303.

A *female* covert is capable of purchasing ; for such an act does not make the property of the husband liable to any disadvantage, nor does it suppose a separate will or power of contracting in the wife ; but here the will of the wife is supposed the mind of the husband, since no man is supposed not to assent to that which is for his benefit ; but in this case the husband may disagree, and it shall avoid the purchase. 1 *Inst.* 3. a.

By the stat. 11 & 12 *W.* 3. c. 4. *Papists* are disabled from purchasing lands, &c.

Persons capable of purchasing may gain a *fee-simple* by *feoffment* ; or by *fine*, or *common recovery* ; which are of the nature of a *feoffment* upon record ; or by *grant*, or by *exchange*, *release*, or *confirmation*, which are in the nature of *grant* ; or by *bargain and sale* ; or by *covenant* to stand seised ; or by *devise*. 3 *Com. Dig.* 215.

So a man may gain a fee by wrong : as by *disseisin*, *abatement*, or *intrusion*. *Id.* *Ibid.*

III. *By what words a fee-simple may be created.*

It is the word *heirs* makes the inheritance ; and a man cannot have a greater estate. *Litt.* 1. To have *fee-simple* implies, that it is without limitation to what heirs, but to heirs generally : though it may be limited by act of parliament. 4 *Inst.* 206. If one give or grant land to *J. S.* and his heirs ; and if he die without heirs, that *J. D.* shall have it to him and his heirs : by this *J. S.* hath a *fee-simple*, and *J. D.* will have no estate. *Dyer* 4, 33. Where land is given or granted by *fine*, deed, or will, in possession, reversion, or remainder, to another and his heirs ; it will be a *fee-simple*. *Floud.* 134. And if land be granted to a man and his heirs, *habendum* to him for life only, and livery of seisin is made ; it is a *fee-simple* estate, because a fee is expressed in the grant. 2 *Rep.* 23.

A lease is granted to one for a term of years, and after that the lessee shall have the land to him and his heirs by the rent of 10 l. a year ; if the grantor make livery upon it, 'tis a *fee-simple* ; otherwise but for years. 1 *Inst.* 217. Where lands are granted to *A.* for life, remainder to *B.* for life, the remainder to the right heirs of *A.* here *A.* hath a *fee-simple*. 20 *Hen.* 6. 35. *Bro. Eft.* 34, 35. A gift or grant is to a man's wife during life, after to him in tail, and after to his right heirs ; he will have a *fee-simple* estate. 2 *Rep.* 91.

If lands are granted to a man and his successors, this creates no *fee-simple* ; but if such a grant be made to a corporation, it is a *fee-simple* ; and in case of a sole corporation, as a bishop, person, &c. a *fee-simple* is to them and their successors. *Wood* 119. An estate granted to a person, to hold to him for ever, or to him and his assigns for ever, is only an estate for life ; the word *heirs* being wanted to make it *fee-simple* ; but in wills, which are more favoured than grants, the *fee-simple* and inheritance may pass without the word *heirs*. 1 *Inst.* 19. 9.

And by deed of *feoffment* a *fee-simple* may be created, which would be an estate-tail by will ; as where lands are given to another, and his heirs male, &c. without the word *body*. *Hob.* 32. A gift to a man and his children, and their heirs, is a *fee-simple* to all that are living ; though if land is given to a man and his heir, in the singular number, it is but an estate for life, and the heir cannot take by descent, he being but one, and therefore it is said shall take nothing. 1 *Inst.* 8. *Litt. Rep.* 6. *Quare*, If the intent of the testator appears, that he designed a *fee*, whether a *fee* shall not pass, by the devise ?

A *feoffment* to *B.* & *heredibus*, without saying *suis*, gives him a *fee-simple*. *Co. L.* 8. b. So to a son and the heirs of his father. *Semb.* *Co. L.* 220. b. So to *B.* & *liberis suis* and their heirs ; if he has issue, it gives them a joint-estate in fee. *Co. L.* 9. a. So to *B. heredibus & successoribus suis*, gives a fee. *Co. L.* 9. a. So a *feoffment* or grant to a body politic and their successors, gives them a *fee-simple*. *Co. L.* 8. b.

So a grant to the King *in perpetuum* gives him a fee, without the words, *his heirs or successors*, for he never dies. *Co. L. 9. b.* So a feoffment to a corporation aggregate *in perpetuum* gives a fee; for it never dies. *Co. L. 9. b. 1 Rol. 832. l. 55.*

Or, to a corporation sole, to be held in *frankalmoigne*. *Co. L. 9. b. 1 Roll. 833. l. 5.* So, if *A.* re-entfeoffs *B.* *adeo plene* as *B.* enfeoffed him, he has a fee without the word, *heirs*. *Co. L. 9. b.—2. 1 Rol. 833. l. 12.* So a grant to the church of *B.* gives a fee, without the word, *heirs or successors*. *1 Rol. 833. l. 3.*

And a limitation to the right heirs of *B.* gives a fee, without the words, *and their heirs*. *1 Rol. 833. l. 16.* So by a *devise*, a fee may be given without the words, *his heirs*. *Co. L. 9. b.* Or, by fine *sur connissance de droit come ceo*, &c. *Co. L. 9. b.* Or, by a common recovery. *Co. L. 9. b.*

So, a fee passes without the words, *his heirs*, where a man gives land with his daughter, &c. in *frankmarriage*. *Co. L. 9. b.* If a parcener, or joint-tenant releases to his companion. *Co. L. 9. b.* If the lord, &c. releases to the terretenant; which enures by way of extinguishment. *Co. L. 9. b.* If a man releases a mere right; as, where a disseisor releases to the disseisor all his right. *Co. L. 9. b.*

So, if a rent be granted upon partition, for owelty of partition. *Co. L. 9. 10.* So if a peer be summoned to parliament by writ, he has a fee in his dignity, without the word, *heirs*. *Co. L. 9. b.* So, by the forest law, if the King at a justice seat, grants to another an *assart in perpetuum*, without more, he has a fee. *Co. L. 10. a.* So, by custom, a grant of a copyhold, *sibi & suis*, or, *sibi & assignatis*, may give the inheritance. *4 Co. 29. b.*

A *fee-simple* may not come after a *fee-simple*; nor can a remainder, it being an absolute estate, so that nothing can come after it. *Dyer 33.*

A *fee-simple* determinable upon a contingency, is a fee to all intents; though not so durable as absolute fee. *Vaugh. 273.* But see title *Executory Devise*.

In pleading estates in *fee-simple*, they may be generally alledged, but the commencement of estates-tail, and other particular estates, must regularly be shewn. *1 Inst. 303.* The *fee-simple* estate, being the chief and most excellent; therefore he who hath it in lands or tenements, may give, grant, or charge the same by deed or will at his pleasure; or he may make waste or spoil upon it: And if he bind himself and his heirs to warranty; or for money by obligation, or otherwise; and leaving such land to the heir, it shall be charged with the warranty and debts: Also the wife of a man that is seised of such an estate, shall be endowed; and the husband of a woman having this estate, be tenant by the curtesy. *Co. Lit. 273. Dyer 330. Perk. Sect. 236.* Though *fee-simple* is the most ample estate of inheritance, it is subject to many incumbrances; as judgments, statutes, mortgages, fines, jointures, dower, &c. And there is a *fee-simple conditional*, where the estate is defeasible by not performing the condition; and a *qualified fee-simple*, which may be defeated by a limitation, &c. This is called a *base fee*, upon which no reversion or remainder can be expectant. *1 Inst. 18. 10 Rep. 97. See Discent, Executory Devise, Wills.*

Fee Expectant. (*Feudum Expectativum*) See *Expectant*.

Fee-farm. (*Feudum Firma*) Is when the lord upon creation of the tenancy, reserves to himself and his heirs, either the rent for which it was before let to farm, or was reasonably worth, or at least a fourth part of the value; without homage, fealty or other services, beyond what are especially comprised in the feoffment. *2 Inst. 44.* By *Fitzherbert*, a third part of the yearly value of the land may be appointed for the rent, where lands are granted in *fee-farm*, &c. *F. N. B. 110.* And Lord Coke says, *fee-farm* rents may be one half, a third, or fourth part of the value. *Co. Lit. 143.* Though these *fee-farm* rents seem to be more or less according to the conditions or consideration of the purchase of the lands out of which they are issuing. It is the nature of *fee-farm*, that if the rent

be behind and unpaid for the space of two years, then the feoffor or his heirs may bring an action to recover the lands, &c. *Brit. cap. 66. num. 4. See 10 Ann. c. 18. sec. 4. 30 Geo. 2. c. 3. sec. 5.*

Fee-farm Rents of the Crown. The *fee-farm* rents remaining to the Kings of England from their ancient demesnes, were many of them alienated from the crown in the reign of King Charles II. And by *Stat. 22 Car. 2. c. 6.* the King was enabled by letters patent to grant *fee-farm* rents due in right of his crown, or in right of his dutchies of Lancaster and Cornwall, except quit-rents, &c. to trustees to make sale thereof, and the trustees were to convey the same by bargain and sale to purchasers, &c. who may recover the same as the King might. But it has been observed, that men were so very doubtful of the title to alienations of this nature, that while these rents were exposed to sale for ready money, scarce any would deal for them, and they remained unsold; but what made men earnest to buy them, was the stop upon some of his Majesty's other payments, which occasioned persons to resort to this as the most eligible in that conjuncture: No tenant in tail of any of the said rents, is enabled to bar the remainder. *22 & 23 Car. 2. cap. 24.* On the taxing of *fee-farm* rents, receivers, &c. were to allow to the persons paying them so much in the pound as the land-tax amounts to. *Stat. 9 & 10 W. 3. c. 18. See 30 Geo. 2. c. 3. sec. 27, 28. 7 Geo. 2. c. 7. sec. 5. 22 & 23 Car. 2. cap. 24. sec. 8. and 10 Ann. c. 18. sec. 4.*

Fees. Are certain perquisites allowed to officers who have to do with the administration of justice, as a recompence for their labour and trouble; and these are either ascertained by acts of parliament, or established by ancient usage, which gives them an equal sanction with an act of parliament. *2 New Abr. 463.*

Herein may be considered,

I. In what cases fees are due.

II. At what time they may be demanded.

I. In what cases fees are due.

At Common law no officer, whose office related to the administration of justice, could take any reward for doing his duty, but what he was to receive from the King. *Co. Lit. 368. 2 Inst. 176, 208-9.*

And this fundamental maxim of the Common law is confirmed by *Westm. 1. cap. 26.* which enacts, "That no sheriff, or other King's officer, shall take any reward to do his office, but shall be paid of that which they take of the King; and that he who so doth shall yield twice as much, and shall be punished at the King's pleasure." This statute comprehends escheators, coroners, bailiffs, gaolers, the King's clerk of the market, aulneger, and other inferior ministers and officers of the King, whose offices do any way concern the administration or execution of justice. *2 Inst. 209.*

And so much hath this law been thought to conduce to the honour of the King and welfare of the subject, that all prescriptions whatsoever, which have been contrary to it, have been holden void; as where by prescription the clerk of the market claimed certain fees for the view and examination of all weights and measures, and it was held merely void. *4 Inst. 274. Moor 523. 2 Inst. 209. 2 Rol. Abr. 226.*

But it hath been holden, that the fee of 20 d. commonly called the bar fee, which hath been taken time out of mind, by the sheriff, of every prisoner who is acquitted; and also the fee of one penny, which was claimed by the coroner of every *visne*, when he came before the justices in *eyre*, are not within the meaning of the statute, because they are not demanded of the sheriff or coroner for doing any thing relating to their offices, but claimed as perquisites of right belonging to them. *2 Inst. 210. Stann. P. C. 49.*

Also it is holden by Lord Coke, that within the words of the statute 34 Ed. 1. which are, "No tallage or aid shall be taken or levied by us or our heirs in our realm, without the good will and assent of archbishops, bishops, earls, barons, knights, burghers, and other free-men of the land; no new offices can be erected with new fees,

fees, or old offices with new fees; for that is a tallage upon the subject, which cannot be done without common assent by act of parliament. 2 *Inst.* 533.

Yet it is holden, that an office erected for the public good, tho' no fee is annexed to it, is a good office; and that the party, for the labour and pains which he takes in executing it, may maintain a *quantum meruit*, if not as a fee, yet as a competent recompence for his trouble. *Moor* 808. *Bishop of Sarum's case*.

All fees allowed by acts of parliament become established fees; and the several officers intitled to them may maintain actions of debt for them. 2 *Inst.* 210. All such fees as have been allowed by the courts of justice to their officers, as a recompence for their labour and attendance, are established fees; and the parties can't be deprived of them without an act of parliament. *Co. Lit.* 368. *Pres. Chan.* 551.

Where a fee is due by custom, such custom, like all others, must be reasonable; and therefore where a person libelled in the spiritual court for a burying fee due to him for every one who died in his parish, tho' buried in another; the court held this unreasonable, and a prohibition was granted. *Hob.* 175. 1 *Roll. Abr.* 557, 559. *S. C.* adjudged.

The plaintiff brought an action on the case for fees due to him as Usher of the Black Rod, and obtained a verdict. *Stran.* 747. *Trin.* 13 *Geo.* 1. No fee shall be taken for a report upon a reference from any court. 1 *Jac.* 1. c. 10. Certain fees of sheriffs settled. 3 *Geo.* 1. c. 15. *sec.* 16. *Sec. Sheriff.* Fees on *nisi prius* records out of the Exchequer to be the same as on other records. 23 *Geo.* 2. c. 26. *sec.* 10. Fees of justices clerks to be regulated. 26 *Geo.* 2. c. 14. 27 *Geo.* 2. c. 16. *sec.* 4. Debt lies for the sheriff's fees for executing an *elegit*. *Lord Raym.* 1212.

As to the *quantum* of the fees due, it must be observed in general, that it is extortion for any officer to take more for executing his office, than is allowed by act of parliament, or is the known, and settled fee in such case. 10 *Co.* 102. a. *Co. Lit.* 368.

But in this place we shall only take notice of the fees of sheriffs for executions, about which there seems to have been the most controversies in our books. We must first observe, that by 28 *Elix. cap.* 4. it is enacted, "That it shall not be lawful for any sheriff, &c. nor for any of their officers, &c. by colour of their office, to take of any person, directly or indirectly, for the serving and executing of any extent or execution upon the body, lands, goods or chattels of any person, more recompence than in this present act appointed, *i. e.* twelve-pence of and for every twenty shillings where it exceedeth not one hundred pounds; and six-pence of and for every twenty shillings, over and above the said sum of 100*l.* that he or they shall so levy or extend, and deliver in execution, or take the body in execution for; upon pain, that the person offending, shall forfeit, to the party grieved, his treble damages; and shall forfeit the sum of 40*l.* for every time that he, they, or any of them shall do the contrary.

II. As to the time when fees may be demanded.

It is extortion for any officer to take his fee before it is due; and therefore where an under-sheriff refused to execute a *capias ad satisfaciendum* till he had his fees, the court held, that plaintiff might bring an action against him for not doing his duty, or might pay him his fees, and then indict him for extortion. *Co. Lit.* 368. 10 *Co.* 102. a. 1 *Salk.* 330.

Officer must obey a writ, though fees unpaid. *Stran.* 814. Process must be obeyed though fees are not tendered. *Stran.* 1262. If an *habeas corpus ad subjiciendum* be directed to a gaoler, he must bring up the prisoner altho' his fees were not paid him; and he can't excuse himself of the contempt to the court, by alledging that the prisoner did not tender him his fees. 1 *Keb.* 272. pl. 57. So as to an *habeas corpus ad faciendum & recipiendum*. *March* 89. 2 *Keb.* 280. 2 *Inst.* 178. but 1 *Keb.* 566. *cont.*

But if the gaoler brings up the prisoner by virtue of such *habeas corpus*, the court will not turn him over till

the gaoler be paid all his fees; nor, according to some opinion, till he be paid all that is due to him for the prisoner's diet; for that a gaoler is compellable to find his prisoner sustenance. See 1 *Roll. Rep.* 338. *Co. Lit.* 295. 9 *Co.* 87. *Plowd.* 68. a. 2 *Roll. Abr.* 32. 2 *Jon.* 178.

If a person pleads his pardon, the judges may insist on the usual fee of gloves to themselves and officers, before they allow it. *Fitz. Coron.* 294. *Pulton de Pace* 88. *Keling.* 25. 2 *Jon.* 56. 1 *Sid.* 452.

If an erroneous writ be delivered to the sheriff, and he executes it, he shall have his fees, though the writ be erroneous. 1 *Salk.* 332. It seems to be laid down in the old books as a distinction, that upon an extent of land upon a statute, the sheriff is to have his fees, so much *per pound* according to the statute immediately; but that upon an *elegit* he is not to have them till the *liberate*. *Poph.* 156. *Winch* 51. *S. P.*

A solicitor in Chancery may exhibit his bill for his fees for business done in that court; and so he may where the business is done in another court, if it relates to another demand the plaintiff makes in Chancery. 1 *Fern.* 203. 2 *Chan. Ca.* 153. But it hath been held, that chancellors, registers and proctors who are officers of temporal profit, and whose fees do not relate to the jurisdiction of the spiritual court, can't sue for them in the spiritual court. See 3 *Leon.* 268. 2 *Roll. Rep.* 59. 1 *Mod.* 167. 2 *Keb.* 615. 3 *Keb.* 303, 441, 516. 4 *Mod.* 254. 5 *Mod.* 242.

Fees of Attornies and Officers. Are considerations allowed them as a recompence for their labour: and in respect to officers, they are granted over and above their salaries, to excite them to diligence in executing their offices. They differ from *wages* which are paid to servants for certain work and labour done in a certain space; whereas *fees* are disbursed to officers, &c. for the transacting of business which occasionally occurs. If a client, when his business in court is dispatched, refuseth to pay the officer his court fees; the court on motion will grant an attachment against him, on which he shall be committed until the fees are paid. 1 *Lill. Abr.* 598. Ecclesiastical courts have not power to establish fees: But if a person bring a *quantum meruit in B. R.* &c. for fees, and the jury find for him, then they become established fees. 1 *Salk.* 335.

Action of the case lies for an attorney for his fees, against him that retained him in his cause: And attornies are not to be dismissed by their clients, till their fees are paid. 1 *Lill.* 142. But attornies are not to demand more than their just fees; nor to be allowed fees to counsel without tickets, &c. *Stat.* 3 *Jac.* 1. c. 7. An attorney may have action of debt for his fees, and also of counsel, and costs of suit: As a counsellor is not bound to give counsel till he has his fee; tis said he can have no action for it: Though it has been held otherwise. *F. N. B.* 121. 1 *Brownl.* 73. 31 *H.* 6. c. 9.

There were no fees due to sheriffs for executing their offices, till the *Stat.* 29 *Elix.* &c. which allows them fees for executing writs of execution, &c. By the *Stat.* of *Westm.* 2. 13 *Ed.* 1. c. 42 & 44, the ancient fees of officers of courts of justice were ordained: And by statutes, the fees of sheriffs, gaolers, bailiffs, &c. are limited. See *Extortion*. In an action of false imprisonment, it has been adjudg'd that a bailiff cannot detain a person arrested for his fees. 1 *Ld. Raym.* 4.

Feigned Action. See *Faint Action*.

Feigned Issue. If in a suit in equity, any matter of fact is strongly contested, the court usually directs the matter to be tried by a jury; especially such important facts as the validity of a will, or whether *A.* is the heir at law to *B.* or the existence of a *modus decimandi*, or real and immemorial composition for tithes. But as a jury cannot be summoned to attend a court of equity, the fact is usually directed to be tried at the bar of the court of King's Bench, or at the assizes, upon a *feigned issue*. For this purpose, a feigned action is brought, wherein the pretended plaintiff declares that he laid a wager of 5*l.* with the defendant, that *A.* was heir at law to *B.* then avers that he is so; and brings his action for the 5*l.* The defendant allows the wager, but avers that *A.* is not the heir to *B.* and thereupon that issue is joined, which is directed out of Chancery to be tried: And thus the ver-

dict of the jurors at law determines the fact in the court of equity. *Black. Com.* 3 P. 452.

Felagus, (*Quasi fide cum eo ligatus*) A companion, but particularly a friend, who was bound in the *decennary* for the good behaviour of another. In the laws of King *Ina*, it is said, if a murderer could not be found, &c. the parents of the person slain should have six marks, and the King forty; if he had no parents, then the lord should have it. *Et si dominus non haberet, felagus ejus.* LL. *Ina*, cap. 15.

Feld, Is a Saxon word, signifying *field*; and in its compound it signifies wild, as *feld honey*, is wild honey, &c. *Blount*.

Felle Homagers, Were faithful subjects, from the Sax. *fai*, i. e. *fides*.

Felo de se, One that commits felony by laying violent hands upon himself, whereby he is the occasion of his own untimely death. When a person with deliberation and direct purpose kills himself, by hanging, drowning, shooting, stabbing, &c. this is *felo de se*; but the person that commits this felony, must be of the age of discretion, and *compos mentis*: And therefore if an infant under fourteen years of age, or a lunatick during his lunacy, or one distracted by a disease, or an idiot, kills himself, it is not felony. 3 *Inst.* 44. *Dalt. cb.* 145. Also if a person during the time that he is *non compos mentis* giveth himself a mortal wound, though he dieth thereof when he recovers his memory; he is not *felo de se*, because at the time of the stroke he was not *compos mentis*. *Dalt.* 342, 344. And he who desires and persuades another man to kill him, is not a *felo de se*; his assent being void in law, and the person killing him a murderer. *Kelw.* 136. It is *felo de se* where a man maliciously attempts to kill another, and falls upon his sword, &c. whereby he kills himself; but he must be the only agent. 1 *H. P. C.* 68.

A *felo de se* shall forfeit all his goods and chattels real and personal; but not until it is lawfully found by the oath of twelve men, before the coroner *super visum corporis*, that he is *felo de se*. 3 *Inst.* 55. By the return of the inquisition the goods, &c. are vested in the King: Though it hath been said, that the goods of a *felo de se* are forfeited before inquisition, *viz.* immediately upon committing the fact. 1 *Lev.* 8. But see 5 *Rep.* 110. where it is adjudged that they are not forfeited till it is found of record. The lands of inheritance of a *felo de se* are not forfeited, by reason he was not attainted in his life-time: nor is such a person's wife barred of dower, or his blood corrupted. 1 *Hawth.* 68. If a judgment is obtained by a plaintiff in any action, and the plaintiff hangs himself, so as to become *felo de se*, the debt is forfeited to the King. 1 *Saund.* 36. 2 *Nelf. Abr.* 840. Goods are forfeited to the King by a *felo de se*, for the loss of a subject, and breach of the peace. 1 *Plowd.* 261. But these forfeitures are oftentimes saved, by the coroner's jury finding their verdict *lunacy*; to which they are inclined on a favourable interpretation, that it is impossible for a man in his senses to do a thing so contrary to nature: but if this argument be good, self-murder can be no crime, because a madman cannot be guilty of any crime. 1 *Hawth.* 67.

If a person *felo de se* is secretly made away with, that the coroner cannot view the body; presentment is to be made of it by justices of peace, &c. to entitle the King to the forfeiture of goods. 5 *Rep.* 110. Where a person is found *felo de se*, who on account of lunacy, &c. ought not to be so; or where one is returned *non compos*, when in truth the party is *felo de se*, &c. if there be no fault in the coroner, or incertainty in the inquisition, a *melius inquirendum* will not be granted; but the inquisition is traversable in *B. R.* 3 *Mod.* 238. 2 *Nelf. Abr.* 840. Although there can be no *melius inquirendum*, 'tis said the court may order an indictment to be against the *felo de se*; and if that be found, his goods shall be forfeited. 1 *Lill. Abr.* 601. A pardon of murder, doth not pardon *felo de se*; but a pardon of all felonies and forfeitures doth. By custom and practice, the bodies of *felo de se*'s are buried in the highway, &c.

Felons Woods. The statute *de prerogativa regis*, 17 *Ed.* 2. c. 1. grants to the King, among other things,

the goods of felons and fugitives. If the King grant to a man and his heirs *felons goods*, the grantee cannot devise them, &c. on the statute 32 *H. 8.* c. 1. because they are not of a yearly value; but where a person is seised of a manor, to which they are appendant, it is otherwise, for they will pass as appurtenant. 3 *Rep.* 32. A person committed to prison on suspicion of felony, having the money taken from him which he had about him before conviction, brought an action of trespass for seizing his money, &c. on the *Stat.* 1 *R.* 3. c. 3. by which it is enacted, that no person shall take the goods of another, &c. *Raym.* 414. 2 *Nelf.* 839. See *Flight*.

Felony, (*Felonia*, Fr. *Felonnie*) As Sir Edward Coke tells us, is derived from the Latin word *fel*, or from the old Sax. *fell*, one signifying gall, and the other fierce; and his reason is, because either of these words are suitable to the crime, which is always intended to be done with a bitter or fierce mind: But the learned *Spelman* gives a different account of the derivation of this word, that it comes from the Saxon word *seab*, which signified a reward or estate, and the German *lon*, which in English is price; and this was formerly a crime punished with the price, *viz.* the loss of estate. And before the reign of K. H. 1. felonies were punished with pecuniary fines; for he was the first who ordered felons to be hanged, about the year 1108.

The judgment against a man for felony hath been the same since the reign of this King, i. e. That he be hanged by the neck till dead; which is entered *suspendatur per collum*, &c. 4 *Inst.* 124. Felony was anciently every capital crime perpetrated with an evil intention: All capital offences by the Common law, came generally under the title of felony; and could not be expressed by any word but *felonice*; which must of necessity be laid in an indictment of felony. 1 *Inst.* 391. It is always accompanied with an evil intention; and therefore shall not be imputed to any misanimadversion. But the bare intention to commit a felony is so very criminal, that at the Common law it was punishable as felony, where it missed of its effect through some accident; and as our law now is, the party may be severely fined for such an intention. 1 *Hawth. P. C.* 65.

Felony is included in high treason. *H. P. C.* 11. We account any offence felony, that is in degree next petit treason; and at this day felony includes petit treason, murder, homicide, sodomy, rape, burning of houses, burglary, robbery, breach of prison, rescous and escape, after one is imprisoned or arrested for felony, with other offences particularly enumerated in the tables to the statutes. It is either by the Common law, or by statute: Felony by the Common law is against the life of a man; as murder, manslaughter, *felo de se*, *se defendendo*, &c. Against a man's goods, such as larceny, and robbery: Against his habitation, as burglary, arson or house-burning; and against publick justice, as breach of prison. 3 *Inst.* 31. Piracy, robbery, or murder upon the sea, are felonies punishable by the *Civil law*; and likewise by statute: And felonies by statute are very numerous. *Mod. Just.* 180. Felony is distinguished from lighter offences, in that the punishment of it is death; but not always, for petit larceny is felony, and the indictment against such an offender must run, *felonice cepit*, yet it is not punished by death, though it be loss of goods: And of felonies in general, there are two sorts; one of which for the first offence is allowed clergy, and another that is not; but clergy is granted where it is not expressly taken away by statute. *Staundf. lib.* 1. Felony is punished with loss of life, and of lands, not entailed, goods and chattels; but the statutes make a difference in some cases concerning lands, as the 37 *H. 8.* c. 6. And felony ordinarily works corruption of blood; unless a statute making an offence felony, ordains it shall be otherwise, as some statutes do.

The punishment of a person for felony, by our ancient books, is, 1st, To lose his life. 2dly, To lose his blood, as to his ancestry, and so as to have neither heir nor posterity. 3dly, To lose his goods. 4thly, To lose his lands; and the King shall have *annum, diem & vastum*, to the intent that his wife and children be cast out of the house, his house pulled down, and all that he had for his comfort

comfort or delight destroyed. 4 Rep. 124. A felony by statute incidentally implies, that the offender shall be subject to the like attainder and forfeiture, &c. as is incident to a felon at Common law. 3 Inst. 47, 59, 90. And when persons are to undergo judgment of life and member for any crime by statute, it is felony thereby, whether the word felony be mentioned or not. 1 Hawk. 107.

All felonies are several, and cannot be joint; so that a pardon of one felon, cannot discharge another: but the felony of one man may be dependant upon that of another, and the pardon of the one by a necessary consequence enure to the benefit of the other, as in cases of principal and accessory, &c. 2 Hawk. P. C. 387, 380. Private persons may arrest felons by their own authority, or by warrant from a justice of peace: And every private person is bound to assist an officer to take felons, &c. 2 Hawk. 75. And if a person be brought before a justice on suspicion of felony, where a felony is committed, though it appears on examination that he is not guilty, yet it is said he is not to be discharged without trial. Lamb. 229.

But one ought not to be arrested upon suspicion of felony, except there be *probabilis causa* shewed for the ground of the suspicion. 1 Lill. Abr. 603. If a felony is not done by a man, but some person else, if another hath probable cause to suspect he is the felon, and accordingly doth arrest him, this is lawful, and may be justified: But to make good such justification, there must be in fact a felony committed by some person, without which there can be no ground of suspicion. 2 Hale's Hist. P. C. 78. And as to the person, there ought to be reasonable cause to suspect him, otherwise the arrest will be illegal.

A private man arresting one for felony, cannot justify breaking doors, to take the party suspected; but he doth it at his peril, viz. if in truth he be a felon, it is justifiable; but if innocent, then it is not: To prevent a murder or manslaughter, private persons may break doors open. 2 Hale Ibid. 82. Officers may break open a house to take a felon, or any person justly suspected of felony; and if an officer hath a warrant to take a felon, who is killed in resisting, it is not felony in the officer; but if the officer is killed, it is otherwise. Dalt. 289.

Persons indicted of felony, &c. where there are strong presumptions and circumstances of guilt, are not repleviable; but for larceny, &c. when persons are committed who are of good reputation, they may be bailed. 2 Hawk. 101. If one be committed to prison for one felony, the justices of gaol delivery may try him for another felony, for which he was not committed, by virtue of their commission. 1 Lill. 602.

A felon refusing to plead, and put himself upon his trial, shall be put to the penance of *paine fort & dure*, &c. If a felon stands mute by the act of God, the felony is to be inquired of by jury, and whether the prisoner be the same person, and all other matters in the same manner as if the criminal had pleaded. 2 Hawk. 327. And it may be inquired of by inquest of office, whether he do so of malice, or by the act of God. Ibid. Where a married woman commits felony, in company with her husband, it shall be presumed to be done by his command, and she shall be excused. 3 Inst. 310. If a man's horse be going into the ground of another, and he takes it *felice animo*, not as damage-feasant, it is no finding, but felony: But if A.'s sheep stray into the flock of B. and he drives the same along with his flock, or by mistake shears him, this is not a felony; though if he knew it to be another person's, and marks it with his mark, it is an evidence of felony. 1 Hale's Hist. P. C. 506.

Where one steals another's goods, and a third person feloniously takes them from him; he is a felon as to both the others. And when there is a pretence of title to things unlawfully taken, it may be only a trick to colour felony; and the ordinary discovery of a felonious intent is, if the party doth it secretly, or being charged with the goods denies it. Ibid. 507, 509. If a person to whom goods are delivered on a pretended buying them, runs away with them, it is felony: And a guest stealing plate set before him at an inn, &c. is felony; also persons who have the charge of things, as a servant of a chamber, &c. may be guilty of felony: And the least removing

of a thing in attempts of felony, is felony, though it be not carried off. 3 Inst. 308. Raym. 275.

But goods must not be of a base nature; such as dogs, &c. nor *feræ naturæ*, as deer, hares, &c. except they be made tame, when it will be felony to steal them. If any turkeys, geese, poultry, fish in a trunk, &c. are taken away, it is felony. 3 Inst. 309, 310. Stealing of tame peacocks, is felony; so of herons, and young hawks in their nests: 'tis otherwise of pheasants, partridges, conies, &c. although they be so kept that they cannot escape; if they be not reclaimed, and known. Jenk. Cent. 204. As to cats, dogs, monkeys, and the like; though it be not felony to take them, trespass lies for them. Jenk. ibid.

Felonies by statute, Are very numerous, and as this work will not admit of a proper enumeration, we must refer to the Table of the quarto edition of the Statutes, where they are set forth in alphabetical order.

Feme Covert, Is a married woman; who is likewise said to be *covert baron*. See *Baron and Feme*.

Feme sole, (Fr.) A woman alone, that is unmarried; and if she marries, her debts become those of the husband, &c. 1 Rol. Abr. 351. *Feme Sole Merchant*. See *Baron and Feme*, and *London*.

Fence, Is a hedge, ditch, or other inclosure of land for the better manurance and improvement of the same. And where a hedge, and ditch join together, in whose ground or side the hedge is, to the owner of that land belongs the keeping of the same hedge or fence, and the ditch adjoining to it on the other side, in repair and scoured. Par. Offic. 188. An action of the case or trespass lies, for not repairing of fences, whereby cattle come into the ground of another, and do damage. 1 Salk. 335. Also it is presentable in the Court-Baron, &c. Vide *Appropriation*. Stat. 13 Ed. 1. and *Inclosure*.

Fence-month, (*mensis prohibitionis*, or *mensis vetitus*) Is a month wherein female deer in forests, &c. do *season*, and therefore it is unlawful to hunt in forests during that time; which begins fifteen days before *Midsummer*, and ends fifteen days after it, being in all thirty days. *Marrus*. part 2. cap. 13. Stat. 20 Car. 3. cap. 3. Some ancient foresters call this month the *defence-month*, because then the deer are to be defended from being disturbed, and the interruptions of fear and danger; as there are certain *defence-months* for fish, particularly salmons, as appears by the Stat. Westm. 2. cap. 47, &c. Serjeant Fleetwood saith, that the *fence-month* hath been always kept with watch and ward, in every bailiwick throughout the whole forest, since the time of *Canutus*. Fleetwood's Forest Laws, p. 5.

Fengeld, (Sax.) A tax or imposition, exacted for the repelling of enemies.—*Pecunia vel tributum ad arcendos hostes erogatum*. MS. Antiq.

Fens, (*paludes*) Are low marshy grounds, or lakes for water; for the draining whereof in this kingdom several statutes have been enacted: The statutes 4 Jac. 1. c. 8. & 13. make provision for draining and securing from inundation the drowned grounds and marshes of *Leisnes* and *Fants* in Kent; and the fens and low grounds in the *isle of Ely*. The 15 Car. 2. cap. 17. appoints *William, Earl of Bedford*, and other adventurers, a corporation, for the draining of *Bedford Level* in *Bedfordshire*, consisting of a governor, bailiffs, and conservators, &c. who have power to lay and levy taxes within the great level of the fens; and also to erect works within the same, for carrying the water to the sea, making satisfaction to the owners of lands for injury received; and throwing down any of the said works, incurs treble damages, &c.

By 16 & 17 Car. 2. c. 11. *Deeping fens*, &c. in *Lincolnshire*, are to be drained from water; and *Edward Earl of Manchester*, and several others are declared undertakers thereof, on certain trusts, with power to erect banks, bridges, drains, locks, sluices, &c. for recovery of the said fens; and assignees of lands held by the adventurers under the trustees, may hold assemblies for making of by-laws, for the management of the works of draining; they may charge the owner of the lands by an acre tax, &c. and on default of payment, sell the defaulters lands, &c.

The 11 Geo. 2. c. 34. ordains that commissioners shall be appointed to put this act in execution, for effectually draining and preserving of the fens in the *isle of Ely* in Cam-

Cambridgeshire, who are authorised to make drains, dams, &c. and proper works thereon: and the said commissioners may charge proprietors with a proportionable acre tax, viz. for *Waterden Fen*, at the rate of 5 s. and *Redmoor, Carwile Fen*, and the *Holts*, at 2 s. an acre by the year, for four years; and afterwards at an yearly rate, not exceeding 1 s. 6 d. per acre; they may likewise borrow money for maintaining and effecting the works, by assigning over the duties: persons obstructing the draining to forfeit 100 l. and if any person shall burn any of the engines erected, he shall be imprisoned three years; and being convicted again of the like offence, to be guilty of felony. And for raising money, for draining and future preservation of *Deeping fens*, a rate of 20 s. an acre is to be paid, by all the taxable land owners, according to agreement of the proprietors; levied by distress of goods, or sale of defaulters lands; which may be also mortgaged to raise the money, &c. by 11 Geo. 2. c. 39.

By the Stat. 21 Geo. 2. c. 18. Commissioners are appointed for draining and preserving certain fen lands in the several parishes of *Maney, Upwell, Welney, Downham, Witcham*, and in a certain extraparochial place, in *Byal Fen*, within the isle of *Ely*, and county of *Cambridge*, who may make an assessment of 1 s. 6 d. per acre yearly, on which they may borrow money, with like powers, authorities and directions as in Stat. 11 Geo. 2. cap. 34. See Stat. 22 Geo. 2. c. 11, 16, 19. as to fen lands in the parishes of *Sutton, Mepal, Witcham, Chatteris, Doddington, Somersham, Upwell, Outwell, Demer, Welney, Whittlesey* and *Padley* with *Fenton* in *Ely*, *Cambridge* and *Huntingdon*, with many others, which see in the Table to the 4th edition of *Statutes at Large*.

Feod or Feud, Is defined to be a right which a vassal hath in lands, or some immoveable thing of his lord's, to use the same, and take the profits thereof hereditarily; rendering unto the lord such feudal duties and services as belong to military tenure, &c. and the property of the soil always remaining to the lord. *Spelm. of Tenures*, cap. 1.

Feodal, (*feodalis, vel feudalis*) Of or belonging to the fee. Stat. 12 Car. 2. cap. 24.

Feodality, Fealty paid to the lord by his feudal tenant. *Fecit feodalitatem suam, prout decet dicto domino*. Cartular. Rading. MS.

Feodary, or Feudary, (*feudatarius*) An officer of the court of wards, appointed by the master of that court, by virtue of the statutes 32 Hen. 8. cap. 26. whose business it was to be present with the escheator in every county at the finding of offices of lands, and to give in evidence for the King as well concerning the value as the tenure; and his office was also to survey the lands of the ward, after the office found, and to rate it. He did likewise assign the King's widows their dowers; and receive all the rents of wards lands within his circuit, which he answered to the receiver of the court. This office seems to be wholly taken away by Statute 12 Car. 2. cap. 24.

Feodary, Was the tenant who held his estate by feudal service; and grantees, to whom lands in feud or fee were granted by a superior lord, were sometimes called *homagers*; and in some writings are termed *vassals, feuds*, and *feudataries*. See *Feuds*.

Feodum. See *Feud*.

Feodum Militis, A knight's fee: *feodum laicum*, a lay fee, or land held in fee of a lay lord. *Kenes's Gloss*. See *Feuds*.

Feoffment, (*feoffamentum*, from the Gothic word *feudum*, and signifies *donationem feudi*) Is a gift or grant of any manors, messuages, lands or tenements, to another in fee, to him and his heirs for ever, by the delivery of seisin and possession of the thing given or granted; and in every feoffment, the giver or grantor is called the *feoffor*, and he that receives by virtue thereof, is the *feoffee*. *Littleton* says, the proper difference between a *feoffor* and a *donor*, is, that the one gives in *fee-simple*, the other in *fee-tail*. *Litt. lib. 1. cap. 6. Accomp. Conv. 1 Vol. 71*. The deed of feoffment is our most antient conveyance of lands; and in records we often find *fees* given to knights under the phrases of *de veteri feoffamento*, and *de novo feoffamento*; the first whereof were such lands as were given or granted by King Henry I. And the others, such as were granted

after the death of the said King, since the beginning of the reign of Henry II. At Common law the usual conveyance was by feoffment, to which livery and seisin was necessary, the possession being thereby given to the *feoffee*; but if livery and seisin could not be made, by reason there was a tenant in possession, the reversion was granted, and the particular tenant attorned. 1 *Inst.* 9, 49. And a feoffment is said, in some respects, to excel the conveyance by fine and recovery; it clearing all disseins, abatements, intrusions, and other wrongful estates, which no other conveyance doth: and for that it is so solemnly and publicly made, it has been of all other conveyances the most observed. *West. Symb.* 235. *Plowd.* 554.

This head will be best illustrated by considering,

- I. Of what things a feoffment may be made.
- II. Who may make a feoffment, and how it is to be made.
- III. Of the different kinds of livery, with their effects and operations.

I. Of what things a feoffment may be made.

A feoffment may be of a messuage, land, meadow, pasture, or other corporal thing; and of a moiety, third, or fourth part of it; that lies in livery.

So a feoffment may be made of lands, in which a man has no fixed estate; as, if he has twelve acres to be annually assigned in such a meadow; and livery in any acre, which he has at the time of the feoffment, is sufficient. *Co. L. 4. a. 48. b. 2 Rol. 10. l. 40 ad 50*.

So, if a feoffment be of fifty acres towards the north in such a moor, which contains 100 acres, livery in any of them is sufficient. *2 Rol. 11. l. 5. Dy. 372. b.*

So, if two manors be divided *alternis vicibus* between parceners, either may make a feoffment of her manor; and the deed ought to comprehend both, and she shall make livery in one *secundum formam chartæ* this year, and in the other the next year. *Co. L. 48. b.*

But a feoffment cannot be made of a thing of which livery cannot be given; as, of incorporeal inheritances, *rent, advowson, common*, &c. *2 Rol. 1. l. 20*. Though it be an advowson, &c. in gross. *Cont. 11 H. 6. 4. Acc. 2 Rol. 1. l. 21*.

So a feoffment of lands, which are uncertain till a future act, is void; for livery does not operate *in futuro*: as, if A. agrees by indenture to convey 20 l. per annum in land to such an use, and 20 s. per annum to such an use, and makes a feoffment of all his lands to the uses in the indenture; it will be void for all but that where livery was made, it not being ascertained which shall be to one use, and which to the other. *R. 1. Rol. 187*.

In deeds of feoffment, there must be a good feoffor, that is, one able to grant the thing conveyed by the deed; a feoffee capable to take it; and a thing grantable, and granted in the manner the law requireth. 1 *Inst.* 42, 49, 190.

II. Who may make a feoffment, and how it is to be made.

If a person *non compos* makes a feoffment, and gives livery himself, this is allowed on all hands to be good to bind himself, so that he can by no process or plea avoid the feoffment, and restore himself to the possession; the same law of an idiot; and the reason is, because the investiture being made before the *pares curiæ*, their solemn attestation could not be defeated by the person himself, because it is presumed they are competent judges of the ability of the feoffor to make such feoffment. *2 Rol. Abr. 2. Co. Lit. 247. 4 Co. 125. B. Show. Parl. Cases 153.* and see tit. *Idiots and Lunatics*, and *post*.

But if an infant makes a feoffment, and makes a livery himself, this shall not bind him, but he himself may avoid it by writ of *dum fuit infra ætatem*; yet the feoffment of the infant is not void in itself, as well because he is allowed to contract for his benefit, as that there ought to be some act of notoriety to restore the possession to him equal to that which transferred it from him. *4 Co. 125. 2 Rol. Abr. 2. 8 Co. 42, 43. Whittingham's case*.

But if an infant makes a feoffment, and a letter of attorney to make livery, that is void; so if a person *non compos* makes a surrender or release, this is void in law; so if he makes a letter of attorney to give livery; but the heir at law after the death of the person of *nons compos* memory,

mory, or idiot, may avoid his feoffment; and so may the King upon an office found of his lunacy during his life. 8 Co. 45. Co. Lit. 247. a. 4 Co. 125. a. 2 Rol. Abr. 2. Show. Parl. Cases 153.

There must be livery of seisin in all feoffments, and gifts, &c. where a corporal inheritance or freehold doth pass; and without livery, the deed is no feoffment, gift or demise. Lit. 59. 8 Rep. 82. But a freehold may pass without livery by the statute 27 H. 8. c. 10. By force of which statute, a feoffment to the use of the feoffor, feoffee, &c. supplies the place of livery and seisin. Wood's Inst. 239.

But a feoffment may not be of such things whereof livery and seisin may not be made; for no deed of feoffment is good to pass an estate without livery of seisin; and if either of the parties die before livery, the feoffment is void. Plowd. 214, 219. Though where a feme feoffor made a feoffment of lands with livery in view, and then married the feoffee before the livery was executed by actual entry; it was adjudged the livery might be executed after marriage, the feoffee having not only an authority to enter, but an interest passed by the livery in view, and the woman did all on her part to be done. 1 Vent. 186.

A man may either give or receive livery by letter of attorney; for since a contract is no more than the consent of a man's mind to a thing, where that consent or concurrence appears, it were unreasonable to oblige each person to be present at the execution of the contract, since it may as well be performed by any other person delegated for that purpose by the parties to the contract. Co. Lit. 52. 2 Rol. Abr. 8.

But such delegation or authority, to give or receive livery, must be by deed, that it may appear to the court, that the attorney had a commission to represent the parties that are to give or take the livery, and whether the authority was pursued. Co. Lit. 48. b. 52. a. 2 Rol. Pulfreman and Grobie.

If a man be disseised, and makes a deed of feoffment, and a letter of attorney to enter and take possession of the land, and afterwards to make livery, according to the form of the charter, it will be a good feoffment, though he was out of possession at the time of the deed made; for the feoffment takes effect by the livery, and not by the deed. Co. Lit. 48, 52.

A feoffment being a Common law conveyance, and executed by livery, makes a transmutation of estate; but a conveyance on the statute of uses, as a covenant to stand seised, &c. makes only a transmutation of possession, and not of estate. 2 Lev. 77. 1 Vent. 378. A feoffment to the use of A. for life, the remainder to B. If A. refuses to take the estate, B. shall take presently, because the whole estate is out of the feoffor by livery; but if it had been by covenant to stand seised, he should not have taken till after the death of A. but it would rest in the covenantor, who shall have the use in the mean time. 2 Lev. 77. 1 Leon. Ca. 279. Before the Stat. Westm. 3. If a man had made feoffment in fee, without declaring any use, it should have been to the use of the feoffee; though now by that statute, where no consideration or declaration of use is expressed, it shall go to the feoffor himself. 2 Leon. 15, 16. If I convey lands by feoffment, which I have on the part of the mother, to J. S. and his heirs, without consideration; the use will be void, and the land shall return again to me and my heirs on the part of the mother; yet if I declare the use to me and my heirs, or upon such feoffment reserve a rent in like manner, it shall go to my heirs at the Common law, it being a new thing divided from the land. Hob. 31. Co. Lit. 13, 231. 1 Rep. 100. Dyer 134. Where a man makes a feoffment, without any consideration; by that the estate and possession passes, but not the use, which shall descend to his heir. 1 Leon. 182.

A feoffment in fee is made to the use of such persons, and for such estates, as the feoffor shall appoint by his will, or to the use of the last will; by operation of law the use vests in the feoffor, and he is seised of a qualified fee, viz. until he makes his will, and declares the uses; and after the will is made, it is only directory, for nothing passes by it but all by the feoffment. 6 Rep. 18. Moor 567. A feoffment in fee, upon condition, &c. was

inrolled, but no livery made; and it was adjudged no good feoffment, but the inrollment shall conclude the person to say that it was not his deed. Popb. 6. 2 Nels. Abr. 844. If a bargain and sale of lands be not inrolled, and the bargainor deliver livery and seisin of the lands secundum formam chartae, &c. it has been held a good feoffment. 2 And. 68.

A feoffment in fee made upon condition not to alien, the condition is void; because 'tis repugnant to the estate; but if livery is had, the feoffment will be good against the feoffor: and a bond with condition that the feoffee shall not alien, is said to be good. 1 Co. Inst. 206. 2 Cro. 596. If a man makes a feoffment of lands on condition; that the feoffee shall give the lands to the feoffor, and his wife in special tail, remainder to the heirs of the feoffor; and he dies before such gift is made, the feoffee ought to make it as near the intent of the condition as may be, viz. to the wife without impeachment of waste, remainder to the heirs of the body of her husband, on her body begotten, and remainder to the husband's right heirs. In case the feoffor and his wife both die, the feoffee then should make the estate to the issue, and heirs of the body of his father and mother begotten, remainder to the right heirs of the husband or father. 1 Inst. 219, 220.

Tenant in tail makes a feoffment in fee; the inheritance of the tail is not given to the feoffee by the feoffment, nor is he thereby tenant in tail; for none shall be tenant in tail but he only who is comprehended in the gift made by the donor. But it gives away all the immediate estate the feoffor had. Plowd. 562. Hob. 335. If lessee for life, and the reversioner in fee, make a feoffment in fee by deed, each gives his estate; the lessee his by livery, and the fee from him in remainder. 6 Rep. 15. Lill. Abr. 609. A feoffment was made habendum to the feoffee and his heirs, after the death of the feoffor, and livery was made; yet it was held to be a void feoffment, for an estate of freehold in lands cannot begin at a day to come: but where a lessor made a lease for lives, and granted the reversion to another for life, whose estate for life was to begin after the death of the survivor of the other lessees for life, this was adjudged a good estate in reversion for life. Hob. 171. 1 Nels. Abr. 846.

If the husband alone make a feoffment of his wife's land, or of both their lands, his wife being on the land and disagreeing to it; this will be good against all persons but the wife: also so it is, if one jointenant make a deed of feoffment of the whole land, his companion being then upon it: or if a man disseise me of my lands, and then enfeoff another thereof, whilst I am upon the land, &c. Perk. Sett, 219, 220.

Every gift of feoffment of lands made by fraud or maintenance, shall be void; and the disseisee, notwithstanding such alienation, shall recover against the first disseisor his land and double damages; provided he commence his suit in a year after the disseisin, and that the feoffor be pernor of the profits. Stat. 1 R. 2. c. 9. See 11 H. 6. c. 3.

III. Of the different kinds of livery, with their effects and operations.

Livery may be by deed; and within view, or in law.

The livery in deed, is the actual tradition of the land, and is made either by the delivery of a branch of a tree, or a turf of the land, or some other thing, in the name of all the lands and tenements contained in the deed; and it may be made by words only, without the delivery of any thing; as if the feoffor being upon the land, or at the door of the house, says to the feoffee, *I am content that you should enjoy this land according to the deed, or Enter into this house or land, and enjoy it according to the deed*; this is a good livery to pass the freehold, because in all these cases, the charter of feoffment makes the limitation of the estate, and then the words spoken by the feoffor on the land, are a sufficient indicium to the people present, to determine in whom the freehold resides during the extent of the limitation; besides, the words being relative to the charter of feoffment, plainly denote an intention to enfeoff. Co. Lit. 48. a. 9 Co. 137. b. Fbarwood's case. 6 Co. 26. Sharp's case. 2 Rol. Abr. 7. And see Cro. Jac, 80, which seems contr.

But if a man without any charter, being in his house, says, *I here demise you this house, as long as I live, paying 20l. per annum*, this passes no freehold, but only an estate at will, because the word *demise* denotes only the extent of the limitation of the estate intended to be conveyed; but bare words of limitation, without some acts or words to discover the intention of the feoffor to deliver over the possession, are not sufficient to convey the freehold; for if a charter of feoffment be made to a man and his heirs, this, without some other act, or word to give the possession, only passes an estate at will, because the act of delivery is requisite to the perfection of the charter; but besides the charter of feoffment, there must be some act or words to deliver over the possession, before the feoffee can enjoy it pursuant to the charter. 6 Co. 26. 2 Rel. Abr. 7. Co. Lit. 48. Cro. Eliz. 482. 9 Co. 138. Moor, pl. 632.

The livery within view, or the livery in law, is when the feoffor is not actually on the land, or in the house, but being in sight of it says to the feoffee, *I give you yonder house, or land, go and enter into the same, and take possession of it accordingly*; this sort of livery seems to be made at first only at the court barons, which were antiently held *sub dio*, (that is, in the open air) in some open part of the manor, from whence a general survey or view, might have been taken of the whole manor, and the *pares curiæ* easily distinguished that part which was then to be transferred. Pollex. 47.

But this sort of livery is not perfect to carry the freehold, till an actual entry made by the feoffee, because the possession is not actually delivered to him, but only a licence or power given him by the feoffor to take possession of it; and therefore, if either the feoffor or feoffee die before livery, and entry made by the feoffee, the livery within the view becomes ineffectual and void; for if the feoffor dies before entry, the feoffee can't afterwards enter, because then the land immediately descends upon his heir, and consequently no person can take possession of his land without an authority delegated from him who is the proprietor; nor can the heir of the feoffee enter, because he is not the person to whom the feoffor intended to convey his land, nor had he an authority from the feoffor to take possession; besides, if the heir of the feoffee were admitted to take possession after his father's death, he would come in as a purchaser, whereas he was mentioned in the feoffment to take as the representative of his ancestor, which he can't do since the estate never vested in his ancestor. Co. Lit. 48. b. 2 Rel. Abr. 3, 7. 1 Vent. 186. Moor 85. Pollex. 48.

The livery within view may be made of lands in another county than where the lands lie, because the translation of the feud was often made at the court-baron, in the presence of *pares curiæ*; and these courts being held *sub dio*, the *pares* could have a distinct view of every part of the manor; and therefore were proper to attest this sort of investiture, tho' the lands were in a different county, for notwithstanding that, they might have been part of the same manor, for which the court was held. Co. Lit. 48. b.

This ceremony was first instituted, that the *pares* of the county may, upon any dispute relating to the freehold, determine in whom it is lodged, and from thence be the better enabled to determine in whom the right is. Hence therefore it is, that if a man makes a feoffment, or lease for life, to commence *in futuro*, and makes livery immediately, the livery is void, and only an estate at will passes to the feoffee; for the design of the institution would fail, if such livery were effectual to pass the freehold; for it would be no evidence, or notoriety of the change of the freehold, if after the livery made, the freehold still remained in the feoffor; the use of the investiture would rather create than prevent the uncertainty of the freehold, and in many cases would put men to fruitless trouble and expence in pursuit of their right; for by that means, after a man had brought his *præcipe* against a person, whom he supposed to be tenant to the freehold, and had proceeded in it a considerable time, the writ might abate by the freehold's vesting in another, by virtue of a livery made before the purchase of the writ. Another reason why such future interests can't be al-

lowed to pass by any act of livery was, because no man would be safe in his purchase, if the operation of livery might create an estate, to commence many years after the livery was made; and though they have allowed a future interest, to commence by way of lease, yet that had no such ill effect in making purchases uncertain, because antiently they were under the power of the freeholder, who by recovery might destroy them; and now, unless such leases are made upon good considerations, they are fraudulent against a purchaser; and 'tis not to be presumed, that leases at great distances should be purchased for value. Cro. Eliz. 451. 2 Vent. 204. Co. Lit. 217. 5 Co. 94. b.

Hence, by the way, we may account why a freehold in reversion or remainder can't be granted *in futuro*, though there no livery is necessary to pass it; as where A. is tenant for life, remainder to B. in fee; A. makes a lease for years to C. and afterwards grants the land to D. *habend'* from Mich. next ensuing, for life; this grant to D. was adjudged void, though C. attorned to it after Michaelmas, because such future grants create an uncertainty of the freehold, and the tenant of the freehold being the person who is to answer the stranger's *præcipe*, and was answerable to the lord for the services, it were unreasonable to permit him, by any act of his own, to prevent or delay the prosecution of their right. Cro. Eliz. 451. 2 Ven. 204. Co. Lit. 217. 5 Co. 94. b. 2 Co. 55. Buckler's case. 2 And. 29. Moor 423. Cro. Eliz. 450, 585. Hob. 170, 171. 5 Co. 94. 1 Rel. Rep. 261. See Livery of Seisin.

A deed of feoffment is be made by the words have granted, bargained, enfeoffed, &c. The way of pleading a feoffment is thus, *viz.* That A. B. was seized in fee of the place where, &c. and being so seized, *fecerunt quendam C. D. inter alia per nomina omnium, &c. habend. & tenend. dict' tenementa, &c. prefat' C. D. & heredibus suis in perpetuum ad solum usus & uijum, &c.* 3 Salk. 165.

Fera Natura, In our law signifies beasts and birds that are wild, in opposition to the tame; such as hares, foxes, wild geese, and the like, wherein no man may claim a property. 2 Cro. 293.

Ferdfare, (from the Sax. *fyrd* and *fare* iter) Significat *quietantium eundi in exercitum*. Fleta, lib. 1. c. 47.

Ferdwit (Sax. *ferd* exercitus, & *uite* pœna) Was used for being quit of manslaughter, committed in the army. Fleta, lib. 1. It is rather a fine imposed on persons for not going forth in a military expedition; to which duty all persons who held land, were in necessity obliged: and a neglect or omission of this common service to the publick, was punished with a pecuniary mulct called the *ferdwite*. Cowel.

Ferial Days, (*dies feriales, feriae*) According to the Latin dictionary are holy-days; but in the Stat. 27 H. 6. c. 5. Ferial days are taken for working days; all the days of the week, except Sunday; the week days as distinguished from Sunday, the profane from the sacred, were called *dies feriales*, by a charter dat. 28 Mart. 1448. — Ex Cartular. Eccl. Elyensis. MS.

Ferlingata terra, A quarter or fourth part of a yardland. — *Decem acre faciunt ferlingatam, 4 ferlingatæ faciunt virgatam, & 4 virgatæ faciunt hidam, &c.* In antient records there is mention of *ferlingus* and *ferdingus terra*. Mon. Ang. tom. 2. f. 8. See Fardel of Lund.

Ferm, (*firma*) A house and land let by lease, &c. Vide Farm.

Fermery, (from the Sax. *oferme*, victus) Is an hospital; and we read of friers of the *firmery*.

Fermisoma, The winter season of killing deer; as *tempus pinguedinis* is the summer season. *Quod idem Hugo & hæredes sui de cætero quolibet anno possunt capere in predicto parco de, &c. unam damam in fermisoma inter festum sancti Martini & Purif. beate Marie, et unam damam in pinguedine inter festum, &c.* Fin. Con. or. in Cur. Dom. Regis apud Litchfield coram Roger de Turkilby, &c. inter Hugonem de Acouer Quer. & Will. de Aldethley Desfore. Penes Will. Dugdale, Mil'.

Fernigo, A piece of waste ground where fern grows. Cartular. Abbat. Glaslon. MS.

Ferramentum, ferramenta, The iron tools or instruments of a mill. — *Et reparare ferramenta ad tres ca-*

ruca, i. e. the iron work of three ploughs. *Lib. Nig. Heref.*

Ferrandus, An iron colour, particularly applied to horses, which we at this time call an *iron gray*.

Ferry, A liberty by prescription of the King's grant, to have a boat for passage upon a river, for carriage of horses and men for reasonable toll: it is usually to cross a large river. *Terms de Ley*. A ferry is no more than a common highway; and no action will lie for one's being disturbed in his passage, unless he alledge some particular damage, &c. 3 *Mod. Rep.* 294.

A ferry is in respect of the landing-place, and not of the water, the water may be to one, and the ferry to another; as 'tis of *ferries* on the *Thames*, where the ferry in some places belongs to the archbishop of *Canterbury*, where the mayor of *London* has the interest of the water; and in every ferry, the land on both sides of the water ought to belong to the owner of the ferry, or otherwise he cannot land on the other part. 13 *April* 23 *Eliz.* in *Scacc. Savill* 11. *Inhabitants of Ipswich v. Brown*. And every ferry ought to have expert and able ferrymen, and to have present passage, and reasonable payment for the passage. And it is requisite to have one, who has property in the ferry, and not to allow every fisherman to carry, and recarry at their pleasure, for divers inconveniencies; and especially when a place is between the divisions of two counties, any felon may be conveyed from one county to another, secretly, without any notice. *Sav.* 14.

A ferryman, if it be on salt water, ought to be privileged from being pressed as a soldier, or otherwise. *Savil* 11. & 14. *ut sup.*

Owner of a ferry cannot suppress that, and put up a bridge in its place without licence, and *ad quod damnum*; per *Holt Ch. J. Pasch.* 3 *Will. & Mar. Show.* 243, 257. *Pain v. Partridge.* *Cart.* 193. *S. C.* 1 *Salk.* 12. *S. C.*

If a ferry be granted at this day, he that accepts such grant is bound to keep a boat for the publick good; per *Holt Ch. J. Show.* 257. in the case of *Pain v. Partridge*.

Custom for the inhabitants to be discharged of toll, may have a reasonable beginning by agreement, as that the inhabitants of the town might be at the charge of procuring the grant, and in consideration thereof, one man to find the boat, and take toll; and the inhabitants to pay none; per *Holt Ch. J. Show.* 257. *ut sup.*

A common ferry was for all passengers paying toll, but the inhabitants of *A.* were toll-free. An inhabitant of *A.* may bring an action for taking toll, but not for neglecting to keep up the ferry; because the former is a private right, but the latter a publick. 1 *Salk.* 12. *Trin.* 3 *W.* 3. *Pain v. Partridge.* But he cannot maintain an action for not passing; for so, any other subject might bring an action, which would be endless; but the taking toll was a special damage, and without special damage he can only indict, or bring information. *ibid.*

The not keeping up a Ferry, has been held to be indictable. See *Bridge*.

Ferspeken, To speak suddenly—*Nemo potest placitare, &c. nec cogi debet rectum ejus ferspeken de omnibus causis, &c.* *Leg. H.* 1. c. 61.

Festa in Cappis, Were some grand holy-days, on which the whole choirs and cathedrals wore caps. *Vitz Abbat S. Alban.* p. 80, 83.

Festingsmen, The Sax. *Festman* signifies a surety or pledge; and to be free of festingsmen, was probably to be free of frank-pledge, and not bound for any man's forthcoming, who should transgress the law. *Mon. Ang. Tom.* 1. p. 123.

Festing-Denny, Earnest given to servants when hired or retained in service, so called in some Northern parts of England, from the Sax. *Festian*, to *festen*, or confirm.

Festum, A feast; *Festum S. Michaelis*, the feast of St. Michael, &c.

Festum Stultorum, The feast of fools. See *Caput anni*.

Feud, (*Feida*) Signifies in the German tongue *Guerram*, Lat. *Bellum*; and according to *Lambard*, *capitales inimicitias*: and *feud* used in Scotland is a combination of kin-

ded for revenging the death of any of their blood against the killer, and all his race; or any other great enemy. *Skene*.

Feudal and Feudary, See *Feodal* and *Feodary*.

Feudbott, A recompence for engaging in a feud, and the damages consequent; it having been the custom in ancient times, for all the kindred to engage in their kinsman's quarrel. *Sax. Dig.*

Feuds, (*Feoda*) According to the authorities in *Robert Hist. Emp. C. V.* 1 *V.* 226. *Feodum* is compounded of *ad*, possession or estate, and *fe*, wages, pay; intimating that it was stipendiary, &c. and granted as a recompence for service, according to *Spelman*. Estates in lands were originally at will, and then they were called *Munera*; afterwards they were for life, and then they were termed *beneficia*, and for that reason the livings of clergymen are so called at this day; and afterwards they were made hereditary, when they were called *feoda*, and in our law *fee-simple*. *Rel. Spel.* 9. When *Hugh Caput* usurped the kingdom of France, about the year 947, to support himself in such usurpation, he granted to the nobility and gentry, that whereas till then they enjoyed their honours for life, or at will only, they should from thenceforth hold them to them and their heirs; which was imitated by *William* called *The Conqueror*, upon his accession to the crown of England, for till his reign feuds or fees were not hereditary, but only for life, or for some determinate time. 3 *Salk.* 165. Feuds are called by various names, according to their respective natures, As

Feudum antiquum, A feud descending to a son, &c. from his ancestors. *Black. Com.* 2 *V.* 212, 221.

Feudum apertum, A feud resulting back again to the lord of the fee, where the blood of the person last seized in fee-simple, is utterly extinct and gone. *Black. Com.* 2 *V.* 245.

Feudum honorarium, (and *Feudum individuum*) An honorary feud, or title of nobility, not of a divisible nature, and descendible to the eldest son, in exclusion of all the rest. *Black. Com.* 2 *V.* 56, 7. 215.

Feudum improprium, An improper or derivative feud; and *feoda impropria* are all such feuds as do not fall within the description of *feoda propria*. *Black. Com.* 2 *V.* 58.

Feudum maternum, A feud descending to the son from the mother. *Black. Com.* 2 *V.* 212, 243.

Feudum novum, A feud newly acquired by the son, to which in ancient times only the descendants from his body could succeed, by the known maxim of the early feudal constitutions. *Black. Com.* 2 *V.* 212, 221.

Feudum novum, Held *ut antiquum*: descendible in the same manner as a *feudum novum*. *Black. Com.* *ib.*

Feudum paternum, A feud descendible from father to son, &c. *Black. Com.* 2 *V.* 243.

Feudum proprium, A proper feud, distinguished from an improper, which are the two grand and general divisions. *Black. Com.* 2 *V.* 58.

As to the history of Feuds. See *Dalrymple*, *Montesquieu*, *Gilbert*, *Wright*, *Crag* and *Robert Hist. Emp. C. V.* 1 *V.* 13, &c.

Fiat, In our law, is a short order or warrant of some judge for making out and allowing certain processes, &c. If a *certiorari* be taken out in vacation, and tested of the precedent term, the *fiat* for it must be signed by a judge of the court, some time before the effoin-day of the subsequent term, otherwise it will be irregular: but it is said there is no need for a judge to sign the writ of *certiorari* itself; but only where it is required by statute. 1 *Salk.* 150. 2 *Hawk.* 289.

Fiat Justitia. On a petition to the King, for his warrant to bring a writ of *error in parliament*, he writes on the top of the petition *fiat justitia*, and then the writ of error is made out, &c. And when the King is petitioned to redress a wrong, he indorses upon the petition, *Let right be done the party*. *Dyer* 385. *Stamf. Prærog. Reg.* 22.

Fiction of Law, (*Fictio juris*) Is allowed of in several cases: but it must be framed, according to the rules of law; not what is imaginable in the conceptions of man; and there ought to be equity and possibility in every legal fiction.

fiction. There are many of these *fictions* in the civil law ; and by some civilians, it is said to be an assumption of law upon an untruth, for a truth, in something possible to be done, but not done. *Godolphin & Bartol*. The seisin of the conusee in a fine is but a *fiction in our law* ; it being an invented form of conveyance only. 1 *Lill. Abr.* 610. And a common recovery is *factio juris*, a formal act or device by consent, where a man is desirous to cut off an estate-tail, remainders, &c. 10 *Rep.* 42. By *fiction of law*, a bond made beyond sea, may be pleaded to be made in the place where made, *to wit*, in *Ullington* in the county of *Middlesex*, &c. to try the same here ; without which it cannot be done. 1 *Inst.* 261. And so it is in some other cases ; but the law ought not to be satisfied with *fictions*, where it may be otherwise really satisfied ; and *fictions in law* shall not be carried farther than the reasons which introduce them necessarily require. 1 *Lill. Abr.* 610. 2 *Hawk.* 320.

Fidem mentiri, Is when a tenant doth not keep that *fidelity* which he hath sworn to the lord. *Leg. H.* 1. c. 53.

Fief, Which we call *fee*, is in other countries the contrary to chattels : in *Germany*, certain districts or territories are called *Fiefs* ; where there are *fiefs of the empire*. See *Black. Com.* 2 *V.* 45.

Kings and chieftains, when they settled in a conquered country, bestowed land on their adherents, as a recompence for their service, &c. These grants were called *Beneficia* ; because they were gratuitous donations, and *honores*, because they were regarded as marks of distinction : this is the origin of *fiefs*. See the history thereof *Robert Hist. Emp. C. V.* 1 *V.* 217, 18, &c.

Fieri facias, Is a judicial writ, given by the statute of *Westm.* 2. 13. *Ed.* 1. that lies where judgment is had for debt, or damages recovered in the King's courts ; by which writ the sheriff is commanded to levy the debt and damages of the goods and chattels of the defendant, &c. *Old. Nat. Br.* 152.

This writ, though mentioned in the statute *W.* 2. 18. is a writ of execution at common law, and is called a *feri facias*, because the words of the writ directed to the sheriff are *Quod feri facias de bonis & catallis*, &c. and from these words the writ takes its denomination. *Co. Lit.* 290. b.

The property of goods is vested by the delivery of the *fi. fa.* and an extent afterwards for the King comes too late, and that on the statute of frauds and perjuries ; per *Holt.* *Comb.* 123. *Trin.* 1 *W. & M.* in *B. R.* *Lechmere v. Thoroughgood*.

This writ is to be sued out within a year and a day after judgment ; or the judgment must be revived by *scire facias* : but if a *feri facias* be not executed, a second *feri facias*, or *elegit* may be sued out ; and 'tis said some years after, without a *scire facias*, provided continuances are entered from the first *fi. fa.* which 'tis also held may be entered after the second *fi. fa.* taken out, unless a rule is made that proceedings shall stay, &c. *Sid.* 59. 2 *Nels. Abr.* 776. If a man recover debt against *A. B.* and levy part of it by *feri facias*, and this writ is returned ; yet he may take the body in execution by *capias* for the rest of the debt. *Roll. Abr.* 904. The sheriff on a *feri facias* is to do his best endeavours to levy the money upon the goods and chattels of the defendant ; and for that purpose to inquire after his goods, &c. And the plaintiff may inquire and search if he can find any, and give notice thereof to the sheriff, who *ex officio* is to take and sell them if he can, or if not, by a writ of *venditioni exponas*. 2 *Shep. Abr.* 111. There may be a *testatum feri facias* into another county, if the defendant hath not goods enough in the county where the action is laid to satisfy the execution ; and the *feri facias* for the ground of the *testatum*, may be returned of course by the attornies, as originals are. 2 *Salk.* 589. If all the money is not levied on a *feri facias*, the writ must be returned before a second execution can be issued ; because it is to be grounded on the first writ, by reciting that all the money was not levied. 1 *Salk.* 318.

Where the sheriff sells goods which he levied by *feri facias*, and doth not pay the money, action of debt will

lie against him ; for the defendant is discharged as to the plaintiff, and the sheriff is now become his debtor in law ; and if the sheriff die after he hath levied the debt, the like action will lie against his executors, as it is a duty when levied. *March Rep.* 13. *Cro. Car.* 387. If a sheriff that hath seized goods by *feri facias* is going out of his office, he must deliver them to the new sheriff, and return his writ executed *pro tanto* ; and he ought not to deliver them to the owner, by reason the writ of execution is warranted by a record, and therefore the discharge thereof must appear by record. *Kelw.* 44. Upon a *feri facias* the sheriff returned, that he had levied goods *ad valentiam* of the debt ; the return being filed, a motion was made that he might bring in the money, which not being done an attachment was granted, and then the sheriff appeared and prayed to amend the return, for that the goods were damaged by lying, and he could not get buyers ; but it was adjudged that the return shall not be altered, *for he might have returned this at first by way of excuse* ; and having returned that he had levied goods *ad valentiam*, he shall pay the money. *Sid.* 407.

The sheriff cannot deliver the goods by him taken in execution to the plaintiff, in satisfaction of his debt ; because his authority is to sell the goods. *Lut.* 589. 1 *Lill. Abr.* 611. And if a sheriff sells the goods taken by *feri facias* at under price, the sale is good, and the defendant can have no remedy ; though where there appears to be covin between the sheriff and the buyer, the owner shall have his action upon the case. *Kelw.* 64. 1 *Salk.* 28. On a *feri facias* the sheriff has power to take any thing, but wearing cloaths ; and if the defendant hath two gowns, &c. it is said he may sell one. If the sheriff executes a writ of *feri facias*, he may afterwards return *nulla bona*, if there appear a prerogative writ ; or on better information, that the goods taken were not the defendant's. *Comb.* 356, 452. By the seizure of the goods, the sheriff hath a property in them ; but goods of a stranger, &c. in the possession of the defendant shall not be seized in execution ; *for the sheriff at his peril must take notice whose goods they are* : though if the sheriff inquires by a jury, where the property is lodged, and it is found that they are the defendant's goods, when they are not, this will indemnify the sheriff. *Dalt. Sher.* 60. *Wood's Inst.* 608.

The sheriff cannot break open the door of an house to execute a *feri facias* upon the goods of the owner or occupier ; but a man's house shall be a protection for his own goods only, and not for the goods of another. 5 *Rep.* 91. 2 *Nels. Abr.* 775. If the defendant is a beneficed clergyman, and the sheriff returns *Quod est Clericus beneficiatus*, &c. a writ shall go to the bishop of the diocese to levy the debt *de bonis Ecclesiasticis*, who thereupon sends forth a sequestration of the profits of the clerk's benefice, directed to the churchwardens, &c. But this writ of sequestration must be renewed every term. 2 *Inst.* 4. 472, 627. By virtue of a *feri facias* a term for years may be sold, as well as any other goods, and without an inquest or jury : also corn growing may be sold. 8 *Rep.* 96. 1 *Roll. Abr.* 892. And if the sheriff on a *feri facias*, &c. selleth a term for years, and after that the judgment is reversed ; the term shall not be restored, but the money for which it is sold. 4 *Rep.* 141.

But where a term is delivered to the plaintiff upon an *elegit*, and then the *elegit* is reversed, restitution shall be of the term. *Cro. Jac.* 246. When upon a *feri facias* the sheriff sells a term, reciting it falsely, as to its commencement and ending, &c. the sale is void, because there is no such term, yet if he reciteth generally, and being of divers years yet to come, sells all the interest which the defendant had in the land, the sale will be good. 4 *Rep.* 74. If an execution is sued on a *fi. fa.* and the defendant dies before it is executed, it may be served on the defendant's goods in the hands of his executor or administrator. *Cro. Elix.* 181. Two *feri facias*'s are delivered the same day to the sheriff against the same person ; he is bound to execute that first, which was first delivered ; and if he executes the last first, he must answer it to the party if

2 *P.* 348. Lands bought of divers persons, by several purchasers, may pass in one fine, to save charges; but the writ of covenant must be brought by the vendee against all the vendors, and every vendor warrant against him and his heirs.

The nature of a fine being explained it remains to consider,

- I. Of the several sorts and parts of a fine, and how fine operate.
- II. Of what things a fine may be levied.
- III. By whom, and to whom it may be levied.
- IV. Before whom, and in what manner it may be levied.
- V. Who may be barred by a fine, and who not.
- VI. How fines may be reversed.

I. Of the several sorts and parts of a fine, and how fine operate.

As to fines, there are various kinds; they are either with proclamations, or without: that with proclamations is termed a fine according to the statutes, 1 *R.* 3. c. 7 and 4 *H.* 7. c. 24. And such a fine, every fine that is pleaded, is intended to be, if it be not shewn what fine it is: And these fines are the best sort, and most used. If there be error in the proclamations, it shall be taken as a good fine at common law. 3 *Rep.* 36. A fine may stand, though the proclamations according to the statute are irregular; for fines are matter of record, and remain in substance and form as they were before *Plowd.* 265. If tenant in tail levies a fine, and dies before all the proclamations are made, though the right of the estate tail descends upon the issue, immediately on the death of the ancestor; yet if proclamations are made afterwards, such right shall be barred by the fine, by the statutes 4 *H.* 7. c. 24. and 32 *H.* 8. c. 36. 3 *Rep.* 84.

The fine without proclamations is called a *Fine at the Common Law*, being levied in such manner as was used before the stat. 4 *H.* 7. c. 24. and is still of the like force by the common law, to discontinue the estate of the cognisor, if the fine be executed. A fine also with or without proclamations is either executed or executory: A fine executed is such a fine as of its own force gives present possession to the cognisee, without any writ of seisin to enter on the lands, &c. as a fine *sur cognissance de droit come ceo*; and in some respects a fine *sur Release*, &c. is said to be executed. A fine executory doth not execute the possession in the cognisee, without entry or action, but requires a writ of seisin; as the fine *sur connissance de droit tantum*, &c. unless the party be in possession of the lands; for if he be in possession at the time of levying the fine, there need not be any such writ, or any execution of the fine; and then the fine will enure by way of extinguishment of right, not altering the estate or possession of the cognisee, however it may better it. *West. Sel.* 20. Fines are likewise single or double; single, where an estate is granted by the cognisor to the cognisee, and nothing is thereby rendered back again from the cognisee to the cognisor. The double fine is that which doth contain a grant or render back again from the cognisee, of the land itself; or of some rent, common, or other thing out of it, and by which remainders are limited, &c. *West. Sel.* 21, 30. And a fine is sometimes called a double fine, when the lands lie in several counties.

But there is a more particular division of fines; for,

Fines are further divided into four sorts, viz. 1. A fine *sur cognissance de droit come ceo*, que il ad de son don. 2. A fine *sur cognissance de droit tantum*. 3. A fine *sur concessit*. And 4. A fine *sur done grant & render*.

The fine *sur cognissance de droit come ceo*, &c. is a single fine levied with proclamations, according to the stat. 4 *H.* 7. c. 24. And it is the principal and surest kind of fine, it being said to be executed, because it gives present possession (at least in law) to the cognisee, so that he needs no writ of *hab. fac. seisinam*, or other means for execution thereof; for it admits the possession of the lands of which the fine is levied to pass by the fine, so that the cognisee may enter, and the estate is thereby in him, to such uses as are declared in the deed to lead the uses thereof: but if it be not declared by deed to what use the fine was

levied, such fine shall be to the use of the cognisor that levied the same. 2 *Inst.* 513. If the cognisee of a fine levied of lands, pay money unto the cognisor at the time of the fine levied, and there is no use declared of the fine, the law will construe the fine to the use of the cognisee: and if there be no money paid by the cognisee, nor any use declared, the fine shall enure to the cognisor that levied it. *Pash.* 23 *Car. B. R.* Where a fine is levied to the use of two persons in tail, &c. in consideration of marriage, though the deed to lead its uses do not mention any marriage had between them, yet it hath been adjudged that the estate-tail is executed before marriage; for the fine doth carry the uses, and they are perfected by the fine, notwithstanding the consideration is perfected afterwards; but without a fine, the marriage must be had, before any use could arise. 1 *Leon.* 138. If a feme covert alone declares the uses of a fine intended to be levied by husband and wife of her land, and the husband alone declares other uses; it hath been hold that both declarations of uses are void, and the use shall follow the ownership of the lands: But in another case it was determined that the uses declared by the wife were void; and the uses declared by the husband, good only against himself, during the coverture. 2 *Rep.* 56. If husband and wife levy a fine of the lands of the wife, and he alone declares the uses, this shall bind the wife, if her dissent doth not appear; because otherwise it shall be intended that she did consent. *Ibid.* 59. Though there be a variance between a deed declaring uses, and the fine levied; yet if nothing appears to the contrary, such fine by construction of law shall be to the uses declared in the deed, and which is evidence thereof: and where a fine varies from a former description, it has been held that a new deed made after, will declare the uses of the fine. 1 *Ld. Raym.* 289, 290. 'Tis not absolutely necessary, to insert the word *Use*, in the declaration of uses of fines; for any words which shew the intent of the parties will be sufficient. *Ibid.* A fine *sur connissance de droit come ceo*, &c. may not be levied to any person but one that is party to the writ of covenant; though a vouchee, after he hath entered into the warranty to the demandant, it is said, may confess the action, or levy a fine to the demandant, &c. he is then supposed to be tenant of the land, though he is not a party to the writ; and yet a fine levied by the vouchee to a stranger, is void. No single fine can be with a remainder over to another person not contained in it: But if A. levy a fine to B. *sur connissance de droit come ceo*, and B. by the same concord, grants back the land again to A. for life, remainder to E. the wife of A. for her life, remainder to A. and his heirs; this will be a good fine. *Plowd.* 248, 249.

A fine *sur connissance de droit tantum*, is also a fine executory, and much of the nature of a fine *sur concessit*; it is commonly made use of to pass a reversion, and then it is expressed by such fine that the particular estate is in another, and that the cognisor willeth that the cognisee shall have the reversion, or that the land shall remain to him after the particular estate is spent: sometimes it is used by tenant for life, to make a release (in nature of a surrender) to him in reversion, but not by the word *Sur-render*; for it is said a particular tenant, as for life, &c. cannot surrender his term to him in reversion by fine; but he may grant and release to him by fine. *Plowd.* 268. *Dyer* 216. A fine upon a release, &c. shall not be intended to be to any other use, but to him to whom it is levied.

Leon. 61:

A fine *sur concessit* is where the cognisor is seised of the lands contained therein, and the cognisee hath no freehold in it, but it passeth by the fine: this fine is used to grant away estate for life, or years, and it is executory, so that the cognisee must enter or have a writ of *hab. fac. seisinam* to obtain possession; if the parties to whom the estate is limited, at the time of levying such fine, be not in possession of the thing granted.

A fine *sur done grant & render*, is a double fine, being in a manner two fines, i. e. A fine *sur connissance de droit come ceo*, &c. and a fine *sur concessit*, both formed into one; whereby the cognisee, after a release and warranty made to him by the cognisor of the lands contained therein, both grant and render back to the cognisor the lands,

&c.

Et. thereby often limiting remainders to persons that are strangers, and not named in the writ of covenant. This fine is partly executed and partly executory; and as to the first part of it, is altogether of the same nature with a fine *sur conuissance de droit come ceo*; but as to the second part, containing a grant and render back, it is taken in law to be rather a private conveyance or charter between party and party, and not as a writ or judgment upon record; and this render is sometimes of the whole estate, and sometimes of a particular estate, with remainder or remainders over; or of the reversion, and sometimes with reservations of rent and clause of distress, and grant thereof over by the same fine. 5 Rep. 38. A. B. and C. D. levied a fine of lands, and the cognisee by the same fine rendered back the land to A. B. in tail, reserving a rent to himself, Et. the rent and reversion shall pass, tho' in one fine; and it shall enure as several fines. Cro. Eliz. 727. It is said, a grant and render of land, cannot be immediately *in primo gradu* to a person who is, no party to the writ; but mediately, or *in secundo gradu* it may. 3 Rep. 514. Bro. 108. The fine with grant and render, differs from the fine *sur conuissance de droit come ceo*, Et. as that must be levied of the land in the original; but the grant and render may be of another thing than is expressed in the original: Tho' to make a good grant and render, the land rendered must pass to the cognisee by the fine; for he cannot render what he hath not. 3 Rep. 98, 510. Hughes's Abr. 936. A man may not by this fine reserve to himself a less estate by way of remainder, than the fee; and the render of a rent (if any be) must be to one of the parties to the fine, and not to a stranger. Dyer 33, 69. 2 Rep. 39. To make a lease for years, Et. by fine with a render; the lessee must acknowledge the land to be the right of the lessor that is seised thereof, and then such lessor grants and renders the same back again to the lessee, for a certain number of years, reserving rent, Et. and this is a good fine: but if the lessor be tenant in tail, then he bind him, he and the lessee are to acknowledge the tenements the right of A. B. who is to render the same fine to lessee for years, the remainder to the lessor and his heirs, Et. 44 Ed. 3. 45. 2 Leon. 206. A fine and render is a conveyance at Common law, and makes the cognisor render back a new purchaser; by which, lands arising on the part of the mother, may go to the heirs on the part of the father, Et. 1 Salk. 337. 2 Nels. Abr. 864.

Having shewn how each particular sort of fine operates, it may be material to observe, that a fine may enure to a confirmation of a former estate, which was defeasible before: as, if tenant in tail by bargain and sale, lease and release, Et. conveys to B. in fee, and afterwards levies a fine to B. and his heirs; this gives him a base fee determinable upon his death without issue. Vide 1 Sand. 261.

So a fine may enure by way of extinguishment; therefore, if tenant in tail makes a lease, or other estate, to A. and afterwards levies a fine to B. the lease, or other estate, shall be indefeasible; for his right during such former estate was extinct by the fine. R. Jon. 60. 2 Cro. 689. Vide *Essex*.

As to the parts of a fine.

There are in every fine five parts, viz. 1st. An original writ, usually a writ of covenant. 2. The licence concordandi, or King's licence, for which the King hath a fine called the King's silver. 3. The concord itself, containing the agreement between the parties how the land, Et. shall pass, being the foundation and substance of the fine; it begins, *Ecce concordia talis*, Et. 4. The note of the fine, or, abstract of the original contract. 5. The foot of the fine, which includes all, setting forth the day, year, and place, and before what justices the concord was made, Et. Of this there are indentures made forth in the office, which is called the ingrossing of the fine; and it beginneth thus, *Hec est finalis concordia facta in curia Domini Regis apud Westm. a die Pasche in quindacim dies anno*, Et. 2 Inst. 511, 517. 'Tis said, the concord being the compleat fine, it shall be adjudged a fine of that term in which the concord was made, and the writ of covenant returnable. 1 Salk. 341. A concord cannot be of any thing but what

is contained in the writ of covenant: and the note of the fine remaining with the Chirographer, it hath been held, *est principale recordum*. 3 Leon. 234.

II. Of what things a fine may be levied.

A fine may be levied of any things whereof a *præcipe quod reddat* lies; as of manors, messuages, lands, rents, Et. or of any thing, whereof a *præcipe quod faciat* lies, as customs, services, Et. or whereof a *præcipe quod permittat*, or *præcipe quod teneat* may be brought. 2 Inst. 513.

As fines may be levied of things in possession, so they may be levied of a remainder, or reversion, or of a right in future. 3 Rep. 90.

Now, since the Stat. 32 H. 8. 7. it may be levied of rectories, vicarages, tithes, pensions, oblations, and all ecclesiastical inheritances made temporal. Of a chantry. Vide *West. Symb.* 7. So it may be of a feignory. 11. Of all services; as, homage, fealty, Et. *West. Symb.* 6. b. Of acquittal, and of every thing, for which a *præcipe quod faciat* lies. 2 Inst. 513. So it may be levied of common of pasture. Vide *West. Symb.* 6. b. Of a corody. *Ibid.* Of an office; as, of the custody of a forest. Of a boilary. Of two pools and a fishery in the water of D. Of an annuity.

Fines may be had of all things in *esse tempore finis*, which are inheritable; but not of things uncertain; or of lands held in tail by the King's letters patent; of land restrained from sale by act of parliament, or of lands in right of a man's wife, without the wife, Et. 5 Rep. 225. *West. Sess.* 25.

And almost any kind of contract may be made and expressed by a fine, as by a deed; and therefore it may be so made that one of the parties shall have the land, and the other's rent out of it; and that one shall have it for a time, and another for another time; also a lease for years, or a jointure for a wife, may be made; and a gift in tail, and a remainder over, may be limited and created thereby. 1 Rep. 76.

III. By whom and to whom a fine may be levied.

The King, and all persons who may lawfully grant by deed, may levy a fine; but not infants, idiots, lunatics, Et. 7 Rep. 32. Civil corporations, as mayor and commonalty, Et. may levy a fine of land belonging to their body: but bishops, deans and chapters, parsons, Et. are restrained from levying of fines to bind their successors. All persons that may be grantees, or that may take by contract, may take by fine; though in cases of infants, feme coverts, persons attainted, aliens, Et. who, it is said, may take by fine, before the ingrossing of the fine, there goes a writ to the justices of C. B. *quod permittant finem levare*. Lit. 669. Tenant in fee-simple, fee-tail general, or special, tenant in remainder or reversion, may levy a fine of their estates; so may tenant for life, to hold to the cognisee for life of tenant for life; but a person who is tenant, or hath an interest only for years, cannot levy a fine of his term to another. 3 Rep. 77. 5 Rep. 124.

A fine by a man *non compos*, though it ought not to be levied, binds for ever when it is levied. So a fine by a man attainted for treason, or felony, binds all but the King. Vide *West. Symb.* 3. a. So a fine by an infant, or feme covert without her husband, binds till it be avoided. Vide *Comyn's Digest*, tit. *Baron and Feme*, (P. 1.) — *Infant*, (B. 2.)

But a fine cannot be levied by a corporation aggregate; for it cannot act but by attorney, and it cannot make conveyance by attorney. So, if commissioners take a fine of an infant, Et. the court will grant an attachment against them; and upon examination and inspection, the fine shall be vacated. R. *Stin.* 24.

Land assured for dower, or term of life, or in tail, to any woman by means of her husband, or his ancestors, cannot be conveyed away from her by fine, Et. without her act; but if a woman and her husband levy a fine of her jointure, she is barred of the same; tho' if the jointure be made after coverture, when the wife hath an election to have her jointure, or dower on the husband's death, it is said this will be no bar of her dower in the residue

residue of the land of the husband. *Dyer* 358. *Leon.* 185. No fine of the husband alone, of the lands of the wife, shall hurt her; but that she or her heirs, or such as have right, may avoid it; but if she joins with him, it shall bind her and her heirs. Women covert ought to be cautious in levying fines with their husbands of their own lands, and if a married woman under age levies a fine of her lands, she cannot reverse it during her husband's life, nor after his death, if she be of full age when he dies; but if the husband dies during her minority, she may. *Dyer* 359. *Wood's Inst.* 243. A married female ought not to be admitted alone without her husband to levy a fine; and if she be received, the husband may avoid the fine by entry; but if he do not, it is good to bar her and her heirs, except she be an infant at the time of the fine levied: the husband and wife together may dispose of her land, &c. 12 *Rep.* 122. If baron and feme levy a fine, the feme within age, she may be brought into court by *habeas corpus*; and if it be found by inspection, that she is under age, it hath been adjudged, where the baron and feme brought a writ of error, that as to both, *quod finis revocetur*. 1 *Leon.* 116, 117. 3 *Salk.* 168.

Husband and wife, tenants in special tail, the husband only levies a fine, this bars the issue in tail; but it remains in right to the wife as to herself, and to all the estates and remainders depending upon it, and all the consequences of benefit to herself and others, so long as she lives, as if the fine had not been levied. *Hob.* 257, 259. If a husband make a feoffment of the wife's land, upon condition, which is broken, and the feoffee levies a fine, and the husband and wife die having issue, and five years pass; the heir is barred to enter as heir to the father upon the condition, but he shall have five years after the death of his father, as heir to his mother. *Plowd.* 367. If a woman with her second husband acknowledge a fine, it shall not bind her; though if she levies a fine with her right husband by a wrong Christian name, she is bound by *estoppel* during her life, and the tenant may plead. See *1 Ass. pl.* 11. *Brook* 117. When the husband and wife join in a fine of the wife's lands, all the estate passeth from her, and he is joined only for conformity; so that if the fine levied by husband and wife in such a case be reversed, she shall have restitution. *Rep.* 77. A husband and his wife covenanted to levy a fine of the lands of the wife, to the use of the heirs of the body of the husband on the wife, remainder to the husband in fee; both dying without issue; it was held that the heir of the wife had the title, *because the limitation to the heirs of the body of the husband was merely void, there being no precedent estate of freehold for life, &c. to support it as a remainder.* 2 *Salk.* 675. 4 *Mod.* 253.

If a widow having an estate in dower accept of a fine, and by the same fine render back the land for 100 years, &c. this is a forfeiture of her estate within the Stat. 11 *H.* 7. 20. by which statute she may not make a greater estate than for her own life; if she do, it is a present forfeiture. 2 *Cro.* 689. If tenant for life grants a greater estate by fine than for his own life, it is a forfeiture: and if there be tenant for life, and remainder for life, and the tenant for life levy a fine to him in remainder and his heirs, both their estates are forfeited; the tenant for life by levying the fine, and the remainderman for life by accepting it. 2 *Lev.* 209. Where a fine is levied by tenant for life, for a greater estate, the fine may be good; but it is a forfeiture of the estate of tenant for life, whereof he in remainder, &c. may take present advantage and enter: and when a person enters for a forfeiture, all estates are avoided. *Dyer* 111. Tho' if such a tenant for life levy a fine *sur grant & release* to the cognisee for the life of tenant for life; or by fine grant a rent out of the land for a longer time, the fine is good, and there will be no forfeiture of the estate of tenant for life: so likewise if a fine be levied of lands by tenant for life to a stranger, who thereby acknowledges all his right to be in the tenant for life, and releases to him and his heirs. 27 *Ed.* 1. 1. 44 *Ed.* 3. 36.

If there be tenant in tail upon condition not to alien, or discontinue the lands, &c. if he doth, the donor to re-enter, and his issue levy a fine of the land; this is a

forfeiture of the estate. 1 *Leon.* 292. An estate being settled on husband and wife for life, remainder to first and other sons in tail, with remainders over; after the birth of their eldest son, they by release and fine, mortgaged the lands: on a bill exhibited against the son to redeem, &c. he pleaded the marriage settlement of his father and mother, whereby they were but tenants for life, and that this fine was a forfeiture of their estate; and so it was adjudged. *Præd. Canc.* 591. But it is said where a wife by settlement has only a trust for life, if she joins with her husband in a mortgage in fee and fine of the lands; this trust is not forfeited, as it would be in case of a legal estate. 1 *Piers Williams* 147.

As to *femes covert*, the books which say, that a fine shall not bind a woman under coverture unless she be examined, must not be understood as if it were in her power to reverse the fine for want of her examination, but they are to be understood in this sense, that the judge ought not to receive a fine from a feme covert without examining her, lest it should not proceed from her own freedom and choice; but if such a fine be once admitted, and recorded without any examination, tho' the judge has omitted a very necessary part of his duty, yet the fine shall stand, and neither the feme nor her heirs shall be admitted to aver that she was not examined; for that were to lessen the credit of the judgment of the courts of justice, which is the highest evidence of the law. 2 *New Abr.* 527.

As to fines levied by an infant, tho' strictly speaking all contracts made by infants are in their own nature void, *because a contract is an act of the understanding, which, during their infancy, they are presumed to want*; yet civil societies have so far supplied that defect, and taken care of them, as to allow them to contract for their benefit and advantage, with power to recede from and vacate it when it may prove prejudicial to them; now the method to set aside such a contract must be by matter of equal notoriety with the manner in which it was made; and therefore if an infant levies a fine, which is no more than his own agreement recorded as the judgment of the court, he must reverse it by writ of error, and this must be brought during his minority, that the court of *B.* may by inspection determine the age of the infant; but the judges by *adjuncts* may in such cases inform themselves by witnesses, church-books, &c. 2 *New Abr.* 526. *Co. Lit.* 380. b. *Moor* 76. 2 *Roll. Abr.* 15. *Bro. tit. Error.* *Bro. tit. Fines*, 74, 79. 2 *Inst.* 482. 2 *Bulst.* 320. 12 *Co.* 122.

With regard to *ideots* and *lunatics*, it is necessary to distinguish between their acts done *in pais*, and those solemnly acknowledged on record; tho' the law is clear, that in neither case are they admitted to disable themselves, for the insecurity that may arise in contracts from counterfeit madness and folly, but their heirs and executors may avoid such acts *in pais* by pleading the disability; because if they can prove it, it must be presumed real, since nobody can be thought to counterfeit it, when he can expect no benefit from it himself. 4 *Co.* 124. *Co. Lit.* 247. *Bro. tit. Fals.* 62. *Cro. Eliz.* 398, 622. *F. N. B.* 202.

But neither the lunatick himself, nor his heir, can vacate any act of his done in a court of record; and therefore if a person *non compos* acknowledges a fine, it shall stand against him and his heirs; for tho' the judge ought not to admit of a fine from a man under that disability, yet when it is once received, it shall never be reversed, because the record and judgment of the court being the highest evidence in the law, presumes the consensus, at that time, capable of contracting; and therefore the credit of it is not to be contested, nor the record avoided by any averment against the truth of it. 4 *Co.* 124. 2 *Inst.* 483. *Bro. tit. Fines*, 75. *Co. Lit.* 247.

IV. Before whom, and in what manner, a fine may be levied.

Fines are now levied in the court of Common Pleas at Westminster, on account of the solemnity thereof, ordained by the Stat. 18 *Ed.* 1. *ff.* 4. before which time they were sometimes levied in the Exchequer, in the County-Courts, Courts Baron, &c. They may be acknowledged before the

the Lord Chief Justice of the *Common Pleas*, as well in, as out of court; and two of the justices of the same court, have power to take them in open court: also justices of assize may do it by the general words of their patent or commission; but they do not usually certify them without a special writ of *dedimus potestatem*. 2 Inst. 512. *Dyer* 224. The King by patent or commission, with a *non obstante*, may give power to *A.* and *B.* justices of assize in a circuit, when *A.* is not a judge of either of the benches, only a serjeant at law, &c. to take the cognisance of all fines *conjunctim* & *separatim*; and upon such a commission, the cognisance of a fine taken by *A.* will be good, without any *dedimus potestatem* sued out before, or after it. *Jenk. Cent.* 277.

Fines are also taken by commissioners in the country, impowered by *dedimus potestatem*; the writ of *dedimus* doth surmise, that the parties who are to acknowledge the fine are not able to travel to *Westminster* for the doing thereof: these commissions, general and special, issue out of the Chancery. By the *Common law* all fines were levied in court; but the *Stat. 15 Ed. 2. ff. de fin.* allows the *dedimus potestatem* to commissioners, who may be punished for abuses, and the fines taken before them set aside: and it is said an information may be brought by him in reversion against commissioners, who take the caption of a fine, where a married woman, &c. is an infant. 3 Lev. 36.

In the levying of fines in court, a pleader shall say, *Sir justice conge d' accorder*, &c. i. e. he desires leave to accord or agree: and when the sum for the King's fine is agreed, after proclamation and crying the peace, the pleader shall repeat the substance of the fine, &c. *Stat. de Finibus*, 18 Ed. 1. ff. 4.

Touching the form of fines, it is to be considered upon what writ, or action the concord is to be made: and there must first pass a pair of indentures between the cognisor and cognisee, whereby the cognisor covenants to pass a fine to the cognisee of such things, by a time limited; and these indentures preceding the fine, are said to lead the uses of the fine: but by the *Stat. 4 Ann. c. 16.* The uses of a fine, &c. may be declared after the fine levied, and be good in law. Upon this the writ of covenant is brought by the cognisee against the cognisor, who then yields to pass the same before the judge; and so the acknowledgment being recorded, the cognisor and his heirs are presently concluded, and all strangers (not excepted) after five years past; and if the writ, whereon the fine is grounded, be not a writ of covenant, which is usual, but of *warrantia chartæ*, or a writ of right, or of customs and services, &c. then the writ is to be served upon the party that is to acknowledge the fine; and he appearing doth it accordingly. *West. sess.* *Dyer* 179.

By statute a fine's concord cannot be levied in the King's court, without original writ, &c. And when a fine is passed, it is to be in the presence of the parties, who are to be of full age, good memory, &c. And if a feme covert be one, she is to be privately examined if she consent freely; for if she doth not, the fine cannot be levied. *Stat. 18 Ed. 1. ff. 4.* A fine after the ingrossing is to be openly read and proclaimed in the court of *C. B.* and a transcript to be sent to the justices of assize, and another to the justices of the peace of the county where the land lieth, to be openly proclaimed there; which being certified, concludes all persons; feme coverts, persons under age, in prison, &c. excepted; if they lay no claim by way of action or entry in five years: persons out of the land, or *non sane memoria*, &c. have that time after their imperfections are removed, 1 R. 3. c. 7. 4 H. 7. c. 24. And by subsequent acts, fines after ingrossing are to be proclaimed in court the same term, and the three next terms, formerly four several days in each term; but of late only once in the term where ingrossed, and once in each of the succeeding terms. 4 H. 7. c. 24. 31 Eliz. c. 2. The day and year of acknowledging a fine, and warrant of attorney for the suffering a recovery, are to be certified with the concord: and an office hath been erected for the enrolment of writs for fines, &c. the fees whereof are limited and appointed; likewise the *Chirographer* the first day of every term is to fix in the court of *C. B.* a

table containing the fines passed in the term before in every county, &c. by 23 Eliz. c. 3.

V. Who may be barred by a fine, and who not.

The statutes of 4 H. 7. c. 24. and 32 H. 8. c. 36. declare the force of fines how far they bar and take away the entry or action of parties, privies and strangers, having right: privies in blood, as heirs of the cognisor, are barred presently by a fine; but strangers to the fine, such as are not parties nor privies, have five years to enter and claim their rights, &c. *Plowd.* 367, 375. *Co. Lit.* 372. See 4 Ann. c. 16. Feme coverts have five years after the death of their husbands, to avoid the fine of the husband of the wife's lands; and also to claim their dower; and if they do not make their claim in that time by action or entry, they are barred by statute. *Dyer* 72. 2 Rep. 93. An infant shall have five years after he comes of age, although he was in his mother's womb at the time of the fine levied. *Plowd.* 359. And an infant is allowed time, during his minority, to reverse his own fine and prevent the bar; and if not reversed during that time, their fines will be good. *Aff. pl.* 53. Strangers out of the realm at the time of the fine levied, shall have five years after their return to prevent the bar; and so if they were in *England* when the fine was levied, and within five years are sent in the King's service by his commandment. *Plowd.* 366. A person in *Scotland* or *Ireland* shall be said to be out of the realm. 4 H. 7. c. 24. Madmen, &c. shall have five years after the cure of their maladies, and tho' the infirmity happen after the fine levied, if before the last proclamation. *Plowd.* 367. *Dyer* 3. And they who have divers defects have five years after the last infirmity removed; but if the impediments are once wholly gone, and afterwards the party relapses into the like again, the five years shall begin immediately after the first removal; and if the party dies, his heir shall not have a new five years. *Plowd.* 375. *Dyer* 233.

If a feme covert dies during the coverture, being no party to the fine, &c. or if an infant being party to the fine, and having present right, dies in his infancy: if a person beyond sea when the fine was levied, never return, &c. a person in prison dies whilst therein: or if one non compos, &c. dies such, in all these cases, their heirs are not limited to any time. 2 Inst. 519, 520. Five years are given after a remainder falls; and five years after the forfeiture of tenant for life. *Plowd.* 374. And he that hath two titles, shall have two five years to make his claim. *Jenk. Ca.* 45. A future interest of another person, cannot be barred by fine and non claim, until five years after it happens; as in case of a remainder or reversion. 2 Rep. 93. *Raym.* 151. And where there is no present nor future right in land, &c. only a possibility at the time of levying the fine, a person may enter and claim when he pleases. 10 Rep. 49. Also when there is only right to a rent, &c. issuing out of lands, and not the land in the fine, the persons that have it are not barred at all. 5 Rep. 124.

No fine bars any estate in possession or reversion, which is not divested, or put to a right. 9 Rep. 106. He that at the time of a fine levied had not any title to enter, shall not be immediately barred by the fine: but this is in case of an interest not turned to a right, where a man is not bound to claim; and not in the case of tenant in tail, barring his issue. 32 H. 8. c. 36.

When an estate is put to a right, and there comes a fine and non-claim, it is a perpetual bar. *Carter* 82, 162. A fine, grant and render was levied, and a *seire facias* brought and judgment given, and also writ of seisin awarded, but not executed; and afterwards a second fine was levied and executed, and five years passed; it was the opinion of the court that the second fine barred the first. *March's Rep.* 194. 2 Nels. Abr. 864.

If a man attainted of treason or felony, levy a fine of his land, this, as to the King, and lord of whom the land is held, is void, and no bar to their disadvantage and title of forfeiture: but as to all others it is a good bar. 2 Shep. Abr. 241. One levied a fine, and then was outlawed for treason and died; the heir reversed the outlawry, and it was held the wife should have

have her dower, if she bring her action within five years. *Moor. c. 876.* A fine is levied by lessee for life, &c. who continues the possession, and pays the rent; it shall not bind the lessor, who shall have five years claim after the determination of the lessee's estate, &c. 3 *Rep.* 77, 78. If one doth levy a fine of my land, while I am in possession, this will not hurt me; nor where a stranger levies a fine of my lands let to a tenant, if the tenant pays me his rent duly: And if there is tenant in tail, or for life, remainder in tail, &c. And the first tenant in tail or for life, bargains and sells the land by deed inrolled, and levies a fine to the bargainee, the remainders are not bound; for the law adjudges them always in possession. 9 *Rep.* 106.

Lessors who pretend title to the inheritance of the lands, cannot by fine bar the inheritance. 3 *Rep.* 77. But if a lease is made for years, and the lessor before entry of the lessee levies a fine with proclamations, and the lessee doth not make his claim within five years, the lessee is barred, and no relief can be had for him; for tho' the lessee for years cannot levy a fine, yet he shall be barred by a fine levied by the tenant of the land, &c. 5 *Rep.* 124. If a person hath a remainder depending on an estate for years, and the termor is disseised, and a fine is levied and five years pass, &c. the termor and reversioner are barred; because the termor might presently have entered, and he in remainder had an assise. *West. Sect.* 183. In case a person enters upon, and puts out a copyholder, and the disseisor doth levy a fine of the lands, if the copyholder suffer five years to pass after the disseisin and fine, without making any claim, the interest of the copyholder and his lord are hereby barred for ever: And if a copyholder makes a slossment in fee upon good consideration, and the feoffee levies a fine with proclamations, and five years pass, the lord is barred; but if a copyholder himself levies a fine, and five years do pass, the lord is not barred; for the copyholder not having a freehold, the fine will be void. *Wood's Inst.* 247, 248.

A fine of *cestui que trust* shall bar and transfer a trust, as it should an estate at law, if it were on a good consideration. *Chan. Rep.* 49. And fines of *cestui que use* are as good as if levied of immediate possessions, &c. 1 *R. c. 2.* 2 *Nelf. Abr.* 860.

Interests in estates which may be barred by fine, are either interests by Common law, or by custom; as copyholds, &c. And if I have a fee-simple, and am disseised, and the disseisor levies a fine with proclamations, and I do not claim within five years after, I and my heirs (allowance being made for impediments) are barred for ever. *Plowd.* 353. 3 *Rep.* 79. If a man purchase lands of another in fee, and after finding his title to be bad, and that a stranger hath right to the land, levies a fine thereof with intent to bar him; and he suffers five years to pass without claim, &c. he is barred of his right for ever: And in these cases none shall be relieved in equity. 3 *Rep. Dec. & Stud.* 83, 155.

A fine with proclamations levied by persons of lands intailed to them or their ancestors, &c. is a good bar against their heirs, claiming only by such intail. 32 *H. 8. c. 36.* Where the ancestor is barred by the fine, there for the most part the heir is barred also. 9 *Rep.* 105. Altho' the issue in tail be within age, out of the realm, &c. when a fine is had and the proclamations passed; the estate tail shall be barred. 3 *Rep.* 84. If the estate passed by the fine, be afterwards (before all the proclamations had) avoided, it is said the issue in tail are barred by it. 3 *Rep.* 91. The tenant in tail, to him and the heirs male of his body, hath three sons, the second levies a fine in the life of the father, and the father dies; here the eldest is not barred. But if the elder die without issue, living the second, it is a bar to the third. *Hob.* 333. *Jenk. Cent.* 96. Tenant in tail discontinues; the discontinuer levies a fine with proclamation, and five years pass without claim in the life of tenant in tail: In this case the issue may have a *formedon*, and shall not be barred; for his father could not claim, 'Tis otherwise where he is disseised, and the disseisor levies such fine; there the tenant in tail may claim, &c. *Jenk. Cent.* 192.

A tenant for life, and he that is next in remainder in tail join in a fine, it is a good bar to the issue in tail for ever, so long as that estate-tail shall continue. 10 *Rep.* 96. But tho' a fine bars the estate-tail and the issue in tail, yet it doth not remainders or reversions; tho' recoveries bar them all.

And if one makes his title as heir by another, and not by him that levied the fine, he is not barred. 1 *Cro.* 377. Also he that is privy in blood only, and not in estate, is not within the statutes to be barred by a fine: As if lands are given to a man and the heirs female of his body, and he hath a son and a daughter, and the son levies a fine, and dies without issue, this is no bar to the daughter; for notwithstanding she be heir to his blood, yet she is not heir to the estate, nor need make her conveyance to it by him; but if her father had levied the fine, it would have been otherwise. *Trin.* 21 *Jac.*

A fine, &c. cannot destroy an executory estate, which depends upon contingencies, as it is uncertain whether there will ever be an estate in being for the fine to work upon; but a fine and recovery will bar an estate in remainder, as that is an estate vested. 1 *Lill. Abr.* 617. Estates by statute merchant, statute staple, and *elegit*, may be barred, if a fine is levied, and those that have right suffer five years to pass without claim, &c. 5 *Rep.* 124. If a fine be levied of lands in ancient demesne, it doth not bar by the statute of non-claim. *Lut.* 781. As deans, bishops, parsons, &c. are prohibited by statutes to levy fines, and may not have a writ of right; they are not barred by five years non-claim, and their non-claim will not prejudice their successors. *Plowd.* 238, 375. If a corporation which hath an absolute estate, so as to maintain a writ of right, is disseised of land, and a fine is levied by the disseisor; if they claim not in five years, they are barred: but in such case it is said, that every successor being head of the corporation, may have a new five years to make their claim. *Plowd.* 537.

By the ancient Common law, he that had right was to make his claim, &c. within a year and a day of the fine levied and the execution thereof, or he was barred for ever: But this bar is now gone; and if a fine without proclamations according to the Common law be now levied, he that hath right may make his claim or entry, &c. at any time to prevent the bar. 1 *Inst.* 254, 260. By statute, a claim or entry to avoid the bar of a fine is to be made in five years: And no claim or entry shall avoid any fine with proclamations, unless an action be commenced within one year after such entry, and prosecuted with effect. 1 *R. c. 7.* 4 *Ann. c. 16.*

Where a fine may be a bar as to some lands, and not as to other lands. See *F. N. B.* 98. A fine was levied, and five years passed without bringing a writ of error; and it was held a good bar within the *Stat. 4 H. 7. c. 14.* *Cro. Jac.* 333. But it has been adjudged that where five years pass, that shall not hinder, where the fine is erroneous. 2 *Nelf. Abr.* 838.

VI. How fines may be reversed.

Fines may be reversed for error, so as the writ of error be brought in twenty years, &c. and not afterwards, by *Stat.* 10 & 11 *W. 3. c. 14.*

As to erroneous fines, and the manner of reversing them, it must be observed in the first place, that no person can bring a writ of error to reverse a fine, or any judgment, that is not intitled to the land, &c. of which the fine was levied, for the courts of law will not turn out the present tenant, unless the demandant can make out a clear title, possession always carrying with it the presumption of a good title till the right owner appears; besides, where the plaintiff in the writ of error can't make out a title, he can receive no damage by the fine, which the writ of error always supposes to be done, tho' it should be erroneous; and therefore it is no less than trifling with the courts of justice, to seek relief when he can't make appear he has received any injury. 1 *Roll. Abr.* 747. *Dyer* 90. 3 *Lev.* 36.

But if there be several parties to an erroneous fine, they shall all join with the party that is to enjoy the land, tho' they themselves can have nothing. 1 *Roll. Abr.* 747. *Dyer* 89.

Another rule to be observed is, that nothing can be assigned for error that contradicts the record; for the records of the courts of justice, being things of the greatest credit, can't be questioned but by matters of equal notoriety with themselves; wherefore tho' the matter assigned for error should be proved by witnesses of the best credit, yet the judges would not admit it. 1 *Roll. Abr.* 757.

Hence it is, that in a writ of error to reverse a fine, the plaintiff can't assign that the conusor died before the *teste* of the *dedimus potestatem*, because that contradicts the record of the conusance taken by the commissioners, which evidently shews, that the conusor was then alive, because they took his conusance after they were armed with the commission and the *dedimus* issued. *Dyer* 89. b. 1 *Roll. Abr.* 757. *Cro. Eliz.* 469.

But the plaintiff in error may say, that after the conusance taken, and before the certificate thereof returned, the conusor died; because this is consistent with the record. 1 *Roll. Abr.* 757.

If a lessee for years, or a disseisee, or one that hath right only to a reversion or remainder, levy a fine to a stranger that hath nothing in the land, this fine will be void or voidable as to the stranger; and he that hath cause to except against it, may shew that the freehold and seisin was in another at the time of the fine levied, and that *partes finis nihil habuerunt tempore levationis finis*, and by this avoid the fine: And yet a disseisor, who hath a fee-simple by wrong in him, may levy a fine to a stranger that hath nothing in the land, like unto one that is rightfully seised of land in fee, &c. and it will be a good fine. *Plowd.* 353. 3 *Rep.* 87. If the cognisor of a fine hath nothing in the land passed, at the time of the fine levied, the fine may be avoided: But where the cognisor or cognisee is seised of an estate of freehold, whether by right, or by wrong, the fine will be a good fine in point of estate. 41 *E. 3. c. 14.* 22 *Hen. 6. c. 43.*

Fines are not reversible for rasure, interlineation, misentry, &c. or any want of form; but it is otherwise if of substance. 23 *Eliz. c. 3.* A fine shall not be reversed for small variance, which will not hurt it; nor is there occasion for a precise form in a render upon a fine, because it is only an amicable assurance upon record. 5 *Rep.* 38. If a fine be levied of lands in a wrong parish, tho' the parish in which they lie be not named, it will be a good fine, and not erroneous, being an amicable assurance: And a fine of a close may be levied by a *lieu conus* in a town, without mentioning the town, vill, &c. *Godb.* 440. 2 *Cro.* 574. 2 *Mod.* 47. If there be want of an original, or not writs of covenant for lands in every county; or if there is any notorious error, in the suing out a fine, or any fraud or deceit, &c. writ of error may be had to make void the fine. 1 *Inst.* 9. 1 *Cro.* 469. So if either of the parties dies before finished, &c. And if the cognisor of a fine die before the return of the writ of covenant, (tho' after the caption of the fine) it is said it may be reversed. 3 *Salk.* 168. *If the King's silver is paid, before death of cognisor, the fine may be finished and good. See several cases towards the end of this division.*

A writ of error may be brought in *B. R.* to reverse a fine levied in *C. B.* and the transcript only, not the very record of the fine, is removed in these cases: But if the court of *B. R.* adjudge it erroneous; then a *certiorari* goes to the chirographer to certify the fine itself, and when it comes up it is cancelled. 1 *Salk.* 341. And where on a writ of error in *B. R.* to reverse a fine in *C. B.* the fine was affirmed; a writ of error *coram vobis resident.* hath been allowed to lie, *Ibid.* 357. The court of *B. R.* will not reverse a fine without a *sci. fac.* returned against the tertenant, because the cognisees are but nominal persons. *Ibid.* 339. A fine may be set aside, by pleading that neither of the parties had any thing in the estate, at the time of levying the fine, &c. But those that are privy to the person that levied the fine, are estopped to plead this plea. 3 *Rep.* 88. In pleading a fine or recovery to uses, the deeds need not be set forth; but the pleader is to say, that the fine, &c. was levied to such uses, and produce the deeds in evidence to prove the uses. 8 *W. 3. B. R.*

Fines may be avoided where they are obtained by fraud, covin or disceit, tho' there be no error in the process; and that may be done either by writ of disceit or averment, setting forth the fraud or covin. *Cro. Eliz.* 471.

Thus if a fine be levied of land in ancient demesne, the lord shall have a writ of disceit against the conusor and the tenant, and by that avoid the fine. *F. N. B.* 98. a. *Moor* 6.

If a fine be levied to secret uses to deceive a purchaser, and the conusor pleads the fine in bar, the purchaser may aver the fraud in avoidance of the fine, by 27 *Eliz. cap.* 4. and such averment is not contrary to the record, because it admits the fine, but sets it aside for the covin and fraud in obtaining it. 3 *Co.* 8. a. *Plowd.* 49. a.

So if a fine be levied upon an usurious contract, it may be avoided by averment, by 13 *Eliz. cap.* 8. because such fine being levied for ends the law has prohibited, the law will not encourage any evasion out of the act, nor suffer such usurious contracts to be supported by the solemn acts of the courts of justice against the intention of the act. 3 *Co.* 80.

A fraudulent obtaining of a fine, or irregularity therein, cannot be relieved against in *Chancery*; but must be in the court where levied, though the officers may be examined and punished, if they did it *criminaliter*. *Preced.* *Canc.* 150. And where one was personated on levying a fine, it was not set aside in equity, but a reconveyance ordered of the land. *Ibid.* 151.

If a feme sole marries after the *dedimus potestatem* to take her fine, &c. the fine shall nevertheless be passed as her fine. *Dyer* 246.

And if either of the parties cognisors die after the King's silver is entered, the fine shall be finished, and be good. 1 *Cro.* 469.

A record of a fine may be amended, (if the King's silver is paid) where it is the misprision of the clerk. 5 *Rep.* 43. A fine is perfect, when the King's silver is paid thereon. 1 *And.* 229.

Tho' one concord will serve for lands that lie in divers counties; yet there must be several writs of covenant. 3 *Inst.* 21. *Dyer* 227. A concord of a fine may have an exception of part of the things mentioned therein: And if more acres are named, than a man hath in the place, or are intended to be passed; no more shall pass by the fine than is agreed upon. 1 *Leen.* 81. 3 *Bull.* 317, 318. A fine as well as a deed may be covinous, and avoidable for this; where it is suffered by fraud to deceive a purchaser, or creditor, &c. 3 *Rep.* 80. 16 *H. 7. c. 5.*

Fines levied before the justices in *Wales*; or in the counties Palatine of *Chester*, *Durham*, &c. have the same effect as fines levied before the justices of *C. B.* 34 *E. 3. H. 8. c. 22.* 37 *H. 8. c. 19.* 2 *E. 3. Ed. 6. c. 28.* 5 *Eliz. c. 27.* &c. See *Recovery*. See also *Com. Dig.* 3 *V. tit. Fine.* 2 *V. New Abr.* 520 to 554. *Black. Com.* 2 *V.* 118, 348, 352-3, &c. 3 *V.* 156. 4 *V.* 419, 422. and for *Forms*, 2 *V. Appendix*, xiv.

Sometimes a sum of money paid for the income of lands, &c. let by lease, is called fine. Fine also signifies an amends, or punishment for an offence committed; in which case a man is said *facere finem de transgressionem cum rege*, &c. See *Post fines for offences*. In all cases it is a final conclusion or end of differences.

Fine annullando levato Penemiento quod fuit de antiquo Dominico, Is a writ directed to the justices of *C. B.* for disannulling a fine levied of lands in ancient demesne, to the prejudice of the lord. *Reg. Orig.* 15.

Fines for Alienations, Were fines paid to the King by his tenant in chief, for licence to alien their lands according to the *Stat.* 1 *Ed.* 3. c. 12. But these are taken away by the *Stat.* 12 *Car.* 2. c. 24.

Fines for Offences, Fine, in this sense, is amends, pecuniary punishment, or recompence for an offence committed against the King and his laws, or against the lord of a manor: In which case a man is said *finem facere de transgressionem cum rege*, &c. *Reg. Jud.* 1. 25. a. *Corwell*.

It seems that originally all punishments were corporal; but that after the use of money, when the profits of the courts

courts arose from the money paid out of the Civil causes, and the fines and confiscations in criminal ones, the commutation of punishments was allowed of, and the corporal punishment, which was only in *terroram*, changed into the pecuniary, whereby they found their own advantage. This begat the distinction between the greater and the lesser offences; for in the *crimina majora* there was at least a fine to the King, which was levied by a *capiatur*; but upon the lesser offences there was only an amercement, which was assessed, and for which a *distringas*, or action of debt only lay. 2 *New Abr.* 502.

Under this head is to be considered,

I. *Who may fine and amerce, and for what.*

II. *How fines, &c. may be mitigated and aggravated; as also how they may be recovered, and to whom they are payable.*

III. *What persons are exempt from being fined.*

I. *Who may fine and amerce, and for what.*

Where a statute imposes a fine at the will and pleasure of the King, that is intended of his judges, who are to impose the fine. 4 *Inst.* 71. Courts of record only can fine and imprison a person, (except as aftermentioned): And such a court may fine a man for an offence committed in court in their view, or by confession of the party recorded in court. 1 *Lill. Abr.* 621. A man shall be fined and imprisoned for all contemptments done to any court of record against the commandment of the King's writs, &c. 9 *Rep.* 60. If a person is arrested coming to the courts of justice to answer a writ, the offender doing it shall be fined for the contempt: But there has been a difference made where it is done by the plaintiff in the writ, and a stranger, who it is said shall not be fined. 9 *H. 6. c.* 5: 1 *Danv.* 469. If an officer of the court neglects his duty, and gives not due attendance; a clerk of the peace doth not draw an indictment well in matter of form, or return thereof, upon a *certiorari* to remove the indictment into R. R. If a sheriff, &c. make an insufficient return of a *habeas corpus* issuing out of B. R. &c. Or if justices of peace proceed on an indictment after a *certiorari* issued to remove the indictment; the court may fine them. 1 *Lill.* 620. When a juror at the bar will not be sworn, he may be fined. 7 *H. 6. c.* 12. And if one of the jury depart without giving his verdict; or any of the jury give their verdict to the court before they are all agreed, they may be fined. 8 *Rep.* 38. 40 *Aff.* 10.

Also the sheriff in his torn, and the steward of a court-leet, have a discretionary power, either to award a fine, or amercement for contempt to the court; as for a suitor's refusing to be sworn, &c. and the steward of a court-leet may either amerce or fine an offender, upon an indictment for an offence not capital, within his jurisdiction, without any farther proceeding or trial; especially if the crime were any way enormous, as an affray accompanied with wounding. *Keilw.* 66. *Kitchin* 43, 51.

It is said, that some courts may imprison, but not fine, as the constables at the petit sessions. 11 *Co.* 44. 1 *Roll. Rep.* 74. 11 *C.* 43. *b.* Also some courts cannot fine or imprison, but amerce, as the county, hundred, &c. 11 *Co.* 43. *b.* But some courts can neither fine, imprison, nor amerce; as ecclesiastical courts held before the ordinary, archdeacon, &c. or their commissaries, and such who proceed according to the Canon, or Civil law. 11 *Co.* 44. *a.*

Every court of record may injoin the people to keep silence under a pain, and impose reasonable fines, not only on such as shall be convicted before them of any crime, on a formal prosecution, but also on all such as shall be guilty of any contempt in the face of the court; as by giving opprobrious language to the judge, or obstinately refusing to do their duty as officers of the court. 11 *H. 6. 12. b.* 1 *Roll. Abr.* 219. 8 *Co.* 38. 11 *Co.* 43. *Cro. Eliz.* 581. 1 *Sid.* 145.

If a dead body in prison, or other place, whereon an inquest ought to be taken, be interred, or suffered to lie so long, that it putrify before the coroner hath viewed it, the gaoler, or township shall be amerced. 1 *Keilw.* 278. 2 *Hawth. P. G.* 48. If any homicide be committed, or

dangerous wound given, whether with or without malice, or even by misadventure, or self-defence, in any town, or in the lanes or fields thereof, in the day-time, and the offender escape, the town shall be amerced; and if out of a town, the hundred shall be amerced. 3 *Inst.* 53. 4 *Inst.* 183. *Cro. Car.* 252. 3 *Leon.* 207. 2 *Inst.* 315. *Dyor* 210.

Besides fines imposed for offences, it seems, that regularly there was a fine or amercement in all actions; for if the plaintiff or demandant did not prevail, it was thought reasonable that he should be punished for his unjust vexation; and therefore there was judgment against him, *quod sit in misericordia pro falso clamore.* 8 *Co.* 59. *F. N. B.* 75.

Hence when the plaintiff takes out a writ, the sheriff, before the return of it, was formerly obliged to take pledges of prosecution, which, when fines and amercements were considerable, were real and responsible persons, and answerable for those amercements; but being now so very inconsiderable, that they are never levied, they are only formal pledges entered, *vis. John Doe and Richard Roe.* 1 *Sand.* 227. See tit. *Rail.*

In all actions, where the judgment is against the defendant, it was to be entered with a *misericordia*, or a *capiatur*; and herein the difference is, that if it be an action of debt, or founded on a contract, the entry is *ideo in misericordia*, without assessing any sum in certain, which was afterwards assessed by the coroners in the proper county; but if it were in action of trespass, the court set the fine, and levied it by a *capiatur*. 8 *Co.* 60. 1 *Roll. Abr.* 212, 219. *Cro. Eliz.* 844. *Cro. Jac.* 255. Therefore,

In actions *quare vi & armis*, as trespass, and the like; if judgment pass against the defendant in a court of record, he shall be fined. 8 *Rep.* 59. But in actions which have not something of force, or fraud, or deceit to the court; if the defendant comes the first day he is called, and tender the thing demanded to the plaintiff, he is not to be fined. 5 *Rep.* 49. 8 *Rep.* 59. 60, 99. 3 *Aff.* 9. 22 *Aff.* 82. 1 *Danv. Abr.* 471. 1 *Vent.* 116.

All *capiatur fines* are taken away by *Stat.* 4 *3* 5 *W. & M. c.* 12. Except where a defendant pleads *non est factum*, and it is found against him. 1 *Lill. Abr.* 621. In trespass, assault and battery, &c. there can be no *capiatur pro fine* entered since this *Stat.* See *Capiatur*.

II. *How fines, &c. may be mitigated and aggravated; as also how they may be recovered, and to whom they are payable.*

A fine may be mitigated the same term it was set, being under the power of the court during that time; but not afterwards. *J. Raym.* 376. And fines assessed in court by judgment upon an information, cannot be afterwards mitigated. *Cro. Car.* 251. If a fine certain is imposed by statute on any conviction, the court cannot mitigate it; but if the party comes in before conviction, and submits to the court, they may assess a less fine; for he is not convicted, and perhaps never might. 3 *Salk.* 33. The court of *Exchequer* may mitigate a fine certain, because it is a court of equity, and they have a privy seal for it. *Ibid.*

If an excessive fine is imposed at the sessions, it may be mitigated at the King's Bench. 1 *Vent.* 336. A defendant being indicted for an assault, confessed it, and submitted to a small fine; and it was adjudged that in such a case he may produce affidavits to prove on the prosecutor, that it was *non assault*, and that in mitigation of the fine; though this cannot be done after he is found Guilty. 1 *Salk.* 55. If a person is found Guilty of a misdemeanor upon indictment, and fined, he cannot move to mitigate the fine, unless he appear in person; but one absent may submit to a fine, if the clerk in court will undertake to pay it. 1 *Vent.* 209, 270. 1 *Salk.* 55. 2 *Hawth.* 446. It is a common practice in the court of *B. R.* to give a defendant leave to speak with the prosecutor, *i. e.* to make satisfaction for the costs of the prosecution, and also for damages sustained, that there may be an end of suits; the court at the same time shewing on that account an inclination to set a moderate fine

on behalf of the King. *Wood's Inst.* 653. And in cases where costs are not given by law, after a prosecutor has accepted costs from the defendant, he cannot aggravate the fine; because having no right to demand costs, if he takes them, it shall be intended by way of satisfaction of the wrong. 2 *H. P. C.* 292.

All fines belong to the King, and the reason is, *because the courts of justice are supported at his charge*; and where ever the law puts the King to any charge for the support and protection of his people, it provides money for that purpose. *Brañ.* 129. When a person is fined to the King, notwithstanding the body remains in prison, it is said the King shall be satisfied the fine out of the offender's estate. 4 *Leon. c.* 393.

As to the method of recovering fines.

By the Common law, the King, or Lord may, at their election, distrain, or bring an action of debt for a fine or amercement. *Cro. Eliz.* 581. *Savil* 93. *Rast.* *Ent.* 151, 553, 606. 2 *H. 4.* 24. *b.* 10 *H. 6.* 7. *Raym.* 68. But every avowry, or declaration of this kind ought expressly to shew, that the offence was committed within the jurisdiction of the court, for if it were not, all the proceedings were *coram non iudice*, and a court shall not be presumed to have a jurisdiction where it doth not appear to have one. *Hob.* 129. *Rast. Ent.* 553. *Co. Ent.* 572. Also it is adviseable to alledge, that the offence was committed, as well as presented, and to shew the names of the presentors and the assessor in setting forth a presentment or assentment, and also to shew that proper notice was given of holding the court. But for this, *vide Hawk. P. C.* 59, 60.

Of common right, a distress is incident to every fine and amercement, in a torn or leet for offences of right within the jurisdiction thereof; but if the offence were only the neglect of a duty created by custom, and of a private nature, it is clear, that *there must be a custom to warrant a distress*, and perhaps such custom is also necessary, though the duty be of a publick nature. 2 *Hawk. P. C.* 60.

Also the sheriff, or lord mayor may for such fines or amercements distrain the goods of the offender, even in the highway, or in land not holden of the lord, unless such land be in the possession of the crown. 1 *Roll. Ab.* 670. 2 *Inst.* 104. But such fines and amercements being for a personal offence, no stranger's beasts can lawfully be distrained for them, tho' they have been levan and couchant upon the lands of the offender. *Owen* 146 *Noy* 20.

A joint award of one fine against divers persons is erroneous; it ought to be several against each defendant for otherwise one who hath paid his part might be continued in prison till the others have paid theirs, which would be in effect to punish for the offence of another 2 *Hawk.* 446. Fines to the King are *estreated* into the *Exchequer*. See farther as to fines, *Black. Com.* 3 259. 4 *V.* 372.

Fines le Roy, Are all fines to the King; and under this head are included fines for *original writs*. Originals on trespass on the case, where the damages are laid above 40*l.* pay a fine, *viz.* from 40*l.* damages to 100 marks, 6*s.* 8*d.* from 100 marks to 100*l.* the fine is 10*s.* From 100*l.* to 200 marks, 13*s.* 4*d.* From 200 to 400 marks, 16*s.* 8*d.* From 400 marks to 200*l.* it is 1*l.* fine; and so for every 100 marks more, you pay 6*s.* 8*d.* and every 100*l.* further 10*s.* *Practis. Attorn.* 1 Edit. p. 132. And fines are paid for original writs in debt; for every writ of 40*l.* debt, 6*s.* 8*d.* and if it be of 100 marks, but 6*s.* 8*d.* and for every 100 marks 6*s.* 8*d.* &c. also for every writ of *plea of land*, if it be not a writ of right patent, which is for the yearly value of 5 marks, 6*s.* 8*d.* and so according to that rate. 19 *H. 6.* 44. 7 *H. 6.* 33. *New Nat. Br.* 212.

Fine non capiendo pro pulchre Placitando, Is a writ to inhibit officers of courts to take fines for fair pleading. *Reg. Orig.* 179.

Fine capiendo pro Terris, &c. A writ lying where a person upon conviction of any offence by jury, hath his lands and goods taken into the King's hand, and his body is committed to prison, to be remitted his imprisonment,

and have his lands and goods redelivered him, on obtaining favour for a sum of money, &c. *Reg. Orig. fol.* 42.

Fine pro Redivisione capienda, Is a writ that lies for the release of one imprisoned for a *redivision*, on payment of a reasonable fine. *Reg. Orig.* 222.

Fine Force, Is where a person is forced to do that which he can no ways help; so that it seems to signify an absolute necessity or constraint not avoidable. *Old Nat. Br.* 68. *Stat.* 35 *H. 8.* c. 12.

Finire, To fine, or pay a fine upon composition and making satisfaction, &c. It is the same with *finem facere*, mentioned in *Leg. H. 1. c.* 53. And in *Bampton*, p. 1105.—*Quando Rex Scotiæ cum domino rege finivit*, &c. And in *Hoveden*, p. 783.

Finisio, Death, so called; because *extra finitur morte*. *Blount.*

Finors of Gold and Silver, Are those persons who purify and separate gold and silver from coarser metals, by fire and water. 4 *H. 7. c.* 2. They are not to alloy it; or sell the same, save only to the master of the mint, gold smiths, &c. *Ibid.*

Firdfare and Firdwite; See *Ferdfare* and *Ferdwit*. *Leg. Canuti*, par. 2. c. 22.

Firderinga, A preparation to go into the army. *Leg. H. 1.*

Fir and Fire-cocks. Churchwardens in London and within the bills of mortality, are to fix *fire-cocks*, &c. at proper distances in streets, and keep a large engine and hand-engine for extinguishing fire, under the penalty of 10*l.* &c. *Stat.* 6 *Ann. c.* 31. To prevent fires, workmen in the city of London, &c. must erect party-walls between buildings of brick or stone, of a certain thickness, under penalties. *Stat.* 7 *Ann. c.* 17. 11 *Geo. 1. c.* 28. 33 *Geo. 2. c.* 30. and 4 *Geo. 3. c.* 14. And on the breaking out of any fire, all the constables and beadles shall repair to the place with their slaves, and be assisting in putting out the same, and causing people to work, &c. No action shall be had against any person in whose house or chamber a fire shall begin. 6 *Ann. c.* 31. 10 *Ann. c.* 14.

Firemen exempt from being impressed, 6 *Ann. c.* 31. *f.* 2. Penalty on servants firing houses by negligence. 6 *Ann. c.* 31. *sec.* 3. Restrictions of boiling turpentine. 7 *Ann. c.* 17. *sec.* 11. Stock in fire-offices how taxed. 4 *Geo. 3. c.* 2. *f.* 54. See *Arson*.

Firebare, (Sax.) Signifies a beacon or high tower by the sea-side, wherein were continual lights, either to direct sailors in the night, or to give warning of the approach of an enemy.—*Quod sine dilatione levare & reparare fac. signa & firebares super montes altiores in quolibet hundredo, ita quod tota patria, per illa signa, quotiescunque necesse fuerit, præmunire possit*, &c. *Ordinatio observanda à Lynne usque Yarmouth.* *Temp. Ed.* 2.

Firebote, Fuel for firing for necessary use, allowed by law, to tenants out of the lands, &c. granted them. See *Essovers*.

Firma, Is taken for victuals or provisions; also rent, &c.

Firma Tiba, Rent of lands let to farm paid in silver, not in provision for the lord's house.

Firma Noctis, Was a custom or tribute paid towards the entertainment of the King for one night, according to *Domesday*.—*Comes meriton T. R. E. reddebat firmam unius noctis*, &c. *i. e.* provision or entertainment for one night, or the value of it. *Temp. Reg. Edw. Confess.*

Firmam Regis, Anciently *pro villa regia, seu regis manerio*. *Spelm.*

Firmatio. *Firmationis Tempus.* Doe season, as opposed to buck season. 31 *H. 3.* *Firmatio* signifies also a supplying with food. *Leg. Inæ, cap.* 34.

Firmura. *Will. de Cressi* gave to the monks of Blyth, a mill, cum libera firmura of the dam of it. *Reg. de Blyth.* This has been interpreted liberty to scour and repair the mill dam, and carry away the soil, &c. And Dr. *Yberson* Englishes it *Free Firmage*.

Fire-ordeal. See *Ordeal*, and *Black. Com.* 4 *V.* 336.

Fire-Mozks. No person whatsoever shall make, sell, &c. squibbs, rockets, serpents, &c. or cases, moulds, &c.

&c. for making such squibbs, and every such offence shall be adjudged a common nuisance.

Persons throwing or firing squibbs, &c. or suffering them, &c. to be thrown or fired from their houses incur a penalty of 20 s. Likewise persons throwing, casting or firing, or aiding or assisting in the throwing, casting or firing of any squibbs, rockets, serpents, or other fireworks, in or into any publick street, house, shop, river, highway, road or passage, incur the like penalty of 20 s. and on nonpayment may be committed to the house of correction. Stat. 9 & 10 W. 3. c. 7.

N. B. This statute doth not take from any person injured, by throwing of squibbs, &c. the remedy, at Common law, for the party may maintain a special action on the case, or trespass, &c. for recovery of full damages.

First-fruits, (Primitivæ) Are the profits after avoidance, of every spiritual living for the first year, according to the valuation thereof in the King's books. These were given in ancient times to the Pope throughout all christendom; and were first claimed by him in England of such foreigners as he bestowed benefices on here by way of provision; afterwards they were demanded of the clerks of all spiritual patrons, and at length of all other clerks on their admission to benefices: but upon the throwing off the Pope's supremacy in the reign of Hen. 8. they were translated to, and vested in, the King, as appears by the Stat. 26 H. 8. c. 3. And for the ordering thereof, there was a court erected 32 H. 8. but dissolved Anno 1 Mar. Though by 1 Eliz. c. 4. these profits are reduced again to the crown, yet the court was never restored; for all matters formerly handled therein, were transferred to the Exchequer, within the survey of which court they now remain. By Stat. 26 H. 8. the Lord Chancellor, &c. is empowered to examine into the value of First-fruits; and clergymen entering on their livings before the same are paid or compounded, are to forfeit double value. But the 1 Eliz. c. 4. ordains, that if an incumbent on a benefice do not live half a year, or is ousted before the year expired, his executors are to pay only a fourth part of the First-fruits; and if he lives the year, and then dies, or he ousted in six months after, but half of the First-fruits shall be paid. And by this statute livings not above 10 l. per Ann. &c. are discharged from payment of these duties: as are also benefices under and not exceeding 50 l. a year, by Stat. 5 Ann. c. 24. The 2 Ann. c. 11. settles upon a corporation the First-fruits and tenths of all benefices for the maintenance of the poor clergy; which is called the corporation of the bounty of Q. Anne. See the act, relating to large wastes in Yorkshire inclosed, a sixth part for the benefit of poor clergymen, whose livings do not exceed 40 l. per Ann. Stat. 12 Ann. c. 4. Vide 3 Geo. 1. c. 10. Black. Com. 1 V. 284. 2 V. 67. 4 V. 106.

Fish and Fishing. No fisherman shall use any net or engine, to destroy the fry of fish: and persons using nets for that purpose, or taking salmon or trout out of season, or any fish under certain lengths, are liable to forfeit 20 s. and justices of peace, and Lords of leets have power to put the acts in force. See 1 El. c. 17. 3 Jac. 1. c. 12. 30 Geo. 2. c. 21. & post. No person may fasten nets, &c. across rivers to destroy fish, and disturb passage of vessels, on pain of 5 l. Stat. 2 H. 6. c. 15. None shall fish in any pond or moat, &c. without the owner's licence, on pain of three months imprisonment. 31 H. 8. c. 2. And no person shall take any fish in any river, without the consent of the owner, under the penalty of 10 s. for the use of the poor, and treble damage to the party grieved, leviable by distress of goods; and for want of distress, the offender is to be committed to the house of correction for a month: also nets, angles, &c. of poachers may be seized, by the owners of rivers, or by any persons by warrant from a justice of peace, &c. 22 & 23 Car. 2. c. 25. 4 & 5 W. & M. c. 23. The Stat. 4 & 5 Ann. c. 21. was made for the increase and preservation of salmon in rivers in the counties of Southampton and Wilts; requiring that no salmon be taken between the 1st of August and 12th of November, or under size, &c. And by 1 Geo. 1. c. 18. salmon taken in the river Severn, Dee, Wye, Were, Ouse, &c. are to be 18 inches long at least; or the persons catching them shall forfeit 5 l. And sea fish sold must be of the lengths following, viz. Bret and turbot 16 inches, brill and pearl 14, codlin, bass and

mallet 12, sole and plaice 8, flounders 7, whiting 6 inches long, &c. on pain of forfeiting 20 s. to the poor, and the fish. Vide the statute. Persons that import any fish, contrary to the 1 Geo. 1. c. 18. for better preventing fresh fish taken by foreigners being imported into this kingdom, &c. shall forfeit 100 l. to be recovered in the court at Westminster, one moiety to informers, and the other to the poor; and masters of smacks, hoys, boats, &c. in which the fish shall be imported, or brought on shore, forfeit 50 l. Also selling the same in England, is liable to 20 l. penalty. Stat. 9 Geo. c. 33.

By the Stat. 22 Geo. 2. c. 49. contracts for the buying fish (except fresh salmon, or soles brought by land carriage, oysters or salt or dried fish) to be sold by retail before the same are brought to market and exposed to sale, are declared void; and each party contracting shall forfeit 50 l. And fishermen not selling their fish within eight days after their arrival on the coast between North Yarmouth and Dover, shall forfeit the cargo, vessel and tackle, &c. And sea fish under the dimensions prohibited by the Stat. 1. Geo. 1. may be exposed to sale, provided they are taken with a hook, and so not capable of being preserved alive. But see Stat. 33 Geo. 2. c. 27. made to regulate the sale of fish at the first hand in the fish markets in London and Westminster; and to prevent salesmen of fish buying fish to sell again on their own account; and to allow bret and turbot, brill, and pearl, although under the respective dimensions mentioned in 1 Geo. 1. c. 18. to be imported and sold; and to punish persons who shall take or sell any spawn, brood, or fry of fish, unsizeable fish, or fish out of season, or smelts under the size of five inches. By this act every master of a vessel is to give a true account of the several sorts of fish brought alive to the shore in his vessel, and if after such arrival, he shall wilfully destroy or throw away any of the said fish, not being unwholesome or unmarketable, &c. he is liable to be committed to the house of correction, and kept to hard labour for any time not exceeding 2 months not less than one. And see farther 2 Geo. 3. c. 15. for the better supplying the cities of London and Westminster with fish, and to reduce the exorbitant price thereof; and to protect and encourage fishermen.

Fish-royal, Whale and Sturgeon, which the King is intitled to when either thrown on shore or caught near the coasts. Plowd. 315. Black. Com. 1 V. 290.

Fishing Right of, and property of fish. It has been held, that where the Lord of the manor hath the soil on both sides the river, 'tis a good evidence that he hath the right of fishing, and it puts the proof upon him who claims liberam piscariam; but where a river ebbs and flows, and is an arm of the sea, there 'tis common to all, and he who claims a privilege to himself must prove it; for if trespass is brought for fishing there, the defendant may justify that the place where is brachium maris, in quo unusquisque subditus domini regis habet & habere debet liberam piscariam: In the Sewer, the soil belongs to the owners of the land on each side; and the soil of the river Thames, is in the King, &c. but the fishing is common to all. 1 Mod. 105. He who is owner of the soil of a private river, hath separatis piscaria; and he that hath libera piscaria, hath a property in the fish, and may bring a possessory action for them; but communis piscaria is like the case of all other commons. 2 Salk. 637. One that has a close pond in which there are fish, may call them pisces suos in an indictment, &c. But he cannot call them as bona & catalla, if they be not in trunks. Mod. Ca. 183. There needs no privilege to make a fish pond; as there doth in case of a warren. Ibid. See Black. Com. 2 V. 34, 39, 417.

Fishermen. There shall be a master, wardens and assistants of the Fishermen's Company in London, chosen yearly at the next court of the Lord Mayor and Aldermen after the tenth of June, who are constituted a court of assistants; and they shall meet once a month at their common hall, to regulate abuses in fishery, register the names of fishermen, and mark their boats, &c. See Stat. 9 Ann. c. 26. Fish and Fishing, Herrings, &c.

Fishery. A Royal Fishery of England was established in the reign of King Car. 2. and the members of it incorporated into a company. The crown hath power to direct 20 s. out of every 100 l. South-Sea stock, to be applied

plied for improving the fishery of the kingdom; carried on to Greenland, and in other Northern seas. *Stat. 9 Ann. c. 21.* And for recovery of the British fishery, allowances are made on fish exported to other countries, &c. *Stat. 5 Geo. 1. c. 28.* Fishery in Scotland to be improved according to the articles of the union. *13 Geo. 1. c. 30.* By *stat. 22 Geo. 2. c. 45.* The whale fishery is further encouraged and enlarged. And see *statutes 23 Geo. 2. c. 24.* and *26 Geo. 2. c. 9.* for the encouragement of the British White Herring Fishery. And tit. *Fish and Fishing.*

Filthgath, A dam or wear in a river, made for the taking of fish, especially in the rivers of *Ouse* and *Humber.* *23 H. 8. c. 18.*

Flaco, A place covered with standing water. *Mon. Ang. Tom. 1. p. 209.*

Flesta, A feathered or fledged arrow, a *fleet arrow.* Radulphus de F. tenet, &c. per servitium reddendi per Annum viginti Flettas. *Dom. Reg. 9 Edw. 1.*

Fledwite or **Flighdwite,** (from the Sax. *Flyth fuga* & *Wite, Multa*) In our ancient law signifies a discharge from americiaments, where a person having been a fugitive, comes to the peace of our Lord the King of his own accord, or with licence. *Rassal.*

Fleet, (Sax. *Fleet*, i. e. *Flota*, a place of running-water, where the tide or float comes up) Is a famous prison in London, so called from a river or ditch that was formerly there, on the side whereof it stood. To this prison men are usually committed for contempt to the King and his laws, particularly against the courts of justice; or for debt, when persons are unable or unwilling to satisfy their creditors: there are large rules, and a *warden* belonging to the *Fleet Prison*, &c. *Stat. 8 & 9 W. 3. c. 7.* By a late statute, the warden of the *Fleet* was disabled to hold any office, for his notorious oppressions of the prisoners; and the King was empowered to grant the said office to such person as he should think fit, &c. *2 Geo. 2. c. 32.*

Fleet-Ditch. The Lord Mayor of London, &c. may fill up *Fleet-Ditch*, and make the soil level with the streets; and the fee is vested in the Mayor and commonalty. *Stat. 6 Geo. 2. c. 22.* And now, by virtue of the act for building *Blackfriars Bridge* the ditch is in part arched over, and so filled up to the foot of the bridge, that the ground is now level with *Fleet-street.*

Fleet of Ships. See *Flota Navium*, and *Navy Royal of England.*

Flem, *Flema*, (from the Sax. *Flean*, to kill or slay) An outlaw; and by virtue of the word *Flemaflare* were claimed *bona felonum*, as may be collected from a *quo warranto* *Temp. Ed. 3.*

Flemensfrit, **Flemensfrithe,** **Flymenafrynthe,** Signifies the receiving or relieving of a fugitive or outlaw. *Leg. Ine. c. 29, 47. LL. H. 1. c. 10, 12.*

Flemeswite, (Sax.) *Fleta*, who writes of this word, interprets it *habere catalla fugitivorum.* *Lib. 1. c. 47.*

Flighers, *Maifs* for ships. — *Concessit etiam eis, Flighers ad suam propriam navem, colligendas in territorio,* &c. *Mon. Ang. Tom. 1. p. 799.*

Flight, For any crime committed, which implies guilt. See *Fugitives.* And *Black. Com. 4 V. 380.*

Flood-mark. The mark which the sea makes on the shore, at flowing water and the highest tide: it is also called *High-water Mark.*

Florence, An ancient piece of English gold coin: every pound weight of old standard gold was to be coined into fifty *Florences*, to be current at six shillings each; all which made in tale fifteen pounds, or into a proportionate number of half *Florences* or *quarter* pieces, by indenture of the Mint. *18 Ed. 3.*

Florin, A foreign coin, in Spain 4 s. 4 d. Germany 3 s. 4 d. and Holland 2 s. And in some parts of Germany, accounts are kept in *Florins.*

Flota navium, A fleet of ships. — *Rex, &c. Sciatis quod constituimus Johannem de R. Admirallum nostrum Flotæ Navium ad ore aquæ Thamisæ versus partes occidentales,* &c. *Rot. Francia, 6 R. 2. m. 21.*

Flotages, Are such things as by accident swim on the top of great rivers; the word is sometimes used in the commissions of *Water Bailiffs.*

Flotsam, Is where a ship is sunk or cast away, and the goods are floating upon the sea. *5 Rep. 106.* *Fletsam, Jetsam* and *Lagan* are mentioned together; *Jetsam* being where any thing is cast out of the ship when in danger, and the ship notwithstanding perisheth; and *Lagan* is when heavy goods are thrown over-board before the wreck of the ship, which sink to the bottom of the sea. *Lex Mercat. 149.* The King shall have *Flotsam, Jetsam* and *Lagan*, when the ship is lost, and the owners of the goods are not known; but not otherwise. *F. N. B. 122.* Where the proprietors of the goods may be known, they have a year and a day to claim *Fletsam.* *1 Keb. 657.* *Fletsam, Jetsam, &c.* any person may have by the King's grant; as well as the Lord Admiral, &c. *Lex Mercat. 149.* See *12 Ann. stat. 2. c. 18.* *26 Geo. 2. c. 19.* and title *Wreck.*

Focage, (*Focagium*) The same with *Hause-bote* or *Fire bote.*

Focal, A right of taking wood for firing: *In eadem Hail 10 Carratas Focales recipiendas annuatim per visum servantis met.* *Mon. Ang. Tom. 1 p. 779.*

Fodder, (Sax. *Fodu*, i. e. *Alimentum*) Any kind of meat for horses, or other cattle: and among the *Feudists* it is used for a prerogative of the prince, to be provided with corn and other meat for his horses, by his subjects, in his wars or other expeditions. *Hotem. de verb. Feudal.*

Foddertozium, Provision or fodder, to be paid, by custom to the King's purveyor. *Cartular. St. Edmund. MS. fol. 102.*

Foenus nauticum. Where money was lent to a merchant to be employed in a beneficial trade, with condition to be repaid, with extraordinary interest, in case such a voyage was safely performed, the agreement was sometimes called *foenus nauticum*, sometimes *usura maritima.* But as this gave an opening for usurious and gaming contracts, *19 Geo. 2. c. 37.* enacts, that all money lent on bottomry or at *respondentia*, on vessels bound to or from the *East-Indies*, shall be expressly lent, only upon the ship or merchandize; the lender to have the benefit of salvage, &c. *Black. Com. 2 V. 459. Mol. de jur. mar. 361.*

Focsa, (Fr. *Foisson*) Grass, herbage. *Mon. Ang. Tom. 2. p. 506.*

Fogage, (*Fogagium*) Fog or rank after-grass, not eaten in Summer. *LL. Forfeitar. Sect. c. 16.*

Foiterers, By Blount are interpreted to be vagabonds. See *Faitours.*

Folk-lands, (Sax.) Copyhold lands so called in the time of the Saxons, as charter lands were called *Boc-lands*. *Kitch. 174.* *Folkland* was *terra vulgi* or *popularis* the land of the vulgar people, who had no certain estate therein, but held the same under the rents and services accustomed or agreed, at the will only of their Lord the *Thane*; and it was therefore not put in writing, but accounted *prædium rusticum* & *ignobile.* *Spelm. of Feuds, cap. 5.*

Folcmote or **folkmore,** (Sax.) *Folcemet*, i. e. *Conventus populi* Is compounded of *Folk*, *populus*, and *mote* or *gemete*, *convenire*; and signified originally, as *Sommer* in his *Saxon Dictionary* tells us, a general assembly of the people, to consider of, and order matters of the commonwealth: *Omnes proceres regni & milites & liberi homines universi totius regni Britannia facere debent in pleno Folcmote Fidelitatem domino regii, &c.* *Leg. Edw. Confess. cap. 35.* And Sir Henry *Spelman* says, the *folcmote* was a sort of annual parliament, or convention of the Bishops, *Thanes*, *Aldermen* and *freemen*, upon every *May-day* yearly; where the laymen were sworn to defend one another, and to the King, and to preserve the laws of the kingdom, and then consulted of the common safety. But Dr. *Brady* infers from the laws of our Saxon Kings, that it was an inferior court, held before the King's *Reeve* or steward, every month to do *Folk* right, or compose smaller differences, from whence there lay appeal to the superior courts. *Brady's Gloss. p. 48.* *Squire* seems to think the *folcmote*, not distinct from the *Motemote*, or common general meeting of the county. See his *Engl. Sax. Gov. 155. n.*

Manwood mentions *folkmote* as a court holden in London, wherein all the *folk* and people of the city did complain

plain of the Mayor and Aldermen, for misgovernment within the said city: and this word is still in use among the *Londoners*; and denotes *Celebrem ex tota civitate conventum*. *Stowe's Survey*. According to *Kennet*, the *folk-mote* was a common council of all the inhabitants of a city, town or borough, convened often by sound of bell to the *Mote Hall* or *House*; or it was applied to a larger congress of all the freemen within a county, called the *Shire-mote*, where formerly all knights and military tenants did fealty to the King, and elected the annual sheriff on the first of *October*, till this popular election to avoid tumults and riots devolved to the King's nomination. *Anno 1315*. 3 *Ed. 1*. After which the *City Folk-mote* was swallowed up in a select committee or *Common Council*; and the *County Folk-mote*, in the *Sheriff's Tour* and *Affises*. The word *Folk-mote* was also used for any kind of popular or public meeting; as of all the tenants at the *Court-Leet* or *Court-Baron*, in which signification it was of a late extent. *Paroch. Antiq.* 120.

Foldage and Fold-course, A liberty to fold sheep, &c. *Fallege* and *Faldfee*.

Folgarit, Menial servants; *Eos qui aliis deserviunt*. *Bract. lib. 3. tract. 2. c. 10*. House-keepers by the *Saxons* were called *Husfascene*; and their servants or followers, *Feigheres* or *Folgeres*. *LL. Hen. 1. c. 9*.

Fool, A natural, one so from the time of his birth. See *Idiot*.

Foot of a Fine. See *Fine*.

Footgeld, (From the *Sax.* *Fot*, *Pes* & *Geldan*, *solvere*) Is as much as *pedis redemptio*, and signifies an amercement for not cutting out and expediting the balls of great dogs teet in the *forest*: to be quit of *footgeld* is a privilege to keep dogs within the *forest* unawed, without punishment. *Manswood, par. 1. p. 86*.

Forage, (Fr. *Fourage*) Hay and straw for horses, particularly for the use of horse in an army.—*Et le dit J. trovera herbe & foyen & Forage pour un Hackney*, &c. *MS. Penes Wal. Blount, Bar.*

Foragium, Straw when the corn is thrashed out. *Coquel*.

Forbalk, (*Forbelka*) Lying forward or next the highway. *Petr. Blesensis Contin. Hist. Croyland, p. 116*.

Forbarte, Is to bar or deprive one of a thing for ever. *9 R. 2. c. 2. and 6 H. 6. c. 4*.

Forbatudus, Is when the aggressor in combat is slain.—*Et sic est veritas sine ullo concludio & in sua culpa secundum legem Forbatudum fecit*, &c.

Forbider of Armour, (*Forbator*) *Si quis forbitor arm. alicujus suscepit, ad purgandum*, &c. *LL. Aluredi, MS. c. 22*.

Force, (*Vis*) Is most commonly applied in *pejorem partem*, the evil part, and signifies any unlawful violence. It is defined by *West* to be an offence, by which violence is used to things or persons; and he divides it into *simple* and *compound*; *simple force*, is that which is so committed that it hath no other crime accompanying it; as if one by *force* do only enter into another man's possession, without doing any other unlawful act: mixed or *compound force*, is when some other violence is committed with such a fact, which of itself alone is criminal; as where any one by *force* enters into another man's house, and kills a man, or ravishes a woman, &c. And he makes several other divisions of this head. *West. Symbol. par. 2. sect. 65*. Lord Coke says, there is also a *force* implied in law; as every trespass, rescous, or disseisin, implieth it; and an *actual force*, with weapons, number of persons, &c. where threatening is used to the terror of another. 1 *Inst.* 257. By law any person may enter a tavern; and a landlord may enter his tenant's house to view repairs, &c. But if he that enters a tavern, commits any *force* or violence: or he that enters to view repairs, breaketh the house, &c. it shall be intended that they entered for that purpose. 8 *Rep.* 146. All *force* is against the law; and it is lawful to repel *force* by *force*: there is a maxim in our law, *Quod alias bonum & justum est, si per vim vel fraudem petatur, malum & injustum est*. 3 *Rep.* 78.

Forcible Entry and Detainer. The first is a violent actual entry into houses or lands: and *forcible detainer* is a with-holding by violence, and with strong hand, of the

possession of land, &c. whereby he who hath right of entry is barred or hindered. At common law, any one who had a right of entry into lands, &c. might regain possession thereof by force; but this liberty being much abused, to the breach of the publick peace, it was found necessary that it should be restrained by statute: at this day, he who is wrongfully dispossessed of goods, may justify the retaking them by force. *Lamb.* 135. *Crompt.* 70. *Kelw.* 92. But see 3 *Salk.* 187. By statutes, none shall enter into any lands or tenements, but where entry is given by law, and in a peaceable manner, tho' they have title of entry, on pain of imprisonment, &c. And when a *forcible entry* is committed, justices of peace are empowered to view the place, and inquire of the force by a jury summoned by the sheriff of the county; and cause the tenements to be seized and restored, and imprison the offenders till they pay a fine. 5 *R. 2. stat. 1. c. 8*. 15 *R. 2. c. 2*. 8 *H. 6. c. 9. f. 2*. If a justice of peace come to view a force in a house, and they refuse to let him in; this of itself will make a *forcible detainer* in all cases; but it must be upon complaint made. The justices of peace are not to inquire into the title of either party: and there shall be no restitution upon an indictment of *forcible entry* or detainer, where the defendant hath been in quiet possession for three years together without interruption, next before the day of the indictment found, and his estate in the land not ended; which may be allowed in stay of restitution, and restitution is to be stayed till that be tried, if the other will traverse the same, &c. *Dalt.* 312. *Stat. 31 Eliz. c. 11*.

Indicement for *forcible entry* must be laid of *liberum tenementum*, &c. to have restitution by the statute 15 *R. 2. c. 2*. 8 *H. 6. c. 9*, &c. 2 *Cro.* 157. Though by 21 *Jac. 1. c. 15*. Justices of peace may give like restitution of possession to tenants for years, tenant by *elegit*, statute staple, &c. and copyholders, as to freeholders.

It remains to consider,

- I. *What shall be deemed a forcible entry and detainer under the foregoing statutes.*
- II. *What remedy is provided in such cases.*

- I. *What shall be deemed a forcible entry and detainer under the foregoing statutes.*

When one or more persons armed with unusual weapons, violently enter into the house or land of another; or where they do not enter violently: if they forcibly put another out of his possession; or if one enters another's house, without his consent, although the door be open, &c. These are forcible entries punishable by law. 1 *Inst.* 257. So when a tenant keeps possession of the land at the end of his term against the landlord, it is a forcible detainer. *Cro. Jac.* 199. And if a lessee takes a new lease of another person, whom he conceives to have better title, and at the end of the term keeps possession against his own landlord, this is a forcible detainer. *Ibid.* Also persons continuing in possession of a defeasible estate, after the title is defeated, are punishable for forcible entry; *for continuing in possession afterwards, amounts in law to a new entry*. 1 *Inst.* 256, 257. And an infant, or feme- covert may be guilty of forcible entry within the statutes in respect of violence committed by them in person; but not for what is done by others at their command, their commands being void. 1 *Inst.* 357.

If a man have two houses next adjoining, the one by a defeasible title, and the other by a good title; and he uses force in that he hath by the good title to keep persons out of the other house, this is a forcible detainer. 2 *Shep. Abr.* 203. A man enters into the house of another by the windows, and then threatneth the party, and he for fear doth leave his house, it is a forcible entry: so if one enter a house when no person is therein, with armed men, &c. *Moor v. Inf.* 185. If a person after peaceable entry, shall make use of arms to defend his possession, &c. it will be forcible detainer: a man put another out of his house by force, if he then puts in one of his servants in a peaceable manner, who keeps out the party, &c. it will be a forcible entry, but not a detainer; but if himself remaineth there with force, this

this makes a *forcible detainer*. 2 Shep. 203. If I hear that persons will come to my house to beat me, &c. and I take in force to defend myself, 'tis no *forcible detainer*: tho' where they are coming to take possession only, it is otherwise. *Ibid.* This must mean, where they have a right to take possession, by law.

This offence may be committed of a rent, as well as of a house or land; as where one comes to distrain, and the tenant threatens to kill him, or *forcibly* makes resistance, &c. *Ibid.* 201. But no man can be guilty of *forcible entry*, for entering with violence into lands or houses in his own sole possession at the time of entry; as by breaking open doors, &c. of his house, detained from him by one who has the bare custody of it: but jointenants, or tenants in common, may be guilty of *forcible entry*, and holding out their companions. 1 Harw. P. C. 147. A person is not guilty of a *forcible detainer*, by barely refusing to go out of a house, and continuing therein in despite of another. *Ibid.* 146. And no words alone can make a *forcible entry*, although violent and threatening, without force used by the party. 1 Lill. Abr. 514. 1 Harw. 145.

II. What remedy is provided in such cases.

The remedy may be,

1. By action.

An action lies upon Stat. 15 R. 2. 2. against him who makes a *forcible entry*. So, upon Stat. 8 H. 6. 9. against him who makes a *forcible entry*, or *detainer*.

2. By justices of peace upon view.

By Stat. 15 R. 2. 2. A justice of peace may go to the place, &c. and if he find any hold *forcibly*, shall commit, &c. till, convicted by record of the justice, they make fine and ransom. And therefore, any justice of the peace, upon view of the *force*, may make a record of it, and commit the offender. Dalt. c. 44. And this, without a writ directed to him to execute the statutes. And, upon any information, without a complaint of the party. So every justice may take the sheriff, and *posse comitatus*, to restrain; or he may break open a house to remove the *force*. *Ibid.* The record made by a justice upon view, shall be a conviction, and is not traversable. Vide 8 Co. 121. Dalt. c. 44. And ought to be certified to B. R. or the next assizes, or quarter-sessions. And the party convicted shall be there fined. But the justice himself cannot fine. *Ibid.* Vide Sal. 353. And if a defect appears, in the conviction, to B. R. it shall be quashed. 1 Sid. 156.

The justices, on *forcible detainer*, may punish the force upon view, and fine and imprison the offenders; but cannot meddle with the possession. Sid. 156. Yet see *post*. And it hath been held, that in *forcible entry* and *detainer*, the jury are to find *all* or *none*; and not the *detainer*, without the *forcible entry*. 1 Vent. 25.

3. By inquisition, according to 8 H. 6. c. 9. or by indictment.

An indictment may be for a *forcible entry*, or *detainer*, before justices of peace of the county where the land lies, at the quarter-sessions. But an indictment for a *forcible detainer*, ought to shew, that the entry was peaceable. R. 2. Cro. 151.

Indictments for *forcible entry* must set forth, that the entry was *manu forti*, to distinguish this offence from other trespasses *vi & armis*; and there are many niceties to be observed in drawing the indictment, otherwise it will be quashed. 1 Cro. 461. Dalt. 298. There must be certainty in this indictment; and no repugnancy, which is an incurable fault. An indictment of *forcible entry* was quashed, for that it did not set forth the estate of the party: so where the defendant hath not been in possession peaceably three years before the indictment, without saying before the indictment found, &c. And force shall not be intended when the judgment is generally laid, for it must be always expressed. 2 Nels. Abr. 867, 869.

Indictment of *forcible entry* lies not only for lands, but for tithes; also for rents: but not against a lord entering a common with force, for which the commoner may not indict him, because it is his own land. Cro. Car. 201, 486.

In many cases restitution may be made. By 8 H. 6. c. 9. A justice of peace, if on inquiry, &c. a *forcible entry*

or *detainer* is found, shall put the party in possession of the lands so entred or holden; and the justice shall make restitution, (after inquisition found) to the party ousted, by himself, or by his precept to the sheriff. 2 T. Ray. 85. Carth. 496. So restitution shall be made upon an indictment at the quarter-sessions. H. P. C. 140.

An indictment of *forcible entry* may be removed from before justices of peace into the court of B. R. *coram rege*, which court may award restitution. 11 Rep. 65. And the justices before whom such indictment was found, may, after traverse tendered, certify or deliver the indictment into the King's Bench, and refer the proceeding thereupon to the justices of that court.

So justices of gaol-delivery, upon an indictment before them. So re-restitution shall be, where the indictment is quashed. Sav. 68. 2 Cro. 151. So restitution shall be to a disseisor ousted by the force of the disseisee. To a lessee, tho' the lessor, who was disseised, thereby opposes it. To a copyholder, tho' his lord opposes it. Vide Dalt. c. 132. Cont. before the St. 21 Jac. 15. Dy. 142. in marg.

A copyholder cannot be disseised, because he hath no freehold in his estate; but he may be expelled. And a copyhold tenant may be restored, where he is wrongfully expelled; but if the indictment be only of disseisin, as he may not be disseised, there can be no restitution but at the prayer of him who hath the freehold. Yelv. 81. 2 Cro. 41. Possession of the termor is the possession of him in reversion: and when a lessee for years is put out of possession by force, restitution must be to him in reversion, and not the lessee; and then his lessee may re-enter. 1 Leon. 327. A termor may say that he was expelled, and his landlord in reversion disseised; or rather that the tenant of the freehold is disseised, and he the lessee for years expelled. 4 Mod. 248. 2 Nels. Abr. 869. If a disseisee within three years makes a lawful claim, this is an interruption of the possession of the disseisor. H. P. C. 139. Though it has been adjudged, that it is not the title of the possessor, but the possession for three years, which is material. Sid. 149. Since the Stat. 5 R. 2. st. 1. c. 8. if W. R. is seised of lands, and L. R. having good right to enter, doth accordingly enter *manu forti*, he may be indicted notwithstanding his right, &c. 3 Salk. 170. For a *forcible detainer* only 'tis said there is no restitution; the plaintiff never having been in possession. 1 Vent. 23. Sid. 97, 99.

No restitution shall be awarded to an *advowson*, common, rent, &c. for it shall only be to land. Dalt. c. 44. Nor, where he, who used force has the possession by operation of law: as if a disseisee enters, and afterwards, by force, ousts his disseisor, the possession shall not be restored; for it was re-vested in the disseisee by his entry. Dalt. c. 132. Nor, if a lessor enters by force, upon the lessee, for a forfeiture; nor, to any other than him who was ousted by force, as to his heir. Sal. 587. Or any abator, after the death of the ancestor. Dalt. c. 132. Nor if the party tenders a traverse to the inquisition. 1 Sid. 287. It shall be stayed, or granted at discretion. H. P. C. 141. It shall be stayed. Sal. 260. Sal. 588. Semb. that it shall be stayed. But it is said, that it shall be granted. Mod. Ca. 115. So upon a *certiorari* delivered to remove an indictment, it shall be stayed. H. P. C. 141. Or, if the indictment appears insufficient. H. P. C. 140. And in such case restitution granted may be stayed before execution. H. P. C. 140. So restitution shall not be, after a conviction by a justice upon his view. 1 Vent. 308. Nor by justices of assize, gaol-delivery, or justices of peace; if the indictment was not found before them. H. P. C. 140. Dalt. c. 44, 131. So restitution shall not be, unless immediately; not four or five years afterwards. R. Carth. 496. Nor by Stat. 31 El. 11. If by plea it appears, that the party had possession for three years before the inquisition found. T. Ray. 85. Sal. 260. Tho' the plea does not shew, how he was possessed. T. Ray. 85. 1 Sid. 149.

A record of justices of peace of *forcible entry*, is not traversable; but the entry and force, &c. may be traversed in writing, and the justices may summon a jury for trial of the traverse. 1 Salk. 353. The finding of the force

force being in nature of a presentment by the jury, is traversable; and if the justices of peace refuse the traverse, and grant restitution, on removing the indictment into B. R. there the traverse may be tried; and on a verdict found for the party, &c. a re-restitution shall be granted. *Sid.* 287. 2 *Salk.* 588. If no force is found at a trial thereof before justices, restitution is not to be granted; nor shall it be had till the force is tried; nor ought the justices to make it in the absence of the defendant, without calling him to answer. 1 *Havok. P. C.* 154. No other justices of peace but those before whom the indictment was found, may either at sessions, or out of it, award restitution; the same justices may do it in person, or make a precept to the sheriff to do it, who may raise the power of the county to assist him in executing the same. 1 *Havok.* 152. And the same justices of peace may also supersede the restitution, before it is executed; on insufficiency found in the indictment, &c. But no other justices, except of the court of B. R. A *certiorari* from B. R. is a *superfedeas* to the restitution; and the justices of B. R. may set aside the restitution after executed, if it be against law, or irregularly obtained, &c. 1 *Salk.* 154. If justices of peace exceed their authority, an information may be brought against them. A conviction for forcible entry, before a fine is set, may be quashed on motion; but after a fine is set, it may not; the defendant must bring writ of error. 2 *Salk.* 450.

If a plaintiff proceeds not criminally by indictment for forcible entry, but commences a civil action on the case, (which he may do on the statute of 8 Hen. 6. c. 9.) the defendant is to plead *Not guilty*, or may plead any special matter, and traverse the force; and the plaintiff in his replication must answer the special matter, and not the traverse; and if it be found against the defendant, he is convicted of the force of course; whereupon the plaintiff shall recover treble damages and costs. 3 *Salk.* 169.

A reversioner cannot bring action of forcible entry, because he cannot be expelled, though he may be disseised. *Dyer* 141. And the words in the writ to maintain the action are, that the defendant *expulsi & disseisavit*, &c. yet it is said that every disseisin implies an expulsion in forcible entry. 2 Cro. 31. And if in trespass or assise upon the statute of forcible entries 8 H. 6. c. 9. the defendant is condemned by *non sum informatus*; he shall pay treble damages and treble costs: adjudged, and affirmed in error. For the words of the statute give them where the recovery is by verdict, or otherwise in due manner. *Jenk. Cent.* 197. Though forcible entry is punishable either by indictment or action; the action is seldom brought, but the indictment often. See *Black. Com.* 3 V. 179. 4 V. 147.

Forcible Marriage. Of a woman of estate, is felony; for by the Stat. 3 H. 7. c. 2. it is enacted, "That if any persons shall take away any woman having lands or goods, or that is heir apparent to her ancestor, by force, and against her will, and marry or defile her, the takers, procurers, abettors, and receivers of the woman taken away against her will, and knowing the same, shall be deemed principal felons." but as to procurers and accessaries, they are to be before the offence committed, to be excluded the benefit of clergy, by 39 Elix. c. 9. The indictment on the Stat. 3 H. 7. is expressly to set forth, that the woman taken away had lands or goods, or was heir apparent, and also that she was married or defiled, because no other case is within the statute; and it ought to alledge that the taking was for lucre: it is no excuse that the woman at first was taken away with her consent; for if she afterwards refuse to continue with the offender, and be forced against her will, she may from that time properly be said to be taken against her will; and it is not material whether a woman so taken away, be at last married or defiled with her own consent or not, if she were under the force at the time; the offender being in both cases equally within the words of the act. 3 *Inst.* 61. H. P. C. 119. 1 H. P. C. 109, 110.

Those persons who after the fact receive the offender, are but accessaries after the offence, according to the rules of the Common law; and those that are only privy to the damage, but not parties to the forcible taking away, are not within the act. H. P. C. 119. A man may be in-

dicted for taking away a woman by force in another county; for the continuing of the force in any county amounts to a forcible taking there. *Ibid.* Taking away any woman child, under the age of sixteen years and unmarried, out of the custody and without the consent of the father or guardian, &c. the offender shall suffer fine and imprisonment; and if the woman agrees to any contract of matrimony with such person, she shall forfeit her estate during her life, to the next of kin to whom the inheritance should descend, &c. Stat. 4 & 5 P. & M. c. 8. See 3 *Mod. Rep.* 84, 169. This is a force against the parents: and an information will lie for seducing a young man or woman from their parents, against their consents, in order to marry them, &c. 3 Cro. 557. *Raym.* 473. See *Marriage*, and *Black. Com.* 4 V. 208.

Ford, (*forda*) A shallow place in a river made so by damming or penning up the water. *Mon. Ang. tom.* 1. p. 657.

Fordol, (from the Sax. *fore*, before, and *dole*, a part or portion) Signifies a butt or head-land, shooting upon other bounds.

Forecheapum, Præemption, from the Sax. *fore*, ante, and *ceapcan*, i. e. *Nundinari*, *emere*.—*Et non licebat iis aliquod forecheapum facere burghmannis, & dare theolonium suum.* Chron. Brompton. col. 897, 898. and LL. *Æthelredi*, c. 23.

Foreclosed, Shut out, or excluded, as the barring the equity of redemption on mortgages, &c. 2 *Inst.* 298. See *Black. Com.* 2 V. 159.

Foregoers. The King's purveyors were so called from their going before to provide for his household. 36 Ed. 3. 5.

Foreign, (Fr. *foreign*, Lat. *forinſecus, extraneus*) Strange or outlandish, of another country; and in our law, is used adjectively, being joined with divers substantives in several senses. *Kitch.* 126.

Foreign Attachment, Is an attachment of foreigners goods, found within a liberty or city, for the satisfaction of some citizen to, whom the foreigner is indebted; or of money in the hands of another person, due to him against whom an action of debt is brought, &c. *Sed qu.* if now, any distinction is made, as to the goods or money attached being the property of a foreigner, or a citizen? For we apprehend the custom now is to attach the property of the latter, as well as of the former. See *Attachment*.

Foreign Court. At *Lemſter* (anciently called *Lrominſter*) there is the borough and the foreign court; which last is within the jurisdiction of the manor, but not within the liberty of the bailiff of the borough; so there is a foreign court of the honour of *Gloceſter*. *Claus.* 8 Ed. 2. *Foreign bought and sold*, is a custom within the city of *London*, which being found prejudicial to the sellers of cattle in *Smithſeld*, it was enacted 22 & 23 Car. 2. c. 19. that as well strangers, as freemen, may buy and sell any cattle there. See 25 Car. 2. c. 24. 1 *Jac.* 2. c. 17.

Foreign Kingdom, Is a kingdom under the dominion of a foreign prince; so that *Ireland*, or any other place, subject to the crown of *England*, cannot with us be called foreign; though to some purposes they are distinct from the realm of *England*. If two of the King's subjects fight in a foreign kingdom, and one of them is killed, it cannot be tried here by the Common law; but it may be tried and determined by the *Constable and Marshal*, according to the *Civil law*; or the fact may be examined by the Privy Council, and tried by commissioners appointed by the King in any county of *England*, by statute. 3 *Inst.* 48. 33 H. 8. One *Hutchinson* killed Mr. *Colson* abroad in *Portugal*, for which he was tried there and acquitted, the exemplification of which acquittal he produced under the Great Seal of that kingdom; and the King being willing he should be tried here, referred it to the judges, who all agreed, that the party being already acquitted by the laws of *Portugal*, could not be tried again for the same fact here. 3 *Keb.* 785.

If a stranger of *Holland*, or any foreign kingdom, buys goods at *London*, and gives a note under his hand for payment, and then goes away privately into *Holland*; the seller may have a certificate from the Lord Mayor, on proof of sale and delivery of the goods; upon which the people of *Holland* will execute a legal process on the party.

4 *Inst.* 38. Also at the instance of an ambassador or consul, such a person of *England*, or any criminal against the laws here, may be sent from a *foreign kingdom* hither. Where a bond is given, or contract made in a *foreign kingdom*, it may be tried in the *King's Bench*, and laid to be done in any place in *England*. *Hob.* 11. 2 *Bull.* 322. And an agreement made in *France*, on two *French* persons marrying, touching the wife's fortune, has been decreed here to be executed, according to the laws of *England*; and that the husband surviving should have the whole; but relief was first given for a certain sum, and the rest to be governed by the custom of *Paris*. *Preced.* *Chanc.* 207, 208.

Foreign Opposer, or *opposer*. See *Exchequer*.

Foreign Plantations. See *Plantations*.

Foreign Plea, Is a plea in objection to a judge, where he is refused as incompetent to try the matter in question, because it arises out of his jurisdiction. *Kitch.* 75. *Stat.* 4 *Hen.* 8. c. 2. And if a plea of issuable matter is alledged in a different county from that wherein the party is indicted or appealed, by the Common law, such pleas can only be tried by juries returned from the counties wherein they are alledged. 2 *Hawk. P. C.* 404. But by the *Stat.* 33 *H.* 8. c. 14. All *foreign pleas* triable by the country, upon an indictment for petit treason, murder or felony, shall be forthwith tried without delay, before the same justices before whom the party shall be arraigned, and by the jurors of the same county where he is arraigned, notwithstanding the matter of the pleas are alledged to be in any other county or counties: though as this statute extends not to treason, nor appeals, it is said a *foreign issue* therein must still be tried by the jury of the county wherein alledged. 3 *Inst.* 17. *H. P. C.* 255. In a *foreign plea* in a civil action the defendant ought to plead to that place where the plaintiff alleges the matter to be done in his declaration; and the defendant may plead a *foreign plea* where a matter is transitory, or not transitory; but in the last case he must swear to it. *Sid.* 254. 2 *Nell.* 871. When a *foreign plea* is pleaded, the court generally makes the defendant put it upon oath, that it is true; or will enter up judgment for want of a plea. See 5 *Mod.* 335. *Foreign answer* is such an answer as is not triable in the county where made; and *foreign matter* is that matter which is done in another county, &c.

Foreign Service, Is that whereby a mean lord holds of another, without the compass of his own fee: or that which the tenant performs either to his own lord, or to the lord paramount, out of the fee. *Kitch.* 299. Of these services, *Bracton* says thus: *Item sunt quedam servitia, quæ dicuntur forinseca, quævis sunt in charta de feoffamento expressa & nominata; & quæ ideo dici possunt forinseca, quia pertinent dominum regem, & non ad dominum capitalem, &c. Quandoque enim nominantur forinseca, large sumpto vocabulo, quoad servitium domini regis quandoque scutagium, quandoque servitium domini regis, & ideo forinsecum dici potest, quia fit & capitur foris, sive extra servitium quod fit domino capitali.* *Bract.* lib. 2. c. 16. And *foreign service* seems to be knight service, or *feudage* uncertain, *Perkins* 650—*Salvo Forinseco Servitio.* *Men. Ang. tom.* 2. p. 637.

Foreigners, Though made denizens or naturalized here are disabled to bear offices in the government, to be of the privy council, members of parliament, &c. by the acts of settlement of the crown. 12 *W.* 3. c. 2. 1 *Geo.* 1. c. 4.

Forejudger, (*forejudicatio*) A judgment whereby a person is deprived or put by the thing in question. *Bract.* lib. 4. To be *forejudged* the court, is when an officer or attorney of any court is expelled the same for some offence; or for not appearing to an action, on a bill filed against him, &c. And in the latter case, he is not to be admitted to practise in the court, till he appears. 2 *Hen.* 4. c. 8. If an attorney privileged in *C. B.* is sued, after a bill filed against him, the plaintiff's attorney delivers it to one of the criers of the court, who calls the attorney defendant by his name, and solemnly proclaims aloud, that if he does not appear to such a bill, he will be *forejudged*: and when the crier hath so called such an attorney, the bill is delivered to the secondary, who gives a rule for him to appear, or he will stand *forejudged*: after which this bill is to be

carried to the prothonotary's office, and there filed and entered; and if the attorney appears not in four days, then the bill is entered upon a roll of that term, and carried to the clerk of the warrants and inrolments; and he thereupon strikes such attorney out of the roll of attorneys; when he stands unprivileged, and may be arrested as any other person, &c. *Practif. Solic.* 322. *Attorn. Compan.* 182, 183. But an attorney *forejudged*, may be restored, on clearing himself from his contumacy in not appearing when he was called, and on making satisfaction to the plaintiff; and then a judge will make an order to the clerk of the warrants, to replace him in the proper roll of attorneys: and there are instances of restoring attorneys *forejudged*, upon payment of a small fine. *Ibid.* *Rastal* 96.

Form of a forejudger of an attorney.

BE it remembered, that on the day of, &c. this same term, A. B. came here into this court by, &c. his attorney, and exhibited to the justices of our Sovereign Lord the King, his bill against C. D. Gent. one of the attorneys of the Common Bench of our said Sovereign Lord the King, personally present here in court; the tenor of which bill follows in these words, that is to say, To the justices of our Sovereign Lord the King, ss. A. B. by, &c. his attorney, complains of C. D. one of the attorneys, &c. for that whereas, &c. (setting forth the whole bill) The pledges for the prosecution are John Doe and Richard Roe; whereupon the said C. D. being solemnly called, came not; therefore he is forejudged from exercising his office of attorney of this court, for his contumacy, &c.

Foreshoke, (*derelictum*) Is of the same meaning with *forfeited* in modern language; in one of our statutes, it is specially used in lands or tenements, seized by a lord, for want of services performed by the tenant, and quietly held by such lord beyond a year and a day; now the tenant, who seeing his land taken into the hands of the lord, and possessed so long, and not pursuing the course appointed by law to recover it, doth in presumption of law disavow or forsake all the right he hath to the same; and then such lands shall be called *foreshoke*. *Stat.* 10 *Ed.* 2. c. 1.

Forest, (*foresta, saltus*) Signifies a great or vast wood; *locus sylvestris & saltuosus*. Our law writers define it thus, *Foresta est locus ubi fera inhabitant vel includuntur*; others say it is called *Foresta, quasi ferarum statio, vel tuta mansio ferarum*. *Manwood*, in his *Forest Laws*, gives this particular definition of it: A *forest* is a certain territory or circuit of woody grounds and pastures, known in its bounds and privilege, for the peaceable being and abiding of wild beasts, and fowls of forest, chase and warren, to be under the King's protection for his princely delight; replenished with beasts of venary or chase, and great covert of vert for succour of the said beasts; for preservation whereof there are particular laws, privileges, and officers belonging thereunto. *Manw. part* 2. c. 1.

Forests are of that antiquity in *England*, that (except the *New Forest* in *Hampshire*, erected by *William* called *The Conqueror*, and *Hampton Court*, erected by *King Hen.* 8. see 31 *H.* 8. c. 5.) it is said there is no record or history doth make any certain mention of their erections and beginnings; though they are mentioned by several writers; and in divers of our laws and statutes. 4 *Inst.* 319. Our ancient historians tell us, that *New Forest* was raised by the destruction of twenty-two parish churches, and many villages, chapels and manors, for the space of thirty miles together; which was attended with divers judgments on the posterity of *King Will.* 1. who erected it; for *William Rufus* was there shot with an arrow, and before him *Richard*, the brother of *Hen.* 1. was there killed; and *Henry*, nephew to *Robert*, the eldest son of the Conqueror, did hang by the hair of the head in the boughs of the forest like unto *Abraham*. *Blount*.

Besides the *New Forest*, there are sixty-eight other forests in *England*; thirteen chases, and more than seven hundred parks; the four principal forests are *New Forest* on the Sea, *Shirenewood Forest* on the Trent, *Dean Forest* on the Severn, and *Windfor Forest* on the Thames. The way

way of making a *forest* is thus: Certain commissioners are appointed under the Great Seal of England, who view the ground intended for a *forest*, and fence it round with metes and bounds; which being returned into the Chancery, the King causes it to be proclaimed throughout the county where the land lieth, that it is a *forest*, and to be governed by the laws of the *forest*, and prohibits all persons from hunting there without his leave; and then he appointeth officers fit for the preservation of the vert and venison, and so it becomes a *forest* on record. *Manw. c. 2.* Though the King may erect a *forest* on his own ground and wastes; he may not do it in the ground of other persons, *without their consents*; and agreements with them for that purpose ought to be confirmed by parliament. *4 Inst. 300.*

Proof of a *forest* appears by matter of record; as by the *eyres* of the justices of the *forests*, and other courts, and officers of *forests*, &c. and not by the name in grants. *12 Rep. 22.* As parks are inclosed with wall, pale, &c. so *forests*, and chases are inclosed by metes and bounds; such as rivers, highways, hills, *viz.* which are an inclosure in law; and without which there cannot be a *forest*. *4 Inst. 317.* And in the eye of the law, *the boundaries of a forest go round about it as it were a brick wall, directly in a right line the one from the other, and they are known either by matter of record, or prescription.* *Ibid.* Bounds of *forest* may be ascertained by commission from the Lord Chancellor; and commissioners, sheriffs, officers of *forests*, &c. are empowered to make inquests thereof. *Stat. 16 & 17 Car. 1. c. 16.* Also the boundaries of *forests* are reckoned a part of the *forest*; for if any person kill or hunt any of the King's deer in any highway, river, or other inclusive boundary of a *forest*, he is as great an offender as if he had killed or hunted deer within the *forest* itself. *4 Inst. 318.*

By the grant of a *forest*, the game of the *forest* do pass; and beasts of *forest* are the hart, hind, buck, doe, boar, wolf, fox, hare, &c. The seasons for hunting whereof are as follow, *viz.* that of the hart and buck begins at the feast of St. John Baptist, and ends at Holy-rod Day; of the hind and doe, begins at Holy-rod, and continues till Candlemas; of the boar, from Christmas to Candlemas; of the fox, begins at Christmas, and continues till Lady-Day; of the hare, at Michaelmas, and lasts till Candlemas. *Dyer 169. 4 Inst. 316.*

Not only game, &c. are incident to a *forest*, but also a *forest* hath divers special properties. 1. A *forest* truly and strictly taken, cannot be in the hands of any but the King; for none but the King hath power to grant commission to any one to be a justice in *eyre* of the *forest*: but if the King grants a *forest* to a subject, and granteth further that upon request made in Chancery, he and his heirs shall have justices of the *forest*, then the subject hath a *forest* in law. *4 Inst. 314. Cro. Jac. 155.* The second property of a *forest* is the courts; as the justice-seat, the *swainmote*, and court of attachment. The third property is the officers belonging to it; as first, the justices of the *forest*, the warden or warder, the verderors, foresters, agisters, regarders, keepers, bailiffs, beaules, &c. Though as to the courts, the most especial court of a *forest* is the *swainmote*, which is no less incident to it than a court of piepowder to a fair: and, if this fail, there is nothing remaining of the *forest*, but it is turned into the nature of a chase. *Manw. c. 21. Crompt. Jur. 146.* There is but one Chief Justice of the *forests* on this side Trent, and he is named *Justiciarius Itinerans Forestarum*, &c. *citra Trentam*; and there is another, *Capitali Justiciarius*; and he is *Justiciarius Itinerans omnium Forestarum ultra Trentam*, &c. who is a person of greater dignity, than knowledge in the laws of the *forest*; and therefore when justice seats are held, there are associated to him such as the King shall appoint, who together with him determine *omnia placita forestarum*, &c. *4 Inst. 315.*

A justice in *eyre* cannot grant licence to sell any timber, unless it be *sedente curia*, or after a writ of *ad quod damnum*: and it hath been resolved by all the judges, that though justices in *eyre*, and the King's officers within his *forests*, have charge of venison, and of vert or green hue, for the maintenance of the King's game, and all manner of trees for covert, browse and pannage; yet when tim-

ber of the *forest* is sold, it must be cut and taken by power under the Great Seal, or the Exchequer Seal by view of the foresters, that it may not be had in places inconvenient for the game: and the justice in *eyre*, or any of the King's officers in the *forest*, cannot sell or dispose of any wood within the *forest* without commission; so that the Exchequer and the officers of the *forest* have *divisum imperium*, the one for the profit of the King, the other for his pleasure. *3d Vol. Read. on Stat. p. 304, 305.* Also no officer of the *forest* can claim windfalls, or dotard trees, for their perquisites, because they were once parcel of the King's inheritance; but they ought to be sold by commission, for the King's best benefit. *Ibid.* If any officers cut down wood, not necessary for browse, &c. they forfeit their offices. *9 Rep. 50.* The lord of a *forest* may, by his officers enter into any man's wood within the regard of the *forest*, and cut down browsewood for the deer in winter. *2 Par. Game Law, p. 46.*

A prescription for a person to take and cut down timber trees in a *forest*, without view of the forester, it is said may be good: but of this *quære*, without allowance of a former *eyre*, &c. If a man hath a wood in a *forest*, and hath no such prescription, the law will allow him to sell it, so as he doth not prejudice the game, but leave sufficient vert; but it ought to be by writ of *ad quod damnum*, &c. *4 Inst. Cro. Jac. 155.* And every person in his own wood in a *forest* may take *house-bote* and *hay-bote*, by view of the forester; and so may freeholders by prescription, copyholders by custom, &c. *1 Ed. 3. c. 2.* The wood taken by view of the forester, ought to be presented at the next court of attachment, that it was by view, and may appear of record.

Fences, &c. in *forests* and chases, must be with low hedges, and they may be destroyed, though of forty years continuance, if they were not before. *Cro. Jac. 156.* He whose wood is in danger of being spoiled, for want of repairing fences by another, ought to request the party to make good the hedges; and if he refuse, then he must do it himself, and have action on the case against the other that should have done it. *1 Jones 277.*

A person may have action at Common law for a trespass in a *forest*, as to wood, &c. to recover his right. *Sid. 296.*

The court of the justice in *eyre* may proceed upon the presentments or verdicts in the *swainmote*, &c. And presentments and convictions of the court of attachment and *swainmote*, must be delivered to the Lord Chief Justice in *Eyre*, at the next court of justice-seat, &c. where judgment is to be given; and the plea of the *forest* runs thus: *Presentatio per forestarios, & convictio per viridarios*, &c. The court of attachment or woodmote in *forests*, is kept every forty days; at which the foresters being in the attachments *de viridi & venatione*, and the presentments thereof, and the verderors to receive the same, and inrol them; but this court can only inquire, not convict. *4 Inst. 289.* The court of *swainmote* is holden before the verderors as judges, by the steward of the *swainmote*, thrice in the year: the freeholders within the *forest* are to appear at this court, to make inquests and juries; and this court may inquire *de superacionibus forestariorum & aliorum ministrorum forestarum, & de eorum oppressionibus populo nostro illatis*: it may inquire of offences, and convict also, but not give judgment, which must be at the justice-seat. *Ibid.*

The court of the Chief Justice in *Eyre*, or Justice-Seat, is a court of record, and hath authority to hear and determine all trespasses, pleas, and causes of the *forests*, &c. within the *forest*, as well concerning vert and venison, as other causes whatsoever; and this court cannot be kept oftener than every third year. As before other justices in *Eyre*, it must be summoned forty days at least before the sitting thereof; and one writ of summons is to be directed to the sheriff of the county, and another writ *custodi forestarum Domini Regis vel ejus locum tenenti*, &c. Which writ of summons consists of two parts: First, to summon all the officers of the *forest*, and that they bring with them all records, &c. Secondly, All persons which claim any liberties or franchises within the *forest*, and to shew how they claim the same: if there be erroneous judgment at the

the justice-seat, the record may be removed by writ of error into B. R. 4 Inst. 291.

The *Court of Regard*, or Survey of Dogs, is holden likewise every third year, for expeditation, or lawing of dogs, by cutting off to the skin three claws of the fore feet, to prevent their running at or killing of deer. By statute, three courts of *swainmote* are to be held for *forests* in the year; one fifteen days before *Michaelmas*, another about *Martinmas*, and the third fifteen days before *Midsummer*: and presentments of trespasses of green hue, and hunting in *forests*, must be made at the next *swainmote* by *foresters*, &c. Also no officer of the *forest* shall surcharge the *forest*, on pain of imprisonment by the justices of the *forest*. *Charta de Foresta*, 9 H. 3. c. 1. *Ordinatio de Foresta*, 34 Ed. 1. *Justices of forests*, &c. may make deputies. 32 H. 8. c. 35.

The *Chief Warden* of the *forest* is a great officer, next to the justices of the *forest*, to bail and discharge offenders; but he is no judicial officer; and the constable of the castle where a *forest* is, by the *forest* law is *Chief Warden* of the *forest*, as of *Windsor Castle*, &c.

A *Verdorer* is a judicial officer of the *forest*, and chosen in full county, by the King's writ: his office is to observe and keep the assises or laws of the *forests*, and view, receive, and enrol the attachments and presentments of all trespasses of the *forest*, of vert and venison, and to do equal right and justice to the people: the *Verderors* are the chief judges of the *swainmote* court; although the *Chief Warden*, or his deputy, usually sits there. 4 Inst. 292.

The *Regarder* is to make regard of the *forest*, and to view and inquire of offences, concealments, defaults of *foresters*, &c. Before any justice-seat is holden, the *Regarders* of the *forest* must make their regard, and go thro' and view the whole *forest*, &c. They are ministerial officers, constituted by letters patent of the King, or chosen by writ to the sheriff. 4 Inst. 291.

A *forester* is in legal understanding a sworn officer ministerial of the *forest*, and is to watch over the vert and venison, and to make attachments and true presentments of all manner of trespasses done within the *forest*: a *Forester* is also taken for a *Woodward*: this officer is made by letters patent, and it is said the office may be granted in fee, or for life. 4 Inst. 293. Every *Forester*, when he is called at a court of justice-seat, ought upon his knees to deliver his horn to the Chief Justice in Eyre; so every *Woodward* ought to present his hatchet to my Lord.

A *Riding Forester* is to lead the King in his hunting. 1 Jones 277. The office of *Forester*, &c. though it be a fee-simple, cannot be granted or assigned over without the King's licence. 4 Inst. 316. If a *forester* by patent for life, is made justice of the same forest *pro hac vice*, the *forestership* is become void; for these offices are incompatible, as the *forester* is under the correction of the justice, and he cannot judge himself. 4 Inst. 313.

An *agister's* office is to attend upon the King's woods and lands in a *forest*, receive and take in cattle, &c. by agistment, that is to depasture within the *forest*, or to feed upon the pannage, &c. And this officer is constituted by letters patent. 4 Inst. 293. Persons inhabiting in the *forest* may have common of herbage for beasts commonable within the *forest*; but by the *forest* law, sheep are not commonable there, because they bite so close that they destroy the vert; and yet it has been held, that *sheep* may be commonable in *forests* by prescription. 3 Bull. 213. There may be a prescription for common in a *forest* at all times of the year; tho' it was formerly the opinion of our judges, that the *fence-month* should be excepted. 3 Lev. 127. A *forest* may be *disafforested* and laid open; but right of common shall remain. Popb. 93. He that hath a grant of the herbage or pannage of a park, forest, &c. cannot take any herbage or pannage, but of the surplusage over and above a competent and sufficient pasture and feeding for the game; and if there be no surplusage, he that hath the herbage and pannage cannot put in any beasts; if he doth, they may be driven out. 3 Vol. Read. on Stat. 305. None may gather nuts in the *forest* without warrant.

A *Ranger* of a *forest* is one whose business is to chase the wild beasts from the *purlicus* into the *forest*, and to

present offences within the *purlicu*, and the *forest*, &c. And though he is not properly an officer in the *forest*, yet he is a considerable officer of, and belonging to it.

The *Beadle* is a *forest* officer, that warns all the courts of the *forest*, and executes process, makes all proclamations, &c. 4 Inst. 313.

There are also *Keepers* or *Bailiffs* of walks in *forests* and chases, who are subordinate to the *Verderors*, &c. And these officers cannot be sworn on any inquests, or juries out of the *forest*. If any man hunt beasts within a *forest*, although they are not beasts of the *forest*, they are punishable by the *forest* laws; because all hunting there, without warrant, is unlawful. 4 Inst. 314. If a deer be hunted in a *forest*, and afterwards by hunting it is driven out of the *forest*, and the *Forester* follows the chase, and the owner of the ground where driven kills the deer there; yet the *Forester* may enter into the lands and retake the deer: for property in the deer is in this case by pursuit. 2 Leon. 201. He that hath any manner of licence to hunt in a *forest*, chase, park, &c. must take heed that he do not abuse his licence, or exceed his authority; for if he do, he shall be accounted a trespasser *ab initio*, and be punished for that fact as if he had no licence at all. *Mamw.* 280, 288.

Every lord of parliament, sent for by the King, may, in coming and returning, kill a deer or two in the King's *forest* or chase through which he passes; but it must not be done privily, without the view of the *Forester*, if present; or, if absent, by causing one to blow a horn, because otherwise he may be a trespasser, and seem to steal the deer. *Chart. Forest.* c. 11. 4 Inst. 308.

Lex Forestæ is a private law, and must be pleaded. 2 Leon. 209. But it hath been observed, that the laws of the *forest* are established by act of parliament, and for the most part contained in *Charta de Foresta*, 9 H. 3. st. 2. c. 2. and 34 Ed. 1. st. 5. c. 1. By the law of the *forest*, receivers of trespassers in hunting or killing of deer, knowing them to be such, or any of the King's venison, are principal trespassers; though the trespass was not done to their use or benefit, as the Common law requires; by which the subsequent agreement amounts to a commandment: but if the receipt be out of the bounds of the *forest*, they cannot be punished by the laws of the *forest*, being not within the *forest* jurisdiction, which is local. 4 Inst. 317.

If a trespass be done in a *forest*, and the trespasser dies, it shall be punished after his death in the life-time of the heir, contrary to the Common law. *Hue and cry* may be made by the *forest* law for trespass, as to venison; though it cannot be pursued but only within the bounds of the *forest*. 4 Inst. 294. And not pursuing hue and cry in the *forest*, a township, &c. may be fined and amerced. In every trespass and offence of the *forest* in vert or venison, the punishment is, to be imprisoned, ransomed, and bound to the good behaviour of the *forest*, which must be executed by a judicial sentence by the Lord Chief Justice in Eyre of the *forest*.

If any *Forester* find any person hunting without warrant, he is to arrest his body, and carry him to prison, from whence he shall not be delivered without special warrant from the King, or his justices of the *forest*, &c. But by 1 Ed. 3. c. 8. Persons are bailable if not taken in the manner, as with a bow ready to shoot, carrying away deer killed, or smeared with blood, &c. Tho' if one be not thus taken, he may be attached by his goods. 4 Inst. 289.

The Warden of the *forest* shall let such to mainprise until the *eye* of the *forest*; or a writ may be had out of the Chancery to oblige him to do it; and if he refuse to deliver the party, a writ shall go to the sheriff to attach the warden, &c. who shall pay treble damages to the party grieved, and be committed to prison, &c. Stat. 1 Ed. 3. c. 8. No officer of the *forest* may take or imprison any person without due indictment, or *per main curant*, with his hand at the work; nor shall constrain any to make obligation against the assise of the *forest*, on pain to pay double damages, and to be ransomed at the King's will. 7 R. 2. c. 4.

A *Forester* shall not be questioned for killing a trespasser, who (after the peace cried unto him) will not yield
5 G him-

himself; so as it be not done out of some former malice. 21 *Ed. 1.* But if trespassers in a forest, &c. kill a man who opposes them, although they bore no malice to the person killed, it is murder; because they were upon an unlawful act, and therefore malice is implied. *Rel. Abr.* 548. And if murder be committed by such trespassers, all are principals. *Rel. Rep.* 87. If a man comes into a forest in the night-time, the Forester cannot justify beating him before he makes resistance; but if he resists, he may justify the battery. Persons may be fined for concealing the killing of deer by others; and so for carrying a gun, with an intent to kill the deer; and he that steals venison in the forest, and carries it off on horseback, the horse shall be forfeited, unless it be a stranger's ignorant of the fact. 2 *Par. Game Law* 34, 35.

Where heath is burnt in a forest, the offenders may be fined; and if any man cuts down bushes and thorns, and carries them away in a cart, he is fineable, and the cart and horses shall be seized by the forest laws. *Ibid.* 36, 46. But a man may prescribe to cut wood, &c. And every freeman within the forest may on his own ground make a mill-dyke, or arable land, without inclosing such arable; but if it be a nuisance to others, it is punishable. *Chart. Forest.* c. 11. 12 *Rep.* 22. And if any having woods in his own ground, within any forest, or chase, shall cut the same by the King's licence, &c. he may keep them several and inclosed, for seven years after felling. 22 *E. 4.* 7.

By *Charta de Foresta*, 9 *H. 3.* §. 2. c. 2. No man shall lose life or member for killing the King's deer in a forest, &c. but shall be fined; and if he have nothing to pay the fine, he shall be imprisoned a year and a day; and then be delivered, if he can give good security not to offend for the future; and if not, he shall abjure the realm: before this statute, it was felony to hunt the King's deer. 2 *Rel.* 120. To hunt in a forest, park, &c. in the night, disguised, if denied or concealed, upon examination before a justice of peace, it is felony: but if confessed, it is only fineable. 1 *H. 7.* c. 7.

By the 9 *Geo. 1.* c. 22. If any persons armed and disguised, shall appear in any forest, chase, &c. where deer are kept, and hunt, wound, kill or steal any deer; or if any persons shall procure any one to join with them in any such unlawful act; or shall rescue such an offender, &c. they shall be guilty of felony. And the Norman Kings punished those who hunted and killed deer in forests with great severity, inflicting their punishments in various ways; as by hanging, forfeiture of goods, and loss of limbs, gelding, and putting out of eyes, &c. *W. 1.* *H. 1.* *R. 1.* &c. Felony committed within a forest is inquired of before the judges of the Common law, and not by the justices of the forest.

Penalty on officers of forests and parks confederating with deer-stealers, 5 *Geo. 1.* c. 15. *sect. 5.* Keepers, &c. may seize instruments used in unlawful cutting of trees, 4 *Geo. 3.* c. 31. See *Drift of the Forest, Chase and Purlieu*. Yet see farther on this subject, *Black. Com.* 1 *V.* 289. 2 *V.* 14, 38, 414, 416. 3 *V.* 71, 73. 4 *V.* 408, 413, 414, 415, 430. And as to the Charters of the Forest, see *id.* 4 *V.* 416, 418. and *Black. Law Tracts*, *V.* 2.

Forestagium, seems to signify some duty payable to the King's Foresters, as *chiminage*, or such like: *et sint quieti de thelonia & passagio, & de forestagio, &c.* *Chart.* 18 *E. 1.*

Forestal, (*forestallamentum*, from the Sax. *fore*, i. e. via, & *stal*) Is to intercept on the highway. *Spelman* says, it is *via obstructio, vel itineris interceptio*; with whom agrees *Coke on Litt.* fol. 161. And according to *Fleta*, forestalling significat obstructionem viæ vel impedimentum transitus & fugæ ateriorum, &c. lib. 1. c. 24. In our law, forestalling is the buying or bargaining for any corn, cattle, or other merchandise, by the way as they come to fairs or markets to be sold, before they are brought thither; to the intent to sell the same again, at a higher and dearer price.

All endeavours to enhance the common price of any victuals or merchandise, and practices which have an apparent tendency thereto, whether by spreading false rumours, or buying things in a market before the accustomed hour, or by buying and selling again the same

thing in the same market, &c. are highly criminal by the Common law; and all such offences anciently came under the general appellation of *forestalling*. 3 *Inst.* 195, 196. And so jealous is the Common law of practices of this nature, which are a general inconvenience and prejudice to the people, and very oppressive to the poorer sort, that it will not suffer corn to be sold in the sheaf before thrashed; for by such sale the market is in effect forestalled. 3 *Inst.* 197. *H. P. C.* 152. By the Common law, Persons guilty of *forestalling*, upon an indictment found, are liable to a fine and imprisonment, answerable to the heinousness of their offence. 1 *Hawk.* 235.

By the 5 & 6 *Ed. 6.* c. 14. Any buying or contracting for merchandise, victuals, or other thing whatsoever in the way, coming by land or water to any fair or market, or to any port, &c. to be sold, or causing the same to be bought, or dissuading people by word, letter, message, or otherwise, from bringing such things to market, or persuading them to enhance the price after they are brought thither, is *forestalling*: and the party guilty of any offence of *forestalling*, &c. upon conviction at the quarter-sessions, by two witnesses, on bill, information, presentment, &c. shall, for the first offence, lose the goods so bought, or the value of them, and suffer two months imprisonment; for the second offence, he shall forfeit double the value, and be imprisoned six months; and for the third offence, he shall lose all his goods, be set upon the pillory, and be imprisoned at the King's pleasure. *Stat. ibid.* The forfeitures are to the King's use only, if there are no informers; otherwise a moiety goes to the King and moiety to the informer.

No information for any of the said offences against the statute can be good, without shewing in certain the quantity of the thing, for which the penalty is supposed to be incurred, not only because otherwise the judgment to be given on such an information can never be pleaded in bar of any other, and that it cannot appear that both of them were brought for the same thing; but also, because it cannot appear to the court what forfeiture the defendant ought to incur, unless the extent of the offence be specially set forth. 1 *Hawk.* 238. But nothing in the act abovementioned shall extend to the buying of any such thing, (otherwise than by *forestalling*) by any fishmonger, butcher, or poulterer, as concerns their trade, who shall sell the same again upon reasonable prices by retail, nor to the buying of wine, or other dead victuals, by any innholder, or victualler, to retail the same in his house; nor to the buying of any dried or salted fish (not *forestalled*), and sold for reasonable prices; nor to the buying of any corn, fish, butter, or cheese, by persons duly licensed, and not *forestalling*. 5 & 6 *Ed. 6.* c. 14. *sect. 7.* Neither shall it extend to wines, oils, sugars, spices, currants, nor other foreign victuals, fish and salt only excepted. 13 *El.* c. 25. *f. 21.* And by the 15 *Car. 2.* c. 7. When the quarter of wheat (*Winchester measure*) doth not exceed 48 s. rye 32 s. barley or malt 28 s. buck wheat 28 s. oats 13 s. 4 d. pease or beans 32 s. any person (not *forestalling*, nor selling the same again in the same market in three months) may buy such corn, at or under such price, and lay it up, and sell the same again without incurring any penalty. *Secl. 4.* Also it hath been resolved, that such victual only, as is necessary for the food of man, is within the aforesaid statute of 5 & 6 *Ed. 6.* and therefore that apples and cherries, and such like fruit are not; but that salt is a victual within the meaning of it. 1 *Hawk.* 237. By 31 *El.* c. 5. which ordains that informations for offences against penal statutes, must be laid in the proper county, it is provided, that nevertheless an information on the said statute of 5 & 6 *Ed. 6.* c. 14. against forestalling, ingrossing, or regrating, where the penalty shall appear to be 20 l. or above, may be laid out of the proper county, and in any other county, at the pleasure of the informer. See *Burn's Justice*, 290, &c. and see *Ingrasser and Regrator*, and *Black. Com.* 4 *V.* 158.

Forestaller, Is a person guilty in any of the instances and particulars described of forestalling. 5 & 6 *Ed. 6.* c. 14.

Foretooth. Striking out the foretooth is a *mayhem*. *Black. Com.* 4 *V.* 206.

Forfang or **Forfeng**, (from the Sax. *Fore*, ante & *fangen*, prendere) is the taking of provision from any one in fairs or markets, before the King's *Purveyors* are served with necessaries for his Majesty.—*Est captio obsoniorum quæ in foris aut nundinis ab aliquo fit, priusquam Minister Regis ea ceperit quæ Regi fuerint necessaria. Antecaptio vel preventio*—*Et fuit quieti de Wardwite & Forfeng & Withfang, &c. Chart. Hen. 1. Hosp. Sancti Barth. Lond. Anno 1133.*

Forfeiture, (*Forisfactura*, from the Fr. *Forfait*) Signifies the effect or penalty of transgressing some law.

Forfeitures may be either in *civil* or in *criminal* cases. With respect to the first. A man that hath an estate for life or years, may *forfeit* it many ways, as well as by *treason* or *felony*, and such means as are before mentioned: as by *alienation*; by *claiming a greater estate* than he hath, or *affirming the reversion* to be in a stranger, &c. If tenant for life, in dower, by the curtesy, or after possibility of issue extinct, or lessee for years, tenant by statute merchant, staple, or *elegit*, of lands or tenements that lie in *livery*, shall make any absolute or conditional feoffment in fee, gift in tail, lease for any other life than his own, &c. or levy a fine *sur conscience de droit come ceo*, &c. or suffer a common recovery thereof: or being impleaded in a writ of right brought against him, join the *mise* upon the meer right, or admit the reversion to be in another; or in a *quid juris* clamor, claim the fee-simple; or if lessee for years being ousted, bring an assise *ut de libero tenemento, &c.* By either of these things, there will be a *forfeiture* of estate. *Plowd.* 15. 1 *Rep.* 15. 8 *Rep.* 144. 1 *Inst.* 251. *Dyer* 324, 152. 1 *Bulst.* 219. But where the land granted by tenant for life, or years, is not well conveyed; or the thing doth not lie in *livery*, as a rent, common, or the like; he will not *forfeit* his estate: and therefore if a feoffment, gift in tail, or lease for another's life, made by the tenant for life, is not good, for want of words in the making it, or due execution in the livery and seisin, this shall not produce a *forfeiture*. 2 *Rep.* 55. When tenant in tail makes leases, not warranted by the statute; a copyholder commits waste, refuses to pay his rent, or do suit of court; and where an estate is granted upon condition, on non-performance thereof, &c. they will make a *forfeiture*. 1 *Rep.* 15.

Entry for a *forfeiture* ought to be by him, who is next in reversion, or remainder after the estate forfeited. As, if tenant for life or years commits a *forfeiture*, he who has the immediate reversion, or remainder, ought to enter; tho' he has the fee, or only an estate-tail. 1 *Rol.* 857. *l.* 45, 50. 858. *l.* 5. It shall be a dispensation of the *forfeiture*, if he in reversion, or remainder be a party to the estate made, and accept it: as, if a husband, seised in right of his wife for life, leases to him in reversion for his own life. 1 *Rol.* 856. *l.* 10. A feoffment by a husband, or by husband and wife, of an estate for life, of which the husband is seised in right of his wife, or jointly with his wife, binds only during coverture. 1 *Rol.* 851. *l.* 45, 50. *Vide Com. Dig.* title, *Baron and Feme*, (K.—R.)

Also offices may be forfeited by neglect of duty, &c. See *Fine*. As to *forfeitures* in *criminal* cases, it is to be seen,

- I. For what crimes such forfeitures are inflicted, and blood corrupted.
- II. To what time they bear relation.
- III. When forfeitures may be seized.

- I. For what crimes such forfeitures are inflicted, and blood corrupted.

Forfeitures are in *criminal* matters, where a person is attainted of *treason*, *felony*, &c. And as all estates are said to be derived from the crown; so all forfeitures and escheats of land belong to the King, unless granted away. *Finch.* 132, 164. Also where land comes to the crown, as forfeited by attainder of *treason*, all mesne tenures of common persons are extinct; but if the King grant it out, the former tenure shall be revived, for which a petition of right lies. 2 *Hale's Hist. P. C.* 254. In *treason*, all lands of inheritance, whereof the offender was seised

in his own right, were forfeited by the common law; and rights of entry, &c. 2 *Hawk. P. C.* 448. And the inheritance of things not lying in tenure, as of rent charges, commons, &c. shall be forfeited in high *treason*; but no right of action whatsoever to lands of inheritance is forfeited; either by the common or statute law. *Ibid.* 449. All lands, tenements, &c. are forfeited in *treason* by *stat.* 26 *H. 8. c.* 13. And the King shall be adjudged in possession of lands and goods forfeited for *treason* on the attainder of the offender, without any office found, saving the right of others. 33 *H. 8. c.* 20. Lands and hereditaments in fee-simple and fee-tail, are forfeited in high *treason*; but lands in tail could not be forfeited only for the life of tenant in tail, till the statute 26 *H. 8. c.* 13, by which statute, they may be forfeited. Where tenant for life, &c. is attainted, the King shall have the profits of the lands during the life of such tenant only. 2 *Inst.* 37.

There shall be no forfeiture of lands for *treason* of dead persons, not attainted in their lives. *Stat.* 34 *Ed.* 3. *c.* 12. 3 *Inst.* 12. Though the chief justice of *B. R.* as sovereign coroner may view the body of a person killed in rebellion, and make a record thereof, whereby he shall forfeit lands and goods. *Wood's Inst.* 654. And a man may be attainted by act of parliament. After the decease of the *Pretender*, no attainder for *treason* in *Scotland* shall make any forfeiture, to disinherit the heir, &c. *Stat.* 7 *Ann. c.* 21. Upon *outlawry* in *treason* or *felony*, the offender shall forfeit as much as if he had appeared, and judgment had been given against him so long as the *outlawry* is in force. 3 *Inst.* 52, 212.

For *petit treason*, murder, burglary, robbery, and all felonies for which the offenders shall suffer death, they shall forfeit all their lands in fee-simple, goods and chattels. 1 *Inst.* 391. 1 *Lill. Abr.* 628. But *Gavelkind* land in *Kent* is not forfeited by committing of *felony*; and by a *felony* only, intailed lands are not forfeit. *S. P. C.* 3. 26. Land that one hath in trust; or goods and chattels in right of another, or to another's use, &c. will not be liable to forfeiture. Tho' leases for years, in a man's own, or his wife's right: estates in jointenancy, &c. and all statutes, bonds, and debts due thereby, and upon contracts, &c. shall be forfeited. 1 *Inst.* 42, 151. *Staund.* 188. A married man guilty of *felony*, forfeits his wife's term; and if a wife kill her husband, the husband's goods are forfeited. *Jenk. Cen.* 65. In *man-slaughter*, the offender forfeits goods and chattels: and in *chancemedy* and *se defendendo*, goods and chattels; but the offenders may have their pardon of course. 1 *Inst.* 391.

Those that are hanged by *Martial Law* in time of war, forfeit no lands. 1 *Inst.* 13. And for robbery or piracy, &c. on the sea, if tried in the Court of Admiralty by the *Civil Law*, and not by jury, there is no forfeiture: but if a person be attainted before commissioners by virtue of the *stat.* 28 *Hen. 8. c.* 18. there works a forfeiture. 1 *Lill. Abr.*

The King shall have goods of felons, and year, day and waste in their lands, &c. which afterwards go to the Lord of the manor of whom held. *Magna Charta, c.* 22. and 17 *Ed.* 2. *c.* 14. And the profits of lands whereof a person attainted of *felony* is seised of an estate of inheritance in right of his wife; or of an estate for life only in his own right, are forfeited to the King, and nothing is forfeited to the Lord. 3 *Inst.* 19. *Fitz. Aff.* 166. By the conviction of a felon, his goods and chattels are forfeited; but by attainder, his lands and tenements. 1 *Inst.* 291.

Goods of persons that fly for a *felony*, are forfeited to the Lord of the franchise, when the flight is found of record. 2 *Inst.* 281. A *felo de se* forfeits all his goods and chattels. 3 *Inst.* 55. For *misprision* of *treason* the forfeiture is goods and chattels, and profits of lands during life. 3 *Inst.* 392. In a *præmunire*, lands in fee-simple are forfeited, with goods and chattels. 1 *Inst.* 129. For *petit larceny* the offender forfeits his goods. 1 *Inst.* 391. And for *standing mute* where persons are adjudged to penance, in cases of *felony*, there is a forfeiture of goods and chattels; and so for challenging above 35 jurors, &c. 3 *Inst.* 227.

It is clearly agreed, that by an attainder of treason or felony, the blood of the offender is so far stained and corrupted, that the party loses all the nobility, or gentility he might have had before, and becomes ignoble. *Co. Lit.* 8, 41. 3 *Inst.* 211. *Staundf. P. C.* 195.

Also it is clearly agreed, that he can neither inherit as heir to any ancestor, nor have an heir. *Co. Lit.* 8. a. 391. b. 392. *Staundf. P. C.* 165. *Bro. Nobility* 21. *Cro.* 66.

If a man be attainted, and after pardoned by charter, the children born before such pardon shall not inherit; but if they fail, the children born after such pardon may inherit him; for the pardon makes him capable of new relations as well as of new purchases, tho' all the old legal benefits and relations are lost. *Noy* 170. *Co. Lit.* 8. a. 3 *Inst.* 233.

Before the statute of 1 E. 6. cap. 12. the wife not only lost her dower at Common law, but also her dower *ad ostium ecclesie*, or *ex assensu patris*, or by special custom (except that of gavelkind,) by the husband's attainder of treason, or capital felony, whether committed before or after marriage. *Co. Lit.* 31. b. 37. a. 41. a. *F. N. B.* 150. *Perk. sect.* 308. *Bro. tit. Dower* 82. *Plow.* 261.

But the wife forfeited lands given jointly to her husband and her, whether by way of frank-marriage or otherwise, but only for the year and day and waste. *Co. Lit.* 37. 3 *Inst.* 216.

It is enacted by 1 E. 6. cap. 12. par. 17. That albeit any person shall be attainted of any treason or felony whatsoever; yet notwithstanding every woman, that shall fortune to be the wife or the person so attainted, shall be endowable and enabled to demand, have, and enjoy her dower, in like manner and form as tho' her husband had not been attainted, &c. But this is repealed as to treason by 5 & 6 E. 6. cap. 11. par. 9.

If the husband seized of lands in fee, makes a feoffment, and then commits treason, and is attainted of it, the wife shall not recover dower against the feoffee. *Bendl.* 56. *Dyer* 140. *Co. Lit.* 111. a. So if the husband is attainted of treason, and afterwards pardoned, yet the wife shall not recover dower; but of lands purchased by the husband after the pardon, the wife shall be endowed. 3 *Leon.* 3. *Perk. sect.* 391.

If a husband having levied a fine with proclamation, is erroneously attainted of treason, and the five years pass after his death, and then the outlawry is reversed, the fine and nonclaim are no bar till five years are passed after the reversal, because the wife could not sue for her dower while the attainder stood in force, neither could she any way reverse it. 3 *Inst.* 216. *Moor* 639. pl. 879.

After the making of the statute 1 E. 6. cap. 12. it seems to have been doubted, whether the wife should not lose her dower in case of any new felony made by act of parliament; therefore where several offences have been made felony since, care has been taken to provide for the wife's dower. 2 *New Abr.* 584. See 12 *Vin. Abr.* tit. *Forfeiture*. And see *Attainder*, and 2 *Haw. tit. Treason*.

Besides these forfeitures for crimes attended with corruption of blood, &c. There are forfeitures in lesser offences. Drawing a weapon upon a judge, or striking another in the King's Courts, incurs forfeiture of the profits of lands for life, and of goods: and it is the same forfeiture for rescuing a prisoner in, or before any of those courts, committed by the justices. 2 *Cro.* 367. 3 *Inst.* 141. If a woman after a rape, consent to the ravisher, she shall lose her dower after the death of her husband, &c. *Stat.* 6 R. 2. c. 6. And if any maiden or woman child above 12, and under 16 years of age, shall agree to be taken away and deflowered, or contract with any man for marriage against the will and without the consent of her father; or if he be dead, her mother or guardian appointed by her father's will, she shall forfeit her land of inheritance for her life. 4 & 5 P. & M. c. 8. *Artificers* going out of the kingdom, and teaching their trades to foreigners, are liable to forfeit their lands, &c. by *stat.* 5 Geo. 1. c. 27. Forfeitures likewise are incurred by several penal statutes.

II. As to the time to which forfeitures shall relate.

The forfeiture in case of felony shall relate to the time mentioned in the indictment when the felony was committed, as to the avoiding of estates and charges after; but for the mean profits of the land, it shall relate only to the judgment. 1 *Inst.* 390. But it is otherwise, if he be attainted upon an appeal, by verdict or confession. *Vide infra*. So, if he be attainted by outlawry upon an indictment. *Co. L.* 390. b. 13. a. R. 30 H. 6. 5. a. So, if a man be convicted in a *Præmunire*. *Dub. Cro. Car.* 173. *Jon.* 217. So, if a man be a fugitive beyond sea, it relates to the time of his flight. R. 2 *Cro.* 82. So, if a man be *felo de se*, the forfeiture relates to the fact. 1 *Lev.* 8. And is vested in the King before inquisition found. R. 1 *Lev.* 8. R. 2 *Cro.* 82. But the forfeiture of goods and chattels relates to the time of the conviction. *St. P. C.* 192. a. *Co. L.* 391. So, upon presentment of the coroner, of a *fugam fecit*, the forfeiture relates to the day of the presentment. *St.* 192. a. So, if it be found by verdict that he fled, to the time of the verdict. *St.* 192. a. To the time of the indictment, or acquittal. 5 *Co.* 109. b. So the forfeiture, as to the *mean* profits of lands, relates only to the conviction. *Co. L.* 390. b. So the forfeiture by outlawry upon an appeal; for the time of the offence is not mentioned in the count. *Co. L.* 390. b. 13. a.

III. When forfeitures may be seized.

Goods or lands of one arrested for felony, shall not be seized before he is convicted or attaint of the felony; on pain of forfeiting double value. 1 R. 3. c. 3. Goods of a felon, &c. cannot be seized before forfeited; though they may be inventoried, and a charge made thereof before indictment. *Wood's Inst.* 659. In treason or felony, the delinquent may sell his goods, be they chattels real, or personal, *bona fide*, before conviction, for his maintenance in prison; for the King hath no interest in the forfeiture till conviction. And where goods of a felon are pawned before he is attainted, the King shall not have the forfeiture of the goods till the money is paid to him to whom they were pawned. 3 *Inst.* 17. 2 *Nels. Abr.* 874, 875.

After conviction by judgment, or outlawry, for high treason, &c. a commission goes to persons named by the King, or the Attorney General, to inquire, what lands and tenements the offender had at the time of the treason committed, and the value; and that they seize them into the King's hands. And the inquisition taken thereon shall be returned to the Court of Exchequer, and filed in the office of the King's remembrancer. *Lut.* 997. So after conviction for felony, a *seire facias* shall go against the vill, or any other, who has the goods in his custody. *St. P. C.* 194. But if any one has title to the goods or lands found by inquisition to be the goods or lands of the offender, he may make his claim, by pleading his title. *Lut.* 998.

To which the Attorney General shall demur, or reply. *Vide Com. Dig.* tit. *Prærogative*, (D. 83, 84.) A copyholder surrenders to the use of his will, the devisee is convicted of felony and hanged before admittance, the lands are not forfeited to the Lord but descend to the heir of the surrenderor. *Wilson par.* 2. fo. 13.

Forfeiture differs from *confiscation*, in that forfeiture is more general; whereas *confiscation* is particularly applied to such as are forfeit to the King's Exchequer, and *confiscate* goods are said to be such as no body doth claim. *Staundf. P. C.* 186.

There is a full forfeiture, *plena forisfactura*, otherwise called *plena wita*, which is a forfeiture of life and member, and all that man hath. *Leg. H.* 1. c. 88. And there is mention in some statutes, of forfeiture at the King's will, of body, lands, and goods, &c. 4 *Inst.* 66. See farther as to forfeiture, generally. *Black. Com.* 1 V. 299. 2 V. 153, 267. And as to forfeitures for crimes. *Id.* 4 V. 370, 374, 416, 417. *Forfeiture of Copyholds.* *Id.* 2 V. 284. *Of goods and chattels.* *Id.* 2 V. 420. 4 V. 379. *Of lands.* *Id.* 2 V. 267. 4 V. 374.

Forfeiture of Marriage, (*Forisfactura maritagii*.) Was a writ which lay against him, who, holding by knights-service, and being under age, and unmarried, refused

used her whom the lord offered him without his disparagement, and married another: *P. M. B. fol. 141. Rep. Orig. fol. 163.*

Forfeited Estates. There are several statutes appointing commissioners of forfeited estates, on rebellions in this kingdom and Ireland: by 11. G. 2. c. 3. all lands and tenements, &c. of persons attainted or convicted of treason or rebellion in Ireland, were vested in several commissioners and trustees for sale thereof. The 1. Geo. 1. c. 10. appointed commissioners to inquire of forfeited estates in England and Scotland, on the rebellion at Friesen, &c. And the estates of persons attainted of treason were vested in his Majesty for publick uses; but afterwards in trustees, who were to sell for the use of the publick; and purchasers to be *Presumpt.* See 1. Geo. 1. c. 50. 4. Geo. 1. c. 2. 5. 7. 8. Geo. 1. c. 23.

Forgabul. (*Forgabulum*). A small reserved rent in money, or quit rent. — *Ita quid ego Henricus M. ad Henricum de met. nihil juris de tenemento, &c. exceptis vel denar. de Forgabulo quantam percipientis ad Pascha pro omnibus servitiis.* Ex Cartulat. Abbat. de Rading. MS. 4. 88.

Forge. (*Forgia*). A smith's Forge, to melt and work iron. — *Marium Res concessit, &c. U nam Forgiam Patrum suorum liberam.* Chart. Hen. 2.

Forgery. (From the Fr. *Forger*, i. e. *accidere*, *fabricare*, to beat on an anvil, forge or form). Is where a person fraudulently makes and publishes false writings, to the prejudice of another man's right; or it signifies the writ that lies against him who commits such an offence, the penalty whereof is declared in the Stat. 1. Eliz. c. 14. And *forgery* is either at Common Law, or by statute, punishable by indictment, information, &c. But there can be no *forgery* where none can be prejudiced by it but the person doing it. 1. Salk. 375. *Forgery* by the Common Law extends to a false and fraudulent making or altering of a deed or writing, whether it be matter of record, or any other writing, deed, or will. 3. Inst. 169. 1. Rol. Abr. 65. Not only where one makes a false deed; but where a fraudulent alteration is made of a true deed, in a material part of it, as by making a lease of the manor of Dale, and it appears to be a lease of the manor of Sale, by changing the letter D. into an S. or by altering a bond, &c. for 500 l. expressed in figures, to 5000 l. by adding a new cypher, these are *forgery*: for it is, if a man finding another's name at the bottom of a letter, at a considerable distance from the other writing, causes the letter to be cut off, and a general release to be written above the name, &c.

Also a writing may be said to be *forged*, where one being directed to draw up a will for a sick person, doth insert some legacies therein falsely of his own head; though there be no *forgery* of the hand or seal; for the crime of *forgery* consists as well in endeavouring to give an appearance of truth to a meer falsity, as in counterfeiting a man's hand, &c. 1. Hawk. P. C. 182, 183. 3. Inst. 170. But a person cannot regularly be guilty of *forgery*, by an act of omission; as by omitting a legacy out of a will, which he is directed to draw for another, though it has been held, that if the omission of a bequest to one cause a material alteration in the limitation of an estate to another, as if the testator directs a gift for life to one man, and the remainder to another in fee, and the writer omits the estate for life, so that he in remainder hath a present estate upon the death of the testator, not intended to pass, this is *forgery*. *Rep. 118. Moor 760.* Supposing it is fully done, and not by a mere mistake.

If one write a will without any direction, and bring it to the testator, who is not of perfect memory, and he sign it, this doth not amount to *forgery*. *Ibid.* If a feoffment be made of land, and livery and seisin is not interred when the deed is delivered, and afterwards on selling the land for a valuable consideration to another, livery is interred upon the first deed; this hath been adjudged *forgery* both in the feoffer and feoffee; because it was done to deceive an honest purchaser. *Moor 665.* And when a person knowingly falsifies the date of a second conveyance, which he had no power to make, in order to deceive a purchaser, &c. he is said to be guilty of *forgery*. 3. Inst. 169. 1. Hawk. 182.

It seems to be no way material, whether a *forged* instrument be made in such manner, that if it were in truth such as it is counterfeited for, it would be of validity or not. 1. Sid. 142. The counterfeiting writings of an inferior nature, as letters and such like, is not properly *forgery*; but the deceit is punishable. 1. Hawk. 184. By Stat. 1. H. 3. c. 3. a *forger* or publisher of false deeds, was to pay damages, fine and ransom. And by 5. Eliz. c. 14. If any person alone, or with others, shall falsly forge or make, or cause to be forged and made, or assent to the forging of any deed or writing sealed, court-roll or will in writing, to the intent that the freehold or inheritance of lands may be defeated or charged; or shall pronounce, publish, or shew forth in evidence any such *forged* writings, as true, knowing of the *forgery*; and shall be convicted thereof upon an action founded on this Statute, or otherwise by bill, &c. in the King's Bench or Exchequer, he shall pay double costs and damages to the party grieved, and be sat on the pillory; and have both his ears cut off, and his nostrils slit; and shall forfeit to the King the issues and profits of his lands and tenements during life, suffer perpetual imprisonment; &c. And if any one shall *forge* or falsly make any deed or writing, containing a lease for years of lands (not copyhold) or an annuity in fee, for life or years, or any obligation, acquittance, release, or other discharge of any debt or personal demand, or publish or give in evidence the same knowingly; he shall pay to the party injured double costs and damages, and shall be likewise set on the pillory, and lose one of his ears, and be imprisoned for a year. And if any person shall be guilty of a second offence, it shall be adjudged *felony*, without benefit of clergy. *Stat. Ibid.*

Where there is a penalty in an obligation; &c. the party grieved by a *forged* release thereof, shall recover double the penalty as damages, and not of the debt appearing in the condition. 3. Inst. 172. As to publishing a deed, knowing the same to be *forged*, it has been resolved, that if a person is informed by another that a deed is *forged*, if he afterwards publishes it as true, he is within the danger of the Statute. *Ibid.* 171. The King may pardon the corporal punishment of *forgery* which tends to common example; but the plaintiff cannot release it: if the plaintiff release or discharge the judgment or execution, &c. it shall only discharge the costs and damages; and the judges shall proceed to judgment upon the residue of the pains, and award execution upon the same. 5. Rep. 50. 5. Eliz. c. 12.

A person convicted of *forgery*, and adjudged to the pillory, &c. whereby he becomes infamous, is not allowed to be a witness; but it is a good exception to his evidence. *Hawk. P. C. 433.* And one convicted of this crime, may be challenged on a jury, so as to be incapable to serve as a juror; and it hath been holden, that exceptions to persons found guilty of perjury or *forgery*, as well as felony, &c. are not saved by a pardon. 1. Hawk. 417. The court of B. R. will not ordinarily at the prayer of the defendant, grant a *certiorari* for removal of an indictment of *forgery*, &c. 2. *Ibid.* 54.

By a late act, *forging* or counterfeiting any deed, will, bond, bill of exchange, note or acquittance for money, or any indorsement or assignment of a bill, &c. with intent to defraud any person, or publishing such false deed, &c. to be true, knowingly, the offenders shall be guilty of felony, and suffer death as felons; but not to work corruption of blood, &c. Stat. 2. Geo. 2. c. 25. Vide 7. Geo. 2. c. 22. As to *forging* of Exchequer and Bank Bills, Lottery Tickets, Letters of Attorney to transfer Stock, &c. But for the several species of this offence, See title *Forgery* under title *Felonies* in the table to the quarto edition of the Statutes. And Black. Com. 4. V. 245.

Forinsecum. Outward, or on the outside. *Kennet's B. 5.*

Forinsecum Quantum. The manor as to that part of it which lies without the town, and not included within the liberties of it. — *Summa reddituum assignata Manerio Forinsecum Hanbury, &c. Paroch. Antiq. 351.*

Forinsecum Servitium. The payment of extraordinary aid, opposed to *intrinsicum servitium*, which was the common and ordinary duties, within the Lord's court. *Kennet's Gloss. See Foreign Service.*

Forisbannitus. Signifies banished: *Expulsus a Scotia, Forisbannitus ab Anglia, &c.* *Mat. Paris. Ann. 1245.*

Forisfamiliari. When a son accepts of his father's part of lands, in the life-time of the father, and is contented with it; he is said to be *forisfamiliari*, and cannot claim any more. *Blount.*

Forland, (Forlandum) Lands extending further or lying before the rest; also a *promontory.* *Mon. Ang. Tom. 2. fol. 332.*

Forstland. Was land in the bishoprick of Hereford granted or leased *dum episcopus in episcopatu steterit*, so as the successor might have the same for his present revenue: this custom has been long since disused, and the land thus formerly granted is now let by lease as other lands, tho' it still retains the name by which it was anciently known. *Butterfield's Surv. 56.*

Form, Is required in law proceedings, otherwise the law would be no art; but it ought not to be used to ensnare or intrap. *Hob. 232.* Matters of *form* in pleas that go to the action, may be helped on a general demurrer; as when a plea is only in abatement. *2 Ld. Raym. 1015.* The formal part of the law or method of proceeding, cannot be altered but by parliament: for, if once those outlets were demolished, there would be an inlet to all manner of innovation in the body of the law itself. *Black. Com. 1 V. 142.*

Forma Pauperis. Is where any person has just cause of suit, and is so poor, that he cannot bear the usual charges of suing at law, or in equity: in this case, upon his making oath that he is not worth 5 *l.* except the matter in question, his debts being paid, and bringing a certificate from some lawyer that he hath cause of suit, the judge admits him to sue *in forma pauperis*, i. e. without paying any fees to counsellor, attorney or clerk: this had beginning from the *stat. 11 H. 7. c. 12.* by which it is enacted, that poor persons having cause of action or suits, shall have original writs, counsel and attornies, assigned them *gratis.*

On proceeding in *Chancery*, *affidavit* is first made that the plaintiff is not worth 5 *l.* in lands, tenements, goods or chattels, his wearing apparel, and the matters of the suit excepted; and then a *petition* is drawn up and presented to the Lord Chancellor or Master of the Rolls, praying to be admitted *in forma pauperis*, and to have counsel, &c. assigned him, who are neither to take fees, nor make any contract or agreement for recompence, on pain of punishments; and no counsellor or attorney assigned shall refuse to proceed, without shewing good cause to the Lord Chancellor, &c. *Pract. Sol. 24.* If it be made appear, that any *pauper* has sold or contracted for the benefit of his suit, while depending in court, such cause shall be thenceforth wholly dismissed. And a man suing *in forma pauperis* is not to have a new trial granted him, but is to acquiesce in the justice of the court; nor shall *paupers* be admitted to remove causes out of inferior courts. *1 Mod. 268.* If a cause goes against a *pauper*, or a plaintiff *in forma pauperis* be nonsuit; he shall not pay costs to the defendant, but shall suffer such punishment in his person as the court shall award. *23 H. 8. c. 15. 1 Lill. Abr. 634. 2 Sid. 261.* *Paupers* using delays, to vex their adversaries; or being proved to be vexatious persons, and having many frivolous suits depending, will be *dispaupered* by the court; for the law doth not assist them to do injury to others. *1 Lill. 633. See Black. Com. 3 V. 400.*

Formedon, (Breve de forma donationis) Is a writ that lieth for him who hath right to lands or tenements by virtue of any *intail*, growing from the *stat. of Westm. 2. c. 2.* It is a writ of right for recovery of land; and is of three kinds, *viz.* in *descender*, *remainder* and *reverter*: *formedon in descender* lieth where tenant in tail incoverts a stranger, or is disseised and dieth, the heir shall have this writ to recover the land. *Formedon in remainder* lies where one gives land in tail, and for default of issue the remainder to another in tail, &c. If the tenant in tail die without issue, and a stranger abates and enters into the land, he in remainder shall have this writ. *Formedon in*

the reverter lieth where land is intailed to certain persons and their issue, with remainder over for want of issue, and on the remainders failing to revert to the donor and his heirs; now if tenant in tail dies without leaving any issue, and likewise he in remainder, then the donor or his heirs to whom the reversion comes, shall have this writ for recovery of the estate, in case it be aliened, &c. *Reg. Orig. 238, 242. F. N. B. 111.*

Formedon in descender is the highest writ a tenant in tail can have; and where tenant in tail aliens, or is disseised of his estate, or if a recovery is had against him by default, and he die, his heir shall have a *formedon*, it being the only remedy the heir may have for the possession of his ancestor; but if he be ousted of his own possession, as if he be seised, and put out, he shall have his writ of *assise.*

There is a writ of *formedon in descender*, where partition of lands held in tail, being made among parceners, &c. and one alieneth her part, her heir shall have this writ; and by the death of one sister without issue, the partition is made void, and the other shall have the whole land as heir in tail. *New Nat. Br. 476, 477.*

Also there is a writ of *formedon in simul tenuit*, that lies for a coparcener against a stranger upon the possession of the ancestor; which may be brought without naming the other coparcener who hath her part in possession. *Ibid. 481.* This writ may be likewise had by one heir in *Gavelkind*, &c. of lands intailed; and where the lands are held without partition,

A demandant in a writ of *formedon*, ought to make his descent by all who held the estate: otherwise the writ will abate; and the demandant should always be made cousin and heir, or son and heir to him who was last seised of the tail; but the surest way is to make every man named in the writ son and heir in the writ; and it is not material whether they were seised or not, altho' they are named heir. *8 E. 11 H. 6.*

In a *formedon in descender*, the demandant is to set forth his pedigree in the declaration; in *formedon in remainder*, that the tenant in tail is dead without issue: but in a *formedon in reverter* the donor, &c. need not shew the pedigree of the issue, nor who was last seised, because he is supposed to be a stranger to them. *2 Nels. Abr. 880.* Where a fee-simple is demanded in a *formedon in reverter*, the taking of the profits ought to be alledged in the donor, and donee: if an estate-tail is demanded, it must be alledged in the donee only. *1 Lutw. 96.*

There are several pleas both in bar and in abatement, which the tenant may plead to this action; such as non-tenure, which is a plea in abatement, and by which the tenant shews, that he is not tenant of the freehold, or of some part thereof, at the time of the writ brought, or at any time since; which is called the pleading non-tenure generally. *Booth 28.*

Special non-tenure is where the tenant shews what interest and estate he hath in the land demanded, as that he is tenant for years, in ward, by statute-merchant, *elegit*, or the like; and therefore the plea of special non-tenure must always shew who is tenant. *Booth 29. See 1 Brereton. 153.*

At Common law, non-tenure of parcel of an intire thing, as a manor, &c. abated the whole writ; but now by the *25 E. 3. cap. 16.* it is enacted, "That by the exception of non-tenure of parcel, no writ shall be abated, but only for that parcel whereof the non-tenure was alledged." *Booth 29. 2 Mod. 181.*

If the tenant pleads non-tenure of the whole, he need not shew who is tenant: but in a plea of non-tenure of parcel, he must shew who is tenant, and this even before the statute; for the Common law would not suffer a writ, good in part, to be wholly destroyed, except the tenant shewed the demandant how he might have a better. *1 Mod. 181.* The tenant can't, after a general imparlance, plead non-tenure of part, tho' he may plead non-tenure of the whole. *3 Lev. 55.*

The writ of *formedon* is now rarely brought, except in some special cases, where it cannot be avoided; and the trying titles by *petitiones forme* supplies its place, in an easier manner. *See Booth of real actions. Black. Com. V. 191.*

Fornella, A certain weight of about seventy pounds, mentioned in the *Statutes of weights and measures*, 51 H. 3.

Fornagium, Furnagium, (Fr. *Fournage*) Signifies the fee taken by a lord of his tenant, bound to bake in the lord's common oven, or for a permission to use their own; this was usual in the northern parts of England. *Plac. Parl.* 18 Ed. 1.

Fornication, (*Fornicatio*, from the *Fornix* in Rome, where lewd women prostituted themselves for money) Is whoredom, or the act of incontinency in single persons; for if either party is married, it is *adultery*. The *Stat. H. 7. c. 4.* mentions this crime, which by an act made anno 1650. during the times of usurpation, was punished with three months imprisonment for the first offence; and the second offence 'tis said was made felony. *Scobell's Collect.* The spiritual courts hath cognizance of this offence: And formerly courts-leet had power to inquire of and punish fornication and adultery; in which courts the King had a fine assessed on the offenders, as appears by the book of *Domesday*. 2 Inst. 428. See *Black. Com.* 4 V. 64.

Forprise, (*Forprisum*) An exception or reservation, in which sense it is used in the *Stat. 14 Ed. 1.* This word is frequently inserted in leases and conveyances, wherein accepted and forprised is an usual expression. In another signification it is taken for any exaction; according to *Thorn. anno 1285.*

Foßes, (*Catadupa*) Water-falls, so called in *Westmoreland*. Camb. Britan.

Foßspeaker, An attorney or advocate in a cause. *Blount.*

Fortia, Power, dominion or jurisdiction: And we read of *infortiares Placitum*, by judges assembled. *Leg. H. 1. c. 29.*

Fortiori, à fortiori or *multo fortiori*, Is an argument often used by *Littleton*, to this purpose: If it be so in a feoffment passing a new right, much more is it for the restitution of an ancient right, &c. *Co. Litt.* 253, 260.

Fortilice and **Fortilitz**, (*Fortellecum*) Signifies a fortified place, bulwark or castle; as it is said within the towns and fortilities of *Barwick* and *Carlisle*, anno 11 H. 7. c. 18.

Fortlet, (Fr.) A place or fort of some strength; or rather a little fort. *Old Nat. Br.* 45.

Fortes and Castles, The statute 13 Car. 2. c. 6. extends to forts and other places of strength within the realm; the sole prerogative as well of erecting, as manning, and governing of which belongs to the King, in his capacity of general of the kingdom. 2 Inst. 30. *Black. Com.* 1 V. 263.

Fortuna, Is that which is called in our law treasure trove, i. e. *Tesaurum ductente fortuna inveniunt*—*Inveniendum est per 12 Juratos. pro Rege, &c. quod fideliter præsentabunt omnes fortunas, abjuraciones, &c.*

Fortune-tellers, Persons pretending to tell fortunes &c. are to be punished with a year's imprisonment, and standing four times in the pillory. *Stat. 9 Geo. 2. c. 5.*

Fortunium, A tournament or fighting with spears; or an appeal to fortune therein. *Mat. Paris. Anno 1241.*

Forty-days-Court, The court of attachment or *wandermoot*, held before the verderors of the forest once in every forty days, to enquire concerning all offenders, against vert and venison. *Black. Com.* 3 V. 71. See *Forest.*

Fossa, A ditch full of water; wherein women committing felony were drowned: It has been likewise used for a grave, in ancient writings. See *Furca*.

Fossatum, (Lat.) Is a ditch or place fenced round with a ditch or trench; also it is taken for the obligations of citizens to repair the city ditches, *Fossatura* signifies the same with *fossatum*. And the work or service done by tenants, &c. for repairing and maintenance of ditches is called *fossatum operatio*; and the contribution for it *fossagium*. *Knuton's Gloss.*

Foßway, (From *fossu*, digged) Was anciently one of the four principal highways of England, leading through the kingdom, which had its name from its being supposed to be digged and made passable by the Romans, and having a ditch upon one side. *Cowel.*

Fosteritan, (Sax.) Nuptial gift, which we call a jointure or stipend for the maintenance of the wife.—*Poston*

sciendum est tui fosterleian pertinent, vadit hoc brigdunia & Plegier amici sui.

Fother or **Fodder**, (From the Teuton *Fudro*) Is a weight of lead containing eight pigs, and every pig one and twenty stone and a half; so that it is about a tun or common cart load: Among the *plumbers* in London it is nineteen hundred and an half; and at the mines it is two and twenty hundred weight and a half. *Skene.*

Fovea, A place for burial of the dead. *Statut. Eccl. Paulin. London. MS.* 29.

Foundation, The founding and building of a college or hospital is called *fundatio*, *quasi fundatio*, or *fundamentum locatio*. *Co. lib. 10.* The King only can found a college; but there may be a college in reputation, founded by others. *Dyer* 267. If it cannot appear by inquisition, who it was that founded a church or college, it shall be intended it was the King; who has power to found a new church, &c. *Moor* 282. The King may found and erect an hospital, and give a name to the house, upon the inheritance of another, or license another person to do it upon his own lands; and the words, *fundo, creso*, &c. are not necessary in every foundation, either of a college or hospital made by the King; but it is sufficient if there be words equivalent: The incorporation of a college or hospital is the very foundation; but he who endows it with lands is the founder; and to the erection of an hospital nothing more is requisite but the incorporation and foundation. 10 Rep. *Case of Sutton's Hosp.* Persons seized of estates in fee-simple, may erect and found hospitals for the poor, by deed enrolled in Chancery, &c. which shall be incorporated, and subject to such visitors as the founder shall appoint, &c. *Stat. 39 Eliz. c. 5.* Where a corporation is named, it is said the name of the founder is parcel of the corporation. 2 Nels. 886. Though the foundation of a thing may alter the law, as to that particular thing; yet it shall not work a general prejudice. 1 *Lill. Abr.* 634. See *College*. 1 *Black. Com.* 1 V. 480.

Founder of Metal, (From the Fr. *Fondre*, to melt or pour) Is he that melts metal, and makes any thing of it by pouring or casting it into a mould. 17 R. 2. c. 1. Whence is *bell-founder*, a founder of letters, &c.

Fourcher, (Fr. *Fourcher*) Signifies a putting off, or delaying of an action; and has been compared to stammering, by which the speech is drawn out to a more than ordinary length of time, as by *fourching* a suit is prolonged, which might be brought to a determination in a shorter space: The device is commonly used when an action or suit is brought against two persons, who being jointly concerned, are not to answer till both parties appear; and is where the appearance or *essoin* of one will excuse the other's default, and they agree between themselves that one shall appear or be essoined one day, and for want of the other's appearing, have day over to make his appearance with the other party; and at that day allowed the other party doth appear, but he that appeared before doth not, in hopes to have another day by adjournment of the party who then made his appearance. *Termes de Ley.*

This is called *fourcher*; and in the statute of *West. 1. c. 42.* it is termed *fourcher by essoin*; where are words to this effect, *vin. coparceners, jointenants*, &c. may not *fourch* by *essoin*, to essoin severally; but shall have only one essoin, as one sole tenant. And anno 6 Ed. 3. c. 10. it is used in like manner: The defendants shall be put to answer without *fourching*, &c. 23 Hen. 6. c. 2. 2 Inst. 250. *Fourcher* in the Latin is writ *furcari*; because it is two-fold.

Fraction, The law makes no fraction of a day; if any offence be committed, in case of murder, &c. the year and day shall be computed from the beginning of the day on which the wound was given, &c. and not from the precise minute or hour. 2 Hawk. 163. See *Co. Litt.* 255.

As to murder, this relates to the question, whether the party died within a year and a day after the stroke, &c. But as to an appeal of death, it may be sued within a year and a day after the completion of the felony, by the death of the party. *Stat. Glouc. 6 Ed. 1. c. 9.* *Black. Com.* 4 V. 311.

An act of record will not admit any division of a day, but is to be said done the first instant of the day, *Arg.* and judgment accordingly. *Pasch. 23 Eliz. Mo. 137.*

Assumpsit, to pay 40*l.* by 5*s.* per month; where a man brings an action for breach, on the first day, it is best to count of the damages for the intire debt; for he cannot have a new action; but he must declare that the 40*l.* is not paid, nor any part of it; for the 40*l.* is not yet due. *Cra. J. 505. Mich. 16 Jac. B. R.*

In presumption of law, when a thing is to be done upon one day, all that day is allowed to do it in, for the avoiding of fractions in time, which the law admits not of, but in case of necessity. *Per Roll. Ch. J. Sti. 119. Trin. 24 Car. B. R.*

Insurance for H.'s life; H. died on the last day; *per Helt* Ch. J. the law makes no fraction in a day; yet, in this case, he dying after the commencement, and before the end of the last day, the insurer is liable, because the insurance is for a year, and the year is not complete till the day be over; yet, if A. be born on the 3d. day of September, and on the second day of September, 21 years afterwards he makes his will, this is a good will, for the law will make no fraction of a day, and by consequence he was of age. *2 Salk. 625. Trin. 11 W. 3. B. R. at Guildhall, per Helt, Ch. J. in Sir Robert Howard's case.*

Fractitium, is made use of for arable land.—*Pratum de Mura 3 tres Agr. terra de fractitio. Mon. Ang. Tom. 2. 873.*

Fractura navium, Wreck of shipping at sea.

Frampole fences, Are such fences as the tenants in the manor of *Writtel* in *Essex*, set up against the lord's demesne; and they are intituled to the wood growing on those fences, and as many poles as they can reach from the top of the ditch with the helve of an axe, towards the reparation of their fences. It is thought the word *frampole* comes from the Sax. *frampul*, profitable; or that it is a corruption of *frampole*, because the poles are free for the tenants to take: But Chief Justice *Brampton*, whilst he was steward of the court of the manor of *Writtel*, acknowledged that he could not find out the reason why those fences were called *frampole*; so that we are at a loss to know the truth of this name etymologically.

Franchitanus, (Fr. *Franchi*, i. e. free) A freeman—*Sciatis me dedisse, cum villanis, & franchilano, & cum tenuis eorum, &c. Chart. H. 4.* And we find *Francus* borne used for a freeman in *Domesday*.

Franchise, (Fr.) is taken for a privilege or exemption from ordinary jurisdiction; as for a corporation to hold pleas to such a value, &c. And sometimes it is an immunity from tribute, when it is either personal or real, that is belonging to a person immediately; or by means of this or that place whereof he is chief or a member. *Crompt. Jurisd. 141.* There is also a *franchise royal*; which seems to be that where the King's writ runs not *21 H. 6. c. 4.* But *franchise royal* is said by some authors, to be where the King grants to one and his heir, that they shall be quit of toll, &c. *Bract. lib. 2. c. 5.* A *franchise* in general is a royal privilege in the hands of a subject; and may be vested in bodies politic or corporations, either aggregate or sole, or in many persons that are not corporations, (as in borough towns, &c.) or in a single person.

Franchises are of different kinds; such as the *principality of Wales*, *Counties Palatine*, *Counties*, *Hundreds*, *Ports of the sea*, &c. Then there is a *franchise* or liberty of having a *leet*, *manor* or *lordship*, as well as a liberty to make a *corporation*, and to have cognizance of pleas; and *bailliwicks* of liberties, the liberty of a *forest*, *chafe*, &c. *Fairs* and *markets*, *felons goods*, *goods of fugitives*, *outlaws*, *deadlands*, *treasure trove*, *waifs*, *estrays*, *wrecks*, &c. All these come under *franchises* and liberties. *F. N. B. 330. 2 Inst. 221.*

All *franchises* and liberties are derived from the crown, and some are held by charter; but some lie in prescription and usage, without the help of any charter. *Finch 164.* And usage may uphold *franchises*, which may be claimed by prescription, without record either of creation,

allowance or confirmation; and wreck of the sea, waifs, strays, fairs and markets, and the like, are gained by usage, and may become due without any matter of record. *2 Inst. 281. 9 Rep. 27.* But goods of felons and outlaws, and such like, grow due by charter; and cannot be claimed by usage, &c. *Ibid.* It hath been adjudged, that grants of *franchises*, made before the time of memory, ought to have allowance within the time of memory, in the *King's Bench*, or before the barons of the *Exchequer*, or by some confirmation on record; and it is said they are not records pleadable, if they have not the aid of some matter of record within time of memory; and such ancient grants, after such allowance, shall be confirmed as the law was when they were made, and not as it hath been since altered: But *franchises* granted within time of memory are pleadable without any allowance or confirmation; and if they have been allowed or confirmed as aforesaid, the *franchises* may be claimed by force thereof, without shewing the charter. *9 Rep. 27. 2 Inst. 281, 494.*

There have been formerly several ancient prerogatives derived from the crown; besides the *franchises* aforementioned; as power to pardon felony, make justices of assize, and of the peace, &c. Though by the *Stat. 27 H. 8. c. 24.* they were resumed and reunited to the crown; and the King cannot grant power to another to make strangers born, denizens here, because such power is by law inseparably annexed to his person. *7 Rep. 25.* By several ancient statutes, the church shall have all her liberties and *franchises* inviolable: And the *Lords Spiritual* and *temporal* shall enjoy their liberties, &c. and the King may not deprive them of any of them. *9 H. 3. c. 1. 14 Ed. 3. 2 H. 4. c. 1.*

By the statute of *Magna Charta*, *9 H. 3. c. 37.* The *franchises* and liberties of the city of *London*, and all other cities, towns, &c. are confirmed. All writs, processses, &c. in *franchises*, are to be made in the King's name; and stewards, bailiffs, and other ministers of liberties, shall attend the justices of assize, and make due execution of process, &c. *27 H. 8. c. 24.* Some *franchises*, as *York*, *Bristol*, &c. have return of writs, to whom mandates are directed from the courts above, to execute writs and process: And a mayor or bailiff of a town, may have liberty to keep courts, and hold pleas in a certain place, according to the course of the Common law; and power to draw causes out of the King's courts, by an exclusive jurisdiction: But the causes here may be removed to the superior courts. *1 Inst. 114. 4 Inst. 87, 224.*

Sheriffs of counties, within which is any *franchise*, the lord whereof is intituled to a return of writs, shall on his request, appoint one or more deputies, to reside at some place near, there to receive all writs in the sheriff's name, and under his seal to issue warrants for their due execution; and the Lord Chancellor is to settle the charges to be paid any such deputy, &c. by *13 Geo. 2. c. 18.*

A *franchise* hath no relation to the county wherein it lies, as has been generally held; for it is not necessary to set forth the county when any thing is shewed to be done within a liberty or *franchise*. *Trin. 23 Car. B. R.* If a *franchise* fails to administer justice within the same, the *franchise* shall not be allowed; but on any such failure, the court of *B. R.* may compel the owners of the *franchise*, &c. to do justice; for this court ought to see justice equally distributed to all persons. *1 Lill. Abr. 635.* *Franchises* may be forfeited and seized where they are abused, for mis-user or non-user; and when there are many points, a mis-user of any one will make a forfeiture of the whole on a *quo warranto* brought. *Kitch. 65.* And where *franchises* come to the crown again from whence derived, by forfeiture, &c. they are *extinguished*; but in some cases it is said they are not. For contempt of the King's writ, in a county palatine, &c. the liberties may be seized, and the offenders fined; and the temporalities of a bishop, have been adjudged to be seized until he satisfied the King for such a contempt, on information exhibited, &c. *On Car. 253.* The bishop of *Durham* pretending he had such a *franchise*, that the King's writ was not to come there, and because one brought it thither he imprisoned him, this being proved

upon an information brought against him, it was adjudged he should pay a fine to the King, and lose his liberties. 2 *Shep. Abr.* 250.

Wherever the King is party to a suit, as in all informations and indictments, the process ought to be executed by the sheriff, and not the bailiff of any *franchise*, whether it have the clause *non omittas*, &c. or not; for the King's prerogative shall be preferred to any *franchise*. 2 *Harw.* 284. A sheriff upon a *non omittas*, or on a *capias utlagatum*, or *quo minus*, may enter and make arrests in a *franchise*. 1 *Lill.* 635. An arrest by the sheriff within a *franchise* on a common writ, is said to be good, tho' the officer be subject to an action at the suit of the lord of the *franchise*, &c. If a person claims *franchises* which he ought not to have, it is an usurpation upon the King; and not shewing his title, the King shall take from him his *franchise*. *Poph.* 180. 1 *Bull.* 54. The King's Bench will not grant an information on private usurpation of *franchises*, but the proper remedy is to apply to the Attorney General; i. e. to proceed by *quo warranto*. *Ibbatson's case. Rep. Temp. Hardw. per Annal.* 261. See *Quo Warranto*.

Frangence, Was the general appellation of all foreigners. *Vide Englecey.*

Franklaine, Is used to denote a freeman or gentleman, in our ancient authors. *Fortescue.*

Frank, A French gold coin, worth about a French shilling; but in computation was twenty *soli*, which is a *livre*, and twenty pence in our money.

Frankalmoin, (*Libera Elemosyna*) Is a tenure by spiritual service, where an ecclesiastical corporation, sole or aggregate, holdeth land to them and their successors, of some lord and his heirs in free and perpetual alms: And perpetual supposes it to be a fee-simple; though it may pass without the word *successors*. *Litt.* 133. 1 *Inst.* 94. A lay person cannot hold in free alms: And when a grant is in *frankalmoin*, no mention is to be made of all manner of service; for it is free from any temporal service, and is of the highest nature, because it is a tenure by spiritual service. *Litt.* 137. None can hold in *frankalmoin* but by prescription, or by force of some grant made before the statutes of Mortmain, 7 *Ed.* 1. c. 36, and 18 *Ed.* 1. c. 1. so that the tenure cannot at this day be created, to hold of a founder and his heirs in free alms: But the King is not restrained by the statutes; nor a subject licensed or dispensed with by the King, to make such a grant, &c. 1 *Inst.* 98, 99. And if an ecclesiastical person holds lands by fealty and certain rent, the lord may at this time confirm his estate, to hold him and his successors in *frankalmoin*; for the former services are extinct, and nothing is reserved but that he should hold of him, which he did before; whereby this change and alteration is not within the *Stat.* 18 *Ed.* 1. of *quia emptores terrarum*. *Litt.* 540. 1 *Inst.* 99, 306.

Tenure in *frankalmoin* is incident to the inheritable blood of the donor or founder; except in case of the King, who may grant this tenure to hold of him and his successors. *Litt.* 135. And the reason why a grant in *frankalmoin*, since the *Stat.* 18 *Ed.* 1. is void, except in the case of the King, &c. is because none can hold land by this tenure, but of the donor; whereas the statute enjoins, that it be held of the Chief Lord, by the same service by which the feoffor held it; though the King may grant away any estate, and reserve the tenure to himself. 1 *Inst.* 99, 223. If any person that holds lands or tenements in *frankalmoin*, make any failure in doing such divine service as they ought, the lord may make complaint of it to the ordinary or visitor; which is the King, if he be founder; or a subject where he was appointed visitor upon the foundation; and the ordinary, &c. may punish the negligence, according to the ecclesiastical laws. *Litt.* 136. 1 *Inst.* 96. Also for neglect in performing divine service in certain, the lord may distrain: But *frankalmoin* is said to be held by service uncertain; and where the tenure is tied to certain services, as to read prayers every Friday, &c. this is not *frankalmoin*, but tenure by divine service; it is lands given in alms, but not in free alms. *Britton*, c. 66. The tenure by *frankalmoin* is an ancient tenure, chiefly to be met with in grants to

religious houses, bishops, deans, colleges, &c. and is become out of use.

Frank-Chase, Is a liberty of free chase; by which all persons that have lands within the compass thereof, are prohibited to cut down any wood, &c. without the view of the forester, though it be in their own demesnes. *Crompt. Juris.* 187.

Franked-Letters. See the *Stat.* 4 *Geo.* 3. c. 24. Previous to that statute, the annual amount of franked letters gradually increased from 23,600 l. in the year 1715 to 170,700 l. in the year 1763. *Com. Journ.* 28 Mar. 1764. *Black. Com.* 1 *V.* 322.

Frank-fee, Is where freehold lands are held exempted from all services, but not from homage. In the register of writs, we find that is *frank-free*, which a man holds at the Common law, to him and his heirs; and not by such service, as is required in ancient demesne, according to the custom of the manor; And that the lands in the hand of King Edward the Confessor, at the making of the book of *Domesday*, were ancient demesne, and all the rest *frank-fee*; wherewith Fitzherbert agrees. *Reg. Orig.* 12. *F. N. B.* 161. And the author of the *Terms of the Law* defines a *free-fee* to be a tenure pleadable at the Common law; and not in ancient demesne. *Feudum Francum est, pro quo nullum servitium prestatum domino*. *Pachincus*, lib. 7. c. 39.

Frank-ferm, Was when lands or tenements were changed in the nature of the fee by feoffment, &c. out of knight service, for certain yearly services. *Britton*, c. 66. See *Fee farm*.

Frank Law, (*Libera Lex*) Is applied to the benefit of the free and Common law of the land. You may find what it is by the contrary, from *Crompton* in his *Justice of Peace*; where he says, he that for any offence loseth his *frank-law*, falls into these mischiefs, viz. He may never be impannelled upon any jury or assize; or be permitted to give any testimony: If he hath any thing to do in the King's courts, he must not attend them in person, but appoint his attorney therein for him: And his lands shall be estranged, and his body committed to prison, &c. *Crompt. Jurisd.* 156. *Lib. Ass.* 59. See *Conspiracy*.

Frank-Marriage, (*Librum Maritagium*) Is where a man seised of land in fee-simple, gives it to another with his daughter, sister, &c. in marriage; to hold to them and their heirs: And it is a tenure in special tail, growing from these words in the gift, i. e. *Sciatis, &c. me A. B. dedisse & concessisse, &c. T. B. filio meo & Annæ uxori ejus, filie, &c. in liberum maritagium unum messuagium, &c.* *Litt.* 27. *West. Symb.* par. 1. lib. 2. *feff.* 303. The effect of which words is, That they shall have the land to them and the heirs of their bodies; and shall do no services to the donor, except fealty, until the fourth degree. *Glanvil*, lib. 7. c. 18. And *Fleta* gives this reason why the heirs do no service until the fourth degree: *Ne donatorum vel eorum heredes per homagii receptionem a reversione repellantur*. And why in the fourth descent and downward, they shall do services to the donor; *quia in quarto gradu vehementer presumitur, quod terra est pro defuncti heredum donatorum reversione*. *Fleta*, lib. 3. c. 11. All this appears in *Bracton*, lib. 2. c. 7. where it is said, that lands in *frank-marriage* are *quæta & libera ab omni seculari servitio, &c. usque ad tertium heredem, & usque ad quartum gradum*.

Also *Bracton* divides marriage into *librum maritagium* and *maritagium servitio obligatum*; which last was where lands were given in marriage, with a reservation of the services to the donor, which the donee and his heirs were bound to perform for ever; but neither he, or the next two heirs, were obliged to do homage, which was to be done when it came to the fourth degree, and then, and not before, were required to be performed both services and homage. *Bract.* lib. 2. Lands given by one man to another with a wife in *frank-marriage*, amounts by implication to a gift in tail; which in this case may be created without the words *heirs* or *body*. *Litt.* 17. *Wood's Inst.* 120. A gift in *frank-marriage* might be made as well after as before marriage: And such a gift was a fee-simple before the statute of *W. 2.* but since, it is usually

usually a fee-tail: These gifts were common in former times, whereon questions in law did arise; but are now disused. 2 *Nelf. Abr.* 888.

Frank-pledge, (*Franci plegium*, from the French *Franc*, i. e. Liber, and *pledge*, *sidejussor*) Signifies a *pledge* or surety for the behaviour of *freemen*; it being the ancient custom of this kingdom, borrowed from the *Lombards*, that for the preservation of the publick peace, every free-born man at the age of fourteen, (religious persons, clerks, &c. excepted) should give security for his truth towards the King and his subjects, or be committed to prison; whereupon a certain number of neighbours, usually became bound one for another, to see each man of their *pledge* forth-coming at all times, or to answer the transgression done by any gone away: And whenever any one offended, it was forthwith inquired in what *pledge* he was, and then those of that *pledge* either produced the offender within one and thirty days, or satisfied for his offence. This was called *frank-pledge*; and this custom was so kept, that the sheriffs at every county-court, did from time to time take the oaths of young persons as they grew to fourteen years of age, and see that they were settled in one *decennary* or other; whereby this branch of the sheriff's authority was called *visus franci plegii*, or *view of frank-pledge*. At this day no man ordinarily giveth other security for the keeping of the peace, than his own oath; so that none answereth for the transgression of another, but every person for himself. 4 *Inst.* 78. Living under *frank-pledge* has been termed living under *law*, &c. See the statute of *view of frank-pledge*, 18 Ed. 2. And *court-leet*, *decimer*, &c. and *Black. Com.* 1 *K. 113.* 4 *V.* 249, 270.

Frank-Tenement, A possession of *freehold* lands and tenements. See *Freehold*.

Fraxinetum, A corruption of *fraxinetum*, is taken for a wood or woody ground, where *albes* grow. 1 *Inst.* 4.

Frateria, A fraternity, brotherhood or society of religious persons, who were bound to pray for the good health and life, &c. of their living brethren, and the souls of those that were dead: in the statutes of the cathedral church of *St. Paul* in *London*, collected by *Ralph Baldock*, Dean, 1295, there is one chapter *de frateria beneficiorum ecclesie S. Pauli*, &c.

Fraternities, Of places in respect to a trade or mystery. *Vide Corporation*.

Frater nutricius, Used in ancient deeds for a bastard brother. *Malmsh.*

Fratres conjurati, Are sworn brothers or companions; sometimes those were so called who were sworn to defend the King against his enemies. *Hoveden*, p. 445. *Leg. W. 1.* — *Præcipimus ut omnes liberi homines sint fratres conjurati ad monarchiam nostram ad regnum nostrum contra inimicos pro posse suo defendendum.* *Leg. Ed. 1.* c. 35.

Fratres pyes, Were certain friers, wearing black and white garments; of whom mention is made by *Walsingham*, p. 124.

Fratriagium, Is a younger brother's inheritance; and whatever the sons or brothers possess of the estate of the father, they enjoy it *rations fratriagii*, and are to do homage to the elder brother for it, who is bound to do homage for the whole to the Superior lord. *Brass. lib.* 2. c. 35.

Fraud, (*Fraus*) Is deceit in grants and conveyances of lands, and bargains and sales of goods, &c. to the damage of another person. *N. N. B.* 98. Under this head may be considered,

I. What acts are fraudulent at Common law, and in equity.

II. What acts are fraudulent by statute.

I. What acts are fraudulent at Common law, and in equity.

It may be laid down as a general rule, that without the express provision of any act of parliament, all deceitful practices in defrauding or endeavouring to defraud another of his known right, by means of some artful device, contrary to the plain rules of common honesty, are condemned by the Common law, and punishable ac-

cording to the heinousness of the offence. *Co. Litt.* 3. b. *Dyer* 295. Such as causing an illiterate person to execute a deed to his prejudice, by reading of it over to him in words different from those in which it was written, &c. 1 *Sid.* 312, 431.

Also it is a rule, that a wrongful manner of executing a thing shall avoid a matter that might have been executed lawfully. *Co. Litt.* 35. 41 *Aff.* 28. 44 *Aff.* 29. 1 *Rel. Abr.* 420, 549. *Co. Lit.* 357. *Popb.* 64, 100.

As to frauds in contracts and dealings, the Common law subjects the wrong-doer, in several instances, to an action on the case; as a person having the possession of goods sells them to another, affirming them to be his own, when in truth they are another's, an action on the case lies. 1 *Rel. Abr.* 90. *Cra. Jac.* 474. But if *A.* possessed of term for years, offers to sell it to *B.* and says, that a stranger would have given him twenty pounds for this term, by which means *B.* buys it, tho' in truth *A.* was never offered twenty pounds, an action on the case lies, tho' *B.* is hereby deceived in the value. 1 *Rel. Abr.* 91, 101. 1 *Sid.* 146. *Tylr.* 20. *S. P.*

Contra, if on a treaty for the purchase of a house, the defendant affirms the rent to be more than it is, whereby the plaintiff is induced to give more than the house is worth. 1 *Salk.* 211. 1 *Lev.* 102. 1 *Sid.* 146. 1 *Keb.* 510, 518, 522. *S. P.* adjudged. And see *Kel.* 24, 81. 1 *Shrw.* 50, 51.

All frauds and deceits, for which there is no remedy by the ordinary course of law, are properly cognisable in equity; and it is admitted, that the matters of fraud were one of the chief branches to which the jurisdiction of Chancery was originally confined. 4 *Inst.* 84. It would be endless to enumerate the several cases, wherein relief has been given against frauds: but the following instances are too material to be omitted.

A. being tenant in tail, remainder to his brother *B.* in tail, *A.* not knowing of the intail, makes a settlement on his wife for life for her jointure, without levying a fine, or suffering a recovery, which *B.* who knew of the intail ingrosses, but does not mention any thing of the intail, because, as he confessed in his answer, if he had spoke any thing of it, his brother, by a recovery, might have cut off the remainder, and barred him; and altho' after *A.*'s death, *B.* recovered in ejectment against the widow by force of the intail; yet she was relieved in Chancery, and a perpetual injunction granted for this fraud in *B.* in concealing the intail, which if it had been disclosed, the settlement might have been made good by a recovery. *Preced. Chanc.* 35. *Raw v. Potts.* 2 *Vern.* 239. *S. C.* and affirmed in the House of Lords.

So where a mother being absolute owner of a term, the same being limited to her in tail, is present at a treaty for her son's marriage, and hears her son declare, that the term was to come to him at his mother's death, and is a witness to the deed, whereby the reversion of the term is settled on the issue of the marriage after the mother's death, and she was compelled in equity to make good the settlement. 2 *Vern.* 150.

If *A.* has a prior incumbrance on an estate, and is a witness to a subsequent mortgage, but does not disclose his own incumbrance; this is such a fraud in him, for which his incumbrance shall be postponed. 2 *Vern.* 151. *Clare and Earl of Bedford*, cited to have been decreed. And see 2 *Vern.* 554. *Ibbotson v. Rhodes.*

So if *A.* having a mortgage on a leasehold estate, lends the mortgagee deed to the mortgagor, with an intent to borrow more money; that is such a fraud in the mortgagee, for which his mortgage shall be postponed to the subsequent incumbrance. 2 *Vern.* 726. *Peter and Russell.* *Abr. Bq.* 321. *S. C.*

If a copyholder, by his will intending to give the greatest part of his estate to his godson, and the other part to his wife, is persuaded by the wife to nominate her to the whole, on a promise that she would give the godson the part designed for him; it will be decreed against the wife on the point of fraud, though there was no memorandum thereof in writing pursuant to the statute of frauds and perjuries. *Preced. Chanc.* 3. *Devonish and Baines.* And see similar case as to father, elder son, and younger children, *Preced. Chanc.* 4. *Chamberlain's case.*

So where the defendant, on a treaty of marriage for his daughter with the plaintiff, signed a writing comprising the terms of the agreement, and afterward designing to elude the force thereof, and get loose from his agreement, ordered his daughter to put on a good humour, and get the plaintiff to deliver up that writing, and then marry him, which she accordingly did, and the defendant stood by at a corner of a street to see them go by to be married; and the plaintiff was relieved on the point of fraud. *Abr. Eq. 20. Halpeny and Mallet. 2 Vern. 373. S. C.*

If a security be obtained from a person by fraud and practice, upon a pretence of a demand that is fictitious, it will be relieved against in equity: *2 Vern. 123.*

Where an agreement for a purchase was obtained from a woman of ninety years of age, and several suspicious circumstances appearing, the court would neither decree it to be carried into execution against the heir at law, nor to be delivered in a cross bill for that purpose, but left the parties their remedy at law. *2 Vern. 632. Green v. Wood.*

There are likewise several instances, where a parol agreement intended to be reduced into writing, but prevented by fraud, has been decreed in equity, notwithstanding the statute of frauds and perjuries; as where upon a marriage treaty, instructions were given by the husband to draw a settlement, which he privately countermanded, and afterwards drew in the woman by persuasions and assurances of such settlement to marry him; and it was decreed, that he should make good the settlement. *Abr. Eq. 19. and see tit. Agreement.*

So where a parol agreement was concerning the lending of money on a mortgage, and the covenants proposed were an absolute deed from the mortgagor, and a deed of defeasance from the mortgagee, and after the mortgagee had got the deed of conveyance, he refused to execute the defeasance; and it was decreed against him on the point of fraud. *Abr. Eq. 20. See Action on the Case, Deceit.*

II. As to frauds by statute.

Fraudulent assurances of lands or goods to deceive creditors, shall be void; and the creditors shall have execution thereof. *50 E. 3. c. 6. By the Stat. 13 Eliz. c. 5.* All fraudulent conveyances made of lands, goods or chattels, to set aside or avoid debts, as to creditors, shall be void; and by *27 Eliz. c. 4.* Conveyances and assurances of land made to defraud purchasers, as to such purchasers they are declared void: and persons justifying or putting such grants, &c. in use as good, and bona fide made, shall forfeit a year's value of the lands, and the whole value of goods and chattels, and be also imprisoned: where lands are conveyed with clause of revocation, &c. and afterwards sold for valuable consideration, the first conveyance shall be void against the purchaser; but this is not to extend to mortgages made bona fide.

If a man seised of land in fee, make a feoffment of it to divers uses, with remainders over, &c. and with power of revocation by writing under hand and seal; here if he for good consideration doth enter into a recognisance, the land shall be charged with the same: so if A. reserves to himself power to revoke by the assent of B. and then bargains to another. *Bridg. 22. Lane 22.* And where one hath made an estate with the power of revocation; and after with intent to deceive a purchaser he makes a feoffment, &c. to a stranger to extinguish the power, and then sells the land for a valuable consideration; in this case both the conveyances shall be fraudulent as to the purchaser. *2 Rep. 83.*

The statute of frauds, *29 Car. 2. c. 3.* requires that contracts and agreements, leases and devises of lands, &c. shall be put in writing. And devises of lands, rents, &c. are deemed fraudulent and void, against creditors upon bonds, or other specialties. *3 & 4 W. & M. c. 14.* Also judgments against purchasers of lands for a valuable consideration, shall be deemed judgments only from the signing, &c. *29 Car. 2. c. 3. The Stat. 13 Eliz. c. 5.* makes a fraudulent deed or grant of goods, &c. void against creditors, but not against the party himself, his executors or administrators, for against them

it remains good: and a conveyance, if made of lands by fraud, is not void by the statute against all persons; but only against those who afterwards come to the land upon valuable consideration. *Cro. El. 445. Cro. Jac. 271.*

Grants and conveyances are to be on good consideration, and bona fide, or they will be fraudulent; and a grant bona fide is made without any trust, &c. A grant upon good consideration, except it be also bona fide, is not within the proviso of the act *13 Eliz. c. 5. 3 Rep. 81.* A valuable consideration is money, marriage, &c. and not natural affection, &c. A man made a lease for twenty-one years, in trust for his daughter till marriage; and if she married with his consent, then to her during the term; this till marriage, has been held fraudulent as to a purchaser: but after marriage it is good, because marriage is an advancement to the daughter, and taking effect made it upon valuable consideration, which a marriage is always taken to be, and the husband was drawn in by this conveyance to marry her. *1 Sid. 133.*

It has been adjudged, that if a father makes a feoffment to another, for the advancement of daughters, or his younger sons, or for payment of his debts; and afterwards incoffs his eldest son or heir, that is not fraud or collusion within the statute, for he is bound in law to make provision for his children: but where there is a grandfather, father, and two sons, and the grandfather (living the father) conveys his land to either of the sons, this is out of the Stat. *32 H. 8. c. 1.* because it is not a common thing so to do, and the father ought to have the immediate care of his children; though if he is dead, then it belongeth to the grandfather. *6 Rep. 76.* If a man levy a fine to the use of himself for life, remainder to his son in tail, and after sells the fee-simple to another, he as a purchaser shall avoid this conveyance upon the Stat. *27 Eliz. c. 4.* because it was voluntary, and therefore fraudulent; so it had been if he had settled the remainder on his wife, unless there had been a consideration on precedent marriage. *Sid. 133. 3 Salk. 174.*

But it was ruled by Hale Chief Justice, that a deed may be voluntary, and not fraudulent; as where a father having an extravagant son, settles his land so that he may not spend all; this is good, if there is no consideration of money. *1 Mod. 119.* Although every voluntary conveyance is prima facie deemed fraudulent against purchasers, yet some circumstances may alter the case: an infant promised, on his marriage, to settle his estate when he came of age, upon himself and his issue; and this was held a sufficient consideration, though an infant by law is not compellable to fulfil such promise. *2 Lev. 147.* A person, in consideration that his son is to marry the daughter of A. B. covenants to stand seised of lands to the use of his son for life; and after to other sons in reversion or remainder: the uses thus limited in remainder, shall be fraudulent as to any purchaser of the land, though the first be upon good consideration. And although the consideration of marriage is good; if there be a power to revoke annexed to the deed, it will be void as to purchasers. *Lane 22.*

If a man after marriage, make a voluntary conveyance of land for a jointure, or maintenance of his wife, and afterwards sell the land for money, to one that hath no notice of it; in this case the conveyance, made to the use of the wife, shall be said to be fraudulent: and yet if a person upon a marriage, before the marriage, and in consideration thereof, or after marriage, in consideration of a portion given, or money paid, convey his land to the use of his wife, &c. it will not be a fraudulent deed. *2 Cro. 158.* A feme covert joins with her husband in the alienation of her jointure, and hath a new deed of settlement of other lands dated the same day in lieu thereof, without articles or agreement precedent to this second settlement; this is not fraudulent against a purchaser, though the lands in the new settlement are more in value than those in the first; for the old settlement being destroyed, and a new one made on the same day, it shall be presumed that there was an agreement for it. *2 Lev. 70, 71.*

The husband who married a wife an inheritrix, promised, that if she would join with him in a sale of her land, and let him have the money to pay his debts, that

he would leave her 400*l.* at his death; about six months after the lands were sold, he gave bond to a stranger to leave his wife the 400*l.* And it was adjudged, that this was not *fraudulent* *quoad* creditors, but good against them 2 *Lev.* 148. A person makes a voluntary conveyance, and then mortgages the same land, and the first deed is upon a trial found *fraudulent*; then he to whom the deed was made exhibited his bill in *equity* to redeem the mortgage; and it was held, that though the first deed was *fraudulent quoad* the mortgage money, yet it was good to pass the equity of redemption. *Chanc. Rep.* 59.

Where a lease is made with a *proviso* that if the lessor pays 10*s.* the lease shall be void; because 10*s.* is not the value of the lease and land, but only limited as a power of revocation, it is *fraudulent* as to a purchaser. *Cro. Jac.* 455. And if a man makes an assignment of his lease, and yet keeps possession of the lands, the deed of assignment will be judged *fraudulent*. In *Chancery* it has been decreed, that if a man conveys his land to friends in trust, to the use of his children, &c. to defraud a purchaser, the trust shall go in *equity* to the purchaser; also it shall be liable for debts, to satisfy the same. *Tatbil.* 43, 44. A husband assigned a term of his wife's, in trust for his wife; and it was held *fraudulent* against purchasers. *Chan. Rep.* 325.

By the *Common law*, an estate made by *fraud*, shall be avoided only by him who hath a former right, title, interest, debt or demand. 3 *Rep.* 83. If one indebted do really sell lands, though to avoid payment of debts; if the vendee be not privy to the intent, the sale to him is good: for as to the vendee, there is no *fraud* in the case. *Micb.* 24 *Car. B. R.* A man gives his goods to his son, they are nevertheless liable as to his creditors; but if he gives them to one of his creditors, without any trust or covin, it shall not be *fraudulent* to make him liable to other creditors. 3 *Salk.* 174.

If a man is indicted; and give away his goods to prevent a forfeiture, the King shall have them upon an attainder or conviction; though 'tis otherwise if he sell them for a good consideration to one who had no notice of the indictment. *Ibid.* If tenant for life commit a forfeiture, and he in the reversion enters, this shall be as a *fraudulent* conveyance with respect to creditors. *Vent.* 257. *Fraudulent* gifts, or grants of goods to defraud the lord of his heriot, shall be void; and the value of the goods forfeited. 13 *Elix.* 5. Gifts made in secret are liable to suspicion of *fraud*: a general gift of all a man's goods may be reasonably suspected to be *fraudulent*, even tho' there be a true debt owing to the party to whom made. 3 *Rep.* 80, 81. And the several marks or badges of *fraud*, in a gift or grant of goods are, if it be general, without exception of some things of necessity; if the donor still possesses and uses the goods; if the deed be secretly made, if there be a trust between the parties; or if it be made pending the action. 3 *Rep.* 80, &c.

And where a person is party to a *fraud*, all that follows by reason of that *fraud* shall be said to be done by him. *Cro. Jac.* 469. But when *fraud* is not expressly averred, it shall not be presumed; nor shall the court adjudge it to be so, till the matter is found by jury. 10 *Rep.* 56. A poor man was drawn in to sell an estate, at a great under-value; but no *fraud* appearing, tho' the purchase was not a fair bargain, the seller could not be relieved in equity, to set it aside. *Preced. Canc.* 206. The Chancery may decree a conveyance to be *fraudulent*, merely for being voluntary, and without any trial at law; yet it has been insisted, that *fraud* or not, was triable only by a jury. *Ibid.* 14, 15.

A will, as well as a deed, shall be set aside in Chancery for *fraud* and circumvention. *Ibid.* 123. *Fraudulent* conveyances to multiply votes at election of knights of the shire, shall be taken against the persons making them as free and absolute; and all securities for redeeming and restoring, &c. to be void. *Stat.* 10 *Ann.* c. 23. A presentation to a benefice; or administration of goods, obtained by *fraud*, are void; and so is sale of goods by *fraud*, altho' in open market, &c. Where a *fraudulent* deed or conveyance is assigned upon a valuable consideration, the *fraud* is purged thereby. 1 *Ld. Raym.* 88.

Gross frauds are punishable by way of indictment or information; such as playing with false dice, causing an illiterate person to execute a deed to his prejudice, levying a fine in another's name, &c. and that for these and such like offences the party may be punished not only with fine and imprisonment, but also with such farther infamous punishment, as the judges in their discretion shall think proper. *Cro. Jac.* 497. 2 *Rel. Abr.* 78. 2 *Rel. Rep.* 107. 1 *Keb.* 849. 6 *Mod.* 42. 1 *Sid.* 312, 431. *Noy* 99, 103. *Moor* 630. *Cro. Eliz.* 531. 1 *Mod.* 46. 2 *Jen.* 64. 6 *Mod.* 105. 1 *Salk.* 379.

By the 33 *H. 8. cap.* 1. it is enacted, "That if any person or persons shall falsely and deceitfully obtain or get into his or their hands or possession, any money, goods, chattels, jewels, or other things of any other person or persons, by colour and means of any privy false token, or counterfeit letter, made in another man's name, to a special friend or acquaintance, for the obtaining of money, &c. from such person, and shall be thereof convicted; every such offender shall suffer such punishment by imprisonment, setting upon the pillory, or otherwise, as shall be appointed by those before whom he shall be so convicted". And by 30 *Geo.* 2. c. 24. (commonly called the statute of false pretences) the obtaining goods, &c. by false pretences, may be punished with transportation.

Frauds and Perjuries. See the *Stat.* 29 *Car.* 2. c. 3. and *Wilson*, par. 1. 118, 227, 305, 313, 320. par. 2. 26, 94. See farther as to civil fraud, where cognizable, *Black. Com.* 3 *V.* 431, 437, 439. As to criminal, id. 4 *V.* 158. And as to the statute of frauds and perjuries, c. 29 *Car.* 2. c. 3. *Black. Com.* 3 *V.* 157. 4 *V.* 432. As to *fraudulent devises*, id. 2 *V.* 378.

Fraus Legis. If a person having no manner of title to a house, procure an affidavit of the service of a declaration in ejectment, and thereupon gets judgment; and by virtue of a writ of *hab. fac. possessionem* turns the owner out of possession of the house, and seizes and converts the goods therein to his own use, he may be punished as a felon; because he used the process of the law with a felonious purpose, *in fraudem legis*. *Raym.* 276. *Sid.* 254.

Fraxinetum, A wood of ash trees. *Domesday.*

Fredum, Was a composition made by a criminal, to be freed from prosecution, of which the third part was paid into the *Exchequer*. This is fully explained in *Robertson's Hist. Emp. C. V.* 1 *V.* 300, &c. Formerly compositions were paid for crimes in general, particularly for murder. The magistrate was to determine the composition, and protect the offender against the violence of resentment. For that protection the offender paid a sum of money, which was called *fredum*. See *Montesquieu de l'Esprit des Loix*, l. 30. c. 20, &c. See *Dilatatura*.

Fredumit, A liberty to hold courts, and take up amerancements, &c. *Cowel.*

Free-Bench, (*francus bancus*, i. e. *sedes libera*) Is that estate in copyhold lands which the wife hath on the death of her husband for her dower, according to the custom of the manor: but it is said the wife ought to be espoused a virgin; and is to hold the land only so long as the lives sole and continent. *Kitch.* 102. Of this *free-bench* several manors have several customs; and *Fitzherbert* calls it a *custom*, whereby in certain cities the wife shall have the whole lands of the husband for her dower, &c. *F. N. B.* 150. In the manors of *East and West Eubourne* in the county of *Berks*, and the manor of *Torre* in *Devonshire*, and other parts of the *West of England*, there is a custom, that when a copyhold tenant dies, his widow shall have her *free-bench* in all his customary lands, *dum sola & casta fuerit*; but if she commits incontinency, she forfeits her estate: yet nevertheless, on her coming into the court of the manor, riding backwards on a black ram, with his tail in her hand, and saying the words following, the steward is bound by the custom to re-admit her to her *free-bench*; the words are these, .

Here I am,
Riding upon a black ram,
Like a whore as I am:

*And for my crincum crancum,
I have lost my bincum bancum;
And for my tail's game,
Have done this worldly frame;
Therefore pray, Mr. Steward, let me have my land again.*
Cowel.

This is a kind of *penance* among jocular tenures and customs, to purge the offence. See *Black Com.* 2 *V.* 122.

Free-booster. Signifies a person who fights without pay, in hopes of getting some booty.

Freehold, (francherdom) Is ground claimed in some places more or less, beyond, or without the fence: it is said to contain two foot and a half, in *Man. Aug. Tm.* 2. 2. 141.

Free-borough-men. Were such great men as did not engage like the *frank-pledge* men for their decennium. See *Friburgh.*

Free-Chapel, (libera capella) A chapel so called, because it is exempt from the jurisdiction of the diocesan. Those *chapels* are properly *free chapels* which are of the King's foundation, and by him exempted from the ordinary's visitation: also *chapels* founded within a parish for the service of God, by the devotion and liberality of pious men, over and above the mother-church, and endowed with maintenance by the founders, which were *free* for the inhabitants of the parish to come to, were therefore called *free-chapels*. *Reg. Orig.* 40, 41. The *free-chapel* of *St. Martin la Grand* is mentioned in the *Stat.* 3 *Ed.* 4. c. 4. as are others likewise by ancient statutes: but these *chapels* were given to the King, with the *chantries*, &c. 1 *Ed.* 6. c. 14.

Freehold, (liberum tenementum) Is that land or tenement which a man holds in fee-simple, fee-tail, or for term of life. *Bract. lib.* 2. c. 9. And is described to be of two sorts: *freehold in deed*, and *freehold in law*; the first being the real possession of lands, &c. in fee, or for life; the other, the right a person hath to such lands or tenements, before his entry or seizure. *Freehold* is also extended to *offices*, which a man holds either in fee, or during life: and in the *Register of Writs* it is said, that he who holds land upon an execution of a *statute merchant* until he is satisfied the debt, *tenet ut liberum tenementum sibi et assignatis suis*, and the same of a tenant by *eligit*; but such tenants are not *freeholders*, only as *freeholders* for their time, till they have received the profits of the land to the value of their debt. *Reg. Judic.* 68, 73. A lease for ninety-nine years, &c. determinable upon a life or lives, is not a lease for life to make a *freehold*, but a lease for years, or chattel determinable upon life or lives; and an estate for one thousand years is not a *freehold*, or of so high a nature as an estate for life. *Co. Lit.* 6. He that hath an estate for the term of his own life, or the life of another, hath a *freehold*, and no other of a less estate; tho' they of a greater estate have a *freehold*, as tenant in fee, &c. *Litt.* 57.

When a man pleads *liberum tenementum* generally, it shall be intended that he hath an estate in fee; and not a base estate for life. *Cro. Eliz.* 87. An estate of *freehold* cannot by the *Common law* commence *in futuro*; but it may take presently in possession, reversion, or remainder. 5 *Rep.* 92. See *Black Com.* 2 *V.* 144, 165. A man made a deed of gift to his son and his heirs, of lands after his death, and no livery was made; now if there had been livery, it had been void, because a *freehold* cannot commence *in futuro*; and it has been held, that it shall not enure as a covenant to stand seised, by reason of the word *give*, by which was intended a transmutation of the estate, and not to pass it by way of use. *March Rep.* 50, 51. Whatsoever is part of, or fixed to the *freehold* goes to the heir; and glass windows, washbasin, &c. affixed to the house are parcel of the house, and cannot be removed by tenants. 4 *Rep.* 61, 64. But it hath been adjudged, that if things for trade, &c. are fixed to the *freehold* by the lessee, he may take them down and remove them, so as he do it before the end of the term, and he do not thereby injure the *freehold*. 1 *Salk.* 368.

Any thing fixed to the *freehold* may not be taken in distress for rent or in execution, &c. But it is not felony at *Common law*, only trespass, to steal or take any thing annexed to the *freehold*; such as lead on a church, or house,

corn or grass growing on the ground, apples on a tree, &c. Though if they are severed from the *freehold*, whether by the owner or a thief; if he sever them at one time, and take them away at another, it is larceny to take them. 12 *Aff.* 32. 1 *Hawk.* 93. And to steal lead on houses, &c. is made felony, by a late statute. 4 *Geo.* 2. c. 32.

The statute of *Magna Chart.* c. 29. ordains, "that no person shall be disseised of his *freehold*, &c. but by judgment of his peers, or according to the law of the land;" which doth not only relate to common disseisins, but the King may not otherwise seize into his hands the *freehold* of the subject. *Wood's Inst.* 614. None shall distrain any *freeholders* to answer for their *freeholds*, or any thing touching the same, without the King's writ. *Stat.* 52 *H.* 3. c. 22. Nor shall any person be compelled to answer for his *freehold*, before any lord of a manor, &c. 15 *R.* 2. c. 12. *Freehold* estates, of certain values, are required by statutes to qualify jurors; electors of knights of the shire in parliament, &c.

Freeholders. Are such as hold any *freehold* estate. By the ancient laws of *Scotland*, *freeholders* were called *militar*; and *freehold*, in this kingdom, hath been sometimes taken in opposition to *villanage*, it being lands in the hands of the gentry and better sort of tenants, by certain tenure, who were always *freeholders*, contrary to what was in the possession of the inferior people, held at the will of the lord. *Lambard.*

Freeman, (liber homo) Is one distinguished from a slave, that is born or made free; and these have divers privileges beyond others. The distinction of a freeman from a vassal under the feudal policy *liber homo* was commonly opposed to *vassus* or *vassallus*; the former denoting an *allodial proprietor*; the latter, one who held of a superior. These *free* men were under an obligation to serve the *state*, and this duty was considered so sacred, that freemen were prohibited from entering into holy orders, unless they had obtained the consent of the sovereign. *Robert. Hist. Emp. G. V.* 2 *V.* 216. See *London.*

Freight, (Fr. fra) Signifies the money paid for carriage of goods by sea; or in a larger sense, it is taken for the cargo, or burthen of the ship. Ships are freighted either by the ton, or by the great; and in respect of time, the freight is agreed for, at so much *per month*, or at a certain sum for the whole voyage. If a ship freighted by the great, happens to be cast away, the freight is lost; but if a merchant agrees by the ton, or at so much for every piece of commodities, and by any accident the ship is cast away, if part of the goods is saved, it is said she ought to be answered her freight *pro rata*; and when a ship is insured and such a misfortune happens, the insured commonly transfer those goods over to the assurers, towards a satisfaction of what they make good. *Lex Mercat. or Merchant's Companion.* 79.

If freight is agreed for the lading and unlading of cattle at such a port, and some die before the ship arrives there, the whole freight shall be paid for the living and the dead; but if the agreement be for transporting them, freight shall be only paid for the living: it is the same of slaves. *Ibid.* 85. The lading of a ship, in construction of law, is bound for the freight; the freight being in point of payment preferred before any other debts to which the goods so laden are liable, tho' such debts as to time were precedent to the freight; and actions touching the same are construed favourably for the ship and owners; for if four part-owners of a ship, belonging to a ship, settle their accounts with the freighters, and receive their due, yet the fifth man may sue singly by himself without joining with the rest, by the *Common law*, and the *Law Marine*. *Hill.* 27 *Car.* 2. *B. R.* If part of the lading be on ship-board, and through some misfortune happening to the merchant, he has not his full lading aboard at the time agreed, the master shall have freight by way of damage, for the time those goods were on board; and is at his liberty to contract with another, lest he lose his season and voyage; and where a ship is not ready to take in or the merchant not ready to lade his goods aboard, the parties are not only in at liberty, but the person damaged may bring an action against the other and recover his damages sustained. *Lex Rep.*

If the freightor of a ship shall lade on board prohibited goods, or unlawful merchandise, whereby the ship is detained,

tained, or the voyage impeded; he shall answer the freight agreed for. *Style* 220. And when goods are laden aboard and the ship hath broke ground, the merchant may not afterwards unlade them; for if he then changes his mind, and resolves not to venture, but will unlade again, by the marine law the freight becomes due. If a master freights out his ship, and afterwards secretly takes in good unknown to the first laders, by the law marine he forfeits his freight: and if a master of a ship shall put into any other port than what the ship was freighted to, he shall answer damages to the merchant; unless he is forced in by storm, enemies, or pirates; and in that case he is obliged to sail to the port agreed at his own expence. *Leg. Oleron*. A ship is freighted out and in, there shall be no freight due till the voyage is performed; so that if the ship be cast away, coming home, the freight outwards as well as inwards, are both gone. 1 *Brownl.* 21. See *Charter-party*.

French. King William I. called *The Conqueror*, being a native of *Normandy in France*, caused the laws of this realm, in his time, to be written and pleaded in the *French language*. 3 *Rep.* 17. But by the *Stat.* 37 *Ed.* 3. 15. All pleas that are pleaded in any of the King's courts shall be pleaded in the *English tongue*; tho' appeals were still to be arraigned, and the plea of the defendant read in *French* in the same manner as anciently. 2 *Hawk.* P. C. 308. See *vide Stat.* 4 *Geo.* 2. c. 26.

Frenchman. Heretofore a term for every stranger or outlandishman. *Bract.* lib. 3. tract. 2. c. 15. See *Francigena*.

Friendship. Comes from the Sax. *freond*, i. e. amicus, & *wise multa*, and is a mulel exacted of him who harboured his outlawed friend: *Blount*. But see *Fleta*, lib. 1. c. 7.

Fresca. Fresh water, or rain, and land floods. *Chart. Antiq.* in *Sumner of Gavelkind*, p. 132.

Fresh Distress. (*frisca diffissina*, from the Fr. *frain*, i. e. recens & *diffissir*, viz. *possessione ejicere*) Signifies that *diffissin*, which a man might formerly seek to defeat of himself, and by his own power, without resorting to the King, or the law; as where it was not above fifteen days old, or of some other short continuance. *Briston*, c. 5. Of this, *Bracton* writes at large, concluding it to be arbitrary. *Lib.* 4. c. 5.

Fresh Fine. Is that which was levied within a year past: it is mentioned in the statute of *Wesim.* 2. 13 *Ed.* 1. c. 45.

Fresh Force. (*frisca fortia*) Is a force newly done in any city, borough, &c. And if a person be disseised of any lands or tenements within such a city, or borough, he who hath a right to the land, by the usage and custom of the said city, &c. may bring his *assise*, or bill of *fresh force*, within forty days after the *force* committed; and recover the lands. *F. N. B.* 7. *Old Nat. Br.* 4. This remedy may be also had where any man is deformed of any lands after the death of his ancestor, to whom he is heir; or after the death of tenant for life, or in tail, in dower, &c. within forty days after the title accrued; and in a bill of *fresh force*, the plaintiff or demandant shall make protestation to sue in the nature of what writ he will, as *assise of mortdancester*, of *novel diffissin*, *intrusion*, &c. *New Nat. Br.* 15. The *assise* or bill of *fresh force* is sued out without any writ from the Chancery; but after the forty days, there is to be a writ out of Chancery, directed to the mayor, &c. But ejectments are now in use for recovering the possession of lands, &c.

Fresh Suit, or Pursuit. (*Recens insecutio*) Is such a present and earnest following of an offender, where a robbery is committed, as never ceases from the time of the offence done or discovered, until he be apprehended. *Vide post*. And the benefit of a pursuit of a felon is, that the party pursuing shall have his goods restored to him; which otherwise are forfeited to the King. *Staundf. Pl. Cor.* lib. 3. c. 10. and 12. When an offender is thus apprehended, and indicted, upon which he is convicted, the party robbed shall have restitution of his goods; and tho' the party robbed do not apprehend the thief presently, but that it be some time after the robbery, if the party did what in him lay to take the offender; and notwithstanding in such case he happen to be apprehended by some other person, it shall be adjudged *fresh pursuit*. *Terms de Ley*.

It has been anciently holden, that to make a *fresh suit*, the party ought to make *hue and cry* with all convenient speed, and to have taken the offender himself, &c. But at this day, if the party hath been guilty of no gross negligence, but hath used all reasonable care in inquiring after, pursuing, and apprehending the felon, he shall be allowed to have made sufficient *fresh suit*. 2 *Hawk.* P. C. 169. Also it is said, that the judging of *fresh suit* is in the discretion of the court, tho' it ought to be found by the jury; and the justices may, if they think fit, award restitution without making any inquisition concerning the same. *Ibid.* 169, 171. Where a gaoler immediately pursues a felon, or other prisoner, escaping from prison, it is *fresh suit*, to excuse the gaoler: and if a lord follow his *disseisin* into another's ground, on its being driven off the premises, this is called *fresh suit*; so where a tenant pursues his cattle, that escape or stray into another man's lands, &c. *Fresh suit* may be either within the view, or without; as to which, the law makes some difference: and it has been said that *fresh suit* may continue for seven years. 3 *Rep.* S. P. C.

Fretum Britannicum. Is used in our ancient writings for the *Straits* between *Dover* and *Calais*.

Fretum and Fretum. The freight of a ship, or freight money. — *Acquietari facietis fretum navium*, &c. *Clauſ.* 17 *Joh.* m. 16.

Friburgh. alias **Fritsburgh**, (*frideburgum*, from the Sax. *frid*, i. e. pax, & *berge*, fidejussor) Is the same with *frank pledge*; the one being in the time of the Saxons, and the other since the *Conquest*: of these *friburghs*, *Bracton* treats, lib. 3. tract. 2. c. 10. And they are particularly described in the laws of King *Edward*, set out by *Lambard*, fol. 143. *Fleta* likewise writes on this subject, lib. 1. cap. 47. And *Spelman* makes a difference between *friborg* and *fritsburgh*; saying the first signifies *libera securitas*, and the other *pacis securitas*. Altho' *friburghs* or *fritsburghs* were anciently required as principal pledges or sureties for their neighbours, for the keeping of the peace; yet as to great persons, they were a sufficient assurance for themselves, and their menial servants. *Skene*.

Fristoll and Fritstoll. (Sax. *frid*, pax, & *stol*, sedes) A seat, chair, or place of peace. In the charter of immunities granted to the church of *St. Peter* in *York* by *Hen.* 1. and confirmed anno 5 *H.* 7. *Fristoll* is expounded *cathedra pacis & quietudinis*, &c. And there were many such in *England*; but the most famous was at *Beverley*, which had this inscription: *hec sedes lapidea fridstoll dicitur*, i. e. *pacis cathedra, ad quam reus fugiendo pervenit, omnimodam habet securitatem*. *Camd*.

Friendless Man. Was the old Saxon word for him whom we call an outlaw; and it is for this reason, because he was, upon his expulsion from the King's protection, denied all help of friends, after certain days: *nam forsisset amicos*. *Bract.* lib. 3. tract. 2. c. 12. See *Friendawite*.

Friar. (Lat. *frater*, Fr. *frere*) The name of an order of religious persons, of which there were four principal branches, viz. 1. *Minors*, *Grey Friars*, or *Franciscans*. 2. *Augustines*. 3. *Dominicans*, or *Black Friars*. 4. *White Friars*, or *Carmelites*; of which the rest descend. 4 *H.* 7. cap. 17. *Lyndewood de Relig. Dominis*, c. 1.

Friar-observant. (*frater observans*) A branch of the *Franciscan friars*, who are *minors*, as well the *Observants* as the *Conventuals* and *Capuchins*. And they are called *Observants*, because they are not combined together in any cloister, convent, or corporation, as the *Conventuals* are; but tie themselves to observe the rules of their order more strictly than the *Conventuals*, and upon a singularity of zeal separate themselves from them, living in certain places of their own choosing. *Zach. de Rep. Eccles. de Regular.* c. 12. They are mentioned in the *Stat.* 25 *H.* 8. c. 12.

Fritling. (*From the Sax. Frith, Liber & Ling, rogenies*) Signifies a man that is free.

Frier. (Fr. *Fripter*, i. p. Interpolator) One that seours and surbishes up old clothes to sell again; a kind of broker. 1 *Jac.* 1. c. 21.

Fritous. Is taken for uncultivated ground. — *Et de communia pastura in Frisia & dominicis suis*. *Mon. Ang.* Tom. 2. p. 56.

Friste,

Fist. A term among merchants for selling goods upon credit.

Fith. (*Sax.*) A wood, from *Frid*, i. e. *Pax*; for the English Saxons held woods to be sacred, and therefore made them sanctuaries. Sir Edward Coke expounds it a plain between woods, or a lawn. *Co. Litt.* 5. Camden in his *Britan.* useth it for an arm of the sea, or a freight, between two lands, from the word *Fretum*.

Frithbrech. (*Pacis Violatio*) The breaking of the peace. *LL. Eibfred.* c. 6. See *Grithbrech*.

Frithgear. (From the *Sax.* *Frith* or *Frid*, *Pax*, & *Gear*, *Annus*) The year of jubilee, or of meeting for peace and friendship. *Soma.*

Frithgild. Is the same which we now call a *Guild-Hall*; or a company or fraternity.

Frithman. One belonging to such fraternity or company. *Blount.*

Frithmote. Is mentioned in the records of the county palatine of *Chester*: *Per Frithmote J. Stanley. Ar. clamas capere annuatim de villa de Olton, quæ est infra feodum & manerium de, &c. 10 sol. quos comites cestræ ante consecutionem chartæ præd. solabant capere. Pl. in itin. apud Cestriam.* 14 Hen. 7.

Frithske. *Frithsoken.* Signifies surety of defence; or according to *Fleta*, *libertatis habendi franci plegii; seu immunitatis locus.*

Frodmortel. *requis. Frodmortel.* (From the *Sax.* *Fro*, free, and *Mortel*, Homicidium) An immunity for committing manslaughter.—*Et concedo eis curiam suam de omnibus querelis, Et judicium suum pro Frodmortel, &c. Mon. Ang. Tom. 1. p. 173.*

Fruit. (*Stealing of.*) To rob orchards or gardens of fruit growing therein, is made felony, liable to transportation for seven years by 4 Geo. 2. c. 32.

Frumgild. (*Sax.*) Is the first payment made to the kindred of a person slain, towards the recompence of his murder.—*Prima capitis estimationis pensio vel solutio. LL. Edmund.*

Frumstol. The chief seat or mansion-house; which is called by some the *Homesal*. *Leg. Inæ.* c. 38.

Frustra terra. Waste and desert lands. *Mon. Ang. Tom. 2. p. 327.*

Frustra. (From the *Fr.* *Frustrare*) A breaking down; also a ploughing or breaking up: *Frustra domorum* is house breaking: and *Frustra terre*, new broke land. *Mon. Ang. Tom. 2. p. 394.*

Frustrum terre. Is a small piece or parcel of land, *residuum quiddam præter acras numeratas vel campum mensuratum.*—*Frustrum terre accipitur pro amplâ portione forsum a campo villæ, manerio jacenti. Domesday.*

Frustrum. A place where shrubs, or tall herbs do grow. *Mon. Ang. Tom. 3. p. 22.*

Fuage. In the reign of King Edward III. the Black Prince having *Acquiescent* granted him, laid an imposition of fuage upon the subjects of that dukedom, i. e. 12 d. for every *firr*. *Rot. Parl.* 25 Ed. 3. And it is probable, that the hearth-money imposed Anno 16 Car. 2. took its original from hence. See *Fumage*.

Fuel. By an ancient statute, if any person shall sell billet-wood or faggots for fuel under the assise, &c. on presentment thereof upon oath by six persons sworn by a justice of peace, the party may be set on the pillory in the next market town, with a faggot, &c. bound to some part of his body. For the assise of fuel, *Stat. 3 Ed. 6. c. 7.* and 43 Eliz. c. 14. None are to buy fuel but such as will burn it, or retail it to those who do; on pain to forfeit the treble value; also no person may alter any mark or assise of fuel, or the like forfeiture. *Stat. Ibid.* See *Billet*.

Fuer. (*Fr. Fuir.* Lat. *Lagere*) Is used substantively, tho' it be a verb; and is twofold, *fuer in fait*, or *in facto*, when a man doth apparently and corporally fly; and *fuer in ley*, *in lege*, when being called in the county court he appeareth not, which is *fugit* in the interpretation of the law. *Statut. Pl. Car. lib. 3. c. 22.*

Fuga Cællorum. A drove of cattle; *fugatorum carucarum*, waggoners who drive oxen, without beating or goading. *Fleta, lib. 2. c. 78.*

Fugacia. Signifies a chase, being all one with *chasea*; and *fugatis*, hunting, or the privilege to hunt. *Blount.*

Fugam fecit. Is where it is found by inquisition, that a person fled for felony, &c. And if *fugit* and felony be

found on an indictment for felony, or before the coroner, where a murder is committed, the offender shall forfeit all his goods, and the issues of his lands, till he is acquitted or pardoned: and it is held, that when one indicted of any capital crime, before justices of Oyer, &c. is acquitted at his trial, but found to have fled, he shall notwithstanding his acquittal, forfeit his goods: but not the issues of his lands, because by acquittal the land is discharged, and consequently the issues. 3 Inst. 218. *Hawk. P. C.* 27. 2 *Hawk. P. C.* 450. The party may in all cases, except that of the coroner's inquest, traverse the finding of a *fugam fecit*; and the particulars of the goods found to be forfeited, may be always traversed: also whenever the indictment against a man is insufficient, the finding of a *fugam fecit* will not hurt him. 2 *Hawk. 451.* Making default in appearance on indictment, &c. whereby outlawry is awarded, is a *fugit in law*. See *Exigent*.

Fugitives Goods. (*Bona Fugitivorum*) Are the proper goods of him that flies upon felony, which after the flight lawfully found on record, do belong to the King or Lord of the manor. 5 Rep. 109.

Fugitives over Sea. To depart this realm over the sea, without the King's licence, except it be great men and merchants, and the King's soldiers, incurs forfeiture of goods: and masters of ships, &c. carrying such persons beyond sea, shall forfeit their vessels; also if any searcher of any port, negligently suffer any persons to pass, he shall be imprisoned, &c. *Stat. 9 Ed. 3. 10. 5 R. 2. c. 2.*

Fugitio. *Pro Fuga.*—*Condonavit omnes felonias & Fugitones. Knighton, Anno 1537.*

Full-age. The ages of male and female are different, for different purposes. A male at 12 may take the oath of allegiance; at 14 may consent, or disagree, to marriage, may choose his guardian, and, if his discretion be actually proved, may make a testament of his personal estate; at 17 may be an executor; and at 21 is at his own disposal, and may alien his lands, goods and chattels: a female at 7 may be betrothed or given in marriage; at 9 is entitled to dower; at 12 is at years of maturity, and therefore may consent or disagree to marriage, and, if proved to have sufficient discretion, may bequeath her personal estate; at 14 is at years of legal discretion, and may choose a guardian; at 17 may be executrix; and at 21 may dispose of herself and her lands. *Black. Com. 1 V. 463.*

Fulium Aqua. A steam or stream of water, such as comes from a mill.

Fumage. (*Fumagium*) Dung for soil, or a manuring of land with dung.—*Et sunt quieti de Fumagio & marcio cariando, &c. Chart. R. 2. Pat. 5 Ed. 4.* And this word has been sometimes used for *smoke-money*, a customary payment for every house that had a chimney. *Domesday. Black. Com. 1 V. 323.*

Fumatores. Are pilchards garbaged and salted, then hung in the smoke, and pressed; so called in *Spain* and *Italy*, whether they are exported in great abundance. 14 Car. 2. c. 31.

Funditores. Is used for pioneers, in *Pat. 10 Ed. 2. m. 1.*

Funds. The publick funds, of any account, are three; the aggregate fund, the general fund, so called from the union, and addition of several, and the South-Sea fund. *Black. Com. 1 V. 328, 9.* Which vide, as well worthy of perusal. The surplus of these three funds are carried to the sinking fund.

Funeral charges. A person died in debt, and 600 l. was laid out in his funeral; decreed the same should be a debt, payable out of a trust estate, charged with payment of debts, he being a man of great estate and reputation in his country, and buried there; but had he been buried elsewhere, it seemed his funeral might have been more private, and the court would not have allowed so much. *Trin. 1691. Ch. Prec. 27. Offley v. Offley.*

Where a citizen of London devised 700 l. for mourning, the question was, if it should come out of the whole estate, or out of the legatory part only; it was insisted, that there had been no direction by the will, or if the will had directed, that the expences of the funeral should not exceed such a sum, there the deduction must have been

been out of the whole estate. *Per cur.* Mourning devised by the will, must come out of the legatory part, and not to lessen the orpanage and customary part. *Mich.* 1691. 2 *Vern.* 240. *Deakin v. Buckley.*

Executor is not liable to pay for funeral expences, unless he contracts for it; *per Holt* Ch. J. 12 *Mod.* 256. *Mich.* 10 *W.* 3. *Anon.*

Settlements for separate maintenance of the wife shall never extend to funeral charges, and tho' she made a will, (according to a power given her) and an executor, and gave several legacies, but there was no residuum for the executor, the husband's estate in the hands of a devisee subject to the payment of debts, was made liable to the funeral charges of the wife. 9 *Mod.* 31. *Trin.* 9 *Geo.* at the rolls, *Bertie v. Lord Chesterfield.*

In strictness no funeral expences are allowable against a creditor, except for the coffin, ringing the bell, parson, clerk, and bearers fees; but not for pall or ornaments; *per Holt.* 1 *Salk.* 296. *Trin.* 5 *W. & M. B. R. Shelley's* case. Ten pounds is enough to be allowed for the funeral of one in debt; *per Holt.* Baron *Powell* in his circuit would allow but 11 s. 6 d. as all the necessary charge. *Comb.* 342. *Trin.* 7 *W. B. R. Anon.* *Quere* If 40 s. is not now the usual sum, in case of an insolvent? See *Salk.* 196. *Godolph.* p. 2. c. 26. f. 2.

Furca & fossa, (i. e. the gallows and the pit) In ancient privileges granted by our Kings, it signified a jurisdiction of punishing felons; that is, men by hanging, and women with drowning. And Sir *Edw. Coke* says, *fossa* is taken away, but that *furca* remains. 3 *Inst.* 58. *Skene* treating of these words, saith — *Ereclio Furcarum est veri imperii & alter justitie, & significat dominium acris, quia suspensi pendent in arboribus. Et merum imperium consistit in quatuor, sicut sunt quatuor elementa; in aere, ut hii qui suspenduntur; in igne, quando quis comburitur propter malefictum; in aqua, quando quis ponitur in culio & in mare projicitur, ut parricida, vel in amnem immergitur, ut femina furti damnata; in terra, cum quis decapitatur & in terram prosteritur.* *Skene.*

Furcare ad tassum, To pitch corn with a fork in loading a waggon, or in making a rick or mow. *Tenentes debent falcare, spargere, vertere, cunilare, coriare in manerium domini, & ad tassum furcare unam acram prati.* — *Cowel.*

Furcam & flagellum, The meanest of all servile tenures, when the bondman was at the disposal of his Lord for life and limb. — *Iste tenet in Villenagio ad furcam & flagellum de domino suo, &c.* *Placit.* *Term.* *Mich.* 2 *Joh.* Rot. 7.

Furigelbium, A mulct paid for theft: by the laws of King *Ethelred*, it is allowed, that they shall be witnesses qui nunquam furigeldum reddiderunt, i. e. who never were accused of theft.

Furlong, is a quantity of ground containing generally forty poles or perches in length, every pole being fifteen foot and a half; eight of which *furlongs* make a mile: it is otherwise the eighth part of an acre of land in quantity. *Stat.* 35 *Ed.* 1. c. 6. In the former acceptation, the *Romans* call it *Stadium*; and in the latter *Fugerum*. Also the word *Furlong* hath been sometimes used for a piece of land of more or less acres.

Furnage, (*Furnagium*) *Est tributum quod domino Furni a scitatoribus penditur ob usum Furni; Et multis enim in locis tenentur vassalli ad coquendum panes suos in Furno domini. Est etiam lucrum seu emolumentum quod piscatori conceditur in pisciculis sumptus & mercedem, & tunc potest piscator de quolibet quarterio frumenti lucrare 4 denar. & furfur, & duos panes ad Furnagium. Assisa panis & cervisie, 51 H. 3. Sec Formagium.*

Furnarius, Is used for a baker, who keeps an oven; and *furniare* signifies to bake or put any thing in the oven. *Mait. Paris.* Anno 1258.

Furr, (*Furrua*) From the *Fr. Fouter*, i. e. *Pelluculare* Is the coat or covering of a beast. The *stat.* 24 *H.* 8. c. 13. mentions divers kinds of it, viz. *Sables*; which are a rich furr, of colour between black and brown, the skin of a beast called a *Sable*, of bigness between a pole cat and an ordinary cat, bred in *Russia* and *Tartary*. *Lucerns*, the skin of a beast of that name, near the size of a wolf, in colour neither red nor brown, but between both, and mingled with black spots; which are bred in *Muscovy*;

and is a very rich furr. *Genets*, a beast's skin so called, in bigness between a cat and a weezle, nailed like a cat, and of that nature, and of two kinds, black and grey, the black most precious which hath black spots upon it hardly to be seen; this beast is the product of *Spain*: *Foins* are of fashion like the *sable*, the top of the furr is black, and the ground whitish; bred for the most part in *France*. *Marten* is a beast very like the *Sable*, the skin something coarser, produced in *England* and *Ireland*, and all countries not too cold; but the best are in *Ireland*. Besides these, there are the *Fitch* or *Pole-cat*; the *Calabar*, a little beast, in bigness near a *Squirrel*: *Miniver* being the beelies of *Squirrels*; and *Shanks*, or what is called *Budge*, &c. all of them *Furrs* of foreign countries, some whereof make a large branch of their inland traffick.

Furst & Fondong, (*Sax.*) Time to advise, or to take counsel. — *De quibuscunque implacitetur aliquis Furst & Fondong habeat.* *Leg. H.* 1. c. 46.

Furtum, Theft, or robbery of any kind. *Litt. Dig.*

Fustians. No persons shall dress *fustians* with any other instrument than the broad sheers, under the penalty of 20 s. And the master and wardens of the company of *Clothworkers* in *London*, &c. have power to search the workmanship of sheermen, as well for *fustian*, as cloth. 11 *H.* 7. c. 27. 39 *Elix.* c. 13.

Fustica, Wood brought from *Barbadoes*, *Jamaica*, &c. used by dyers, mentioned in the 12 *Car.* 2. c. 18.

Fyrdinga, (From the *Sax. Firdung*, i. e. *Expeditionis apparatus*) A going out to war, or a military expedition at the King's command; not going upon which, when summoned, was punished by fine at the King's pleasure. *Leg. H.* 1. c. 10. *Blount* calls it an expedition; or a fault or trespass for not going upon the same.

Fything or fyding, A military expedition.

G.

Gabble, (*Blatere, Garrio*) To babble and talk idly to no purpose, whence comes gabbler and babler. *Plant.*

Gabel, (*Gabella, Gablum, Gablagium*) In French *Gabelle*, i. e. *Vedigal*, hath the same signification among our ancient writers, as *gabells* hath in *France*: it is a tax; but hath been variously used; as for a rent, custom, service, &c. And where it was a payment of rent, those who paid it were termed *gabellatores*. *Domesday.* Co. *Litt.* 213. It is by some authors distinguished from tribute; *Gabella est vedigal quod solvitur pro bonis mobilibus; & Tributum est propriis quod fisco vel principi solvitur pro rebus immobilibus.* When the word *Gabel* was formerly mentioned, without any addition to it, it signified the tax on salt, tho' afterwards it was applied to all other taxes.

Gable-end, (*Gabulum*) The head or extrem part of a house or building. — *Quia domus sita est inter Gabuluna tenementi mei & Gabulum tenementi Laurentii K. Paroch. Durig.* 286.

Gabulus Denetioquum, Rent paid in money. *Selden on Titul.* p. 321.

Gaboldrigu, (*Sax.*) Is the payment of tribute or custom; it sometimes denotes usury.

Gabold-land, or Gabul-land, (*Terra censuali*) Land liable to taxes; and rented or let for rent. *Sax. Dig.*

Gage, (*Fr. Lat. Vadium*) Signifies as much as to pawn or pledge. *Glawb. lib.* 10. c. 6. And *gage deliverance* is where he that hath taken a distress being sued, hath not delivered the cattle, &c. that were distrained; then he shall not only avow the distress; but *gage deliverance*, i. e. put in surety or pledges that he will deliver them. *F. N. B.* 67. 94. This *gage deliverance* is had on suing out *replevin*, upon the plaintiff's praying the same: and it is said the parties are to be at issue, or there is to be a demurrer in law, before *gage deliverance* is allowed; and if a man claim any property in the goods, or the beasts are dead in the pound, the plaintiff shall not *gage*, &c. *Kitsh.* 145.

Gager del Ecy, In old writings. See *Wage* and *Wager of Law*.

Gainage, (*Gainagium*, i. e. *Plaustr' apparatus*, Fr. *Guignage*, viz. *Lucrum*) The gain or profit of tilled or planted land, raised by cultivating it; and the draught, plough, and furniture for carrying on the work of tillage, by the baser kind of *sok-men* or *villains*. *Gainage* was only applied to arable land, when they that had it in occupation, had nothing thereof but the profit raised by it from their own labour, towards their sustenance, nor any other title but at the Lord's will: and *gainer* is used for a *sok-man*, that hath such land in occupation. *Bract. lib. 1. c. 9. Old Nat. Br. 117.* The word *gain* is mentioned by *West. Symb. par. 2. sect. 3.* Where he says land in demesne, but not in *gain*; &c. And in the *stat. 51 H. 3.* there are these words, "no man shall be distrained by his beasts, that *gain* the land." By the statute of *Magna Charta, c. 14.* *Gainage* is meant no more than the plough-tackle, or implements of husbandry, without any respect to *gain* or profit; where it is said of the knight and freeholder, he shall be amerced *salvo contentamento suo*; the merchant or trader, *salvo merchandisa sua*; and the villeins or countrymen, *salvo gainagio suo*, &c. In which cases it was, that the merchant and husbandman should not be hindered, to the detriment of the publick, or be undone by arbitrary fines; and the villein had his *vainage*, to the end that the plow might not stand still; for which reason the husbandmen at this day are allowed a like privilege by law, that their beasts of the plough are not in many cases liable to distress. See *Wainage*.

Gainery, (Fr. *Gaignerie*) Tillage, or the profit arising from it, or of the beasts employed therein. *Stat. West. 1. c. 6 & 17.*

Galea, A gallery, or swift sailing ship. *Hoved. p. 682, 692.*

Galleti, According to *Somner* were *viri Galeati*; but *Knighton* says they were *Welchmen*.—In *quorum prima acie fuit dominus Galfridus, cum multis Galletis*, &c. Knight.

Galligashins, Wide hose or breeches, having their name from their use by the *Gascigns*.

Galliballpent, A kind of coin, which with *faskins* and *dothkins*, were forbidden by the *stat. 3 H. 5. 1.* It is said they were brought into this kingdom by the *Genoese* merchants, who trading hither in *galley*, lived commonly in a lane near *Tower-street*, and were called *Galley-men*, landing their goods at *Galley-Key*, and trading with their own small silver coin termed *Galley Half-pence*. *Stow's Survey of London 137.*

Gallinawtry, Signifies a meal of coarse victuals, given to *Galley Slaves*.

Gallivolatium, (From *Gallus*, a cock) A cock shoot of cock-glade.

Galoches, (Fr.) Signify a kind of shoe, worn by the *Gauls* in dirty weather; mentioned in the *stat. 14 & 15 H. 8. c. 9.*

Gamba, **Gamberia**, **Gambria**, (Fr. *Jambiere*) Military boots or defence for the legs.

Gambeyson, (*Gambesonum*) A horseman's coat used in war, which covered the legs: or rather a quilted coat, *coste, vestimentum ex coactili lana confectum*, to put under the armour, to make it sit easy. *Flora, lib. 1. c. 24.*

Game, (*Aurupia*, from *Auceps*, *Aucupis*, i. e. *Avium captio*) Birds or prey got by fowling and hunting: and destroying the *game* is an offence by statute. The Common law allows the hunting of foxes, and other ravenous beasts of prey, in the ground of another person; tho' a man may not dig and break the ground to unearth them, without licence; if he doth, the owner of the ground may maintain an action of trespass for it. *2 Roll. 538. Cro. Jac. 321.* An action was brought against a person for entering another man's warren; the defendant pleaded that there was a pheasant on his land, and his hawk pursued it into the plaintiff's ground; it was resolved that this doth not amount to a sufficient justification, for in this case he can only follow his hawk, and not take the *game*. *Popb. 162.* Tho' it is said to be otherwise where the soil of the plaintiff is not a warren. *2 Roll. Abr. 567.* If a man in hunting starts a hare upon his own ground, and follows and kills it on the ground of another, yet

still the hare is his own, because of the fresh suit; but if a man starts a hare upon another person's ground, and hunts and kills it there, he is subject to an action, tho' it is seldom brought, being frivolous. *Cro. Car. 553.*

By the Common law, a property in those living creatures, which by reason of their swiftness or fierceness were not naturally under the power of man, was gained by the mere caption or seizure of them; but as by this toleration persons of quality and distinction were deprived of their recreations and amusements, it was thought necessary to make laws for preserving the *game* from idle and indigent people, who by their loss of time and pains in such pursuits were much impoverished. *2 New. Abr. 615.*

Upon this subject we shall make some extracts from a very judicious and learned author, viz. *Blackstone*. The qualifications for killing *game*, as they are usually called, or more properly the exemptions from the penalties inflicted by the statute law, are, 1. The having a freehold estate of 100 *l. per Annum*; there being fifty times the property required to enable a man to kill a partridge, as to vote for a knight of the shire: 2. A leasehold for ninety-nine years of 150 *l. per Annum*: 3. Being the son and heir apparent of an esquire, (a very loose and vague description) or person of superior degree: 4. Being the owner or keeper of a forest, park, chase, or warren. For unqualified persons transgressing these laws, by killing *game*, keeping engines for that purpose, or even having *game* in their custody, or for persons (however qualified) that kill *game* or have it in possession, at unreasonable times of the year, there are various penalties assigned, corporal and pecuniary, by different statutes; on any of which, but only on one at a time, the justices may convict in a summary way, or prosecutions may be carried on at the assizes. By *stat. 28 Geo. 2. c. 12.* No person however qualified to kill, may make merchandize of this valuable privilege, by selling, or exposing to sale any *game*, on pain of like forfeiture as if he had no qualification. *Com. 4 V. 175.*

The same author (*id. 408, 409.*) treating of the alterations in our laws, and mentioning franchises granted of chase and free warren, as well to preserve the breed of animals, as to indulge the subject; adds—From a similar principle to which, though the forest laws are now mitigated, and by degrees grown intirely obsolete, yet from this root has sprung a *bastard ship*, known by the name of the *Game Law*, now arrived to, and wantoning in its highest vigour: both founded upon the same unreasonable notion of permanent property in wild creatures; and both productive of the same tyranny to the Commons: but with this difference; that the forest laws established only one mighty hunter throughout the land, *the game laws have raised a little Nimrod in every manor*. And in one respect the ancient law was much less unreasonable than the modern; for the King's grantee of a chase or free-warren might kill *game* in every part of his franchise; but now, though a freeholder of less than 100 *l. a year* is forbidden to kill partridge upon his own estate, yet nobody else (not even the Lord of the manor, unless he hath a grant of free-warren) can do it without committing "a trespass, and subjecting himself to an action."

The several statutes concerning the game.

No person shall take pheasants or partridges with engines in another man's ground, without licence, on pain of 10 *l. stat. 11 H. 7. c. 13.* If any person shall take or kill any pheasants or partridges, with any net in the night-time, they shall forfeit 20 *s.* for every pheasant, and 10 *s.* for every partridge taken; and hunting with spaniels in standing corn, incurs a forfeiture of 40 *s.* *23 Eliz. c. 10.* Those who kill any pheasant, partridge, duck, heron, hare, or other *game*, are liable to a forfeiture of 20 *s.* for every fowl and hare; and selling, or buying to sell again, any hare, pheasant, &c. the forfeiture is 10 *s.* for each hare, &c. *1 Jac. 1. c. 17.* Also pheasants or partridges, are not to be taken between the first of July and the last of August, on pain of imprisonment for a month, unless the offenders pay 20 *s.* for every pheasant, &c. killed; and constables, having a justice of peace's warrant, may search for *game* and nets, in

the possession of persons not qualified by law to kill game, or to keep such nets. 7 *Jac.* 1. c. 11. Constables, by warrant of a justice of peace, are to search houses of suspected persons for game: and if any game be found upon them, and they do not give a good account how they came by the same, they shall forfeit for every hare, pheasant, or partridge, not under 5 s., nor exceeding 20 s. And inferior tradesmen, hunting, &c. are subject to the penalties of the act, and may likewise be sued for trespass: if officers of the army or soldiers kill game without leave, they forfeit 5 l. an officer, and 10 s. a soldier. 4 & 5 *W. & M.* c. 23. higlers, chapmen, carriers, inn-keepers, victuallers, &c. having in their custody, hare, pheasant, partridge, heath-game, &c. (except sent by some person qualified to kill game) shall forfeit for every hare and fowl 5 l. to be levied by distress and sale of their goods, being proved by one witness, before a justice; and for want of distress shall be committed to the house of correction for three months: one moiety of the forfeiture to the informer, and the other to the poor. And selling game, or offering the same to sale, incurs the like penalty; wherein hare, and other game found in a shop, &c. is adjudged an exposing to sale: killing hares in the night is liable to the same penalties: and if any persons shall drive wild fowls with nets, between the first day of July and the first of September, they shall forfeit 5 s. for every fowl. 5 *Ann.* c. 14. 9 *Ann.* c. 25. And penalties for killing and destroying game, are recoverable not only before justices of peace by the several statutes; but also by action of debt, bill, plaint or information, in any of his Majesty's courts at *Westminster*; and the plaintiff, if he recovers, shall likewise have double costs. 8 *G.* 1. c. 19. Persons qualified to keep guns, dogs, &c. to kill game, are such as have a free-warren, or are Lords of manors, or have 100 l. *per Annum* inheritance or for life, or lease for ninety-nine years of 150 l. *per Annum*. (and by the exception of the act, the eldest sons and heirs of esquires, or other persons of higher degree.) And if any person shall keep a gun not so qualified, he shall forfeit 10 l. And persons being qualified may take guns from those that are not, and break them. 22 & 23 *Car.* 2. c. 25. 33 *H.* 8. c. 6. One justice of peace, upon examination and proof of the offence, may commit the offender till he hath paid the forfeiture of 10 l. And persons not qualified by law, keeping dogs, nets, or other engines to kill game, being convicted thereof before a justice of peace, shall forfeit 5 l. or be sent to the house of correction for three months; and the dogs, game, &c. shall be taken from them, by the *stat.* 5 *Ann.* No *certiorari* shall be allowed to remove any conviction or other proceeding on the *stat.* 5 *Ann.* &c. into any court at *Westminster*, unless the party convicted become bound to the party prosecuting with sufficient sureties, in the sum of 50 l. to pay the prosecutor his costs and charges, &c. after the conviction confirmed, or a *procedendo* granted. *Ibid.* In convictions for keeping of guns, the peace is not concerned, but only the qualifications of the persons that use them; so that it hath been adjudged the justices of peace have no general power to punish the offenders, for want of jurisdiction. 4 *Mod.* 49. But where a person was brought before a justice of peace for shooting with hail-shot in a hand-gun, the justice committed him to prison until he should pay 10 l. &c. and having made a record of his conviction, it was certified upon the return of an *habeas corpus*; and it was held, that if the justice of peace had pursued the statute, no court could discharge the defendant. *W. Jones* 170. On a *certiorari* to remove a conviction before a justice, &c. for carrying a gun, not being qualified; it appeared upon the return to be taken before a certain justice of peace, without adding *neque ad diversas felonias & transgressiones audiend. assign.* &c. and it was ruled that this was a good exception upon a *certiorari* to remove an indictment taken at the sessions; but not upon a conviction of this nature, because the court can take notice that the statutes give the justices authority in these cases. 1 *Vent.* 33. *Sid.* 419. A person was convicted before a justice of peace upon the statute, for keeping a gun, not having 100 l. *per Annum*, and the conviction being removed into *B. R.* was quashed, for not saying when the defendant had not 100 l. a year; for it might be he had such estate at the time when he kept the gun, tho' not at the conviction, and the offence and

time ought to be certainly alledged. 3 *Mod.* 280. The defendant not having 100 l. *per Annum* did shoot in a gun in February, and was brought before a justice of peace in March following, and then by him convicted; and it was held, that as by the statute no time was limited when the offender should be carried before a justice to be examined, it therefore ought to be *Instantur*; which not being done, the conviction was quashed. 4 *Mod.* 147. A man was indicted for shooting of game; but it was omitted shewing that he was not worth 100 l. a year; and it was ordered by the court, that the party should shew he was worth so much to discharge him. 2 *Keb.* 582. If a person hunt upon the the ground of another, such other person cannot justify killing of his dogs, as appears by 2 *Roll. Abr.* 567. But it was otherwise adjudged *Mitch.* 33 *Car.* 2. in *C.* & 2 *Cro.* 44. and see 3 *Lrv.* 28. In action of debt, *qui tam*, &c. by a common informer on the *stat.* 5 *Ann.* for 15 l. wherein the plaintiff declared on two several counts, one for 10 l. for killing two partridges, the other for 5 l. for keeping an engine to destroy the game, not being qualified, &c. The plaintiff had a verdict for 5 l. only: this action was brought by virtue of the *stat.* 8 *Geo.* 1. *Mod. Caf. in Law and Eq.* 238. See *stat.* 9 *Geo.* 1. c. 22. See likewise 24 *Geo.* 2. c. 34. for the better preservation of the game in Scotland. By the *stat.* 26 *Geo.* 2. c. 2. All suits and actions brought by virtue of *stat.* 8 *Geo.* 1. c. — for the recovery of any pecuniary penalty, or sum of money, for offences committed against any law for the better preservation of the game, shall be brought before the end of the second term after the offence committed.

By 28 *Geo.* 2. c. 12. persons selling, or exposing to sale, any game, are liable to the penalties inflicted by 5 *Ann.* c. 14. on higlers, &c. offering game to sale: and game found in the house or possession of a poulterer, salesman, fishmonger, cook, or pastrycook, is deemed exposing thereof to sale.

By 2 *Geo.* 3. c. 19. After the 1 June 1762, no person may take, kill, buy or sell, or have in his custody, any partridge, between 12 February and 1 September, or pheasant, between 1 February and 1 October, or heath fowl, between 1 January and 20 August, or grouse, between 1 December and 25 July, in any year; pheasants taken in their proper season, and kept in mews, or breeding places, excepted: and persons offending in any of the cases aforesaid, forfeit 5 l. *per bird*, to the prosecutor, to be recovered, with full costs, in any of the courts at *Westminster*. By this act, likewise the whole of the pecuniary penalties under the 8 *Geo.* 1. c. 19. may be sued for, and recovered to the sole use of the prosecutor with double costs; and no part thereof to go to the use of the poor of the parish.

By 2 *Geo.* 3. c. 29. After 24 June 1762, any person who shall wilfully shoot at, or destroy any house-doves or pigeons belonging to other persons, shall forfeit on conviction, 20 s. to the prosecutor; and if not forthwith paid, he may be committed, and kept to hard labour for any time not exceeding three, nor less than one month, unless the forfeiture be sooner paid: the owners of dovecotes, or other places built for the preservation or breeding of pigeons, and those appointed by them, excepted. Offender is liable only to one conviction for the same offence; and prosecutions are to be commenced, and carried on with effect, within two months after the offence; and where persons suffer imprisonment, they are not liable afterwards to pay the penalty.

By 5 *Geo.* 3. c. 14. After the 1 June 1765, persons convicted, within six months after the offence, of stealing or destroying fish in fish-ponds, &c. or aiding or assisting therein; or knowingly receiving or buying such fish; are to be transported for seven years. Any offender making a discovery of, and convicting his accomplices, is intitled to pardon. Persons convicted of taking or destroying, &c. Fish in rivers or other waters, forfeit to the owner of the fishery 5 l. On complaint of the offence, justice to issue his warrant for apprehending the offender; and the penalty to be paid down upon conviction; otherwise the offender to be committed to the house of correction for six months; or an action may be brought for the penalty in any of the courts at *Westminster*, within

within six months after the offence. None liable to forfeit for taking fish in any river, &c. wherein they have a right. Persons convicted of entering warrens, in the night-time, and taking or killing conies there, or aiding or assisting therein, may be punished by transportation, or by whipping, fine, or imprisonment. Persons convicted on this act, not liable to be convicted under any former act. This act does not extend to the destroying conies in the day-time, on the sea and river banks in the county of Lincoln; &c. No satisfaction to be made for damages occasioned by entry, unless they exceed 1 s.—It may not be improper to mention an act lately made and not yet repealed, viz. 10 Geo. 3. c. 19. for preservation of the game, which shews the importance of the object. 'Tis thereby enacted, that if any person kill any hare, &c. between sun-setting and sun-rising, or use any gun, &c. for destroying game, shall for the first offence be imprisoned for any time not exceeding six, nor less than three months. If guilty of a second offence, after conviction of a first, to be imprisoned for any time not exceeding twelve months, nor less than six, and shall also within three days from the time of his commitment either for the first, or for any other offence, be once publicly whipped.

Offenders on a Sunday using a gun or engine for destroying game to forfeit on conviction twenty pounds. For want of distress the offender to be committed for any time not exceeding six, nor less than three calendar months.

Persons thinking themselves aggrieved may appeal to the quarter sessions, and the determinations of the justices there to be final. See farther *Burn's Justice*, title *Game*.

Game-keepers. Are those who have the care of keeping and preserving of the game, being appointed thereto by Lords of manors, &c. Lords of manors, or other royalties, not under the degree of an esquire, may by writing under hand and seal, authorise one or more game-keepers; who may seize guns, dogs, nets, and other engines, made use of to kill the game by such persons as are prohibited, for the use of the Lord of the manor, or otherwise destroy them. 22 & 23 Car. 2. c. 25. Any Lord or Lady of a manor or lordship, may empower his or her game-keeper within their respective royalties, to kill hare, pheasant, partridge, &c. But if the game-keeper under colour of the said power, shall kill, and afterwards sell or dispose thereof to any person whatsoever, without the consent of the Lord or Lady of such manor, upon conviction thereof, he shall be committed to the house of correction for three months, there to be kept to hard labour. 5 Ann. c. 14. By the stat. 9 Ann. no Lord or Lady of a manor shall make, constitute or appoint, above one person to be game-keeper within any one manor; with power to kill game; the name of which game-keeper so appointed, is to be entered with the clerk of the peace of the county wherein the manor lies; and if any other game-keeper shall presume to kill any hare, pheasant, partridge, &c. Or if any game-keeper shall sell any hare, pheasant, &c. he shall for every offence incur such forfeitures as are inflicted by the act 5 Ann. And by 3 Geo. 1. c. 11. no Lord of a manor is to make or appoint any person to be a game-keeper, with power to take and kill hare, pheasant, partridge, or other game, unless such person be qualified by law so to do, or be truly and properly a servant to the said Lord, or immediately employed to take and kill game for the sole use or benefit of the said Lord: and any person not qualified, or not employed as aforesaid, who under pretence of any qualification from any Lord of a manor, shall take or kill any hare, &c. or keep or use any dogs to kill and destroy the game, shall for every such offence incur such forfeitures, pains, and penalties, as are inflicted by the acts 5 & 9 Ann. By this last statute, no game-keeper can qualify any person to kill game, or to keep guns, dogs, &c. Where game-keepers ought to have a justice of peace's warrant, to take away guns from unqualified persons, see *Comberb.* 305.

Appointment of a game-keeper by a Lord of a manor.

TO all people to whom these presents shall come, I T. Lord A. Lord of the manor of B. in the county of, &c. have (by virtue of several acts of parliament lately made for the preservation of the game) nominated, authorised and appointed, and by these presents do nominate, authorise and appoint E. D. of, &c. to be my game-keeper of and within my manor, &c. in the county of, &c. aforesaid, with full power and authority, according to the direction of the statutes in that case made, to kill game for my use; and to take and seize all such guns, greyhounds, setting dogs, and other dogs, ferrets, trammels, hays, or other nets, snares or engines, for the taking, killing or destroying of hares, pheasants, partridges, or other game, as within the said manor of, &c. and the precincts thereof, shall be kept or used by any person or persons not legally qualified to do the same: and further to act and do all and every thing and things which belong to the office of a game-keeper, pursuant to the direction of the said acts of parliament, during my will and pleasure; for which this shall be his sufficient warrant. Given under my hand and seal, &c.

Gaming, or Games unlawful, (Ludos vanos) The playing at tables, dice, cards, &c. King Ed. 3. in the 39th year of his reign, enjoined the exercise of shooting and of artillery, and forbad the casting of the bar, the hand and foot balls, cock-fighting, & alios ludos vanos; but no effect did follow from it, till they were, some of them forbidden by act of parliament. 11 Rep. 87. Anno 28 H. 8. Proclamation was made against all unlawful games, and commissions awarded into all the counties of England, for the execution thereof; so that in all places, tables, dice, cards and bowls, were taken and burnt. *Stow's Annals* 527. And by the statute 33 H. 8. c. 9. Justices of peace, and head officers in corporations, are empowered to enter houses suspected of unlawful games; and to arrest and imprison the gamesters, till they give security not to play for the future: also the persons keeping unlawful gaming houses, may be committed by a justice, until they find sureties not to keep such houses; who shall forfeit 40 s. and the gamesters 6 s. 8 d. a time: and if the King license the keeping of gaming-houses, it is against law, and void.

No artificer, apprentice, labourer, or servant, shall play at tables, tennis, dice, cards, bowls, &c. out of Christmas time, on pain of 20 s. for every offence; and at Christmas, they are to play in their master's house, or presence: but any nobleman, or gentleman, having 100 l. per Annum estate, may license his servants or family to play within the precincts of his house, or garden, at cards, dice, tables, or other games, as well among themselves, as others repairing thither. *Stat. ibid.* This act is to be proclaimed once a quarter, in every market-town, by the respective mayors, &c. and at every assizes and sessions. A person was convicted of keeping a cock-pit; and the court resolved it to be an unlawful game, within the statute 33 Hen. 8. c. 9. and fined him 40 s. a day. *Rep.* 510. But to play at dice, &c. is not unlawful in itself, though prohibited by statutes to certain persons, and to be used in certain places. 2 Vent. 175. If any person of what degree soever, shall by fraud, deceit, or unlawful device, in playing at cards, dice, tables, bowls, cock-fighting, horse-races, foot-races, or other games or pastimes, or bearing a share in the stakes, betting, &c. win any money or valuable thing, he shall forfeit treble the value, one moiety to the crown, and the other to the party grieved, prosecution being in six months; in default whereof, the last mentioned moiety is to go to such other person as will prosecute within one year, &c. 16 Car. 2. cap. 7. See the stat.

By the statute of 9 Ann. cap. 14. all notes, bills, bonds judgments, mortgages, or other securities, given for money won by playing at cards, dice, tables, tennis, bowls, or other games; or by betting on the sides of such as play at any of those games, or for repayment of any money knowingly lent for such gaming or betting, shall be void: And where lands are granted by such mortgages or securities,

rities, they shall go to the next person, who ought to have the same as if the grantor were actually dead, and the grants had been made to the person so intitled after the death of the person so incumbering the same. If any person playing at cards, dice, or other game, or betting, shall lose the value of 10*l.* at one time, to one or more persons, and shall pay the money, he may recover the money lost by action of debt, within three months afterwards; and if the loser do not sue, any other person may do it, and recover the same, and treble the value with costs, one moiety to the prosecutor, and the other to the poor: And the person prosecuted shall answer upon oath, on preferring a bill to discover what sums he hath won. Persons by fraud or ill practice, in playing at cards, dice, or by bearing a share in the stakes, &c. or by betting, winning any sum above 10*l.* shall forfeit five times the value of the thing won, and suffer such infamy and corporal punishment, as in cases of wilful perjury, being convicted thereof on indictment or information; and the penalty shall be recovered by action, by such person as will sue for the same. And if any one shall assault and beat, or challenge to fight, any other person, on account of money won by gaming, upon conviction thereof, he shall forfeit all his goods, and suffer imprisonment for two years. *Stat. 9 Ann. c. 14.*

Also by this statute, any two or more justices of peace, may cause such persons to be brought before them as they suspect to have no visible estates, &c. to maintain them; and if they do not make it appear that the principal part of their expences is got by other means than gaming, the justices shall require securities for their good behaviour for a twelvemonth; and in default of such security, commit them to prison until they find it: And playing or betting during the time, to the value of 20*s.* shall be deemed a breach of good behaviour, and a forfeiture of their recognisances. *Ibid.*

Where it shall be proved before any justice of peace, that any person hath used unlawful games contrary to the *Statute 33 Hen. 8. c. 9.* the justice may commit such offender to prison, till he enter into a recognisance that he shall not from thenceforth at any time to come, play at any unlawful game. *Statute 2 Geo. 2. cap. 28.* For better preventing excessive and deceitful gaming; the ace of hearts, faron, basset, and hazard, are declared to be lotteries by cards or dice; and persons setting up these games are liable to the penalty of 200*l.* And every person who shall be an adventurer, or play or stake therein, forfeits 50*l.* Likewise the sale of any house, plate, &c. in the way of lottery, by cards, &c. is adjudged void, and the things to be forfeited to any person that will sue for the same. *12 Geo. 2. cap. 28.* The game of passage, and all other games with one or more dice, or any thing in that nature, having figures or numbers thereon, (bagammon and games now played with those tables only excepted) shall be deemed games or lotteries by dice, within the *12 Geo. 2. c. 28.* And such as keep any office or table for the said game, &c. or play thereat, are subject to the penalties in that act. *13 Geo. 2. cap. 19.*

By the *Statute 18 Geo. 2. cap. 34.* Playing at, or keeping any house or place for playing at the game of roulette, otherwise roly poly, or any other game with cards or dice already prohibited, incurs the penalties in *Statute 12 Geo. 2. cap. 28.* Persons losing 10*l.* and paying the same, may sue the winner, and recover the same with costs: And on a bill in equity the court may decree the same to be paid. The persons who have jurisdiction to determine informations on the statutes against gaming, may summon witnesses, who, on refusing to appear and give evidence, shall forfeit 50*l.* No privilege of parliament shall be allowed on prosecution for keeping a gaming house. Persons losing 10*l.* at one time, or 20*l.* in twenty-four hours, may be indicted and fined five times the value. See the *25 Geo. 2. c. 36.* concerning the manner of prosecuting persons for keeping gaming-houses, &c. See 1 *Salk. 344-5. 5 Mod. 13. Mod. Caf. 128.* Common gaming-houses are a common nuisance in the eye of the law; not only because they are great temptations to idleness, but as they draw together great numbers of disorderly persons to the disturbance of the neighbourhood. 1 *Hawkt. P. C. 198.* *Noy* had a writ on the *Statute 33 Hen. 8. c. 9.* to remove

bowling-alleys, &c. which were pulled down, as common nuisances. 3 *Keb. 465.*

Cricket adjudged a game within the 9th of *Ann. c. 14. Wilson, par. 1. 220.* So as to a foot race, but it must appear that a person was playing at such a game, or else a wager laid on his side, is not abetting within the statute. *Ibid. par. 2. 36.* A horse race is a game within the *Stat. 1b. 309.*

Gang-days. (*Dies Lustrationis*) And gang-weeks are mentioned in the laws of King *Atthelstan.* See *Rogation Week.*

Gaol, (*Gaola, Fr. Geole, i. e. Cavocula*, a cage for birds) Is used metaphorically for a prison. It is a strong place or house for keeping of debtors, &c. and wherein a man is restrained of his liberty to answer an offence done against the laws: And every county hath two gaols, one for debtors, which may be any house where the sheriff pleases; the other for the peace and matters of the crown, which is the county gaol. *Mod. Just. 230.*

Under this head we may consider according to the division in the *New Abr.*

- I. By what authority gaols may be erected, and at whose charge they are to be repaired.
- II. To what place, and at whose charge offenders are to be committed, and how they are to be maintained.
- III. Of the offence of breaking gaol.

- I. By what authority gaols may be erected, and at whose charge they are to be repaired.

Gaols are of such universal concern to the publick, that none can be erected by any less authority than an act of parliament. 2 *Inst. 705.* All prisons and gaols belong to the King, altho' the subject may have the custody or keeping of them. 2 *Inst. 100.* It is said, that none can claim a prison as a franchise, unless they have also a gaol-delivery; and that therefore the Dean and Chapter of *Westminster*, tho' they have the custody of the *Gatehouse* prison, yet as they have no gaol-delivery, they must send a calendar of the prisoners to *Newgate.* 1 *Salk. 343. Farest. 31. per Holt Ch. J.*

By the *14 Ed. 3. cap. 10.* it is enacted, That the sheriffs shall have the custody of the gaols as before, and shall put in under-keepers for whom they will answer. This statute is confirmed by *19 Hen. 7. cap. 10.*

Altho' divers lords of liberties have the custody of prisons, and some in fee, yet the prison itself is the King's *pro bono publico*, and therefore it is to be repaired at the common charge. 2 *Inst. 589.* If a gaol be out of repair, insufficient, &c. the justices of peace in the Quarter-sessions may agree with workmen for rebuilding or repairing it; and by warrant under their hands and seals, order the sum agreed upon to be levied upon the several hundreds and divisions in the county, by a proportionate rate. 11 & 12 *W. 3. cap. 19.* See *12 Geo. 2. c. 19.*

- II. To what place, and at whose charge offenders are to be committed, and how they are to be maintained.

Justices of peace may not commit felons, and other criminals to the counters in London, or other prisons but the common gaols, for legally they cannot imprison any where but in the common gaol. *Co. Litt. 9. 119.* But the house of correction, and the counters of the sheriffs of London, are the common prisons for offenders for the breach of the peace, &c.

By the *5 H. 4. cap. 10.* it is enacted, "That none shall be imprisoned by any justice of the peace, but only in the common gaol, saving to lords and others, who have gaols, their franchise in this case".—This stat. is only declaratory at the Common law. 2 *Inst. 43.*

But the court of King's Bench may commit to any prison in the kingdom which they shall think most proper, and the offender so committed or condemned to imprisonment can't be removed or bailed by any other court. *Moor 666. pl. 913. 1 Sid. 145.*

But by *31 Car. 2. 2. sec. 12.* No subject shall be sent to foreign prisons.

And as prisoners ought to be committed at first to the proper prison, so ought they not to be removed from thence, except in some special cases.

To which purpose, by the said stat. 31 *Car. 2. c. 2. sess. 2.* it is enacted, "That if any subject of this realm shall be committed to any prison, or in custody of any officer, for any criminal or supposed criminal matter, he shall not be removed into the custody of any other, unless it be by a *habeas corpus*, or other legal writ; or where the prisoner is delivered to the constable, &c. to be carried to some common gaol; or where any person is sent by order of any judge of assize, or justice of the peace, to any common work-house, or house of correction; or where the prisoner is removed from one prison to another within the same county, in order to a trial or discharge by due course of law; or in case of sudden fire or infection, or other necessity; upon pain that he who makes out, signs, or countersigns, or obeys, or executes such warrant, shall forfeit to the party grieved one hundred pounds for the first offence, two hundred pounds for the second, &c." See 19 *Car. 2. cap. 4.* for empowering justices of the peace to remove prisoners in case of infection.

By 11 & 12 *Will. 3. c. 10.* All murderers and felons shall be imprisoned in the common gaol, and the sheriffs shall have the keeping of the gaol.

As to the charge of conveying prisoners.

Offenders committed to prison, are to bear the charges of their conveying to gaol; or on refusal, their goods shall be sold for that purpose, by virtue of a justice of peace's warrant; and if they have no goods, a tax is to be made by constables, &c. on the inhabitants of the parish where the offenders were apprehended. 3 *Jac. 1. cap. 10.* And by 27 *Geo. 2. c. 3.* The expence of conveying poor offenders to gaol, or the house of correction, shall be paid by the treasurer of the county, except in *Middlesex*.

For the relief of prisoners in gaols, justices of peace in sessions have power to tax every parish in the county, not exceeding 8 *d.* per week, leviable by constables, and distributed by collectors, &c. 14 *Eliz. cap. 5.*

Also by 19 *Car. 2. c. 4.* Further provisions are made for the relief of poor prisoners, and setting them to work. And by 22 & 23 *Car. 2. c. 20.* It is enacted, "That all sheriffs, gaolers, &c. shall permit their prisoners to send for necessary food where they please; nor demand any greater fee for their commitment or discharge than what is allowable." Also it is thereby directed, that an inquiry be made into all charities given for the benefit of poor prisoners. Lastly, by 2 *Geo. 2. c. 22.* Chief justices, &c. are to examine into gifts for prisoners: And tables of such gifts are to be hung up in the gaols, and registered by the clerks of the peace.

III. *As to breaking of prison.*

This offence, by the Common law, was no less than felony; and this whether the party were committed in a criminal, or civil case, or whether he were actually within the walls of the prison, or only in the stocks, or in the custody of any person who had lawfully arrested him, or whether he were in the King's prison, or one belonging to a lord, or franchise. 2 *Inst. 589. Staundf. P. C. 31. Cro. Car. 210.*

But now by the statute 1 *Ed. 2. ff. 2.* "None from henceforth that breaketh prison shall have judgment of life, or member, for breaking of prison only, except the cause for which he was taken and imprisoned did require such judgment, if he had been convicted thereupon according to the law and custom of the realm; albeit in times past it hath been used otherwise."

Any place whatsoever, wherein a person under a lawful arrest for a supposed capital offence is restrained from his liberty, whether in the stocks or street, or in the common gaol, or the house of a constable, or private person, or the prison of the ordinary, is a prison within the statute. 2 *Inst. 589. Dyir 99. pl. 60. Crom. 38. Cro. Car. 210. Hale's P. C. 107.*

That there must be an actual breaking, for the words *felonice fregit prisonam*, which are necessary in every indictment for this offence, cannot be satisfied without some actual force or violence; and therefore if the prisoner, without the use of any violent means, go out of the prison doors, which he finds open by the negligence or consent of the gaoler, or if he escape thro' a breach made by others without his privity, he is guilty of a misdemeanor only,

and not of felony. 2 *Inst. 589. Hale's P. C. 108. Staundf. P. C. 31.*

Nor will the breaking of prison, which is necessitated by any accident, happening without any default of the prisoner, as where the prison is fired by lightning, or otherwise, without his privity, and breaks out to save his life, come within the statute. *Plow. 136. 2 Inst. 590. Hale's P. C. 108.* Nor is it felony to break a prison, unless the prisoner escape. *Keilw. 87. a.*

If the imprisonment be for any offence made capital by a subsequent statute, the breach of prison is as much within the act of 1 *Ed. 2. Stat. 2.* as if the offence had always been felony; but if the offence, for which a man is committed, were but a trespass at the time when he breaks the prison, and afterwards become felony by a subsequent matter; as where one committed for having dangerously wounded a man, who afterwards dies, breaks the prison before he dies, the fiction of law, (which to many purposes makes the offence a felony *ab initio*) shall not be carried so far as to make the prison-breach also a felony, which at the time when it was committed, was but a misdemeanor. *Hale's P. C. 108. 2 Inst. 591. Plow. 258.*

Also it seems the better opinion, that if the offence, for which the party was committed, be in truth but a trespass, the calling it felony in the *mittimus*, will not make the breaking of the gaol amount to felony; and that on the other side, if the offence were in truth a capital one, the calling it a trespass in the *mittimus* will not bring it within the statute; for the cause of imprisonment is what the statute regards, and that is the offence, which can neither be lessened, nor increased by a mistake in the *mittimus*. But for this see 2 *Hawk. P. C. 126-7.*

The offence of breaking prison is but felony, whatsoever the crime were for which the party was committed, unless his intent were to favour the escape of others who were committed for treason, for that will make him a principal in the treason. 2 *Hawk. P. C. 127.*

He that breaks prison may be proceeded against for such crime before he be convicted of the crime for which he is committed, because the breach of prison is a distinct independant offence; but the sheriff's return of a breach of prison is not a sufficient ground to arraign a man without an indictment. 2 *Hawk. P. C. 127-8.*

It is not sufficient to indict a man generally, for having feloniously broken prison; but the case must be set forth specially, that it may appear he was lawfully in prison, and for a capital offence. *Hale's P. C. 109. 2 Inst. 591. See Prison, Marshallee.*

Gaoler. Is the master of a prison; one that hath the custody of the place where prisoners are kept. Sheriffs must make such gaolers for which they will answer: But if there is a default in the gaoler, action lies against him for an escape, &c. 2 *Inst. 592.* In common cases, the sheriff, or gaoler are chargeable at the discretion of the party; though the sheriff is most usually charged. *Wood's Inst. 76.* He who hath the custody of the gaol wrongfully, or of right, shall be charged with the escape of prisoners; and if he that hath the actual possession be not sufficient, *respondeat superior.* *Ibid.* A gaoler kills an unruly prisoner, it is no felony; but if it be by hard usage, it is felony and murder. 3 *Inst. 52.* And if a gaoler barbarously misuse prisoners, he may be fined and discharged. *Raym. 216.*

By the 14 *Ed. 3. cap. 10.* "If any keeper of a prison or under-keeper, by too great dures of imprisonment, and by pain, make any prisoner that he hath in his ward to become an appellor against his will, he is guilty of felony."

By the 4 *Ed. 3. c. 10.* It is enacted, That the sheriffs and gaolers shall receive, and safely keep in prison, from henceforth such thieves and felons, by the delivery of the constables and townships, without taking any thing for the receipt; and the justices to deliver the gaol, shall have power to hear their complaints, that will complain against the sheriffs and gaolers in such case, and moreover to punish the sheriffs and gaolers, if they be found guilty. By the 23 *H. 6. cap. 10.* a gaoler upon commitment may take 4 *d.*

By the 3 *H. 7. c. 3.* The sheriff and every other person, having authority or power of keeping of gaol, or of prisoners for felony, shall certify the names of all prisoners

in his custody to the justices of *gaol-delivery*. And by *Stat. 22 & 23 Car. 2. c. 20.* It is enacted, That the rates of fees, and government of prisons be signed by the Lord, Chief Justices, &c. and hung up in every *gaol*, fairly written. And farther, that felons and prisoners for debt, shall not be lodged together. No fees shall be taken by *gaolers* of prisoners, but such as are allowed by law, and the judges, &c. are to settle the same; also the judges may determine petitions against extortions of *gaolers*, bailiffs. *Statute 2 Geo. 2. cap. 22. Sec 28 Geo. 2. c. 13.* If any person assault a *gaoler*, for keeping a prisoner in safe custody, he may be fined and imprisoned. 1 *Hawk. 58, 59.* Where a *gaol* is broken by thieves, the *gaoler* is answerable; not if it be broken by enemies. 3 *Inst. 52.*

It seems clearly agreed, that a *gaoler* by suffering voluntary escapes, by abusing his prisoners, by extorting unreasonable fees from them, or by detaining them in *gaol*, after they have been legally discharged, and paid their just fees, forfeits his office; for that in the grant of every office it is implied, that the grantee execute it faithfully and diligently. *Co. Litt. 233. 9 Co. 5. 3 Mod. 143.*

By 8 & 9 *W. 3. c. 27.* Marshal and warden taking any reward to connive at prisoners escape, forfeits 500*l.* and his said office, and be forever after incapable of executing any such office.

It hath been resolved, that a forfeiture by a *gaoler* who hath but a particular interest, as of him who hath custody of a *gaol* for life, or years, does not affect him in remainder, or reversion, who hath the inheritance, but that upon such forfeiture his title shall accrue, and not go to the King. *Poph. 119. 2 Lev. 71. Raym. 216. 3 Lev. 288.*

But by the 8 & 9 *W. 3. c. 27.* It is enacted, That the office of marshal of the King's Bench, and warden of the Fleet, shall be executed by those who have the inheritance of the said prisons, or their deputies, &c.

By the 3 *Geo. 1. cap. 15.* None shall purchase the office of *gaoler*, or any other office pertaining to the high sheriff, under pain of 500*l.* And a *gaoler* in fact, is as much punishable for a misdemeanor in his office, as if he were a rightful *gaoler*. 2 *Hawk. 134.*

Gaol-delivery. The administration of justice being originally in the crown, in former times our Kings in person rode thro' the realm once in seven years, to judge of, and determine crimes and offences; afterwards justices in eyre were appointed; and since justices of assize and *gaol-delivery*, &c. A commission of a *gaol-delivery* is a patent in nature of a letter from the King to certain persons, appointing them his justices, or two, or three, of them, and authorising them to deliver his *gaol*, at such a place, of the prisoners in it; for which purpose, it commands them to meet at such a place, at the time they themselves shall appoint; and inform them, that for the same purpose the King hath commanded his sheriff of the same county to bring all the prisoners of the *gaol*, and their attachments before them, at the day appointed. *Crompt. Jurisd. 125. 4 Inst. 168.*

Justices of *gaol-delivery* are empowered by the Common law to proceed upon indictments of felony, trespass, &c. and to order execution or reprieve: And they have power to discharge such prisoners, as upon their trials shall be acquitted; also all such against whom, upon proclamation made, no evidence appears to indict them; which justices of *oyer and terminer*, &c. may not do. 2 *Hawk. 24, 25.* But these justices have nothing to do with any person not in custody of the prison, except in some special cases; as if some of the accomplices to a felony be in such prison, and some of them out of it, the justices may receive an appeal against those who are out of the prison, as well as those who are in it; which appeal after the trial of such prisoners, shall be removed into *B. R.* and process issue from thence against the rest. *Fitz. Coron. 77. S. P. C. 64.* Such justices have no more to do with one let to mainprize, than if he were at large; for such person cannot be said to be a prisoner, since it is not in the power of his sureties to detain him in their custody: And where any person is bailed, that he is in the custody of his sureties, they may detain him where they please. 2 *H. P. C. 25.* Though per *Hale C. J.* If a

person be let to bail, yet he is in law in prison, and his bail are his keepers; and therefore the justices of *gaol-delivery* may take an indictment against him, as well as if he was actually in *gaol*. And they may take indictments not only of felony, but also of high treason, if the offenders are in prison, and try and give judgment upon them, like unto commissioners of *oyer and terminer*; tho' it has been formerly held otherwise. 2 *Hale's Hist. P. C. 35.*

Justices of *gaol-delivery* may punish those who unduly bail prisoners; as being guilty of a negligent escape. *S. P. C. 77. 25 Ed. 3. 39.* They are also to punish sheriffs and *gaolers*, refusing to take felons into their custody from constables, &c. 4 *Ed. 3. 10.* and have authority to punish many particular offences by statute.

The granting a new commission of *gaol-delivery*, or of the peace, in a town corporate, shall not avoid the former commission, 2 & 3 *Ph. & Mar. c. 18.* Justices of *gaol-delivery* may act in their countries. 12 *Geo. 2. c. 27.*

Garb, (*Carba*, from the *Fr. Garbe*, alias *Gerbe*, i. e. *fascis*) Signifies a bundle or sheaf of corn. *Chart. Forest. cap. 7.* And in some places it is taken for an handful, viz. *Garba accris fit ex triginta pectis.* *Fleta, lib. 2. cap. 12.* *Garba sagittarum* is a sheaf of arrows containing twenty-four. *Skene.*

Garble, Is to sever the dross and dust from spice, drugs, &c. *Garbling* is the purifying and cleaning the good from the bad; and may come from the Italian *Garbo*, i. e. Finery or neatness; and thence probably we say, when we see a man in a neat habit, that he is in a handsome *Garb*. *Cowel.*

Garbler of Spices, An officer of antiquity in the city of London, who may enter into any shop, warehouse, &c. to view and search drugs and spices, and *garble*, and make clean the same, or see that it be done. 21 *Jac. 1. cap. 19.* And all drugs, &c. are to be cleansed and garbled before sold, on pain of forfeiture, or the value. *Stat. Ibid.* But see *Statute 6 Ann. cap. 16.*

Garcio, (*Fr. Garçon*) A groom or servant. *Pla. Cor. 21 Ed. 1.* *Garcio stola*, groom of the stole to the King: And in the *Irish* language, (according to *Toland*) *garçon* is an appellative for any menial servant. *Kennet's Gloss.*

Garciones, Are those servants who follow the camp. — *Habeat garcionem suo servitio semper attendantem.* *Ingulph. 886.* And the word *garciones* hath been applied to the baggage of an army; so called a *garcionibus suis militum famulis.* *Walsing. 242.* See *Dict. de Trevoux.*

Garb, Gardian, &c. See *Guard* and *Guardian*.

Gardebache, (*Fr. Gardebrache*) An armour or vambrace for the arm. *Chart. K. Hen. 5.*

Gardens. Rubbing of gardens of fruit growing therein, punishable criminally by whipping, small fines, imprisonment, and satisfaction to the party wronged, according to the nature of the offence. See 43 *Eliz. c. 7. 15 Car. 2. c. 2. 23 Geo. 2. c. 26. 31 Geo. 2. c. 35. and 6 Geo. 3. c. 36, 48.*

Garderobe, (*Garderocha*) A closet or small apartment, for hanging up clothes, being the same with *wardrobe*. See 2 *Inst. 255.*

Gardia, Is a word used by the *feudists* for *custodia*. *Lib. Feud. 1.*

Gare, A coarse wool, full of staring hairs, such as grow about the shanks of sheep. 31 *Ed. 3. cap. 8.*

Garlanda, A chaplet, coronet, or garland. *Matt. Paris.*

Garnestura, *Viſtials*, arms, and other implements of war, necessary for the defence of a town or castle. *Matt. Paris. Ann. 1250.*

Garnish, To garnish the heir, signifies in law to warn the heir. *Stat. 27 Eliz. cap. 3.*

Garnishment, (*Fr. Garnement*, from *Garnir*, i. e. *instruere*) In a legal sense intends a warning given to one for his appearance, for the better furnishing of the cause and court. For example; one is sued for the *detinue* of certain writings delivered; and the defendant alleging that they were delivered to him by the plaintiff, and another person, upon condition, prays that the other person may be warned to plead with the plaintiff, whether the condition be performed or not; in this petition he is said to pray *garnishment*; which may be interpreted either a warning of that other, or a furnishing the court with all parties

parties to the action, whereby it may thoroughly determine the cause; and until he appears and joins, the defendant is as it were out of the court. *Crompt. Juris.* 211. *F. N. B.* 106. A writ of *scire facias* is to go forth against the other person to appear and plead with the plaintiff; and when he comes and thus pleads, it is called *enterpleader*. If the *garnishee* be returned *scire feci*, and make default, judgment will be had to recover the writings, and for their delivery, against the defendant; and if the *garnishee* appears and pleads, if the plaintiff recovers, he shall have damages. *Rast.* 213. 1 *Brownl.* 147. Garnishment is generally used for a warning; as *garnisher le court* is to warn the court; and *reasonable garnishment*, is where a person hath reasonable warning. *Kitch.* 6. In the *statute* 27 *Eliz.* cap. 3. we read, upon a *garnishment* or two *nibils* returned, &c. And further, some contracts are naked, *sans garnement*, and some furnished, &c.

Garnishee, Is a third person or party in whose hands money is attached within the liberties of the city of *London*, by process out of the sheriff's court; so called, because he hath had *garnishment* or warning, not to pay the money to the defendant, but to appear and answer to the plaintiff creditor's suit. Vide *Attachment*.

Garniture, A furnishing or providing. *Pat.* 17 *Ed.* 3. Vide *Garneitura*.

Garsummure, *Gersuma*, or *Gersoma*, A fine or amer-
ciament. *Domesday*, *Spelm.* *Gloss.*

Garter. (*Carterium*, Fr. *Jartier*, i. e. *Periculis*, *Fascia poplitaria*) Signifies in divers statutes and elsewhere, a special *garter*, being the ensign of a noble order of knight instituted by King *Ed.* 3. anno dom. 1344. called *Knights of the Garter*: It is also taken for the principal *King at Arms*, among our *English heralds*, attending upon the *Knights* thereof; created by King *Hen.* 5. and mentioned in the *statute* 14 *Car.* 2. cap. 33.

The first dignity after that of nobility, is that of a Knight of the Order of Saint *George*, or of the *Garter*. Indeed many sovereign Princes have been proud of the order, and considered themselves as highly honoured by our Sovereign's conferring it on them.

Garth, A little backside or close in the North of *England*; being an ancient *British* word, as *gardd* in that language is *garden*, and pronounced and writ *garth*; also a dam or wear, &c.

Garthman. As there are *fishgarths* or weirs for catching of fish, so there are *garthmen*; for by statute it is ordained, that no fisher nor *garthman* shall use any nets or engines to destroy the fry of fish, &c. 17 *R.* 2. cap. 9. And this word is supposed to be derived from the *Scottish* *gart*, which signifieth enforced, or compelled; and fish are forced by the wear to pass in at a loop where they are taken.

Gastaldus, A governor of the country, whose office was only temporary, and who had jurisdiction over the common people. *Blount*.

Gate, At the end of the names of places, signifies a way or path, from the Sax. *geat*, i. e. *porta*. The custody of the gates of the city of *London*, is granted to the Lord Mayor, &c. by *Chart.* King *Hen.* 4.

Gabel, (Sax. *gafel*) Tribute, toll, custom or yearly revenue; of which we had in old time several kinds. See *Gabel*.

Gavellet, (*gaveletum*) Is an antient and special kind of *cessavit* used in *Kent*, where the custom of *gavelkind* continues, whereby a tenant, if he with-holds his rents and services due to the lord, shall forfeit his land: it was intended where no distress could be found on the premises, so that the lord might seize the land itself in the nature of a distress, and keep it a year and a day; within which time, if the tenant came and paid his rent, he was admitted to his tenement to hold it as before; but if not, the lord might enter and enjoy the same. 10 *H.* 3. 10 *Ed.* 2. The lord was to seek by the award of his court, from three weeks to three weeks, to find some distress upon the land or tenement, until the fourth court; and if in that time he could find none, at the fourth court it was awarded that the tenement should be seized as a distress, and kept in the lord's hands a year and a day without manuring; and if the tenant did not in that time redeem it, by paying the rent and making amends to the lord, the

lord having pronounced his process by witnesses at the next county court, was awarded by his court to enter and manure the tenement as his own: and if the tenant would afterwards have it again, he was to make agreement with the lord. *Fitz. Cess.* 60. *Terms de Ley.* *Gaveletum* is as much as to say to cease, or to let to pay the rent; and *consuetudo de gavelet* was not a rent or service, but a rent or service with-held, denied or detained, causing the forfeiture of the tenement.

Gavellet in London, (*breve de gaveleto in London, pro redditu ibidem, quia tenementa fuerunt indistringibilia*) Is a writ used in the *bustings* of *London*; and the *statute* of *gavelet*, 10 *Ed.* 2. gives this writ to lords of rents in the city of *London*, as well as in *Kent*: here the parties, tenant and demandant, appear by *scire facias*, to shew cause why the one should not have his tenement again on payment of his rent, or the other recover the lands, on default thereof. *Practic. Solic.* 419.

Gavelgeld, Is applied to the payment of tribute or toll. *Mon. Ang. tom.* 3.

Gavelkind, Is said by *Lambard* to be compounded of three Saxon words, *gyfe*, *eal*, *kyn*, *omnibus cognatione proximi's data*. *Wessagan* calls it *gavelkind*, *quasi gywe all kind*, that is to each child his part: and *Taylor* in his history of *gavelkind*, derives it from the *British* *gavel*, i. e. a hold or tenure, and *cenned*, *generatio out familia*; and so *gavelcenned* might signify *tenura generationis*. But whatever is the etymology, it signifies a tenure or custom, annexed and belonging to lands in *Kent*, whereby the lands of the father are equally divided at his death among all his sons; or the land of the brother among all the brethren, if he have no issue of his own. *Litt.* 210. In the time of our Saxon ancestors, the inheritance of lands did not descend to the eldest son as now, but to all alike; from whence came the custom of *gavelkind*: and the reason why this custom was retained in *Kent*, is, according to some, because the *Kentishmen* were not conquered by the *Normans* in the time of *William I.* For *Stigand*, then *Archbishop of Canterbury*, who commanded the forces in the country, ordered every every man to march with boughs in their hands, and meeting *William*, they acquainted him with their resolution of standing or falling in defence of the laws of their country, and he imagining himself to be encompassed in a wood, granted that they and their posterity should enjoy their rights, liberties and laws; some of which, particularly this of *gavelkind*, continues to this day. *Blount*.

All the lands in *England* were of the nature of *gavelkind* before the Conquest, and descended to all the issue equally; but after the Conquest (as it is called) when *knight-service* was introduced, the descent was restrained to the eldest son, for the preservation of the tenure. *Lamb.* 167. 3 *Salk.* 129. In the reign of *Hen.* 6. there were not above thirty or forty persons in all *Kent* that held by any other tenure than this of *gavelkind*; which was afterwards altered upon the petition of divers *Kentish* gentlemen, in much of the land of that county, so as to be descendible to the eldest son, according to the course of the Common law, by the *Statute* 31 *H.* 8. cap. 3. Though the custom to devise *gavelkind* land, and the other qualities and customs remain. 1 *Inst.* 140. By the *Statute* 34 & 35 *Hen.* 8. cap. 26. sect. 128. All *gavelkind* lands in *Wales* were made descendible to the heir, according to the Common law; whereby it appears, that the tenure of *gavelkind* was likewise in that principality.

By the customary tenure called *gavelkind*, which is an ancient *socage* tenure, the lands are dividable between the heirs male who shall inherit as sisters do at Common law; and when one brother dies without issue, all the other brothers are to inherit. 1 *Inst.* 140. But a father having *gavelkind* lands, had three sons, one of whom died in the life-time of his father, leaving issue a daughter; and it was held that the daughter shall inherit the part of her father *jure representationis*, and yet she is not within the words of the custom of dividing the land between the heirs male, for she is the daughter of a male, and heir by representation. 1 *Salk.* 243. The heir at the age of fifteen years, it is said, may give and sell his lands in *gavelkind*, and shall inherit. *Co. Litt.* 111. The custom of *gavelkind* is not altered, though a fine be levied of the

lands at Common law; because 'tis a custom that runs with the land. 6 Ed. 6.

Land in *gavelkind* was devised to the husband and wife for life, remainder to the next heir male of their bodies, &c. They had three sons, and it was adjudged that the eldest son should not have the whole. *Dyer* 133. A donee in tail, of *gavelkind* lands, had issue four sons; and it was held, that all should inherit: but if a lease for life is made of *gavelkind*, remainder to the right heirs of A. B. who hath issue four sons, in this case the eldest son shall inherit the remainder, because in case of purchase, there can be but one right heir. 1 Rep. 103. If *gavelkind* lands come to the crown, and are regranted to hold in capite, &c. the land shall descend to all the heirs male as *gavelkind*. 4 & 5 Mar. 2. Nels. Abr. 895.

A wife shall be endowed of *gavelkind* land, of a moiety of the land whereof her husband died seised, during her widowhood. 1 Inst. 111. And it has been adjudged, that the widow cannot have election to demand her thirds or dower at Common law, so as to avoid the custom, and marry a second husband, by which she shall lose her dower. *Moor* 260. But see 1 Leon. 62.

The husband shall be tenant by the curtesy of half the *gavelkind* lands of the wife, during the time he continues unmarried, without having any issue by his wife; but if he marry, he shall forfeit his tenancy by the curtesy. 1 Inst. 111. If the husband had issue by his wife, and she die, he shall be tenant by the curtesy of the whole land; and though he marry, he shall not forfeit his tenancy. *Mich.* 21 Car. B. R. 1 Lill. Abr. 649.

Although a father be attainted of treason or felony, and hanged, the heir of *gavelkind* land shall inherit; for the custom is, The father to the bough and the son to the plough. *Doct. & Student*, cap. 10. A rent in fee granted out of *gavelkind* lands, shall descend in *gavelkind* to all the heirs male, as the lands would have done; it being of the same nature with the land itself. 2 Lev. 138. 1 Mod. 97.

All lands in *Kent* shall be taken to be *gavelkind*, except those which are *disgavelled* by particular statutes. 1 Mod. 98.

If lands are alleged to be in *Kent*, it shall be intended that they are *gavelkind*; if the contrary doth not appear. 2 Sid. 153. By *Hale* Chief Justice, *gavelkind* law, is the law of *Kent*, and is never pleaded, but presumed: and it has been held, that the superior courts may take notice of *gavelkind* generally without pleading; tho' not of the special custom of devising it, &c. which ought to be pleaded specially. But it appears by some of our books, that the court cannot judicially take notice of the custom of *gavelkind*, without pleading the same; and that it ought to be set forth in the declaration, &c. 1 Mod. 98. *Cro. Car.* 465. *Lutw.* 236, 754.

Gabelman, Is a tenant liable to tribute.—*Villani de* &c. qui vocantur *gavelmanni*. *Somner of Gavelkind*, pag. 33. And hence *gavelkind* has been thought to be land in its nature taxable. *Blount*.

Gabelmed, The duty or work of mowing grafs, or cutting of meadow land, required by the lord from his customary tenants, *consuetudo falcandi quæ vocatur gabelmed*. *Somn.*

Gabelcester, (Sax.) *Sextarius Vestigalis*, Is a certain measure of rent-ale: and among the articles to be charged on the stewards and bailiffs of the manors belonging to the church of Canterbury in *Kent*, according to which they were to be accountable, this of old was one; *de gabelcester cujuslibet braciini braciati infra libertatem maneriorum, viz. unam lagenam & dimidiam cervisie*. This duty elsewhere occurs under the name of *tolsester*; in lieu whereof the *Abbot of Abbingdon* was wont of custom to receive the penny mentioned by *Selden* in his Dissertation annexed to *Fleta*, cap. 8. Nor doth it differ from what is called *oak-gavel* in the Glossary at the end of *Hen. 1. Laws*. Sax. *DiA.*

Gabel-werk, (Sax.) Was either *manu opera*, by the hands and person of the tenant, or *carropera*, by his carts or carriages. *Philips of Parvey*.

Gaugetum, A gauge or gauging, done by the gauger; and the true *Englifo gauge* is mentioned. *Rot. Parl.* 35 Ed. 1.

Gauger, (*gaueator*, Fr. *ganchir*, i. e. in *gyrum torquere*) Signifies an officer appointed by the King, to examine all

tuns, pipes, hogsheds, barrels and tercians of wine, oil, honey, &c. and to give them a mark of allowance, as containing lawful measure, before they are sold in any place: and because his mark is a circle made with an iron instrument for that purpose, it seems to have its name from thence. Of this officer and his office, we may have many statutes; as by 27 Ed. 3. cap. 8. all wines, &c. imported, are to be gauged by the King's *gaugers*, or their deputies. By 31 Ed. 3. c. 5. Selling wine, before gauged, incurs forfeiture of the value. And by 23 Hen. 6. cap. 16. The *gauge-penny* is to be paid *gaugers*, on gauging wines. The 31 Eliz. c. 8. ordains, that beer, &c. imported, shall be gauged by the Master and Wardens of the Cooper's Company. See 12 Car. 2. c. 4.

Vessels brought from beyond sea, and used for utterance of ale and beer, shall be gauged, 31 Eliz. c. 8. The wardens of the coopers, shall attend to gauge vessels upon request, 23 Hen. 8. c. 4. 31 Eliz. c. 8. s. 3. *Gaugers* may take samples not exceeding half a pint, 32 Geo. 2. c. 29. Vide *Excise*.

Geatpæcia. In a charter of the privileges of *Newcastle upon Tyne*, renewed anno 30 Eliz. we find *sturgiones, porpæcias*, i. e. (*porpoises*) *delphinos*, *geatpæcias*, (viz. *gram-pois*, &c.

Geburfcip, (*geburfcipa*) Neighbourhood, or adjoining district. *Leg. Edw. Confess.* cap. 1.

Geburus, A country inhabitant of the same *gebureship*, or village; from the Sax. *gebure*, a carl, ploughman, or farmer. *Corwel*.

Geld (*geldum*) *Mulcta, compensatio delicti & pretium rei*. Hence, in our antient laws, *werfeld* was used for the value or price of a man slain; and *orfeld* of a beast: likewise money or tribute; for it is said, *Et sint quæti de geldis, danegeldis, borngeldis, blodwita*, &c. *Chart. Rich. 2. Priorat. de H. in Devon. Pat. 5 Ed. 4. Angeld* is the single value of a thing, *twigeld*, double value, &c.

Geldable, (*geldabilis*) That is liable to pay tax or tribute. *Camden*, dividing *Suffolk* into three parts, calls the first *geldable*, because subject to taxes; from which the other two parts were exempt, as being *ecclesiæ donatæ*. The word is mentioned in the *Statute 27 Hen. 8. cap. 26*. But in an old MS. it is expounded to be that land, or lordship, which is *sub districtione curiæ vicecom.* 2 Inst. 701.

Jur. dicunt quod prior de Semprinham tenet tres carueatas terræ in S. & non sunt geldabiles. Ex Rot. Hundi. in Turr. Lond. Ann. 3 Ed. 1.

Gemote, (Sax. i. e. *conventus*) An assembly. *Omnis homo pacem habeat eundo ad gemotum & rediens de gemoto, nisi probatus fur fuerit.* *Leg. Edw. Conf.* cap. 35. See *Alderman, Ealdorman, Folc-mote, Mote, Wittena-gemote*.

Geneath, *Villanus*, as *Regis Geneath*, is the King's Villain. *LL. Inæ, MS.* cap. 19.

General Issue, Is a plea to the fact of *Not Guilty*, in criminal cases, in order to trial, by the country, or by peers, &c. *H. P. C.* 254. In civil suits, there are various pleas, which are general issues, according to the species of the action, as in *trespass*, *Not Guilty*, in case on *promises*, *non assumpsit*, &c.

Generatio. When an old abbey, or religious house, had spread itself into many colonies, or depending cells, that issue or offspring of the mother monastery was called *generatio, quasi proles & suboles matricis domus*. *Annual. Waverl.* 1232.

Generale. The single commons, or ordinary provision of the religious, were termed *generale*, as their general allowance, distinguished from their *pictantia*, or pittances; which on extraordinary occasions were thrown in as over commons. In the observances of the *Cluniac monks*, they are described thus: *Generale appellamus quod singulis in singulis datur scutellis: pictantia quod in una scutella duobus*. They are also described amongst other customs. *Cartular. Glasfow. MS. fol. 10.*

Generals of Orders, Chiefs of the several orders of monks, friars, and other religious Societies.

Geneva, A famous strong water or spirit. Vide *Distillers*.

Gentleman, (*generosus*) Is compounded of two languages, from the Fr. *gentil*, i. e. *benignus, vel honesto loco natus*, and the Sax. *mon*, a man; as if you would say a man

man well born. The *Italians* call those *gentil homini* whom we style *gentlemen*; the *French* likewise distinguish such by the name of *gentilhomme*; and the *Spaniards* keep up to the meaning of the word, calling him *hidalgo* or *bijo d'alga*, who is the son of a man of account; so that gentlemen are such whom their blood or race doth make known. Under the denomination of gentlemen, are comprised all above yeomen; whereby noblemen are truly called gentlemen. *Smith de Rep. Angl. lib. 1. cap. 20, 21.* A gentleman is generally defined to be one, who, without any title, bears a coat of arms, or whose ancestors have been freemen; and by the coat that a gentleman giveth, he is known to be, or not to be descended from those of his name, that lived many hundred years since. *Cicero*, in his *Topicks*, speaks thus of this subject; *gentiles sunt, qui inter se eodem sunt nomine ab ingenuis oriundi, quorum majorum nemo servitutem servavit, qui capite non sunt diminuti.* There is said to be a gentleman by office, and in reputation, as well as those that are born such. *2 Inst. 668.* And we read that *J. Kingston* was made a gentleman by King *R. 2. Pat. 13 R. 2. par. 1.* *Gentilis homo* for a gentleman, was adjudged a good addition. *Hill. 27 Ed. 3.* But the addition of esquire, or gentleman, was rare before *1 Hen. 5.* tho' that of knight is very ancient. *2 Inst. 595, 667.*

Gentlewoman, (generosa) Is a good addition for the estate and degree of a woman, as *generosus* is for that of a man; and if a gentlewoman be named *spinster* in any original writ, appeal, &c. it hath been held that she may abate and quash the same. *2 Inst. 668. Sed qu. If spinster is not a good addition, for an unmarried woman, supposed to be a virgin, as single woman is, for one who being unmarried hath a bastard?*

Gentility, (gentilitas) Is lost by attainder of treason, or felony, by which persons become base and ignoble, &c.

Genu, Is a generation.—*Successe Ethelbaldo. Offa quinto Genu. Malmsb. lib. 1. c. 4.*

Genus, (Lat.) The general stock, extraction, &c. as the word office in law is the *genus*, or general; but the sheriff, &c. is the *species* of it, or particular. *2 Lill. Abr. 528.*

Genus, among metaphysicians and logicians, denotes a number of beings, which agree in certain general properties, common to them all; so that a *genus* is, in fact, only an abstract idea, expressed by some general name or term; or rather a general name or term, to signify what is called an abstract idea.

George Noble, A piece of gold, current at six shillings and eight-pence, in the reign of King Hen. 8. *Lownd's Ess. upon Coins, p. 41.*

Georgia, In America, its colony established, *6 Geo. 2. c. 25. sec. 7.* The sum of twenty-six thousand pounds is granted by the land-tax act, towards settling the new colony of *Georgia in America.* *Statute 8 Geo. 2. cap. 23.* And thirty thousand pounds further, by *9 Geo. 2. c. 34.* and *10 Geo. 2. cap. 17.*

Gersuma, Mentioned in Mon. Ang. tom. 2. p. 973. See *Garsummas.*

Gesta e fama, An antient writ where a person's good behaviour was impeached, now out of use. *Lamb. Eiren. lib. 4. cap. 14.* See *Good Abearing.*

Gewineda, (Sax.) Was used for the publick convention of the people, to decide a cause: *et pax quam aldermannus Regis in quinque burgorum gewineda dabit emendatur 12 libris.* *LL. Ethelrpd. cap. 1.*

Gewinnesa, The giving of evidence. *Leg. Ethel. cap. 1. apud Brompton.*

Gift, (donum) Is a conveyance, which passeth either lands or goods. And a gift is of a larger extent than a grant, being applied to things moveable and immoveable; yet as to things immoveable, when strictly taken, it is applicable only to lands and tenements given in tail; but gifts and grants are said to be alike in nature and often confounded. *Wood's Inst. 260.* A gift may be by deed, in word, or in law: all goods and chattels personal may be given without deed, except in some special cases; and a free gift is good without a consideration. *Perk. 57.* But a general gift of all one's goods, without any exception, though by deed, is liable to suspicion as fraudulent, to deceive creditors; for by giving all a man's goods, there seems to be a secret trust and confidence implied,

that the donee shall deal favourably with the donor, in respect to his circumstances. *3 Rep. 80.* Therefore whenever any gift shall be made, in satisfaction of a debt, it is good to make it in a publick manner before neighbours, that the goods and chattels be appraised to the full value, and the gift expressly made in satisfaction of the debt; and that on the gift, the donee take possession of them, &c. *Hob. 230.* If a man intending to give a jewel to another, say to him, *Here I give you my ring, with the ruby in it, &c.* and with his own hand delivers it to the party, this will be a good gift; notwithstanding the ring bear any other jewel, being delivered by the party himself, to the person to whom given. *Bac. Max. 87.* And if a person give a horse to another, being present, and bid him take the horse, though he call the man by a wrong name, it will be a good gift; but it would be otherwise if the horse were delivered for the use of another person, being absent: there a mistake of the name would alter the case. *Ibid.* A gift must be certain; therefore to give, or grant another his horses or cows, that may be spared, will be void; though if one give to *A. B.* his horse, or his cow, he may take which he will. *Bro. Dont. 90.* If I give all my money in my purse to another, without saying how much it is, this is a void gift, and no action will lie for the same. *Plowd. 273.*

By the *Stat. 29 Car. 2. cap. 3.* "No leases, estates or interests either of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to or out of, any messuages, manors, lands, tenements or hereditaments, shall at any time be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law."

As to gifts in law, when a man is married to a woman, all her goods and chattels by gift in law become the husband's; but then he is liable for her debts: so if a man is made executor, the law gives him all the goods and chattels of the testator, subject to his debts: And if a person make a suit of clothes for another, and put it upon him to use and wear, this will be a gift or grant in law of the apparel made. *1 Inst. 351.* A man by deed did give and grant, bargain and sell, alien, enfeoff and confirm to his daughter certain lands: but no consideration of money was mentioned, nor was the deed inrolled; there was likewise no consideration of natural affection expressed, (other than what was implied in naming the grantee his daughter) and there was no livery indorced, or any found to have been made; nor was the daughter in possession at the time of the deed made; and in *B. R.* it was adjudged by the court that the deed was good, and carried the estate to the daughter by way of covenant to stand seised, &c. *1 Mod. Rep. 157.*

The words *give* and *grant*, in deeds of gift, &c. of things which lie in grant, will amount unto a grant, a feoffment, a gift, release, confirmation or surrender, at the election of the party, and may be pleaded as a gift, or grant, release, &c. at his election. *1 Inst. 301.* And words shall be marshalled so in gifts and grants, that where they cannot take effect according to the letter, the law will make such construction as the gift by possibility may take effect: *benigne sunt interpretationes chartarum propter simplicitatem laicorum, ut rei, &c.* *Co. Lit. 183.* If a person gives or grants land, and does not say in what parish or county it lies; yet if there be any other thing to describe it, as lately belonging to such a person, &c. or other circumstantial matter, it may be averred where the land lieth, and so the gift be good. *Bro. Grant 53. 9 Rep. 47.* All corporeal and immoveable things that lie in livery, such as manors, messuages, cottages, lands, woods, and the like, may be given and granted in fee, for life, or years at first; and be assignable over after, from man to man in infinitum. *1 Roll. Abr. 44.* And where a man gives and grants wood to another on his lands, or so. for it to be received out of the same lands, &c. here the wood passes by the gift presently, with power to choose to have the money. *Roll. Abr. 47.* A deed of gift of lands or goods may be made upon condition; and on a gift or sale of goods, the delivery of 6d. or a spoon, &c.

Et, is a good *seisin* of the whole. *Wood's Inst.* 234.
See *Fraud*.

Giffa Aqua, The stream of water to a mill.—
Molendinum & vivarium cum giffa aquae. Mon. Angl.
tom. 3.

Gismills, A kind of fulling mills for fulling and
burling of woollen cloth, prohibited *anno* 5 & 6 *Ed.* 6.
c. 22.

Gild, A fraternity, or company, *Et*. See *Guild*.

Gilda Mercatoria, A mercantile meeting or assembly.
If the King grants to a set of men to have *gildam mercato-*
riam, this is alone sufficient to incorporate and establish
them for ever. 10 *Rep.* 30. 1 *Roll. Abr.* 513. *Black*
Com. 1 *V.* 473.

Gilding Metals. The gilding any metal but silver,
and church ornaments; or silvering any thing except the
apparel of peers, *Et*. and metal for knight's spurs, is
liable to forfeiture of ten times the value, and a year's im-
prisonment, by statute 8 *H.* 5. *cap.* 3. None shall gild
rings or other things made of copper or latten, on pain
to forfeit 5 *l.* to the King, and damages to the party de-
ceived. 5 *Hen.* 4. *c.* 13. For gilding silver wares, no
person may take above 4 *s.* 8 *d.* for a pound of troy
weight, under penalties. *Statute* 2 *H.* 5. *cap.* 4.

Gisarmis, or *Gisfarmes*, An halbert or hand-ax
from the Lat. *bis arma*, because it wounds on both sides
Skene—*Est armorum genus longo manubrio & porrecta*
cuspide. *Spelm.* It is mentioned in the statute 13 *Ed.* 1.
c. 6.

Gist of Action, From the Fr. *gist*, is the cause for
which the action lieth; the ground and foundation there-
of, without which it is not maintainable. 5 *Mod. Rep.*
305.

Gladiolus, A little sword, or dagger; also a kind of
sedge. *Matt. Paris.* 1206.

Gladius *Jus gladii*, is mentioned in our Latin au-
thors, and the Norman laws; and it signifies a supreme ju-
risdiction. *Camd.* And it is said that from hence, at the
creation of an earl, he is *gladio succinctus*; to signify that
he had a jurisdiction over the county of which he was
made earl. See *Pleas of the Sward*.

Glaive, (Fr.) A sword, lance, or horseman's staff.
Gleyre was one of the weapons allowed the contending par-
ties in a trial by combat. *Orig. Jurisd.* 79. *Glovea*, a
hand dart. *Blount*.

Glass. There were certain duties granted on all glass-
ware, *Et*. by *Stat.* 6 & 7 *W.* 3. And these duties were
continued for ever by a subsequent act. But they are since
taken off. See *Stat.* 10 & 11 *W.* 3. *cap.* 18. By the
Stat. 19 *Geo.* 2. *cap.* 12. A further duty is laid upon glass
of 8 *d.* per pound, upon all crown, plate, and flint glass
imported; 2 *d.* per pound on green glass imported, and
2 *s.* per dozen on flask and bottles imported; and on all
materials or metal used in making crown, plate or flint
glass 9 *s.* 4 *d.* per hoghead; and for making common
bottles, or green glass 2 *s.* 4 *d.* per hoghead.

Glass-men, Are reckoned amongst wandering rogues
and vagrants, by the old statutes. 39 *Eliz.* *c.* 17. and
1 *Jac.* 1. *c.* 7.

Gleaning. It hath been said, that by the Common
law and custom of England, the poor are allowed to enter
and glean upon another's ground, after the harvest, with-
out being guilty of trespass; (*Gilb. Eo.* 253. *Trials per*
Pais *c.* 15. *p.* 438.) which humane provision seems borrowed
from the Mosaic law, (*Levit.* *c.* 19. *v.* 9. & *c.* 23. *v.*
22. *Deut.* *c.* 24. *v.* 19, &c.) *Black. Com.* 3 *V.* 212,
213.

Glebe, (gleba) Is church-land; *Dos vel terra ad ec-*
clesiam pertinens. *Lyndewood* says, *Gleba, est terra in qua*
consistit dos ecclesie; generaliter tamen sumitur pro solo vel
pro terra culta: we most commonly take it for the land
belonging to a parish church, besides the tithes. If any
parson, vicar, *Et*. hath caused any of his glebe lands to
be manured and sown at his own costs, with any corn or
grain, the incumbents may devise all the profits and corn
growing upon the said glebe by will. *Statute* 28 *Hen.* 8.
cap. 11. And if a parson sows his glebe and dies, the ex-
ecutors shall have the corn sown by the testator. But if
the glebe be in the hands of a tenant, and the parson dies
after severance of the corn, and before his rent due; it is

aid, neither the parson's executors, or the successor, can
claim the rent, but the tenant may retain it, and also the
crop, unless there be a special covenant for the payment to
the parson's executors proportionably, *Et*. *Wood's Inst.*
163. *Sed quod* If this case would not come within the
equity of 11 *Geo.* 2. *c.* 19. *f.* 15. which gives right of
action to the representative of tenant for life, for any por-
tion of rent in arrear at the time of his death?

A parson exchanges his glebe land and dies; the successor
enters into the exchanged land, and takes the profits; yet
the successor is bound for his time; *Et adjournatur*.
'Tis clear the exchange shall not have been good, if it
had been made after the 13 of *E.* But the exchange in
this case was before. *Noy* 5. *Thurter's case*.

Prohibition was moved for to a parson for digging new
coal-mines in his glebe, and also for felling trees; for 'tis
waste and prohibitable by the statute *de non proferendis*
arboribus, Et. The court held, it lay not for the mines;
for then no mines in glebe could ever be opened. *Lev.*
107. *Frin.* 15 *Car.* 2. *B. R.* *Earl of Rutland's case*.

By *Stat.* 28 *Hen.* 8. *c.* 11. Every successor, on a month's
warning, after induction, shall have the mansion-house,
and the glebe belonging thereto, not sown at the time
of the predecessor's death. He that is instituted may
enter into the glebe land before induction, and has right
to have it against any stranger; *per Coke* *Ch. J.* *Roll. R.*
192.

There is a writ grounded on the *Stat. articuli cleri*,
cap. 6. Where a parson is distrained in his glebe lands
by sheriffs, or other officers; against whom attachment
shall issue. *New Nat. Br.* 386, 387. See *Picar*.

Glebaria, Turfs dug out of the ground.—*In Sylvis*,
Campis, Semitis, Moris, Glebariis, Et.

Glisterna, An old Saxon word for a fraternity. *Leg.*
Adelstan, cap. 12.

Glomerells, Commissaries appointed to determine dif-
ferences between scholars of a school or university, and the
townsfolk of the place: in the edict of the bishop of
Ely, *anno* 1276, there is mention of the Master of the
Glomerells.

Glove-Silver, Money customarily given to servants to
buy them gloves, as an encouragement of their labours.
—*Inter antiquas consuetudines abbatis de Sancto Edmundo*,
capitulum etiam quidam ex predictis. Servientibus glove silver
in festo Sancti Petri quorum hæc sunt nomina, clericus celler-
arii 2 denar. armiger cellerarii 11 den. grangiarius 11
den. vaccarius 1 den.—*Ex Cartular. S. Edmund.* *MS.*
323. *Glove-money* has been also applied to extraordinary
rewards given to officers of courts, *Et*.

Glyn, A valley, according to the book of *Demofday*.
Go. This word is sometimes used in a special signifi-
cation, as to go without day, is to be dismissed the court;
so in old phrase, to go to God. *Broke Kitch.* 190.

Goats, No man may common with goats within the
forest without especial warrant. *Nota*, That *Capriolus*
non est bestia venationis foreste. *Manwood's Forest Laws*,
cap. 25. *numb.* 3.

Goat's butt, To what duties liable, 4 *Will. & Ma.*

God-bote, (Sax.) An ecclesiastical or church fine, paid
for crimes and offences committed against God.

God-gift, That which is offered to God, or his ser-
vice. *Sax.*

God and Religion, Offences against. *Apostacy* is an
offence against God and religion. 'Twas formerly the
object only of the Ecclesiastical courts, which corrected
the offender *pro salute animæ*. But now, by *Stat.* 9 & 10
W. 3. *c.* 32. If any person educated in, or having made
profession of the Christian religion, shall by writing,
printing, teaching, or advised speaking, deny the Chris-
tian religion to be true, or the Holy Scriptures to be of
divine authority, he shall upon the first offence be ren-
dered incapable to hold any office or place of trust; and
for the second, be rendered incapable of bringing any
action, being guardian, executor, legatee, or purchaser
of lands, and shall suffer three years imprisonment with-
out bail. To give room however for repentance, if with-
in four months after the first conviction, the delinquent
will in open court publicly renounce his error, he is
discharged for that once, from all disabilities.

Heresy is another offence. See *Stat. 1 Eliz. c. 1.* The offender subject only to ecclesiastical censure, by 29 *Car. 2. c. 9.* See *Black. Com. 4 V. 42 to 65.* as to *Revolving of the ordinances, Nonconformity, Blasphemy, Swearing and Cursing, Witchcraft, Religious Impostors, Simony, Sabbath-breaking, Drunkenness and Lewdness,* and those several titles.

Golda, A mine, according to *Blount. Concessionem quam idem Thomas fecit de terris suis & terris tenentium suorum à goldis mundandis per se & suos secundum consuetudinem, &c.* Mon. Ang. tom. 2. pag. 610.

Gold and Silver Lace and Thread, Persons that sell orrize lace, mixed with other metal or materials than gold, silver, silk and vellum, shall forfeit 2 s. 6 d. for every ounce: and there shall be allowed at least six ounces of gold and silver prepared and reduced into plate, to cover four ounces of silk, except large twist, frize, &c. And laying the same on greater proportions of the silk, or in any other manner than directed, incurs the like forfeiture of 2 s. 6 d. the ounce. Copper, and lace inferior to silver, is to be spun upon thread, yarn or iccle, and not on silk; but this does not extend to *Tinsel* apparel, used in theatres. No gold or silver lace, thread, fringe or wire, &c. may be imported, on pain of being forfeited and burnt, and 100 l. penalty. *Statute 15 Geo. 2. c. 20.*

Importation and making up of gold and silver lace, embroidery, brocade, &c. prohibited, 22 *Geo. 3. c. 36.* See *Wire Drawers, Embroidery.*

Goldsmiths, Gold and silver manufactures are to be assayed by the warden of the *Goldsmiths* company in London, and marked; and gold is to be of a certain touch. 28 *Ed. 1. cap. 20.* *Goldsmiths* must have their own marks on plate, after the surveyors have made their assay; and false metal shall be seized and forfeited to the King. 37 *E. 3. 7.* Work of silver made by *Goldsmiths*, &c. is to be as fine as *Sterling*, except the folder necessary; and marking other Work, incurs a forfeiture of double value. 2 *H. 6. c. 14.* *Goldsmiths* shall not take above 1 s. the ounce of gold, beside the fashion, more than the buyer may be allowed for it at the King's exchange: and if the work of any *goldsmith* be marked and allowed by the master and wardens of the mystery, and afterwards found faulty; the wardens and corporation shall forfeit the value of the thing so sold or exchanged. 18 *Eliz. c. 5.* Molten silver is not to be transported by *goldsmiths* before it is marked at *Goldsmiths Hall*, and a certificate made thereof on oath; and officers of the customs may seize silver shipped otherwise. 6 & 7 *W. 3. c. 17.* The cities of *York, Exeter, Bristol, Chester, Norwich*, and town of *Newcastle*, are appointed places for assaying and marking wrought plate of *goldsmiths*, &c. 12 *W. 3. 4.* 1 *Ann. c. 9.* A duty is granted on silver plate of 6 d. per ounce; and *goldsmiths* are to make entries thereof with the weight, on pain of 100 l. &c. And *goldsmiths* must work their plate according to the old standard; which is to be touched, assayed and marked before exposed to sale. *Stat. 6 Geo. 1. c. 11.* Gold

of silver, in every pound, y forfeit 10 s. And no *goldsmith* shall sell any such plate, until marked with the first letters of the maker's christian and surname, the mark of the city of *London*, being the leopard's head, lion passant, &c. and those made use of by the assayers at *York, Exeter, &c.* All persons making plate, are to enter their marks, names and places of abode in the assay-office; they are likewise to send with the plate required to be marked, a particular account thereof, in order to be entered, &c. or forfeit 5 l. The Assayers determine what folder is necessary about plate, and judge of the workmanship, and for good cause may refuse to assay it; and if any parcel be discovered of a coarser alloy than the standard, it may be broke and defaced; also the fees for assaying and marking are particularly limited, &c. 12 *Geo. 2. c. 26.*

Goldwite, or **Goldwits**, Perhaps a golden mulct; in the records of the *Tower*, there is mention of *confutudo aurata Goldwits vel Goldwits.*

Goltarius, Is a jester or buffoon, mentioned in *Mart. Paris. 1229.*

Good Bearing, (*Bonus Gestus*) Signifies an exact carriage or behaviour of a subject towards the King and the people; whereunto some persons upon their misbehaviour are bound; and he that is bound to this, is said to be more strictly bound than to the peace; because where the peace is not broken, the surety *de bono gestu* may be forfeited by the number of a man's company, or by their weapons. *Lamb. Eiren. lib. 2. c. 2. 34 Ed. 3. c. 1.*

Good Behaviour, Surety for the good behaviour is surety for the peace, and differs very little from *good abearing*. A justice of peace may demand it *ex officio*, according to his discretion, when he sees cause; or at the request of any other under the King's protection: his warrant also is to be issued when he is commanded to do it by writ of *supplicavit* out of *Chancery* or *B. R.*

But a justice of peace may not bind any person to his good behaviour, upon a general accusation made against the party. *Pasch. 23 Car. B. R.* He that demands security for the peace, must make oath before the justice of blows given, or that he stands in fear of his life, or some bodily hurt; or that he fears the party will burn his house, &c. and that he doth not demand the peace of him for any malice or revenge, but for his own safety; whereupon the justice grants his warrant to bring the party before him, and then security is to be given by recognisance for the good behaviour; or on default thereof, the party shall be committed to gaol. 1 *Inst. 293. 4 Inst. 180.*

It may be granted against any persons whatsoever, under the degree of nobility, against whom complaint is to be made in the Court of Chancery, or in *B. R.* and they may be bound there to keep the peace. *Dalt 267, 268.* The warrant of the justice to keep the peace, is to be granted against infants, and feme-coverts, who ought to find security by their friends, and not be bound themselves; it may be had against the husband, at the request of the wife, and against the wife, at the request of the husband; against a lunatick, that hath sometimes lucid intervals; (but not a *non compos*, or against, or for one attainted of felony, &c.) against any person affronting a judge, justice of the peace, &c. and in a word against all persons that are suspected to break the peace, or that do break it by affrays, assaults, battery, wounding, fighting, quarreling, threatening to beat another, or to burn his house, rioters, &c. and in all cases, where there is a future danger. *Dalt. 263, 264. 4 Inst. 180.* Also one may be bound to his good behaviour for a scandalous way of living, for keeping bawdy-houses, or haunting them, gaming-houses, &c. and so may common drunkards, whoremongers, and common whores, night-walkers, and those that live idly, cheats, libellers, &c. *Dalt. 292, 293.* A woman who is a common scold may be bound to the good behaviour.

Surety for the good behaviour may be required of scandalous, turbulent, suspicious persons, as of forcible entries, or obscene writers, or recusants, but not in respect of bare words; unless they tend to a breach of the peace, or scandal of the government. *Hawth. Pl. C. c. 61. 9. See Pl. 1, 2, 3, 4.*

The statute 34 *Ed. 3. c. 1.* relates only to misbehaviours against the publick peace, so that it ought not to be demanded for private defamation of another, but for words only, which tend to the breach of the peace, or terrifying others, or unto sedition, &c. 4 *Inst. 181. 1 Lill. Abr. 650, 651.*

Sureties of good behaviour may be required of persons convicted of disturbing divine service, 1 *M. 2. c. 3. 12 Ed. 6.* Or offending against game laws, 5 *El. c. 21. 12 Ed. 3. 22 & 23 Car. 2. c. 25. 12 Ed. 4.* Or entertaining outlaws and felons, 43 *Eliz. c. 13. 12 Ed. 5.* Or persons infected with the plague going abroad, tho' no sore on them, 1 *Jac. 1. c. 51. 12 Ed. 7.* Or unlawfully hunting in parks, 3 *Jac. 1. c. 13. 12 Ed. 2.* Or convicted a second time of drunkenness, 4 *Jac. 1. c. 5. 12 Ed. 3. 21 Jac. 1. c. 7. 12 Ed. 3.* Or refusing to take the oaths of supremacy and allegiance, 1 *W. & M. 2. c. 8. 12 Ed. 9.* Or of felons after pardon, 5 *W. & M. c. 13. 12 Ed. 2.* Or persons unlawfully gaming, 9 *Ann. c. 14. 12 Ed. 6.*

Or committing disorders in dock-yards, 1 Geo. 1. c. 25. *sect.* 2. Or destroying timber, 1 Geo. 1. c. 48. *sect.* 3. Or forcing through turnpikes, 8 Geo. 2. c. 20. *sect.* 11. Or pretending to witchcraft, 9 Geo. 2. c. 5. *sect.* 4. Or assisting in running goods, 9 Geo. 2. c. 35. *sect.* 19.

When security for the peace is given to the King by recognizance in the penal sum, if the peace is afterwards broken by any act of the party, or by his procuring another to break it, &c. it is a forfeiture of the recognizance, which being brought to the next sessions of the peace by the justice, the justices in sessions are to certify the recognizance, with the cause of forfeiture, into B. R. or the Exchequer, &c. from whence process shall go out against the offender. *Dalt.* 277, 296.

Such a recognizance shall not only be forfeited for such actual breaches of the peace, for which a recognizance for the peace may be forfeited; but also for some others, for which such a recognizance cannot be forfeited, as for going armed with great numbers to the terror of the people, or speaking words tending to sedition. And also for all such actual misbehaviour, which are intended to be prevented by such a recognizance, but not for barely giving cause of suspicion of what perhaps may never actually happen. *Hawt. Pl. C. c. 62. pl. 6.*

The surety for the peace or good behaviour may be released by the justice that took it, and the party upon whose complaint it was granted. *Dalt.* 296. But it is said such a recognizance may not be discharged by release of the party himself; because the cognisor is bound to the King, and to keep the peace in general; though by the death of the King, or of the principal cognisor, (not of the sureties) it is discharged of course. *Roll. Rep.* 199.

Note; The King cannot discharge recognizance taken for surety of the peace, but after it is broken he may. *Hill. 1 & 2 W. & M. C. B. 2 Vent.* 131. cites 11 H. 7. 12. and in *Marg. 1 Inst.* 238. *Faugh.* 334.

Justices of peace, under colour of their authority, use to require the good behaviour of every one at their pleasure; and if they refused, then to commit them to prison: But if they have not good cause to require sureties for good behaviour, and the party refusing to give it is committed to prison, false imprisonment lies; for the statute which gives the justices that authority, is principally against vagabonds. 1 *Lill.* 651. See *Black. Com.* 4 V. 248, 253.

Good Consideration. A good consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation; being founded in motives of generosity, prudence and natural duty: a valuable consideration is such as money, marriage or the like, which the law esteems an equivalent given for the grant; (3 *Rep.* 83.) and is therefore founded in motives of justice. Deeds made upon good consideration only, are considered as merely voluntary, and are frequently set aside in favour of creditors, and bona fide purchasers. *Black. Com.* 2 V. 297.

Goods and Chattels, (*Bona & catalla*) Personal, &c. See *Chattels.*

Goule, (Fr. *Goulet*) A breach in a sea bank or wall; or a passage worn by the flux and reflux of the sea. 16 & 17 *Car.* 2. c. 11.

Goyce, (From the Fr. *Gort*.) A wear: by *stat.* 25 *Ed.* 3. c. 4. it is ordained, that all *Gorces*, mills, wears, &c. levied and set up, whereby the King's ships and boats are disturbed and cannot pass in any river, shall be utterly pulled down, without being renewed. Sir *Edward Coke* derives this word from *Gorges*, a deep pit of water, and calls it a *Gors*, or *Gulf*; but this seems to be a mistake, for in *Domesday* it is called *Gourt* and *Gort*, the French word for a wear. *Co. Litt.* 5.

Goyt, A narrow slip of ground. *Paroch. Antiq.* 393.

Gote, (Sax. *Geotan*, i. e. *Fundera*) A ditch, sluice or gutter, mentioned in the 23 H. 8. c. 5.

Government. According to the great *Montesquieu* (as well as most other writers) there are three kinds of government; 1. The *Republican*, 2. The *Monarchical*, 3. The *Despotic*. The first is that where the people in a body, or only a part of the people have the sovereign

power: The second where one alone governs, but by fixed and established laws. But in the despotic one alone, without law, and without rule, directs every thing by his own will and caprice. *L'Esprit des Loix*, *Liv.* 2. c. 1. fo. 10. *Quarto Edition* 1767. On the subject of government see that excellent author, also *Locke* on the same subject, 2 V. 139, &c. *Quarto Edition* 1768. *Sidney* on government, Sir *Thomas Smith's de Repub. Angl.* And *Acherly's Britannic Constitution*.

As to the Gothic government its origin and faults, &c. See *Montesq. L'Esprit des Loix*, *Liv.* 11. c. 8. fo. 223. *Quarto Edition*.

With respect to the feudal policy, how it limited government, See *Robertson's Hist. Emp. Cba.* V. 1 V. 16, &c. &c. So far as to generals.—In the first year of King *William* and *Queen Mary*, an act was made for empowering his Majesty to apprehend and detain such persons as he should find just cause to suspect were conspiring against the government: by virtue of which, those who were suspected of treasonable practices, were taken up and imprisoned, without bail or mainprize, for six months, &c. *Stat.* 1 W. & M. c. 2. A like act of parliament, to continue a short time, passed in the reign of *Queen Anne*, 6 *Ann.* c. 15. And his Majesty King *George* the first was empowered by statute, to secure and detain suspected persons, in the time of the late rebellion; and all actions, suits and prosecutions, by reason of any thing done to suppress the same, and for the service of the government, were made void. *Stat.* 1 Geo. 1. c. 8, 39. and others. Suspending the *habeas corpus* act. See *Habeas Corpus*. Preaching against the government. Vide *Indisment*. *Montesquieu*, speaking of liberty, and alluding to the *English*, says, I must own, that the practice of the freest nation that ever existed, induces me to think that there are cases in which a veil should be drawn for a moment over liberty, as it was customary to veil the statues of the Gods. *L'Esprit des Loix*, *Liv.* 12. c. 19. 1 V. 273. *Quarto Edition* 1767.

Governors of the Chest at Chatham, Are officers appointed to take care of, and relieve the poor and maimed seaman belonging to the Royal Navy.

Grace. Acts of parliament for a general and free pardon, are called *Acts of Grace*. 7 Geo. 1. cap. 29, &c.

Graduates, (*Graduati*) Are scholars who have taken degrees in an university. 1 *Hen.* 6. c. 3.

Gratter, (Fr. *Greffier*, i. e. *Scriba*) A notary or scrivener, used in the *stat.* 5 H. 8. c. 1.

Gravio, *Gravio*, A landgrave, or earl—*Nec princeps; nec Graffio, hanc lenitatem mutare audeat.* *ibon. A. g.* Tom. 1. p. 100.

Grassum, A writing-book, register, or cartulary of deeds and evidences. *Annal. Eccl. Menevensis apud Angl. Sacr. par.* 1. pag. 653.

Grail, (*Gradale*, or *Graduale*) A gradual or book, containing some of the offices of the Roman church—*Gradale, sic dictum, a gradalibus in tali libro contentis.* *Lyndewood. Provincial. Ang. lib.* 3. It is sometimes taken for a mass-book, or part of it, instituted by *Pope Celestine*, Anno 430. See *Stat.* 37 H. 6. c. 32.

Grain, is the twenty-fourth part of a penny weight. *Merch. Dic.* Also grain signifies any corn sown on ground; and there is what is so called in the top of the ear, less than corn. *Lit. Allyn's Rep.* 80.

Grand Writte, A writ in real action to determine the right of property in lands. See *Magna Assisa*.

Grand Cape, Is a writ on a plea of land, where the tenant makes default in appearance at the day given, for the King to take the land into his hands, &c. *Reg. Jud.* 1. Vide *Cape Magnum*.

Grand Days, Are those days in the *Terms* which are solemnly kept in the *House of Court* and *Chancery*, i. e. *Candlemas Day* in *Hilary term*, *Ascension Day* in *Easter term*, *St. John the Baptist Day* in *Trinity term*, and *All Saints Day* in *Michaelmas term*; which days are *Dies non Juridici*, or no days in court.

Grand Distress, Is a writ so called, not for the quantity of it, for it is very short, but for its quality; for the extent thereof is very great, being to all the goods and chattels of the party distrained within the county; it lies in

in two cases, either when the tenant or defendant is attached, and appears not, but makes default; or where the tenant hath once appeared, and after makes default, then this writ is had by the *Common Law* in lieu of a *Petit Cape*. Stat. Westm. 1. cap. 44. 52 H. 3. cap. 9.

Grand Jury, Is the jury that find bills of indictment before justices of peace, and gaol delivery, or of *Oyer and Terminer*, &c. They ought only to hear witnesses for the King; and to find a bill on probable evidence; because it is but an accusation, and the party is to be put upon his trial afterwards. But if the bill be against *A.* for murder, and the grand jury on the evidence before them, be satisfied it was *se defendendo*, &c. and so return it specially; the court may remand them to consider better thereof, or hear the evidence at the bar, and accordingly direct the grand jury. 2 *Half's Hist. P. C.* 157, 158. But see 2 *Hawk.* 210. Where a grand jury refuses to present things, within their charge, &c. a new grand inquest may be impanelled, to inquire of the concealment of the former; on whose defaults presented, they shall be amerced. *Ibid.* 155. A grand juror disclosing to any one indicted, the evidence that appeared against him, is guilty of a high misprision, and liable to be fined and imprisoned. 1 *Hawk. P. C.* 59. *Black. Com.* 4 V. 126, 299. Vide *Indictment and Jury*.

Grand Serjeanty, An ancient tenure, by military service. See *Chivalry*.

Grange, (*grangia*) A house or farm where corn is laid up in barns, granaries, &c. and provided with stables for horses, stalls for oxen, and other things necessary for husbandry.

Grangarius, Is the person who has the care of such a place, for corn and husbandry: and there was anciently a granger, or grange-keeper belonging to religious houses, who was to look after their granges, or farms in their own hands. *Flota, lib. 2. cap. 8. Cartular. St. Edmund.* MS. 323.

Grant, (*Concessio*) Signifies in the Common law a conveyance in writing of incorporeal things not lying in livery, and which cannot pass by word only; as of reversions, advowsons in gross, tithes, rents, services, common in gross, &c. It has also been taken generally, for every gift and grant of any thing whatsoever. 1 *Inst.* 172. 3 *Rep.* 63. And grants are made by such persons as cannot give but by deed: he that granteth is termed the grantor, he to whom the grant is made is the grantee: *West. Symb.* See 234.

Under this head may be considered,

- I. *What things and interests may be granted, by what description, and how grants shall be construed.*
- II. *Who may make grants, and who may take by grant*

- I. *What things and interests may be granted, by what description, and how grants shall be construed.*

A man cannot grant that which he hath not, or more than he hath: though he may covenant to purchase an estate, and levy a fine to uses, which will be good. *Bac. Max.* 58. A person may grant a reversion, as well as a possession; but the law will not allow grants of titles only, or imperfect interests, or of such interests, as are merely future. *Ibid.* A bare possibility of an interest, which is uncertain; a right of entry, or thing in action, cause of suit, &c. may not be granted over to a stranger. *Perk. Sect.* 65. 2 *Inst.* 214. 4 *Rep.* 66. It was formerly held, that by a grant of all a man's goods and chattels, bonds would pass; now 'tis held the contrary, that the words *Goods and Chattels* do not extend to bonds, deeds or specialties, being things in action, unless in special cases. 8 *Rep.* 33. 1 *Inst.* 152. See 2 *Grb.* 2 cap. 25. In grants there must be a foundation of interest, or they will not be binding: If a person grants a rent-charge out of lands, when he hath nothing in the land, the grant will be void. *Perk.* 15. Though it is said, if a man grant an annual rent out of land, wherein he hath no kind of interest, yet it may be good to charge the person of the grantor. *Owen Rep.* 3. A man may grant an annuity for him, and his heirs, to commence after his death, and it shall charge the heir. *Bac. Max.*

58. And after the grant of an annuity, &c. is determined, debt lies for the arrears; and the person of the tertenant will be charged. 7 *Rep.* 39. If a common person grants a rent, or other thing that lies in grant, without limitation of any estate, by the delivery of the deed, a freehold passes: but if the King make such a grant of a rent, &c. it is void for uncertainty. *Dow. Rep.* 45. a.

A grant to a man, with a blank for his christian name, is void, except to an officer known by his office, when it must be averred: and it is the same where the grantee's christian name is mistaken. *Cro. Eliz.* 328. And grants may be void by uncertainty, impossibility, being against law, on a wrong title, to defraud creditors, &c. 1 *Inst.* 183. Such things as lie in grant, may not be granted, or held without deed: and if any thing not grantable, is granted with other things, the grant will be void for all. 2 *Shep. Abr.* 269, 271, 273. Trusts and confidences are personal things, and may not be granted over to others in most cases; as offices of trust, and the like: but all kinds of chattels real and personal, are grantable. *Perk. Sect.* 99. *Plowd.* 141, 379.

If one grant any thing that lies in livery, or grant, and that is *in esse* at the time of the grant, in fee, or for life, and the estate is to begin at a day to come; this for the most part will be void: but a lease or grant for years, may be good *in futuro*; and may be to one for term of years, or years determinable on lives, and after to another, to begin at the end of that estate. 5 *Rep.* 1. *Dyer* 58. Where a man hath a reversion after an estate for life of land, and he grants a rent out of it; the grant is good, and will fasten upon the land after the estate of the tenant for life is ended: and if a person grant rents, &c. and a stranger take them at that time; in this case the grant will be good, for one may not be out of possession of these things but at his pleasure. *Perk.* 92, 98. If a man grants that to one, that he hath granted before to another, for the like term, &c. the second grant will be void. *Dyer* 23. *Perk. Sect.* 102. Grants are usually made by these words, *viz. Have Given, Granted and Confirmed*, &c. And words in Grants shall be construed according to a reasonable sense, and not be strained to what is unlikely. *Hob.* 304. Also it hath been adjudged, that grants shall be expounded according to the substance of the deed, not the strict grammatical sense; and agreeable to the intention of the parties. 1 *Inst.* 146, 313.

To every good grant the following things are requisite: 1. That there be a person able to grant. 2. A person capable of the thing granted. 3. That there be a thing grantable. 4. That it be granted in such manner as the law requires. 5. That there be an agreement to, and acceptance of the thing granted, by him to whom made. And 6. There ought to be an attornment where needful. 1 *Inst.* 73. But grants and conveyances are good, without attornment of tenants, notice being given them of the grants, by stat. 4 *Ann. c.* 16. s. 9. Grants are taken most strongly against the grantor in favour of the grantee: the grantee himself is to take by the grant immediately, and not a stranger, or any *in futuro*; and if a grant be made to a man and his heirs, he may assign at his pleasure, though the word *Assigns* be not expressed. *Litt.* 1. *Saund.* 322. The use of any thing being granted, all is granted necessary to enjoy such use: and in the grant of a thing, what is requisite for the obtaining thereof is included. 1 *Inst.* 56. So that if timber trees are granted, the grantee may come upon the grantor's ground to cut and carry them away. 2 *Inst.* 309. *Plowd.* 15.

Where the principal thing is granted, the incident shall pass; but the principal will not pass by the grant of the incident. 1 *Inst.* 152. A Lord of a manor cannot grant the same, and reserve the Court Baron, it being inseparably incident. *Ibid.* 313. A grant of a manor, without the word *cum pertinentiis*, will pass all things belonging to the manor: the grant of a farm will also pass all lands belonging to it; but a grant of a messuage passes only the house, outhouses and gardens. *Owen's Rep.* 51. *Tit. il. maner de A.* may be taken in the singular, or plural number; and dashes and abbreviations in

grants shall be so taken that the *grant* be not void. 9 *Rep.* 48. When lands are *granted* by deed, the houses which stand thereon will pass; houses and mills pass by the *grant* of all lands, because that is the most durable thing on which they are built. 4 *Rep.* 86. 2 *And.* 123. By *grant* of all the lands, the woods will pass: and if a man *grant* all his trees in a certain place, this passeth the soil; tho' an exception of wood extends to the trees only, not the soil. 1 *Roll. Rep.* 33. *Dyer* 19. 5 *Rep.* 11.

Trees in boxes will not pass by the *grant* of the land, &c. as they are separate from the freehold. *Mod. Cases* 170. A man *grants* all his wood that shall grow in time to come; it is a void *grant*, not being in esse. 3 *Leon.* 37. A *grant de vestura terre* passeth not the freehold; therefore, the *grantee* hath no authority to dig in it by virtue of such a *grant*. *Ow.* 37. By the *grant* of lands in the possession of another, it is good if such other be in possession, let the possession be by right, or wrong. 1 *Roll. Rep.* 23. If a *grant* is general, and the lands *granted* restrained to a certain Vill, the *grantee* shall have no lands out of the Vill. 2 *Rep.* 33. If I *grant* all my lands in D. which I had by the *grant* of A. B. this is a good *grant* of all my lands in D. whether I had them of A. B. or any other. *Mich.* 2. *Jac.* 2. It has been held, that where a *grant* is made of lands and tenements in D. copyhold lands will not pass; for they cannot pass otherwise than by surrender. *Owen* 37.

Where lands are certainly described in a *grant*, with a recital as *granted* to A. B. &c. though they were not thus *granted*, it has been adjudged that the *grant* was good. 10 *Rep.* 110. If a first description of lands in a *grant* is false, notwithstanding the second be true, nothing will pass by it; though if the first be true, and the second false, the *grant* may be good. 3 *Rep.* 10. The word *grant*, where it is placed among other words of demise, &c. shall not enure to pass a property in the thing demised; but the *grantee* shall have it by way of demise. *Dyer* 56.

Of *grants* some charge the *grantor* with something he was not charged with before; others discharge the *grantee* of something wherewith he was before charged, or chargeable. If a man *grant* to me a rent-charge; and after I *grant* to him, that he shall not be sued for this rent; this is good to bar me of bringing an action, tho' I may still distrain for the rent: And if one *grants* to his lessee for life or years, that he shall not be impeached for waste; it will be a good discharge, and may be pleaded. 7 *H.* 6. 43. *Bro. Grant* 175. *Kelw.* 88. See 1 *Rep.* 147. 10 *Rep.* 48. and tit. *Condition*.

II. Who may make grants, and who may take by grant.

Any natural person, or corporate body, (not prohibited by law, as infants, feme coverts, monks, &c.) may make a *grant* of lands, and be a *grantor*; and an infant, or woman covert, may be a *grantee*. *Perk.* 3, 4, 43. &c. Though the infant at his full age may disagree to the *grant*, and the husband disagree to the *grant* to his wife. *Ibid.*

But herein the law distinguishes between such *grants* as are void, and only voidable; the first of which are all such gifts, grants or deeds, made by an infant, which do not take effect by delivery of his hand; as if an infant give a horse, and no delivery of the horse with his hand, and the donee take the horse by force of the gift, the infant shall have an action of trespass, for the *grant* was merely void. *Perk. fca.* 12, 19. But if an infant enters into an obligation, makes a feoffment, levies a fine, or suffers a recovery, these are not void, only voidable. *Perk. fca.* 12, 13.

A *grant* by a feme covert is void, for no act of her's can transfer that interest which the intermarriage has vested in the husband. See 2 *New Abr.* 548. *Perk. fca.* 6. See *Infant* and *Baron* and *Feme*.

Grants made by persons *non sane memorie*, are good against themselves; but they are voidable by their heirs, &c. A man that is born dumb, or dumb and deaf, if he have understanding, by making signs, he may grant his land to another; not one who is born deaf, dumb and blind also. 1 *Co. Inst.* 2. A person attainted of treason, or felony, may make a deed of gift, or grant, and be good against all persons, except the King, and the lord

of whom the lands are held; and for relief in prison, they may be good against them likewise. 1 *Inst.* 2. *Perk. fca.* 26, 31. See *Capacity*.

The *grants* of persons under duress are void, that is, if they were made under an apprehension of some bodily hurt, or if the grantor were imprisoned without cause, and the grantee refused to release or discharge him, unless he made such *grant*. 2 *Inst.* 483. See *Dress*.

But menacing to burn houses, or spoil, or carry away the party's goods, are not sufficient to avoid the *grant*; for if he should suffer what he is threatened, he may sue and recover damages in proportion to the injury done him. 4 *Inst.* 485. *Perk. fca.* 18.

If there be father and son of the same name, and the father grants an annuity by his name, without any addition, it shall be intended the *grant* of the father; and if the son being of the same name with his father grant an annuity without any addition; yet the *grant* is good, for he cannot deny his deed. *Perk. fca.* 37.

There are but few (if any) persons excluded from being *grantees*, therefore a man attainted of felony, murder, or treason, may be a *grantee*; so of the King's villein, an alien, one outlawed in a personal action, or a bastard, may be *grantees*. *Perk. fca.* 48. A bastard, who is known to be the son of such a one, may purchase, or be a *grantee* by such reputed name; for all surnames were originally acquired by reputation. *Co. Lit.* 3. 2 *Rel. Abr.* 43, 4.

A feme covert may be a *grantee*, therefore if a rent-charge be granted to a feme covert, and the deed is delivered to her without the privacy of her husband, and the husband dies before any disagreement made by him, and before any day of payment, the *grant* is good, and shall not be avoided, by saying, that the husband did not agree, &c. but the disagreement of the husband ought to be shown. *Perk. fca.* 43.

Altho' aggregate corporations are invisible and exist only in supposition of law, yet they are capable of taking by *grant*, for the benefit of the members of the corporation. *Co. Lit.* 9. 1 *Saund.* 344.

Grants of the King. The King's *grant* is good for himself and successors, though his successors are not named. *Yelv.* 13. Before the statute *de prerogativa Regis*, dowers, advowsons, and other things, have passed by the general *grant of the King*; but by that statute they are to be *granted* in express words. 1 *Rep.* 50. The King may not *grant* away an estate tail in the crown, &c. And the law takes care to preserve the inheritance of the King for the benefit of the successor. 2 *And.* 154. *Style* 263. See *Jenk. Cent.* 307. A *grant* may not be made by the King which tends to a monopoly, against the liberty of the subject: Nor can the King make a *grant non obstante* any statute made, or to be made; if he doth, any subsequent statute prohibiting what is *granted*, will be a revocation of the *grant*. 11 *Rep.* 87. *Dyer* 52. Where the King is restrained by the Common law to make a *grant*, if he makes a *grant non obstante* the Common law, it will not make the *grant* good; but when he may lawfully make a *grant*, and the law requires he should be fully apprised of what he *grants*, and not be deceived, a *non obstante* supplies it, and makes the *grant* good; if the words are not sufficient to pass the thing *granted*, a *non obstante* will not help. 4 *Rep.* 35. *Nels. Abr.* 904.

If a *grant* is made by the King, and a former *grant* is in being of the same thing, if it be not recited, the *grant* will be void: And reciting a void *grant*, when there is another good, may make the King's *grant* void.

77. *Cro. Car.* 143. But there may be a *non obstante* to a former *grant*. If the King is deceived in his *grant*, as where it contains more than was intended to be *granted*; or if there be any deceit in the consideration, &c. such *grant of the King* is void. 5 *Rep.* 94. *Moor* 293. And the King's *grants* may be void, by reason of uncertainty; as if debts and duties are *granted*, without saying in particular what duties, &c. 12 *Rep.* 46. But where there is a particular certainty preceding, they shall not be destroyed by any uncertainty or mistake which follows: And there is a distinction where a mistake of title is prejudicial to the King, and when it is in some description of the thing which is supplemental only, and not material

or issuable. 1 *Mod.* 195. The King grants the manor of D. which he has by the attainder of a certain person, &c. and in fact the King hath it not so; this grant is void. 10 *Rep.* 109.

If the King grants a messuage of the value of 5 l. a year to A. B. and it be of the yearly value of 10 l. the value being in the same sentence with the grant, will make it void: Though if it be mentioned in another sentence it may be good. *Jenk. Cent.* 261. The grant of the King to a corporation, that they shall not be impleaded for lands, nor for any cause arising there, elsewhere than before themselves, &c. This doth not bind the King where he is party: And the King by his grant cannot exclude himself from prosecuting pleas of the crown; for it concerns the publick government. *Kelw.* 88. *Dyer* 376. *Jenk. Cent.* 190.

The King's grantee shall not forfeit for non-payment of rent, where the rent has been answered before process issued. 21 *Jac.* 1. c. 25. Grants of felons goods how to be inrolled. 4 & 5 *W. & M.* c. 22. s. 1. The crown restrained from granting lands, except for 31 years, &c. 1 *Ann.* s. 1. c. 7. s. 5. Forfeited estates excepted. 1 *Ann.* s. 1. c. 7. s. 8.

The King cannot grant a thing intrusted to him in respect of his sovereignty: As, the lapse of a church, before or after it becomes void. 2 *Rol.* 187. l. 32, 35. Nor, purveyance, butlerage, prisage, &c. 2 *Rol.* 187. l. 35. Nor, the power to make a dispensation of a statute. 7 *Co.* 36. b. So he cannot grant the lands, or goods of a recusant convict, before the commission returned. 2 *Rol.* 184. l. 20. Nor, the lands or goods of one attainted of treason, before his attainder. *Per* 6 *J.* 5. *cent.* *Dy.* 108. a. Tho' the treason was committed at the time of the grant, and the forfeiture has relation to the offence. 2 *Dy.* 108.

So the King cannot grant the prosecution, or execution of any penal statute to another; for it is intrusted with him as the head of the publick-weal. *R.* 7 *Co.* 37. a. Nor, the penalty or benefit of a penal statute, before it be recovered. 7 *Co.* 36. b. 37. a. Nor, any fine or forfeiture of a particular person, before he be convicted. *Declared by the Stat.* 1 *W. & M.* 2. that such grant or promise is illegal and void.

Grantz, Is used for *grandees*, in the *Parl. Roll* 6 *Ed.* 3. a. 5, 6.—*Et les ditz Countz, Barons, & autre Grantz, &c.*

Grass-hearth, The *grasing* or turning up the earth with a plough; whence the customary service for the inferior tenants of the manor of *Amselden* in *Oxfordshire*, to bring their ploughs and do one day's work for their lord, was called *grasi-hearth* or *grasi-burt*: And we still say the *plough* is *grased* or slightly hurt, and a bullet *grases* on any ace, when it gently turns up the surface of what it strikes upon. *Paroch. Antiq.* 496, 497.

Graba, A little wood or grove:—*Unam Carucatam terra cum gravis & pasturis eidem pertinet.* *Mon. Ang.* *Tom.* 2. p. 198. *Co. Litt.* 4.

Graber & Grabbio, An accusation or impeachment. *Leg. Etheld.* cap. 19.

Grabe. The names of places ending with *grave* come from the Sax. *graf*, a wood, thicket, den or cave.

Graders, Of seals and stones shall give to every one their weight of silver and gold, on pain of imprisonment. *Stat.* 7 *Ed.* 3. cap. 7.

Grasier, (*Pecuarium*) A breeder, or keeper of cattle, mentioned in the *Statute* 8. *See Cattle.*

Great Men, Are sometimes understood of the Temporal Lords in the higher house of Parliament, as by *Stat.* 25 *Ed.* 3. cap. 2. and sometimes of the members of the House of Commons, as by 2 *R.* 2.

Great Seal of England. *See Keeper of the Great Seal, and Privy Seal.*

Grave, (*Fr. Gr.* i. e. Good liking or allowance) In our law signifies satisfaction; as to make *grace* to the parties, is to agree with, and satisfy them for an offence done. And where it is said in our statutes, that judgment shall be put in suspense till *grace* is made to the King of his debt; it is taken for satisfaction. 1 *R.* 2. cap. 15. 25 *Ed.* 3. cap. 19.

Green Cloth, Of the King's Household, so termed from the green cloth on the table, is a court of justice composed of the Lord Steward, Treasurer of the Household, Comptroller, and other officers, to which is committed the government and oversight of the King's court, and the keeping of the peace within the verge, &c. *See Counting-house.*

Greenhew or Green-hue, Is all one with *vert* in forests, &c. *Mamwood*, *Par.* 2. cap. 6. num. 5.

Greenland Company. A joint stock of 40,000 l. was by statute to be raised by subscribers, who were incorporated: And the company to use the trade of catching whales, &c. into and from Greenland, and the Greenland seas; they may make by-laws for government, and of persons employed in their ships, &c. *Stat.* 4 & 5 *W.* 3. cap. 17. But any persons who will adventure to Greenland for whale-fishing, shall have all privileges granted to the Greenland Company, by 1 *Ann.* cap. 16. Any subjects may import whale-fins, oil, &c. of fish caught in the Greenland seas, without paying any customs, &c. *Stat.* 10 *Geo.* 1. cap. 16. And ships employed in the Greenland fishery are to be of such burden, provided with boats, so many men, fishing-lines, harping irons, &c. and be licensed to proceed; and on their return shall be paid 20 s. per tun bounty for whale fins, &c. imported. 6 *Geo.* 2. cap. 33. A further bounty, or allowance of 10 s. a tun, is granted to this company, to be paid by the commissioners of the customs, during war; and the seamen shall not be impressed from that service, by 13 *Geo.* 2. cap. 28.

A second bounty of 20 s. per tun given. 22 *Geo.* 2. c. 45. 28 *Geo.* 2. c. 20. No larger bounty than 400 tuns. 28 *Geo.* 2. c. 20. s. 6. Every ship employed in the fishery to have one apprentice for every 50 tuns burden. 28 *Geo.* 2. c. 20. s. 5. Bounty may be insured. 28 *Geo.* 2. c. 20. s. 12.

Green-Silver. There is an ancient custom within the manor of *Writtel* in the county of *Essex*, that every tenant whose fore-door opens to *Greenbury*, shall pay a halfpenny yearly to the lord, by the name of *green silver*.

Green Wax. Is where estreats are delivered to the sheriffs out of the *Exchequer*, under the seal of that court, made in green wax, to be levied in the several counties: this word is mentioned in the *statute* 43 *Ed.* 3. cap. 9. and 7 *H.* 4. cap. 3.

Greenwich Hospital. A duty is laid on all foreign-built ships for the relief of decayed seamen in *Greenwich Hospital*, &c. by *Stat.* 1. *Jac.* 2. cap. 18. And every seaman shall allow out of his wages 6 d. a month, for the better support of the said hospital: for which duty receivers are appointed, who may depute officers of the customs, &c. to collect the same, and examine on oath masters of ships, &c. 8 & 9 *W.* 3. c. 23. &c. 10 *Ann.* 2 *Geo.* 2. cap. 7.

Provisions for securing the payment of the 6 d. per month from privateers. 18 *Geo.* 2. c. 31. Regulations for securing prize-money belonging to the hospital. 20 *Geo.* 2. c. 24. Penalties on pensioners or servants pawning cloths or imbezilling stores. 20 *Geo.* 2. c. 24. s. 16, 17.

The governors empowered to grant out pensions to decrepit seamen. 3 *Geo.* 3. c. 16. *See Navy and Marines.*

Grebe, (*Sax. Grefsa*) A word of power and authority, signifying as much as *comes* or *victories*; and hence comes our *brave*, *portress*, &c. which by the Saxons were written *freigrefsa*, *portgrefsa*. *Lambert* in his exposition of Saxon words, *verbo prefatus*, makes it the same with *revue*. *See Hoveden Part. poster. Annal. fol.* 346.

Gills, A kind of small fish. *Stat.* 22 *Ed.* 4.

Gith, Is a Saxon word, signifying peace. *Terms de Ley.*

Grythbreche, (*Sax. Grythbryce*, i. e. *Paris frañis*) Breach of the peace.—*In campis Regis* Grythbreche 100 *Sol. amandabit.* *Leg. Hen.* 1. cap. 36.

Grythale, (*Sax. Seder Pacis*) A place of sanctuary. *See Friedal.*

Grocers, Were formerly those who ingrossed merchandise. *Stat.* 17 *Ed.* 3. c. 5. It is now a particular and well known trade; and the custom duties for grocery wares and

and drugs, are particularly ascertained, by the statute 2 W. & M. Sess. 2. c. 4.

Raisins imported to pay but five pounds, and currans fifty shillings for every hundred pounds value. 4 & 5 W. & M. c. 5. 100. Currans imported in English or Venetian shipping, how exempt from paying of the subsidy granted by 3 & 4 Ann. c. 5. sect. 1. 4 Ann. c. 6. sect. 3. 8 Ann. c. 13. sect. 21. Every hundred weight of raisins imported pays five shillings. 8 Ann. c. 7. sect. 6. Importers of raisins what time to have for payment of duties, and what allowance for prompt payment. 8 Ann. c. 7. sect. 12. Landing raisins without entry, or unshipping with a design to land them before payment of duties, what to forfeit. 8 Ann. c. 7. sect. 14, 17. Duties in what cases to be repaid on exportation. 8 Ann. c. 7. sect. 15. And how to be levied. 8 Ann. c. 7. sect. 16. Vide *Aromatarius*.

Gronna A deep pit, or bituminous place, where turfs are dug to burn. *Iloved.* 438. *Mon. Ang. Tom.* 1. p. 243.

Groom, Is the name of a servant in some inferior place. 33 Hen. 8. cap. 10. and is generally applied to servants in stables: But it hath a special signification, extending to *Groom of the Chamber*; *Groom of the Stole*, &c. which last is a great officer of the King's household, whose precinct is properly the King's Bed Chamber, where the Lord Chamberlain hath nothing to do; and *stole* signifies a robe of honour. *Lex Constitut.* p. 182. Vide *Garcio*.

Groom-Porter, An officer or superintendant over the royal gaming tables; and in Latin is writ *Aulæ Regiæ janitor Primarius*.

Gross, (*Grossus*) In *gross*, absolute, intire, not depending on another; as anciently a *villein in gross* was such a servile person as was not appendant or annexed to the lord or manor, and to go along with the tenure as appurtenant to it; but was like the other personal goods and chattels of his lord, at his lord's pleasure and disposal: so also *advowson in gross* differs from *advowson appendant*, being distinct from the manor. *Co. Litt.* 120. See *Black. Com.* 2 V. 22.

Grosse bois, (Fr. *Gros bois*, i. e. great wood) Signifies such wood as by the Common law or custom is reputed timber. 2 *Inst.* 642.

Gross, (common in, or *Common at large*), is such as is neither appendant nor appurtenant, to land, but is annexed to a man's person; being granted to him and his heirs by deed: or it may be claimed by prescriptive right, as by parson of a church, or the like corporation sole. This is a separate inheritance, entirely distinct from any landed property. *Black. Com.* 2 V. 34.

Gross-weight, The whole weight of goods or merchandise, dust and dross mixed with them, and of the chest, bag, &c. out of which *tare* and *tret* are allowed. *MERCHANT'S DICTIONARY*.

Grot, (Fr.) A den, cave, or hollow place in the ground; also a shady woody place, with springs of water. *L. Fr. Dict.*

Groundage, A custom or tribute paid for the standing of a ship in a port.

Groule, Are the red and black heath game, for preserving of which, no heath, furze or fern shall be burnt on any heaths, moors or other wastes, between the 2d of February and 24th of June, by Stat. 4 & 5 W. & M. c. 23.

Groume, An engine to stretch wollen cloth after it is woven; mentioned 43 Ed. 3. c. 10.

Growth-halfpenny, Is a rate so called and paid in some places for the tithe of every fat beall, ox, or other unfruitful cattle. *Clayton's Rep.* 92.

Guarrit, (From the Fr. *Gnyer*) Signifies the principal officers of the forest in general.

Guard, (Fr. *Garde*, Lat. *Custodia*) A custody or care of defence. And sometimes it is used for those that attend upon the safety of the Prince, called the *life guard*, &c. sometimes such as have the education and guardianship of infants; sometimes for a writ touching wardship, as *droit de gard*, *ejection de gard*, and *ravishment de gard*. *F. N. B.* 139.

Guardian, (Fr. *Gardein*, Lat. *Custos*, *Guardianus*) Signifies him who hath the charge or custody of any person or thing; but commonly he who hath the custody and

education of such persons as are not of sufficient discretion to guide themselves and their own affairs, as children and idiots, (usually the former) being as largely extended in the Common law as tutor and curator among the civilians. *Blount*.

Under this head we may consider,

- I. The several kinds of guardians, and how they are appointed.
- II. Who may be guardian, and of the guardians interest in the body and lands of the ward, and what he may lawfully do, so as to bind the infant.
- III. Of the infant's remedy against the guardian, and of obliging him to account, &c.

- I. Of the several kinds of guardians, and how they are appointed.

A guardian is either *legitimus*, *testamentarius*, *datus*, or *custumarius*: he that is a legitimate or lawful guardian is to *jure communi*, or *jure naturali*; the first as guardian in *chivalry*, in fact, or in right; the other *de jure naturali*, as father or mother: A *testamentary guardian* was by the Common law; for the body of the minor was to remain with him who was appointed, till the age of fourteen; and as for his goods it might be longer, or as long as the testator appointed; but as to this matter there are several statutes: *Guardianus datus* was by the father in his life time, or by the Lord Chancellor after the death of the father; and where there is a *guardianship* by the Common law, the Lord Chancellor can order and intermeddle; but where by statute, he cannot remove either the child, or the *guardianship* by *custom*, is of orphans by the custom of London, and other cities and boroughs; and in copyhold manors, by the custom it may belong to the lord of the manor to be guardian himself, or to appoint one. 3 *Salk. Rep.* 176, 177. The *guardianships* by the Common law, are *guardians in chivalry*; (taken away by statute) *guardians by nature*, such as the father or mother; *guardians in socage*, who are the next of blood, to whom the inheritance cannot descend, if the father does not order it otherwise; and *guardian* because of *nurture*, when the father by will appoints one to be *guardian* of his child. 1 *Inst.* 18. 2 *Inst.* 305. 3 *Rep.* 37.

The first statute, that gave the father a power of appointing, was the 4 & 5 W. & M. cap. 8. which provides under severe penalties, such as fine and imprisonment for years, "That nobody shall take away any maid or woman child unmarried, being within the age of sixteen years, out of or from the possession, custody or governance, and against the will of the father of such maid or woman child, or of such person or persons to whom the father of such maid or woman child, by his last will and testament, or by any other act in his lifetime, hath or shall appoint, assign, bequeath, give or grant the order, keeping, education and governance of such maid or woman child." 1 *Sid.* 362.

Guardianship by statute, is by the 12 Car. 2. cap. 24. by which it is enacted, "That a father by deed in his lifetime, or by will, may dispose of the custody of his child under twenty-one years of age, and not married at the time of his death, and whether then born, or *in ventre sa mere*, during the minority, to any persons, not Popish recusants; who may maintain action of trespass, &c. against unlawful takers away of such children, and take into custody their lands, &c." And by this statute the father may appoint a *guardian* to his heir, for any time till he is twenty-one years old; and such *guardian* shall have the like remedy for his ward, as the *guardian* in *socage* had at Common law. 2 *Nelf. Abr.* 511. But the father appoint no *guardian* to his child, the ordinary or spiritual court may appoint one for the personal estate until the age of fourteen: And as to his lands, there shall be a *guardian* in *socage*, &c. as heretofore. 2 *Lev.* 262.

If a bishop appoints a *guardian* of goods and lands, it will be void; for it may be only of goods and chattels: and *guardianship* is a thing cognizable by the temporal courts, where a devise is made of it, which courts are to judge whether the devise be pursuant to the Statute. 1 *Vent.* 207. A copyhold tenant is not within the Statute 12 Car. 2. c. 24. to dispose of the custody of his children; for

for it belongs to the lord or others, according to the custom of the manor: But the lord of a manor hath no power by the Common law, without some *particular custom*, to grant the *guardianship* of an infant copyholder. 3 *Lev.* 395. *Lutw.* 1190. *Guardianships* are not only by the Common law, by *Statute law*, and by *particular custom*; but are also distinguished into *guardian in socage*, *guardian appointed by the father*, and *guardian assigned by the court*. 1 *Lill. Abr.* 655. And a father or mother, without assignment, are *guardians* of women, children, &c. *Stat. 4 & 5 P. & M. cap. 8.* A female infant may be brought into court, and asked whether she be willing to stay with her *guardian*.

The husband of a woman under age cannot disavow a *guardian* made by the court for his wife. 1 *Vent.* 185. An infant, 'tis said, cannot revoke the authority of the *guardian*: but the court may discharge one *guardian*, and assign another at their discretion; and the justices of *Nisi prius*, &c. may assign a new *guardian*. *Palm.* 252. *Style* 456. *Noy* 49. 1 *Danv. Abr.* 604. The court will assign a *guardian* to an infant to sue, or defend actions, if the infant comes into court and desires it: or a judge at his chambers, at the desire of the infant, may assign a person named by him to be his *guardian*; but this last is no record until entered and filed by the clerk of the rules: the heir must be in person in court, for the appointment of a *guardian* for his appearance. 1 *Lill.* 656. 2 *Leon.* 238.

II. *Who may be guardian, and of the guardian's interest in the body and lands of the ward, and what he may lawfully do, so as to bind the infant.*

Where land descends of the part of the father, there the next of kin on the part of the mother shall have the *guardianship*; and so on the other side, and not such a kinsman as may have any benefit by his death. 1 *Cro.* 825. *Moor.* cap. 872. The eldest son of the half blood shall be *guardian in socage*, to a son by a second venter; and the *guardianship in socage* continues till the minor attains the age of fourteen years, and then he may chuse his *guardian* before a judge, at his chambers, or in court, or in the Chancery: also after the minor is come to the age of fourteen, he may sue his *guardian in socage* to account as bailiff, &c. *Cro. Jac.* 219. Though a father is *guardian* by nature, yet a man may be *guardian* to an infant against his father, for prevention of waste; which is a forfeiture of *guardianship*. *Hard.* 96.

If a woman hath issue a son by a former husband, and marries a second husband, seized of socage lands, by whom she has issue another son, and the husband and wife die, leaving the said son under fourteen, his brother of the half blood shall be *guardian in socage*, as next of kin, to whom the inheritance can't descend. *Cro. Eliz.* 825. 2 *And.* 171. *Moor* 635. 2 *Jon.* 17.

An infant, idiot, lunatick, *non compos*, one blind and dumb, deaf and dumb, or leper removed, can't be *guardian in socage*. *Co. Lit.* 88. b.

It is clearly agreed, That the King as *pater patrie*, is universal *guardian* of all infants, idiots and lunaticks, who can't take care of themselves; and as this case can't be exercised otherwise than by appointing them proper curators or committees; it seems also agreed, that the King may, as he has done, delegate the authority to his Chancellor; therefore at this day, the court of Chancery is the only proper court, which hath jurisdiction in appointing and removing *guardians*, and in preventing them and others from abusing their persons or estates. 2 *Inst.* 14. 4 *Co.* 126. *Beverley's case*, and in *Staudf. Prae.* 374.

And as the court of Chancery is now invested with this authority, hence in every day's practice we find that court determining, as to the right of *guardianship*, who is the next of kin, and who the most proper *guardian*; as also orders are made by that court on petition, or motion for the provision of infants during any dispute herein; as likewise *guardians* removed or compelled to give security; they and others punished for abuses committed on infants, and effectual care taken to prevent any abuses intended them in their persons or estates; all such wrongs and injuries being reckoned a contempt of that court, that

hath by an established jurisdiction the protection of all persons under natural disabilities. 2 *Mod.* 177.

Guardian in socage shall make no waste, nor sale of the inheritance, but keep it safely for the heir: and where there hath been some doubt of the sufficiency of a *guardian in socage*, the Chancery hath obliged him to give security. 2 *Mod.* 177. Also a *guardian* may be ordered to enter into security by recognisance, not to suffer a female infant to marry whilst in his custody; and to permit other relations to visit her, &c. 2 *Lev.* 128. And the court of Chancery will make such *guardian* give security not to marry the infant without the court is first acquainted with it. 2 *Chan. Rep.* 237. Before the act of 12 *Car.* 2. c. 24. Tenant in socage might have disposed of his land, in trust for the benefit of the heir; but it is said he could not devise or dispose of the *guardianship* or custody of the heir from the next of kin to whom the land could not descend, because the law gave the *guardianship* to such next of kin. *Kelw.* 186. But now tenant in socage may nominate whom he pleases to have the custody of the heir; and the land shall follow the *guardianship*, as an incident given by law to attend the custody; and such special *guardian* cannot assign the custody by any act, the trust being personal; nor shall it go to the executor or administrator of the *guardian*, but determines by his death. *Vaugh.* 180. *Dyer* 189.

As the law hath invested *guardians* not with a bare authority only, but also with an interest till the *guardianship* ceases; so it hath provided several remedies for *guardians* against those who violate that interest; therefore at Common law there were remedies both *droit* and *possessory*, to recover the *guardianship*. 2 *Inst.* 90. 9 *Co.* 72.

A *guardianship* of a minor is an interest in the body and lands, &c. of one within age. *Guardians* to infants, appointed by the court to sue, may acknowledge satisfaction upon the record, for a debt recovered at law for the infant. *Trin.* 23 *Car. B. R.* A *guardian in socage* may keep courts, in the infant's manors, in his own name, grant copies, &c. He is *dominus pro tempore*, and hath an interest in the lands. *Cro. Jac.* 91. Such *guardian* may let the land for years, and avow in his own name and right; and his lessee for years may maintain ejectment: but he cannot present to an advowson, for which he may not lawfully account; and the infant must present of whatsoever age. *Cro. Jac.* 98, 99. Though it is said, if the infant be within the age of discretion, his *guardian* may present. 8 *E.* 2. 10. A *guardian* for nurture of the minor appointed by will, hath power to make leases at will only. *Cro. Eliz.* 678, 734. *Guardians* are to take the profits of the minor's lands, &c. to the use of the minor, and account for the same: they ought to sell all moveables in a reasonable time, and turn them into land or money, except the minor is near of age, and may want such goods himself: and they shall pay interest for money in their hands, which might have been put out at interest; in which case it shall be presumed the *guardians* made use of it themselves. 3 *Salk.* 177.

III. *Of the infant's remedy against the guardian, and of obliging him to account, &c.*

At Common law, both a prohibition of waste, and an action of waste, lay against a *guardian in chivalry* and a *guardian in socage*, for a voluntary, but not for permissive waste, or waste done by a stranger. 2 *Inst.* 305. By the Common law, *guardians in socage* are accountable to the infant, either when he comes to the age of fourteen years, or at any time after, as he thinks fit. *Co. Lit.* 87. But the *guardian*, on his account, shall have allowance of all reasonable expences; and if he is robbed of the rents and profits of the land without his default or negligence, he shall be discharged thereof upon his account; for he is in the nature of a bailiff or servant to the infant, and undertakes no otherwise than for his diligence and fidelity. *Co. Lit.* 89. a.

If a *guardian* takes a bond for the arrears of rent, he thereby makes it his own debt, and shall be charged with it. 2 *Chan. Rep.* 97. *Wall* and *Buckley*. If a man during a person's infancy receives the profits of an infant's estate, and continues to do so for several years after the infant comes

comes of age, before any entry is made on him; yet he shall account for the profits throughout, and not during the infancy only. *Abr. Eq.* 280. *Tallop* and *Halsworthy*. A receiver to the guardian of an infant, who has had his account allowed him by the guardian, shall not be obliged to account over again to the infant when he comes of age. *Preced. Chan.* 535.

A guardian shall answer for what is lost by his fraud, negligence or omission; but not for any casual events, as where the thing had been well but for such an accident. *Litt.* 123. On accounting of guardians, they shall have allowance of costs and expences; and if they are robbed, &c. without any default or negligence, they shall be discharged thereof. *1 Inst.* 89. In guardianships of great estates, the guardians generally pass their accounts yearly in the Chancery, for their better justification when the minor calls them to a general account at his full age. By statute, guardians are to retain the lands till the heir comes of age, and then restore the same as fully stocked, &c. as received. *9 H. 3. cap. 3.* They shall sustain the land, without destruction of any thing. *3 Ed. 1. cap. 21.* And persons, who as guardians hold over, without the consent of the person next intitled, shall be adjudged trespassers, and be accountable for profits, &c. *Stat. 6 Ann. cap. 18.* Action of account may be brought against the executors or administrators of a guardian, &c. *Stat. 4 Ann. c. 16.*

An election of a guardian by a minor.

K NOW all men by these presents, That I A. B. son and heir of, &c. deceased, being now about the age of eighteen years, have elected and chosen, and by these presents do elect and chuse C. D. of, &c. to be guardian of my person and estate, until I shall attain the age of twenty-one years, and I do hereby promise to be ruled and governed by him in all things touching my welfare; and I do authorize and empower the said C. D. to enter upon and take possession of all and every my messuages, lands, tenements, hereditaments and premises whatsoever, situate, lying and being in, &c. in the county of, &c. or elsewhere, whereunto I have or may have any right or title, and to let and set the same, and receive and take the rents, issues and profits thereof, for my use and benefit, during the term aforesaid; giving and hereby granting unto the said C. D. my full power in the said premises; and whatsoever he shall lawfully do or cause to be done in the premises, by virtue hereof, I do hereby promise to ratify and confirm. In witness, &c.

Guardian de l'Œmery, Is the guardian or warden of the Stannaries, or mines in the county of Cornwall, &c. *17 Car. 1. cap. 15.*

Guardians de l'Eglis, Churchwardens, who are officers chosen in every parish to have the care and custody of the church goods; and they may have an action for such goods, and have divers powers for the benefit of the church. *Stat. 43 Eliz. cap. 2.*

Guardians of the Peace, Are those that have the keeping of the peace; wardens or conservators thereof. *Lamb. Eiren. lib. 1. cap. 3.*

Guardian of the Cinque Ports, Is a magistrate that hath the jurisdiction of the ports or havens, which are commonly called the Cinque Ports, who has there all the authority and jurisdiction the Admiral of England has in places not exempt: and Camden believes this Warden of the Cinque Ports was first erected among us in imitation of the Roman policy, to strengthen the sea-coasts against enemies, &c. *Camb. Br.* 238.

Guardian of the Spiritualities. The person to whom the spiritual jurisdiction of any diocese is committed, during the vacancy of the see, is called by this name. *25 H. 8. cap. 21.* The archbishop is guardian of the spiritualities on the vacancy of any see within his province; but when the archiepiscopal see is vacant, the dean and chapter of the archbishop's diocese are guardians of the spiritualities, viz. the spiritual jurisdiction of his province and diocese is committed to them. *2 Roll. Abr.* 223. The guardian of the spiritualities it is said may be either guardian in law, *jure magistratus*, as the archbishop is of any diocese

in his province; or guardian by delegation, being he whom the archbishop or vicar general doth for the time appoint. *13 Eliz. cap. 12.* And the guardian of the spiritualities hath all manner of ecclesiastical jurisdiction of the courts, power of granting licences and dispensations, probate of wills, &c. during the vacancy, and of admitting and instituting clerks presented; but such guardians cannot, as such, consecrate or ordain, or present to any benefices. *Wood's Inst.* 25, 27.

Guest, (Sax. *Gest.* Fr. *Gist*, a stage of rest in a journey) A lodger or stranger in an inn, &c. A guest who hath a piece of plate set before him in an inn, may be guilty of felony in fraudulently taking away the same. *1 Hawk. P. C.* 90. And a guest having taken off the sheets from bed, with intent to steal them, carried them into another room, and was apprehended before he could get away; this was adjudged larceny. *Ibid.* 92. Action lies against an innkeeper, refusing a guest lodging, &c. See *Inn.*

Guidage, (*Guidagium*) Is an old legal word, signifying that which is given for safe conduct through a strange land, or unknown country. *Est guidagium quod datur alicui, ut tuto conducatur per terram alterius.* *Consuetud. Burgund.* p. 119. *2 Inst.* 526.

Guild, (from the Sax. *Gildan*, to pay) Signifies a fraternity or company, because every one was *gildare*, i. e. to pay something toward the charge and support of the company. The original of these guilds and fraternities is said to be from the old Saxon law, by which neighbours entered into an association, and became bound for each other, to bring forth him who committed any crime, or make satisfaction to the party injured, for which purpose they raised a sum of money among themselves, and put into a common stock, whereout a pecuniary compensation was made according to the quality of the offence committed. From hence came our fraternities and guilds; and they were in use in this kingdom long before any formal licences were granted for them: though at this day they are a company combined together, with orders and laws made by themselves, by the prince's licence.

Camd. Guildam Mercatoriam, or the Merchant's Guild, is a liberty or privilege granted to merchants, whereby they are enabled to hold certain pleas of land, &c. within their own precinct. *37 Ed. 3. 15 R. 2.* And Guild-halls are the halls of those societies, where they meet and make laws, &c. for their better government. King *Ed. 3.* in the 14th year of his reign, granted licence to the men of Coventry to erect a Merchant's Guild, and also a fraternity of brethren and sisters, with a master or warden, and that they might make chantries, bestow alms, do other works of piety, and constitute ordinances touching the same, &c. And King *Hen. 4.* in the 4th year of his reign, gave licence to found a Guild of the Holy Cro, at Stratford upon Avon. *Antiq. Warwicksh.* 119, 522. *Guild*, or *Gild*, is also used for a tribute, or tax, an amercement, &c. *27 Ed. 3. 11 H. 6. 15 Car. 2.* See *Gilda Mercatoria*.

Guildhall, Or the chief hall of the city of London, for the meeting of the Lord Mayor and Commonalty of the city, making laws and ordinances, holding of courts, &c. — *Gildarta nomine continentur non solum minores fraternitates, sed ipsæ etiam civitatum communitates.* *Spelm.* It also signifies the chief hall of other cities and corporate towns.

Guildhalda Tenentorum. The fraternity of East-ling merchants in London, called the *Still-yard*. *22 Hen. 8. cap. 8.*

Guild-Rents, Are rents payable to the town, by any guild or fraternity; or such rents as formerly belonged to religious Guilds, and came to the crown at the general dissolution of monasteries, being ordered to be sold by the *Stat. 22 Car. 2. cap. 6.*

Guilder, Foreign coin: the German guilder is 3 s. 8 d. and the golden one in some parts of Germany 4 s. 9 d. In Portugal it passes for 5 s. but the Poland and Holland guilder is but 2 s. In Holland merchants keep their accounts in guilders, &c.

Gule of August, (*Gula Augusti*, alias *Goule de August*) Is the day of St. Peter ad Vincula, which is celebrated on the 1st of August, and called the Gule of August, from the Lat. *Gala* a throat, for this reason, (as pretended) that one

Quirinus,

Quirinus, a tribune, having a daughter that had a disease in her throat, went to Pope *Alexander*, (the sixth from St. Peter,) and desired of him to see the chains that St. Peter was chained with under *Nero*, which request being granted, she the said daughter kissing the chains, was cured of her disease; whereupon the Pope instituted this feast in honour of St. Peter; and, as before, this day was termed only the *calends of August*, it was on this occasion called indifferently either St. Peter's *Day ad Vincula*, from what wrought the miracle, or the *Gule of August*, from that part of the virgin whereon it was wrought. *Durand's Rationale Divinorum*, lib. 7. cap. 19. It is mentioned F. N. B. 62. *Plowd.* 316. *Stat. Westm.* 2. cap. 30 27 Ed. 3.

Guns. None may shoot in, or keep in his house any gun, hand-gun, &c. who hath not lands to the value of 100*l.* a year, on pain of 10*l.* Nor shall any person shoot in such guns, under the length of one yard, or three quarters of a yard, under the like penalty: if any do so, one that hath 100*l.* per ann. land, may seize the guns unlawfully kept and used; but then he must break them within 20 days, or shall forfeit 40*s.* In forests, parks and chases, those who have power from the King to take away guns, may retain the same. *Stat.* 33 H. 8. cap. 6.

Gunpowder. It is lawful for all persons, as well strangers as natural-born subjects, to import any quantities of gunpowder, or salt-petre, brimstone, and other materials for the making thereof, and to make and sell gunpowder, &c. *Stat.* 16 Car. 1. cap. 21. But no person shall keep more than 600*lb.* weight of gunpowder, in any places in the cities of London and Westminster, or the suburbs, &c. And persons keeping more, not removing it on order of justices of peace, shall forfeit 20*s.* for every hundred weight: gunpowder is to be carried in covered carriages, the barrels close jointed, or in cases, bags of leather, &c. 5 Geo. 1. cap. 27.

By a subsequent act, it is unlawful for any person to keep in London, &c. above 200*lb.* weight of gunpowder at one time, beyond the space of twenty-four hours, which incurs a forfeiture of the powder, or the value: and two justices may cause searches to be made, and the same to be seized and removed. &c. Persons obstructing the search, incur the penalty of 5*l.* Also none shall use iron or steel hammers, where gunpowder is, on pain of 20*s.* 11 Geo. 1. cap. 23. Persons who are no dealers therein are not to keep above 50*lb.* of gunpowder in London and Westminster, or if they deal in it, not more than 200 weight longer than twenty-four hours, though under different roofs; or on the Thames, except in ships plying or detained, on pain of forfeiting all such gunpowder, &c.

Justices of peace may issue his warrant to search for dangerous quantities of powder, and break open any place, if there be occasion, to seize the same; which may be removed out of the limits aforesaid, and kept till determined in one of the courts, whether it be forfeited, &c. And if any persons permit others to have gunpowder in places not belonging to the owners, they shall forfeit 1*0s.* for every pound. *Stat.* 15 Geo. 2. cap. 32. No gunpowder shall be put on board ships, above *Whitehall* in the river Thames, under 5*l.* penalty for every 50*lb.* weight, &c. by 5 Geo. 2. cap. 20. By the *Stat.* 22 Geo. 2. cap. 38. No person shall keep gunpowder for more than twenty-four hours, at one time, in greater quantities than 400 weight, in any house, &c. in or within 100 yards of any city, the suburbs thereof, or any market town; or within two miles of any of the King's palaces, or one mile of any of his magazines for powder, or more than 300 weight, in any other place whatsoever.

Upon information two justices may grant search warrants, and if more found, it shall be forfeited; no greater quantity shall be carried at one time than 2500 weight in any land-carriage, and 5000 weight in any open vessel; carriages to be covered, and barrels closely hooped. Any person employed in any storehouse where gunpowder is kept, or in conveying gunpowder from one place to another, wilfully committing any act whereby the gunpowder shall be in danger of taking fire, shall forfeit 5*s.* for every 100 weight in such storehouse; and in default of payment be committed for not exceeding six months.

No penalty shall be incurred for keeping above 300 weight of gunpowder, in any warehouse already built for that purpose, unless the same be deemed dangerous. To obtain an exclusive patent for the sole making or importation of gunpowder or arms, or to hinder others from importing them, is a *præmunire* by 16 Car. 1. c. 21. 1 Jac. 2. c. 8.

Gunpowder, &c. shipped after prohibition, forfeited, 29 Geo. 2. c. 16. *sect.* 2. Allowance on exportation of gunpowder continued to 29th of September 1771, 4 Geo. 3. c. 11.

Gurgites, Is used as a Latin word for *wearers*: *trēs gurgites in aqua de Mosew attachiantur per homines de grēf-faments*. Black Book Hereford, f. 20. See *Gores*.

Guti and Gotti, Engl. *Goths*, called sometimes *Juts*, and by the Romans *Geta*, is derived from the old word *Jut*, which signifies a Giant: they were one of those three nations or people who left Germany, and came to inhabit this island. *Leg. Edw. Confess.* cap. 35.

Guttera, A gutter or spout to convey the water from the leads and roofs of houses: and there are gutter tiles, especially to be laid in such gutters, &c. mentioned in the *Stat.* 17 Ed. 4.

Ginaputched, Is a British word which signifies a payment or fine, made to the lords of some manors, upon the marriage of their tenants daughters; or otherwise on their committing incontinency. See *Marchant*.

Gwalstow, (Sax.) A place of execution: *omnia gwalstowa*, i. e. *occidendorum loca, totaliter regis sunt in joca sua*. *Leg. Hen.* 1. cap. 11.

Gylpitt, The name of a court held every three weeks in the liberty or hundred of *Patebrow* in the county of Warwick. *Inquisit.* ad quod Daimn. 13 Ed. 3.

Gylmste, A compensation or amends for trespass, &c. *Malicia pro transgressione*. LL. Edgar. Regis, Anno 964.

Gypsies. Formerly there were foreign persons, calling themselves *Egyptians*, or *Gypsies*, a strange kind of commonwealth among themselves of wandering impostors and jugglers. 'Tis said that when Sultan *Selim* conquered Egypt in the year 1517, several of the natives refused to submit to the Turkish yoke, and dispersed in small parties all over the world, where their supposed skill in the black art gave them an universal reception, in that age of superstition and credulity. There are various laws against persons pretending to be gypsies, and wandering about, &c. See 22 H. 8. c. 10. 1 & 2 P. & M. c. 4. 5 El. c. 20. And see *Black Com.* 4 P. 165, 6, 7.

Gyrobags, Wandering monks, who pretending great piety left their own cloisters, and visited others. *Matt.* Paris. p. 490.

H.

Habeas Corpus, Is a writ for the bringing up a jury, or so many of them as refuse to appear upon the *venire facias*, for the trial of any cause brought to issue. *Old Nat. Br.* 157. And the *habeas corpus juratorum* in the court of C. B. serves for the same purpose as the *distingas jurator* in B. R. It commands the sheriff to have the jurors before the judges at such a day, to pass on the trial of certain parties, in such a cause, &c. *Practif. Solic.* 308, 309.

Habeas Corpus, The great writ of English liberty, lies where one is indicted for any crime or trespass before justices of peace, or in a court of any franchise, and being imprisoned for the same, hath offered sufficient bail, but it is refused where bailable; he may then have this writ out of the King's Bench to remove himself thither, and answer the cause there. F. N. B. 250. But see *infra*. This writ is also used to bring the body of a person into court, who is committed to any gaol, either in criminal or civil cause; and a *habeas corpus* will remove a person and cause from one court and prison to another. See the *Stat.* 31 Car. 2. c. 2. There are several kinds of this writ.

1. The *habeas corpus ad subjiciendum* is that which issues in criminal cases, and is deemed a prerogative writ, which the King may issue to any place, as he has a right

to be informed of the state and condition of the prisoner, and for what reasons he is confined. It is also in regard to the subject, deemed his writ of right; that is, such a one as he is intitled to *ex debito iustitiæ*, and is in nature of a writ of error to examine the legality of the commitment; therefore commands the day, the caption, and cause of detention to be returned. 2 *Inst.* 55. 4 *Inst.* 182. *Cro. Jac.* 543. 2 *Roll. Abr.* 69.

2. The *habeas corpus ad faciendum & recipiendum* issues only in civil cases, and lies where a person is sued, and in gaol, in some inferior jurisdiction, and is willing to have the cause determined in some superior court, which hath jurisdiction over the matter; in this case the body is to be removed by *habeas corpus*, but the proceedings by *certiorari*. 3 *Bac. Abr.* 2.

3. There is likewise a writ of *habeas corpus ad respondendum*, where a person is confined in gaol for a cause of action accruing within some inferior court; and a third person hath also a cause of action against him; in which case he may have this writ in order to charge him in such superior court; for inferior courts being tied down to causes arising within their own jurisdiction, the party would be without remedy, unless allowed to sue him in another court; but it seems, that regularly a person confined in *B. R.* cannot be removed to the *C. B.* by this writ, nor *vice versa*; for in these cases there can be no defect of justice, as these courts have consue as well of local, as transitory actions. *Dyer* 197. a. 249. pl. 84, 296, 307. 1 *Mod.* 235. *Styl. Praët. Registr.* 330.

4. There are also, besides these, other writs of *habeas corpus*, as a *habeas corpus ad deliberandum & recipiendum*, which lies to remove a person to the proper place or county, where he committed some criminal offence. 3 *New. Abr.* 2, 3.

5. There is also a writ of *habeas corpus ad satisfaciendum* after a judgment; and on this writ the attorney for the plaintiff must indorse the number roll of the judgment on the back of the writ. *Styl. Registr.* 331.

6. *Habeas corpus* upon a *cepi*, where the party is taken in execution in the court below.—So upon an attachment out of Chancery, and a *cepi corpus* returned by the sheriff, the next step is a *habeas corpus*; for the sheriff having executed the command of the writ of attachment by taking the body, he cannot carry him out of the county without the King's writ.

7. There is also a writ of *habeas corpus ad testificand'*, which is to remove a person in confinement, in order to give his testimony in some court of justice; for which vide *Styl.* 119, 126, 230. 3 *Keb.* 51. *Comb.* 17, 48. Of these several writs the most usual in practice are—

The *habeas corpus ad subjiciendum*:—and

The *habeas corpus ad faciendum & recipiendum*.

With respect to the first it is to be considered,

1. By whom and in what cases it is grantable.
2. What shall be a proper return of such writ.
3. Of bailing, discharging, or remanding the prisoner.

1. By whom, and in what cases, an *habeas corpus* is grantable.

The writ of *habeas corpus* was originally ordained by the Common law of the land, as a remedy for such as were unjustly imprisoned, to procure their liberty; and it is a mistaken notion that this writ is of a modern date, and introduced with the reign of King Charles II. But before the *Stat.* 31 Car. 2. c. 2. 'tis true it was difficult to be obtained, because the judges, who had authority to issue it, pretended to have power either to grant or deny it; and the sheriffs and gaolers, to whom the writ was directed, frequently put poor prisoners to the charges of a second, and third *habeas corpus*, before they would yield obedience to the first; which being grievous to the people, the *Stat.* 31 Car. 2. c. 2. was enacted to prevent abuses of this nature, and further our laws for the benefit of the liberty of the subject. *Laws of Liberty*, pag. 44, 45.

By the *Stat.* 31 Car. 2. c. 2. A person in prison may have an *habeas corpus* from any judge, on complaint made and view of the copy of the warrant of commitment, (unless he be committed for treason or felony, especially expressed in the warrant, or other offences or matters not bailable) which

habeas corpus shall be returnable immediately; and upon certificate of the cause of commitment, the prisoner shall be discharged on bail to appear in the court of *B. R.* the next term, or at the next assizes, &c. where the offence is cognisable: and persons committed for treason or felony, (especially expressed in the warrant) on prayer in open court, the first week of the term, or day of sessions, &c. are to be brought to trial; and if not indicted the next term, or sessions after commitment, upon motion the last day of the term, &c. they shall be let out upon bail; except it appears upon oath, that the King's witnesses are not ready; and if on prayer they are not indicted or tried the second term after commitment, they shall be discharged. No persons who shall be delivered upon an *habeas corpus*, shall be committed again for the same offence, other than by legal order and process of such court where they shall be bound to appear, or other court having jurisdiction of the cause; on pain of 500 *l.*

And if any person be in prison, or any officer's custody, for any criminal matter, he shall not be removed by him into the custody of any other officer but by *habeas corpus*, upon pain of incurring the penalty of 100 *l.* for the first offence, and 200 *l.* for the second offence, and being disabled to execute his office.

No person shall be sent prisoner to Ireland, Scotland, or any place beyond the seas in the King's dominions; which will be false imprisonment, on which the prisoner may recover treble costs, and not less than 500 *l.* damages, &c. and the party committing, or detaining him, also shall incur the penalty of a *præmunire*.

Judges denying a *habeas corpus* shall forfeit 500 *l.* And the officer refusing to obey it, or to deliver a true copy of the commitment warrant, is liable to a forfeiture of 100 *l.* for the first offence, &c. *Stat. ibid.* This is the substance of the *habeas corpus act*; which hath been suspended several times in late reigns, on rebellions, &c.

It is clear, that both by the Common law, as also by the statute, the courts of Chancery and King's Bench have jurisdiction of awarding this writ of *habeas corpus*, and that without any privilege in the person for whom it is awarded; but it seems, that by the Common law the court of King's Bench could only have awarded it in term-time, but that the Chancery might have done it as well out of, as in term, because that court is always open. 2 *Inst.* 55. 4 *Inst.* 290. 2 *And.* 297. 2 *Jon.* 13, 14, 17. Any of the courts at Westminster may award it. See *Vaugh.* 155.

If the *habeas corpus* issues out of Chancery, and on the return thereof the Lord Chancellor finds that the party was illegally restrained of his liberty, he may discharge him, or if he finds it doubtful, he may bail him; but then it must be to appear in the court of King's Bench; for the Chancellor hath no power in criminal causes; or the Chancellor may commit the party to the Fleet, and in term-time may *proprio manibus* deliver the record into the King's Bench, together with the body; and thereupon the court of King's Bench may proceed to bail, discharge, or commit the prisoner. 2 *Hal. Hist. P. C.* 147. 2 *Hart. P. C.* 114-15.

We apprehend every subject imprisoned, is intitled to his *habeas corpus*, that the cause of his imprisonment may be inquired into, whether he is, or is not, intitled to be bailed. See the case of *Mr. Wilkes*, in *Wilf. Rep. par. 2.* 154.

If a party be imprisoned against law, tho' he is intitled to a *habeas corpus*, yet he may have an action of false imprisonment, in which he shall recover damages in proportion to the injury done him. *Fitz. Corpus cum Causa* 2. 9 *H. 6.* 44. a. 2 *Inst.* 55. 10 *H. 7.* 17. 5 *Co.* 64. 11 *Co.* 98, 99.

If a husband confine his wife, she may have a *habeas corpus*; but the judges on the return of it, cannot remove the wife from her husband. 2 *Lev.* 128.

If a person be in custody, and also indicted for some offence in the inferior court, there must, besides the *habeas corpus* to remove the body, be a *certiorari* to remove the record; for as the *certiorari* alone removes not the body, so the *habeas corpus* alone removes not the record itself, but only the prisoner with the cause of his commitment;

mitment; therefore, although upon the *habeas corpus*, and the return thereof, the court can judge of the sufficiency or insufficiency of the return and commitment, and bail or discharge, or remand the prisoner, as the case appears upon the return; yet they cannot upon the bare return of the *habeas corpus* give any judgment, without the record itself be removed by *certiorari*: but the same stands in the same force it did, though the return should be adjudged insufficient, and the party discharged thereupon of his imprisonment; and the court below may issue new process upon the indictment. 2 *Hal. Hist.* 210, 211. 1 *Salk.* 352. *Comb.* 2.

If the Chief Justice of the King's Bench, commit one to the marshal by his warrant, he ought not to be brought to the bar by rule, but by *habeas corpus*. 1 *Salk.* 349.

Also by the *habeas corpus* act, (31 *Car.* 2. *cap.* 2. *par.* 11.) it is enacted, and declared, "That an *habeas corpus*, according to the intent and true meaning of the act, may be directed and run into, any county palatine, the cinque ports, or other privileged places within the kingdom of England, dominion of Wales, or town of Berwick upon Tweed, and the isles of Jersey or Guernsey; any law, &c."

2. What shall be a proper return of an *habeas corpus*.

In extrajudicial commitments, the warrant of commitment ought to be returned *in bac versa* on a *habeas corpus*: but when a man is committed by a court of record, it is in the nature of an execution for a contempt, and in such case the warrant is never returned. 5 *Mod.* 156. The cause of imprisonment must be particularly set forth in the return of the *habeas corpus*, or it will not be good; for by this the court may judge of it, and with a *paratum habeo*, that they may either discharge, bail, or remand the prisoner. 2 *Nell. Abr.* 915. 2 *Cro.* 543. If a commitment is without cause, or no cause is shown, a prisoner may be delivered by *habeas corpus*. 1 *Salk.* 348. But on a *habeas corpus* granted by the court of B. R. a difference was made as to a return; that where a prisoner is committed by one of the privy council, there the cause of his commitment is to be returned particularly; but when he is committed by the whole council, no cause need be alleged. 1 *Leon.* 79, 71.

And it has been adjudged, that on a commitment by the house of commons, of persons for contempt and breach of privilege, no court can deliver on a *habeas corpus*: but *Holt Ch. Just.* was of a contrary opinion. 2 *Salk.* 503, 504. A writ of error may be allowed by the King in such case, &c. and it is not to be denied *ex debito iustitie*; though it has been a doubt, whether any writ of error lay upon a judgment given on a *habeas corpus*. *Ibid.* A man may not be delivered from the commitment of a court of Oyer and Terminer, by *habeas corpus*, without writ of error: and where there appears to be good cause, and a defect only in the form of the commitment, he ought not to be discharged. 1 *Salk.* 348.

The method to compel the return of a *habeas corpus* is by taking out an *alias* and *pluries*, which if disobeyed, an attachment issues of course; also the court may take a rule on the officer to return his writ, and if disobeyed, the court may proceed against such disobedience in the same manner as they usually do against the disobedience of any other rule. *F. N. B.* 68. 11 *H.* 4. 86. 1 *Mod.* 195. 2 *Leon.* 128, 9. 5 *Mod.* 21.

And by the 31 *Car.* 2. *cap.* 2. *sect.* 2: it is enacted, "That if any officer, &c. shall neglect, or refuse to make returns, as by the act is directed, or to bring the body of the prisoner, according to the command of the writ, or shall not within six hours after demand, deliver a true copy of the commitment, &c. he shall forfeit for the first offence 100 *l.* for the second offence 200 *l.* and be made incapable to hold his office."

For a false return there is regularly no other remedy against the officer, than an action on the case at the suit of the party grieved, and an information or indictment at the suit of the King. 6 *Mod.* 90. 1 *Salk.* 349. But no action lies until the return be filed. 1 *Salk.* 352.

As upon the return of the writ the court is to judge, whether the cause of the commitment and detainer be

according to law, or against it; so the officer or party in whose custody the prisoner is, must, according to the command of the writ, certify on the return thereof, the day, cause of caption and detainer. *Vaugh.* 137.

It seems to be agreed, that no one can in any case controvert the truth of the return to a *habeas corpus*, or plead or suggest any matter repugnant to it; yet it hath been holden, that a man may confess and avoid such a return by admitting the truth of the matters contained in it, and suggesting others not repugnant, which take off the effect of them. *Cro. Eliz.* 821. 5 *Co.* 71. b. 2 *Barw. P.* C. 113.

It seems that, before the return filed, any defect in form, or the want of an averment of a matter of fact, may be amended; but this must be at the peril of the officer, in the same manner as if the return were originally what it is after the amendment. 1 *Mod.* 102, 103.

But after the return is filed, it becomes a record of the court, and cannot be amended. 1 *Mod.* 102, 103.

3. Of bailing, discharging, or remanding the prisoner brought up by *habeas corpus*.

Upon the return of the *habeas corpus* the prisoner is regularly to be discharged, bailed or remanded; but if it be doubtful which the court ought to do, it is said that the prisoner may be bailed to appear *de die in diem* till the matter is determined. 5 *Mod.* 22. *Styl.* 16.

By the petition of right, (or 17 *Car.* 1. *cap.* 10.) the court must within three days after the return of the *habeas corpus*, either discharge, bail or remand the prisoner. But it seems that a commitment by the court of King's Bench to the Marshalsea, is a remanding, being an imprisonment within the statute. 5 *Mod.* 22. 3 *New. Abr.* 14.

Also it hath been ruled, that the court of King's Bench may, after the return of the *habeas corpus* is filed, remand the prisoner to the same gaol from whence he came, and order him to be brought up from time to time, till they shall have determined whether it is proper to bail, discharge, or remand him absolutely. 1 *Vent.* 330.

And tho' in doubtful cases the court is to bail, or discharge the party on the return of the *habeas corpus*; yet if a person be convicted, and the conviction on the return of the *habeas corpus* appears only defective in point of form, it is at the election of the court either to discharge the party, or oblige him to bring his writ of error. 1 *Salk.* 348. 5 *Mod.* 19, 20.

If a person be committed by the admiralty in execution, he is not removeable by *habeas corpus* into B. R. to answer an action brought against him there; but it might be otherwise if an action had been before depending. 1 *Salk.* 351. Where there is a precedent action in B. R. to the King's suit, on which the party is out on bail, *habeas corpus* may be brought by the bail, &c. and the prisoner turned over; tho' this was greatly opposed in favour of the King's execution. *Ibid.* 353.

It remains now to treat of the *habeas corpus ad faciendum & recipiendum*, the nature of which hath been already explained, and it is farther to be observed, That—No writ of *habeas corpus*, or other writ to remove a cause out of an inferior court, shall be allowed, except delivered to the judge of the court, before the jury to try the cause have appeared, and before any of them are sworn. 43 *Eliz. cap.* 5. And writs to remove suits commenced in an inferior court of record, shall not be obeyed, unless delivered to the Barrow of the court before issue or demurrer joined, &c. And a suit shall never be removed again, after a *procedendo* allowed. 23 *Ed.* 1. 23. Nor shall any suit be removed where the demand doth not exceed 5 *l.* or where the freehold, inheritance, title of land, &c. are concerned. And judges are to proceed in suits in inferior courts laid not to exceed the sum of 5 *l.* although there may be actions against the defendant, wherein the plaintiff's demands may exceed that sum, by *stat.* 12 *Geo.* 2. *cap.* 29.

If the Barrow of an inferior court, proceeds after an *habeas corpus* delivered and allowed, the proceedings are void; and the court of B. R. will award a *superfedeas*; and

and grant an attachment against the steward for the contempt. *Cro. Car.* 79, 296. A *habeas corpus* suspends the power of the court below, so that if they proceed, it is void, and *coram non iudice*. And on a *habeas corpus*, if the record be filed, no *procedendo* can go to the court below; but where a record below is not filed, or not returned, it may be granted. 1 *Salk.* 352.

A *habeas corpus cum causa* removes the body of the party for whom granted, and all the causes depending against him; and if upon the return thereof the officer doth not return all the causes, &c. it is an escape in him. 2 *Lill. Abr.* 2. A judge will not grant a *habeas corpus* in the vacation, for a prisoner to follow his suits; but the court may grant a special *habeas corpus* for a prisoner to be at his trial in the vacation-time. *Ibid.* 3. And court may grant a *habeas corpus* to bring a prisoner, not in prison on execution, out of prison, to be a witness at a trial; though it is at the peril of the party suing out the writ, that the prisoner do not escape. *Syde* 119. *Trin.* 1640. But no person ought to take out a *habeas corpus* for any one in prison, without his consent; except it be to turn him over to B. R. or charge him with an action in court. 2 *Lill.* A man brought into B. R. by *habeas corpus*, shall not be removed thence till he has answered there; he shall be detained until then, and after he may be removed. 1 *Salk.* 359.

A person is in custody upon a criminal, and also on a civil matter, if he would move himself by *habeas corpus*, there ought to be but one *habeas corpus* of the crown side or plea side, and both causes are to be returned. *Mod. Caf.* 133. If there be judgment against a defendant in the court of B. R. and another in C. B. on which he is in execution in the *Plac.*, he may have an *habeas corpus* to remove himself into B. R. where he shall be in custody of the marshal for both debts. *Dyer* 132.

Where an action is founded on the custom of London, for a thing actionable there, and not elsewhere; if it be removed by *habeas corpus*, a *procedendo* shall be granted: but the declaration itself ought to be returned upon the *habeas corpus*, and then the court will see what was the cause, &c. For the special matter and all the proceedings are to be in the return in this case; as well as in an action on a by-law, to take notice thereof. *Carth.* 75, 76. Before a *procedendo* is granted and filed, it may be amended; but not afterwards.

2. A *habeas corpus* is grantable, without motion, to remove a person upon an arrest; but not where committed for a crime. 1 *Lev.* 1. In suing out these writs in B. R. to remove a cause, &c. they are first to be carried to the other court to be allowed; and some few days after the delivery, the return must be called for, and special bail put in at a judge's chamber; which being done, within four days in term, and six days in the vacation, the cause is removed to the superior court. *Practif. Solit.* 262. And if the defendant be actually a prisoner, he shall not be delivered from prison till the bail on the *habeas corpus* be accepted, or justified. *Ibid.*

If a defendant arrested cannot find bail, and would be removed to the King's Bench or Fleet prison, a *habeas corpus* is to be sued out; and then a return is to be made, and send an officer with the defendant to a keeper, and there a commitment is made, and the judge's tipstaff takes the prisoner in custody, and brings him to prison; and he may agree with the warden, for the liberty of the rules, &c. *Practif. Edit.* 1. p. 124. When the defendant is committed to bailiff, or in any other prison, and would be turned over to the King's Bench, the practice is the same; the *habeas corpus* directed to the sheriff of London and Middlesex is to be delivered, and he, after search in his office for what writs he hath against the defendant, will make return of them, and then the bailiff or keeper of the other prison, who hath the defendant in custody, is to carry him to a judge's chamber, where he will be turned over, as *supra*. *Ibid.*

Habendum. In every deed or conveyance there are two principal parts, the *premisses*, and the *habendum*; the office of the first is to express the name of the grantor and grantee, and the thing granted: and the *habendum* is to

limit the estate, by which the general implication in the premisses may be qualified: as in a lease or grant to two persons, if the *habendum* be to one for life, and the remainder to the other for life, this alters the general implication of the jointtenancy, which would pass by the premisses, if the *habendum* were not. 2 *Rep.* 55. And where things which lie in grant are conveyed to take effect, hardly on delivery of the deed of grant without other ceremony; in such case, if the *habendum* be for a less estate than in the premisses, or be repugnant to it, the *habendum* is void: but when a ceremony is requisite to the perfection of an estate granted, and not a bare delivery only of the deed; and to the estate limited by the *habendum*, nothing is required to perfect it; there though the *habendum* is of a less estate than the premisses, the *habendum* shall stand good, and qualify the estate granted in the premisses. 2 *Rep.* 23. 2 *Nell.* 920. An *habendum* may not only qualify what is granted in the premisses; but it may also enlarge what is thus granted, or explain the premisses: though the *habendum* shall never introduce one who is a stranger to the premisses. 1 *Jones* 4. 3 *Lees* 68. If a bargain and sale be made without expressing to whom, although it were *habendum* to A. B. who is a party to the deed, it is not good; because the *habendum* is only to limit an estate, and not to give any thing. *Cro. Eliz.* 585, 909. 2 *Lill.* 8. If one thing be granted in the premisses of a deed, *habendum* with another thing, which is not appendant, &c. this other thing shall not pass. *Hob.* 161, 172. None can take by any deed, who is not named in the premisses: but though an estate limited by the *habendum* to a man that is no party, is void by way of estate; it may be good in remainder. *Hob.* 313. *Godb.* 51. 'Tis said, that an *habendum* from the day of the date, with respect to a freehold is void, because in future. *Denn* on the demise of *Warren v. Faarnside*. *Wilf. Rep.* par. 1. fo. 176. See *Deed*.

Habentis. Signifies riches: In some ancient charters, *habentes homines* is taken for rich men; and we read, *Nec Rex suum patrum requirat, vel habentes homines quos nos dicimus* feasting men. *Mon. Angl. Tom.* 1. p. 100.

Haberdashers. If any persons work *bats* with foreign wool, and not having served an apprenticeship to the trade, &c. they shall forfeit the goods and 5 *l.* And no person may dye any caps with bark, &c. but only with copperas and gall, or woad and madder. *Stat.* 8 *Eliz.* cap. 7. None shall make *bats* or *felts*, that hath not served seven years in *felt-making*; nor retain any but journeymen who have lawfully served; or have above two apprentices at once, and those not for less than seven years time, &c. on pain of 5 *l.* a month: but *hatterers* may employ their own children in the trade. 1 *Jac.* 1. cap. 17. And the masters and wardens of *Haberdashers* in London, calling to them one of the company of *Coppers*, and another of the *Hatterers*, and mayors, &c. of towns and corporations, may search all *batters*, and punish them that offend, by *Stat. Ibid.* To prevent the exportation abroad, which may be seized, and liable to 100 *l.* penalty; and for regulating *Stat.* 5 *Geo.* 2. c. 6.

Habere

lies of *ejusdem* genus, to into *N. B.* 167. And one may have a new writ, if a well executed; but where execution is made, and the writ returned, the court will never grant a new *habeas facias*, &c. *Ibid.* 21 *Car.* 1. B. R. A sheriff delivered virtue of an *habeas facias* was

been carried out immediately by his officers where there, an against the defendant; for this had been a disturbance in contempt of the execution; it being several hours after the plaintiff was in possession of the court docket, but agreed to grant a new writ, &c. 1 *Salk.* 321. 2 *Nell.* 779. If the sheriff delivers possession of more than is contained in the writ of *habeas facias possidendum*, an action of the case will

will lie against him, or an assise for the lands. *Style* 238. The sheriff cannot return upon this writ, that another is tenant of the land by right, but must execute the writ, for that will not come in issue between the demandant and him. 6 *Rep.* 52. See *Ejectment*.

Habere facias seisinam. Is a writ directed to the sheriff, to give seisin of a freehold estate recovered in the King's courts, by *ejectio firme*, or other action. *Old Nat. Br.* 154. The sheriff may raise the *posse comitatus* in his assistance, to execute these writs: and where a house is recovered in a real action, or by ejectment, the sheriff may break open the doors to deliver possession and seisin thereof; but he ought to signify the cause of his coming, and request that the doors may be opened. 5 *Rep.* 91. This writ also issues sometimes out of the records of a fine, to give the cognate seisin of the land whereof the fine is levied. *West. Sym.* par. 2. And there is a writ called *Habere facias seisinam, ubi Rex habuit annum, diem & westm.* for the delivery of lands to the Lord of the fee, after the King hath had the year, day, and waste in the lands of a perjuror convicted of felony. *Reg. Orig.* 156.

Habere facias Missum. A writ that lies in divers cases in real actions, as in *formosa*, &c. where a view is required to be taken of the lands in controversy. *Reg. Ind.* 46, 28, &c. *P. N. B.*

Habergeon. (From the Germ. *Hals, Collum, & Berger, tapere*) An helmet which covered the head and shoulders. *Blount.*

Haberjess. (*Haberjess*) A sort of cloth of a mixed colour, mentioned in *Magna Charta*, cap. 26.

Habiliments of War. Armour, utensils, or provisions for the maintaining of war. 3 *Eliz.* cap. 4.

Hable. (*Fr.*) Signifies a sea-port town; this word is used in 27 *H. 6.* cap. 3.

Hachia. A hack, pack, or instrument for digging. *Placit.* 2 Ed. 3.

Hackney Coaches and Chaires. They are under the direction of certain commissioners appointed by act of parliament. See 13 & 14 *Car. 2.* c. 2. 5 *W. & M.* c. 22. 9 *Ann.* c. 23. 10 *Ann.* c. 19. *J. 178.* 12 *Geo. 1.* c. 15. 33 *Geo. 2.* c. 25.

Hachote. (*Sax.*) A recompence or amends for violence offered to persons in holy orders. *Sax. Dict.*

Hade of Land. (*Hada terra*) Is a small quantity of land, thus expressed. — *Sursum reddidit in manus domini duas acras terra continentis decem selmone & duas Hadas Anglie.* ten ridgers, and two hades, jacunt inter terr. &c. *Rot. Cur. Maner. de Orleton.* Anno 15 *Jac.*

Haderunga. Respect or distinction of persons; from the *Sax. Hæd, Personæ*, and *Drung*, honoured and admired. *Lat. Etelred.*

Hadgonel. (*Sax.*) Seams to be a tax or mulct. — *Item quando aliquis delegabit terram hergonel.* &c. *quinta Hadgonel & maxime caruaris.* *Mon. Angl.* par. 1. fol. 302.

Hæreda abauke. Is a writ that anciently lay for the Lord, who having by right the wardship of his tenant under age, could not come by his body, being carried away by another person. *Old Nat. Br.* 91.

Hæreda delibetationis alii, qui habet custodiam terre. A writ directed to the sheriff to receive one that had the body of him who was ward to another, to deliver him to the person whose ward he was, by reason of his land. *Reg. Orig.* 167.

Hæreda Regis. Also a writ; see *Requisition of Guard.* *Reg. Orig.* 163.

Hæredipeta. The next heir to lands. — *Item nullus Hæredipeta seu propinquus vel amicus personarum sine castella committitur.* *Leg. 11.* c. 20.

Hæreticus. Is a writ that lay against an *Heretic*, who having been convicted of heresy by the bishop, and absented himself, was taken into the same again, or some other, and was afterwards delivered over to the secular power. *P. N. B.* 69. By this writ, grantable out of Chancery, upon a certificate of such conviction, *Heretics* were burnt; and so were likewise witches, forerers, &c. Was the writ, *De Hereticis con-*

versus lies not at this day. 12 *Rep.* 93. *Stat. 29 Car.* 2. c. 9.

Hæst. Is a Danish word for haven or port; and *Hæst* *Chairs* are granted *inter alia*, by letters patent of *Rich.* duke of *Glouc.* admiral of England. 14 Aug. Anno 3 *Edw.* 4.

Haga. (*Sax. Manſio*) A house in a city or borough. *Demolay.* An ancient anonymous author, expounds *haga* to be a house and shop, *domus cum shopa*; and in a book which belonged to the *Abby of St. Austin* in *Canterbury*, mention is made of *bagas monachis*, &c. See *Co. Litt.* 58.

Hæga. A hedge. (*Sax. Hæg*, melted into *hay*, whence *hays*) *Mon. Angl.* Tom. 2. p. 273.

Hæle. Also a hedge: sometimes taken for a park, &c. enclosed. *Bract. lib.* 2. c. 10. And *hælement* is used for a hedge-fence. *Rot. Ing.* 36 Ed. 4.

Hæll-hot. The *stat.* 3 Ed. 6. against shooting of *hæll-hot*, or more pellets than one, by any person under the degree of a Lord, &c. is repealed. *Stat.* 5 & 7 *W.* 3. c. 13.

Hæll-painter. Not to be mixed with lime, alabaster, &c. under penalties, by *stat.* 4 *Geo. 2.* c. 14. Vide *Starch-powder*.

Hæle. A sort of fish dried and salted; hence the proverb obtains in *Kent*, *As dry as a Hæle*. *Paroch. Antiq.* 371. *Spelm.*

Hæstet. A military coat of defence. *Walf.* in *Ed.* 1.

Hæst-blood. Is no impediment to descent of free-simple lands of the crown, or to dignities, or in descent of estates tail; but in other cases it is an impediment. Admiration is grantable to the *hæst-blood* of the deceased, as well as to the whole blood; and *hæst-blood* shall come in for a share of an intestate's estate, equally with the whole blood, they being next of kin in equal degree. *Stat.* 74. *Vint.* 1071. 22 *Car. 2.* c. 16. See *Demy-Sanguis*, and *Intestacy*.

Hæstendal. Signifies the moiety, or one half of a thing; as *hæstendal* is a quarter, or fourth part of an acre of land, &c.

Hæst-mark. (*Dimidia Marka*) is a noble, or six shillings and eight pence in money. If a writ of Right is brought, and the seisin of the plaintiff, or his ancestor, be alleged, the seisin is not traversable by the defendant, but he must tender the *hæst-mark* for the inquiry of the seisin; which is as much as to say, that though the defendant shall not be admitted to deny, that the plaintiff or his ancestor were seised of the land in question, and to prove his denial; yet he may be allowed to tender *hæst-mark* in money, to have an inquiry made, whether the plaintiff, &c. were so seised, or not. *P. N. B.* 5. *Old Nat. Br.* 26. But in a writ of advowson brought by the King, the defendant may be permitted to traverse the seisin, by license obtained from the King's serjeant; so that the defendant shall not be obliged to proffer the *hæst-mark*, &c. *P. N. B.* 31.

Hæst-trail. Is what is used in the *Chancery*, for selling of commissions to *delegatus*, upon any appeal to the court of delegates, either in ecclesiastical or marine causes. *Stat.* 8 *Eliz.* c. 5.

Hæst-Langue. See *Mellitus Lingua*, as to pleas and trials of *forfeiture*.

Hæst. (From the *Sax. Hæst, & Angulus*) A hole; looking in every hole, &c.

Hæll. (*Lat. Halla, Sax. Hæll*) Was anciently taken for a mansion-house or habitation, being mentioned as such in *Demolay*, and other records; and this word is retained in many counties of England, especially in the county palatine of *Chester*, where almost every gentleman of quality's seat is called a *Hæll*.

Hæll. or *Common Hall.* There is a *Common Hall* for electing a mayor, sheriffs, and other officers of the city of *London*, assembled at *Guild-hall* by the Lord Mayor. *Ord.* 17 *J.* 3.

Hællage. Is sold paid for goods or merchandize vended in a *Hæll*; and particularly applied to a fee or toll due for cloths, brought for sale to *Blackwell-Hall* in *London*. *Lords*

Lords of fairs or markets, are entitled to this fee. 6 Rep. 62.

Hallamas, The day of *All Hallows* or *All Saints*, viz. November 1. and one of the cross quarters of the year, was computed in ancient writings from *Hallamas* to *Candlemas*. Cowel.

Hallamshire, Is a part of the county of *York*, in which the town of *Sheffield* stands. 21 Jac. 1. c. 23.

Hallmote or **Halmote**, (Sax. *Heall*, i. e. *Aula*, & *Gemote*, *Conventus*) Was that court among the Saxons, which we now call a court baron; and the etymology is from the meeting of the tenants of one hall or manor. The name is still kept up in several places in *Herefordshire*, and in the records of *Hereford*, this court is entered as follows, viz. *Hereford Palatium, ad Hallmote ibidem tenet*, 11 Dic. Octob. anno Regni Regis Hen. 6. &c. It hath been sometimes taken for a convention of citizens in their public hall, where they held their courts, which was also called *Folkmete* and *Halmote*: But the word *Hallmote* is rather the lord's court held within the manor, in which the differences between the tenants were determined. — *Omnis causa terminetur vel hundreda, vel comitatus, vel hallmote, sive halmotium, vel dominorum curia*. Leg. Hen. 1. cap. 10.

Halmote, Is properly a holy or ecclesiastical court; but there is a court in *London*, formerly held on the Sunday next before St. Thomas's day, called the *Halmote* or *holy court*, (*Curia Sanctimonialium*) for regulating the bakers of the city, &c.

Halywerthfolk, *Halywerthfolk*, or people who enjoyed lands by the service of repairing or defending a church or sepulchre; for which pious labours they were exempt from all feudal and military services. It did signify such of the province of *Durham* in particular, as held their lands to defend the corpse of St. Cuthbert; and who claimed the privilege not to be forced to go out of the bishoprick, either by the King, or Bishop. Hist. Dunelm. apud War-toni Ang. Sac. par. 1. p. 749.

Halm, Is a Saxon word, used for a place of dwelling; a village or town; hence the termination of some of our towns, as *Nottingham*, *Buckingham*, &c. Also a home close, or little narrow meadow is called *halm*.

Hambling, or **Hambeling of Dogs**, Is the ancient term used by foresters for expediting, Manwood.

Hamefechen, Burglary or nocturnal house-breaking, was by our antient law called *hamefechen*, as it is in *Scotland* to this day. Black. Com. 4 P. 223.

Hamlet, and **Hamel** or **Hamplet**, (From the Sax. *Ham*, i. e. *Domus*, and Germ. *Let*, *Membrum*) Signify a little village, or part of a village or parish; of which three words, *hamlet* is now only used; though *Kitchen* mentions the other two, *hamel* and *Hampfel*. By *Spelman* there is a difference between *villam integram*, *villam dimidiam*, and *hamletam*; and *Stow* expounds it to be the seat of a freeholder. Several country towns have *hamlets*, as there may be several *hamlets* in a parish; and some particular places may be out of a town or *hamlet*, though not out of the county. Wood 3.

Hamfare, Breach of the peace in a house. *Brompton in Legibus H. 1. c. 80.*

Hamtohen, (Sax. *Hamtohen*) Is the liberty or privilege of a man's own house; also a franchise granted to lords of manors, whereby they hold pleas, and take cognizance of the breach and violation of that immunity. And likewise significant *quietantiam misericordie intrationis in aliam domum vi & iniuste*. Fleta, lib. 1. cap. 47. In *Scotland* violations of this kind are equally punishable with ravishing a woman. *Skene*. And our old records express *burglary* under the word *hamtohen*.

Hamper Office, One of the offices so called, belonging to the Court of Chancery. Writs relating to the business of the subject and their returns, were, according to the simplicity of antient times, originally kept in a hamper, in *hamperio*; and the others, relating to such matters wherein the crown is immediately, or mediately concerned, were preserved in a little sack or bag, in *parva boga*; and thence hath arisen the distinction, of the *Hamper Office*, and *parva bag office*, which both belong to the Common law Court in Chancery. Black. Com. 3 P. 49. and vide *Gillb. Chanc. p. 10.*

Hambrohm, A surety or manual pledge, i. e. an inferior undertaker; for *headbrom* is the superior or chief. *Spelm.*

Hambrohm, A thief caught in the very fact, having the goods stolen in his hand. Leg. Hen. 1. cap. 59. Fleta, lib. 1. cap. 38.

Hambrohm, Is the name of an unlawful game or disused and prohibited by statute 17 Ed. 4. c. 2.

Hambrohm, In measuring is four inches by the standard. Anno 33 H. 8. c. 5.

Hambrohm, (From the Sax. *Hond*, manus, and *Gritb*, Pax) Peace or protection given by the King, with his own hand. — *Hec mittunt hominem in misericordia Regis, in-fractis seu violatis partibus quam per manum suam dabit alicui*. Leg. Hen. 1.

Hambrohm, An engine to destroy game. Stat. 33 Hen. 8. See Gun.

Hambrohm, A kind of cloth. Stat. 4 & 5 Ph. & M. c. 5.

Hambrohm, A term for customary labour to be done and performed. Man. Ang. Tom. 2. p. 264.

Hambrohm alias **Hanguite**, (From the Sax. *Hangan*, i. e. suspendere, & *wit*, multa) Is a liberty granted to a person, whereby he is quit of a felon or thief hanged without judgment; or escaped out of custody. *Rassal*. We read it interpreted to be quit *de laron pendu sans serjeants le Roy*, i. e. without legal trial: And elsewhere, *multa pro latrone prout ipse innocentiam suspensio vel elapso*. And it may signify a liberty, whereby a lord challenges the forfeiture for him who hangs himself within the lord's soc. *Domesday*.

Hanger or Hanaper, (*Hanaperium*) The *Hanager* of the *Chancery*; it seems to be the same as *fiscus* originally in the *Latin*. 20 R. 2. c. 1.

Hanse, (An old Gothick word) Signifies a society of merchants, for the good usage and safe passage of merchandise from one kingdom to another. The *hanse* or *mercatorum societas*, was and in part yet is endowed with many large privileges by Princes within their territories; and had four principal seats or *staples*, where the *Almain*, or German and Dutch merchants, being the founders of this society, had an especial house; one of which was here in *London*, called the *Steel-Yard*. *Ortelius's Index ad Theatr. verbo Affatici*.

Hans Towns, In *Germany*, &c. so named, either because they lay near the sea, or from the Gothick *Anf*, which is taken for those who were the richest of the people; and from thence it is inferred, that these towns were the chiefest for trade or riches: or it may come from the German *Hansa*, i. e. *Societas*; a company of merchants excelling others in trade. There were at first seven towns distinguished by this name; afterwards they were seventy in number.

We shall give an abstract of Dr. *Robertson's* account, which is much more perfect. Towards the middle of the thirteenth century, the nations around the *Baltick* were extremely barbarous, and infested that sea with their piracies; this obliged the cities of *Luback* and *Hamburg* soon after they began to open some trade with these people, to enter into a league of mutual defence. They derived such advantages from this union, that other towns acceded to their confederacy, and in a short time eight of the most considerable cities scattered through those valleys which stretch from the bottom of the *Baltick*, to *Gologne* on the *Rhine*, joined in the famous *Hanseatic league*, which became so formidable, that its alliance was courted, and its enmity dreaded by the greatest monarchs. The members of this powerful association formed the first systematic plan of commerce known in the middle ages, and conducted it by common laws enacted in their general assemblies. Hist. Emp. Char. V. 1 P. 79, 80 See Id. p. 330.

Hantelast, An arrest from the Germ. *Hant*, an hand and *last*, i. e. land; *manus inmissio*: As arrefts are made by laying hold on the debtor, &c.

Hap, (Fr. *Happer*, i. e. *Repere*, to catch) Is of the same signification with us as in the *French*; as to *hap* the rent is where partition being made between two partners, an moi

more land, allowed to one than the other, the last has most of the land charges it to the other, and she *has* the rent, whereon assise is brought, &c. This word is used by *Lichsten*, where a person *happeth* the possession of a deed poss. *Litt. f. 8.*

Haque. A little hand gun, prohibited to be used by statute 33 H. 8. c. 6. and 2 E. 3 Ed. 6. cap. 14. There is the *half-haque* or *deny-haque*, within the field acts.

Haquebut. A bigger sort of hand-gun than the *haque*, from the Teuton. *hauck bayle*; it is otherwise called an *haquebut*, vulgarly a *bagbut*. 2 & 3 Ed. 6. c. 14. and 4 & 5 Ph. and Mar. c. 2.

Havattum. (From the Fr. *Heras*.) A race of horses and mares, kept for breed; in some parts of England termed a *find of mares*, &c. *Spelm. Gloss.*

Harbinger. An officer of the King's house, &c. See *Harbinger*.

Harbours and Havens. There are many acts of parliament for repairing and improving the *harbours* and *havens* of this kingdom; such as the 23 Hen. 8. cap. 7. and 28 H. 8. relating to the *havens* and ports of *Plymouth*, *Portsmouth*, *Falmouth*, &c. in *Devonshire* and *Cornwall*; and none shall labour in tin works, near rivers of those *havens*, but shall prevent the fall of stones and gravel therein. Casting and unlading ballast, rubbish, &c. in any *harbour*, *haven*, or road, incurs the penalty of 5 l. by stat. 34 Hen. 8. cap. 9. The 27 of *Eliz. cap. 1.* was made for repairing *Orford haven* in *Suffolk*; and 13 E. 14 Car. 2. and 4 Geo. 1. c. 13, &c. for the reparation of *Dover harbour*, &c. And duties are granted by these statutes, towards effecting thereof. *Vide* the Statutes. By the Stat. 19 Geo. 2. c. 22. If any master of a ship shall cast out of any ship, riding in any haven, &c. any ballast, &c. but only on land, where the tide never flows or runs, he may be fined by the justices, not more than 5 l. nor less than 50 s. As soon as any ship shall be sunk, stranded, or run on shore in any *harbour*, &c. or be brought or drove in, or be there in a ruinous condition, and there suffered to remain, and the owner shall begin to carry away the rigging; on summons of the owner, or commander, a justice may seize the ship, &c. and by sale thereof raise money to clear the *harbour*. Stat. 20 Geo. 2. c. 14. was made for opening *Southwold haven* in *Suffolk*. Stat. 20 Geo. 2. c. 18. was made for improving *Sunderland harbour* in *Durham*. See Stat. 27 Geo. 2. c. 8. for improving and enlarging the harbour of *Lith*.

Harbottle. Mentioned in *Domesday*, and by *Speham*. See *Herdwick*.

Harcis. The penalty of taking and killing them, by statute 1 J. 1. &c. *Vide Game*.

Harlots. If any victimer, alehouse-keeper, &c. in *London*, shall permit any *harlots*, or common women of their bodies, to come into their houses to eat, or drink, or otherwise to be conversant or abide there; they shall be liable to imprisonment, and also the women and *harlots*. Artic. Wardmote 23.

Harnes. (Fr. *Harnois*.) Signifies all warlike instruments. *Hoved. p. 725. Matt. Paris.* The tackle or furniture of a ship, was also called *harnes* or *harnesum*. Pl. Parl. 22 Ed. 1.

Hars. *Harsum.* An outcry after felons and malefactors; and the original of this *clameur de hars* comes from the *Normans*. *Custom. de Normand. Vol. 1. p. 104.*

Harp. *Harp.* Iron instruments for the striking and killing of *fish*. And those that strike the fish with them are called *Harpigiers*, or *Harpioners*. *Merch. Dic.*

Hartens. (*Hartell cant.*) Small hounds, for hunting the *hare*. Notably several persons held lands of the King, by the tenure and service of keeping packs of *henges* and *hartens*. *Cart. 12 Ed. 1.*

Hart. Is a *stag*, or male deer of the forest five years old complete; and if the King or Queen do hunt any such, and he escape alive, then he is called an *Hart Royal*. And where by the hunting he is chased out of the forest, proclamation is usually made in the adjacent places, that in regard of the diversion the *beast* hath afforded the King or Queen, none shall hurt or hinder him from returning to the

forest; and then he is called a *Hart Royal proclaimed*. *Manwood's Forest Laws, par. 2. cap. 4.*

Hartest Workmen. May be licensed by justices of peace to go into other counties to work, &c. Stat. 13 E. 14 Car. 2. c. 12.

Hatch. *Hatch.* A shield of brawn — *Johannes de Moulgrave tenuit terras in B. de homino rege per servitium deferendi domini regi unam hacham porci*, &c. *Paroch. Antiq. 450.*

Hatches. Are certain dams made of clay and earth, to prevent the water issuing from the works and its washes in *Cornwall*, from running into the fresh rivers: And the tenants of several manors there, are bound to do certain days work *ad le hatches*, or *hatches*. Stat. 27 Hen. 8. c. 23. And from a *hatch*, gate, or door, some houses situate on the highway, near a common gate, are called *Hatches*.

Hats and Caps. A title in the statute law. See Stat. 8 Eliz. c. 7. *Haberdashers*.

Haur. (From the Fr. *Haïr*.) Is used for hatred. *Leg. W. 1. c. 16.*

Hawthor. (*Homo Loricatus*) A man armed with a coat of mail. — *Et faciendo servitium de Hawthor, quantum pertinet ad villam*, &c. *Charta Galfridi de Dutton, temp. H. 3.*

Haw. A small parcel of land so called in *Kent*; as a *Hampshire* or *Brighthelm*, lying near the house, and inclosed for those uses. *Sax. Dic.* But Sir Edward Coke, in an ancient plea concerning *Proverham* in *Kent*, says *Hawes* are houses. *Co. Litt. 5.* See *Haga*.

Hawth. or *Hawth.* Signifies a green plot in a valley, as they used it in the *North of England*. *Camb.*

Hawberk alias *Hobberk*, (Fr. *l.e. Loric*.) He who holds lands in *France* by finding a coat or shirt of mail, and to be ready with it when he shall be called, is said to have *hawberticum studium*, *Plef. de Haubert*: And *Hawberk*, with our ancestors, had the same signification, and so it seems to be used in the stat. 13 Ed. 1. cap. 6.

Hawks. The stealing of an *hawk*, or concealing it, after proclamation made by the sheriff, is felony with clergy: But this extends only to long-winged *hawks*, of the kind of *falcon*; and not to *goshawks*, or *sparrow hawks*. 34 Ed. 3. 37 Ed. 3. cap. 19. 3 Inst. 97. None shall kill, or take away, any *hawks* from the coverts where they use to breed, on pain of 10 l. to be recovered before justices of peace, and divided between the King and prosecutor. Stat. 11 Hen. 7. cap. 17. A *hawk* taken up, must be delivered to the sheriff, if taken up by a mean person, to be proclaimed in the towns of the county, &c. An action of trover and conversion lies for an *hawk reclaimed*, and which may be known by her *vervels*, *bells*, &c. *Hawking* for game, see *Game*.

Hawkers. Those deceitful fellows who went from place to place, buying and selling brass, pewter, and other goods and merchandize, which ought to be utter'd in open market, were of old so called; and the appellation seems to grow from their uncertain wandering, like persons that with *hawks* seek their game where they can find it. They are mentioned Stat. 25 Hen. 8. cap. 6. and 33 Hen. 8. cap. 4. *Hawkers* and *pedlars*, &c. going from town to town, or house to house, are now to pay a fine or duty the King. If they travel with an horse, ass, &c. the same is 2 l. and if on foot, 4 l. and to be licensed by commissioners appointed for that purpose, or be liable to certain penalties; and any person may seize a *hawker*, &c. till he produce his licence: travelling without licence, shall forfeit 12 l. and refusing to shew their licences 5 l. There is also a forfeiture for lending a licence to hire; and it shall be void. 2 E. 9 W. 3. cap. 21. But traders in the linen and woollen manufactures, lending their goods to markets and fairs, and selling them by wholesale; makers of goods, selling those of their own making; and makers and sellers of *hose* or *bone-lace*, going from house to house, &c. are excepted out of the acts, and not to be taken as *hawkers*. 1 E. 4 Ann. 4. c. 4. If *hawkers* and *pedlars*, offer any *tea*, &c. to sale, tho' they have permits, the same may be seized as forfeited, &c. by the late act against raising uncustomed goods. 9 Geo. 2. c. 35. We now call those persons *hawkers*, who go up and down the streets of *London*, crying *news books* and papers, and sell-

ing them by retail, and the women and others who sell them by wholesale from the press, are called *mercuries*. See *Gen. 2. c. 26*.

Hays, Fr. Hays, A hedge, or inclosure; also a net to take game. See *Hain*.

Hedge, Is a liberty to take thorns and other wood, to make and repair hedges, gates, fences, &c. either by tenant for life or years; it is also said to be wood, for the making of rakes and forks, with which men in Summer make hay. See *Co. Litt. 41. Black. Com. 2 V. 35*.

Hay-market. Carts of hay, which stand to be sold in the *hay-market*, are to pay 3 d. per load towards the paving and amending the street; and shall not stand laden with hay after three o'clock in the afternoon, &c. on pain of forfeiting 5 s. Hay sold in London, &c. between the first of June and the last of August, being new hay is to weigh 60 pounds a truss; and old hay the rest of the year 56 pounds, under the penalty of 2 s. 6 d. for every truss offered to sale, &c. Stat. 2 W. & M. c. 6. 8 & 9 W. 4. See Stat. 31 Geo. 2. c. 40.

Hayward, (from the Fr. *Hays*, i. e. *sepes*, & *Garde*, *Custodia*) Is one who keeps a common herd of cattle of a town; and the reason of his being called *Hayward* may be, because one part of his office is to see that they neither break nor crop the hedges of inclosed grounds, or for that he keeps the grafs from hurt and destruction. He is an officer appointed in the *Lord's Court*: And is to look to the fields, and impound cattle that do trespass therein; to inspect that no pound breaches be made, and if any be, to prevent them at the leet, &c. *Kitch. 46*. There may be a custom in a manor, to have a surveyor of the fields or *hayward*, and for him to distrain cattle damage-feasant; but he must avow in the name of him who hath the freehold. 2 *Cro. 430*. See *Agellarius*.

Hazard, Is an unlawful game at dice; and those who play at it are called *hazarders*: And we read, *Hazardor communis ludens ad falsos talos adjudicatur, quod per sex dies in diversis locis ponatur super colliatrigium*. Int. Plac. Trin. 2 Hen. 4. Suffex. 10.

Headborough, or Headborough, (from the Sax. *Head*, caput, & *Borge*, sive *jurissor*) Signifies him who is head of the frank-pledge in boroughs; and who had a principal government within his own pledge; as he was called *headborough*, so he was also stiled *boroughhead*, *borsholder*, *thirdborough*, *tithingman*, &c. according to the usage and diversity of speech in several places. *Lamb*. These *headboroughs* were the chief of the ten pledges; the other nine being denominated *handboroughs*, or inferior pledges. *Headboroughs* are now a kind of *constables*.

Headland, Is the upper part of ground left for the turning of the plough; whence the *headway*. *Paroch. Antiq. 587*.

Head-pence, Was an exaction of a certain sum heretofore collected by the sheriff of Northumberland of the inhabitants of that county, without any account therefore to be made to the King; which was abolished by Stat. 23 H 6. c. 7.

Head-silver, Paid to lords of leets. See *Common Fin*.

Healfang or Hulsfang, Is compounded of two Saxon words *Heals*, i. e. *Collum*, and *Fang*, capere, and signifies that punishment, *qua alius collum stringatur*, (*colliatrigium*). Sometime it is taken for a pecuniary mulct, to commute for standing in the pillory; payable to the King or Chief Lord. *Leg. H. 1. cap. 11*.

Health (*Injuria* 10.) Injuries affecting a man's health, are where by any unwholesome practices of another a man sustains any apparent damage in his vigour or constitution. As by selling him bad provisions or wine; (1 *Roll. Abr. 90*.) by the exercise of a noisome trade, which infects the air in his neighbourhood; (9 *Rep. 57. Hist. 135*.) or by the neglect, or unskilful management, of his physician, surgeon or apothecary. For it hath been solemnly resolved, that *mala praxis* is a great misdemeanor and offence at Common law, whether it be for curiosity and experiment, or by neglect; because it breaks the trust which the party had placed in his physician, and tends to his destruction. *Ld. Raym. 214*. These are wrongs or injuries unaccompanied by force, for which there is a re-

medy in damages, by special action of *trespass*, in the *case*. *Black. Com. 3 V. 122*. As to offences against the public health of the nation, there are various provisions, as with respect to the *plague*. Stat. 1 Jac. 1. c. 31. 26 Geo. 2. c. 6. 29 Geo. 2. c. 8. As to *unwholesome provisions*. 51 Hen. 3. Stat. 6. *Ord. Provisors* 5, 7, 12 Car. c. 25, sect. 11.

Heath-money, A tax formerly levied, but now abolished. Vide *Chimney-Money*.

Hebber-men, Fishermen, or poachers below London Bridge, who fish for whiting, smelts, &c. commonly at ebbing water; mentioned in one of the articles of the Thames jury, at the court of the conservator of the river Thames, printed anno 1632. And these persons are punishable by statute 4 H. 7. c. 15.

Hebbling-wears, Are wears or engines made or laid at ebbing water. 23 H. 8. c. 5.

Hebdomas, (Lat.) A week. See *Week*.

Hebdomadus, The week's man, canon or prebendary in the cathedral church, who hath the care of the choir, and the officers belonging to it, for his own week. *Reg. Epis. Hereford. MS.* See *Ebdomary*.

Heck, Is the name of an engine to take fish in the river Ouse. 23 H. 8. c. 18.

Heccagium, Is supposed to be rent paid to the lord of the fee for liberty to use the engines called *Hecks*.

Heed, A small haven, wharf, or landing place. *Domesd.* See *Hub*.

Heccagium, Toll or customary duties paid at the bish or wharf, for the landing goods, &c. from which exemption was granted by the King to some particular persons and societies. *Cartular. Abbat. de Radings. MS. f. 7*.

Hedge-bote, Is necessary stuff to make hedges, which the lessee for years, &c. may of common right take in his ground leased. See *Hay-bote*.

Hedge-breakers. By the statute 43 Eliz. cap. 7. *Hedge-breakers*, &c. shall pay such damages as a justice of peace shall think fit; and if not able to pay the damages, shall be committed to the constable to be whipped. And constables, and others, may apprehend persons suspected of *hedge-stealing*, and carry them before a justice; where not giving a good account how they came by wood, &c. they are not only to make such recompence as the justice of peace shall adjudge, but pay a sum not exceeding 10 s. for the use of the poor, or be sent to the house of correction for a month, by 15 Car. 2. c. 2. Persons convicted of buying stolen wood, shall forfeit treble value to him from whom taken. *Ibid*.

Heir, (*Herus*, ab *Hereditate*) Is he ex *justis* *hereditatibus* procreatus, who succeeds by descent to lands, tenements and hereditaments, being an estate of inheritance. The estate must be fee, because nothing passeth *jure hereditatis* but fee; and by the Common law a man cannot be heir to goods and chattels: But the civilians will him *heredem*, *qui ex testamento succedit in universum* *bonorum*.

Under this head may be considered,

I. The several kinds of heirs.

II. Who may be heirs, what persons are excluded from being heirs, and where the word heirs is used to create an inheritance.

III. Where the heir shall take advantage of the conditions, covenants, &c. of his ancestor, which shall go to him, &c. and where the heir shall be bound to the debts and contracts of the ancestor.

I. The several kinds of heirs.

Some writers have made a distinction of *heredes sanguinis*, & *heredes testamenti*; a man may be *heres sanguinis* his father or ancestor, and yet upon displeasure, be debarred of his inheritance: And there is an *ultimus heres*, being he to whom lands come by *escheat*, for want of lawful heirs, &c. The lord of whom the lands are held, or the King. *Bract. lib. 7. cap. 17*. But the most usual division is, that of *heir apparent*, *heir general*, *heir special*, *heir by custom*, and *heir by devise*, called *heredes factus*.

Heir apparent, Is one during the life-time of his ancestor; till the ancestor's death he is only *heir apparent*, or

or at law. 1 Inst. 8. Bonds and bargains with such an heir, to have double or treble the money lent, after his father's death, &c. are set aside in equity; but it is by paying what was lent *bona fide*, with interest, if the obligor applies for relief; tho' in case the obligee sues, he shall not recover what was really lent; for that would be to assist fraud. 1 Vern. 359. 1 Vern. 141. Where young heirs enter into any bond, Chancery relieves against it, without evidence of actual imposition; because there is a supposition of duress, and presumption of a liability to be imposed on. Barnardist. 481.

Heir general. The heir general or heir at Common law is he who after his father or ancestor's death hath a right to, and is introduced into, all his lands, tenements and hereditaments. But he must be of the whole blood, not a bastard, alien, &c.

None, but the heir general, according to the course of the Common law, can be heir to a warranty, or sue an appeal of the death of his ancestor. Co. Lit. 14. a. Cro. Jac. 217, 218.

If a condition be annexed to Borough English or Gavel-kind lands, and the condition is broken, the heir at Common law shall enter; for the condition is a thing of new creation, and collateral to the land: But when the eldest son enters, the heir or heirs by custom, shall enjoy the land; for by breach of the condition they are restored to their ancient estates. Cro. Eliz. 204. Plow. 28. Co. Lit. 11, 12.

Special heir. Is the issue in tail claiming *per formam doni*, and as the Statute *de donis* preserves the estate to him, his ancestor cannot grant or alien, nor make any rightful estate of freehold to another, but for term of his own life. Lit. jess. 613.

Heir by custom. A custom in particular places varying the rules of descent at Common law is good; such as the custom of Gavel-kind, by which all the sons shall inherit, and make but one heir to their ancestor; but the general custom of Gavel-kind lands extends to sons only, but a special custom, that if one brother dies without issue, all his brothers may inherit, is good. Co. Lit. 140.

Heir by devise, or *heres factus*. is only a devisee of lands, being made, so by the will of the testator, and has no other right or interest than the will gives him. 3 Co. 42.

It has been held in Chancery, that such an heir shall have the aid of the personal estate in discharging the debts of the testator. 1 Vern. 36, 7.

But this must be understood of an *heres factus* of the whole estate, who shall have the benefit of the personal estate, but a devisee of particular lands shall not. Preced. Chanc. 3.

Likewise there is a *limbal heir*, as the son of a person; and a *collateral heir*, as brother, &c. Yet a man can have no right heir, to take lands during his life. Dyer 99.

II. Who may be heir, what persons are excluded from being heirs, and where the word heirs is necessary to create an inheritance.

The eldest son, after the death of his father, is his heir. 1 Inst. 20. And if he be grandfather, father, and son, and the father die before the grandfather, and after the grandfather, the land shall go to the son or daughter of the father, and not to any other children of the grandfather. 1 Inst. 20. And this heir is called *heres factus*, because he doth represent his father's person: But if in this case, the father die without any child, his next eldest brother shall have the land as heir, or the want of a brother, it descends to the sisters of the father. 1 Inst. 20. A man having issue only a daughter, dies, leaving his wife with child of a son, which is afterwards born; here the son after his birth is heir to the land, but till then the daughter is to have it. 9 H. 6. 23. Per. 251.

There are some persons who may not be heirs; as a bastard born out of lawful wedlock; an alien, born out of the King's allegiance, tho' in wedlock; a man attainted of treason or felony, whose blood is corrupted; these last may not be heirs, *propter defectum*; and an alien

cannot be heir, *propter defectum subjectionis*; nor may one made alien by letters patent; tho' in otherwise of a person naturalized by act of parliament. Co. Lit. 2. a. Dyer. Abr. 152. A bastard by continuance, may be heir against a stranger; and an hermaphrodite may be heir, and take according to that sex which is most prevalent; but a monster, who hath not human shape cannot be heir, although a person deform'd may. Co. Lit. 7. a. Dyer. 553. Idiots and lunatics, persons excommunicate, attainted in premunire, out-laws in debt, &c. may be heirs. Ibid.

The word *heir* is not a good description of a person in the life time of the ancestor; and an eldest son shall not take by the name of heir in the life-time of his father. 1 Leon. 70. A man cannot take a fee-simple estate to his right heirs, by the name of heirs, as a purchase, by conveyance or otherwise; but in such case the heir shall be in by descent: *Fortius est potestas ut dispositio legis, quam hominis.* Hob. 30. 2 Lill. Abr. 12. By the law of England, no person can take to himself an inheritance in fee-simple by deed, without the word *heirs*; but he may by devise; tho' in cases where the word *heir* is wanting, it has been adjudged that if there were other words equivalent, and the interest in the thing granted passeth by the consideration only, without any further ceremony in the law, an estate in fee may pass. 2 Nelf. Abr. 928. In a devise by will, or exchange, &c. the word *heirs* is not necessary; but estates of inheritance which are otherwise conveyed, require it. Jenk. Cent. 196. The word *heir* is *verbum collectivum*, and extends unto all heirs: And under heirs, the heirs of heirs are comprehended in infinitum; if lands are given to a man and his heirs, all his heirs are so totally in him, that he may give his lands to whom he will. Trin. 23 Jac. 1. Noy 56.

The heir is favoured by the Common law; and the ancestor could not give away his lands by will from his heir at law, without the consent of the heir, till the Statute 32 H. 8. c. 1. 2 Lill. 11. Hill. 23 Car. B. R. Dubious words in a will shall be construed for the benefit of the heir; and not to disinherit him: And the heir at law is preferred in Chancery in a doubtful case. Noy 185. Chanc. Rep. 7. Where lands were devised to the heirs of J. S. then living; it was held, that his eldest son should have them, though in strictness he was not heir during his father's life, but heir apparent: But this was by reason of the words *then living*, which made it a description of the person. Preced. Chanc. 57.

III. Where the heir shall take advantage of the conditions, covenants, &c. of his ancestor, what shall go to him, &c. and where the heir shall be liable to the debts and contracts of the ancestor.

Conditions and covenants real, or such as are annexed to estates, shall descend to the heir, and he alone shall take advantage of them. 43 Ed. 3. c. 4. 1 And. 55.

And this is not only where there are express words, but also where there are none; for the law by implication reserves the condition to the heir of the feoffor, &c. for being prejudiced by the disposition, it is but reasonable that he should take the same advantage that his ancestor whom he represents might. 1 Hol. Abr. 407, 472.

If a man seized of lands in right of his wife, makes a feoffment in fee upon condition, and dies, and after the condition is broken, the heir of the husband shall enter; for though no right descended to him, yet the title of entry by force of the condition which was created upon the feoffment, and reserved to the feoffor and his heirs, descended. 8 Co. 43. Co. Lit. 202. a. 336. b.

The heir shall take advantage of a *nomine pance*, for being incident to the rent, it shall descend to the heir, being a security or penalty to engage the payment of the rent; therefore whoever has a right to the rent, ought in reason to have the penalty, which is to oblige the tenant to pay it. Co. Lit. 162. b.

If a man leases for years, and the lessee covenants with the lessor, his executors and administrators, to repair and leave it in good repair at the end of the term, and the lessor dies, &c. his heir may have an action upon this covenant, for this is a covenant which runs with the land, and shall go to the heir, tho' he is not named; and it appears,

appears that it was intended to continue after the death of the lessor, inasmuch as his executors, &c. are named. 3 *Lev.* 92. *Lougher* ver. *Williams*. *Skin.* 305. *S. C.* cited.

If *A.* infeoff *B.* upon condition, that if the *heir* of *A.* pays to *B.* *℥.* 20*s.* then he and his *heirs* may re-enter; this is a good condition, of which the *heir* of *A.* may take advantage, and yet *A.* himself never can. *Co. Lit.* 214. 6.

Not only land, but rent not due at the death of the ancestor lessor, shall go to the *heir*; so corn sown by a tenant for years, where his term expires before the corn is ripe; every thing fastened to the freehold, timber-trees, deeds belonging to the inheritance; deer, conies, pigeons, fish, &c. 2 *Nell. Abr.* 927. An *heir* shall enforce the administrator to pay debts with personal estate, to preserve the inheritance. *Chanc. Rep.* 280, 293. If an executor hath assets, he is compellable in equity to redeem a mortgage, for the benefit of the *heir*; and it is the same where the *heir* is charged in debt. *Hard.* 511. And when the *heir* is sued for the debt of his ancestor, and pays it, he shall be reimbursed by the executor of the obligor, who hath personal assets. 1 *Chanc. Rep.* 74. But in action of debt brought upon a bond against an *heir*, 'tis no good plea for the *heir* to say, that the executors have assets in their hands. *Dyer* 204. For a creditor may sue either *heir* or executor, and *heirs* and executors are both chargeable upon specialties. If an *heir* hath assets, and the executor also, it is at the election of the obligee to have action of debt against the one, or the other; but he shall not charge them doubly. 2 *Plowd.* 433. If an *heir* hath made over lands fallen to him by descent, execution shall be had against him to the value of the land, &c. if it be not sold *bona fide* before the action brought, in which case there is a saving by the Statute 3 & 4 *W. & M. cap.* 14. And whether the *heir* hath lands by descent, shall be tried and enquired of, with the value, by a jury, to make the *heir* answerable. 5 *Mod.* 122.

Where bound, &c.

As the *heir* at law is the proper and only person, who can take advantage of conditions, &c. annexed to the real estate; so he shall be bound by all such conditions, &c. which run with the land, whether such conditions were annexed to the estate by the original feoffor, grantor, or immediate ancestor. 1 *Rel. Abr.* 421.

If a gift be made in tail on condition, that the donee should not discontinue, and the donee hath issue two daughters, and one of them discontinues, the donor shall enter and evict them both, because it was the original condition annexed to the whole estate, that no part of it should be discontinued. *Co. Lit.* 165.

But note, that neither tenant in tail, nor his issue can be restrained from aliening by fine and recovery, tho' they may be restrained from aliening by feoffment, or other tortious act, which amounts to a discontinuance.

So where one devised lands to *A.* and the *heirs* male of his body, provided, that if he does attempt to alien, that then immediately his estate shall cease, and *B.* shall enter, and *A.* makes a feoffment in fee, and thereupon *B.* enters; and it was adjudged against *B.* and that the condition was void, because *non constat* what shall be adjudged an attempt, and how it should be tried. 1 *Fent.* 521. 3 *Kebl.* 787. *Piers* and *Winn.*

Also where a condition is annexed to the estate given to the *heir*, and which goes in abridgment and restraint thereof, the same shall in some cases be construed a limitation; for if it were a condition, nobody could take advantage of it but the *heir*. *Dyer* 316. 10 *Co.* 41. 1 *Fent.* 199.

As if a copyholder in *Borough English* surrenders to the use of his will, and after devises to his wife for life, remainder to his eldest son, paying 40*s.* to each of his brothers and sisters within two years after the death of his wife, &c. this is a limitation, and not a condition; for if it should be a condition, it would extinguish in the *heir*, and there would be no remedy for the money. *Cro. Eliz.* 204. *Willott* and *Hammond.* 3 *Cro.* 20-1. 2 *Lein.*

114. *S. C.* *Visd* farther as to the doctrine of the *heir* being bound, &c. *Faugh.* 271. 2 *Mod.* 26. *S. C.* *Cro. Eliz.* 833, 919. *Moor* 644. pl. 891. *May* 51.

But wherever the ancestor makes a conveyance or disposition on condition, which goes in restraint and abridgment of the estate of the *heir*, he must have notice of it; for having a good title by descent, he is not obliged to take notice of such condition at his peril, as others must do. 8 *Co.* *France's* case.

If the person of the ancestor be bound in respect of his land, which descends to the *heir*, he shall be charged: as, if by a subsidy to be assessed upon every one having 20*s.* per annum, *A.* be charged and die; his *heir* shall pay it, for it runs with the land. *R. Mo.* 17.

Heir is *non collectum*; and therefore, if a condition be, that if his *heir* does not pay such a rent charge, the estate shall go to *B.* if the *heir* of the *heir* does not pay, the condition is broken. *R.* 2 *Cro.* 145.

It has been held, that the *heir* is never chargeable without an express *lien* and assets; and even then, no longer than he hath assets, for he is not obliged to keep them till he is charged: But if he hath assets, he ought to plead truly, and confess them; otherwise judgment shall be given against him *de terris propriis*, for 'tis then his debt. *Joan.* 88. 1 *Salk.* 179.

When a man recovers against an *heir*, by default or verdict, on pleading *riens per descent*, a special judgment *de terris defensis*, may be entered against the *heir*, and the plaintiff shall have all the lands by descent in execution; tho' if the judgment be general against the *heir*, without praying such special judgment, he can only have a moiety of the lands by *elegit*. *Plowd.* 439. 2 *Lein.* 16. Here the plaintiff may surmise, that the *heir* hath such land by descent, and pray to have execution of all his land. *Dyer* 149. *Roll.* 72. The judgment and execution shall be general, unless the *heir* acknowledge the action, and shews that he hath so much by descent; but if he will not shew what he hath by descent, he loses the benefit of the law. *Mich.* 1 *W. & M. B. R.* *Cro. Eliz.* 692.

If the *heir*, in case where the ancestor hath bound himself and his *heirs*, have never so much land come to him by gift in tail, or conveyance of the father, and *an* *ex* *defect*, he is *not* chargeable at all: and so it is for any estate but what is in *fee simple*; as where lands are granted to *J. S.* and his *heirs* during the life of another, &c. the *heir* shall not be charged for this, no more than for the land entail'd. 10 *Rep.* 98. No lands can be charged *hæc* *fee-simple*; therefore in a suit against the *heir*, the judgment is only for the land descended, and not for other lands, &c. but where it is by his own fault, as by a false plea, or the like. 1 *Inst.* 102, 376.

A man binds himself and his *heirs* in an obligation, and hath lands and *heirs* on the part of the father, and the part of the mother; the *heirs* and lands of both, and not of one alone, must be charged in debt: and the plaintiff shall have several actions; and execution shall stay, till it may be had against both of them. 2 *Rep.* 25. *Hob.* 25.

Also if one bind himself and his *heirs*, and leave land at *Common law*, and lands in *gavelkind*; the obligee must sue all the *heirs*. *Hob.* 25. An *heir* sued on a specialty, shall have his age; and if one of the *heirs* be within age, the parcel shall be stay'd for all. *Moor.* cap. 203. A collateral *heir* is chargeable for the debt of his ancestor; but the declaration must be special, and he is to be charged as collateral *heir*, not as immediate *heir*; and if a son happens between, who dies, he shall be *heir* unto and *heir* of the son, who was *heir* of the debtor, &c. *Co. Car.* 151. And a child born, though he lives but an hour, has the fee of lands vested in him as *heir*. *Hecl.* 132.

In a writ a man need not shew how he is *heir*; but he must in a declaration, &c. tho' it is only for form to set forth how a person is *heir*, because it is not traversable; and *heir*, or no *heir*, is issuable. *Moor* 885. If an *heir* sought to confess the debt on action brought against him, and the debt be not denied, it must be admitted. 1 *Lein.* 442.

Debt against the *heir*, upon the bond of his ancestor, is to be brought in the *debet* and *solvo*, because the *heir* himself is bound; and not in the *decies* only, tho' that is cured by verdict. *Sid.* 342. 1 *Lev.* 224. An *heir*

heir is not bound by the bond of the ancestor, unless he is expressly bound: and if in a bond a man bind his *heirs*; but not himself, the bond is void. *2 Samsd. 135. Cro. Jac. 570.* Also a man shall never bind his *heir* to warranty, where he himself was not bound: if he make a feoffment in fee, and binds his *heirs* only to warranty, the feoffment is void, for the *heir* shall be bound to warranty in such cases only, where the ancestor was bound, without which it cannot descend upon him. *1 Inf. 386.* And warranties and covenants shall descend upon the *heir* general, and not upon any special *heir*, &c. So that if a man convey land with warranty against him and his *heirs*, his *heir* on the mother's part shall not be vouched by this, so long as there is an *heir* on the father's part. *Cr. H. 24.*

A grant of an annuity, must be for a man and his *heirs*, to bind the *heir*, altho' there be assets; and when he is named, the *heir* shall not be bound except there be assets. *1 Inf. 144.* Where a person covenants with another to perform any act, if his *heir* be not named, he is not bound by it: but in covenants of others, that concern the inheritance, the *heir* shall have the benefit of them, tho' not named. *3 Rep. 8. 1 Rel. Abr. 210.* An *heir* may enter for a condition broken, when the condition is annexed to lands, and take advantage of it, because if there had been no condition, the land would have descended to him. And an *heir* may perform a condition, to save the land. *2 Nels. Abr. 249.*

The *heir* shall not have money due on mortgages in fee, if he be not particularly named, but the executor; and if the day be past, although the *heir* be named, the executor shall have it. *1 Inf. 210. 2 Year. 348.*

As to suing and being sued.

It is clear, that the *heir* may bring any real action *quasi*, in right of his ancestor, but cannot regularly bring any personal action, because he has nothing to do with the assets, or personal contracts of his ancestor. *Co. Litt. 164.* If an erroneous judgment be given against the ancestor, by which he loses the lands, the *heir* may bring a writ of error. *1 Rel. Abr. 747. Dyer 90. Godb. 337.* And if one hath lands on the part of his mother, and loses by erroneous judgment, and dies, the *heir* of the part of the mother shall have the writ of error. *1 Leach. 261. 2 Str. 56.* So the younger son, when entitled to the land by the custom of Borough English, shall bring the writ of error, and not the *heir* at Common law, for this remedy descends with the land. *Covent. 68. 1 Leach. 261. 4 Leach. 5. adjudged; and see Bridg. 71.* So if there be an erroneous judgment against tenant in tail female, the issue female, and not the son, shall bring a writ of error. *Dyer 90. 1 Leach. 261. 1 Rel. Abr. 747.*

So if a man settles land to the use of himself and the *heirs* of his body, the remainder to his own right *heirs*, and dies, leaving issue only a daughter, who leaves a son, and dies without issue, and J. S. brings a writ of error as cousin and collateral *heir* to the daughter, yet he shall never reverse the fine, for there could no right descend to him from the daughter, because she had but an estate tail, which determined by her death without issue; and it does not appear that the remainder in fee was in the daughter as right *heir*; wherefore J. S. shall not reverse the fine, *quia in hoc apparetur quod non existit remanens in fee*, especially in a court of judicature, where the judges can take notice of nothing that does not come judicially before them, and appear in the pleading. *Dyer 13. Cro. Eliz. 200. 1 Leach. 16.*

If J. S. dies seised of land, and his *heir*, in a bond, and thereupon judgment is obtained against J. S. and J. S. makes his will, and his *heir* at law succeeds, and dies, leaving lands which descended to his *heir*; yet he shall not have a writ of error as *heir*, for he is not party to the judgment; and when an execution is made upon him, it is as tenant, but when the lands are taken in execution, he may have a writ of error. *Dyer 24. 10. 10. Rel.*

The *heir* at law may, in right of his ancestor, maintain an action of debt for rent reserved on a lease, made by his ancestor, for the rent is part of the lands, and incident to the reversion; but for arrears of rent incurred in the

life-time of the ancestor, neither the *heir*, nor the executor, could by the Common law maintain an action: for as to the *heir*, they were considered as part of the personal estate, and as to the executor, he could not represent his testator as to any contracts relating to the freehold and inheritance. *11 H. 6. 15. 19 H. 6. 41. Co. Litt. 262. a.* But now by the 32 H. 8. cap. 37. An executor may maintain an action of debt for such arrears; for which see *ut Dicit.*

If a nobleman, knight, squire, &c. be buried in a church, and have his coat of arms, and pennons with his arms, and such other ensigns of honour as belongs to his degree, set up in the church, or if a grave-stone, or tomb be laid or made, &c. for a monument of him; in that case, about the freehold of the church be in the parson, and that church be annexed to the freehold, yet cannot the parson, or any, take them, or deface them, but he is subject to the *heir*, and his *heirs*, in the honour and memory of whose ancestor they were set up. *Co. Litt. 18. b.* For this see *1 Rel. Abr. 62. Nels. 104. Godb. 200. Cro. Jac. 167. 2 Bull. 151.*

Where the ancestor binds himself, and his *heirs*, in an obligation, the obligee may sue the *heir*, or executor, or the administrator of the executor, at his election, and may have execution of the land descended to the *heir*; for the Common law having allowed illustration of debt against the *heir*, he could have no benefit by the action, unless he were permitted to have execution of the lands which descended to the *heir*. *Plow. 241. 3 Co. 12. a. Cro. Jac. 210. 1 And. 7.*

But the body of the *heir* is protected, for it would be most unreasonable to subject the *heir* to the payment of his ancestor's debts, any farther than to the value of the assets descended. *Dyer 21. 11. Co. 207. 11. 15. Minor 11. 207. Co. Litt. 103. 290.*

Also the *heir* must be expressly named, otherwise he is not chargeable, and the reason why the *heir* is not chargeable in this case, as the executor in case of a bond entered into by the testator, without being named, is this; by the Common law only the goods and chattels of the debtor, and the annual profits of the land as they arose, and not the land itself, were liable to execution for debt or damages, because these being the security the creditor depended upon, they were liable in the hands of his representative or executor, as well as in the hands of the debtor himself; hence it was, that the executor was bound by the debt of the testator, so far as he had chattels or assets, tho' he was not named in the contract; but the land was not liable to execution, because it was preserved from the personal contracts and engagements of the tenant, that he might be the better able to answer the feudal duties to the lord, which were the life and support of government; therefore the land not being originally liable to the demand in the hands of the obligor, must be much less liable in the hands of the *heir*, who was not comprehended in the contract. *2 Bull. 19. Plowd. 440. Hob. 60.*

But if J. S. had granted, for him and his *heirs*, to B. and his *heirs*, such a rent out of his lands; in this case, the *heir*, being comprehended in the contract, are bound to make good the grant, so far as they have assets by descent from the grantor; and this was allowed at Common law, because the grantee of the rent had the land originally in view for his security; and by the grant itself having it in his power to distrain the land for the rent, it was equal to the *heir*, whether the land answer the rent by distress, or by an execution upon a judgment in a writ of annuity. *1 Rel. Abr. 228. Popple 87. Hob. 58. Dyer 344. b. Co. Litt. 114. a.*

If the ancestor bind himself in a statute, recognizance, &c. the *heir* is liable, not only as tenant, but also as *heir*, otherwise he could not have his age; and cannot charge a purchaser, whether for valuable consideration, or without, to contribute, but one *heir* may oblige another to contribute, as if a man seized of two acres, the one tenant, according to the course of the Common law, the other in Borough English, acknowledge a statute, &c. the *heir* at law shall oblige the Borough English as contributor; so one coparcener shall oblige the other to contribute; or if the conxor had lands, some descendible

descendible to the *heirs* of the father, and some descendible on the *heirs* of the mother, the *heir* on the part of the father shall compel the *heir* on the part of the mother to contribute; *Et sic vice versa.* 3 Co. 12. Sir William Herbert's case.

By the Common law, if the *heir* before an action brought against him had aliened the assets, the obligor was without any remedy; but if he only aliened, hanging the writ, the lands, which he had by descent at the time of the original purchased, had been liable. *Co. Lit.* 102.

In consequence of this doctrine, that the lien shall have relation to the time of the original purchased, it hath been adjudged, that if there had been two creditors to J. S. whose *heir* is bound, *viz.* A. and B. and A. files an original in C. B. and hath judgment thereon, *Trin. Term.* 2 Jac. 2. by default, and thereupon a general *elegit* issues against all the lands of the *heir*, and a moiety thereof is delivered to A. B. on a bill filed in B. R. 1 & 2 Jac. 2. has a special judgment against the assets confess'd by the *heir*, *Trin. Term.* 3 Jac. 2. tho' B.'s judgment be subsequent to A.'s, yet it appearing that his bill or original was filed before A.'s, the judgment shall have relation thereto, therefore he must be first satisfied. *Carth.* 245.

So it seems in the above case, that tho' A.'s judgment had been on an original actually filed before B.'s, that B. must have been preferred, because his judgment was general against the *heir*, and the execution a general and common execution by *elegit*, and not against the assets only by way of extent; therefore such a general judgment will not operate by way of relation to the original, but binds only, as in common cases, from the time of the judgment given. *Carth.* 246. *Per Cur'.*

But now, in relief of creditors against the alienation of lands descended, &c. by the 3 & 4 W. & M. cap. 14. it is enacted, "That in all cases, where any *heir* at law shall be liable to pay the debt of his ancestor, in regard of any lands, tenements or hereditaments descending to him, and shall sell, alien, or make over the same, before any action brought or process sued out against him, that such *heir* at law shall be answerable for such debt or debts, in an action or actions of debt to the value of the said land so by him sold, aliened, or made over; in which cases all creditors shall be preferred, as in actions against executors and administrators, and such execution shall be taken out upon any judgment or judgments so obtained against such *heir* to the value of the said land; as if the same were his own proper debt or debts; saving that the lands, tenements and hereditaments *bona fide* aliened before the action brought, shall not be liable to such execution."

But it is by the act provided, That where any action of debt upon any specialty is brought against any *heir*, he may plead *riens per descent* at the time of the original writ brought, or the bill filed against him. And the plaintiff in such action may reply, that he had lands, tenements or hereditaments from his ancestor before the original writ brought, or the bill filed: and if, upon issue joined thereupon, it be found for the plaintiff, the jury shall inquire of the value of the lands, tenements or hereditaments, so descended, and thereupon judgment shall be given, and execution shall be awarded as aforesaid: but if judgment be given against such *heir*, by confession of the action without confessing the assets descended, or upon demurrer, or *nihil dicit*, it shall be for the debt and damages, without any writ to inquire of the lands, tenements or hereditaments so descended.

It is not improper to observe, that, before this act, if the ancestor had devised away the lands, a creditor by specialty had no remedy either against the *heir*, or devisee. *Abr. Eg.* 149.

But now, to provide against that mischief, it is, by the same statute enacted; "That all wills and testaments, limitations, dispositions, or appointments, of or concerning any manors, messuages, lands, tenements or hereditaments, or of any rent, profit, term, or charge out of the same, whereof any person or persons at the time of his, her, or their decease shall be seized in fee-simple, possession, reversion or remainder, or have

power to dispose of the same by his, her, or their last wills or testaments, shall be deemed and taken (only as against such creditor or creditors as aforesaid, his, her, and their *heirs*, successors, executors, administrators and assigns, and every of them,) to be fraudulent, and clearly, absolutely, and utterly void, frustrate, and of none effect; (any pretence, colour, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding.)"

And that such creditors may be enabled to recover their debts, it is further enacted, "That in the cases before mentioned, every such creditor, shall and may have and maintain his, her, and their action and actions of debt upon his, her, and their said bonds and specialties, against the *heir* and *heirs* at law of such obligor or obligors, and such devisee or devisees jointly, by virtue of this act; and such devisee or devisees shall be liable and chargeable for a false plea by him or them pleaded, in the same manner as any *heir* should have been for false plea by him pleaded, or for not confessing the lands or tenements to him descended."

It is however, by this act further provided, That where there hath been, or shall be, any limitation or appointment, devise or disposition of, or concerning, any manors, messuages, lands, tenements, or hereditaments for the raising or payment of any real or just debt or debts, or any portion or portions, sum or sums of money, for any child or children of any person, other than the *heir* at law, according to, or in pursuance of any marriage contract, or agreement in writing *bona fide* made, before such marriage, the same, and every of them, shall be in full force, and the same manors, messuages, lands, tenements and hereditaments, shall and may be holden and enjoyed by every such person or persons, his, her, and their *heirs*, executors, administrators and assigns, for whom the said limitation, appointment, devise, or disposition was made, and by his, her, and their trustee or trustees, his, her, and their *heirs*, executors, administrators and assigns, for such estate or interest, as shall be so limited, or appointed, devised or disposed, until such debt or debts, portion or portions shall be raised, paid and satisfied."

And it is further enacted, "That all and every devisee and devisees, made liable by that act, shall be liable and chargeable in the same manner as the *heir* at law, by force of the act, notwithstanding the lands, tenements and hereditaments to him or them devised, shall be aliened before the action brought."

In the construction of this statute it hath been holden, that tho' a man is prevented thereby from defeating his creditors by will, that yet any settlement or disposition he shall make in his life time of his lands, whether voluntary or not, will be good against bond creditors; for that was not provided against by the statute, which only took care to secure such creditors from any imposition, which might be supposed in a man's last sickness; but if he gave away his estate in his life-time, this prevented the descent of so much to the *heir*, consequently took away their remedy against him, who was only liable in respect of the lands descended; and as a bond is no lien whatsoever on lands in the hands of the obligor, much less can it be so, when they are given away to a stranger. *Abr. Eg.* 149.

As to the manner of pleading and replying under this statute, vide the case of *Kelshew and Hightor*, *Carth.* 35. and 5 *Mod.* 122. S. C.

It seems that neither before, nor since, this statute, the executor or administrator of the *deft.* are liable, for the person of the *deft.* is not chargeable, but with respect to the land; and if before the statute, the *heir* had aliened before action brought, he should not be charged for the profits he received; which is evident from the plea of *riens per descent* the day of the writ purchased: much less could his executor, nor can he yet, unless some statute make him so: for an executor is but in nature of a trustee for the personally, and not at all privy to the inheritance. *Trin.* 31 Car. 2. In C. B. adjudged. 3 *Nemo Abr.* 28.

If there be judgment in debt against two, and one dies, a *fi. fac.* lies against the other alone, reciting the death, and he cannot plead that the *deft.* of him who

is dead has assets by descent, and demand judgment if he ought to be charged alone: for at Common law, the charge upon a judgment being personal survived, and the statute of *W. 2.* that gives the *elegit*, does not take away the remedy of the plaintiff at Common law, therefore the party may take out his execution which way he pleases; for the words of the statute are *fit in electionibus*: but if he should, after the allowance of the writ, and revival of the judgment, take out an *elegit* to charge the land, the party may have remedy by suggestion, or else by *audita querela*. 1 Lev. 30. Raym. 26. 1 Keb. 92. 8. C.

As to a *sequestration*, and to shew that a decree shall have the same authority to bind the personal assets, as a judgment at law, and therefore shall go *pari passu* to be paid off and discharged, *Vide* 1 Vern. 143. 3 Lev. 355. 2 Kerr. 37. 89-9.

With respect to *assets*, &c.

Where the ancestor binds himself and his heirs, all his lands of freehold, and which descend in *fee-simple*, are assets by descent, and shall be liable, as far as they extend, to answer the ancestor's obligations. See *Bra. tit. Assets, Fit. tit. Assets*. 1 Rol. Abr. 269. tit. *Assets*. A reversion after a lease for years made by the ancestor is present assets, so that the heir cannot plead *rems. per dissent* in delay of execution of the rent and reversion, tho' the plaintiff cannot have benefit of the reversion till the lease be determined. 1 Salk 354-5. *Forsk. 44. 2 Mod. 50-51. Horn's Plead. 320.*

So a reversion expectant upon the determination of an estate for life is *quasi assets*, and ought to be pleaded specially by the heir, and the plaintiff in such case may take judgment of it *cum acciderit*. Carth. 129. per Holt. But a reversion in *fee* expectant upon an estate-tail is not assets, because it lies in the will of the tenant in tail to dock and bar it at his pleasure. 6 Co. 58. 1 Rol. Abr. 269.

If A. hath issue B.; and C. and conveys lands to the use of himself for life, the remainder to B. in tail male, the remainder to his own right heirs, and A. dies, and the reversion descend to B. his son, and B. dies seised, and the reversion descends to his son, who dies without issue, so that the tail is spent, and C. enters, these lands shall be assets to answer the debt of his father. Carth. 127. 3 Lev. 286. 3 Mod. 253. S. C.

The lands, (as hath been observed,) must descend to the heir; and therefore it was formerly held, that if he took by *purchase*, as if the testator devised them to him, paying so much, or if he devised lands to one of the two, and his heirs at law jointly, that those lands were not assets; but if he devised one part to A. another to B. and another to his heir at law, this third part was assets. Cro. Elin. 431. 2 Mod. 286.

By the statute of frauds and perjuries (29 Car. 2. c. 3.) it is enacted, That if lands come to the heir by reason of a special occupancy, they shall be chargeable in his hands as assets by descent, as in cases of lands in *fee-simple*, and in case there be no special occupancy thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands. Also by the said statute, par. 10. & 11, where lands are settled in trust, and descend in *fee* to the heir of *testator que trust*, the same shall be assets in the same manner as lands in possession, but he shall not, by reason of any plea or other matter, be chargeable to pay the condemnation out of his own estate. *Vide* 2 Vern. 143.

An equity of redemption of an inheritance is assets, for the heir having a right in equity, that ought in equity to be liable to satisfy a bond debt. 1 Comm. 64. 148. Tenant in tail suffers a recovery to let in a mortgage of 500 years, then surrenders the land to the old uses, and makes his will, and devises all his lands for the payment of his debts; the redemption was limited to him, his heirs and assigns; and the court thought that the equity of redemption of this mortgage, should be assets to satisfy creditors, as a subsequent grantee of an annuity. *Preced. Chan. 39. 40. 41. and 42.* A right without any estate in possession, reversion or remainder is not assets

till it be recovered and reduced into possession. 6 Co. 58. For more learning on this subject, see 14 Vin. Abr. and 2 New Abr. tit. *Heir*.

General observations.

Heir includes assigns in grants, &c. If a woman keeps land from the heir, on pretence of being big with child by the heir's ancestor, her deceased husband, tho' writ *ventre inspiciendo* is to be granted to search her, &c. that the heir be not defrauded. F. N. B. 227. The next heir male is to bring appeal for the death of his ancestor, &c. And heirs may have divers writs, as writ of *Mortd'ancestor*, *Entre ad communam legem*, *In casu preiudice*, and *consequi casu*, quod permittat, &c. The heir may bring an ejectment of copyhold lands before admittance. *Will. Rep. par. 2. fo. 14.*

Whoever claims as heir by descent, must make himself heir to the person last actually seised, and in possession of the inheritance. 1b. 45.

There cannot be a *possessio fructus* of a reversion or remainder. 1b. 47.

Whoever takes as heir male by purchase, must be both heir and male. 1b. par. 1. fo. 20.

Heir apparent, See *Heir*.

Heiress, Is a female heir to a man, having an estate of inheritance in lands; and where there are several joint heirs, they are called Co-heirs or Co-heiresses. Stealing an heiress, and marrying her against her will, where felony. See *Forcible Marriage*. And *Black. Com. 4 V. 208.*

Heir-loom, (From the Sax. *Heir*, i. e. *Heris*, & *Loome*, Membrum) Comprehends divers implements of household, such as the first best bed and other things, which by the custom of some countries have belonged to a house certain descents, and are never inventoried after the decease of the owner as chattels, nor do they go to the executor, but accrue to the heir with the house itself by custom, and not by the Common law: these are not devisable by testament; for the law prefers the custom before a devise, which takes not effect till after the death of the testator, and then they are vested in the heir by the custom. Co. Litt. 18, 185. But sale in a man's life-time might make it otherwise. The ancient jewels of the crown are heir-looms, and shall descend to the next successor; and are not devisable by will. *Ibid.* 185. And heir-loom is general are said to extend to all large household implements; of which *Spelman* says thus: *Omnia utensilia robustius quod ab antibus non facile revellitur, ideoque ex more quorundam locorum ad heredem transit, tanquam membrum hereditatis.* And Sir Edw. Coke says, *Conjecturae hundredi de Stratford in com. Oxon est, quod Heredes testamentorum post mortem antecessorum suorum habebunt, &c. principalium, Anglice an Heir-loom, viz. de quodam genere catallorum, utagrum, &c. Optimum plaustrum, optimam carucam, optimum cithum, &c.* Co. Litt. 18.

It is said, that the word by time hath a more general signification than at first it did bear, comprehending all implements of household, as tables, presses, cupboards, bedsteads, wainscot, and such like: which, by the custom of some countries, having belonged to a house during certain descents, as before mentioned.

Trover by plaintiff administrator cum testaments annexo of the late Lord *Petre* against the wife of the first executor for a necklace of pearl, said to have been in the family for many generations, and worn as a personal ornament by the Lady *Petre* for the time being, or for default of such, by the Lady *Dowager* *pro tempore*; and to prove the property, an ancient inventory made by the defendant's husband, being executor of the Lord *Petre*, now intestate, being found among the ancient evidences of the family, was allowed; for the mentioning this necklace in it, shews he did not claim it in his own right, and none but a husband will inventory more assets than he has; and though if the question were whether my Lord *Petre* were proprietary or not, he himself could not be witness for the executor, by inventorying it, charged himself with it as assets, and there it shall be taken as such; and per *Holt Ch. J.* the wearing of a pearl is a conveyance, and goods in grols cannot be an heir-loom, but they must be things fixed to the freehold, as old

Soub fide *the Trent*. The third is *Norroy*, quasi *North Roy*, w^{ch} office and business is the same on the North side of *Trent*, as *Clarentius* on the south, which is intimated by his name, signifying the *Northen King*, or *King at Arms* of the North parts. These three officers are distinguished as follows, viz. *Garter Rex Armorum Anglicorum indefinitus*, *Clarentius Rex Armorum partium Australium*, *Norroy Rex Armorum partium Borealiū*.

Besides the *Kings at Arms*, there are six inferior *heralds*, according to their original, as they were created to attend *Dukes* and great *Lords*, in martial expeditions, i. e. *York*, *Lancaster*, *Chesler*, *Windsor*, *Richmond* and *Somerfet*; the four former instituted by *King Edward 3.* and the two latter by *Edward 4.* and *Henry 8.* To these, upon the coming of *King George* to the crown, on account of his *Hanoverian* dominions, a new *Herald* was made, called *Hanover Herald*; and another titled *Gloucester King at Arms*. *Anno 11 Geo. 1.* And lastly, to the superior and inferior *Heralds*, are added four others, called *Marshals* or *Pursuivants at Arms*, who commonly succeed in the places of such *Heralds* as die, or are preferred; and they are *blue mantle*, *rouge cross*, *rouge dragon*, and *portcullis*; all equip'd with proper ensigus, badges and distinctions.

The ancient *Heralds* have been made a corporation or college under the *Earl Marshal of England*, with certain privileges by the *Kings* of this realm: *Concessimus*, &c. *Heraldi Armorum, omnes alii Herald, personarum sine Pursuivandi armorum, qui pro tempore fuerint, imperpetuum, sint unum corpus corporatum, in re, factu, & nomine, habeantque successionem perpetuam, nec non quoddam sigillum commune, &c. Dat. &c. Spelm. Gloss. Herald's Court of Honour. See Honor-Courts. Vide Black. Com. 3 P. 104, 105.*

For the ceremony of making the *King of Arms*, see *Dehibit's case*. *Lev's Reports* 248.

Herbage, (*herbagium*) Is the green pasture and fruit of the earth, provided by nature for the bite or food of cattle: it is also used for a liberty that a person hath to feed his cattle in the ground of another person; or in the forest, &c. *Crompt. Jurisd.* 197.

He that hath herbage of a forest by patent may have trespass for the grass, but not for trees or the fruit of them; and he may take beasts damage-ferant, and have *quare clausum fregit*, and by such grant may inclose the forest. *D. 285. b. pl. 40.* Grantee of herbage may inclose, and may have action of trespass *quare clausum fregit*. *Arg. Trin. 21 Jac. B. R. 2 Roll. R. 356 cites D. 285.* But tho' he that hath herbage may inclose, yet he that hath reasonable herbage cannot. *Ibid.*

Grantee of herbage of a park cannot dispark it. *Arg. Godb. 419.* A lease was made of a manor with all gardens, orchards, yards, &c. and with all the profits of a wood, excepting to lessor 40 acres, to take at his pleasure; per *Dyer*. The wood is not comprized within the lease, but the lessee shall only have the profits, as *pagnage*, herbage, &c. *21 Elin. in C. B. 4 Lr. 8.*

Herbagium antientius. The first crop of grass or hay, in opposition to after-math and second cutting.—*Dicunt quod est communis via, & sua communis pastura, quam sanum & antientius herbagium antientius*. *Antiq. Parochial*, pag. 459.

Herbery, or **Herbury**. An inn. *Cocwell*.

Herberge, or **Herbinger**, (from the French *herberger*, that is, *hospitium accipere*.) Signifieth an officer in the *King's* house, who goes before and allots the noblemen, and those of the household their lodgings. *Kitchin*, fol. 176. used it for an innkeeper.

Herbergastium. Lodgings to receive guests in the way of hospitality. *Cocwell*.

Herbergium. Spent in an inn. *Cocwell*.

Herbigant. To harbour, to entertain, from *herbergen*, *herbergen*, *Saxon* *hera* *herg*, a house of entertainment.—*Ballivi p^{re}sentem civitat^{is} iusticiarium domum ad herbiganum ut ad hospitium populo—in anno Jubilæi apud Cantuariam 1400. Summa's Antiq. p. 248.* Hence our *herbinger* or *herbinger*, who provides harbour or house-room, &c.

Herce, A harrow, Lat. *herce*. *Plat. lib. 2. cap. 77.* *Caracas & hercia expiare*, and in *Domesday*, per *Gale*

fol. 760. *Habet Rex, &c. unum jugum de ora & unum jugum de herce.*

Herca, The same with *herce*; it signifies also a candlestick set up in churches, made in the form of an harrow, in which many candles were placed. *Die sepulture & die mensis, & pro corpore s^{an}cto, i. e. Conceptionis, ann hercia, i. e. Candelabre in hercia modum confecta*, which was filled with candles, and placed ad caput cenotaphii.

Herclage, (from the French *hercer*, to harrow) *Achant & herciabant ad cariam Domini, i. e. they did plough and harrow at the manor of the Lord.* 4 *Inst.* fol. 270.

Herdelich, or **Herdelwic**, (*Herdelwyche*.) A grange or place for cattle and husbandry. *Et unum herdelwytham apud Helbecum in Pace, &c. Mon. Angl.* 3 part.

Herdelich, **Herdelich**, **Herdsman's work**, or customary labours done by the shepherds, herdsman, and other inferior tenants at the will of their lord. *Cocwell*, edit. 1727. *Regist. Eccles. Christi Cant.* MS.

Herdbannum, (*Sax. Heru, exercitus, & Ban edictum, mulda*) A mulct, for not going armed into the field, when called forth. *Spelm.* Under the feudal policy, every free man, was under an obligation to serve the state. If upon being summoned into the field, any free-man refused to obey, a full *herdbannum*, i. e. A fine of sixty crowns, was to be exacted from him, according to the law of the Franks. This fine was levied with such rigor, that if any person was insolvent, he was reduced to servitude, and continued in that state until such time as his labour should amount to the value of the *herdbannum*. The Emperor *Lotharius* rendered the penalty more severe, by confiscating the goods of the person refusing, and banishing him. *Robertson's Hist. Emp. Char. V.* 1 P. 216, 217.

Herdbott, (From the *Sax. Heru*, and *Bode* a messenger) The *King's* edict commanding his subjects into the field from the *Saxon heru, exercitus*, and *bode*, a messenger. *Cocwell*.

Hereditaments, (*Hereditamenta*) Signify all such immovable things, whether corporeal or incorporeal, which a man may have to him and his heirs by way of inheritance; and which, if they are not otherwise devised, descend to him that is next heir, and fall not to the executor as chattels do. 32 *Hien. 8. cap. 2.* It is a word of very great extent, comprehending whatever may be inherited or come to the heir; be it real, personal or mixed, and tho' it is not holden, or lieth not in tenure. *Co. Lit. 6. 16.* And by the grant of *hereditaments* in conveyances, manors, houses, and lands of all sorts, rent, services, advowsons, &c. pass. *Ibid.* *Hereditamentum est omne quod jure hereditario ad heredem transit.* *Coke.*

Hereditamenta corporea (according to judge *Doderidge*.) are revenues local, and of annual value. *Hist. of Wales*, fol. 90.

A condition is without question an hereditament. 3 *Rep. 2. b. Trin. 25 Elin.* in the *Marquis of Winchester's* case. Writ of error is an hereditament, but by the Common law cannot be forfeited or escheat. 3 *Rep. 2. b. C.*

Uses were hereditaments; for this shall be *passisse jureis*; but condition or use were not forfeitable at Common law. 3 *Rep. 2. b.* in the *Marquis of Winchester's* case. See farther 2 *Black. Com.* 17.

Hereditary right. According to *Blackstone*, the grand fundamental maxim upon which the *jur coronæ*, or right of succession to the throne of these kingdoms, depends; he takes to be this, "That the crown is, by Common law, and constitutional custom, hereditary; and this in a manner peculiar to itself; but that the right of inheritance may from time to time be changed or limited by act of parliament; under which limitations the crown still continues hereditary." See the *Commentaries*. 1 P. 191, &c.

Hereditary revenue. The *King* how seized of the hereditary revenue and post-office. 12 *Car. 2. c. 24.* 1 *Ja. 2. c. 12.* How restrained from aliening the revenue of the post-office, 9 *Ann. c. 10. fol. 43.*

Hereditus, (*German*) *Profectus militaris & expeditio*. See *Hereditus*. A military expedition, a going to warfare.

Hereditus,

Hereford. For inclosing of commons in Herefordshire, *Jac. 1. c. 11.*

Heregeld. (Saxon) *Pecunia seu tributum aliunde exactum collatum.* A tribute or tax levied for the maintenance of an army. See *Subsidy*.

Herellus. A sort of little fish, perhaps minnows, or rather gudgeons. *Cowell, edit. 1727.*

Heremistarium. A solitary place of retirement for hermits—*Radulphus heremita locum heremitorum de M. edificavit.* Mon. Angl. Tom. 3. p. 18.

Herenuach. An archdeacon. *Cowell, edit. 1727.*

Herenotes. or **Hereteams.** One who follows an army of rebels. *Lamb. Leges lxx, cap. 15. In exercitu praedatorum, &c. from here, exercitus, and team, jaquela.*

Herellus, or **Herella,** or **Herellus.** Denotes a hired soldier, that departs without licence, derived from the Saxon *here, exercitus,* and *stien,* to depart, according to *C. 4 Inst. fol. 128.*

Heresy. (*Haeresis.*) Among Protestants, is said to be a false opinion repugnant to some point of doctrine clearly revealed in scripture, and either absolutely essential to the Christian faith, or at least of most high importance. *1 Hawk. P. C. 3.*

Anciently, under the general name of heresy there have been comprehended three sorts of crimes; 1. Apostasy, when a Christian apostatizes to Paganism. 2. Witchcraft. 3. Formal heresy, which seems to be an apostasy from the established religion; for which, and the several ways of determining, punishing, and the difference between the Civil and Imperial laws, Popish canons, and the laws of England concerning heresy, see a large account in *1 Hal. Hist. P. C. 383 to 410.*

It seems difficult precisely to determine what error shall amount to heresy, and what not; but the statute *1 Eliz. cap. 1.* which erected the high commission court, having restrained it to such as are either determined by scripture, or by one of the 4 first general councils, or by some other council, by express words of scripture, or by parliament, with the assent of the convocation; these rules are at present generally thought the best directions concerning this matter. *1 Hawk. P. C. 3. 4.*

By the Common law with us, the convocation of the clergy or provincial synod, might and frequently did proceed to the sentencing of hereticks, and when convicted, left them to the secular power, whereupon the writ of *haeretico comburendo* might issue. *Bro. tit. Heresy. 2 Roll. Abr. 226.*

It is also agreed, that every bishop may convict persons of heresy within his own diocese, and proceed by church censures against those who shall be convicted; but it is said, that no spiritual judge, who is not a bishop, hath this power; and it has been questioned, whether a conviction before the ordinary were a sufficient foundation whereon to ground the writ of *haeretico comburendo*, as it is agreed that a conviction before the convocation was. *F. N. B. 269. 12 Co. 56, 57. 3 Inst. 40. Glaf. Ceder 401. 1 Hawk. P. C. 4. State Trials, Vol. 2. 275.*

Lord Ch. Jus. Hale seems to be of opinion, that if the diocesan convict a man of heresy, and either upon his refusal to abjure, or upon a relapse, decree him to be delivered over to the secular power; and this being signified under the seal of the ordinary into Chancery, the King might thereupon by special warrant command a writ of *haeretico comburendo* to issue, tho' this were a matter that lay in his discretion to grant, suspend, or refuse, as the case might be circumstantiated. *1 Hal. Hist. P. C. 392.*

But it seems agreed, that regularly the temporal courts have no consueance of heresy, either to determine what it is, or to punish the heretick as such, but only as a disturber of the publick peace; that therefore, if a man be proceeded against as an heretick in the spiritual court, *pro salute anime*, and think himself aggrieved, the proper remedy is to bring his appeal to a higher ecclesiastical court, and not to move for a prohibition, from a temporal one. *27 H. 2. 14. 5. 5 Co. 58. Hob. 216.*

Yet a temporal judge may incidentally take knowledge whether a tenet be heretical or not; as where one was committed by Juries of a *H. 4. cap. 5.* for saying, that

he was not bound by the law of God to pay tithes to the curate; another for saying, that tho' he was excommunicated before men, yet he was not so before God; the temporal courts on an *habeas corpus* in the 6th case, and an action of false imprisonment in the other, adjudged neither of the points to be heresy within that statute, for the King's courts will examine all things which are ordained by statute. *3 Inst. 42. 1 Roll. Rep. 110. 2 Bull. 300.*

Also in *quare impedit*, if the bishop plead that he refused the clerk for heresy, it seems that he must set forth the particular point, that it may appear to be heretical to the court wherein the action is brought. *5 Co. 58. 1 And. 191. 3 Leon. 199. 3 Lev. 314.*

By the Common law, one convicted of heresy, and refusing to abjure it, or falling into it again after he abjured it, might be burnt by force of the writ of *haeretico comburendo*, which issued out of Chancery upon a certificate of such conviction; but he forfeited neither lands nor goods, because the proceedings against him were only *pro salute anime.* *F. N. B. 269. 3 Inst. 43. Doctor and Student, lib. 2. cap. 29. 1 Hawk. P. C. 4. 5.*

But at this day the said writ of *haeretico comburendo* is abolished by *29 Car. 2. cap. 9.* and all old statutes, that gave a power to arrest or imprison persons for heresy, or introduced any forfeiture on that account, are repealed; yet by the Common law, an obstinate heretick being excommunicate is still liable to be imprisoned by force of the writ of *excommunicato capiende*, till he make satisfaction to the church. *12 Co. 44. 1 Hawk. P. C. 5.*

By the *9 & 10 W. 3. cap. 32.* If any person having been educated in, or made profession of the Christian religion within this realm, shall be convicted of denying any of the persons in the Holy Trinity, &c. or of denying the truth of the Christian religion, &c. he shall for the first offence be adjudged incapable of any office; for the second disabled to sue any action, or to be a guardian, executor or administrator, or to take by any legacy or deed of gift, or to bear any office civil or military, or benefice ecclesiastical, for ever, and shall also suffer imprisonment for three years, without bail or mainprize. *Vide ex libet subject, 14 Vin. Abr. and 3 New Abr. tit. Heresy. See tit. Haeretico comburendo, and Black. Com. 4 P. 44.*

Heretick Jurisdiction. in Scotland. The feudal grievances of these jurisdictions is removed by *Stat. 20 Geo. 2. c. 43. Vide Dalrymple of Fife, 292.* and see the *Stat. 20 Geo. 2. c. 56. and Black. Com. 2 P. 77.*

Heretick. (*Haereticus.*) is one that adheres to, and is convicted of heresy, or that maintains any opinions or principles contrary to the Christian religion; And a person is not an heretick by doing a thing condemned or forbidden by the gospel; but by an obstinate adherence to an opinion, opposite to some article of the Christian faith. See *Haeretico comburendo.*

Haeretico comburendo. See *Haeretico comburendo.*

Hereticks. (from the Sax. *here, exercitus,* and *egen, ducere*) The general of an army; a leader or commander of military forces. *L.L. Ed. Cons. c. 35. Ducany* says, the *hereticks* were the barons of the realm. *Interfecti episcopi, comites, vicomites, hereticks.* *Leg. H. 1. De Fresne. See Black. Com. 1 P. 309. 2 P. 406.*

Hereticks. A leader or commander of military forces. See at large the name and office in the laws of Edward the Confessor. *cap. 34. De Hereticks.*

Heretum. A court or yard for drawing up the guards or military retinue, which usually attended our prelates and nobility. *Thomas Langley Episcopus Dunelmensis apud monasterium de Hadden restituit hunc portum accidentalem hunc castellum per quod transierat ad heretum vel portum.* *Hist. Dunelm. apud Wharton Angl. Sat. pars 1. pag. 126.*

Heretum. Falling by the hair; from the Sax. *her, rapille,* and *egen, ducere.* *Et post aliquem per capillos capere, tunc ducere, hunc ad nos tales facies, id est, capere ducere ad heretum.* *Leg. H. 1. cap. 94.*

Heretum. A sort of garment is called, *Cowell.*

Heretum. (*Haereticus.*) is in the Sax. language, *hollum, apud, derivat from here, &c. exercitus,* an army, and *egen,*

gaus, fusi, & effusi, quasi fuerit quid in curritum erigatum; and signified originally a tribute given to the lord of a manor for his better preparation for war. By the laws of *Canutus*, at the death of the great men of this realm, so many horses and arms, were to be paid as they were in their respective life-times, obliged to keep for the King's service. *Spelm.* Sir *Edw. Coke* makes *heriot*, or *herogas*, (from *heras* lord) the lord's beast: And it is now taken with us for the best beast, whether it be horse, ox, or cow, that the tenant dies possessed of, due and payable to the lord of the manor; and in some manors, the best goods, piece of plate, &c. *Kitch.* 133. According to *Blackstone*, *heriots* are agreed to be a Danish custom. *Com. 2. V. 97. and for ib. 422. See Post.*

We must observe, that there is

Heriot Service,
and
Heriot Custom.

Heriot-service is payable on the death of tenant in fee simple; and *heriot-custom* upon the death of tenant for life: when a tenant holds by service to pay a *heriot* at the time of his death, which service is expressed, and especially reserved in the deed of feoffment, this is *heriot-service*; and where *heriots* have been customarily paid time out of mind, after the death of tenant for life, this is *heriot-custom*. *Co. Litt. 185.*

Heriots for custom are commonly paid for copyhold estates; and if an heriot is reserved upon a lease, it is heriot-service, and incident to the reversion. *Lanes. 1366. 1367.* For a heriot goes with the reversion, as well as rent; and the grantee of the reversion shall have it. *a Saund. 166.*

Although an heriot reserved upon a lease is called an heriot service; yet it is not like the case where a man holds land by the service of paying an heriot, &c. because where a heriot is reserved on lease, the proper remedy is either a distress, or action of covenant grounded on the contract; for the lessor cannot seize, as the lord of a manor may do, the best of his tenant who holds of him by heriot-service. *Kitch. 82, 84. See Post.*

There may be a covenant in leases for lives, &c. to render the best beast, or so much money for an heriot, at the election of the lessor; in which case the lessor must give notice which he will accept, before action may be brought for it, or a distress taken, &c. *2 Lill. Abr. 19.* For heriot-service, the lord may distress any beast belonging to the tenant on the land: After it has been held, that the lord may distress any man's beasts which are upon the land; and retain them until an heriot is satisfied. *1 Inst. 185. Lev. Rep. 38.* And if the tenant devest away all his goods, &c. yet the lord shall have his heriot on the death of the tenant. *Stat. 13 Elix. cap. 5.* For heriot-custom, the lord is to seize, not distress; and he may seize the best beast, &c. though out of the manor, or in the King's highway, because he claims it as his proper goods, by the death of the tenant, which he may find in any place where he finds it. *Kitch. 267. 2 Inst. 132. 2 Nels. Abr. 931. See Black. Com. 37. 15.*

The lord may properly seize for heriot custom, and take a distress for heriot-service: And for heriot custom, he may seize any where; but for heriot-service, on the land only: though it has been adjudged, that a heriot custom or service, may be seized any where; but one cannot distress for them out of the manor. *Plowd. 66. Kitch. 84. 1 Salk. 396.* Where a woman marries and dies, the lord shall have no heriot custom, because a feme covert can have no goods to pay as a heriot. *2 Lam. 239.* And when a heriot is to be paid by a woman life of his own goods, an assignee is not liable to pay the heriot; his goods not being the goods of such life. *Co. Car. 313. 2 Nels. 934.* If the lord purchase part of the tenancy, heriot custom is extinguished; but it is not so of heriot-service. *3 Nels. 100.* There is this difference between heriot and relief; heriot has been generally a personal, and relief always a real service.

It appears not only from *Spelman's* conjectures, but likewise from the laws themselves of King *Canutus*, that

the Danes were the first inventors of heriots; and that it was a political institution of theirs, whereby the Danish tenants were to hold by military service; and their arms and horses at their deaths to revert to the publick; and by that means putting the whole strength and defence of the kingdom into their hands, committing only the affairs of agriculture, and the improvement of the nation to the English, though they thereby enjoyed greater freedom and immunities in their tenures than the Danish tenants. *Spelm. 287.*

As to the several kinds of heriots, some are due by custom, some by tenure, and some by reservation on deeds executed within time of memory; those due by custom, are the most frequent, and arose by the contract or agreement of the lord and tenant, in consideration of some benefit or advantage accruing to the tenant, and for which an heriot as the best beast, best piece of household furniture, &c. became due, and belonged to the lord either on the death or alienation of the tenant, and which the lord may seize either within the manor or without at his election. *Dyer. 199. b. Bro. tit. Heriot 2, 3.*

It seems to have been always agreed, that for an heriot custom the lord might seize the best beast of the tenant, or what ever else was due as an heriot, wherever he could find it. *Bro. tit. Heriot 2, 3. Kitch. 84.*

It hath been solemnly adjudged, that for an heriot-service, or for a heriot reserved by way of tenure, the lord may either seize or distress; for when the tenant agrees that the lord shall on his death have the best beast, &c. the lord hath his election which beast he will take, and by seizing thereof reduces that to his possession, wherein he had a property at the death of the tenant, without the concurring act of any other person; and it is not like the case where the lessor reserves heriot 20 s. or a robe, for there the lessee has his election which he will pay, and being to do the first act, the lord cannot seize, but must distress. *Plowd. 66. adjudged. Cro. Eliz. 209.*

Altho' though the lord may either seize or distress for an heriot-service, yet he can only seize the proper beasts of the tenant; but he may distress any man's beasts which are upon the land, and retain them until the heriot be paid. *Cro. Car. 269.*

So it hath been ruled, that for a heriot custom or service the lord may seize as well as the manor as one; but if he distress, it must be in the manor. *1 Salk. 396. per cur. 1 Show. 84. S. P. 3 Mod. 231. S. P. arguendo.*

But it is said, that this liberty must be understood to be annexed to ancient tenures, on which the lords had many privileges, and not to be extended to those which are created within time of memory, upon particular reservations. *Wile 1 Show. 81. 3 Mod. 231. Also vide 14 Fin. Abr. and 3 New Ab. tit. Heriot.*

Heriotage, Military service, or knight's fee: from the Sax. *hera*, an army, and *gealt*, payment. *Cowell, edit. 1727.*

Heriotage, Laying down of arms: from the Sax. *hera*, an army, and *gealt*, payment. *Id.*

Heriotage, A division of household goods; from the Sax. *hera*, an army, and *gealt*, payment. *Id.*

Heriotage, A cable; from the Sax. *hera*, an army, and *gealt*, payment. *Id.*

Heriotage, (Heriotage) A person that is both man and woman. *Lit. Dig.* And as heriotage is a mixture of both sexes; they may give or grant lands, or inherit as heirs to any, and shall take according to the prevailing sex. *1 Inst. 2, 7.*

Heriotage, Among the Danes was a great lord; from the Sax. *hera*, an army, and *gealt*, payment. *Id.*

Heriotage, (Heriotage) A mixture, of which kind we have none.

Heriotage, (Heriotage) The habitation of a hermit, a solitary place. *Fulgensius autem locus iste a latine heremitium interpretatur, propter solitudinem; non quod heremitae ibi habitarent, sed quia ibi solus conversari.* *Max. Aug. 2. par. 2. 339. b.*

Heriotage, The chapel or place of prayer, belonging to an hermitage. *Cowell.*

Heriotage, Herons. *Cowell.*

Heriotage,

Hernesium, Anciently used for the tackle or furniture of a ship. *Cepit etiam in predicta navi hernesia ad novum illum spectantia*. Pl. Parl. 22 Ed. 1.

It is also called *bornesium*, from the Teuton. *bornas*, English *bornesi*, and signified any sort of furniture of a house, implements of trade, or rigging of a ship. Cowell.

Heroudes, The same with heralds: *Et assistebant eis quatuor duces, &c. bene ad custoditionem heroudes, &c.* Knighton, p. 2571.

Herrings It is unlawful to buy or sell herrings at sea, before the fishermen come into the haven, and the cable of the ship be drawn to the land. 31 Ed. 3. Stat. 2. No herrings shall be sold in any vessel, but where the barrel contains 32 gallons, and half barrel and firkin accordingly; and they must be well packed, of one time's packing and salting, and be as good in the middle as at the ends, on pain of forfeiting 3 s. 4 d. a barrel, &c. by stat. 22 Ed. 4. cap. 2. The vessels for herrings are to be marked with the quantity, and place where packed; and packers are to be appointed and sworn in all fishing ports, &c. under the penalty of 100 l. Stat. 15 Car. 2, cap. 16.

Allowance on the exportation of herrings, &c. 5 & 6 W. & M. c. 7. stat. 10. 9 & 10 W. 3. c. 44. stat. 15, 16, 17. 5 Geo. 1. c. 18. Of white herrings from Scotland. 5 Ann. c. 8. art. 8. Oath of exporter that herrings were cured with salt that paid duty, &c. 5 Ann. c. 20. stat. 6. altered by 6 Ann. c. 12. stat. 3. Duty on red herrings for home consumption. 8 Geo. 1. c. 4. On white herrings. 8 Geo. 1. c. 16. Duties reduced, and taken off where only home-made salt is used, 3 Geo. 2. c. 20. stat. 14 & 15. 26 Geo. 2. c. 3. Duties on red and white herrings revived, 5 Geo. 2. c. 6. stat. 3. Establishment of the British white herring fishery, 23 Geo. 2. c. 24. 26 Geo. 2. c. 9. 28 Geo. 2. c. 14. Officers of the customs to view the vessels at their return, 23 Geo. 2. c. 24. stat. 15. Duties to Greenwich hospital to be paid before bounty is received, 28 Geo. 2. c. 14. stat. 10. 30 Geo. 2. c. 30. stat. 10. Staves of herring-barrels in Scotland to be half an inch thick, 29 Geo. 2. c. 23. stat. 4. Not to extend to the white herring fishery, 3 Geo. 2. c. 30. stat. 6. One shilling per barrel payable in Scotland on herrings for home consumption, 29 Geo. 2. c. 23. stat. 6. Further bounty on vessels employed in the white herring fishery, 30 Geo. 2. c. 30. Such nets may be used in the herring fishery as are best adapted to it, 30 Geo. 2. c. 30. stat. 2. Penalty on obstructing those employed in the herring fishery, in the free use of ports, shores, &c. 30 Geo. 2. c. 30. stat. 7.

Herring Silver, Seems to be a composition in money, for the custom of paying such a number of herrings, for the provision of a religious house, &c. *Placit. Term. Ste. Trin. 18 Ed. 1.*

Hesia, An casement—*Usque ad quandam hesiam ante messagium, &c.* Chart. Antiq.

Hesla or **Hesla**, (* corruption of the Latin *bestia*) A little loaf of bread. *Domesday*. Cowell, edit. 1727. See *Rufca*.

Hestcopn, King *Aethelstan* in his return from the North, after a victory, went to *Beowry*, where he gave to God, &c. *Quosdam avenas, vulgariter dictas hestcopne, percipendas de dominis & ecclesiis in illis partibus, quas, &c.* Mon. Ang. Tom. 2. p. 367.

Hesha, A capon or young cockerill.—*Quandam Ren ibi veniebat, reddebat ei unaqueque tarucata 200 Heshas.* *Domesday*.

Heubelborgh, (from the Sax. *bealf*, i. e. *dimidium*, & *borgh*, *debitor vel fidussor*) A surety for debt, *quis qui fidesset, debitorem se quodammodo constituit*. Du Fresnoie.

Hexam and **Hexamshire**, Anciently *bagasland*, was a county of itself, and likewise a bishoprick, endowed with great privileges: but by the Stat. 14 Elin. c. 13. it is enacted, that *Hexam* and *Hexamshire*, shall be within and accounted part of the county of *Northumberland*. 4 Inst. 22.

Heybatt. See *Huybale*.

Heyplote, Seems to signify a customary load or burden laid upon the inferior tenants for mending or repairing the *hays* or hedges. Cowell.

Heynestas, A net for catching conies, *bay-net*. *Placit. Temp. Ed. 3. Cowell.*

Hidage, (*hydageum*) Was an extraordinary tax, payable to the King for every hide of land. *Bracton* writes of it thus: *Sunt etiam quedam communis possessiones, quas servitia non dicuntur, nec de consuetudine veniant, nisi cum necessitas interveniat, vel cum Rex venerit; sicut sunt Hida-gia, Coragia, & Carvagia, &c. consensu communi totius regni introducta* &c. *Bract. lib. 2. cap. 6.* This taxation was levied not only in money, but provision of armour, &c. And when the *Danes* landed at *Sandwich*, in the year 994. King *Ethelred* taxed all his lands by *hides*, so that every 310 hides found one ship furnished; and every 8 hides found one jack and one saddle, to arm for the defence of the kingdom, &c. Sometimes the word *hidage* was used for the being quit of that tax; which was also called *hidgild*, and interpreted from the *Saxo*, a price or ransom paid to save one's skin or hide from beating. *Sax. Dict.* See *Danegild*, and *Black. Com.* 1 P. 310.

Hiden. See *Leather* and *Skins*.

Hide and Gain, Did anciently signify arable land. *Coke on Litt. fol. 85. b.* For of old, to gain the land was as much as to till it. See *Gainage*.

Hidelands, (Sax. *Hydelander*.) *Terra ad hydum seu hidum pertinetur*.

Hide of land, (Sax. *hyde-land*, from *hyden*, *tegmen*.) *Tanta fundi portio quantam unus per annum colere poterat; sive; vel quam famulus uni sustentanda sufficeret*. A plough-land. In an old manuscript it is said to be 120 acres. *Bede* calls it *Familiam*, and says it is as much as will maintain a family. Others call it *Mansum*, *Manentem*, *Calatam*, *Carucratam*, *Sulhagam*, &c. *Crompton*, in his *Jurisdicc. f. 222*, says, a *hide of land* contains one hundred acres, and eight hides make a knight's fee. *Hidum autem Anglice vocatur terra unius aratri cultura sufficiens per annum*. Henry Hunting. Hist. lib. 6. fol. 206. b. But Sir *Edw. Coke* holds, that a knight's fee, a *hide* or plough-land, a yard-land, or an oxgang of land, do not contain any certain number of acres. On *Litt. fol. 69*. The distribution of England by *hides of land* is very ancient; for there is mention of them in the laws of King *Ina*, cap. 14. *Henricus 1. maritanda filia sua erat imperatori, cepit ab unaquaque hida Anglie tres fol.* *Spelman*. And see *Cam. Brit. fol. 158*.

Hidel, Signifies a place of protection or sanctuary. Stat. 1 Hen. 7. c. 6. Cowell, edit. 1727.

Hidgild, (in L.L. *Canons R.*) *Expensum pretium redemptionis aut manumissionis servi*. From the Sax. *hida*, i. e. the skin, and *gild*, *pretium*, i. e. the price by which he redeemed his skin, i. e. redeemed it from being whipped. *Et liber fessis diebus operatur, perdat libertatem; si servus, totum perdat, vel hidgildum, i. e. let him be whipped; which was the punishment for servants; vel hidgildum, i. e. let him pay for his skin; by which payment he is to be excused from whipping.* Cowell. See *Hiddegild*.

Hidlocom. See *Hidlocom*.

Hight treason. See *Treason*.

Higway, (*Via Regia*) is a passage for the King's people, for which reason it is called the King's Higway. Under this head we shall treat,

I. Of the various sorts of higways, &c.

II. Of the right to, the claiming, and changing of ways.

III. Of repairs.

IV. Of the assessment for those purposes, and of day work.

V. Of offences, of various sorts.

VI. Of prosecuting persons, guilty of offences, relative to the highways, and of the general doctrine as to indictments, &c.

VII. Of turnpike roads.

I. Of the various sorts of higways, &c.

It seems that anciently there were but four higways in England, which were free and common to all the King's subjects, and thro' which they might pass without any toll, unless there was a particular consideration

tion for it; all others, which we have at this day, are supposed to have been made thro' the grounds of private persons, &c. a writ of *ad quod damnum*, &c. which being an injury to the owner of the soil, it is said that they may prescribe for toll without any special consideration. 3 *New Abr.* 54. 1 *Mod.* 231. 2 *Mod.* 143.

There are, (says Lord Coke,) three kinds of ways: 1. A foot-way, called in Latin *iter*. 2. A pack and prime-way, which is both a horse and foot-way, called in Latin *actus*. 3. A cart-way, called in Latin *vias* or *actus*, which contains the other two, and also a cart-way, and is called *vias regia*, if it be common all men; and *communis strata*, if it belong only to some town or private person. *Co. Lit.* 56. n.

But notwithstanding these distinctions, it seems that any of the said ways which is common to all the King's subjects, whether it lead directly to a market-town or only from town to town, may properly be called a highway; that any such cart-way may be called the King's highway; that a river common to all men may also be called a highway; and that nuisances in any of the said ways are punishable by indictment; otherwise they would not be punished at all: for they are not actionable unless they cause a *special damage* to some particular person; because if such action would lie, a multiplicity of suits would ensue. But it seems, that a way to a parish-church, or to the common fields of a town, or to a village, which terminate there, may be called a private way, because it belongs not to all the King's subjects, but only to the particular inhabitants of such parish, house or village, each of which, as it seems, may have an action for a nuisance therein. *Palm.* 389. *Cro. Eliz.* 63, 664. 1 *Vent.* 189, 208. 3 *Keb.* 28. *Co. Lit.* 56. 6 *Mod.* 255. 1 *Hawk.* P. C. 201.

If passengers have used time out of mind, when the roads are bad, to go by outlets on the land adjoining to a highway in an open field, such outlets are parcel of the highway; and therefore if they are sown with corn, and the tract foundrous, the King's subjects may go upon the corn. 1 *Roll. Abr.* 390. *Cro. Car.* 366. S. C.

Tho' every highway is said to be the King's, yet this must be understood so as that in every highway the King and his subjects may pass and repass at their pleasure. But the freehold, and all the profits, as trees, &c. belong to the lord of the soil, or to the owner of the lands on both sides of the way. Also the lord or owner of the soil shall have an action of trespass for digging the ground. But the lord of a rape, within which there are ten hundreds, may prescribe to have all the trees growing within an highway within this rape, tho' the manor or soil adjoining belongs to another; for usage to take the trees is a good mark of ownership. 1 *Roll. Abr.* 392. 1 *Brownl.* 42. *Kebw.* 141.

II. Of the right to, claiming, and changing of highways, &c.

A man may have a way either by prescription or grant, by reservation, by implication, or by owelty of partition, and shall not in a *cur. claudend.* be obliged to shew which way he claims it; but it will be sufficient for him to alledge *debit & filer*, &c. but in a bar or replication he must shew his title precisely. 1 *Vent.* 274. 1 *Low.* 148. 3 *Keb.* 528, 531. *St. John v. Moody*. But he who prescribes for a way, must shew in certain whether it is a foot, horse, or cart-way. *Pol.* 163. adjudged upon demurrer.

But it seems, that if a man hath a way for carriages from D. to Blackacre over my close, and after he purchases land adjoining to Blackacre, he cannot use the said way with carriages to the land adjoining, for then it may be very prejudicial to my close; but it seems, if I will help myself, I must shew the special matter, and that he used it for the land adjoining. 1 *Roll. Abr.* 391.

A way must not be claimed as appendant or appurtenant to a house, because it is only an easement, and no interest. *Yelv.* 159. But it may be *quasi* appendant thereto, and as such pass by grant thereof. *Cro. Jac.* 190.

A man may prescribe for a way from his house thro' a certain close, &c. to church, though he himself has lands next adjoining to his said house, through which of necessity he must first pass; for the general prescription shall be applied only to the lands of others. *Palm.* 387, 388. 2 *Roll. Rep.* 397.

An ancient highway cannot be changed without an acquisition found on a writ of *ad quod damnum*, that such change will be no prejudice to the publick; and it is said, that if one change a highway without such authority, he may stop the new way whenever he please; neither can the King's subjects in an action brought against them for going over such new way, justify generally as in a common highway, but ought to shew specially, by way of excuse, how the old way was obstructed, and a new one set out; neither are the inhabitants bound to keep watch in such new way, or repair it, or to make amends for a robbery committed in it. *Cro. Car.* 266. *Yanb.* 341. *Yelv.* 141. 1 *Hawk.* P. C. 201-2.

But it hath been holden, that if a water, which hath been an ancient highway, by degrees changes its course, and goes over different ground from that whereon it used to run, yet the highway continues in the new channel in the same manner as in the old. 24 *Aff.* 93. 1 *Roll. Abr.* 390.

III. Of repairs.

By Common law, also by reason of the inclosure, tenure, or prescription. And, by Statute law.

Of Common right, the general charge of repairing highways lies on the occupiers of lands in the parish wherein they lie; but it is said, that the tenants of the lands adjoining are bound to scour their ditches. 1 *Roll. Abr.* 39. *March* 26. 1 *Vent.* 90, 183. 8 *Hon.* 7. 5.

Also if a parish is part in one county, and part in another, and the highways in one county are out of repair, the whole parish shall contribute to the repair; but there may be an agreement between the inhabitants, that the one shall repair one part, and the other the other; and such agreement is good between themselves, and for breach, the one may have an action upon the case against the other; but in an indictment they shall take no advantage of these agreements, for as to the King they are equally liable. 1 *Mod.* 112. 1 *Vent.* 256. 3 *Keb.* 301. Also *vide* 1 *Vent.* 256. 1 *Mod.* 112. 3 *Keb.* 301.

A highway lying within a parish, the whole parish is of common right bound to repair it; except it appear that it ought to be repaired by some particular person either *rations tenuræ*, or by prescription. 1 *Ventr.* 183. *Style* 163.

But though the parish be obliged of common right to repair the highways in it, yet it is certain, that particular persons may be bound to repair the highway, by reason of inclosure or prescription; as where the owner of lands not inclosed, next adjoining to the highway, incloses his lands on both sides of it; in which case he is bound to make a perfect good way, and shall not be excused by making it as good as it was before the inclosure, if it were then any way defective, because by the inclosure he takes from the people the liberty of going over the lands adjoining to the common track. 1 *Roll. Abr.* 390. *Cro. Car.* 366. 1 *Sid.* 464.

Also it is said, that if one inclose land on one side, which hath anciently been inclosed on the other side, he ought to repair all the way; but that if there be no such ancient inclosure on the other side, he ought to repair but half the way. 1 *Sid.* 464.

Therefore, if there be an old hedge time out of mind belonging to A. on the one side of the way, and B. having land lying on the other side, makes a new hedge, there B. shall be charged with the whole repair. 1 *Sid.* 464. 2 *Keb.* 565. 3 *Saund.* 157. But if A. makes a hedge on the one side of the way, and B. on the other, they shall be chargeable by moieties. 1 *Sid.* 464. 2 *Keb.* 565. But it seems clear, that wherever a person makes himself liable to repair a highway by reason of inclosure, that by throwing of it open again, he thereby

frees himself of the burthen of any future reparation. 2 *Saund.* 160.

Particular persons may be bound to repair a highway by prescription; and it is said, that a corporation aggregate may be charged by a general prescription, that it ought and hath used to do it, without shewing any consideration in respect whereof they had used to do it, because such a corporation never dies, neither is it any plea, that they have done it out of charity; but it is said, that such a general prescription is not sufficient to charge a private person, because no man is bound to do a thing which his ancestors have done, unless it be for some special reason; as having lands descended to him holden by such service, &c. but it seems, that an indictment charging a tenant of lands in fee with having used of right to repair such a way *ratione tenuræ terræ suæ*, without adding that his ancestors, or those whose estate he hath, have so done, is sufficient, for 'tis implied. 27 *Aff.* 8. 27 *Ed.* 4. 38. *Bro. Prescription* 49. 70. *Keilw.* 52. a. *Litch.* 206. 1 *Howk. P. G.* 202—3.

And it seems certain in all those cases, whether a private person be bound to repair a highway by inclosure or prescription, that the parish cannot take advantage of it on the general issue, but must plead *in speciali*; that therefore, if to an indictment against the parish, for not repairing a highway, they plead Not guilty, this shall be intended only that the ways are in repair, but does not go to the right of reparation. 1 *Mod.* 112. 3 *Keb.* 301. 1 *Fent.* 256.

At Common law it is said, that all the country ought to make good the reparations of a highway, where no particular persons are bound to do it; by reason the whole country have their ease and passage by the said way. *Co. Rep.* 13. By the ancient Common law, villages are to repair their highways, and may be punished for their decay; and if any do injure, or straighten the highway, he is punishable in the King's Bench, or before justices of the peace in the Court Leet, &c. 27 *Aff.* 63. *Crump. Jurisd.* 76.

By Statute law various provisions are made, *viz.* the 7th of *Geo.* 3. c. 42. (made to reduce into one act all the laws relative to the highways,) directs, that annual lists be made in September, of a certain number of persons qualified to serve as surveyors of the highways, to be returned to the justices, at their special sessions in October, who are to nominate such a number to be surveyors, as they shall judge necessary, who are to hold the office for one year. On refusal they forfeit 5*l.* and others to be nominated.

The surveyor is to take a view of the highways at proper times, in respect of nuisances, &c. and give notice to the parties concerned to remove the same, who, if they do not, surveyor to employ his men to do it, the defaulters forfeiting according to direction of the act.

The surveyor is to make new ditches, drains, &c. where the old are insufficient, and keep the same secured, &c. with proper trunks, tunnels, platts, bridges or arches over the same, making satisfaction to the owners of lands, &c. where any damage is done. The surveyor is also to make cart-ways leading to market towns twenty feet wide at least, and the horse cart-ways three feet, and to keep the same in repair.

Two or more justices of peace, upon view, may order narrow roads to be widened to a sufficient breadth, in which cases the surveyor is to agree with the owner of the soil as to recompence; in default of such agreement, the same to be assessed by a jury.

The surveyor is to make report of such defective highways, bridges, &c. as ought to be repaired by particular persons, to the justices, or two, or more, and notice to be given to the occupier. If not repaired in due time, the justices are to present the highways, in due of repair, together with the person or persons, whether publick or corporate, liable to repair, at the next general quarter sessions.

The act also empowers justices of assize, and justices of peace, to make presentments to the assizes, or sessions, of defective highways, caseways or bridges, or of any other defaults or offences against the act, and to assess such fines as they shall think fit, saving to the persons assessed their lawful traverse to such presentments.

The justices at their special sessions may order those roads to be first repaired that most want it. If the surveyor neglect their duty, two justices may hear complaint, and make such order as they think fit.

The justices are to order proper direction posts to be set up where several highways meet, and at the approaches to such parts as are subject to deep or dangerous floods, and where necessary for guiding travellers in the best and safest tract; surveyor subject to a penalty for neglect of duty in this particular.

The surveyor is empowered to take materials for repair of the highways, from any neighbouring quarries, commons, wastes, grounds, rivers, or brooks. And where sufficient can't be had from such places, then from private grounds, making such satisfaction to the owners, as shall be agreed upon, or otherwise as the justices shall direct.

By *stat.* 22. of the act, particular directions are given for filling up, and stopping of holes made in digging for materials, under certain penalties on the surveyor.

By *stat.* 32. The surveyor is to collect and pay over to the justices all rates, forfeitures, penalties, and compositions.

IV. Of the assessment for repairs, and of day-work.

By 7 *Geo.* 3. c. 42. s. 12. Where there is not sufficient money in the hands of the surveyor, to pay owners of soil for damage done, in widening of roads, two justices, or quarter sessions, may order an assessment, upon every occupier of lands and tenements, in the respective parishes, &c. where the highways lie, if assessment not paid in ten days; after demand, it may be levied by distress and sale of the goods of the persons assessed: provided that no such assessment be made in any one year to exceed the rate of 6*d.* in the pound of the yearly value of the lands, &c. assessed.

By *stat.* 21. The expences incurred by the surveyors, in doing various things, directed by the statute, are to be reimbursed by a rate on the inhabitants, according to the rules prescribed in the 43d of *Edw.* intituled, "An Act for the Relief of the Poor."

By *stat.* 23. Statute work in general is regulated. Every person keeping a team, draught, or plough, shall six days in the year furnish a wain, cart or carriage, and other necessities, and two able men with each. Those occupying of lands, &c. of 50*l.* yearly value, the like. So for every 50*l.* *per annum* respectively, and one labourer for every 10*l.* over such 50*l.* and less than 100*l.* &c. of the yearly value of 10*l.* and not of 50*l.* Not keeping a team, &c. one labourer, for every 10*l.* Under 10*l.* and not keeping a team, 40 *qd.* in person, or find a labourer. Power is also given to change carriages for oxen, where thought needful by the surveyor; or a certain sum to be paid in lieu. Men sent to furnish their own tools.

The surveyors are to give due notice to persons liable to statute work.

By *stat.* 25. Persons liable to perform statute work may compound at such rates as the justices shall appoint, not exceeding 6*d.* nor less than 3*d.* for each day; and other particular specifications.

Stat. 26. Regulates the duty of the surveyor in giving notice of time and place of admitting persons to compound, and regulates the changes, in the occupation of land, &c. or new inhabitants.

By *stat.* 27. It is provided, that persons occupying lands, &c. not above 50*l.* *per annum* are not obliged to find or compound for more than one carriage; and a team or plough kept part of the year in one parish, and part in another, the duty to be performed where the person actually resides.

Stat. 28. Where composition made, a proportion is to be paid to the township surveyor, if part of such duty is to be performed on the common roads.

If the justices at sessions are satisfied that money raised by preceding rates, &c. is not sufficient, then, by *stat.* 29. they are to make an assessment upon every occupier, to be levied by distress and sale.

But, by *stat.* 30. it is provided it do not exceed 6*d.* in the pound in any one year.

All fines and forfeitures for not repairing the highways, or not appearing to indictments, are to be applied in repair of the highways.

V. Of nuisances, viz. by stopping highways, and other nuisances in Common law.—Of hedges, &c. near the highways.—Of drawing carriages with a greater number of cattle than allowed.—Of leaving empty carriages in the road, &c.

It is clearly agreed to be a nuisance to dig a ditch, or make a hedge over-thwart the highway, or to erect a new gate, or to lay logs of timber in it, or generally to do any other act, which will render it less commodious. *Kitchin 34. 1 Hawk. P. C. 212.* Also it is a nuisance for an owner (and for which he may be indicted,) to contrive an incroachment, or other nuisance to a highway begun by his ancestor, because such continuance thereof amounts, in the judgment of law, to a new nuisance. *1 Hawk. P. C. 214.* Also it is agreed, that it is no excuse for him who lays logs in the highway, that he laid them only here and there, so that the people might have a passage through them by windings and turnings. *2 Roll. Abr. 137. 1 Hawk. P. C. 212.*

It is a nuisance to suffer the highway to be incumbered by reason of the faulness, &c. of the adjoining ditches, or by boughs of trees hanging over it, &c. And it is said, that the owner of land next adjoining to the highway, ought of common right to keep his ditches, but that the owner of land next adjoining to such land, is not bound by the Common law to do without a special prescription; also it is said, that the owner of trees hanging over a highway, to the annoyance of travellers, is bound by the Common law to lop them, and it is clear that any other person may lop them, so far as to avoid the nuisance. *8 H. 7. 5. 4. Kitch. 34. Dalt. cap. 26. 1 Hawk. P. C. 212, 213.*

But it is no nuisance for an inhabitant of a town to enlade billets, &c. in the street before his house, by reason of the necessity of the case, unless he suffer them to continue there an unreasonable time. *2 Roll. Abr. 137.*

Any one may justify pulling down, or otherwise destroying a common nuisance, as a new gate or house erected in a highway; and it hath been of late holden, that there is no need, in pleading such justification, to shew that as little damage was done as might be. *2 Roll. Abr. 144. Cas. Car. 184. 1 Jon. 231. 2 Salk. 458.*

Also besides that all nuisances are punishable by indictment with fine and imprisonment, it is said, that one convicted of a nuisance to the highway, may be commanded by the judgment to remove it at his own costs. *2 Roll. Abr. 84. 1 Hawk. P. C. 200.*

A gate erected in a highway is a common nuisance, because it interrupts the people in that free and open passage, which they before enjoyed and were lawfully entitled to; but where such a gate has continued time out of mind, it shall be intended that it was set up at first by consent, as a composition with the owner of the land on the laying out the road, in which case the people had never any right to a freer passage, than what they still enjoy. *1 Hawk. 190.*

By the Stat. 7 Geo. 3. c. 42. which we have before mentioned, viz. Stat. 5. No tree or bush is to be allowed to grow, or stand within 12 feet of the center of the highway, on forfeiture of 10s. by the owner. By Stat. 4. The possessor of land next adjoining to the highway are to keep their ditches, ditches, drains, water-courses, trunks, tunnels, pipes and bridges, in proper order. And so as to support or adjoining grounds, through which the water hath used to pass from the highway, on forfeiture of 10s.

By Stat. 5. The owner or other matter is to be laid in the highway, or out of the highway, so the obstruction or prejudice thereof, on forfeiture of 10s.

By Stat. 6. Where any thing (not intended by the act,) shall be laid within 12 feet of the center, the owner of the adjacent lands may remove and dispose of the same to his own use.

Stat. 7. If the highway is wilfully obstructed by carriages, or implements of husbandry, the person offending shall forfeit 10s.

By Stat. 11. No waggon, the fellics of whose wheels are less than nine inches, shall be drawn with more than six horses; no car, less than nine inches, to be drawn with more than four; waggons of nine inches, with no more than eight horses; cart of nine, with no more than six; on forfeiture of all horses above the number, with the accoutrements, to the person seizing.

Stat. 30. Waggons fitted with narrow tire, or set with one-headed nails, are to be drawn by more than three horses, on forfeiture of the supernumerary.

Stat. 30. Except carriages drawing one stone or block of marble, or piece of metal or timber, ammunition or artillery for his Majesty's service.

By Stat. 42. Owners of carriages to have the owner's real name and place of abode painted on some conspicuous part, in large letters, on penalty of 20s.

By Stat. 43. The driver of any cart or dray, riding thereon in any street or highway, without having some person on foot, or on horseback to guide the same (except carriages drawn by one horse, or two horses abreast, and conducted by some person holding the reins), and the driver of any carriage, who by negligence or misbehaviour, shall damage or obstruct persons, or carriages in passing, or who shall not make way for loaded carriages, forfeits, if not the owner, any sum not exceeding 10s. if the owner, any sum not exceeding 20s. or may be committed to the house of correction for any time not exceeding one month.

So far as to the act, on this subject, it is proper to inform the reader, that this Statute does not restrain the subject, who receives any injury by a driver, &c. of any carriage, from suing the owner thereof at Common law, or from punishing the driver for wilful offences, by indictment, as the nature of the case may require. But that the party prosecuting must waive the benefit of proceeding under this Statute, in the summary way thereby prescribed.

VI. Of preventing persons guilty of offences relative to the highways.

A variety of punishments, with various modes of proceeding, have been inflicted and directed by several Statutes, but the 9th of Geo. 3. having reduced the laws in general into one code, it is unnecessary to take any farther notice of the preceding Statutes.—As to the doctrine of indictments on this subject, it may be of use to refer the reader to 1 Hawk. P. C. 218, 219, 220, and *Strat. 349, 300.*

We now proceed to the substance of 7 Geo. 3. c. 42. on this subject.

By Stat. 34. The pulling up, removing, or destroying, &c. the posts, blocks, banks, &c. set up for security of horse and foot pathways, or the parapets or battlements of bridges, mile-stones, or direction-posts, incurs a penalty not exceeding 5l. nor less than 5s. on conviction by a justice of peace, or a commitment to the house of correction, to be whipped, and kept to hard labour, for any time not exceeding one month, nor less than seven days.

By Stat. 35. The surveyor, or neglect of duty in instances not otherwise provided for by the act, forfeits a sum not exceeding 5l. nor less than 10s.

By Stat. 36. Justices of the peace are empowered to put in execution every part of the act.

By Stat. 40. Persons wilfully opposing the execution of the act, or obstructing or making a nuisance or distress, or refusing cattle or other goods, and constables not duly executing the warrant or precept of any justice, forfeits a sum, not exceeding 10l. nor less than 40s. and on non-payment, may be committed for three months.

By Stat. 43. All penalties and forfeitures, and all costs and charges, when not otherwise directed, are to be levied by distress and sale, by warrant of a justice; one half to the use of the informer, the other to the roads; and in want of distress, the party to be committed.

By *sec. 48*: Penalties or forfeitures may be sued for, by the prosecutor or informant, either as before directed, or by *action of debt*, where the penalty is a pecuniary one, (declaring in a very general manner, as directed by the act), or by *action of trover*, where the penalty or forfeiture is an article, or other goods, and recovering, shall have double costs.

[It may not be improper to observe, that there are very good opinions, against the general method of declaring in debt, directed by the act, and that a declaration, thus framed, could not be supported, as damages; for, the act creating a variety of offences, where the forfeiture is a pecuniary one, the defendant can't be prepared to defend the charge, not knowing what may be given in evidence on the trial, i. e. what kind of offence may then be alleged against him.]

By *sec. 49*. No conviction is to be had but upon confession of the party, or oath of a witness. And inhabitants deemed competent witnesses.

By *ss. 51*. Distress for money is not to be deemed unlawful, for default of *form*, in the proceedings; nor the party making it, to be deemed a trespasser, *ab initio*, on account of any subsequent irregularity.

By sec. 52. The plaintiff in any action for irregularity, &c. not to recover, where tender of amends has been made, before the action brought. And by this section the defendant is allowed to put money into court before issue joined.

By §§. 53. Persons arrested, where there is not any other method of relief afforded, or injured by the inclosure any common highway, may appeal to the general quarter-sessions; which court is to proceed in a summary way, award proper costs, and the determination to be final.

The general doctrine of re-indulgents, &c. upon this subject Mr. Sergeant Hawkins has laid down the following

That it is safe to every such indictment to show the place from which, and also the place to which the way supposed to be out of repair both lead, yet essential for want of such certainty, have sometimes been disallowed; however it seems certain, That there is no necessity to show that a highway leads to a market town, because every highway leads from town to town. 1 Hawk. P. C. 219.

ably, That it is necessary in every such indictment expressly to shew *in what place* the nuisance complained of was done; for which cause an indictment for stopping a way at *D.* leading from *D.* to *C.* is not good; for it is impossible that a way leading from *D.* should be in *D.* and no other place is alleged. 1 *Havel. P. C.* 219.

July, That every such indictment ought also certainly to shew *to what part* of the highway the nuisance *did extend*, as by shewing how many feet in length, and how many feet in breadth it contained, or otherwise the defendant will neither know of the certainty of the charge, against which he is to make his defence, neither will the court be able from the record to judge of the greatness of the offence, in order to assign a fine answerable thereto; and upon this ground it hath been adjudged, that an indictment for stopping a certain part of the King's highway at K. is naught, for the uncertainty thereof. Also it hath been resolved, that the same offence, such a nuisance is alledged, is not sufficiently averred in such an indictment, by shewing that it contained so many feet in length, and so many in breadth, *by glosses*.

Hovatt. 210, 220.

4thly, That every such indictment shew, that
it be *any* wherein a nuisance is alleged, is a *common* *highway*; for which cause it hath been resolved, That an
indictment for a nuisance to a *highway*, without adding
that it was a highway, is *naught*; and upon the same
ground it seemeth also, That an indictment for a nuisance
to a *common* *footway* to the church of D. for all the
parishioners of D. is not good; yet it seems, that if those
last words, *and for all the parishioners of D.* had been
omitted, such an indictment might be maintained.
Hewit. 120.

5thly, That it is not left in an indictment against a common person for not repairing a highway, which is

ought to have done in respect of the *tenure* of certain lands, barely to say that he was bound to repair it *ratione tenure tenet*, without adding *fecit*. Also it is said, that in an indictment against a tenant, *Et. per non repairing a highway*, in respect of certain lands, it ought to be shewn in what capacity he ought to repair it, because otherwise it cannot be known, to what capacity the process is to be awarded against him. *See. Howl. 20.*

6thly. That in every such indictment the fact alleged against the defendant must be expressed in full proper terms, that it may clearly appear to the court to have been a nuisance; and for this cause it hath been resolved, That a prohibition for diverting a highway is not good, because a highway cannot be diverted, but must always continue in the same place where it was, notwithstanding it be obstructed, and a new way made in another place. *1 How. P. C. 110.*

But it hath been resolved, That an indictment against a man for stopping a highway in his own land, is good, without laying the offence done *in & contra*. Also it is said, That a presentment that a highway in such a place is decayed by the default of the inhabitants of such a town, is good, without naming any person in certainty. But it hath been adjudged, that an indictment against particular persons must specially charge them every one; for which cause it hath been resolved, that an indictment against several for not repairing their streets, that they, *& eorum executores*, did not repair them, is not good. 1 *Howell. P. C.* 227.

Upon an indictment for not repairing a highway, if the defendant produces a certificate before trial, that the way is repaired, he shall be admitted to a fine; but after verdict, the certificate is too late, for then he must have a certificate to the sheriff, who ought to return that the way is repaired, because the verdict, which is a record, shall be animated by a record. *Rayn. 215.* And where the defendants, indicted for not repairing a common foot-way, confessed the indictment, and submitted to a fine; it was held, that the matter was not ended by their being fined, but that writs of *assumpsit* shall be awarded *in infinitum*, till the court of *B. R.* is satisfied that the way is repaired, as it was when it was at best; but the defendants are not bound to put it in better repair than it has been since out of mind. *1 Salk. 258.* If a defendant hath made a highway, as good as it is capable of being made, it was said in an extraordinary case, this shall not discharge him, on an information against him; though it may be mitigation of his fine. *1 Salk. 181.* Altho it is no excuse for the inhabitants of a parish indicted at Common law, for not repairing the highways, that they have done the work required by statute; for the statutes are made in aid of the Common law, and when the statutory work is not sufficient, rates and assessments are to be made. *Dart. c. 26.*

It is said, that if the right or title to repair such ways come in question, upon suggestion and affidavit made thereon, a ~~complaint~~ may be had to remove the incumbrance into B. P.

A person may be charged for not repairing a loose landing upon a highway, which originally, and due to fall down, to the danger of travelers, wherever he has tenent, which in such case is not married. *Call.*

If there be a commandment way through a close by prescription, and the owner of the close ploughs up the way, and burns it, and lays stones in the face of it, passengers may go over another foot-way in the same state, without being trespassers. *2 Inst. 120.* And if a highway is not sufficient, any passenger may break down the inclosure of it, and go over the land, and justify it till a sufficient way is made. *3 Inst. 134.*

Drawing a gate with a *gongwan*, that was locked, but cracking and lifting a plank, it thrust a nui-sack, for it is a sack, and call it a pillow, as if there had been no gate, and the usual way of cursing meanness of this kind, is by *tsichien-sai*, for every person may remove the meanness, by cursing or throwing it down, if there be occasion to do so; and it hath been held, that the there are many gates *tsouk* *tsouk*, they must be anciently let

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up, and it shall be removed by labour from the King upon the next great demand. *Cap. Cart. 234.*

Form of an indictment for not repairing a highway.

THE *jurors*, &c. That the common King's highway leading from, &c. in the parish of St. in the county of St. the day and year, &c. was, and still is in great decay, for default of due repair and maintenance thereof, so that the subjects of our Lord the King, passing or travelling through or along this way, cannot without danger pass through the same, as the great damage and trouble now done by all the large subjects of our said Lord the King passing through that way, and the small inhabitants of the town of, &c. of right and by ancient custom ought to repair, and amend the said highway, whereunto it shall be necessary against the peace, &c.

VII. Of turnpike roads.

The Statute of 1 Geo. 3. c. 12. hath reduced the general laws in being, on this subject into one.—As the act is very long, and has many particulars, conformable to that for the highways, we shall only give these general heads, and for further information refer to the Statute itself.

Stat. 1. Impowers trustees to cross weighing engines, and specifies the tolls to be taken.

Stat. 2. Grants privileges to waggons, &c. rolling a surface of 16 inches.

Stat. 3. The previous regulations not to exceed in carriages employed only in husbandry.

Stat. 4. No composition for narrow wheels.

Stat. 5. Inflicts a penalty on persons fraudulently unloading goods, before coming to a gate or weighing engine.

Stat. 6. Regulates the construction of wheels within 20 miles of London.

Stat. 7. Binds four wheel carriages may travel with eight horses, two wheels with five, but no more. Narrow four wheel, with four horses. Two wheels, three horses. Four wheel, and supererogatory horses.

Stat. 8. Penalty of 100 on fraudulently taking of any toll, or altering the distance of the wheels before coming to any gate.

Stat. 9. Driver travelling with more horses than be passed thro' any gate with penalty of 100.

Stat. 10. Where necessary, trustees may allow broad wheeled waggons to be drawn up hills by 12 horses, narrow by 6.

Stat. 11. Particulars respecting, passing thro' any gate, show or less.

Stat. 12. Narrow wheeled waggons not to be drawn by horses in pairs.

Stat. 13. Turning carriages out of turnpike roads to avoid tolls, incurs a forfeiture of one of the horses.

Stat. 14. The driver of a waggon with wheels not duly constructed, or drawn by more horses than authorized, may be apprehended, &c. and forfeit 100.

Stat. 15. Discretion to be had in the sale, and of the turnpike roads.

Stat. 16. Division of lands and place of roads to be pointed out, and if as all on the said turnpike roads part of waggons, &c. And the words Common High Way as Cart, as the case may be. Deceased in Statute, cap. 34. in the Statute.

Stat. 17. As to toll, the Statute refers to the Statute, but refer to the Statute.

Stat. 18. Contains the description of certain carriages.

Stat. 19. Wherever any new turnpike roads under several acts, within three years, &c. and the Statute they exceed three years, the Statute are to regulate the same.

Stat. 20. Inflicts a penalty of 100 on persons making distress, &c. on any turnpike road not included on such side within 50 feet of the centre, or turning them through a narrow within 15.

Stat. 21. Direction puts as to the up, and down.

Stat. 22. Inflicts a penalty, on persons pulling up posts, destroying banks, mile stones, &c.

Stat. 23. The Statute to toll gates, &c. and makes several alterations, &c. without benefit of clergy.

Stat. 24. Intimation of hundreds, which Statute contained, to make full intimation.

Stat. 25. Provisions and reasonable protections and returns made in favour of offenders to be required into and set aside.

Stat. 26. Trustees charging or exceeding their power, in various instances specified, the general quarter sessions may determine any complaint thereof in a summary way.

Stat. 27. Constables, surveyors, &c. neglecting their duty to forfeit 100.

Stat. 28. Seizures, &c. (unless by warrant) to be delivered to the constable, till proof of the offence. If not made in 14 days, to be returned to the owner, and return to pay expenses of keeping, &c. &c. to be allowed to the party. If the party neglects daily protests such seizure, to forfeit 100.

Stat. 29. All contrivances to be on conviction, or oath of one witness, liable to be removed without notice.

Stat. 30. Inflicts a penalty on persons opposing the execution of the act, &c. &c. instances there specified.

Stat. 31. Penalties, &c. not otherwise directed, to be forfeited to the crown and sale.

Stat. 32. Penalties on informers in liberty to sue either in the respective turnpike acts direct, or by certificate of record by order of the surveyor, to have full costs, on conviction.—But the action to be brought in one calendar month after the offence committed, of which the days previous notice to be given.

Stat. 33. Discret for money not devoted unlawfully, &c. for default of form in the proceedings, nor the party making it, a trespasser, at large, for any subsequent irregularity.

Stat. 34. Plaintiff in action for irregularity, not to recover where cause made before action.—And defendant may pay money into court, before the trial.

Stat. 35. Parties aggrieved may in general appeal to the general quarter sessions.—The determination there final and not removable by writ.

[Note under Div. VI. an exception, where a right is in question.]

Stat. 36. Any action to be brought for any thing done in pursuance of the act, to be commenced in three calendar months. Defendants may plead the general issue, and if judgment for him, is entitled to *treble costs*.

Stat. 37. A reward of 100 is given for the apprehension and taking of a *highwayman*, to be paid within a month after conviction, by the sheriff of the county, &c. Stat. 1 Geo. 3. c. 12. s. 1. Vide Statute.

Stat. 38. A sum of money appointed in the Statute, for the relief of the poor, &c. &c. and for the relief of the poor, &c. &c. they are left under various restrictions by the Statute laws. See *Game, Highway*.

Stat. 39. The Statute, which is dead, after the 10 years, &c. &c. which Statute were first called, then the Statute, and then Statute entered down, but the Statute of the Statute in the Statute of Statute has been since the reign of King Hen. 8. Cap. 11. s. 1.

Stat. 40. Statute, which is the Statute, 1. c. Statute, &c. &c. and to the Statute of the Statute, all such Statute, &c. &c. and valued, as to Statute, &c. &c. Statute, &c. according to the Statute they were Statute, the Statute Statute were valued at twelve hundred Statute, and Statute called *Townshipmen*; the middle class Statute, &c. Statute Statute, and the Statute, or two hundred Statute, called *Parishmen*; their Statute were termed *Statute*. Statute, 1 Geo. 3. c. 12. s. 30, 31.

Hine, (Sax.) A servant, or one of the family; but is properly a term for a servant in husbandry, and he that oversees the rest is called the *Master-hine*, Stat. 12 R. 2. c. 4.

Hinefare, (Sax.) *Hine*, a servant, and *fare*, a going or passage. Signifies the loss or departure of a servant from his master.—*Si quis occidit hominem Regis & facit Hinefarum, Aut Regi 20 s. &c.* Domesday.

Hinegeld, Significant *quintantium transgressionis illata in servum transgredientem*. MS. Arch. Trevis. Ar.

Hircifcunda, Is the division of an inheritance among heirs. Sax.

Hird, Domestica vel intrinseca familia. Inter Pla. Trin. 12 Edw. 2. Ebor. 48. MS.

Hirteman, A subject, from the Sax. *Hiran*. i. e. *Obdiro*, to obey; or it may be one who serves in the King's hall, to guard him from *bird*, *aula*, and *man*, *home*. Du Fresne. Cowell.

Hiring. A contract by which a qualified property may be transferred to the *hirer*. Hiring is always for a price, stipend, or recompence. By this contract the possession and a transient property is transferred for a particular time or use, on condition and agreement to restore the goods, &c. so hired, as the time is expired or use performed; together with a price or stipend, either expressly agreed on by the parties, or left to be implied by law according to the service. Black.

Com. 2 V. 454.

Hirst or Hurst, A little wood. Domesday.

Hithe. See *Hythe*.

Hlafordfocna, The Lord's protection; from the Sax. *Hlaford*, dominus, and *foca*, libertas. *Nec dominus homini libero hlaforfocnam prohibuit*. Leg. Adelftan, cap. 3.

Hlaforner, The benefit of the law; from the Sax. *laga*, lex, and *foca*, libertas.

Hloth, An unlawful company, from seven to thirty-five. *Qui de hloth fuerit accusatus, abneget per centum viginti bidas, vel sit munda*; that is, he who is accused for being at an unlawful rout, let him purge himself for sacramentalibus quot is qui 120 bidas estimatur; or, let him clear himself by a mulct, which is called *hlothota*. Cowell.

Hlothbott, A mulct set on him who is in a riot. From the Sax. *hloth*, turba, and *bote*, compensatio.

Hloft-men, An ancient gild, or fraternity at Newcastle upon Tyne, who dealt in sea-coal; they are mentioned Stat. 21 Jac. 1. cap. 3.

Hoblers or Hobilers, (Hobelarii) Were light horsemen; or certain tenants bound by their tenure to maintain a little light horse, for giving notice of any invasion made by enemies, or such like peril towards the sea side; of which mention is made in the Stat. 18 Ed. 3. c. 7. 25 Ed. 3. c. 8. *Quidam* Stat. 172. They were to be *Ad omnem marem equites*. &c. And we read, *Duravit vocabulum eques ad equitum* &c. *Contadurmes* and *Hobelarii*. Spelm. See *Brit. Antiqu.* in 4 Inf. f. 307. *Hobelarii*, Rot. Parl. 21 Edw. 1. Sometimes the word signifies those who used horse and arms, &c. *Pro nova de maris tempore guerra, pro hobilibus sagittariis inventis*, &c. Thorn. Antiqu. 30. in the Stat. *pro munitione & apparatu hobilium ad mare hobiliorum sagittariorum*. Cowell.

Hoccus salis, It seems to be a salt, &c. of salt.—In which Stat. *Sanctus domus xi. & in v. plateis habebat* &c. *Is Tegenich putes liv salina & ii. hoccendous vi. &c. viii. denar.* In alio putes *Halperis xvii. salina*. In tertio putes *Melonic xii. salina & ii. parit* &c. *hoccendous vi. salina & viii. denarius*.—Et Libro Domesday, Worcesterhire.

Hockettes, or *Hockettours*, Is an old French word for a knight of the post, a decayed man, a baggage carrier. 3 Par. Hist. f. 175. *Qui sui equerelam non respiciunt ut fuit foris non chison per hockettours, parvus quoque modus ne fuit ensue*. Stat. Ragman. Cowell.

Hock-Tuesday-Money, Was a duty given to the landlord, that his tenants and bond-men might solemnise that day on which the English mastered the Danes, being the second Tuesday after Easter week. Cowell.

Hoga, Hogium, Hach, A mountain or hill, from the Germ. *Hoogh*, altus; or from the Sax. *Hou*—H2.

quidam *quidam* *Hogam*, &c. & *est* *indistincta* *quidam* *villam* *quidam* *quidam* *Stanhow*, *postea* *Stanhow*, *De Camp*.

Hogget, (Hogastum) A little hog; it also signifies a young sheep: *sectum ovile pro Hogastis annatis & juvenibus*. Fleta, lib. 2. c. 79.

Hogstine, (Sax.) Is he that comes guest-walk to an inn or house, and lies there the third night, after which he is accounted of that family. *Bract. lib. 3. See Third Night* *Atton* *biud*.

Hoggatus, Hoggaster, A sheep of the second year.

—*Agri primo computo postquam nati sunt agni vocantur secundo anno hoggatus*. Et conjuguntur mulieres cum mul-
tonibus, & burlandi cum burgardis. & femelle codd idem.

Regula computi domus de Parendon. MS.—*Censura* *ovet* *pascantur*, *scilicet* *multos cum mulionibus, matricibus cum matricibus, hogacii cum hogacis*. Cartular. Abbat. Glasston. MS. fo. 48. a. And indeed in many, especially the northern parts of England, sheep after they lose the name of lambs, are called *hogs*, as in Kent, says Cowell.

Hogthead, A vessel of wine, or oil, &c. containing in measure 63 gallons, half a pipe, and the fourth part of a ton. 1 R. 3. c. 13.

Hoggus, Hogetus, A hog or swine, beyond the growth of a pig.—*Porcelli primo computo postquam nati sunt vocantur, secundo computo hoggi vocantur*. *Regula Computi Domus de Parendon*. MS.—*Solvunt eodem die pro porco superannato unum denarium, & pro hoggeto Almodii anni unum obolum*. Cartular. Radinges. MS. fol. 271. a.

Hogs, The keeping of hogs in any city or market town is indictable as a publick nuisance. *Salk. 460. Black. Com. 4 V. 167*. Indeed we conceive the keeping hogs in any neighbourhood (if they stink much, so as to be troublesome) is indictable. See as to hogs and hogs flesh, *ut Cattle*, *Jewins*.

Hockday, Called otherwise *Hock Tuesday*, (*dis martis*, *quam quendam Pasche vocant*) Was a day so remarkable in ancient times, that rents were reserved payable thereon: and in the accounts of *Magdalen College* in Oxford, there is a yearly allowance *pro mulieribus hockantibus*, in some manors of theirs in *Hampshire*, where the men *back* the women on Monday, & *contra* on Tuesday; the meaning of it is, that on that day the women in marriage stop the ways with ropes, and pull passengers to them, desiring something to be laid out in pious uses. See *Hock-Tuesday-Money*.

Holbourn, St. *Andrew's* parish, *Holbourn* how to be assessed, 30 Geo. 2. c. 3. *stat. 72*.

Holdes, Bailiff of a town or city, from the Sax. *hold*, i. e. *summus praepositus*. Others are of opinion that it signifies a general; for *hold* in *Norman* doth also signify *summus imperator*. *Comitis Willelmi*, &c. *Assimilis capituli, & 15 milia theymse*, *holdis &c.* *et pene per quatuor milia theymse*. *Leges Alured. de Wergildis*.

Nothing else is a term, &c. Lands were devised to A. till such a time. Resolved, that if the heir at law, or he to whom or remainder, in case of lease or limitation of a life, enters upon A. or on him to whom the lands are devised or limited, and upon him, 'tis in the election of him to be expelled, either to bring the action and recover the mean profits which shall be produced parcel of the fine, or he may re-enter and hold over till he shall levy the entire fine, after abating the time of his expiration. But otherwise, if the expulsion was by a stranger, 4 Rep. 62. *Mort. 41* & *42* *Edw. Carbet's case*.

There is a difference between an *aleys* and a *statute-merchant*, for an *aleys* doth hold over, but upon a statute-merchant he doth not hold over, it is to have his charges and expenses paid and above the debt, &c. are not to be recovered upon the *aleys*. *Arg. 156. Mort. 80. Mort. 2 Rep. 67. b.* *Parson's case*.

The expression hath also another sense, i. e. Where a term is expired and premises are held by the tenant or person in possession, afterwards, against the will of the tenant, or person claiming the estate and possession, &c. *Stat. 4. c. 28*. In case any tenant for years,

or other person claiming under or by collusion with such tenant, shall wilfully hold over after the determination of such term, and demand made in writing for recovering possession of the premises, shall pay for the time he continues, at the rate of double the yearly value. See *Hent*.

Holm, (Sax. *holm*, *insula amica*) An isle or fenny ground, according to *Bede*; or a river island. And where any place is called by that name, or this syllable is joined with any other in the names of places, it signifies a place surrounded with water; as the *Flatbolms* and *Stepholms* in the *Severn* near *Bristol*: but if the situation of the place is not near the water; it may then signify a high place; *Holm* in *Saxon* being also a hill or cliff. — *Cum duobus Holmis in campis de Wedone*. *Mon. Angl. Tom. 2. pag. 262.*

Holt, (Sax.) A wood: wherefore the names of towns beginning or ending with *holt*, as *buckholt*, &c. denote that formerly there was great plenty of wood at those places.

Holy-days and fasting-days. Vide the Statutes, *West. 1. 3 Ed. 1. c. 51.—28 Ed. 3. c. 14.—2 & 3 Ed. 6. c. 19.—5 & 6 Ed. 6. c. 3.—*

Fairs and markets not to be kept on *Sundays* and principal festivals, except four *Sundays* in Autumn, 27 H. 6. c. 5. Shoemakers in *London* not to sell or sit on their goods on *Sundays*, &c. 4 Ed. 4. c. 7. 1 Jac. 1. c. 22. s. 29. Penalty of not resorting to church on *Sundays* and holy-days, 1 El. c. 2. s. 14. The fifth of *November* to be kept as a day of thanksgiving, 3 Jac. 1. c. 1. The punishment of using sports on the *Sundays*, 1 Car. 1. c. 1. Carriers, drovers, butchers or higlers, not to travel or expose meat on the *Sunday*, 3 Car. 1. c. 2. 20 Car. 2. c. 7. The 29th of *May* to be an anniversary thanksgiving, 12 Car. 2. c. 14. The 30th of *January* to be kept as an anniversary day of humiliation, 12 Car. 2. c. 39. s. 1. The 2d of *September* to be annually kept as a fast in *London*, 19 Car. 2. c. 3. s. 28. No wares to be exposed to sale on the *Sunday*, 29 Car. 2. c. 7. Except victuals in inns, &c. or milk, *ibid.* s. 3. or mackarel, 10 & 11 W. 3. c. 24. s. 14. Coachmen or chairmen may ply on the Lord's day, notwithstanding the 29 Car. 2. c. 7. 9 Ann. c. 23. s. 20. Persons not to travel in boats, &c. on the *Sunday*, 29 Car. 2. c. 7. s. 2. unless with a licence.

Whithead, Rock salt may be used in its salt-works, 6 Ann. c. 12. s. 1.

Homage, (*Homagium*) is a French word derived from *homo*, because when the tenant does his service to the Lord, he says, *I become your man*. Co. Lit. 64. In the original grants of lands and tenements by way of fee, the Lord did not only oblige his tenants to certain services; but also took a submission with promise and oath, to be true to him as their Lord and benefactor; and this submission, which is the most honourable, being from a freehold tenant, is called *homage*. Stat. 17 Ed. 2. The Lord of the fee for which *homage* is due, takes *homage* of every tenant, as he comes to the land or fee: but women perform not *homage* but by their husbands, as *homage* especially relates to service in war; and a corporation cannot do *homage*, which is personal, and they cannot appear but by attorney; also a bishop, or religious man, may not do *homage* only fealty; but the archbishop of *Canterbury* does *homage* on his knees to our King at their coronation; and it is said the bishop of the *Isle of Man* does *homage* to the Earl of *Derby*; the *Fulder* reconciles this, when he says that a religious man may do *homage*, but may not say to his Lord, *Ego sumus tuus vassor*, I become your man, because he has professed himself to be God's man, but he may say, *I do unto you homage, and to you shall be faithful and loyal*. *Britton*, cap. 68.

There is *homage* by liganee.

Homage by reason of tenure.

And, *homage* ancestral.

Homage by liganee is inherent and inseparable to every subject. *Homage* by tenure is a service made by tenants

to their Lords according to the statute; and *homage* ancestral is where a man and his ancestors have time out of mind held their land of the Lord by *homage*, and such service draws to it warranty from the Lord, and acquittal of all other services to other Lords, &c. *Bract. lib. 3. f. 14. c. 260. Lit. Sect. 3.* But according to Sir *Edw. Coke*, there must be a double prescription for *homage* ancestral, both in the blood of the Lord, and of the tenant; so that the same tenant, and his ancestors, whose heir he is, is to hold the same land of the same Lord and his ancestors, whose heir the Lord is, time out of memory, by *homage*, &c. and therefore there is but little land holden by *homage* ancestral. Co. L. 100. b. Tho' in the manor of *Whitney* in *Hertfordshire*, there was one *West* who holds lands by this tenure. *Homage* tenure is incident to a freehold, and none shall do or receive *homage*, but such as have estates in fee-simple, or fee-tail, in their own right or right of another. *Kitch. 131.* Seisin of *homage* is seisin of fealty, and inferior services, &c. And the Lord only shall take *homage*, and not the steward, whose power extends but to fealty. 4 Rep. 8. When a tenant makes his *homage* to the Lord, he is to be ungirt, and his head uncovered, and his Lord shall sit, and he shall kneel, and hold his hands together between his Lord's hands, and say, *I become your man from this day forward, for life, for member, and for worldly honour, and unto you shall be true and faithful, and bear you faith for the lands that I hold of you, (saying the faith that I owe to our Sovereign Lord the King.)* And the Lord so sitting shall kiss the tenant, &c. 17 Ed. 3. Litt. Sect. 85. See *Black. Com. 1. p. 357. 379. 2. p. 53, 91, 300. 4. p. 414.*

Homage jury, Is a jury in a *Cour-Bare*, consisting of tenants that do *homage* to the Lord of the fee; and these by the *Feudist*, are called *pari curia*: they enquire and make presentment of defaults and deaths of tenants, admittances, and surrenders, in the Lord's court, &c. *Kitch.*

Homager, Is one that does or is bound to do *homage* to another.

Homage respite, Was a writ to the escheator, commanding him to deliver seisin of lands to the heir of the King's tenant, notwithstanding his *homage* not done. *F. N. B. 269.* And the heir at full age was to do *homage* to the King, or agree with him for respiteing the same. *New Nat. Br. 162.*

Homagium redditum, To renounce *homage*, when the vassal made a solemn declaration of disowning and defying his lord, for which, there was a set form and method prescribed by the feudatary laws. — *Item reddere poterit domino suo homagium suum, simul cum tenemento, propter capitales inimicitias, ut liberius persequatur appellum suum, &c. sic dissolvitur homagium*. *Bracton, lib. 2. cap. 35. s. 35.* This is the meaning of that passage in *Richardus Hufildunus de Bellis Standard*, p. 321. *Itaque Re-fortius reddito homagio quod ei fecerat—ad suos socios revertitur &c.* And of *Matt. Paris* sub anno 1188. *tunc Rex Anglorum Regi Francorum fecit homagium, quia in principibus huius generis homagium suum reddiderat Regi Francorum*. *Concil. lib. 2. c. 27.*

Homocidus, **Homocidus**, or **Hamociden**, and **Hamocida**, (from the Sax. *homo* a man, *habitation*, and *foens*, *libertas immunitas*, &c. *Bracton, lib. 3. tract. 2. c. 23.* thus defined. *Homocidus dicitur invadere domum contra pacem Domini Regis, et in eadem facere in domo extra pacem Domini*. It appears by *Bracton*, that in ancient times some men had an immunity to do this. *Si quis hamociden violenter, iure Regium Regis emendat 5 libr. LL. Canuti, cap. 39.* *Hamociden est quis prior tenebit placita in curia sua de his qui in eadem domum vel curiam aliqujus ad liganam, vel servitium, vel quicquid apportandum, vel aliquid ad tenebatur, contra voluntatem illius qui debet domum servitium, &c. Reg. Priora de Cokerford*. See *Hamociden*.

Hamociden, Is also the privilege or freedom which every man hath in his house; and he who invades that freedom is properly said *facere hamociden*. This we take to be what we now call *burglary*, which is a crime of a very heinous nature, because 'tis not only a breach of the King's peace, but a breach of that liberty which a man hath in his

his house, which, (as we commonly say,) should be his castle, and therefore ought not to be invaded. *Bracton, lib. 3. tract. 2. cap. 23. Du Cange.*

It is also taken for an impunity to those who commit this crime, viz. *Homociden, hoc est, quietus esse de homicidii pro ingressu hospitii violento & sine licentia, & contra pacem Regis, & quod tentatis placita de hujusmodi transgressionibus in curia vestra.* W. Thorn. p. 2030.

Homestall, is taken for a mansion-house. *Vide Frumstol.*

Homicide, (*Homicidium*), is the killing of a man, and is divided into *voluntary* and *casual*: *Homicide voluntary* is that which is deliberate, and committed of a set purpose to kill; *casual* is done by chance, without any intention to kill. *Homicide voluntary* is either with precedent malice, or without. The former is murder, and is a felonious killing through malice prepensed of any person living in this realm, under the King's protection. *West. par. 2. Symbol. tit. Indictments, sect. 37. &c. usque 51.* where you may see divers subdivisions of this matter. See also *Glanvil, lib. 14. cap. 3. Bract. lib. 3. tract. 2. cap. 4. 15 & 17. Britton, cap. 5, 6, 7. Co. Litt. 3. c. 8.*

Offences against the life of a man come under the general name of homicide, which in our laws signifies the killing of a man, by a man. *1 Hawk. P. C. 66. Bracton, lib. 3. c. 4.*

Homicide, properly so called, is either against a man's own life, (called *self-murder*, or *felo de se*), or the life of another. *Homicide* against the life of another either amounts to felony, or does not. That which amounts not to felony, is either *justifiable*, and causes no forfeiture at all, or *excusable*, and causes the forfeiture of the party's goods. *1 Hawk. P. C. 67, 69.*

Under this head we shall treat,

1. Of *self-murder*, or *felo de se*.
2. Of *justifiable homicide*.
3. Of *excusable homicide*.
4. Of *manslaughter*.
5. Of *murder*.

1. Of *self-murder*, or *felo de se*.

In this, as well as all other felonies, the offender ought to be of the age of discretion, and *compos mentis*; and therefore, an infant killing himself under the age of discretion, or a lunatic during his lunacy, cannot be a *felo de se*. *1 Hawk. 67. Crom. 30. a. b. 31. a. H. P. C. 28. Dal. cap. 92. 3 Inst. 54.*

Our laws have always had such an abhorrence of this crime, that not only he who kills himself with a deliberate and direct purpose of so doing, but also in some cases he who maliciously attempts to kill another, and in pursuance of such an attempt unwillingly kills himself, shall be adjudged in the eye of the law a *felo de se*; for wherever death is caused by any act done with a murderous intent, it makes the offender a murderer. *1 Hawk. P. C. 68. cites Dal. cap. 92. 44 E. 3. 4. 45 E. 55. Bro. Car. 12, 14. Dal. cap. 92.*

Also vide *S. P. C. 16. H. P. C. 28, 29. Pul. 119. b. Crom. 28.*

He who kills another upon his desire or command, is in the judgment of the law as much a murderer, as if he had done it merely of his own head, and the person killed is not looked upon as a *felo de se*, inasmuch as his assent was merely void, being against the law of God and man. *1 Hawk. P. C. 68. cites Keilw. 136. Moor 754.*

As to what such an offender, viz. a *felo de se*, shall forfeit, it seems clear, that he shall forfeit all chattels real or personal which he hath in his own right, and also all chattels real whereof he is possessed either jointly with his wife, or in her right; and also all bonds and other personal things in action, belonging solely to himself; and also all personal things in action, and, as some say, entire chattels in possession to which he was intitled jointly with another, on any account except that of merchandise: But it is said, that he shall forfeit a moiety only of such joint chattels as may be severed, and nothing

at all of what he was possessed of as executor or administrator. *1 Hawk. P. C. 68. cites many authorities.*

However the blood of a *felo de se* is not corrupted, nor his lands of inheritance forfeited, nor his wife barred of her dower. *1 Hawk. P. C. 68. Plow. Com. 261. b. 262. a.*

Also not any part of the personal estate is vested in the King, before the self-murder is found by some inquiry; and consequently the forfeiture thereof is saved by a pardon of the offence before such finding. *1 Hawk. P. C. 68. 5 Co. 110. b. 3 Inst. 54. 1 Saund. 362. 1 Sid. 150, 162.* But if there be no such pardon, the whole is forfeited immediately after such inquiry, at the time such mortal wound was given, and all intermediate alienations are avoided. *1 Hawk. P. C. 68. Plow. Com. 260. H. P. C. 29. 5 Co. 110.* And such inquiries ought to be by the coroner *super visum corporis*, if the body can be found, and an inquiry so taken, as some say, cannot be traversed. *1 Hawk. P. C. 68. H. P. C. 29. 3 Inst. 55.*

But if the body cannot be found, so that the coroner, who has authority only *super visum corporis*, cannot proceed, the inquiry may be by justices of peace, (who by their commission have a general power to enquire of all felonies,) or in the King's Bench, if the felony were committed in the county where the said court sits; and such inquiries are traversable by the executor, &c. *1 Hawk. P. C. 69. 3 Inst. 55. H. P. C. 29. 2 Lev. 141.*

Also all inquiries of this offence being in the nature of indictments, ought particularly and certainly to set forth the circumstances of the fact; and in the conclusion add, that the party in such manner murdered himself. *1 Hawk. 69. 3 Lev. 140. 3 Mod. 100. 2 Lev. 152.* Yet if it be full in substance, the coroner may be served with a rule to amend a defect in form. *1 Hawk. 69. 1 Sid. 225, 259. 3 Mod. 101. 1 Keb. 907.*

By the rubrick in the Common Prayer, before the burial office, (confirmed by stat. 13 & 14 Car. 2. c. 4.) persons who have laid violent hands upon themselves, shall not have that office used at their interment.

2. Of *justifiable homicide*.

1. It must be owing to some unavoidable necessity, to which the person who kills another must be reduced, without any manner of fault in himself. *1 Hawk. 69.*

2. There must be no malice coloured under pretence of necessity, for wherever a person who kills another, acts in truth upon malice, and takes occasion from the appearance of necessity to execute his revenge, he is guilty of murder. *1 Hawk. P. C. 69. 2 Rol. Rep. 120, 121. Keilw. 28. H. P. C. 38. Bract. lib. 3. cap. 4.*

3. No one can plead a fact amounting to homicide *se defendendo*, or by misadventure, but in such a case the defendant must plead Not guilty, and give the special matter in evidence: And it is also agreed, that where a special fact, amounting to justifiable homicide, is found by the jury, the party is to be dismissed, without being obliged to purchase any pardon. &c. *1 Hawk. 69.*

Justifiable homicide is either of a *public* or *private* nature. That of a *public* nature is such as is occasioned by the due execution or advancement of public justice. That of a *private* nature is such as happens in the just defence of a man's person, house, or goods. *1 Hawk. P. C. 70.*

As to justifiable homicide in the due execution of public justice, the following rules must be observed.

1. The judgment, by virtue whereof any person is put to death, must be given by one who has jurisdiction in the cause; for otherwise both judge and officer may be guilty of felony. *1 Hawk. P. C. 70. Dal. cap. 98. 10 Co. 75. 22 Ed. 4. 33. a. H. P. C. 35.*

2. The judgment must be executed by the lawful officer. Indeed it was formerly held, that any one might as lawfully kill a person attainted of treason or felony, as a wolf or other wild beast; and anciently a person com-

demanded

condemned in appeal of death, was delivered to the relations of the deceased in order to be executed by them. 1 Hawk. 70. 1 Inst. 128. b. 2 Aff. pl. 3. S. P. C. 13. a. 11 H. 4. 12. a. Plow. Com. 306. b. 3 Inst. 131.

But at this day, as it seems agreed, if the judge, who gives the sentence of death, and, *a fortiori*, if any private person execute the same, or if the proper officer himself do without a lawful command, they are guilty of felony. 1 Hawk. 70. 27 Aff. 41. Bro. Appeal, 69.

The execution must be pursuant to, and warranted by the judgment, otherwise it is without authority; and consequently, if a sheriff behead a man where it is no part of the sentence to cut off the head, he is guilty of felony. 1 Hawk. 70. 35 H. 6. 57. b. Bro. Appeal, 5. S. P. C. 13. H. P. C. 36. 272.

Justifiable homicide in the due advancement of public justice, relates either to *criminal* or *civil* causes. As to the first, it may be justified in several cases; as if a person having actually committed felony will not suffer himself to be arrested, but stand on his own defence, or fly, so that he cannot possibly be apprehended alive by those who pursue, whether private persons or public officers, with or without a warrant from a magistrate, he may be lawfully slain by them. 1 Hawk. P. C. 70. 22 Aff. 55. Bro. Cor. 87, 89. S. P. C. 13. 3 Inst. 221. Dalt. cap. 98. H. P. C. 36. Crom. 30.

If trespassers in a forest, chase, park or warren, or any inclosed ground wherein deer are kept, will not render themselves to the keepers, upon hue and cry made to stand to the King's peace, and fly from, or defend themselves against them, they may be slain by force of the statute *de malefactoribus in parcis*, and 4 Will. 4 Mar. cap. 10. 1 Hawk. 71. S. P. C. 13. b. Crom. 30. b. Dyer 326. pl. 3.

Homicide in the advancement of justice in *civil* causes may also be justified in some cases: As where a sheriff, &c. attempting to make a lawful arrest in a *civil* action, or to retake one who has been arrested and made his escape, is resisted by the party, and unavoidably kills him in the affray. 1 Hawk. P. C. 71. 1 Roll. Rep. 189. H. P. C. 37. 3 Inst. 56. Crom. 24. a. Dalt. cap. 98. And in such case the officer is not bound to give back, but may stand his ground and attack the party. 1 Hawk. P. C. 71. H. P. C. 31.

But no private person of his own authority can arrest a man for a *civil* matter, as he may for felony, &c. 1 Hawk. 71. Crom. 30. b. Neither can the sheriff himself lawfully kill those who barely fly from the execution of any civil process. 1 Hawk. 71. H. P. C. 37.

As to justifiable homicide of a *private* nature, in the just defence of a man's person, house or goods, it may happen either by the killing of a *wrong-doer*, or an *innocent* person in the making of such defence. And first, the killing of a wrong-doer in the making of such defence, may be justified in many cases; as where a man kills one who assaults him in the highway to rob or murder him; or the owner of a house, or any of his servants, or lodgers, &c. kill one who attempts to burn it, or to commit therein murder, robbery, or other felony; or a woman kills one who attempts to ravish her; or a servant coming suddenly and finding his master robbed and slain, falls upon the murderer immediately and kills him; for he does it in the height of his surprise, and under just apprehensions of the like attempt upon himself; but in other circumstances, he could not have justified the killing of such an one, but ought to have apprehended him, &c. 1 Hawk. P. C. 71, 72. 24 H. 8. cap. 5. Dalt. cap. 98.

Neither shall a man in any case justify the killing another by a pretence of necessity, unless he were himself wholly without fault in bringing that necessity upon himself; for if a man, in defence of an injury done by himself, kill any person whatsoever, he is guilty of manslaughter at least; as where divers rioters wrongfully detain a house by force, and kill those who attack it from without, and endeavour to burn it. 1 Hawk. 72. Crom. 37. b. H. P. C. 56.

Neither can a man justify the killing another in defence of his house or goods, or even of his person, from a bare private trespass; and therefore he that kills another, who claiming a title to his house, attempts to enter it by force and shoots at it, (see *post* Div. 5.) or that breaks open his windows in order to arrest him, or that persists in breaking his hedges after he is forbidden, is guilty of manslaughter; and he who in his own defence kills another that assaults him in his house in the day-time, and plainly appears to intend to beat him only, he is guilty of homicide *se defendendo*, for which he forfeits his goods, but is pardoned of course; yet it seems, that a private person, and, *a fortiori*, an officer of justice, who happens unavoidably to kill another endeavouring to defend himself from, or suppress dangerous rioters, may justify the fact, inasmuch as he only does his duty in aid of the public justice. 1 Hawk. 72. H. P. C. 40, 57. Cro. Car. 538. Dalt. cap. 98.

According to the opinion of Mr. Serjeant Hawkins (which we conceive is law) A person, who without provocation is assaulted by another in any place whatsoever, in such a manner as plainly shews an intent to murder him, as by discharging a pistol, or pushing at him with a drawn sword, &c. may justify killing such an assailant, as much as if he had attempted to rob him. 1 Hawk. 72. N. Bendlo 47. 1 And. 41. Crom. 27. b. 28. b. Dalt. cap. 98. S. P. C. 15. a. 3 Inst. 57. Bacon 33. Dalt. 98. For other cases, vide 1 Hawk. 73. Cro. Car. 338. March 5.

3. Of excusable homicide.

Excusable homicide is either *per infortunium*, or *se defendendo*. Homicide *per infortunium*, or by misadventure, is where a man in doing a lawful act, without any intent of hurt, unfortunately chances to kill another; as, where a labourer being at work with a hatchet, the head thereof flies off, and kills one who stands by. 1 Hawk. P. C. 73. 6 Ed. 4. 7. b. Bro. Coro. 59, 148.

Where a third person whips a horse on which a man is riding, whereupon he springs out, and runs over a child and kills him; in which case the rider is guilty of homicide *per infortunium*, and he who gave the blow, of manslaughter. 1 Hawk. 73. H. P. C. 58, 59.

Where a workman, having first given loud and timely warning to all persons to stand clear, flings down a piece of timber from a private house standing out of the road, and thereby kills one who happens to be underneath: But if any person fling down such a piece of timber idly in play, or even a workman fling it down in the streets of a town, where the danger is apparent in respect of the number of people continually passing by, he is guilty of manslaughter. 1 Hawk. 73. Kelynge 40. Bracl. lib. 3. c. 4. Dalt. cap. 96. H. P. C. 31. Bro. Coro. 229.

Where workmen throw stones, rubbish, or other things, from an house, in the ordinary course of their business, by which a person underneath happens to be killed; if they look out and give timely warning to those below, it will be homicide by misadventure; if without such caution, it will amount to manslaughter at least; it was a lawful act, but done in an improper manner. It is said by some, that if this be done in the streets of London, or other populous towns, it will be manslaughter notwithstanding the caution abovementioned.

But this will admit of some limitation; if it be done early in the morning, when few or no people are stirring, and the ordinary caution is used, it seemeth that the party is excusable. But when the streets are full, that will not suffice; for in the hurry and noise of a crowded street, few people hear the warning, or sufficiently attend to it. Foster's Crown Law 262, 263.

Where a schoolmaster in correcting his scholar, or a father his son, or a master his servant, or an officer in whipping a criminal condemned to such punishment, happens to occasion his death; yet if such persons in their correction, be so barbarous as to exceed all bounds of moderation, and thereby cause the party's death, they are guilty of manslaughter at the least; and if they make use of an instrument improper for correction, and apparently

indangering the party's life, as an iron bar, or sword &c. or kick him to the ground, and then stamp on his belly and kill him, they are guilty of murder. 1 Hawk. 73. 74. Bratt. lib. 1. cap. 4. H. P. C. 31. Crom. 28. b. Dalt. cap. 96. Keilw. 136. Kelynge 65. See 5 Mod. 287, 288, &c.

Where one lawfully using an innocent diversion, as shooting at butts, or at a bird, &c. by the glancing of an arrow, or such-like accident, kills another. 1 Hawk. 74. Keilw. 108. Bro. Cor. 148. See Kelynge 41.

Where a person happens to kill another in playing a match of foot-ball, wrestling, or such like sports which are attended with no apparent danger of life, and intending only for the trial, exercise and improvement of the strength, courage and activity of the parties. 1 Hawk. 74. Keilw. 108, 136. Crom. 29. a. 11 H. 7. 23. a.

Where one kills another in fighting at barriers or tilting by the King's command, which by the better opinion secures him from being guilty of felony by reason of any such unfortunate accident. 1 Hawk. P. C. 74. 11 H. 7. 23. a. 3 Inst. 160. Keilw. 108, 136.

But if a person kill another by shooting at a deer, &c. in a third person's park, in the doing whereof he is a trespasser; or by shooting of a gun, or throwing stones in a city or highway, or other place where men usually resort, by throwing stones at another wantonly in play, which is a dangerous sport, and has not the least appearance of any good intent; or by doing any other such idle action as cannot but endanger the bodily hurt of some one or other; or by titling or playing at hand-sword without the King's command; or by parrying with naked swords, covered with buttons at the points, or with swords in the scabbards, or such like rash sports, which cannot be used without the manifest hazard of life, he is guilty of manslaughter. 1 Hawk. 74. H. P. C. 31, 32, 58. Con. Hob. 134.

And if a man happen to kill another in the execution of a malicious and deliberate purpose to do him a personal hurt, by wounding or beating him; or in the wilful commission of any unlawful act, which necessarily tends to raise tumults and quarrels, and consequently cannot but be attended with the danger of personal hurt to some one or other; as by committing a riot, robbing a park, &c. he shall be adjudged guilty of murder. 1 Hawk. P. C. 74. H. P. C. 52, 57. Kelynge 117.

And *a fortiori*, he shall come under the same construction, who in the pursuance of a deliberate intention to commit a felony, chances to kill a man, as by shooting at tame fowl with an intent to steal them, &c. for such persons are by no means favoured, and they must at their peril take care of the consequence of their actions; and it is a general rule, that wherever a man intending to commit one felony, happens to commit another, he is as much guilty as if he had intended the felony which he actually commits. 1 Hawk. P. C. 74. 3 Inst. 56. Kelynge 117. H. P. C. 52.

If any one shoot at any wild fowl upon a tree, and the arrow killeth any reasonable creature afar off, without any evil intent in him, this is by misadventure; for it was not unlawful to shoot at the wild fowl: But if he had shot at a cock or a hen, or any tame fowl of another man's, and the arrow by mischance had killed a man; if his intention was to steal the poultry (which must be collected from circumstances,) it will be murder by reason of that felonious intent; but if it was done wantonly, and without that intention, it will be barely manslaughter. Foss. 258, 9.

The rule before laid down supposeth, that the act from which death ensued, was *malum in se*. For if it was barely *malum prohibitum*, as shooting at game by a person not qualified by statute-law to keep or use a gun for that purpose; the case of a person offending, will fall under the same rule as that of a qualified man. For the statutes prohibiting the destruction of the game under certain penalties, will not in a question of this kind enhance the accident beyond its intrinsic moment. Foss. 259.

Neither shall he be adjudged guilty of a less crime who kills another, in doing such a wilful act as shews him to

be as dangerous as a wild beast, and an enemy to mankind in general; as by going deliberately with a horse used to strike, or discharging a gun among a multitude of people, or throwing a great stone or a piece of timber from a house into a street, through which he knows that many are passing; and it is no excuse that he intended no harm to any one in particular, or that he meant to do it only for sport, or to frighten the people, &c. 1 Hawk. P. C. 74. H. P. C. 32, 44. 3 Inst. 57. Dalt. cap. 93, 97. 11 H. 7. 23. a. Bro. Cor. 229.

Homicide, *se defendendo*, or by self-defence, seems to be where one who has no other possible means for preserving his life from one who combats with him on a sudden quarrel, or of defending his person from some who attempts to beat him, (especially if such attempt be upon him in his own house,) kills the person by whom he is reduced to such an inevitable necessity. 1 Hawk. P. C. 74, 75. H. P. C. 40. S. P. C. 15.

And not only he who on an assault retreats to a wall, or some such streight, beyond which he can go no further before he kills the other, is adjudged by the law to act upon unavoidable necessity: But also he who being assaulted in such a manner, and in such a place, that he cannot go back without manifestly endangering his life, kills the other without retreating at all. 1 Hawk. 75. Bro. Cor. 125. 43 Aff. 31. 3 Inst. 56. H. P. C. 41.

And notwithstanding a person, who retreats from an assault to the wall, give the other divers wounds in his retreat, yet if he give him no mortal one till he get thither, and then kill him, he is guilty of homicide *se defendendo* only. 1 Hawk. 75. H. P. C. 41. Crom. 28. S. P. C. 15. a.

And an officer who kills one that resists him in the execution of his office, and even a private person that kills one who feloniously assaults him in the highway, may justify the fact without ever giving back at all.

Hawk. P. C. 75. H. P. C. 41. 3 Inst. 56. Crom. 28. a.

According to some good opinions, even he who gives another the first blow on a sudden quarrel, if he afterwards do what he can to avoid killing him, is not guilty of felony; yet such a person seems to be too much favoured by this opinion, inasmuch as the necessity to which he is at last reduced, was at the first owing to his own fault. And it is now agreed, that if a man strike another upon *malice prepense*, and then fly to the wall, and there kill him in his own defence, he is guilty of murder. 1 Hawk. P. C. 75. S. P. C. 15. a. Crom. 28. a. Dalt. cap. 98. Kelynge 58. H. P. C. 42.

It seems clear, that neither of these homicides (except as aforesaid) are felonies, because they are not accompanied with a felonious intent, which is necessary in every felony. 1 Hawk. 75. 3 Inst. 56. 2 Inst. 149.

And from hence it seems plainly to follow, that they were never punishable with loss of life: And the same also farther appears from the writ *De odio & atia*, by virtue whereof, if any person committed for killing another, were found guilty of either of these homicides, and no other crime, he might be bailed; and indeed it seems to be against natural justice to condemn a man to death, for what is owing rather to his misfortune than his fault. 1 Hawk. 75.

It is true indeed, that some of our best authors have argued from the statute of Marlbridge, Ch. 26. which enacts, that *murdrum de cætero non adjudicetur, ubi infatum tantummodo adjudicatum est*, &c. That before this statute homicides by misadventure, or *se defendendo*, were adjudged murder, and consequently punished by death. 1 Hawk. 75. 2 Inst. 56. S. P. C. 16.

But to this it may be answered, that murder in those days signified only the private killing of a man, by one who was neither seen nor heard by any witness, for which the offender, if found, was to be tried by ordeal, and if he could not be found, the jury in which the fact was done, was to be amerced sixty-six marks, unless it could be proved that the person killed was an Englishman: otherwise it was presumed he was a Dane or Norman, who in those days were often privately made away

away by the *English*. And it being a doubt whether homicide by misadventure, &c. were to be esteemed murder in this sense, it seems to have been the chief intent of the makers of this statute to settle this question. 1 Hawk. 75. Brañ. 134. b. 135. a. Kelynge 121.

However it is certain, that notwithstanding neither of these offences be felonies, yet a person guilty of them is not bailable by *justices of peace*, but must be committed till the next coming of the justices of eyre or gaol-delivery. 1 Hawk. 76. H. P. C. 98, 99. 2 Inst. 315. L. cap. 98.

Indeed anciently a person committed for the death of a man, might sue out the writ *De odio & atia*, which by *Magna Charta* 16. is grantable without fee; and if thereon, by an inquest taken by the sheriff, he were found to have done the fact by misadventure, or *se defendendo*, he might be mainprized by twelve men, upon the writ *De povenendo in ballium*. But such writs and enquiries were taken away by the statute of Gloucester, 9 and 28 Ed. 3. 9. and though perhaps they were again revived by 42 Ed. 3. 1. which makes all statutes contrary to *Magna Charta* void; yet at this day they seem to be obsolete, and indeed useless, inasmuch as the party may probably be sooner delivered in the usual course, by the coming of the justices of gaol-delivery. 1 Hawk. 76. S. P. C. 77. g. 2 Inst. 43, 315. 9 Co. 56. Co. Bail and Mainprize, c. 10.

It is also agreed, that no one can excuse the killing another, by setting forth in a special plea, that he did it by misadventure, or *se defendendo*, but that he must plead Not guilty, and give the special matter in evidence. And that wherever a person is found guilty of such homicide, either by a special indictment for the same, or by a verdict setting forth the circumstances of the case on a general indictment of murder or homicide, he shall be discharged out of prison upon bail, and forfeit his goods: But that upon removing the record by *certiorari* into Chancery, he shall have his pardon of course, without staying for any warrant from the King to that purpose. 1 Hawk. 76. 4 H. 7. 2. a. Keilw. 53. a. 108. b. 2 Inst. 316. S. P. C. 15. b. 16. b. Dalt. cap. 96, 98. F. N. B. 246. C. H.

4. Of manslaughter.

Homicide against the life of another, amounting to felony, is either *with* or *without* malice; that which is without malice is called manslaughter, or sometimes chance-medley, by which we understand such killing as happens either on a sudden quarrel, or in the commission of an unlawful act, without any deliberate intention of doing any mischief at all. 1 Hawk. 76. 3 Inst. 55, 57. Dalt. cap. 94. H. P. C. 56, 57.

And from hence it follows, that there can be no accessories to this offence before the fact, because it must be done without premeditation. 1 Hawk. P. C. 76. H. P. C. 217. See division Murder.

There is a particular kind of manslaughter proper to be considered here, from which the benefit of the clergy is taken away by 1 Jac. 1. c. 8. "Where any person shall stab or thrust any person or persons that hath not then any weapon drawn, or that hath not then first stricken, the party which shall so stab or thrust, so as the person or persons so stabbed or thrust, shall thereof die within the space of six months then next following, although it cannot be proved that the same was done of malice forethought."

It is generally holden, that this statute is but declarative of the Common law, and in the construction thereof, the following points have been resolved. 1 Hawk. 77. 1 Bull. 87. Kelynge 55.

1. That wherever a person who happens to kill another, was struck by him in the quarrel before he gave the mortal wound, he is out of the statute, though he himself gave the first blow. 1 Hawk. 77. 1 Jon. 240. See 3 Lev. 266.

2. That he who actually gives the stroke, and not any of those who may be said to do it by construction of law, being present, and aiding and abetting the fact,

are within the statute; from whence it follows, That if it cannot be proved by whom the stroke was given, none can be found guilty within the statute. 1 Hawk. 77. H. P. C. 58. Allyn 44.

3. That the killing of a man with a hammer, or such like instrument, which cannot come properly under the words *thrust* or *stab*, is not a killing within the statute; but it seems that the discharging a pistol, or throwing a pot, or other dangerous weapon at the party, is within the equity of the words, *having a weapon drawn*; for penal statutes are construed strictly against the subject, and favourably and equitably for him. 1 Hawk. 77. 1 Jones 432. 3 Lev. 266.

4. That there is no need to lay the conclusion of the indictment *contra formam statuti*, because the statute makes no new offence, but only takes away the privilege of the clergy from an old one, and leaves it to the judgment of the Common law; from whence it follows, that a person indicted on the statute, may be found guilty of manslaughter generally. Also from the same ground it hath been resolved, That if an indictment lay, and a verdict also find, a fact to be *contra formam statuti*, which cannot possibly be so, as if *A.* and *B.* aided and abetted *C.* *contra formam statuti*, yet neither such indictment nor verdict are void, but *A.* and *B.* shall be dealt with in the same manner as they should have been, if these words *contra formam statuti* had been wholly omitted, because the substance of the indictment being found, they may be rejected as senseless and surplus: And, *a fortiori*, therefore it is certain, that they shall do no hurt to an indictment or verdict containing a fact which may be within the statute. 1 Hawk. 77. H. P. C. 58, 266. Allen 47. Cro. Jac. 283.

5. That as these words, *contra formam statuti*, do not vitiate an indictment which would be good without them; so also, they will not supply a defect in a vitious one, which does not specially pursue the statute. 1 Hawk. 77. H. P. C. 58.

5. Of murder.

Homicide against the life of another, amounting to felony with malice, is either murder or petit treason. And first of murder, which anciently signified only the private killing of a man, for which, by force of a law introduced by King Canutus for the preservation of his *Dans*, the town or hundred where the fact was done, was to be amerced to the King, unless they could prove that the person slain were an *Englishman*, (which proof was called *Engleschire*), or could procure the offender, &c. And in those days, the open wilful killing of a man through anger or malice, &c. was not called murder, but voluntary homicide. 1 Hawk. 78. Brañ. 134. b. 135. a. Kelynge 121, &c. Brañ. 121. a.

But the law concerning *Engleschire* having been abolished by 14 Ed. 3. 4. the killing of an *Englishman* or foreigner through malice prepened, whether committed openly or secretly, was by degrees called murder; and 13 Ric. 2. 1. which restrains the King's pardon in certain cases, does in the preamble, under the general name of murder, include all such homicide as shall not be pardoned without special words; and in the body of the act expresses the same by murder, or killing by await, assault, or malice prepened. And doubtless the makers of 25 H. 8. cap. 1. which excluded all wilful murder of malice prepened from the benefit of the clergy, intended to include open, as well as private, homicide within the word murder. 1 Hawk. 78. S. P. C. 18. b. 19. a.

By murder therefore at this day we understand, the wilful killing of any subject whatsoever, through malice forethought, whether the person slain be an *Englishman* or foreigner. 1 Hawk. 78.

Not only he who by a wound or blow, or by poisoning, strangling or famishing, &c. directly causes another's death, but also in many cases, he who by wilfully and deliberately doing a thing which apparently endangers another's life, and thereby occasions his death, shall be adjudged to kill him. 1 Hawk. 78. 3 Inst. 48. H. P. C. 53. Palm. 548. Vide examples in 1 Hawk. 78,

78, 79. *Crom.* 24. *b.* *Pult.* 122. *a.* *b.* *Dalt.* cap. 93.

And in some cases a man shall be said, in the judgment of the law, to kill one who is in truth actually killed by another, or by himself; as where one by duress of imprisonment compels a man to accuse an innocent person, who on his evidence is condemn'd and executed; or where one incites a madman to kill himself or another; or where one lays poison with an intent to kill one man, which was afterwards accidentally taken by another, who dies thereof. 1 *Haw.* P. C. 79. *S. P. C.* 36. 3 *Inst.* 91. *Dalt.* cap. 93. 1 *Haw.* ch. 1. f. 7. *Ploq.* Com. 474.

Also he who wilfully neglects to prevent a mischief, which he may, and ought to provide against is, as some have said, in judgment of the law, the actual cause of the damage which ensues; and therefore if a man have an ox or horse, which he knows to be mischievous, by being used to gore or strike at those who came near them, and do not tie them up, but leave them to their liberty, and they afterwards kill a man, according to some opinions, the owner may be indicted, as having himself killed him; and this is agreeable to the Mosaic law. However, as it is agreed by all, such a person is guilty of a very gross misdemeanor. 1 *Haw.* 79. *Fitz. Corone* 311. *S. P. C.* 17. *a.* *Crom.* 24. *b.* *Dalt.* cap. 93. *Pult.* 122. *b.* *H. P. C.* 53. *Exodus.* c. 2. v. 29.

Also it is agreed, That no person shall be adjudged by any act whatever to kill another, who doth not die thereof within a year and a day after; in the computation whereof, the whole day on which the hurt was done shall be reckoned the first. 1 *Haw.* P. C. 79. *H. P. C.* 55. *Pult.* 123. *a.* *Dalt.* cap. 93. *S. P. C.* 21. *d.*

But if a person hurt by another die thereof within a year and a day, it is no excuse for the other, that he might have recovered, if he had not neglected to take care of himself. 1 *Haw.* 79. 3 *Inst.* 53. *Kelynge* 26, 1 *Keb.* 17.

As to the place where such killing is within the consequence of the law, it seems that the killing of one who is both wounded and dies out of the realm, or wounded out of the realm and dies here, cannot be determined at Common law, because it cannot be tried by a jury of the neighbourhood where the fact was done. But it is agreed, that the death of one who is both wounded and dies beyond sea, and it is said by some, that the death of him who dies here of a wound given there, may be heard and determined before the constable and marshal, according to the Civil law, if the King please to appoint a constable. And it seemeth also to be clear, that such a fact being examined by the privy council, may by force of 33 *H. 8.* cap. 23. be tried (in relation to the principal offenders, but not as to the accessaries,) before commissioners appointed by the King, in any county of England. 1 *Haw.* 79. 3 *Inst.* 48. 2 *Inst.* 51. *Co. Lit.* 75. *S. P. C.* 65. *a.* *Bro. Appeal* 153. *Cro. Car.* 247. 1 *And.* 195.

A murder at sea was anciently cognizable only by the Civil law, but now by force of 27 *H. 8.* 4. and 28 *H. 8.* 15. it may be tried and determined before the King's Commissioners in any county of England, according to the course of the Common law; yet the killing of one who is at land of a wound received at sea, is neither determinable at Common law, nor by force of either of these statutes: but it seems, that it may be tried by the constable and marshal, or before the commissioners appointed in pursuance of the aforesaid statute of 33 *H. 8.* 23. 1 *Haw.* 79. 3 *Inst.* 48, 49. 1 *Leon.* 270. *H. P. C.* 54. 3 *Inst.* 48. But now see 2 *Geo. 2.* c. 21. *Post.*

And it is said by some, that the death of one who died in one county, of a wound given in another, is not indictable at all at Common law, because the offence was not complete in either county, and the jury could enquire only of what happened in their own county. But it hath been holden by others, That if the corps were carried into the county where the stroke was given, the whole might be enquired of by a jury of the same county. And it is agreed, that an appeal might be brought in either county, and the fact tried by a jury returned jointly from each. And at this day, by force of 2 & 3 *Ed. 6.* 24. the whole is triable by a jury of the county wherein the death shall

happen, on an indictment found, or appeal brought, in the same county. 1 *Haw.* 79, 80. 3 *Inst.* 48, 49. *Bro. Cor.* 140, 141, 143. *Indictm.* 13. *S. P. C.* 90. c. 6 *H. 7.* 10. *a.* *Finch Law* 411. *S. P. C.* 182. *Bro. Appeal* 3, 80, 83, 85. 149.

Also by force of 26 *H. 8.* cap. 6. a murder in Wales may be enquired of in an adjoining English county, but appeals must still be brought in the proper county. 1 *Haw.* 80. *Cro. Car.* 247. 1 *Jen.* 255. 1 *Lev.* 118. *Latch* 12, 118.

It is agreed, That the malicious killing of any person, whatsoever nation or religion he be of, or of whatever crime attainted, is murder. 1 *Haw.* 80. 3 *Inst.* 50.

And it was anciently holden, That the causing of an abortion by giving a potion to, or striking a woman big with child, was murder: but at this day, it is said to be a great misprision only, and not murder, unless the child be born alive, and die thereof, in which case it seems clearly to be murder, notwithstanding some opinions to the contrary. And in this respect also, the Common law seems to be agreeable to the Mosaic law, which is as to the purpose thus expressed; "If men strive and hurt a woman with child, so that her fruit depart from her, and yet no mischief follow, he shall be surely punished, according as the woman's husband will lay upon him, and he shall pay as the judges determine; and if any mischief follow, then those shall give life for life." 1 *Haw.* 80. *Brass.* 121. *S. P. C.* 21. *Bro. Cor.* 91. *H. P. C.* 53. 3 *Inst.* 5. 3 *Aff.* 2. *Bro. Cor.* 68. *Dalt.* cap. 93. *Exodus.* cap. 21. v. 22, 23.

It seems also agreed, that where one counsels a woman to kill her child when it shall be born, who afterwards kills it in pursuance of such advice, he is an accessory to the murder. 1 *Haw.* 80. *Dyer* 186. 3 *Inst.* 51.

As to what killing shall be adjudged of malice prepense or murder; it is to be observed, that any former design of doing mischief may be called malice; and therefore that not such killing only as proceeds from premeditated hatred or revenge against the person killed, but also in many other cases, such as is accompanied with those circumstances that shew the heart to be perversely wicked, is adjudged to be of malice prepense or aforesaid, and consequently murder. 1 *Haw.* 80. *Kelynge* 127. *Stran.* 766.

And according to this notion, it is thought proper to consider, 1. Such murder as is occasioned through any express purpose to do some personal injury to him who is slain in particular; which seems to be most properly called express malice. 2dly, Such as happens in the execution of an unlawful action, principally intended for some other purpose, and not to do a personal injury to him in particular who is slain, in which case the malice seems to be most properly said to be implied. 1 *Haw.* 80. *Kelynge* 129, 130.

As to murder in the first sense, such acts as shew a direct and deliberate intent to kill another, as poisoning, stabbing, and such like, are so clearly murder, that there are not any questions relating thereto worth explaining: but the cases which have borne disputes, have generally happened in the following instances. 1st, In duelling. 2dly, In killing another without any provocation, or but upon a slight one. 3dly, In killing one whom the person killing pretended to hurt in a less degree. 1 *Haw.* 80.

As to the first instance of this kind, it seems agreed, that wherever two persons in cool blood meet and fight on a precedent quarrel, and one of them is killed, the other is guilty of murder, and cannot help himself by alledging that he was first struck by the deceased; or that he had often declined to meet him, and was prevailed upon to do it by his importunity; or that it was his only intent to vindicate his reputation; or that he meant not to kill, but only to disarm his adversary: For since he deliberately engaged in an act highly unlawful in defiance of the laws, he must at his peril abide the consequences thereof. 1 *Haw.* 80, 81. 1 *Bull.* 86, 87. 2 *Bull.* 147. *Crom.* 22. *b.* 1 *Rel. Rep.* 360. 3 *Bull.* 174. *H. P. C.* 48.

From hence it clearly follows, that if two persons quarrel over night, and appoint to fight the next day; or quarrel in the morning, and agree to fight in the afternoon,

afternoon, or such a considerable time after, by which, in common intendment, it must be presumed that the blood was cooled, and then they meet and fight, and one kill the other, he is guilty of murder. 1 Hawk. 81. 3 Inst. 51. H. P. C. 48. Kelynge 56. 1 Lev. 180.

And wherever it appears from the whole circumstances of the case, that he who kills another on a sudden quarrel was master of his temper at the time, he is guilty of murder; as if after the quarrel he fall into other discourse, and talk calmly thereon; or perhaps if he has so much consideration as to say, that the place wherein the quarrel happens, is not convenient for fighting; or that if he should fight at present, he should have the disadvantage by reason of the height of his shoes, &c. 1 Hawk. 81. Kelynge 56. 1 Sid. 177. 1 Lev. 180.

If A. on a quarrel with B. tell him that he will not strike him, but that he will give B. a pot of ale to drink him, and thereupon B. strike, and A. kill him, he is guilty of murder; for he shall not elude the justice of the law by such pretence to cover his malice. 1 Hawk. 81. H. P. C. 48.

In like manner, if B. challenge A. and A. refuse to meet him; but in order to evade the law, tells B. that he shall go the next day to such a town about his business, and accordingly B. meet him the next day in the road to the same town, and assault him, whereupon they fight, and A. kills B. he is, in the opinion of Hawkins, guilty of murder, unless it appear by the whole circumstances that he gave B. such information accidentally, and not with a design to give him an opportunity of fighting. 1 Hawk. 81. Cræ. Crim. 22. b. H. P. C. 48.

And at this day it seems to be settled, That if a man assault another with malice prepense, and after be driven by him to the wall, and kill him there in his own defence, he is guilty of murder in respect of his first intent. 1 Hawk. 81. Crim. 22. b. Dalt. cap. 93. H. P. C. 47. Kelynge 58. Mawbridge's case.

And it hath been adjudged, that even upon a sudden quarrel, if a man be so far provoked by any bare words, or gestures of another, as to make a push at him with a sword, or to strike at him with any other such weapon as manifestly endangers his life, before the other's sword is drawn, and thereupon a fight ensue, and he who made such assault kill the other, he is guilty of murder; because that by assaulting the other in such an outrageous manner, without giving him an opportunity to defend himself, he shewed that he intended not to fight with him, but to kill him; which violent revenge is no more excused by such a slight provocation, than if there had been none at all. 1 Hawk. 81. Crim. 23. a. b. Dalt. cap. 93. Kelynge 61. Mawbridge's case.

But it is said, that if he who draws upon another in a sudden quarrel, make no push at him, till his sword is drawn, and then fight with him, he is guilty of manslaughter only, because that by neglecting the opportunity of killing the other, he was on his guard, and in a condition to defend himself, with like hazard to both; he shewed that his intent was not so much to kill, as to combat with the other, in compliance with those common notions of honour, which prevailing over reason, during the time that a man is under the transports of a sudden passion, so far mitigate his offence in fighting, that it shall not be adjudged to be of malice prepense. 1 Hawk. 81, 82. Kelynge 55, 61, 131. 2 Rol. Rep. 401.

And if two happen to fall out upon a sudden, and presently agree to fight, and each of them fetch a weapon, and go into the field, and there one kill the other, he is guilty of manslaughter only; because he did it in the heat of blood. 1 Hawk. 82. H. P. C. 48. 3 Inst. 51.

And such an indulgence is shewn to the frailties of human nature, that where two persons who have formerly fought on malice, are afterwards to all appearance reconciled, and fight again on a fresh quarrel, it shall not be presumed that they were moved by the old grudge, unless it appear by the whole circumstances of the fact. 1 Hawk. 82. Crim. 23. a. Dalt. cap. 93. H. P. C. 49. 2 Rol. Rep. 300.

But the law so far abhors all duelling in cold blood, that not only the principal who actually kills the other, but also his seconds are guilty of murder, whether they fought or not; and some have gone so far as to hold, that the seconds of the person killed are also equally guilty, in respect of that countenance which they give to their principals in the execution of their purpose, by accompanying them therein, and being ready to bear a part with them: but perhaps the contrary opinion is the more plausible; for it seems too severe a construction to make a man by such reasoning the murderer of his friend, to whom he was so far from intending any mischief, that he was ready to hazard his own life in his quarrel. 1 Hawk. 82. H. P. C. 51. Dalt. cap. 93.

As to the second instance of this kind, viz. such murder as happens in killing another without any provocation, or but upon a slight one; it is to be observed, that wherever it appears that a man killed another, it shall be intended *prima facie* that he did it maliciously, unless he can make out the contrary, by shewing that he did it on a sudden provocation, &c. 1 Hawk. 82. Kelynge 27.

Also it seems to be agreed, that no breach of a man's word or promise, no trespass either to lands or goods, no affront by bare words or gestures, however false or malicious it may be, and aggravated with the most provoking circumstances, will excuse him from being guilty of murder, who is so far transported thereby, as immediately to attack the person who offends him, in such a manner as manifestly endangers his life, without giving him time to put himself upon his guard, if he kills him in pursuance of such assault, whether the person slain did at all fight in his defence or not; for so base and cruel a revenge cannot have too severe a construction. 1 Hawk. 82. Kelynge 135. 2 Rol. Rep. 460, 461. Kelynge 131. 3 Co. Dalt. cap. 93. Cræ. Crim. 779. Nov. 1744. 1 Sid. 277. 1 Levins. 180. Hob. 121. Con. 1 Jan. 432. a.

But if a person so provoked had beaten the other only in such a manner, that it might plainly appear that he meant not to kill, but only chastise him; or if he had restrained himself till the other had put himself on his guard, and then in fighting with him had killed him, he had been guilty of manslaughter only. 1 Hawk. 82. Kelynge 55, 61, 131.

And of the like offence shall he be adjudged guilty, who seeing two persons fighting together on a private quarrel, whether sudden or malicious, takes part with one of them, and kills the other. 1 Hawk. 82. Kelynge 61, 135. Cræ. Jac. 296. 12 Co. 87.

Neither can he be thought guilty of a greater crime, who finding a man in bed with his wife, or being actually struck by him, or pulled by the nose, or fillipped upon the forehead, immediately kills him; or who happens to kill another in a contention for the wall; or in the defence of his person from an unlawful arrest; or in the defence of his house from those who claiming a title to it, attempt forcibly to enter it, and to that purpose knock at it, &c. or in the defence of his possession of a room in a publick house, from those who attempt to turn him out of it, and thereupon draw their swords upon him; in which case the killing the assailant hath been holden by some to be justifiable: but it is certain, that it can amount to no more than manslaughter. 1 Hawk. 82, 83. H. P. C. 57. 3 Inst. 55. Kelynge 137. H. P. C. 57. Crim. 27. a. Kelynge 51.

Nor was he judged criminal in a higher degree, who seeing his son's nose bloody, and being told by him, that he had been beaten by such a boy, ran three quarters of a mile, and having found the boy, beat him with a small cudgel, whereof he afterwards died. 1 Hawk. 83. H. P. C. 48. Cræ. Jac. 296. 12 Co. 87.

As to the third instance of the kind, viz. such murder as happens in killing one whom the person killing intended to hurt in a less degree, as to which it is to be observed, that wherever a person in cool blood by way of revenge, unlawfully and deliberately beats another in such a manner that he afterwards dies thereof, he is guilty of murder, however unwilling he might have been

to have gone so far. 1 Hawk. 83. Kelyne 119. Marw-
grudge's case. H. P. C. 49, 50, 51, 52.

Also it seems, that he who upon a sudden provocation
executeth his revenge in such a cruel manner, as shews a
cool and deliberate intent to do mischief, is guilty of
murder, if death ensue; as where the keeper of a park
finding a boy stealing wood, tied him to a horse's tail,
and bear him, whereupon the horse ran away with, and
killed him. 1 Hawk. 83. Cro. Car. 131. 1 Jon. 198.
Palm. 545. H. P. C. 49.

As to the cases where such killing shall be adjudged
murder, which happen in the execution of an unlawful
action, principally intended for some other purpose, and
not to do a personal injury to him in particular who
happens to be slain, they are as follow. And first, Such
killing as happens in the execution of an unlawful action,
whereof the principal intention was to commit another
felony; it seems agreed, that wherever a man happens to
kill another in the execution of a deliberate purpose to
commit any felony, he is guilty of murder; as where a
person shooting at tame fowl, with an intent to steal
them, accidentally kills a man; or where one sets upon
a man to rob him, and kills him in making resistance;
or where a person shooting at, or fighting with one man
with a design to murder him, misses him, and kills an-
other. 1 Hawk. 83. Kelyne 117. H. P. C. 46, 50.
Dalt. cap. 93. Moore 87.

And not only in such cases, where the very act of a
person having such a felonious intent, is the immediate
cause of a third person's death, but also where it any
way occasionally causes such a misfortune, it makes him
guilty of murder; and such was the case of the husband,
who gave a poisoned apple to his wife, who eat not
enough of it to kill her, but innocently, and against the
husband's will and persuasion, gave part of it to a child
who died thereof; such also was the case of the wife who
mixed *rusticane* in a potion sent by an apothecary to her
husband, which did not kill him, but afterwards killed
the apothecary, who to vindicate his reputation tasted it
himself, having first stirred it about. Neither is it ma-
terial in this case, that the stirring of the potion might
make the operation of the poison more forcible than
otherwise it would have been; for inasmuch as such a
murderous intention, which of itself perhaps in strictness
might justly be made punishable with death, proves now
in the event the cause of the King's losing a subject, it
shall be as severely punished as if it had had the intended
effect, the missing whereof is not owing to any want of
malice, but of power. 1 Hawk. 84. Flow. Com. 474.
9 Co. 91.

But if one happened to be poisoned by *ratsbane* laid in
order to destroy vermine, the person by whom he is so
killed, is guilty of homicide *per infortunium* only, because
his intentions were wholly innocent. *Ibid.*

Also if a third person accidentally happen to be killed
by one engaged in a combat with another upon a sudden
quarrel, it seems that he who kills him is guilty of man-
slaughter only; but it hath been adjudged, that if a jus-
tice of peace, constable or watchman, or even a private
person be killed in the endeavouring to part those whom
he sees fighting, the person by whom he is killed, is
guilty of murder; and that he cannot excuse himself by
alleging that what he did was in a sudden affray in the
heat of blood, and through the violence of passion; for
he who carries his resentment so high as not only to exe-
cute his revenge against those who have affronted him,
but even against such as have no otherwise offended him
but by doing their duty, and endeavouring to restrain
him from breaking through his, shews such an obstinate
contempt of the law, that he is no more to be favoured
than if he had acted in cool blood. 1 Hawk. 84.
H. P. C. 45, 50. 3 Inst. 52. Dalt. cap. 93. Savil 67.
Kelyne 66. 22 Aff. 71. 4 Co. 40. b. 9 Co. 68. Crom.
25. a. b.

Yet it hath been resolved, that if the third person
slain in such a sudden affray, do not give notice for
what purpose he comes, by commanding the parties in
the King's name to keep the peace, or otherwise mani-
festly shewing his intention to be not to take part in the

quarrel, but to appease it, he who kills him is guilty of
manslaughter only, for he might suspect that he came
to side with his adversary. 1 Hawk. 84. Kelyne 66.

As to the second instance of this kind, viz. such kil-
ling as happens in the execution of an unlawful action,
where the principal design is to commit a bare breach of
the peace, not intended against the person of him who
happens to be slain; it seems clear, that where divers
persons resolving generally to resist all opposers in the
commission of any such breach of the peace, and to exe-
cute it in such a manner as naturally tends to raise tur-
mults and affrays, as by committing a violent distur-
bance with great numbers of people, hunting in a park, &c.
and in so doing happen to kill a man, they are all guilty
of murder; for they must at their peril abide the event of
their actions, who wilfully engage in such bold distur-
bances of the publick peace, in open opposition to the
defiance of the justice of the nation. 1 Hawk. 84.
Savil 67. Moore 86. Palm. 35. Crom. 24. b. 25. a.
H. P. C. 47. 5 Mod. 285. Dyer 128. pl. 60. S. P. C.
17. b.

Yet where divers rioters, having forcible possession of a
house, afterwards killed the person whom they had ejected,
as he was endeavouring in the night forcibly to regain the
possession, and to fire the house, they were adjudged
guilty of manslaughter only, notwithstanding they did
the fact in maintenance of a deliberate injury, perhaps
for this reason, because the person slain was so much in
fault himself. 1 Hawk. 85. Crom. 28. b. H. P. C.
56.

But if in such, or any other quarrel, whether it were
sudden or premeditated, a justice of peace, constable or
watchman, or even a private person, be slain in endea-
vouring to keep the peace, and suppress the affray, he
who kills him is guilty of murder; for notwithstanding
it was not his primary intention to commit a felony, yet
inasmuch as he persists in a less offence with so much ob-
stinacy as to go on in it to the hazard of the lives of those
who no otherwise offend him, but by doing their duty in
maintenance of the law, which therefore affords them its
more immediate protection, he seems to be in this respect
equally criminal, as if his intention had been to commit
a felony. 1 Hawk. 85. H. P. C. 45. Dalt. cap. 93.
3 Inst. 52. Kelyne 66. 22 Aff. 71. 4 Co. 40. b. 9 Co.
68. Crom. 25. See *supra*.

As to the third instance of this kind, viz. such killing,
as happens in the execution of an unlawful action, the
principal motive whereof was to assist a third person; it
seems clear, that if a master maliciously intending to kill
another take his servants with him, without acquainting
them with his purpose, and meet his adversary and fight
with him, and the servants seeing their master engaged
take part with him, and kill the other, they are guilty
of manslaughter only, but the master of murder. Pl.
Com. 100, 101. a. Crom. 23. Dalt. cap. 93. H. P. C.
51, 52.

And therefore it follows *a fortiori*, that if a man's
servant or friend, or even a stranger, coming suddenly,
see him fighting with another and side with him, and kill
the other; or seeing his sword broken send him another,
wherewith he kills the other, he is guilty of manslaughter
only. 1 Hawk. 85. Crom. 26. b. H. P. C. 57.
Dalt. cap. 94. 1 Roll. Rep. 407, 408. 3 Bulst. 206.
H. P. C. 52.

Yet in this very case, if the person killed were a bailiff,
or other officer of justice, resisted by the master, &c. in
due execution of his duty, such friend or servant, &c.
are guilty of murder, whether they knew the person slain
were an officer or not. 1 Hawk. 85. Kelyne 67, 86, 87.

But perhaps it may be objected, that in this last case
there seems to be no more malice than in the former;
and such third person being wholly ignorant that the
party killed was an officer, seems to be no more in fault
than if he had been a private person. 1 Hawk. 85.

To this it may be answered, that all fighting is highly
unlawful, and that he who on a sudden seeing persons
engaged in it, is so far from endeavouring to part them,
as every good subject ought, that he takes part with one
side, and fights in the quarrel, without knowing the
cause

cause of it, shews a high contempt of the laws, and a readiness to break through them on a small occasion, and must at his peril take heed what he does; and consequently might perhaps in strict justice be adjudged in the foregoing cases to act with malice, which doth not always signify a particular ill-will against the person killed, as appears by many of the above-mentioned cases; and tho' such person be favoured in respect of the suddenness of the occasion where both the quarrel and the persons are private, yet he must not expect such indulgence, where the fight, in which he so rashly engages, was begun in opposition to the justice of the nation, and a person happens to be killed thereby who engaged in maintenance thereof, and on that account is under its more particular care; and it may be justly challenged, that his opposers be made examples to deter others from joining in such unarrangeable quarrels. *1 Hawk. 85, 86. 1 Sid. 160. Noy 50. Plow. Com. 100.*

But if a man seeing another arrested and restrained from his liberty, under colour of a preſs-warrant or civil process, &c. by those who in truth have no such authority, happen to kill such trespassers in rescuing the person oppressed, he shall be adjudged guilty of manslaughter only, notwithstanding the injured person submitted to them, and endeavoured not to rescue himself, and the person who rescued him, did not know that he was illegally arrested; for since in the event it appears, that the persons slain were trespassers, covering their violence with a shew of justice, he who kills them is indulged by the law, which in these cases judges by the event, which those who engage in such unlawful actions must abide at their peril. *1 Hawk. 86. Kelynge 66, 137. Crom. 27. u. Dent's case.*

As to the fourth instance of this kind, viz. such killing as happens in the execution of an unlawful action, whereof the direct design was to escape from an arrest, it seems to be agreed, that whoever kills a sheriff, or any of his officers, in the lawful execution of a civil process, as on arresting a person upon a *capias*, &c. is guilty of murder. *1 Hawk. 86. Dalt. cap. 93. H. P. C. 45. Crom. 24. a.*

Neither is it any excuse to such a person, that the process was erroneous, (for it is not void by being so,) or that the arrest was in the night, or that the officer did not tell him for what cause he arrested him, and out of what court, (which is not necessary when prevented by the party's resistance); or that the officer did not shew his warrant, which he is not bound to do at all, if he be a bailiff commonly known, nor without a demand, if he be a special one. *9 Co. 66, 68. 9 Cro. Jac. 280. 6 Co. 68. b. 69. a. Cro. Jac. 486.*

Yet the killing of an officer in some cases will be manslaughter only; as, where the warrant by which he acts gives him no authority to arrest the party; as where a bailiff arrests J. S. a baronet, who never was knighted, by force of a warrant to arrest J. S. knight. *1 Hawk. 86. Cro. Car. 372. 1 Jon. 346. 12 Co. 49.*

Where a good warrant is executed in an unlawful manner; as if a bailiff be killed in breaking open a door or window to arrest a man; or perhaps if he arrest one on a Sunday since 29 Car. 2. cap. 7. by which all such arrests are made unlawful. *H. P. C. 46.*

As to the fifth instance of this kind, viz. such killing as happens in the execution of an unlawful action, whereof the principal purpose was to usurp an illegal authority; it seems clear, that if persons take upon them to put others to death, either by virtue of a new commission wholly unknown to our laws, or by virtue of an unknown jurisdiction, which clearly extends not to cases of this nature; as if the court of Common Pleas cause a man to be executed for treason or felony; or the Court Martial, in time of peace, put a man to death by the martial law, both the judges and officers are guilty of murder. *1 Hawk. 86. H. P. C. 46.*

But where persons act by virtue of a commission, which, if it were strictly regular, would undoubtedly give them full authority, but happens to be defective only in some point of form, it seems that they are no way criminal.

As to the sixth instance of this kind, viz. such killing as happens in the execution of an unlawful action, where

no mischief was intended at all, it is said, that if a person happen to occasion the death of another, in advisedly doing any idle, wanton action, which cannot but be attended with the manifest danger of some other; as by riding with a horse known to be used to kick among a multitude of people, by which he means no more than to divert himself by putting them into a fright, he is guilty of murder. *1 Hawk. 87.*

Also it has been anciently holden, that if a person not duly authorized to be a physician or surgeon, undertake a cure, and the patient die under his hand, he is guilty of felony; but in as much as the books wherein this opinion is holden, were written before the statute of 23 H. 8. c. 1. which first excluded such felonious killing, as may be called wilful murder of malice prepense, from the benefit of clergy, it may be well questioned, whether such killing shall be said to be of malice prepense, within the intent of that statute; however, it is certainly highly rash and presumptuous for unskilful persons to undertake matters of this nature; and indeed the law cannot be well too severe in this case, in order to deter ignorant people from endeavouring to get a livelihood by such practice, which cannot be followed without the manifest hazard of the lives of those who have to do with them; but surely the charitable endeavours of these gentlemen who study to qualify themselves to give advice of this kind, in order to assist their poor neighbors, can by no means deserve so severe a construction from their happening to fall into some mistakes in their prescriptions, from which the most learned and experienced cannot always be secure. *1 Hawk. 87. 8. P. C. 16. b. Pul. 32. b. Crom. 27. 43 Ed. 3. 33. b. Fitz. Coron. 163. See Dalt. cap. 93.*

The principal in murder is ousted of clergy in all cases, and the accessory before is also ousted of clergy in all cases; but the accessory after is in no case ousted of clergy. *2 Hale's H. 344.*

By stat. 1 Ed. 6. c. 12. sect. 13. All wilful killing by poisoning of any person, shall be adjudged wilful murder of malice prepensed.

Stat. 21 Jac. 1. cap. 27. sect. 2. If any woman be delivered of an issue, which being born alive should be a bastard, and she endeavours privately, either by drowning, or secret burying thereof, or any other way, so to conceal the death thereof, as that it may not come to light whether it were born alive or not; the said mother shall suffer death as in case of murder, except such mother can make proof by one witness that the child was born dead.

Continued indefinitely by 3 Car. 1. cap. 4. and 16 Car. 1. cap. 4.

Stat. 2 Geo. 2. cap. 21. Where any person shall be feloniously stricken or poisoned upon the sea, or at any place out of England, and shall die of the same in England; or where any person shall be feloniously stricken or poisoned within England, and shall die of such stroke or poisoning upon the sea, or out of England, an indictment thereof found by jurors of the country in England, in which such death, stroke or poisoning shall happen, whether it be found before any coroner upon view of such dead body, or before justices of peace, or other justices who shall have authority to inquire of murders, shall be as effectual, as well against the principals as the accessories, as if such stroke or poisoning and death, and the offence of such accessories, had happened in the same county: and every such offender shall have the like defences (except challenges for the hundred) as if such stroke or poisoning and death, and the like offence of such accessories, had happened in the same county where such indictment shall be found.

By stat. 25 Geo. 2. cap. 37. sect. 1. All persons found guilty of wilful murder, shall be executed according to law, on the day next but one after sentence passed, unless the same happen to be Sunday, and in that case on the Monday following.

And by the same statute a variety of other provisions are made relative to persons convicted of murder, unnecessary here to particularize; therefore we refer to the act.

At a meeting of the judges to consider of this act, there was some doubt whether hanging in chains might ever be made part of the sentence; but on debate it was agreed by nine judges, that in all cases within the act, the judgment for dissecting and anatomizing only should be part of the sentence: and if it should be thought advisable, the judge might afterwards direct the hanging in chains, by special order to the sheriff, pursuant to the power given by the act. *Foster's Crown Law* 107.

Hominatio. *Domesday*, tit. *Northampton Sockmanni de Risden*, — *Idcirco episcopus clamat Hominationem eorum*. It signifies the mustering of men; also the doing of homage. *Cowell*, edit. 1727.

Homine capto in Withernamsum, Is a writ to take him that hath taken any bondman or woman, and led him out of the country, so that he or she cannot be replevied according to law. *Reg. Orig. fol. 79*. See *Withernam*.

Homine Eligendo ad custodiendam pecuniam sigilli pro mercatoribus editi, Is a writ directed to a corporation, for the choice of a new person to keep one part of the seal appointed for *statutes merchant*, when a former is dead, according to the statute of *Edw. Burnel*. *Reg. Orig. 178*.

Homine replegiando, Is a writ to bail a man out of prison: in what cases it lies, see *F. N. B. fol. 6*. *Reg. Orig. fol. 77*.

It may not be improper to observe, that it lies where a person is in prison, not by special commandment of the King, or his judges, or for any crime or cause irrepleviable, directed to the sheriff to cause him to be replevied: and if the sheriff return on a *homine replegiando*, that the defendant hath *effoined* the plaintiff's body, so that he cannot deliver him; then the plaintiff shall have a *capias in withernam* to take defendant's body, and keep it *quousque*, &c. Any if the sheriff return *non est inventus* on that writ against the body, the plaintiff shall have a *capias* against the defendant's goods, &c. *F. N. B. 66*. *New Nat. Br. 151, 152*. Where one man takes away secretly, or keeps in his custody another man against his will, upon oath made thereof, and a petition to the Lord Chancellor, he will grant a writ of *replegiari facias*, with an *alias* and *pluries*, upon which the sheriff returns an *elongatus*, and thereupon issues out a *capias in withernam*: and when the party is taken, the sheriff cannot take bail for him; but the court where the writ is returnable may, if they think fit, grant a *habeas corpus* to the sheriff to bring him into court and bail him, or remand him. *2 Lill. 23*.

In a *homine replegiando* it hath been adjudged, that it doth not differ from a common *replevin*, on which the sheriff must return a *deliberari feci*, or an excuse why he doth not: that where he cannot make deliverance, if he return an *elongatus*, the defendant is not concluded by that return to plead *non cepit*; and after the return of an *elongatus*, and a *capias in withernam*, if the defendant pleads this plea, he shall be bailed, for the *withernam* is no execution: and after a defendant is bailed upon the *capias in withernam*, there may be a new *withernam* against him. *2 Salk. 381*. And it was held, that in a *homine replegiando* after an *elongatus* returned, if the defendant comes in *gratis*, and calls for a declaration, and pleads *non cepit*, he shall not be obliged to give bail; but if he come in upon the return of the *capias*, he must give bail, and shall not be admitted to it till he call for a declaration, and plead *non cepit*. *Ibid*.

The sheriff returned an *elongatus* in a *homine replegiando*, and then a *capias in withernam* went forth; afterwards the defendant having entered an appearance, moved for a *superfedeas* to the *withernam*, and offered to plead *non cepit*; which was opposed, unless he would give bail to deliver the person, in case the issue was found against him: though it was ruled, that if any property had been pleaded in the party, then the defendant ought to give bail to deliver him; but he says he hath not the person, and therefore *non cepit* is a proper plea, and he shall put in bail to appear *de die in diem*. *4 Mod. 183*. In this case the defendant shall not be compelled to give deliverance; and a *superfedeas* was granted to the *withernam*. *5 W. & M.*

A *homine replegiando* cannot be brought either by the wife herself, or by her *prochein amy* against her husband; and the nature and proceedings in the writ shew it to be so. *Pafch. 1718. Ch. Prec. 492*.

This writ is now seldom used to deliver a person out of custody, by having the cause enquired into, and bail accepted, if bailable, or the person discharged, without bail, if unlawfully imprisoned, 'tis usual to sue an *habeas corpus*, out of one of the courts of *Westminster*, returnable in court, in term time, or before one of the judges in vacation.

Homines, Were a sort of *feudatory* tenants, who claimed a privilege of having their causes and persons tried only in the court of their lord: and when *Gerard de Camvil. anno 5 R. 1.* was charged with treason and other misdemeanors, he pleaded that he was *Homo Comitum Johannis*, &c. and would stand to the law and justice of his court. *Parish. Antiq. 152*.

Homiplagium, Is used in the laws of *Hen. 1. cap. 80*. for the maiming a man. *Si quis in domo vel curia Regis fecerit homicidium vel homiplagium*.

Homo. This Latin word includes both man and woman, in a large or general understanding. *2 Inst. 45*.

Houstaile, A home-stall, or mansion-house. As in a charter granted about the *5 Edw. 1. Cowell*.

Hond-habend, (from the Sax. *hond*, hand, and *habens*, having.) Signifies a circumstance of manifest theft, when one is apprehended with the *mainor* or *mainower*, i. e. the thing stolen in his hand. *Bracton, lib. 3. tract. 2. cap. 8, 32 & 35*. who also uses *hand-bereud* in the same sense, *sc. Latro manifestus*. See *Hand-habend*. So in *Fleta, lib. 1. c. 38*. *Furtum manifestum est ubi aliquis latro deprehensus sit de aliquo latrocinio hand-habund, & backberinde, & infecutus fuerit per aliquam ejus res illa fuerit, quæ dicitur sacborgh, & tunc licet infecutori rem suam petere criminaliter ut furatam*.

It also signifies the right which the lord hath of determining this offence in his court.

Honey. All vessels of honey are to be mark'd with the name of the owner, and be of such a content, under penalties; and if any honey fold, be corrupted with any deceitful mixture, the seller shall forfeit the honey, &c. *Stat. 23 Eliz. c. 8*.

Honour, Is, besides the general signification, used especially for the more noble sort of *feignories*, on which other inferior lordships or manors depend, by performance of some customs or services to those who are lords of them; (though antiently *honour* and *baronia* signified the same thing.) *Uti manerium plurimis gaudet interdum feodis, sed plerumque tenementis, consuetudinibus, serviciis, &c. Ita honor plurima complectitur maneria, plurima feoda militaria, plurima regalia, &c. dictus etiam olim est beneficium seu feodum regale, tentusque semper a rege in capite*. *Spelm*. The manner of creating these honours by act of parliament, may in part be collected out of the statute of *23 Hen. 8. c. 37, 38*.

An honour ought to consist of lands, liberties, and franchises. *1 Bul. 197. 2 Rol. 72. l. 48*. And it is the most noble feignory. *Co. L. 108. a*. So one or more manors may be parcel of an honour. *2 Rol. 72. l. 45*. So a forest may be appendant to it. *2 Rol. 73. l. 3*.

An honour originally shall be created by the King. *Co. L. 108. a*. Every honour must be holden of the King. *R. 1 Bul. 195*. And if it be assigned, or granted over to another, it shall not be holden of a subject. For it may be granted by the King to a subject. A man may claim an honour by grant, or by prescription. But the King at this day cannot make an honour by grant, without an act of parliament. *R. 1 Bul. 195, 196. Co. 108. a*.

There are within the realm 80 honours, viz. the honour of *Aquile, Arundel, Abergavenny, Boling, Berkhamsled, Beaulieu, Barnard's Castle, Bullingbroke, Barstable, Bononia, Brecknock, Brember, Bedford, Clare, Croucours, Clun, Christchurch, Cokermouth, Cormayls, Candicut, Carisbrook, Clifford-Castle, Chester, Carmarthen, and Cardigan, Dudley, and Dover-Castle, Eze, and Egremont*.

The honour of *East and West Greenwich, Gloucester, Greatmoul, Gorwer, Haganes, Huntingdon, Hedingham, Haverenden*.

Hawenden-Castle, Hertford, and Halton, Lancaster, Lincoln, Leicester, Leicetot, Hinckley, and Kingston, and Falkingham.

The honour of Montgomery, Mowbray, Middleham, and Maidstone, Nottingham, Newelbn, Oakhampton, and Oxford.

The honour of Plimpton, Peverel, Pickering, Raleigh, Richard's Castle, Skipton, Stafford, Strigal, Tickhill, Tremanton, Totness, Theony, Tamworth.

The honour of Wigmore, Wallingford, Windsor, Wormgay, Whirwelton, Werk, Whitechurch, and Warwick, Webley, and Furbury.

By the stat. of 31 Hen. 8. c. 5. Hampton Court is made an honour.

So, by the Stat. 33 H. 8. 37, 38. Ampthill, and Grafton. And by the Stat. 37 H. 8. 18. Westminster, Kingston on Hull, St. Osyth, and Donnington Castle.

The King granted to a subject a great manor, called an honour, and passed it by the name of an honour; and well. Jenk. 277. pl. 99.

It is illegal to purchase honour, (as a dukedom) for money. Vern. 5. Pasch. 1681. E. of Kingston v. Lady Eliz. Pierepoint.

At this day the Earl of Arundel only hath his Earldom by prescription, the beginning of which is time out of mind, not within the memory of any one; so that his Earldom is the most ancient in the realm. 1 Bull. 196.

Honour-Courts. Are courts held within such honours, mentioned in the Stat. 33 Hen. 8. cap. 37. And there is a court of honour of the Earl Marshal of England, &c. which determines disputes concerning precedency and points of honour. 2 Hawk. P. C. 11. This court of honour, which is also exercised to do justice to heralds, is a court by prescription, and has a prison belonging to it, called the White Lyon in Southwark. 2 Nelf. 935. See Black. Com. 3 V. 104.

Honourary (or Honorary) Feuds. Are titles of nobility, descendible to the eldest son in exclusion of all the rest. Black. Com. 2 V. 56, 215.

Honourary Services. Are those that are incident to the tenure of grand serjeanty, and commonly annexed to some honour. Stat. 12 Car. 2. 29.

Hontfongenethesf. Cum omnibus aliis libertatibus tantummodo hontfongenethesf mibi retento. Charta Wil. Comitis Mathefialci. In Mon. Angl. 1 par. fo. 724. This should have been written hontfongenethesf, and signifies a chief, taken with bondhabend, i. e. having the thing stolen in his hand. Cowell.

Hopron. Signifies a valley in Domesday Book; for too do hope, bawgh and bewgh. Cowell, edit. 1727.

Hops and hop-binds. Penalty on importing or using corrupt hops, 1 Jac. 1. c. 18. Hops imported, what duties to pay. 2 W. & M. sess. 2. c. 4. sect. 10. 9 Ann. cap. 12. No bitter to be used in brewing but hops, 9 Ann. c. 12. sect. 24. Foreign hops not to be imported in Ireland, 9 Ann. c. 12. 1 Geo. 1. c. 12. sect. 6. The drawback on hops exported to Ireland taken off, 6 Geo. 1. c. 11. f. 40. Planters to give notice of the time of bagging, 6 Geo. 2. c. 21. sect. 25. No hops to be imported into Ireland from other parts but Great Britain, 5 Geo. 2. c. 9. Landing foreign hops before duty paid, hops to be burnt, and ship forfeited, 7 Geo. 2. c. 19. Penalty on sophisticating hops, 7 Geo. 2. c. 19. f. 2. Damages to be made good, as by 9 Geo. 1. c. 27. Cutting hop-binds, 10 Geo. 2. c. 32. sect. 4. By Stat. 6 Geo. 2. c. 37. f. 6. Unlawfully and maliciously cutting hop-binds is made felony without benefit of clergy.

Hora Aurora. The morning bell, or what we now call the four o'clock bell, was antiently called hora aurea; as our eight o'clock bell, or the bell in the evening was called ignitogium or coverfen. Cowell.

Hozdera. (from the Sax. Hord, Thefaurus.) A treasurer; and hence we have the word Hord or Hoard, as used for treasuring or laying up a thing. Leg. Adelfhan. cap. 2.

Hozderium. A hoard, a treasury, or repository. As in the laws of King Canute, c. 104. Sed suum hozderium, quod dicere possumus thesaurum, & cistam suam, & trage, id est thesaurum suum, debet ipse custodire. Cowell.

Hordeum palmale. Hoc indentura 18thatur, quod Rob. 1. c. 23. unam virgatam terre in Gillingham, redd.

nde quolibet anno ad festum S. Mich. quatuor Buffellos ordeum palmale firmæ juxta melius precium per duos denarios in quarterio, &c. Dat. 43 Ed. 4. penus Alington Paynter 1rm. Doubtless this is meant of beer-barley, which in Norfolk is called sprat-barley, and battledore-barley; and in the marches of Wales cymridge, it being broader in the ear, and more like a band than the common barley, which in old deeds is called hordeum quadragesimale. Cowell.

Hoznebeame pollengens. Are trees so called, that have been usally lopped, and are about twenty years growth, and therefore not tithable. Plowden, fol. 407. Soby's case.

Hoznegeld. Is a compound from the Saxon word hozn, cornu, and geld, solutio, signifying a tax within a forest, to be paid for horned beasts. Crompt. Jurisd. 197. And to be free thereof is a privilege granted by the King unto such as he thinketh good. Idem ibid. & Rastall in his Exposition of Words, Quietum esse de omni collectione in foresta de bestiis cornutis affert. 4 Inst. fol. 369. Et sunt quieti de omnibus geldis, & danegeldis, & walgeldis, & senegeldis, & horngeldis, &c. Diploma H. 3. canonicis & monialibus de Semplingham. Cowell, edit. 1727.

Hozn with hozn, or Hozn under hozn. The promiscuous feeding of bulls and cows, or all horned beasts, that are allowed to run together upon the same common. As in the constitution of Robert, Bishop of Durham, 1276. Similiter de decimis quæ de vaccis proveniunt statuendum duximus, quod ubicunque fuerit receptaculum earum, licet in vicinis parochiis hozn with hozn, secundum Anglicam linguam, pascua quærant, illi remaneat tota decima; ubi fuerit domicilium & remanentia. Spelman. To which may be added, that the commoning of cattle horn with hozn, was properly when the inhabitants of several parishes let their common herds run upon the same open spacious common, that lay within the bounds of several parishes; and therefore that there might be no dispute upon the right of tithes, the bishop ordains, that the cows should pay all profit to the minister of the parish where the owner lived, &c. Cowell.

Hoznagium. Is supposed to be the same with horn-geld.

Hoznets. No stranger was to buy any English horns gathered or growing in London, or within twenty-four miles thereof, by the Stat. 4 Ed. 4. c. 8. And none may sell English hozns unwrought to any stranger, or send them beyond sea, on pain of forfeiting double value: the wardens of hozners in London may search all wares, &c. 7 Jac. 1. cap. 14.

Hors de son fee. (Fr. i. e. out of his fee) Is an exception to avoid an action brought for rent or services, &c. issuing out of land, by him that pretends to be the lord; for if the defendant can prove that the land is without the compass of his fee, the action falls. Brooke. In an avowry, a stranger may plead generally hors de son fee; and so may tenant for years: and such stranger to the avowry, being made a party, is at liberty to plead any matter in abatement of it. 9 Rep. 30. 2 Mod. 104. A tenant in fee-simple ought either to disclaim, or plead hors de son fee. 1 Danv. Abr. 655. Vide 9 Rep. Bucknal's case, 22 Hen. 6. 23. Kelw. 73, 14. Aff. pl. 13. 1 Inst. 1. b. 2 Mod. 103, 104. Trin. 28 Car. 2. C. B. Sherard v. Smith. See 14 Vin. Abr. tit. Hors de son fee.

Horse-bread. Inn-keepers shall not make horse-bread. 13 Ric. 2. f. 1. c. 8. 4 Hen. 4. c. 25. 21 Jac. 1. c. 21. Permitted to bake horse-bread, 32 Hen. 8. c. 41.

Horses. were not to be conveyed out of the realm without the King's licence, &c. on pain of forfeiture, by an ancient statute, 11 H. 7. c. 13. Persons having lands of inheritance in parks, &c. are to keep two mares apt to bear foals thirteen hands high; for the increase of the breed of horses, on pain of 40 s. for every month they are wanting; and nor suffer them to be leaped by stoned horses under fourteen hands, on a certain penalty. 27 Hen. 8. c. 6. And for the preservation of a strong breed of horses, stone-horses above two years old are to be fifteen hands high, or they shall not be put into forests or commons, where mares are kept, upon pain of forfeiture; and scabbed or infected horses shall not be put into common fields, under the penalty

nalty of 10*s*. leviable by the Lord of the leet. 32 H. 8. c. 13. Stealing of any horse, gelding or mare, is felony without benefit of clergy; but accessories to this offence are not excluded clergy. 1 Ed. 6. c. 14. 2 & 3 Ed. 6. c. 23. And if any horse that is stolen be not sold according to the statute 2 & 3 P. & M. c. 7. the owner may take the horse again where ever he finds him, or have action of detinue, &c. To prevent horses being stolen and sold in private places, the 2 & 3 P. & M. provides, that owners of fairs and markets shall appoint toll-takers or book-keepers, who are to enter the names of buyers and sellers of horses, &c. And to alter the property, the horses must be rid or stand in the open fair one hour; and all the parties to the contract must be present with the horse. And by 31 Eliz. cap. 12. Sellers of horses are to procure vouchers of the sale to them; and the names of the buyer, seller and voucher, and price of the horse are to be entered in the toll taker's book, and a note thereof delivered to the buyer; and if any person shall sell a horse without being known to the book-keeper, or bringing a voucher; or if any one shall vouch without knowing the seller; or the book-keeper shall make an entry without knowing either, in either of these cases the sale is void, and a forfeiture is incurred of 5*l*. A horse stolen, the owner according to the direction of the act, may be redeemed and taken by the owner within six months, repaying the buyer what he shall swear he gave for the same. Stat. *Ibid*.

Horses in hackney coaches to be 14 hands, 9 Ann. c. 23. *Sec. 4*.

Horses hired. Action of trespass on the case lies for abating a horse hired, by immoderate riding, &c. And a difference has been made in our law betwixt hiring a horse, and borrowing one to go a journey; for in the first case the party may let his servant, &c. upon the horse, but not in the second, 1 Mod. 210.

Horses for the King's Service. None shall take the horse of any person to serve the King without the owner's consent, or sufficient warrant, on pain of imprisonment, &c. Stat. 20 R. 2. c. 5.

Horse-Races. For small sums having encouraged idleness, and impoverished the meaner sort of people; it is ordained, that no person shall run any horse at a race, unless it be his own, nor enter more than one horse for the same plate, upon pain of forfeiting the horse; and no plate is to be run for under 50*l*. on the penalty of 500*l*. Also every horse-race must be begun and ended in the same day, &c. Stat. 13 Geo. 2. cap. 19. *Sept. 18 Geo. 2. c. 34*.

Horses at races to be entered by the owners 13 Geo. 2. c. 19. Horses racing with horses carrying small weights, prohibited. *Ib*. Horses may run for the value of 50*l*. with any weight and at any place, 18 Geo. 2. c. 34. *Sec. 21*.

Hosellers, (Fr. *Hosellers*) Is used for inn-keepers; and in some old books the word *hospellers* is taken in the same sense. 31 Ed. 3. c. 2. The executors of hosellers are not chargeable for their faults. 1 Keb. 582.

Hospes generalis. A great chamberlain.—*Polonius quantum ad hospitium pertinet, omnia indifferenter ad hoc hospitii generalis obediunt*, &c. Du Cange.

Hospitality. The reader will not be displeased with the following extract from the learned Dr. Robertson, on this subject.

Speaking of the middle ages, he says, "Among people whose manners are simple, and who are seldom visited by strangers, hospitality is a virtue of the first rank. This duty of hospitality was so necessary in that state of society which took place during the middle ages, that it was not considered as one of those virtues which men may practise or not, according to the temper of their minds, and the generosity of their hearts. Hospitality was enforced by statutes, and those who neglected the duty were liable to punishment." The laws of the *Slawi* ordained that thenceforward of an inhospitable person should be confiscated and his house burnt. They were even so solicitous for the entertainment of strangers, that they permitted the landlord to steal for the support of his guests." *Hist. Emp. Char. V. 1 P. 326*.

Hospitallers, (*Hospitalarii*) Were the knights of a religious order, so called, because they built an hospital at Jerusalem, wherein pilgrims were received. To these Pope *Clement* the Fifth transferred the templars, which order, by a council held at *Vienne* in France, he suppressed, for their many and great offences. The institution of their order was first allowed by Pope *Gelasius* the Second, *ann* 1118, and confirmed here by parliament, and had many privileges granted them, as immunities from payment of tithes, &c. You shall find their privileges reserved to them by *Magna Charta*, cap. 37. and you shall see the rights of the King's subjects vindicated from the usurpation of their jurisdiction, by the statute of *Westm. 2. cap. 43*. Their chief abode is now in *Mallia*, an island given them by the Emperor *Charles* the Fifth, after they were driven from *Rhodes* by *Solyman* the Magnificent, Emperor of the *Turks*; and for that they are now called *Knights of Mallia*. They are mentioned 13 Ed. 1. cap. 43, and 9 Hen. 3. c. 37. *The Walsingham* in Hist. Ed. 2. and *Stow's Annals*, *Ibid*. All the lands and goods of these knights here in England were given to the King, by 32 Hen. 8. c. 34. See *Mos. Angl. 2 par. fol. 189*.

Hospitals are aggregate, in which the master, or warden and his brethren have the estate of inheritance; or sole, in which the master, &c. only has the estate in him, and the brethren, or sisters, having college, and common seal in them, must consent, or the master alone has the estate not having college, or common seal. Co. L. 342. d.

So hospitals are eligible, donative, or presentative. *Ibid*.

The master of the hospital, who has college, and common seal, may have a writ of right; for the right, and inheritance is in him. If he has no college, or common seal, he may have a *juris utrum*. Co. L. 341. b. *Sec. 2*.

Any person seized of an estate in fee-simple may by deed enrolled in *Chancery* erect and found an hospital for the sustenance and relief of the poor, to continue for ever; and place such heads, &c. therein as he shall think fit; and such hospital shall be incorporated, and subject to such visitors, &c. as the founder shall nominate; also such corporations have power to take and purchase lands not exceeding 200*l*. per annum, so as the same be not holden of the King, &c. and to make leases for twenty-one years, reserving the accustomed yearly rent; but no hospital is to be erected, unless upon the foundation it be endowed with lands or hereditaments of the clear yearly value of 10*l*. per annum. Stat. 39 Eliz. cap. 5.

It has been adjudged upon this Statute, that if lands given to an hospital be at the time of the foundation or endowment of the yearly value of 200*l*. or under, and afterwards they become of greater value by good husbandry, accidents, &c. they shall continue good to be enjoyed by the hospital, although they be above the yearly value of 200*l*. And goods and chattels, (real or personal) may be taken of what value soever. 2 Rep. 712. And if one give his land then worth 10*l*. a year to maintain poor, &c. and the land after comes to be worth 100*l*. a year, it must all of it be employed to increase their maintenance, and none of it may be converted to private use. 3 Rep. 130.

Also if one devise the rent of his land for such uses, it shall be taken largely for 2 devils of the rent then reserved, or afterwards to be reserved upon an improved value. 9 Jac. Such only are to be founders of hospitals within the act 39 Eliz. c. 5. as are seized of any estate in fee, and who give the same at the first foundation of the hospital to the incorporation of the hospital, &c. But if a man as a citizen of *London*, by will devise that his executors shall pay out 100*l*. in the purchase of lands, &c. and that an hospital shall thereupon be built and incorporated for the sustentation and relief of poor impotent people, and others, who upon the execution purchase land of such a value, and cause the estate to be conveyed to certain persons and their heirs, and build an hospital; if this and the like cases, the persons that have the estate in the lands are by the purview of this Statute to be founders

and do all things that the founder is appointed to do. *Inst.* 724. If one devise so much a year for the poor, &c. leaving assets in goods, this is good, and the executors will be forced to buy as much land, and to assure it to that use. *Trin.* 15 *Cor.* And if a devise be to the poor people maintained in the hospital of St. Laurence in Reading, &c. (where the mayor and burgesses capable to take in mortmain, do govern the hospital) albeit the poor not being a corporation, are not capable by that name to take; yet the devise is good, and commissioners appointed to enquire into lands given to hospitals, &c. may order him that hath the land to assure it to the mayor and burgesses for the maintenance of the hospital. 43 *Eliz.*

A deed of gift to a parish generally, to maintain poor or other charitable use, is not good; but a devise by will is good, and the churchwardens and overseers shall take it in succession; and in London the mayor and commons. 40 *Aff.* 26. A gift must be to the poor, and not to the aged or impotent of such a parish, without expressing their poverty; for poverty is the principal circumstance to bring the gift within the statute 43 *Eliz.* Although at Common law a corporation may be of an hospital, that is in *potestate* of certain persons to be governors of the hospital and not of the persons placed therein: the safest way upon the act 39 *Eliz.* c. 5. is first to prepare the hospital, and to place the poor therein, and to incorporate the persons therein placed; and after the incorporation to convey the lands, tenements, &c. to the said corporation, by bargain and sale, or otherwise, between the founder of the one part, and the master and brethren, &c. of the other part, in consideration of 5 s. in hand paid by the master of the said hospital, &c. 2 *Inst.* 724, 725. And the founder cannot erect an hospital for years, lives, or any other limited time; but it must be for ever, according to the stat. 39 *Eliz.* c. 5. which statute for erecting of hospitals is made perpetual by 21 *Jac.* 1. r. 1. See 10 *Rib.* 17. 34.

By 39 *Eliz.* c. 6. and 43 *Eliz.* c. 4. Commissioners may be awarded to certain persons to enquire of lands or goods given to hospitals; and the Lord Chancellor is empowered to issue commissions to commissioners for enquiring by a jury, of all grants, abuses, breaches of trust, &c. of lands given to charitable uses, who may make orders and decrees concerning the same, and the due application thereof; and the commissioners are to decree, that recompence be made for fraud and breaches of trust, &c. so as their orders and decrees be certified into the Chancery; and the Lord Chancellor shall take order for the execution of the said judgments and decrees; and after certificate may examine into, annul, or alter them agreeable to equity, on just complaint: but this does not extend to lands given to any college or hall in the universities, &c. nor to any hospital over which special governors are appointed by the founders; and it shall not be prejudicial to the jurisdiction of the bishop or ordinary, as to his power of inquiry into and reforming abuses of hospitals, by virtue of the stat. 2 *Hen.* 5. &c.

These commissioners may order houses to be repaired, by those who receive the rents; see that the lands be let at the utmost rent; and on any tenant's committing waste, by cutting down and sale of timber, they may decree satisfaction, and that the lease shall be void. *Hill.* 11 *Cor.* Where money is kept back, and not paid, or paid where it should not, they have power to order the payment of it to the right use: and if money is detained in the hands of executors, &c. any great length of time, they may decree the money to be paid with damages for detaining it. *Dale Rep.* 123. See 4 *Rep.* 104.

The hospital of St. Cross near Winchester, and several other large hospitals, were anciently founded by particular persons, or acts of parliament. And King Charles the First granted to the mayor and commons of London the keeping of *Bread Street Hospital*, and the manors and lands belonging to it. *Chas. I. Cha. 1.* Altho there is now an hospital in London for *foundling children*, under the care of governors and governors, who may purchase lands or tenements to the value of 2000 l. a year: and they are to receive as many such children, as they think fit, which may be brought to the hospital, and shall there be bred

up and employed, or placed apprentice to any trade, or the sea service, the males till the age of 24, and the females till 21. They may likewise be let out or hired, &c. 13 *Geo. 2. cap.* 29. and several other hospitals. See 20 *Geo. 2. c.* 29. f. 13. 30 *Geo. 2. c.* 26. f. 14. as to the *Foundling Hospital*, and 30 *Geo. 2. c.* 3. f. 22. to 27. how far hospitals are subject to the land-tax. See farther *Black Com.* 1 *P.* 471, 474.

Hospitium, Is the same with procurator, or visitation-money. *Et nomine sua legationis cum excessivo numero hospitium a quibus per Angliam exegit monasteriis; minores vero domus, quae pondus hospitii ferre non poterint, certa summa, id est, octo vel quinquaginta marcarum, hospitium redemerunt.* Neobrigensis, lib. 4. c. 14. Brompton, fol. 1193.

Hospitalium, Is the same with hospitium.

Hospitalium, A right to have lodging and entertainment; referred by Lords in the houses of their tenants. *Cartular. Radigis.* MS. 157.

Hospitalier, (*Hospitalarius*, from the French *hospelier*, i. e. *hospes*), Signifieth with us those that otherwise are called inn-keepers. Stat. 31 *Ed.* 3. f. 2. c. 2. See *Hospitalier*.

Hospitalier, Inn-keepers. 9 *Ed.* 3. f. 2. c. 2.

Hospitalium, A hoe, being an instrument well known: *Et quoniam de aratro & hospitalio, & fegibus frigidis, & hominibus faciendo, de averiis & de panapis, & omnibus aliis necessitatibus, &c.* Chart. Hamon. Massy.

Hospita, Host bread, or consecrated wafers in the Holy Eucharist; and from this word *hostia*, Mr. Sommer derives the Sax. *hast*, used for the Lord's Supper, and *hastian* to administer the Sacrament; which were kept long in our old English, under *houfel*, and to *houfal*. *Paroch. Antiqu.* 170.

Hospitalier, An hospitalier.

Hospitalia, *Hospitalaria*, A place or room in religious houses, allotted to the use of receiving guests and strangers, for the care of which there was a peculiar officer appointed, called *Hospitalarius*, and *Hospitalarius*.—*Nos Wilhelmus Prior Elyen.* & *quidam loci conventus ad regationem*—*Henrici Sexti Regis concessimus Johanni Norry armigero officium hospitalarii in hospitalaria nostra Elyen.*—*Ex Cartular. Eccl. Elyen.* MS. fol. 34.

Hospitalium, (*Hospitalium*, from the Lat. *hospes*, a goshawk) The manor of Broughton cum Oke, in the reign of Edw. 2. was held by John Maudslai—in capite per feoffamentum *mutandi unum hospitalium Domino Regis, vel illum hospitalium portandi ad curiam Domini Regis.* *Paroch. Antiquities*, pag. 500.

Hospitalium, (*In partem patris*) Is a word brought from the Fr. *hospital*, used for a confused mingling of divers things together, and among the Dutch it signifies flesh cut into pieces, and sadden with herbs or roots; but by a metaphor it is a blending or mixing of lands given in marriage, with other lands in fee falling by descent: as if a man held of thirty acres of land in fee, hath issue only two daughters; and he gives with one of them ten acres in marriage to the man that marries her; and dies seized of the other twenty acres: now she that is thus married, to gain her share of the rest of the land, must put her part given in marriage in *hospital*, i. e. she must refuse to take the sole profits thereof, and cause her land to be mingled with the other; so that an equal division may be made of the whole between her and her sister, as if none had been given to her; and thus for her ten acres she shall have fifteen, otherwise her sister will have the twenty acres of which her father died seized. *Litt.* 55. *Co. Litt.* lib. 3. cap. 12. This seems to be a right of waving a provision, made for a child in a man's life-time, at his death, though as it depends upon *frank marriage*, and gifts of lands therein, it now seldom happens. But there is a bringing of money into *hospital*, upon the clauses and intent of the act of parliament for distribution of intestate estates, 22 & 23 *Car.* 2. c. 10. f. 2. Where a certain sum is to be raised, and paid to a daughter for her portion, by a marriage settlement; this has been decreed to be an advancement by the father in his life time, within the meaning of the statute, though future and contingent; and if the daughter would have any further share of her father's personal estate, she must bring this money into *hospital*; and shall not have both the one and the

the other. *Abr. Caf. Eq.* 253. See 2 *Vern.* 638. By the custom of London, there is likewise a term of *botchpot*, where the children of a *freeman* are to have an equal share of one third part of his personal estate, after his death. *Preced. Cauc.* 3.

There is also in the Civil law *collatio bonorum* answerable to this, whereby if a child advanced by the father, do after his father's decease challenge a child's part with the rest he must call in all that he had formerly received, and then take out an equal share with the others. *Cowell.* See farther *Britton*, c. 72. *Litt. J.* 267, 268. *Black. Com.* 2 *V.* 190, 317.

Hobel, (Mandra) Is a place wherein husbandmen set their ploughs and carts out of the rain or sun. *Law Lat. Dic.*

Houndston-Heath, A large *heath* containing 4293 acres of ground, and extending into several parishes; 46 much thereof as is the King's inheritance, and fit for pasture, meadow, or other several grounds, shall be of the nature of *copyhold lands*; or the steward of the manor may let it for twenty-one years, &c. and the lessees may improve the same. *Stat.* 37 *H. 8.* c. 2.

Hour, (Hora) Is a certain space of time of sixty minutes, twenty-four of which make the natural day. It is not material at what *hour* of the day one is born. 1 *Inst.* 135. *Vide Fraction.*

Houllage, Is a kind of fee paid for *hauling* goods by a carrier, or at a wharf or key, &c. *Sherp. Epit.* 1725.

House, (Domus) A place of dwelling or habitation, also a family or household. Every man has a right to air and light, in his own *house*; and therefore if any thing of infectious smell, be laid near the *house* of another, or his lights be stopped up and darkened, by build-ings, &c. they are nuisances punishable by our laws. 3 *Inst.* 231. 1 *Danv. Abr.* 173. But for a prospect, which is only matter of delight no action will lie for this being stopped. 9 *Rep.* 58. See *Black. Com.* 2 *V.* 402, 3. 3 *V.* 216, 217.

The dwelling *house* of every man, is as his castle; therefore if thieves come to a man's *house* to rob or kill him, and the owner or his servants kill the thieves in defending him and his *house*, that is not felony, nor shall he forfeit any thing. 2 *Inst.* 316. A man ought to use his own *house*, so as not to damnify his neighbour; and one may compel another to repair his *house*, in several cases, by the writ *de domo reparanda*. 1 *Salk. Rep.* 360. Doors of a *house* may not be broke open on arrests, unless it be for treason, or felony, &c. *H. P. C.* 137. *Plowd.* 5. 5 *Rep.* 91. Riptously pulling down a *house* is felony excluded clergy. *Stat.* 1 *Geo.* 1. c. 6. Stealing lead, or iron bars, or rails fixed to *houses*, &c. is felony punishable by transportation, by 4 *Geo.* cap. 32. *House-burning*, see *Arson*.

Several things have been resolved on the subject, as to the protection a man's house affords him, as, 1. That every man's house is as his castle, as well to defend him against injuries as for his repose. 2. Upon recovery in any real action or ejectment, the sheriff may break the house and deliver seisin, &c. to the plaintiff, the writ being *habere facias possessionem* or *possessorem*; and after judgment it is not the house of the defendant in right and judgment of the law. 3. In all cases, where the King is party, the sheriff (if no door be open) may break the party's house to take him, or to execute other process of the King, if he cannot otherwise enter; but he ought first to signify the cause of his coming, and request the door to be opened; and this appears by the statute *Westm.* 1. 17. which is only in affirmance of the Common law; and without default in the owner, the law will not suffer a house to be broken. 4. In all cases, when the door is open, the sheriff may enter and make execution at the suit of any subject, either of body or goods; but otherwise where the door is shut, there he cannot break it to execute process at the suit of a subject. 5. Tho' a house is a castle for the owner himself and his family and his own goods, &c. yet 'tis no protection for a stranger flying thither, or the goods of such an one, to prevent lawful execution; and therefore in such case, after request to enter, and denial, the sheriff may break

the house. 5 *Rep.* 91, a. to 93. a. *Mich.* 2 *Jac.* B. R. *Semaine's case*, alias *Semaine v. Gresham*.

Commissioners of bankruptcy cannot break open a house to search for the bankrupt's goods, unless it be the bankrupt's goods in the house of the bankrupt. 2 *Shew.* 247. *Mith.* 34 *Car.* 2 B. R. *Anon*.

Hundred liable to damages by the burning of houses, 9 *G. 1.* c. 22. *stat.* 7. A new duty on houses and windows granted, 20 *Geo.* 2. c. 3. & 42. Additional duty on houses, &c. 31 *Geo.* 2. c. 22. *stat.* 31. 2 *Geo.* 3. c. 8.

Housethatch and Huzbith, Seem to signify *houseboot* and *bedgeboot*, in *Man. Ang.* 2. *par. fol.* 633. *Cowell*, edit. 1727.

Housethatch, A compound of *house* and *hatch*, i. e. *compensatio*, signifies *allowance*, or an allowance of necessary timber out of the Lord's wood, for the repairing and support of a *house* or *tenement*. And this belongs of common right to any lessee for years or for life: but if he take more than is needful, he may be punished by an action of waste. *Housethatch*, says *Co.* on *Litt. fol.* 41. is twofold, viz. *Essecurium edificandi* & *ardendi*. *Cowell*.

House-breaking, or House-robbing, Is the *robbing* of a man in some part of his *house*, or his booth or tent, in any fair or market, and the owner or his wife, children or servants being within the same; for this is felony by 23 *Hen.* 8. cap. 1. and 3 *Ed.* 6. cap. 5. And since it is made felony, though done be within the *house*, booth or stall, by 39 *El.* 15. See *Burglary*, *Robbery*.

House-burning. See *Arson*, *Burning*.

House of Correction. Justices of peace in their quarter-sessions, are to make orders for erecting *houses of correction*, and the maintenance and government of the same; and for the punishment of offenders committed thither. 39 *Eliz.* cap. 4. In every county of England there shall be a *house of correction* built at the charge of the county, with conveniences for the setting of people to work, or every justice of peace shall forfeit 5 l. and the justices in sessions are to appoint governors or masters of such *houses of correction*, and their salaries, &c. which are to be paid quarterly by the treasurer out of the county stock: These governors are to set the persons sent on work, and moderately correct them, by whipping, &c. and to yield a true account every quarter-sessions of persons committed to their custody, and if they suffer any to escape, or neglect their duty, the justices may fine them. 7 *Jac.* 1. c. 4. and 14 *Geo.* 2. c. 33.

The *house of correction* is chiefly for the punishing of idle and disorderly persons; parents of bastard children, beggars, servants running away, trespassers, rogues, vagabonds, &c. Poor persons refusing to work are to be there whipped, and set to work and labour: and any person who lives extravagantly, having no visible estate to support himself, may be sent to the *house of correction*, and set at work there, and may be continued there until he gives the justices satisfaction in respect to his living; but not be whipped. 2 *Bulst.* 351. *Sid.* 281. A person ought to be convicted of vagrancy, &c. before he is ordered to be whipped. *Ibid.* *Bridewell* is a prison for correction in London, and one may be sent thither. *Stat.* 27. By the 14 *Geo.* 2. c. 33. and 17 *Geo.* 2. c. 5. upon presentment of the grand jury, the justices at sessions may build, or purchase land for building, or enlarge, buy or hire fit *houses of correction*. And the justices are to take care that the *houses of correction* be provided with proper materials for relieving, employing and correcting persons sent to the same: And two justices shall visit the same twice or oftner in a year, and examine into the estate and management thereof, and report the same at the sessions. The governor or master of a *house of correction* misbehaving himself, may be fined or turned out, at the discretion of the justices. Offenders liable to be sent to the *house of correction*, where the time and manner of their punishment is not expressly limited by law, may be committed until the next sessions, or until discharged by due course of law. See *County Rates*.

Housetaker, (Pater-familias) Is the occupier of a house, a house-keeper or master of a family.

Housing, Readily, or quickly, *Item diximus de illis laqueibus, qui in credigo sequuntur culpabiles inventi, i. e.*

Could

Could not readily be convicted. *Leg. Adelftan. c. 16.* From the Sax. *herdinge, i. e. brevis*, in a short time. *Corwell.*

Budegeld, *Significat quietantiam transgressionis illatae in servum transgredientem.* *Fleta, lib. 1. c. 47. sect. 20.* It may be thought in that place of *Fleta* to be misprinted for *binegeld*, which see, & *quere*. When a villain or servant had committed any trespass, for which he deserved whipping or corporal punishment, when he bought off his penalty with money, the price of exemption from such chastisement was called *budegeld*, or *hidegeld*; some fancy money given to save his hide. *Corwell.* See *Fleta, ubi supra.*

Hue and cry, *Hutesium & clamor*, Is derived from two French words *huer* and *crier*, both signifying to shout or cry aloud. *Manwood in his Forest Law, cap. 19. num. 11.* saith, that *bue* in Latin, *est vox dolentis*, as signifying the complaint of the party, and *cry* is the pursuit of the felon upon the highway upon that complaint; for if the party robbed, or any in the company of one robbed or murdered, come to the constable of the next town, and will him to raise the *bue* and *cry*, that is, make the complaint known, and follow the pursuit after the offender, describing the party, and shewing as near as he can which way he went; the constable ought forthwith to call upon the parish for aid in seeking the felon, and if he be not found there, then to give the next constable notice, and the next, until the offender be apprehended, or at least until he be thus pursued unto the sea side. Of this *Bracton, lib. 3. tract. 2. cap. 5.* *Smith de Rep. Anglor. lib. 2. cap. 20.* and the stat. 13 *Edw. 1. of Winchester, cap. 3 & 28 Ed. 3. 11. & 27 Eliz. 13.* The Normans had such pursuit with a *cry* after offenders, which they called *Clamour de barre*, whereof you may read the *Grand Customary, cap. 54.* And it may probably be derived from *barrier*, *flagitare*. *Hue* is used alone in stat. 4 *Ed. 1. §. 2.* In the ancient records this is called *Hutesium & clamor*. See *Coke's 2 Inst. fol. 172.*

But the *clamor de barre* was not a pursuit after offenders, but a challenge of any thing to be his own after this manner, *viz.* He who demanded the thing did with a loud voice, before many witnesses, affirm it to be his proper goods, and demanded restitution. This the Scots call *hutesium*; and *Skene de verb. signif. verb. Hutesium*, saith, it is reduced from the French *oyer, i. e. audire*, (or rather *oyer*,) being a *cry* used before a proclamation; the manner of their *bue and cry* he thus describeth; If a robbery be done, a horn is blown, and an *out-cry* made, after which, if the party fly away, and doth not yield himself to the King's bailiff, he may lawfully be slain, and hanged upon the next gallows.

Of this *bue and cry*, see *Crompt. Just. of Peace, fol. 160.* and in *Rot. Claus. 30. H. 3. m. 5.* we find a command to the King's treasurer, to take the city of London into the King's hands, because the citizens did not, *secundum legem & consuetudinem Regni*, raise the *bue and cry* for the death of *Guido de Arette* and others who were slain. *Corwell.* See *Vociferatia.*

Hue and cry, is also defined the pursuit of an offender from town to town till he be taken, which all that are present when a felony is committed, or a dangerous wound given, are by the Common law, as well as by the statute, bound to raise against the offenders who escape, on pain of fine and imprisonment. 3 *Inst. 116, 117.* 2 *Inst. 172.* *Dalt. Justice, cap. 28, 109.* *Fitz. Coron. 395.* *Cro. Eliz. 654.*

The raising of *bue and cry* is enjoined by the Common law, which may be called a raising of it at the suit of the King, as well as by several acts of parliament, which may be called a raising of it at the suit of a private person, inasmuch as those statutes make the hundred answerable to the party robbed, if they neglect to pursue the *bue and cry*, and apprehend the robbers. 3 *New Abr. 61.*

As to *bue and cry* at Common law, it seems to be clearly agreed, that a private person who hath been robbed, or who knows that a felony hath been committed, is not only authorized to levy *bue and cry*, but is also bound

to do it under pain of fine and imprisonment. 2 *Inst. 172.* 3 *Inst. 116.* 1 *Hal. Hist. P. C. 464.*

From hence it follows, that although it is a good course, as Lord Hale says, to have a precept or warrant from a justice of peace for raising *bue and cry*, yet it is neither of absolute necessity, nor sometimes convenient, for the felons may escape before the justice can be found; also *bue and cry* was part of the law before the statute of 1 *Ed. 3. cap. 16.* which first instituted justices of the peace. 2 *Hal. H. P. C. 99.*

It is incumbent upon constables to pursue *bue and cry* when called upon, and they are severely punishable if they neglect it: and it prevents many inconveniences if they be there; for it gives a greater authority to their pursuit, and enables the pursuants, in his assistance, to plead the general issue upon the statutes 7 *Jac. 1. cap. 5.* 21 *Jac. 1. cap. 12.* without being driven to special pleading: therefore, to prevent inconveniences which may happen by unruliness, it is most advisable that the constable be called: yet upon a robbery, or other felony committed, *bue and cry* may be raised by the country in the absence of the constable; and in this there is no inconvenience, for if *bue and cry* be raised without cause, they that raise it are punishable by fine and imprisonment. 2 *Hal. Hist. P. C. 99, 100.*

The regular method of levying *bue and cry*, is for the party to go to the constable of the next town, and declare the fact, and describe the offender, and the way he is gone; whereupon the constable ought immediately, whether it be night or day, to raise his own town, and make search for the offender; and upon the not finding him, to send the like notice, with the utmost expedition to the constables of all the neighbouring towns, who ought in like manner to search for the offender, and also to give notice to their neighbouring constables, and they to the next, till the offender be found. 3 *Inst. 116.* *Dalt. Justice, cap. 28.* *Crompt. 178.* 2 *Hawk. P. C. 75.*

The constable is not only to make search in his own vill, but is also to raise all the neighbouring vills, who are all to pursue the *bue and cry* with horsemen as well as footmen until the offender be taken. 2 *Hal. Hist. P. C. 101.* In case of *bue and cry* once raised and levied upon supposal of a felony committed, tho' in truth there was no felony committed; yet those who pursue *bue and cry* may arrest, and proceed as if a felony had been really committed. 2 *Hal. Hist. P. C. 101.* 5 *H. 5. a. 21 H. 7. 28. a. per Rede.* 2 *Ed. 4. 8 & 9.* 29 *Ed. 3. 39.* 2 *Inst. 173.* 2 *Hal. Hist. P. C. 102.*

If *bue and cry* be raised against a person certain for felony tho' possibly he is innocent, yet the constables, and those that follow the *bue and cry*, may arrest and imprison him in the common gaol, or carry him to a justice of the peace 2 *Hal. Hist. P. C. 102.*

If the person pursued by *bue and cry* be in a house, and the doors are shut, and refused to be opened upon demand of the constable, and notice given of his business, he may break open the doors; and this he may do in any case where he may arrest, tho' it be only a suspicion of felony for it is for the King and Commonwealth, and therefore: *virtual non omittas* is in the case; and the same law is upon a dangerous wound given, and a *bue and cry* levied upon the offender. 7 *Ed. 3. 16. b.* 2 *Hal. Hist. P. C. 102.*

It seems in this case, that if he cannot be otherwise taken, he may be killed, and the necessity excuseth the constable. 1 *Hal. Hist. P. C. 102.*

Upon *bue and cry* levied against any person, or where any *bue and cry* comes to a constable, whether the person be certain or uncertain, the constable may search in suspected places within his vill, for the apprehending of the felons. *Dalt. cap. 28.* 2 *Ed. 4. 8. b.* *Crompt. de Pa. 178.* 2 *Hal. Hist. P. C. 103.*

But though he may search suspected places or houses: yet his entry must be *per ostia aperta*, for he cannot break open doors barely to search, unless the person against whom the *bue and cry* is levied be there, and then it is true he may; therefore in case of such a search, the breaking open the door is at his peril, *viz.* justifiable

He be there; but it must be always remembered, that in case of breaking open a door, there must be first a notice given to them *within* of his business, and a demand of entrance, and a refusal, before doors can be broken. 2 *Hal. Hist. P. C.* 103

If the *bue and cry* be not against a person certain, but by description of his stature, person, clothes, horse, &c. the *bue and cry* doth justify the constable, or other person, following it, in apprehending the person so described, whether innocent or guilty, for that is his warrant; it is a kind of process that the law allows, (not usual in other cases) *viz.* to arrest a person by description. *Ibid.*

But if the *bue and cry* be upon a robbery, burglary, manslaughter or other felony committed; but the person that did the fact is neither known nor described by person, clothes or the like; yet such a *bue and cry* is good, as hath been said, and must be pursued, tho' no person certain be named or described. *Ibid.*

And therefore in this case, all that can be done is, for those who pursue the *bue and cry*, to take such persons as they have probable cause to suspect; as for instance, Such persons as are vagrants, that cannot give an account where they live, whence they are, or such suspicious persons as come late into their inn or lodgings, and give no reasonable account where they had been, and the like. 2 *Ed. 4. 8. l. 2 Hal. Hist. P. C.* 103.

There can be no doubt but that both by the Common law, as also by the several statutes which injoin the levying of *bue and cry*, they who neglect to levy one, (whether officers of justice, or others) or who neglect to pursue it when rightly levied, are punishable by indictment, and may be fined and imprisoned for such neglect. 2 *Hal. Hist. P. C.* 104.

By the *stat. 8 Geo. 2. 16.* Every constable, to whom notice is given or left at his house of a robbery, &c. and every constable of the hundred, or constable, &c. in any town, parish, &c. within the hundred, on notice from the party robbed or otherwise, shall with all expedition make *bue and cry* after the felon, &c. on pain of 5 *l.* for neglect, a moiety to the King, a moiety to him that sues in six months, to be recovered with full costs.

If there be judgment against the hundred, it may be levied against the inhabitants of the same hundred by *feri facias*. So it may be levied upon any one, who has lands in his possession within the hundred, tho' he has no house, nor lodging there; for he is an inhabitant. *R. 2 Saund. 423.* Upon a lessee, or purchaser after the robbery committed. *R. Noy 155.* So it may be levied upon one or two of the inhabitants. But if a man come to inhabit in an hundred after a robbery done, he shall not be charged. *R. Hutt. 125. Cont. per Barkley, Mar. pl. 28.* So, if the whole debt be levied upon one or two of the hundred, by the *stat. 27 El. 13.* on complaint to two justices of peace of the county (*quorum unus*) in or near the hundred, they may assess rateably all the towns, &c. within the same hundred, or in the liberties within the same, for the relief of him against whom the plaintiff took execution; and the constable of each town, &c. may rateably assess the said sum on every inhabitant, and if he refuse to pay, levy it by distress and sale, &c.

And by the *same statute*, The hundred, where default of fresh suit on *bue and cry* was made, shall answer half the damages recovered against the hundred in which the robbery was committed, to be recovered by debt, &c. at the suit of the clerk of the peace.

By the *stat. 8 Geo. 2. 16.* After judgment against the hundred, no process shall be served on the high constable or any inhabitant, but the sheriff on receipt of the writ of execution shall shew it *gratis* to two justices of the peace in or near the hundred, who shall speedily cause an assessment to be levied pursuant to the *stat. 27 El. 13.* and also for the necessary expences of the high constable above his costs and damages recovered, of which, on notice from the two justices, he shall give an account and proof on oath to their satisfaction, having first caused his attorney's bill to be taxed.

The sheriff shall pay the money levied to the parties without fee, and indorse the day of receiving the writ of execution, and not to be called upon for a return till sixty days after. And *v. 22 Geo. 2. c. 46.*

And the like assessment shall be in case the plaintiff be nonsuit, discontinue, or have a verdict or judgment on demurrer against him, if by insolvency of the plaintiff or his sureties, he cannot be reimbursed on the bond of 100 *l.* penalty; and the money levied shall be paid to the justices for the high constable in ten days after it is levied.

And the justices may limit a time not exceeding thirty days for levying such assessment; and the officer appointed refusing or neglecting to levy and pay the money, &c. in such time forfeits double the sum.

See the statutes 27 *Eliz. c. 13.* 8 *Geo. 2. c. 16.* And 22 *Geo. 2. c. 24.* Also *vide* 30 *Geo. 2. c. 3. s. 116.* No receiver general of the land-tax or his agents, can sue the hundred for a robbery, unless the persons carrying the money be three in company.

And see the law under this title of *bue and cry*, well and largely treated of in the *New Abr. 3 V. 61, &c.*

The general doctrine as to actions is as follows. Where a robbery is done on the highway, in the day-time, of any day except *Sunday*, the hundred where committed is answerable for it: but notice is to be given of it, with convenient speed, to some of the inhabitants of the next village, to the intent that they may make *bue and cry* for the apprehending of the robbers, or no action will lie against the hundred: and if any of the robbers are taken within forty days, and convicted, the hundred shall be excused.

By a late statute, no process is to be served against the hundred, &c. for a robbery committed, but on the high constable, who shall give notice of it in one of the principal market-towns, &c. and then enter an appearance, and defend the action, *v. 8 Geo. 2. c. 16.* By the *stat. 22 Geo. 2. c. 24.* No person shall recover on any of the statutes of *bue and cry*, above 200 *l.* unless the person or persons so robbed shall at the time of such robbery be together in company, and be in number two at the least, to attest the truth of his or their being so robbed. If he that is robbed, after *bue and cry*, makes no further pursuit after the robbers, action lies against the hundred. 4 *Leon. 180.* The party robbed is not bound to pursue the robbers himself, or to lend his horse for that purpose; but still has his remedy against the hundred, if they are not taken: tho' if any of them are taken, either within forty days after the robbery, or before the plaintiff recovers, the hundred is discharged. *Sid. 11.* It has been held, that an action lies against the hundred for a robbery in the day-time, although not in the King's highway, but in a private way. *Hill. 1 Ann. 1 Mod. 221.* But not for a robbery in the morning, before it is light; and yet where it is before sun-rising, or after sun-set, if it be so light that a man's face may be known, it well lies. 7 *Rep. 6. Cro. Jac. 106.* If a party be robbed in the night-time, when persons are at rest, the hundred is not chargeable: and where a person is seized by day-light, but robbed in the night, he is without remedy. 3 *Leon. 350.* Though where robbers forced a coach out of the way, in the day-time, and afterwards robbed it in the night, this was held a robbery in the day, and that action lay against the hundred. 1 *Sid. 263.* When a man is robbed on a *Sunday*, on which day persons are supposed to be at church, and none ought to travel, the hundred is not liable. 27 *Eliz.* But where a robbery is done on a *Sunday*, tho' the hundred is not chargeable, *bue and cry* shall be made by *stat. 29 Car. 2. c. 7.* And if a person be robbed going to church in a country town or village, on a *Sunday*, which is a religious duty required by law, it has been lately held an action lies against the hundred; but not if one be robbed on that day in other travelling for pleasure, &c. which is prohibited by statute. 6 *Geo. 1. C. B. per King, chief justice.*

And it was formerly ruled by three judges on the statute of *Winton*, where a man was robbed on a *Sunday*, in time of divine service, and made *bue and cry*, that the hundred should be charged; for many persons are necessitated to travel on this day; as physicians, &c. 2 *Cro. 496. 2 Rel. 59. Godb. 280.* See 2 *Nels. Abr. 937, 938.* If a person be robbed in a house, where he is presumed to be at safety by his own care, the hundred is not chargeable: A robbery must be an open robbery, that the country may take notice of it, to make the hundred answerable.

7 Rep. 6. A man is set upon and assaulted by robbers in one hundred, and carried into a wood, &c. in another hundred, near the highway, and there robbed, the action shall be brought against the hundred where the robbery was done, as particularly expressed in the statute, and not the hundred where the man was taken or assaulted; because the assault is not the efficient cause of the robbery, as a stroke is in case of murder. *Hill. 1 Ann. B. R. 2 Salk. 614.* But where goods are taken from a man in one hundred, and opened in another, where they are first taken or seized, they are stolen, and the robbery is committed. 2 *Lill. Abr. 27.* If a servant is robbed of his master's money, he may sue the hundred on the statute of *Winton of hue and cry*; or the master may bring the action, and the man making oath of the robbery, and that he knew none of the robbers, is sufficient without the oath of the master. *Goldf. 24. Cro. Car. 26, 37, 336.* Where a servant is robbed, he must be examined and sworn; but if the master be present, it is a robbery of him, *Shew. 241. 1 Leon. 323.* If a quaker be robbed, or a man's servant being a quaker, and either refuse to take the oath of the robbery, and that he did not know any of the robbers, the hundred is not answerable; for the statute of 27 *Eliz. c. 13.* was made to prevent combination between persons robbed and the robbers. 2 *Salk. 613.* But the master's oath where the servant is a quaker, or otherwise, and being robbed in his presence, will maintain the action in his own name, *Carib. 146.* And a plaintiff had judgment on his oath, though his servant that was robbed with him knew one of the robbers. When a carrier is robbed of another man's goods, he or the owner may sue the hundred; but the carrier is to give notice, and make oath, &c. though the owner of the goods brings the action. 2 *Saund. 380.*

If an action against the hundred be discontinued, on a new action brought, there must be a new oath taken within forty days before the last action brought. *Sid. 139.* In action upon the statute of *hue and cry*, the declaration is good, though the plaintiff doth not say, that the justice of peace who took the oath lived *prope locum* where the robbery was committed. *Mich. 6 W. 3.* And oath was made before a justice of peace of the county where the robbery was done, in a place of another neighbouring county; and it was held good. *Cro. Car. 211.* If a justice of peace refuse to examine a person robbed, and to take his oath, action on the statute lies against the justice. 1 *Leon. 323.* It is safe to say the plaintiff gave notice at such a place, near the place where the robbery was done; and though that place where notice is given be in another hundred or county, yet it is good enough; for a stranger may not know the confines of the hundred or county. *Cro. Car. 41, 379. 3 Salk. 184.* If there be a mistake of the parish in the declaration where the robbery was, if it be laid in the right hundred, it is well enough. 2 *Leon. 212.* And though the party puts more in his declaration than he can prove, for so much as he can prove it shall be good. *Cro. Jac. 348.* Upon a trial in these cases, the party must file his original, and be sure to have a true copy thereof, and witnesses to prove it; and he must also have the affidavit or oath, and a witness to prove the taking it. 2 *Lill. Abr. 25.* In these actions, poor persons in a hundred, and servants, are good witnesses for the hundred; but not those householders who are worth any thing. 1 *Mod. 73.* And as proof cannot be otherwise for the plaintiff, he is allowed to be a witness in his own cause.

For further satisfaction when the action lies against the hundred, and when not. Vide *Comyn's Digest*, 3 V. 481, &c. Also see 3 V. 160. 4 V. 244, 290.

As to the proceeding, declaration, plea, &c. in an action upon the stat. of *Winton*, vide *Com. Dig.* 5 V. 197.

Huissier, An usher of a court, or in the King's palace, &c. See *Usher*.

Huissertum, or *Uffers*, Are ships to transport horses; derived, as some will have it, from the Fr. *huis*, i. e. a door, because when the horses are put on shipboard, the doors or hatches are shut upon them, to keep out the water. *Brompton Anno 1190.*

Hulka, Is a hulk or small vessel, *Walsingham*, p. 394.

Hull, A restraint of evasions taken there, 27 *Hen. 8. c. 3.* Their duties on fair fish and herrings restored, 35 *Hen. 8. c. 33. 5 Eliz. c. 5. sect. 3.* The customer of *Hull* to have a deputy resident at *York*, 1 *El. c. 11. f. 8.* For erecting workhouses and maintaining the poor at *Hull*, 15 *Geo. 1. c. 10. 28 Geo. 2. c. 27.* See *Fish.*

Hullus, A hill. — *Hubendum* & *comitum dittoq. possessionem in hullis & helmis*, i. e. in hill and dale, *Mon. Angl. tom. 2. p. 292.*

Humagium, A moist place. *Is echfus, in derivis, in humagis, in teris, in pratis.* *Mon. Angl. 1 par. 1. 628. a.*

Humber, (river) in *Yorkshire*, fish garth and piles, &c. to be removed, 23 *Hen. 8. c. 18.*

Hundred, (*hundredum centuria*) Is a part of a shire so called, either because of old each hundred found 100 benefactors of the King's peace, or a hundred able men for his wars. But more probably 'tis so called, because it was composed of an hundred families. *P. s. truv.* *Brompton* tells us, that an hundred contains *centum villas*; and *Giraldus Cambrensis* writes, that the *Isle of Man* hath 343 villas. But in these places the word *villa* must be taken for a country family; for it cannot mean a village, because there are not above 40 villages in that island. So where *Mr. Lambard* tells us, that an hundred is so called, à numero *centum hominum*, it must be understood of an hundred men, who are heads or chiefs of so many families. These were first ordained by King *Alfred*, the 29th King of the *West-Saxons*: *Alarodus Rex*, (says *Lambard*, verbo *Centuria*), *ubi cum Guthruno Daw sedus inerat, prudentissimum illud olim a Teithone Moiss datum secutus consilium, Angliam primis in satrapias, centurias, & decurias, partiti sunt.* *Satrapiam*, shire, a *securian*, (quod *partiri* significat), *nominavit centuriam*, hundred, & *decuriam*, toothing *five tiegmantal*, i. e. *Decemvirale collegium appellavit; atque isdem nominibus vel hodie vocantur*, &c. This dividing counties into hundreds, for better government, King *Alfred* brought from *Germany*: For there *centa*, or *centena*, is a jurisdiction over an hundred towns. See *Black. Com. 1 V. 115*, &c.

This is the original of hundreds, which still retain the name, but their jurisdiction is devolved to the county-court, some few excepted, which have been by privilege annexed to the crown, or granted to some great subject, and so remain still in the nature of a franchise. This has been ever since the *Stat. 14 Ed. 3. f. 1. cap. 9.* whereby these hundred-courts, formerly farmed out by the sheriff to other men, were all, or the most part, reduced to the county-court, and so remain at present. But now, by hundred-courts, we understand several franchises, wherein the sheriff has nothing to do by his ordinary authority, except they of the hundred refuse to do their office. See *West. part 1. Symbol. lib. 2. f. 9. 228.* *Ad hundredum post Pascha, & ad proximum hundredum post festum St. Mich.* *Mon. Angl. 2 par. f. 293. a.*

An hundred is to have jurisdiction or power to administer justice in 100 vills, or of 100 men, or of 100 parishes, *Br. Court Baron, pl. 8. cites 8 H. 7. 3. per Rede.*

Every ward in *London* is an hundred in a county, and every parish in *London* is a vill in an hundred. 9 *Rep. 66. b.*

Hundreds were either parcel of the counties, and there the sheriffs did constitute bailiffs, (*viz.* those hundreds which were anciently parcel of the farm of the sheriffs, that the statute 2 *Ed. 3. cap. 12.* speaks of); or else they were such as were granted out, which the lord of the hundred sometimes held at farm, and sometimes in fee, called hundreds in fee, liberties of hundreds, franchises of hundreds. *Per Hale Ch. B. Vent. 405.* *Hill. 22 & 23 Car. 2.* in the case of *Atkins v. Clare.*

In the time of King *Alfred* the kingdom was in gross, and then divided into counties and hundreds, and all persons then came within one hundred or other; and then the King's relations had the government of them, and therefore they were called *Consanguinei*; and so are the Earls, Lord-lieutenants, &c. at this day; but when the office became troublesome, there were obtained *Vicecomes*, which name remains to this day, and the others continue to be called *Consanguinei*, but have no power in the county, having

having only the honorary name of Earls or *Comites* of such or such a county, &c. For the better government of these counties, the *Viccomites* had two courts; but out of those the King granted petty leets and courts-baron; but the turn of the sheriff had yet a superintendant power, they being derived out of the sheriff's turn, as in *Dyer* 13.

The King afterwards granted away some hundreds in fee-simple, and some franchises, and the last excluded the King utterly, but the hundreds granted in fee were not wholly exempt. On this arose some confusion, and the parliament hereon took notice, that the execution of justice was by this much interrupted, and therefore came the statute of *Linc.* 9 *Ed.* 2. *stat.* 2. That sheriffs should be sufficient persons, and have lands in the county, and so be able to answer both the King and country, and that bailiffs and farmers of hundreds should be sufficient men. And at this time hundreds were grantable for years.

Then came the statute of 2 *Ed.* 3. *cap.* 4 & 5. That sheriffs should continue but for one year. But this took not away the whole inconvenience; for the crown still granted away bailiwicks and hundreds, for lives, at rents at such excessive dear rates, that made them endeavour to make up their money by unlawful means; and therefore came the statute of 2 *Ed.* 3. *cap.* 12. and 14 *Ed.* 3. *cap.* 9. By the first it was enacted, That all hundreds and wapentakes granted by the King shall be annexed to the county, and not severed. And by the other statute, that all should be annexed, and the sheriff should have power to put in bailiffs, for which he will answer, and no more should be granted for the future; and one reason of this was, because the King granted away hundreds, and abated not the sheriff's farm. *Arg.* 2 *Show.* 98, 99. *Pajeb.* 32 *Car.* 2. *B. R.*

Hundreds are liable to penalty on exportation of wool, 7 & 8 *Will.* 3. *c.* 28. *f.* 8. Liable to damages sustained by pulling down buildings, 1 *Geo.* 1. *c.* 5. *sect.* 6. By killing cattle, cutting down trees, burning houses, &c. 9 *Geo.* 1. *c.* 22. *sect.* 7. 29 *Geo.* 2. *c.* 36. *f.* 9. By destroying turnpikes, or works on navigable rivers, 8 *Geo.* 2. *c.* 20. *sect.* 6. By cutting hopbinds, 10 *Geo.* 2. *c.* 32. *sect.* 4. By destroying corn to prevent exportation, 11 *Geo.* 2. *c.* 22. *sect.* 5. By wounding officers of the customs, 19 *Geo.* 2. *c.* 34. *sect.* 6. Or by destroying woods, &c. 29 *Geo.* 2. *c.* 36. *f.* 9.

Inhabitants within the hundred may be witnesses for the hundred, 8 *Geo.* 2. *c.* 16.

The word *hundredum* is sometimes taken for an immunity or privilege, whereby a man is quit of money or customs due to the hundreds. *Cowel.* See *Turn.* Hundred chargeable for robberies, vide *Hue and Cry*.

Hundred-Court, Is only a larger court-baron, being held for all the inhabitants of a particular hundred instead of a manor. The free suitors are here the judges, and the steward the register, as in the case of a court-baron. It is not a court of record, and it resembles a court-baron in all points, except that in point of territory it is of a greater jurisdiction. According to *Blackstone*, its institution was probably co-eval with that of hundreds themselves, introduced, though not invented, by *Alfred*, being derived from the polity of the ancient *Germans*. See *Black. Com.* V. 1. *Introd.* *f.* 45. and 3 *V.* 34. 4 *V.* 408.

Hundredors, (*hundredarii*) Are persons serving on juries, or fit to be impanelled thereon for trials, dwelling within the hundred where the land in question lies. *Stat.* 35 *H.* 8. *c.* 6. And default of *hundredors* was a challenge or exception to panels of sheriffs, by our law, till the *Stat.* 4 & 5 *Ann.* *cap.* 16. ordained, that to prevent delays by reason of challenges to panels of jurors for default of *hundredors*, &c. Writs of *venire facias* for trial of any action in the courts at *Westminster*, shall be awarded of the body of the proper county where the issue is triable.

Hundredor also signifies him that hath the jurisdiction of the hundred, and is in some places applied to the bailiff of an hundred. 13 *Ed.* 1. *c.* 38. 9 *Ed.* 2. 2 *Ed.* 3. *Horn's Mirror*, lib. 1.

Hundred-lagh, (from the Sax. *lega*, *lex*) Is in Saxon the hundred court. *Manwood*, par. 1. pag. 1.

Hundred penny, Was collected by the sheriff or lord of the hundred, in oneris sui subsidium. *Camd.* 223.—*Est*

autem pecunia quam subsidii causa vicecomes olim exigebat ex singulis decuriis sui comitatus, quas tithingas Saxones appellabant; sic ex hundredis, hundred penny, &c. Spelm. Gloss. Pence of the hundred is mentioned in *Domesday*. And it is elsewhere called, *hundredseeb*. *Chart. K.* Joh. Egidio Episc. Heref.

Hundred-Dweller, Signifies dwellers or inhabitants of a hundred. *Charta Edgar.* Reg. Mon. Ang. tom. 1. p. 16.

Hunger. According to the present doctrine, *hunger* will not justify stealing food, to relieve a present necessity. 1 *Hal. P. C.* 54. *Black. Com.* 4 *V.* 31. And the doctrine seems just, as (on conviction) a judge may respite, and a merciful King pardon. The ancient doctrine, (that it would justify) if now in force, might open a door to many villanies. And in this commercial state, those who can labour need not fear starving. Those that cannot, and who are poor, the laws have made a provision for.

Hunting, of game and prey, see *Game and Deer-sealers*.

The 4 & 5 *W. & M.* *c.* 23. gives full costs against an inferior tradesman, apprentice, or other dissolute person convicted of a trespass in hawking, hunting, fishing or fowling in another's land. Upon this statute it hath been adjudged, that if a person be an inferior tradesman, as a clothier for instance, it matters not what qualification he may have in point of estate; but, if he be guilty of such trespass, he shall be liable to pay full costs. *L. Ray.* 149. *Black. Com.* 3 *V.* 215.

Notwithstanding all the game laws, and the various qualifications pointed out by statutes, which imply a power for persons so qualified to hunt, according to *Blackstone*, "No man but he who has a chase, or free-warren, by grant from the crown, or prescription, which supposes one, can justify hunting or sporting upon another man's soil, nor indeed, in thorough strictness of Common law, either hunting or sporting at all." 2 *V.* 416. Persons so hunting are liable to actions of trespass, by the possessors of the land. 2 *V.* 418. and to the same purport, 4 *V.* 174.

By 1 *Hen.* 7. *c.* 7. Unlawful hunting, in any legal forest, park or warren, not being the King's property, by night, or with painted faces, declared to be felony. And by 9 *Geo.* 1. *c.* 22. Appearing armed with faces blacked, or disguised, to hunt, wound, kill, or steal deer, to rob a warren, or steal fish, is felony, without benefit of clergy. See *Black. Com.* 4 *V.* 144.

Hurdle, A sledge or hurdle used to draw traitors to execution. *Black. Com.* 4 *V.* 92, 370.

Hurderferst, A domestick, or one of the family, from the Sax. *hyred*, *familia*, and *fest*, *firmus*. *Bis in anno convenient in hundredum suum quicunque liberi tam hurderferst quam solgarii ad dignoscend. si decantæ plenæ sint.* *Leg. H.* 1. *c.* 8.

Hurrers. The cappers and hat-makers of London were formerly one company of the *haberdashers*, called by this name. *Stow's Surv.* *Land.* 312.

Hurst, *Hyrt*, *Hert*, Are derived from the Sax. *hyrst*, i. e. a wood or grove of trees. There are many places in *Kent*, *Suffex*, and *Hampshire*, which begin and end with this syllable; and the reason may be, because the great wood called *Andreswald* extended through those counties. *Cowell*.

Hurst-Castle, Is so called, because situated near the woods. So *Hurslega* is a woody place; and probably from thence is derived *Hursley*, now *Hurley*, a village in *Berkshire*. *Cowell*.

Hurtardus, **Hurtus**, A ram or wether, a male sheep. *Agni primo compoto postquam nati sunt agni vocantur, secundo anno hogastri, & conjunguntur multones cum multonibus, & hurtardis cum hurtardis, & famella cum ovibus.* *Regulæ Compoti Domus de Farendon.* MS.—*De multonibus* 381. *de hurtis & muricis* 207. *de hogris* 121. & *de agnis* 100. *Mon. Angl.* tom. 2. pag. 666.

Hus and Hant, Words used in ancient pleadings.—*Henricus P. captus per querimoniam mercatorum Flandriæ & imprisonatus, offeri Domino Regi hus & hant in plegio ad standum recto, & ad respondendum prædictis mercatoribus & omnibus aliis, qui versus eum loqui voluerint: et diversi veniunt qui mancipiunt quod dictus Hen. P. per hus & hant* *ueniunt*

veniet ad summonitionem Regis vel Concilii sui in Curia Regis apud Shepway, & quod stabit ibi recto, &c. Placit. coram Concilio Dom. Reg. Anno 27 H. 3. Rot. 9. See commune Plegium, sicut Johannes Doe & Richardus Roe. 4 Inst. 72.

Husband and Wife, Are made so by marriage, and being thus joined, are accounted but one person in law. *Litt. 168. See Baron and Feme.*

Husbandry and Husbandman. There having been great decay of husbandry and hospitality, it was enacted that one half of the houses decayed should be erected, and 40 acres of arable land laid to them, by the person, his heir, executor, &c. who suffered the decay: and they are to keep the houses and lands in repair, by *Stat. 39 Eliz. c. 1.*

The decaying of houses of husbandry prohibited, 4 H. 7. c. 19. 6 H. 8. c. 5. 7 H. 8. c. 1. 27 H. 8. c. 22. 2 & 3 Ph. & Ma. c. 1, 2. 39 El. c. 1. Wood not to be turned to tillage or pasture, 35 H. 8. c. 17. *sect. 3.* Land to be re-converted to tillage, 5 & 6 Ed. 6. c. 5. 5 El. c. 2. Who may be compelled to serve in husbandry, 5 El. c. 4. f. 7. How husbandmen shall take apprentices, 5 El. c. 4. f. 25. The statute of 5 El. c. 2. concerning the keeping a quantity of land in tillage, repealed, 35 El. c. 7. f. 20. Arable land not to be converted to pasture, 39 El. c. 2. But not to extend to *Northumberland*, 43 El. c. 9. f. 32.

Husberie, (from the Sax. *hus*, a house and *brice*, a breaking) Was that offence formerly which we now call *burglary*. *Blount.*

Huscarle, A menial servant: it signifies properly a stout man, or a domestick: altho the domestical gatherers of the *Danes* tributes were antiently called *huscarles*. The word is often found in *Domesday*, where it is said the town of *Dorchester* paid to the use of *huscarles* or *houscarles*, one mark of silver. *Domesday.*

Huseans, (Fr. *haujeau*) A sort of boot, or buskin made of coarse cloth, and worn over the stockings, mentioned in the *Stat. 4 Ed. 4. c. 7.*

Husfaine, (Sax. *hus*, i. e. domus, & *fæst*, fixus) Is he that holdeth house and land.—*Et in Franco plegio esse debent omnes qui terram & domum tenent qui dicuntur husfaine, &c. Bract. lib. 3. tract. 2. cap. 10. See Heord-feste.*

Husgable, (*husgabulum*) House-rent, or some tax or tribute laid upon houses. *Mon. Angl. tom. 3. p. 254.*

Husseling-People, Communicants, from the Sax. *hussel*, which signifies the holy sacrament: and in a petition from the borough of *Leominster* to King *Edward* the Sixth, the petitioners set forth that in their town there were to the number of 2000 *husseling people*.

Hustings, (*hustingum* from the Sax. *hustinge*, i. e. concilium, or curia) Is a court held before the Lord Mayor and Aldermen of *London*, and is the principal and supreme court of the city: and of the great antiquity of this court, we find this honourable mention in the laws of King *Edward the Confessor*: *Debet etiam in London, quæ est caput Regni & Legum, semper Curia Domini Regis singulis septimanis die lune hustingis sedere & teneri; fundata enim erat olim & edificata ad insar, & ad modum & in memoriam veteris magnæ Trojæ, & usque in hodiernum diem leges & jura & dignitates, & libertates regiasque consuetudines antiquæ magnæ Trojæ, in se continet: et consuetudines suas una semper inviolabilitate conservat, &c.* Other cities and towns have also had a court of the same name; as *Winchester*, *York*, *Lincoln*, &c. *Fleta*, lib. 2. c. 55. 4 Inst. 247. *Stat. 10 Ed. 2. c. 1. See Court of Hustings*, and *Black. Com. 3 V. 80.*

Hutefium, A hue and cry. — *Abbas & conventus usi sunt hijs libertatibus, scilicet, visum franciplegii, hutefium clamatum, & effusionem sanguinis.* *Cartular. Abbat. Glas-ton. MS. fol. 87.*

Hutilan, *Terras quietas ab omni hutilan & omni alia exactione.* *Mon. Angl. tom. 1. p. 586.*

Hybernagium, The season for sowing winter corn, between *Michaelmas* and *Christmas*; as *Tremagium* is the season for sowing the summer corn in the spring of the year: These words were taken sometimes for the different seasons; other times for the different lands on which the several kinds of grain were sowed; and sometimes for the dif-

ferent corn; as *hybernagium* was applied to wheat and rye, which we still call *winter-corn*; and *tremagium* to barley-oats, &c. which we term *summer corn*: this word is likewise writ *ibernagium* and *thornagium*. *Fleta*, lib. 2. cap. 73. *sect. 18.*

Hyde of Land, and **Hydegild**. See *Hide* and *Hideage*.

Hypotheca, In the Civil law, was where the possession of the thing pledged remained with the debtor. *Inst. l. 4. t. 6. f. 7. Black. Com. 2 V. 159.*

To **Hypothecate**, A ship, (from the Lat. *hypotheca*, a pledge) Is to pawn the same for necessities; and a master may hypothecate either ship or goods for relief when in distress at sea; for he represents the traders as well as owners: and in whose hands soever a ship or goods hypothecated come, they are liable. *1 Salk. 34. 2 Lil. Abr. 195.*

By the Common law, (by which property is to be tried,) the master of the ship could not impawn the ship; for he has no property either general or special; nor is such power given to him by the constituting him master; but the defendant's counsel said, that by the Civil law the master may in case of necessity, and when he has no other means to provide necessities for her. And *Hobart J.* held clearly, that the admiralty law is, that if the ship be in danger at sea, or wants necessities, so as the voyage may be defeated, the master, in such case of necessity, may impawn for money, &c. to relieve such extremities by employing the money so; for he is trusted with the ship and voyage, and so may reasonably be thought to have the power implicitly given him, rather than see the whole lost. *Hob. 11, 12. Bridgman's case.*

A. being in a ship on the sea, B. who was in it, and was reputed an agent and factor, borrows 100 l. of A. upon bottomage (that is, when the money is paid on the keel of the ship, and the ship obliged to payment of it, and if it be not paid at the time, &c. that he that lends the money shall have the ship); and it was allowed to be a good and necessary custom by all; and it was agreed, that if the master, factor, purser, or he that is reputed owner of the ship, borrows money in such a manner for the necessities of a ship, that binds the owner of the ship, although the money be not so employed, and the owner has his remedy against him that he so put in trust. And 'tis not a good allegation to have a prohibition, to say that the property was not in him that took such bottomage. *Noy 95. Scarborough v. Lyrius.*

'Tis said the master may hypothecate, tho' the agreement be made and the money lent at land. *Benzen v. Jeffries. 1 L. Ray. 152. See Black. Com. 2 V. 159.*

Hyth, A port or little haven to lade or unlade wares at, as *Queen-hyth*, *Lamb-hyth*, &c. *New Book of Entries*, fol. 3.—*De tota medietate hythæ suæ in, &c. cum libero introitu & exitu, &c. Mon. Angl. 2 par. fol. 142.* Also a wharf, &c. See *Hith*.

J.

Jeens hereditas dicitur, antequam adita sit: An estate in abeyance. *Dig.*

Jack, A kind of defensive coat-armour worn by horsemen in war, not made of solid iron, but of many plates fastened together; which some persons by tenure were bound to find upon any invasion. *Walsingham*.—It was called *lorica*, because at first it was made with leather cover.

Justitiation of Marriage, Is one of the first and principal matrimonial causes; as, when one of the parties boasts or gives out that he or she is married to the other, whereby a common reputation of their marriage may ensue. On this ground the party injured may libel the other in the Spiritual Court; and unless the defendant undertakes and makes out a proof of the actual marriage, he or she is enjoined perpetual silence upon that head which is the only remedy the Ecclesiastical Court can give for this injury. *Black. Com. 3 V. 93.*

But if two persons are not married, and the one say with respect to the other, that he or she is her, or his husband, or wife, or any thing implying a marriage whereby

whereby the other loses his or her marriage with a third person, or is otherwise actually damaged, we conceive an action will lie for the special damage; as in other cases of words, not actionable in themselves, but rendered actionable, by the damage which ensues.

Idiotus, (*Lat.*) Signifies he that loseth by default: *placitum suum neglexerit, & jactivus exinde remansit.* Formul. Solen. 159.

Jamaica, An American island, taken from the Spaniards in the year 1655, mentioned in the *Stat. 15 Car. 2. c. 5.* See *Plantations*.

Jamaica-wood, (mentioned 15 *Car. 2. cap. 5.*) Is a kind of speckled wood, of which are made cabinets, called there *granadillo*. The tree (as they say) is low and small, seldom bigger than a man's leg.

Jambeaux, Leg-armour, from *jambe*, tibia. *Blount.*

Jamprum, Furze or gorse, and gorsy ground; a word used in *finis* of lands, &c. and which seems to be taken from the Fr. *jaune*, *i. e.* yellow, because the blossoms of furze or gorse are of that colour. 1 *Crok.* 179.

Jannum, or **Jaun**, Heath, whins, or furze. *Placita.* 23 *H. 3.* No man can cut down furze, or whins in the forest without licence. *Mannwood, cap. 25. num. 3.*

Jacques, Small money, according to *Staundford. S. P. C. c. 30.*

Jar, (*Span. Jarro, i. e.* an earthen pot) With us it is taken for an earthen pot or vessel of oil, containing twenty gallons.

Jarrocks, (mentioned in *stat. 1 R. 3. c. 8.*) Is a kind of cork, or other ingredient, which this statute prohibits dyers to use in dying cloth.

Jaun, (*Fr. Jaune, i. e.* yellow colour.) *Præterea concedit abbati & conv. & hominibus eorum de Stanbal de se & de hereditibus suis colligere jaun & feugere & breue & genellam per terram suam sine impedimento, &c.* Charta Will. de Bay, sine dat. Doubtless here *jaun* is used for furz or gorse, which we now in law *Latin* call *jamprum*, and anciently *jaunum*; as, *Decimas illius jaun in Dunberd. Pl. Affij. 22 H. 3.* Cowell.

Jbernagium, *hibernagium*, *ybernagium*, Season for sowing winter-corn.—*Et arabit unam acram, seminabit cum semine domini, eandem berciabit, videlicet, dimidiam acram ad ibernagium & dimidiam ad tremagium, & curiabit de sæno domini.* Cartular. Abbat. Glasston. MS. fol. 91. a.

Jecni, The people of *Suffolk, Norfolk, Cambridgeshire, and Huntingdonshire.* Law Lat. Dict.

Jch Dien, (From the *German*) Is the motto belonging to the arms of the *Prince of Wales*, signifying *I serve*: It was formerly the motto of *Jehu*, King of *Bohemia*, slain in the battle of *Cressy*, by *Edward the Black Prince*; and taken up by him to shew his subjection to his father King *Edward 3.*

Icona, (*Iconia*) A figure or representation of a thing. *Matt. Paris.* 146. *Hoveden* 670.

Istus oibus, A maim, bruise, or swelling; any hurt without cutting the skin and shedding of blood, which was called *Plaga*: It is mentioned in *Bracton, lib. 2. tract. 2. cap. 5 & 24.* And in the laws of *Hen. 1. c. 34.*

Identitate nominis, Is a writ that lies for him who is taken and arrested in any personal action, and committed to prison for another man of the same name; in such case he may have this writ directed to the sheriff, which is in nature of a commission to inquire, whether he be the same person against whom the action was brought; and if not, then to discharge him. *Reg. Orig.* 194. *F. N. B.* 267. *Mich.* 25 *H. 8.* But when there are two men of one name, and one of them is sued without any name of place, or addition to distinguish him, this writ will not lie; and where there are father and son, &c. of the same name, if there is no addition of *junior*, the person sued is always taken for *senior*, and if the younger be taken for him, he may have false imprisonment. *Hob.* 330. A writ *de identitate nominis*, it is said, hath been allowed after verdict and judgment. *Cro. Jac.* 623. It lies also for wrongfully seizing lands or goods of a person outlawed, for want of a good declaration of his surname; and officers shall take security, to answer the value of what is seized, if the party cannot discharge it, on pain of double damages. *Stat. 37 Ed. 3. c. 2.* And this

writ shall be maintainable by executors, &c. by *Stat. 9 H. 6. c. 4.* Vide *Com. Dig. 3 V. 486.* 14 *Vin. Abr. tit. Identitate Nominis.*

Where one person is by mistake arrested for another, the person so arrested, may maintain an action for false imprisonment, against the officer to recover damages, tho' he sues this writ, for immediate relief, from the imprisonment.

Identity of Person. Where a person convicted of, or outlawed for a criminal offence, being asked what he hath to alledge why execution should not be awarded against him, if he pleads diversity of person, a jury that be impanelled to try this collateral issue, viz. the identity of the person. This trial is *instantur*, and no time allowed the prisoner for defence or producing of witnesses, unless he will make oath, that he is not the person attainted: neither shall any peremptory challenge of the jury be allowed the prisoner. See 1 *Sid.* 72. *Fest.* 42, 46. 1 *Lev.* 61. *Black. Com.* 4 *V.* 389.

Ideots and Lunaticks.

Here we shall consider,

- I. What persons are esteemed such, so as to come within the protection of the law.
- II. How they are to be found such.
- III. Who hath an interest in, and jurisdiction over them, of appointing proper curators and committees, and their power and duty.
- IV. How far their want of understanding shall be said to be prejudicial to them in civil respects.
- V. How far the want of understanding will excuse in criminal cases.
- VI. How far their acts are good, void, or voidable.
- VII. How they are to sue and defend.

I. What persons are esteemed ideots and lunaticks, so as to come within the protection of the law.

Idiot is a Greek word properly signifying a private man, who has no publick office. Among the *Latins* it is taken for *illiteratus, imperitus*, and in our law for *non compos mentis*, or a natural fool. The words of the statute 17 *Ed. 2. c. 9.* are *Rex habebit custodiam terrarum factorum naturalium*, whereby it appears he must be a natural fool, that is, a fool a *nativitate*: for if he was once wise, or become a fool by chance or misfortune, the King shall not have the custody of him. *Staundf. Prærog. cap. 9. F. N. B. fol. 232.* If one have understanding to measure a yard of cloth, number twenty, rightly name the days of the week, or to beget a child, he shall not be counted an *ideot* or natural fool, by the laws of the realm. See 4 *Rep. Beverley's case.* Cowell.

The more general description of a person, who, from his want of reason and understanding, comes within the protection of the law, is that of *non compos mentis.* *Co. Lit.* 246. 4 *Co.* 124. *Skin.* 177.

There are, (says my Lord Coke,) four kinds of men who may be said to be *non compos*: 1. An *ideot*, who is *non compos* from his nativity. 2. One made such by sickness. 3. *Lunatick*, *qui aliquando gaudet lucidis intervallis*, who is *non compos* only for the time that he wants understanding. 4. One that is drunk; which last is so far from coming within the protection of the law, that his drunkenness is an aggravation of whatever he does amiss. *Co. Lit.* 247. 4 *Co.* 124. See 1 *Hale Hist. P. C.* 30 to 37. and *Peer Williams*, 3 *V.* 130. and tit. *Drunkenness.*

1. An *ideot* is a fool or madman from his nativity, and one who never has any lucid intervals; therefore the King has the protection of him and his estate, during his life, without rendering any account; because it cannot be presumed that he will be ever capable of taking care of himself or his affairs: And such a one is described a person that cannot number twenty, tell the days of the week, does not know his father or mother, his own age, &c. But these are mentioned as instances only; for *ideot*, or not, being a question of fact, must be tried by jury or inspection. *Dyer* 25. *Moor* 4 pl. 11. *Bro. Ideots.* *F. N. B.* 233.

But tho' an *ideot* must be so a *nativitate*, yet if by inquiry it be found, that *A.* is an *ideot* not having any lucid intervals *per spatium ullo annorum*, this is a sufficient

ficient finding; for the inquisition having found the party an idiot, the adding *spatium octo annorum* is surplusage, and shall be rejected. 3 *Mod.* 43, 44. 2 *Sboru.* 171. *Skin.* 5, 177. *S. C. Producers and Lady Frazier.*

2. One made such by sickness, which my Lord Hale calls *Dementia accidentalis vel adventitia*, and which he again distinguishes into a total and a partial insanity, from its being more or less violent, is such a madness as excuseth in criminal cases; and tho' the party also in every thing else be intitled to the same protection with an idiot; and tho' his disorder seems permanent and fixed, yet as he had once reason and understanding, and as the law sees no impossibility but what he may be restored to them again, it makes the King only a trustee for the benefit of such a one, without giving him any profit or interest in his estate. 1 *Hale Hist. P. C.* 30.

3. A lunatick; this is also *Dementia accidentalis vel adventitia*, and takes its name from the great influence which the moon has in all disorders of the brain; and tho' such a one hath intervals of reason, yet during his phrenzy he is intitled to the same indulgence as to his acts, and stands in the same degree with one whose disorder is fixed and permanent. 4 *Co.* 125. *Co. Lit.* 247. 1 *Hale Hist. P. C.* 31.

4. One made mad by drunkenness, which is called *Dementia effectata*; and tho', as has been said, such a person be not intitled to the protection of the law, yet if a person by the unskilfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causeth phrenzy, this puts him in the same condition with any other phrenzy, and equally excuseth him; also if by one or more such practices an habitual or fixed phrenzy be caused, tho' this madness was contracted by the vice and will of the party, yet this habitual and fixed phrenzy thereby caused puts the man in the same condition, as if the same was contracted involuntarily at first. *Plow.* 19. *a. Crom. Justice* 29. *a. Co. Lit.* 247. 1 *Hale Hist. P. C.* 32.

But tho' this subject of madness may be spun out to a greater length, and branched into several kinds and degrees, yet it appears that the prevailing distinction herein in law is between *idocy* and *lunacy*; the first a *fatuity a naturalitate, vel dementia naturalis*, which excuseth the party as to his acts, and intitles the King to the receipt of the rents and profits of his estate during his life, without being obliged to render any account for the same; the other accidental or adventitious madness, which, whether permanent and fixed, or with lucid intervals, goes under the general name of lunacy, and equally excuseth with *idocy*, as to acts done during the phrenzy; but herein they differ, that in the latter case the King, as has been said, is only a trustee for the lunatick, and accountable to him, if he happens to be restored to his understanding, or to his representatives, if it happen otherwise. 3 *New Abr.* 80. 4 *Co.* 125. *a.*

II. How idiots and lunaticks are to be found such.

Every person of the age of discretion is in law presumed to be of sound mind and memory, unless the contrary appear; and this rule holds as well in civil as criminal cases. 1 *Hale Hist. P. C.* 33.

The trial of *idocy*, *madness* or *lunacy* in civil cases, and in order to the commitment or custody of the person and his estate, which belongs to the King, either to his own use and benefit, as in case of *idocy*, or to the use of the party, in case of *accidental madness* or *lunacy*, is by writ or commission to the sheriff or escheator, or particular commissioners both by their own inspection and by inquisition to inquire, and return their inquisition into the Chancery; and thereupon a grant or commitment of the party and his estate ensues: And in case the party or his friends find themselves injured by the finding him a *lunatick* or *idiot*, a special writ may issue to bring the party before the Chancellor, or before the King, to be inspected; and if, on examination, it appear the party is no idiot, the whole commission and office shall be discharged without any traverse or *monstrans de droit*. 9 *Co.* 31. *a.* 4 *Co.* 126. And for this writ of *idiotia inquirendo*, see *Fitz. N. B.* 232, 3.

Also the party found an *idiot* or *lunatick* may traverse the inquisition, as may any other person having a title to the land, and therefore it is said, that by the statute 18 *Hen.* 6. c. 6. there ought to be a month's time between the return of the inquisition and the grant of the custody and lands, in order for the parties to come in and tender such traverse. *Skin.* 178.

If by inquisition a person be found a *lunatick*, and the custody granted to *J. S.* and the party thus found bring a *scire facias* to set aside the inquisition, the committee of the lunatick cannot plead nor join issue in such *scire facias*; for he can have no interest in the estate of the lunatick, being only in the nature of a bailiff to the King, and therefore his duty is to inform the King's Attorney General of the nature of the affair, who is the proper person to contest the matter in behalf of the King. 2 *Sid.* 124. *Susan Thorn. v. Corwards.*

As to *idocy*, *lunacy* or *madness*, which excuses in capital cases, it is not necessary that it was found by inquisition that the party was a *madman*, *idiot*, or *lunatick*, previous to the commitment of the fact; for if he was *actually mad* at the time of the fact committed, this shall excuse; and this regularly is to be tried by an inquest of office to be returned by the sheriff of the county wherein the court sits for the trial of the offence; and if it be found that he was *actually mad*, he shall be discharged without any other trial; but if they find that the party only feigns himself mad, and he refuses to answer or plead, he shall be dealt with as one who stands mute. 26 *Aff. pl.* 27. *Bro. Cor.* 101. 1 *And.* 107, 154. *Sav.* 50, 1 *Harwk. P. C.* 2. 1 *Hale Hist. P. C.* 35.

Also in case a man in a *frenzy* happen by some oversight, or by means of the gaoler, to plead to his indictment, and is put upon his trial, and it appears to the court upon his trial that he is *mad*, the judge in discretion may discharge the jury of him, and remit him to gaol to be tried after the recovery of his understanding, especially in case any doubt appear upon the evidence touching the guilt of the fact, and this *in favorem vite*; and if there be no colour of evidence to prove him guilty, or if there be a pregnant evidence to prove his *insanity* at the time of the fact committed, then, upon the same favour of life and liberty, it is fit it should be proceeded in the trial, in order to his acquittal and enlargement. 1 *Hale Hist. P. C.* 33, 36.

So if a person during his *insanity* commits a capital offence, and recovers his understanding, and being indicted and arraigned for the same, pleads Not guilty, he ought to be acquitted; for, by reason of his *incapacity*, he cannot act *felleo animo*. 1 *Hale Hist. P. C.* 36.

III. Who hath an interest in, and jurisdiction over them, of appointing proper curators and committees, and their power and duty.

It seems to be agreed at this day, that the King as *pater patriæ* hath the protection of all his subjects, and that in a more peculiar manner he is to take care of all those who, by reason of their imbecillity and want of understanding, are incapable of taking care of themselves; this, in some books, is called a prerogative in the crown, and in others a *regium munus*, or duty which the King owes to his subjects in return to their subjection and allegiance to him. *Stann. Prærog. cap.* 9. *fol.* 33. 2 *Inst.* 14. 4 *Co.* 126. *a.* *Dyer* 25.

Lord Coke is of opinion, that by the Common law the King had no prerogative in the custody of an idiot's lands, but that the same belonged to the lords of whom the lands were holden, and that the same was given to the King by some act of parliament after the making of *Magna Charta*, and before the statute *de prærogativa Regis* 17 *Ed.* 1. *cap.* 9. In 4 *Co. Bowerley's case*, he says, that this prerogative was by the Common law, and that the statute *de prærogativa Regis* is only declarative thereof. 2 *Inst.* 14. 4 *Co.* 126.

But however that may be, now, by the statute *de prærogativa Regis*, or 17 *Ed.* 2. *cap.* 9. it is enacted, that the King shall have the custody of the lands of *natural fools*, taking the profits of them, without waste or destruction,

struction, and shall find them their necessaries, of whose fees forever the lands be holden; and after the death of such *ideots*, he shall render it to the right heirs, so that such *ideots* shall not alien, nor their heirs be disinherited.

And by *cap. 10.* of the said statute, "The King shall provide when any (that before time hath had his wit and memory) happen to fail of his wit, and there are many *per lucida intervalla*, that their lands and tenements shall be safely kept without waste and destruction, and that they and their household shall live and be maintained competently with the profits of the same, and the residue, besides their sustentation, shall be kept to their use, to be delivered unto them when they come to right mind; so that such lands and tenements shall in no wise be aliened, and the King shall take nothing to his own use; and if the party die in such estate, then the residue shall be distributed for his soul, by the advice of the ordinary."

This distinction, established by this statute, between the King's interest in the lands of an *ideot* and *lunatick*, is laid down and admitted in all the books which speak of this matter; and on this foundation it hath been resolved, that the King may grant the custody of an *ideot* and his lands to a person, his heirs and executors, and that he had the same interest such a one as he had in his *ward* by the Common law. *Bro. Idiot*, 4, 5. *Dyer* 25. *Moor* 4. *pl. 12.* 1 *And.* 23. 4 *Co.* 127. *Co. Lit.* 247.

But though a *lunatick* is by commission to be under the care of the publick, and such *committee* is to be appointed for him by the Lord Chancellor, whose acts are subject to the controul and correction of the court of Chancery; yet such a one, whether so appointed, or whether he of his own head take upon him the care and management of the estate of a *lunatick*, is but in nature of a bailiff or trustee for him, and accountable to him, his executors or administrators. 4 *Co.* 127. 2 *Chan. Ca.* 239.

And as the *committees* of a *lunatick* have no interest, but an estate during pleasure, it has been ruled, that they cannot make leases, nor any ways incumber the *lunatick's* estate, without a special order from the court of Chancery, where the profits are not sufficient to maintain the *lunatick*. 1 *Vern.* 262. *Foster v. Merchant*.

Also where a *lunatick*, before he became such, made a mortgage of good part of his estate for 50*l.* and the committee transferred this mortgage, and took up 3 or 400*l.* more upon it; and it was held by my Lord Keeper, that the mortgage should stand but a security for the 50*l.* only. 1 *Vern.* 262, 263.

And though the King, as has been said, has the sole direction and management of *ideots*, &c. yet a private person may confine a friend who is *mad*, and bind and beat him, &c. in such a manner as is proper in such circumstances. 2 *Roll. Abr.* 546.

And also by the 12 *Ann. cap. 23.* reciting, that whereas there are sometimes in parishes, towns and places, persons of little or no estate, who by lunacy, or otherwise, are *furiously mad*, and dangerous to be permitted to go abroad, and by the laws in being the justices of peace and officers have not authority to restrain and confine them, it is enacted, "That it shall and may be lawful for any two justices of the peace, where such *lunatick* or *mad person* shall be found, by warrant under their hands and seals, directed to the constables, churchwardens and overseers of the poor of such parish, town or place, or some of them, to cause such person to be apprehended and kept safely locked up in such place within the county where such parish or town shall lie, as such justices shall, under their hands and seals, direct and appoint; and (if such justices find it necessary) to be there chained, if the last legal settlement of such person shall be in any parish, town or place within such county; and if such settlement shall not be there, then such person shall be sent to the place of his or her last legal settlement, as vagrants by this act are directed to be sent, (whipping excepted) and shall be kept safely locked up or chained, as aforesaid; and the charges of keeping and maintaining such person during such restraint, which shall be for and during such time only, as such

lunacy or madness shall continue,) shall be satisfied and paid by order of two or more justices of the peace for the county, town or place where such settlement shall lie, out of the estate of such person, if such person hath an estate to pay and satisfy the same, over and above what shall be sufficient to maintain his wife and children if he hath any; and if he hath not such an estate, then the charges of the keeping and maintaining such person, during such restraint, shall be satisfied and paid by such ways and means as the poor of such parish, town or place, are by the laws in being to be provided for."

"Provided, that this act, or any thing contained therein, shall not extend, or be construed to extend, to restrain or abridge the prerogative of the Queen, or the power or authority of the Lord Chancellor, Lord Keeper, or Commissioners of the Great Seal for the time being, or of the Chancellor, or Vice-Chancellor of the County Palatine of *Lancaster* for the time being, or of the Chamberlain or Vice-Chamberlain of the County Palatine of *Chester* for the time being, touching or concerning the premises."

IV. How far their want of understanding shall be said to be prejudicial to them in civil respects.

An *ideot*, or person *non compos*, may inherit, because the law, in compassion of their natural infirmities, preumes them capable of property. *Co. Lit.* 2, 8.

Also an *ideot*, or person of *non-sane memory*, may purchase, because it is intended for their benefit; and if after recovery of their memory they agree thereto, they cannot avoid it; but if they die during their *lunacy*, their heirs may avoid it, for they shall not be subject to the contracts of persons who want capacity to contract; so if after their memory recovered, the *lunatick*, or person *non compos*, die without agreement to the purchase, their heirs may avoid it. *Co. Lit.* 2. 2 *Vent.* 203.

If an *ideot* or *lunatick* marry, and die, his wife shall be endowed; for this works no forfeiture at all, and the King has only the custody of the inheritance in one case, and the power of providing for him and his family in the other; but in both cases the freehold and inheritance is in the *ideot* or *lunatick*; and therefore if lands descend to an *ideot* or *lunatick* after marriage, and the King, on office found, takes those lands into his custody, or grants them over to another, as *committee*, in the usual manner; yet this seems no reason why the husband should not be tenant by the *curtesy*, or the wife endowed, since their title does not begin to any purpose till the death of the husband or wife, when the King's title is at an end. *Co. Lit.* 31. a. 4 *Co.* 124, 125. Yet see *Plow.* 263. b. 1 *Vern.* 10.

A *lunatick* shall be tenant by the *curtesy*, and shall have dower; so tho' a woman, being a *lunatick*, kill her husband, or any other, yet she shall be endowed, because this cannot be *felony* in her, who was deprived of her understanding by the act of God. *Perk.* 365.

If a person *non compos* be disseised, and a descent cast, this, it is said, takes away his entry, but not the entry of the heir; for regularly the *non compos* in this case cannot alledge the disability in himself, because he cannot be supposed conscious of it, nor is he allowed ever, at any time, to alledge it, for when he is once *non compos*, there is no certain time when he can be adjudged to recover that disability, unless where he is legally committed, and then the acts during his *lunacy* will be set aside and discharged, and afterwards the *commission* superdeded; for in no other way can the *non compos* be legally restored to his right, and to his capacity of acting. *Lit. sect.* 405. *Co. Lit.* 247.

A person *non compos*, being lord of a copyhold manor, may make grants of copyhold estates, for such estates do not take their perfection from any power or interest in the lord, but from the custom of the manor, by which they have been demised and demisable time out of mind. 4 *Co.* 23. b. *Co. Copyholder* 79, 107.

Ideots and *lunaticks* are both by the Civil law, and likewise by the Common law, incapable of being executors or administrators; for these disabilities render them not only incapable of executing the trust reposed in them, but also by their *insanity*, and want of understanding, they

they are incapable of determining whether they will take upon them the execution of the trust or not. *Godolph. Orph. Leg.* 86.

Therefore it hath been agreed, that if an executor become *non compos*, that the spiritual court may, (on account of this natural disability,) commit administration to another. *1 Salk.* 36.

An *idiot* or person *non compos*, being robbed, shall be bound by a sale of his goods in a market overt. *2 Inst.* 713. Vide last clause, in *Div. V.*

V. How far the want of understanding will excuse in criminal cases.

It is laid down as a general rule, that *idiots* and *lunatics*, being by reason of their natural disabilities incapable of judging between good and evil, are punishable by no criminal prosecution whatsoever. *1 Hawk. P. C.* 2.

And therefore a person, who loses his memory by sickness, infirmity, or accident, and kills himself, is no *felo de se*. *3 Inst.* 54.

So if a man give himself a mortal stroke while he is *non compos*, and recovers his understanding, and then dies, he is not *felo de se*; for tho' the death compleat the homicide, the act must be that which makes the offence. *1 Hale Hist. P. C.* 412.

But it is not every melancholy or hypochondriacal distemper that denominates a man *non compos*, for there are few who commit this offence, but are under such infirmities; but it must be such an alienation of mind that renders them to be madmen, or frantick, or destitute of the use of reason. *ibid.*

And as a person *non compos* cannot be a *felo de se* by killing himself; so neither can he be guilty of homicide in killing another, nor of petit treason; also if one who is committed for a capital offence become *non compos* before conviction, he shall not be arraigned; and if after conviction, he shall not be executed. *ib.* 30. *1 Hawk. P. C.* 2.

It seems to have been anciently holden, (in respect of that high regard which the law has for the safety of the King's person,) that a *madman* might be punished as a traitor for killing, or offering to kill the King; but this is now contradicted by better and later opinions. *Fitz. Coron.* 351. *Regist.* 309. *4 Co.* 124. *b.* *1 Roll. Rep.* 324.

The great difficulty in these cases is, to determine where a person shall be said to be so far deprived of his sense and memory, as not to have any of his actions imputed to him; or where, notwithstanding some defects of this kind, he still appears to have so much reason and understanding as will make him accountable for his actions, which Lord *Hale* distinguishes between, and calls by the name of *Total* and *partial insanity*; and tho' it be difficult to define the indivisible line that divides *perfect* and *partial insanity*, yet, says he, it must rest upon circumstances, duly to be weighed and considered both by the judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or on the other side too great an indulgence given to great crimes; and the best measure he can think of is this: Such a person, as labouring under melancholy distempers, hath yet *ordinarily* as great understanding as a *child of fourteen years* commonly hath, is such a person as may be guilty of treason or felony. *1 Hale Hist. P. C.* 30.

It hath been already observed, that he who is guilty of any crime whatsoever thro' his voluntary *drunkenness* shall be punished for it as much as if he had been sober. *Vide supra.*

Also he who incites a madman to do a murder, or other crime, is a principal offender, and as much punishable as if he had done it himself. *Keilw.* 53. *Dalt. cap.* 95. *1 Hawk. P. C.* 2.

And here we must observe a difference the law make between civil suits that are terminated in *compensationem damne illati*, and criminal suits or prosecutions, that are *ad pœnam* & in *vindictam criminis commissi*; and therefore it is clearly agreed, that if one who wants discretion commits a trespass against the person or possession of another,

he shall be compelled in a *civil action* to give satisfaction for the damage. *2 Roll. Abr.* 547. *Hob.* 134. *Co. Lit.* 247. *1 Hawk. P. C.* 2. *1 Hal. Hist.* 15, 16, 38.

VI. How far their acts are good, void, or voidable.

We must first distinguish between acts done by *idiots* and *lunatics in pais*, and in a court of record; that as to those solemnly acknowledged in a court of record, as fines and recoveries, and the uses declared on them, they are good, and can neither be avoided by themselves nor their representatives; for it is to be presumed, that had they been under these disabilities, the judges would not have admitted them to make these acknowledgments. *4 Co.* 124. *2 And.* 145. *Co. Lit.* 247.

Therefore if a person *non compos* acknowledges a *fine*, it shall stand against him and his heirs, for tho' the judges ought not to admit of a *fine* from a madman under that disability, yet when it is once received, it shall never be reversed, because the record and judgment of the court being the highest evidence that can be, the law presumes the conuzor at that time capable of contracting; and therefore the credit of it is not to be contested, nor the record avoided by any averment against the truth of it. *4 Co.* 124. *2 Inst.* 483. *Bro. tit. Fines* 75. *Co. Lit.* 247.

So in case of a *fine* levied by an *idiot*, it shall stand against him and his heirs; for no averment of *ideocy* can vacate the *fine*; nor will an office, finding him an *idiot a natiuitate*, be sufficient to reverse the *fine*, for that were to lessen the credit of judgments in courts of record, by trying them by other rules than themselves. *2 And.* 193. *4 Co.* 124.

As to acts done by them *in pais*, they are distinguished into *void* and *voidable*, tho' as to themselves, they are regularly unavoidable, because no man is allowed to disable himself, for the insecurity that may arise in contracts from counterfeited madness and folly; besides, if the excuse were real, it would be repugnant that the party should know or remember what he did; but their heirs and executors may avoid such acts *in pais*, by pleading the disability; because if they can prove it, it must be presumed real, since nobody can be thought to counterfeit it, when he can expect no benefit from it himself. *4 Co.* 124-5. *Beverley's case.* *Bro. tit. Fait* 62. *F. N. B.* 202. *Cro. Eliz.* 398.

If an *idiot* or *lunatick* enter into *recognizance*, or acknowledge a *statute*, neither they themselves, nor their heirs nor executors can avoid them; for these are securities of a higher nature than specialties and obligations, which yet they themselves cannot avoid, and being *matters of record*, and equivalent to judgments of the superior courts, neither they themselves, their heirs nor executors, can avoid them. *4 Co.* 124. *a.* *10 Co.* 42. *b.* *2 Inst.* 493. *Bro. Fait* *lur.* 14.

If *parceners* of *non-sane memory* make *partition*, unless it be equal, it shall only bind the parties themselves, but not their issue: And the reason it binds the parties themselves is the same that all other contracts bind them, *viz.* because no man is admitted to stultify himself: And the reason their issue may avoid such partition is the same likewise for which they may avoid all other contracts made by such ancestors during their *insanity*, *viz.* because they may be admitted to shew the incapacity of their ancestors, and so avoid all acts done by them during that time, *Co. Lit.* 166. *a.*

Altho', as hath been observed, according to the strict rules of law no person is allowed to stultify himself, yet it seems that even at law, the *contracts* of *idiots* and *lunatics*, after office found, and the party legally committed, are void, and it must be at the peril of him who deals with such a one; and that if afterwards the commission of lunacy be superseded or discharged, the *non compos* shall be restored to his legal right: But this, it seems, must be at the suit and application of his committee. *4 Co.* 125.

Also there are frequent instances in *equity*, where not only *idiots* and *lunatics*, who come within the protection of the law, but also persons of *weak understandings* have been relieved, when they appeared to have been imposed upon in their dealings and unreasonable purchases, and securities

obtained from them set aside in their favour. But for this see 1 *Chan. Ca.* 113, 153. 1 *Vern.* 155. 2 *Vern.* 189, 414, 678. and see tit. *Agreements*, also *vide Abr. Eq.* 279. *Ridler v. Ridler.*

Idiots and lunatics, during their lunacy, are incapable of making any will or testament; as are also persons grown *childish* by reason of extreme old age; so one actually drunk, if he be so drunk as to have lost the use of his reason: But tho' a person who wants understanding cannot make a will, yet the rule herein is not to be taken from his not being able to measure an ell of cloth, tell twenty, or the like; but whether he has sense enough to dispose of his estate with understanding. *Swinb.* 71. *Godolph.* *Orph. Leg.* 25.

But every person making a will is presumed to be of sound understanding, until the contrary be proved; so that the *onus probandi* lies on the other side: If the testator used to have fits and lucid intervals, and it cannot appear whether the will be made in the lucid intervals, if there be no argument of folly in the will; nay, tho' the testator had no lucid intervals, yet if it can be proved that he was mad at the time of making the will, if the will be a sensible, orderly will, it shall stand; (*sed qu.* if contested) but the least word of folly in such a will, overthrows it: on the other hand, if one be a *very idiot* and make a good sensible will, yet the will shall not stand good. *Swinb.* 72. *Godolph.* 25. *Dyer* 203. 8 *Co.* 147.

If a person of sound memory makes his will, and afterwards becomes *non compos*, this is no revocation of the will; yet a bill will not lie in the life-time of the *non compos*, to establish the testimony of the witness in *perpetuum rei memoriam* to such a will. *Godolph.* 26. 4 *Co.* 126. 1 *Vern.* 105.

By the stat. 4 *Geo.* 2. cap. 10. it is enacted, "That it shall be lawful for any person being *idiot*, *lunatick* or *non compos mentis*, or for the committee of such person in his, her or their name, by the direction of the Lord Chancellor of Great Britain, or the Lord Keeper, or Commissioners of the Great Seal for the time being, signified by an order made upon hearing all parties concerned, on the petition of the person for whom such person being *idiot*, *lunatick* or *non compos mentis*, shall be seized or possessed in trust, or of the mortgagor, or of the person intitled to the monies secured by or upon any lands, &c. whereof any such person being *idiot*, *lunatick* or *non compos mentis*, is or are, or shall be seized or possessed by way of mortgage, or of the person intitled to the redemption, to convey and assure any such lands, tenements or hereditaments in such manner as the Lord Chancellor, &c. shall by such order so to be obtained direct to any other person, such conveyance so to be had and made, shall be as good and effectual in law, to all intents and purposes, as if the said person being *idiot*, *lunatick*, or *non compos mentis*, was at the time of making such conveyance of sane mind, memory and understanding, and not *idiot*, *lunatick* or *non compos mentis*, or had by him, her or themselves executed the same."

And it is further enacted, That all and every such person, being *idiot*, &c. and only trustee or mortgagee as aforesaid, or the committee of such person being *idiot*, *lunatick* or *non compos mentis*, and only such trustee or mortgagee as aforesaid, shall and may be impowered and compelled, by such order so as aforesaid to be obtained, to make such conveyance or assurance as aforesaid, in like manner as trustees or mortgagees of sane memory are compellable to convey, surrender or assign their trust-estate or mortgages.

VII. How they are to sue and defend.

When an *idiot* doth sue or defend he shall not appear by guardian, prochein amy or attorney, but he must be ever in proper person. *Co. Lit.* 135. b. *F. N. B.* 27. The statute of *Westm.* 2. cap. 15. extends not to an *idiot*. 2 *Inst.* 390.

But otherwise of him who becomes *non compos mentis*; for he shall appear by guardian, if within age, or by attorney if of full age. 4 *Co.* 124. *Palmer* 529. *Et vid.* 2 *Saund.* 335

If a trespass be committed in the lands of a lunatick who is legally committed, the committee cannot bring an action of trespass; but this must be brought in the name of the lunatick. 2 *Sid.* 125.

If a lunatick be sued, he must have a committee assigned to him to defend the suit. 1 *Vern.* 106.

For more learning on this subject, see 3 *New Abr.* tit. *Idiots and Lunatics.* See *Lunatics.*

Idiotia inquirendo vel Examinando, Is a writ to examine whether a person be an *idiot*. The King having the protection of his subjects, and the government of their lands who are naturally defective in their understanding; for this purpose the writ *de idiota inquirendo*, &c. is issued, directed to the sheriff to call before him the party suspected of *idioty*, and to examine him and inquire by a jury of twelve men, who are to be on their oaths, whether the party is an *idiot*, or not, *viz.* If he be of sufficient understanding and discretion to manage his estate, or not so; and if from his birth he hath been a perfect *idiot*, by reason whereof the custody of his lands and tenements ought to belong to the King; or if by any misfortune, he hath fallen into such infirmity, &c. and by what, &c. and of his age, and lands, and who holds them, &c. and when the inquisition is taken, the sheriff is to certify it into the *Chancery*: And the party may be afterwards examined by the Lord Chancellor, &c. *F. N. B.* 232. *Reg. Orig.* 267. 9 *Rep.* 31.

Ides, (*Idus*) With the ancient Romans, were eight days in every month, so called; being the eight days immediately after the *Nones*. In the months of *March*, *May*, *July* and *October*, these eight days begin at the eighth day of the month, and continue to the fifteenth day: In other months they begin at the sixth day, and last to the thirteenth. But it is observable, that only the last day is called *Ides*, the first of these days is the *eighth Ides*, the second day the *seventh*, the third the *sixth*, i. e. the eighth, seventh, or sixth day before the *Ides*; and so it is of the rest of the days; wherefore when we speak of the *Ides* of any month in general, it is to be taken for the fifteenth or thirteenth of the month mentioned. See *Calends*.

Idleness. Idle and disorderly persons liable to be imprisoned in the house of correction for one month, per 17 *Geo.* 2. c. 5. which *vide*, and *Black. Com.* 4 *V.* 169, 170.

Idoneum se facere, *idoneare se*, To purge himself by oath of a crime of which he is accused. *Leg. H.* 1. cap. 15. where the word *idoneus* is taken for *innocent*. But he is said in our law to be *idoneus homo*, who hath these three things, *honesty*, *knowledge*, and *ability*; and if an officer, &c. be not *idoneus* he may be discharged. 8 *Rep.* 41. See *Presentation*.

Idumanus flubius, *Black-Water in Effex*.

Jejunum, (*Purgatio per jejunium*.) 'Tis mentioned in *Leg. Canuti*, cap. 7. apud *Brompton*, viz. *Cum sociis se purget vel jejunum ineat, si opus est, Et applicetur ad cornu, Et fiat voluntas Dei.*

Jeman, Sometimes used for *yeomen*. *Cowell*.

Jesfalle, Is compounded of the *Fr. Jay faille*, i. e. *Ego lapsus sum*, and signifies an oversight in pleading or other law proceedings. It is when the parties to any suit have gone so far that they have joined issue, which shall be tried, or is tried by a jury or inquest, and this pleading or issue is so badly pleaded or joined, that it will be error if they proceed; then some of the parties may by their counsel shew it to the court, as well after verdict given and before judgment, as before the jury are charged; the shewing of which defects by the counsel was often, when the jury came into court to try the issue, by saying, *This inquest ye ought not to take*; and if after verdict, by saying, *To judgment you ought not to go*, &c. Therefore for avoiding the frequent delays in suits by such suggestions, several statutes have been made. *Terms de Ley*.

In an *assumpsit*, the defendant pleads Not guilty, and thereupon issue is joined, and found for the plaintiff; he shall have judgment, tho' it is an improper issue in this action; for as there is a deceit alledged, Not guilty is an answer thereto, and it is but an issue misjoined, which is aided by statute. *Cro. Eliz.* 407. If in debt upon a single bill, the defendant pleads payment, without an ac-

quittance, and issue is joined and found for the plaintiff; tho' the payment without acquittance is no plea to a single bill, he shall have judgment, because the issue was joined upon an affirmative and a negative, and a verdict for the plaintiff. *Mich. 37 & 38 Eliz. 5 Rep. 43.*

Of the statutes of jeofails.

An ill plea and issue may be aided by the statute of *jeofails*, after a verdict: and if an issue joined be uncertain and confused, a verdict will help it. *Cro. Car. 316. Hob. 113.* The statutes likewise help when there is no original; and where there is no bill upon the file, it is aided after verdict by statute: but when there is an original, which is ill, that is not aided. *Cro. Jac. 185, 480. Cro. Car. 282.* The statute of *jeofails*, 16 & 17 Car. 2. helps a mis-trial in a proper county; but not where the county is mistaken. 1 *Mod. 24.* And these are the *statutes of jeofails*, which help errors and defects by mis-pleading in records, process, mis-prisons of clerks, &c. By 32 H. 8. c. 30. it is enacted, "That if the jury have once passed upon the issue, though afterwards there be found a *jeofaile* in the proceedings, yet judgment shall be given according to the verdict." The 18 *Eliz. c. 14.* ordains, that after verdict given in any court of record, there shall be no stay of judgment, or reversal for want of form in a writ, count, plaint, &c. or for want of any writ original or judicial; or by reason of insufficient returns of sheriffs, &c. But this is not to extend to appeals of felony, indictments, &c. By the 21 *J. c. 1. c. 13.* "if a verdict shall be given in any court of record, the judgment shall not be stayed or reversed for variance in form between the original writ or bill and the declaration, &c. or for want of averment of the party's being living, so as the person is proved to be in life; or for that the *venire facias* is in part mis-awarded; for mis-nomer of jurors, if proved to be the persons returned; want of return of writs, so as a panel of jurors be returned and annexed to the writs; or for that the return officer's name is not set to the return, if proof can be made that the writ was returned by such officer, &c."

The stat. 16 & 17 Car. 2. c. 8. enacts, that judgment shall not be stayed or reversed after verdict in the courts of record at *Westminster*, &c. for default in form; or for that there are not pledges to prosecute upon the return of the original writ, or because the name of the sheriff is not returned upon it; for default of alledging the bringing into court of any bond, bill or deed, or of alledging or bringing in letters testamentary, or of administration; or for the omission of *vi & armis*, or *contra pacem*; mistaking the Christian name or surname of either party, or the sum of money, day, month or year, &c. in any declaration or pleading, being rightly named in any record, &c. preceding; nor for want of the averment of *hoc paratus est verificare*, or for not alledging *prom patet per recordum*; for that there is no right *venire*, if the cause was tried by a jury of the proper county or place; nor any judgment after verdict, by confession, *cognovit actionem*, &c. shall be reversed for want of *misericordia* or *capitatur*, or by reason that either of them are entered, the one for the other, &c. But all such defects, not being against the right of the matter of the suit, or whereby the issue or trial are altered, shall be amended by the judges: tho' not in suits of appeal of felony, indictments, informations on penal statutes, which are excepted out of the act. The 22 & 23 *Car. 2. c. 4.* made this act perpetual.

By 4 & 5 *Ann. c. 16.* all the statutes of *jeofails* shall extend to judgments entered by confession, *nil dicit*, or *non sum informatus* in any court of record; and no such judgment shall be reversed, nor any judgment or writ of inquiry of damages thereon shall be stayed for any defect which would have been aided by those statutes, if a verdict had been given; so as there be an original writ filed, &c. The 5 *Geo. 1. c. 13.* ordains, that after verdict given, judgment shall not be stayed or reversed for defect in form or substance, in any bill or writ, or for variance therein, from the declaration or any other proceedings See *Error.* And *Black. Com. 3 V. 406. 4 V. 369, 432.* Note, An action for a false return of a member of parliament on the stat. 7 & 8 *W. 3.* for double damages is re-

medial, tho' founded on a law that is penal, so within the statutes of *jeofails*. *Wilf. Rep. par. 1. fo. 125.* See many cases where a bad original is considered as none, and aided by the statutes of *jeofails*; so a bad plaint in an inferior court is aided after verdict, and considered as none, if it varies from the declaration. *Annals 367.*

Jersey and Guernsey, Islands, laws relating to. Vide *Iste.* And *Black. Com. 1 V. 106.*

Jesse, A large brass candlestick, with many sconces, hanging down in the middle of a church or choir; which invention was first called *jesse*, from the similitude of the branches of those of the *Arbor Jesse*: and this useful ornament of churches was first brought over into this kingdom by *Hugh de Flory*, Abbot of *St. Austin's* in *Canterbury*, about the year 1100. *Chron. Will. Thorn. 1796.*

Jetsam, *Jetson*, and *Jotson*; (from the French *jetter*, *ejicere*,) Is any thing thrown out of a ship, being in the danger of wreck, and by the waves driven to the shore. See *Flotsam*, and 5 *Co. Rep. 103.* And *Black. Com. 1 V. 292. 3 V. 106.*

Jesuits, The society of *Jesuits* was instituted by *Ignatio Loyola*, a *Biscayan* gentleman.—The most political and best regulated of all the monastic orders, and from which mankind have derived more advantages, and received greater hurt, than from any other of these religious fraternities. *Robert. Hist. Emp. Char. V. 2 V. 134, 135, &c.* Born in the King's dominions and ordained by the pretended jurisdiction of *Rome*, remaining in *England*, or coming from beyond sea into this kingdom, and not submitting to some bishop or justice of peace within three days, and taking the oaths, are guilty of high treason; and receivers, aiders and harbourers of them, are guilty of felony. *Stat. 27 Eliz. c. 2.* Persons knowing priests, *Jesuits*, &c. and not discovering them to a justice of peace, shall be fined and imprisoned. 22 *Car. 2. And see 27 El. c. 2.*

Jews, (*Judei*) In former times the *Jews* and all their goods were at the disposal of the chief lord where they lived; who had an absolute property in them; and they might not remove to another Lord without his leave: and we read that King *Henry 3.* sold the *Jews* for a certain term of years to *Earl Richard* his brother. They were distinguished from the *Christians* in their lives, and at their deaths; for they wore a badge on their outward garments, in the shape of a table, and were fined if they went abroad without such badges, and they were never buried within the walls of any city, but without the same, and anciently not permitted to burial in the country. *Matt. Paris. 521, 606, &c.* There were particular judges and laws by which their causes and contracts were decided, and there was a court of justice assigned for the *Jews*. 4 *Inst. 254.* A *Jew* may be witness by our laws, being sworn on the Old Testament. But by our ancient books, *Jews*, Hereticks, &c. are adjudged out of the statutes allowing benefit of clergy. 2 *Haruk. P. C. 338.* But this doctrine we apprehend is now exploded.

The 53 *Hen. 3.* is called *provisiones de judaismo*; and by the statute 18 *Ed. 1.* the King had a fifteenth granted him *pro expulsione Judaeorum*. In the 16th year of *Edw. 1.* all the *Jews* in *England* were imprisoned; but they redeemed themselves for a vast sum of money: notwithstanding which anno 19. of that King, he banished them all. *Stow's Surv. Lond. b. 3. p. 54.* And they remained in banishment 364 years; till *Oliver Cromwell* restored them to their trade and worship here. See stat. 1 *Ann. c. 30.* concerning *Jewish* parents refusing maintenance to a protestant child; and 10 *Geo. 1. c. 4.* by which *Jews* may take the oaths to the government, &c. *Stat. anno 26 Geo 2. c. 26.* an act was made to permit persons professing the *Jewish* religion, to be naturalized by parliament; but the very next year, the legislature thought proper to repeal it. 27 *Geo. 2. c. 1.*

Alterations of the abjuration oath in favour of *Jews*, to be naturalized in *America*, 13 *Geo. 2. c. 7. sect. 3.*

A plaintiff had leave given him by the court to alter the *Vifue* from *London* to *Middlesex*, because all the sittings in *London* were on a *Saturday*, and his witness was a *Jew*, and would not appear that day. 2 *Mod. 271. Mich. 29 Car. 2. C. B.* in case of *Barker v. Warren.*

A *Jew* brought an action, and the defendant pleaded that the plaintiff is a *Jew*, and that all *Jews* are perpetual enemies *regis & religionis*; judgment *fi actio*. But *per cur.* A *Jew* may recover as well as a villain, and the plea is but in disability so long as the King shall prohibit them to trade; and judgment for the plaintiff. *L. P. R. 4. cites Mich. 36 Car. 2. B. R.*

A *Jew* was ordered to swear his answer upon the *Pentateuch*, and that the plaintiff's clerk should be present to see him sworn. *Mich. 1684. Vern. R. 263. Anon.*

The *Jews* are here by an implied licence, but on a proclamation of banishment, 'tis like a determination of let- lers of safe conduct to an alien enemy, that was here by virtue of such letters before, &c. *Arg. 2 Show. 371. in case of the East-India Company v. Sands.*

Vide *Judaism*, and *Wm's Rep. 524. Hill. 1718. Vincent v. Fernandez. And Black. Com. 1 V. 375, 449. 4 V. 365.*

Jewels. All diamonds and other jewels may be im- ported or exported without paying any custom duty, &c. But not to make void duties granted the *East-India* com- pany, for jewels brought from places in their limits. *Stat. 6 Geo. 2. c. 7. See Jocalia.*

Msungia, The finest white bread, formerly called cocked bread. *Corwell.*

Ignis Judicium, Purgation by fire, or the old judicial fiery trial. *Id. See Ordeal.*

Ignoramus, (*i. e.* We are ignorant) Is used by the *grand jury* impanelled on the inquisition of criminal causes when they reject the evidence as too weak or defective to make good the presentment against a person so as to put him on the trial, in which case they write this word on the bill of indictment; the effect whereof is, that all farther inquiry and proceedings against that party, for that fault wherewith he is charged, is thereby stopped, and he is delivered without further answer. *3 Inst. 30. i. e.* for that time. For, if better evidence can be procured, (or partiality in the jury is suspected) a new bill of in- dictment may be preferred, at another sessions, &c.

Ignorance, (*Ignorantia*) Which is want of knowledge of the law, shall not excuse any man from the penalty of it. Every person is bound at his peril to take notice what the law of the realm is; and ignorance of it, though it be invincible, where a man affirms that he hath done all that in him lies to know the law, will not excuse him. *Doct. & Stud. 1. 46.* (This may be considered as an argument in favour of the position, that jurors are judges of the law, as well as of the fact.) And an infant of the age of discretion shall be punished for crimes, though he be ignorant of the law; but infants of tender age, have ignorance by nature to excuse them; so persons non compos have ignorance by the hand of God. *Stud. Compan. 83, 84.* Though ignorance of the law excuseth not, ignorance of the fact doth: as if a person buy a horse or other thing in open market, of one that had no property therein, and not knowing but he had right; in that case he hath good title, and the ignorance shall excuse him. *Doct. & Stud. 309.* But if the party bought the horse out of the market; or knew the seller had no right, the buying in open mar- ket, would not have excused. *Ibid. 5 Rep. 83.* Also where a man is to enter into land, or seize goods, &c. he must see that what he does be rightly done, or his igno- rance shall be no excuse. *Wood's Inst. 608. See Black. Com. 4 V. 27.*

Ikenild-Street, Is one of the four famous ways that the Romans made in England, called *Stratum Icenorum*, because it took beginning *ab Icenis*, which were the people that inhabited *Norfolk, Suffolk and Cambridgeshire.* *Camb. Brit. f. 343. Leg. Edw. Conf. c. 12. See Watling- Street.*

Islet, By contraction *ight*, signifies a little island. *Blount.*

Illeivable, A debt or duty that cannot, or ought not to be levied; as *nihil* set upon a debt is a mark for *ille- viable.*

Illiterate. If an illiterate man be to seal a deed, he is not bound to do it, if none be present to read it, if re- quired; and reading a deed false, will make it void. *2 Rep. 3, 11.* A man may plead *non est factum* to a deed

read false; as where a release of an annuity was read to an illiterate person, as a release of the arrears only, &c. agreed to be released. *Moor 148.* If there is a time li- mited for a person to seal a writing, in such case illiteracy shall be no excuse, because he might provide a skilful man to instruct him; but when he is obliged to seal it upon request, &c. there he shall have convenient time to be in- structed. *2 Nels. Abr. 946.*

If a man for great age cannot see to read, and seals an obligation upon false reading, he shall avoid it. *11 Rep. 28.* Resolved, though he was lettered; for now he has all his intelligence by hearing. Also vide *9 H. 6. 59. b. 10 H. 6. 6. 10. 2 Rep. 9. Skin. 159. 47 E. 3. 3. b. 17. 44 Ed. 3. 23. 44 Aff. 30. 3 Ed. 3. 31. b. 32. a. 11 Rep. 27. b. Piggot's case.*

Illuminate, To illuminate, to draw in in gold and co- lours the initial letters, and the occasional pictures in manuscript books—*Ita ipse episcopus libros scribere, illu- minare, & ligare non fastidiret.* *Brompton, sub anno 1076.* Those persons who particularly practised this art, were called *illuminatores*, whence our *linners.*

Images, How to be defaced, *3 & 4 Ed. 6. c. 10.*

Imagining (or compassing, &c.) the King's Death, is high treason, *25 Ed. 3. c. 2.* A Queen regnant is within the words of the act. *1 Hal. P. C. 101.* The terms compassing, imagining, are synonymous. And there must be sufficient proof of an Overt act to convict. *Black. Com. 4 V. 76, 77, 78, 79, &c.*

Imbargo, (*Span. in Lat. Navium detentio*) Is a stop, stay, or arrest upon ships or merchandise, by publick au- thority. *Stat. 18 Car. 2. c. 5.* This arrest of shipping is commonly of the ships of foreigners in time of war and difference with states to whom they are belonging; but by an ancient statute, foreign merchants in this kingdom are to have forty days notice to sell their effects and depart, on any difference with a foreign nation. *27 Ed. 3. c. 17.* The King may grant imbargoes on ships, or employ the ships of his subjects, in time of danger, for the service and defence of the nation; but a warrant to stay a single ship, on a private account is no legal imbargo. *Moor 892. Carib. 297.* Prohibiting commerce in the time of war; or of plague, pestilence, &c. is a kind of imbargo on shipping.

Imbasting of money, (from *adultero* to corrupt or mingle) Signifies to mix species with an alloy below the standard of sterling; which the King by his prerogative may do, and yet keep it up to the same value as before: Imbasting of it, is when 'tis raised to a higher rate, by proclamation, *1 Hale's Hist. P. C. 192.*

Imbezile, To steal, pilfer, or purloin; or where a per- son entrusted with goods, wastes and diminishes them. The word imbezile is mentioned in several statutes, particularly relating to workers of wool, &c. as the stat. *7 Jac. 1. c. 1. 14 Car. 2. c. 31. and 1 Ann.* By the former of which, imbezillers of wool, yarn, or other materials for making of cloth, are to make satisfaction, or be whipped and put in the stocks; and by the latter they are to for- feit double damages, and be committed to the house of correction till paid, &c. By a late statute, persons that imbezil or illegally dispose of any woollen, linen, suttan, cotton, or iron materials; or gloves, leather, shoes, &c. they are intrusted to work up, shall forfeit double the value, or be sent to the house of correction, and there whipped, and kept to hard labour fourteen days; and for a second offence, forfeit four times the value, &c. And buyers and receivers are liable to the same penalties. *Stat. 13 Geo. 2. c. 8.* If any servant imbezils, purloins, or makes away his master's goods, to 40 s. value, it is made felony without benefit of clergy, by *12 Ann. c. 7.*

Imbeziling the King's armour or stores is felony, by *31 El. c. 4.* As to naval stores the benefit of clergy is taken away by *22 Car. 2. c. 5.* Other inferior imbezilements and misdemeanors, that fall under this denomination, are punished by statute, *1 Geo. 1. c. 25.* with fine and im- prisonment.

Imbeziling the publick money. If by high officers, the usual method is by impeachment in parliament.—As Common law the offender is subject to a discretionary fine and imprisonment. *Black. Com. 4 V. 121, 122.*

Imbeziling

Imbroiling or vacating records, is a felonious offence against publick justice. See 8 Hen. 6. c. 12. *Black. Com.* 4 V. 128.

Imbracery. See *Embracery*.

Imbrocus, A brook, a gut, a water-passage. *Sommer of Paris and Forts*, p. 43.

Imbroiderery. See *Embroidery*.

Immunities. King Hen. 3. by charter granted to the citizens of London, a general immunity from all tolls, &c. except customs and prisage of wine. *Cit. lib.* 94. Vide *Prærogative*, London.

Impalate, Is to put in a pound, by the laws of Hen. 1. c. 9.

Impanel, (*Impanellare Juratis*) Signifies the writing and entering into a parchment schedule by the sheriff, of the names of a jury summoned to appear for the performance of such publick service as juries are employed in. *Impanulare* was sometimes a privilege granted that a person should not be impanelled or returned upon a jury.

Non ponatur nec impanuletur in aliquibus juratis, &c. Paroch. Antiq. 657. See *Panel*, and *Kennel's Glossary*.

Impar lance, (*Interlocutio, vel licentia interloquendi*) Is derived from the Fr. *parler*, to speak, and in the Common law is taken for a petition in court of a day to consider, or advise what answer the defendant shall make to the action of the plaintiff; being a continuance of the cause till another day, or a larger time given by the court.

Impar lance is either
General
or
Special.

A general *impar lance* is set down and entered in general terms, without any special clause, thus; and now at this day to wit, on Thursday next after the Oſtave of St. Hilary, in the same terms, until which day the aforesaid C. D. the defendant had licence to impar lance to the bill aforesaid, and then to answer, &c.

Special *impar lance*, is where the party desires a farther day to answer, adding also these words; Saving all advantages, as well to the jurisdiction of the court, as to the writ and declaration, &c. *Kitch.* 200. This *impar lance* is had on the declaration of the plaintiff; and special *impar lance* is of use where the defendant is to plead some matters which cannot be pleaded after a general *impar lance*. 5 Rep. 75.

Impar lance is generally to the next term; and if the plaintiff amend his declaration after delivered or filed, the defendant may *impar lance* to the next term afterwards, if the plaintiff do not pay costs; but if he pay costs, which are accepted, the defendant cannot *impar lance*. 2 Lill. Abr. 35. Also if the plaintiff declares against the defendant, but doth not proceed in three terms after; the defendant may *impar lance* to the next term. *Ibid.*

Causes of impar lance, &c.

The not delivering a declaration in time is sometimes the cause of *impar lance* of course: and where the defendant's case requires a special plea, and the matter which is to be pleaded is difficult; the court will, upon motion, grant the defendant an *impar lance*, and longer time to put in his plea, than otherwise by the rules of the court he ought to have: if the plaintiff keeps any deed, or other thing from the defendant, whereby he is to make his defence, *impar lance* may be granted till the plaintiff delivers it to him, or brings it into court, and a convenient time after to plead. *Hill.* 22 Car. 1 B. R.

In criminal proceedings.

An *impar lance* being prayed on a defendant's appearing to answer an information, it was said *impar lance* was formerly from day to day, but now from one term to another, on the crown side; and it was ruled that the defendant should have the same time to *impar lance* that the process would have taken up, if he had stood out till the attach-

ment or *capias*; for when he comes in upon that, he must plead *instantly*. 1 Salk. 367. *Mod. Cases* 243. And if process had been continued, he might have been brought in the same term upon an attachment; and then there could be no *impar lance*, but he ought to plead *instantly*. 2 Nels. Abr. 947.

Where impar lances are not allowed.

There are many cases wherein *impar lances* are not allowed; no *impar lance* is granted in an *habeas replegiando*; or in an *assise*, unless on good cause shewn: nor shall there be an *impar lance* in an action of special *clamum fregit*; though it is allowed in general actions of trespass. *Hill.* 9 W. 3. 3 Salk. 186. Where an attorney, or other privileged person of the court, sues another, the defendant cannot *impar lance*, but must plead presently: if the plaintiff sues out a special original, wherein the cause of action is expressed, and the defendant is taken on a special *capias*, he shall not have an *impar lance*, but shall plead as soon as the rules are out. 2 Lill. 35, 36.

Of pleading afterwards.

As to pleadings on *impar lances*; a plea to the jurisdiction, may not be pleaded after general *impar lance*. *Raym.* 34 After *impar lance*, the defendant cannot plead in abatement; if he doth, and the plaintiff tenders an issue, whereupon the defendant demurs, and the plaintiff joins in demurrer, such plea is not peremptory; because the plaintiff ought not to have joined in demurrer, but to have moved the court, that the defendant might be compelled to plead in chief. *Allen* 65. Tho' a defendant may not plead in abatement after a general *impar lance*; yet if it appear by the record that the plaintiff hath brought his action before he had any cause, the court *ex officio* will abate the writ. 2 Lev. 197.

What may not be done after impar lance, and where the want of it is error, &c.

The defendant cannot have *oyer* of a deed in a common case, after *impar lance*: and a tender after *impar lance*, is naught. 2 Lev. 190. *Lutw.* 238. If it appears upon the record, that an *impar lance* was due, and denied, it is error; but then such error must appear on the record. 3 Salk. 168. It has been held, that if the defendant doth not appear on a *dies datus*, the plaintiff shall not have judgment by default, as he may on *impar lance*; because the *dies datus* is not so strong against him as an *impar lance*; and therefore the plaintiff must take process against the defendant for not appearing at the time. *Moor* 79. 2 Nels. 947.

Modern practice as to impar lances, &c.

By late orders of court, where a defendant is arrested by process out of B. R. in which the cause of action is specially expressed; or a copy of process is delivered, and the plaintiff hath declared; the defendant shall not have liberty of *impar lance*, without leave first granted, but shall plead within the time allowed a defendant prosecuted by original writ. *Ord. Hill.* 2 Geo. 2. And upon all processes returnable the first, or second return of any term, the declaration shall be delivered with notice to plead in eight days after delivery, where the defendant lives above twenty miles from London, &c. without any *impar lance*; and on default of pleading, the plaintiff may sign judgment. *Ord. Cur. Trin.* 5 & 6 Geo. 2. Vide *New. Abr.* tit. *Pleading*, and 14 *Vin. Abr.* tit. *Impar lance*.

Imparsonce, A parson *imparsonce*, *persona imparsonata*, is he that is indicted, and in possession of a benefice, *Dyer*, fol. 40. num. 72. says a dean and chapter are parsons *imparsonces* of a benefice appropriate unto them. *Cowell*.

Impeachment, (from the Lat. *impetere*) Is the accusation and prosecution of a person for treason, or other crimes and misdemeanors. Any member of the House of Commons may not only impeach any one of their own body, but also any Lord of parliament, &c. And there-
upon

upon articles are exhibited on behalf of the Commons, and managers appointed to make good their charge and accusation; which being done in the proper judicature, sentence is passed, &c. And it is observed, that the same evidence is required in an *impeachment* in parliament, as in the ordinary courts of justice: but not in bills of attainder. *State Trials*, Vol. 1. 676. Vol. 4. 311. An impeachment before the Lords by the Commons of Great Britain, in parliament, is a prosecution of the known and established law, and hath been frequently put in practice; being a presentment to the most high and supreme court of criminal jurisdiction, by the most solemn grand inquest of the whole kingdom. (1 *Hal. P. C.* 150.) A commoner cannot however be impeached before the Lords for any capital offence, but only for high misdemeanors: (*Rot. Parl.* 4 Ed. 3. n. 2 & 6. 2 *Brad. Hist.* 190. *Selden Judic. in Parl.* ch. 1.) A Peer may be impeached for any crime. The articles of impeachment are a kind of bills of indictment, found by the House of Commons, and afterwards tried by the Lords; who are in cases of misdemeanors considered not only as their own peers, but as the peers of the whole nation. This is a custom derived to us from the constitution of the antient Germans; who in their great councils sometimes tried capital accusations relating to the publick: "*Licet apud concilium accusare quoque, et discrimen capitis intendere.*" *Tacit. de mor. Germ.* 12. See on this subject. *Black. Com.* 4 V. 256, 257, 258. And *Montesquieu's L'Esprit des Loix*. l. 11. c. 6. vol. 1. of the quarto edition, 208, 210. particularly fol. 217; 218.

No pardon under the Great Seal, can be pleaded to an impeachment by the Commons in parliament. 12 & 13 W. 3. c. 2.

Impeachment of Waste, (*Impeditio vasti*, from the Fr. *empêchement*, i. e. *impedimentum*) Signifies a restraint from committing of waste upon lands or tenements; or a demand of recompence for waste done by a tenant who hath but a particular estate in the land granted: but he that hath a lease to hold without impeachment of waste, hath by that such an interest given him in the land, &c. that he may make waste without being impeached for it; that is, without being questioned, or any demand of recompence for the waste done. 11 *Rep.* 82. Bills in equity are often filed, as a preventive remedy, to obtain injunctions to stay waste, which are readily granted where proper cases are made out, for courts of equity to ground their injunctions on. See *Waste*.

Impechiare, (French *empêcher*, Latin *impetere*.) To impeach, to accuse and prosecute, for felony, or treason,—*Et promisit Regi Navarra quod nunquam cum impechiaret pro morte dicti Caroli de Hispania.* *Hen. de Knighton*, sub anno 1256. *Spelman* and *Sommer* tell us, that it is derived from the Lat. *impetere*, which is to accuse, or *in jus vocare*, from whence *impetitus* signifies an accusation, viz. *sine impetitione vasti*, is without impeaching or accusing him of waste. See *Impeachment*.

Impeditatus, *Impediati canes*, Dogs lawed and disabled from doing mischief in the forests, and purlieus of them.—*Omnes canes infra forestam solebant esse impediati aut amputati sinistro ortello.* *Cowell.* See *Expeditate*.

Impedens, A defendant, or deforciant. *Cowell.*

Impediments in Law, Persons under impediments are those within age, under coverture, non compos mentis, in prison, beyond sea, &c. who, by a saving in our laws, have time to claim, and prosecute their rights, after the impediments removed, in case of fines levied, &c. 1 R. 3. c. 7. 4 H. 7. c. 24. See *stat. Limitations* 21 Jac. 1. c. 16. And 4 Ann. c. 16. s. 19.

Imperiale, A sort of very fine cloth. *Cowell.*

Impescatus, Impeached, or accused. *Pat.* 18. *Edw.* 1.

Impetitio, Accusation or impeachment: As, *sine impetitione vasti*, or, *sine impedimento vasti*, i. e. without impeachment of waste, the party shall not be questioned or accused for any waste. *Cowell.*

Impetratio, (*Impetratio*) Signifies an obtaining any thing by request and prayer: And in our statutes it is a pre-obtaining of church benefices in England from the court of Rome, which belong to the gift and disposition

of the King, and other lay patrons of this realm; the penalty whereof was the same with *provisors*. 25 Ed. 3. 38 Ed. 4. c. 1.

Impierment, Is used for impairing or prejudicing; as to the impierment and diminution of their good names, &c. 23 *Hen.* 8. c. 9.

Implead, To sue or prosecute by course of law; from the Fr. *plaider*.

Implements, (from the Lat. *impleo*, to fill up) Things necessary in any trade or mystery, without which the work cannot be performed; also the furniture of an house, as all household goods, *implements*, &c. And *implements of household* are tables, presses, cupboards, bedsteads, wainscot, and the like: In this sense, we find this word often in gifts and conveyances of moveables. *Terms de Ley*.

Implication, Is where the law doth imply something that is not declared between parties in their deeds and agreement: And when our law, giveth any thing to a man, it giveth implicitly, whatsoever is necessary for the enjoying the same.

Of omissions helped by implication, &c.

The want of words in some cases may be helped by implication; and so one word or thing, or one estate given, shall be implied by another: There is an implication in wills and devises of lands, whereby estates are gained; as if a husband devotes the goods in his house to his wife, and that after her decease his son shall have them, and his house; though the house be not devised to the wife by express words, yet it has been held, that she hath an estate for life in it by implication, because no other person could then have it, the son and heir being excluded, who was to have nothing till after her decease. 1 *Entr.* 223. But where it may be reasonably intended, that the deviser meant as well the one, as the other, in such case his intention shall never be construed in prejudice to the heir at law: For instance; A man devised part of his lands to his wife for life, and that the same and all the rest of his lands should remain to his youngest son, and the heirs of his body, after the death of the wife; here was no express devise of the rest of the lands to his wife, and she shall not have them by implication, because the eldest son and heir at law was not excluded, who shall have them during the life of the wife, till the devise to the youngest son takes effect, for they shall descend to the heir in the mean time. *Moor* 123. Tho' *Croke*, (who reports the same case,) says, it was adjudged the wife should have the whole. *Cro. Elix.* 15.

Of estates raised by implication.

Estates for life, and estates-tail, may be raised by implication in wills; a testator had three sons, the eldest son dying, leaving his wife with child, to whom the father devised an annuity in *ventre sa mere*, and if his middle son died before he had any issue of his body, remainder over, &c. And it was resolved, that such son had an estate-tail by implication. *Moor* 127. It is said, a fee-simple estate shall not arise by implication in a will; tho' there is a perpetual charge imposed by the deviser, on the devisee, &c. *Bridgm.* 103. Also it hath been adjudged, that where a particular estate is devised by will expressly, a contrary intent shall not be implied by any subsequent clause. And implication is either necessary, or possible; and where-ever an estate is raised by that means in a will, it must be by a necessary implication; for the devisee must necessarily have the thing devised, and no other person can have it. 1 *Salk.* 236. 2 *Nelf. Abr.* 494.

No implication shall be allowed against an express estate, limited by express words, to drown the same. *Salk.* 266. There are conditions and covenants, implied by law, in deed and grants: And implication will sometimes help law proceedings, and supply defects. See *Intendment* and *Use*. And *Black. Com.* 2 V. 381.

Rules, &c. concerning implication.

It is a general rule, that where an estate is to be raised by implication, it must be a necessary and inevitable implication, and such as that the words can have no other construction whatsoever. *Arg. Cases in Chan.* in Lord Talbot's time, 9 Mich. 1733 in the case of Lord Glenorby v. Desjoville.

An implication cannot be intended by deed, unless there are apt words, but otherwise in a will. *Brownl.* 153. Mich. 15 Jac. *Nevill v. Nevill.*

An implied intent must not, without clear expression, alter the equitable general law. *Arg. Hill.* 28 & 29 Car. 2. 1 *Chan. Cases* 297. in the case of *Ford Lord Grey v. Lady Grey & al.*

An estate by implication was never thought of in a deed, nor in a will but in case of necessity, 4 Mod. 156. Mich. 4 W. & M. B. R. *Davis v. Speed.*

No implication shall be allowed against an express estate limited by express words. 1 Salk. 226. Hill. 5 W. & M. B. R. *Goodright v. Cornish.*

An express estate for life cannot be enlarged by implication, but by express words it may; per *Wright K.* and 2 Ch. J. and 1 J. Mich. 1703. 2 Vern. 449. *Danfield v. Popham.* See *Tail, Will.*

Importation, (Importatio) Is where goods and merchandize are brought into this kingdom from other nations. 12 Car. c. 4.

Impossibility. A thing which is impossible in law, is all one with a thing impossible in nature: And if any thing in a bond or deed is impossible to be done, such deed, &c. is void. 21 Car. 1. B. R. Yet where the condition of a bond becomes impossible by the act of God, in such case, it is held the obligor ought to do all in his power towards a performance: As when a man is bound to enfeoff the obligee and his heirs, and the obligee dies, the obligor must enfeoff his heir. 2 Co. Rep. 74. See *Black. Com.* 2 V. 156.

Impost, (from the Lat. impono) Signifieth the tax received by the Prince, for such merchandize as are brought into any haven within his dominions from foreign nations. 31 Eliz. 5. It may in some sort be distinguished from custom, because custom is rather that profit the Prince maketh of wares shipped out; yet they are frequently confounded. *Cowell.*

Impostors (Religious) Those who falsely pretend an extraordinary commission from heaven; or terrify and abuse the people with false denunciations of judgments. They are punishable by the Temporal courts with fine, imprisonment, and infamous corporal punishment. 1 Hawk. P. C. 7.

Impotence, is a canonical disability to avoid marriage in the Spiritual Court. The marriage is not void *à initio*, but voidable only by sentence of separation, but to be actually made during the life of the parties. See *Black. Com.* 1 V. 434, 435.

Impotentia, property ratione. A qualified property may subsist with relation to animals *feræ naturæ, ratione impotentia*, on account of their own inability. As when hawks, herons, or other birds build in my trees, or conies or other creatures make their nests or burrows in my land, and have young ones there; I have a qualified property in those young ones, till such time as they can fly or run away, and then my property expires, *Carta de forest.* (9 Hen. 3. c. 13.) but, till then, it is in some cases trespass, and in others felony, for a stranger to take them away 7 Rep. 17. *Lamb. Eiren.* 274. *Black. Com.* 2 V. 394.

Impressing Seamen. As this is a subject of great consequence, and the power much disputed, we shall give the sentiments of an eminent author thereon, without a comment.

The power of impressing men for the sea service by the King's commission, has been a matter of some dispute, and submitted to with great reluctance; though it hath very clearly and learnedly been shewn by Sir Michael Foster, (Rep. 154. *Broadfoot's case*) that the practice of impressing, and granting powers to the Admiralty for that purpose, is of very antient date, and hath been uniformly

continued by a regular series of precedents to the present time: Whence he concludes it to be part of the Common law. The difficulty arises from hence, that no statute has expressly declared this power to be in the crown, though many of them very strongly imply it. The stat. 2 Ric. 2. c. 4. Speaks of mariners being arrested and retained for the King's service, as of a thing well known, and practised without dispute; and provides a remedy against their running away. By a later statute, (2 & 3 Ph. & M. c. 16.) if any waterman, who uses the river Thames, shall hide himself during the execution of any commission of pressing for the King's service, he is liable to heavy penalties. By another, (5 Eliz. c. 5.) no fisherman shall be taken by the Queen's commission to serve as a mariner; but the commission shall be first brought to two justices of the peace, inhabiting near the sea-coast where the mariners are to be taken, to the intent, that the justices may chuse out, and return such a number of able bodied men, as in the commission are contained, to serve her Majesty. And, by others, (7 & 8 W. 3. c. 21. 2 Ann. c. 6. 4 & 5 Ann. c. 19. 13 Geo. 2. c. 17, &c.) especial protections are allowed to seamen in particular circumstances, to prevent them from being impressed. All which do most evidently imply a power of impressing to reside some where; and, if any where, it must from the spirit of our constitution, as well as from the frequent mention of the King's commission, reside in the crown alone. *Black. Com.* 1 V. 418, 419.

The same author observes, that this method of impressing is only defensible from public necessity, to which all private considerations must give way. 1 V. 419. For further satisfaction on this important subject, we refer the reader to *Camberbatch's Rep.* 245, and to *Foss. Rep.* 154, &c. Where the subject is very fully and learnedly treated.

Imprest-Money, (from the preposition In, and Fr. prest, paratus) Is money paid on insisting soldiers.

Impretabilis, Signifies invaluable, in which sense it is often mentioned in *Matt. Paris.*

Imprimery, (Fr.) A print, or impression; and the art of printing, also a printing-house, are called *imprimery*. Stat. 14 Car. 2. c. 33.

Imprii, Are those who side with, or take the part of another, either in his defence, or otherwise.—*Omnes homines & Imprii Domini Ludovici, &c.* *Matt. Westm.*—*Nos erimus Imprii Regis, &c.* *Matt. Paris.* 127.

Imprisonment, (imprisonamentum) Is the restraint of a man's liberty under the custody of another; and extends not only to a gaol, but to a house, stocks, or where a man is held in the street, &c. for in all these cases the party so restrained is said to be a prisoner, so long as he hath not his liberty freely to go about his business, as at other times. 1 Inst. 253.

None shall be imprisoned but by the lawful judgment of his peers, or by the law of the land. M. C. 9 H. 3. c. 2. 25 Ed. 3. st. 5. c. 4.

Imprisonment according to law, or the custom of England; or by process, and course of law. 2 Inst. 46, 50, 282. And no person is to be imprisoned, but as the law directs either by command and order of a court of record, or by lawful warrant, or the King's writ; by which one may be lawfully detained to answer the law. 2 Inst. 46. 3 Inst. 209.

At Common law, a man could not be imprisoned in any case, unless he were guilty of some force or violence; for which his body was subject to imprisonment, as one of the highest executions of the law: but imprisonment is inflicted by statute in many cases. 3 Rep. 11. Though see *Magna Chart.* 9 H. 3. c. 29. Whenever the Common law, or any statute gives power to imprison, there it is lawful and justifiable; but he who doth it in pursuance of a statute, must be sure exactly to follow the statute in the order and manner of doing thereof. *Dyer* 204. 13 E. 1.

A justice of peace may cause offenders to be imprisoned, and may himself require any man to give security of the peace or good behaviour, where he hath cause, and if he refuse may imprison him. *Bro. Tresf.* 177. If a warrant of commitment be for imprisoning a man until farther order, &c. it has been held ill; for it should be till the party

party is delivered by due course of law. 1 *Roll. Rep.* 337. It is the same when a person is imprisoned on a warrant, without shewing any cause for which he is committed: and where a person was committed to prison by warrant from a Secretary of State, without assigning any cause, &c. it was adjudged, that he ought to be discharged for that reason; but then another warrant was returned of the same Secretary, in which the first warrant was recited, and that upon farther examination, he commanded the gaoler to detain him safely, for suspicion of high treason; and it was said this was no cause to detain him, because this second warrant referred to the first, which was no warrant at all; besides, there was no special cause of suspicion alledged, nor for what species of treason. *Palm.* 558. 1 *Roll. Rep.* 219.

In the case of *John Wilkes, Esq.*; it was resolved, that a member of parliament is intitled to the privilege of being free from arrests in all cases, except *treason, felony, and actual breach of the peace*; therefore ought to be discharged from imprisonment without bail. *Vid. Willf. par. 2.* 159. And see the opinion of the court of Common Pleas, with respect to imprisonment, under general warrants from the Secretary of State. *Ibid. from fo. 151 to 160.* And from *fo. 275 to 292.*

In all actions, *quare vi & armis*, if judgment be given against the defendant, he shall be fined and imprisoned, because to every fine, imprisonment is incident: and therefore where the defendant is fined for a contempt to any court of record, he may be imprisoned till the fine is paid. 8 *Rep.* 60. But with respect to imprisoning for the fine, in actions of *trespass*, the *captivitas pro fine* is taken away, and other provisions in lieu thereof made, (*viz.* by plaintiff paying it, and being allowed in costs.) *per 5 W. & M. c. 12.* See further as to imprisonment, *Black. Com.* 1 *V.* 134, 136, 137. 3 *V.* 127. 4 *V.* 116, 218, 370, 429. In what cases persons imprisoned may be delivered on bail; or by *habeas corpus*, &c. see *Bail and Habeas Corpus.*

Impropriation, Is properly so called when a benefice ecclesiastical is in the hands of a layman; and *appropriation*, when in the hands of a bishop, college, or religious house, though sometimes they are confounded. There are computed to be in *England* 3845 *impropriations*; and on the dissolution of monasteries they were granted to lay persons by the King's patents, &c. 31 *H. 8. c. 13.* *Vide Appropriation, and Black. Com.* 1 *V.* 386.

Improvement. See *Appropriation*.

Impulsare, To improve land.

Impulsamentum, The improvement of lands. *Cartular. Abbat. Glaston. MS. pag. 50.* Or rather the improvement itself.

In auter droit, In another's right; as where executors or administrators sue for a debt or duty, &c. of the testator or intestate.

Inblaura, Profit or product of ground. *Cowell.*

Inborow and Outborow, Saxon. See *Camden's Britan. in Ortadinis*, where he says, speaking of *Edelingham*, the barony of *Patrick Earl of Dunbare*, which also was *Inborow* and *Outborow* between *England* and *Scotland*, as we read in the book of *Inquisition*, that is, (as he believes) he was to allow, and to observe in this part the ingress and egress of those who travelled to and fro between both realms; for *Englishmen* in antient time called in their language an *entry* and *fore-court* or gate-house, *inborow*. *Cowell.*

Incastellate, To reduce a thing to serve instead of a castle; and it is often applied to churches.—*Qui post mortem patris ecclesiam incastellatam retinebat.* *Gervai. Dorob. anno 1144.*

In casu consimili. See *Casu consimili*.

In casu probiso. *Casu probiso*.

Incaustum, or **Encaustum**, Ink. *Quæ propter encausti & chartæ vitium abcleri incipiebat.* *Fleta, lib. 2. c. 27. par. 5.*

Incendiaries. Burning of houses maliciously, to extort sums of money from those, whom the malefactors should spare, was made treason the first year of King *H. 6.* 1 *Hale's Hist. P. C.* 270. The like offences of firing houses and sending letters demanding money of persons, &c. is felony, by *Stat. 9 Geo. 1. c. 22.* *Vide Arson, and Waltham Blacks.*

Inception. The same person is patron and incumbent, and he devises the next avoidance; it was objected, that by his death the church is void, and then the presentation is a *chese en action*, and not grantable, and the devise takes not effect till after the death of devisor, and therefore void; but held a good devise, because it has inception in his life. *Roll. Rep.* 214. 13 *Jac. B. R.* in case of *Harris v. Austen.* 3 *Bullf.* 42. *S. P.*

The condition of a lease was, that if he alien to any person during his life, the lessor might enter. Lessee devises it to *B.* this does not take effect in his life, but has inception in his life. *Roll. R.* 214. cites *D. 45. b.* 3 *Bullf.* *S. C.* cited.

Lease to *A.* for life, remainder to the right heir of *A.* this is a good remainder to vest upon the death of *A.* for the inception in his life. *Roll. R.* 215. cites 7 *H. 4.*

Institution gives inception to a lay fee, so that if a caveat be entered after to prevent induction, a prohibition shall be granted. 2 *Roll.* 294. *Prohibition (M)* pl. 14.

Uncertainty, Is that which opposeth certainty, where a thing is so ambiguously set down, that one cannot tell how to understand it: and this is said to be the mother of contention. The questions of *uncertainty* arise sometimes on matter of record; as writs, counts, pleas, verdicts, &c. and sometimes on deeds or writings, or upon contracts, &c. 5 *Rep.* 221. *Plowd.* 25.

In law proceedings, *uncertainty* will make them void; for all proceedings at law are to be certain and affirmative, that the defendant may be at a certainty as to what he should answer, &c. *Plowd.* 84. If the count and verdict in an appeal be uncertain, there can be no judgment given thereon; and it is the same on an indictment. 3 *Mod.* 121.

Uncertainty in deeds renders them void; but sometimes a term for years granted by lease, may be made certain by reference to a certainty; and *uncertainty* may be reduced to certainty, by matter *est post factum*, implication, &c. *Plowd.* 6. 273. 6 *Rep.* 20. If there are two men of one name, and a devise of lands, &c. is to one of that name, without any distinction, it will be void for uncertainty; tho' perhaps an averment may make it good. 2 *Bullf.* 180. *Uncertainty* in declarations of uses of fines of lands, &c. is rejected in law; for otherwise there would be no certain inheritances. 9 *Rep.*

Incest. In the year 1650, when the ruling powers found it for their interest to put on the semblance of a very extraordinary strictness and purity of morals, incest and wilful adultery were made capital crimes. But at the restoration, when men, from an abhorrence of the hypocrisy of the late times, fell into a contrary extreme, of licentiousness, it was not thought proper to renew a law of such unfashionable rigour. And these offences have been ever since left to the feeble coercion of the Spiritual Court, according to the rules of the Canon law. *Black. Com.* 4 *V.* 64. See *Lewdness*.

Enchantment. There were formerly two severe statutes against this imaginary offence, *vim.* 33 *Mss.* 8. c. 8. & 1 *Jac. 1. c. 12.* But now, in wiser times, a statute hath been made, *vim.* (9 *Geo. 2. c. 5.*) on more rational grounds, *vim.* that no prosecution shall, for the future, be carried on against any person for *conjuratio, witchcraft, sorcery, or enchantments*. But, the misdemeanor of persons pretending to use witchcraft, tell fortunes, or discover stolen goods by skill in the occult sciences, is still deservedly punished with a year's imprisonment, and standing four times in the pillory.

Louis the Fourteenth of *France*, thought proper, by an edict, to restrain the tribunals of justice from receiving informations of witchcraft. *Voltaire Siècl. Louis XIV. Mod. Univers. Hist. XXV.* 215.

Enchanter, (*incantator*) Is he who by charms conjures the devil; *qui carminibus vel cantuiculis dæmonem adjurat*: and they were antiently called *carmina*, by reason in those days their charms were in verse. 3 *Inst.* 44.

Enchantress, (*incantatrix*) A woman who uses charms and incantations. See *Conjuratio*.

Enchastate, Signifies to give, or grant any thing by an instrument in writing: *concessit ipse comiti terram ipsam & enchastavit, ut possideret suam, &c.* *Matt. Paris. anno 1252.* *Ench*

Kind of Candle, is the manner of selling goods by merchants; which is done thus: First, Notice is to be given upon the *Exchange*, or other publick place, of the time of sale; and in the mean time, the goods to be sold are divided into lots, printed papers of which, and the conditions of sale, are also forthwith published; and when the goods are exposed to sale, a small piece of wax-candle, about an inch long, is burning, and the last bidder when the candle goes out, is intitled to the lot or parcel so exposed. If any difference happens in adjusting to whom a lot belongs, where several bid together, the lot is to be put up again; and the last bidder is bound to stand to the bargain, and take the lot, whether good or bad. In these cases, the goods are set up at such a price; and none shall bid less than a certain sum, more than another hath before, &c. *Merc. Dig.*

Incident, (incident) Is a thing necessarily depending upon, appertaining to, or following another that is more worthy or principal. A court-baron is inseparably incident to a manor; and a court of plea-pleaders to a fair; these are so inherent to their principals, that by the grant of one the other is granted; and they cannot be extinct by release, or saved by exception, but in special cases. *Kitch. 36. 1 Inst. 151.* Rent is incident to a reversion; timber trees are incident to the freehold, and also decays and charters, and a way to lands; fealty is incident to tenures; distress to rent and antientment, &c. *1 Inst. 151.* Tenant for life or years, hath incident to his estate, crovers of wood. *1 Inst. 41.* And there are certain incidents to estates-tail; as to be disseizable of waste, to suffer a recovery, &c. *1 Inst. 224. 10 Rep. 38. 39.* Incidents are needful to the *bens off* of that to which they are incident; and the law is tender of them. *Hob. 39. 40.*

If a man, either by grant or prescription, has a right to a wreck thrown on another's land, of consequence he has a right to a way over the same land to take it; and the very possession of the wreck is in him before seizure. *6 Mod. 149. Pasch. 3 Ann. B. R. Aven'. See 14 Vin. Abr. tit. Incidents.*

Inclaudere, is mentioned in the *Monasticum*, 2 tom. p. 598. and signifies to fetter a horse, viz. *Et si inclaudet palefridum Regis dabit ei palefridum 4 marcarum; &c.*

Inclausa, A home-closure, or inclosure near the house. — *Dicunt per sacramentum suum, quod capitale messuagium valeat per annum cum tota inclausa, 11 sol.* Paroch. Antiquit. pag. 31.

Incur, To what duties liable, 4 *Will. & M. c. 5. s. 2. 7 Ann. c. 9. s. 24. 12 Ann. s. 2. c. 21.*

Inclosures, Throwing down inclosures is an offence punishable by our ancient laws and statutes. *13 Ed. 1. c. 46.* But if the lord of a manor inclose part of the waste or common, and doth not leave sufficient for the commoners, they may break down such inclosure, or have writ of assize. *3 & 4 Ed. 6. c. 3.* Large wastes or commons in the *West-Riding* of the county of *York*, with the consent of the lords of manors, &c. may be inclosed, a sixth part whereof shall be for the benefit of poor clergymen, whose livings are under 40 l. a year, to be settled in trustees, who may grant leases for twenty-one years, &c. *Stat. 12 Ann. c. 4.*

Destroying them in the night, to be made good by the neighbouring towns, *13 Ed. 1. s. 1. c. 46. 3 & 4 Ed. 6. c. 3. 6 Geo. 1. c. 16.* Throwing down inclosures in the night, to be punished with treble damages, *3 & 4 Ed. 6. c. 3. s. 4. 22 & 23 Car. 2. c. 7.* Persons obtaining inclosures or wastes disabled, *9 & 10 W. 3. c. 36. s. 16.* Taking away gates, pales, posts, stiles or hedges wood, or destroying them, how punished, &c. *45 Eliz. c. 7. 19 Car. 2. c. 2. 3 W. & M. c. 10. s. 9. 5 Geo. 1. c. 15. s. 6. 6 Geo. 1. c. 16. See Approvements, Wastes.*

Incommensurable, (incompatibilis beneficiorum) Is when benefices cannot stand one with another, if they be with curies, and of such a value in the King's books. *Whitlock's Rem. p. 4.*

Incontinency, (incontinentia) Where persons are *virgines*, and have no command of themselves, is a crime that may be committed in several cases, and there are divers degrees thereof; as in case of *bigamy*, or having more

wives than one; *rape* of women; *solony*, or *buggery*; getting *bastards*, &c. all which are punishable by statute. See *25 H. 8. c. 6. 5 El. 17. 18 Eliz. c. 7. 1 Jac. 1. c. 11. Incontinency of priests* is punishable by the ordinary, by imprisonment, &c. *1 H. 7. c. 4. See Lewdness.*

Incopellitus, Is made use of for a proctor, or vicar. *Leg. Hen. 1.*

Incorporation, (power of) The King's consent is absolutely necessary to the erection of any corporation, either impliedly or expressly given. The King's implied consent is to be found in corporations which exist by force of the *Common law*, to which our former Kings are supposed to have given their concurrence; Common-law being nothing else but custom, arising from the universal agreement of the whole community. The King's consent is also presumed as to all corporations by *prescription*, such as the city of *London*, and many others, which have existed time out of memory; and therefore are looked upon in law to be well created. The methods by which the King's consent is expressly given, are either by act of parliament or by charter. But the immediate creative act is usually performed by the King alone, in virtue of his royal prerogative, i. e. by charter. See *2 Inst. 330. 10 Rep. 29. 30. 1 Rd. Abr. 512, 513. 8 Rep. 114. Black. Com. 1 V. 472. 3.*

Incorporeal Hereditaments. An incorporeal hereditament is a right issuing out of a thing corporeal, (whether real or personal) or concerning, or annexed to, or exercisable within the same. *Co. Litt. 19. 20.* It is not the thing corporeal itself, but something collateral thereto, as a *rent* issuing out of lands, &c. or an office belonging to *jewels*, &c. Or, according to the *legicians*, corporeal hereditaments are the *substantia*, which may be always seen, always handled: incorporeal hereditaments are but a sort of *accidents*, which inhere in and are supported by that substance; and may belong or not belong to it, without any visible alteration therein. Their existence is merely in idea and abstracted contemplation; tho' their effects and profits may be frequently objects of our bodily senses. N. B. The profits produced and the thing or hereditament which produces them, are very different. *Black. Com. 2 V. 20.*

Incrementum, Increase or improvement; to which was opposed *decrementum* or abatement. — *Raddendo antiquam firmam & de incremento xi s.* Paroch. Antiqu. 164. And we read *de d. A. B. quoddam incrementum terra mea apud*, &c. where it is meant a parcel of ground inclosed out of a common, or improved.

Incroachment, (Fr. atcroachment, i. e. a grasping of a thing) Signifies an unlawful gaining upon the right or possession of another man. As where a man sets his hedge or wall too far into the ground of his neighbour, that lies next to him, he is said to make incroachment upon him: and a writ is said to be incroached, when the lord by distress or otherwise compels his tenant to pay more than he owes; and so of *services*, &c. *9 Rep. 33.* And sometimes this word is applied to power; for the *Spencers*, father and son, it is said incroached unto them *royal power* and authority, *anno 1 Ed. 3.* And the Admirals and their deputies did incroach to themselves divers jurisdictions, &c. *15 R. 2. c. 3.*

Incumbent, (from the Lat. incumbere, to mind diligently) Is a clerk who is resident on his benefice with cure; and is so called, because he does or ought to bend all his study to the discharge of the cure of the church to which he belongs. *Co. Litt. 119.* Where an incumbent is put out without due process, he shall be at large to sue for his remedy at what time he pleareth, &c. *Stat. 4 H. 4. cap. 22. See Black. Com. 1 V. 392. and tit. Church.*

Incumbent, See *Mortgage, Purchase*, and *14 Vin. Abr. tit. Incumbent.*

Incurmentum, The incurring or being subject to a penalty, fine or amercement: so *incurri aliquid* is to be liable to another's legal censur or punishment. — *Statutum de rebus capitalibus Dominis vel Regi incurrantur.* *Willelm. c. 37.*

Indebitatus Assumpsit, Is used in declarations and law proceedings, where one is indebted unto another in any certain sum; and the law creates it: it is also an *action* thereupon. And it has been held, that action upon

an *indebitatus assumpsit* lies in no case, but where debt will lie for the same thing. 1 Salk. 23. See *Assumpsit*.

Indecimable, (*indecimabilis*) That is not *tithable*, or by law ought not to pay tithes. 2 Inst. 490.

Indefeasible, or **Indefeasible**, Is what cannot be defeated or made void: as a good and *indefeasible estate*, &c.

Indefeasible Right to the Throne. The doctrine of *hereditary right* does by no means imply an *indefeasible* right to the throne. It is unquestionably in the breast of the supreme legislative authority of this kingdom, the King and both Houses of Parliament, to defeat this hereditary right; and, by particular entails, limitations and provisions, to exclude the immediate heir, and vest the inheritance in any one else. This is strictly consonant to our laws and constitution; as may be gathered from the expression so frequently used in our Statute Book, of "The King's Majesty, his heirs, and successors." In which we may observe, that as the word, "heirs," necessarily implies an inheritance or hereditary right, generally subsisting in the royal person; so the word "successors", distinctly taken, must imply that this inheritance may sometimes be broken through; or, that there may be a successor, without being the heir of the King. Black. Com. 1 V. 195. It is a doctrine founded in reason and the nature of things, which doth not require a comment.

Indefensus, A word signifying one that is impleaded, and refuseth to make answer: *Et prædictus J. nihil sinit dicere contra factam dicti Richardi, nec voluit ponere se inquisitionem aliquam; consideratum est quod tanquam indefensus sit in misericordia*, &c. Mich. 50 H. 3. Rot. 4.

Indemnity. On the appropriation of a church to any college, &c. when the archdeacon loses for ever his induction money, the recompence he receives yearly out of the church so appropriate, as 12 d. or 2 s. more or less, as a pension agreed at the time of the appropriating, is called *indemnity*. MS. in Bibl. Cotton. p. 84. There is an indemnity from penalties, of persons who have neglected to read the morning and evening prayers, according to the Book of Common Prayer, and to subscribe the declaration, &c. See Stat. 9 Geo. 2. c. 6. and other indemnities by various acts.

Indenture, (*indentura*) Is a writing containing some contract, agreement or conveyance between two or more persons, being indented in the top answerable to another part, which hath the same contents. Co. Litt. 229. If a deed or writing begins, *This indenture*, &c. and is not indented, it is no indenture; but it may work as a deed poll: but if the deed is actually indented, and there are no words importing an indenture, it is nevertheless an indenture in law. Wood's Inst. 223. Cro. Eliz. 472. A deed of bargain and sale of freehold lands, &c. must be by indenture, enrolled, &c. Stat. 27 Hen. 8. c. 16. Words in indentures, though of one party only, are binding to both parties. Cro. Eliz. 222, 657. But the indenting is now considered as of no consequence. 'Tis a general name given to a variety of deeds, beginning with the words, *This indenture*, &c.

India Company. See *East-India Company*.

India Goods. A duty upon *India* linens and silk exported, 1 Jac. 2. c. 5. All *India* goods to be sold by inch of candle, 9 & 10 W. 3. c. 44. f. 69. A duty of 5 per cent. upon *India* goods, 9 & 10 W. 3. c. 44. f. 76. Additional duties on wrought silk, &c. 9 & 10 W. 3. c. 44. f. 80. 11 & 12 W. 3. c. 3. Made perpetual, Ann. c. 7. and part of the aggregate fund, 3 Geo. 1. c. 8. Drawback on exportation, 11 & 12 W. 3. c. 3. f. 5. Several *India* goods prohibited to be worn, or to be imported in any other port than London, 11 & 12 W. 3. c. 10. 10 G. 1. c. 11. Wrought silks, &c. to be warehoused till exported, 11 & 12 W. 3. c. 10. f. 2. Proof to lie on owner, 11 & 12 W. 3. c. 10. f. 4. No duties but the half subsidy, 11 & 12 W. 3. c. 10. f. 10. The terms muslins and painted calicoes explained, 12 & 13 W. 3. c. 11. f. 14. Duties on japanned and lacquered goods to be paid *ad valorem*, 12 & 13 W. 3. c. 11. f. 15. Unrated *India* goods to pay custom as sold at the sale, 2 & Ann. c. 9. f. 6. Security to be given for importing the goods to Great Britain, and paying the duties, 5 Ann

3. Bonds for exporting *India* goods to be delivered up, if no prosecution within three years, 8 Ann. c. 13.

f. 24. *India* goods to be carried to Ireland only from England, 5 Geo. 1. c. 11. f. 12. Printed silks, calicoes, &c. not marked forfeited, 5 Geo. 1. c. 11. f. 15. *India* goods carried to Ireland, Jersey, Guernsey, Alderney, Sark, or Man, or the plantations, not shipped in Great Britain, forfeiture of ship and goods, 7 Geo. 1. c. 21. f. 9.

The time of sale for unrated *India* goods, enlarged to three years, 7 Geo. 1. c. 21. f. 11. The 11 & 12 W. 3. c. 10. shall not extend to any goods made up in furniture before the 25th of December 1722, 10 Geo. 1. c. 1.

Foreign goods may be taken out of warehouses and refreshed, 15 Geo. 2. c. 31. f. 8. Unrated *East-India* goods to pay subsidy of 5 per cent. 21 Geo. 2. c. 2. f. 2.

Inducitavit, Is a writ or prohibition that lies for a patron of a church, whose clerk is sued in the Spiritual Court by another clerk for tithes, which amount to a fourth part of the profits of the advowson; then the suit belongs to the King's courts, by the Stat. Westm. 2. c. 5. And the patron of the defendant, being like to be prejudiced in his church and advowson, if the plaintiff recovers in the Spiritual Court, hath this means to remove it to the King's court. Reg. Orig. 35. Old Nat. Br. 31. This writ may be also purchased by the parson sued; and is directed as well unto the judge of the court, as unto the party plaintiff, that they do not proceed, &c. But it is not to be had before the defendant is libelled against in the Spiritual Court, the copy of which ought to be produced in Chancery, before the *inducitavit* is granted: and this writ must be brought before judgment given in the Spiritual Court; for after judgment there, the *inducitavit* is void. New Nat. Br. 66, 101. The writ *inducitavit* doth not lie of a less part of the tithes, &c. than a fourth part of the church; if they are not so much, this being surmised by the other party, a consultation shall be had. Ibid. The patron of the clerk, who is prohibited by the *inducitavit*, may have his writ of right of the advowson of *dismes*, &c. See Black. Com. 3 V. 91.

Remedy for the patron disturbed by it, 13 Ed. 1. f. 1. c. 5. f. 4. The Ecclesiastical Court may hold plea of tithes not amounting to the fourth of the church, Stat. Circumsp. Agatis, 13 Ed. 1. f. 4. It shall not be granted till the matter is contested in the Spiritual Court, 34 Ed. 1. f. 1.

Indico and Indigo, Restraints on exporting it from the plantations before it hath been in England, 12 Car. 2. c. 18. f. 18. 15 Car. 2. c. 7. f. 9. To what duties liable, 4 W & M. c. 5. f. 2. Indico may be imported, 7 Geo. 2. c. 18.

For the encouraging the making of indico in the British plantations in America, by the Stat. 21 Geo. 2. c. 30. a premium of 6 d. per pound is allowed on the importation of such indico.

Indictis, (*indictatus*) When any one is accused by bill preferred to jurors at the King's suit, for some offence, either criminal or penal, he is said to be indicted thereof. Corwell.

Indictio, The same with indictment. *Nonnunquam enim sunt accusationes de foresta, & indictmentes vulgariter sic appellatae*. Du Fresne.

Indiction, (*indictio, ab indicendo*) Was the space of fifteen years, by which computation charters and publick writings were dated at Rome; likewise antiently in England, which we find not only in the charters of King Edgar, but of King Hen. 3. And by this account of time, which began at the dismission of the Nicene Council, every year still increased one till it came to fifteen; and then returned again, making the first, second indiction, &c. dat. apud Chippenham, 18 die Aprilis, indictione nona, anno Dom. 1266.

Indictment, (*indictamentum*, from the Fr. *enditer*, i. e. *deserre nomen alicujus indicare*) Is a bill or declaration of complaint drawn up in form of law, exhibited for some offence criminal or penal, and preferred to a grand jury; upon whose oath it is found to be true, before a judge or others, having power to punish or certify the offence. *Terms de Ley*. Lambard says, An indictment is an accusation, at the suit of the King, by the oaths of twelve men of the same county, wherein the offence was committed,

mitted, returned to inquire of all offences in general in the county, determinable by the court into which they are returned, and their finding a bill brought before them to be true: but when such accusation is found by a grand jury, without any bill brought before them, and afterwards reduced to a formed indictment, it is called a presentment; and when it is found by jurors returned to inquire of that particular offence only, which is indicted, it is properly called an inquisition. *Lamb. lib. 4. cap. 5.* By *Pulton*, an indictment is an inquisition taken and made by twelve men, at the least, thereunto sworn, whereby they find and present, that such a person, of such a place, in such a county, and of such a degree, hath committed such a treason, felony, trespass, or other offence, against the peace of the King, his crown and dignity. *Pult. 169.* An indictment by Lord Chief Justice *Hale*, is only a plain, brief, and certain narrative of an offence, committed by any person, and of those necessary circumstances, that concur, to ascertain the fact and its nature; there is great strictness required in indictments, where life is in question; therefore very nice exceptions are allowed. *2 Hale's Hist. P. C. 168, 169.*

Why called a bill of indictment.

A bill of indictment is said to be an accusation for this reason; because the jury that enquireth of the offence, doth not receive it, until the party that offereth the bill appearing subscribes his name, and offers his oath for the truth of it: But it differs from an accusation in this, that the preferrer of the bill is not tied to the proof of it, upon any penalty, except there appear conspiracy. *Staundf. P. C. lib. 2. cap. 23.*

But if any one prefer an indictment to the grand jury for any criminal offence, without probable cause, and the bill is not found, or the party is acquitted, action lies for a malicious prosecution.

Of the preferring and finding of the bill, and of the grand jury, &c.

Although a bill of indictment may be preferred to a grand jury upon oath, they are not bound to find the bill, if they find cause to the contrary; and tho' a bill of indictment be brought unto them without oath made, they may find the bill if they see cause: but it is not usual to prefer a bill unto them before oath be first made in court, that the evidence they are to give unto the grand inquest to prove the bill is true. *Pafch. 23 Car. B. R. 2 Lill. Abr. 44.* The grand jury are to find the whole in a bill, or reject it, and not find specially for part, &c. *2 Hawk. P. C. 210.* According to the Common law, every indictment must be found by twelve men at the least, every one of whom ought to be of the same county, and returned by the sheriff, or other proper officer, without the nomination of any other, and to be *freemen*, not under any attainder of felony, nor outlaws, &c. And any one under prosecution for a crime, before he is indicted, may except against or challenge any of the persons returned on the grand jury; as being outlawed, returned at the instance of the prosecutor, or not returned by the proper officer, &c. *2 Hawk. 215.* By statute, no indictment shall be made but by inquest of lawful men returned by sheriffs, &c. *11 H. 4. cap. 2.* And if a person not returned by the sheriff on a grand jury, procures his name to be read among those of others who were actually returned, whereupon he is sworn of the jury; he may be indicted for it and fined, and the indictment found by such a jury shall be void. *Stat. 11 Hen. 4. cap. 9. 12 Rep. 98. 3 Inst. 33.*

Of the power of sheriffs, justices of the peace, &c.

Sheriffs had formerly power to take indictments; which they did by roll indicted, one part whereof remained with the inquest. *13 Ed. 1. and 1 Ed. 3.* Justices of peace have no power relating to indictments for crimes, but what is given them by act of parliament: And it is said justices of peace in sessions, cannot on an indictment, try and determine the offence in one and the same sessions in which

the offenders are indicted. *Hill. 11 Car. Cro. Car. 430, 448.* And indictments before justices of peace, &c. may be removed into the court of B. R. by *certiorari*: But an indictment removed by *certiorari* into B. R. may be sent back again into the county or place whence removed, if there be cause to do it. *Mich. 22 Car.*

Of appeals, &c.

Before the statute 3 H. 7. c. 1. it was the common practice not to try any man upon an indictment of murder, before the year and day were passed, to bring an appeal, lest that suit should be prevented: And appeals are to be generally preferred to indictments. *3 H. 7. 2 Hawk. 214.* As an appeal is ever the suit of the party; so an indictment is always at the suit of the King. *1 Inst. 126.* And till the statute 1 Ed. 6. if a man had been indicted and convicted of felony, &c. and the King had died before judgment, no judgment could be given, because it was at the suit of the King; and the authority of the judges who should give the judgment was determined by his death: but by that statute judgment may be given in the time of another King. *7 Rep. 29.*

An indictment is not at the suit of the party, nor is he interested.

An indictment is the King's suit; for which reason the party who prosecutes, is a good witness to prove it: And no damages can be given to the party grieved upon an indictment, or other criminal prosecution, unless particularly grounded on some statute; but the court of B. R. by the King's Privy Seal may give to the prosecutor a third part of the fine assessed for any offence; and the fine to the King may be mitigated, in regard to the defendant's making satisfaction to a prosecutor for costs of prosecution, and damages sustained by the injury received. *2 Hawk. 210.*

Of proceeding by indictment.

No man may be put upon his trial for a capital offence, except on an appeal or indictment, or something equivalent thereto. *H. P. C. 210.* And all indictments ought to be brought for offences committed against the Common law, or against some statute; and not for every slight misdemeanor. *Trin. 23 Car. B. R. 2 Lill. 44.* Where a statute appoints a penalty to be recovered by bill, plaint, or information, it cannot be by indictment, but as directed to be recovered: An indictment will not lie where another remedy is provided by statute. *Cro. Jac. 643. 3 Salk. 187.*

Where an indictment will lie, and for what offence, &c. and where not.

Indictments are for the benefit of the Commonwealth, and the publick good; and to be preferred for criminal, not civil matters: they may be of high treason, petit treason, felony, trespass, and in all sorts of pleas of the crown; but not of injuries of a private nature, which do not concern the King, and the publick. *1 Inst. 126, 303. 4 Rep. 44.* An indictment lies against one for assaulting and knocking another on the highway, being a breach of the peace. *Hill. 22 Car.* It lies for cheating a person at play, with false dice, or any other cheating: but it is not indictable for one man to make a fool of another, in the case of cheats getting money, &c. tho' action may be brought. *2 Lill. 44. 1 Salk. 479.* Except in the cases specified in the act of 30 Geo. 2. c. 24. commonly called the statute of *False Presenters*.

Indictment will not lie for a private nuisance, wherein action on the case only lies; and where a person is indicted for trespass, which is not indictable at law, but for which action should be had; or if a man be indicted for scandalous words, as calling another rogue, &c. such indictments are not good; for private injuries are to be redressed by private actions. *2 Lill. Abr. 42.* But where a person is beaten, he may proceed for this trespass by indictment, or information, as well as action. *Pafch. 24 Car.*

Car. B. R. And where in an action on the case, a defendant justifies for words, as calling the plaintiff *thief*, &c. if on the trial it be found for the defendant, *indictment* may be brought forthwith to try the plaintiff for the felony. *Mich. 22 Car. B. R. a Lill. 44.* By *Hals Chief Justice*: If a civil action of trover be brought for goods taken, after recovery the party may be indicted for trespass or felony, for the same taking: But if the first prosecution had been criminal, as an indictment for trespass, &c. and the crime appears to be felony; there you cannot have verdict or judgment on the indictment for trespass till the felony is tried, it being the inferior offence. *Mod. Caf. 77.* 'Tis said that trover lies not for goods stolen, until the offender is convicted, &c. on indictment of felony. *1 Hals's Hist. P. C. 546.* A parson may be indicted for preaching against the government of the church, the civil and ecclesiastical government being so incorporated together, that one cannot subsist without the other; and both center in the King; wherefore to speak against the church, is within the statute *13 Car. 2. Sid. 69. 3 Nels. Abr. 959.* And a parson was indicted for pronouncing absolution to persons condemned for treason, at the place of execution, without shewing any repentance. *5 Mod. 363.* Also a parson hath been indicted, and fined, &c. for drinking healths to the memory of traitors. *3 Mod. Rep. 52.*

Of the certainty required in indictments.

Indictments ought to be more certain than common pleadings in law, because they are more penal, and to be answered with more precision. *Hill. 23 Car. B. R.* They must be precise and certain in every point, and charge some offence in particular, and not a person as an offender in general, or set down goods, &c. stolen, without expressing what goods; and it ought to be laid positively, not by way of recital, &c. or be supplied by implication. *Cro. Jac. 19. 2 Hawk. P. C. 225, 226.* *Indictments* must set forth the Christian name, surname, and addition of the place of residence of the offender; the certainty of the time when the offence was done, as the day, year, &c. and the town or place where; the nature of the offence, whether treason, felony, &c. and the value of the thing by which it is committed, &c. And in indictment of murder, the length and depth of the wound is to be expressed: the value of things stolen is to be specified, *that it may appear whether grand or petit larceny*; and of the thing that does the felony, which is forfeited to the King; and the dimensions of a wound must be expressed, *that it may be judged whether mortal.* *1 Hen. cap. 5. 2 Inst. 318. H. P. C. 264. West's Symb. Sect. 70.* In treason, according to our old books, the indictment must say *proditorie*, and conclude *contra ligeantiam suam debitum*; in murder, it is to say *murdravit*; and if the killing was by shooting, or with the hand, &c. it must say *percussit*; in burglary, *burglariter*, or *bargalariter*; in rape, *rapuit*; in felony, *felonice*; in larceny, *felonice cepit*; maihem, *mayhemavit*, &c. And in all these cases, and in trespasses, the indictment ought to be *vi & armis*, and conclude *contra pacem*, which are words to shew an offence generally: and if the offence is created by statute, it must conclude *contra formam statuti*, &c. *4 Rep. 39, 48. 5 Rep. 121. H. P. C. 206.* These words the law hath appropriated for the description of offences, and none other will supply them. [Now law proceedings are in English, similar words in that tongue, must be used.]

Of faults in indictments, what shall be fatal, and what not.

The omission of *vi & armis* & *contra pacem*, is helped by statute *4 & 5 Ann. c. 16.* False Latin in the former course of proceedings, did not hurt an indictment, if by any intendment it could be made good; but if any word was not Latin, or allowed by law as a word of art; or if it had been insensible in a material point, the indictment was insufficient. *5 Rep. 121. 2 Cro. 108. 3 Cro. 465.* An indictment should not be set aside for a false concord between the substantive and adjective, &c. the expressions being significant to make the sense appear.

5 Co. Rep. 121. But an indictment against two or more, laying the fact in the singular number, as if against one, hath been held insufficient for the incertainty. *2 Hawk. 238.* A misnomer of the defendant's surname, will not abate the indictment, as it will in case of the name of baptism; and if there be a mistake in spelling, if it sounds like the true name, it is good. *1 Hen. 5.* A person may be indicted for felony against an unknown person; and when the name of one killed is unknown, or goods are stolen from a person that cannot be known, it is sufficient to say in the indictment that *one unknown was killed by the person indicted*, or that *he stole the goods of one unknown.* *Wood's Inst. 624.* But tho' an indictment may be good for stealing the goods *cujusdam ignoti*, of a person unknown, yet a property must be proved in some body at the trial; otherwise it shall be presumed to be in the prisoner, by his pleading Not guilty. *Mod. Caf. in L. & E. 249.* Where a person injured is known, his name ought to be put into the indictment. *2 Hawk. 232.*

Of the day or time.

If an indictment be generally of offences at several times, without laying any one of them on a certain day; as if it be laid between such a day and such a day, it hath been adjudged that the indictment is void: But a mistake in not laying an offence on the very same day, on which it is afterwards proved upon the trial, is not material upon evidence. *2 Hawk. 236.* And it is said, the crown is not bound to set forth the very day, when treason, &c. was committed: Evidence may be given of a treasonable conspiracy, &c. at any time before or after the time alledged in the indictment; where it is laid on such a day and divers other days as well before as after, because the time is only a circumstance, and of form some day must be alledged; but it is not material. *1 Salk. 188.*

Of the venue or place.

If no town or place be named where the fact was done, the indictment shall be void; tho' a mistake of the place in laying the offence, is of no signification on the evidence, if the fact is proved at some other place in the same county. *H. P. C. 264. 1 Hen. 5. cap. 5.* *Indictments* for facts committed, ought to be laid in the county where done; and the town or parish in which committed to be set forth, &c. And if, upon Not guilty pleaded, to an indictment, it shall appear that the offence was done in a county different from that in which the indictment was found, the defendant shall be acquitted. *H. P. C. 203. Kel. 15.* At Common law, if a man had died in one county, of a wound received in another, he could not regularly be indicted in either county, the offence not being compleat in either; and no jury could inquire of what happened out of the limits of their own county: but by the statute *3 Ed. 6. cap. 24. the offence is to be indicted and tried by jurors of the county where the death happens.* *2 Hawk. 220.* It has been held, if a person steals goods in one county, and carries them into another, he may be indicted in the other county: And if a person steals my goods from another, who had stolen them before, he may be indicted as having stolen them from me, because in judgment of law, the possession as well as property always continued in me. *2 Hawk. 99.* If there be an accessory in one county, to a felony committed in another, the accessory may be indicted and tried in the same county wherein he was accessory. *Stat. 2 & 3 Ed. 6. c. 24.*

Of joint and several offences, &c.

Husband and wife may commit a trespass, felony, &c. and be indicted together; so for keeping a bawdy-house, tho' the house be the husband's. *Hob. 95. 1 Salk. 382.* Tho' as to felony, 'tis said the wife can't be guilty of it, in company with her husband, the law presuming her to be under his coercion.

If an offence wholly arises from any joint act that is criminal of several defendants, they may be all charged in one indictment, jointly and severally, or jointly only; and

and some of the defendants may be convicted, and others acquitted; for the law looks on the charge as several against each, tho' the words of it purport a joint charge against all: In other cases, the offences of several persons must be laid several, *because the offence of one cannot be the offence of another; and every man ought to answer severally for his own crime.* 2 Hawk. 240. A person cannot be indicted barely of suspicion of felony; but of the crime itself: And three offences may be joined in an indictment, and the party convicted of one offence, though he is found Not guilty of the others. 1 Hale's Hist. P. C. 561, 610. (On penal statutes, several things shall not be joined in the indictment, &c. except it be in respect of some one thing, to which all of them have relation. 2 Hawk. 243.

Of indictments upon statutes, pursuing, and reciting of the same, &c.

When an indictment is drawn upon a statute, it ought to pursue the words of it, if a private act; but it is otherwise on a general statute: It is best not to recite a publick statute; *the recital is not necessary*, for the judges are bound *ex officio* to take notice of all publick statutes, and misrecitals are fatal; so that it is the surest way only to conclude generally *Contra formam statuti*, &c. 4 Rep. 48. 'Tho' there be no necessity to recite a public statute in an indictment, yet if the prosecutor take upon him to do it, and materially vary from the substantial part of the purview of the statute, and conclude *Contra formam statuti prædicti*, he vitiates the indictment. - Plowd. 79, 83. Cro. Eliz. 236. But many mis-recitals may be saved by a general conclusion *Contra formam statuti*, without adding *prædicti*, &c. And mistakes may be helped by the constant course of precedents upon such statutes. 2 Hawk. 247. An indictment is to bring the fact making an offence, within all the material words of the statute, or the words, *Contra formam statuti*, will not make it good. *Ibid.* 249. If a word of substance be omitted in the indictment, the whole indictment is naught; but it is otherwise where a word of form is omitted, or there is an omission of a synonymous word, where the sense is the same, &c. *Ibid.* 246. Judgment shall not be given by statute, upon an indictment which doth not conclude *Contra formam statuti*: And judgment by statute shall never be given on an indictment at Common law, as every indictment which doth not thus conclude shall be taken to be. *Ibid.* But where persons are indicted on the statute of stabbing, and the evidence is not sufficient to bring them within the statute; they may be found guilty of general manslaughter at Common law, and the words *Contra formam statuti*, be rejected as useless: In other cases the same has been also adjudged; tho' formerly it was held, that an indictment grounded on a statute, which would not maintain it, could not in any case be maintained as an indictment at Common law. *Ibid.*

Of amendments, &c.

Indictments may be amended the same term wherein brought into court, and not after: But criminal prosecutions are not within the benefit of the statutes of amendments; so that no amendment can be made to an indictment, &c. but such only as is allowed by the Common law. 2 Lill. 45. 2 Hawk. 244. The body of a bill of indictment removed into B. R. may not be amended, except from London where a tenor only of the record is removed; tho' the caption of an indictment from any place may, on motion, be amended by the clerk of the assizes, &c. so as to make it agree with the original record. *Ibid.* And captions of indictments ought to set forth the court in which, and the jurors by whom, and also the time and place, at which the indictment was found; and that the jurors were of the county, city, &c. Also they must shew that the indictment was taken before such a court as had jurisdiction over the offence indicted. 2 Hawk. 253. While the jury who found a bill of indictment is before the court, it may be amended by their consent in matter of form, the name, or addition of the party, &c. Kel. 37. Clerks of the assize and of the peace, &c. drawing defective bills of indictment, shall draw new bills

without fee, and take but 2 s. for drawing any indictment against a felon, &c. on pain of forfeiting 5 l. Stat. 10 & 11 W. 3. cap. 23. If one material part of an indictment is repugnant to, or inconsistent with another, the whole is void; but where the sense is plain, the court will dispense with a small impropriety in the expression. *Ibid.* 228, 229. And many objections to indictments, are over-ruled. 5 Rep. 120. Where an indictment is void for insufficiency; or if the trial is in a wrong county, another indictment may be drawn for the same offence, whereby the insufficiency may be cured; and the indictment may be laid in another county, ('tis said) tho' judgment be given. 4 Rep. 40. H. P. C. 244. By the Common law, the court may quash any indictment for insufficiency, as will make the judgment thereon erroneous: But the court may refuse to quash an indictment preferred for the publick good, tho' it be not a good indictment, and put the party to traverse, or plead to it. Mich. 22 Car. B. R. Also the court will grant time for the King's counsel to maintain an indictment, if they desire it.

Judges are not bound *ex debito justitiæ* to quash an indictment; but may oblige the defendant either to plead or demur to it; and where indictments are not good, the parties indicted may avoid them by pleading. 2 Lill. 42. 2 Hawk. 258. The court doth not usually quash indictments for forgery, perjury, and nufances, notwithstanding the indictments are faulty; and it is against the course of the court to quash an indictment for extortion. 2 Lill. 41. 5 Mod. 31. If an indictment be good in part, tho' the other part of it is naught, the court will not quash it; for if an offence sufficient to maintain the indictment be well laid, it is good enough, although other facts are ill laid. Latch. 173. Popb. 208. 1 Salk. 384. One that is convicted upon an erroneous indictment, cannot after he conviction move to have the indictment quashed; but must bring his writ of error to reverse the judgment given against him upon the indictment. Mich. 22 Car. B. R. An indictment is quashed for the insufficiency in it; or because no good judgment can be given upon it: But if judgment be given upon an erroneous indictment, it is good against the party till reversed by writ of error. 2 Lill. 43. If the party indicted is outlawed upon the indictment, the court will not quash the indictment, tho' erroneous; but will force the party outlawed to bring his writ of error to reverse the outlawry. Mich. 24 Car. B. R. The stat. 7 W. 3. cap. 3. ordains, 'That no indictment for treason, &c. or any process thereon, shall be quashed, on motion of the prisoner, or his counsel, for mis-writing, false Latin, &c. unless exception be made before evidence given in court; nor shall any such defect, &c. after conviction, be cause to arrest judgment; though any judgment given upon such indictment may be reversed on a writ of error, &c. By the statute of Hen. 5. indictments shall abate for omissions, by the exception of the party; and if no advantage be taken by exception, but he appears and pleads, he loses the benefit of the law. 2 Inst. 670.

Counts in an indictment, cannot be struck out; (but may in an information :) for the court cannot strike out that, which the grand jury have found. Vide Rep. Temp. Hardw. per Annot. 203.

Of pleading, and of process against a person indicted.

A person indicted of felony, &c. may plead generally misnomer, or wrongful addition; a formal acquittal or conviction; a pardon, or other special plea; or the general issue; or may plead any plea in abatement of the indictment, &c. 2 Hawk. 259. One indicted for felony may have counsel assigned him to speak for him in matter of law only. 2 Hill. 44. And all persons indicted for high treason, shall have a copy of the indictment before trial, to advise with counsel, &c. And such indictments are to be found in three years after the offence committed, except it be against the King's person. 7 & 8 W. 3. c. 3. which is extended to trials on impeachments by 30 Geo. 2. c. 30. Persons indicted of treason must be by the oaths of two witnesses; but in other cases one witness is enough. After a person is indicted for felony, the sheriff is commanded to attach his body by a *capias*; and on return of a *non est inventus*, a second *capias* shall be granted, and the sheriff is to seize the offender's chattels, &c. And if

On that writ a *non est inventus* is returned, an *exigent* shall be awarded, and the chattels be forfeited, &c. 25 Ed. 3. ff. 5. c. 2.

Of not surrendering.

If an innocent person be indicted of felony, and will not suffer himself to be arrested by the officer who has a warrant for it, he may be killed by the officer, if he cannot otherwise be taken; for there is a charge against him upon record, to which at his peril he is bound to answer. *Fitz. Coron.* 179, 261.

Of being twice indicted.

A person may be indicted twice at the same time, where he hath committed two felonies, and if he hath his clergy for one, he may be hanged for the other. And if there is an indictment and inquisition against one for the same offence, one found by the coroner's inquest, and another by the grand jury, he may be tried on both at the same time: But if he be tried and acquitted upon the one, it may be pleaded in bar on trial for the other. *Kel.* 30, 108. 1 *Salk.* 382.

Of trial in another county.

An *indictment* being found in the proper county, may (in some cases) be heard and determined in any other county, by special commission. 3 *Iust.* 27.

In general, all offences must be enquired into, as well as tried, in the county where the fact is committed. *Black. Com.* 4 V. 301.

In the two last rebellions, acts passed empowering the crown to try the traitors in any county.

Of appearance after conviction.

When a person is convicted upon an *indictment* for trespass or misdemeanor, he is to appear in court, on judgment pronounced; and the court having set a fine upon him, will commit him in execution, &c. 2 *Lill. Abr.* 41. *Forms of Indictments*, see *Murder*, *Felony*, *Burglary*, &c. For *Indictments* for *Perjury*, see *Stat.* 23 Geo. 2. c. 11.

See the doctrine of indictments treated at large, in a very learned and masterly manner. 2 *Hawk. P. C.* 210, &c.

Indictor, Is he that indicteth another man for any offence; and *indittec* is the party that is indicted. 1 *Ed.* 3. cap. 11. 21 *Jac.* 1. c. 8.

Indistanter, A word signifying without delay. *Matt. Westm. Anno* 1244.

Indivisiunt, Is used for that which two persons hold in common without partition; as where it is said he holds *pro indiviso*, &c. *Kitch.* 241.

Indolis, A studious young man, or a youth. *Ego Edgar indolis Clito consensu.* *Mon. Angl.* 3 tom. p. 120.

Indomit, Is law French for boisterous and ungovernable. *Law Fr. Di.* 3.

Indorsement, (*Indorsamentum*) Signifies any thing written on the backside of a deed; and receipts for consideration money, and the sealing and delivery, &c. on the back of deeds, are called *Indorsements*. *West. Symb. par.* 2. *sect.* 157. On sealing of a bond any thing may be *indorsed* or subscribed upon the back thereof, as part of the condition, and the *indorsement* and that shall stand together. *Moor* 679. There is also an *indorsement* of bills or notes, of what part thereof is paid, and when, &c. And in another sense it is a writing a man's name only on the backside of bills of exchange, &c. which passing from one man to another, all the *indorsers* are answerable as well as the drawer. 3 & 4 *Ann.* c. 9. See *Black. Com.* 2 V. 468-9. Forging of notes, acceptances, &c. felony without clergy. 2 *Geo.* 2. c. 25. 7 *Geo.* 2. c. 22.

Indowment, Of a church, &c. See *Endowment*.

Inducement, Is what is alledged as a motive or incitement to a thing; and in law is used specially in several cases, *viz.* there is *inducement* to actions, to a traverse in pleadings, a fact or offence committed, &c. *Inducements*

to actions need not have so much certainty as in other cases: A general *indebitatus* is not sufficient, where it is the ground of the action; but where it is but the *inducement* to the action, as in consideration of forbearing a debt till such a day, (for that the parties are agreed upon the debt) this being but a collateral promise, is good without shewing how due. *Cro. Jac.* 548. 2 *Mod.* 70. A man ought to induce his traverse when he denies the title of another, because he should not deny it till he shew some colourable title in himself; for if the title traversed be found naught, and no colour of right appears for him who traversed, there can be no judgment given: but an *inducement* cannot be traversed, because that would be a traverse after a traverse, and quitting a man's own pretence of title, and falling upon another. *Cro.* 265, 266. 3 *Salk.* 357. An *inducement* to a traverse must be such matter as is good and justifiable in law. *Cro. Eliz.* 829. There is an *inducement* to a justification, when what is alledged against it is not to the substance of the plea, &c. *Cro. Jac.* 138. *Moor* 847. 2 *Nels. Abr.* 986.

Induction, (*Inductio*, i. e. a leading into) Is the giving a parson possession of his church: And after the Bishop hath granted institution, he issues out his mandate to the Archdeacon to induct the clerk, who thereupon either does it personally, or usually commissions some neighbouring clergyman for that purpose; which is compared to livery and seisin, as it is a putting the minister in actual possession of the church, and of the glebe lands, which are the temporalities of it. This *induction* is done in the following manner: One of the clergymen commissioned takes the parson to be inducted by the hand, lays it on the key of the church, and pronounces these words: *By virtue of this commission, I induct you into the real and actual possession of the rectory of, &c. with all its appurtenances.* Then he opens the church door, and puts the parson into possession thereof, who commonly tolls a bell, &c. and thereby shews and gives notice to the people that he hath taken corporal possession of the said church: If the key of the church door cannot be had, the clerk to be inducted may lay his hand on the ring of the door, the latch of the church-gate, on the church-wall, &c. and either of these are sufficient: Also *induction* may be made by delivery of a clod, or turf of the glebe, &c. *Countr. Parf. Campan.* 21, 22. Ordinarily the Bishop is to direct his mandate to the Archdeacon, as being the person who ought to induct or give possession unto the clerks instituted to any churches within his Archdeaconry: But 'tis said, the Bishop may direct his mandate to any other clergyman to make *induction*. 38 *Ed.* 3. cap. 3. And by prescription, others as well as Archdeacons may make *inductions*. *Parf. Counsel.* 8.

An *induction* made by the patron of the church, is void; but Bishops and Archdeacons may induct a clerk to the benefices of which they are patrons, by *prescription*, &c. 11 *Hen.* 4. 7. The Dean and Chapter of Cathedral Churches are to induct prebends; tho' it hath been held, if the Bishop doth induct a prebend, it may be good at the Common law. 11 *Hen.* 4. 7. 11 *Hen.* 6. In some places a prebend shall be in possession, without any *induction*; as at *Westminster*, where the King makes collation by his letters patent. If the King grants one of his free chapels, the grantee shall be put in possession by the sheriff of the county, and not by the bishop: And no *induction* is necessary to a *donative*, where the patron by donation in writing puts the clerk into possession, without presentation, &c. 11 *Hen.* 4. 7. If the authority of the person who made the mandate for *induction*, determines by death or removal, before the clerk is inducted, the *induction* afterwards will be void; as where before it is executed, a new bishop is consecrated, &c. But if the archbishop, during the vacancy of a see, as guardian of the spiritualities, issue a mandate to induct a clerk to a church, it is good tho' not executed before there is a new bishop. 2 *Lev.* 299. 1 *Ventr.* 309. *Induction* is a temporal act; and if the archdeacon refuse to induct a parson, or to grant a commission to others to do it, action of the case lies against him, on which damages shall be recovered; he may likewise be compelled, by sentence in the ecclesiastical court, to induct the clerk, and shall answer the contempt. 12 *Rep.* 128.

It is *induction* makes the parson compleat intumbent, and fixes the freehold in him; and a church is full by *induction*, which cannot be avoided but by *quare impedit* at Common law. 4 Rep. 79. Plowd. 529. Hob. 15. A bishop sued in the court of audience, to repeal an institution, after *induction* had, and a *prohibition* was granted; because an institution is not examinable in the Spiritual Court after induction, but then a *quare impedit* lies. Moor 860. 'Tis not the admission and institution, but *induction* to a second benefice, which makes the first void, in case of pluralities, &c. Moor 12. See Black. Com. 1 V. 391. 2 V. 312. 4 V. 106.

Indulgences. According to the doctrine of the Romish church, all the good works of the Saints, over and above those which were necessary towards their own justification, together with the infinite merits of Jesus Christ, are deposited in one inexhaustible treasury. The keys of this were committed to St. Peter, and to his successors the Popes, who may open it at pleasure, and by transferring a portion of this superabundant merit to any particular person, for a sum of money, may convey to him either the pardon of his own sins, or a release for any one in whom he is interested, from the pains of purgatory. Such indulgences were first invented in the eleventh century by Urban II. Robertson's Hist. Emp. Char. V. 2 V. 79, &c. which vide. Also see the stat. 25 H. 8. c. 21. f. 27. And see the statutes against Papists, &c. A collection of which may be seen in British Liberties.

In esse. Is any thing *in being*; and the learned make this distinction between things *in esse* and *in posse*; as, a thing that is not, but may be, they say is *in posse*, or *in potentia*; but what is apparent and visible, they alledge is *in esse*, viz. that it has a real being, whereas the other is casual, and but a possibility. A child, before he is born or conceived, is a thing *in posse*; after he is born, he is said to be *in esse*, or actual being. The words *in esse* are mentioned in the statute 21 Jac. 1. cap. 2. And where there must be persons *in esse*, to take by grants, &c. See Grants and Wills.

Inewardus. (*Inwardus*.) A guard, a watchman, one set to keep watch and ward.—In Limunare Iest in Bresen- nei habet Rex consuetudinem scil. 11 caretas, & 11 sticas Anguillarum pro uno inewardo, & de uno ingo de Northblynge xii denarios out unum inewardum & de Dena xviii denarios, & de Garra unum inewardum. Lib. Domesday Chenth. Quando Rex venatui instabat de unuqua; domo per consuetudinem ibat unus homo ad stabillationem in silva. Alii homines non habentes integras majuras inveniebant inewardos, ad aulam quando redierant in civitate.—Lib. Domesday. Herefordshire.

Infalifatus. This word occurs only in Ralph de Hengham, Summa parva, cap. 3. Vir commissi feloniam ob quam fuit suspensus, utlagatus, vel alio modo morti damnatus, vel demembratus, vel apud Dover infalifatus, vel apud Southampton submersus, vel apud Winton demembratus, vel decapitatus, ut apud Northampton; vel in mari superundatus, sicut in aliis partibus portuum.—Mr. Selden, in his notes on that author, says, "It appears that several customs of places made in those days capital punishments several. But what is *infalifatus*? In regard of its being a custom used in a port-town, I suppose it was made out of the French word *salize*, which is *sine sand* by the water side, or a bank of the sea. In this sand or bank it seems their execution at Dover was." The elaborate Du Fresne condemns this derivation and this sense of the word, but yet gives no better. Therefore, (till we have more authority) we may conclude that *infalifatus* did imply some capital punishment inflicted on the sands or sea-shore: perhaps *infalifatio* was exposing the malefactor to be laid bound upon the sands, till the next full tide carried him away; of which custom, there is some dark tradition. The penalty took name from the Norman *falese*, *falefia*, which signified not only the sands, but rather the rocks and cliffs adjoining or impeding on the sea-shore. Cowell. See the like use of *falefia* in Mon. Angl. tom. 2. p. 165. b.

Infamy. Which extends to forgery, perjury, gross cheats, &c. disables a man to be a witness, or juror; but a pardon of crimes restores a person's credit to make him a good evidence. 2 Hawk. P. C. 432, 433. Judg-

ment of the pillory makes *infamy* by the Common law; but by the Civil and Canon law, if the cause for which the person was convicted was not infamous, it infers no *infamy*. 3 Lev. 426.

Infangthef, Infangenetheof. (From the Saxon *Fang* or *Fangen*, i. e. *capere*, and *Theof*, *Fur*) Signifies a privilege or liberty granted unto lords of certain manors, to judge any thief taken within their sec. Bract. lib. 3. c. 35. In some ancient charters, it appears that the thief should be taken in the lordship, and with the goods stolen, otherwise the lord had not jurisdiction to try him in his court; tho' by the laws of King Edward the Confessor, he was not restrained to his own people or tenants, but might try any man who was thus taken in his manor: 'tis true afterwards, the word *infangthef* signified *Latro captus in terra alicujus seistus de aliquo Latrocinio, de suis propriis huminibus*. 1 & 2 P. & M. c. 15. The franchises of *infangthef* and *outfangthef*, to be heard and determined in court-barrons, are antiquated, and long since gone. 2 Inst. 31. The word is sometimes preceded by an H.

Infant. (*Infans*) In our law is a person under twenty-one years of age, whose acts are in many cases either void, or voidable. Co. on Lit. lib. 1. cap. 21. and lib. 2. cap. 28. An infant of eight years of age or above, may commit homicide, and be hanged for it, viz. if it may appear by hiding the person, by excusing, or by any other act, that he had knowledge of good and evil, and of the danger of the offence, for here *malitia supplebit etatem*. 1 Hal. Hist. 27. Yet Co. upon Litt. sect. 405. saith; That an infant shall not be punished till the age of fourteen, which, says he, is the age of discretion. Cowell. But in fact, whether an infant under the age of fourteen, shall or shall not be answerable for criminal acts, depends on the degree of judgment he possesseth. See the End of Div. I.

We shall consider this subject under the following divisions:

- I. The several ages distinguished by law for various purposes.
- II. Who are minors, and how far the law regards infants in ventre sa mere.
- III. Of the trial of infancy.
- IV. Of what offices and trusts an infant is capable.
- V. What things he is capable of doing for his own advantage, and of his acts as good, void, or voidable, &c.

- I. The several ages distinguished by law for various purposes.

From the observations made on the daily actions of infants, as to their arriving at discretion, the laws and customs of every country, have fixed upon particular periods, on which they are presumed capable of acting, with reason and discretion; in our law the full age of man or woman is twenty-one years. 3 New Abr. 118.

Therefore, if one under the age of twenty-one years makes his will, and thereby devises his lands, and after attains the age of twenty-one years, and dies, without making a new publication thereof, this devise is void. Dyer 143. Raym. 84. 1 Sid. 162.

But tho' a person under the age of twenty-one, cannot dispose of his lands, yet it is said, that one under that age may, (pursuant to the stat. of 12 Car. 2. cap. 24.) dispose of the custody of his infant child, and that such disposition draws after it the land, &c. as incident to the custody. Vaugh. 178.

Also it seems agreed, that an infant male at fourteen, and female at twelve, may dispose of their personal estate at those ages: For herein the Common law has appointed no time, being a matter cognizable in the Spiritual Court, which herein proceeds according to the Civil law, by which law infants at those ages are presumed to have sufficient discretion to make such disposition; therefore their testaments in these cases are not to be set aside, or controlled in Chancery, or the temporal courts. 2 Mod. 315. 2 Jones 210. Comb. 59. 1 Vern. 469. Preced. Chan. 316.

The age of consent to a marriage in an infant male is fourteen, and in a female twelve; but they may marry before,

before, and if they agree thereto when they attain these ages, the marriage is good; but they cannot disagree before then; and if one of them be above the age of consent, and the other under such age, the party so above the age may as well disagree as the other; for both must be bound, or neither. *Co. Litt.* 33, 78, 79. 2 *Inft.* 434. 3 *Inft.* 88, 89. 6 *Co.* 22. 7 *Co.* 43. 1 *Roll. Abr.* 340, 341.

But tho' the party above age, may as well disagree as the other, yet it is said that the party cannot do it before the other arrives at the proper age: Also it is said to have been adjudged, that if a man marries a woman that is within the age of twelve years, and after the woman at eleven years of age disagrees to the marriage, and after the husband takes another wife, and hath issue by her, that this is a baltard; for the first marriage continues notwithstanding the disagreement of the woman; for the cannot disagree within the age of twelve years, and so her disagreement is void. *Co. Lit.* 79. 1 *Roll. Abr.* 341.

If a man marries a woman who is within the age of twelve years, and after the feme covert within the age of consent disagrees to the marriage, and after the age of twelve years marries another, the first marriage is absolutely dissolved, so that he may take another wife; for tho' the disagreement within the age of consent was not sufficient, yet her taking another husband after the age of consent affirms the disagreement, and so the marriage avoided *ab initio*. 1 *Roll. Abr.* 341.

Vide the case of Mr. Fitzgerrard, Lord Decius, and Mr. Villers, 3 *New Abr.* 119, 120. Vide also, 1 *Inft.* 33. 1 *Roll. Abr.* 340. *Dyer* 369. *Moor* 575. 1 *Roll. Abr.* 341. 1 *Inft.* 79. 7 *Co.* Keen's case. 6 *Co.* Ambrose's George's case. 7 *H.* 6. 11. 6 *Co.* 22.

As the age of fourteen, is the age of consent to a marriage in an infant male; so by law he hath several other ages assigned him, for several purposes, viz. at the age of twelve, to take the oath of allegiance in the tourn or leet; at fourteen, to be out of ward of guardian in socage, to chuse a guardian, and this is also accounted his age of discretion; fifteen to have had *aid pur fair Fitz Chevalier*. *Co. Lit.* 98. b. *Hob.* 225.

The authority of a guardian in socage, ceases at the age of fourteen, at which age the infant may call his guardian to an account, and may chuse a new guardian. *Lit. sect.* 103. *Co. Lit.* 75. 2 *Inft.* 135.

One within the age of twenty-one years may do homage, but not fealty; because, in doing of fealty he ought to be sworn, which an infant cannot be. *Co. Lit.* 65. b. 2 *Inft.* 11.

An infant at the age of seventeen, may be a procurator or executor; and in this both the Civil and Common law agree. 5 *Co.* 29. b. *Off. Ex.* 307. 1 *Hal. Hist. P. C.* 17.

Infancy is a good cause of refusal of a clerk; also by the statutes 13 *Eliz.* cap. 12. and 13 *Ed.* 14 *Car.* 2. none is to be admitted a deacon, unless he be twenty-three at least, nor a priest, unless he be twenty-four. *Comb. Incumb.* 142, 214. *Gibb. Cod.* 168. 3 *Mod.* 67.

By the custom of gavel-kind, an infant at the age of fifteen, is reckoned at full age to sell his lands; and this seems to have been taken from the Civil law, which reckons fourteen the *etas pubertatis*; for they reckoned that tho' the infant had ended his years of guardianship at fourteen, yet he might not have completed his account with his guardian till the age of fifteen, and that was esteemed to be the age when he was completely out of guardianship; therefore at this age he was allowed to sell the lands descended to him: But in this the customs of England differ from the Civil law; for the Civil law does not allow of his dispositions till the age of twenty-five; therefore this must have been allowed by the old Saxon law, because they thought that much time was lost, if the infant could only use his own without being able to dispose of it in a way of traffick, or in marriage, till twenty-five; therefore they allowed the infant to sell, (but under great limitations and restrictions,) that he might not be defrauded; and by this means they thought there was sufficient provision made for the necessity of

commerce, which in the small divided shares was absolutely necessary. *Lamb.* 624, 625. and see *Gavel-kind*.

Also by custom in some places, an infant seized of lands in socage, may at the age of fifteen years, make a lease for years, which shall bind him after he comes of age; for the custom makes fifteen his full age to that purpose. *Co. Lit.* 45. b.

Also by the custom of London, an infant unmarried, and above the age of fourteen, tho' under twenty-one, may bind himself apprentice to a freeman of London by indenture, with proper covenants; which covenants, by the custom of London, shall be as binding as if he were of full age. *Moor* 134. 2 *Bulj.* 192. 2 *Roll. Rep.* 305. *Palm.* 361. 1 *Mod.* 271.

As to capital offences, in which the law is the same with regard to the male and female sex, the age of fourteen is the common standard, at which both males and females are, by our law, obnoxious to capital punishments; for this being the *etas pubertatis*, or age of discretion, the law presumes them at those years to be *doli capaces*, and capable of discerning between good and evil; therefore subjects them to capital punishments as much as if they were of full age. *F. N. B.* 202. *Co. Lit.* 247. b. *Dalt. cap.* 95. and 104. 1 *Ed.* 1 *Ed.* *P. C.* 25. 1 *Hawk. P. C.* 2. Sed vide *Post* this Division.

But tho' the age of fourteen, be the *etas pubertatis*, before which our laws do not presume the party to be *doli capax*, and therefore that a party indicted for a capital offence committed before these years is to be found Not guilty, yet this general rule hath the following temperaments.

1. That if the party be above twelve, tho' under 14, and appears to be *doli capax*, and could discern between good and evil at the time of the offence committed, he may be convicted, and undergo judgment and execution of death, tho' he hath not attained the age of fourteen; but herein, according to the nature of the offence and circumstances of the case, the judge may, or may not, in discretion relieve him, before or after judgment, in order to obtain the King's pardon. 1 *Hal. Hist. P. C.* 26.

2. If an infant be above seven, and under twelve years, and commit a capital offence, *prima facie* he is to be judged Not guilty, and to be found so; because he is supposed not of discretion to judge between good and evil: Yet if it appear, by strong and pregnant evidence and circumstances, that he had discretion to judge between good and evil, judgment of death may be given against him; for *malitia supplet etatem*; but herein the circumstances must be inquired of by the jury, and the infant is not to be convicted upon his confession: Also herein, my Lord Hale says, that it is prudence after conviction to respite judgment, or at least execution; but that if he be convicted the judge cannot discharge, but only relieve him from judgment, and leave him in custody till the King's pleasure be known. 1 *Hal. Hist. P. C.* 27. See *Post* this Div.

3. If an infant within age be *infra annos infantia*, viz. seven years old, he cannot be guilty of felony, whatever circumstances proving discretion may appear; for *ex presumptione juris* he cannot have discretion, and no averment shall be received against that presumption. 1 *Hal. Hist. P. C.* 27, 28. *Flow.* 19.

Vide the case of William York a boy of ten years of age, convicted of murder at the Summer assizes for Bury, in 1748. before *Willis* Ch. J. *Foster's Crown Law*, fol. 70, &c. In this case, it appeared from all the circumstances, that the party was *doli capax*, and the evidence of the fact, being his own repeated confessions, &c. he was very justly convicted.

II. *Who are minors, and how far the law regards infants in ventre sa mere.*

The privilege of infancy does not extend to the King; for the political rules of government have thought it necessary, that he who is to govern the whole kingdom, should never be considered as a minor, incapable of governing

governing himself and his affairs. *Co. Lit.* 43. *Dyer* 209. b.

Therefore if the King within age, make any lease or grant, he is bound presently, and cannot avoid them, either during his minority, or when he comes of full age. *Plow.* 213. a. 5 *Co.* 27. 7 *Co.* 12. So, if the King aliens land which he had by descent from his mother, he shall not defeat it, by reason that he was within age at the time of the alienation; for his body politic, which is annexed to his body natural, takes away the imbecility of the natural body, and draws it, and all the effects thereof, to itself; *quia magis dignum trahit ad se minus dignum*, *v. Plowd.* 213. 14.

So if the King consent to an act of parliament during his minority, yet he cannot after avoid this act: because the King, as King, cannot be a minor; for as King he is a body politic. *Co. Litt.* 43. 1 *Roll. Abr.* 728.

Also the acts of a mayor and commonalty, shall not be avoided, by reason of the nonage of the mayor. *Cro. Car.* 557. 5 *Co.* 27.

Altho' a Duke, Earl, or the like, be but a minor, or not above ten years of age, in the custody and in the family of another nobleman, who may and doth retain chaplains, yet he may qualify chaplains to hold two benefices with cure, as if he was of full age. 4 *Co.* 119. *Comp. Incumb.* 22.

An infant in gavelkind shall have his age, and all other privileges of the infant at Common law; because tho' he hath the privilege of alienation at fifteen, yet that doth not take from him any privilege he had before at Common law. 1 *Roll. Abr.* 144.

A bastard being impleaded shall have his age; for the dilatory plea must be determined before the pleas in chief can come on; so that the plea of infancy will stay the suit, before it can be inquired, whether he is or is not a bastard. *Co. Lit.* 244. b.

An infant *in ventre sa mere*, or in the mother's womb, is supposed in law, to be born for many purposes. It is capable of having a legacy, or, a surrender of a copyhold estate made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born; and in this point the Civil law agrees with ours, *v. Black. Com.* 1 *V.* 130.

A child *in ventre sa mere*, may be appointed executor; also if there are two or more at a birth, they shall be joint executors, or joint legatees of the thing bequeathed; for the Civil law, for the benefit of the infant, reputes a child in his mother's womb in the same condition as if it were born. *Godolph. Orph. Leg.* 102.

If there be bastard *eigne* and *mulier puisne*, and the bastard enters, and dies seised, his issue shall inherit the lands, and exclude the *mulier* for ever; but in this case if the bastard had died leaving issue *in ventre sa mere*, and the *mulier* had entered, and then a son is born, yet he cannot enter upon the *mulier*: Herein our law differs from the Civil law; for our law requires an immediate descent, which cannot be before the person is *in esse*; also by our law the freehold cannot be in abeyance. *Co. Lit.* 244.

It appears to have been a matter of much controversy, whether a devise of lands to an infant *in ventre sa mere* be good, because not in being to take at the time of the death of the deviser; and since, as some say, by the devise the person is to take immediately after the death of the deviser, the freehold cannot be put in abeyance by the act of the parties; but others hold, that such devise is good, tho' the infant be not *in esse* at the death of the deviser, and that the freehold shall not be in abeyance, but shall descend to the heir at law in the mean time. 11 *Hen.* 6. 13. *Bro. Devise* 32. *Moor* 177, 637. 2 *Bulf.* 273. *Cro. Eliz.* 423. 1 *Lev.* 135. 1 *Sid.* 153. *Raym.* 163. 1 *Keb.* 85. 1 *Salk.* 231. 2 *Mod.* 9.

However all the books agree, that a devise to an infant when he shall be born, or when God shall give him birth, is good, as an executory devise, and that the freehold shall descend to the heir at law in the mean time. 1 *Sid.* 153. 1 *Lev.* 135. *Raym.* 163. *S. C.* *Snow* and *Cutler*. It may be devised to trustees.

So it is clear, that if land be devised for life, the remainder to a posthumous child, that this is a good contingent remainder; because there is a person in being to take the particular estate; and if the contingent remainder vests during the continuance of the particular estate, or *eo instante* that it determines, it is sufficient. *Moor* 637. *Church and Wiat.* 3 *Lev.* 408. 4 *Mod.* 359. 1 *Salk.* 227. *Carth.* 309. *Reeve and Long*; and see 10 *Ed.* 11 *W.* 3. cap. 16. and *Remainders*.

Also it seems agreed, that a man may surrender copyhold lands immediately to the use of an infant *in ventre sa mere*; for a surrender is a thing executory, and nothing vests before admittance; and therefore if there be a person to take at the time of the admittance, it is sufficient, and not like a grant at Common law, which putting the estate out of the grantor must be void, if there be no-body to take. 1 *Roll. Rep.* 109, 138. 2 *Bulf.* 273. *Co. Copyh.* 9. and see *Moor* 637.

If an usurpation be had on one *in ventre sa mere*; at the next turn after his birth, he shall be relieved on the statute of *Westm.* 2. cap. 5. *Hob.* 240.

III. Of the trial of infancy.

Infancy is to be tried by inspection of the court, or by jury: And herein it is laid down as a rule in some books, that *wheresoever it is alledged upon the pleading, that the party was and yet is under age, there it shall be tried by inspection; but where the infant is of full age at the time of the plea, there it shall be tried per pais.*

Lev. 142. 1 *Sid.* 321. 1 *Keb.* 796. *Cro. Jac.* 59, 581.

But as to judicial acts, or acts done by an infant in a court of record, and which he is allowed to avoid, the trial thereof must be by inspection; therefore if an infant levies a fine, he must reverse it by writ of error; and this must be brought during his minority, that the court may by inspection determine the age of the infant; but the judges, as by *adjuncta*, may in such cases inform themselves by witnesses, church books, &c. *Co. Lit.* 380. *Moor* 76. 2 *Roll. Abr.* 15. 2 *Inf.* 483. 2 *Bulf.* 320. 12 *Co.* 122.

If an infant brings a writ of error to reverse a fine for his non-age, and, after inspection and proof of infancy by witnesses, dies before the fine is reversed, his heir may reverse it; because the court having recorded the non-age of the conusor, ought to vacate his contract when he appeared to be under a disability at the time he entered into it. *Co. Lit.* 380. *Moor* 884. *Keckwick's* case.

An infant acknowledged a fine, and the conuzees omitting to have the fine ingrossed till he came of age, in order to prevent the infant from bringing a writ of error; yet the court upon view of the conuzance produced by the infant, and upon his prayer to be inspected, and his age examined, recorded his non-age, to give him the benefit of his writ of error, which he must otherwise lose, his non-age determining before the next term. *Moor* 189. *Ed.* vide *Cro. Jac.* 230. 1.

So if an infant suffer a common recovery by appearing in person, this must be reversed during his minority by inspection of judges.

But it is said, that if an infant suffers a recovery, in which he appears by attorney, he may reverse it after his full age, as it may be discovered whether he was within age when the recovery was suffered; because it may be tried *per pais* whether the warrant of attorney was made by him when he was an infant. 1 *Sid.* 321. 1 *Lev.* 142.

It is said, that in all cases where the party pleads that he was within age at B. and alledges a place, that there the trial may be well enough where it is alledged; where no place is alledged, there in personal actions where the writ is brought, and in real actions where the right of the land depends upon infancy, there the trial is to be where the land lies, and if not, where the action is brought. *Skin.* 10, 11. *Cro. Eliz.* 818. *S. P.*

IV. Of what offices and trusts an infant is capable.

As to what offices and trusts an infant is capable; he seems capable of such offices as do not concern the administration of justice, but only require skill and diligence; and there it seems he may either exercise himself when of the age of discretion, or they may be exercised by deputy, such as the offices of park-keeper, forester, gaoler, &c. *Plow.* 379, 381. 9 *Co.* 48, 97. See *Offices*.

But it is said, that an infant is not capable of the stewardship of a manor, or of the stewardship of the courts of a bishop; because by intendment of law he hath not sufficient knowledge, experience and judgment to use the office, and also because he cannot make a deputy. *Co. Lit.* 3. b. 1 *Rol. Abr.* 731. 2 *Rol. Abr.* 153. *March* 41, 43. *Cro. Eliz.* 636. *Cro. Car.* 556.

An infant cannot be an attorney, bailiff, factor or receiver. *F. N. B.* 118. 1 *Rol. Abr.* 117. *Co. Lit.* 172. *Cro. Eliz.* 637. An infant cannot exercise an office in a corporation. *Rep. Temp. Hard. per Annaly*, 8, 9.

If an infant, being master of a ship at *St. Christopher's* beyond sea, by contract with another, undertakes to carry certain goods from *St. Christopher's* to England, and there to deliver them; but does not afterwards deliver them according to agreement, but wastes and consumes them, he may be sued for the goods in the court of Admiralty, though he be an infant; for this suit is but in nature of a detinue, or trover and conversion at the Common law. 1 *Rol. Abr.* 530. *Furnes and Smith*, and a prohibition denied to the court of Admiralty.

If an infant keeps a common inn, an action on the case upon the custom of inns will not lie against him. 1 *Rol. Abr.* 2. *Carth.* 161. cited.

So if an infant draws a bill of exchange, yet he shall not be liable on the custom of merchants, but he may plead infancy in the same manner that he may to any other contract of his. *Carth.* 160. *Williams v. Harrison*. Adjudged on demurrer.

An infant cannot be a juror; and it is said by *Hobart*, that by the wisdom of the Common law a person under forty-two, could not be on a trial *de etate probanda*, because he then tried a matter which might have happened before he was twenty-one. *Hob.* 325.

An infant, or one under the age of twenty-one years, cannot be elected a member of the House of Commons; nor can any Lord of parliament sit there until he be of the full age of twenty-one years. 2 *Inst.* 47.

V. What things an infant is capable of doing for his own advantage, and of his acts as good, void, or voidable.

An infant is capable of inheriting, for the law presumes him capable of property; also an infant may purchase, because it is intended for his benefit, and the freehold is in him till he disagree thereto, because an agreement is presumed, it being for his benefit, and because the freehold cannot be in the grantor contrary to his own act, nor can be in abeyance, for then a stranger would not know against whom to demand his right; and if at his full age the infant agrees to the purchase, he cannot afterwards avoid it; but if he dies during his minority, his heirs may avoid it; for they shall not be bound by the contracts of a person who wanted capacity to contract. *Co. Lit.* 2, 8. 2 *Inst.* 203.

If an infant take a lease for years rendering rent; if he enter upon the land he shall be charged with an action during his minority, because the purchase is intended for his benefit; but he may waive the term, and not enter, and if more rent be reserved upon the lease than the land is worth, he may avoid it. 2 *Bull.* 69. If an infant make a lease for years, with remainder over, rendering rent, and at full age, accepts the rent of the tenant for years, this shall be an assent to him in remainder, so that he shall not oust him after. *Plowd.* 546.

If an infant be lord of a manor, he may grant copyholds notwithstanding his non-age; for these estates do

not take their perfection from the interest or ability of the lord to grant, but from the custom of the manor, by which they have been demised, and are demisable time out of mind. 4 *Co.* 23. b. *Co. Copyholder* 79, 107. *Noy* 41. 8 *Co.* 65.

An infant may present to a church; and here it is said, that this must be done by himself, of whatsoever age he be, and cannot be done by his guardian, for the guardian can make no advantage thereof, consequently has nothing therein whereby he can give an account, therefore the infant himself shall present. *Co. Lit.* 17. b. 89. a. 29 *Ed.* 3. 5. 3 *Inst.* 156. An infant lessor in ejectment, must give security for costs; because the infant himself is not liable. *Wilf. Rep. par.* 1. p. 130.

Contracts for necessities.

Here we must observe, that, (strictly speaking,) all contracts made by infants, are either void or voidable, because a contract is the act of the understanding, which during their state of infancy they are presumed to want; yet civil societies have so far supplied that defect, and taken care of them, as to allow them to contract for their benefit and advantage, with power, in most cases, to recede from, and vacate it when it may prove prejudicial to them; but in this contract for necessities they are absolutely bound, and this likewise is in benignity to infants, for if they were not allowed to bind themselves for necessities, nobody would trust them, in which case they would be in worse circumstances, than persons of full age. 10 *H.* 6. 14. 18 *Ed.* 4. 2. 1 *Rol. Abr.* 729.

Therefore it is clearly agreed, that an infant may bind himself to pay for his necessary meat, drink, apparel, physick, and such other necessities, and likewise for his good teaching and instruction, whereby he may profit himself afterwards. *Co. Lit.* 172. a. *Ec.* With respect to schooling, &c. it must be in cases, where the credit was given, *bonâ fide*, to the infant. *Vide infra*.

As to necessities, &c.

It must appear that the things were actually necessary, and of reasonable prices, and suitable to the infant's degree and estate, which regularly must be left to the jury; but if the jury find that the things were necessities, and of reasonable price, it shall be presumed they had evidence for what they thus find; and they need not find particularly what the necessities were, nor of what price each thing was; also if the plaintiff declares for other things, as well as necessities, or alleges too high a price for those things that are necessary, the jury may consider of those things that were really necessities, and of their intrinsic value, and proportion their damages accordingly. *Cro. Jac.* 360. 2 *Rol. Rep.* 144. *Poph.* 51. *Palm.* 361. *Gouls.* 168. *Godb.* 219. 1 *Leon.* 14.

If an infant promises another, that if he will find him meat, drink and washing, and pay for his schooling, that he will pay 7 l. yearly; an action upon the case lies upon this promise; for learning is as necessary as other things, and though it is not mentioned what learning this was, yet it shall be intended what was fit for him, till it be shewn to the contrary on the other part; and though he to whom the promise was made does not instruct him, but pays another for it, the promise of re-payment thereof is good; and it appears that the learning, meat, drink and washing, could not be afforded for a less sum than 7 l. 1 *Rol. Abr.* 729. *Palm.* 528. 1 *Jon.* 182. *S. C.* *Pickering v. Guning*, adjudged on motion in arrest of judgment.

Assumpsit, for labour and medicines in curing the defendant of a distemper, &c. who pleaded *infra etatem viginti & unius annorum*; the plaintiff replied, it was for necessities generally; and upon a demurrer to this replication it was objected, that the plaintiff had not assigned in certain how, or in what manner, the medicines were necessary; but it was adjudged, that the replication in this general form was good. *Carth.* 110. *Huggins and Wylman*.

• If an infant be a mercer, and hath a shop in a town, and there buys and sells, and contracts to pay a certain sum to J. S. for wares sold to him by J. S. to re-sell, yet he is not chargeable upon this contract, for this trading is not immediately necessary *ad vitum & vestitum*; and if this were allowed, infants might be infinitely prejudiced, and buy and sell, and live by the loss. 1 *Roll. Abr.* 729. *Cro. Jac.* 494. 2 *Roll. Rep.* 45. S. C. adjudged between *Hill and Wottingham*.

• And as the contract of an infant for wares, for the necessary carrying on his trade, whereby he subsists, shall not bind him; so neither shall he be liable for money which he borrows to lay out for necessities; therefore the lender must, at his peril, lay it out for him, or see that it is laid out in necessities. 5 *Mod.* 368. *Salk.* 386-7.

As in debt upon a single bill, the defendant pleaded that he was within age; the plaintiff replied, that it was for necessities, *viz.* 10*l.* for cloaths, and 15*l.* money lent *pro & erga* his necessary support at the university; the defendant rejoined, *that the money was lent him to spend at pleasure; oblique hoc*, that it was lent him for necessities; and issue hereupon was found for the plaintiff, who had judgment in C. B. but was reversed in B. R. on a writ of error; for the issue only being, whether this money was lent the infant for necessities, not whether it was laid out in necessities, it cannot bind the infant which ever way it is found; *for it might have been borrowed for necessities, and laid out in a tavern*; and the law will not intrust the infant with application and laying of it out. 1 *Salk.* 386. *Earl v. Peals*. See *Infra*.

So if one lends money to an infant, who actually lays it out in necessities, yet this will not bind the infant, nor subject him to an action; *for it is upon the lending that the contract must arise*, and after that time there could be no contract raised to bind the infant, because after that he might waste the money, and the infant's applying it afterwards for necessities, will not by matter *ex post facto*, in-titile the plaintiff to an action. 1 *Salk.* 279.

Altho' an infant shall be liable for his necessities, yet if he enters into an obligation with a penalty for payment thereof, this shall not bind him; *for the entering into a penalty can be of no advantage to the infant*. *Cro. El.* 920. *Moor* 679. pl. 929. *Co. Lit.* 172. 1 *Roll. Abr.* 729. See *vide infra*.

It is also said, that an infant cannot either by parol contract, or a deed, bind himself, even for necessities, in a sum certain, and that should an infant promise to give an unreasonable price for necessities, that would not bind him; and that therefore it may be said, that the contract of an infant for necessities, *quatenus* a contract, does not bind him any more than his bond would; but only since an infant must live as well as a man, the law gives a reasonable price to those who furnish him with necessities. *Cases in Law and Equity* 85.

Yet it hath been adjudged, that if an infant contracts for necessities, and enters into a single bill for payment, that this shall bind him, and that an action of debt will lie on such obligation. 1 *Lev.* 86. *Ruffel and Lee*, adjudged. 1 *Kab.* 382, 416, 423. S. C. *Co. Lit.* 172. S. P.

So an infant may bind himself in an *assumpsit* for payment of necessities, and an action upon the case, lies against him upon the promise for this, but in nature of an action of debt; therefore where debt lies, an action on the case lies against him. 1 *Roll. Abr.* 729. *Noy* 85. *Latch* 157, and see *Buff.* 188. 1 *Roll. Rep.* 382.

Also it seems clear, that if an infant becomes indebted for necessities, and the party takes a bond from the infant, that this shall not drown the simple contract, because the bond has no force. *Cro. Eliz.* 920.

But it is agreed, that an *infimus computasset* will not lie against an infant, tho' it be for necessities; *for he not having discretion, is not to be liable to false accounts*. *Co. Lit.* 172. *Lamb.* 169. *Noy* 87.

If an infant comes to a stranger, who instructs him in learning, and boards him, there is an implied contract in law, that the party should be paid as much as his board and schooling are worth; but if the infant at the time of his going thither was under the age of discretion, or if

he were placed there upon a special agreement with some of the child's friends, the party that boards him has no remedy against the infant, but must resort to them with whom he agreed for the infant's board, &c. *Allen* 94. *Duncomb and Tickeridge*.

Judicial acts, or acts done in a court of record.

As to judicial acts, and acts done by an infant in a court of record, they regularly bind the infant and his representatives, with the following savings and exceptions; as if an infant levies a fine, tho' the judges ought not to admit the acknowledgment of one under that disability; yet having once recorded his agreement as the judgment of the court, it shall for ever bind him and his representatives, unless he reverses it by writ of error, *which must be brought by him during his minority*, that the court by inspection may determine his age. *Co. Lit.* 380. *Moor* 76. 2 *Roll. Abr.* 15. 2 *Inst.* 483. 2 *Bulf.* 320. 12 *Ca.* 122. *Yelv.* 115. 3 *Mod.* 229.

So if an infant levies a fine, he is enabled by law to declare the uses thereof, and if he reverseth not the fine during his nonage, the declaration of uses will stand good for ever, for tho' that be a matter *in pais*, and all such acts an infant may avoid at any time after his full age, if he do not consent; yet being made in pursuance of the fine levied, which fine must stand good for ever, (unless reversed in the manner as has been mentioned,) so will the declaration of uses too. 2 *Co.* 58. a. 10 *Co.* 42. *Moor* 22. *Dals.* 47. 2 *Leon.* 159. *Goulf.* 13. 1 *Jones* 390. *Winch* 103.

If there be tenant for life, the remainder to an infant in fee, and they two join in a fine, the infant may bring a writ of error, and reverse the fine as to himself; but it shall stand good as to the tenant for life; for the disability of the infant shall not render the contract of the tenant for life, who was of full age, ineffectual. 1 *Leon.* 115, 317. 2 *Sid.* 55. 2 *Jones* 182.

If an infant brings a writ of error to reverse a fine for his nonage, and his nonage, after inspection, is recorded by the court, but before the fine reversed he levies another fine to another, the second fine shall hinder him from reversing the first; because the second having intirely barred him of any right to the land, must also deprive him of all remedies which would restore him to the land. 1 *Roll. Abr.* 788. See *Moor* 74.

As to recoveries suffered by infants, when these were improved into a common way of conveyance, it was thought reasonable that those, whom the law had judged incapable to act for their own interest, should not be bound by the judgment given in recoveries, tho' it was the solemn act of the court; for where the defendant gives way to the judgment, it is as much his voluntary act and conveyance, as if he had transferred the land by livery, or any other act *in pais*; therefore if an infant suffers a recovery, he may reverse it, as he may a fine, *by writ of error, during his minority*: And this was, formerly taken to be law, as well where the infant appeared by guardian, as by his attorney, or in person: But now the distinction turns upon this point, that if an infant suffers a recovery in person, it is erroneous, and he may reverse it by writ of error; but even in this case the writ of error must be brought during his minority, that his infancy may be tried by the inspection of the court; *for at his full age, it becomes obligatory and unavoidable*; but in cases of necessity the court has admitted the infant to appear by guardian, and to suffer a recovery, or come in as a vouchee; but this too, is seldom allowed by the court, unless upon emergences, when it tends to the improvement of the infant's affairs, or when lands of equal value have been settled on him, and when he has had the King's Privy Seal for that purpose; and those recoveries have been allowed and supported by the judges, and the infant could not set them aside; besides, if such recoveries be to the prejudice of the infant, he has his remedy for it against his guardian, and may reimburse himself out of his pocket to whom the law had committed the care of him. 1 *Roll. Abr.* 731, 742. *Co. Lit.* 381. b. 2 *Roll. Abr.* 395. 10 *Co.* 43. a. *Cro. El.* 471. *Hob.* 196-7.

1967. Cro. Car. 307. 2 Bull. 235. 1 Sid. 321-2. 1 Lev. 142. 2 Sand. 94. 1 Vern. 461. 2 Salk. 567.

Partition by writ *De partitione facienda* binds infants, because by judgment in a court of justice, to which no partiality can be imputed. Co. Lit. 171. b.

If an infant acknowledge a recognizance or statute, it is only voidable; and the infant at his peril must avoid them by *audita querela*, as he must a fine or recovery by writ of error during his minority; for such conveyances or other acts of record become obligatory and unavoidable, if they be not set aside before the infant comes of age; the reason is, *because these contracts being entered into under the inspection of the judge, (who is supposed to do right,) the infant cannot against them aver his disability, but must reverse them by a judgment of a Superior Court, who by inspection, has the same means to determine whether the inferior jurisdiction has done right, that first received the contract.* Moor pl. 206. 2 Inst. 483, 673. Co. Lit. 380. Kelw. 10. Reg. 149. 10 Co. 43. a.

If an infant bargain and sell his land by deed indented and inrolled, yet he may plead non-age; for notwithstanding the statute 27 Hen. 8. cap. 16. makes the inrolment in a court of record necessary to complete the conveyance; yet the bargainee claims by the deed as at Common law, which was, and therefore is, still defeasible by non-age. 2 Inst. 673.

Acts in pais.

Infants are regularly allowed to rescind and break through all contracts *in pais* made during minority, except only for schooling and necessities, be they never so much to their advantage; and the reason hereof is, the indulgence the law has thought fit to give infants, who are supposed to want judgment and discretion in their contracts and transactions with others, and the care it takes of them in preventing their being imposed upon, or over-reached by persons of more years and experience. 39 Ed. 3. 20. b. 1 Rol. Abr. 729. Co. Lit. 172, 381.

And for the better security and protection of infants herein, the law has made some of their contracts absolutely void; i. e. all such in which there is no apparent benefit, or semblance of benefit, to the infant; but as to those from which the infant may receive benefit, and which were entered into with more solemnity, they are only voidable; that is, the law allows them when they come of age, and are capable of considering over again what they have done, either to ratify and affirm such contracts, or to break through and avoid them. Cro. Car. 502. 1 Jones 405. 3 Mod. 310.

Hence an infant may purchase, because it is intended for his benefit, and at his full age he may either agree, or disagree, to the same. Co. Lit. 2, 8. 2 Vern. 203.

Also the feoffment of an infant is not void, but only voidable, not only because he is allowed to contract for his benefit, but because that there ought to be some act of notoriety to restore the possession to him, equal to that which transferred it from him. Co. Lit. 380. Dyer 104. 2 Rol. Abr. 572. 4 Co. 125. a.

Therefore if an infant make a feoffment and livery in person, he shall have no assise, &c. but must avoid it by entry; for it is to be presumed in favour of such solemnity, that the assembly of the *pais* then present would have prevented it, if they had perceived his non-age, and therefore the feoffment shall continue till defeated by entry, which is an act of equal notoriety. 8 Co. 42. Bro. tit. *Disseisin* 63.

But if the infant had made a letter of attorney to deliver seisin, he might have an assise, &c. because the letter of attorney, (like all other acts or agreements made by an infant to his prejudice,) must be void; therefore whoever claims under it, or by virtue of its authority, must be a wrong-doer. 2 Rol. Abr. 2. Noy 130. Palm. 237.

Also as to the acts of infants being void or voidable, there is a diversity between an actual delivery of the thing contracted for, and a bare agreement to deliver it

only; that the first is voidable, but the last absolutely void; as if an infant deliver a horse, or a sum of money, with his own hands, this is only voidable, and to be recovered back in an action of account. Perk. sect. 12; 19. 3 Rol. Abr. 730. 2 Rol. Rep. 408. Latch 10.

But if an infant agrees to give a horse, and does not deliver the horse with his hand, and the donee take the horse by force of the gift, the infant shall have an action of trespass; for the grant was merely void. Perk. sect. 12, 19. 1 Mod. 137.

In trespass *quare vi & armis insultum fecit, & totum crinem capitis ipsius Annæ abscindit*, the defendant as to all the trespass *præter injuriam crinis* pleads Not guilty, and as to that, pleads that the plaintiff was of the age of sixteen years, and for a certain sum of money *licentiam*: the defendant *duas uncias crinis dictæ Annæ detondere & abscindere*; and upon demurrer to this plea the court held, that the contract was absolutely void, and consequently the trespere unlawful, and gave judgment accordingly for the plaintiff. Mich. 26 Car. 2. *Anna Seabrogham per Guardianum v. Stuartson*. 3 Keb. 369. S. C.

And as an infant is not bound by his contract to deliver a thing; so if one deliver goods to an infant upon a contract, &c. knowing him to be an infant, he shall not be chargeable in trover and conversion, or any other action for them; for the infant is not capable of any contract, but for necessities; therefore such delivery is a gift to the infant: But if an infant without any contract wilfully takes away the goods of another, trover lies against him; also it is said, that if he take the goods under pretence that he is of full age, trover lies; because it is a wilful and fraudulent trespass. 1 Sid. 129. 1 Lev. 169. 1 Keb. 905, 913.

Also it seems that if an infant, being above the age of discretion, be guilty of any fraud in affirming himself to be of full age, or if by combination with his guardian, &c. he make any contract or agreement with an intent afterwards to elude it, by reason of his privilege of infancy, that a court of equity will decree it good against him according to the circumstances of the fraud; but in what cases in particular a court of equity will thus exert itself is not easy to determine. Vide 1 Vern. 132. 2 Vern. 224-5.

Also notwithstanding the disability of an infant to contract, by the 7 Ann. cap. 19. it is enacted, "That it shall be lawful for any person under the age of twenty years, by the direction of the High court of Chancery, or the court of Exchequer, signified by an order made upon hearing all parties concerned, to convey and assure any lands, &c. mortgaged in such manner as shall by order be directed, to any other person; and such conveyance shall be good and effectual in law."

And, "That every such infant being only trustee or mortgagee as aforesaid, shall be compellable, by such order to make such conveyance."

How an infant is to bind himself by a contract to serve in the plantations, 4 Geo. 1. c. 11. sect. 5.

All gifts, grants, &c. of an infant, which do not take effect by delivery of his hand are void; and if made to take effect by delivery of his own hand, are voidable by himself, and his heirs, and those which shall have his estate. And privies in blood, (as the heir general or special,) may avoid a conveyance made by their ancestor during his infancy. But privies in estate, such as the donor of an estate tail where the tenant in tail dies without issue; or privies in law, as the lord by escheat where there is no heir, shall not avoid a conveyance made by an infant. If a man within age, seised in right of his wife, makes a feoffment and dies, his heir cannot enter and avoid it, because no right descends to him; for the baron, if he had lived, could have entered only in right of his wife. And no person shall take advantage of the infancy of his ancestor, but he who hath a right descending to him from that ancestor; tho' the heir may take the benefit of a condition, notwithstanding no right descended to him from his ancestors. 8 Rep. 42, 3, 4. and see 3 Rep. 35.

If husband and wife are both within age, and they by indenture join in a feoffment, and the husband dies, the wife

wife may enter and avoid the deed, or have a *dum fuit infra aetatem*. 1 *Inst.* 337. Tho' if there be two jointenants within age, and one of them makes a feoffment in fee of the moiety during his infancy, and dies, the survivor cannot enter; but the heir of the feoffor may enter into the moiety, &c. 8 *Rep.* 43. If an *infant* exchanges lands with another, and the other enters, the *infant* may have assise. 18 *Ed.* 4. 2. And where an *infant* leases for years, he may affirm the lease, or bring trespass against the lessee for the occupation. 18 *Ed.* 4. *Bro. Trespas* 338. A lease made by an *infant* reserving rent is voidable; but if there be no rendering rent, it is absolutely void. *Latch* 199. If an *infant* make a lease paying rent, and after his coming of age he accepts the rent, the voidable lease is made good; and an *infant's* lease in ejectment is good. 2 *Lill. Abr.* 55. 3 *Salk.* 196. An *infant* cannot surrender a future interest, by taking a new lease; his surrender by deed and by acceptance of a second lease, are void, except there be an increase of the term; or a decrease of the rent; for *where no benefit comes to him, his acts are merely void*. *Cro. Car.* 502. If an *infant* surrenders a lease for years to him in reversion, this is void, and cannot be made good by any agreement at full age. *Roll. Abr.* 728.

An *infant* confessed judgment in an action of debt brought against him; and it was held, *audita querela* did not lie upon this judgment, though it would on a statute or recognizance; but the party ought to bring a writ of error in the Exchequer Chamber, by virtue of the statute 27 *Eliz.* *Moor* 460. See 3 *Salk.* 196. 1 *Inst.* 233, 380. *Moor* 189. Where an *infant* may levy a fine, he may declare the uses of it also by deed: and the *infant's* declaration of uses shall be good and binding to the *infant* and his heirs, so long as the fine continues unreversed. *Hob.* 224. 2 *Leon.* 193. 2 *Rep.* 58. 10 *Rep.* 42. It was formerly held that an *infant* appearing by guardian, could not suffer a common recovery. 10 *Rep.* 42. Tho' it hath since been allowed in many cases, and by all the Judges, that an *infant* may suffer a common recovery by guardian, and he shall not avoid it; for by indentment he shall have recompence in value; and if it is not for the good of the *infant*, he may have recompence over against his guardian. 2 *Danv. Abr.* 772.

A common recovery may be had against an *infant*, being examined *sole & secrete*; and he may suffer a recovery by guardian in open court. *Hob.* 169. 2 *Bulst.* 255. 2 *Nels. Abr.* 994. A recovery was suffered by an *infant* by his guardian. See *Sid.* 321. 2 *Nels.* 995.

If an *infant* appears by attorney, and not by guardian, it is error; for which a judgment may be reversed. 2 *Nels.* 998. but if an *infant* appearing *per guardianum* comes of age pending the suit, he may then plead *per attornatum*. *Moor* 665. An *infant* is to sue by *prochein amy*, or guardian; but always defend by guardian. *Inst.* 135.

N. B. When the defendant is an *infant*, the plaintiff ought to apply to him, to name his guardian; and if he doth not do it, the court will compel him. *Wils. Rep. par. 2. p.* 50.

He is not to appear by attorney in his own right; but if he be joint executor with others of age, they may make an attorney for him: resolved where three executors brought an action by attorney, one being within age. 2 *Saund.* 212. Tho' it was adjudged, that an *infant* may neither sue, nor be sued, as executor, by attorney; for the *infant's* disability is adherent to his person, and he has no power to make an attorney in any case, who would not be answerable to him. *Fitzgib.* 1, 2. *Mitch.* 1 *Geo.* 2. And it hath been held, if an action be brought against three several defendants, and one of them is an *infant*, they may not all appear by attorney; but he within age must appear by guardian, or it will be error to reverse the judgment. *Style* 400. *Leu.* 294.

If baron and feme, where the feme is an *infant*, appear by attorney, it is error. 5 *Mod.* 209. When the defendant in an action is an *infant* the plaintiff shall have six years to bring his action in, after the defendant comes of age; and if the plaintiff be an *infant*, he hath six years likewise after his age, to sue by the statute of limitations. *Lutw.* 243. And *infants* are not bound by nonclaim,

&c. on fines levied by others, within five years, by the *Stat.* 13 *Ed.* 1. Nonclaim shall not bind an *infant*, nor any negligence, &c. be imputed to him; except in some particular cases, *viz.* in case of a fine where the time begins in the life of the ancestor; or of an appeal of death of his ancestor, where he brings not his appeal within a year and a day, &c. 1 *Inst.* 246, 380. *Wood's Inst.* 3. Laches shall prejudice an *infant*, if he presents not to a church in six months. *Litt.* 402. All acts of necessity bind *infants*; as presentations to benefices, admittances and grants of copyhold estates, and assenting to *graceries*, &c. 3 *Salk.* 190. Conditions annexed to lands, whether the estate come by grant or descent, bind *infants*: and where the estate of an *infant* is upon condition to be performed by the *infant*, if the condition is broken during the minority, the land is lost for ever. 1 *Inst.* 233, 380. Though a statute is not extendible against an *infant*, yet *Chancery* will give relief against *infants*. 1 *Lev.* 198. And by *Stat.* 7 *Ann.* c. 19. *Infants* seised of states in fee, in trust, or in mortgage, on petition of the person for whom the *infant* is seised in trust, or the mortgagee, &c. by order of the court of *Chancery*, may make conveyances of such estates, as trustees or mortgagees of full age. See *ante*.

An *infant* is much favoured by the law; therefore it gives him many privileges above others: if an *infant* make default in a real action, he shall not lose his land as another man shall do; one who is an *infant* shall not be amerced, nor find pledges like one of full age; and if he be bail, he may be discharged by *audita querela*, &c. 1 *Inst.* 272.

Rep. 61. On his default at the *grand cape*, the *infant's* writ of error may reverse the judgment given against himself; unless it be in case of a judgment in dower. *Dyer* 104. *Jenk. Cent.* 47, 319. But an *infant* may be disseised of his lands: and a warranty that descendeth upon an *infant*, may bar him of his entry; so a remitter upon him; *contra* of a descent: and if an *infant* hath franchises or liberties, and do abuse, or disuse them, he shall forfeit them as a man of full age may. 1 *Inst.* 3, 133. 1 *And.* 311. *Bro.* 48.

A promise of a person when at full age, for consideration during infancy, shall be binding, and *assumpsit* lieth. 2 *Lev.* 144. 2 *Leon.* 215. A person gave a note, a few days after of age, for things had during his infancy; on extraordinary circumstances, equity set it aside: tho' 't is true, if an *infant* takes up goods, or borrows money, and after he comes to age, gives his note or promise for the money, that is good at law: but to prevent the ruin of *infants*, it may be convenient to give relief. *Barnardist.* 4, 6. If an *infant* delivers money with his own hand, it is voidable, and to be recovered by action of account. The *infant* sells goods to another; he may make the sale void, or have debt, &c. for the money. *Hob.* 77. 18 *Ed.* 4. 2. Also trespass lies for taking the goods; but if he deliver the thing with his own hands, the vendee is excused of the trespass: if an *infant* sell a horse, he may take it again, &c. *Roll.* 736. 3 *Rep.* 13. *Hob.* 96.

If a trespass be done to an *infant*, and he submits to an award, it is said the award shall not be binding to him. 2 *Danv.* 770. An *infant* is not bound by his consent not to bring a writ of error; for tho' the judgment binds him, yet it binds but as a judgment reversible. *Rep. Temp. Hardw. per Annals*, 104. Agreements, &c. made by an *infant*, although he be within a day of his full age, shall not bind him. *Plowd.* 364. but *vide* the next *tit.* Where an *infant* enters into bond, pretending to be of full age, though he may avoid it by pleading his infancy, yet he may be indicted for a cheat. *Wood's Inst.* 585. See *Age*, and *Heir apparent*.

Infants when of Age. An *infant* has been adjudged of age the day before his birth-day, for the law will not make a fraction of a day; therefore where a person was born the third of September, and the second of September 21 years after, he made his will, it was held good; and that he was then of age to devise his lands. 1 *Ld. Raym.* 480. And it is said such will shall take effect, tho' the deviser dies by six at night of that day. 2 *Raym.* 1096.

Infancy of Corporations. The King cannot be an *infant* by our law. 1 *Inst.* 43. And he shall never avoid his grants, &c. in respect of infancy; for he cannot be a minor, being as King a body politick. 2 *Danv. Abr.*

767. The acts of a Mayor and Commonalty shall not be avoided by reason of infancy of the Mayor. *Cre. Car.* 557.

Infestions. By casting garbage and dung into ditches, &c. how punished. See *Stat. 12 R. 2. c. 13.*

Introdation of Tithes. The granting of tithes to mere laymen. See *Black. Com. 2 V. 27.*

Inferior Courts. The courts of judicature of this kingdom are divided into a general division of *superior* and *inferior*. The courts at *Westminster* are the *superior*, and in general have (especially the courts of King's Bench and Common Pleas) superintendence over the inferior.

Lords or their bailiffs not to arrest on foreign pleas, on pain of double damages. *Stat. Westm. 1. 3 Ed. 1. c. 35.*

In courts of piepowder the plaintiff shall swear, *that the cause of action accrued within the time and jurisdiction of the fair.* 17 Ed. 4. c. 2. 1 Ric. 3. c. 6. The consideration of *assumpsit* must be laid within the jurisdiction of an inferior court, but the promise need not. *Ld. Raym.* 211. In a *scire facias* on a judgment of an inferior court, removed by *certiorari*, the plaintiff must pray execution within the limits, otherwise on a writ of error. *Ib.* 216. Justification by process of an inferior court, is not avoided by replication that the cause of action arose out of the jurisdiction. *Ib.* 230.

No prohibition to an inferior court for proceeding in a cause arising out of their jurisdiction, till that matter has been pleaded. *Ib.* 346. An inferior court refuses to give costs of a nonsuit; the remedy is by writ of *executione judicii*, and not by *mandamus*. *Ib.* 348.

Misdemeanors in inferior courts are punishable in *B. R.* *Ib.* 556. Attachment against a steward for sitting judge in his own cause, or for misdeeming himself between parties. *Ib.* 766. The several sorts of inferior jurisdiction, consufance of pleas, and exempt jurisdiction. *Ib.* 836, 837. The judgment of an inferior court must be entered, *per eandem curiam.* *Ib.* 895. A *habeas corpus* does not remove the cause, as a *recordari* or *certiorari* do, and the plaintiff may vary in his declaration, but then he discharges the bail. *Ib.* 1102.

Judgment of an inferior court reversed for want of the averment, that the cause was within the jurisdiction. *Ib.* 1310. A court held before the under-steward *secundum consuetudinem*, &c. without setting forth the custom, and well. *Ib.* 1543. Inferior courts cannot grant a new trial. *Siran.* 113, 392. Have been allowed jurisdiction in cases similar to those where they have jurisdiction. *Ib.* 256. May set aside proceedings for irregularity or surprize. *Ib.* 392. May set aside a verdict for irregularity. *Ib.* 499. The King's Bench cannot reverse a fine set by an inferior court. *Ib.* 786. The King's Bench cannot set a fine on a conviction by justices of the peace. *Ib.* 794.

Infidels, (infidelus) Heathens; who may not be witnesses by the laws of this kingdom, because they believe neither the Old or New Testament to be the word of God, on one of which oaths must be taken. 1 *Inst.* 6. 2 *Hawk. P. C.* 434. But in some cases they are allowed in civil suits being sworn according to their own law. See the case of a witness who was of the *Genton* religion, being admitted an evidence in equity.

Infinity of Actions. The lord of the soil may have a special action against him who shall dig soil in the King's highway: but one subject may not have his action against another for common nufances; for if he might, then every man would have it, and so the actions would be infinite, &c. 2 *Co. Inst.* 56. 9 *Rep.* 113.

Infirmary, (infirmarius) In monasteries there was an apartment allotted for *infirm* or sick persons; and he who had the care of the infirmary was called *infirmarius*. *Matt. Paris.* anno 1252.

In forma Pauperis. Suing actions in. See *Forma Pauperis*.

Information for the King, (informatio pro Rege). We shall treat of this subject under the following heads, *viz.*

I. Of informations generally, and the antiquity of the practice.

II. In what cases an information will lie.

III. Of filing an information.

IV. How it is to be laid; the proceedings, and provisions by statute law, &c.

I. Of informations generally, and the antiquity of the practice.

An *information* is, in many respects, the same as what, for a common person, we call a declaration. It ought to be certain, that the party may perfectly know what he is to answer to, and the court what they are to give judgment on. *Vide Flowd.* 329.

It is not always exhibited directly by the King or his attorney, but sometimes by another, *qui sequitur tam pro Domino Rege quam pro seipso*, upon the breach of some penal law or statute, wherein a penalty is given to the party that will sue for the same, and may be either by action of debt or *information*. *Cowell.*

An *information* may be defined, an accusation or complaint exhibited against a person for some criminal offence, either immediately against the King, or against a private person, which from its enormity or dangerous tendency, the publick good requires should be retrained and punished, and differs principally from an indictment in this, that an indictment is an accusation found by the oath of twelve men, whereas an *information* is only the allegation of the officer who exhibits it. 3 *New Abr.* 164.

Informations are either at the suit of the King, or at the suit of the King and party, which is called an *information qui tam*, because the informer prosecutes *tam pro Domino Rege quam pro seipso*; but these *informations* will not lie on any statute, which prohibits a thing, as being an immediate offence against the publick good in general, under a certain penalty, unless the whole or part of such penalty be expressly given to him who will sue for it, because otherwise it goes to the King, and nothing can be demanded by the party. 2 *Hawk. P. C.* 265.

The King shall put no one to answer for a wrong done principally to another, without indictment or presentment; though of common right, *informations*, or actions in the nature thereof, may be brought for offences against statutes, whether mentioned or not in such statutes, where other methods of proceeding are not particularly appointed. *Ibid.* 260. And wherever a matter concerns the publick government, and no particular person is entitled to an action, there an *information* will lie. 1 *Salk.* 374. *Vide 5 Geo. 1. c. 4. Wood's Inst.* 630.

This difference between *informations* and indictments has made some men conceive, that this kind of proceeding was utterly unlawful, as being not only contrary to the original frame and nature of our laws, but also contrary to *Magna Charta*, and several other statutes, which require that no man shall be put to answer, &c. but upon indictment or presentment. 3 *New Abr.* 165. See Sir Francis Winnington's argument, 5 *Mod.* 456. and 1 *Show.* 106, &c.

But tho', as my Lord Hale observes, in all criminal cases the most regular and safe way, and most consonant to the statute of *Magna Charta*, &c. is by presentment or indictment of twelve sworn men, yet he admits that for crimes inferior to capital ones, the proceedings may be by *information*; and this from the long and frequent practice, is now said to be established as part of the law of the land; therefore at this day the following kinds of *informations* may be exhibited, wherever the nature of the offence deserves such a proceeding. 2 *Hal. Hist. P. C.* 8.

1st, For an offence principally, and more immediately against the King, an *information* may be exhibited in the name of the Attorney-General, and such *information* may be filed without any application or leave of the court, and the party shall be obliged to answer the same; also the statute, 4 & 5 *H. 3.* (which requires a recognizance for payment of costs from persons exhibiting and prosecuting *informations*;) does not extend to *informations* filed by the King's Attorney General, and it is said, that the court will not quash such *information* on motion, but will oblige the party to demur or plead thereto. 2 *Hawk. P. C.* 260.

C. 260. and see *Carth.* 465-6. that no such information can be brought on a penal statute. 1 *Salk.* 372.

2dly, On application, and leave of the court, grounded on motion and affidavit of some misdemeanor, which if true, doth from its evil tendency merit such prosecution, the court allows of the filing of an information in the name of the Master of the Crown-office; and of such kind of informations there are numberless precedents in the Crown-office. 2 *Hawk. P. C.* 261. 2 *Hal. Hist. P. C.* c. 20. But *B. R.* (generally speaking) will not grant an information, where there is a civil suit depending, except the offence appears very clearly. Vide *Rep. Temp. Hardw. per Annaly*, 241.

3dly, Where by many penal statutes the prosecution upon them is by the acts themselves limited to be by bill, plaint, information or indictment, there, without doubt, the prosecution may be by information as well as by any other of these methods; also of common right such an information, or an action in the nature thereof, may be brought for offences against statutes, whether they be mentioned by such statutes or not, unless other methods of proceeding be particularly appointed, by which all others are impliedly excluded. But for this see *Actions qui tam, or Actions on penal Statutes*.

4thly, Informations in nature of a *quo warranto* may be, and frequently are exhibited, with leave of the court, for usurping privileges, franchises, &c. which in some respects is a civil suit, as it is used as a proper means to try a right, tho' it punishes the misdemeanor, such as the usurpation, &c. Yet the court of *B. R.* will not grant an information, on private usurpation of franchises, but the proper remedy is to apply to the Attorney General. Vide *Rep. Temp. Hardw. per Annaly*, 261.

II. In what cases an information will lie.

Here we shall lay down what hath been collected by Serjeant *Hawkins*, and is, as he says, every day's practice, agreeable to numberless precedents, viz. either in the name of the King's Attorney General, or of the Master of the Crown-office, to exhibit informations for batteries, cheats, seducing a young man or woman from their parents, in order to marry them against their consent, or for any other wicked purpose, spiriting away a child to the plantations, rescuing persons from legal arrests, perjuries, and subornations thereof, forgeries, conspiracies, (whether to accuse an innocent person, or to impoverish a certain set of lawful traders, &c. or to procure a verdict to be unlawfully given, by causing persons bribed for that purpose to be sworn on a *rales*,) and other such like crimes, done principally to a private person, as well as for offences done principally to the King; as for libels, seditious words, riots, false news, extortions, nuisances, (as in not repairing highways, or obstructing them, or stopping a common river, &c.) contempts, as in departing from the parliament without the King's licence, disobeying his writs, uttering money without his authority, escaping from legal imprisonment on a prosecution for contempt, neglecting to keep watch and ward, abusing the King's commission to the apprehension of the subject, making a return to a *mandamus* of matters known to be false, and in general any other offences against the publick good, or against the first and obvious principles of justice and common honesty. 3 *New Abr.* 166. 2 *Hawk. P. C.* 260. and several authorities there cited. Words reflecting on the publick government are punishable at the suit of the King by information. *Carth.* 14, 15. *The King v. Darby*.

An information was exhibited by the Attorney General for conspiring to destroy the King's revenue of the excise; that the defendants and others *ignot*, &c. *illicite, factiose, & seditiose consultaverunt & conspiraverunt ad destruend' & depauperand' fermarios excise predict'*, &c. and many other facts were laid in the information tending to destroying the excisemen, depauperating them, destroying the King's revenue of excise, pulling down the excise-house, raising a tumult amongst the poor people, &c. But the jury that were to try the issue were unwilling to find this matter, tho' expressly proved, fearing it might be construed no less than treason, and so would

only find that such and such of the defendants *illicite, factiose, & seditiose se assablaerunt, & illicite, factiose & seditiose consultaverunt, & conspiraverunt ad depauperand' fermarios Dom' Regis excise predict'*, prout *predict' attornat' gen' Dom' Regis, &c.* & quoad totam aliam materiam in informatione contentam, find them Not guilty, and find 7. 8. Not guilty of the whole. It was moved in arrest of judgment, that here is no offence found. The court unanimously concurred, that judgment ought to be given for the King, though as to the offence found there was some variety of opinion: *Twisden* held, that *vi & armis* was not necessary, and that they were found guilty of an unlawful assembly, and in that the *Ld. Ch. Just.* concurred; as also that the intention of defrauding and depriving the King of his said rent is implicitly found within the *modo & forma prout, &c.* for so shall the *machinantes, &c.* be applied. *Twisden* and *Keeling* concurred, that for a conspiracy alone, without any prosecution, information lay; and they all agreed, that the King's revenue being concerned did highly aggravate the offence; 2 *Hen.* 4. 7. and 8 *Hen.* 5. 6. were cited, that for maintenance of that a monk should be able to contract, and *probi homines de Dale* should be a corporation. Lord Chief Justice cited *Old Magna Charta*, where there is a statute against such as should undervalue lands in the King's hands. So judgment was given for the King. 1 *Lev.* 125. 1 *Sid.* 174. 1 *Keb.* 650. *Hil.* 15 & 16 *Car.* 2. in *B. R. Rex. v. Starling*, and other brewers in *London*.

A coroner having sworn the jury to inquire of the death of one supposed a *fole de se*, and finding the evidence very strong, took off some of the inquest; and tho' it was said, that this coroner was a weak silly man, yet *Holt* said there was no reason why an information should not be against him. 12 *Mod.* 493. *Pasch.* 13 *W.* 3. *The King v. Stukely*.

An information was granted against one for counterfeiting or pretending himself to be bewitched by a poor woman who was thereupon indicted for witchcraft, and acquitted, and the whole discovered to be a cheat. 12 *Mod.* 556. *Mich.* 13 *W.* 3. *B. R. Hathaway's case*.

Information against an attorney for examining persons on oath, upon an arbitration, without putting the same in writing. So, against a justice of peace, for committing a man, for not paying one shilling as a fee, for discharging his warrant. *Wilf. Rep. par. 1. fo. 7.*

So, for the following libellous words in a letter, viz. I am sure you will not be persuaded from doing justice, by any little arts of your town-clerk, whose consummate malice and wickedness against me and my family, will make him do any thing, be it ever so vile." *Ib.* 22.

So, against an overseer of the poor, for procuring a soldier, to marry a poor woman, chargeable to the parish. *Ib.* 41.

So, against one for practising as an attorney, while he was under-sheriff. *Ib.* 93.

So, for exercising the office of Master, of the Cooper's Company. *Rep. Temp. Hardw. per Annaly*, 106.

So, against a justice of peace, for convicting a person unheard, and sending him to the house of correction. *Ib.* 124.

So, against judges of an inferior court, for misbehaviour. *Ib.* 135.

So, to try the truth of the return of a *mandamus*. *Ib.* 184.

An information was filed against a gaoler for suffering one taken upon an *exen. capiend.* to go at large. 12 *Mod.* 434. *Mich.* 13 *W.* 3. *Ann'*. An information was filed against certain persons for that they, as enemies, &c. to the government, hired a boat during a war with France, in order to go thither, intending to aid and assist the King's enemies, though they did not actually go thither, but only intended it. *Skin.* 637. *Pasch.* 8 *W.* 3. *B. R. The King v. Cooper and al'*.

Upon a motion, leave was given to file an information against a justice of peace for sending the prosecutor to the house of correction, without sufficient cause. 8 *Mod.* 45. *Pasch.* 7 *Geo.* *The King v. Okry*. Information was filed against one for building of locks in the river Thames to the obstruction

obstruction of navigation. 12 Mod. 615. Hill. 13 W. 3. *The King v. Clark.*

Information for a scandalous narrative licensed by the defendant, Speaker of the house of Commons, being *Dangerfield's Narrative*, reflecting on a nobleman, (the E. of Peterborough); the defendant pleaded, that he did it by order of the House of Commons, and demanded judgment if this court will take consufance of it. The Attorney General demurred, and afterwards the defendant pleaded the common plea, *quod non vult contendere cum Domino Rege*, and was fined 10,000*l.* Comb. 18. Pasch. 2 Jac. 2. B. R. *The King v. Williams.*

Leave was given to file an information against the defendant, by whom the plaintiff's wife was inveigled away, and who procured merchants and tradesmen to sell goods to her, in order to saddle the husband with the debt, he agreeing with the sellers to deliver the goods back again. 12 Mod. 454. Pasch. 13 W. 3. *Pocock v. Thornicroft.*

Leave was moved for to file an information against the defendant for these words spoke of a justice of peace, *viz.* *He is an old rogue for sending his warrant for me.* Holt Ch. J. said, that he deserved to be bound to his good behaviour, tho' it be not proper for that justice to do it, but rather to get one of his brothers to do it for him; and leave was denied; the court desiring them to go by way of indictment if they would. 12 Mod. 514. Pasch. 13 W. 3. *The King v. Lee.*

The court was moved for an information against a churchwarden, for refusing to collect money on a brief for fire, according to the act, 4 Ann. c. 14. and the case of informations granted for not burying in woollen was cited. *Sed per curiam*; That is of a publick nature, and wherein the revenue is concerned: and besides, in this case there is a penalty given, and a method for obtaining it. So no rule was made. *Stran.* 1130. *East.* 13 Geo. 2. *Rex v. Ford.*

The court was moved for an information against one *Gresvener*, for refusing to serve the office of one of the sheriffs of London.—It appearing that he was a Protestant Dissenter, the court said, it was a doubtful question, and a matter of very great consequence; and they would not interpose to have that matter tried in a criminal way, when the city had another, and that a civil way of obliging persons to serve that office. *Vide Will. Rep.* par. 1. 18.

N. B. The doctrine is now settled, in the case of the Chamberlain of London and *Allen Evans*, Esq; on error, in the House of Lords, upon the opinion of the judges, eleven to one, that a dissenter is not liable to serve.

An information may be brought for offences and misdemeanors by the Common law; as for batteries, conspiracies, seducing persons, nuisances, contempts, libelling, seditious words, abusing the King's commission to the oppression of the subject, &c. And in many cases by statute, wherein the offender is liable to a fine, or other penalty. *Finch* 340. *Show.* 109. For words spoke of a deceased King, which advance pernicious doctrine and evil tenets, and have an influence on the present government, &c. an information lies, on which the offender may be fined, and also corporally punished. 2 *Ld. Raym.* 879. If the marshal of B. R. misdemeanors himself in his office, he who is prejudiced by it may prefer an information against him in that court, where he shall be fined and ordered to make satisfaction. *Hill.* 23 *Car. B. R.*

If a person exhibits his information only for vexation, the defendant may bring information against the informer, upon the *Stat.* 18 *Eliz.* c. 5. 2 *Bulst.* 18.

III. Of filing an information.

* It seems to be an established practice, not to admit the filing of an information, (except those exhibited in the name of his Majesty's Attorney General,) without first making a rule on the persons complained of, to show cause to the contrary; which rule is never granted but upon motion made in open court, and grounded upon affidavit of some misdemeanor, which, if true, doth either for its enormity or dangerous tendency, or other such like circumstances, seem proper for the most publick prosecution; and if the person, on whom such rule is made, having

been personally served with it, do not at the day given him for that purpose, give the court good satisfaction by affidavit, that there is no reasonable cause for the prosecution, the court generally grants the information; and sometimes, upon special circumstances, will grant it against those who cannot be personally served with such rule; as if they purposely absent themselves, &c. 2 *Hawk. P. C.* 262.

But if he shew good cause to the contrary, as that he has been indicted for the same cause, and acquitted, or that the intent is to try a civil right, which has not been yet determined, or that the complaint is trifling, or vexatious, &c. or where the motion is for an information in the nature of a *quo warranto*, if he can shew that his right hath been already determined on a *mandamus*, or that it hath been acquiesced in many years, or that it depends upon the right of his voters, which hath not been tried, or that it doth not concern the publick, but is wholly of a private nature, the court will not grant the information without some particular circumstances, the judgment whereof lies in discretion. *Ibid.*

IV. How it is to be laid, the proceedings, and provisions by Statute law, &c.

Regularly, the same certainty that is required in an indictment, is required in an information; but it has been held not to be necessary, to repeat the words *dat cur' hic intelligi & informari* in the beginning of every distinct clause, if the want of them may be supplied by a natural, and easy construction. See tit. *Indictment.* 1 *Salk.* 375. *Raym.* 34. 2 *Haw. P. C.* 261.

In an information against *Roberts* the ferryman over the river *Mercy*, which parts *Anglesey* from *Carnarvonshire* in *Wales*, it was laid generally, *viz.* That this was an ancient ferry time out of mind, and that 1*d.* was the usual rate for the passage of a man and horie, 7*d.* for 20 cattle, 2*d.* for 20 sheep, &c. that *Roberts* being the common ferryman, between the 7th *Septembris* Anno 2. and the day of exhibiting this information, unjustly, oppressively, & deceptively cepit & extorsit de diversis legibus & subditis Domini Regis ignotis to the Attorney General, passing that way, *diversas demeriorum summas exceden' antiquam ratam & pretium pro passagio & transportatione suis & averiorum suorum videlicet, pro passagio & transportatione cujuslibet personæ cum equo suo 2 d. & pro quibuslibet 20 catallis 2 s. & sic secund' ratam predict' pro majori vel minori numero averiorum, &c.* The defendant was found guilty, and it was moved in arrest of judgment, that the information was too general and uncertain, because it did not allege that any particular person, or any certain number of cattle, were ferried over within the time laid in the information; neither did it mention any particular person from whom the extorted rates were taken, which it ought to do, that the single offence might certainly appear to the court; after great deliberation, the whole court was of that opinion; and per *Holt* Chief Justice, In every such information a single offence ought to be laid and ascertained, because every extortion from every particular person is a separate and distinct offence; therefore they ought not to be accumulated under a general charge, as in this case, because each offence requires a separate and distinct punishment, according to the quantity of the offence; and it is not possible for the court to proportion the fine or other punishment, unless it is singly and certainly laid. *Carth.* 226. *The King v. Roberts.*

An information upon a penal statute must be sued in one of the superior courts, and cannot be brought in any inferior court, because the King's Attorney cannot be there to acknowledge or deny, as he can in a superior court. *Cro. Jac.* 538. All informations on penal statutes, brought by an informer, where a sum certain is given to the prosecutor, must be brought in the proper county where the offence was committed; and within a year after the same; but a party grieved, who is not a common informer, is not obliged to bring his information in the proper county, but may inform in what county he pleases. *Stat.* 31 *Eliz.* c. 3. *Cro. Eliz.* 645. And the King may exhibit an information in two, or three years, and be good; tho' it will

will be naught in an *informar*. Cro. Jac. 366. Where an information is given by statute, to be prosecuted at the assizes, &c. the *informar*, on filing his information, must make oath before a judge, that the offence laid in the information was not committed in any other county than that mentioned in the information; and that he believes the offence was committed within a year next before the filing of the information. 21 Jac. 1. c. 4. And when an information is ordered to be filed, upon an affidavit made, the court will not suffer the prosecutor to put any more or other matter into the information than what only is in his affidavit. Mich. 9 W. 3. B. R. It has been resolved, that the Stat. 21 Jac. 1. c. 4. restrains the jurisdiction of B. R. in actions of debt by common *informers*, and that they cannot bring debt upon the statute in that court, unless the cause of action arise in the county where the King's Bench sits; but must in other cases prosecute by information before justices of assize, &c. as the statute directs. 1 Salk. 373. Offences created since the statute 21 Jac. 1. cap. 4. are not within that statute, to be prosecuted in the county where the fact was done; so that informations on subsequent penal statutes are not restrained thereby. *Ibid.* By the Stat. 18 Elin. cap. 5. *Informers* are to exhibit their suits in proper person, by way of information, or original action; they are not to compound with the defendant without the consent of the court, on pain of 10 l. penalty, pillory, &c. And if they discontinue, or are nonsuit, the court shall immediately assign costs to the defendant; but this statute, and the 21 Jac. 1. c. 4. do not extend to informations of officers, nor on the statutes of maintenance, champerty, concerning concealments of customs, &c. and is extended not to parties grieved, and those to whom any forfeiture is given in certain. *Ibid.*

An *informar* upon a popular statute shall never have costs, if not given by statute; but the party grieved in action on the statute shall, where a certain penalty is given. 2 Hawk. 275. Informations by the Attorney General remain as they were at Common law, notwithstanding the statute 4 & 5 W. & M. c. 18. And when the Attorney General exhibits an information, he does it *ex officio*; but when the Clerk of the Crown does it, it is generally by order of court. 5 Mod. 464. Where a penalty is divided by statute between the King and the *informar*, if the King prefers his information before the *informar*, he shall have the whole penalty; but if the *informar* prefers his information first, the King cannot hinder him from his proportion. 1 Lill. Abr. 65. If an *informar* dies, the Attorney General may proceed in the information for the King: nonsuit of an *informar*, is no bar against the King; and if the King's Attorney enter a *noli prosequi*, it is not any bar against the *informar*. Cro. El. 383. 1 Leon. 119. If two informations are had on the same day, they mutually abate one another; because there is no priority to attach the right of the suit in one *informar*, more than in the other. Hob. 138.

If an information contain several offences against a statute, and be well laid as to some of them, but defective as to the rest, the *informar* may have judgment for such as are well laid. *Ibid.* 366. After a plea pleaded to an information for any crime, the defendant by favour of the court may appear by attorney; also the court may dispense with the personal appearance before plea pleaded, except in such cases where a personal appearance is required by some statute: and it is the same of indictments for crimes under the degree of capital. *Ibid.* 273.

If a defendant plead *nil debet* to an information *qui tam*, &c. it is safest to say he owes nothing to the *informar*, nor the King, which is an answer to the whole. On breach of a statute alleged from a matter in point, the defendant may plead *that he owes nothing, or Not guilty, &c.* And if there be more than one defendant, they ought to plead *severally*, and not jointly, *Not guilty*; but if it be alleged from a matter of record, the record not being taken by the country, but by itself, such plea is not good. 2 Hawk. 276. *Brn. Issue* 23.

A replication to an information on a special plea in the courts at Westminster, is to be made by the Attorney General, and before justices of Assize, by the Clerk of the Assize: tho' the replication to a general issue in an

information *qui tam* in the courts at Westminster, may be made in the name of the Attorney General only; and in actions *qui tam*, most of the precedents are, that the replication is to be made by the plaintiff. 2 Hawk. 277.

A demurrer may lie to an information *qui tam*, without the Attorney General. *Ibid.* Informations are not qualified for insufficiency, like indictments; but the defendant must demur to them. Pas. 1650. 2 Lill. 59. Fines entered in court by judgment on an information, cannot afterwards be qualified or mitigated. Cro. Car. 251. The Stat. 9 Ann. c. 29. makes the proceedings upon informations in the nature of a *quo warranto* more speedy and effectual. *Vide* the Statute, &c.

By the 4 & 5 W. & M. cap. 18. The Clerk of the Crown in the court of King's Bench shall not, without express order to be given by the court in open court, exhibit, receive, or file any information for any of the causes stated, or issue out any process thereupon, before he shall have taken or shall have delivered to him a recognizance from the person or persons procuring such information to be exhibited, with the place of his, her, or their abode, with or profession, to be entered; to the person or persons against whom such information is exhibited, in the penalty of twenty pounds, that he, she, or they will effectually prosecute, &c. and if the prosecutor of such information shall not, at his own costs, within one year after issue joined therein, procure the same to be tried, or if upon such trial a verdict pass for the defendant, or in case the *informar* procure a *noli prosequi* to be entered, then in any of the said cases, the court of King's Bench is authorized to award the defendant costs, unless the judge, before whom such information shall be tried, shall at the trial in open court certify upon record, that there was reasonable cause for exhibiting such information; and in case the *informar* shall not, within three months after the costs taxed, and demand made thereof, pay to the defendant the costs, then the defendant shall have the benefit of the recognizance.

Provided, That nothing in that act shall extend or be construed to extend to any other information than such as shall be exhibited in the name of their Majesties coroner, or attorney in the court of King's Bench for the time being, commonly called the Master of the Crown-office.

In the construction hereof it hath been holden:

1. That if process be issued on such information before such recognizance is given as the statute directs, the same may be set aside and discharged on motion. 2 Hawk. P. C. 263.

2. That this statute extends to all informations, except those exhibited in the name of his Majesty's Attorney General, so that an information in nature of a *quo warranto*, tho' a proper remedy to try a right, in respect of which it may not in strictness come within the words *prosequi, &c.* yet being also intended to punish a misdemeanour, and also as the proceedings therein may be as vexatious as in any other, the same is within the purview of the statute, which being a remedial law, shall receive as large a construction as the words will bear. Carth. 505. The King v. The Town of Hertford. 1 Salk. 376; 6 G. 2. adjudged.

3. That no costs can be had on this statute on an acquittal by a trial at bar, not only because the clause that gives costs, unless the judge certify a reasonable cause, seems only to have a view to *debt et ass. ppet.* but also because a cause, which is of such consequence as to be thought proper for a trial at bar, cannot well be thought within the purview of the statute, which was chiefly designed against trifling and vexatious prosecutions. 2 Hawk. P. C. 263.

4. That if there be several defendants, and some of them acquitted, and others convicted, none of them can have costs. 1 Salk. 194.

5. That whenever a defendant's case is such as authorizes the court to award him costs, he has a right to them *in debito justitiae*; for it seems a general rule, that *quibus jura sunt impositum est statuta* to do a matter of justice, they ought to do it of course. 2 Chan. Cases 291. 2 Hawk. P. C. 263.

As to informations in the nature of a *quo warranto*, against persons usurping offices. See the *Stat. 9 Ann. c. 20*.

An information was moved against a clergyman for perjury at his admission to a living, upon an affidavit that the presentation was simoniacal. But the court refused to grant it, till he had been convicted of the simony *Stran. 70*.

Defendant came up on a *habeas corpus* from the *Savoy*, to which it was returned, that for several years last past the *African Company* have been a body corporate, and retained the defendant in their service, and sent him to the *Savoy* to be provided with necessaries, till he should embark for *Africa*, & *hæc est causa*, &c. The court dismissed the defendant for the insufficiency of the return, and ordered an information against the Colonel who listed the men, and the keepers of the *Savoy*. *Stran. 404*. See 14 *Vin. Abr. tit. Information*; and for informations on penal statutes, see *Admon. Vide 3 New Abr. 164, &c.*

Informatus non sum, or more properly, *non sum informatus*, is a formal answer made of course by an attorney, who is authorised by his client to let judgment pass in that form against him. 'Tis commonly used in warrants of attorney, given for the express purpose of defeating judgments.

Informers, (*informator*) is a person who informs against, or prosecutes in any of the King's courts, those who offend against any law, or penal statute; — no man may be an informer who is disabled by any misdemeanor. *Stat. 31 Eliz. c. 5*.

Infirmitatum, is one part of the digests of the *Civil law*; according to *Benedict*, Abbot of the monastery of *Peterborough*, in the reign of *K. Hen. 3*.

Infugare, Signifies to put to flight. *Leg. Canuti. c. 32*.

Insula, Was anciently the garment of a priest, like that which we now call a cassock; sometimes it is taken for a coif.

Inge. This syllable, in the names of places, denotes meadow or pasture; and in the North, meadows are called the *inges* from the Sax. *ing, i. e. pratium*.

Ingenium, Is an instrument used in war, *arte & ingenio confectum*; from whence 'tis said we derive the word *engine*.

Ingenuitas, Used for liberty given to a servant by manumission. *Leg. H. 1. c. 89*.

Ingenuitas Regni, *Ingenii*, *liberi & legales homines*; freeholders, and the commonalty of the kingdom; sometimes this title was given to the barons and lords of the King's council. *Eadmer. Hist. Nov. fol. 70*.

Ingress, *Egress*, and *Regress*, Words in leases of land, to signify a free entry into, going forth of, and returning from some part of the lands let; as to get in a crop of corn, &c. after the term expired.

Ingressus, Is a writ of entry, whereby a man seeks entry into lands or tenements; and lies in many cases, having as many different forms: this writ is also called *precipe quod reddat*, because these are formal words inserted in all writs of entry. See *Entry*.

Ingressus. The relief which the heir at full age paid to the head lord, for entering upon the fee, or lands fallen by the death or forfeiture of the tenant, &c. was sometimes called *ingressus*. *Blount*.

Ingrossator magni rotuli. See *Clerk of the Pipe*.

In gross. Advowson *in gross*, Villain *in gross*, &c. see *Gross*.

Ingrosser, (*ingrossator*) Is one who buys and sells any thing by wholesale; and whoever shall get into his hands by buying, contract or promise, (other than by demise, grant or lease of lands,) any corn growing, or other corn or grain; butter, cheese, fish, or other dead victuals whatsoever, within the realm of *England*, to the intent to sell the same again, shall be reputed an unlawful *ingrosser*, by *Stat. 5 & 6 Ed. 6. c. 14*. Such victual only as is necessary for the food of man, is within the purview of the statute; therefore apples and fruits are not within the meaning of it. It has been holden, that hops are not within the statute. 3 *Inst. 195*. *H. P. C. 152*. *Cro. Car. 231*.

The buying of corn to make starch of it, and then to sell it, is not within the intent of the statute; because it is not bought, to be sold again, in the same nature it was bought, but to be first altered by a trade or art; by the like reason, the buying corn to make meal, and then to sell it, is said not to be within the act; and buying of barley, with intent to make it into malt, and after that to sell it, had no need of the exception made for it in the statute. 1 *Howk. P. C. 237*. Foreign corn and victuals, except fish and salt, are exempted, and not within the penalty of the statute 13 *Eliz. cap. 25*. And licensed badgers are excepted; as are likewise fishmongers, butchers, poulterers, &c. buying any thing in their own faculties, otherwise than by foretelling, and selling the same again at reasonable prices by retail. 1 *Howk. 240*.

Any merchant, whether a subject or foreigner, bringing victuals, or other merchandise into this kingdom, may sell the same in gross; but he who buys them of him cannot do so, because by such means the price will be enhanced, for the more hands any merchandise passeth thro', the dearer it must grow, as every one will make a profit: and if this were allowable, a rich man might *ingross* into his hands a whole commodity, and then sell it at what price he should think fit; which is of such bad consequence, that the bare *ingrossing* of a whole commodity, with intent to sell it at an unreasonable price, is an offence indictable at Common law, whether any part thereof be sold by the *ingrosser*, or not. 3 *Inst. 196*. *Cro. Car. 231, 232*.

The punishment of this offence by statute, is forfeiture of the goods for the first offence, and two months imprisonment; double value and six months imprisonment for the second offence; and loss of all goods, and imprisonment at the King's pleasure, &c. for the third offence. See *Forefaller*.

Ingrosser of Deeds, Is a clerk who writes records or instruments of law, in skins of parchment.

Ingrossing of a fine. The making of the indentures by the *Chirographer*, for delivery of them to the party to whom the fine is levied. *F. N. B. 147*.

Inhabitant, Is a dweller or householder in any place; as *inhabitants* in a vill, are the householders in the vill. 2 *Inst. 702*.

The word (*inhabitants*) includes tenants in fee-simple, tenant for life, years, by *elegit*, &c. tenant at will, and he who has no interest but only his habitation and dwelling. 6 *Rep. 60. a. Hill. 4 Jac. C. B. Gateward's case*. He who hath a house in his hands in a town, may be said to be an *inhabitant*. *Tirrel. J. Carth. 119*. *Mich. 18 Car. 2. C. B. Inhabitants have not capacity to take an inheritance, as in 15 Ed. 4. to have common. 12 Rep. 120. Pasch. 12 Jac. in Dugannon's case. See Gateward's case, 5 Co. 60*.

Inheritance, (*hereditas*) is a perpetuity in lands or tenements, to a man and his heirs: and the word *inheritance* is not only intended where a man hath lands or tenements by descent of *hereditas*; but also every fee-simple, or fee-tail, which a person hath by purchase, may be said to be an *inheritance*, because his heirs may inherit it. *Lit. sect. 9*. And one may have *inheritance* by creation; as in case of the King's grant of *patridge*, by letters patent, &c.

Inheritances are
Corporal,
or
Incorporal.

Corporal inheritances relate to houses, lands, &c. which may be touched or handled; and *incorporal inheritances* are rights issuing out of, annexed to, or exercised with, *corporal inheritances*, as advowsons, tithes, annuities, offices, commons, franchises, privileges, services, &c. 1 *Inst. 9; 49*.

There is also *several inheritance*, which is where two, or more, hold lands severally; if two men have lands given to them and the heirs of their two bodies, these have joint estate during their lives; but their heirs have several *inheritances*. *Kitch. 155*. Without blood none

none can inherit; therefore he who hath the whole and entire blood, shall have an inheritance before him who hath but part of the blood of his ancestor. 3 Rep. 41. The law of inheritance prefers the first child before all others; the male before the female; and of males the first born, &c. And as to inheritance, if a man purchases land in fee, and dies without issue, those of the blood of the father's side shall inherit, if there be any; and for want of such, the land shall go to the heirs of the mother's side. But if it come to the son by descent from the father, the heirs of the mother shall not inherit it. *Plowd.* 132. *Lit.* 4. 15. Goods and chattels cannot be turned into an inheritance. 3 Inst. 19, 126. See *Descent and Fee Estate*.

Inhibition, (inhibitio) Is a writ to forbid a judge from further proceeding in a cause depending before him; being in nature of a prohibition. 9 Ed. 2. c. 1. 24 Hen. 3. c. 12. 15 Car. 2. c. 9. F. N. B. 39. An inhibition is most commonly issuing out of a higher Court Christian, to an inferior, upon an appeal: Inhibitions are likewise on the visitations of archbishops and bishops, &c. This inhibition is either *hominis* or *juris*; it is *Ne existantiam facias, vel aliquam jurisdictionem ecclesiasticam vel contenti- onem voluntariam habeas*: Thus when the archbishop visits, he inhibits the bishop; and when a bishop visits, he inhibits the archdeacon; this is to prevent confusion, and continues till the last parish is visited. Now after such inhibition by an archbishop, if a lapse happens, the archbishop cannot institute, because his power is suspended; but the archbishop is to do it, &c. 2 Inst. 601. *Pafch.* 13 Car. B. R. 3 Salk. 201.

Inboc, or Inboke, (from In, within, and boka a corner or nook) Signifies any corner or part of a common field ploughed up and sowed with oats, &c. and sometimes fenced in with a dry hedge, in that year wherein the rest of the same field lies fallow and common. It is called in the North of England an *intock*, and in *Guernsey* a *berbin*; and no such *inboke* is now made without the joint consent of all the commoners, who in most places have their share by lot in the benefit of it, except in some manors, where the lord has a special privilege of so doing. *Kinney's Paroch. Antiq.* 297, &c. and his *Glossary*.

Infeittate, Tenant by the curtesy. As soon as a child is born, the father begins to have a permanent interest in the land: and the child could not be in ward of the lord of the fee, during the life of his father: Who by the birth, became one of the *pari curtis*, and was called, "Tenant by the curtesy *initate*." And this estate being once vested in him by birth of the child, is not liable to be determined by the subsequent death or coming of age of the infant. *Black. Com.* 2 P. 127.

Injunction, (inhibitio) Is a kind of prohibition granted in divers cases; it is generally grounded upon an interlocutory order or decree out of the court of Chancery or Exchequer, to stay proceedings in courts at law; and sometimes it is issued to the Spiritual courts. *West. Symb. lib.* 25. It is likewise sometimes used to give possession to a plaintiff; for want of the defendant's appearance, and may be granted by the Chancery, or Exchequer, to quiet possession of lands; also where a privileged person of the Chancery is sued elsewhere; and to stay waste, &c. *Injunction* lies. If a defendant by his answer in Chancery, swears a certain sum of money is due to him, the court will often not grant an injunction, unless the money be brought into court.

Of obtaining an injunction.

An injunction, is obtained by order, either upon matter confessed, or appearing of record, or by deed, writing, or other evidence shewn in court, from whence there is a probability that the party ought to be discharged in equity. Sometimes it is granted before answer, when it is only until answer, and further order, &c.

Of dissolving an injunction.

A delay of proceedings for a considerable time, is good cause for setting aside and dissolving an injunction to stay

proceedings at law; but an injunction may be revived on cause shewn, and sometimes the court will revive it, tho' dissolved, where the plaintiff's case is hard, or equity is evidently on his side. *Pract. Sol.* 124, 125.

Of shewing cause why an injunction should issue.

If an injunction be for staying of waste, there must be affidavit made of waste committed in houses, lands, &c. belonging to the complainant: And if it be to stay suits in other courts, it is granted on suggesting some matter, by reason of which the complainant is not able to make his defence in the other court, as for want of witnesses, &c. or, for that he is prosecuted at law, for what in equity, he ought not to pay; or that the other court acts erroneously, denies him some just advantage, and that if the rigour of the law takes place, it is against equity and good conscience, &c. *Ibid.*

Consequence of an injunction granted.

If an attorney proceeds at law, after he is served with an injunction to stay proceedings, on affidavit made thereof, interrogatories are to be exhibited against him, to which he must answer on oath; and if it appears that he was duly served with the injunction, and hath proceeded afterwards contrary thereto, the court of Chancery will commit the attorney to the Fleet for the contempt. 2 *Litt. Abr.* 64. But if an injunction be granted by the court of Chancery in a criminal matter, the court of B. R. may break it, and protect any that proceed in contempt of it. *Mitch. Ann. Mod. Caf.* 16.

Of the proceeding to judgment with leave, and of the form of an injunction.

If a cause at law be at issue, the injunction may give leave to go to trial, and stay execution, &c. The writ of injunction is directed to the party proceeding, *et omni- bus singulis Consiliariis, Advocatis, Solicitis, suis quibuscunque, &c.* and concludes, *injungetur precipimus quod ab omni ulteriori prosecutione quacunque ad communem legem de, pro vel concernent, aliquam materiam in quorundam contentis, &c. desistat, & quilibet vestrum desistat, subpana, &c.*

Vide more on this subject. 3 *New Abr.* 172, &c. And 14 *Fin. Abr.* tit. *Injunction*.

Injury, (Injuria) Is a wrong or damage to a man's person or goods. The law punisheth injuries; and so abhors them, that it grants writs of anticipation for their prevention, in cases of combinations and confederacy, *Stat. Comp.* 93. But the law will suffer a private injury rather than a publick evil; and the act of God, or of the law, doth injury to none. 4 *Rep.* 124. *Co. Rep.* 148.

Inlagare, To restore to the benefit of the law. — *Edgarus pater, vinum ad eum a Scotia, & Rex eum inlagavit & omnes homines suos.* *Annal. Waverl.* sub anno 1074.

Inlagation, (Inlagatio, from the Sax. In lagiam, i. e. Inlagare) Signifies a restoration of one outlawed to the protection of the law, and benefit of a subject. *Braet. lib.* 3. *tract.* 2. c. 14. *Leg. Canoni. par.* 1. c. 2.

Inlagb, (Inlagatus, vel homo sub lege) Is he who is of some *frankpledge*, and not outlawed. It seems to be the contrary to *Utlagb*. *Braet. tract.* 2. lib. 3. c. 11.

Inland, Is said to be terra dominicalis, pars manerii dominica, terra interior vel inclusa; for that which was let to tenants was called Outland. In an ancient will there are these words; To Wulfe I give the inland or demeans, and to Elsey the outland or tenancy. Testam. Britterici. This word was in great use among the Saxons, and often occurs in *Domesday*.

Inland bills. See *Bills of exchange*.

Inland Trade, A trade wholly managed at home in the country. *Merch. Dis.*

We conceive this the proper definition, and that the foreign is with propriety called *Commerce*, at least that which we carry on with other states.

Inland, Inlandale, Demeane or inland, to which was opposed outland, land tenanted or outlawed. *Cowell.* *Inleasb.*

such things as are *infra hospitium*, the words of the writ being *eorum bona & catalla infra hospitium illa existentia*, &c. But if the inn-keeper put the guest's horse to graze, without orders, and the horse is stolen, he shall make it good. 3 Rep. 34. The inn-keeper shall not be charged, unless there shall be some default in him or his servant; for if he that comes with the guest, or who desires to lodge with him, steal his goods, the host is not chargeable: Tho' if an inn-keeper appoint one to lie with another, he shall answer for him. 2 Shep. Abr. 334. Altho' the guest deliver not his goods to the inn-keeper to keep, &c. if they be stolen, he shall be charged: Not where the hostler requires his guest to put them in such a chamber under lock and key; if he suffers them to be in an outward court, &c. *ibid.*

Of tipping, &c.

Any person found tipping in an inn, is adjudged, within the statutes, against drunkenness. 21 Jac. 1. c. 7. 1 Car. 1. c. 14. And inn-keepers or alehouse-keepers, permitting tipping in their houses, are liable to the penalty of 10 s. &c. by statute 1 Jac. 1. c. 5. 1 Car. 1. c. 14. See *Action on the Case and Guest*. Also 3 New Abr. and 14 Vin. Abr. tit. Inns and Inn-keepers.

Inns of Court, (Hospitia Curie) Are so called, because the students therein, do not only study the law to enable them to practice in the Courts in Westminster; but also pursue such other studies, as may render them better qualified to serve the King in his court. *Fortescue*, c. 49. Of these (says Sir Edward Coke) there are four well known viz. The Inner Temple, Middle Temple, Lincoln's Inn, and Gray's Inn; which with the two Serjeants' Inns, and eight Inns of Chancery, viz. Clifford's Inn, Symonds' Inn, Clement's Inn, Lyon's Inn, Furnival's Inn, Staple's Inn, Bernard's Inn, and Thavie's Inn, (to which is since added New Inn) make the most famous university for profession of the law, or of any one human science in the world. *Co. Litt. Out Inns of Court*, or societies of the law, which are famed for their production of learned men, are governed by masters, principals, benchers, stewards, and other proper officers; and the chief of them have chapels for divine service, and all of them publick halls for exercises, readings and arguments, which the students are obliged to perform and attend for a competent number of years, before admitted to speak at the bar, &c. These societies or colleges, nevertheless are no corporation, nor have any judicial power over their members, but have certain orders among themselves, which by consent have the force of laws; for light offences, persons are only excommunicated, or put out of Commons; for greater, they lose their chambers, and are expelled; and when expelled out of one society, shall never be received by any of the others. All the lesser Inns of Chancery, are mostly inhabited by attornies, solicitors, and clerks, and belong to some or other of the principal Inns of Court, who have been used to send yearly some of their barristers, to read to them. *Fortescue*.

Innuendo, (from *innuo*, to nod or beckon with the head to one) Is a word used in declarations, and law pleadings, to ascertain a person or thing which was named before; as to say he (innuendo the plaintiff) did so and so, when there was mention before of another person. 4 Rep. 17. An innuendo is in effect no more than a *præditi*, and cannot make that certain, which was uncertain before; and the law will not allow words to be enlarged by an innuendo, so as to support an action of the case for speaking of them. *Hob. 2, 6, 45.* 5 *Mod. 345.* An innuendo may not enlarge the sense of words, nor make a supply, or alter the case where the words are defective. *Hutt. Rep. 44.* In slander, both the person and scandalous words ought to be certain, and not want an innuendo to make them out: If a plaintiff declares that the defendant said these words, *Thou art a thief and stole a mare*, &c. (innuendo the plaintiff) without an averment that the words were spoken *ex animo querenti*, this is not good; because it doth not certainly appear of whom they were spoken, and the innuendo doth not help it. *Pag. 11 Car. B. R. 1 Denp. Abr. 158.* Also if one say of another, he hath sworn himself, (innuendo before justices of assize, &c.)

this innuendo shall not make the words actionable. 1 *Daw. 157.* A man shall not be punished for perjury, by the help of an innuendo. 5 *Mod. 344.* And an innuendo will not make an action for a libel good; if the matter precedent imports not scandal, &c. to the damage of the party. *Mich. 5 Ann.* Where action lies without any innuendo, an innuendo shall be repugnant and void. 1 *Daw. 158.*

Insuperatio, Is one of the legal excuses to exempt a man from appearing in court: *Causæ quæ ad excusationem sufficiunt*, &c. *hoc est, vel infirmitatis, vel domini necessitatis, vel contramandationis, vel regis implacitationis, vel inoperationis rasis, &c.* on the days in which all pleadings are to cease, or in diebus non juridicis. *Leg. H. 1. c. 61.*

Insuperatus, Was anciently taken for one who died intestate; it is mentioned in *Matt. Westm. 1246.*

Inpeny and Outpeny, Money paid by the custom of some manors, on the alienation of tenants, &c. In peny and Outpeny *consuetudo talis est in villa de East Radham, de manibus terris quæ infra burgagium tinentur, viz. Quod ipse, qui vendiderit vel dederit dictam tenuram alixi dabit pro exitu suo de eadem tenura annu denarium, et simile dabit pro ingressu alterius, et si prædicti denarii à refo fuerint, ballivus domini distringet pro eisden denariis in eadem tenura.* *Regist. Prior. de Cokeford, p. 25.*

Inquest, Adherents or accomplices. — *Sciatis quod receptum in gratiam nostram Gilbertum Marschallam, et alios qui fuerunt imprisii Richardi Marschalli.* — *Glanf. 18 H. 3, in Brady Hist. Engl. Append. p. 180.*

Inquest, (inquisitio) Is an inquisition of jurors, in causes civil and criminal, on proof made of the fact on either side, when it is referred to their trial, being impeached by the sheriff for that purpose; and as they bring in their verdict, judgment passeth. *Stannf. P. C. lib. 3. c. 12.* There is an inquest of office, as well on an issue as the mise of the party, &c. as in cases of appeals of robbery, the fresh suit to entitle restitution of goods, it to be enquired of by inquest of office, which inquest is chiefly for the satisfaction of the conscience of the judges. 2 *Haw. P. C. 169.* Whether a criminal be a lunatick, or not, shall be tried by an inquest of office, returned by the sheriff of the county; and if it be found by the jury that he only feigns himself lunatick, and he refuses to plead, he shall be dealt with as one standing mute. *H. P. C. 226.* 1 *And. 107.* Where a person stands mute without making any answer, the court may take an inquest of office, by the oath of any twelve persons present, if he do so out of malice, &c. This signifies from a perverse or obstinate disposition. But after the issue is joined, when the jury are in court, if there be any need for such inquiry, it shall be made by them, and not by an inquest of office. 2 *Haw. P. C. 327.* If a person attainted of felony escape, and being retaken, denies he is the same man, inquest is to be made of it by a jury before he is executed. *Ibid. 463.* By *Magna Charta*, nothing is to be taken for inquest of life or member. 9 *H. 3. c. 26.*

Inquestendo. An authority given in general to some person, or persons, to inquire into something for the King's advantage. *Reg. 72.*

Inquisition. A manner of proceeding by way of search or examination, and used in the King's behalf in temporal causes and process, in which sense it is founded with office. *Stannf. Prærog. 51.* This inquisition is upon an outlawry found; in cases of treason and felony committed; upon a *felto de se*, &c. to entitle the King to forfeitures of lands and goods: And there is no such nicety required in an inquisition as in pleading; because an inquisition is only to inform the court how process shall issue for the King, whose title accrues by the attainer, and not by the inquisition; yet in the cases of the King and a common person, inquisitions have been held void for uncertainty. *Lanc. 39.* 2 *Nels. Abr. 1008.* It is said, there are two sorts of inquisitions, one to inform the King, the other to vest an interest in him; the one need not be certain, but the other must; and where an inquisition finds some path well, and nothing as to others, it may be helped by *indici inquirendum*. 2 *Salk. 460.* There is a judicial writ *ad inquirendum*, to inquire by a jury into any thing touching a cause depending in court; and inquisition

sition is had upon extents of land, writs of *elegit*, where judgment is had by default, and damages and costs are recovered, &c. *Finch* 484. 2 *Lill. Abr.* 65.

Inquisition, Ex officio mero, Is one way of proceeding in Ecclesiastical Courts. Wood's *Inst.* 596. And formerly the oath *ex officio* was a sort of inquisition.

Inquisitors, (inquisitores) Are sheriffs, coroners *super visum corporis*, or the like, who have power to inquire in certain cases; and by the statute of *Westm.* 1. Inquirors or inquisitors are included under the name of *Ministri*. 2 *Inst.* 211.

Inrollment, (irrotulatio) Is the registering or entering in the rolls of the Chancery, King's Bench, Common Pleas or Exchequer, or by the clerk of the peace in the records of the quarter-sessions, of any lawful act; as a statute or recognizance acknowledged, a deed of bargain and sale of lands, &c. An inrollment of a deed, may be either by the Common law, or according to the statute: And inrollment of deeds ought to be made in parchment, and recorded in court, for perpetuity's sake. *Trin.* 23 *Car. Pasch.* 24 *Car.* 1. *B. R.* But the inrolling a deed doth not make it a record, tho' it thereby becomes a deed recorded; for there is a difference between matter of record, and a thing recorded to be kept in memory; a record being the entry in parchment of judicial matters controverted in a court of record, and whereof the court takes notice; whereas an inrollment of a deed is a private act of the parties concerned, of which the court takes no cognizance at the time of doing it, altho' the court gives way to it. *Mich.* 21 *Car.* 1. 2 *Lill. Abr.* 69. Every deed before it is inrolled, is to be acknowledged to be the deed of the party before a master of the Court of Chancery, or a judge of the court, wherein inrolled; which is the officer's warrant for inrolling of the same: And the inrollment of a deed, if it be acknowledged by the grantor, will be good proof of the deed itself upon a trial. *Ibid.* A deed may be inrolled without the examination of the party himself; for it is sufficient if oath is made of the execution. If two are parties, and the deed is acknowledged by one, the other is bound by it: And if a man lives in New York, &c. and would pass land in England, a nominal person may be joined with him in the deed who may acknowledge it here, and it will be binding. 1 *Salk.* 389. If the party dies before it is inrolled, it may be inrolled afterwards; And inrollments of deeds operate by virtue of the statute of inrollments; but if livery and seisin, &c. be had before the inrolling, it prevents the operation of the inrollment, and the party shall be in by that, as the more worthy ceremony to pass estates. 1 *Leys* 5. 2 *Nelf. Abr.* 1010. Altho' inrollment, or matter of record, shall not be tried *per pais*, yet the time when the inrollment of a deed was made, shall. 2 *Lill.* 68. See Bargain and Sale.

Inrollment, Is ordained in divers cases by Statute; Of bargains and sales by 27 *H.* 8. c. 16. Deeds in corporations, &c. 34 & 35 *H.* 8. c. 22. Of writings in the counties of Lancaster and Chester, &c. 5 *Edw.* c. 26. Grants from the crown of felons goods, &c. 4 & 5 *W.* & *M.* c. 22. Of deeds and wills made of lands of Papists. 3 *Geo.* 1. c. 18.

Inscriptions, Were written instruments by which any thing was granted; as *inscriptions monasterii*, &c. Blount.

Inscitator, A prosecutor or adversary at law. *Paroch. Antiq.* 388.

Interbite, To reduce persons to servitude:—*Si ingenuus ancillam uxorem cepit, & si ipsa postea fuerit interbita. Du Cange.*

Interena, (Sax.) An inditch. *infetenis*, & *Watergangs*, &c. *Ordin. Romn. Maris.* p. 72.

Insidiar, The same with *Vigilie* or *Excubie*. *Fleta*, lib. 1. cap. 4. par. 3. *Insidias autem nocturnas non tenetur facere, sed singulis noctibus in crepusculo insidias affidebit*, &c.

Insidiatores viarum, Are way-layers; which words are not to be put in indictments, appeals, &c. by statute *H.* 4. c. 2. And before this statute, clergy might be denied felons charged generally as *insidiatores viarum*, &c. See 23 *Car.* 2. c. 1.

Insignia, Ensigns or arms. See *Arms* and *Generality*.

Institutum, Evil advice or counsel. — *Multaque Regis insilia adversus Anglos dederunt.* Sim. Dunelm. Ann. 1003. *Insiliarius* is an evil counsellor: *Filius Regis cum suis consiliariis, & insiliariis*, &c.

Institutum computassent, Is a writ or action of account, which lies not for things certain but only for things uncertain. *Brake. Acco.* 81. Also, in *assumpsit*, a count is often added to the declaration, called an *Institutum computassent*, &c. Setting forth an account stated, wherein defendant was found indebted to the plaintiff in so much, as a Consideration for the defendant's promise to pay the sum found in arrears.

Institutum tenete, Is one species of the writ of *formedon*, brought against a stranger by a coparcener on the possession of the ancestor, &c. See *Formedon*.

Insinuation, (insinuatio) Is a creeping into a man's mind or favour covertly; mentioned in the *stat.* 21 *Hen.* 8. cap. 5. *Insinuation of a will* is among the *Civilians*, the first production of it; or leaving it in the hands of the regisler, in order to its probate.

Insolvent, Till of late the Chancery would not put out an insolvent trustee; for that he was intrusted by the donor; per *Byres J.* *Comb.* 185. *Mich.* 3 *W. & M.* *B. R.* in case of *Hill v. Mills*. An insolvent person made executor cannot be put out by the ordinary; for he is intrusted by the testator. *Comb.* 185. in case of *Hill v. Mills*. *Carth.* 457. *King v. Rayns.* But Chancery granted an injunction against him, not to intermeddle with the assets, any further than to satisfy the legacy given to himself; for in equity he is but a trustee for the other legatees (infants), and where a trustee is insolvent, the court of Chancery will compel him to give security before he shall enter upon the trust. *Carth.* 458. *Mich.* 10 *W.* 3. *B. R.*

Insolvent Debtors, Unable to pay their debts, &c. See *Debtors*. They have been relieved by 1 *Ann.* st. 1. c. 25. 2 & 3 *Ann.* c. 16. 6 *Geo.* 1. c. 22. 11 *Geo.* 1. c. 21. 2 *Geo.* 2. c. 20. 24 & 25 *Geo.* 2. c. 31. 28 *Geo.* 2. c. 13. 29 *Geo.* 2. c. 18. 1 *Geo.* 3. c. 17. 5 *Geo.* 3. c. 41, &c.

Inspection. See *Age*, *Infancy*, *Trial*.

Trial by inspection or examination, is, when for the greater expedition of a cause, in some point or issue being either the principal question, or arising collaterally out of it, but being evidently the object of sense, the judges of the court, upon the testimony of their own senses, shall decide the point in dispute. See *Black. Com.* 3 *V.* 331, 332.

Inspectimus, Is a word used in *letters patens* giving name to them, being the same with *exemplification*, and called *inspectimus*, because it begins *Rex omnibus*, &c. *Inspectimus irrotulamentum quarund.* *Literar. Patent*, &c.

Installment, A settlement, establishing, or sure placing in; as installment into dignities, &c. 20 *Car.* 2. c. 2.

In Ecclesiastical promotions, where the freehold passes to the person promoted, corporal possession is required, to vest the property completely in the new proprietor, who, according to the distinction of the Canonists, acquires the *Jus ad rem*, or inchoate and imperfect right, by nomination and institution; but not the *jus in re*, or complete and full right, unless by corporal possession. Therefore in Dignities possession is given by *Installment*; in *Rectories* and *Vicarages* by *Induction*, without which no Temporal rights accrue to the minister, tho' every Ecclesiastical power is vested in him by *Institution*. See *Black. Com.* 2 *V.* 312.

Instant, (Lat. *instant*, *instantor*) Is defined by the *Logicians* to be, *Unum indivisibile in tempore, quod non est tempus, ne pars temporis, ad quod tamen partes temporis copulantur*; and tho' it cannot be actually divided, yet in indentment of law it may, and be applied to several purposes: He who lays violent hands upon himself commits no felony till he is dead, and when dead he is not in being so as to be termed a felon; but he is so adjudged in law *eo instante*, at the very instant of this fact done! And there are many other like cases where the instant time that is not dividable in nature, in the consideration of the mind is divided. *Flouid. Hales v. Petit*, fol. 258. b.

258. b. And vide *Co. Lit.* 185. b. And *Vin. Abr.* tit. *Instant*, A. pl. 2.

An instant is not to be considered in law, as in logic, as a point of time, and no parcel of time; but in our law things which are to be done in an instant, have in consideration of law a priority of time in them. Vide *Co. Lit.* and *Flow.* as cited before. And in several cases, a difference is allowed in our law in an instant, as *per mortem & post mortem*, &c. Arg. *Show.* 415. in case of *The King v. Dr. Birch and the Bishop of London*.

Instanter, (Lat.) Instantly or presently. *Law Lat. Dict.*

A trial *instante* where a prisoner between *Attainder* and *Execution*, pleads that he is not the same that was attainted. In such case a jury is to be impanelled to try this collateral issue, viz. the identity of this person, and in such collateral issue, the trial shall be *instante*. See *Black. Com.* 4 V. 389. Append. v. 1 Sid. 72. *Fest.* 42. 46. 114. 61. *Staudf. P. C.* 163. *Co. Lit.* 157. *Hal. Sum.* 259.

Instaurum, Is used in ancient deeds for a stock of cattle; and we read of *staurum* and *instauramentum*, properly young beasts, store or breed. *Mon. Angl. Tom.* 1. pag. 548. *Instaurum* was commonly taken for the whole stock upon a farm, as cattle, waggons, ploughs, and all other implements of husbandry. *Pleta*, lib. 2. cap. 72. And *instaurum ecclesie* is applied to the books, vestments, and all other utensils belonging to a church. *Synod. Exet. Ann.* 1287.

Instirpare, To plant or establish — *Non sturum est gentem externam & turbidam instirpare.* *Brompt.* 935.

Institution, (*Institutio*) Is when the bishop lays to a clerk, who is presented to a church living, *Instituto te rectorem talis ecclesie, cum cura animarum, & accipe curam tuam & meam*: Or it is a faculty made by the ordinary, whereby a parson is approved to be inducted to a rectory or parsonage. If the bishop upon examination finds the clerk presented capable of the benefice, he admits and institutes him; and institution may be granted either by the bishop under his Episcopal seal; or it may be done by the bishop's vicar general, chancellor or commissary; and if granted by the vicar general, or any other substitute, their acts are taken to be the acts of the bishop: Also the instrument or letters testimonial of institution may be granted by the bishop, tho' he is not in his diocese; to which some witnesses should subscribe their names. 1 *Inst.* 344. *Clergym.* *Law* 109. The bishop by institution transfers the cure of souls to the clerk; and if he refuseth to grant institution, the party may have his remedy in the *Court of Audience* of the archbishop, by *duplex querela*, &c. for institution is properly cognisable in the Ecclesiastical court: Where institution is granted, and suspected to be void for want of title in the patron, &c. a superinstitution hath been sometimes granted to another, to try the title of the present incumbent by ejectment. 2 *Roll. Abr.* 220. 4 *Rep.* 79.

Taking a reward for institution incurs a forfeiture of double value of one year's profit of the benefice, and makes the living void. *Stat.* 31 *Eliz.* c. 6. On institution the clerk hath a right to enter on the parsonage house and glebe, and take the tithes; but he cannot grant, let, or do any act to charge them, till he is inducted into the living: He is complete parson as to the spirituality, by institution; but not as to the temporality, &c. By the institution he is only admitted *ad officium*, to pray and preach; and is not entitled *ad beneficium*, until formal induction. *Plowd.* 528. Vide *Installment*. The church is full by institution against all common persons, so that if another person be afterwards inducted, it is void, and he hath but a mere possession; but a church is not full against the King till induction. 2 *Inst.* 358. 1 *Roll. Rep.* 151. When a bishop hath given institution to a clerk, he issues his mandate for induction; and if the archbishop should inhibit the archdeacon to induct the clerk thus instituted, he may do it notwithstanding. The first beginning of institutions to benefices, was in a national synod held at *Westminster*, *Ann.* 1124. For patrons did originally fill all churches by collation and livery; till this power was taken from them by canons. *Selden's Hist. of Tithes*, cap.

6 & 9 pag. 375. See *Induction*. And *Black. Com.* 1 V. 390. 2 V. 23. 4 V. 106.

Insuper, Is used by auditors in their accounts in the *Ex. chequer*; as when so much is charged upon a person as due on his account, they say so much remains *insuper* to such an accountant. 21 *Jac.* 1. r. 2.

Insurante or *Assurance*, Signifies a security given, in consideration of a sum of money paid in hand of so much *per cent.* to an *assurer* or *insurer*, to indemnify the insured from such losses as shall be specified in the policy, or instrument of assurance, subscribed by the insurer or insurers for that purpose. *Dict. Tr. and Com.* 135. *Savary's Dict.* tit. *Assurance & Police d'Assurance*.

We shall here consider,

- I. The origin of insurance, and the nature and effect of policies, &c.
- II. Ratary and deviation,
- III. Warranty to depart with convey.

I. The origin of insurance, and the nature and effect of policies, &c.

It is conceived by *Santonius*, that *Claudius Cesar* was the first who brought in this custom of assurance; by which the danger and adventure of voyages is divided, repaired and borne by many persons, who for a certain sum, by the Spaniards called *premium*, assure ships or goods, or both, or a proportion, according to the policy. *Molloy*, b. 2. c. 7. *sect.* 1. *Malynt's Lex Mercatoria*, ed. 1686. p. 104.

Mr. *Savary*, in his *Dictionnaire de Commerce*, tit. *Assurance*, thinks this custom was first introduced by the Jews in the year 1182, but whoever was the first contriver, or original inventor of this useful branch of business, it has been many ages practised in this kingdom, and is supposed to have been introduced here by some Italians from *Lombardy*, who at the same time came to settle at *Antwerp*, and among us: And this being prior to the building of the *Royal Exchange*, they used to meet in a place where *Lombard Street* now is, at a house they had called the Pawn House or *Lombard*, for transacting business; and as they were then the sole negotiators in insurance, the policies made by others in after-times had a clause inserted, that those latter ones should have as much force and effect, as those formerly made in *Lombard Street*. *Lex Mercatoria Rediviva* 261.

Assurances are of various sorts, some being to places certain, others general. Those that are made to places certain, are commonly upon goods laden, or to be laden abroad outward, and until the same adventure shall be landed at such a port; or upon goods laden, or to be laden homeward in such a ship, till the adventure shall likewise be landed; or else upon goods out and in, with liberty to touch at all ports mentioned in the policy.

So likewise on ships that go trading voyages, as round to *Cadix*; and that it shall be lawful, after the ship's delivery there, to take in at the same port another cargo, and with that proceed to the *West-Indies* or other ports, and back again to *Cadix*, and from thence to *London*; this policy being general and dangerous, seldom procures subscriptions, or at least very chargeable ones.

As goods and merchandize are commonly insured, so likewise are the ship's tackle and furniture; but in regard there seldom happens a voyage but somewhat is missing or lost, the *premium* commonly runs higher than for merchandize.

Assurances may be made on goods sent by land, so likewise on hoys and the like, and may be made on the heads of men; as if a man is going for the *Streights*, and perhaps is in some fear that he may be taken by the *Moor* or *Turkish* pirates, and so made a slave, for the redemption of whom a ransom must be paid, he may advance a *premium* accordingly upon a policy of assurance; and if there be a caption, the assurer must answer the ransom that is secured to be paid on the policy. *Molloy*, b. 2. c. 7. *sect.* 4. cites *Mich.* 29 *Car.* 2. *B. R. Lisle v. Sedgwick*.

The policies are now so large, that almost all these curious questions that former ages, and the Civilians according to the law marine, nay and the Common lawyers too, have controverted, are now out of date. Scarcely any misfortune that can happen, or provision to be made, but the same is provided for in the policies that are now used; for they insure against heaven and earth, fires of weather, storms, enemies, pirates, rovers, &c. or whatsoever detriment shall happen or come to the thing insured, *Gr. Molloy, b. 2. c. 7. § 7.* When a ship hath been long missing, and no advice can be had where she is, the premium in time of war will run very high; sometimes 30 or 40 per cent. or more, but when these words are inserted in the insurance, *lost or not lost*; in such case, if it happens at the time the subscription is made, that the ship is cast away, the insurers must answer: But if the party that caused the insurance to be made, saw the ship wrecked, or had certain intelligence of it, such subscription will not be obligatory; so likewise if the insured having a rotten ship, shall insure upon the same more than she is worth, and afterwards going out of the port she is sunk or wrecked, this will be adjudged fraudulent, and not oblige insurers to answer. *Mish. 26 Car. 2. B. R.* And wilfully casting away, or making holes in the bottom of a ship, &c. with design to prejudice any insurers, merchants, &c. is made felony by *stat. 1 Ann. St. 2. c. 9. § 4 Geo. 1. c. 12. and 12 Geo. 1. c. 29.* Subscriptions for insurances are generally for certain sums; as 100 l. or 500 l. &c. at the premium current; and if a man insures goods to the value of 5000 l. and he hath but 2000 l. remitted, now he having insured a real adventure, if a loss happens, by the law marine, all the insurers are compellable to answer *pro rata*: Tho' this is more by the custom of merchants than by law; and by some opinions, only the first subscribers, who underwrit so much as the real adventure amounted to, are to be made liable, and the rest to have their *pro rata* deducted, and be discharged. *Gr. Intrad. Jar. Hall. 212.* If a merchant freights out wool, &c. which occasions a forfeiture of ship and lading; or if he lades contraband goods knowingly, and afterwards insures the same, and they are seized by the King's officers; the insurers are not liable to bear the loss: But if goods insured are not contraband at the time of the lading and insurance, and after become such, if they are then seized, the insurers are answerable. *12 Car. 2. 32.* And if goods and merchandise be lawfully insured, and afterwards the ship becomes disabled, by reason of which, with the consent of the supercargo or merchant, they are re-laden into another vessel; and that vessel proves the ship of an enemy, by reason of which, on her arrival, she is subject to seizure; in this case it is said the insurers are liable, for this is no accident within the intention of the policy of insurances, which mentions dangers of seas, enemies, &c.

A ship is insured for a voyage, or cruise of three months, and is taken by the enemy within that time, but before she is carried *infra presidia hostis* is re-taken by an *Englishman*, and is now a living ship, this is a total loss. *v. Wilf. Rip. par. 1. fol. 191.*

Yet where goods are insured in a ship bound to any foreign port, and in the voyage she happens to be leaky or receive other damage, and another vessel is freighted for the preservation of the goods; and then the second vessel is lost at sea, it is said the insurers are discharged without a special clause to make them liable. *Lex Mercat. or Merch. Compan. 93. Sed qd.* If a ship be insured from the port of London to any foreign place, and before the ship breaks ground she happens to take fire, and is consumed, the insurers are not obliged to answer, unless the words of the insurance are *As and from the port of London*; for the adventure did not commence till the ship was gone from thence: Tho' if the ship had broken ground, and afterwards been driven by storm back to the port of London, and there had taken fire, the insurers must answer. *Rat. Scaccar. 15 Car. 2.* Goods are stolen or imbealied on ship-board, the master, and not the insurers are liable: And when insurers are to answer, and it happens that some part only of the effects insured are lost, as in the case of ejections in a storm, or other such accidents; then the insurers make an average of it, and each man pays so much

pro rata, is proportion of the sum for which he subscribed. When advice is received of the loss of the ship or goods, application is to be made to the insurers, and the vouchers to be produced; with which if they are satisfied, they will pay the money; but if they have reasonable ground to scruple it, the insured must wait a convenient time, till the insurers can obtain a more satisfactory advice; or if nothing can be heard of the ship in any reasonable time, the insurers are obliged to pay the money: Tho' if the ship afterwards arrive in safety, the money is to be returned them by the insured. *Merc. Compan. 91, 96, 97.* A merchant having insured the greatest part of the adventures of a ship; if advice is received of a loss, but with hope of recovery, whereby such merchant would have the assistance of the insurers; he has a privilege to make a renunciation of the lading to the insurers, and to come in himself in the nature of an insurer, for so much as shall appear he hath borne the adventure of, beyond his part of the value insured. *N. B.* The party insured, must have property in the thing insured, at the time of insurance and loss. *v. Wilf. Rip. par. 1. fol. 10.*

The 6 Geo. 1. c. 18. empowers his Majesty to grant two charters for insurances of ships and merchandise, &c. and to incorporate the adventurers, in consideration of a large sum of money advanced; and all other corporations for insurance, and their policies, are declared void. By 11 Geo. 1. c. 30. Policies of insurance shall be made out and stamped in three days after ships are insured, on pain of 100 l. and promissory notes for insurance shall be void, and nothing recovered thereon. Where any person undertakes the insuring of wools to be transported, or agrees to pay money for such insurance, he is liable to forfeit 500 l. but one may be discharged of this penalty, and have likewise the whole forfeiture, on discovering, and convicting the other guilty party, in six months. *Stat. 12 Geo. 2. c. 21.* By the *stat. 25 Geo. 2. c. 26.* no insurance shall be made on money to be lent on bottomree, or *Responsoria* Bonds on foreign ships or goods bound to, or from the *East Indies*, on penalty of forfeiting treble the sum insured or lent. This prohibition not to extend to the ships or goods of the subjects of such sovereigns who traded there before the 7th of October 1748.

By the *stat. 19 Geo. 2. c. 37.* No assurance shall be made by any person on any ship belonging to his Majesty or his subjects, (except privateers, and by the owners of them) or on any goods laden on board such ship, interest or no interest, or without further proof of interest than the policy, or by way of gaining or wagering, or without benefit of salvage to the insurer. And every such assurance shall be void. Re-assurances shall not be made except the insurer becomes insolvent, and then but to the value before assured, and to be expressed in the policy to be re-assurances. The plaintiff in any action upon a policy of assurance, shall within fifteen days after request, declare what sums he hath assured in the whole, or borrowed at *Responsoria* or bottomree for the voyage. Any person sued on a policy of assurance may bring the money into court, and if the plaintiff shall refuse to accept it, and the jury shall not assess more damages than the money brought into court, the plaintiff shall pay costs. See *Bartons.*

II. Of Baratry and deviation.

Baratry is when the master of a ship, or the mariners cheat the owners or insurers, whether by running away with the ship, sinking her, deserting her, or imbealilling the cargo. *Dia. Tr. and Com. 219.*

Baratry of the mariners is a disease so epidemic on shipboard, that it is very rare for a master, to prevent it. However the law does in such cases impute offences and faults committed by them to the negligence of the master; and were it otherwise, the merchant would be in a very dangerous condition. The reasons why he ought to be responsible are, that the mariners are of his own choosing, and under his government, and know no other superior on shipboard but himself; and if they are faulty, he may correct and punish them, and justify the same by law; and if the fact is apparently proved against them, may reimburse himself out of their wages. *Molloy, b. 1.*

b. 1. c. 3. f. 13. *King v. Bell* 533. *Regist.* 11 Jan. in *B. R. Horn v. Smith*.

Therefore, in all cases whereforever the merchant loads aboard any goods or merchandize, if they be lost, imbeziled, or any other way damaged, he must be responsible for them; for the very loading them aboard makes him liable, and that as well by the Common law as the law maritime. *Malley, b. 1. c. 3. f. 14. vites i. Nov. 190, 298. 1 Mod. 85. 2 Lev. 69.*

Nay, if his mariners go with the ship-board to the quay or wharf to fetch goods on shipboard, if once they have taken charge of them, the master becomes immediately responsible, if they steal, lose, damage, or imbezel them. *Malley, b. 1. c. 3. f. 15.*

Where a ship was insured against the baretry of the master, &c. in an action brought thereupon, the jury found that the ship was lost by the fraud and negligence of the master: The court held, that if the master ran away with the ship, or imbezel the goods, the merchant may have an action against him; for it is reasonable that merchants who hazard their stocks in foreign traffick, should secure themselves in what manner they think proper, against baretry of the master and all other frauds; and this must be intended fraud in the master; not a bare neglect: and they all agreed that fraud is baretry, tho' not named in the covenant; but negligence might not. *1 Mod. 230, 231.*

Baretry imports fraud (*De Fraus Glossar. verbo Barataria fraud, delus*) and he who commits a fraud may properly be said to be guilty of a neglect of his duty. Baretry of a master is not to be confined to the master's running away with the ship; and the general words of the policy ought to be construed to extend to losses of the like nature as those mentioned before. Losses arising from the fraud of the master, are of the same nature as if he had run away with the ship, supposing baretry to be confined to that which it is not, because it imports any fraud. *Ld. Raym. 1349. Knight v. Cambridge. Stra. 581. S. C. Vide the case of Simpson v. Brown. 2 Stra. 1173. where the deviation of the master, being for the benefit of his owners, and not for his own, was construed not to the baretry, in an action on a policy brought by a person who had put goods on board to be carried to Marshfield.*

An intention to deviate is not sufficient to discharge the underwriter. *Foster v. Wilson. 2 Stra. 1249.*

The excuse of necessity is always allowed. *Ellen v. Bridges. 2 Stra. 1264.*

A voyage ought to be performed according to usage. *2 Salk. 443.*

If after a policy of insurance a damage happens, and afterwards in the same voyage a deviation, yet the assured shall recover for what happened before the deviation; for the policy is discharged from the time of the deviation only. *Vid. Sower 129. Kemp and Andrews. 2 Salk. 444.*

III. Of warranty to depart with convoy.

Where the captain does every thing in his power, it is a departing with convoy; and these agreements are never confined to precise words; as in the case of departing with convoy from London, where the place of rendezvous is specified; a loss in going thither is within the policy. So that the plaintiff recovered. *Stra. 1250. 19 Geo. 2. Fisher v. Lewis. See infra.*

A ship is to be considered as under insurance to a place of general rendezvous, according to the interpretation of the words warranted to depart with convoy. *Salk. 443, 445.* And if the parties mean to vary the insurance from what is commonly understood, they should particularize her departure with convoy from the place specified. *Stra. 1265. 2 Nov. 2. Gordon v. Morley, and Campbell v. Bowden.*

Action on a policy of insurance; the defendant pleaded an excuse, and the jury found the policy, by which the insurer undertook against the perils of the sea, pirates, enemies, &c. from London to Pinck, warranted to depart with convoy. *Et per cur* The words warranted to depart with convoy, mean only that he will leave the port,

and sail with the convoy without any mutual default in the master; therefore, if by default of the master, the ship is separated and taken, the insurers are not liable; but if there be no default, the master having done all that could be done, and the ship is taken, they are liable; so if the ship be lost by stress of weather; for they insure against these by their own agreement. *2 Salk. 443. Hill. 2 W. & M. in B. R. Jeffries v. Legandra, S. C. 3 Lev. 320. 4 Mod. 58. 1 Show. 320. Garth. 216. Holt's Rep. 465.*

Action on a policy of insurance by the defendant at London, insuring a ship from thence to the East-Indies, warranted to depart with convoy; and shews that the ship went from London to the Downs, and from thence with convoy, and was lost. After a frivolous plea and demurrer, the case stood upon the declaration; to which it was objected, that there was a departure without convoy. *Et per cur*. The clause warranted to depart with convoy, must be construed according to the usage among merchants, i. e. from such place, where convoys are to be had, as the Downs, &c. *Holt Chief Justice curia*; We take notice of the laws of merchants that are general, not of those that are particular usages. It is no part of the law of merchants to take convoy in the Downs. *2 Salk. 443. Mich. 4 W. & M. in B. R. Lothner's case.*

The words warranted to depart with convoy have been resolved to import, by the usage of merchants, a continuance with that convoy as long as may be. *Luc. Rep. 287.*

For another case, on the explanation of the words, but similar to those already stated, vide *Lex Mercat. Revisum. 277. Gordon and Murray v. Morley. Sittings after Michaelmas term at Guildhall, 1746.*

See a Collection of Cases in *Cunningham's Law of Bills of Exchange, Laws of Insurances, &c.* and see *Black. Com. 2 P. 460, 3 P. 74. 4 P. 434.*

Form of a policy of insurance.

K NOW all men by these presents, That A. B. of, &c. merchant, as well in his own name, as for and in the name and names of all and every other person and persons, to whom the same may or shall appertain, doth make assurance and hereby cause himself and them, and every of them, to be insured, left or not left, at and from the port of London in, &c. in the kingdom of, &c. and as and from thence back to London, upon the body, tackle, apparel, ordnance, munition, artillery, and other furniture of and in the good ship Elizabeth, burden, &c. or thereabouts, whereof, &c. is master, and also upon all kinds of goods and merchandises shipped on board the said ship; beginning the adventure upon the said ship and goods, from and immediately following the day of the date hereof, and so to continue and endure, until the said ship, with her said tackle, apparel, &c. shall be arrived back at London, and hath there moored at anchor twenty-four hours. And it shall be lawful for the said ship in this voyage to proceed and sail to, and touch and stay at, any ports or places whatsoever, especially at, &c. without prejudice to this insurance; and the said ship and goods, &c. for so much as concern the insured, is and shall be rated and valued at, &c. sterling, without further account to be given by the assured for the same. And touching the adventures and perils, which we the insurers are content to bear, and do take upon us, they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, letters of mark, and reprisals at sea, arrests, restraints and detrainments of all Kings, Princes and people, of what nature, condition or quality soever, barratry of the master and mariners, and all other losses and misfortunes that shall come to the hurt or damage of the said ship, &c. or any part thereof. And in case of any misfortune, it shall be lawful for the insured, their factors, servants and assigns, to sue, labour, and travel for, in and about the said ship, goods, and recovery of the said ship, &c. or any part thereof, without prejudice to this insurance; to the charges of, without the insurers will contribute each of us according to the rate and quantity of his own herein assured. And so we the insurers are content, and do hereby promise, and bind ourselves; each for his own part, our heirs, executors, goods and chattels, to the insured, their executors, administrators

Arators and assigns, for the true performance of the premises, confessing ourselves paid the consideration due to us for this insurance, by, &c. at and after the rate of, &c. per cent. and in case of loss, to abate, &c. And to pay without further proof, &c. more than this present policy; any use or custom to the contrary notwithstanding. In witness, &c.

Intakers. Were a kind of thieves in the northern parts of England, so called, because they did take in and receive such bounties as their confederates the outpartners brought to them from the borders of Scotland; they are mentioned 9 H. 5. cap. 7.

Intallare. See *Tassum*.

Intendment of Law. (*intellusit legis*) The understanding, intention, and true meaning of law. *Co. Litt.* 78. says, the judges ought to judge according to the common intendment of law.

Intendment shall sometimes supply that which is not fully expressed or apparent, and when a thing is doubtful in some cases, *intendment* may make it out; also many things shall be *intended* after verdict, in a cause, to make a good judgment: but *intendment* cannot supply the want of certainty in a charge in an indictment for any crime, &c. 5 Rep. 121. 2 Hawk. P. C. 127. 441. Sometimes a thing is necessarily *intended* by what precedes or follows it; and where an indifferent construction may have two *intendments*, the rule is to take it most strongly against the plaintiff. Show 162. Tho' if a plaintiff declares, that the defendant is bound to him by obligation, it shall be *intended* that the obligation was sealed and delivered: if one is bound in a bond, and in the *sevend.* of the bond it is not expressed unto whom the money shall be paid, or if said to the obligor; the law will *intend* it is to be paid to the obligee: and where no time is limited for payment of the money, it shall be *intended* to be presently paid. 2 Lill. Abr. 71. Pasch. 24 Car. B. R.

The *intent* of parties in deeds, contracts, &c. is much regarded by the law: tho' it shall not take place against the direct rules of law: the law doth not in conveyances of estates admit them regularly to pass by *intendment* and implication; in *devises* of lands they are allowed, with due restrictions. *Vaugh.* 261, 262. Where seisin of an inheritance is once alledged, it shall be *intended* to continue till the contrary is shewn. *Jones* 181. A court pleaded generally to be held *secund. consuetud.* shall be *intended* held according to the Common law. *Com. Law* Com. Plac. 276. *Goldsb.* 111. On an act of parliament, the intent may be put in issue; but the Common law doth not allow it. *Jenk. Cent.* 87. 88. See *Implication*.

By *intendment* of law every parson, or rector of a church, is supposed to be resident in his benefice, unless the contrary be proved. *Co. Lit.* 78. b.

One part of a manor by common *intendment* shall not be of another nature than the rest. *Co. Lit.* 78. b.

Of common *intendment* a will shall not be supposed to be made by collusion. *Co. Lit.* 78. b. The law presumes that every one will act for his best advantage; therefore credits the party in whatever is to his own prejudice. *Fin. Law* 10. *Max.* 53. Usury shall not be *intended*, unless expressly found by the jury. *Arg. Bridgm.* 112. *Mich.* 15 Jac. cites 10 Rep. 59. *Chancellor of Oxford's* case. *Covin* shall not be *intended* or presumed in law, unless expressly averred. *Arg. Bridgm.* 112. cites the case of *Tyrer v. Littleton*. When one word may have a double *intendment*, one according to the law, and another against the law, that *intendment* shall be taken which is according to law; and this by a reasonable *intendment*. 3 Bulf. 306. *Mich.* 1 Car. B. R. *Telv.* 50. *Game v. Harvey*.

Intendment of Crimes. In ancient times felonious attempts, intending the death of another, were adjudged *felony*; for the will was taken for the fact. *Bracl. i. E.* 3. But now, on this day the law does not generally punish *intendments*; do ill, if the intent be not executed, except in case of treason, where intention proved by circumstances shall be punished as if put in execution. 3 Inst. 108. And if a person enter a house in the night, with intent to commit burglary, it is felony: and by statute, maliciously cutting off, or disfiguring any limb or member, with an intent to disfigure, &c. is felony. 23 Car. 2. c. 1.

and vide *Plowd.* 474. Where assault and intent to commit robbery on the highway, is made felony, and transportation, see 7 Geo. 2. c. 21. Intention of force and violence makes riots criminal. 3 Inst. 9. Also where men do evil, and say they intend none; or if the intention be only to beat, and they kill a person, they are to be punished for the crime done. *Plowd.* 345. And if a man entering a tavern, &c. commit a trespass, the law will judge that he intended it. 8 Rep. 147. Vide *Murder*.

Intent, or Intention. The words of deeds shall be construed according to the intent of the parties, and otherwise. The intent shall be destroyed where it does not agree with the law. *Pl. C.* 160. b. 162. b. *Throgmorton v. Tracy*.

In every agreement the intent is the chief thing that is to be considered; and if by the act of God, or other means not arising from the party himself, the agreement cannot be performed according to the words, yet the party shall perform it as near the intent as he may. *Arg. Pl. C.* 290. *Trin.* 7 Eliz. in case of *Chapan v. Dalton*.

Common usage and reputation frequently govern the matter, and direct the intention of the parties; as upon sale of a barrel of beer the barrel is not sold, but upon sale of a hoghead of wine it is otherwise. *Savil* 124. *Mich.* 32 & 33 Eliz. in case of *Matthew al. Bishop v. Harcourt*. *Hard.* 3. *Arg. Trin.* 1655. in *scacc.* The intention of a man is not always to be pursued in equity; as if a man settles a term in trust for one and his heirs, yet it shall go to the executor; per Lord North. *Pasch.* 1683. *Vern.* 164. in case of *D. of Norfolk v. Howard*.

All deeds are but in nature of contracts, and the intent of the parties reduced into writing, and the intention is to be chiefly regarded. In an act of parliament the intention appearing in the preamble shall controul the letter of the law; and from the regard which the law itself gives to the intention of the party, it is, that where there is fine by render, there shall be no dower; and so a rent or recognizance shall not be extinguished by levying a fine to the party. Per Master of the Rolls. *Pasch.* 1683. *Vern.* 58. See 14 Vin. Abr. tit. *Intent*.

Intendone, Is a writ that lies against him who enters into lands after the death of tenant in dower or for life, &c. and holds out him in reversion or remainder. *F. N. B.* 203.

Inter Canem & Lupum. Words formerly used in appeals to signify the crime being done in the twilight. *M. filia N. de Okele appellat J. C. pro rapta & pace regis frastra die Martis prom.* &c. *Inter canem & lupum, i. e. in crepusculo, scilicet, Anglice twilight, i. e. inter diem & noctem.* &c. *Inter Placita de Trin.* 7 Ed. 1. Rot. 12. Glouc. In placit. de domo combusta malitiose, hora vespertina, sc: *Inter canem & lupum venerunt malefactores,* &c. *Plac. Cor. apud Novum Casstrum.* 24 Ed. 6. Rot. 6. This in Herefordshire, they call the *mock-shadow*, corruptly the *mock-shade*, and in the north, *day-light's gate*; others betwixt *hawk and buzzard*. *Cowell*.

Intercommoning, Is where the commons of two manors lie together, and the inhabitants of both have time out of mind depastured their cattle promiscuously in each. *Cowell*.

Interdiction, (*interdictio* and *interdictum*) Has the same signification in the Common, as it hath in the Canon law, which thus defines it: *interdictio est censura ecclesiastica prohibens administrationem divinorum.* And so it is used 22 Hen. 8. cap. 12. & 25 Hen. 8. cap. 23. *Eodem anno relaxatum est interdictum Oxonie, quod auctoritate Domini Joh. Episcopi Lincol. propter clericorum & fraterlegia anno proximo prateritis fuit illatum.* *Walf. Hist.* Anno 1357. So that an *interdict* is, a general excommunication of a whole country or province: is mentioned in some of our historians, viz: *Knights* tells us, anno 1208. that the Pope excommunicated King John, and all his adherents, *Et totam terram Angliam suppositum interdictum*, which began the first Sunday after Easter, and continued six years and one month; during all which time nothing was done in the churches besides baptism and confessions of dying people.

The form of an *interdict*, as set down by *Du Cange*, is as follows, *viz.*

IN the name of Christ, We the bishop, in behalf of the Father, Son, and Holy Ghost, and of St. Peter, the chief of the apostles, and in our own behalf, do excommunicate and interdict this church, and all the chapels thereto belonging, that no man from henceforth may have leave to sing mass, or to hear it, or in any wise to administer any divine office, nor to receive God's tidings without our leave; and whosoever shall presume to sing or hear mass, or perform any divine office, or to receive any tidings contrary to this interdict, on the part of God the Father Almighty, and of the Son, and of the Holy Ghost, and on the behalf of St. Peter, and all the saints, let him be accursed and separated from all Christian society, and from entering into Holy Mother Church, where there is forgiveness of sins; and let him be Anathema, Maranatha, for ever, with the devils in hell. Fiat, fiat, fiat. Amen.

This severe church censure hath been of long time disused.

Interdictum, In the Civil law, was a prohibition or injunction of the prætor, or an order for the possession of a thing in dispute, made by the magistrate *per interdictum repetere possessionem suam*. Cic. pro Cæcin. 3. If a bill be filed in either of our courts of equity to quiet the possession of lands, to stay waste, or to stop proceedings at law, an *injunction* is prayed in the nature of the *interdictum* of the Civil law, commanding the defendant to cease.

Interdicted of Water and Fire, Were antiently those persons who suffered banishment for some crime; by which judgment, order was given that no man should receive them into his house, but deny them fire and water, the two necessary elements of life, which amounted as it were to a civil death; and this was called *legitimum exilium*, says *Livy*.

Interest (interesse), Is commonly taken for a chattel real, as a lease for years, &c. and more particularly for a future term; in which case, it is said in pleading, that one is possessed *de interesse termini*. Therefore an estate in lands is better than a right or interest in them: tho' in legal understanding an interest extends to estates, rights and titles, that a man hath in, or out of lands, &c. so as by grant of his whole interest in such land, a reversion therein as well as possession in fee-simple shall pass. Co. Lit. 345.

A mortgage is an interest in land, and on non-payment, the estate is absolute in law, and his interest is good in equity to intitle him to receive and enjoy the profits till redemption or satisfaction, and, on a foreclosure, he hath the absolute estate both in law and equity. 9 Mod. 146. See *Black. Com.* 2 V. 134.

Interest of Money, As distinguished from the principal, what lawful, &c. See *Usury*, and *Black. Com.* 2 V. 455.

Where an estate is devised for payment of debts, Chancery will not allow interest for book debts. 3 Ch. Rep. 94. *Dalman v. Fritman*. Where lands are charged with payment of a sum in gross, they are also chargeable in equity with payment of interest for such sum. Hill. 29 Car. 2. Fin. R. 286. *Shipton v. Tyrrel*. Interest is recovered by way of damages, where damages are recovered *ratione detentionis debiti*; but not where damages only are recovered, for interest is not recovered *occasione dampnorum*; per *Powell J.* 2 Salk. 623. Hill. 10 W. 3. B. R. *Sweetland v. Squire*. No interest to be allowed for costs. MS. Tab. cites 6 Feb. 1719. *Builer v. Burk*. For more learning on this subject, see 14 Vin. Abr. tit Interest.

Interest on Bankrupt Debts. The usual rule is, that all interest on debts carrying interest shall cease, from the time of issuing the commission, yet, in case of a surplus left after payment of every debt, such interest shall again revive, and be chargeable on the bankrupt, or his representatives. Atk. 244. *Black. Com.* 2 V. 488.

Interest on Legacies. In case of a vested legacy, due immediately, and charged on land, or money in the funds, which yield an immediate profit, interest shall be payable thereon, from the testator's death; but if charged

only on the personal estate, which cannot be immediately got in, it shall carry interest only from the end of the year after the death of the testator: 2 P. Wms. 26, 27. *Black. Com.* 2 V. 513, 514.

Interest, or no Interest, in policies of insurance, see 19 Geo. 2. c. 37. and tit. Insurance, and *Black. Com.* 2 V. 461.

Interested Witnesses. Interested witnesses may be examined upon a *voir dire*, if suspected to be secretly concerned in the event, or their interest may be proved in court. *Black. Com.* 3 V. 370.

Intestineation in a deed. A deed may be avoided by matter *ex post facto*, as by rasure, *interlining*, or other alteration in any material part; unless a memorandum be made thereof at the time of the execution and attestation. 11 Rep. 27. *Black. Com.* 2 V. 308.

Interlocutory Decree in Chancery. In a suit in equity, if any matter of fact is strongly controverted, the fact is usually directed to be tried at the bar of the court of King's Bench, or at the assizes upon a feigned issue. If a question of mere law arises in the course of a cause, it is the practice of the court of Chancery to refer it to the opinion of the judges of the court of King's Bench, upon a case stated for that purpose. In such cases *interlocutory decrees*, or orders are made. See *Black. Com.* 3 V. 452, 453.

Interlocutory Judgment. Interlocutory judgments are such as are given in the middle of a cause, upon some plea, proceeding on default, which is only intermediate, and does not finally determine or complete the suit. As judgment for the plaintiff in abatement, or *respondeat auster*, i. e. that defendant shall answer over, or farther, plead in chief, or put in a more substantial plea.

But the *interlocutory judgments*, most usually spoken of, are those incomplete judgments, whereby the right of the plaintiff is indeed established, but the quantum of damages sustained by him is not ascertained, which is the province of a jury. It such case a writ of inquiry issues to the sheriff, who summonses a jury, enquires of the damages, and returns to the court the inquisition so taken, whereupon the plaintiff's attorney axes costs, and signs final judgment. See *Black. Com.* 3 V. 396, 397.

Interlocutory Order, (*ordo interlocutorius*) Is that which decides not the cause, but only some incidental matter, which happens between the beginning and end of it; as where an order is made in Chancery, for the plaintiff to have an *injunction*, &c. till the hearing of the cause: this, or any such order, not being final, is *interlocutory*.—*Ordo interlocutorius non definit controversiam, sed aliquid obiter, ad causam pertinens, decernit*. Lanc. Inst. Juris Canon. lib. 3.

Interlopers, Persons who intercept the trade of a company of merchants. *Merch. Ditt.*

Interpleader in Actions, see *Enterpleader*.

Interregnum. There can't be any *interregnum*, in this country, by the policy of the constitution, for the right of sovereignty is fully invested in the successor by the very descent of the crown. See *Black. Com.* 1 V. 196, 249.

Interrogatories, Are particular questions demanded of witnesses brought in to be examined in a cause, especially in the court of Chancery. And these *interrogatories* must be exhibited by the parties in suit on each side; which are either *direct* for the party that produces them, or *counter* on behalf of the adverse party; and generally both plaintiff and defendant may exhibit, direct and counter or cross *interrogatories*.

They are to be pertinent, and only to the points necessary, and either drawn or perused by counsel, and be signed by them: if they are leading, *viz.* such as these, *Did you not do or see such a thing, &c.* the depositions on them will be suppressed; for they should be drawn, *Did you do or did you not see, &c.* without leaning to either side; and not only where they point more to one side of the question than the other; but if they are too particular, they will likewise be suppressed: The commissioners, &c. who examine witnesses on *interrogatories*, must examine to one *interrogatory* only at a time, they are to hold the witnesses to every point *interrogated*; and take what comes from them on their examination, without asking any idle questions, or putting down any impertinent answers not relating

relating to the *Interrogatories*, &c. *Practif. Attorn.* first Edit. 225. See *Depositions*.

At Common law, witnesses going abroad, are sometimes examined, by consent, upon interrogatories *de bene esse*. See *Black. Com.* 3 *V.* 383. The mode of trial, in equity, is by interrogatories, administered, in writing to the witnesses. *Black. Com.* 3 *V.* 438. 4 *V.* 449.

An attachment sometimes issues against a person supposed guilty of some contempt to the court whence the process goes forth, to bring him in; and when there he is to stand committed, or put in bail to answer *interrogatories* upon oath. Whether this proceeding is legal and constitutional or not, it is not for the editor to determine. But, as a contempt can scarce be committed without a witness, it should seem more rational to indict the party, and give him the benefit of a legal trial, by his peers.

Intestates, (Intestati.) There are two kinds of *intestates*; one who makes no will; another who makes a will, and nominates executors, but they refuse; in which case he dies an *intestate*, and the ordinary commits administration. 2 *Par. Inf.* fol. 397. In former times, he who died *intestate*, was accounted damned, because (as *Mat. Par.* tells us) he was obliged by the canons, to leave at least a tenth part of his goods to pious uses, for the redemption of his soul, therefore, who neglected so to do, took no care of his own salvation. They made no difference between a *suicide* and an *intestate*; for as in one case, the goods were forfeited to the King, so in the other they were forfeited to the chief lord. But because it was accounted a very wicked thing to die without making any distribution of his goods to pious uses, and such cases often happened by sudden deaths, therefore by subsequent constitutions, the bishops had power to make such distribution as the *intestate* himself was bound to do; and this was called *Elemosyna rationalis*. Thus in *Mur. Paris.* anno 1190. we read, *Se quis subitanea morte vel quolibet casu preoccupatus fuisset ut de rebus suis disponere non posset, distributio bonorum ejus ecclesiastica fecerat auctoritate*: And it was by this means that the spiritual courts came first to have jurisdiction in testamentary cases. *Cowell.*

By the statute *Westm.* 2. Goods of *intestates* were to be committed to the Ordinary, to answer the debts of the deceased, &c. And the 22 & 23 *Car.* 2. cap. 10. appoints a distribution of *intestates* estates, after the debts and funeral expences are paid, among the wife and children of the deceased; or for want or such, the next of kin, &c. And the act of parliament doth immediately, upon the death of the *intestate*, vest an interest in the persons intitled; so that if any one dies before the distribution, though within the year, his share shall go to his executors or administrators; and not to the survivors and next of kin to the *intestate*. 1 *Lill. Abr.* 487.

A husband shall not be compelled to distribute his wife's estate. 29 *Car.* 2. c. 3. s. 25.

The brothers and sisters of the *intestate* shall have equal shares with the mother. 1 *Jac.* 2. c. 17. s. 7.

Shares claimed by the administrator by custom shall be distributed *Ibid.* s. 8.

Distribution shall be made of estates *par ante vis*, whereof there is not any special occupant, and which are undivided. 14 *Geo.* 2. c. 20. s. 9.

If A. by will appoints that the executors of J. S. shall be his executors, and he dies, leaving J. S. there till the death of J. S. this is a dying intestate of A. for in the mean time A. has no executor. *Per Dyer & Walsh, Pl. C.* 281. b.

So if A. makes J. S. (to be) his executor a year after his death; for within the year he dies intestate; and therefore for this the ordinary has power to commit administration, and it shall never be disproved; By *Dyer* and *Walsh, Pl. C.* 281. b. And if executor proves the testam. and dies intestate, there, from the death of such executor by dying intestate, the first testator dyeth intestate, and for that reason the ordinary may grant administration. *Per Dyer* and *Walsh, ibid.* 281. b. 282. a.

Where the strictness of the Civil law is observed, there a man cannot die partly testate and partly intestate; tho' here in *England*, where that ceremonial strictness is not observed, but all immunities enjoy'd, being not obliged

to any other observance in making testaments than what is *jura gentium*, a man may several ways die partly testate and partly intestate. 1 *Godolph. Orph. Leg.* cap. 19. s. 4.

Error was assigned that one pleaded (*non testamento autem qui obijt intestatus*) which is absurd and repugnant; *per cur.* It is well; for though one make a will, yet if he make no executor, he is intestate. *Quint.* 20. See *Administrators*.

Intestates Estates. Are the goods and chattels of persons dying *intestate*. 2 *Lill. Abr.* 73.

Tare & Weight. Toll or custom paid for things imported and exported, or brought in, and sold out. *Cowell.*

Intrate Spettum. Signifies to digen any low ground, and by dikes, walls, &c. take in and reduce it to herbage or pasture; whence comes the word *intra*. Will. Thorn.

Intrusion, (Intrusio) Is when the ancestor dies seized of any estate of inheritance, expectant upon an estate for life, and then tenant for life dies, between whose death and entry of the heir, a stranger intrudes. *Co. Lit.* 227. — *Intrusio est ubi quis, cui nullum jus competit in re nec scintilla juris, possessionem vacuum ingreditur*, &c. *Bract.* lib. 4. cap. 21. By which *intrusio* significeth an unlawful entry into lands or tenements void of a possessor, by him who hath no right to the same. And the difference between an *intruder* and an *abator* in this, that an *abator* entereth into lands void by the death of a tenant in fee; and an *intruder* enters into land void by the death of tenant for life, or years. *F. N. B.* 203. And there is a writ of *intrusion*, which lies where the tenant for life, &c. dies; but if a man doth *intrude* after the death of such a tenant, he in reversion in tail shall not have this writ, but is put to his *formedon*: For it lieth only for him who hath the reversion in fee-simple, &c. after the death of tenant for life, or in dower, &c. *New Nat. Br.* 509. Also one having such a fee-estate in remainder, shall have writ of *intrusion*; and the assignee of the remainder may bring it, as well as an heir, &c. 16. Ejectments are now chiefly in use. As he who enters and keeps the right heir from the possession of his ancestor is an *intruder* punishable by Common law; so he who enters on the King's lands and takes the profits, is an *intruder* against the King. *Co. Lit.* 477. For this *intrusion* information may be brought; but before office found, he who occupies the land shall not be said to be an *intruder*, for *intrusion* cannot be but where the King is actually possessed, which is not before office; tho' the King is intitled to the mesne profits after the tenant's estate ended. *Mow.* 295. By statute 21 *Jac.* 1. cap. 14. the defendants may plead the general issue in informations of *intrusion*, brought on behalf of the King, and retain their possession till trial; where the King hath been out of possession, and not received the profits for twenty years: And no *scire facias* shall issue, whereupon the subject shall be forced to special pleading, &c. See *Black. Com.* 3 *V.* 169, 183, 261.

Intrusion de Gard. Was a writ that lay where the infant within age entered into his lands, and held out his Lord. *Old Nat. Br.* 90.

Intrusione, Is the writ brought against an *intruder*; by him that hath fee-simple, &c. *New Nat. Br.* 433.

Inventare. To engage or mortgage lands; and impositions were mortgages of land. — *Confirmatio est, omnes donationes, venditiones, & invasiones*, &c. *Mon. Ang. Tum.* 1. pag. 476.

Inventiones, Mortgage or pignus. *Ibid.*

Inveniens. Is when one has been accused of some crime, which being not fully proved, he is put *sub debita suspitione*.

Inquisitiones. In the inquisition of sergeants and knights fees, anno 12 & 13 of King John, there are some titles called *inquisitiones* or *invasiones* *per regem*.

Inventiones. Invented in ancient charters for treasure-trove, money or goods found by any person, and not challenged by the owner, which by the Common law is due to the King, who grants the privilege to some particular subjects. — *Quod habent inventiones sunt in Maris & in Terra.* *Chart. K. Ed. 1.* to the Barons of the *Clinges Ports*. — *Placit. temp. Edw. 1. & Edw. 2. MS. C.* 89.

Inventory, (*Inventorium*) Is a list or schedule containing a true description of all the goods and chattels of a person deceased at the time of his death, with their value appraised by indifferent persons; which every executor or administrator ought to exhibit to the bishop or ordinary at such time as he shall appoint. *West. Symb. lib. 2. pag. 696. By 21 H. 8. c. 5.* Executors and administrators are required to make and deliver in upon oath to the ordinary, *inventories* indented, of which one part shall remain with the ordinary, and the other part with the executor or administrator: And the intention of this statute was for the benefit of the creditors and legatees, that the executor or administrator might not conceal any part of the personal estate from them: Though as to the valuation it is not exclusive, but the real value found by a jury; if they are undervalued, the creditors may take them as appraised; and if over-valued, it shall not be prejudicial to the executor. *2 Nels. Abr. 1015.* But though generally all the personal estate of the deceased, of what nature or quality soever, ought to be put into the *inventory*; yet goods given away in the life-time of the deceased, and actually in the possession of the party to whom given, and the goods to which a husband is intitled as administrator to his wife, are not. *3 Bulstr. 355.* And notwithstanding the law requires that the *inventory* be exhibited within three months after the death of the person, if it is done afterwards, it is good, for the ordinary may dispense with the time, and even in some cases, whether it shall be exhibited, or not; as where creditors are paid, and the will performed, &c. *Raym. 470.* These *inventories* proceed from the *Civil law*; and as by the old *Roman law*, the heir was obliged to answer all the testator's debts, *Justinian* ordained, that *inventories* should be made of the substance of the deceased, and he should be no further charged. *Justin. Inst. See Executor & Black. Com. 2 V. 510.*

In ventre sa mere, (*Fr.*) In the mother's belly, relating to which there is a writ mentioned in the register of *curia*, and in *12 Car. 2. cap. 24.* *Infant in ventre sa mere*, is where a woman is with child at the time of her husband's death; which child, if he had been born, would be heir to the land of the husband: And this is sometimes privily, and sometimes open and visible. *1 Shep. Abr. 142.* And the law hath consideration of such a child, on account of the apparent expectation of his birth: For a devise to an infant *in ventre sa mere*, shall be good by way of future executory devise. *Raym. 164.* He may be vouched in his mother's belly; and action lies for detention of charters from him as heir, &c. *Hob. 222. Dyer 186.* And in all cases, where a daughter or female comes into land by descent; there the son born after, shall oust her and have the land. *3 Rep. 61. Plowd 375.* But if the daughter and female heir cometh to land in nature of a purchaser; as on a will of lands given to J. S. and his heirs, and he hath a daughter when the devilor dies, his wife being then with child of a son; in this case the daughter shall enjoy the land, and not the after-born son. *3 Rep. 61. 5 Ed. 4. 6. 9 H. 7. 24. Vide Infant.*

Inveritate, To verify or make proof of a thing. *Leg. Inc. c. 16.*

Inverness, A duty of excise granted to the town of. *5 Geo. 1. c. 17. 11 Geo. 2. c. 16.*

Invest and Investiture, (from the *Fr. investir*) Signifies to give possession: some define it thus, *investitura est alicujus in suum jus introductio*; a giving livery of seisin or possession. The customs and ceremonies of investiture or giving possession, were long practised with great variety: at first investitures were made by a form of words; afterwards by such things as had most resemblance to what was to be transferred; as lands passed by the delivery of a turf, &c. which was done by the grantor to the person to whom the lands were granted: but in after ages, the things by which investitures were made were not so exactly observed. *Inglph. p. 901.* In the church, it was the custom of old for Princes to promote such as they liked to ecclesiastical benefices, and declare their choice and promotion by delivery, to the persons chosen, of a pastoral staff and ring; the one a symbolical representation of their spiritual marriage with the church; and the other

of their pastoral care and charge, which was termed investiture; after which they were consecrated by ecclesiastical persons. *Hoveden* tells us, that King *Richard* being taken by the Emperor, gave this kingdom to him, & investit *rum inde per pileum suum*; and that the Emperor immediately afterwards returned the gift; *et investit rum per duplicem crucem de auro.* *Hoved. 724. Walsingham* says, that *John Duke of Lancaster* was invested Duke of *Aquitaine*, *per Virgam & Pileum*, p. 343. See *Black. Com. 2 V. 23, 53, 209, 211.*

Inbitatoria & Veneriarum, Those hymns and psalms that were sung in the church to invite the people to prayer: They are mentioned in the *statute of St. Paul's MS.*

Inbolte. A particular account of merchandise, with its value, custom and charges, &c. sent by a merchant to his factor or correspondent in another country. *Stat. 12 Car. 2. c. 34.*

Involuntary Manslaughter, Differs from homicide excusable by misadventure, in this; that misadventure always happens in consequence of some lawful act, but this species of manslaughter in consequence of an unlawful act. Yet, in general, when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasioned it. *Vide Black. Com. 4 V. 192, 193.*

Inure, Signifies to take effect, as the pardon *inureth*. *Staund. Præc. fol. 40.* See *Enure*.

Jobber, Is used for one who buys or sells cattle for others. And there are *stock-jobbers*, who buy and sell stocks for other persons, &c.

Jocalis, (*Fr. joyaux*) Jewels; derived from the *Lat. jocus, joculus, and jucula*, which comprehend every thing that delighteth; but in a special and more restrained sense, it signifies those things which are ornaments to women, and which in *France* they call their own; as diamonds, ear-rings, bracelets, &c. But in this kingdom a wife shall not be intitled to jewels, diamonds, &c. on the death of her husband, unless they are suitable to her quality; and the husband leaves assets to pay debts, &c. *1 Roll. Abr. 911.*

Jocari, To contend with pikes. *Craftino die quidam milites Anglici strenue nimis & viriliter jocabantur.* *Matt. Paris. anno 1252.*

Jocariur, A jester. In a deed of *Richard*, abbot of *Bernay*, to *Henry Lovet*, *sine dat.* among the witnesses to it was *Willielmo tunc jocario Domini Abbatis*. But in *Domesday* 'tis said *Berdic* was *Joculator Regis*, the King's jester.

Joculet, (*Sax.*) *Prædiolum, agri colendi portiuncula.* A little farm or manor; in some parts of *Kent* a yoklet, as requiring but a small yoke of oxen to till it. *Sax. Dict.*

Jocus partitus. 'Tis so called when two proposals are made, and a man hath liberty to choose which he will. *Nec potest transigere, nec pacisci, nec jocum partium facere, nec aliud.* *Bracton. lib. 4. tract. 1. cap. 32. par. 2. Etiam si apparentibus partibus queruletur & respondeatur, sive loquela per non tenuram vel per quemcunque Biperti jocus cavilletur, &c.* *Hengham Magn. cap. 4.*

Joinder in Action, Is the coupling or joining of two in a suit or action against another. *F. N. B. fol. 118, 201, 221.* In all personal things, where two are chargeable to two, the one may satisfy it, and accept of satisfaction, and bind his companion; and yet one cannot have an action without his companion, nor both only against one. *2 Leon. 77.* In joint personal actions against two defendants, if they plead severally, and the plaintiff is nonsuit by one before he hath judgment against the other, he is barred against both. *Hob. 180.* A covenant to two, not to do a thing without their consent; one of them may bring an action for his particular damage. *2 Mod. 82.* If a man covenants with two or three severally, which he may do, and it differs from a bond; here it was held; they could not join in action of covenant. *Marrb 103.* But a person, in consideration of a sum of money paid to him by A. and B. promises to procure their cattle distrained to be delivered; if they are not delivered, one joint action lies by the parties; for the consideration

sideration cannot be divided. *Styl. 156, 203. 1 Danv. Abr. 5.* And if one jointenant of goods is robbed, both may join in an action: and where two joint owners of a sum of money are robbed upon the highway, they are to join in one action against the hundred. *Latch 127. Dyer 307.* 'Tis otherwise if they have several properties. *Ibid.* Where the suit will survive to the wife, the must join in the action. *Wils. par. 1. p. 224.* and see *ibid. par. 2. fol. 423.* Upon a joint grievance all parties may join; as the inhabitants of a hundred, &c. And where an action against owners of a ship, in case of goods damaged, &c. is *quasi ex contractu*, it must be brought against all of them. *3 Lev. 258. 3 Mod. 321. 2 Salk. 440.* Tho' one partner acts in trade, where there are many partners, actions are to be brought against all the partners jointly for his acts. *1 Salk. 292.* If two men are partners, and one of them sells goods in partnership, action for the money must be brought in both their names. *Godh. 244.* But where there are two partners in merchandise, and one of them appoints a factor, they may have several writs of account against him, or they may join. *Moor 188.* And if one of the merchants dies, the survivor is to bring the action. *2 Salk. 444.* If one man calls two other men thieves, they shall not join in an action against him; and one joint action will not lie for, or against several persons for speaking the same words: *for the wrong done to one is no wrong to the other; and the words of the one are not the words of the other.* *1 Danv. 5. Palm. 313.*

So in assault and battery. On a joint trespass the plaintiff may declare severally; but it remains joint till severed by the declaration. *2 Salk. 454.* A man cannot declare in an action against one defendant for an assault and battery, and against another for taking away his goods; because the trespasses are of several natures. But where they are done by two persons jointly at one time, they may be both guilty of the whole. *Styl. 153. 10 Rep. 66.* If two men procure another to be indicted falsely of barrettry, he may have action against them both jointly; and it is the same if two conspire to maintain a suit, tho' one only gives money, &c. *Latch 262.*

Tenants in common cannot join in an action of waste against their lessee; but 'tis otherwise in the case of coparceners or jointenants. *Moor 34.*

Joinder of Counties. There can be no joinder of counties for the finding of an indictment: tho' in appeal of death, where a wound was given in one county, and the party died in another, the jury were to be returned jointly from each county, before the statute *2 & 3 Ed. 6. c. 24.* But by that statute the law is altered; for now the whole may be tried either on indictment or appeal, in the county wherein the death is. *2 Hawk. P. C. 323, 403.* Where several persons are arraigned upon the same indictment or appeal, and severally plead Not guilty, the prosecutor may either take out *joint venire's* or several. *H. P. C. 256.* But after a *joint venire*, several ones cannot be taken out.

Joinder in Demurrer. An issue upon matter of law is called *demurrer*. It confesses the fact to be true as stated by the opposite party, but denies that, by the law arising upon those facts, any injury is done to the plaintiff, or that the defendant has made out a legitimate excuse; according to the party who first demurs. The form of the demurrer is by averring the pleading insufficient in law, to answer the end proposed by it. The opposite party avers it to be sufficient, which is called a *joinder in demurrer*, and then the parties are at issue in point of law. See *Black. Com. 3 V. 314, 315.*

Joindre in Writ. The form, on a writ of right, may be seen in *Black. Com. Append. to 3 V. iv.*

Joindre of Issue. Of an issue in *fact*, is when he denies the fact pleaded by his antagonist has tendered the issue thus, And this he prays may be inquired of by the "country," or "And of this he puts himself upon the "country," it may be immediately subjoined by the other party, "And the said A. B. doth the like." Which done, the issue is said to be joined. *Black. Com. 3 V. 315. 4 V. 334.* See *Joinder in Demurrer.*

Joint Actions. In personal actions, several wrongs may be joined in one writ; but actions founded upon a

tort, and on a contract, cannot be joined, for they require different pleas and different process. *1 Keb. 847. 1 Vent. 366.* And where there is a tort by the Common law, and a tort by statute, they may not be joined; tho' where several torts are by the Common law, they may be joined, if personal. *3 Salk. 203.* Trover and *assumpsit* may not be joined; but in an action against a common carrier, the plaintiff may declare in *case* upon the custom of the realm, and also upon trover and conversion, for Not guilty answers to both. *1 Danv. Abr. 4.* Debt upon an *amercement*, and upon a *mutuatus*, may be joined in one declaration. *Wils. par. 1. 248.* So, *case* for a *misfeasance* and negligence may be joined with a count in *trover*, in the same declaration. *Id. par. 2. 319.* Two counts may be joined in the same declaration, where there is the same judgment in both. *Id. 321.* And any actions may be joined, where the plea of Not guilty goes to all. *8 Rep. 47.* But as to carriers, see *1 Vent. 365.* And judgment was arrested in *assumpsit*, in such a *case*. *1 Salk. 10.* Ejectment and battery cannot be joined; but after verdict, where several damages were found, the plaintiff was allowed to release those for the battery, and had judgment for the ejectment. *1 Danv. 3.* Altho' persons may join in the personalty, they shall always sever in actions concerning the realty; and waste being a mixed action favouring of the realty, that being more worthy draws over the personalty with it, in any action brought. *2 Mod. Rep. 62.* A person cannot as administrator, &c. join an action for the right of another, with any action in his own right; *because the costs will be entire, and it cannot be distinguished how much he is to have as administrator, and how much for himself.* *1 Salk 10.* See this subject well treated, or rather a variety of cases well selected and digested, in *Com. Dig. 1 V. tit. Action.*

N. B. Every thing, that comes within the compass of the writ, may be comprehended within the declaration; but the declaration cannot in any manner be extended beyond the writ. *Vide also as to this subject Gilb. H. C. P. 4, 5, 6, 7, 8, 9.*

Joint and several. An interest cannot be granted jointly and severally; as if a man grants *proximam aduocationem*, or makes a lease for years, to two jointly and severally, those words (severally) are void, and they are jointenants. *5 Rep. 19. Mich. 29 & 30 Eliz. Slingsby's case.*

A power or authority may be joint and several. *5 Rep. 19. Slingsby's case.* Joint words of parties shall, by construction of law, be taken respectively and severally. *5 Rep. 7. b.*

When it appears by the count, that the several covenantees have, or are to have, several interests or estates, there when the covenant is made with the covenantees, & *cum quolibet eorum*, these words make the covenant several, in respect of their several interests. *5 Rep. 19.*

There is a difference between a *power* given to two, and an *interest* given to two; a lease for years is made to two, & *cuiuslibet eorum*, this is a joint lease, and the words (*cuiuslibet eorum*) are void; this is to maintain quiet and avoid contention. So of an obligation made to two & *cuiuslibet eorum*, or a grant of the next avoidance to two & *cuiuslibet eorum*. But a power to sell, lett, or make livery to two & *cuiuslibet eorum*, 'tis good; for there is no profit. *Cupido divitiarum est causa belli.* *Jenk. 262, 263. pl. 63.*

And a grant of the next avoidance to two & *cuiuslibet eorum*, to present A. to the said church, is good; for the contention is avoided by restraining both to present A. *Jenk. 263. pl. 63. See 14 Vin. Abr. 48. 469.*

Joint Executors. Are accounted in law but as one person, and acts done by any of them shall be taken to be the acts of every one of them; for they all represent the testator. *2 Nels. Abr. 1026.* If two joint executors have a lease for years, one of them may sell the term without the other's joining, *because both are possessed of it as one person in right of the testator*; and this is the reason why one of them cannot assign the term to the other; and for which cause one joint executor cannot compel his companion to account. *Cro. Eliz. 347. Sid. 33.* If one joint executor gives an acquittance or release, the other is bound by it; for as they are but one executor to the testator,

tator, each hath an authority over the whole estate. 2 *Brownl.* 183. *Kelw.* 23. But, if a release is procured of one joint executor by fraud, for a less sum than due; relief may be had in equity: and joint executors shall not be charged by the acts of their companions, any further than they are *actually possessed of* the goods of the testator. *Moor* 620. *Cro. Eliz.* 318. 2 *Leon.* 209. 'Tho' if joint executors, by agreement among themselves, agree, that each shall intermeddle with such a part of the testator's estate; in this case each of them shall be chargeable for the whole by the agreement as to receipts, &c. *Hurd.* 314.

Also it has been decreed in *Chancery*, that if two or more executors join in a receipt, and one of them only receives the money, each of them is liable for the whole, as to creditors at law; but as to legatees, and those who claim distribution, who have no remedy but in equity, the receipt of one executor shall not charge the other. 1 *Salk.* 318. Two joint executors cannot plead distinct pleas, *because their testator, if living, who was but one person, on a writ brought against him, could have but one plea.* *Raym.* 123. It is held, where there are two joint executors, and one has possessed himself of a moiety of the goods, and then dies, in that case the survivor shall have all. 2 *P. Williams* 352. See *Executors*.

Joint fines. If a whole vill is to be fined, a joint fine may be laid, and it will be good for the necessity of it; but in other cases, fines for offences are to be severally imposed on each particular offender, and not jointly upon all of them. 1 *Roll. Rep.* 33. 11 *Rep.* 42. *Dyer* 211.

Joint Indictments, May be sometimes had: if offences of several persons arise from a joint criminal act, without any regard to any particular personal default or defect of either of the defendants; as the joint keeping of a gaming-house; or unlawful hunting and carrying away deer; or for maintenance, extortion, &c. an indictment or information may charge the defendants jointly. 1 *Ventr.* 302. 2 *Hawk. P. C.* 240. When there are more defendants than one in an information, they may not exhibit a joint plea of *Not guilty*; but are to plead severally, *that neither they, nor any of them are guilty, &c.* 21 *H. 6.* 20. 2 *Roll. Abr.* 707.

Joint Lives. A bond was made to a woman *dum sola*, to pay her so much yearly as long as she, and the obligor should live together, &c. Afterwards the woman married, and debt being brought on this bond by husband and wife, the defendant pleaded, that he and the plaintiff's wife did not live together; but it was adjudged that the money should be paid during their joint lives, so long as they were living at the same time, &c. 1 *Lutw.* 555. And where a person in consideration of receiving profits of the wife's lands on marriage, during their joint lives, was to pay a sum of money yearly, in trust for the wife, though it was not said every year during, &c. It was held, that the payment shall be intended to continue every year also during their joint lives. 1 *Lutw.* 459. Lease for years to husband and wife, if they, or any issue of their bodies should so long live, has been adjudged so long as either the husband, wife, or any of their issue should live; and not only so long as the husband and wife, &c. should jointly live. *Moor* 339. The word *or* may be taken disjunctively or distributively for either; when the word *and*, which requires a joining and coupling, shall not.

Jointenants, (simul tenentes or qui conjunctim tenent) Are those who come to, and hold lands or tenements jointly by one title; and these jointenants must jointly plead, and be jointly sued and impleaded, which property is common to them and coparceners; but jointenants have a sole and peculiar quality of survivorship, which coparceners have not; for if there be two or three jointenants, and one has issue and dies, the survivors, or survivor shall have the whole. *Litt.* 277, 280. 1 *Inst.* 180.

They are called jointenants, not only because lands are conveyed to them jointly, by one and the same title; but *for that they take by purchase only*; whereas an estate in coparcenary is always by descent. *Ibid.* Where a man is seised of lands and tenements, and makes a feoffment to two or more, and their heirs; or makes a lease to them for life; or where two, or more, have a joint estate in

possession, in a chattel real or personal; or a joint estate in a debt, duty, covenant, contract, &c. it is a jointenancy; and the part of him who dieth, goeth not to his heir or executor; but the whole to the survivors or survivor.

But an exception is to be made as to joint merchants, for their stock or debts which they have in partnership; for the share of the person dying goes to the executor or administrator by the law merchant, and not to the survivor. *Ibid.*

If a father make a deed of bargain or sale of lands to his son, to hold to him and his heirs, &c. to the use of the father and son, and their heirs and assigns for ever, they are jointenants. 2 *Cro.* 83. And if the father devises lands to his eldest and other sons, they are jointenants and not tenants in common. *Goldf.* 28. *Poph.* 52. And a man having only two daughters, who were his heirs, devised his land to them and their heirs; and it was adjudged they were jointenants, because they have it by the devise in another manner than the law would have given it them, which would have been as coparceners by descent; here the survivor shall have the whole. *Cro. Eliz.* 431. *Sed qu.* if they may not reject the devise, and take as heirs? A man devised lands to his wife for life, and after her death to his three daughters, and the heirs males of their bodies, &c. The wife and the two eldest daughters died; and it was held that the surviving daughter should have the whole for life, the three sisters being jointenants for life, and several tenants in tail of the inheritance. *Lee* 47. A devise to two jointly and severally, is a jointenancy. *Poph.* 52. If lands are devised to two equally, and their heirs, they are jointenants; but if it had been to two, equally to be divided between them, it generally makes a tenancy in common. 2 *And.* 17. But by *Holt Ch. Justice*, the words *equally to be divided*, do not make a tenancy in common in a deed, but a jointenancy; tho' they might in a will. 1 *Salk.* 390. "Equally to be divided" in a deed of uses makes a tenancy in common. *Wils. par.* 1. 261.

It is said a term for years of goods devised to two equally, makes a tenancy in common, and not jointenancy; but land devised to two equally, makes a jointenancy. 3 *Cro.* 697. 3 *Salk.* 205. A devise to two equally to be divided, *habendum* to them and the heirs of the survivor, is a jointenancy. *Style* 211, 434. Lands are given by will to two persons, and the survivor of them, and their heirs, *equally to be divided between them share and share alike*; it is held that the first part of the devise makes them jointenants for life, and the latter words import a tenancy in common, so as they are tenants in common of the inheritance. 2 *Peere Williams* 280, 282. What words in a will make a tenancy in common, and yet there shall be a survivorship, if any of the devisees die under age, see *Wils. par.* 1. 165. One by will gives the residue of his personal estate to three persons, it is a jointenancy, and the survivor takes the whole; and where a surplus of such estate is devised to A. and B. after the debts and legacies are paid, on one's dying, it will survive. 2 *Peere Williams* 347.

Two or more purchase land, and advance the money in equal parts, and take a conveyance to them and their heirs; this makes a jointenancy with the chance of survivorship: But where the proportions of money are not equal, they are in nature of partners; and tho' the legal estate survives, the survivor shall be as a trustee for the others, in respect of the sums paid by each. *Abr. Caf.* *Eq.* 291. So if where two having purchased jointly, afterwards one lays out a considerable sum on improvements, &c. and dies, in equity it shall be a lien on the lands, and a trust for the representative of him who advanced it. *Ibid.*

A rent of 10 *l.* a year is granted to A. and B. to hold to one until he marry, and to the other till he is presented to such a church; it was holden they were jointenants, and that if either of them die before marriage or presentment, the rent shall survive. 1 *Inst.* 180. If lands are given to two men, and the heirs of their bodies, the remainder to them and their heirs; they shall be jointenants for life, tenants in common of the estate-tail, and jointenants of the fee-simple. *Ibid.* 183. But where a remainder is limited to the right heirs of two persons, in this

this ease they shall take severally, tho' the words be joint. 5 Rep. 8. Land is granted to a man, and such woman as shall be his wife; here is no jointenancy, but the man will have the whole: Tho' if one make a feoffment in fee to the use of himself, and of such wife as he shall after marry, for their lives; when he takes a wife, they are jointenants. Co. Litt. 188. 1 Rep. 101.

One person is in by the Common law, and another by limitation of use, yet they may be jointenants by virtue of a deed of grant, &c. Jenk. Cent. 330. Lands given in the premises of a deed to three, to hold to one for life, remainder to another for life, remainder to the third for life, they are not jointenants, but shall take successively. Dyer 160.

There may be a jointenancy, tho' there is not equal benefit of survivorship on both sides. 1 Inst. 181. When a fee-simple estate is limited by a new conveyance, there one may have the fee, and another an estate for life; but when two persons are tenants for life first, and one of them gets the fee-simple, there the jointure is severed. 2 Rep. 6. If a reversion descend upon one jointenant, the jointure is severed, and by operation of law they are then tenants in common. 1 Bulst. 113. And a diversity has been taken, that where the reversion comes to the freehold, the jointure is destroyed; but when the freehold comes to him in reversion, and to another, it is otherwise. Cro. Eliz. 470, 743.

Two infants are jointenants, and one of them makes a feoffment of his moiety: this will be a severance of the jointenancy. Bro. Jointen. 13. A jointenant in fee grants a lease for life, and then dies; it severs the jointure: Tho' if the tenant for life die before either of the jointenants, then it is *in statu quo prius*. Co. Litt. 193. If there be two jointenants in fee, and one makes a lease for life to a stranger, the freehold and reversion is severed from the jointure: But in case one such jointenant leases for years, the jointure of the inheritance is not severed; and the other jointenant shall have the reversion by survivorship. Lut. 729, 1173. Two jointenants are of a lease for twenty-one years, and one lets his part but for three years, the jointure is severed, so that survivorship shall not take place. 1 Inst. 188, 192. In case three persons are jointly interested in a term, and one of them mortgages his third part; by this it has been held, the jointenancy was severed. 1 Salk. 158. But where one jointenant of lands, in order to sever the jointenancy, and provide for his wife, makes a deed of gift of his moiety to her; this being made to the wife, and so void in law, cannot be made good. Preced. Canc. 124. If two jointenants be of a term, and one commits felony, or is outlawed, &c. the jointure will be severed; for the King shall have the moiety by the forfeiture: And if the jointenancy is of personal things, all will be forfeited. Plowd. 410.

Where there are several jointenants in fee-tail, and some of them suffer a common recovery of the whole, the estate of the others is turned to a right; and contingent remainders may be destroyed, and a new estate gained thereby. Sid. 241. And if one jointenant levies a fine, it severs the jointenancy; but it doth not amount to an actual turning out of his companion. 1 Salk. 286. A jointenant in fee, makes a lease for years, of the land, to begin presently, or *in futuro*, and dies, it is a severance of the jointenancy, and cannot be avoided by the survivor; because immediately by force of the lease, the lessee hath a right in the same land, of all that to the lessor belongs. Lit. 286. And it has been held, that where a jointenant in fee or for life, makes a lease for years to commence after his death, it is good against the survivor. 2 Cro. 91. 2 Nels. Abr. 1037. But it has been also adjudged not good. Moor 776. Noy 157. See 2 Vern. 323.

If there are two jointenants for life, it is said each of them hath an estate for life, and for the life of his companion; and for that reason, if one of them make a lease, it shall continue not only during the life of the lessor, but after his death during the life of his companion, as long as the original estate out of which it was derived: Tho' it hath been resolved, that such a jointenant hath only an estate for his own possibility of surviving; his

companion to be entitled to his part; therefore if he grants over his estate, that possibility is gone; and if he dies, the estate of the grantee shall revert to him in reversion. 1 Roll. 441. Jones 55. 3 Salk. 204, 205. If one jointenant grants a rent charge, &c. out of his part, and dies, the survivor shall have the whole land discharged: For he hath the land by survivorship, and not by descent from his companion. Litt. 286. 1 Co. Inst. 184. And if one jointenant in fee, makes a lease for years, reserving a rent, and dieth; the survivor shall have the reversion, but not the rent, because he claims by title paramount. 1 Inst. 18.

Jointenants, as to the possession of lands in jointure, are seised by intireties of the whole, and of every part equally, (and the possession of any jointenant is the possession of both) but as to the right of the land, they are seised only of moieties, therefore if one grant the whole, a moiety only passeth. 1 Bulst. 3. Cro. Eliz. 809. If there be two jointenants, and each make a several lease of the whole, their several moieties only shall pass by each lease. Wilf. par. 1. fol. 1. Jointenants cannot singly dispose of more than the part that belongs to them; where they join in a feoffment, in judgment of law each of them gives but his respective part; so it is of a gift in tail, lease for life, &c. And for a condition broken, they shall only enter on a moiety of the lands. 1 Inst. 186.

Every jointenant hath a right as to his own share, to several purposes, as to give, lease, forfeit, &c. But a devise of land, whereof the devisor is jointly seised, is void; the will not taking effect till after death, and the title of the survivor cometh by the death. 1 Inst. 186. Litt. 287. One jointenant may lease to his companion: But one jointenant cannot make a feoffment, or grant to another jointenant, tho' he may release. 1 Vent. 78. Raym. 187. By whatever means a jointenant comes to the estate of his companion, by conveyance, &c. from him, it may enure by way of release. 2 Cro. 649.

Action of trespass or trover may not be brought by one jointenant against his companion, because the possession of one is the possession of the other. 1 Salk. 290. Before the stat. 3 & 4 Ann. c. 16. one jointenant had no remedy against his companion, to recover damages for what he had received more than his share; and a jointenant might prejudice his companion in the personalty, by reason of the privity and trust between them, tho' not in the realty; but that statute gives action of account to one jointenant or tenant in common, his executors or administrators, against the other, as bailiff or receiver, his executors, &c. One jointenant may distrain for rent alone; and he may avow in his own right, and as bailiff to the others, but he cannot avow solely; and he may not bring debt alone. 5 Med. 73, 150.

If a jointenant in fee-simple, is indebted to the King, and dieth; the lands cannot be extended in the hands of the survivor, who claimeth not from his companion, but from the feoffor, &c. 1 Inst. 185. Where there are two jointenants, and one is indebted to the King, and dieth, the other shall hold the land discharged of the debt: But if husband and wife have a term jointly, and the husband is indebted to the King, and dieth, in such case the term shall be subject to the debt, because the husband might have disposed of the whole estate. Plowd. 321. Judgment in action of debt, is had against one jointenant for life, who before execution releases to his companion; adjudged that the moiety is still liable to the judgment during the life of the releasor; but if he had died before execution, the survivor should have had the land discharged of the debt and judgment. 6 Rep. 78. Husband and wife were jointenants, and action was brought against the husband alone, who made default, thereupon the wife prayed to be received; but it was not allowed, because she was not a party to the writ; but he in reversion may be received, and plead jointenancy in abatement of the writ. Moor 242.

If a feme sole and A. B. purchase a term for years jointly, and afterwards intermarry, the jointenancy continues. Dyer 318. 2 Nels. Abr. 1035. And where there are two women, jointenants of a lease for years, and one taketh husband, and dies, the term shall survive;

if the husband hath not aliened her part, and severed the jointure: But it is otherwise in case of goods, vested in the husband by marriage. 1 Inst. 185. Jointenants sometimes enter into covenants not to take advantage of each other by survivorship. Wood's Inst. 143. When there are two jointenants, and one alien his part, the alienee and the other jointenant are tenants in common; for they claim by several titles. Lit. 292, 319, 321. And jointenants and tenants in common of inheritance, by statute, are to make partition, as coparceners; also jointenants and tenants in common for life or years, may be compelled to do the same by writ of partition, 31 H. 8. c. 1, 32 H. 8. c. 32. 8 & 9 W. 3. c. 31.

The King cannot be jointenant with any person, because none can be equal with him. 1 Inst. 1. Finch 83. And Black. Com. 2 V. 409. And a corporation cannot be jointly seised of any estate with another. 2 Lev. 12.

The essential difference between joint-tenants and tenants in common is, that joint-tenants have the lands by one joint title, and in one right, and tenants in common by several titles, or by one title and by several rights; this is the reason, says my lord Coke, that joint-tenants have one joint freehold, and tenants in common have several freeholds, tho' this property is common to them both, viz. that their occupation is undivided, and neither of them knoweth his part in several. Co. Lit. 189. a.

If there be two joint-tenants, and one releaseth to the other, this passeth a fee without the word heirs, because it refers to the whole fee, which they jointly took, and are possessed of, by force of the first-conveyance; but tenants in common cannot release to each other; for a release supposeth the party to have the thing in demand; but tenants in common have several distinct freeholds, which they cannot transfer, otherwise than as persons who are sole seised. Co. Lit. 9. 200. b.

Tenants in common cannot make a joint lease of the whole, for their estates are several and distinct, and there is no privity between them, and for that reason, one tenant in common may enfeoff another. Wilk. par. 2. 232.

Vide this subject fully and very learnedly treated of in 3 New Abr. 187, &c. And see farther as to joint-tenancy, in lands. Black. Com. 2 V. 180. and as to joint-tenancy in things personal. Ib. 2 V. 399.

Jointures of Lands. A jointure is a settlement of lands and tenements made to a woman in consideration of marriage; or it is a covenant, whereby the husband or some friend of his, assureth to the wife, lands or tenements, for term of her life: It is so called, either because it is granted *ratione juncturae in matrimonio*, or for that land in frank marriage was given jointly to husband and wife, and after to the heirs of their bodies, whereby the husband and wife were made as it were jointenants during the coverture. 3 Rep. 27. By some a jointure is defined to be a bargain and contract of livelihood, adjoined to the contract of marriage; being a competent provision of freehold lands or tenements, &c. for the wife, to take effect after the death of the husband, if she herself is not the cause of the determination or forfeiture of it. 1 Inst. 36. 4 Rep. 2. 3.

According to Co. Lit. 36. b. The maxims of the Common law, that no right could be barred before it accrued; and that a right or title to a freehold could not be barred by acceptance of a collateral satisfaction, and those reasons allowing the wife to claim her dower, and also the benefit of such settlement as was made on her, which being contrary to justice. By 27 H. 8. c. 10. s. 6. Reciting, "That whereas divers persons had purchased, or had estates made and conveyed of, and in divers lands, &c. unto them and their wives, and to the heirs of the husband, or to the husband and wife, and to the heirs of their bodies, or to the husband and wife for term of their lives, or for term of life of the wife." 'Tis enacted, "That in such case, or where any such estate or purchase of any lands, &c. hath been or hereafter shall be made to any husband and to his wife in manner and form above expressed, or to any other person or persons, and to their heirs and assigns, to the use of and behoof of the said husband and wife, or to the use of the wife, as is before rehearsed, for the jointure of the wife; that then in every such case, every woman

married having such jointure made, or hereafter to be made, shall not claim nor have title to any dower of the residue of the lands, tenements or hereditaments, that at any time were her said husband's, by whom she hath any such jointure; nor shall demand nor claim her dower of and against them that have the lands and inheritances of her said husband; but if she have no such jointure, then she shall be admitted and enabled to pursue, have, and demand her dower, by writ of dower, after the due course and order of the Common law of this realm; this act or any law or provision made to the contrary thereof notwithstanding."

Stat. 7. Provided, "That if any such woman be lawfully expelled or evicted from her said jointure, or from any part thereof, without any fraud or covin, by lawful entry, action, or by discontinuance of her husband, then every such woman shall be endowed of as much of the residue of her husband's tenements or hereditaments whereof she was before dowable, as the same lands and tenements so evicted and expelled shall amount or extend unto."

Stat. 9. Provided also, "That if any wife have, or hereafter shall have, any manors, lands, tenements or hereditaments unto her given or assured after marriage for term of her life or otherwise, in jointure, except the same assurance be to her made by act of parliament, and the said wife after that fortune to overlive the same her husband in whose time the said jointure was made or assured unto her; that then the same wife so overliving shall and may at her liberty at the death of her said husband refuse to have and take the lands and tenements so to her given, appointed, or assured during the coverture, for term of her life or otherwise, in jointure, except the same assurance be to her made by act of parliament as is aforesaid, and thereupon to have, ask, demand, and take her dower by writ of dower or otherwise, according to the Common law, of and in all such lands, tenements and hereditaments, as her husband was and stood seised of any estate of inheritance at any time during the coverture; any thing, &c."

To make a good jointure within this statute, the six following things are to be regarded:

1. The estate must take effect immediately upon the death of the husband. Vide 4 Co. 3. Hutton 51. Hob. 151. Winch 33. 1 Sid. 3. 4. Per Bridgman. Co. Lit. 133. Moor 851. 3 Bulst. 188. 1 Rol. Rep. 400. 2 Vern. 104.

2. The estate must be for term of the wife's life, or a greater estate. Vide Co. Lit. 36. a. b. 4. Co. 2. b. 3. a.

3. The estate must be made to herself and to others in trust for her. This rule, my Lord Coke says, is so necessary to be observed, that tho' the wife should assent to a jointure made in trust for her, yet it would not be good; for the statute only bars the dower when by it the possession (which was formerly an use) is executed in her. Co. Lit. 36. b.

But as the intention of the statute was to secure the wife a competent provision, and also to exclude her from claiming dower, and likewise her settlement, it seems that a provision or settlement on the wife, tho' by way of trust, if in other respects it answers the intention of the statute, will be enforced in a court of equity.

4. The estate must be in satisfaction of her whole dower. The reason hereof is, that if it be in satisfaction of part only, it is uncertain for what part, therefore void in the whole. Co. Lit. 36. b.

If an estate be made to the wife, in satisfaction of part of her dower before marriage, and after marriage, other lands are conveyed to her, she shall have dower of all the lands of her husband, notwithstanding the settlement is in satisfaction of part. 4 Co. 5.

5. The estate must be expressed to be in satisfaction of her dower; and how far a collateral recompence shall be a bar of dower or jointure. My Lord Coke says, that it must be expressed, or averred to be, in satisfaction of her dower; but quare, for this does not seem requisite, either within the words or intention of the statute. Co. Lit. 36. b. Vide Owen 3. 4 Co. 4. Moor pl. 103. Cro. Eliz. 128.

Essling v. Warburton. Dyer 220. 2 Vent. 340. 1 Chan. Cases 181. *Pheasant's case.*

It hath been often ruled in Chancery, that if lands, money, goods, &c. are devised to a woman, without saying in lieu or satisfaction of dower, &c. the wife shall have both; because a devise is to be considered as a bounty, and implies a consideration in itself, but if it be said in lieu or recompence of dower, there the wife cannot have both, but may waive which she pleases; 2 Chan. Cases 24. 2 Vern. 365. *Preced. Chan.* 133. Also vide *Bro. Dow.* 69. 4 Rep. 4. Dyer 220. 2 Vent. 365. *Lawrence v. Lawrence.* Abr. Eq. 218-9. S. C. and vide 1 Vern. 463. And *Jordan v. Savage.* 3 New Abr. 226.

6. The estate must not be made during the coverture. This the very words of the act of parliament require, therefore if a jointure be made to a woman during coverture in satisfaction of dower, she may waive it after her husband's death; but if she enters and agrees thereto, she is concluded: for tho' a woman is not bound by any act when she is not at her own disposal, yet if she agrees to it when she is at liberty, it is her own act, and she cannot avoid it. 4 Co. 3. Also vide *Co. Lit.* 29. b. 36. b. 348. a. 357. 1 Bulf. 163. *Moor* 717. pl. 1002. *Perk.* 352-3. 3 Co. 27. 3 Leon. 272. *Cro. Jac.* 490. Dyer 351. *Hob.* 72. 2 Rol. Abr. 422.

All other settlements in lieu of jointure, not made according to the statute; are jointures at Common law, and no bars to claim of dower: And a jointure was no bar of dower before this statute; as a right or title to a freehold cannot be barred by acceptance of a collateral satisfaction. 1 Inst. 36. A father made a settlement to the use of himself for life, and afterwards to the use of his son and his wife, for their lives, for the jointure of the wife; this was adjudged no jointure to bar the wife of her dower, because it might not commence immediately after the death of the husband, who might die in the life-time of the father. 2 Cro. 489. So, if a feoffment be made to the use of the husband for life, remainder to another for years, remainder to the wife for life for her jointure. *Ibid.* But a feoffment in fee, upon condition that the feoffee shall make another feoffment to the use of the son of the feoffor, and to his the son's wife in tail, remainder to the right heirs of the feoffor, which feoffment is made accordingly; this is a good jointure within the statute, and bar to the dower of the wife. *Moor* 28.

An estate settled in jointure, coming from the ancestors of the wife, and not of the purchase of the husband or his ancestors, is not within the statute 11 H. 7. c. 20. as to discontinuances, alienations, &c. Where a father of the intended wife, in consideration of marriage, &c. covenanted to assure lands to the husband and wife, his, the covenantor's daughter, and the heirs of her body, &c. this was held no jointure, within the meaning of the statute 11 H. 7. c. 20. being an advancement of the woman by her own father. 2 Cro. 264. 2 Lill. Abr. 80. And an estate in fee-simple conveyed to a woman for her jointure, was not any jointure within the statute; which never extended to lands granted to women in fee: But an estate in fee, conveyed to a woman for her jointure, and in satisfaction of her dower, is a jointure within the statute 27 H. 8. c. 10. 4 Rep. 3.

Yet an estate for life is the usual jointure: And an estate for life upon condition, may bar the wife if she accepts it; as a jointure to a woman on condition to perform the husband's will, was judged good, where the wife entered and agreed to the estate. 3 Rep. 1, 2. &c. If no inheritance is reserved to the husband and his heirs, but the estate is limited to the wife for life, or in tail, the remainder to a stranger; it is not a jointure within the stat. 11 H. 7. c. 20. tho' made by the husband or his ancestor. *Cro. Eliz.* 2. A husband covenanted to stand seised of lands, to the use of himself and his heirs, till the marriage should take effect; and afterwards to himself, his wife, and their heirs; and it was adjudged a good jointure within the statute 27 H. 8. c. 10. Dyer 248. A devise to a wife for life, or in tail, for her jointure, is good within this statute: But a devise to a wife generally, without expressing what estate, is not good; because it cannot be averred to be for her jointure. 3 Rep. 1. Tho' where an assurance was made to a woman, and it was

not expressed to be made for her jointure; it was held it might be averred to be made for that purpose, which is not traversable. *Owen.* 33.

A man makes his wife a jointure after marriage; and afterwards by will devises, that she shall have a third part of all his lands; with her jointure; here the wife will have the third part of all as a legacy, and if she waives her jointure, she may have a third part of the residue for dower. Dyer 62: If a master, in consideration of service done by his servant; grants lands to the servant and a woman he intends to marry, and the heirs of their bodies, creating an estate-tail; this is not a jointure; not being a gift of the husband, or any of his ancestors, but of his master, and in consideration of service, which will not make the husband such a purchaser as the law requires. *Moor* 683. But as to considerations; if an estate is settled in jointure upon a woman, in consideration of money paid, and also of a marriage to be had; the marriage shall be looked upon to be the consideration. *Cro. Jac.* 474. A husband, tenant in tail, remainder to his wife for life, makes a feoffment in fee to the use of himself and wife for life, for her jointure; it is no bar to the wife's dower, because it may be avoided by a writ to her first estate for life. *Moor* 872. If lands are conveyed to a woman before marriage, in part of her jointure only, and after marriage other lands are granted in full; it is said she may waive and refuse the lands conveyed to her after coverture, and retain her first jointure lands and dower also. 3 Rep. 1, 5. 2 Nelf. Abr. 1039.

Where a jointure is made of lands, (according to the direction of the statute of 27 H. 8. 10.) before coverture, and after the husband and wife alien them by fine, she shall not have dower in any other lands of her husband; but 'tis otherwise where the jointure is made after marriage, when the wife's estate is waivable, and her election of choosing comes not till the death of the husband. 1 Inst. 36. A man levies a fine of his land, and it is granted back again to him and his wife for her jointure, and to the heirs of the husband; then he and his wife levy a fine to another use; the wife if she survive her husband, will have dower notwithstanding the fine. 1 And. 350. If the husband make a lease of lands to his friends, for any number of years, in trust for his wife and children, that she shall have 100 l. a year out of it, or in any such manner; by this she may have the provision, which is no jointure, and likewise her dower. By *Bridgman Ch. J.* An estate is made to husband in tail, with remainder to the wife for life, and remainder to others; this is not such a jointure, as with her acceptance within the statute will hinder her from dower; and tho' the husband die without issue, it will not help it, but the wife shall be endowed in his other land: But if the estate were made to the husband and wife for their lives, it would be otherwise. 13 Jac. 1 B. R. 2 Shep. Abr. 74.

After the death of the husband, the wife may enter into her jointure, and is not driven to a real action, as she is to recover dower by the Common law; and upon a lawful eviction of her jointure, she shall be endowed according to the rate of her husband's lands, whereof she was dowerable at Common law. 1 Inst. 37. Stat. 27 H. 8. c. 10. If she be evicted of part of her jointure, she shall have dower pro tanto. A wife's jointure shall not be forfeited by the treason of the husband: But feme-coverts, committing treason or felony, may forfeit their jointures; and being convict of recusancy, they shall forfeit two parts in three of their jointures and dower, by statute 3 Jac. 1. c. 4. If a woman conceals her jointure, and brings dower and recovers it, and then sets up her jointure, she is barred of her jointure; and by bringing writ of dower for her thirds, the wife waives the benefit of entry into lands, so as to hold them in jointure. *Cro. Eliz.* 128, 129. 3 Rep. 5. By stat. 3 Jac. 1. c. 5. *See Marriage.*

Jointress or Jointure. Is she who hath an estate settled on her by the husband, to hold during her life, if she survive him. 17 H. 8. c. 10. 1 Inst. 46. When estates settled on a wife are a jointure, if the jointress makes any alienation of them by fine, feoffment, &c. with another husband, it is a forfeiture of the same; but if

they are not a jointure by law, it is otherwise. 2 Nels. 1040. A jointress within the statute may make a lease or forty years, &c. if she so long live; and also for life, and be no forfeiture, tho' she levies a fine *sur cognisance de droit*; &c. Cro. Jac. 688. 3 Rep. 50. 1 Lill. 81. In other cases, if she levies a fine, it is a forfeiture; and if a jointress within the statute 11 H. 7. c. 20. suffer a recovery covinously to bar the heir, the heir may enter presently, &c. 2 Leon. 206. 1 Plowd. 42.

With respect to the acts of a jointress or those of her husband defeating her of her jointure, and how far equity will relieve her, vide Co. Lit. 36. Dyer 358. 2 Inst. 673. Hob. 225. 2 Chan. Caf. 162. 1 Chan. Caf. 119, 120. 2 Vent. 343. 1 Vern. 427, 479. Abr. Eq. 18, 221, 222. 2 Vern. 701. And 14 Vin. Abr. tit. Jointress and Jointure.

Jour, (Fr.) A day, used in heads of our old law; *touts jours* for ever. Law Fr. Dict.

Journal, Is a day-book or diary of transactions, used in many cases: As by merchants and other tradesmen in their accounts; by mariners in observations at sea, &c.

Journals of Parliament, Are not records, but remembrances, and have been of no long continuance. Hob. Rep. 109.

Jourchoppers, Were regrators of yarn, which formerly perhaps was called *journ*: They are mentioned in the stat. 8 H. 6. c. 5.

Journeymen, (from the Fr. *journee*, i. e. A day, or day's work) Was properly one who wrought with another by the day; tho' it is extended by statute to those also who covenant to work with others in their trades or occupation by the year. 5 Elic. c. 4.

Journeys Accounts, (*dicta computata*) Is a term in law thus understood; if a writ abates by the death of the plaintiff or defendant, or for false Latin, want of form, &c. the plaintiff shall have a new writ by journey accounts, i. e. *within as little time as he possibly can after the abatement of the first writ*; and this second writ shall be a continuance of the cause, as if the first writ had not abated. *Terms de Ley*. When the new writ is purchased, which must be *recenter*, the plaintiff is to recite in an entry upon the roll, that the former writ was abated, and shew for what: *Super quo per dictas computat. recenter tulit quoddam aliud breve*, &c. 6 Rep. 10. This writ is to be brought presently; and fifteen days is held a convenient time for the purchase of the new writ. 2 Lill. Abr. 83. 1 Lut. 297. Judicial writs shall never be had by journey accounts; *because they never abate for form*. The abatement of the writ must be without the default of the plaintiff, or a second writ may not be purchased by journey accounts: If a writ abates for the plaintiff's default, in his mistaking the name of the vill, &c. he shall not have a writ of journey accounts; but where it abates by default of the clerk, for any variance or want of form, in such case he may have it. 6 Rep. 10. And when an outlawry is discharged or reversed, the plaintiff may have writ of journey accounts; for there is no default in him. Cro. Jac. 590. The writ must be brought for the same thing, and in the same court, as the first writ.

This learning is now of little use, it being customary to enter a judgment that the writ be *quashed*, and then to sue forth another.

Ipsa facta, Is where the same person obtains two or more preferments in the church with cure, not qualified by dispensation; &c. the first living is void *ipsa facta*, viz. *without any declaratory sentence*, and the patron may present to it. Dyer 275. And there is not only deprivation of a clergyman *ipsa facta*; but for crimes in striking persons in a church or church-yard, the offenders are to be excommunicated *ipsa facta*. Stat. 5 & 6 Ed. 6. c. 4. An estate or lease may be *ipsa facta* void by condition, &c. 1 Inst. 45, 215.

Ipſwich, The bailiffs and port-men, &c. of Ipswich, may tax every house in reasonable sums to be yearly paid, towards finding a minister within every parish, and for the reparation of the churches; Also the streets there shall be paved, by the landlords of houses or tenements, under certain penalties. Stat. 13 Eliz. c. 24.

Ire ad largum, To go at large, to escape, or be set at liberty. Blount,

Ireland, Is a distinct kingdom from England, but subordinate to it in government; and by *Poyning's Laws* (enacted in Ireland, Anno 10 Hen. 7.) all the statutes of England, till that time were declared in force in Ireland; and by *special words*, our statutes still may bind the people of Ireland, notwithstanding they have parliaments of their own, who make laws and statutes, being affirmed here by the King and Council. 1 Inst. 141. 2 Inst. 2. 3 Inst. 18. In the proceedings of the Irish parliament; first the lieutenant and council certify to the King the causes and considerations of all such acts, as seem good to them to be passed in parliament; and licence under the Great Seal of England, is obtained to summon and hold a parliament in Ireland: If the acts are affirmed, or altered or changed here, they are transcribed and returned into Ireland under the Great Seal: and all that passes ought to be enrolled here in the Chancery. 12 Rep. 111, 112. See *Infra*.

Treason committed in Ireland, by an Irish peer, is not triable in England; because he is entitled to a trial by his peers, which cannot be in England, but Ireland. Dyer 360. But the House of Lords of England, have power to reverse or affirm the decrees of the court of Chancery, &c. of Ireland: And the King's Bench here may reverse a judgment given in B. R. in Ireland, by directing a writ of error to the Chief Justice there, to summon the party to appear here, &c.

B. R. in England cannot issue a writ to the sheriffs of Ireland, but in error may direct the court of B. R. or B. C. in Ireland to issue such writ. Annals, 50, 51.

By statute 17 Ed. 1. c. 1. No pardon for the death of a person, or for felony, shall be granted by the justices of Ireland, but at the King's command, and under his seals.

By 34 Ed. 3. c. 18. all kinds of merchandises may be exported and imported from and to Ireland, by aliens as well as denizens: But wool, and woollen manufactures, &c. are prohibited to be exported from thence into foreign parts by a modern statute. And by the 32 Car. 2. c. 2. cattle, butter, cheese, &c. are not to be imported from Ireland into this kingdom, on pain of forfeiture to the poor. Yet sometimes temporary acts are passed, permitting the importation from Ireland, of various kinds of provisions, i. e. as particular occasions require.

The statute 1 W. & M. c. 9. enacted and declared, "That the pretended parliament assembled at Dublin, was an unlawful assembly; and that all acts done by them are void." All cities, boroughs, &c. were restored by this statute to their privileges, and the proceedings against them vacated; and all Protestants restored to their possessions, &c. By 3 W. & M. c. 2. members of parliament, officers in the government, ecclesiastical persons, lawyers, &c. in Ireland, are to take the oaths, or be liable to forfeitures.

Acts of parliament made in England since the act of 10 H. 7. do not bind them in Ireland; but all acts made in England before 10 H. 7. do bind them in Ireland by the said act made in Ireland. 10 H. 7. cap. 22. 12 Rep. 111.

Lord Coke in 2 Inst. 2. says, that by this law [but there cites it as made 11 H. 7.] *Magna Charta* extends to Ireland. 4 Inst. 351. recites the statute more fully, and says, that acts of parliament made in England since that time, wherein Ireland is not particularly named or generally included, extend not thereunto; for tho' it be governed by the same law, yet it is a distinct realm or kingdom, and hath parliaments there. S. P. Arg. Carr. 180, 198. cites *And. 262. Orork's case*. 2 Vent. 4 & 5. 7 Rep. 23; in *Calvin's case*. *Jenk. 164. pl. 14*. In acts of parliament Ireland shall not be bound *without express words*, tho' the nature and reason of the act extends to Ireland. *Skin. 519. Trin. 6. W. & M. B. R. in case of Phillips v. Bury*. Tho' Ireland has its own parliaments, yet it is not absolute, & *sui juris*; for if it were, England has no power over it, and it would be as free after conquest and subjection by England as before. And that it is a conquered kingdom is not doubted, but admitted in *Calvin's case* several times, &c. *Vaugh. 292. Hill. 21 & 22 Cor. 2. C. B.*

2. *C. B. per Vaughan Ch. J. in case of Crow v. Ramsey.* And *ibid.* 300 says, It is a dominion belonging to the crown of England. And *ibid.* 301. That its having a parliament is *gratia regis*, subject to the parliament of England, it is to be considered as a provincial government, subordinate to, but *not part* of the realm of England. *Mich.* 11 *Geo.* 2. in case of *Oruay v. Ramsey.* And by stat. 6 *Geo.* 1. cap. 5. *sect.* 1. The kingdom of Ireland ought to be subordinate to and dependant upon the imperial crown of Great Britain, as being inseparably united thereunto. And the King, with the consent of the lords and commons of Great Britain in parliament, hath power to make laws to bind the people of Ireland.

Lands in Ireland are not bound by a statute in England, but their persons are. *Cart.* 186. *Arg. Pasch.* 19 *Car.* 2. *C. B.* cites 7 *Rep.* 22. *Calvin's case*, and *Mod.* 796.

Ireland is beyond sea as to the statute of limitations. *Arg. Hill.* 2 *W. & M. Show.* 197. says it was ruled so.

Bond executed in England for a debt in Ireland shall carry but English interest. *Mich.* 1700. 2 *Vern.* 395. *Lord Ranelagh v. Sir John Champante.*

As to error vide *Vent.* 53, 59, 357. 12 *Mod.* 225. *Br. Jurisdiction*, pl. 109. *Gro. Jac.* 534.

A man may be sent over to Ireland to be tried for a crime there committed, notwithstanding the clause in the *habeas corpus* act. *Gibb.* 111. *Mich.* 3 *Geo.* 1. *B. R. The King v. Kimberly.*

Justices of peace in England may commit a person of-fending against the Irish law, in order to his being sent over. *Stran.* 848.

Judges in England are proper expositors of the Irish laws. *Per Jefferies C.* assisted with judges. *Vern.* 422. *Mich.* 1686. *Earl of Kildare v. Sir Maurice Eustace.*

Linen, hemp and flax, may be imported from Ireland free. 7 & 8 *W.* 3. c. 39. 8 & 9 *W.* 3. c. 20. *sect.* 10. Iron may be imported from Ireland free. 8 & 9 *W.* 3. c. 20. *sect.* 10. For sale of the estates of Irish rebels, see *Stat.* 11 & 12 *W.* 3. c. 2. 1 *Ann. Stat.* 1. c. 11, & c. 32. 1 *Ann. Stat.* 2. c. 21. 2 & 3 *Ann.* c. 10. 4 *Ann.* c. 24. 6 *Ann.* c. 4. Augmentations of small vicarages in Ireland. 1 *Stat.* 1. c. 31. Papists are disqualified from purchasing the forfeited estates in Ireland. 1 *Ann. Stat.* 1. c. 32. Irish linen may be exported to the plantations. 3 & 4 *Ann.* c. 8. Forfeited impropriations in Ireland applied to the building of churches, &c. 5 *Ann.* c. 25. The statute 1 *Ann.* c. 32. ordains, that persons educated in the Popish religion in Ireland, of eighteen years of age, shall take the oaths, or be disabled to take lands by descent, devise, &c. Protestant families being *Palatines*, settled in Ireland, are declared naturalized on their taking the oaths to the government. 1 *Geo.* 1. c. 29. And by 6 *Geo.* 1. cap. 5. the jurisdiction of the House of Lords in Ireland to reverse judgments or decrees given in the courts of that kingdom, was wholly taken away. See *Stat.* 4 *Geo.* 2. c. 15.

Foreign hops not to be imported into Ireland. 5 *Geo.* 2. c. 9. No sugar, &c. of the British plantations to be imported into Ireland, unless shipped in Great Britain. 6 *Geo.* 2. c. 13. *sect.* 4. Irish manufactures of hemp and flax, may be imported free. 16 *Geo.* 2. c. 26. *sect.* 6. Foreign glass not to be imported into Ireland. 19 *Geo.* 2. c. 12. *sect.* 19. Glass not to be exported from Ireland. *Ibid.* *sect.* 21.

Certificate of goods landed in Ireland to be signed by the collector, &c. 5 *Geo.* 1. c. 11. *sect.* 5. 27 *Geo.* 2. c. 18. *sect.* 4. India goods not to be imported into Ireland from foreign parts, 5 *Geo.* 1. c. 11. *sect.* 12.

The dependency of Ireland asserted, 6 *Geo.* 1. c. 5.

Ships of 50 tons hovering on the coast of Ireland to give bond for proceeding on their voyage, 6 *Geo.* 1. c. 21. *sect.* 62. 12 *Geo.* 2. c. 23. *sect.* 1. Commissioners of excise in Ireland to determine offences in shipping wool, &c. 6 *Geo.* 1. c. 21. *sect.* 64. In running India goods, 12 *Geo.* 2. c. 32. *f.* 3.

Foreign hops not to be imported into Ireland, 5 *Geo.* 2. c. 9. Ships to be stationed to hinder the exportation of Irish woollen manufactures, 5 *Geo.* 2. c. 21. No su-

gar, &c. of the British plantations to be imported into Ireland, unless shipped in Great Britain, 6 *Geo.* 2. c. 13. *sect.* 4. Duties on woollen or bay yarn from Ireland taken off, 12 *Geo.* 2. c. 21. Irish manufactures of hemp and flax, may be imported free, 16 *Geo.* 2. c. 26. *sect.* 6. Importation of dirty butter from Ireland, commonly called grease-butter, permitted, 3 *Geo.* 3. c. 20. Importation of tallow, hog's lard, &c. permitted, 4 *Geo.* 3. c. 6.

See farther as to Ireland, its ancient form of government, and the alterations made therein, &c. *Black. Com.* 1 *V.* 99, &c.

Irishmen, Coming to live in England, by an ancient statute, were to give security for their good behaviour. 2 *Hen.* 6. c. 8.

Iron, Made in this kingdom, or brought into England and sold, shall not be exported, on pain of forfeiting the value; and justices assigned by the King have power to inquire of such as sell iron at too dear a price, and punish them. 28 *Ed.* 3. c. 5. None shall convert to coal or other fuel, for the making of iron metal, any trees of such a size; or within a certain compass of London, under penalties by statute: Nor shall any new iron mills be set up in *Suffex*, *Surrey* or *Kent*. 1 *Elix.* c. 15. 23 *Elix.* c. 5. & 27 *Elix.* c. 19. English iron may be exported, by *Stat.* 5 & 6 *W. & M.* c. 17. See *Stat.* 23 *Geo.* 2. c. 29. for encouraging the importation of pig and bar iron from America.

Bar iron from from the plantations may be imported to London, 23 *Geo.* 2. c. 29. or to any port, 30 *Geo.* 2. c. 16.

Iron works charged with the land-tax, 4 *Geo.* 3. c. 2. *sect.* 4.

By 4 *Geo.* 2. c. 32. to steal, or sever, with intent to steal any lead or iron, fixed to a house, or in any court or garden, thereunto belonging, is made felony, liable to transportation for seven years.

Prisons, to secure prisoners. According to *Blackstone*, in his *Com.* 4 *V.* 297. Imprisonment (before trial) is only for safe custody, and not for punishment: therefore, in the dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity; and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only: though what are so requisite, must too often be left to the discretion of the goalers; who are frequently a merciless race of men, and by being conversant in scenes of misery, steeled against any tender sensation.

Yet the law will not justify them in fettering a prisoner, unless he is unruly, or has attempted an escape: (2 *Inst.* 381. 3 *Inst.* 34.) this being the humane language of our ancient lawgivers: "*Custodes potestate sibi commissam non augeant, nec eos torquent; sed omni servitia remota, pietateque adhibita, judicia debite exequantur.*" *Flex.* lib. 1. c. 26.

The same learned author, in the same *Vol.* fo. 317, saith, The prisoner is to be called to the bar by his name; and it is laid down in our ancient books, that, though under an indictment of the highest nature, he must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape, and then he may be secured with irons. (*Bract.* lib. 3. de coron. c. 18. *sect.* 3. *Mirr.* c. 5. *sect.* 1, 54. *Flet.* lib. 1. c. 31. *sect.* 1. *Britt.* c. 5. *Staudf.* P. C. 78. 3 *Inst.* 34. *Kel.* 10. 2 *Hal. P. C.* 219. 2 *Hawth.* P. C. 308.) But yet in *Layr's* case, (anno 1722.) a difference was taken between the time of arraignment, and the time of trial; and accordingly the prisoner stood at the bar in chains during the time of his arraignment. *State Trials*, 1 *V.* 230.

Iron wire. See *Wire*.

Irony, In *libels*, makes them as properly *libels* as what is expressed in direct terms. *Hob.* 215. 1 *Hawth.* 193, 194.

Irregularity, (*Irregularitas*) Signifies disorder, or going out of rule: And in the *Canon Law*, it is used for an impediment to the taking *Holy Orders*; as where a man is base born, notoriously defamed of any crime, maimed, or much deformed in body, &c.

Irre-

Irrepleviable or Irreplevisable, That neither may nor ought to be replevied or delivered on sureties. 13 Ed. 1. c. 2. It is against the nature of a distress for rent, to be irrepleviable. 1 Inst. 145.

Island, Composition fish to be taken as usual of subjects travelling into *Island*, 5 El. c. 5. sect. 5. Fishing vessels not to proceed on their voyage to *Westmory* and *Island*, till the 10th of *March* yearly. 15 Car. 2. c. 16.

Isinglass, A kind of fish glue, brought from *Island*, used by some persons in the adulterating of wine; but for that prohibited by Stat. 12 Car. 2. cap. 25.

Isle, (*Insula*), Is land inclosed in, and invironed with the sea or fresh water. There are several islands belonging to *England*; as the isles of *Jersey* and *Guernsey*, *Isle of Man*, &c. The isles of *Jersey* and *Guernsey* are not bound by our acts of parliament, except they are specially named; nor do our original writs run into those islands: But the King's Commission under the Great Seal runs there, to redress any injuries; yet the commissioners must judge according to the laws and customs of those isles: And for controversies arising in law, among the King's subjects in the isles of *Jersey* and *Guernsey*, &c. the King and his Privy Council are the proper judges, without appeal. 4 Inst. 286, 287. Wood's Inst. 2. 458. Inhabitants of those isles of *Jersey* and *Guernsey*, &c. may import into *Great Britain*, goods of their own growth and manufacture, custom free. Stat. 3 Geo. 1. c. 4.

The *Isle of Man* is a distinct territory from *England*, and out of the power of our *Chancery*, or of original writs which issue from thence; it has been granted by letters patent under the Great Seal to divers subjects, and their heirs, and hath peculiar laws and customs: And in the case of the *Earl of Derby*, it was adjudged, that no man had any inheritance in this *Isle*, but the *Earl* and the *Bishop*; and that they are governed by laws of their own, so that no statute made in *England* did bind there without express words, in the same manner as in *England*. 1 Inst. 9. 4 Inst. 284. 7 Rep. 21. 2 And. 115. French wines not exceeding 100 tons in one year, may be imported by strangers. 5 Eliz. c. 5. sect. 46. Liberty given to import cattle and corn into *England*. 15 Car. 2. c. 7. sect. 21. No drawback to be allowed for foreign goods exported to the *Isle of Man*. 12 Geo. 1. c. 28. sect. 21. No goods but of the product of the island to be imported from the *Isle of Man*. 12 Geo. 1. c. 28. sect. 22. The pension of 100 l. a year granted by Car. 2. to the poor clergy of the *Isle of Man* not chargeable with taxes. Stat. 30 Geo. 2. c. 3. sect. 96. By statute, the commissioners of the treasury are impowered to treat with the *Earl of Derby* for the purchase of all right to the said *Island*, for the use of his Majesty: And no wine, brandy, tobacco, *East-India* goods, &c. shall be brought from the *Isle of Man* into *Great Britain* or *Ireland*, on pain of forfeiture, &c. 12 Geo. 1. c. 28. The purchase was completed in the year 1765, and confirmed by statute 5 Geo. 3. c. 26 & 39. whereby the whole *Island* and all its dependencies, (formerly granted) except the landed property of the *Arthol* family, their manorial rights and emoluments, and the patronage of the bishoprick and other ecclesiastical benefices, are unalienably vested in the crown, and subjected to the regulations of the *British* excise and customs.

See farther as to the isles of *Jersey*, *Guernsey*, and *Man*, Black. Com. 1 V. 105, 106, &c.

As to islands arising in rivers, to whom it belongs, see Black. Com. 2 V. 261.

An *Island* in the sea, that has no owner, by the law of nations, belongs to him that first finds it. Justin. Inst. lib. 2. Vide Plantations.

Isle of Ely. See Ely.

Isle of Man. See Man.

Isle of Wight. See Wight.

Islet, A small island. See Islet.

Issuable terms. *Hilary* and *Trinity* terms, are usually called issuable terms, from the making up of the issues therein. Tho' for causes tried in *Middlesex* and *London*, many issues are made up in *Easter* and *Michaelmas* terms.

Issue, (*Exitus*, from the Fr. *Issuer*, i. e. *Emanare*) Hath divers significations in law; sometimes it is taken for the children begotten between a man and his wife, sometimes for profits growing from amerciaments and fines;

sometimes for the profits of lands and tenements: But it generally signifies the point of matter, issuing out of the allegations and pleas of the plaintiff and defendant in a cause, to be tried by a jury of twelve men. 1 Inst. 126. 11 Rep. 10.

The issues concerning causes are of two kinds:

Upon matter of fact,
and
Matter of law.

An issue in *fact* is where the plaintiff and defendant have agreed upon a point to be tried by a jury; and issue in law is where a demurrer to a declaration, plea, &c. and a joinder in demurrer, which is an issue at law to be determined by the judges. 1 Inst. 71, 72.

As to issues of fact, viz. whether the fact is true or false, which are triable by the jury, they are either

General
or
Special.

General, when it is left to the jury to try whether the defendant hath done any such thing as the plaintiff lays to his charge; as when he pleads *Not guilty* to a trespass, &c.

Special is when some special matter, or material point alleged by the defendant in his defence, is to be tried; as in assault and battery, where the defendant pleads that the plaintiff struck first, &c. 1 Inst. 126. And when special matter is alleged by the defendant, both parties join thereupon, and so go to a trial by the jury, if it be *questio facti*; or to a demurrer, if it be *questio juris*.

There is also a general issue, wherein the defendant may give the special matter in evidence, for excuse or justification, by virtue of several statutes, made for avoiding prolixity of pleading; and upon the general issue in such cases, the defendant may give any thing in evidence, which proves the plaintiff hath no cause of action. 1 Inst. 283. Matter amounting to the general issue, and special matter of justification, have been joined in one intire plea, and held good. 3 Lev. 41. And where there is an issue upon *Not guilty*, and there are other issues upon justifications, the trial of the general issue of *Not guilty*, is but matter of form, and the substance is upon the special matter. Cro. Jac. 599. But the general issue is pleaded, to put the plaintiff on proof of the fact.

In real actions, causes grown to issue are tried by a jury of twelve men of the county where the cause of action arises; and in criminal cases, issues ought to be tried in the county where the offence was committed; but this hath admitted of some alteration by statute. 3 Inst. 80, 135. 2 Rep. 93.

The place ought not to be made part of the issue, in a transitory action; it is not material, as it is in real and mixed actions. Trin. 24 Car. B. R. If the place is material, and made a part of the issue, there the jury cannot find the fact in another place, because by the special pleading, the point in issue is restrained to a certain place; but upon the general issue pleaded, the jury may find all local things in another county, and where the substance of the issue is found, it is good, and the finding more may be surplusage. 6 Rep. 46. If an issue is of two matters in two counties, trial may be in one county, by the statute 21 Jac. for that statute extends to cases where the matter in issue arises in two counties, and the trial is by one only, as well as where the matter in issue arises in two places in one county, and the trial is by one. 2 Lev. 121. 2 Nels. Abr. 1050. Every issue is to be joined in such a court that hath power to try it, otherwise the issue is not well joined; for if the cause cannot be tried, the issue is fruitless, and if it be tried, the trial is *coram non judice*. 21 Car. B. R. 2 Lill. Abr. 84.

Where an issue is not joined, there cannot be a good trial, nor ought judgment to be given. 2 Nels. Abr. 1042. All issues are to be certain and single, and joined upon the most material thing in the cause; that all the matter in question between the parties may be tried. 23 Car. B. R. 2 Lill. 85. An immaterial issue joined, which

will not bring the matter in question to be tried, is not helped after verdict by the statute of *jeofails*; but there must be a replender: But an informal issue is helped. 18 *Car. 2. B. R.*

For the difference between an immaterial and informal issue, see *Annals* 341. The statute 32 *H. c. 30.* helps misjoining of issues.

A replender may be awarded after verdict, for the badness and uncertainty of the issue: And a judgment may be reversed in error, being on an immaterial issue. 2 *Lutw.* 1608. 2 *Lew.* 194. On a joint trespass by many persons, there must be only one issue joined: And if several offences are alleged against the defendant, he ought to take all but one by *protestation*, and offer an issue upon that one, and no more. *Moor* 80. But in action for damages, according to the loss which the plaintiff hath sustained, every part ought to be put in issue. 1 *Saund.* 269. In action upon the case for service done for a time certain, the defendant ought to put in issue all the time alleged in the declaration. *Lutw.* 1268. And upon a general issue in waste, the plaintiff must shew his title. *Ibid.* 1547. Tho' when any special point is in issue, the plaintiff is not obliged to set forth any other matter. *Cro. Eliz.* 320. If there are several things in a declaration, upon which an issue may be joined, and it is joined in any of them, *it is good*; and an affirmative and an implied negative will make a good issue. *Style* 151, 210.

There must be in every issue an affirmation on the one part, as that the defendant owes such a debt, &c. and a denial on the other part, as that he oweth not the debt, &c. And tho' the matter contradicts, yet there must be a negative and affirmative of it, to make a right issue. 1 *Ventr.* 213. An issue may be of two affirmatives. *Wils. par. 1. 6.* Also a negative should be as full as the affirmative, or it is no negative to make an issue; as if a defendant pleads a grant of four acres, and two acres only are denied, &c. 1 *Roll. Rep.* 86. It has been held, that issue ought not to be joined on a traverse only, without answering in the affirmative, &c. 2 *And.* 6, 102. But where the matter, which is the *gist* or cause of the action is found, it has been adjudged good after verdict, tho' there was no negative and affirmative to make the issue; as where in debt upon bond the defendant pleads payment, and concludes to the country, without giving the plaintiff opportunity to deny the payment, if the jury in such case find the money paid, it is good after verdict. *Sid.* 341.

If several issues are joined, and the jury give a verdict but as to one of them, the whole is discontinued; and where there are two issues joined, one good and the other bad, if entire damages are given upon the trial on both issues, it will be error; but if several damages are found, the plaintiff may release the bad damages, and have judgment for the rest. 2 *Lill. Abr.* 87, 88. And it is said judgment may be entered as to one part of the issue; and a *nolle prosequi* to another part of the same issue, where it may be divided. *Pasch.* 23 *Car. B. R.* Where two issues are joined, and a verdict only on one of 'em, it is a mistrial and the judgment may be arrested, and a *venire facias de novo* awarded, if error brought, the judgment must be arrested. *Annals* 246.

There may be a plea to issue to part, and a demurrer to part; which have no dependance on each other. 1 *Saund.* 338. Where the declaration of the plaintiff is good, and the plea of the defendant is ill; if the plaintiff in his replication tender an issue upon such ill plea, and a trial is had, and it is found for the plaintiff, he shall have judgment. *Cro. Car.* 18. And generally, when a plea is naught, that the plaintiff might have demurred upon it, and he doth not, but takes issue, and it is found for the defendant; this is aided by the statute of *jeofails*, and the defendant shall have judgment: So likewise where the replication is naught, and issue is taken upon it, and found for the plaintiff, he shall have judgment. *Cro. Eliz.* 455. *Cro. Jac.* 312. But there are many cases where the plea or replication is bad in substance, it is not aided by the statute of *jeofails*. See *Com. Dig. V. 1. tit. Amendment.*

If issue be taken on a dilatory plea, &c. and found against the defendant, final and peremptory judgment shall be given; but it is otherwise on a demurrer. *Raym.* 118. A good issue is offered to the defendant, he ought not to

plead over; and if he plead over, the plaintiff shall have judgment. 1 *Saund.* 318, 338. If he does not join issue, but demurs, it is the same. The plaintiff's attorney is to be paid by the defendant's attorney for entering the plea; and for paper books, in special pleadings, &c. 2 *Lill.* 87, 88. And when issue is joined between the parties, it cannot be afterwards waived, if it be a good issue, without consent of both parties: But where defendant pleads the general issue, and it is not entered, he may within four days of the term, waive that issue, and plead specially; and when the defendant pleads an abatement, he may at any time after waive his plea of special matter, and plead the general issue, unless there be a rule made for him to plead as he will stand by it. 12 *W. 3. B. R.* 3 *Salk.* 211. If the plaintiff will not try the issue after joined, in such time as he ought by the course of the court, the defendant may give him a rule to enter it; which if he does not he shall be nonsuit, &c. 2 *Lill.* 84. If the tender of the issue comes on the part of the plaintiff, the form of it is; *And this he prays may be inquired by the record; or by the country; and when on the part of the defendant, And of this he puts himself up on the country; and The plaintiff doth the like, &c.*

There are many acts of parliament, that enable the defendant to plead the general issue—Too numerous, to set forth in a dictionary.—We therefore refer the reader to the tables of the statutes, tit. *General Issue, &c.*

Issues on Sheriffs. Are for neglects and defaults, by amercement and fine to the King, levied out of the issues and profits of their lands; and double or treble issues may be laid on a sheriff for not returning writs, &c. But they may be taken off before retreated into the *Exchequer*, by rule of court, on good reason shewn. 2 *Lill. Abr.* 89. Issues shall be levied on jurors, for non-appearance; tho' on reasonable excuse proved by two witnesses, the justices may discharge the issues. *Stat. 35 Hen. 8. cap. 6.* See 1 *Keb.* 475.

Itinerant, (Itinerans) Travelling or taking a journey: And those were anciently called *Justices Itinerant*, who were sent with commission into divers counties to hear causes.

The King's courts were formerly itinerant, being kept in the King's palace, and removing with his household. The Common Pleas is now fixed by *Magna Charta*; but tho' the court of King's Bench is constantly held in *Westminster-Hall*, yet there is nothing but custom to fix it there, as it is supposed to be before the King, and if actually so, must be *itinerant*.

Itinerary, (Itinerarium) A commentary concerning things falling out in journies. *Law Lat. Dist.*

Jubilee, (Annus Jubilæus) The most solemn time of Festival at Rome, when the Pope gives his blessing and remission of sins. It was first instituted by *Boniface* the 8th, in the year 1300, who granted a plenary indulgence and remission of sins to all who should visit the churches of St. Peter and St. Paul at Rome in that year, and stay there fifteen days; and this he ordered to be observed once in every hundred years; which Pope *Clement* the 6th reduced to fifty years, anno 1350, and to be held upon the day of circumcision of our Saviour: And *Urban* the 4th, in the year 1389, ordained it to be kept every thirty-three years, that being the age of our Saviour: After which, Pope *Sixtus* the 6th, reduced it to twenty-five years. In imitation of the grand jubilee of Rome, the Monks of *Christ-Church* in *Canterbury*, every fiftieth year invited a great concourse of people to come thither, and visit the tomb of *Thomas Becket*. And King *Edw. 3.* in the fiftieth year of his age, which was 1362, caused his birth-day to be observed at court, in the name of a *Jubilee*; giving pardons, privileges, and other civil indulgencies.

Jubilæus, Signified afterwards a man one hundred years old, and likewise a possession or prescription for fifty years. *Si ager non invenitur in scriptis inquiratur de senioribus, &c. Et si sub certo jubileo mansit, sine vituperatione maneat in æternum.* Du Fresnoie.

Judaism, (Judaismus) The customs, religion, or rites of the Jews: Also the income heretofore accruing from the Jews to the King: And the word *Judaism* was formerly used for a mortgage; and sometimes taken for usury. *Ex Magno Rot. Pipæ, de anno 9 Ed. 2.*

Judaismus is also taken for the mansion or dwelling-place of the *Jesus* in any town; as *Wigorniam cepit & intravit, & Judaismus evertit*. Rishangor, p. 668. And it sometimes signifies usury: as, *Empta fuit grangia, &c. domus obligata in magnis debitis in Judaismo*. Mon. 1 tom. p. 834.

Judge, (Judex) Is a chief magistrate in the law, to try civil and criminal causes, and punish offences. He is appointed with a certain jurisdiction; and our King hath the nomination and appointment of judges. 2 Inst. 56. A judge at his creation takes an oath, *That he will serve the King, and indifferently administer justice to all men, without respect of persons, take no bribe, give no counsel where he is a party, nor deny right to any, tho' the King by his letters, or by express words, command the contrary, &c.* and he is answerable in body, land and goods. 18 Ed. 3. c. 1. *Judex est lex loquens*, and ought to judge by laws, and not by examples: by *Glanvil* a judge is called *justicia in abstracto*, because he should be as it were justice itself. Co. Litt. 71. 7 Rep. 4. And all the commissions of judges are bounded with this limitation, *Facturi quod ad justitiam pertinet secundum legem & consuetudinem Angliæ*. There are ancient precedents of judges, who were fined when they transgressed the laws, tho' commanded by warrants from the King; and it is said that *Earl Tyttest*, who was a Chancellor, was beheaded, for acting upon the King's warrant against law. *Burnet's Rich.* 2. pag. 38. The judges are to give judgment according to law, and what is alledged and proved: And they have a private knowledge, and a judicial knowledge, tho' they cannot judge of their own private knowledge, but may use their discretion; but where a judge has a judicial knowledge he may and ought to give judgment according to it. *Plowd.* 82. King *Henry 4.* demanded of *Judge Gascoigne*, if he saw one in his presence kill *A. B.* and another person who was not culpable, should be indicted of this, and found Guilty before him, what he would do in this case; to which he answered, *That he ought to respect the judgment against him, and relate the matter to the King, in order to procure him a pardon; for there he cannot acquit him, and give judgment according to his private knowledge.* Ibid.

And the same King *Henry*, when his eldest son the Prince, was by the Lord Chief Justice committed to prison, for a great misdemeanor, thanked God that he had a son of that obedience, and a judge of that courage and impartiality. *Stow.* The King in all cases doth judge by his judges; who ought to be of counsel with prisoners: And if they are doubtful or mistaken in matter of law, a slander-by may be allowed to inform the court, as *amicus curiæ*. 2 Inst. 178. Our judges are to execute their offices in proper person, and cannot act by deputy, or transfer their power to others; as the judges of ecclesiastical courts may. 1 Roll. Abr. 382. *Bro. Judges*, 11. Yet where there are divers judges of a court of record, the act of any one of them is effectual; especially if their commissions do not expressly require more. 2 Hawk. 3. Tho' what a majority rules when present, is the act of the court. If on a demurrer or special verdict, the judges are divided in opinion, two against two, the cause must be adjourned into the *Exchequer Chamber*. 3 Mod. 156. And a rule is to be made for this purpose, and the record certified, &c. 5 Mod. 335. In fines levied all the judges of *C. B.* ought to be particularly named: But writs of *certiorari* to remove records out of that court, &c. are directed to the Chief Justice, without naming his companions. 1 H. 7. 27. *Jenk. Cent.* 167.

When a record is before the judges, they ought *ex officio* to try it: And they are to take notice of statutes, and of the terms, &c. Ibid. 215, 298. No judge is compellable to deliver his opinion before-hand, in relation to any question which may after come judicially before him. 3 Inst. 29. Judges of the Common law, have no ordinary jurisdiction to examine witnesses at their chambers; tho' by consent of parties, and rule of court, they may on interrogatories; and some things done by judges at their chambers, in order to proceedings in court, are accounted as done by the court.

A judge shall not be generally excepted against, or challenged; or have any action brought against him, for what he does as judge. 1 Inst. 294. 2 Inst. 422. And

to kill a judge of either bench, or of assize, &c. in his place administering justice, is treason: Also drawing a weapon only upon a judge, in any of the courts of justice, the offender shall lose his right hand, forfeit his lands and goods, and suffer perpetual imprisonment. 25 Ed. 3. cap. 2. 2 Inst. 549. Judges are not in any way punishable for a mere error of judgment: And no action will lie against a judge for an erroneous judgment; or for a wrongful imprisonment, &c. 2 Hawk. 4. 1 Mod. 184. The judges of courts of record are freed from all prosecutions whatsoever, except in the parliament, where they may be punished, for any thing done by them in such courts as judges; this is to support their dignity and authority, and draw veneration to their persons, and submission to their judgments: But if a judge will so far forget the dignity and honour of his post, as to turn solicitor in a cause which he is to judge, and privately and extrajudicially tamper with witnesses, or labour jurors, he may be dealt with according to the same capacity to which he so basely degrades himself. 13 Rep. 24. *Vaugh.* 138. S. P. C. 173.

Bribery in judges is punishable by loss of office, fine and imprisonment; and by the Common law, bribery of judges in relation to a cause depending before them, has been punished as treason. 1 Leon. 295. *Cro. Jac.* 65. 1 Hawk. 170. A judge ignorantly condemns a man to death for felony, when it is not felony; for this offence, the judge shall be fined and imprisoned, and lose his office. *Jenk. Cent.* 162. If a judge who hath no jurisdiction of the cause, give judgment of death and award execution, which is executed, such judge is guilty of felony; and also the officer who executes the sentence. H. P. C. 35. 10 Rep. 76. And if justices of peace, on indictment of trespass, arraign a man of felony, and judge him to death, and he is executed, it is felony in them. H. P. C. 35. *Dalt. cap.* 98. A judge ought not to judge in his own cause, or in pleas where he is party. 8 Rep. 118.

If a fine be levied to a justice of Bank, he cannot take the consuance; for he cannot be his own judge. 8 H. 6. 21. *Br. Patents*, pl. 15. cites S. C. *per Martin*. If a fine be levied by a justice in Bank, his name shall not be in the fine. 11 H. 6. 49. b. So, if a fine be levied to a justice of Bank, his name shall not be in the fine; because he shall not be judge in his own cause. Ibid.

So if a justice of Bank be sued in Bank, he cannot record it; it shall be recorded by the other justices. So if a justice of Bank sues there, he cannot record it, but it shall be recorded by the other justices. Ibid. If the chief justice of Bank be to sue a writ there, the writ shall not be in his name, but in the name of the secondary. 8 H. 6. 19. b.

None may judge in his own cause. Ibid. See *Herodii Directa*, lib. 2. fol. 1440. — *Arg. Bridgm.* 11, 12. for it is a manifest contradiction that a man can be agent and patient in the same thing, and what Lord Coke says in *Dr. Bonham's* case is far from any extravagancy; for it is a very reasonable and true saying, that if an act of parliament should ordain, that the same person should be party and judge, or, as is the same thing, judge in his own cause, it would be a void act of parliament; *per Holt Ch. J.* 12 Mod. 687.

This is a ground in the feudal law also, as appears in the prelections of *Wesmbech. cap.* 17. fol. 401.

Judgment given by a judge, who is party in the suit with another, and so entered of record, is error, altho' several other judges sit there, and give judgment for the judge who is party. *Jenk.* 90. pl. 74.

Where a judge has an interest, neither he nor his deputy can determine a cause, or sit in court; and if he does, a prohibition lies. *Mich.* 20 Car. 2. *Hard.* 503. *Brooks v. Earl of Rivers.*

A justice cannot raise a record, nor embezzle it, nor file an indictment which is not found, nor give judgment of death where the law does not give it; if he does, it is misprison, he shall lose his office, and make fine for misprison; but it is not felony. *Br. Judges*, pl. 33. cites 2 R. 3. 9.

Where judges are limited to the subject matter of their jurisdiction, and they exceed the limits of their jurisdiction, action lies against them; *per* — *U. J.* 2 *Lutw.*

1565. *Mich.* 4 *W. & M.* cites *Hard.* 480. *Terry v. Huntington.*

A Judge is not answerable to the King, or the party, for mistakes or errors of his judgment, in a matter of which he has jurisdiction. 1 *Salk.* 397. All misdemeanors of judicial officers are a contempt of the court of *B. R.* 1 *Salk.* 201.

Among the laws of King *Edgar* is this, *viz.* *Judex, qui injustum judicium judicabit alicui, det Regi CXX's, nisi jurare audeat, quod rectius judicare nescivit. Decem scriptores Anglicani* 872. l. 3. The same among the laws of *Canute.* *Ibid.* 924. l. 2. adds, that *Et dignitatem suæ legalitatis semper amittat, si non eam redimat erga Regem, sicut ei permittetur. In Denelaga Labstithes reus sit; si non juret, quod melius nescivit.* *Chronicon Johannis Bromton.* See 14 *Vin. Abr. tit. Judges.* See 33 *H. 8. c. 24. & 12 Geo. 2. c. 27. Black. Com. 1 V. 267. 3 V. 25. 4 V. 84, 125, 126, 349, 433.*

By 1 *Geo. 3. c. 23.* Judges are continued in the enjoyment of their offices, during their good behaviour, notwithstanding any demise of the crown; but they may be removed by the crown, upon the address of both Houses or Parliament.

For the judges oath, see *St. 18 E. 3. stat. 4.* The duty of the judges, see in *Stat. 20 Ed. 3. c. 1. 8 R. 2. c. 3. 9 R. 2. c. 1.* Of the immunity of judges from prosecutions, see *Stat. 31 Ed. 3. stat. 4. c. 17.*

Judger. In *Cheshire*, to be judge of a town, is to serve on the jury there. *Leicester's Hist. Antiq.* 302.

Judgment, (*judicium, quasi juris dictum*) Is the determination or sentence of the judges upon the suit, &c. and the ancient words of judgments are, *consideratum est per curiam*, &c. because judgment is ever given by the court upon due consideration had of the record and matter before them. 1 *Inst.* 39. Of judgments, some are final, and some not, &c. And a judgment may be given not only upon trial of the issue; but by default, *nihil dicit*, confession, or on demurrer; and outlawry is a judgment in itself. 1 *Inst.* 167. 2 *Inst.* 236. *Finch.* 457. There is likewise judgment for departing in despite of the court, without leave, in common recoveries, &c. And after an issue joined in a cause to be tried by the plaintiff and defendant, the plaintiff may, (if he will,) without going to trial or any verdict, accept of a judgment from the defendant, which judgment must be by *relucta verificatione cognovit actionem*: but on this judgment error may be brought without putting in bail, which it may not on judgment after verdict. 2 *Lill. Abr.* 104.

Judgment is sometimes had with a *cessat executio*; and if the defendant gives a judgment, with stay of execution, till a certain day, the plaintiff may notwithstanding sue forth a *capias* or a *feri facias* into the county where the action is laid, returnable before the day, to enable him at that day to take a *testatum* against the defendant; tho' he shall not in that case sue out a *capias* to warrant a *scire facias* against the bail. *Pasch.* 22 *Car. 2.* If debt be brought against an executor upon the bond of the testator, and he pleads *plene administravit*, this is a confession of the debt; and the plaintiff may have judgment with a *cessat executio* till the defendant hath assets. 4 *Rep.* 2 *Nels. Abr.* 1052.

On interlocutory judgments, upon dilatory pleas, it is in many cases *respondet auster*, to answer over; and if the plaintiff or defendant die after interlocutory judgment, the action shall not abate. *Stat. 8 & 9 W. 3. c. 11.* Judgment upon a demurrer to a declaration, &c. is no bar to any other action; because it is not on the merits, and the plaintiff may afterwards make his declaration right, and then proceed. 2 *Lill.* 113. But other judgments may be pleaded in bar to any other action for the same cause; and judgment in an inferior court, may be alledged in bar to an action in a superior court. 2 *Lev.* 93. A judgment on *nil dicit*, in case, trespass, or covenant, &c. is not perfect, until writ of enquiry of damages taken out and executed upon it, of which notice is to be given the defendant, and the time of execution, &c. But in debt, it is a perfect judgment as soon as signed, &c. and there needs no writ of enquiry. 2 *Lill.* 105.

Where damages are given upon a judgment without trial, there shall issue out a writ of enquiry of damages; and

when judgment is given on trial of the issue, the court gives damages, without writ of enquiry. 1 *Inst.* 167. Judgment final ought not to be given upon default in real actions; but a *grand cape* upon default before appearance, and a *petit cape* on default after appearance. 1 *Lev.* 105.

If in debt, part is found for the plaintiff, and the defendant acquitted of the residue, the judgment must be *quod quer. in misericordia* for that part whereof the defendant is acquitted. *Cro. Eliz.* 699. But the statute 4 & 5 *W. & M. c. 12.* takes away the *capiatur in trespass*, assault, false imprisonment, &c. and there is in lieu thereof 6s. 8d. paid to the secondary for the fine before he signs judgment.

All judgments given in any court of record, must be duly entered: the plaintiff's attorney, four days after the *posse* is brought into court, if the rule for judgment is out, may enter judgment for his client by the course of the court. 2 *Lill. Abr.* 55. After a rule to sign judgment, there ought to be four days *exclusive* of the day on which the rule was made, before the judgment is signed, that the party may have a reasonable time to bring writ of error: in *C. B.* they never give rules for signing judgment, but stay till the *quarto die post*, which makes but four days inclusive. *Mod. Caf.* 241. A plaintiff got his judgment signed on the very day, but it was not executed till after the sixth day, so that the defendant had time enough to bring a writ of error, or move any thing in arrest of judgment: but the court of *B. R.* held the signing of the judgment to be irregular, it being before the day allowed by the rules of the court; and tho' execution was taken out afterwards, judgment was set aside. 5 *Mod.* 205.

If a *disfringas* is returnable within term, and the party, &c. is tried two or three days only before the end of the term, the judgment shall be entered that very term, tho' there be not four days to move in arrest of judgment. 1 *Salk.* 77. But if verdict be given after term, no judgment can be given on it till the next term following; for the judgment is the act of the court, and the court sits not but in term. *Mich.* 22 *Car. B. R.* If verdict pass for the plaintiff, and he will not enter his judgment; the defendant by motion of court may oblige him to it. 2 *Lill. Abr.* 97. The defendant may enforce the plaintiff to enter his judgment, to the end he may plead it to another action. *Latch.* 216. 1 *Danv.* 722. *Palm.* 281. So if the defendant wants to bring a writ of error. Judgments are not only to be signed by a Judge, but entered of record; before which they are not judgments; and in a judgment given to recover a sum of money, the sum must be entered in words at length; and not in figures, which may be easily altered; and a judgment was reversed, because the time when given was in figures, and the sum recovered expressed in figures, &c. But the court may amend their judgments of the same term, because the term is but as one day in law; tho' they may not do it in another term. 2 *Lill.* 103. 3 *Lev.* 430. If a judgment be unduly obtained, the court will vacate the judgment, and restore the party damaged; if not, punish the offender: but it is against the course of the court to vacate a judgment the last day of the term. *Pasch.* 1656.

By statute, if the plaintiff die before judgment, it shall not hinder the judgment being entered, provided it be done within two terms after verdict. 17 *Car. 2. cap. 8.* A judgment entered in *C. B.* shall relate to the *effoin* day of the term, and be a judgment from that time: but a judgment in *B. R.* shall relate only to the first day of the term. *Cro. Car.* 102. If a rule be given for the defendant to plead at a certain day, and he do not plead accordingly, the plaintiff may enter judgment against him, without moving the court; tho' in real actions, and criminal causes, on indictments, &c. there must be a motion in court for a peremptory rule. 2 *Lill.* 116. Yet a plaintiff, after he hath signed judgment against the defendant, may waive if it he will, and accept of a plea from the defendant. *Trin.* 23 *Car. B. R.*

If a judgment be obtained, but the plaintiff doth not take out execution within a year and a day, the judgment must be revived by *scire facias*. If any thing be entered in a judgment, which is not mentioned in the plaintiff's declaration, the judgment is not good. 2 *Lill.* 104. And where it appears upon the record, that the plaintiff hath

no cause of action, he shall never have judgment. 8 Rep. 120. In such case the court may give judgment for the defendant. 1 *Plowd.* 66. Altho' it appear to the court that the defendant's title is not good, if the plaintiff in his declaration hath not set forth a good title for himself, the court shall never give him judgment. 2 *Lill.* 98. Tho' the plaintiff destroys the defendant's title, if he gives him another title by pleading, &c. the defendant shall have judgment; for the court are to judge upon the whole record. 8 Rep. 90. But if action of trespass is brought for trespass done in lands belonging to such a house, and it appears at the trial that the plaintiff had no title to the house, the court cannot give judgment to turn him out of possession, because that was not judicially before them. 3 *Salk.* 213.

In debt on specialty, the whole and exact sum must be demanded; or the judgment upon it will not be good. 3 *Mod.* 41. If more be in the judgment than the plaintiff demands, it is erroneous; tho' this may be helped by a *remisit dampna* for part. 2 *Lill.* 27.

If issue is found against one party in a suit, and not against the other, judgment may be for the plaintiff to recover against him where the matter is found; and a *nil capiat per billam* be entered against the plaintiff as to the other. 1 *Saund.* 216. And when several damages are recovered against several defendants, the plaintiff may enter a *nolle prosequi* as to one of the defendants, &c. and have judgment against one only for the damages against him. 3 *Mod.* 101. In trespass and assault against three persons, they plead severally, and are found guilty, and entire damages are given, the judgment is good; and where there is but one judgment for the damages against several, the plaintiff may make his election against which he will take his judgment. *Cro. Jac.* 384. *Cro. Eliz.* 118. If one entire judgment is given against two several persons, and one of them is an infant, the whole judgment is void; (which being entire cannot be divided) except the infant be joint executor with the other party. 2 *Lill.* 100. When a judgment is entire, it cannot be divided, to make one part of it good, and another part thereof erroneous; but if it be not an entire judgment, it may. *Ibid.* On action where damages are to be recovered, if the declaration be good in part, and insufficient in part, and the defendant demurs upon the entire declaration; the plaintiff shall have judgment for that which is well laid, and be barred for the rest. 2 *Saund.* 379. And if in action of debt upon three bonds, it appears that one of them is forfeited, &c. the plaintiff shall have judgment for the other two. 1 *Saund.* 286.

Where a judgment is partly by the Common law, and partly by statute, the judgment at Common law may remain and be compleat, without the other. 1 *Salk.* 24.

Where there are two distinct judgments, one at Common law, and the other by statute, one may be affirmed, and the other reversed on a writ of error. *Annals* 50.

Every judgment ought to be compleat and formal: one judgment cannot determine another judgment; and the judges will not give a judgment against law, although the plaintiff and defendant do agree to it. 1 *Salk.* 213. *Cro. Eliz.* 817. *Trin. 23 Car. B. R.* In actions personal, judgment given against the plaintiff upon any plea to bar him, is peremptory. *Jenk. Cent.* 52. If the defendant doth not deny the debt, or other matter in suit, but endeavours to elude the action by insufficient pleading: in this case, if it be found for the plaintiff, he shall have judgment; but *non vice versa*, if for the defendant, because the matter of the suit is not fully and sufficiently denied, but in some measure confessed by the insufficient plea. *Ibid.* 70. Judgment may not be given for the plaintiff upon an insufficient bar, if the replication be so, and shew no title, but a judgment shall not be set aside for mispleading a point collateral to the issue. *Hob.* 8, 128. In debt upon an obligation, the defendant pleaded that he delivered it on a condition to be performed by the plaintiff, which he had not done, and therefore it was not his deed: the jury found for the defendant, that the condition was not performed, yet the plaintiff had judgment; for the defendant's plea confesses it to be his deed, and the verdict does not disprove it, and the issue is deed or no deed, &c. *Jenk. Cent.* 102. Here the plaintiff

hath his judgment upon the defendant's confession, not upon the verdict. *Ibid.*

A judgment contrary to the verdict found in the case is generally void; for it is to be warranted by the verdict. *Mich. 23 Car. B. R.* There may be cases where judgment may be given for one of the parties contrary to the verdict; as where the defendant pleads such a plea as in effect acknowledges the demand, there tho' there should be a verdict for defendant, judgment shall be for the plaintiff, or the judge of *Nisi prius* may refuse to try it. *Annals* 250. If a verdict is imperfect, judgment cannot be given upon it; and for the uncertainty of the verdict, judgment may be void. 2 *Lill.* 111. *Raym.* 220. Action of debt lies upon a good judgment, as well after writ of error brought as before. *Raym.* 100. 2 *Mod.* 127. In actions of debt on bonds, a rule may be made to stay proceedings on payment of principal, interest and costs. *Mod. Ca.* 60. If a judgment is recovered jointly against three defendants, the plaintiff cannot bring action of debt upon that judgment against one alone. 2 *Leon.* 220. A plaintiff shall not have a new action of debt on the same bond, &c. after judgment had on it, as long as the judgment is in force. 6 Rep. 2. 2 *Nelf. Abr.* 1056. An erroneous judgment in *Chancery* is reversible in *B. R.* *Dyer* 315. And if the House of Lords reverse a judgment of *B. R.* the Lords are to enter the new judgment, and not the court of *B. R.* who by the first judgment had executed their authority. *Trin. 6 Ann. B. R.* 1 *Salk.* 403. Judgments are to continue, till they shall be attained by error. *Stat. 4 H. 4. cap. 23.* And after verdict given in any court of record, there shall be no stay of judgment for want of form in a writ; count, &c. or mistaking the name of either party, sum of money, day, month, year, &c. rightly named in any writ or record preceding, &c. 18 *Eliz. cap. 14.* 16 & 17 *Car. 2. c. 8.*

A small mistake in the title of a declaration is not a reason to set aside the judgment, and the roll may be right. *Wils. par. 1.* 104.

A regular judgment in a crown cause cannot be set aside on payment of costs. *Ib.* 163.

Where there is a judgment and no surprise, it shall not be set aside on an affidavit of a matter relative to the merits which might have been pleaded. *Annals* 157.

Where the condition of a bond was, that the money was not to be paid till a future day, and the consuee by virtue of a warrant of attorney entered judgment, and took out execution before the day, the court would not set the judgment aside, but did the execution. *Ibid.* 270.

The *Stat. 8 W. 3. c. 11.* orders judgment for costs, upon demurrers, and on suing writs of error, where the former judgment is affirmed, &c. And the statutes of jeofails extend to judgments upon *nihil dicit*, confession, & *non sum informatus*, &c. 4 *Ann. c. 16.* See Error, Jeofail, and Issue.

Judgments acknowledged for Debts. The course for one to acknowledge a judgment for debt, is for him that doth acknowledge it, to give a warrant of attorney to some attorney of that court where the judgment is to be acknowledged, to appear for him at his suit, against the party who is to have the judgment acknowledged unto him; and also to file common bail, and receive a declaration, and then plead *non sum informatus*, &c. or to let it pass by *nihil dicit*; whereupon judgment is entered for want of a plea. 2 *Lill.* 105. If one gives a warrant of attorney to confess judgment, and dies before it is confessed, this is a countermand of the warrant. 1 *Ventr.* 310. Tho' the courts have, on motion, allowed judgment to be entered up.—Where they may be entered after the party's death, see *Annals* 158.—But the rule does not hold in adversary suits. *Ibid.* 183. If a feme sole gives warrant of attorney to confess judgment, and marries before it is entered, the warrant is also countermanded; and judgment shall not be entered against husband and wife. 1 *Salk.* 399.

A man under arrest gives warrant of attorney to confess a judgment; if no attorney for the defendant is then present, the court, on a supposition that the judgment was obtained by force or fear, will set aside the same. 1

Salk. 408. It has been adjudged, that if one under arrest gives a warrant to confess judgment, if an attorney be not by, it is ill: and so is it if one be seemingly discharged, with design that he should give a warrant of attorney to confess a judgment: but if one arrested by process of an inferior court, gives a warrant for confessing judgment in that court, *B. R.* will not set it aside, tho' an attorney be not present. *Mich. 2 Ann. Mod. Cas. 85.* And where one has been in prison some time, and he confesses judgment to his creditor voluntarily, that judgment shall stand, altho' there be no attorney. *Faresley's Rep. 115.* A judgment confessed upon terms, being in effect conditional, the court will see the terms performed: but where a judgment is acknowledged absolutely, and a subsequent agreement is made, this does not affect the judgment, and the court will take no notice of it. *Ibid. 400.* If a warrant be to enter judgment as of such a term, or any time after; the attorney may enter it *at any time during life*; but without those words the judgment must be entered the term expressed in the warrant: and if no term be mentioned, it may be intended the next term. *1 Mod. 1.* Or it has been held, it may be entered within a year after the date of it: and if judgment upon a warrant of attorney be not entered within the year, it cannot be done without leave of the court, on motion and affidavit made of the party's being living, and the debt not satisfied. *2 Lill. Abr. 118. 2 Show. 253.* It is dangerous to take a judgment acknowledged in the vacation, as of the preceding term; and if any such judgment be taken, the warrant of attorney to confess the same must bear date before, or in the term whereof it is confessed: but the safest way is to make it a judgment of the subsequent term. *2 Lill. 103.*

By *Holt Chief Justice*, If one will enter a judgment as of a precedent term, he must actually enter it before the *effoin* day of the succeeding term: and if judgment be signed in *Hilary* term and in the subsequent vacation the defendant sells lands, if before the *Effoin* of *Easter* term, the plaintiff enters his judgment, it shall affect the lands in the hands of the purchaser; and if one enters judgment so in vacation, when the party is dead, the judgment shall be good by relation, if he was living in the precedent term. *1 Salk. 401. Law of Securities 74.* On complaints for delay of entering judgments, the same shall be examined into by commissioners and ordered to be entered, &c. by the *Stat. 14 Ed. 3.* and by *29 Car. 2. c. 3.* Judgments, as against purchasers, shall only relate to the day of signing. *29 Car. 2. c. 3. s. 15.* If any person having acknowledged or suffered a judgment as a security for money, afterwards on borrowing other money of another, mortgage his lands, &c. without giving notice of such judgment, unless he pay it off in six months, he shall forfeit his equity of redemption, &c. *4 W. & M. c. 16.* The particular times of entering judgments of debt, by confession, *non sum informatus*, &c. and docketting them after every term, by the clerks of courts, &c. is directed under the penalty of *100l.* by *Stat. 4 & 5 W. & M. cap. 20.* And no judgment shall affect purchasers of lands and mortgages till docketted; nor have any preference against heirs, executors, &c. in the administration of estates. *Ibid.* Upon signing judgment *6s. 8d.* is to be paid the proper officer, in satisfaction of the *capiatur fine*, &c. *5 & 6 W. & M. c. 12.* To search for judgments a fee is paid of *4d.* a term.

On judgments, a release of errors is usually entered into at the time of the warrant of attorney given, or judgment had. And in case of several judgments, if two are given in one term, and the last is first executed, that creditor hath the best title. *Laich. 53.* When a judgment is satisfied, it is to be acknowledged on record by attorney, &c. Acknowledging a judgment in the name of another, who is not privy or consenting to the same, is felony. *Stat. 21 Jac. 1. cap. 26.*

Judgment in criminal Cases. No man can be attainted of treason or felony, but on judgment by express sentence, or by outlawry, or abjuration. *2 Hawk. 447.* And a person shall not have two judgments for one offence; for in outlawry which is a judgment, execution shall be awarded against the offender, but no sentence pronounced.

Finch 389, 467. But one convicted of a scandalous libel, had judgment to pay a fine, and to go to all the courts in *Westminster-Hall* with a paper in his hat signifying his crime; and on his behaving impudently, his punishment was increased. *1 Salk. 401.* No judgment or punishment can be inflicted unknown to our laws; but only by act of parliament. *Dalij. 20.* And the law makes no distinction, in fixed and stated judgments, between a peer and a commoner; or between a common and ordinary case and one extraordinary. *2 Hawk. 443.* Judgment cannot be given for a corporal punishment, in the absence of the party. *1 Salk. 400.* Tho' persons may have judgment to be fined in their absence, having a clerk in court to undertake for the fine. *1 Salk. 56.* Judgment in high treason is for the offender to be drawn, hanged, his entrails taken out and burnt, his head cut off, and body quartered, &c. In petit treason, to be drawn to the place of execution and hanged: and a woman in all cases of high and petit treason, to be drawn and burnt. A man or woman for felony, is to be hanged by the neck till dead. Misprision of treason is liable to imprisonment for life. In *praemunire*, the party offending is to be out of the King's protection, and his body to remain in prison during the King's pleasure, &c. And for misprision of felony, fine and imprisonment is inflicted. *2 Hawk. 443, 444.* For crimes and misdemeanors of an infamous nature; perjury or forgery at Common law, gross cheats, conspiracy, keeping bawdy-houses, &c. the judgments are discretionary in the court, by fine, pillory, whipping, &c. *2 Hawk. 445.* See *Execution in Criminal Cases.* As to the several kinds of judgments, vide *1 Hawk. P. C. 57, 177, 184, 193, 196. 2 Hawk. P. C. 380, 442, 3, 4, 5. 3 Inst. 210, 11, 12, 13, 14, 16, 18, 19, 20, 224, 4. 1 Hal. P. C. 375.*

Judgment arrested. In civil and criminal cases. See *Arrest of Judgment.*

Judgment or Trial by the Holy Cross, Was a trial in ecclesiastical cases, anciently in use among the Saxons. *Cress. Church Hist. 960.*

Judicatores terrarum, Are persons in the county palatine of *Chester*, who on a writ of error out of Chancery, are to consider of the judgment given there, and reform it; and if they do not, and it be found erroneous, they forfeit *100l.* to the King by the custom. *Dyer 348. Junk. Gen. 71.*

Judices fiscales; So *Polydore Virgil* calls *Empson* and *Dudley*, who were employed by *Hen. 7.* for taking the benefit of penal statutes, and were pdt to death by *Hen. 8.* See *Lord Herb. H. 8. fol. 5, 6.*

Judicial decisions, opinions or determinations, as far as they refer to the laws of this kingdom, are for the matter of them of three kinds. 1st, They are either such as have their reasons singly in the laws and customs of this kingdom; as who shall succeed as heir to the ancestor? what is the ceremony requisite for passing a freehold? what estate, and how much the wife shall have for her dower? And many such matters, wherein the antient and expressed laws of the kingdom give an express decision, and the judge seems only the instrument to pronounce it; and in those things the law or custom of the realm is the only rule to judge by, and in reference to those matters, the decisions of courts are the conservatories and evidences of those laws. Or 2dly, They are such decisions, as by way of deduction and illation upon those laws are formed or deduced; as for the purpose, Whether of an estate thus or thus limited the wife shall be endowed? Whether if thus, or thus limited, the heir may be barred? And an infinite number of the like complicated questions. And herein the rule of decision is; first, the Common law and custom of the realm, which is the great *substratum* that is to be maintained; then authorities of decisions of former times in the same or the like cases; and then the reason of the thing itself. 3dly, Or they are such as seem to have no other guide but the common reason of the thing, unless the same point has been formerly decided, as in the exposition of the intention of clauses in deeds, wills, covenants, &c. where the very sense of the words, and their positions and relations give a rational account of the meaning of the parties, and in such cases the judge does much better herein, than

what a bare grave grammarian or logician, or other prudent man could; for in many cases there have been former resolutions, either in point, or agreeing in reason or analogy with the case in question; or perhaps the clause to be expounded is mingled with some term or clauses that require the knowledge of the law to help out with the construction or exposition; both which often happen in the same case; therefore it requires the knowledge of the law to render and expound such clauses and sentences; and doubtless a good common lawyer is the best expounder of such clause, &c. *Hale's Hist. Com. Law* 68, 69. cites *Plowden* 122 to 130, 140, &c.

An extra-judicial opinion given in, or out of court, is no more than the *prolatum* or saying of him who gives it, nor can be taken for his opinion, unless every thing spoken at pleasure must pass as the speaker's opinion, *Vaugh.* 382.

So an opinion given in court, if not necessary to the judgment given of record, but that it might have been as well given, if no such, or a contrary opinion had been broached, is no judicial opinion, nor more than a *gratis dictum*. But an opinion, tho' erroneous, concluding to the judgment, is a judicial opinion, because delivered under the sanction of the judges oath upon deliberation, which assures that it is or was, when delivered, the opinion of the deliverer. *Ibid.*

Judicial Power. By the long and uniform usage of many ages, our Kings have delegated their whole judicial power to the judges of their several courts; which are the grand depository of the fundamental laws of the kingdom, and have gained a *known* and *fixed* jurisdiction, regulated by certain and established rules, which the crown itself cannot alter but by act of parliament. *Black. Com.* 1 *V.* 267. cites *2 Hawk. P. C.* 2.

As to the great propriety and indeed consequence of separating the judicial, from the legislative and executive power of the state, see *Montesquieu L'Esprit des Loix Liv. XI. c. 6. fo. 208, &c. of 1st Vol. of quarto edition.*

Judicial Writ. The *capias*, and all other subsequent to the original writ, not issuing out of Chancery, but from the court into which the original was returnable, and being grounded on what has passed in that court in consequence of the sheriff's return, are called *judicial*, not *original*, writs; they issue under the private seal of that court, and not under the Great Seal of *England*; and are *issued*, not in the King's name, but in that of the Chief Justice only. *Black. Com.* 3 *V.* 282.

Judicium Dei, The judgment of God; so our ancestors called those now prohibited trials of ordeal, and its several kinds, *Si se su er defendere non possit* *judicio Dei, sicut, aqua vel ferro, feret de eo justitia.* *Leges Edw. Conf.* c. 16. See *Spelman's Glossary* on this word, and *Dr. Brady* in his *Glossary*, at the end of his *Introduction to Eng.* See *Sutherland*, and *Black. Com.* 4 *V.* 336.

Judicium parium, A trial by a man's equals, i. e. peers by peers, commoners by commoners. The most glorious privilege that a subject can enjoy. It is a protection for the lower order of people, against the violence of the great, and even the passion or caprice of the sovereign himself. 'Tis impossible sufficiently to praise this institution. The defence of *Bingley*, against answering *interrogatories* in the court of *King's Bench*, as tending to accuse himself, may furnish the reader with some pleasing reflections on the subject. That defence, (as drawn up by the Editor *J. M.* tho' not for the purpose of publication) may be seen in No. 75. of the *North Briton*, with a motto prefixed, against the opinion of the writer. *Vide* also *Jury*.

Jug, A watery place, according to *Domesday*.

Jugulator, A cut-throat, or murderer. — *Statutum est prout eo ut nullus occidat jugulator, quales morderes appellant Angli, de cetero chartam de regia gratia obtineat.* *Thom. Walsingham*, p. 343.

Jugum terrae, A yoke of land, in *Domesday*, contains half a plow-land, viz. *Ode tenet de episcopo unum jugum terrae, & est dimid. carucata.* So also *1 Inst. fo. 5. a.* So in *Domesday*, *Unum jugum de ora, & unum jugum de herbe*; i. e. The rent of a yoke of land, and another yoke of land to plough. *Gale* 760.

Junctate, To strew rushes, as was of old the custom of accommodating the parochial church, and the very bed-chamber of princes. — *Terra in Ailesbury tenetur per servitium inveniendi domino Regi cum venerit apud Ailesbury in estate stramen ad lectum suum & prater hoc herbam ad juncandam cameram suam.* — *Pat. 14 Ed. 1.*

Juncaria, or **Juncus** (from *juncus*, the Latin word for a rush;) Is a soil or place where rushes grow. *Co. Litt. fol. 5.* Cum *piscariis, turbariis, juncariis, & communibus pasturis ad messuagium prae dictum pertinet.* *Pat. 6 Ed. 3. p. 1. m. 25.*

Jundum junta, A measure of salt. 2 *Mon. Aug.* p. 99.

Jura regalia. See *Regalia*.

Jurats, (*jurati*) Are in nature of aldermen, for the government of many corporations. As *Romney Marsh* is incorporate of one bailiff, twenty-four jurats, and the commonalty thereof, by *Chart. 1. Ed. 4.* And we read of the mayor and jurats of *Maidstone, Rye, Winchelsea, &c.* Also *Jersey* hath a bailiff and twelve jurats, or sworn assistants, to govern that island. The name is taken from the *French*; for in *France*, among others, there are *major & jurati, &c.* They are mentioned in the *Stat. 2 & 3 Ed. 6. c. 30.* And see *13 Ed. 1. cap. 26.*

Jure divino right to the throne, A doctrine long since exploded,—and now universally denied. See *Black. Com.* 1 *V.* 191.

Jure divino right to tithes. As to this, *Blackstone* saith, in his *Com.* 2 *V.* 25.

“I will not put the title of the clergy to tithes upon any divine right; though such a right certainly commenced, and I believe as certainly ceased, with the Jewish theocracy. Yet an honourable and competent maintenance for the ministers of the gospel is, undoubtedly, *jure divino*; whatever the particular mode of that maintenance may be,” &c. &c.

Juridical Days, (*dies juridici*) Days in court, on which the law was administered. See *Day*.

Jurisdiction (*jurisdictio*) Is an authority or power, which a man hath to do justice in causes of complaint brought before him: of which there are two kinds; the one, which a person hath by reason of his fee, and by virtue thereof doth right in all complaints, concerning the lands within his fee; the other is a jurisdiction given by the prince to a bailiff, as divided by the *Normans*; and by him whom they called a bailiff, we may understand all who have commission from the King to give judgment in any cause. *Custom. Normand. cap. 2.* The courts and judges at *Westminster* have jurisdiction all over *England*; and are not restrained to any county or place: but all other courts are confined to their particular jurisdictions; which if they exceed, whatever they do is erroneous. 2 *Lill. Abr.* 120. There are three sorts of inferior jurisdictions; the first whereof is *tenere placita*, which is the lowest, and the party may either sue there, or in the King's courts: the second is *consuance of pleas*; and by this a right is vested in the lord of the franchise to hold pleas; and he is the only person that can take advantage of it, by claiming his franchise: the third sort is an *exempt jurisdiction*; as where the King grants to some city, that the inhabitants shall be sued within their city, and not elsewhere; tho' there is no jurisdiction, which can withstand a *certiorari* to the superior courts. 3 *Salk.* 79. 80. And a court shall not be presumed to have a jurisdiction, where it doth not appear to have one. 2 *Hawk.* 59. If an action is brought in a corporate town, and the plaintiff sheweth not that the matter arises *infra jurisdictionem* of the court, it will be wrong, tho' the town be in the margin; but the county serves in the margin for the superior courts. *Trin. Com.* 322. The declaration in a bafe court must alledge, that the goods were sold and delivered within the jurisdiction thereof, as well as that the defendant promised within it. *Wils. par. 2.* 16.

After a verdict for the plaintiff in *C. B.* for less than 40 s. the defendant may enter a suggestion on the roll that he resided in *Middlesex*, which, if true, the *C. B.* hath no jurisdiction, by the late statute, touching the county court of *Middlesex*. *Ib.* 68.

Where

Where commissioners or inferior jurisdictions, whose powers are limited, assume a jurisdiction they have not, the law gives an action against them. *Wylf.* 382.

As to the jurisdiction of the King's Bench in the principality of Wales, see *ib.* par. 1. 193.

Altho' a case be debated and have judgment in the Spiritual courts, yet the King's courts may afterwards discuss the same matter. *Artic. 12. Stat. 9 Ed. 2. c. 6.* In some causes, the Spiritual and Temporal courts have a concurrent jurisdiction. See *Black. Com.* 3 V. 111. 4 V. 418, 419.

Juris utrum, Is a writ which lies for the parson of the church, whose predecessor hath alienated the lands and tenements thereof. *F. N. B.* 48. And the writ *juris utrum* shall be granted to try whether free alms belong to a church, where they are transferred, &c. By *Stat. 18 Ed. 1. c. 24.* If a man intrude into lands and tenements, after the death of a parson, the successor shall have this writ: so if a parson be disseised of lands, parcel of his rectory, and dieth, his successor shall have a *juris utrum*. *New Nat. Br.* 109. But if a parson receive rent of the tenant of the land, which is aliened by his predecessor, he shall not himself have a writ of *juris utrum*; but his successor shall have it. *Ibid.* 111. A vicar shall have a *juris utrum* against a parson for the glebe of his vicarage, which is part of the same church: And the plaintiff ought to be named parson or vicar, or such name in right of which he bringeth his action. *Ibid.* See *stat. Westm. 2. 13 Ed. 1. c. 24.* and *14 Ed. 3. Stat. 1. c. 17.* See *Black. Com.* 3 V. 252.

Jurnale, The journal or diary of accounts in a religious house.—*Ut patet per jurnale hoc anno—ut patet per prædictum jurnale.* *Paroch. Antig.* p. 571. From the French *jour*, a day; whence *journey* was at first properly but *one day's travel*. And our ploughmen now use the word in a strict and original sense; for they call one day's travel, or work at plough, a *journey* or *journe*. Hence a *journeyman* is one who works by the day, &c. *Cowell.*

Jurnedam, A journey or one day's travelling.—*Cowell.*

Juror, (*jurator*) Is one of those persons who are sworn on a jury; and the law requires the returning of able and sufficient jurors. 16 & 17 Car. 2. c. 3.

Jury, (*jurata*, from the Lat. *jurare*, to swear) Signifies a certain number of men sworn to inquire of, and try the matter of fact, and declare the truth upon such evidence as shall be delivered them in a cause: And they are sworn judges upon evidence in matter of fact. The privilege of trial by jury, is of great antiquity in this kingdom; some writers will have it that juries were in use among the Britains; but it is more probable that this trial was introduced by the Saxons: Yet some say that we had our trials by jury from the Greeks; (the first trial by a jury of twelve, being in Greece.) By the laws of King *Edelred*, it is apparent that juries were in use many years before the Conquest; and they are, as it were, incorporated with our constitution, being the most valuable part of it; for without them no man's life can be impeached, (unless by parliament) and no one's liberty or property ought to be taken from him. And these juries are not only used in the circuits of the judges, but in other courts and matters: As if a coroner inquire how a person killed came by his death, he doth it by jury; and the justices of peace in their quarter-sessions, the sheriff in his County-Court, the steward of a Court-Leet or Court-Baron, &c. if they inquire of any offence, or decide any cause between party and party, they do it in like manner: And at the general assizes there are usually many juries, because there are many causes, civil and criminal, to be tried; whereof one is called the *Grand Jury*, and the rest *Petit Juries*, of which it is said there should be one for every hundred. *Lamb. Eiren. pag.* 384.

Anciently the jury as well in Common Pleas, as Pleas of the Crown, were twelve knights, according to *Glauvill* and *Bracton*: And to make a jury in a writ of right, called the *Grand Assize*, there must be sixteen, viz. four knights, and twelve others. *Finch* 412. The grand jury generally consists of twenty-four men of greater quality than the other, chosen indifferently out of the whole

county by the sheriff; and the *petit jury* consisteth of twelve men, of equal condition with the party indicted, impanelled in criminal cases, called the *Jury of Life and Death*: The grand jury find the bills of indictment against criminals, and the *petit jury* convict them by verdict, in the giving whereof all the twelve must agree; and according to their verdict the judgment passeth. 3 *Inst.* 30, 31, 221.

By the Common law jurymen are to be returned in all cases for trial of general issues, from the county where the fact was done. *S. P. C.* 154. And jurymen are to be freemen, indifferent, and not outlawed or infamous; aliens, men attainted of any crime, ought not to serve on juries; and infants, persons seventy years old, clergymen, apothecaries, &c. are exempted by law from serving upon juries. 3 *Inst.* 221. 2 *Inst.* 447. Barons of the realm, and all above them, are not to serve in any ordinary jury; and others may have this privilege by writ, or the King's grant, &c. 6 *Rep.* 51. *J. Brown.* 30. But such as have charters of exemption, shall be sworn on great assizes, and in attainments, &c. when their oath is requisite. 52 *H. 3. c.* 14.

By statute, jurors impanelled are to be the next neighbours, most sufficient and least suspicious; or the officer shall forfeit double damages. 28 *Ed. 1. c.* 9. Their qualification by 13 *Ed. 1.* was 40 s. per Annum estate; which was encreased to 4 l. per Annum by 27 *Eliz. c.* 6. and is made 10 l. per Annum freehold or copyhold within the same county, by 4 & 5 *W. & M. c.* 24. But all cities, boroughs, and corporate towns, are excepted out of this last act: And trials of felons in corporations may be by freemen worth 40 l. in goods, by the 23 *Hen. 8. c.* 13. Panels of juries returned to inquire for the King, may be reformed by the judges of gaol-delivery, &c. 3 *Hen. 8. c.* 12.

Jurymen not appearing shall forfeit issues, if they have no reasonable excuse for their defaults, viz. 5 s. on the first writ, upon the second 10 s. and the third writ 13 s. 4 d. 35 *H. 8. c.* 6. Tho' no jury is to appear at *Westminster* for a trial, when the offence was committed thirty miles off; except the Attorney General require it. 18 *Eliz. c.* 5. Constables of parishes, &c. at *Michaelmas* quarter-sessions yearly, are to return to the justices of peace, lists of the names and places of abode of persons qualified to serve on juries, between the ages of twenty-one and seventy, attested upon oath, on pain of forfeiting 5 l. And the justices of peace shall order the clerk of the peace to deliver a duplicate of those lists to the sheriff, &c. And sheriffs are to impanel no other persons, under the penalty of 20 l. &c. 7 & 8 *W. 3. c.* 32. 3 *Ann. c.* 18. No sheriff, bailiff, &c. shall return any person to serve on a jury, unless he hath been duly summoned five days, before the day of appearance; nor shall take any money, or other reward to excuse the appearance of any jurymen, on pain of forfeiting 10 l. 4 & 5 *W. & M. c.* 24. If a trial is for any thing which concerns the sheriff or under-sheriff, the coroner is to return the jury. And the process to bring in the jury in *B. R.* is a *distingas jurat*, and in *C. B.* *venire fac* & *habeas corpora jurator*: Upon the *venire*, the sheriff, &c. returns the jury in a panel, (or little piece of parchment,) annexed to the writ, and then goes the writ of *habeas corpora* to bring in the jury; and where after issue joined, a suit is continued on the roll, the process is to be continued from time to time against the jurors. *Br. Discontin.*

If the sheriff return twelve jurors only according to the writ, where he ought to have returned twenty-four according to the usage, for speeding the trial in case of challenge, death, or sickness, &c. he shall be amerced. *Jenk. Cent.* 172. Lists of jurors qualified according to the acts (4 & 5 *W. & M. c.* 24. 7 & 8 *W. 3. c.* 32. and 3 & 4 *Ann. c.* 18.) are now to be made from the rates of each parish, and fixed on the doors of churches, &c. twenty days before the feast of St. Michael, that publick notice may be given of persons qualified omitted, or of persons inserted who are not so, &c. and the lists being set right by the justices of peace in quarter-sessions, duplicates are to be delivered to the sheriffs of counties, by the clerks of the peace; the names contained in which shall be entered alpha-

alphabetically by the sheriffs in a book, with their additions, and places of abode, &c. If any sheriff shall return other persons to serve on *juries*; or the clerk of the assize record any appearance, when the party did not appear, they shall be fined by the judges, not above 10 *l.* nor less than 40 *s.* The like penalty for taking money to excuse persons from serving; and the sheriffs may be fined 5 *l.* for returning *jurors*, who have served two years before, &c.

Sheriffs, on the return of writs of *venire facias*, are to annex a panel of the names of a competent number of *jurors* named in the lists, not less than forty-eight in any county, nor more than seventy-two (without direction of the judges) who shall be summoned to serve at the assizes, &c. and the names of the persons impanelled shall be writ in several distinct pieces of paper, of equal size, and be delivered by the under-sheriff to the judge's marshal, who is to cause them to be rolled up all in the same manner, and put together in a box; and when any cause shall be brought on, some indifferent person is to draw out twelve of the said papers of names, who not being challenged, shall be the *jury* to try the cause; but if any persons are challenged and set aside, or shall not appear, then a further number to be drawn till there is a full *jury*, &c.

Where a cause comes on, before the *jury* in any other have given their verdict, the court shall order twelve of the residue of the papers to be drawn, &c. And *jurors* making default in appearance, shall be fined, not exceeding 5 *l.* nor under 40 *s.* Stat. 3 Geo. 2. c. 25. Persons having estates for five hundred years, or ninety-nine years, or other term determinable on lives, &c. of the yearly value of 20 *l.* are declared qualified to serve on *juries*, and to be inserted in the freeholders book, &c. And sheriffs of any county, or city, shall not impanel persons on any *jury* for the trial of capital offences, that would not be qualified in civil causes: In London *jurors* to be *house-keepers*, having lands or goods worth 100 *l.* who may be examined on oath, &c. Ibid. Leaseholders on leases where the rent is 50 *l.* a year, are liable to serve upon *juries* in the county of Middlesex; but no person shall be returned as a *juror*, who hath served two terms before in that county, by Stat. 4 Geo. 2. c. 7. Vide the Statutes.

Either the plaintiff or defendant may use their endeavours for any *jurymen* to appear; but one who is not a party to the suit, may not: And an attorney was thrown over the bar, because he had given the names of several persons in writing to the sheriff, whom he would have returned on the *jury*, and the names of others whom he would not have returned. Moor 882. If a *jurymen* appear, and refuse to be sworn, or refuse to give any verdict, if he endeavours to impose upon the court, or is guilty of any misbehaviour after departure from the bar, he may be fined, and attachment issue against him. 2 Hawk. P. C. 145, 146.

After a *juror* is sworn, he may not go from the bar until the evidence is given, for any cause whatsoever, without leave of the court; and with leave he must have a keeper with him. 2 Lill. 123, 127. A witness may not be called by the *jury* to recite the same evidence he gave in court, when they are gone from the bar. Cro. Eliz. 189. Nor may a party give a brief or notes of the cause to the *jury* to consider of; if he doth, he and the *jurors* may be fined. Moor 815. The *jurymen* are not to meddle with any matters which are not in issue; but they may find a thing of their own knowledge, which is not given in evidence. 3 Leon. 121. When the evidence is given, the *jury* are to be kept together till they bring in their verdict, without speech with any, and without meat or drink, fire or candle, otherwise than with leave of the court, by consent of the parties; and the court may give them leave to eat or drink at the bar, but not out of court. 1 Inst. 227.

If *jurymen* after sworn, either before or after they are agreed of their verdict, eat and drink, the verdict may be good; but they are fineable: And if it be at the charge of either party, the verdict is void. Dalis. 10. Cro. Jac. 21. If they agree to cast lots for their verdict, or to bring in guilty or Not guilty, as the court shall seem

inclined, they may be fined, 2 Lev. 205. Cro. Eliz. 779. But a *jury* have been permitted to recall their verdict; as where one was indicted of felony, the *jury* found him Not guilty, but immediately before they went from the bar, they said they were mistaken, and found him guilty, which last was recorded for their verdict. Plowd. 211.

Juries are fineable, if they are unlawfully dealt with to give their verdict; but they are not fineable for giving their verdict contrary to the evidence, or against the direction of the court; for the law supposes the *jury* may have some other evidence than what is given in court, and they may not only find things of their own knowledge, but they go according to their consciences. Vaugh. 153. 3 Leon. 147. Attaint may lie against a *jury* in a civil cause, for going contrary to evidence, in case of any corruption. Vaugh. 144. And *jurors* are subject to no prosecution for giving their verdicts, except by way of attaint for a false verdict; in which case being found guilty, they are punishable by loss of lands and goods, their houses to be rased, and their bodies cast into prison; and the party is to be restored to all that he lost by the verdict; but this punishment is altered by the Stat. 23 Hen. 8. c. 3. 2 Hawk. 147. For a false verdict, in that point which is merely out of the issue, the *jury* may not be sued. Hob. 53, 114, 227. If a *jury* find matter not in issue or pertinent, it will be void: So if it be against law and sense, &c.

They are to adjudge upon the evidence given; but the *jurors* may not contradict what is agreed in pleading between the parties; if they do, it shall be rejected; and where the *jury* finds the fact, but conclude upon it contrary to law, the court may reject the conclusion. 1 And. 41. 10 Rep. 56. Co. Litt. 22. Hob. 222. The *jury* may find a thing done in another county, upon a general issue; and foreign matters done out of the realm, &c. Moor c. 238. Godb. 33. *Jurors* having once given their verdict, altho' it be imperfect, shall not be sworn again in the same issue, unless it be in assize. 2 Cro. 210. If a *jurymen* is guilty of bribery, he is disabled to be of any assize or *jury*, and to be imprisoned and ransomed at the King's will. 5 Ed. 3. c. 10. *Jurymen* accused of bribery, are to be tried presently by a *jury* then taken. 34 Ed. 3. c. 8. And if a *juror* takes any thing of either party to give his verdict, he shall pay ten times as much as taken; or suffer a year's imprisonment. 38 Ed. 3. c. 12. But *jurymen*, where there is a full *jury*, and they try the cause, are to have their charges allowed them. 2 Lill. 125.

If a *jury* take upon them the knowledge of the law, and give a general verdict, it is good; but in cases of difficulty, it is best and safest to find the special matter, and leave it to the judges to determine what is the law upon the fact. 1 Inst. 30. A *jury* sworn and charged in case of life and member, cannot be discharged till they give a verdict: In civil cases, it is otherwise, as where nonsuits are had, &c. And sometimes when the evidence had been heard, the parties doubting of the verdict, do consent that a *juror* shall be withdrawn or discharged. 1 Inst. 154, 227.

Special Jury, Is where either party is of opinion, that the persons who usually attend on common juries may not be of sufficient knowledge and experience to determine the point in question, and would prefer men who in all probability have had a more liberal education and who possess more extensive knowledge, &c. then the court upon motion orders the sheriff to attend the Secondary or prothonotary, with his book of freeholders of the county, and he, in the presence of the attorneys on both sides, is to strike a *jury*: And when a cause of consequence is to be tried at the bar, the court on motion and affidavit made, will make a rule for the secondary or prothonotary to name forty-eight freeholders; and each party is to strike out twelve, one at a time, the plaintiff or his attorney beginning first, and the remainder are to be the *jury* for the trial; and this is called a *Special Jury*. Trin. 23 Car. B. R. 2 Lill. 123.

How *special juries* are to be struck, see Annals, 158.

The nomination of a *special jury*, is to be in the presence of the attorneys on each side; but if either of them

refuse to come, then the secondary, &c. may proceed *ex parte*, and he shall strike twelve for the attorney who makes default. *Trin. 8 W. 3. B. R.*

It has been also adjudged, that if a rule is made for a *special jury*, and it is not expressed that the master of the office or secondary shall strike forty-eight freeholders, and that each of the parties shall strike out twelve; in such case the master may strike the twenty-four, and neither of the parties strike out any. *1 Salk. 405.* This is never done in a capital cause. *T. Jones 222.* A *special jury* may be granted to try a cause at bar, without the consent of parties; but never at the *Nisi prius*, unless good and sufficient cause be shewn by affidavit. *Pasch. 10 Geo. 1.* A rule may be made for a good jury, and that a special verdict may be found, &c. *Mod. Caf. in Law and Eq. 221.*

By the late act, in trials of issues on indictments, &c. and in all actions whatsoever, on the motion of any prosecutor, plaintiff or defendant, &c. the courts at *Westminster* may order a *special jury* to be struck in such manner as upon trials at bar: And when any *special jury* shall be ordered by rule of the said courts in any cause arising in any city, &c. the jury is to be taken out of lists or books of persons qualified, which shall be produced and brought by sheriffs, &c. before the proper officer, as the freeholders book is for striking juries in causes arising in counties. *Stat. 3 Geo. 2. c. 25.* The justices of assize for the counties palatine of *Chester, Lancaster, &c.* upon motion in behalf of the King, or any prosecutor, or defendant, in an indictment, information, or any suit, may appoint a jury to be struck for trial of issues in like manner as *special juries* in the courts of law at *Westminster*. *6 Geo. 2. c. 37.* And by this statute, the *3 & 4 Geo. 2.* are made perpetual.

Persons summoned on juries in courts of record in cities, corporations, and franchises, and not attending, may be fined. *29 Geo. 2. c. 19.* Touching the affairs of *merchants*, where two merchants are plaintiff and defendant, a jury of merchants may be returned to try the issue between them. The court was moved that a jury of merchants might be returned to try an issue between two merchants, and it was granted; *because it was conceived they might have better knowledge of the matters in difference than others who were not of that profession.* *Hill. 21 Car. B. R.* When an alien is plaintiff or defendant in a cause, the jury ought to be half foreigners and half English; but it is not necessary that the foreigners be all of the same country. *2 Lill. 125.* And if the trial is by all English jurors, it is not error; where the party slips his time, and does not pray trial by an equal number of aliens, &c. See *Challenge, Verdict.*

Trial by jury, Was anciently called *Duodecim virale iudicium.*

By *24 Geo. 2. c. 18. s. 1.* The party applying for *special jury*, to pay the fees of striking the same and all expenses thereby occasioned and not to be allowed it in costs, unless the judge certifies that it was a cause proper to be tried by a *special jury.* *Vide the Stat.*

As to fining jurors for not appearing, vide *29 Geo. 2. c. 19.*

Vide for the learning at large on the subject of juries, *3 New Abr. 230.* See *Judicium parium.*

Turrock, Is said to be a kind of cork, mentioned in the statute. *1 R. 3. c. 8.*

Jus, Signifies law or right, authority and rule. *Litt. Dist.*

Jus accrescendi, Is the right of survivorship between jointenants. *Litt. 280. 1 Inst. 180. Black. Com. 2 V. 184.*

Jus ad rem. An inchoate and imperfect right, such as a parson promoted to a living acquires by nomination and institution. *Black. Com. 2 V. 312.*

Jus Anglorum. The laws and customs of the *West Saxons*, in the time of the *Heparchy*, by which the people were for a long time governed, and which were preferred before all others, were termed *Jus Anglorum.*

Jus Coronæ, The right of the Crown; and it is part of the law of England, tho' it differs in many things from the general law relating to the subject. *1 Inst. 15.* The

King may purchase lands to him and his heirs, but he is seized thereof *in jure coronæ*; and all the lands and possessions whereof the King is thus seized, shall follow the crown in descents, &c.

Jus Curialitatis Angliæ. See *Curtsey of England.*

Jus duplicatum, Is where a man hath the possession as well as a property of any thing. *Black. lib. 4. tract. 4. c. 4. Black. Com. 2 V. 189.*

Jus Gentium, Is the law by which kingdoms and society in general are governed. *Selden.*

Jus Habendi & Retinendi, Right to have and retain the profits, tithe, and offerings, &c. of a rectory or parsonage. *Hugh's Parsons Law 188.*

Jus Hereditatis, The right or law of inheritance.

Jus in re, Complete and full right. Such as a person acquires, on promotion to a living, who after nomination and institution hath corporal possession delivered to him, for till such delivery of corporal possession he had only *jus in rem.* *Black. Com. 2 V. 31.*

Jus Patronatus, Is a commission granted by the bishop to some persons to inquire who is the rightful patron of a church. If two patrons present their clerks, the bishop shall determine who shall be admitted by right of patronage, &c. on commission of inquiry of six clergymen, and six laymen, living near to the church; who are to inquire on articles as a jury, Whether the church is void? Who presented last? Who is the rightful patron? &c. But if coparceners severally present their clerks, the bishop is not obliged to award a *jus patronatus*, because they present under one title; and are not in like case where two patrons present under several titles. *5 Rep. 102. 1 Inst. 116.* The awarding a *jus patronatus* is not of necessity, but at the pleasure of the ordinary, for his better information who hath the right of patronage, for if he will at his peril take notice of the right, he may admit the clerk of either of the patrons, without a *jus patronatus.* *1 Leon. 168.* A bishop may award a *jus patronatus* with a solemn premonition to all persons, *quorum interest*, &c. where he knows not who is the patron, to give notice of an avoidance by deprivation, &c. *1 Hob. 318.* This inquiry by *jus patronatus* is to excuse the ordinary from being a disturber. *Jus patronatus* is not within the statute of limitations, *1 M. Sess. 2. c. 5.* In whose name, and under what title a *jus patronatus* is to issue. See *stat. 1 Ed. 6. c. 2. sect. 3.* And *Black. Com. 3 V. 246.*

Jus Possessionis, A right of seisin or possession; and a parson hath a right to the possession of the church and glebe, for he hath the freehold, and is to receive the profits to his own use. *Parf. Law. 188.*

Jus Presentationis, The right of the patron of presenting his clerk unto the ordinary to be admitted, instituted and inducted into a church. *Ibid.*

Jus Recuperandi, Intrandi, &c. A right of recovering and entering lands, &c.

All these rights following the relation of their objects, are the effects of the Civil Law. *Co. Litt. 266.*

Justa, A certain measure of liquor, *quasi justa mensura*; being as much as was sufficient to drink at once. *Mon. Ang. Tom. 1. pag. 149.*

Justs, (Fr. *jeuilla*, i. e. *decursus*) Were exercises between martial men and persons of honour, with spears on horseback; and differed from *tournaments*, which were military contentions, and consisted of many men in troops; whereas *jeuilla* were usually between two men singly. They are mentioned in the statute *24 Hen. 8. c. 13.* and are now disused. See *Tournament.*

Justice, (*justitia*) Is a constant, righteous inclination to give every one his due; or the act of doing what is right and just. *Chamb. Johnson, Locke, Insist.* The delaying justice is an obstruction to and kind of denial thereof; but this is understood of unnecessary and unjust delay; for sometimes it is convenient for the better finding out the truth, and preparation of parties, that they may not be surprised. *Justice* and right shall not be sold, denied or delayed. *Mag. Chart. 9 Hen. 3. c. 29.* Right shall be done to all without respect. *Stat. West. 1. c. 1. Ed. 1. c. 1.* Justice shall not be delayed for any command

under the Great Seal, *Ed. 2. Ed. 3. c. 8. 14. Ed. 3. Stat. 1. c. 14. 11 R. 2. c. 10. See Black. Com. 1. l. 141, 266. 3 V. 109. 4 V. 128, 179.*

Justice, (justiciarius) Signifies an officer deputed by the King to administer justice, and *do right by way of judgment*; and is called justice, because in ancient time the Latin word for him was *justicia*, and for that he hath his authority by deputation, and not *jure magistratus*. *Grauvil, lib. 2. c. 6.* In the *King's Bench* and *Common Pleas*, there are Chief Justices; the former of which, called *Capitalis Justiciarius Banci Regii, vel ad placita coram rege tenenda*, hath the title of lord whilst he enjoys his office, and is stiled *Capitalis Justiciarius*, because he is chief of the rest; and for this reason he hath usually the title of Lord Chief Justice of England. This justice was anciently created by letters patent under the Great Seal; but is now made by writ in this short form: *Rege, &c. Roberto Raymond Mil salutem, fecimus quod constituimus vos justiciarium nostrum capitalem ad placita coram nobis tenenda, quamdiu vos bene gesseritis, &c. Teste, &c.* And the ancient dignity of this supreme magistrate was very great; he had the prerogative to be vicegerent of the kingdom, when any of our Kings went beyond sea, being chosen to this office out of the greatest of the nobility; and had the power alone, which afterwards was distributed to three other great magistrates, that is, he had the power of the Chief Justice of the *Common Pleas*, of the Chief Baron of the *Exchequer*, and the Master of the *Court of Wards*; and he commonly sat in the *King's Palace*, and there executed that authority which was formerly performed *per comitem palatii*, in determining differences which happened between the barons and other great persons of the kingdom, as well as causes criminal and civil between other men: But King Richard I. first diminished his power, by appointing two other justices; to each whereof he assigned a distinct jurisdiction, *viz.* to one the North parts of England, to the other the South; and in the reign of King Edward I. they were reduced to one court, with a further abridgment of their authority, both as to the dignity of their persons, and extent of their jurisdiction; for no more were chosen out of the nobility as anciently, but out of the commons, who were men of integrity, and skilful in the laws of the land; whence it is said the study of the law dates its beginning. *Origines Judiciales.*

In the time of King John, and other of our ancient Kings, it often occurs in charters of privilege, *Quod non ponatur respondere, nisi coram nobis, vel capitali justitia nostra*: And this high officer hath at this time time a very extensive power and jurisdiction in pleas of the crown; and is particularly intrusted not only with the prerogative of the King, but the liberty of the subject. The Chief Justice of the *Common Pleas* hath also the title of Lord whilst he is in office, and is called *dominus justiciarius communium placitorum, vel dominus justiciarius de banco*; who with his assistants did originally, and doth yet, hear and determine *Common Pleas*, in civil causes, as distinguished from the King's pleas, or pleas of the crown. *Bract. lib. 3.* The Chief Justices are installed or placed on the bench by the Lord Chancellor; and the other justices by the Lord Chancellor and the Lord Chief Justices. Besides the Lords Chief Justices and the other justices of the courts at *Westminster*, there are many other justices commissioned by the King to execute the laws; as justices of assize, of the *Forest*, of *Nisi prius*, *Oyer and Terminer*, &c. all of them treated of under their heads; and *Justices of Peace*, &c.

Justice of the forest, (Justiciarius forestæ.) Is also a Lord by his office, and hears and determines all offences within the forest, committed against vert or venison: Of these there are two, whereof one hath jurisdiction over all forests on this side *Trent*, the other of all beyond it. The chief point of their jurisdiction consisteth upon the articles of the King's charter, called *Charta de foresta*, made Anno 9 Hen. 3. concerning which see *Camd. Brit. p. 214. See Protoforestarius.* The court where this justice sits and determines, is called *The justice-seat of the forest*, held once every three years. *Mainwood's Forest Laws, cap. 24.* He is also called *Justice in eyre of the forest*; and is the only justice that

may appoint a deputy, by the statute of 33 Hen. 8. c. 35.

Justice of the hundred, (Justiciarius Hundredi.) *Erat ipse hundredi Dominus, qui & centurio & centenarius, hundredique aldermannus appellatus est. Præter omnibus hundredi sibi propriis, cognovitque de causis majusculis, quæ in eisdem finiri non poterunt. Spelm.*

Justitiements, from justitia. All things belonging to justice. *Co. on Westm. 1. fol. 225.* Also the effects or execution of justice or of jurisdiction.

Justices of assize, (Justiciarii ad capiendas assisas.) Are such as were wont by special commission to be sent (as occasion was offered) into this or that county, to take assizes for the ease of the subjects; for as these assizes pass always by jury, many men could not, without damage and charge, be brought to London, therefore justices for this purpose, by commission particularly authorized, were sent to them. For it seems, that the justices of the *Common Pleas* had no power to take assizes till the Stat. of 8 R. 2. c. 2. by which they were enabled to it, and to deliver gaols. And the justices of the *King's Bench* have by that statute such power affirmed unto them, as they had one hundred years before. These commissions *Ad capiendas assisas*, have of late years been settled and executed only in *Lent*, and the *long vacation*, (called now the *Lent* and *Summer assizes*) when the justices, and other learned lawyers, may be at leisure to attend those controversies; whereupon it also falls out, that the matters that were wont to be heard by more general commissions of justices in eyre, are heard all at one time with these assizes, which was not so of old, as appears by *Bracton, lib. 3. cap. 7. num. 2. Habeat etiam justiciarios itinerantes de comitatu in comitatum, quandoque ad omnia placita; quandoque ad quedam specialia, sicut assisas, &c. & ad gaolas deliberandas; quandoque ad unam vel duas; non plures.* And by this means the justices of both benches being worthily accounted the fittest of all others, and their assistants, were employed in these affairs. But no justice of either bench, or any other, may be justices of assize in his own county, Anno 8 R. 2. c. 2. and 33 Hen. 8. c. 24. And those who now are called justices of assize, and twice every year go the circuit, by two and two, thro' all England, dispatch their several businesses by several commissions. *Crompt. Jur. fol. 210.* For they have one commission to take assizes, another to deliver gaols, another of *oyer and terminer*, &c. That justices of assizes and justices in eyre did anciently differ, appeareth by 27 Ed. 3. cap. 5. And that justices of assize and justices of gaol-delivery were different, is evident by 4 Ed. 3. c. 3. The oath taken by the justices of assize is all one with that taken by the justices of the *King's Bench*. Old Abridgement of Statutes, tit. *Sacramentum Justiciariorum.* Cowell.

Justices of both benches, Shall decide pleas commenced before other matters be arraigned, *St. Westm. 1. 3 Ed. 1. c. 46.*

Justices in eyre (Justiciarii itinerantes.) Are so termed of the old French word *erre*, as (*a grand erre, i. e. magnis itineribus*), proverbially spoken. These in ancient time, were sent with commission into divers countries to hear such causes especially, as were termed *pleas of the crown*. And this was done for the ease of the people, who must else have been hurried to the King's Bench, if the case were too high for the county-court: They differed from the justices of *oyer and terminer*, because they (as we said before) were sent upon one or few special causes, and to one place; whereas the justices in eyre were sent thro' the provinces and counties of the land, with more indefinite and general commission, as appeareth by *Bracton, lib. 3. c. 11, 12, 13.* and *Britton, cap. 2.* And again, because the justices of *oyer and terminer* were sent uncertainly upon any uproar, or other occasion in the country; but these in eyre (as Mr. *Gwyn* sets down in the *Preface to his Reading*), were sent but once in every seven years; with whom agrees *Horne* in his *Mirror of Justices, l. 2. c. Queux poient estre assours, &c. & l. 2. cap. Des peches criminals, &c. al just del Roy, &c.* And *lib. 3. cap. De justices in eyre*: Where he also declares what belongs to their office. But according to *Orig. Juridiciales*,

Juridicales, they went oftener. These were instituted by King Henry the Second, as *Camd.* in his *Brit. witnesseth*, pag. 104. and *Hoveden par. post. suor. Annal. fol. 113.* both of them these words, *Justitii itinerantes, constituti per Henricum secundum, qui divisit Regnum suum in sex partes, per quarum singulas tres justiciarios itinerantes constituit, &c.* In some respect they resembled our justices of assize at present, tho' their authority and manner of proceeding much differ. *Co. Litt. fol. 293. Cowell.*

Justices of Gaol-Delivery, (*Justitii ad gaolas deliverandas*.) Are those who are sent with commissions to hear and determine all causes appertaining to such, who for any offence are cast into gaol: part of their authority is to punish such as let to mainprize those prisoners who are not bailable by law, nor by the statute *De Finibus*, cap. 3. *F. N. B. fol. 151.* These seem in ancient time to have been sent into the country upon several occasions; but afterwards justices of assize were likewise authorized to the like purposes. *Anno 4 Ed. 3. c. 3.* Their oath is all one with others of the King's justices of either bench. *Old Abridgment of the Statutes*, tit. *Sacramentum Justiciariorum. Cowell.*

Justices of assize, if laymen, shall deliver the gaols. 27 *Ed. 1. st. 1. c. 3.*

The justices of peace shall deliver over their indictments to the justices of gaol-delivery. 4 *Ed. 3. c. 2.*

Shall be sworn like the other judges. 2 *Ed. 3. c. 3.*

Justices of the Jews, (*Justitii ad custodiam Judeorum assignati*.) King Richard 1. after his return out of the Holy Land, anno 1194. appointed particular justices, laws, and orders, for preventing the frauds, and regulating the contracts and usury of the Jews. *Hoveden. parte post. pag. 745. Claus. 3 Ed. 1. m. 19.*

Justices of labourers, Were justices heretofore appointed to redress the forwardness of labouring men, who would either be idle, or have unreasonable wages. See 21 *Ed. 3. c. 1.* 25 *Ed. 3. c. 8.* and 31 *Ed. 1. c. 6.*

Justices of Nisi prius, Are all one at this time with justices of assize, for it is a common adjournment of a cause in the Common Pleas, to put it off to such a day, *Nisi prius Justitii venerint ad eas partes ad capiendas assisas*; and upon this clause of adjournment they are called justices of Nisi prius, as well as justices of assize. Their commission you may see in *Crompt. Juris. fol. 204.* yet with this difference between them, that justices of assize have power to give judgment in a cause, but justices of Nisi prius only to take the verdict. But in the nature of both their functions, this seems to be the greatest difference, that justices of Nisi prius have to deal in causes personal as well as real; whereas justices of assize, in strict acceptation, meddle only with the possessory writs called *Assise*. *Cowell.*

Justices of oyer and terminer, (*Justitii ad audiendum & terminandum*.) Were justices deputed upon some special or extraordinary occasions. *Fitzberbert* in his *Nat. Brev.* saith, That the commission d'oyer and terminer is directed to certain persons upon any great riot, insurrections, heinous misdemeanors, or trespasses committed. And because the occasion of granting this commission should be maturely weighed, it is provided by the statute made 2 *Ed. 3. c. 2.* That no such commission ought to be granted, but that they shall be dispatched before the justices of the one bench or other, or justices errant, except for horrible trespasses, and that by the special favour of the King. The form of this commission, see *F. N. B. f. 110.*

Justices of the pabilion, (*Justitii pavilonis*.) Are certain judges of a pie-powder court, of a most transcendent jurisdiction, held under the bishop of Winchester at a fair on St. Giles's Hill, near that city, by virtue of letters patent granted by Richard 2. and Edward 4. *Episcopus Wynton. & successores suos, a tempore quo, &c.* Justitios suos, qui vocantur Justitii pavilonis, cognitiones placitorum & aliorum negotiorum eadem feria durante, necnon claves portarum & custodiam prædictæ civitatis nostræ Wynton, pro certo tempore servæ illius, & nonnullas alias libertates, immunitates & consuetudines habuisse, &c. See the patent at large in *Prynne's Animad.* on 4 *Inst. fol. 194.*

Justices of the Peace, (*Justitii ad Pacem*) Are those who are appointed by the King's commission to keep the peace of the county where they dwell; and are rather commissioners of the peace, of whom some of the greater quality are of the quorum, because business of importance may not be dispatched without the presence of them; or one of them. *Justices of peace,* (*Polidore Virgil* tells us,) had their beginning in the reign of William 1st, called the Conqueror; but Sir Edward Coke was of opinion, that in the sixth year of K. Ed. 1. *Prima fuit institutio justiciariorum pro pace conservanda.* Mr. Prynne affirms, that in the reign of King Hen. 3. after the agreement made between that King and his barons, guardians ad pacem conservandam were constituted; And Sir Henry Spelman differs from both these, being of opinion that they were not made until the beginning of the reign of King Ed. 3. when they were thought necessary for suppressing commotions, which might happen upon dethroning of K. Ed. 2.

It is certain the general commission of the peace, by statute, began 1 *Ed. 3.* Tho' before that time there were particular commissions of the peace to certain men, in certain places; tho' not throughout England. 2 *Nelf. Abr. 1063.* Heretofore there were conservators of the peace at the Common law, elected by the county, upon a writ directed to the sheriff: But the election of conservators is transferred by statutes from the people to the King; and at length justices of peace are created conservators of the peace by commission or letters patent under the Great Seal: The power of constituting them is only in the King; tho' they are generally made at the discretion of the Lord Chancellor or Lord Keeper, by the King's leave; and the King may appoint in every county in England and Wales as many as he shall think fit. 1 *Inst. 174, 175.* At first the number of justices was not above three or four in a county. 18 *Ed. 3.* Afterwards the number was limited to six in every county; whereof two were to be of the best quality, (such as we now call of the quorum) two of the law, and two others. And after there was to be one lord, and three or four of the most worthy of the county, with some learned in the law. 34 *Ed. 3.* By the statute 14 *R. 2.* eight justices of peace were to be assigned in every county: And the number of justices has greatly increased since their first institution; Mr. Lambard above one hundred years ago complaining of their excessive number; and after him the learned Spelman takes notice that there were above threescore in each county: they are now without limitation; and their prodigious increase with the unsuitable appointment many times made of persons for this trust, hath rendered the office contemptible in the eye of our best gentry, for whom it was originally intended; it hath therefore been proposed, that in each county there should be eight honorary justices constituted of men of quality, who should not be obliged to an attendance any farther than their zeal for justice, and love for their country shall incline them; and the like number of acting justices, gentlemen capable of business, who should constantly attend, and be intitled to a reward for their pains, and upon any neglect be subject to penalties, *Lambard's Just.*

Justices of peace were formerly to be allowed 4 s. a day during their attendance at the quarter-sessions, to be paid by the sheriffs of counties. 12 *R. 3. 2 H. 5. 18 H. 6.* Attornies, &c. are incapable to be in the commission of the peace. 5 *Geo. 2. cap. 18.* By the statute 18 *Geo. 2. c. 20.* No person shall be capable of being a justice of peace, or acting as such, who shall not have, in law or equity, for his own use in possession, a freehold, copyhold, or customary estate for life, or some greater estate, or for years determinable upon a life or lives, or 21 years, in lands, &c. of the clear yearly value of 100 l. over and above all incumbrances, rents and charges; or intitled to the immediate reversion or remainder in lands, &c. of 300 l. per ann. and who shall not take the oath in this act mentioned, under the penalty of 100 l. to be recovered by action of debt, and the proof of the qualification to lie on the defendant; and if he insists on any lands not mentioned in the oath, he is to give notice of them; and lands not mentioned in the oath or notice are not to be allowed.

This

This act not to extend to cities or towns, &c. the board of green cloth, or the two universities. Justices of peace are to hold their sessions four times a year, i. e. the first week after Michaelmas, the Epiphany, Easter, and St. Thomas called Becker, being the 7th of July. Stat. 2 H.

5. They are justices of record, for none but justices of record can take a recognizance of the peace: And their power arises from their commission, or from statutes by virtue of these words in their commission, viz. *Sciatis quod assignavimus vos conjunctim & divisim & quolibet vestrum justiciaribus nostris ad pacem nostram in comitatu nostro S. conservandum*, &c. every justice of peace hath a separate power, and may do all acts concerning his office apart and by himself; and even may commit a fellow justice upon treason, felony, or breach of the peace: And this is the ancient power which conservators of the peace had at Common law. But it has been held, that one justice of the peace cannot commit another justice, for breach of the peace: tho' the justices in sessions may do it. *Lamb. Just.* 385. *Jenk. Cent.* 174. By virtue of another *assignavimus*, or clause in the commission, two or more justices of the peace (one of the *quorum*) have a joint power to inquire by jury of all offences mentioned in the commission; to take indictments, and grant process thereupon; and to hear and try offences; which are matters to be transacted at the quarter-sessions. And by the statutes they may act in many cases where their commission doth not reach; the statutes themselves being a sufficient commission. *Lamb. lib.* 4. *Wood's Inst.* 79, 80. The statute 4 H. 7. c. 12. 33 H. 8. c. 10. and 37 H. 8. c. 7. give them a further general power than is expressed either in their commission, or in any particular statute. The particular statutes are to be executed as they direct; wherein if no express power is given to any one justice, he can admonish only, and if not obeyed, may make presentment of the offence upon the statute, and with his fellow justices hear and determine it in sessions; or he may bind the offender to the peace, or the good behaviour: some statutes empower one justice of peace alone to act; some require two, three, four justices, &c. And where a special authority is given to justices of peace, it must be *exactly* pursued; or the acts of the justices will not be good. 2 *Salk.* 475.

A justice of peace's oath for the execution of his office, is as follows: 'You shall swear, That in the office of a justice of peace in and for the county of, &c. in all and every the articles in his Majesty's commission enjoined and to you directed, you will do equal right to the rich and poor, according to your knowledge, and the laws and statutes of this realm; you shall not be counsel to any person, in any quarrel depending before you; you shall hold your sessions according to the direction of the statutes in that case made; and you shall cause to be entered the issues, fines, and amerciaments that shall happen to be made, and all forfeitures, without any concealment, and send an account of them to the King's Exchequer; you shall not spare any one for gift or other cause, nor take any thing for doing the business of your office, but the fees and allowances accustomed and fixed by acts of parliament, &c. And in all things you shall well and truly do and execute the office of a justice of peace.' *Dalt. Just.* If a justice of peace does not observe the form of proceeding directed by statute, it is *coram non judice*, and void: but if he acts according to the direction of the statutes, neither the justices in sessions nor B. R. can reverse what he has done.

Jones 170. The power of justices is *ministerial* when they are commanded to do any thing by a superior authority, as by the court of B. R. &c. In all other cases they act as *judges*: but they must proceed according to their commission, &c. And a justice is to exercise his authority only within the county where he is appointed by his commission; not in any city which is a county of itself or town corporate, having their proper justices, &c. tho' in other towns and liberties he may. *Dalt.* When a justice of peace acts to compel another to perform any thing required by law, as where he imprisons or commands any one to be imprisoned, &c. he cannot act out of the jurisdiction of his county; but he may take informations any where to prove offences in the county where committed, and he principally resides, or take a recognizance to prosecute.

Cro. Car. 213. And by a late statute, justices of any county, dwelling in a city that is in itself a county within the county at large, may grant warrants, take informations, make orders, &c. at their own dwelling houses, tho' out of the county, &c. 9 *Geo.* 1. c. 7.

Also justices of peace may do all things relating to the laws for relief of the poor, the passing and punishing vagrants, the repairs of the highways, or concerning parochial taxes or rates, altho' such justices are rated to the taxes, within any place where they execute their office: but no justice shall act in determining any appeal to the quarter-sessions, from any order that relates to the parish where he is so charged. Statute 16 *Geo.* 2. cap. 18. On appeals to justices of peace in the sessions, they are to cause defects in form in orders, &c. to be rectified without charge, and then determine the matters according to the merits of the case; and their proceedings shall not be removed into B. R. without entering into recognizance of 50 l. to prosecute with effect, and pay costs if affirmed, &c. by statute 5 *Geo.* 2. c. 19. No *certiorari* shall issue to remove any order, made by justices of peace of any county, &c. or at the quarter-sessions, unless it be applied for within six months, and proved on oath that six days notice in writing was given to the justices, by whom the order was made, that they or the parties concerned may shew cause against it. 13 *Geo.* 2. c. 18. A man may be a justice of peace in one part of *Yorkshire*, and yet be no justice of peace in every part of the county; this county being divided into separate ridings. *Hill.* 22 *Car. B. R.* Justices of peace have power by their commission to hear and determine felonies and trespasses, &c. 13 *Ed.* 3. c. 2. But this is by a special clause in their commission; otherwise they cannot do it. *H. P. C.* 165. And if a commission of *oyer and terminer* issues to hear and determine felonies, that determines the commissions of justices of peace as to felonies, tho' not as to the peace, &c. The stat. 1 & 2 *Ph. & M.* c. 13. directs justices of peace to take examinations in cases of felony and murder, and to certify them to the justices of gaol-delivery, &c. since which they forbear to try great felonies. *H. P. C.* 166.

Justices of peace may take an information against persons committing treason; issue warrants for their apprehension, and commit them to prison, &c. They commit all felons in order to trial; and bind over the prosecutors to the assizes: And if they do not certify examinations and informations to the next gaol-delivery; or do not bind over prosecutors, &c. they shall be fined. *Dalt.* c. 11. For petit larceny, and small felonies, the justices in their quarter-sessions may try offenders; other felonies being of course tried at the assizes: And in case of felonies, and pleas upon penal statutes, they cannot hold cognizance without an express power given them by the statutes.

Justices of peace in their sessions cannot try a cause the same sessions, without consent of parties, &c. for the party ought to have convenient time, or it will be error. *Cro. Car.* 317. *Sid.* 334. Nor can the sessions of justices refer a matter which ought to be tried, to be determined by another sessions; yet they may refer a thing to another to examine, and make report to them for their determination. 2 *Salk.* 477. The sessions is all as one day, and the justices may alter their judgments at any time while it continues. *Ibid.* 494.

'Tis incident to the office of a justice of peace to commit offenders: And a justice may commit a person that doth a felony in his own view, without warrant; but if it be on the information of another, he must make a warrant under hand and seal for that purpose. If a justice issues a warrant to arrest a felon, and the accusation be false, the justice is excused, where a felony is committed: if there be no accusation, action will lie against the justice. 1 *Leam.* 187. A justice makes a warrant to apprehend a felon, tho' he is not indicted, he who executes the warrant shall not be punished. 13 *Rep.* 76. *Cro. Jac.* 430. If complaint and oath be made before a justice of peace, by one, of goods stolen, and that he suspects they are in such a house, and shews the cause of his suspicion; the justice may grant a warrant to the constable, &c. to search in the place suspected, and seize the goods and person in whose custody they are found, and bring them before him, or some other justice, to give an account how

he came by them; and farther to abide such order, as to law shall appertain. 2 *Hale's Hist. P. C.* 114. The search on these warrants ought to be in the day-time, and doors may be broke open by constables to take the goods; which are to be deposited in the hands of the sheriff, &c. till the party robbed hath prosecuted the offender, to have restitution. *Ibid.* 150, 151.

A justice of peace may make a warrant to bring a person before himself only, and it will be good; tho' it is usual to make warrants to bring the offenders before him or any other justice of the county, &c. And if a justice directs his warrant to a private person, he may execute it. 5 *Rep.* 60. 1 *Salk.* 347. If a justice grants his warrant beyond his authority, the officer must obey; but if it be where the justice has no authority, the officer is punishable if he executes it. Justices of peace may make and persuade an agreement in petty quarrels and breaches of the peace, where the King is not intitled to a fine: tho' they may not compound offences, or take money for making agreements. *Noy* 103. Justices may not intermeddle with property; if they do, action lies against them and the officers who execute their orders. 3 *Salk.* 217.

A justice of peace hath a discretionary power of binding to the good behaviour; and may require a recognizance with a great penalty of one for his keeping of the peace, where the party bound is a dangerous person, and likely to break the peace, and do much mischief. *Pasch.* 1652. 2 *Lill. Abr.* 131. And where a person is to be bound to the good behaviour, for default of sureties he may be committed to gaol. But a man giving security for keeping the peace in *B. R.* or the *Chancery*, may have a *superfedeas* to the justices in the country not to take security; and so where a person hears of a warrant out against him, gives surety of the peace to any other justice, &c.

If one make an assault upon a justice of peace, he may apprehend the offender, and send him to gaol till he finds sureties for the peace; and a justice may record a forcible entry upon his own possession: In other cases he cannot judge in his own cause. *Wood's Inst.* 81. Where a man abuleth a justice by words, before his face or behind his back, in relation to his office, he may be bound to the good behaviour; and if a justice of peace be abused in the execution of his office, the offender may be also indicted and fined. *Crompt.* 149. 4 *Rep.* 16. To say of a justice of peace he doth not understand law, &c. is indictable: And contempts against justices are punishable by indictment and fine at the sessions. 3 *Mod.* 139. 1 *Sid.* 144. But abusing a justice out of his office, by words that do not relate to his office, seems to stand only as in the case of other persons.

Justices shall not be regularly punished for any thing done by them in sessions as judges; and if a justice of peace be sued for any thing done in his office, he may plead the general issue, and give the special matter in evidence; and if a verdict goes for him, or the plaintiff be nonsuit, he shall have double costs. *Stat.* 21 *Jac.* 1. c. 12. Tho' if a justice of peace is guilty of any misdemeanor in his office, information lies against him in *B. R.* where he shall be punished by fine and imprisonment. *Sid.* 192. If a person be never summoned by justices of peace, to be heard and make his defence, before the justices make any order against him, it is a misbehaviour for which an information will lie against them: but it has been held, that it is not absolutely necessary to set it out in the order. *Trin.* 11 *Geo.* 1.

The court of *B. R.* will grant an information against a justice of peace on motion, for sending a servant to to the House of Correction without sufficient cause; if the justice do not shew good cause, &c. *Mod. Cas. in L. and E.* 45. 46. And for contempt of laws, &c. Attachment may be had against justices of peace in *B. R.* on motion of the Attorney General, &c. A justice of peace fined a thousand marks, for corrupt practices, see 1 *Keb.* 727. If a new commission is made and granted for justices of peace, out of which some of the justices in the old commission are omitted, yet what acts they do as justices are lawful till the next sessions, at which the new commission is published, and when the new commission is published, they are to take notice of it, and not act further.

Moor 187. By granting a new commission, discharge under the Great Seal, accession of another office, and by the death of the King, the power and offices of justices of peace determine. 4 *Inst.* 165. But till then they are empowered to act in a great many particular cases by statute.

By *Stat.* 24 *Geo.* 2. c. 44. No writ shall be sued out against any justice of peace, for any thing done by him in the execution of his office, until a notice in writing shall be delivered to him one month before the suing out the same, containing the cause of action, &c. within which month he may tender amends, and if the tender be found sufficient, he shall have a verdict. No such plaintiff shall recover against the justice, unless such notice shall be proved at the trial. If the justice shall neglect to make such tender, or shall make an insufficient tender, he may before issue joined, pay into court such sum as he shall think fit. Where action against a justice and constable, if there be a verdict against the justice, and the constable be acquitted, the plaintiff shall recover such costs against the justice, as to include the costs the plaintiff shall be obliged to pay to the constable. If plaintiff in any such action shall recover against a justice, and the judge shall certify that the injury was wilfully and maliciously done, the plaintiff shall recover double costs. No action shall be brought against a justice for any thing done in the execution of his office, unless commenced within six months after the act committed. By *Stat.* 26 *Geo.* 2. c. 27. No act, order, adjudication, warrant, indenture of apprenticeship, or other instrument made, done or executed by two or more justices, which doth not express that one or more of them is or are of the *quorum*, shall be impeached, set aside, or vacated for that defect only. By the statute 24 *Geo.* 2. c. 55. Where a justice shall grant a warrant against a person residing out of his jurisdiction, a justice of the county, &c. where such person shall reside, shall indorse his name on the warrant, which shall be a sufficient authority to the person to whom the warrant was originally directed to execute the warrant, and carry the person before the justice who indorsed the warrant, or any other justice of the same county, who, if the offence be bailable, shall take bail for the person's appearing at the next sessions for the county, &c. where the offence was committed, and deliver the recognizance and all proceedings to the constable, &c. who apprehended the party, to be by him delivered to the clerk of the peace of the county, &c. where the fact was committed; if the fact be not bailable, or the party shall not give bail, the constable may carry the party before a justice of the county where the fact was committed.

No action lies against the justice, who indorses such warrant, but only against the justice who granted it, if cause. By the *Stat.* 27 *Geo.* 2. c. 20. In all cases of a warrant of distress for levying any penalty inflicted, or money directed to be paid, the justice or justices granting such warrant, may therein order the goods distrained to be sold within a certain time limited in the warrant, to be not less than four days, nor more than eight days, unless the penalty or money, with the reasonable charges of taking and keeping such distress be sooner paid. The officer may deduct the reasonable charges of taking, keeping and selling the distress; and if required shall shew the party his warrant, and permit him to take a copy of it. This not to extend to *Stat.* 7 & 8 *W.* 3. c. 34. nor 1 *Geo.* 1. c. 6. relating to tithes. See *Statutes* 26 *Geo.* 2. c. 14. and 27 *Geo.* 2. c. 16. for settling fees to be taken by justices clerks. See 1 *Geo.* 3. c. 13. for amending an act made 18 *Geo.* 2. concerning the qualification of justices of peace, &c.

[The Editor would have been much fuller under this head, but for two reasons; first, the laws are so voluminous that the nature of this work would not admit sufficient to be useful;—the second, that Dr. Burn hath so fully collected and so well digested all the laws relative to the office and duty of a justice of peace, that every one who is desirous of being acquainted with this part of the law is, or ought to be possessed of that very valuable work, which renders it wholly unnecessary, here, to enlarge on the subject.]

Justices of Peace within Liberties, (*justitarii ad pacem infra libertates*) Are such in cities, and other corporate towns, as the others are of the county; and their authority is all one within the several territories and precincts, having besides the assise of ale and beer, wood, victuals, &c. 27 H. 8. c. 5. But if the King grant to a corporation, that the mayor and recorder, &c. shall be *justices of peace* within the city; if there be no words of exclusion, *justices* of the county have concurrent jurisdiction with them; and the King, notwithstanding his charter, may grant a commission of the peace specially in that city or county. 2 Hale's Hist. P. C. 47. Also where the *justices* of any corporate town, deny doing right; *justices of the peace* of the county may inquire into it, as hath been lately adjudged. Mod. Cas. 164. The *justices of peace* in cities, or towns corporate, may commit persons apprehended within their liberties to the house of correction of the county, &c. which persons shall be liable to the like correction and punishment, as if committed there by any *justices* of the same county. Stat. 15 Geo. 2. c. 24. *Justices* of cities and corporations, are not within the qualification act. 5 Geo. 2. c. 18. See *Mayors*.

Justices of Trail-baston, Were *justices* appointed by King E. 1. during his absence in the Scotch and French wars. They were so stiled, says *Hollingshed*, of trailing or drawing the staff of justice; or for their summary proceeding, according to Sir Edward Coke, who tells us, they were in a manner *justices in eyre*; and it is said, they had a *baston*, or staff delivered to them as the badge of their office, so that whoever was brought before them was *traile ad baston, traditus ad baculum*: whereupon they had the name of *justices de trail-baston*, or *justitarii ad trabendum offendentes ad baculum vel baston*. Their office was to make inquisition through the kingdom on all officers and others, touching extortion, bribery, and such like grievances; of intruders into other mens lands, barretors, robbers and breakers of the peace, and divers other offenders; by means of which inquisitions, some were punished with death, many by ransom, and the rest flying the realm, the land was quieted, and the King gained great riches towards the support of his wars. Mat. Westm. Anno 1305. A commission of *trail baston* was granted to Roger de Grey, and others his associates, in the reign of King Ed. 3. Spelm. Gloss.

Justice-Seat, Is the highest court that is held in a forest, and is always held before the Lord Chief Justice in Eyre of the forest, upon warning forty days before; and there fines are set for offences, and judgments given, &c. *Manswood's Forest Law*, cap. 24. The fine and amercement of the *justices in eyre*, for false judgment, or other trespasss, shall be assessed by the said *justices* upon the oaths of knights, and other honest men, and be estreated into the Exchequer. Stat. 3 Ed. 1. c. 18. And *justices in eyre* shall appoint a time for delivering in all writs by the sheriff, &c. 13 Ed. 1. c. 10. See *Black. Com.* 3 V. 72.

Justiciar, or Justicier, (Fr. *justicier*,) A justice, or *justicier*. The Lord Bermingham, *justicier* of Ireland. Baker's Cron. Angl. fol. 118.

The whole jurisdiction which is now distributed among the several courts of Westminster-Hall, seems in the first reigns after the conquest to have been lodged in one court, commonly called the King's court, where justice is said to have been administered sometimes by the King himself in person, and sometimes by the high justicier, who was an officer of very great authority, and used in the King's absence beyond sea to govern the realm as vice-roy. 2 Harok. P. C. 6.

The first justiciaries after the conquest were Odo bishop of Baieux in Normandy, half brother by the mother to the conqueror, and William Fitz-Osborn, who was vice-roy, and had the same power in the north that Odo had in the south, and was the chief in the conqueror's army. Brady's Preface to the Norman History 151. (B). Dugd. Chron. Series 1.

The next justiciaries were William Earl of Warren in Normandy, a great commander in the battle against Harold, and Richard de Benefacta, alias Richard de Tonebridge, son to Gilbert Earl of Brion in Normandy, and

were constituted in 1073. Brady's Preface, &c. 151. (B). Dugd. Chron. Series 1.

In a great plea between Lanfrank and the said Odo, Goisfrid bishop of Constance in Normandy, was justiciary. Brady's Preface, &c. 151. (C). Dugd. Chron. Series 1.

In the beginning of William Rufus, Odo was again justiciary. William de Carilefo bishop of Durbam, a Norman, succeeded Odo, and then followed Ranulph Flambard in 1099. Afterwards in the reign of H. 1. in 1100. Hugo de Bocland, a Norman, was justiciary, and after him his son Richard Basset; then Roger bishop of Salisbury, was justiciary and chancellor. The next, in the time of King Stephen, was Henry duke of Normandy, afterwards King Henry II. And in Henry the Second's time was Robert de Bello Monte earl of Leicester in 1168, but Alboric de Vere earl of Guisnes, is said to have been justiciary before him; and after earl of Leicester, Richard de Lucie was made justiciary; after him in 1180. Ranulph de Glanvil, that famous lawyer was made justiciary; after him, Hugo de Putates, commonly called Pufus, Putac, or Pudsey, nephew to King Stephen by his sister, was made justiciary in the north parts beyond Trent; and William de Longo-Campo, or Long-Champ, bishop of Ely, was at the same time by Richard the first, made justiciary on the south parts of this side Trent. Then, after the deprivation of William bishop of Ely, Walter archbishop of Rouen in Normandy, was made justiciary of all England. Brady's Preface, &c. 151. (D) (E) (F) 152. (A) (B) (C). See Dugd. Chron. Series 1, 2, 3, 4, 5.

William Long-Champ bishop of Ely, chief justiciar and lord chancellor to Ric. 1. Speed. 473. Fitz Peter, chief justiciar in the first of John. Ib. 487. Hubert de Burgh earl of Kent, chief justiciar. 1 H. 3. Ib. 513. And after him, Stephen Segrave. Ib. 521. The chief justiciar was the minister of regal command in the absence of the King. Ib. 513.

Towards the latter end of the Norman period, the power of the grand justiciar was broken, so that the *Aula Regis*, which before was one great court where the justiciar presided, was divided into four distinct courts, viz. Chancery, Exchequer, King's Bench, and Common Pleas. Gilb. Hist. View of the Court of Exchequer 7. cites Madd. 2, 4. it determined about the 45 H. 3. Brady's Preface, &c. 154. b.

The chancellor was the first in order on the left hand of the justiciary, and as he was a great person in court, so he was in the Exchequer; for no great thing passed but with his consent and advice; nothing could be sealed without his allowance and privy. But the justiciary surmounted him and all others in authority, and he alone was endowed with and exercised all the power which afterwards was executed by the four chief judges, viz. the Ch. Just. of B. R. the Ch. Just. of C. B. the Ch. B. of the Exchequer, and the Master of the Court of Wards. Brady's Preface to the Roman History 153. (B). As long as the power of the justiciar continued, the *Aula Regis* was one court, and only distinguished by the several officers; for all the officers were united under the justiciar, and he was the governor and superintendent of the courts. Gilb. Hist. View of the Exchequer 10.

Justiciatus, Judicature, prerogative. Cowell.
Justices, Is a writ directed to the sheriff in some special cases, by virtue of which he may hold plea of debt in his county court for a large sum; whereas otherwise by his ordinary power he is limited to sums under 40s. F. N. B. 117. Kitch. 74. It is called *justices*, because it is a commission to the sheriff to do a man justice and right, beginning with the word *justices*, &c. Bract. lib. 4. makes mention of a *justices* to the sheriff of London, in a case of dower; and it lies in account, annuity, customs and services, &c. New Nat. Br. In debt, the writ runs thus: *The King, to the sheriff of S. greeting: We command you, that you justice A. B. that justly and without delay he render to C. D. five pounds, which to him he oweth, as it is said, and as reasonably he can shew, that he ought to render him; that no more clamour thereof we may hear, for default of justice, &c.*

Justifiable Homicide. See Homicide, and Black. Com. 4 V. 178.

Justification.

Justification, (*justificatio*) Is a maintaining or shewing good reason in court why one did such a thing which he is called to answer. *Broke*. And pleas in *justification* are to set forth some special matter whereby the party justifies what he hath done, concerning lands or goods; as that he did it by authority; and this may be by the law, or from another person; wherein to make it right, there must be good authority, which is to be exactly pursued. *Shep. Epit.* 1041. *Justification* may be in trespass, and under writs, process, &c. But a person cannot justify a trespass, unless he confesseth it; for he ought to plead the special matter, and confess and justify what he hath done: and where it cannot be pleaded, *justification* may be given in evidence. 3 *Salk.* 218. Where a defendant justifies in trespass, on his possession, by virtue of any estate, he must shew his title; but when the matter is collateral to the title to the land, it is otherwise. 2 *Mod.* 70. If a sheriff, or other officer, justifies by virtue of any returnable writ, he is to shew that the writ was returned; tho' he need not if the writs are not returnable writs. 1 *Salk.* 409. And it must be shewn from what courts the writs issued. *Ibid.* 517. *Justification* may be by the command of an officer, to aid him, &c. 2 *Nels. Abr.* 1067.

When the action concerns a transitory thing, if the defendant justifies the taking or doing in one place; it is a *justification* in all places: if the action concern a local thing, a *justification* in one place is not a *justification* in another place; for in the former case the place is not material, but the meer doing or taking of the thing is the substance; and in the latter the place is material, as the defendant may be able to justify as to one place, and not in another. *Pasb.* 24. *Car. B. R.* 2 *Lill. Abr.* 134. If the matter of *justification* is local, there the defendant ought to shew the cause specially, and traverse the place; but not where it is transitory. *Cro. Eliz.* 667. If one have corn upon the lands of another, and he take it, and the owner of the ground sues him, he must justify, and may not plead Not guilty. 5 *Rep.* 85. In action for entering a close, and taking corn; the defendants may justify they did it as servants to the parson; and that the corn was tithe, severed from the nine parts, &c. 2 *Keb.* 44. A man may plead in *justification*, that land is his freehold, on making an entry thereon, &c. That one entered a house, to apprehend a felon; or by warrant to levy a forfeiture; to take a distress, &c. And in assault, that he did it by necessity, &c. *Lib. Ent.* Words spoken may be justified, because spoken in a legal way; and for words the defendant may justify in an action; but not in an indictment, &c. 1 *Darv.* 162. 3 *Salk.* 226. A *justification* (in other words) is a special plea in bar; as in actions of assault and battery, *son assault demesne*, that it was the plaintiff's own original assault; (or rather, that the plaintiff first, with force and arms, assaulted the defendant, and he defended himself, and therefore, if any damage happened to plaintiff, 'twas owing to the assault he made on defendant, and in his necessary defence) in trespass, that the defendant did the thing complained of in right of some office which warranted him so to do; or in an action of slander, that the plaintiff was guilty of such or such a crime, and therefore he the defendant, spoke the words. See *Black. Com.* 3 *V.* 306. *Com. Dig.* 5 *V.* 69, 319, &c. There is a *justifiable homicide*, &c. and *justifiable assault*. See *Assault*.

Justificators, (*justificatores*) Are a kind of *compurgators*, or those that by oath justify the innocence, or oaths of others; as in the case of waging of law: and we read in *Spelman*, who leaves this word without explication—*Will. Rex Angliæ H. Camerario & justificatoribus suis, omnibus suis fidelibus Norf. Salutem: inquirete per comitatum quis justius hujusmodi forisfacturam haberet tempore patris mei, sive Abbas Ramefie, &c.*

Justifying Bail. If a man is arrested, and puts in bail, the defendant's attorney may except against the bail, as being, in his opinion, insufficient. In such case, the bail (or other bail in their place) must justify themselves in court, or before a commissioner (for taking bail) in the country, by swearing themselves house-keepers, and each of them to be worth double the sum for which

they are bail, after payment of all their debts. See the *Books of Practice*, and *Black. Com.* 3 *V.* 291.

Justitia, Was anciently used for a judge, and sometimes for a statute, law, or ordinance. *Richardus Dei Gratia, sciat, nos, de communi proborum virorum consilio, fecisse hæc justitias subscriptas.* Hoveden, p. 666.

Justitia, Is often taken for jurisdiction, or the office of a judge. *Leg. Edw. Conf. cap.* 26. *Justitia cognoscens latronis, sua est de homine suo.*

Justitia, He who now is called *justitarius* was formerly called *justitia*, i. e. a judge. *Leg. H. 1. cap.* 42. *A Rege vel justitia ejus, vel a communi utrorumque dominum submoneatur.*

Justitias facere, Is to hold plea of any thing. Mr. Selden, in his *Notes upon Eadmerus*, (mentioning that plea which was held at *Piquenden* between archbishop Lanfrank and Odo bishop of Bayeux,) tells us, *Huic placito interfuerunt Geisfredus episcopus Constantiensis, qui in loco regis fuit, & justitiam illam tenuit, Lanfrancus episcopus qui ut dictum est placitavit, & etiam iuraverunt, &c.*

Justitium, A ceasing from the prosecution of law, and exercising justice in places judicial. *Cowell*.

K.

K A I A, A key or wharf: *Area in littore onerandarum atque exonerandarum navium causa, e compactis tabulis trabibusque (clavium instar) firmata.* Spelm.

Kalagium *Portorium quod kicæ nomine exigit t. h. u. r. ius*: The toll-money paid for loading or unloading goods at a key or wharf. *Pat.* 20 *Ed.* 3. See *Key*.

Kalendar Month Consists of thirty or thirty-one days. (except February, which hath but eight and twenty, and in a leap-year nine and twenty) according to the *Kalendar*; twelve of which months make a year. *Stat.* 12 *Car.* 2. c. 7. 24 *Geo.* 2. c. 23. 25 *Geo.* 2. c. 30.

Kalenda, Rural chapters or conventions of the rural deans and parochial clergy, so called because formerly held on the *kalends*, or first day of every month. *Paroch. Antig.* 640.

Kalends, The beginning of a month, &c. See *Kalends*.

Kantref. According to the description of Mr. Humphrey Lloyd, out of the laws and ordinances of *Howeldda*, a *kantref* had its denomination from one hundred towns, and signifies as much, under which were contained so many commots, which the *Welsh* call *commotud*, and signifies *provincia* or *regio*, and consisteth of twelve manors or circuits, and two townships. We find the word mentioned in *Mon. Angl.* 1 part, fol. 319. thus—*Le premier Conquerreur de trois kantref de la terre de Brecknoch, estoit Bernard de Nefmarch Norman*: See *Cantref*.

Karite, *Carite*, The religious called their best conventual drink, or their strong beer, by this name; because after meals they used to drink their *pocula caritatis*, or *ad caritatem*, i. e. their grace-cups, in this best liquor. *Cowell*.

Karle, (*Sax*) Is a man, and with any addition a servant or clown; as the *Saxons* called a domestick servant, a *huskarle*: from whence comes the modern word *churl*. *Domesd.*

Karrata scani, A cart-load of hay. *Mon. Ang.* tom. 1. p. 548. See *Carella*.

Kay. See *Key*.

Kebbars, (or *Cullers*) The refuse of sheep drawn out of a flock, *ovæ rejiculae*. *Cooper's Thesaur.*

Ketlage, (*kilagium*) A privilege to demand money for the bottom of ships resting in a port or harbour. *Rut. Parl.* 21 *Ed.* 1.

Keelmen, Are mentioned among mariners, seamen, &c. in the *Stat.* 7 & 8 *H.* 3. c. 21.

Keels, To carry coals, &c.

Keep, A strong tower or hold in the middle of any castle or fortification, wherein the besieged make their last efforts of defence, was formerly in England called a *keep*: and the inner pile within the castle of Dover, erected by K. Hen. 2. about the year 1153. was termed the *King's keep*:

so at *Windsor, &c.* It seems to be something of the nature with what is called abroad a *Citadel*.

Keeper of the Forest, (Custos Forestæ) Or chief warden of the forest, hath the principal government over all officers within the forest; and warns them to appear at the court of *justice seat*, on a general summons from the Lord Chief Justice in *Eyre. Manwood, Part. 1. p. 156.*

Keeper of the Great Seal, (Custos magni sigilli) Is a Lord by his office, styled *Lord Keeper of the Great Seal of England*, and is of the King's Privy Council: Through his hands pass all charters, commissions and grants of the King, under the *Great Seal*; without which seal many of those grants and commissions are of no force in law, for the King is by interpretation of law a corporation, and passeth nothing but by the *Great Seal*, which is as the public faith of the kingdom, in the high esteem and reputation justly attributed thereto. The *Great Seal* consists of two impressions, one being the very seal itself with the effigies of the King stamped on it; the other has an impression of the King's arms in the figure of a target, for matters of a smaller moment, as certificates, &c. that are usually pleaded *sub pede sigilli*. And anciently when the King travelled into *France* or other foreign kingdoms, there were two *Great Seals*; one went with the King, and another was left with the *Custos Regni*, or the Chancellor, &c. If the *Great Seal* be altered; the same is notified in the Court of *Chancery*, and publick proclamation made thereof by the sheriffs, &c. 1 *Hale's Hist. P. C.* 171, 174. The *Lord Keeper of the Great Seal*, by statute 5 *Eliz. c. 18.* hath the same place, authority, preeminence, jurisdiction and execution of laws, as the *Lord Chancellor of England* hath, and he is constituted *per traditionem magni sigilli*, &c. and by taking his oath. 4 *Inst.* 87. See *Laub. Archæon.* 65. 1 *Roll. Abr.* 385. The Lord Chancellor or Lord Keeper, is superior, in point of precedence, to every temporal lord. *Stat.* 31 *Hen. 8. c. 10.* See *Black. Com.* 3 *V.* 71.

Keeper of the Privy Seal, (Custos privati sigilli) Is that officer through whose hands all charters, pardons, &c. pass, signed by the King, before they come to the *Great Seal*; and some things which do not pass that seal at all: he is also of the Privy Council, but was anciently called only *Clerk of the Privy Seal*; after which he was named *Guardian del Privy Seal*; and lastly, *Lord Privy Seal*, and made one of the great officers of the kingdom. 12 *R. 2. c. 11.* *Rot. Parl.* 11 *H. 4. Stat.* 34 *H. 8. c. 4.* The *Lord Privy Seal* is to put the seal to no grant without good warrant; nor with warrant, if it be against law, or inconvenient, but that he first acquaint the King therewith. 4 *Inst.* 55. The fees of the clerks under the *Lord Privy Seal*, for warrants, &c. *Vide Stat.* 27 *H. 8. c. 11.* See *Privy Seal*.

Keeper of the Touch, 12 Hen. 6. 14. Seems to be that officer in the King's Mint, at this day called the *Master of the Assay*. See *Mint*.

Keepers of the Liberties of England, By authority of parliament. *Vide Custodes Libertatis.*

Kendal, An ancient barony, written *Concangiam*. *MS.*

Kennets, A sort of coarse *Welsh cloth*, mentioned in the *Stat.* 33 *H. 8. c. 3.*

Kethere, Signifies a custom to have a cart-way; or a commutation for the customary duty for carriage of the lord's goods. *Cowell.*

Kernellare domum, (From Lat. *Crena*, a notch) To build a house formerly with a wall or tower, kernelled with crannies or notches, for the better convenience of shooting arrows, and making other defence. *Du Fresne* derives this word from *quarnellus*, or *quadranellus*, a four-square hole or notch; *ubique patent quarnelli sive fenestre*: And this form of walls and battlements for military uses might possibly have its name from *quadrellus* a four-square dart. It was a common favour granted by our Kings in ancient times, after castles were demolished for prevention of rebellion, to give their chief subjects leave to fortify their mansion-houses with kernelled walls. — *Licentiam dedimus Johanni de H. Quod ipse mansum suum de B. in Cem. &c. Muro de petra & calce firmare & kernellare possit. Dat. 12 Sept. 1312. Paroch. Antiq.* 353.

Kernellatus, Fortified or embattled, according to the old fashion; and the Duke of *Lancaster* claimed to him and his heirs, *Castrum suum de Halton Kernellatum.* 31 *Ed. 3. Pl. de quo Warrant. apud Cestriam.* And we read *Castrum duplici muro Kernellatum, &c. Surv. Dutch. Cornwall.*

Kernes, Idle persons, vagabonds. *Ordin. Hibern.* 31 *Ed. 3. m. 11, 12.*

Kevere, A cover or vessel used in a dairy-house for milk or whey. *Paroch. Antiq. pag. 386.*

Key, (*Kaia* & *caya*, *Sax. Leg. Teut. Key*,) A wharf to land or ship goods or wares at. The verb *caiare*, in old writers, signifies (according to *Scaliger*) to keep in, or restrain; and so is the earth or ground where *keys* are made, with planks and posts. *Cowell.*

The lawful keys and wharfs for lading or landing of goods belonging to the port of *London*, are *Chester's Key*, *Brewer's Key*, *Galley Key*, *Wool-Dock*, *Custom-house Key*, *Bear Key*, *Porter's Key*, *Sab's Key*, *Wiggan's Key*, *Young's Key*, *Ralph's Key*, *Dice Key*, *Smart's Key*, *Somers's Key*, *Hammond's Key*, *Lyon's Key*, *Botolph Wharf*, *Grant's Key*, *Cock's Key*, and *Fresh Wharf*; besides *Billinggate*, for landing of fish and fruit; and *Bridgehouse* in *Southwark* for corn and other provision, &c. but for no other goods or merchandise. Deal boards, masts and timber, may be landed at any place between *Limchouse* and *Wejminster*; the owner first paying or compounding for the customs, and declaring at what place he will land them. *Lex Mercat.* 132, 133. *Stat.* 13 & 14 *Car. 2. c. 11. sect. 14. Rot. Scac.* 19 *Car. 2.*

Keyage, (Kauagium) The money or toll paid for loading or unloading wares at a key or wharf. *Rot. Par.* 1 *Edw. 3. m. 10.* and 20 *Edw. 3. m. 1.*

Keyes, or Keels, (Cudi or Ciules) A kind of long-boats of great antiquity, mentioned in *Stat.* 23 *Hen. 8. c. 18.* *Longæ naves quibus Britanniam primo ingressi sunt Saxones.* *Spel.*

Keyng, Five fells, or pelts, or sheep-skins with their wool on them. *Cowell.*

Keyus, Keys, A guardian, warden, or keeper. — *Nolo etiam quod aliquis fenechalus, constabularius, ballivus, keys, sive forstarius, serviens, vel venator — per terras eorum venientes, ab ipsis nec ab hominibus suis pascantur.* *Mon. Ang.* tom. 2. p. 71. In the *Isle of Man*, the 24 chief commoners, who are as it were conservators of the liberties of the people, are called *Keys* of the island.

Kichell, A cake: It was a good old custom for god-fathers and godmothers, every time their god-children asked them blessing, to give them a cake; which was called a *God's Kichell*. It is still a proverbial saying in some counties, *Ask my blessing, and I will give you some plum-cake.* *Cowell.*

Kiddes, Signifies one that hadges, or carries corn, dead victual, or other merchandise, up and down to sell. *Stat.* 5 *Eliz. c. 12.* They are also called *kiddiers*. 13 *El. cap. 25.*

Kiddele, Kidel, or Kidel, (Kidellus) A dam, or open wear in a river, with a loop or narrow cut in it, accommodated for the laying of weels or other engines to catch fish. 2 *Inst. fol. 38.* *Angustias, machinas sive ingenia in fluminibus posita ad salmones aliosque pisces interceptandos.* Fishermen corruptly call them *kettles*. The word is ancient, for in *Magna Charta, cap. 24.* we read thus, *Omnes kidelli deponantur de cætero penitus per Thamesiam & Medeweyam & per totam Angliam, nisi per costeram maris.* And in a charter made by King *John*, power was granted to the city of *London*, *De kidellis amovendis per Thamesiam & Medeweyam.* 1 *Hen. 4. cap. 12.* it was accorded, *inter alia*, That a survey should be made of the wears, mills, stanks, flukes, and *kidels*, in the great rivers of *England.* *Inq. capit. apud Derb.* 15 *Nov. 1 Eliz. post mortem Tho. Fyndern, &c.* *Et fuit seiscitus de uno kidello vocat. a were, ac de libera piscaria in Portok. Efc. Bundello, 3.* They are now called *kettles*, or *kettle nets*, and are much used on the sea-coasts of *Kent* and *Wales.* *Cowell.*

Kidnapping, Is the stealing and conveying away of a man, woman or child; and is an offence at Common law, punishable by fine, pillory, &c. *Raym.* 474. Also if a

master of a ship, &c. shall, during his being abroad, force any man ashore, and willingly leave him behind, he shall suffer three months imprisonment. 11 & 12 W. 3. c. 7. But the party thus injured may maintain an action against the party offending, for damages sustained on occasion of such treatment, and is not bound to proceed on the statute.

According to *Blackstone*, this is unquestionably a very heinous crime, as it robs the King of his subjects, banishes a man from his country, and may in its consequences, be productive of the most cruel and disagreeable hardships; and therefore the Common law of England has punished it with fine, imprisonment and pillory. *Raym.* 474. 2 *Show.* 221. *Skin.* 47. *Comb.* 10. See also the 11 & 12 W. 3. c. 7. and *Black. Com.* 4 V. 219.

Kilbertan, A vessel of ale, &c. containing the eighth part of an hoghead.

Kilketh, Was an ancient servile payment made by tenants in husbandry.—*Kilketh pro qualibet hundreda 2 denar.* *MS. v. Cowell.*

Killagium, Keelage. *Cowell.*

Killythallion, Is where lords of manors were bound by custom to provide a stallion for the use of their tenants mares. *Selman's Gloss.*

Kilth, *Ac omnes annuales redditus de quadam consuetudine in, &c. vocat. kilth.* *Pat. 7 Eliz.*

Kindred, Are a certain body of persons of kin or related to each other. There are three degrees of kindred in our law; one in the right line descending, another in the right line ascending, and the third in the collateral line; and the right line descending, wherein the kindred of the male line are called *Agnati*, and of the female line *Cognati*, is from the father to the son, and so on to his children in the male and female line; and if no son, then to the daughter, and to her children in the male and female line; if neither son nor daughter, or any of their children, to the nephew and his children, and if none of them to the niece and her children; if neither nephew nor niece, nor any of their children, then to the grandson or granddaughter of the nephew; and if neither of them, to the grandson or granddaughter of the niece; and if none of them, then to the great grandson or great granddaughter of the nephew and of the niece, &c. & sic ad infinitum.

The right line ascending is directly upwards; as from the son to the father or mother; and if neither father nor mother, to the grandfather or grandmother; if no grandfather or grandmother, to the great grandfather or great grandmother; if neither great grandfather or great grandmother, to the father of the great grandfather, or the mother of the great grandmother; and if neither of them, then to the great grandfather's grandfather, or the great grandmother's grandmother; and if none of them, to the great grandfather's great grandfather, or great grandmother's great grandmother, & sic in infinitum. The collateral line is either descending by the brother and his children downwards, or by the uncle upwards: It is between brothers and sisters, and to uncles and aunts, and the rest of the kindred, upwards and downwards, across and amongst themselves. 2 *Nell. Abr.* 1077, 1078.

If there are no kindred in the right descending line, the inheritance of lands goes to the collateral line; but it never ascends in the right line upwards, if there are any kindred of the collateral line, though it may ascend in that line: And there is this difference between the right line descending and the collateral line; that the right of representation of kindred in the right descending line reaches beyond the great grandchildren of the same parents; but in the collateral line, it doth not reach beyond brothers and sisters children; for after them there is no representation among collaterals.

In the right ascending line the father or mother are always in the first degree of kindred; and by the Civil law, if the son died without issue, his father or mother succeeded, and after them his brother or sister, uncle, aunt, &c. But in case of purchase by the son, if he died without issue, his father or mother could not inherit, but his brothers and sisters, &c. by which it appears, that the father cannot succeed the son immediately, though he is the next of kin. It is a constant rule in the collateral line, that those who are of the whole blood are first admitted;

but after brothers and sisters children, the nearest in degree in kindred is to be considered, and not whether they are of the whole or half blood; as for instance; there were two brothers of the whole blood, and one of the half blood, those of the whole blood died, each of them leaving issue a son, then one of the sons died without issue; in this case his uncle of the half blood shall be admitted before the other surviving son of his brother by the whole blood: yet if a man purchase lands and dies without issue, it shall never go the half blood in the collateral line; tho' it is otherwise in case of a descent from a common ancestor.

The children of the brothers and sisters of the half blood, shall exclude all other collateral ascendants, as uncles and aunts, and all remoter kindred of the whole blood in the collateral line; but then the brothers of the half blood, and their children, shall succeed equally *per stirpes*, and not *per capita*, according to the distinct number of their several persons.

There are several rules to know the degrees of kindred; in the ascending line, take the son and add the father, and it is one degree ascending, then add the grandfather, and it is a second degree, a person added to a person in the line of consanguinity making a degree; and if there are many persons, take away one, and you have the number of degrees; as if there are four persons, it is the third degree, if five the fourth, &c. so that the father, son, and grandchild, in the descending line, though three persons make but two degrees: to know in what degree of kindred the sons of two brothers stand, begin from the grandfather and descend to one brother, the father of one of the sons, which is one degree, then descend to his son the ancestor's grandson, which is a second degree; and then descend again from the grandfather to the other brother, father of the other of the sons, which is one degree, and descend to his son, &c. and it is a second degree; thus reckoning the person from whom the computation is made, it appears there are two degrees, and that the sons of two brothers are distant from each other two degrees: For in what degree either of them is distant from the common stock, the person from whom the computation is made, they are distant between themselves in the same degree; and in every line the person must be reckoned from whom the computation is made. If the kindred are not equally distant from the common stock; then in what degree the most remote is distant, in the same degree they are distant between themselves, and so the kin the most remote maketh the degree; by which rule, I, and the grandchild of my uncle, are distant in the third degree, such grandchild being distant three degrees from my grandfather, the nearest common stock. *Wood's Inst.* 48, 49. The Common law agrees in its computation with the Civil and Canon law, as to the right line; and only with the Canon law as to the collateral line. *Ibid.* See *Black. Com.* 2 V. 205.

King, (*Rex*, from Lat. *Rego* to rule, in Sax. *Cuning* or *Coning*) Is a monarch or potentate, who rules singly and sovereignly over a people; or he that has the highest power and rule in the land. The King is the head of the commonwealth; and the learned *Bracon* tell us, *Rex est vicarius & minister Dei in terra, omnes quidem sub eo, & ipse sub nullo nisi tantum sub Deo.* *Bracon.* lib. 1. c. 8. But our King on his coronation, takes an oath of the following purport, *viz.* To govern the people of this kingdom, according to the statutes in parliament agreed on, and the laws and customs of the same; to his power to cause law and justice in mercy to be executed in all his judgments; to maintain to the utmost of his power the laws of God, the true profession of the gospel, and the protestant reformed religion established by law; and preserve to the bishops and clergy their rights and privileges, as by law are appertaining to them: this is the obligatory oath of our Kings, as regulated to be taken by 1 W. & M. c. 6. And the coronation oaths, in former times, were undoubtedly a contract between the King and the people in this nation.

The nature of the government of our King, says *Forseus*, is not only *regal*, but *political*: If it were merely the former, *regal*, he would have power to make what alterations

alterations he pleased in our law, and impose taxes and other hardships upon the subject, whether they would or no; but his government being *political*, he cannot change the laws of the realm, without the people consent thereto, nor burthen them against their wills. *Forrescue's Laud. Leg. Angl.* 17. * It is also said by the same writer, that the King is appointed to protect his subjects in their lives, properties and laws; for which end and purpose he has the delegation of power from the people: likewise our King is such by the fundamental law of our land; by which law the meanest subject enjoys the liberty of his person, and property in his estate; and it is every man's concern to defend these, as well as the King in his lawful rights. *Forrescue*. A late author taking notice of the breaches made in the constitution of this kingdom in several reigns, and the necessity of their being redressed, affirms that is the original power and constitution of the states of the kingdom, to re-institute the regal estate, as when our Kings act arbitrarily and break thro' the constitution, as where there is no immediate heir to succeed the King, so that the throne becomes actually vacant; and without this he takes it there is no perfect constitution. *Britann. Constitut.*

In King *John's Magna Charta* of liberties, there was a clause making it lawful for the barons of the realm to choose twenty-five barons to see the charter observed by the King; with power, on any justice or other minister of the King's failing to do right, and acting contrary thereto, for four of the said barons to address the King, and pray that the same might be remedied; and if the same were not amended in forty days, upon the report of the four barons to the rest of the twenty-five, those twenty-five barons with the commonalty of the whole land, were at liberty to distress the King, take his castles, lands, &c. until the evils complain'd of should be remedied, according to their judgment; saving the person of the King, queen, and their children: And when the evils were redressed, the people were to obey the King as before. King *John's Magna Chart. cap.* 73. But this clause, and some others in favour of liberty, are omitted out of King *Henry III's Magna Charta*; though in a statute made at *Oxford, anno* 42 *Hen.* 3. to reform misgovernment, it was enacted, that twenty-four great men should be named, twelve by the King, and twelve by parliament, to appoint justices, chancellors, and other officers, to see *Magna Charta* observed.

The *barons wars* mentioned in our ancient histories, seem to have proceeded in some measure from a like power granted to them as by the charter of King *John*; and probably the parliament's wars from their example. Sir *Edward Coke* tells us, that if there be a King regnant, in possession of the crown, although he be but *Rex de facto*, and not *de jure*, yet he is *Seignior le Roy*; and another that hath right, if he be out of possession, is not within the meaning of the stat. 11 *H.* 7: c. 1. for the subjects to serve and defend him in his wars, &c. And a pardon, &c. granted by a King *de jure*, that is not likewise *de facto*, is void. 3 *Inst.* 7. A King that usurps the crown, grants licences of alienation or echeats, it will be good against the *rightful King*; so of pardons, and any thing that doth not concern the King's ancient patrimony, or the government of the people: Judicial acts in the time of such a one, bind the right King and all who submitted to his judicature. The crown was tossed between the two families of *York* and *Lancaster* many years; and yet the acts of *royalty* done in the reign of the several competitors, were confirmed by the parliament: And these resolutions were made, because the common people cannot judge of the King's title, and to avoid anarchy and confusion. *Jenk Cent.* 130, 131.

Every King for the time being, has a right to the people's allegiance, who 'tis said are bound by the statute 11 *H.* 7: c. 1. to defend him in his wars against every power whatsoever, and shall incur no pains or forfeiture thereby. 1 *Hawk. P. C.* 36. And a King out of possession, we are bound by the duty of our allegiance to resist. *Ibid.* But in the case of King *Charles* the Second, who was kept out of the exercise of the *kingly* office by traitors and rebels, it was adjudged that he was King both *de facto* and

de jure; and all the acts which were done to the keeping him out, were high treason. *Kel. Rep.* 15.

There may be some Kings *de facto*, to whom it may be dangerous to do any service, *viz.* Such as shall depose a *rightful King*: And according to the *Lord Chief Justice Hale*, if the right heir of the crown be in actual exercise of the sovereignty in one part of the kingdom, and an usurper in the exercise of it in another, the law adjudgeth him in the possession of the crown that hath the true right; and the other is not a *King de facto*, but a disturber and no King: this was the case between King *Ed.* 4. and *Hen.* 6. And the like was held as to Queen *Mary*, who openly laid claim to the crown, and was proclaimed Queen; at the same time the Lady *Jane* was proclaimed Queen at *London* on the nomination of King *Ed.* 6. so that both being *de facto* in possession of the crown, the law adjudged the possession in *Mary*, who had the right of the same. *State Trials* 932.

It is high treason to conspire against the King, Queen, &c. And a person may be guilty of treason against a King, tho' he be not in possession of the crown. The dignity of the *King of England* is imperial; and our Kings have placed on their heads an imperial crown: King *Edgar* wrote himself *imperator & dominus*, &c. But no King of *England* used any seal of arms till the reign of *Rich.* 1. before that time, the seal was the King sitting in a chair of state on one side of the seal, and on horseback on the other side; but this King sealed with a seal of two lions, and King *John* was the first that bare three lions; and afterwards *Ed.* 3. quarter'd the arms of *France*, which has been continued down to this time. Also King *Henry* 8. was the first to whom Majesty was attributed; before which our Kings were called *Hightness*, &c. *Lex Constitut.* 47, 48. The eldest son of the King of *England* is Prince of *Wales*, Duke of *Cornwall*, &c. and the younger sons are born Dukes and Earls of what places the King pleases. *K. Hen.* 2. took his son into a kind of subordinate regality with him, so that there were *Rex Pater* and *Rex Filius*; but he did not divest himself of his sovereignty, but reserved to himself the homage of his subjects. And notwithstanding this King, by consent of parliament, created his son *John* King of *Ireland*; and King *Rich.* 2. made *Robert de Vere* Duke of *Ireland*; and *Ed.* 3. made his eldest son Lord of *Ireland*, with royal dominion; yet it has been held, that the King cannot regularly make a King within his own kingdom. 4 *Inst.* 357, 360. *Hen. de Beauchamp*, Earl of *Warwick*, was by King *Henry* 6. crown'd King of *Wight Island*; but it was resolved, that this could not be done without consent of parliament, and even then our greatest men have been of opinion, that the King could not by law create a King in his own kingdom, because there cannot be two Kings of the same place: And afterwards the same King *Henry* made the same Earl of *Warwick* *Primus Comes totius Angliæ*. A King cannot resign or dismiss himself of his office of King, without consent of parliament; nor could *Hen.* 2. without such consent, divide the sovereignty: there is a sacred band between the King and his kingdom, that cannot be dissolved without the free and mutual consent of both in parliament; and though in foreign kingdoms there have been instances of voluntary cessions and resignations, which possibly may be warranted by their several constitutions, yet by the laws of *England*, the King cannot resign his sovereignty without his parliament. *Sir Matt. Hale's Hist. Coronæ*. But yet let it be remembered, 'twas adjudged by parliament that *James* the Second had abdicated the throne.

If a King hath a kingdom by title of descent, where the laws have taken good effect and rooting; or if a King conquers a Christian kingdom, after the people have laws given them for the government of the country, to which they submit, no succeeding King can alter the same without the parliament. 7 *Rep.* 17. It is nevertheless held, that conquered countries may be governed by what laws the King thinks fit, and that the laws of *England* do not take place in such countries, until declared so by the conqueror, or his successors; here in case of infidels their laws do not cease, but only such as are against the law of God; and where the laws are rejected or silent, they shall

shall be governed according to the rule of natural equity, 2 *Salk. Rep.* 411, 412, 666.

Our Kings have distributed their whole power of jurisdiction to the courts of justice; which courts by immemorial usage have gained a known and stated jurisdiction, that no King can alter without an act of parliament. 2 *Hawk. P. C.* 2. But as it has been resolved, that the successor of every King begins his reign on the very day that the former King died; therefore all patents of judges, sheriffs, justices of peace, &c. determine by the death of the King. Tho' vide *stat. 1 Ann. c. 8.* See 1 *Geo. 3. c. 23.* The Kings of England not having the whole legislative power, if the King and clergy make a canon, tho' it binds the clergy *in re ecclesiastica*, it does not bind laymen; for they are not represented in the convocation, but in parliament: In the primitive church, the laity were present at all synods; and when the empire became Christian, no canon was made without the Emperor's consent, and indeed the Emperor's consent included that of the people, he having in himself the whole legislative power; but the Kings of this kingdom have it not. 2 *Salk. Rep.* 412, 673. Religion, justice, and truth, are the supporters of the crowns of Kings. See *Crown.* See *Black. Com.* 1 *V.* 190, 246. 3 *V.* 254. 4 *V.* 32, 76, 82, &c.

By 5 *Geo. 3. c. 27.* provision is made for the administration of government, in case the crown should descend to any of the children of his Majesty, being under the age of 18 years; and for the care and guardianship of their person. See *King's Prerogative.*

King of heralds, *Rex Heraldorum*, Is a principal officer at arms, that hath the pre-eminence of the society. See *Herald and Garter.* Among the Romans he was called *pater patratus*.

King of the Minstrels, at *Tutbury in com. Staff.* His power and privilege appears by a charter of *Rich. II.* confirmed by *Hen. VI.* in the 21st year of his reign. *Corvill.*

King's Bench (*Bancus Regius*,) from the Saxon *banca*, a bench or form.

We shall here treat of,

- I. The court itself, generally.
- II. Of its criminal jurisdiction.
- III. Of its civil jurisdiction, &c.
- IV. How far its presence suspends the power of other courts, &c.
- V. Of the officers of the court.

I. Of the court of King's Bench.

The court of King's Bench is the court or judgment-seat, where the King of England was sometimes wont to sit in his own person; and therefore it was moveable with the court of King's household, and called *Curia Domini Regis* and *Aula Regia*, as *Gwin* reports in the *Preface to his Reading*; and that therein, and in the court of Exchequer, which were the only courts of the King till Henry the Third's days, were handled all matters of justice, as well civil as criminal.

After the division of the courts, and the establishment of the court of Common Pleas, for the express purpose of determining civil suits, the court of King's Bench was wont in ancient times to be especially exercised in all criminal matters and pleas of the crown, leaving the handling of private contracts and civil actions to the Common Pleas and other courts. *Glanvil, lib. 1. cap. 2, 3, 4. and lib. 10. cap. 18. Smith de Rep. Ang. lib. 2. c. 11. 4 Inst. fol. 70.*

This court hath a president who is Lord Chief Justice of England, with three or four justices assistants; or according to *Fortescue, cap. 51.* four or five, and officers thereto belonging, the clerk of the crown, a prothonotary, and other inferior ministers and attorneys. *Corvill.*

Towards the latter end of the Norman period, the *Aula Regis*, which was before one great court where the justiciar presided was divided into four distinct courts, 1. the court of Chancery, King's Bench, Common

Pleas and Exchequer. *Madox, c. 19. Brañ. lib. 3. c. 7. fol. 105.*

The court of King's Bench retained the greater similitude with the ancient *Curia* or *Aula Regis*, and was always ambulatory, and removed with the King wherever he went: Hence the writs returnable into this court are *Coram nobis ubicunque fuerimus in Anglia*; and all records there are stiled *Coram Rege*, as it is still supposed to have always the King himself in person sitting in it; from whence it obtained the name of the court of King's Bench, and hath always retained a supreme original jurisdiction in all criminal matters; for in these the process both issued, and was returnable into this court; but in trespass it might be made returnable into either the King's Bench or Common Pleas, because the plea was criminal as well as civil. 4 *Inst. 70. 2 Inst. 24. Co. Lit. 71. Dyer 187. Cramp. of Courts 782. 1 Rol. Abr. 94. By Stat. 28 Ed. 1. c. 5.* this court is to follow the King. *King Hen. 3.* sat in person with the justices. *Banco Regis* several times, being seated on a high bench, and the judges in a lower one at his feet: And the King's Bench was originally the only court in *Westminster-Hall*; out of which the courts of Common Pleas and Exchequer seem to have been derived. 2 *Hawk. P. C.* 6.

This court hath supreme authority, the King being still presumed by law to sit there as judge of the court, tho' he doth judge by his judges; and the proceedings are supposed to be *Coram nobis*, that is before the King himself, for which reason all writs in this court are made so returnable, and not *Coram justiciariis nostris*, as is the form in the Common Pleas. 4 *Inst. 73.*

II. Of the criminal jurisdiction of the court of King's Bench.

This court is termed the *Custos morum* of all the realm, and by the plentitude of its power, wherever it meets with an offence contrary to the first principles of justice, and of dangerous consequence if not restrained, adapts a proper punishment to it. 1 *Sid. 168. 2 Hawk. P. C. 6.*

The justices of *B. R.* are the sovereign justices of oyer and terminer, gaol-delivery, and of eyre, and coroners of the land; and their jurisdiction is general all over England: By their preference the power of all other justices in the county, during the time of this court's sitting in it, is suspended; for *in presentia majoris cessat potestas minoris*; but such justices may proceed by virtue of a special commission, &c. *H. P. C. 156. 4 Inst. 73. 2 Hawk. P. C. 32.* It is these justices who have a sovereign jurisdiction over all matters of a criminal and publick nature, judicially brought before them, to give remedy either by the Common law or by statute: And their power is original and ordinary; when the King hath appointed them, they have their jurisdiction from the law. 1 *Hawk. 152. 4 Inst. 74.*

It has a particular jurisdiction, not only over all capital offences, but also over all other misdemeanors of a publick nature, tending either to a breach of the peace, or to oppression or faction, or any manner of misgovernment; and it is not material whether such offences being manifestly against the public good, directly injure any particular person or not. 4 *Inst. 71. 11 Co. 98. 2 Hawk. P. C. 6.*

And for the better restraining such offences, it has a discretionary power of inflicting exemplary punishment on offenders, either by fine, imprisonment or other infamous punishment, as the nature of the crime, considered in all its circumstances, shall require; and it may make use of any prison which shall seem most proper; and it is said, that no other court can remove or bail persons condemned to imprisonment by this court. 2 *Hawk. P. C. 7.*

Also it hath so sovereign a jurisdiction in all criminal matters, that an act of parliament appointing that all crimes of a certain denomination shall be tried before certain judges, doth not exclude the jurisdiction of this court, without express negative words; and therefore it hath been resolved, that 33 *H. 8. cap. 12.* which enacts, That all treasons, &c. within the King's house, shall be determined before the Lord Steward of the King's

King's house, &c. doth not restrain this court from proceeding against such offences. 2 *Inst.* 549. 2 *Jones* 53. 2 *Hawk. P. C.* 7.

But where a statute creates a new offence which was not taken notice of by the Common law, and erects a new jurisdiction for the punishment of it, and prescribes a certain method of proceeding, it seems questionable how far this court has an implied jurisdiction in such a case. 1 *Sid.* 296. 2 *Hawk. P. C.* 7.

This court, by the plenitude of its power, may as well proceed on indictments removed by *certiorari* out of inferior courts, as on those originally commenced here, whether the court below be determined, or still *in esse*, and whether the proceedings be grounded on the Common law, or on a statute making a new law concerning an old offence. *Dalf.* 25. 4 *Ed.* 3. 31. *b.* *Crompt. Jurisf.* 131.

But the court of King's Bench will not give judgment on a conviction in the inferior court, where the proceedings are removed by *certiorari*, but will allow the party to waive the writ below, and to plead *de novo*, and to go to a trial upon an issue joined in *B. R.* *Carth.* 6. adjudged in the case of one *Baker*, who was convicted at *Kingston upon Hull*, for speaking seditious words.

Nor can a record, removed into the King's Bench from an inferior court, regularly be remanded after the term in which it came in; yet if the court perceives any practice in endeavouring to remove such record, or that it is intended for delay, they may in discretion refuse to receive it, and remand it back before it is filed. 2 *Hawk. P. C.* 7. and several authorities there cited.

Also by the construction of the statutes, which give a trial by *nisi prius*, the King's Bench may grant such a trial in cases of treason or felony, as well as in common cases, because for such trial, not the record, but only a transcript is sent down. 4 *Inst.* 74. *Raym.* 364.

And by the 6 *Hen.* 8. *cap.* 6. it is enacted, "That the King's Bench have full authority, by discretion, to remand as well the bodies of all felons removed thither, as their indictments, into the counties where the felonies were done; and to command the justices of gaol-delivery, justices of the peace, and all other justices, to proceed thereon after the course of the Common law, as the said justices might have done, if the said indictments and prisoners had not been brought into the said King's Bench." This act extends not to high treason. *Raym.* 367.

The judges of this court are the sovereign justices of oyer and terminer, gaol-delivery, conservators of the peace, &c. as also the sovereign coroners; and therefore, where the sheriff and coroners may receive appeals by bill, *a fortiori* they may; also this court may admit persons to bail in all cases according to their discretion. 4 *Inst.* 73. 9 *Co.* 118. *b.* 4 *Inst.* 74. *Vaugh.* 157.

In the county where the King's Bench sits, there is every term a grand inquest, who are to present all criminal matters arising within that county, and then the same court proceeds upon indictments so taken; or if in vacation, there be any indictment of felony before the justices of peace, oyer and terminer or gaol-delivery there sitting, it may be removed by *certiorari* into *B. R.* and there they proceed *de die in diem*, &c. 2 *Hale's Hist. P. C.* 3.

It may award execution, against persons attainted in parliament, or any other court; when the record of their attainder or a transcript is removed, and their persons brought thither by *habeas corpus*. *Cro. Car.* 176. *Cro. Jac.* 495. Pardons of persons condemned by former justices of gaol-delivery, ought to be allowed in *B. R.* the record and prisoner being removed thither by *certiorari* and *habeas corpus*. 2 *Hawk.* 27.

III. Of the civil jurisdiction of the court of King's Bench, &c.

On the first division of the courts, it was intended to confine the jurisdiction of the court of King's Bench to matters merely criminal, and accordingly soon afterwards it was enacted by *Magna Charta*, *cap.* 11. That Common

Pleas should not follow the King's court, (*i. e.* *B. R.*) but be held in a certain place: Hence it is that this court cannot determine a meer real action. 17 *Ed.* 3. 50. 1 *Roll. Abr.* 536, 537.

But notwithstanding Common Pleas cannot be immediately holden *Banco Regis*, yet where there is a defect in the court, where by law they be holden originally, they may be holden in *B. R.* as if a record come out of the Common Pleas by writ of error, there they may hold plea to the end; so where the plea in a writ of right is removed out of the county by a *pone* in *B. R.* on a writ of *mesne replevin*, &c. 2 *Inst.* 23. 4 *Inst.* 72, 113. and see *Saund.* 256. *Shew. P. C.* 57.

So any action *vi & armis*, where the King is to have fine, as ejectment, trespass, forcible entry, &c. being of a mixed nature, may be commenced in *B. R.* 2 *Inst.* 23.

Also any officer or minister of the court, entitled to the privilege thereof may be there sued by bill in debt, covenant or other principal action; for the act takes not away the privilege of the court. 2 *Inst.* 23. 4 *Inst.* 71. 2 *Bulst.* 123.

From hence arose the notion, that if a man was taken up as a trespasser in the King's Bench, and there in custody, they might declare against him in debt, covenant or account; for this likewise was a case of privilege, since the Common Pleas could not procure the prisoners of the King's Bench to appear in their court; and therefore it was an exception out of *Magna Charta*. 4 *Inst.* 71. *Cro. Car.* 330.

By the statute of *Gloucester*, *cap.* 8. None shall have writs of trespass before justices, unless he swear by his faith that the goods taken away were worth forty shillings.

This oath is now disused, yet if the damages laid in the declaration (in cases cognizable in inferior courts) do not amount to 40*s.* the court will not hold plea of the matter. If laid to the amount of 40*s.* and there is not any sett off, and plaintiff recovers under 40*s.* defendant may suggest it on the roll, and plaintiff shall not have more costs than damages.

The court of King's Bench now holds plea in all actions in general, except real actions, suffering of recoveries, and leveying of fines, &c. but *vide infra*.

To this court it regularly belongs to examine errors of all judges and justices in their judgments and proceedings; the court of Exchequer excepted. *F. N. B.* 20, 21. It hath been held, that a writ of error lies in *B. R.* of an attainder before the Lord High Steward. 1 *Sid.* 208. And upon judgment given in the Chancery, as well as other courts, writ of error in many cases will lie returnable in the court of King's Bench. But on proceedings in *B. R.* by original writ, error lies not, but to the parliament. The court of *B. R.* being the highest court of Common law, hath power to reform inferior courts, reverse erroneous judgments given therein, and punish the magistrates and officers for corruption, &c. 2 *Hawk.* 8.

The court of King's Bench, as it is the highest court of Common law, hath not only power to reverse erroneous judgments for such errors as appear the defect of the understanding; but also to punish all inferior magistrates, and all officers of justice, for wilful and corrupt abuses of their authority against the obvious principles of natural justice; the instances of which are so numerous, and so various in their kinds, that it seems needless to attempt to insert them. 2 *Hawk. P. C.* 8. *Vaugh.* 157. 1 *Salk.* 201.

This court grants *habeas corpus's* to relieve persons wrongfully imprisoned; and may bail any person whatsoever: A person illegally committed to prison by the King and council, or either house of parliament, (as it is said) may be bailed in *B. R.* and in some cases on legal commitments; also persons committed by the Lord Chancellor, &c. 2 *Hawk.* 110, 111. Writs of *Mandamus* are granted by this court, to restore officers in corporations, colleges, &c. unjustly turned out; and freemen wrongfully disfranchised: Also *quo warranto's* against persons or corporations, usurping franchises and liberties against

against the King; and on misuser of privileges to seize the liberties, &c. and in *B. R.* the King's letters patent may be repealed by *Scire facias*, &c. This court in ancient times was (as before observed) ordinarily exercised in all criminal matters, and pleas of the crown; leaving private contracts and civil actions to the Common Pleas, and other courts. 4 *Inst.* 70. It is now divided into a Crown-side and a Plea-side; the determining criminal, and the other civil causes: The Crown-side determines all criminal matters, (wherein the King is plaintiff) as treasons, felonies, murders, rapes, robberies, riots, breaches of the peace, and all causes prosecuted by way of indictment, information, &c. And into the court of *B. R.* Indictments from all inferior courts and orders of sessions, &c. may be removed by *certiorari*; and inquisitions of murder are certified of course into this court, as it is the supreme court of criminal jurisdiction: Hence also issue attachments, for disobeying rules or orders, &c. 4 *Inst.* 71, 72. On the Plea-side it holds plea of all personal actions prosecuted by bill or writ, as actions of debt, detinue, covenant, account, actions upon the case, and all other personal actions, ejectment, trespass, waste, &c. against any person in the custody of the marshal of the court, as every one sued here is supposed to be; and in all personal actions for or against any officer, minister or clerk of the court, who in respect of their necessary attendance have the privilege of the court. *Ibid.* It has been held, that action upon the statute of *Winchester*, of robbery, does not lie by original in the court of *B. R.* because it is a common plea; but it has been adjudged otherwise, and allowed on bill. 2 *Danv. Abr.* 279, 282. An appeal in *B. R.* must be arraigned on the Plea-side; except it come in by *certiorari*, when it is said it ought to be arraigned on the Crown-side. 2 *Hawk.* 308. Where the court of *B. R.* proceeds on an offence committed in the same county wherein it sits, the process may be made returnable immediately; but when it proceeds on an offence removed by *certiorari* from another county, there must be fifteen days between the teste and return of every process, &c. 9 *Rep.* 118. 1 *Inst.* 134. 1 *Sid.* 72. The court of *B. R.* may sit, hear and determine causes, after term is ended. *Jenk. Cent.* 62.

IV. How far the presence of the court of King's Bench suspends the power of other courts, &c.

This court being the supreme court of oyer and terminer, gaol-delivery and eyre, its presence suspends the power, and avoids the proceedings of all other courts of the same nature in the county wherein it sits, during its sitting there, especially if the justices of such courts have notice of its sitting. *H. P. C.* 156. 9 *Co.* 118. 27 *Aff. pl.* 1. 2 *Inst.* 27. 2 *Hawk. P. C.* 8. or without notice, per 4 *Inst.* 73.

But if an indictment in a foreign county be removed before commissioners of oyer and terminer into the county where the King's Bench sits, they may proceed; for the King's Bench not having the indictment before them cannot proceed for this offence. 4 *Inst.* 73.

But if an indictment is found in the vacation-time in the same county in which the King's Bench sits, and in term-time the King's Bench is adjourned, there may be a special commission to hear it. *Ibid.*

The civil side in the King's Bench commences actions on a supposition of a trespass committed by the defendant in the county where it resides, and he is taken up by process of that court, as the sovereign eyre, and being committed to the marshal, he may be declared against in any civil action whatsoever. See *Process*.

The first process therefore is a bill either real or feigned, and so called, because its foundation was the bill of complaint in court, touching the trespass; on this is founded the *latitat*, which supposes that the defendant had escaped, and therefore issues in the King's name, to apprehend the party where-ever he may be found; for the King has an universal jurisdiction over all his subjects, and consequently may call any of them that fled from the justice of his own court.

All process on writs of appeal, and all process on in-

dictments removed hither by *certiorari* from a foreign county, ought to be returnable *coram nobis ubicunque fuerimus*. 2 *Hawk. P. C.* 8, 9.

V. Of the officers of the court of King's Bench.

The officers of the King's Bench are, on the Crown-side, the Clerk of the Crown, and the Secondary of the Crown: And on the Plea-side there are many clerks and officers; as a Chief Clerk or Prothonotary, and his Secondary and deputy, the Custos Brevium, two Clerks of the Papers, the Clerk of the Declarations, Signer and Sealer of bills, the Clerk of the Rules, Clerk of the Errors, the Clerk of the Bails, Filizers, the Marshal of the court, and the Cryer. The prothonotaries are the masters of the King's Bench office, and their clerks are the proper attorneys here, who enter all declarations, pleas, and other proceedings. Their Secondary constantly attends the sitting of the court, to receive matters referred to him by the judges, to be examined and reported to the court; he signs all judgments, taxes costs, and gives rules to answer, &c. And he also informs the court in point of practice. Their deputy has the custody of the stamp, for signing all writs, &c. and keeps remembrances of all records; writs returned are filed in his office, and common bails, &c. The Custos Brevium files originals and other writs whereon proceedings are had to outlawry; examines and seals all records of *Nisi prius* for trials at the assizes, and has several clerks under him for making up records throughout England. The Clerks of the Papers make up the paper-books of all special pleadings and demurrers, which the plaintiff's attorney commonly speaks for, and afterwards gives a rule for the defendant's attorney to bring to him again to be entered, &c. The Clerk of the Declarations files all declarations, and continues them on the back from the term of declaring till issue is joined. The signer and sealer of bills keeps a book of entry of the names of the plaintiffs and the defendants in all such writs and processes; and the defendants enter their appearances with him. The Clerk of the Rules takes notice of all rules and orders made in court, and afterwards draws them up and enters them in a book at large; and with him also are given all rules of course on a *cepi corpus*, *habeas corpus*, writs of inquiry, &c. and he or the clerk of the papers files all affidavits used in court, and makes copies of them. The Clerk of the Errors allows all writs of error, and makes *Superfedeas* thereupon into any county, and transcribes and certifies records. The Clerks of the Bails and Posses, file the bail-pieces, and mark the Posses, &c. The Filizers of counties make the mesne process after the original, in suing to the outlawry; and have the benefit of all process and entries, thereupon. The Marshal, by himself or deputy always attends the court, to receive into his custody such prisoners as shall be committed. The Cryer makes proclamations of summoning and adjourning the court, calls nonsuits, and swears jurymen, witnesses, &c.

See more of King's Bench under Court, &c. Lord Chief Justice; vide *Justice*.

Kingeld, Escuage, or royal aid. As in a charter of King Henry II. to the abbot and monks of *Minevall*. *Volo & firmiter præcipio, ut sint quieti per totam terram meam de thiloneo & de seiris & de hundredis, & de Wapentachiis, & de Kingeld, & de Deungeld, & de Murdre*. Mon. Angl. tom. 1. p. 830.

King's Household. In the reign of King Edward III. 16,000 *l.* per annum and no more, was appointed for the King's household: And Anno 29 H. 6. the charge of the household was reduced to 12,000 *l.* a year. But in Queen Elizabeth's reign, the profits of the kingdom being very much advanced, 40,000 *l.* per annum was allowed for her household, And on the restoration of King Charles 2. the parliament, for the honour of the King and kingdom, settled on his Majesty 200,000 *l.* per annum. In the reigns of King William 3. and Queen Anne 700,000 *l.* a year was allotted for the support of the household, and ordinary charge of the civil list. And his Majesty King George 1. had the like sum of 700,000 *l.* per annum settled upon him by parliament, arising out of the duties of excise, wine-licence,

licence, post-office, &c. Also to his late Majesty King George 2. The duty of excise on ale, beer, &c. was granted with a further subsidy of tonnage, and the yearly sum of 100,000 l. out of the aggregate fund, for support of the household and dignity of the crown; so as to make the revenue 800,000 l. per annum, and deficiencies to be made good by parliament. See the statutes 13 & 14 W. 3. 1 Ann. c. 7. 1 Geo. 1. 1 Geo. 2. c. 1. Also to his present Majesty King George 3. is granted the sum of 800,000 l. for support of the household and the honour and dignity of the crown. See 1 Geo. 3. c. 1.

King's Palace. The limits of the King's Palace at Westminster, extends from Charing-Cross to Westminster-Hall, and shall have such privileges as the ancient palaces. Stat. 28 H. 8. If any person shall strike another in the King's Palace, he shall have his right-hand cut off, be imprisoned during life, and also be fined. 32 H. 8. c. 12.

King's Prerogative. The statute of the King's prerogative 17 Ed. 2. contains not the King's whole prerogative, but only so much thereof as concerns the profits of his coffers, for his prerogative extends much further; and the King hath divers rights of Majesty peculiar to himself, which the learned in the law term *sacra sacrorum*, viz. sacred and inseparable, and which are many and various. Staundf. Prærog. Reg. Plowd. 314. Sir Henry Spelman calls the King's prerogative, *Lex Regia Dignitatis*; and a great many prerogatives arise to the King from the reason of the Common law; which allows that to be law almost in every case for the King, which is not so for the subject: But the King's prerogative does not extend to any thing injurious to his subjects; for the King by our law can do no wrong. Finch 85. 1 Inst. 19. The King's prerogative is incident to his crown, and as ancient as that itself; and hath in it a prescription, and is not only the law of the Exchequer, but the law of the land: This prerogative of the King is of a very large extent; it reacheth to all persons ecclesiastical and civil, as he is *persona mixta*, so is his power and prerogative. 7 Rep. 14. It is the King's Royal Prerogative to make war and peace: And as head of the state he calls, continues, prorogues and dissolves parliaments; and all statutes are to have his royal assent, which he may refuse to give to a bill; tho' his denial is not an express negative, but that he will advise upon it. 1 Inst. 110, 165.

His proclamation in calling or dissolving parliaments, declaring war and peace, &c. has the effect of a law; but he cannot by proclamation introduce new laws, yet he may enforce old ones discontinued. 3 Inst. 162. 2 Inst. 743. It was anciently held, that the King might suspend or alter any particular law that was hurtful to the publick: And he may dispense with a penal statute, wherein his subjects have not any interest. 4 Inst. 7. Rep. 36. Acts of parliament do not bind the King, if he be not specially named; unless they concern the commonwealth, suppress wrong or fraud, &c. in which cases they do; but he may take the benefit of any statute, tho' not named. 5 Rep. 14. 11 Rep. 71. 7 Rep. 32. And a prerogative given generally to one King, or any thing to be done to one, goes of course to others. Raym. 212. He determines rewards and punishments; moderates laws, and pardons offenders: But the King cannot pardon murder, where appeal is brought by the subject. 2 Inst. 216. And pardons of felony, &c. shall be granted only where the King may lawfully do it, according to his coronation oath. 14 Ed. 3. The King may lay embargo's on shipping; but then it must be *pro bono publico*, and not for the private advantage of any particular traders. 1 Salk. 32. And tho' the King hath an interest in every subject, and a right to his service; he cannot discharge the right of a subject, or hinder him of a remedy the law gives him. Holt Ch. J. 1 Salk. 19. 168.

It is held that the King is *Custos totius Regni Angliæ*: And he may, if he see cause, open or shut the sea-ports, and forbid the passage of his subjects over sea without licence, &c. 12 Rep. 34. He may not dispose of the ports to any subject; but shall appoint officers for the custody thereof, under him. 11 Rep. 86. It is his prerogative alone to dispose and govern the militia of the nation:

to make dukes, earls, barons, knights of the garter, &c. He names, creates, makes and removes the great officers of the government. 1 Inst. 165. All writs, processes, commissions, &c. are in the King's name; and he may make courts, which shall proceed according to the Common law. Jenk. Cent. 285. He may create universities, colleges, counties, boroughs, fairs, markets, &c. No forest, chase or park, can be made, or castle built, without the King's leave. 4 Inst. 294. The King may incorporate a whole city, parish, &c. or part of it, and grant and annex to such corporations divers franchises: Tho' they may not, under colour thereof, set up a monopoly. Godb. 253. Noy 182. And he may incorporate a town, and enable them to chuse burgesses of parliament; but this part of the prerogative of increasing the number of parliament men, seems to be given up, by the late Kings. Hob. 14.

As supreme head of the church, our King hath power to call a national or provincial council; and by his royal assent the canons made in convocation have the force of laws: And to him the last appeal is made. Danv. 73. 4 Inst. 325. He hath the supreme right of patronage all over England; and is the founder and patron of all bishopricks, &c. so that none can be made bishop but by his nomination: He not only founds churches, but licenses others to found them, exempt from the ordinary's jurisdiction; and he hath the tithes of forests and places extraparochial, which he may grant by letters patent: Also the King shall pay no tithes; tho' his lessee shall pay them. Wood's Inst. 18. 1 Cro. 511. The King hath power to make an alien free born, and to grant letters of safe conduct to foreign parts: He can put a value upon the coin, which is made by his authority; and make foreign coin current by proclamation: And to make money, the law gives the King all mines of gold and silver. Plowd. 314.

He is the general guardian of idiots and lunatics; and shall have the lands of felons, &c. convict; also the goods of felons and fugitives; goods and chattels of pirates; wreck of the sea, &c. Stat. 17 Ed. 2. cap. 1. 9 H. 3. 4 Inst. 136. The King is lord paramount of all the lands in England; and all estates for want of heirs, or by forfeiture, escheat to him: All lands are said to be holden of the King; as by construction of law they are originally derived from the crown. 1 Inst. 1. But this must be considered as in trust for the benefit of the state. Lands in the King's possession, are free from tenure; and the King may not be jointenant with any. Finch 83. The grant of the King is taken most strongly against a stranger, and favourably for him: And he may avoid his own grants for deceit, &c. Plowd. 243. The King may grant a thing in action, which another cannot; and reserve a rent to a stranger, &c. He cannot grant or take any land (not cast upon him by descent) but by matter of record: And the King may not grant an annuity to charge his person, which is not chargeable like the person of a subject; tho' he may grant it out of the revenues of excise, &c. 4 Rep. 54. 2 Inst. 186. 1 Salk. 58.

Where the title of the King and of a common person concur, his title shall be preferred. 1 Inst. 30. No distress can be made upon the King's possession; but he may distrain out of his fee in other lands, &c. and may take distresses in the highway. 2 Inst. 131. An heir shall pay the King's debt, tho' he is not named in the bond: And the King's debt shall be satisfied before that of a subject, for which there is a prerogative writ. 1 Inst. 130, 386. By the stat. 25 Ed. 3. c. 19. a common person may sue the King's debtor, notwithstanding he hath a protection, and recover judgment against him; but he cannot have execution unless he give security to pay the King's debt: If he take out execution before, and levy the money, the same may be seized to satisfy the debt of the King. Godb. 290. 2 Nels. Abr. 1081, 1082. If a debtor has not a writ of protection, he may be in execution for a debt, and he hath the command of all forts, and places of strength, &c. and authority in making and casting of ordnance. 21 Jac. 1. c. 3.

The King is the fountain of honour, and has the sole power of conferring dignities and honourable titles; as common

Common person as well as the King: And it hath been adjudged, that altho' the King hath a *prerogative* by the Common law, to have his debt first satisfied, that must be when it is in equal degree with the debt of his subject; and by the *Stat. 33 H. 8. c. 39.* the King's debt shall be preferred, so as there is no judgment, &c. *Cro. Car. 283. Hardr. 23.* Goods and chattels may go in succession to the King; tho' they may not to any other sole corporation. *1 Inst. 90.* In whosoever hands the goods of the King come, their lands are chargeable, and may be seized for the same: And the King is not bound by sale of his goods in open market. *2 Inst. 713.* No prescription of time runs against the King; he is not within the statute of limitation of actions. *11 Rep. 74.* But see the late bills, concerning *Nullum Tempus*, 10 & 11 *Geo. 3.* Action lies not against the King; but a petition instead of it, to him in the Chancery: And it is lawful for any subject to petition the King for redress, where he finds himself grieved by any sentence or judgment. *2 Inst. 187. Hob. 220.* There are no costs against the King; no entry will bar him; and no judgment is ever final against him, but with a *Salvo jure Regis*. *Litt. 178. Finch. 460.* The King's title is not to be tried without warrant from the King, or assent of the Attorney General. *2 Inst. 424.* The King may have such process in his suit, as no other person but himself can have in any case. *1 Rep. 18. Finch. 476.* He may plead several matters, without being double, and the parties shall answer them all. *Bro. Doubl. pl. 57.* And in his pleading, he need not plead an act of parliament, as a subject is bound to do. *4 Rep. 75.*

The King may sue in what court he pleases, and cannot be nonsuit, as he is supposed to be present in all his courts; He is not bound to join in demurrer on evidence; and the court may direct the jury to find the matter specially. *Finch 82. 5 Rep. 104.* The King's only testimony of any thing done in his presence, is of as high a nature and credit as any record; whence it is, that in all original writs or precepts sent out for the dispatch of justice, he useth no other witnesses than himself, as *teste meipsa*, &c. The King cannot be a minor; and in him the law will see no defect, negligence or folly. *1 Inst. 41, 57.* There are some other *prerogatives* belonging to our Kings; but the judges at *Westminster* ought to judge of matters of *prerogative* relating to the King, as they do matters concerning other persons. *Noy 181. Plowd. 136.* The King may not by petition, bill, &c. dispose of any man's lands or goods: Nor shall he take that he hath right to, which is in the possession of another, but by due course of law. *Witch. 9.* He may not command a man to prison, against the writs and process of law. *12 Rep. 66.* The law is the rule of the King's *prerogative*; which ought to be grounded upon antiquity, or otherwise it may be an incroachment on the liberty of the subject. *Rex est anima Legi, & Lex est anima Regi. 2 Inst. 262.* See *Debt to the King, Grants of the King, &c.* See farther on this subject, *Black Com. 1 V. 237. And Com. Dig. 4 V. tit. Prærogative.*

King's Silver, Is the money which is paid to the King in the court of Common Pleas, for a licence granted to any man to levy a *fine* of lands, tenements or hereditaments to another person: And this must be compounded according to the value of the land, in the alienation office, before the fine will pass. *2 Inst. 511. 6 Rep. 39, 43.*

King's Swanherd, (*Magister deductus cignorum.*) *Pat. 16 R. 2. pars 1. m. 38. Rodolphum Scot, custodem cignorum nostrorum, sive per alium quemcumque qui pro tempore custos cignorum nostrorum prædictorum fuerit.* No fowl can be a swan but a swan. *4 Inst. fol. 280.*

Kintal, If a certain weight of merchandise, most commonly of one hundred pounds, or something under or over, according to the several uses of divers nations. *Plowden, fol. 3.* mentions 2000 kintals of woad, in the case of *Remiger and Fogassa. Item duodecim denarios de quolibet cere quintallo.* *Chart. 31 Edw. 1. m. 4.* See *Quintal.*

Kintledge, A term used among merchants and seafaring persons, for a ship's ballast. *Merch. Dic.*

Kipe, (from the Saxon, *Cypa*) Is a basket or engine made of osiers, broad at one end, and narrower by de-

grees, used in *Oxfordshire* and other parts of *England* for the taking of fish; and fishing with those engines is called *Kipping*.

To the curious reader, it may not be improper to observe, that this manner of fishing with baskets of the same kind and shape, is practised by the barbarous inhabitants of *Ceylon* in the *East-Indies*, as appears in the relation and figure of it given by Mr. *Knox* in his travels, pag. 28.

Kipper-time. No salmon shall be taken between *Gravesend* and *Henley upon Thames* in *kipper-time*, viz. between the *Invention of the Cross* (3 May) and the *Epiphany*. *Rot. Parl. 50 Edw. 3. Cowell.*

Kirby's Quest, Is an ancient record remaining with the remembrancer of the Exchequer; so called from its being the *inquest of John d^r Kirby*, treasurer to King *Ed. 1.*

Kirk-mote, A synod; and sometimes it has been taken for a meeting in the church or vestry. *Blount.*

Knave, An old Saxon word, which had at first a sense of simplicity and innocence, then it signified a boy; *Saw. cnapa*, whence a *knave child*, i. e. a boy distinguished from a girl in several old writers; afterwards it was taken for a servant boy, and at length for any servant man: Also it was applied to a minister or officer, that bore the weapon or shield of his superior, as *scild knapa*, whom the *Latins* called *armiger*, and the *French* *escuyer*. *14 Ed. 3. c. 3.* And it was sometimes of old made use of as a titular addition; as *Johannes C. R^{us} Willielmi C. de Derby*, knave, &c. *22 Hen. 7. 36.* The word is now perverted to the hardest meaning, viz. A false and deceitful fellow. *A knave-child, between them two they gate.—Gower, Poem, fol. 52, 106.* And *Wickliff* in his old *English* translation, *Exod. 1. xvi.* *If it be a knave-child*, i. e. a son or male child. In the vision of *Piers Plowman*, *Cokes* and her *knaves* cryden hotes pyes, hote, i. e. *Cooks* and their boys, or skullions. *Cowell.*

Knight, (*Sax. cnytt, Lat. miles, and eques auratus*, from the gilt spurs he usually wore, and thence called anciently *Knights of the spur*: The *Italians* term them *Cavalieri*, the *French* *Chevaliers*, the *Germans* *Ruyters*, the *Spaniards* *Cavalleros*, &c.) In its original properly signified a servant; but there is now but one instance where it is taken in that sense, and that is *knights of a shire*, who properly serves in parliament for such a county; but in all other instances it signifies one who bears arms, who, for his virtue and martial prowess, is by the King, or one having his authority, exalted above the rank of gentleman to a higher step of dignity. The manner of making them, *Camden* in his *Britan.* thus shortly expresseth: *Nostris vero temporibus, qui equestrem dignitatem suscipit, flexis genibus leviter in humero percutitur, princeps his verbis Gallice affatur; Sûs vel fois Chevalier au nom de Dieu, i. e. Surge aut sis eques in nomine Dei.* This is meant of *knights bachelors*, which is the lowest, but most ancient degree of *knighthood* with us. The privilege belonging to a knight, see in *Fern's Glory of Generosity*, p. 116. Of *knights* there are two sorts; one *spiritual*, so called by divines in regard of their spiritual warfare, the other *temporal*. *Cassianus de Gloria Mundi, par. 9. considerat. 2.* See *Selden's Titles of Honour, fol. 770.* Chief Justice *Popham* affirmed, he had seen a commission granted to a bishop, to knight all the persons in his diocese. *Godbolt's Reports, fol. 398.* Of the several orders, both of *spiritual* and *temporal* *knights*, see Mr. *Asmole's Inst. of the Knights of the Garter.* He who served the King in any civil or military office or dignity, was formerly called *miles*: 'Tis often mentioned in the old charters of the *Anglo-Saxons*, which are subscribed by several of the nobility, viz. after bishops, dukes and earls, per *A. B. militem*, where *miles* signifies some officer of the courts, as *minister* was an officer to men of quality. Thus we read in *Inglulphus, De dono F. quondam Militis Kenulfi Regis, fol. 860.*

Afterwards the word was restrained to him who served only upon some military expedition, or rather to him who by reason of his tenure was bound to serve in the wars, and in this sense the word *miles* was taken *pro vassallo*. Thus in the laws of *William the Conqueror*: *Manibus ei sese dedit, cuncta sua ab eo ut miles a Domino recipit.*

recept. And he who by his office or tenure was bound to perform any military service, was furnished by the chief lord with arms, and so *adaptabatur in militiam*, which the French call *adoubet*, and we do dub such a person a knight. But before they went into the service, it was usual to go into a bath and wash themselves, and afterwards they were girt with a girdle; which custom of bathing was constantly observed, especially at the inauguration of our Kings, then those knights were made, who for that reason were called *Knights of the Bath*. Cowell. See *Black. Com.* 2 V. 69. 4 V. 432.

Knights Bachelors. The most ancient, tho' the lowest order of knighthood amongst us; for we have an instance of King *Alfred's* conferring this order on his son *Æthelstan*. *Will. Malms. lib. 2.* *Black. Com.* 1 V. 404. See *Knights of the Chamber*.

Knights-Banneret, (militis vexillarii) Are made only in the time of war, and is a high honour: and though knighthood is commonly given for some personal merit, which therefore lies with the person; yet *John Coupland*, for his valiant service performed against the *Scots*, had the honour of *Banneret* conferred on him and his heirs for ever, by patent. 29 Ed. 3. See *Banneret*. See *Black. Com.* 1 V. 404.

Knights of the Bath, (Militis Balnei) Have their name from their bathing the night before their creation. See *Knights*. This order of knights was introduced by King *Hen. 4.* and revived by King *George the First* in the year 1725; who erected the same into a regular military order for ever, by the name and title of *The Order of the Bath*, to consist of thirty-seven knights, besides the Sovereign. See the antiquity and ceremony of their creation in *Dugdale's Antiquities of Warwickshire*, fol. 531, 532. They have each three honorary Esquires; and they now wear a red ribbon a-cross their shoulders; have a prelate of the order, who is the bishop of *Rockester*, several heralds, and other officers, &c. See *Black. Com.* 1 V. 404.

Knights of the Chamber, (Militis Camera) Seem to be such *Knights Bachelors* as are made in time of peace, because knighted in the King's chamber, and not in the field: they are mentioned in *Rot. Parl.* 28 Ed. 3. 2 Inst. 666. See *Black. Com.* 1 V. 404. They are also mentioned in 2 Inst. 666. and in *Rot. Parl.* 29 Ed. 3. par. 1. m. 29.

Knights Court, Is a court-baron, or honour-court, held twice a year under the bishop of *Horsford*, at his palace there; wherein those who are lords of manors, and their tenants, holding by knight's service of the honour of that bishoprick, are suitors; which court is mentioned in *Butterfield's Surv.* fol. 244. If the suitor appear not at it, he pays 2 s. *suit-filium* for respice of homage, Cowell.

Knights-gild, Was a gild in London, consisting of nineteen knights, which King *Edgar* founded, giving them a portion of void ground lying without the walls of the city, now called *Portokenward*. *Stow's Annals*, p. 151. This in *Mon. Angl. par. 2.* fol. 82. a. is written *emittens-geld*.

Knights' fee, (Feodum militare) Is so much inheritance, as is sufficient yearly to maintain a knight with convenient revenue; which in *Henry the Third's* days was 15 l. *Cam. Britan.* pag. 111. But Sir *Thomas Smith*, (in his *Repub. Angl. lib. 1. cap. 18.*) rates it at 40 l. and by the statute for knights, 1 Ed. 2. cap. 1. such as had 20 l. per annum in fee, or for life, might be compelled to be knights; which statute is repealed by 17 Car. 1. cap. 20. *Stow* in his *Annals*, p. 285. says, there were found in England, at the time of the Conqueror, 60,211 knights' fees, according to others 60,215; whereof the religious houses, before their suppression, were possessed of 28,015. *Q.2. carucata terra faciunt feodum unius militis.* *Mon. Angl.* 2 pag. fol. 825. a. Of this you may read more in *Selden's Title of Honour*, fol. 691. and *Bracton*, lib. 5. tra. 1. cap. 2. See *Coke on Litt.* fol. 69. a. A knight's fee contained twelve plow-lands. 2 Inst. fol. 596. or 680 acres. *Virgata terre continet 24 acras, 4 virgata terre makes an hide, and five hides make a knight's fee, whose relief is five pounds.* Cowell. See *Black. Com.* 1 V. 405, 409. 2 V. 62.

Knights of the Garter, (equites garterii, or periscelidæ.) Are an order of knights, founded by King *Ed. 3.* who after he had obtained many notable victories, for furnishing this honourable order, made choice in his own realm, and all Europe, of twenty-five the most excellent and renowned knights for virtue and honour, and ordained himself and his successors Kings of England, to be the sovereign thereof, and the rest to be fellows and brethren, bestowing this dignity on them, and giving them a blue garter, decked with gold, pearl, and precious stones, and a buckle of gold, to wear daily on the left leg only, a kirtle, crown, cloak, chaperon, a collar, and other magnificent apparel, both of stuff and fashion; exquisite and heroical to wear at high feasts, as to so high and princely an order was meet. *Smith's Repub. Ang. lib. 1. cap. 29.* And according to *Camden* and others, this order was instituted upon King *Edward the Third's* having great success in a battle, wherein the King's garter was used for a token: But *Polydore Virgil* gives it another original, and says, that the King in the height of his glory, the Kings of France and Scotland being both prisoners in the Tower of London at one time, first erected this order, anno 1350, (see *infra*) from the Countess of Salisbury's dropping her garter, in a dance before his Majesty, which the King taking up, and seeing some of his nobles smile, he said, *Mont fait qui mal y pense*, interpreted, evil be to him that evil thinketh, which has ever since been the motto of the garter, declaring such veneration should be done to that silken tie, that the best of them should be proud of enjoying their honours that way. *Camden* in his *Britannia* faith, that this order of knights received great ornament from King *Ed. 4.* And King *Charles I.* as an addition to the splendor, ordered all the knights companions to wear on their upper garment, the cross incircled with the garter and motto. The honourable society of this order is intitled to St. George; and they are a college or corporation having a Great Seal, &c. The site of the college is the royal castle of Windsor, with the chapel of St. George, and the chapter-house in the castle, for their solemnity on St. George's day, and at their feasts and installations. Besides the King their Sovereign, and twenty-five companions, Knights of the Garter, they have a dean and canons, &c. and twenty-six poor knights, that have no other subsistence but the allowance of this house, which is given them in respect of their daily prayer to the honour of God, and St. George; and these are vulgarly called Poor Knights of Windsor. There are also certain officers belonging to the order; as Prelate of the Garter, which office is inherent to the Bishop of Winchester, for the time being; the Chancellor of the Garter, who is the Bishop of Sarum; Registrar, always Dean of Windsor; the Principal King at Arms, called Garter, to manage and marshal their solemnities, and the Usher of the Garter, being likewise Usher of the Black Rod. A Knight of the Garter wears daily abroad, a blue garter decked with gold, pearl, and precious stones on the left leg; and in all places of assembly, upon his coat on the left side of his breast, a star of silver embroidery; and the picture of St. George, enamelled upon gold and beset with diamonds, at the end of a blue ribbon that crosses the body from the left shoulder; and when dressed in his robes, a mantle collar of S S. &c. According to *Blackstone*, 1 V. 404. Knights of the Garter, or Knights of the order of St. George, first instituted by *Ed. 3.* A.D. 1344. *Seld. Tit. of Honour*, 2, 5, 41.

Knighthood, Formerly when the heir came of full age, provided he held a knight's fee, he was to receive the order of knighthood, and was compellable to take it upon him, or else to pay a fine to the King. See *Black. Com.* 2 V. 69. Note, The persons thus compellable were the King's tenants in capite, and that in consequence of the feudal tenure. This being considered in the reign of *Charles I.* as a great grievance, the Stat. 16 Car. 1. c. 20. was passed, whereby it was enacted, "that none shall be compelled to take knighthood". See *Black. Com.* 4 V. 430. **Knights of the Order of St. John of Jerusalem, (Militia Sancti Johannis Hierosolymitani)** Were an order of knighthood, that began about the year of our Lord 1120, *Honorius* being Pope. They had their denomination from *John* the charitable patriarch of Alexandria, though vowed to St. John the Baptist their patron; Fern's

Ferris's Glory of Generosity, pag. 127. They had their primary abode at first in *Jerusalem*, and then in the isle of *Rhodes* until they were expelled thence by the *Turks*. anno 1523. Since which time their chief seat is in the isle of *Malta*, where they have done great exploits against the infidels, but especially in the year 1595. They live after the order of friars, under the rule of *St. Augustine*, of whom mention is made in the statute 25 Hen. 8. cap. 2. and 26 Hen. 8. cap. 2. They had in *England* one general prior that had the government of the whole order within *England* and *Scotland*, *Reg. Orig.* fol. 20. and was the first prior in *England*, and sat in the house of Lords. But towards the end of *Henry the Eighth's* days they in *England* and *Ireland*, being found over much to adhere to the Pope against the King, were suppressed, and their lands and goods given to the King, by the 32 Hen. 8. 24. For occasion and propagation of this order more especially described, see in the treatise, intitled, *The Book of Honour and Arms*, lib. 5. c. 18. written by Mr. Richard Jones.

Knights of Malta. These knights took their name and original from the time of their expulsion from *Rhodes*, anno 1523. The island of *Malta* was then given them by the Emperor *Charles V.* where they now reside, and are therefore called *Knights of Malta*: they have done great exploits against the infidels, especially in the year 1595.

Knight Marshal. (*Marescallus Hospitii Regis*) Is an officer of the King's house, having jurisdiction and cognizance of transgressions within the King's house, and verge of it; as also of contracts made within the same house, whereto one of the house is a party. *Reg. of Writs*, fol. 185. a. and 191. b. and *Spelman's Gloss.* in voce *Marescallus*.

Knights of Rhodes. The *Knights of St. John of Jerusalem*, after they removed to *Rhode* island. 32 H. 8. c. 24. See *Knights of the Order of St. John of Jerusalem*.

Knights Service. (*Servitium Militare*) Was a tenure whereby several lands in this kingdom were held of the King; which drew after it homage, and service in war, escuage, wardship, marriage, &c. The knight's service in capite, or in chief, was service, by which the tenant was bound to serve the King in his wars: and if he held of a common person, then he was to go with his lord in the wars. But it is taken away by *Stat. 12 Car. 2. cap. 24.* See *Chivalry*, and *Black. Com.* 2 V. 62.

Knights of the Shire. (*Milites Comitatus*) Otherwise called knights of parliament, are two knights or gentlemen of worth, chosen on the King's writ, in pleno comitatu, by the freeholders of every county that can dispend 40 s. a year; and these, when every man that had a knight's fee was customarily constrained to be a knight, were obliged to be milites gladio cincti, for so runs the writ at this day; but now notables armigeri may be chosen. *Stat. 1 Hen. 5. c. 1. 10 H. 6. c. 2. 23 H. 6. c. 6.* Their expenses were to be borne by the county, during their sitting in parliament, by the 35 H. 8. c. 11. And as to their qualifications, they are to have 600 l. per annum freehold estate, &c. Vide 9 Ann. c. 5. and *Parliament*, and *Black. Com.* 1 V. 172.

Knights Templars. (*Milites Templarii*) Were a religious order of knights, instituted in the year of our Lord 1119, and so called, because they dwelt in part of the buildings belonging to the Temple at *Jerusalem*, and not far from the sepulchre of our Saviour. They entertained Christian strangers and pilgrims, and in their armour led them through the Holy Land, to view the sacred monuments of Christianity, without danger from infidels. This order was far spread in Christendom, particularly here in *England*, where it flourished in the time of King *Hen. 2.* And had in every nation a particular governor or master, but at length some of them at *Jerusalem* falling away to the Saracens from Christianity, the whole order was suppressed by *Clement quintus*, anno 1307. And their substance given partly to the *Knights of St. John of Jerusalem*, and partly to other religions. *Cassan. de Gloria Mundi*, par. 9. These knights at first wore a white garment; and afterwards in the pontificate of *Pope Eugenius*, it was ordained that they should wear a red cross: in ancient records they were also called *Frates Militie Templi Solomonii*. *Mon. Ang.* tom. 2. p. 554.

Knights of the Garter. The honourable the *Seach* knighthood, the knights whereof wear a green ribbon over their shoulders, and are otherwise honourably distinguished.

Knopa. A knob, nob, boss, or knot.—*Textus super Evangelii cum uno clasp habens ex uno latere quinq; knopas argenteas*, &c. *Mon. Angl.* tom. 3. p. 365.

Known-men. The *Lollards* in *England*, called heretics, for opposing the church of *Rome* before the reformation, went commonly under the name of *known-men*, and just first-men; which title was first given them in the diocese of *Lincoln*, by *Bishop Smith*, anno 1500.

Kyddiers. Mentioned in *Stat. 13 Eliz. cap. 35.* See *Kidder*.

Liquor. Signifies some liquid thing; and in the North it is used for a kind of liquid victuals. It is mentioned as an exaction of foresters, &c. *Mon. Ang.* tom. 1. pag. 722.

Lyste. (*Sax.*) A coffin or chest for burial of the dead. *Ex Reg. Episc. Lincoln.* MS.

Kyth. Is used for kin or kindred. *Cognatur.*

L.

Lace. (*laqueus, à lax, i. e. frans*) A net, gin, or snare. *Litt. Dict.*

Label. (*appendix, lemniscus*) Is a narrow slip of paper or parchment, affixed to a deed, writing or writ, hanging at or out of the same; and an appending seal is called a *label*.

Labina. Signifies watery land; in qua facile labitur. — *Jamque dispersi liget noctanter transiunt in aquis* & labinis periclitantur. *Mon. Ang.* tom. 2. pag. 372.

Labourer. Is an ancient writ against persons refusing to serve and do labour, who have no means of living; or against such as having served in the winter, refuse to serve in the summer. *Reg. Orig.* 189.

Labour. Is the foundation of property. Bodily labour, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein. *Black. Com.* 2 V. 5.

Labourers. Conspiring together concerning their work or wages, shall forfeit 10 l. for the first offence, 20 l. for the second, &c. And if not paid, be set on the pillory. *Stat. 2 & 3 Ed. 6. c. 15.* Justices of peace and stewards of leets, &c. have power to hear and determine complaints relating to nonpayment of labourers wages. 4 Ed. 4. 1. And labourers taking work by the great, and leaving the same unfinished, unless for nonpayment of wages, or where they are employed in the King's service, &c. are to suffer one month's imprisonment, and forfeit 5 l. The wages of labourers are to be yearly assessed for every county by the sheriff, and justices of peace in the *Easter sessions*, and in corporations by the head officers, under penalties. 5 Ed. 4. cap. 4. And the sheriff is to cause the rates and assessments of wages to be proclaimed. 1 Jac. 1. c. 6. All persons fit for labour, shall be compelled to serve by the day in the time of hay or corn harvest; and labourers in the harvest-time may go to other counties, having testimonials. From the middle of *March* to the middle of *September*, labourers are to work from five o'clock in the morning till seven or eight at night, being allowed two hours for breakfast and dinner, and half an hour for sleeping the three hot months; and all the rest of the year from twilight to twilight, except an hour and a half for breakfast and dinner, on pain of forfeiting 1 d. for every hour absent. See 5 Ed. 4. c. 4. If any labourer shall make an assault upon his master, he shall suffer and be punished as a servant making such assault. *Ibid.* By the *Stat. 12 Geo. 1. c. 34. 22 Geo. 2. c. 27.* All contracts of journey-men employed in any woollen, linen, silk, leather, or iron, &c. manufactures for raising wages, lessening the hours of work, &c. are illegal, and the offenders shall be sent to the House of Correction for three months.

Justices of peace may hear and determine disputes concerning the wages of servants and labourers, not exceeding 10 l. 20 Geo. 2. c. 19. Extended to the tanners in the *Stannaries*, by 27 Geo. 2. c. 6. Justices may punish servants

servants on complaint of the masters, 20 Geo. 2. c. 19. f. 2. The 20 Geo. 2. c. 19. shall extend to all servants employed in husbandry, though hired for less than a year, 34 Geo. 2. c. 11. f. 3. See *Black. Com.* 1 V. 406, 426.

Lace. Foreign bone-lace not to be imported; 13 & 14 Car. 2. c. 13. May be exported free to Scotland, Ireland, or the Plantations; 11 & 12 W. 3. c. 3. f. 15. Prohibition of importing bone-lace repealed, 5 Ann. c. 17. Manufacturers excused from the duty upon hawkers and pedlars, 4 Geo. 1. c. 6.

For other matters, see *Manufactures*.

Lacerta. A word signifying a fathom. *Domesday*.

Laches. (from the Fr. *lache*, i. e. *laxare*; or *lache*, ignavus) In our law signifies slackness or negligence; as it appears in *Littleton*, where *laches of entry* is a neglect in the heir to enter. And probably it may be an old English word; for when we say there is *laches of entry*, it is all one as if it were said, there is a *lack of entry*; and in this signification it is used. *Litt.* 136. No *laches* shall be adjudged in the heir within age; and regularly *laches* shall not bar either infants or feme covert, for not entry or claim, to avoid descents; but *laches* shall be accounted in them, for non-performance of a condition annexed to the state of the land. *Co. Litt.* 146. See *Black. Com.* 1 V. 247. as to *laches* generally. And as to the *Laches of an Infant*, 1 V. 465.

Latta. A defect in the weight of money; whence is derived the word *lack*. *Du Fresno*.

Lada. Hath divers significations; 1st, From the Sax. *ladian*, to convene or assemble; it is taken for a *laib*, or court of justice. 2dly, It is used for purgation by trial; from *ladian*: and hence the *lada simplex*, and *lada triplex* or *lada plena*, among the Saxons; mentioned in the laws of King *Ethelred* and *K. Hen.* 1. 3dly, *Lada* is applied to a *lade* or course of water; *Camden* uses *water-lade*, or water-course: And *Spelman* says, that *lada* is a canal to carry water from wet grounds; sometimes *lada* signifies a broad way. *Spelm. Gloss. Mon. Angl. rom.* 1. p. 854.

Lade, Lode. i. e. The mouth of a river; from the Sax. *ladian*, *purgare*, because the water is there clearer; from hence *Crickdale*, *Lochdale*, &c.

Ladies. For the order of trial of duchesses, countesses, and baronesses for treason, when indicted thereof, see *Stat.* 2 Hen. 4. c. 14.

Lædopium, Reproach. *Facitum in sermone pluvium observant dum vel sales vel laedoris nunc levi lingua nunc mordaci.* *Girald. in descrip. Camb.* cap. 14.

Læsa Majestatis, crimen. The crime of high treason. So denominated by *Glanvill*, l. 1. c. 2. High treason is also in Latin *ultraproditio*.

Læssione fidei, Sæpe pro. The clergy, so early as the reign of King *Stephen*, attempted to turn their ecclesiastical courts into courts of equity, by entertaining suits *pro læssione fidei*, as a spiritual offence against conscience, in case of non-payment of debts, or any breach of civil contracts. See *Ld. Lyttel. H.* 2. b. 3. p. 361. *note*. But they were checked by the constitutions of *Clarendon*, 10 Hen. 2. c. 15. See *Black. Com.* 3 V. 52.

Læstodwick. (Sax. *blæstod*, i. e. *dominus*, and *fæp*, proditio, infidelitas erga dominum) A betraying one's lord or master. This word is found in King *Canutus's* laws, c. 61. And in the laws of King *Hen.* 1. *Quædam placita emendari (viz. quædam crimina explari) non possunt*, *hufbrech*, *openthest*, *ebremorth*, & *laforðwick*. *Leg.* 1. c. 13.

Laga. (len) The law, *lagam* *Rex* *Edwardi* *verbis* *red-do, cum illis commendationibus quibus pater meus eam emendavit*, says *Magna Charta*. Hence we deduce *Saxon-lage*, *Mercen-lage*, *Dane-lage*, &c.

Lagan. Is goods sunk in the sea, from the Sax. *ligan* *cubare*: when mariners in danger of shipwreck cast goods out of the ship; and because they know they are heavy and sink, fasten a buoy or cork to them, that they may find and have them again; if the ship be lost, these goods are called *lagan*, and so long as they continue upon the sea, belong to the Lord Admiral; but if they are cast away upon the land, they are then a wreck, and belong to the Lord entitled to the same. 3 Co. Rep. 106. At first *lagan* was that right which the chief lord of the fee had to take

goods cast on shore by the violence of the sea, &c. *Bract.* lib. 3. cap. 2. See 26 Geo. 2. c. 19.

Lagedayum, Lagday. A law-day, or time of open court. *Cowell*, edit. 1727.

Legemant, (legamannus) *Homo habens legem*; or *homo legalis seu legitimus*; such as we call now *good men of the jury*. The word is frequently used in *Domesday*, and the laws of *Edward the Confessor*, cap. 38. thus: *Postea inquisitio facta per legamannos, & per miliores homines de burgo*, &c. Sir *Edw. Coke* says, A *legeman* was he who had *faciam & faciam super homines suos*, i. e. that had a jurisdiction over their persons and estates; of which opinion were *Sumner* and *Lambard*, and that it signified the *Thanes*, called afterwards *Barons*, who sat as judges to determine rights in courts of justice: In *senatus consult. de Monticulis Wallie*, cap. 3. it is said, Let twelve *lagmen*, which *Lambard* renders *men of law*; viz. six English and six Welch, do right and justice, &c. *Blount*.

Lagen, (lagena) *Flata*, lib. 2. cap. 8, 9. In ancient times it was a measure of six *sextarii*. Hence perhaps our *flagon*. *Donatus insuper de sex lagenis olei annuatim*. *Charta* *Edw.* 3. m. 25. n. 82. The lieutenant of the Tower has the privilege to take *unam lagenam vini, ante malum & retro*, of all wine-ships that come up to the Thames. Sir *Peter Leycester*, in his *Antiquities of Cheshire*, interprets *lagena vini*, a bottle of wine.

Lagday, or Labday. A time of open court. See *Law-day*.

Laghitte, Laghite, Labhitte. (Sax. *lag*, *leg*, & *sitte*, *ruptio*) A breaking or transgressing of the law; and sometimes the punishment inflicted for so doing. *Leg. H.* 1. c. 13.

Lagon. See *Lagan*, and *Co. lib.* 5. fol. 106.

Lala. A broad way in a wood; the same with *lada*. *Mon. Ang. rom.* 1. pag. 483.

Lairwite, Wechewite, and Legesgeldum. (from the Sax. *legan*, i. e. *concumbere*, & *wite*, multa) *Pæna vel multa offenditum in adulterio & fornicatione*; and the privilege of punishing adultery and fornication did anciently belong to the lords of some manors, in reference to their tenants. *Flata*, lib. 1. c. 47. 4 Inst. 206.

Lammas-Day. Is the first of August, so called *quasi Lamb-mass*; on which day the tenants that held land of the cathedral church of *York*, (which is dedicated to St. *Peter ad Vincula*) were bound by their tenure to bring a live lamb into the church at high mass. It is otherwise said to come from the Sax. *blæsmæsse*, viz. *leaf-mass*, as on that day the English made an offering of bread made with new wheat. 23 Hen. 8. c. 4.

Lamp-black. To what duties liable. 4 Will. & M. c. 5. f. 2.

Lampage. See *Fish*.

Lamps. None but *British* oil to be used for lamps in private houses, under penalty of 40 s. 8 Ann. c. 9. Shares in the lights how taxable. 30 Geo. 2. c. 3. By the Stat. 17 Geo. 2. c. 29. Such convenient number of lamps as the Mayor, Aldermen and Commonalty of the city of *London* shall think proper, shall be erected in such places as to them shall seem meet; and they are to make rates not exceeding 6 d. in the pound, nor above 50 s. a year on any one person. The Alderman of each ward, with the consent of his deputy and Common Council-men, or the major part of them, may contract for the lamps, &c. Willfully breaking or extinguishing any lamp incurs the penalty of 40 s. for the first, 50 s. for the second, and 3 l. for the third offence. See the new acts for lighting, &c. the streets of *London* and *Windsor*.

Lancaster. Was erected into a county palatine, anno 50 Ed. 3. and granted by the King to his son *John* for life, that he should have *jura regalia*, and a King-like power to pardon treasons, outlawries, &c. and make justices of peace and justices of assize within the said county, and all processes and indictments to be in his name; but these royalties are abridged by the Stat. 27 H. 8. c. 24. There is a feod for the county palatine, and another for the duchy, i. e. such lands as lie out of the county palatine, and yet are part of the duchy: for such there are, and the Dukes of *Lancaster* hold them, but not as counties palatine, for they had not *jura regalia* over those lands. 2 Lutw. 1236. 3 Sall. 110, 111. The statute 37 H. 8. c. 16.

annexes lands to the duchy of *Launcester*, for the enlargement of it. Fines levied before the justices of assize of *Launcester*, of lands in the county palatine, shall be of equal force with those acknowledged before the justices in the Common Pleas. 37 H. 8. c. 19. And process against an outlawed person in the county palatine of *Launcester*, is to be directed to the Chancellor of the duchy, who shall thereupon issue like writs to the sheriff, &c. 5 & 6 Ed. 6. 26. The statute 17 Car. 2. concerning causes of replevin shall be of force in the court of Common Pleas for the county palatine of *Launcester*. 19 Car. 2. 5. By the Stat. 17 Geo. 3. c. 7. The Chancellor or Vice-chancellor may by commission empower persons to take affidavits in any cause, &c. depending in the Chancery or Courts of Sessions, in any plea whatsoever, civil or criminal. A quay to be made at *Launcester*, Stat. 23 Geo. 3. c. 12. See Black. Com. 1 V. 116. And as to its courts, 3 V. 78.

Launceti, These were *agricolæ quidam, sed ignotæ speciei*. Spelm.

Land, (*terra*) Signifies generally not only arable ground, meadow, pasture, woods, moors, waters, &c. but also messuages and houses; for in conveying the land, the buildings pass with it. Co. Litt. 4. 19. In a more restrained sense it is arable ground: and the land of every man is said in the law to be inclosed from that of others, though it lie in the open field; so that for any trespass therein, he shall have the writ *quare clausum fregit*, &c. Doct. and Stud. 8. In a grant, land may extend to meadow, or pasture, &c. But in writs and pleadings, it signifies arable only. 1 Vent. 260.

Co. on Litt. lib. 1. cap. 2. sect. 14. says, *Terra est nomen generalissimum & comprehendit omnes species terræ*, but properly *terra dicitur a terendo, quia vomere teritur*; and antiently it was written with a single *r*, and in that sense includes whatever may be plowed. The earth hath in law a great extent upwards, for *cujus est solum ejus est usque ad celum*. Co. 9 Rep. *Shured's case*. See Black. Com. 2 V. 7, 16, 17.

Where land shall be taken as money, or money as land, see 14 Vin. Abr. tit. Land.

Landia, A lawn or open field without wood. Cowell.

Landbor, (From the Sax. *Land* and *Boc*, Liber) Was a charter or deed whereby land was held. Sic Anglo-Saxones chartas & instrumenta nuncuparunt, prædiorum cessiones, jura & firmitates continentia. Spelm. Gloss.

Landcheap, (Sax. *Land-cheap*, from *cheap*, to buy and sell) An ancient customary fine, paid at every alienation of land lying within some manor, or liberty of a borough, as at *Malden* in *Essex*, there is to this day a custom called by the same name, that for certain houses and lands sold within that place, thirteen pence in every mark of the purchase-money shall be paid to the town; and this custom of *land-cheap*, they claim (*inter alia*) by a grant from the Bishop of *London*, made anno 5 H. 4.

Landea, A ditch in marshy lands to carry water into the sea.—*Vera judicium & awards faciat de Vallis, Landea, & Watergangia*. Du Cange.

Landfricus, (*Landfricus*) The lord of the soil, or the landlord: from the Sax. *land*, and, *terra*, and *rice*, *raðer*. *Es omnis erat sibi lagam 12 oris dimidium Landfrico, dimidium Wepentake*. Leg. Echeired. cap. 6.

Landgandman, Was one of the inferior tenants of a manor. *Custumariorum genus seu inferiorum tenentium manerii*, says the learned Spelman, who adds, —*Occurrit vox in custumar. de Hockham*.

Landgable, Is a tax or rent issuing out of land, according to *Domesday*. *Census prædialis vel tributum quod a prædiis colligitur*, that is, says Spelman, a penny for every house; the *Welsh* use *pridgawl* for *landgable*.

This *landgable* or *landgable* in the register of *Domesday*, was a quit-rent for the site of a house, or the land whereon it stood, the same with what we now call ground-rent.—*Tochi filius Outi habuit in civitate xxx mansuras præter summ ballam & duas ecclesias & dimidium*—& supr. *mansiones habuit locationem, & præter hoc de unaquaque annu denarium, id est, landgable, Domesday. Lincoln.*

Landmeters, *Agromensures*, Measures of land, so called of old; *Landmeters autem est terræ limes vel meta*:

from the Sax. *Gemara*, i. e. *Terminus*; and hence we say *Meters*.

Landrecht. In the *Saxon* times the duties which were laid upon all that held land, were termed *Trinoda necessitas*, viz. Expedition, *burghbote* and *brigbote*; which duties the Saxons did not call *servitia*: because they were not feudal, arising from the condition of the owners, but *Landrecht*, rights that charged the very land, whoever did possess it. Spelm. of Feuds.

Landlord, Is he of whom lands or tenements are holden; and a landlord may distrain on the lands of common right, for rent, services, &c. Co. Litt. 57, 205. In *London* if a tenant commit felony, &c. whereby his goods and chattels become forfeit; the landlord shall be paid his rent for two years, before all other debts except to the King, out of the goods found in the house. Priv. Lond. 75.

Landman, *Terricola*, The terre-tenant.

Land-tax. The ancient method of taxation was by *scutage*, which was on lands held by knight-service; and by tallage on the cities and boroughs, and it was made in this manner: When the King wanted money for his wars, those tenants that did not attend him in person, paid him an aid, and the aid was assessed before the justices itinerant. It was generally a gift of all the inhabitants as a body corporate; if they did not give according to the wants of the Crown, the justiciar enquired into their behaviour, and if there were any forfeitures of their charters, *quo warranto's* came out, to seize their liberties into the King's hands. But Ed. 1, found this way of taxing by *scutage* and tallage to be very incomplete; because wars were drawn out into great length and expence; and therefore he formed into distinct bodies, the tenants in capite that held great baronies, and these were called the *barones majores*, (the now peers of parliament); and the representatives of the *barones minores* and of several corporations, viz. the citizens and burgesses, of whom he made one body; which now composes the House of Commons. Gilb. Treat. of the Excheq. 192.

King Edward the First granted the people *Magna Charta*, which they had long contended for, and also the charter of the forests; and for *Magna Charta* they granted the King a fifteenth, by the name of *Quinducimam partem annuum bonorum*; so that instead of particular assessments in cities and boroughs, there was one universal assessment of the fifteenth of all their substance: this fifteenth seems to have been at first made out of the ecclesiastical tenth; for the Popes claimed the tenths of all benefices; it was therefore easy to know, by the Popes' collections of his tenths, what was the value of every ecclesiastical benefice, for the Pope's tenth was reckoned at 2 s. per pound, and therefore the fifteenth must be 1 s. 4 d. The benefice consisted of the glebe and the tenth part of the township; therefore by the value of the benefice, deducting the glebe, they knew the true value of the township, and how to set a fifteenth upon it: so that the fifteenth of the townships were certain sums, set by the King's taxers and collectors under the act of parliament; and commissions were granted to the taxers and collectors of them under the Great Seal; but in collecting of the fifteenths the sums only appeared in the books below. And the collectors of every township, either returned their collection into the Exchequer, or else there were head collectors for the whole county, who returned it thither; there were likewise commissioners appointed, to supervise such taxation and collections: But about the time of Edward III. there were certain established sums set upon every township; and so, as the King's wants increased, they gave one, two, or three fifteenths. Gilb. Treat. of the Excheq. 193, 194.

We find in the times of Henry the Eighth, Queen Elizabeth, and King James the First, that they raised both subsidies and fifteenths; this was, because the value of things increased, and therefore the old fifteenths were not according to the then true value of townships. And therefore they contrived that the subsidy should be raised by a pound-rate upon lands, and likewise a pound-rate upon goods; and we find in the subsidy 4 Car. (which is said to be the greatest subsidy that ever was given, and which

which passed upon the petition of rights) there was 4 s. in the pound laid upon land; and 2 s. 8 d. upon goods; now 4 s. upon land amounts to three fifteenths; and 2 s. 8 d. which was upon goods to two fifteenths; but in this they had no regard to the old rates made in the tax-book of the several townships, otherwise than to discover the value of the lands; but a method is chalked out by the act of parliament to appoint commissioners, assessors, and collectors, in order to rate and get in the said subsidy. This was found very inconvenient, because the commissioners were to be favourable to their own country, therefore it was found necessary to revive so far the ancient method, as to appoint a certain sum; and in the time of the civil war, the long parliament would not settle any persons to appoint commissioners, but the appointment of commissioners was made in the act itself: And in this new manner of taxing, they appointed the sum to be levied on each particular county, in the act itself; as well as the commissioners names, and where to levy it: And the six associated counties, viz. *London, Middlesex, Kent, Sussex, Surrey, and Hertford*, being not spoiled and pillaged in the civil wars, and more hearty to the parliament interest, were taxed higher than any other counties in *England*. *Ibid.* 194, 195, 196.

After the revolution, to support King *William* in his wars with *France*, it was necessary to come into a land-tax; and from 1684 to 1693, the tax was made by a pound-rate, like the former subsidies; but when the people found that the war was like to hold; about 1693, the tax was mightily lessened; every body being willing to ease his neighbour; and then they came to lay a rate upon every county; and the associating counties, being very zealous for the government in the revolution, and having taxed themselves higher than their neighbours in 1693, it was argued, that those counties were better able to bear the tax, and therefore in 1693, they laid the disproportioned sums that are now the standard of the land-tax: let us now compare the subsidy law, 4 *Car.* 1. with the present land-tax, and consider the manner of gathering them. *Ibid.*

In the old time, according to the way of making war then used, the tenants *per baroniam*, and by knight-service, as is herein before mentioned, were obliged to be in the camp 40 days, at their own expence, and the escuage was levied upon the defaulters; but when the art of war improved, and armies were brought into the field that continued a long time, they made their taxation by way of subsidy; which was so much in the pound upon the personal and real estate; as the subsidy of the fourth of King *Charles* was 2 s. 8 d. per pound on the personal, and 4 s. per pound on the real estate; and where there were different times of taxation and collecting, they were called so many different subsidies; and the spirituality gave their tax in convocation, and the temporality in parliament; but the convocation tax always passed both houses of parliament, since it could not bind as a law till it had the consent of the legislature. Their tax was made according to the rate in the King's books, and since a tenth was paid yearly to the crown, they only taxed the other nine parts as they stood in those books.

The temporality and spirituality were taxed in the same manner as to their personal estate, but as to their real estate, what was given in convocation excused their tax upon their spiritualities. The commissioners for executing the act, were appointed by the Lord Chancellor, Lord Treasurer, or other great officers of the Crown, or any two of them, the Lord Chancellor being one. *Ibid.* 197, 198.

The present land-tax, tho' it follows the plan of the subsidies, viz. in taxing so much on the personal, and so much on the real estate, yet it differs in two material circumstances, viz. that there is a sum imposed on each particular county, and that the commissioners are named in the act itself; this came in, in the time of the civil war, in this manner; they had first taxed according to the pound-rate, but when the zeal of the people fell off, they found it necessary to fix a sum upon each particular county; and so they taxed them according to the highest sum that had been levied in such county, and obliged

them to make it up; and they being then in opposition to the crown, they named the commissioners in the act itself; and this way of taxing was afterwards followed at the restoration, because they found it for the ease of the crown to name particular sums in the act of parliament, and then they named commissioners also, who were to assess and rate each particular inhabitant. The commissioners by the subsidy, were duly to execute that act; but by the land-tax they were directed in a particular manner how they should do it: that is to say, by making the distribution of the particular sum upon each particular hundred, lathe and wapentake; but by both laws, they were to subdivide themselves, and the respective commissioners were not to act out of their district. The commissioners by the land-tax acts, are to give a note to the receiver general, of the names of the acting commissioners, and sums in each division. We do not find this clause in the old subsidy law, because it was not necessary, where there was not a particular sum imposed on each county. The commissioners, both in the subsidy and land-tax, were to issue their precepts to the constables and other inhabitants, and to appoint assessors; and by both laws, the commissioners are to give them in charge, to make a just assessment, and to return such assessments to the commissioners; who by the land-tax were to return the names of collectors. And by both laws, the persons aggrieved might appeal from the assessors to the commissioners; and also stock upon land is excused from paying a personal estate. *Ibid.* 199, 200.

By the subsidy law, the commissioners appointed collectors; but by the land-tax, the assessors brought in the names of the collectors; because the place was answerable for the sums so assessed, until they were paid in to the receiver general; and therefore it was necessary that the assessors should appoint collectors: but by the subsidy law, there was no particular sum locally fixed; and therefore the collectors were appointed by the commissioners, who acted in behalf of the crown; and the collectors names were returned in, by both laws, to the receiver general or high collectors; and this disposition was, that the receiver might know in whose hands the money was. In the subsidy, the commissioners appointed the high collectors in each shire and division, to whom the sub-collectors were accountable, and the high collectors were accountants to the Exchequer; and one duplicate of the assessments was given to the high collector, and the other returned into the Exchequer, to be a charge upon the high collectors receipt: But according to the frame of the land-tax, the receiver is now appointed by the Lord Treasurer; and by this law, a duplicate of each particular division is to be given to the receiver general, and another to be returned into the Exchequer; the duplicate returned to the receiver, is to charge the collectors, and that returned into the Exchequer, to charge the receiver general. *Ibid.* 200, 201.

The high collectors by the subsidy law, gave security to the commissioners by recognizance, to answer the money by them received; but now the receiver general, by the constitution of the treasury gives security to the crown. In the subsidy law and land-tax, the under-collector was to distrain the parties refusing to pay the sum assessed: And by the subsidy law, the under-collector paid in the money collected to the high collector, who was an accountant at the Exchequer; but by the land-tax, the collectors are to pay in the money to the receiver, and he is the accountant at the Exchequer. If the collectors did not pay in the money they had collected to the receivers, the commissioners were to imprison them, and seize their effects; but if the proportion was not answered, the place itself was answerable, by a re-assessment of the commissioners. By both laws, the collectors had precepts and assessments delivered; and, under such precepts, had authority to distrain the lands and goods of the persons so assessed, by virtue of the act. By both laws the parties were to be taxed for goods, in the place where they dwelt. By both laws the distress was to be sold, and the overplus paid to the owner; by the subsidy law, in eight days; by the land-tax, in four days: And for neglect or refusal to pay, and failure of distress, the party

to be imprisoned. By the subsidy law, all the commissioners joined in one certificate; but now the commissioners in each division return their estates, which are a charge upon the receiver general; but in the land-tax, if a non-payment in any place be certified by the receiver under his hand, Exchequer process is to issue against the acting commissioners. By the land-tax, if land doubly taxed comes into protestant hands, and they get a certificate from the commissioners, and prove the truth of the certificate before the barons, by two credible witnesses, the Court of Exchequer is empowered to discharge such sum from the parish or township in which the lands lie, and that discharge is carried to the House of Commons, in order to be discharged out of the general sum the next year. *Ibid.* 203, 204. See *Subsidy, Tax. Black. Com.* 1 P. 308. 4 P. 416.

Landtenant, Is he that possesses land let, or hath it in his manual occupation. 14 Ed. 3. Stat. 1. cap. 3. See *Tenant.*

Langemanni, Are lords of manors, as interpreted by Sir Ed. Coke. 1 Inst. 5. They are mentioned in *Domesday*.

Langeolam, An under garment made of wool, formerly worn by the monks, which reach'd down to their knees; so called because *lanca fit*. Mon. Angl. Tom. 1. pag. 419.

Lanis de crescentia Wallia transuentis abique Cumbria, &c. An ancient writ that lies to the customer of a port, to permit one to pass wool without paying custom, he having paid it before in *Wales*. Reg. Orig. 279.

Lanternum, The lantern, cupola, or top of a steeple. Cowell, edit. 1727. — *Walterus Skirlaw Episcopus Dunelmensis (obit 1405) magnam partem campanilis, vulgo lanterni, ministerii Eboracensis catedralis, in medio cuius operis arma sua posuit.* Angl. Sacr. p. 1. pag. 775.

Lana nigra, A sort of black wool, formerly current in this kingdom. *Manerium in Scaccario*. Mich. 25 Ed. 3.

Lapis Calamitarius, To what duties liable on exportation. 1 W. 3. M. c. 5. 2 Ed. 3. Will. 3. c. 20.

Lapis Marmoreus, A marble stone about twelve foot long and three foot broad, placed at the upper end of Westminster-hall, where was likewise a marble chair erected on the middle thereof, in which our Kings anciently sat at their coronation dinner, and at other times the Lord Chancellor. — *Rex guidam Henricus de Clive, (Clericus Rotulorum) in Magna Aula Westm. apud Lapidem Marmorium in praesentia Domini Cancellarii, praesentia Sacramentum, &c.* Claus. Ed. 2. m. 1. *Dors.* Over this marble table are now erected the courts of Chancery and King's Bench. Orig. Juridical. 37.

Lapis pacis, The same with *Oculus pacis*. Du Fresnoy.

Lapse, (*Lapsus*) Is a slip or omission of a patron to present to a church, within six months after it becomes void; in which case we say, that benefice is in *lapse* or *lapsed*. 13 Eliz. c. 12. And *lapse* is deemed to be a title given to the ordinary to collate to a benefice, on the patron's negligence in presenting within six months; and also to be a devolution of a right of presenting from the patron to the bishop; from the bishop to the archbishop; and from the archbishop to the King. *Wood's Inst.* 158. If after an avoidance, the patron doth not present in six months, the ordinary hath the next six months to collate to the benefice; and if he doth not collate in six months, then the metropolitan hath further six months; and if he doth not collate within his six months, it then devolves to the crown. 2 Roll. Abr. 360. *Hib.* 30. 4 Rep. 17. And the computation of the six months is by the kalender months, exclusive of the day in which the church becomes void. 6 Rep. 62. Where a patron presents his clerk before the bishop hath collated, the presentation is good notwithstanding the six months are past, and shall bar the bishop, who cannot take any advantage of the *lapse*: And so if the patron makes his presentation before the archbishop hath collated, though twelve months are past: But if the bishop collates after twelve months, this bars not the archbishop. 2 Roll. Abr. 360. 2 Inst. 273. If a bishop doth not collate to benefices of his own gift,

they *lapse* at the end of six months to the archbishop; and if the archbishop neglects to collate within six months, to a benefice of his gift, the King shall have it by *lapse*. *Dr. & Stud. cap.* 36. And if a church continues void several years by *lapse*, the successor of the King may present. *Civ. Car.* 258. But if the King hath a title to present by *lapse*, and he suffers the patron to present, and the presentee dies, or resigns before the King hath presented, if the presentation is real and not by covin, he hath lost his presentation, for *lapse* is but for the first and next turn; and by the death of the incumbent, a new title is given to the patron; though it has been adjudged that the King in such case may present at any time as long as that presentee is incumbent. 2 Cro. 116. 7 Rep. Moor 244. When the patronage of the church is litigious, and one party doth recover against the other in a *quare impedit*, if the bishop be not named in the writ, and six months pass while the suit is depending, *lapse* shall incur to the bishop: if the bishop be named in the writ, then neither the bishop, archbishop or King, can take the benefice by *lapse*; and yet it is said, if the patron within the six months brings a *quare impedit* against the bishop, and then the six months pass without any presentation by the patron, *lapse* shall incur to the bishop. 2 Roll. Abr. 365. 6 Rep. 52. 1 Inst. 344. *Hib.* 270. Though where the bishop is a disturber, or the church remains void above six months by his fault, there shall be no *lapse*. 1 Inst. 344. A clerk presented being refused by the bishop for any sufficient cause, as illiterature, ill life, &c. he is to give the patron notice of it, that another may be presented in due time, otherwise the bishop shall not collate by *lapse*; because he shall not take advantage of his own wrong, in not giving notice to the patron as he ought to do by law. *Dyer* 292. And if an avoidance is by resignation, which must necessarily be to the bishop by the act of the incumbent; or by deprivation, which is the act of the law, *lapse* shall not incur to the bishop, till six months after notice given by him to the patron: When the church becomes void by the death of the incumbent, &c. the patron must present in six months without notice from the bishop, or shall lose his presentation by *lapse*. *Dyer* 293, 327. 1 Inst. 135. 4 Rep. 75.

In the cases of deprivation and resignation, where the patron is to have notice before the church can *lapse*, the patron is not bound to take notice from any body but the bishop himself, or other ordinary, which must be personally given to the party, if he live in the same county; and such notice must express in certain the cause of deprivation, &c. If the patron lives in a foreign county, then the notice may be published in the parish church, and affixed on the church door. *Civ. Eliz.* 119. *Dyer* 328. In such cases where there ought to be notice, if none is given by the bishop or archbishop in a year and a half, whereby *lapse* would come to the King if it had been given, here the *lapse* writes not to the King, where no title accrues to the inferior ordinary. *Dyer* 340. And it has been adjudged, that *lapse* is not an interest, like the patronage, but an office of trust reposed by law in the ordinary; and the end of it is, to provide the church a rector, in default of the patron: And it cannot be granted over; for the grant of the next *lapse* of such a church, either before it falls or after, is void. *F. N. B.* 34. Also if *lapse* occurs, and then the ordinary dies, the King shall present, and not the ordinary's executors, because it is rather an administration, than an interest. 25 Ed. 3. 4. *Meller* 2. *Imped.* 118. A *lapse* may incur against an infant or feme covert, if they do not present within six months. 1 Inst. 246. But there is no *lapse* against the King, who may take his own time, and plenarity shall be no bar against the King's title, because *Natus imperator accipit Regi.* 2 Inst. 273. *Dyer* 351. By presentation and institution, a *lapse* is prevented; though the clerk is never inducted: And a denative cannot *lapse*, either to the ordinary or the King. 2 Inst. 273. See *Black. Com.* 2 P. 276. 4 P. 106.

Lapsus Legatus, Is where the legate dies before the mission. *Vide Black. Com.* 2 P. 513.

Larceny, (*Fr. Larcin*, Lat. *Lustrum*) Is a theft or felony of another's goods, in his absence, and in respect of the thing stolen, it is either

Great
or
Small.

Grand larceny is a felonious taking and carrying away the personal goods of another, above the value of 12 d. not from the person, or by night, in the house of the owner. *Petit larceny* is when the goods stolen do not exceed the value of 12 d. It agrees with *grand larceny* in all things except only the value of the goods; so that where ever any offence would be *grand larceny*, if the thing stolen was above 12 d. value; it is *petit larceny*, if it be but of that value, or under. *H. P. C. 60, 69.* If two persons steal goods to the value of 12 d. it is *grand larceny* in both; and if one at different times steals diverse parcels of goods from the same person, which together exceed the value of 12 d. they may be put together in one indictment, and the offender found guilty of *grand larceny*; but this is very seldom done: On the contrary, the jury sometimes, where it is an offender's first offence, &c. find it specially, as they may, that the goods are but of 12 d. value; whereby it will be only *petit larceny*, though the offender is indicted for stealing things of the value of 40 or 40 s. *H. P. C. 70. Pak 125. 3 Inst. 109. 110. Reg. 66.*

Grand larceny is a felony punished with death; *petit larceny* only with whipping, or other corporal punishment, &c. But the offenders may have the benefit of transportation by statute. There is not only *simple larceny*, by taking away the goods of another, but a *mixed* or *complicated larceny*, which has a further degree of guilt in it, and is either a taking from the person, or from the house; as in case of robbery, burglary, &c. Also there is a *private larceny* from a man's person, without his knowledge; or in *open larceny* with his knowledge; private, by picking the pocket, &c. openly, where a thief takes off my hat, or periwig, from my head, and runs away with it: And as to *private larceny* from the person above 12 d. it is excluded clergy, if laid in the indictment as done *clm 15 facit*, &c. according to the words of the Stat. 3 Edw. c. 4. But otherwise it is not: open *larceny* with knowledge, by the Common law is within the benefit of clergy. *H. P. C. 75. Dak. 109. 110. 3 Inst. 68. Dyer 224.* Of all moveable goods, the property whereof is in any person, felony, or *larceny* may be committed; as money, household-stuff, lly, corn and trees severed from the ground, &c. But the goods stolen must be merely personal, to make it *larceny*; for if it be of any thing in the realty, or fixed to the freehold, as corn, or fruit growing, not severed, lead on a church, &c. it is not *larceny*. *3 Inst. 109. 3 Rep. 35. Dak. 372.* And of papers and parchment, on which conveyances are written concerning lands, or obligations, &c. *larceny* cannot be committed. *Went 156. But the stat. 2 Geo. 2. c. 15. as to stealing of bonds and notes; and the 2 Geo. 2. c. 32. against stealing and taking away lead, or iron bars from houses, &c.* Where a person finds the goods of another that are lost, and converts them to his own use, it is no *larceny*. *H. P. C. 61.* To take away goods the owner of which is unknown, sometimes is no *larceny*; such as treasure-trove, wrecks, wild fays, before seizure by the person who hath a right to the same; though in other cases, a man may be guilty of *larceny* in taking away goods, the owner whereof is unknown. *Dak. 370. 3 Inst. 108. H. P. C. 67.* And in some extraordinary cases, the law will rather seize a property, where in strictness there is none, than suffer an offender to escape justice. *1 Hawk. P. C. 94.*

A man may commit *larceny* by taking away his own goods in the hands of another; as where the owner delivers goods to a carrier, and afterwards secretly steals them from him, with an intent to charge him for them, &c. because the carrier had a special property, and the possession for a time. *3 Inst. 109. Dak. 371. Pak. 126.* To make the crime of *larceny*, there must be a felonious taking; or an intent of stealing the thing, when it comes first to the hands of the offender, at the very time of the receiving. *3 Inst. 107. Dak. 367.* And if one intending to steal goods, gets possession of them by agreement, replevin, or other process at law unduly obtained, by

false oath, &c. it is a felonious taking. *3 Inst. 62. Mel. Rep. 43, 44.* If a man hath possession of goods once lawfully, though he afterwards carry them away with an ill intention, it is no *larceny*: where a taylor imbezzles cloth delivered to him, to make a suit of clothes, &c. it is not felony. *H. P. C. 61. 5 Rep. 31.* And if I lend a person my horse to go to a certain place, and he goes there, and then rides away with him, it is not *larceny*; but remedy is to be had by action for the damage; though if one comes on pretence to buy a horse, and the owner gives the stranger leave to ride him, if he rides away with the horse, it is felony; for here an intention is implied. *Went 156. 364, 365.* In the above cases, there is a lawful possession by delivery, to extenuate the offence: But persons having the possession of goods by delivery, may in some instances be guilty of felony, by taking away part thereof; as if a carrier open a pack, and take out part of the goods; a miller, who has corn to grind, takes out part of the same, with an intent to steal it, &c. In which cases, the possession of part, distinct from the whole, was gained by wrong, and not delivered by the owner, &c. *H. P. C. 62. 3 P. C. 25. 1 Hawk. P. C. 90.* If a lodger hath the possession of goods and furniture in a house, by the consent and delivery of the owner, the taking away, imbezzling or perverting thereof, with an intent to steal them, is felony and *larceny*. *Stat. 3 Edw. 1. c. 9. And by statute, if a servant being of the age of 15 years, and not an apprentice, goes away with goods of his master or mistress delivered him to keep; or being in his service imbezzles them, or converts them to his own use, with intention to steal them, it is felony, if the goods are of the value of 40 s. or above. 23 H. 8. c. 7. 11 Edw. 3. c. 17. 28 H. 8. c. 2. 1 Edw. 6. c. 12. 5 Eliz. c. 10.*

Also if one servant delivers the goods to another servant, this is a delivery by the master; yet if the master or another servant delivers a bond, or cards of debt, and the servant goes away with the bond, and receives the money thereon due, or receives the money for the cards sold, and goes away with the same, this is no felony or *larceny* within the statute. *Dak. 389. H. P. C. 62. 3 Inst. 105.* So if a servant receives his master's rents; for the master did not deliver the money to the servant, and it must be of things delivered to keep: And if goods delivered to the servant to keep, are under 40 s. value, and he goes away with them, this is only a breach of trust, by reason of the delivery; but if the goods were not delivered to him, it is felony and *larceny* to go away with or imbezzle them, tho' under the value of 40 s. &c. *Dak. 389. Stat. 12 Hen. 8. c. 7.* A person that hath the bare charge of goods, and not the possession; as a butcher that hath the charge of plate, a shepherd of sheep, a servant who hath the charge of a chamber by delivery of the key to him, &c. may be guilty of *larceny*. *3 Inst. 108.* If the goods of a dead person are stolen, it is felony and *larceny*: But where servants in a house imbezzle them after their master's decease, this seems not to be felony, because the things were in some measure in their custody; tho' if they appear not on proclamation, they shall be attainted of felony, by statute 33 H. 6. c. 1. 1 Hawk. P. C. 515.

A man puts a child of seven years old to take goods and bring them to him, and he carries them away; the child is not guilty by reason of his infancy, yet it is *larceny* in the other. *Ibid. 514.* If a man reduced to extreme necessity (not owing to his own uncharitableness) steals victuals merely to satisfy his present hunger, and keep him from starving, by our English books, this is neither felony nor *larceny*. *1 Hawk. P. C. 93.* An acquittal of *larceny* in one country, may be pleaded in bar of a subsequent prosecution for the same stealing in another country: And an averment that the offences in both indictments are the same, may be made out by witnesses, or inquest of office, without putting it to trial by jury; tho' that of *larceny* has been the usual method. *1 Hawk. P. C. 370.* But it is to be observed in respect of *larceny*, that the defendant must be found not guilty in action of trespass brought against him by the same plaintiff for the same goods, the *larceny* and trespass are entirely different; and a bar in an action of an inferior nature, will not bar another

ther of a superior. *Ibid.* 371. If a person be indicted for felony or larceny generally, and upon the evidence it appears that the fact is but a bare trespass, he cannot be found guilty, and have judgment on the trespass, but ought to be indicted anew; tho' it may be otherwise where the jury finds a special verdict, or when the fact is specially laid, &c. In trespass where the taking is felonious, no verdict ought to be given, unless the defendant hath before been tried for the felony. 2 Hawk. 440. All felony includes trespass, so that if the party be guilty of no trespass in taking the goods, he cannot be guilty of felony or larceny in carrying them away; and in every indictment of larceny, there must be the words *felonice cepit & asportavit*, &c. H. P. C. 61. 1 Hawk. 89.

By the 2 Geo. 2. cap. 25. it is enacted, "That if any person or persons shall steal, or take by robbery, any Exchequer orders or tallies, or other orders, intitling any other person or persons to any annuity or share in any parliamentary fund, or any Exchequer bills, Bank notes, South-Sea bonds, East-India bonds, dividend warrants of the Bank, South-Sea company, East-India company, or any other company, society or corporation, bills of exchange, navy bills or debentures, goldsmiths notes for payment of any money, or other bonds or warrants, bills or promissory notes for the payment of any money, being the property of any other person or persons, or of any corporation; notwithstanding any of the said particulars are termed in law a *chose in action*, it shall be deemed and construed to be felony of the same nature and in the same degree, and with or without the benefit of the clergy in the same manner, as it would have been, if the offender had stolen or taken by robbery any other goods of like value with the money due on, or secured by such orders," &c.

The 4 Geo. 1. c. 11. and 6 Geo. 1. c. 23. Impower the judges on conviction for grand or petit larceny (except the case of buying or receiving of stolen goods knowing them to be such) to transport the offenders. See *Clergy, Felony*.

See *Black. Com.* 4 V. 229, 230, 232, 240, 241, 310.

Lardarium, The larder, or place where the lard and meat were kept. — *Tanentius de Pidington carabunt salem domini de foro ubi emptus fuerit ad lardarium domini*. Paroch. Antiquit. pag. 496. Whence *larderarius Regis*, the King's larderer, or clerk of the kitchen. Cowell.

Larderarius Regis, The King's larderer, or clerk of the kitchen. Cowell.

Larding Money. In the manor of Bradford in the county of Wilt, the tenants pay to their lord a small yearly rent by this name; which is said to be for liberty to feed their hogs with the mast of the lord's woods, the fat of a hog being called *lard*: Or it may be a commutation for some customary service of carrying salt or meat to the lord's larder. This was called *lardarium* in old charters; & *decimam lardarii de бага*. Mon. Ang. tom. 1. P. 321.

Larons, (Fr.) Thieves; mentioned in the statute for view of frank-pledge. 18 Ed. 2.

Lassinus, Often occurs in *Walsingham*, and signifies an assassin or murderer. *Anno* 1271.

Last, (Sax. *blastan*, i. e. *onus*, Fr. *last*) Denotes a burden in general, and particularly a certain weight or measure of fish, corn, wool, leather, pitch, &c. As a *last* of white herrings, is twelve barrels, of red herrings, twenty cades or thousand, and of pilchards, ten thousand; of corn, ten quarters, and in some parts of England twenty-one quarters; of wool, twelve sacks; of leather, twenty dickers, or ten score; of hides or skins, twelve dozen; of pitch, tar or ashes, fourteen barrels; of gunpowder, twenty-four firkins, weighing a hundred pound each, &c. Stat. 32 Hen. 8. cap. 14. 1 Jac. 1. cap. 33. 15 Car. 1. cap. 7.

Last, In the marshes of Kent, is a court held by the twenty-four *jurats*, and summoned by the bailiffs; wherein orders are made to lay and levy taxes, impose penalties, &c. for the preservation of the said marshes. *Hist. of Imbanking and Draining*, f. 54.

Lastage, (*lastagium*) A custom exacted in some fairs and markets, to carry things bought where one will, by the interpretation of *Rassal*: But it is taken for the ballast

or lading of a ship, by the stat. 21 R. 2. cap. 18. — *Omnes homines London sint quieti & liberi*, &c. de Theobonio, & Passagio, & Lastagio, & ab omnibus aliis Consuetudinibus. Diploma Hen. 1. de Libertatibus London. And *Lastage*, says another author, is properly that custom which is paid for wares sold by the *last*; as herrings, pitch, &c.

Lastage and ballastage, Regulated in the river Thames, 6 Geo. 2. c. 29.

Last heir, (*Ultimus hæres*,) Is he to whom land comes by escheat for want of lawful heirs, Last is, the Lord of whom they held in some cases: But in others the King. *Quippe Rex omnium hæredum ultimus est, uti oceanus omnium fluviorum receptaculum* Bract. lib. 7. cap. 17. See *Heir*.

Latera, Sides-men, companions, assistants. Cowell.

Lateral, To lie side-ways in opposition to laying end-ways; used in the description of lands. *Chart. dat. ann.* 1317.

Lath, **Leth**, (*lastum*, *Leda*, Sax. *lathe*) Is a great part of a county, containing three or four hundreds, or wapentakes; as it is used in Kent and Sussex. Leg. Ed. Confess. c. 35. — *Et sunt quidam de factis Comitatum, Leth, Hundred, & auxilium vicomitem*. Pat. 1 H. 4. par. 8. m. 8. See *Lada*. And *Black. Com.* 1 V. 116.

Lathrebe, **Leidgrebe** or **Trithingrebe**, Was an officer under the Saxon government, who had authority over a third part of the county; and whose territory was therefore called *Trithing*, otherwise a *Leid* or *Leithen*, in which manner the county of Kent is still divided; and the *Rapes* in Sussex seem to answer the same. As to the jurisdiction of this officer, those matters that could not be determined in the hundred court, were thence brought to the *Trithing*, where all the principal men of three or more hundreds being assembled by the *Lathrebe* or *Trithingrebe* did debate and decide it; or if they could not, then the *Lathrebe* sent it up to the county court, to be there finally determined. — *Suoque olim subaudiens magistratus quem Ledgreivum appellabant*. Spelm. Ant. Government of England.

Latimer, Is used by Sir Edward Coke for an interpreter, 2 Inst. 315. It seems that the word is mistaken, and should be *latiner*, because heretofore he that understood Latin, which in the time of the Romans was the prevailing language, might be a good interpreter. Camden agrees, that it signifies a *Fruchman* or interpreter, and says the word is used in an old inquisition. *Britan. fol.* 398. and may be derived or corrupted from the Fr. *latiner*, q. d. *latiner*. Cowell.

Latin. There are three sorts of Latin. 1. Good Latin, allowed by grammarians and lawyers. 2. False or incongruous Latin, which in times past would abate original writs; tho' not make void any judicial writ, declaration or plea, &c. And 3. Words of *Art*, known only to the sages of the law, and not to grammarians, called *Lawyers Latin*. 1 Lill. Abr. 146, 147. Stat. 36 Ed. 3. Formerly the use of a word not Latin at all, or so in the sense in which used, might in many cases be helped by an *Anglice*; tho' where there was a proper Latin word for the thing intended to be expressed, nothing could help an improper one. 2 Hawk. P. C. 232. And when there was no Latin for a thing, words made which had some countenance of Latin, were allowed good, as *Felvetum*, *Anglici velvet*, &c. 10 Rep. 131. See *Indulgent*, and *Process*.

Latinatus, An interpreter of Latin, or *latiner*, from the Fr. *latiner*; and heretofore he that understood Latin, which in the time of the Romans was the prevailing language, might be a good interpreter. 2 Co. Inst. 315.

Latitat, Is a writ whereby all men are originally called to answer in personal actions in the King's Bench, having its name upon a supposition that the defendant doth *lure* and *lie hid*, and cannot be found in the county of *Middlesex* to be taken by *bill*, but is gone into some other county, to the sheriff of which this writ is directed, to apprehend him there. F. N. B. 78. *Terms de Ley*. The original of it is this: In ancient time, while the King's Bench was moveable, when any man was sued, a writ was sent forth to the sheriff of the county where the court was resident, called a *bill of Middlesex*, to take him; and if the sheriff re-

137. 4 Rep. 124. The use of the law is to secure the property of what we enjoy; and the objects of it concern persons, their estates, crimes, and misdemeanors, courts of justice, &c. See *Contin. Laws*, and *Black. Com.* 1 P. 38. &c. and 4 P. 400, &c.

Lex hath also a special signification, wherein it is taken for that which is lawful with us, and not elsewhere; as tenant by the *Curtesy of England*, is called tenant by the *law of England*.

Lex Armis, (*lex armiarum*) Is that law which gives precepts how to proclaim war, make and observe leagues and treaties, to assault and encounter an enemy, and punish offenders in the camp, &c. The law and judgment of arms are necessary between two strange princes of equal power, who have no other method of determining their controversies, because they have no superior or ordinary judge, but are supreme and publick persons; and by the law of arms, Kings obtain their rights, rebels are reduced to obedience, and peace is established: but when the law of arms and war do rule, the civil laws are of little or no force. *Treat. Laws* 57. It is a kind of law among all nations, that in case of a solemn war, the prince that conquers gains a right of domination, as well as property over the things and persons he has subdued; and it is for this reason, because both parties have appealed to the highest tribunal that can be, viz. the trial by arms and war; wherein the Great Judge and Sovereign of the world, in a more especial manner, seems to decide the controversy. *Hist. Hist.* 2. 73. 74. Common things concerning arms and war, are under the cognizance of the Constable and Marshal of England. 13 R. 2.

Lex Doctis. All books within the law, are either *historical*, as the *Year-Books*; *explanatory*, such as *Bracton's Treatise of the Royal Prerogative*; *illustrations*, as the *Abridgments of the Law*; *unimproved*, being on one certain subject, such as *Bartholomaeus's Justice of Peace*, &c. *Fullbeck's Parallel*, cap. 3. And our books of Reports, have such great weight with the judges, that many of them are as highly valued, as the *Highway Proverbum* among the *Romans*, which were *authoritative*. Wood's Inst. 10. *Authors of Law-Books*. Vide *Common Law*.

Lex Day, (*legidagum*) Called also *view of frankpledge*, or *court-leet*, was any day of open court; and commonly used for the courts of a county or hundred. *Et quidam sunt de jure contrarium & traditionem nostrorum de vicia franci plegii & lawdayorum*, &c. *Chari.* 39 Rex. 3.

Laming of Dogs, Is the cutting off several claws of the fore-feet of dogs in the *forest*. *Chart. Forest.* c. 6. See *Expositio*, and *Black. Com.* 1 P. 72.

Lawless Court, Is a court held on *King's hill* at *Rushford* in *Essex*, on *Wednesday* morning next after *Michaelmas* day yearly, at cock-crowing; at which court, they whisper, and have no candle, nor any pen and ink, but a coal: and he that owes suit or service there, and appears not, forfeits double his rent: this court is mentioned by *Canden*, who says, that the *revile* attendance was imposed on the tenants, for conspiring at the like unreasonable time to raise a commotion. *Camd. Britan.* 441. It belongs to the honour of *Rushford*, and is called *lawless*, because held at an unlawful hour; or *quia dicta sine lege*. The title of it is in rhyme, and in the court-roll runs thus:

Kingshill in } ff. Curia de Domino Rege,
Rochford. } ff. Dicta sine lege,
Tenta est ibidem
Per consuetudinem
Ante ortum solis
Luceat nisi palus,
Senscallus solus
Nil scribit nisi callis
Toties voluerit
Callus ut cantaverit,
Per cujus soli sonitus
Curia est summota:
Clamata clam pro rege
In curia sine lege,
Et nisi tunc venerint
Civitas periturus.

Et nisi clam accedant
Curia non attendat,
Qui venerit cum lumine
Errat in regimine,
Et dum sunt sine lumine,
Capit sunt in crimine,
Curia sine cura.
Jurati de injuria.

Tenus ibidem die Mercurii (ante diem) proximo post festum Sancti Michaelis anno regni regis, &c.

Lawless Span, (*exlex*) is an outlaw. *Pro exlege tenetur, cum principi non obediatur nec legi, & tunc atlagabitur sicut ille qui est extra legem, sicut laughless man.* *Bract. lib.* 3. c. 11.

Law of Marches, (from the Germ. *march*, i. e. *limet*) Is where they that are driven to it, do take the shipping and goods of that people of whom they have received wrong, and cannot get ordinary justice in another territory, when they can take them within their own bounds and precincts. *Stat. 27 Ed.* 3. c. 17.

Law Merchant, (*lex mercatoria*) Is a special law differing from the common law of England, proper to merchants, and part of the law of the realm. And the *charta mercatoria*, 31 Ed. 1. grants this perpetual privilege to merchants, coming into this kingdom: *quod omnes barones, ministri, feitorum, civitatum, burgorum & villarum mercatorum mercatoribus in omnibus comparentibus coram eis eorum iustitiam faciant de re in rem sine dilatione; secundum legem mercatorum, de mercatoribus & singulis que per eandem legem contrahi solentur.* See 13 Ed. 1. and 27 Ed. 3. c. 8. Co. Litt. 182. See *Custom of Merchants*.

Law Proceedings, Of all kinds, as writs, processes, pleadings, &c. are to be in the *English* language from the twenty-fifth of March 1733, by 4 Geo. 2. c. 26. 5 Geo. 2. c. 27. Except known abbreviations and technical terms, 6 Geo. 2. c. 14. Vide *Præf.*

Law Spiritual, (*lex spiritualis*) Is the Ecclesiastical law, allowed by our laws where it is not against the Common law, nor the statutes and customs of the kingdom: and regularly according to such Ecclesiastical or Spiritual laws, the Bishops and other Ecclesiastical judges proceed in causes within their cognizance. Co. Litt. 344. It was also called *Law Christian*; and in opposition to it, the Common law was often called *Lex Terrena*, &c.

Law of the Staple, (mentioned in Stat. 27 Edw. 2. Stat. 2. cap. 22.) Is the same with *law merchant*. See 4 Inst. 237, 238. and *Staple*.

Lawyer, See *Counsellor*.

Lawyer, (*legista, legisperitus, jurisconsultus*) By the *Saxons* called *laman*, is a counsellor, or one learned in the law. And lawyers, such as counsellors, attorneys, &c. are within the act 3 Jac. 1. against extortion; but it has been held only to extend to officers. 2 Keb. 548.

Law Corporations. Are of two sorts, civil and eleemosynary. The civil are such as are erected for a variety of temporal purposes. The eleemosynary sort are such as are constituted for the perpetual distribution of the free alms, or bounty, of the founder of them to such persons as he hath directed. See *Black. Com.* 1 P. 470, 471.

Law Jurisdiction of Bishops. See *Black. Com.* 1 P. 378, &c.

Law-Free, (*statum laicum*) Lands held in fee of a lay-lord, by the common services to which military tenure was subject; as distinguished from the ecclesiastical holding in *frankalmoin*, discharged from these burdens. *Kent's Gloss.*

Layman, Is one that is not of the clergy; and the *Latin* word *laicus* signifies as much as *popularis*, that which is common to the people, or belongs to the laity. Lit. Dig.

Layhall, (*Sax.*) A place or lay-dwelling. See 22 & 23 Car. 2.

Lazaretto. Places where quarantine is to be performed, by persons coming from infected countries. Escaping from them felony, without benefit of clergy. See 1 Jac. 1. c. 31. 26 Geo. 2. c. 6. 29 Geo. 2. c. 8.

Leagi. The Saxons divided the people of the land into three ranks: the first they called *edilingi*, which were such as are now nobility: the second were termed *frilingi*, from *friling*, signifying he that was born a freeman, or of parents not subject to any servitude, which are the present gentry: and the third and last were called *laxci*, as born to labour, and being of a more servile state than our servants, because they could not depart from their service without the leave of the lord; but were fixed to the land where born, and in the nature of slaves: hence the word *laxci*, or *lax*, signifies those of a servile condition. *Nithardus de Saxonibus. lib. 24.*

Lea of Yarn. A quantity of yarn, so called; and at *Kidderminster* it is to contain 200 threads on a reel four yards about. *22 Ed. 3 Car. 2.*

Lead. Stealing of lead, affixed to a house, &c. transportation for seven years. *4 Geo. 2. c. 32.*

League. Is an agreement between princes, &c. Also a measure of way by sea, or an extent of land containing three miles in most countries abroad. Breakers of leagues and truces, and how punished for offences done upon the seas. See *Stat. 2 H. 5. and 4 H. 5. c. 7.*

Leath, or **Leche,** (from the Sax. *leccian*, to let out water) in the bishoprick of *Durham* is used for a gutter; so in *Yorkshire* any slough or watery hole upon the road, is called by this name: and hence the water-rub so put upon in to make a lee for washing of cloaths, is in some parts of *England* termed a *leche*. *Cowell.*

Leahage. Is an allowance of twelve per cent. to merchants importing wine, out of the customs; and of two barrels in twenty-two of ale to brewers, &c. out of the duty of excise. *Mirch. Dis.*

Leap. A net, engine or wheel, made of twigs, to catch fish in. *4 Ed. 5 W. & M. c. 23. See Leap.*

Leap-year. Every fourth year, having one day more than other years. The day increasing in the leap-year, and the day before, shall be accounted for one day. *11 Hen. 3. Vide Bissextile.*

Lease, (from *leasie* letting, or rather *leasie*, from the *Fr. laiffer*, i. e. *dimittens* to depart with) is a demise or letting of lands, tenements or hereditaments to another, for term of life, years, or at will, for a time referred. *Ca. Lit. 43.* Leases are either in writing, or by word of mouth, when they are called leases *parol*; and it is said not to be material whether any year is referred upon a lease for life, or years, except in the case of leases by tenant in tail, &c. according to the Statute 21 H. 8. c. 28. A lease for life requires livery of seisin; and generally to the making of a good lease, several things necessarily concur; there must be a lessor, not restrained from making a lease; a lessee not disabled to receive; a thing demised which is demisable, and a sufficient description of the thing demised, &c. If it be for years, it must have a certain commencement and determination, it is to have all the usual ceremonies, as feasting, delivery, &c. and there must be an acceptance of the thing demised. *Lib. 56. 1 Inst. 46. Plowd. 272. 523.* A demise having no certain commencement is void: for every contract sufficient to make a lease, ought to have certainty in commencement, in the continuance, and in the end. *Fag. 85. 6 Rep. 55.* A lease at will is at the will of the lessor or lessee, or regularly at the will of both parties. *1 Inst. 25.*

* All estates, interests of freehold, or terms for years in lands, &c. not put in writing, and signed by the parties, shall have no greater effect than as estates at will; unless it be of lands not exceeding three years from the making, wherein the rent reserved shall be two thirds of the value of the thing demised. *Stat. 29 Car. 2. cap. 3.* Leases exceeding three years must be made in writing, and if the substance of a lease be put in writing, and signed by the parties, though it be not sealed, it shall have the effect of a lease for years, &c. *Wood's Inst. 266.* Articles with covenants to let and make a lease of lands, for a certain term, or so much rent, hath been adjudged a lease. *Cro. Eliz. 285.* In a covenant with the words *have, possess, and occupy* lands, in consideration of a yearly rent, without the word *lease*, it was held a good lease: and a licence to occupy, take the profits, &c. which passeth an interest amounts to a lease. *3 Bull.*

204. 1 Salt. 223. An agreement of the parties, that the lessee shall enjoy the lands, will make a lease: but if the agreement hath a reference to the lease to be made, and implies an intent not to be perfected till then; it is not a perfect lease until made afterwards. *Bridge. 13. 2 Slep. Abr. 374.* If a man on promise of a lease to be made to him, lays out money on the premises, he shall oblige the lessor afterwards to make the lease; the agreement being executed on the lessee's part: where no such expence hath been, a bare promise of the lease for a term of years, tho' the lessee have possession, shall not be good without some writing. *Prima. Cas. 561.* A person seised of an estate in fee-simple, in his own right, of any lands or tenements, may make a lease of it for what lives or years he will; and he that is seised of an estate-tail in lands, may make a lease of it for his own life, but no longer; except it be by fine or recovery, or lease warranted by the Stat. 32 H. 8. c. 28. And if tenant in tail, or for life, make a lease generally, it shall be construed for his own life. *1 Inst. 42.*

He that is seised of an estate for life, may make a lease for his life, according as he is seised; also he may make a lease for years of the estate, and it shall be good as long as the estate for life doth last: one possessed of lands for years, may make a lease of all the years, except one day, or any short part of the term; it is to be granted for a less term than the taker hath in the lands; for if all the estate is granted, it is an assignment: and if lessee for years makes a lease for life, the lessee may enjoy it for the lessor's life, if the term of years lasts so long; but if he gives livery and seisin upon it, this is a forfeiture of the estate for years. *Wood's Inst. 267.* Jointenants, tenants in common, and coparceners, may make leases for life, years, or at will, of their own parts, and shall bind their companions: and in some cases, persons who are not seised of lands in fee, &c. may make leases for life or years, by special power enabling them to do it, when the authority must be exactly pursued. *Ibid.* But there is a difference, where there is a general power to make leases, and a particular power. *8 Rep. 69.*

A lease for life cannot be made to commence *in futuro*, by the Common law; because livery cannot be made to a future estate: though where a lease is made for life, the day is at a day to come, and after the day, the lessor makes livery, there it shall be good; and a lease in reversion may be made for life, which commences at a day that is future. *1 Inst. 5. 1 Rep. 156.* A lease for years may begin from a day past, or to come, at *Michaelmas* last, *Christmas* next, three or four years after, or after the death of the lessor, &c. Tho' a term cannot commence upon a contingency, which depends on another contingency. *1 Inst. 5. 1 Rep. 156.* If one make a lease for years; after the death of *A. B.* if he die within ten years; this is a good lease, in case he dies within that time, otherwise not. *Plowd. 70.* And where a man has a lease of land for eighty years, and he grants it to another on hold for thirty years, to begin after his death; it will be good for the whole thirty years, provided there be so many of the eighty to come at the time of the death of the lessor. *Bro. Grant. 54. 1 Rep. 155.* A lease made from the lessor's death, until *anno Domini 1780* is good; and if a lease be during the minority of *J. S.* or until he shall come to the age of twenty-one years; these are good leases; and if he die before his full age, the lease is ended. *Hub. 174.* A person grants a rent of 20 *l.* a year, till an hundred pounds be paid, 'tis a lease of the rent for five years. *Ca. Len. 48.* If a man makes a lease of land to another, until he shall levy out of the profits one hundred pounds, or he is paid that sum, &c. This will be a lease for life, determinable on the payment of the hundred pounds, if livery and seisin be made: but if there is no livery, it will not be good for years, but void for incertainty. *21 Aff. 18. Plowd. 27. 6 Rep. 55.*

A lease for years to such person as *A. B.* shall name, is not good: though it may be for so many years, as he shall name; not as shall be named by his executors, &c. for it must be in the life-time of the parties. *Hub. 173. Moor, cap. 211.* And if a man makes a lease to another for so many years as a third person shall name, when the years

years are named by such person, it is good for so many years. *1 Inst. 45.* So if a person lets his lands for as many years as he hath in the manor of D. and he hath then a term for ten years, this is a good lease for ten years; and in the like cases, by referring to a certainty, it may be made good and certain. *Ibid.* A lease may be made for life or years, of any thing that lies in livery or grant; but leases for years ought to be made of such lands, &c. whereunto the lessor may come to distrain; not of incorporeal inheritances. *1 Inst. 47.* And they may be for the term of one thousand years, or any number of years, months or weeks; or be from week to week, &c. for one, two or three years, and be good for those years; and a tenant for half a year, or a quarter of a year, is tenant for years. *1 Inst. 6.* If one makes a lease for a year, and so from year to year, it is a lease for two years; and afterwards it is but an estate at will. *1 Mod. 4.* *1 Luce. 213.* And if from three years to three years, it is a good lease for six years; also if a man make a lease for years, without saying for how many, it may be good for two years, to answer the plural number. *Wood. Inst. 265.*

A lessee hath a term for a year by parol, and so from a year to year, so long as both parties please; if the lessee enters on a second year, he is bound for that year, and so on; and if there is a lease by deed for a year, and so from year to year as long as both parties agree, this is binding but for one year, though if the lessee enters upon the second year, he is for that year bound; if 'tis for a year, and so from year to year, so long as both parties agree till six years expire; this is a lease for six years, but determinable every year at the will of either party; but if it is for a year, and so from year to year till six years determine, this is a certain lease for six years, adjudged by Holt Chief Justice. *Mod. Ca. 215.* If A. make a lease of land to B. for ten years; and it is agreed between them, that he shall pay fifty pounds at the end of the said term, and if he do so, and pay fifty pounds at the end of every ten years; then the said B. shall have a perpetual demise and grant of the lands, from ten years to ten years continually following, *extra memoriam hominum*, &c. Though this be a good lease for the first ten years, as for all the rest, it is uncertain and void; by covenant a further lease may be made for the like term of years. *Plowd. 192. 2 Srep. Abr. 376.*

A parson makes a lease of his glebe for so many years as he shall be parson, this cannot be made certain; but if he makes a lease for three years, and so from three years to three years, so long as he shall be parson, it is a good lease for six years, if he continue parson so long. *6 Rep. 35. 3 Cre. 511.* And if one make a lease for twenty-one years, if the lessee shall so long live; this is a good lease for years, and a certainty in an uncertainty. *1 Inst. 46.* A lease made to a man for seven years, if D. shall live so long, who is dead when the lease is made; by this the lessee hath an absolute lease for seven years. *9 Rep. 63.* Lease for life is granted, and says that if the lessee within one year do not pay 20 s. then he shall have but a lease for two years; here if he pays not the money, he shall have only the two years, although livery of seisin be had thereon. *1 Inst. 218.* If a lease be made to A. B. during his own life, and the lives of C. and D. it is one entire estate of freehold, and shall continue during the three lives, and the life of the survivor of them; and tho' the lessee can have it no longer than his own life, yet his assignee shall have the benefit of it so long as the other two are living. *5 Rep. 13. Moor 32.* Where one grants land by lease to J. B. and C. D. to hold to them during their lives, although the words and the longest liver of them be omitted, they shall hold it during the life of the longest liver. *5 Rep. 9.* A lease is made to a person for sixty years, if A. B. and C. D. so long live; and afterwards A. B. dies, by his death the lease is determined. Though if the lease be made to one for the lives of A. B. and C. D. the freehold doth not determine by the death of one of them; and if in the other case of a term, the words or either of them be inserted in the lease, it will be good for both their lives. *13 Rep. 66.*

A lease was made to a man for ninety-nine years, if he should so long live; and if he died within the term,

the son to have it for the residue of the term: this was adjudged void as to the son, because there can be no limitation of the residue of a term which is determined. *Cre. Eliz. 216.* But if the words of the lease be, To hold during the residue of the ninety-nine years, and not during the rest of the term, in this case it may be good to the son also. *1 Rep. 153. Dyer 253.* A lease was made for twenty-one years, if the lessee lived so long, and in the service of the lessor; the lessor died within the term, and yet it was held that the lease continued, for it was by the act of God that the lessee could serve no longer. *Cre. Eliz. 643.*

If a lease be to a man, and to her whom he shall take to wife, it is void; because there ought to be such persons at the time of the commencement of the lease which might take. *4 Leon. 158.* When a lease in reversion is granted as such after another lease, and that lease is void by failure, &c. the reversionary lease, expectant upon the lease for years that is void, is void also. *Cre. Car. 289.* But where a man recites a lease, when in truth there is no lease; or a lease which is void, and misrecites the same in a point material, and grants a further lease to commence after the determination thereof; in such case the new lease shall begin from the time of delivery. *Dyer 93. 6 Rep. 36. Vaugh. 73, 80, &c.* A lease that has an impossible date for its commencement, is said to be void; and an uncertain limitation makes the lease void, because it being part of the agreement, the court cannot determine what the contract was. *1 Mod. 180.* Though it hath been adjudged, where a lease bears a date which is impossible, the term shall begin from the delivery, as if there was no date. *1 Inst. 40.* If a lease be to hold from the day of the date, the day itself is excluded; otherwise the day of delivery is inclusive. *5 Rep. 2.*

A man makes a lease for years to one, and afterwards makes a lease for years to another of the same land; the second lease is not void; but shall be good for so many years thereof, as shall come after the first lease ended. *Noy's Max. 67.* And if one make a lease for years, and afterwards the lessor enters upon the lands let, before the term is expired, and makes a lease of these lands to another; this second lease is a good lease until the lessee doth re-enter; and then the first lease is revived, and he is in thereby. *2 Lill. Abr. 152.* It hath been held, that a lease may be void as to one, and stand good to another; and leases voidable, or void for the present, may after become good again. *1 Inst. 46. 3 Rep. 51.* If a lease be made to two, to hold to them and two others, it is voidable as to the two other persons; and when the two first die, the lease is at an end. *2 Leon. 1.* A lease which is only voidable, and not absolutely void, may be made void by the lessor by re-entry; but if a lease be void absolutely, there needs no re-entry: And as a voidable lease is made void by re-entry, and putting out the lessee; so it is affirmed, by accepting and receiving the rent which acknowledges the lessee to be tenant. *21 Car. B. R. 2 Lill. 149.* If a lessor accepts of rent of an assignee of a lease, having knowledge of the assignment, he may not afterwards charge the lessee with the rent in action of debt. *3 Rep. 23.* And where a lessee for years accepts of a less term from the lessor, even by word, it is said this is a surrender of the term which he had by deed. *Style 448.*

When a term for years in lease, and a fee-simple, meet in one person, the lease is drowned in the inheritance; yet in some cases it may have continuance, to make good charges and payments, &c. *Poph. 39. 2 Nelf. Abr. 1100.* If a lease for years is made to a man and his heirs, it shall go to his executors. *1 Inst. 46. 388.* And a lease for years, notwithstanding it be a very long lease, cannot be intailed; but may be assigned in trust, to several uses. *2 Lill. Abr. 150.* If such a lease comes to be limited in tail, the law allows not a present remainder to be limited thereupon. *Ibid.* Lessee for years, though for never so great a term, has only a chattel; but tenant for life hath a freehold. *1 Inst. 6.* A lease is sealed by the lessor, and the lessee hath not sealed the counterpart, action of covenant may be brought upon the lease against the lessor; but where the lease is sealed by the lessee,

lessee, and not the lessor, nothing operates. *1 Clv. 18. Owen 100.*

A man out of possession, cannot make a *lease* of lands, without entering and sealing the lease upon the land. *Dalif. 81.* The lessee is to enter on the premises let; and such lessee for years is not in possession, so as to bring trespass, &c. until actual entry; but he may grant over his term before entry. *1 Inst. 46. 2 Lill. 160.* A lessee of a future interest never enters by virtue of his term, but enters before, and continues after the commencement of the term; and then the lessor ousts him, the lessee may assign over his term off from the land. *1 Lev. 47.* But a *lease* to begin at *Michaelmas*, if the lessee enters before *Michaelmas*, and continues the possession immediately, it is a disseisin. *Ibid. 46.* If a *lease* be made of a close of land, by a certain name, in the parish of *A.* in the county of *B.* whereas the close is in another county, the said parish extending into both counties; such a *lease* is good to pass such land: though where a house is leased without a name, and the parish is mistaken; it hath been held otherwise. *Dyer 276, 292.*

Land and mines are *leased* to a tenant; this only extends to the open mines, and the lessee shall not have any others, if there are such: And if land and timber are demised, the lessee is not empowered to sell it. *2 Lev. 184. 2 Mod. 193.* A man makes a *lease* of lands for life, or years, the lessee hath but a special interest in the timber-trees, as annexed to the land, to have the mast and shadow for his cattle; and when they are severed from the lands, or blown down with wind, the lessor shall have them as parcel of his inheritance. *4 Rep. 62. 11 Rep. 81.* If an house falls down by tempest, &c. the lessee hath an interest to take the timber, to re-edify it for his habitation. *4 Rep. 63.* And every lessee for years, &c. may take of timber necessary plough-bote, house-bote, fire-bote, &c. without doing waste. *1 Inst. 41.* And tenants suffering houses to be uncovered, or in decay; taking away wainscot, &c. fixed to the freehold, unless put up by the lessee, and taken down before the term is expired; cutting down timber-trees to sell; permitting young trees to be destroyed by cattle, &c. ploughing up ground that time out of mind hath not been ploughed; not keeping banks in repair, &c. are guilty of waste. *1 Inst. 52. Dyer 37. 1 Salk. 368.*

Lessees are bound to repair their tenements, except it be mentioned in the lease to the contrary. Though a lessee for years is not obliged to repair the house let to him which is burnt by accident; if there be not a special covenant in the *lease*, that he shall leave the house in good repair at the end of the term: yet if the house be burnt by negligence, the lessee shall repair it, altho' there be no such covenant. *Pajeb. 24 Car. B. R.* A lessee at will is not bound to sustain or repair, as tenant for years, is: If the house of such a tenant is burnt down by negligence, action lies not against the tenant; but action lies for voluntary waste, in pulling down houses, or cutting wood, &c. *5 Rep. 13.*

By stat. 6 & 10 Ann. c. 14. No action shall be brought against any person, in whose house, any fire shall accidentally begin, or any recompence be made by such person for damages, so as not to extend to, or make void, any agreement between landlord and tenant; and negligent firing of houses is liable to penalties.

A lessor who hath *fee*, cannot reserve rent to any other but himself, his heirs, &c. And if he reserves a rent to his executors, the rent shall be to the heir, as incident to the reversion of the lands. *1 Inst. 47.* The lessor may take a distress on the tenements let for the rent; or may have action of debt for the arrears, &c. Also land *leased* shall be subject to those lawful remedies which the lessor provides for the recovery of his rent, possession, &c. into whose hands soever the land comes. *Cro. Jac. 300.* And as to the lessee, if lessee for years loses his *lease*, if it can be proved that there was such a term let to him by *lease*, and that it is not determined, he shall not lose his term; so it is of any other estate in lands, if the deed that created it be lost, for the estate in the land is derived from the party that made it, and not from the deed otherwise than instrumentally and declarative of the mind and intent of the party, &c. *2 Lill. Abr. 152.* If a person

be in possession of the lands of another, and hath usually paid rent for them; the proof of a quarter or half year's rent paid, will be good evidence of a *lease* at will, though it cannot be expressly proved that the lands were demised at will to him in possession; it shall be presumed the rent was received by the owner of the land upon some private contract. *Ibid. 151.*

Lands are *leased* at will, the lessee cannot determine his will before or after the day of payment of the rent, but it must be done on that very day; and the law will not allow the lessee to do it to the prejudice of the lessor, as to the rent; nor that the lessor shall determine his will to the prejudice of the lessee, after the land is sown with corn, &c. *Sid. 339. Lev. 109.* For where lessee at will sows the land, if he does not himself determine the will, he shall have the corn: And where tenant for life sows the corn, and dies, his executors shall have it; but it is not so of tenant for years, where the term ends before the corn is ripe, &c. *5 Rep. 116.* The lessor and lessee, where the estate is at will, may determine the will when they please; but if the lessor doth it *within* a quarter, he shall lose that quarter's rent; and if the lessee doth it, he must pay a quarter's rent. *2 Salk. 413.* By words spoken on the ground by the lessor in the absence of the lessee, the will is not determined; but the lessee is to have notice. *1 Inst. 55.* If a man makes a *lease* at will, and dies, the will is determined; and if the tenant continues in possession, he is tenant at sufferance. *Ibid. 57.* But where a lessor makes an estate at will to two or three persons, and one of them dies; it has been adjudged this doth not determine the estate at will, *5 R.p. 10.* Tenant at will grants over his estate to another, it determines his will. *1 Inst. 57.* No tenant shall take *leases* of above two farms, in any town, village, &c. nor hold two, unless he dwell in the parish, under penalties and forfeitures, by Stat. 25 H. 8. c. 13. See 21 H. 8. cap. 13.

There is a late statute for the more effectual preventing frauds committed by tenants; and for the more easy recovery of rents, and renewal of *leases*; by which chief *leases* of lands may be renewed on surrender, without the surrendering of the under *leases*, &c. *4 Geo. 2. c. 28.* And how *leases* of lands, &c. left uncultivated, may become void, for non-payment of rent, on view of two justices of peace, &c. by the late act 11 Geo. 2. cap. 19. See the purport of these statutes, under *Rent*.

Leases by Statute. There are three kinds of persons, who may make leases for life or years by statute, that could not do so heretofore, *viz.* Tenants in tail, husband and wife of the wife's land, and persons seized of lands in right of the church. By the Stat. 32 H. 8. c. 28. *Tenants in tail* are enabled to make *leases* on the following conditions, *i. e.* They are to be made by deed indented; to begin from the time of making, or some short time after, as *Michaelmas* next, &c. If there be an old lease in being, it must be absolutely surrendered, or expire within a year after the making of the new; they must not exceed three lives or twenty-one years, from the making, or be for both, but may be for less terms; they are to be of lands manurable or corporeal, out of which a rent may be legally issuing; and of such lands or tenements which have been most commonly let to farm by the space of twenty years; the accustomed yearly rent, paid within twenty years is to be reserved; and they are not to be made without impeachment of waste, &c. It has been held on this statute, that where a new thing is demised with lands accustomedly let, though there be great increase of rent, the *lease* is void: but more rent than the accustomed rent may be reserved. *5 Rep. 5. 6 Rep. 37.* And the *leases* according to the statute bind the issues in tail; but not those in reversion or remainder: for if tenant in tail makes a *lease* warranted by the statute, and dies without issue, the *lease* as to him in reversion or remainder is void; tho' by a common recovery, *leases* may be made to bind him in remainder, &c. *Wood's Inst. 267.*

A guardian during the minority of an infant tenant in tail, who was but one year old, made a *lease* for twenty years; and it was adjudged not good by the Stat. 32 H. 8. c. 28. to bind the issue in tail; and it is the same in the case of tenant in dower, tenant by the curtesy, or husband seized in right of his wife, because they have no inheritance. *Dier 171.* The statute impowers a husband

to make *leases* of land in tail, held in his wife's right, so as in such *leases* the conditions aforementioned are observed, and the wife be made a party to and seal the *leases*; and the rent is to be reserved to the husband and wife, and her heirs, &c. If a *lease* of the wife's land is not warranted by the statute, it is a good *lease* against the husband, though not against the wife: the husband and wife cannot bind him in reversion or remainder. 1 *Inst.* 362. *Bishops, Spiritual Persons, &c.* seised in fee in right of their churches, may make *leases* of their spiritual livings for three lives, or one and twenty years, having all the qualities required by the statute, in case of *leases* made by tenants in tail, 32 *H. 8. c. 28.* And *leases* otherwise made are to be void; but not against the bishops, &c. making them only against their successors. 3 *Rep.* 59.

A bishop, &c. may make *leases* of lands for twenty-one years, or three lives, according to the statute, without confirmation of dean and chapter; and at Common law might make them for any longer time, without limitation, with confirmation of dean and chapter; but this is restrained by the statutes 1 *Eliz. c. 19.* and 13 *Eliz. c. 10.* Such confirmation will now make good concurrent *leases* for twenty-one years, &c. upon *leases* for years; though a bishop cannot make a concurrent *lease* for life or lives. *Wood's Inst.* 273. If a bishop have two chapters, as there may be two or more to one bishoprick; both chapters must confirm *leases* made by the bishop. 1 *Inst.* 131. A *lease* by a bishop made to begin presently for twenty-one years; when there is an old *lease* in being, is good, notwithstanding the statute of 1 *Eliz. Moor cap.* 241. But if such *lease* is to commence at a day to come, it will be void, 1 *Leon.* 44. *Lease* for three lives of a bishop of tithes, is void against the successor; although the usual rent be duly reserved. *Moor ca.* 1078. 2 *Cro.* 173.

Leases of a dean and chapter are good, without confirmation of the bishop. *Dyer* 273. 2 *Nell. Abr.* 1096. Where there is a chapter, and no dean; they may make grants, &c. and are within the statute. 1 *Mod.* 204. And a prebendary is seised in right of the church within the equity of the statute 32 *H. 8. c. 28.* 4 *Leon.* 51. A prebendary's *lease* confirmed by the archbishop, who is his patron, is good without confirmation of dean and chapter. 3 *Bulstr.* 290. But where a prebendary made a *lease* for years of part of his prebend, and this was confirmed by dean and chapter; because it was not confirmed likewise by the bishop, who was patron and ordinary of the prebend, the *lease* was adjudged void. *Dyer* 60. If a prebendary hath rectories in two several dioceses belonging to his prebend, and his *lease* of them is confirmed by the bishop, dean and chapter of the diocese of which he is prebendary, it is good, though not confirmed by the other. *Sid.* 75.

A chancellor of a cathedral church may make a *lease*, and 'tis said it will be good against the successor, though not confirmed, &c. *Ibid.* 158. If a parson or vicar makes a *lease* for life or years, of lands usually letten, reserving the customary rent, &c. it must be confirmed by patron and ordinary, for they are out of the statute 32 *H. 8. c. 28.* And if the parson and ordinary make a *lease* for years of the glebe to the patron; and afterwards the patron assigns this *lease* to another, such assignment is good, and is a confirmation of that *lease* to the assignee. 5 *Rep.* 15. Ancient covenants in former *leases* may be good to bind the successor, so as to discharge the lessee from payment of pensions, tenths, &c. but of any new matter they shall not. 1 *Vent.* 223.

By the Stat. 13 *Eliz. c. 20.* the *lease* of a parson is not good for any longer time than the parson's residence upon his living, without absence fourscore days in any year; and an incumbent offending contrary to this act, shall lose a year's profit of the benefice, &c. 4 *Rep.* 403. A *lease* for years of a spiritual person, will be void by his death, if it is not according to the statutes; and a *lease* for life is voidable by entry, &c. of the successor: And so in like cases, *leases* not warranted by statute, are void or voidable on the deaths of their makers: Acceptance of rent on a void *lease* shall not bind the successor. 2 *Cro.* 173.

On college *leases*, a third part of the rent is to be reserved in corn, &c. 18 *Eliz. c. 6.* By 14 *Eliz. c. 11.*

it is ordained, that the 13 *Eliz. c. 10.* shall not extend to *leases* of the masters and fellows of colleges, &c. of houses in corporation towns, which may be made for forty years, &c. But the 18 *Eliz. c. 11.* makes void *leases* of masters and fellows of colleges, deans and chapters, masters of hospitals, &c. where another *lease* for years is in being, and not to be expired or surrendered within three years; and *leases* of such persons are to be made for twenty-one years or three lives, reserving the accustomed rents, &c. Bishops are out of this statute.

If a bishop be not bishop *de jure*, *leases* made by him to charge the bishoprick, are void; though all judicial acts by him are good. 2 *Cro.* 353. And where a bishop makes a *lease*, which may tend to the diminution of the revenues of the bishoprick; &c. which should maintain the successor; there the deprivation or translation of the bishop, is all one with his death. 1 *Inst.* 329. Also all assurances and demises of bishops lands to the King, shall be void. 1 *Jac.* 1. c. 3. Persons for whose lives estates are held by *lease*, &c. remaining beyond sea, or being absent seven years; if no proof be made of their being alive, shall be accounted dead. 19 *Car.* 2. c. 6. If the assignee of a term of years assigns it over to a poor insolvent person, on purpose to get rid of it, he shall not be liable to rent afterwards incurred, for the privity of estate is destroyed by the legal assignment to the insolvent person; and it was the folly of the landlord to discharge the original lessee. 2 *Strange* 1221.

Leases of the King. *Leases* made by the King, of part of the dutchy of Cornwall, are to be for three lives, or thirty-one years, and not be made dispensable of waste, whereon the ancient rent is to be reserved; and estates in reversion, with those in possession, are not to exceed three lives, &c. 13 *Car.* 2. c. 4. All *leases* and grants made by letters patent, or indentures under the Great Seal of England, or seal of the court of Exchequer, or by copy of court-roll, according to the custom of the manors of the dutchy of Cornwall, not exceeding one, two or three lives, or some term determinable thereon, &c. are confirmed; and covenants, conditions, &c. in *leases* for lives or years, shall be good in law, as if the King were seised in fee-simple. Stat. 1 *Jac.* 2. c. 9. See 5 & 6 *W. & M. c. 18.* 12 *Ann. c. 22.* And *leases* from the crown of lands in England and Wales, and under the seals of the dutchy of Lancaster, &c. for one, two or three lives, or terms not exceeding fifty years, are allowed time for inrollment, &c. by 10 *Ann. c. 18.* *Leases* made by the Prince of Wales of lands, &c. in the dutchy of Cornwall, for three lives or thirty-one years, on which is reserved the most usual rent paid for the greatest part of twenty years before, shall be good against the King, the Prince and their heirs, &c. and the conditions of such *leases* be as effectual, as if the Prince had been seised of an absolute estate in fee-simple in the lands. Stat. 10 *Geo.* 2. c. 29.

A freehold *lease* for three lives, differs from a chattel *lease* only in this, viz. That the habendum is to the lessee, his heirs and assigns, for and during the natural lives of him the said C. D. E. his wife, and T. D. his son, and during the life natural of every and either of them longest living. And in every covenant, the lessee covenants for himself, his heirs and assigns; and the covenants are the same as in a chattel *lease*; with the addition of a letter of attorney at the end, to deliver possession and seisin, as in a deed of feoffment.

See more concerning *leases*, New *Abr.* V. 3. tit. *Leases*, and 10 *Vin. Abr.* 299, 368, 396, 419.

Lease and Release. Is a conveyance of right or interest in lands or tenements, to another that hath the possession thereof. *Accomp. Conv.* 1 Vol. 129. Though the deed of feoffment was the usual conveyance at Common law; yet since the Stat. of 27 *H. 8. c. 10.* of uses, the conveyance by *lease and release* has taken place of it, and is become a very common assurance to pass lands and tenements; for it amounts to a feoffment, the use drawing after it the possession without actual entry, &c. and supplying the place of livery and seisin, required in that deed: In the making it, a *lease* or bargain and sale for a year, or such like term, is first prepared and executed; to the intent that by virtue thereof the lessee may be in actual

actual possession of the lands intended to be conveyed by the release, and thereby and by force of the statute 27 H. 8. c. 10. for transferring of uses into possession, be enabled to take and accept a grant of the reversion and inheritance of the said lands, &c. to the use of himself and his heirs for ever: upon which the release is accordingly made, reciting the lease, and declaring the uses: And in these cases, a pepper-corn rent in the lease for a year is a sufficient reservation to raise an use, to make the lessee capable of a release. 2 Ven. 35. 2 Mod. 262.

When an estate is conveyed by *lease and release*, in the lease for a year there must be the words, *bargain and sell* for money, and 5 s. or any other sum, though never paid, is a good consideration, whereupon the bargainee for a year is immediately in possession on the executing of the deed, without actual entry: if only the words *demise, grant and to farm let* are used, in that case the lessee cannot accept of a release of the inheritance until he hath actually entered and is in possession. 2 Lill. Abr. 435. But where *Littleton* says, that if a lease is made for years, and the lessor releases to the lessee before entry; such release is void, because the lessee had only a right, and not the possession; and such release shall not enure to enlarge the estate, without the possession: though this is true at Common law, it is not so now upon the statute of uses. 2 Mod. 250, 251. And if a man make a lease for life, remainder for life, and the first lessee dieth; on which, the lessor releases to him in remainder, before entry; this is a good release to enlarge the estate, he having an estate in law capable of enlargement by release, before entry had. 1 Inst. 270.

No person can make a bargain and sale, who hath not possession of the lands: but it is not necessary to reserve a rent therein; because the consideration of money raises the use. If a lease be without any such consideration, the lessee hath not any estate till entry, nor hath the lessor any reversion; and therefore a release will not operate, &c. 1 Inst. 270, 278. Cro. Jac. 169. 1 Mod. 263. On lease at will, a release shall be good by reason of the privity between the parties: but if a man be only tenant at sufferance, the release will not enure to him; and as to the person who hath the reversion it is void, for such tenant hath not any possession, there being no estate in him. Litt. Sect. 461, 462. Cro. Eliz. 21. Dyer 251. It is necessary in all cases where a release of lands is made, that the estate be turned to a right; as in a disseisin, &c. where there are two rights, a right of possession in the disseisor, and a right to the estate in the disseisee; now when the disseisee hath released to the disseisor, here the disseisor hath both the rights in him, viz. The right to the estate, and also to the possession: or else it is requisite that there be privity of estate between the tenant in possession and the releasor; for a release will not operate without privity. 2 Lill. 435. A release made by one that at the time of the making thereof had no right, is void; and a release made to one that at the time of making thereof hath nothing in the lands, is also void, because he ought to have a freehold, or a possession or privity. *Noy's Max.* 74.

He that makes a release must have an estate in himself, out of which the estate may be derived to the lessee; the lessee is to have an estate in possession in deed or in law; in the land whereof the release is made, as a foundation for the release; there must be privity of estate between the releasor and lessee; and be sufficient words in law not only to make the release, but also to create and raise a new estate, or the release will not be good. 1 Inst. 22. A release to a man and his heirs will pass a fee-simple; and if made to a man, and the heirs of his body, by this the lessee hath an estate-tail: But a release of a man's right in fee-simple, is not sufficient to pass a fee-simple. 1 Inst. 273. And if a person release to another all his right which he hath in the land, without using any more words, as *To hold to him and his heirs, &c.* the lessee hath only an estate for life. Dyer 263. A release made to a tenant in tail, or for life, of right to land, shall extend to him in remainder or reversion. 1 Inst. 267. By release of all a man's right unto lands, all actions, entries, titles of dower, rents, &c. are discharged; though it bars not a right that shall descend afterwards: And a release of all right in such land will not discharge a judgment not executed; because such judgment doth not vest any right;

but only makes the land liable to execution. 8 Rep. 151. 3 Salk. 298.

'Tis said a release of all one's title to lands, is a release of all one's right. Litt. 509. 1 Inst. 292. By a release of all entries, or right of entry, a man hath into lands, without more words, the releasor is barred of all right or power of entry into those lands; and yet if a man have a double remedy, viz. a right of entry, and an action to recover, and then release all entries, by this he is not barred and excluded his action; nor doth a release of actions bar the right of entry. Plowd. 484. 1 Inst. 345. A release made by deed poll, of right to lands, &c. needs no other execution than sealing and delivery; and will operate without consideration: but 'tis convenient to put a valuable consideration therein; lest it should be judg'd fraudulent by statute. Litt. Sect. 445. Lill. Convey. 230, 248. Cro. Jac. 270.

A release that doth not enure by way of passing away an estate, or extinguishment, may be made upon condition or with a defeasance, so as the condition, &c. be contained in the release, or delivered at the same time with it: And there may be a recital, covenants, warranty, &c. inserted in this release; though it is said the deed is good, without any such additions. *Accom. Convey.* Vol. 1.

In a *lease and release* to make a tenant to the *præcipe* to suffer a recovery, where the release is made to A. B. and his heirs, (viz. the tenant to the *præcipe*) it must be also said to the use of him the said A. B. and his heirs and assigns for ever; for the lessee must be absolute tenant of the freehold. 2 Vent. 312. Lill. Conveyance 251. And a release made on trust, must be to A. B. his heirs and assigns, to the only use and behoof of the lessee, his heirs and assigns for ever; in trust for C. D. who is to be a party to the deed, and the purchase-money to be paid by the *cestui que trust*: If the words *to the use, &c.* are not inserted in the release, the estate doth not execute by the statute of uses, and the trust is void. Lill. Ibid. 251, 233. A *lease and release* make but one conveyance, being in the nature of one deed. 1 Mod. 252.

It may not be improper here to observe, that in a court of equity, either *suppessio veri*, or *suggestio falsi*, is a good reason to set aside any release or conveyance. 1 Wilf. Rep. 239, 240, 727.

Leat, A mill-leat, corruptly *millleat*. A trench to convey water to or from a mill, mentioned in stat. 7 Jac. 1. cap. 19. but most peculiar to *Devonshire*, where in conveyances the word does frequently occur. *Cowell*.

Leather. There are several statutes relating to leather; as the 27 H. 8. c. 14. directs packers to be appointed for leather to be transported; but the 18 Eliz. c. 9. prohibits the shipping of leather, on penalty of forfeiture, &c. Though by 20 Car. c. 5. transportation of leather is allowed to Scotland, Ireland, or any foreign country, paying a custom or duty; which statute is continued by divers subsequent acts. No person shall ingross leather to sell again, under the penalty of forfeiture: none but tanners are to buy any rough hides of leather, or calve-skins in the hair, on pain of forfeiture; and no person shall forestal hides, under the penalty of 6 s. 8 d. a hide. Leather not sufficiently tanned, is to be forfeited. In London, the Lord Mayor and Aldermen are to appoint and swear searchers of leather, out of the company of shoemakers, &c. and also triers of sufficient leather; and the same is to be done by mayors, &c. in other towns and corporations; and searchers allowing insufficient leather, incur a forfeiture of 40 s. Shoemakers making shoes of insufficient leather, are liable to 3 s. 4 d. penalty. 1 Jac. 1. c. 22.

Red tanned leather is to be brought into open leather markets, and searched and sealed before exposed to sale, or shall be forfeited; and contracts for sale otherwise to be void. 13 & 14 Car. 2. c. 7. Hides of leather are adjudged the ware and manufacture of the carrier, and subject to search, &c. All persons dealing in leather, may buy tanned leather searched in open market; and any person may buy or sell leather hides or skins by weight. 1 W. & M. c. 33. Duties are granted on leather, and entries to be made of tan-yards, under the penalty of 50 l. and tanners and leather dressers using any private tan-yards, or concealing skins, &c. shall forfeit 20 l. leviable by justices of the peace, by distress, &c. 9 Ann. c. 11. See 5 Geo. 1. c.

2. and 9 Geo. 1. c. 27. *Artificers* may freely buy their leather, and cut it and sell it in small pieces. 12 Geo. 2. c. 25. Penalty on *curriers* neglecting to curry leather. *Ibid.* For the increase of the drawback upon leather exported, see Stat. 12 Ann. stat. 2. c. 9. Vide *Tanners*.

Leccator, A debauched person, *lecher*, or whoremaster. — *Sciant, quod ego Johannes Constabularius Cestrie dedi Hagoni de Dutton & Heredibus suis Magistratum omnium Leccatorum & Meretricum in, &c. Salvo Jure meo mihi & heredibus meis.* Ann. 1220.

Lecherwite, A fine on adulterers and fornicators. See *Lairwite*.

Lectionarium, A bed; sometimes all that belongs to a bed. *Flor. Worc. pag. 631.*

Lettrinum, Is taken for a pulpit. *Mon. Ang. tom. 3. p. 243.*

Lecturer, (*Prælector*) A reader of lectures; and in London, and other cities, there are *lecturers* who are assistants to the *rectors* of churches in preaching, &c. These *lecturers* are chosen by the vestry, or chief inhabitants of the parish, and are usually the afternoon preachers: The law requires, that they should have the consent of those by whom they are employed, and likewise the approbation and admission of the ordinary; and they are, at the time of their admission, to subscribe to the thirty-nine articles of religion, &c. required by the Stat. 13 & 14 Car. 2. c. 4. They are to be licensed by the bishop, as other ministers, and a man cannot be a *lecturer* without a licence from the bishop or archbishop; but the power of a bishop, &c. is only as to the qualification and fitness of the person, and not as to the right of the *lectureship*; for if a bishop determine in favour of a *lecturer*, a *prohibition* may be granted to try the right. *Mich. 12 W. 3. B. R.* If *lecturers* preach in the week days, they must read the Common Prayer for the day when they first preach, and declare their assent to that book; they are likewise to do the same the first *lecture* day in every month, so long as they continue *lecturers*, or they shall be disabled to preach till they conform to the same: And if they preach before such conformity, they may be committed to prison for three months, by warrant of two *justices of peace*, granted on the certificate of the ordinary. 13 & 14 Car. 2. c. 4. *Rights Clerg.* 338.

Where *lectures* are to be preached or read in any cathedral or collegiate church, if the *lecturer* openly at the time aforesaid, declare his assent to all things in the book of Common Prayer, it shall be sufficient; and university sermons or *lectures* are excepted out of the act concerning *lectures*. There are *lectures* founded by the donations of pious persons, the *lecturers* whereof are appointed by the founders; without any interposition or consent of rectors of churches, &c. tho' with the leave and approbation of the bishop; such as that of lady Moier at St. Paul's, &c. But such is not intitled to the pulpit without the consent of the rector, or vicar, in whom the freehold of the church is. *Cases B. R.* 420, 433.

Lectured, of Divinity, Law, Physick, &c. in the universities of Oxford and Cambridge. Vide *Regius Professor*.

Lecturnum, (*Lectorium*) The desk or reading place in churches. *Statut. Eccl. Paul. Lond. MS.* 44.

Leodgrave, The chief man of the *Luthe* or *Lethe*. See *Lathbreve*.

Leodo, (*Leodona*) The rising water or increase of the sea.

— *Leodo sex Horas inundationis & totidem recessus habet, &c.* **Leet**, *Lea*, *visus Franci plegii*, Is otherwise called a *leao-day*. *Smith de Rep. Ang. lib. 2. cap. 18.* and seems to have grown from the Saxon *lea*, which, (as appears by the laws of King Edward, published by Lambard, num. 34.) was a court of jurisdiction above the wapentake or hundred. According to others, 'tis said to be *Lea*, From the Sax. *Lite*, i. e. *Parvus*, quasi a little court; or from the German, *Luet*, a country judge.

Many lords, together with their courts-baron, have likewise leets adjoined, and thereby enquire of such transgressions as are subject to the enquiry and correction of this court. See *Kitchin*, and *Britton*, cap. 28. But this court, in whose manor soever it be kept, is accounted the King's court, because the authority thereof originally belongs to the crown. *Kitchin*, fol. 6. *Dyer*, fol. 64. saith, that this *lee* was first derived from the sheriff's turn.

And it enquireth of all offences under high treason, committed against the crown and dignity of the King, tho' it cannot punish many, but must certify them to the justices of assize, by the statute of 1 Ed. 3. cap. ult. but what things are only inquirable, and what punishable, see *Kitchin* in the charge of a *court-leet*, from fol. 8. to fol. 20. See also the statute 8 Ed. 2. and 4 Inst. 261. *Hæc est curia presca illa*, (saith *Spelman*) quæ inter Saxones ad Friburges, decanias tenementales pertinebat. The jurisdiction of bailiffs within the dutchy of Normandy, in the compass of their provinces, seems to be the same, or very like our *leet*, cap. 4. of the *Grand Custumary*. *Leet* comes from the Sax. *Let*, i. e. *cenfura*, arbitrium; or from *Letan*, *cenfere*, *estimare*. Quod in hac olim curia de damnis æstimabatur inter vicinos emergentibus, ut patet in LL. Edw. Conf. cap. 10. See Sir William Dugdale's *Warwickshire*, fol. 2.

A court-leet is a court of record, having the same jurisdiction within some particular precinct, which the sheriff's torn hath in the county. *Finch* 246. 2 *Hawk. P. C.* 72.

The stat. 18 Ed. 2. which shews of what things the sheriff's torn and court-leet shall have cognizance, does not confine their jurisdiction to those particulars enumerated in the statute. 4 Inst. 261. *Crompt. Jur.* 213. See *Court Leet*. And *Black. Com.* 4 V. 270, 404, 477.

Leets or **Leitz**, Meetings appointed for the nomination or elections of officers; often mentioned in archbishop's *Spotswood's History* of the Church of Scotland.

Lega & Laista. Anciently the allay of money was so called *Debita nummi temperies, quam veteres legam & lactam appellabant.* *Spelm.*

Legabilis, Signifies what is not entailed as hereditary; but may be bequeathed by legacy, in a last will and testament. *Articula propofit. in parlamento coram Rege, Anno* 1234.

Legacy, (*legatum*) Is a particular thing given by a man's last will and testament; and he to whom such legacy is given, is called a *legatee*; and there is a *residuary legatee*.

Of legatees, time of payment, and lapsed legacies.

It seems necessary, that the legatee should be born at the time of making the will; and it has been adjudged where legacies were given to a man's children, that those who were born afterwards should have no share thereof. 1 *Bull.* 153. But it has been otherwise decreed in Chancery. 1 *Ch. Rep.* 301. A man devised 200 l. apiece to the two children of A. B. at the end of ten years after the death of the testator; afterwards the children died within the ten years; and it was held a *lapsed legacy*: for there is a difference where a *devise* is to take effect at a future time, and where the *payment* is to be made at a future time; and whenever the time is annexed to the legacy itself, and not to the *payment* of it, if the legatee dies before the time happens, 'tis a *lapsed legacy*. 2 *Salk.* 415. A bequest of money to one at the age of twenty-one, or day of marriage, without saying to be paid at that time, and the legatee dies before the term; this is a *lapsed legacy*: And so it is if the devise had been to her when she shall marry; or when a son shall come of age, and they die before. *Godb.* 182. 2 *Vent.* 342.

But a devise of a sum of money, to be paid at the day of marriage, or age of twenty-one years; if the legatee die before either of these happen, the legatee's administrator shall have it, because the legatee had a *present interest*, tho' the time of payment was not yet come; and 'tis a charge on the personal estate which was in being at the testator's death; and if it were discharged by this accident, then it would be for the benefit of the executor, which was never intended by the testator. 2 *Ventr.* 366. 2 *Lew.* 207. A father bequeathed goods to his son, when he should be of the age of twenty-one years, and if he die before that time, then his daughter should have them; afterwards the father died, and then the son died before he was of age; adjudged that the daughter shall have the goods given in legacy immediately, and not stay till her brother would have been of age, if he had lived. 1 *And.* 33. And where a legacy was devised to an infant, to be paid when he shall come of age, and he died before that time; it was ruled that his administrator should have it

it presently, and not stay until the infant should have been of age, if he had lived. 1 *Leon.* 278. In a case of this nature, it has been decreed in equity, that although the administrator should have the legacy, yet he must wait for it till such time as the child would have come to twenty-one. 2 *Vern.* 199.

Of legacies devised out of real estates, &c.

Where a legacy is to arise out of the real estate, it shall not go to the representative of the legatee; but sink in the inheritance: And yet where 1000*l.* was given by a person out of lands, to his daughter, and interest to be computed from his death, &c. here tho' the legatee died before the time appointed for paying the same, it was held the legacy should be raised notwithstanding; and the Lord Chancellor said, that this legacy was a vested one. 2 *Vern. Rep.* 617. *Barnardist.* 328, 330. A person by will, &c. gives a portion or legacy to a child, payable at twenty-one years of age, out of a real and personal estate, and the child dies before the legacy becomes payable; in that case, so much thereof as the personal estate will pay, shall go to the child's executors and administrators: But so far as the legacy is charged upon the land, 'tis said it shall sink. 2 *Pere Williams* 613. Also if a legacy be given to one, to be paid out of such a fund, and the same fails; it has been resolved, that it ought to be paid out of the personal estate, and the failing of the manner appointed for payment shall not defeat the legacy. 1 *Pere Williams* 779. One by will disposes of his estate in legacies, and afterwards by parol, or word of mouth, gives a bill for a certain sum, to be delivered over to another, if he the testator should die of that sickness; this is adjudged good, but it being in the nature of a legacy, may be deemed fraudulent against creditors. *Ibid.* 405, 406.

Of payment of legacies, &c.

If a legacy when due be paid to the father of an infant, it is no good payment; and the executor may be obliged in equity to pay it over again: And where any legacy is bequeathed to a feme covert, paying it to her alone, is not sufficient, without her husband. 1 *Vern.* 261. As an executor is not obliged to pay a legacy, without security given him by the legatee to refund, if there are debts, because the legacy is not due till the debts are paid, and a man must be just before he is charitable; so in some cases, the executor may be compelled to give security to the legatee for the payment of his legacy; as where a testator bequeathed 1000*l.* to a person, to be paid at the age of twenty-one, and made an executor, and died; afterwards the legatee exhibited a bill in equity against the executor, setting forth that he had wasted the estate, and praying that he might give security to pay the legacy when it should become due; and it was ordered accordingly. 1 *Ch. Rep.* 136, 237.

Of interest on legacies.

If a legacy is devised, and no certain time of payment, and the legatee is an infant, he shall have interest for the legacy from the expiration of one year after the testator's death; for so long the executor shall have, that he may see whether there are any debts, and no laches shall be imputed to the infant: But if the legatee be of full age, he shall have no interest but from the time of the demand of his legacy. Where a legacy is payable at a day certain, it must be paid with interest from that day. 1 *Salk.* 413. 2 *Nels. Abr.* 1114. A person gives a legacy charged upon land, which yields rents and profits, and there is no day of payment mentioned, the legacy shall carry interest from the testator's death, because the land yields profit from that time: Tho' were it charged on the personal estate, and the will mentions no time for paying it, there the legacy bears interest only from the end of a year, after the death of the testator; which is said to be the settled difference. 2 *Pere Williams* 26. It has been decreed in equity, that altho' a legacy be devised to be paid at a certain time, it carries interest only from such time as it is

demanded: 'Tis otherwise of a debt; and in such case non-payment at the day, has been held no breach, without demand and refusal. *Preced. Chanc.* 161. See *Abr. Cas. Eq.* 286. One having a legacy given him, payable within a year, knew nothing of it till a great while afterwards, when the executor published it in the *Gazette*; here Chancery would allow no interest, but the bare legacy. *Preced. Chanc.* 11. The assent or agreement of the executor is first to be obtained before any legacy can be taken; until then the legatee may not meddle with the legacy, because the executor is to pay debts before legacies, &c. *Wood's Inst.* 329. And this is the reason why no property can be transferred to the legatee, without the executor's assent: If the executor refuses to assent to a legacy, he may be obliged to it by a court of equity, or the spiritual court. *March, Rep.* 19.

Of suing for legacies.

Legacies being gratuities, and no duties, action will not lie at Common law for the recovery of a legacy; but remedy is to be had in the Chancery or spiritual court. *Allen* 38. The cognizance of a legacy properly belongs to the spiritual courts, for such bequests were not good by the Common law; but this is to be understood, where a legacy is devised generally: If 'tis payable out of the land, or out of the profits of the land, an action of the case lies at Common law; but the usual remedy is in Chancery. *Sid.* 44. 3 *Salk.* 223. By *Holt Ch. Just.* A legatee may maintain an action of debt at Common law against the owner of land, out of which the legacy is to be paid; and since the statute of wills gives him a right, by consequence he shall have an action at law to recover it. 2 *Salk.* 415. and sometimes the Common law takes notice of a legacy, not directly, but in a collateral way; as where the executor promised to pay the money, if the legatee would forbear to sue for the legacy, this was adjudged a good consideration to ground an action; but that it would not lie for a legacy in specie, which would be to devert the spiritual court of what properly belonged to their jurisdiction, by turning suits which might be brought there into actions on the case. *Rayn.* 23. If security is given by bond to pay a legacy, in such case an action at law is the proper remedy; by giving the bond, the legacy is as it were extinct, and becomes a debt at Common law, and the legatee can never afterwards sue for it in the spiritual court. *Holt.* 39. For the recovery of a debt or such like thing in action, given by way of legacy, it is best to make the legatee executor as to that debt, &c. or he must have a letter of attorney to sue in the executor's name. *Wood's Inst.* 330.

Of devises to creditors, and who capable of being legatees.

Where a testator gives his debtor a legacy greater than his debt, it shall be taken in satisfaction of it: Tho' where the legacy is less, it shall not be deemed as any part thereof; but as a legacy is a gift, sometimes the legatee has been decreed both. 1 *Salk.* 155. 2 *Salk.* 308. If a greater legacy is given by a codicil, to the same person that was legatee in the will, it shall not be a satisfaction, unless so expressed. 1 *Pere Williams* 414. The name of a legatee being very feebly spelt, it was referred to a master in Chancery, to examine who was the person intended. *Ibid.* 425. Some persons are incapable of taking by legacy, by several statutes; as the 13 *H. 3. c. 6.* relating to officers, lawyers, &c. not taking the oaths; and 5 *Geo. 1. c. 27.* concerning artificers going abroad, &c. A sum bequeathed out of a debt must be paid, tho' the debt is recovered by the testator; otherwise of a bequest of the debt itself. 2 *Strange* 824. One cannot sue in the spiritual court for a *donatio mortis causa*. 2 *Strange* 777. See *Executor and Will. New Abr.* 3 *H. tit. Legacies.* And *Black. Com.* 2 *V. 5. s. 3. §. 98.*

Legal Name. Is used for him who stands *velut in curia*, not outlawed, excommunicated, or infamous; and in this sense are the words *quasi legatarius bonorum*: Hence also *legatus* is taken for the condition of such a man. *Leg. Ed. Cas.* c. 16.

Legalis Moneta Angliæ, Lawful money of England, is gold or silver money coined here by the King's authority, &c. 1 Inst. 207. See *Coin*.

Legatary, (*Legatarius*) He or she to whom any thing is bequeathed; a *legatee*. Sir Henry Spelman says, it is sometimes used *pro legato vel nuncio*.

Legate, (*Legatus*) An ambassador or Pope's Nuncio. And there are two sorts of *legates*, a *legate a latere*, and *legatus natus*; the difference between whom is thus: *legatus a latere* was usually one of the Pope's family vested with the greatest authority in all ecclesiastical affairs over the whole kingdom where he was sent; and during the time of his *legation*, he might determine even those appeals which had been made from thence to Rome: *Legatus natus* had a more limited jurisdiction, but was exempted from the authority of the *legate a latere*; and he could exercise even his jurisdiction in his own province. The Popes of Rome had formerly in England the archbishops of Canterbury their *legatos natus*; and upon extraordinary occasions, sent over *legatos a latere*.

Legatee, Is the person to whom a legacy is bequeathed by a last will.

Legatary, (Mentioned in stat. 37 Eliz. cap. 16.) The same with *legatary*.

Legatum, In the ecclesiastick sense was a legacy given to the church or accustomed mortuary. Cowell.

Legem facere, To make law, or oath: *Legem habere*, to be capable of giving evidence upon oath; *Minor non habet legem*. Seldon's Notes on Hen. 3. 133.

Leggild, (*Legergildum*) See *Lecherwite* and *Lairwite*.

Legiosus, Litigious, and so subjected to a course of law. Cowell.

Legitimation, (*Legitimatio*) A making lawful or legitimate; and naturalization, &c. makes a foreigner a lawful subject of the state.

Leipa, A departure from service.—*Si quis à Domino suo sine licentia discedat, ut leipa emendatur, & redire cogatur*. Leg. Hen. 1. cap. 43.

Leitwit, (*Mulier adulteriorum*. Fleta, lib. 1. cap. 7.) Is used for a liberty, whereby a lord challengeth the penalty of one that lieth unlawfully with his bond-woman. Cowell.

Lemon juice. See *Lime*.

Lent, (From the Germ. *Leutz*. i. e. *Ver*, the spring fast) Is a time for fasting for forty days, next before Easter; mentioned in the stat. 2 Ed. 6. c. 19. And first commanded to be observed in England by Ercombert, seventh King of Kent, before the year 800. Baker's Chron. 7. No meat was formerly to be eaten in Lent, or on Wednesdays or other fish days, but by licence, under certain penalties. 27 Eliz. cap. 7. And butchers were not to kill flesh in the Lent, unless for victualling ships, &c. See *Quadragesima*.

Leip and Lacc, (*Leppe & Lasse*) Is a custom in the manor of *Writtel* in Com. Essex, that every cart which goes over *Greenbury* within that manor, (except it be the cart of a nobleman) shall pay 4 d. to the lord. This *Greenbury* is conceived to have been anciently a market-place; on which account this privilege was granted. Blount.

Lepta, A measure which contained the third part of two bushels: Whence we derive a *feed-leap*. Du Cange.

Leporarius, A greyhound for the hare. *Concedo eis duos leporarios*, &c. *ad leporem capiendum in foresta nostra de Essexia*. Mon. Ang. tom. 2. fol. 283.

Leporium, Is a place where hares are kept together. Mon. Ang. tom. 2. fol. 1035.

Leposo amobendo, An ancient writ that lies to remove a *leper* or *lazer*, who thrusts himself into the company of his neighbours in any parish, either in the church, or at other publick meetings, to their annoyance. Reg. Orig. 237. The writ lieth against those *lepers* that appear outwardly to be such, by sores on their bodies, smell, &c. and not against others: And if a man be a *leper*, and keep within his house, so as not to converse with his neighbours; he shall not be removed. New Nat. Br. 521.

Le Roy le Veut, Words by which the Royal Assent is signified by the clerk of the parliament to publick bills;

and to a private bill the King's answer is, *Soi fait comme il est desire*.

Le Roy se Advisera, And by these words to a bill, presented to the King by his houses of parliament, are understood his denial of that bill. By this means the indecency of a positive refusal to give the *Royal Assent* to a bill passed by the Lords and Commons is avoided.

Leschewes, Trees fallen by chance, or windfalls. Broke's Abr. 341.

Lesla, A leash of greyhounds, now restrained to the number of three, but formerly more. Spelm.

Lespegeud, (Sax. *Leſ-gegen*) *Baro minor. hominibus quos Angli Lespegeud nuncupant, Dani vero young men vocant*, &c. Constitut. Canut. de Foresta, Art. 2.

Lesla, A legacy; and from this word also *lease* is derived. Mon. Ang. tom. 1. pag. 562.

Leslor and Lessee, The parties to a lease. See *Lease*.

Lestage Mentioned in some writers, is the same as *lastage*.

Lestagefre, *Lestage-free*, or exempt from the duty of paying ballast money. Cowell.

Letmes, or *Letbes*, Is a word used in *Domesday*, to signify pastures, and is still used in many places of England, and often inserted in deeds and conveyances. Cowell.

Letare Jerusalem, Was used for the customary oblation made on Midlent Sunday, when the proper hymn was *Letare Jerusalem*, &c. by the inhabitants within a diocese to the mother cathedral church; and these voluntary offerings on that day, were by degrees settled into an annual composition or pecuniary payment, charged on the parochial priest, who was presumed to receive them from the people of his congregation, and obliged to return them to the cathedral church; and this among other burdens was at length thrown on the oppressed vicars, as appears by the ordination of the vicarage of *Erdele*, in the archdeaconry of Huntingdon, Anno 1290, where it is provided, *Qui quidem vicarius solvet synodalia, Letare Jerusalem*, &c. From the ancient custom of processions at that time, began the practice which is still retained in many parts of England, of *Mothering*, or going to visit parents on Midlent Sunday. See *Quadragesimalia*.

Letters, Where it is felony to send letters without a name, or in a fictitious one. See stat. 9 Geo. 1. c. 22. Extorting money, &c. by threatening letters, to be punished by fine and imprisonment, or by pillory, whipping, or transportation. 30 Geo. 2. cap. 24. See 4 Black. Com. 144.

Letter of Advice for electing of a Bishop. A letter from the King to the dean and chapter containing the name of the person whom he would have them elect. Black. Com. 1 V. 379.

Letter of Advice in Chancery. If a peer is a defendant in the court of Chancery, the Lord Chancellor sends a *letter missive* to him to request his appearance, together with a copy of the bill; if he neglects to appear, then he may be served with a *subpoena*; if he continues still in contempt a sequestration issues out immediately against his lands and goods, without any of the mesne process of attachments, &c. which are directed only against the person, therefore cannot affect a lord of parliament. The same process issues against a member of the house of commons, except that the Lord Chancellor doth not send him any *letter missive*. Black. Com. 3 V. 445.

Letters of Absolution, (*Littera Absolutoria*) Or absolatory letters, were such in former times, when an abbot released any of his brethren *ab omni subjectione & obedientia*, &c. And made them capable of entering into some other order of religion. Mon. Faverhamensi. pag. 7.

Letter of Attorney, (*Littera Attornati*) Is a writing, authorising an attorney to do any lawful act in the stead of another: As to give seisin of lands; receive debts, or sue a third person, &c. And letters of attorney are either general or special. West. Symb. par. 1. Stat. 7 R. 2. c. 13. The nature of this instrument is to give the attorney the full power and authority of the maker, to accomplish the act intended to be performed; And sometimes these writings are *revocable*, and sometimes not so: but when they are revocable, it is usually a bare authority only;

only; and they are *irrevocable* when debts, &c. are assigned to another, in which case the word *irrevocable* is inserted.

In cases of *letters of attorney* the authority must be strictly pursued: If it be to deliver livery and seisin of lands between certain hours, and the attorney doth it before or after; or in a capital messuage, and he does it in another part of the land, &c. the act of the attorney to execute the estate shall be void. *Plowd.* 475. But notwithstanding the ancient opinions for pursuing authorities with great strictness and exactness, yet in case of livery and seisin they have been always favourably expounded of later times, unless where it hath appeared, that the authority was not pursued at all; as if a *letter of attorney* be made to three, two cannot execute it, because they are not the parties delegated, and they do not agree with the authority. *2 Mod. Rep.* 79. Where the attorney does less than the authority mentions, it is void: It is said if he doth more, it may be good for so much as he had power to do. *1 Inst.* 258. There were two attorneys made jointly and severally, to deliver seisin of lands, &c. and one of them delivered seisin of part of the land, and after another attorney being tenant thereof for years, gave livery of the other part of the land: This was held good, though made at several times. *1 And.* 247. And if a man make a deed of feoffment of lands in divers counties, with such a *letter of attorney*, the livery must be at several times; otherwise it cannot be made. *Ibid.* See *1 Leon.* 192, 260.

If a mayor and commonalty make a feoffment of lands, and execute a *letter of attorney* to deliver seisin; the livery and seisin, after the death of the mayor, will be good, by reason the corporation dieth not. *1 Inst.* 52. In other cases, by the death of the party giving it, the power given by *letter of attorney* generally determines. A person made a *letter of attorney* to a creditor to receive all his wages and pay due from a ship, and afterwards died at sea; this authority was adjudged to be so determined, that all the rest of the creditors should have a share in his administration. *Preced. Chanc.* 125. *2 Vern.* 391.

Letters Claus, (Litera Clausa) Close letters, opposed to *letters patent*; being commonly sealed up with the King's Signet or Privy Seal; whereas the *letters patent* are left open and sealed with the broad seal.

Letter of Credit, Is where a merchant or correspondent writes a *letter* to another, requesting him to credit the bearer with a certain sum of money. *Merch. Dia.*

Letters of Exchange, (Litera Cambii) *Reg. Orig.* 194. See *Bills of Exchange*.

Letter of Licence, Is an instrument or writing made by creditors to a man that hath failed in his trade, allowing him longer time for the payment of his debts, and protecting him from arrests in going about his affairs. These *letters of licence* give leave to the party to whom granted to resort freely to his creditors, or any others, and to compound debts, &c. And the creditors covenant, that if the debtor shall receive any molestation or hindrance from any of them, he shall be acquitted and discharged of his debt against such creditor, &c.

Letters of Marque, Are extraordinary reprisals for reparation to merchants taken and despoiled by strangers at sea, grantable by the secretaries of state, with the approbation of the King and Council; and usually in time of war, &c. *Lex. Mercat.* 173. If a *letter of Marque* wilfully and knowingly take a ship, and goods belonging to another nation, not of that state against whom the commission is awarded, but of some other in amity, this amounts to a downright piracy. *Roll. Abr.* 430. See *Reprisal*.

Letters Patent, (Litera Patentes) Sometimes called *letters overs*, are writings of the King sealed with the Great Seal of England, whereby a person is enabled to do or enjoy that which otherwise he could not; and so called, because they are open with the seal affixed, and ready to be shewn for confirmation of the authority thereby given. *19 H. 7. cap. 7.* And we read of *letters patent* to make denizens, &c. *32 Hen. 6. c. 16.* *19 Hen. 3. c. 18.* *Letters patent* may be granted by common persons, but in such

case they are properly called *patentes*; yet for distinction, the King's *letters patent* have been called *letters patent royal*. Anno 2 H. 6. c. 10. *Letters patent* conclude with *testes me ipsi*, &c. *2 Inst.* 78. See *Patents*. And *Black. Com.* 2 V. 346.

Letters of safe conduct. See *Safe conduct*.

Lebant and Couchant, Is a law term for cattle that have been so long in the ground of another, that they have lain down and are risen again to feed; in ancient records *levantes & Couchantes*. When the cattle of a stranger are come into another man's ground, and have been there a good space of time, (supposed to be a day and a night) they are said to be *levant and couchant*. *Terms de Ley.* 2 Lill. Abr. 167. Beasts of a stranger on the lord's ground may be distrained for rent, though they have not been *levant and couchant*; but it is otherwise if the tenant of the land is in fault in not keeping up his mounds, by reason whereof the beasts escape upon the land. *Wood's Inst.* 190. See *Districti*. And *Black. Com.* 3 V. 9. 239.

Lebanum, (From the Lat. *Levare*, to make lighter) Is leavened bread.

Lebart foenum, To make hay, or properly to cast it into wind-rows, in order *ad tassandum*, to cock it up.

—*Homines de Hedington venient cum furcis suis ad didum foenum levandum & tassandum.* *Paroch. Antiq. pag.* 320. Hence *una levatio foeni* was one day's hay-making, a service paid the lord by inferior tenants. — *Alicia quæ fuit uxor Richardi le Grey faciet unam sartulaturam & unam Wedbedripam, & levationem foeni.* ch. p. 402.

Lebart facias. A writ directed to the sheriff for levying a sum of money upon a man's lands and tenements, goods and chattels, who has forfeited his recognizance. *Reg. Orig.* 298. This writ is given by the Common law, before the statute *Westm.* 2. cap. 18. gave the writ of *elegit*; and a *levari facias* commands the debt to be levied *de exiitibus & profectibus terræ*, &c. And cattle of a stranger on the land have been held issues of the land, which is debtor. *1 Salk.* 395. On a judgment in an inferior court, and a *levari facias*, whereupon a warrant was made to levy the debt *de terris & catallis*, it was adjudged that the precept ought to be to levy the money *de terris bonis & catallis*, &c. *2 Lutw.* 1410. A *levari facias* in debt lies against a parson, directed to the bishop, &c. to levy the money on his spiritual goods. *13 H. 4. 17.* When a year and a day is past, after the day of payment by the recognizance, there should be anciently a writ of debt; but now a *scire facias*, &c. See *Black. Com.* 3 V. 417.

There is a *levari facias damna disseisoribus*, for the levying of damages, wherein the disseisor has formerly been condemned to the disseisee. *Reg. Orig.* 214. Also *levari facias residuum debiti*, to levy the remainder of a debt upon lands and tenements, or chattels of the debtor, where part has been satisfied before. *Reg. Orig.* 299. And a *levari facias quando vicecomes returnavit quod non habuit emptores*, commanding the sheriff to sell the goods of the debtor, which he has taken, and returned that he could not sell. *Reg. Orig.* 300.

Leuca, Is a measure of land, consisting of 1500 paces. *Ingulphus* tells us, 'tis 2000 paces, *pag.* 910, In the *Monastic.* 1 tom. p. 313. 'tis 480 perches.

Leucata, Is a space of ground, as much as a mile contains. *De hysce, &c. continens unam leucatam in latitudine & dimidium in longitudine.* *Monast.* 1 tom. p. 768 And so it seems to be used in a charter of *William the Conqueror to Battle Abbey*. Cowell.

Levellus, A level, even or upon the level. Cowell.

Levitical degree, The farthest between uncle and niece. See *Black. Com.* 1 V. 435. *Gill. Rep.* 158.

Levy, (Levare) Is used in the law for to collect, or exact; as to levy money, &c. And sometimes to erect, or cast up; as to levy a ditch, &c. And to levy a fine of land is the usual term: In ancient time, the word *tere* a fine, was made use of. *17 H. 6.*

Levying Money without Consent of Parliament. No subject of England can be constrained to pay any aids or taxes, even for the defence of the realm or the support of government, but such as are imposed by his own consent.

sent, or that of his representatives in parliament. See the *Statutes*. 25 Ed. 1. c. 5 & 6. 34 Ed. 1. stat. 4. c. 1. 14 Ed. 3. stat. 2. c. 1. The petition of right, 3 Car. 1. 1 W. & M. stat. 2. c. 2.

Levying war against the King. This is high treason. It may be done by taking arms, not only to dethrone the King, but under pretence to reform religion, or the laws, or to remove evil counsellors, or other grievances whether real or pretended. *Black. Com.* 4 V. 81. cites 1 *Hawth. P. C.* 37. But *Blackstone* on the same subject in the very next page says,

"In cases of national oppression the nation has VERY JUSTLY RISEN as one man, to vindicate the ORIGINAL CONTRACT subsisting between the King and his people."

Lewdness. Is punishable by our law by fine, imprisonment, &c. And *Mish.* 15 Car. 2. a person was indicted for open lewdness in shewing his naked body in a balcony, and other misdemeanors, and was fined 2000 marks, imprisoned for a week, and bound to the good behaviour for three years. 1 *Sid.* 168. In times past when any man granted a lease of his house; it was usual to insert an express covenant, that the tenant should not entertain any lewd women, &c. See *Bawdy-house*. And *Black. Com.* 4 V. 64.

Lex. A law for the government of mankind in society. *Litt. Dig.* It is often taken for *judicium Dei*. 'Tis the same as *lada* amongst the Saxons, which is either a canonical or vulgar purgation. In *Leg. H.* 1. cap. 62. *Ab adventu Domini usque ad octavas Epiphania non est tempus leges faciendi*.

Lex amissa, or legem amittere, viz. One who is an infamous, perjured or outlawed person. In *Bracton*, lib. 4. cap. 19. par. 2. *Non est ulterius dignus lege*.

Lex apostata, or Legem apostatare. Is to do a thing contrary to law. 'Tis mentioned in *Leg. H.* 1. cap. 12. *Qui legem apostatabit verum sua sit reus prima vice*.

Lex Brehania, The Brehan or Irish law, overthrown by K. John.

Lex Byetolse, Was the law of the ancient Britains, or *Marches of Wales*. *Lex Marchiarum*.

Lex Derastina, Derastina est Lex quadam in Normannia constituta, per quam in simplicibus querelis insecutus factum, quod a parte adversa ei obijciatur, se non fecisse declarat. And it is the proof of a thing, which one denies to be done by him, where another affirms it; defeating the assertion of his adversary, and shewing it to be against reason or probability: This was used amongst the *Old Romans*, as well as the *Normans*. *Grand Customar.* c. 126.

Lex Judicialis, Is properly *purgatio per judicium ferri*; sometimes called *judicium*. *Leg. H.* 1.

Lex Sacramentalis, i. e. purgatio per sacramentum. *Leg. H.* 1. c. 9.

Lex Talionis, Is *juris postivi*; and the *taliones* among the *Hebrews*, were converted into pecuniary estimates, so that the price of an eye, &c. lost was allowed to the person injured. 1 *Hall's Hist. P. C.* 12. *Black. Com.* 4 V. 12.

Lex terra, The law and custom of the land, distinguished by this name from *lege civili*, as Mr. Selden tells us in *Dissertationes ad Potham.* cap. 9. par. 3.

Lex Wallensis, The British law, or law of Wales. *Statut. Wall.*

Lex or Leys, The French word for law. We also term pasture by a name frequent in several countries, *leys*, and so it is used in *Domesday*.

Leys, Lei, ley, Whether in the beginning or end of names of places, signify an open field, or large pastures. From the Saxon, *lag, campus, pascuum*; as *Blechingley*, &c. *Cowell*.

Lex-gager, (mentioned in stat. 1 Ga. 1. cap. 3.) *Wager of law*. See *Wager of law*.

Libel, (Libellus) Signifies literally a little book; but by use, it is the original declaration of any action in the *Civil law*. 1 *Hen.* 7. cap. 3. 2 *Rd.* 6. cap. 13. It signifieth also a scandalous report of any man spread abroad, or otherwise unlawfully published, and then called *famosus libellus*, an infamous libel.

And this is either
in scriptis
aut
sine scriptis.

In scriptis is when any writing is composed or published to another's disgrace, &c.

And *sine scriptis*, where the person is painted in a shameful manner, with a fool's coat, asses ears, &c. or a gallows, or other ignominious sign is fixed at his door. 3 *Inst.* 174.

Sentiments of the ancients.

Seneca calls defamatory libels *contumeliosi libelli*, and *Bracton* *carmina famosa*; contumelious libels, and infamous rhymes, which flow from malice; and the *Romans* would not permit their lives and fame to be subject to the injury and scandal of poets; for they made an ordinance, that whosoever should presume to compose any such verses, were to be punished with death. *Treat. of Laws* 75. But in a free state, like that of *Great Britain* such a law does not, cannot exist.—The moment our legislators should be corrupt enough, to give existence to such a law, that moment, liberty would be no more.

Definition of a libel, &c. and against whom libels are published.

'Tis observed in our law, that a libel is the greatest degree of scandal, and does not die like words which may be forgot, an action for which is confined to the person; but the cause of action for scandal in a libel survives. 5 *Rep.* 125. A libel in a strict sense is a malicious aspersions of another, expressed in printing or writing; and tending either to blacken the memory of one who is dead, or the reputation of one that is alive, and to expose him to public hatred, ridicule, or contempt: But in a larger signification, it may be applied to any defamation whatsoever. *Ibid.* 121. All libels are made against private men, or magistrates, and public persons; and those against magistrates deserve the greatest punishment: If a libel be made against a private man, it may excite the person libelled, or his friends, to revenge and break the peace; and if against a magistrate, it is not only a breach of the peace, but a scandal to government, and stirs up sedition. *Ibid.* It hath been held, that writing a seditious libel is not a breach of the peace; and that a member of parliament writing such a libel, is intitled to his privilege from being arrested for the same. *Wilf.* par. 2. 159. Tho' a private person or magistrate be dead at the time of making the libel, yet it is punishable; as it tends to a breach of the peace. *Hob.* 215. *not reported*.

The charge being true, not (in law) a justification of a libel.

With regard to this consideration, it is far from being a justification of a libel, that the contents thereof are true, or that the person upon whom made had a bad reputation; since the greater appearance there is of truth in any malicious invective, so much the more provoking it is. 5 *Rep.* 125. *Moor* 627. It is not material whether the matter be true or false, if the prosecution be by information or indictment; but in action on the case, one may justify that the matter is true. 5 *Rep.* 125. *Hob.* 253. Such is the law. How far it is consonant to reason, we will not attempt to say.—The end proposed, is, to avoid disturbance, &c. and preserve the peace.

What the law requires from a subject, knowing of a libel, &c.

When any man finds a libel, if it be against a private person, he ought to burn it, or deliver it to a magistrate; and where it concerns a magistrate, he should deliver it presently to a magistrate. *Ibid.* If a libel be found in a house, the master cannot be punished for framing, printing and publishing it; but it is said he may be indicted for

for having it, and not delivering it to a magistrate. *1 Vent. 31.*

Of punishment for printing and publishing, &c. of libels.

If a printer print a *libel* against a private person, he may be indicted and punished for it; and so may he who prints a *libel* against a magistrate, and much more one who does it against the King and state: Nor can a person in such a case excuse himself by saying they were dying speeches, or the words of dying men; for a man may at his death justify his villainy; and he who publishes it is punishable: And it is no excuse for the printing or publishing a *libel*, to say that he did it in the way of trade, or to maintain his family. *State Trials, 1 Vol. 982, 986.* Also if booksellers, &c. publish or sell *libels*, though they know not the contents of them, they are punishable. It has been resolved, that where persons write, print, or sell, any pamphlets, scandalizing the publick, or any private persons, such *libellous* books may be seized, and the persons punished by law; and all persons exposing any books to sale, reflecting on the government, may be punished: Also writers of news, (though not scandalous, seditious, or reflecting on the government, if they write *false news*;) are indictable. *State Trials, 2 Vol. 477.* One was indicted for a *libel* in scandalizing the King's vittnesses, and reflecting on the justice of the nation, and had judgment of the pillory and fine. *Ibid. 3 Vol. 50.* A person for *libelling* the Lord Chancellor Bacon, affirming that he had done injustice, and other scandalous matter, was sentenced to pay 1000*l.* fine, to ride on a horse with his face to the tail from the Fleet to Westminster, with his fault written on his head, to acknowledge his offence in all the courts at Westminster, stand in the pillory, and that one of his ears should be cut off at Westminster, and the other in Cheapside, and to suffer imprisonment during life. *Poph. 135.* One who exhibited a *libel* against a Lord Chief Justice, directed to the King, calling the Chief Justice, *traitor, perjured judge*, &c. had judgment to stand in the pillory, was fined 1000 marks, and bound to good behaviour during life. *Cro. Car. 125.*

Of petitions to the throne, parliament, &c.

The petition of the Seven Bishops in the reign of King James 2. against the King's declaration, setting forth that it was founded on a dispensing power, which had been declared illegal in parliament, &c. was called a seditious *libel* against the King; and they refusing to give recognisances to appear in *B. R.* were committed to the Tower; but being after tried at bar, were acquitted: *3 Mod. 212.* The printing of a petition to a committee of parliament, (which would be a *libel* against the party complained of, were it made for any other purpose) and delivering copies thereof to the members of the committee, is not the publication of a *libel*, being justified by the order and course of proceedings in parliament: *1 Hawk. P. C. 196.*

Of libellous matter in legal proceedings.

Scandalous matter in legal proceedings by bill, petition, &c. in a court of justice amounts not to a *libel*, if the court hath jurisdiction of the cause. *Dyer 285. 4 Rep. 14.* But he who delivers a paper full of reflections on any person, in nature of a petition to a committee; to any other persons except the members of parliament, who have to do with it, may be punished as the publisher of a *libel*. *1 Hawk. 196.* And by the better opinion, a person cannot justify the printing any papers which import a crime in another, to instruct counsel, &c. but it will be a *libel*. *Sid. 414.*

Of sending letters, &c. to the parties charged with any scandalous matter.

Sending an abusive letter to one, without publishing it to others, is no *libel*; but if it be sent to a third person, or any ways dispersed, it is a publication of the *libel*: And tho' sending a scandalous letter to the party himself

is not a *libel*, nor can any action be brought upon it, because it is no publication; yet it is an high offence. *12 Rep. 34. 1 Lev. 139. 2 Brownl. 157.* It is an offence against the King's peace, punishable by indictment; and if copies of it are afterwards dispersed, it aggravates the crime, or rather makes it a new crime, for which the party may have an action. *Poph. 35. Hob. 62.* Writing a letter to a man, and abusing him for his publick charities, &c. is a libellous act, punishable by indictment. *Hob. 215.*

Of private libels and obscenity:

A private *libel*, for a private matter, as a letter scandalizing a person courting a woman, is indictable, and fineable to the King. *Sid. 270.* No writing is esteemed a *libel*, unless it reflect upon some particular person; and a writing full of obscene ribaldry, is not punishable by any prosecution at Common law; but the author may be bound to the good behaviour, as a person of evil fame. *1 Hawk. 195.*

What is, and what is not a libel.

Where a writing inveighs against mankind in general, or against a particular order of men, this is no *libel*; it must descend to particulars and individuals, to make it a *libel*. *Trin. 11 W. 3. B. R.* But a general reflection on the government is a *libel*, tho' no particular person is reflected on: And the writing against a known law is held to be criminal. *State Trials, 4 V. 672. 903.* According to Holt Ch. J. scandalous matter is not necessary to make a *libel*; it is enough if the defendant induces an ill opinion to be had of the plaintiff, &c. And if a man speak scandalous words, unless they are put in writing, he is not guilty of a *libel*; for the nature of a *libel* consisteth in putting the infamous matter into writing. *2 Salk. 417. 3 Salk. 226.* A defamatory writing, expressing only one or two letters of a man's name, if it be in such a manner, that from what goes before and follows after, it must be understood by the natural construction of the whole, to signify and point at such a particular person, is as properly a *libel* as if the whole name were expressed at large. *Trin. 12 Ann. 1 Hawk. 194.*

Of the wording of a libel.

Printing or writing may be libellous, tho' the scandal is not directly charged, but obliquely and ironically; and where a writing pretends to recommend to one the characters of several great men for his imitation, instead of taking notice of what they are generally famous for, pitches on such qualities only which their enemies charge them with the want of; as by proposing such a one to be imitated for his learning, who is known to be a good good soldier, but an illiterate; &c. this will amount to a *libel*. *Ibid.*

Of the author, contriver and publisher.

In the making of *libels*, if one man dictates, and another writes a *libel*, both are guilty; for the writing after another shows his approbation of what is contained in the *libel*; and the first reducing a *libel* into writing may be said to be the making it, but not the composing: if one repeats, another writes; and a third approves what is written, they are all makers of the *libel*; because all persons who concur to an unlawful act are guilty. *5 Mod. 167.* The making a *libel* is the genus; and composing and contriving is one species; writing, a second species; and procuring to be written, a third; and one may be found guilty of writing only, &c. *2 Salk. 419, &c.* But observe; a mere writing, without a publication, was not in question in *Salsfield*. 'Tis conceived that for the mere writing of a *libel*, not published, no action can be maintained; nor prosecution legally supported.

If one writes a copy of a *libel*, and does not deliver it to others, the writing is no publication: but it has been adjudged, that the copying a *libel*, without authority, is writing a *libel*, and he that thus writes it, is a contriver; and

and that he who hath a written copy of a known libel, if it is found upon him, this shall be evidence of the publication; but if such libel be not publicly known, then the bare having a copy is not a publication. 2 Salk. 417. 2 Nels. Ab. 1122. Writing a copy of a libel is writing of a libel, as it has the same pernicious consequence; and if the law were otherwise, men might write copies, and print them with impunity. 2 Salk. 419. And when a libel appears under a man's own hand-writing, and no author is known, he is taken in the manner, and it turns the proof upon him; and if he cannot produce the composer, it is hard to find that he is not the very man. *Ibid.* If one reads a libel, or hears it read, and laughs at it, it is not a publishing; for before he reads or hears it read, he cannot know it to be a libel: tho' if he afterwards reads or repeats it, or any part thereof, in the hearing of others, it is a publication of it: yet if part of it be repeated in mirth without any malicious purpose of defamation, it is said to be no offence. 9 Rep. 59. Moor 862. Every one convicted of publishing a libel ought to be esteemed the contriver or procurer: the procurer and writer of a libel have been held to be both contrivers; also the procuring another to publish it, and the publisher, are both publishers: and the contriver, procurer, and publisher of a libel, are punishable by fine, imprisonment, pillory, or other corporal punishment, at the discretion of the court, according to the heinousness of the crime, &c. Moor 627. 5 Rep. 125. 3 Inst. 174. 3 Cro. 17.

Of setting forth a libel in law proceedings, according to the tenor.

In informations and law proceedings there are two ways of describing a libel, by the sense, and by the words; the first is *cujus tenor sequitur*, and the second *quæ sequitur in hæc Anglicana verba*, &c. in which the description is by particular words, and whereof every word is a mark; so that if there is any variance, it is fatal; in the other description by the sense, it is not material to be very exact in the words, because the matter is described by the sense of them. 2 Salk. 660. One great intention of the law in prohibiting libels against persons, is to restrain men from endeavouring to make themselves their own judges of complaints, and to oblige them to refer the decision thereof to the law, &c. And 'tis of great consequence to the state, for preserving peace, order, and good government.—Yet in a free state, such as this is, by the principles of its constitution, 'tis perhaps impossible to draw the line with precision. The liberty of the press is of the utmost importance; yet, though not restricted by statute, it should be observed that the courts of law are always open to punish any abuse of that invaluable privilege. The declaration for a libel must lay it to be *of and concerning* the plaintiff, otherwise there can be no judgment. 2 Strange 934. Books against Christianity, and obscene books, are punishable as libels. 2 Strange 788, 834.

For further learning on this subject, vide *New Abr.* 3 V. tit. Libel, and *Black. Com.* 3 V. 125. 4 V. 150.

Libel, in the *Spiritual* court. If upon a libel for any ecclesiastical matter, the defendant make a surmise in *B. R.* to have a *prohibition*, and such surmise be insufficient, the other party may shew it to the court, and the judges will discharge it. 1 Leon. 10, 128. The libel used in ecclesiastical proceedings, consists of three parts. 1. The major proposition, which shews a just cause of the petition. 2. The narration, or minor proposition. 3. The conclusion, or conclusive petition, which conjoins both propositions, &c. and the form of it is as follows: *In the name of God, Amen*, Before you the Worshipful T. F. Doctor of Laws, Principal Official of the Consistory Court of York, &c. The party C. D. against A. B. alledgeth, complaineth, and propoundeth, &c. *Imprimis*, he doth propound, that the said C. D. was and is a man very honest, just and upright, of good fame, life and conversation, aspersed or defamed with no crime, except what is afterwards mentioned; and is commonly reputed and esteemed as such, &c. *Item*, That notwithstanding the premises, the said A. B. out of a malign spirit, in the month of, &c. in this present year 1771, within the parish of, &c. maliciously, and

with an intent of defaming and injuring the said C. D. hath defamed and injured him, and said some reproachful and defamatory words of and against him the said C. D. and especially these words following, *viz.* That, &c. (here set forth the words) and the party doth propound and article, as to such time and manner of speaking the words, &c. *Wherefore*, proof being made in and upon the premises, the party C. D. doth request and petition that the said A. B. for such his rashness, may be corrected and punished; and also that he may be condemned in charges, made in this cause on the behalf of the said C. D. &c. (or to disown the said defamatory words, &c.) or otherwise that right and justice may be administered, &c. *Black. Com.* 3 V. 100.

Libera, A livery or delivery of so much grass or corn to a customary tenant, who cuts down or prepares the said grass or corn, and receives some part or small portion of it as a reward or gratuity. *Cowell.*

Libera Batella, Signifies a free boat.—*Per liberam batellam, hoc est, habere unam Cymbam ad Piscand. subter Pontem Cestrie, &c. & ibidem cum omni genere retium.* Plac. in Itin. apud Cestriam, 14 H. 7.

Libera Chæsa habenda, Is a judicial writ granted to a person for a free chase belonging to his manor; after proof made by inquiry of a jury, that the same of right belongs to him. *Reg. Orig.* 36.

Liberam Legum. On trial by battel, if either champion proves *recræant*, i. e. yields and pronounces the word *cræven*, he is condemned as a *recræant*, *amittere liberam legem*, that is, to become infamous and not be accounted *liber et legalis homo*, being supposed by the event to be proved forsworn, and therefore never to be put upon a jury, or admitted as a witness in any cause. *Black. Com.* 3 V. 340, 341.

Libera Piscaria, A free fishery, which being granted to one, he hath a property in the fish, &c. 2 Salk. 637. See *Fishing*.

Liber Taurus, A free bull. *Comptum per jur. quod Will. de H. fuit seistus de libero tauro habendo in, &c. Ideo consideratum est, quod prædictus Will. recuperet damna sua quæ taxantur per jur. ad ius. pro imparcatione ejusdem tauri, &c.* Norf. 16 Ed. 1.

Libera wara. See *Wara*.

Liberate, Is a writ that lies for the payment of a yearly pension or sum of money granted under the Great Seal, and directed to the Treasurer and Chamberlains of the *Exchequer*, &c. for that purpose. In another sense it is a writ to the sheriff of a county, for the delivery of possession of lands and goods extended, or taken upon the forfeiture of a recognizance. Also a writ issuing out of the *Chancery* directed to a gaoler for delivery of a prisoner that hath put in bail for his appearance. *F. N. B.* 132. 4 Inst. 116. This writ is most commonly used for delivery of goods, &c. on an *extent*; and by the extent the conusee of a recognizance hath not any absolute interest in the goods, until the *liberate*. 2 Lill. 169. It has been adjudged, that where an extent is upon a statute merchant, there needs no *liberate*, for the sheriff may deliver all in execution without it; but where an extent is upon a statute staple, or a recognizance, there must be a return made of such an extent, and then a *liberate* before there can be a delivery in execution. 3 Salk. 159. See *Extent*.

Liberatio, Is taken for money, meat, drink, clothes, &c. yearly given and delivered by the lord to his domestick servants. *Blount.*

Libertas Ecclesiastica. This is a frequent phrase in our old writers, to signify church liberty, or ecclesiastical immunities: the right of *investiture* extorted from our Kings by force of papal power, was at first the only thing challenged by the clergy, as their *libertas ecclesiastica*: but by degrees, under weak princes and prevailing factions, under the title of *church liberty*, they contended for a freedom of their persons and possessions from all secular power and jurisdiction, as appears by the canons and decrees of the council held by *Boniface*, Archbishop of Canterbury, at Merton, A. D. 1258. and at London, A. D. 1260, &c. *Cowell.* See Lord Lysle's *History of Hen. II.* and *Robertson's History of Emp. C. V.*

Liberate,

Libertate probanda, Is an antient writ that lay for such as being demanded for villeins offered to prove themselves free; directed to the sheriff that he should take security of them for the proving of their freedom before the justices of assize, and that in the mean time they should be unmolested. *F. N. B.* 77. Villenage, and the appendixes thereof, viz. writs *de nativo habendo*, *libertate probanda*, &c. were of old great titles in the books of law, but are now antiquated.

Libertatibus allocandis, A writ lying for a citizen or burgher, impleaded contrary to his liberty, to have his privilege allowed. *Reg. Orig.* 262. And if any claim a special liberty to be impleaded within a city or borough, and not elsewhere, there may be a special writ *de libertatibus allocandis*, to permit the burghesses to use their liberties, &c. These writs are of several forms, and may be used by a corporation, or by any single person, as the case shall happen. *New Nat. Br.* 509, 510. The Barons of the *Exchequer*, &c. may sue forth such writs, if they are delayed to have their liberties allowed them. *Ibid.*

Libertatibus exigendis in Itinere, An antient writ whereby the King commands the *Justices in Eyre* to admit of an attorney for the defence of another man's liberty. *Reg. Orig.* 19.

Liberties or franchises. These are synonymous terms, and their definition is, a royal privilege, or branch of the King's prerogative, subsisting in the hands of a subject. The kinds of them are various, and almost infinite. See *Black. Com.* 2 *V.* 37, &c.

Liberty, (*libertas*) Is a privilege held by grant or prescription, by which men enjoy some benefit beyond the ordinary subject. *Bract.* But in a more general signification, it is said to be a power to do as one thinks fit; unless restrained by the law of the land: and it is well observed, that human nature is ever an advocate for this liberty; it being the gift of God to man in his creation; therefore every thing is desirous of it, as a sort of restitution to its primitive state. *Fortescue* 96. It is upon that account the laws of England in all cases favour liberty, and which is counted very precious, not only in respect of the profit which every one obtains by his liberty, but also in respect of the publick. 2 *Lill. Abr.* 169. According to *Mansfield. Liv.* 26. c. 20. Liberty consists principally in not being compelled to do any thing, which the law does not require, i. e. because we are governed by civil laws, and therefore we are free, living under those laws. See *infra*, at the end of this head.

The people of this kingdom are to enjoy their antient liberties, without impeachment, by *Magna Charta*. No freeman shall be imprisoned or condemned without trial by his peers, or the law. *Mag. Chart.* c. 19. Likewise no person is to be arrested, &c. without process at law: and matters which concern liberty are to be speedily determined, &c.

Magna Charta, 9 *Hen.* 3. cap. 29. No freeman shall be taken or imprisoned, or disseised of his freehold, or of his liberties or free customs, or be outlawed, banished or otherwise destroyed; nor shall the King pass upon him, but by the lawful judgment of his peers, or by the law of the land. The King shall sell to none, or deny or delay to none, right or justice. See 25 *Ed.* 3. §. 5. cap. 4. and 42 *Ed.* 3. cap. 3.

Stat. *Confirm. Chart.* 25 *Ed.* 1. cap. 2. If any judgment be given contrary to the great charters, it shall be undone and holden for nought.

Stat. 2 *Ed.* 3. cap. 8. It shall not be commanded by the Great Seal or the Little Seal, to disturb or delay common right; and the such commandments come, the justices shall not cease to do right.

Stat. 5 *Ed.* 3. cap. 9. No man shall be attached by any accusation, nor forejudged of life or limb, nor shall his lands or goods be seized into the King's hands against the great charter and the law of the land.

Stat. 25 *Ed.* 3. §. 5. cap. 4. None shall be taken by petition or suggestion made to the King or his council, unless it be by indictment of lawful people of the neighbourhood, or by process made by writ original at the Common law. And none shall be put out of his franchises or freehold, unless he be duly brought to answer,

and forejudged by course of law; and if any thing be done to the contrary, it shall be redressed and holden for none.

Stat. 42 *Ed.* 3. cap. 3. No man shall be put to answer without presentment before justices, or matter of record of due process; or writ original, according to the antient law of the land. And if any thing be done to the contrary, it shall be void in law, and held for error.

Vide the *Petition of Right*, 3 *Car.* 1. and see 16 *Car.* 1. c. 10. for the dissolution of the *Star-Chamber*.

The following we have stated pretty fully, as it is an act of great consequence to the subjects of this free state.

Stat. 1 *Will.* & *Mar.* §. 2. cap. 2. §. 1. Whereas the Lords spiritual and temporal and commons assembled at *Westminster*, representing all the estates of the people of this realm, did upon the 13th of February 1688. present unto their Majesties, then Prince and Princess of *Orange*, a declaration, containing that,

The said Lords spiritual and temporal and commons, being assembled in a full and free representative of this nation; for the vindicating their antient rights and liberties, declare,

That the pretended power of suspending of laws, or the execution of laws; by regal authority, without consent of parliament, is illegal;

That the pretended power of dispensing with laws, or the execution of laws; by regal authority, as it hath been assumed and exercised of late; is illegal;

That the commission for erecting the late court of commissioners for ecclesiastical causes, and all other commissions and courts of like nature, are illegal and pernicious;

That levying money for or to the use of the crown, by pretence of prerogative, without grant of parliament, for longer time, or in other manner than the same is or shall be granted; is illegal;

That it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal;

That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law;

That the subjects which are protestants may have arms for their defence suitable to their conditions, and as allowed by law;

That election of members of parliament ought to be free;

That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament;

That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders;

That all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void;

And for redress of all grievances, and for the amending, strengthening and preserving of the laws, parliaments ought to be held frequently;

And they do claim, demand, and insist upon all and singular the premises, as their undoubted rights and liberties; and that no declarations, judgments, doings, or proceedings, to the prejudice of the people in any of the said premises, ought in any wise to be drawn hereafter into consequence or example;

Stat. 6. All and singular the rights and liberties asserted and claimed in the said declaration are the true, antient and indubitable rights and liberties of the people of this kingdom, and so shall be esteemed, allowed, adjudged, and taken to be; and all the particulars aforesaid shall be firmly holden as they are expressed in the said declaration; and all officers shall serve their Majesties according to the same in all times to come.

Stat. 12. No dispensation by non obstante of any statute shall be allowed, except a dispensation be allowed of in such statute; and except in such cases as shall be specially provided for during this session of parliament.

Stat. 13. No charter granted before the 23d of October 1689. shall be invalidated by this act, but shall remain of the same force as if this act had never been made.

Vide the Stat. 12 & 13 Will. 3. cap. 2. whereby, amongst other things, it is enacted, That no person who has an office or place of profit under the King, or receives a pension from the crown, shall be capable of serving as a member of the house of commons.

But the former part of this clause has been altered by a subsequent law, the acceptance of an office, &c. by a member, only vacating his seat, and he may be re-elected, if the electors think proper. And this may be considered as a reasonable law, otherwise the crown might be deprived of the service of some of the most able men in the state. If an ill use is, or ever should be made of this, we can only say 'tis impossible for human laws to be perfect, and guard against every evil.

According to *Montesquieu Liv. 11. c. 3.* "Liberty is a right to do whatever the laws permit." If a citizen could do what they forbid, he would no longer be possessed of liberty, because all his fellow citizens would have the same power. See *ante*, at the beginning of this head. An *Englishman* may add to the preceding idea his right of legislation. See *Black. Com. 1 V. 6, 125.*

Liberty to hold Pleas, Signifies to have a court of one's own; and to hold it before a Mayor, Bailiff, &c. See *Franchise.*

Liblacum, The manner of bewitching any person; also a barbarous sacrifice. *Leg. Athelstan. 6.*

Librae arsa penulatae & ad numerum: A phrase which often occurs in the *Domesday-Register*, and some other memorials of that and the next age,—as *Ailesbury in Buckinghamshire*, the King's manor.—*In totis valentibus reddit lvi libr. arsas & pensatas, & de thelonio x libr. ad numerum, i. e.* in the whole value it pays fifty-six pounds burnt and weighed; and for toll ten pounds by tale. For they sometimes took their money *ad numerum* by tale in the current coin upon content: but sometimes they rejected the common coin by tale, and would melt it down to take it by weight when purified from the dross and too great alloy; for which purpose they had in those times always a fire ready in the Exchequer to burn the money, and then weigh it. *Cowell.*

Libra pensa, A pound of money in weight; for it was usual in former days, not only to tell the money, but to weigh it; for several cities, bishops and noblemen had their mints, and coined money, and often very bad, and therefore though the pound consisted of 20s. they weighed it. Thus in *Domesday* we read, *Reddit nunc 30 libras arsas & pensatas.* *Gale's Hist. of Brit. vol. 761.*

Library, Where a library is erected in any parish, it shall be preserved for the uses directed by the founder: and incumbents and ministers of parishes, &c. are to give security therefore, and make catalogues of the books, &c. None of the books shall be alienable, without consent of the bishop, and then only where there is a duplicate of such books: if any book shall be taken away and detained, a justice's warrant may be issued to search for and restore the same: also action of trover may be brought in the name of the proper ordinary, &c. And bishops have power to make rules and orders concerning libraries, appoint persons to view their condition, and inquire of the state of them in their visitations. *Statute 7 Ann. cap. 14.*

Cotton library settled in the family for the use of the publick, 12 & 13 Will. 3. cap. 5. Vested in the crown; 5 Ann. cap. 30. Establishment of the *British Museum*, 26 Geo. 2. c. 22. 27 Geo. 2. c. 16. f. 3.

Librata terrae, Contains four oxgangs, and every oxgang 13 acres. *Skene, verb. Bonata terrae*, with us, it is so much land as is yearly worth 20s. for in *Henry the Third's* time, he that had *quinde im libras terrae*; was to receive the order of knighthood. See *Fardingdale.* Some are of opinion, that as money is divided into pounds, shillings, pence, half-pence and farthings, the same degrees are to be observed in the division of lands; and therefore as *quadrans* signifies a farthing, so *quadrantata* is the fourth part of an acre, *oblata* is half; and *de-*

maritata is a whole acre, *solidata* is twelve acres, and *librata* is twenty times twelve acres, i. e. two hundred and forty. *Spelman* is of another opinion, who compares an acre to a mark in money; and as in one there are one hundred and sixty pence, so in the other there are one hundred and sixty perches, which they divide into *balvos* and quarters: so that an acre contains three hundred and sixty *denarios*; but some say, that *librata terrae* is so much ground as is worth yearly 20s. of current money. *Cowell.*

Licence, (licentia) Is a power or authority given to a man to do some lawful act: and is a personal liberty to the party to whom given, which cannot be transferred over; but it may be made to a man, or his assigns, &c. 12 H. 7. 25. There may be a parol licence, as well as by deed in writing; but if it be not for a certain time, it passes no interest. 2 Nels. Abr. 1123. And if there be no time certain in the licence; as if a man license another to dig clay, &c. in his land, but doth not say for how long, the licence may be countermanded; though if it be until such a time, he cannot. *Poph. 151.* If a lessor licences his lessee (who is restrained by covenant from aliening without licence) to alien, and such lessor dies before he aliens; this is no countermand of the licence: so it is if the lessor grants over his estate. *Cre. Jac. 133.* But where a lord of a manor for life granteth a licence to a copyhold tenant to alien, and dieth; the licence is destroyed, and the power of alienation ceaseth. 1 Inst. 52. Copyhold tenants leasing their copyhold for a longer time than one year, are to have a licence for it; or they incur a forfeiture of their estates. 1 Inst. 63. If any licence is given to a person, and he abuses it, he shall be adjudged a trespasser *ab initio*. 8 Rep. 146. A grants to B. a way over his ground, or licence to go through it to church, by this none but B. himself may go in it, but if one give me licence to go over his land with my plough, or to cut down a tree therein, and take it away: by this I may take what help is needful to do the same. So if it be to hunt and kill and carry away deer; not if it be to hunt and kill only. 12 H. 7. 25. 13 H. 7. 8 Rep. 146. By licence a man may practise physick and surgery in London; and do divers other things, by statute 3 H. 8. c. 7, &c. *Vide 15 Vin. Abr. tit. Licence.*

Licence to alien in Mortmain. Alienations in mortmain to ecclesiastical persons, &c. are restrained by several statutes; but the King may grant licences to any person or bodies politick, &c. to alien or hold lands in mortmain. 27 Ed. 1. 7 & 8 W. 3. c. 37. See *Mortmain.*

Licence to arise, (licentia surgendi) Is a liberty or space of time given by the court to a tenant to arise out of his bed, who is effoined *de malo lecti*, in a real action: and it is also the writ thereupon. *Bracton.* And the law in this case is, that the tenant may not arise or go out of his chamber, until he hath been viewed by knights thereto appointed, and hath a day assigned him to appear; the reason whereof is, that it may be known, whether he caused himself to be effoined deceitfully or not; and if the demandant can prove that he was seen abroad before the view or licence of the court, he shall be taken to be deceitfully effoined, and to have made default. *Bracton, lib. 5. Fluta, lib. 6. cap. 10.*

Licence to found a Church, Granted by the King. See *Church.*

Licence to go to Election of bishops is by *Conge d'Esire* directed to the dean and chapter to elect the person named by the King, &c. *Reg. Writs 294. Stat. 25 H. 8. c. 20.*

Licence of the King to go beyond sea may be revoked before the time expires, because it concerns the publick good. *Jenk. Cent. See Ne exeat Regnum.*

Licence of Marriage. Bishops have power to grant licences for the marrying of persons; and persons marrying any person without publishing the banns of matrimony, or without licence, incur a forfeiture of 100 l. &c. by statute 7 & 8 W. 3. cap. 35. See *Marriage.*

Licence to erect a Park, Warren, &c. See *Park and Warren.*

Licentia concordandi, Is that licence for which the King's Silver is paid on passing a fine, mentioned in the statute 12 Car. 2. c. 12.

Licentia

Licentia surgendi, Is the writ whereby the tenant enfeigned *de malo lecti*, obtaineth liberty to rise. See *Licence to arise*.

Licentia Transfretandi, Is a writ or warrant directed to the keeper of the port of *Devon*, or other sea-port, commanding them to let such persons pass over sea, who have obtained the King's licence thereunto. *Reg. Orig.* 193.

Litibod Laltu, Is a proverbial speech, intending as much as to hang a man first, and judge him afterwards.

Liege, (*Ligius*) Is used for *Liege Lord*, and sometimes for *Liege Man*: *Liege Lord* is he that acknowledgeth no superior; and *liege man* is he which oweth allegiance to his *liege lord*. 34 & 35 H. 8. The King's subjects are called *liege people*, because they owe and are bound to pay allegiance to him. *Stat. 8 H. 6. c. 10. 14 H. 8. c. 21*. But in ancient times, private persons, as lords of manors, &c. had their *lieges*. *Shene* saith, that this word is derived from the Ital. *Liga*, a bond or league; others derive it from *Litis*, which is a man wholly at the command of the Lord. *Blount*.

Lieges and **Liege-people**, (*Ligati*) The King's subjects, anciently so called, because they owe and are bound to pay allegiance to him. *Stat. 8 Hen. 6. cap. 10. 14 Hen. 8. cap. 2.* and divers other statutes. *Cowell*.

Lien, (*Fr.*) Is a word used in the law, of two significations: *personal lien*, such as a bond, covenant or contract; and *real lien*, a judgment, statute, recognizance, which oblige and affect the land. *Termin de Ley*.

Lieu, Instead or in place of another thing. And when one thing doth come in the place of another, it shall be of the same nature as that was; as in case of an exchange, &c. 2 *Shep. Abr.* 359.

Lieu conus, In law proceedings, signifies a castle, manor, or other notorious place, well known and generally taken notice of by those that dwell about it. 2 *Lill. Abr.* 641. A *revoir faciat*, for a jury to appear, may be from a *lieu conus*: And a fine or recovery of lands in a *lieu conus*, is good; but it is said in a *fin. fac.* to have execution of such fine, the vill or parish must be named. 2 *Cro. 574. 2 Mod. Rep.* 48, 49.

Lieutenant, (*locum tenens*) Is the King's deputy, or he that exercises the King's or any other's place, and represents his person; as the *Lieutenant of Ireland*. *Stat. 4 H. 4. c. 6. and 2 & 3 Ed. 6. c. 2.* The *Lieutenant of the Ordnance*, 39 *Eliz. cap. 7.* And the *Lieutenant of the Tower*, an officer under the *constable*, &c. And the word *lieutenant* is used for a military officer, next in command to the captain.

Life, Union and co-operation of soul with body; enjoyment or possession of terrestrial existence. *Yates*.

The life of every man is under the protection of the law. *Wood's Inst.* 11. A lease made to a person during life, is determinable by a *civil death*; but if it be to hold during natural life, it will be otherwise. 2 *Rep.* 18.

Life Estates, Where persons for whole lives estates are held, shall absent themselves for seven years, they shall be presumed dead. 19 *Car. 2. c. 6.* Persons for whole lives estates are held, on application to the Lord Chancellor, to be produced. 6 *Ann. c. 13.* The tenant holding after the determination of the life, deemed a trespasser. *Ibid.* Posthumous children enabled to take in remainder, where the life estate is determined. 10 & 11 W. 3. c. 16. Estates *per autre vie* shall be divisible, and abide in the hands of the heir or executor. 29 *Car. 2. c. 3.*

Stat. 14 Geo. 2. c. 16. 12 Geo. 3. Estates *per autre vie*, in case there be no special occupant thereof, of which no devise shall have been made according to 29 *Car. 2. c. 3.* or so much thereof as shall not have been so devised, shall be distributed in the same manner as the personal estate of the testator or intestate.

Life-Rent, A rent which a man receives for term of life, or for satisfaction of a debt. *Shen*.

Ligantia, (*ligantia*) Is the true and faithful obedience of a subject to his sovereign: And is also applied to the territory and dominion of the King's *Acres*; as children born out of the *hymens* of the King, &c. *Stat. 15 Ed. 3. Ca. Litt.* 129.

Ligantia, (*ligantia*) Is such a duty or fealty, as no man may owe or bear to more than one lord; and therefore it is used for that duty and allegiance, which every good subject oweth to his *liege lord* the King. It has been

thus defined, *Ligantia est vinculum arctius inter subditum & regem utroque invicem connectens; hunc ad protectionem & justum regimen, illos ad tributa & debitam subjectionem.* As there is a mutual connection of dominion and fidelity between lords and tenants, so there is a higher and greater connection between the King and subject: for the subject oweth to the King his faithful obedience, and ought to prefer the service of his Prince and country before the safety of his life; and the sovereign is to protect and defend his subjects. *Forrestus*. See *Allegiantia*.

Lighter-men, (Mentioned in *stat. 22 & 23 Car. 2. Act for changing, &c. the streets of London*.) Are those that carry away, by water, dung and rubbish in lighters, from the city of London.

They are now generally employed in the carrying of goods to and from ships, &c. lying in the river *Thames*.

Light-house, A useful light to be placed in a light-house erected on the *Shiffons*, by the master, wardens and assistants of *Trinity-house of Deptford-Sirond*; and masters of ships passing by the same, are to pay a certain tonnage duty, &c. *Stat. 4 Ann. c. 20. 8 Ann. c. 17.* The like act concerning the light-house built by *William Trench, Esq.* on the island or rock called *Skarries*, near *Holyhead* in the county of *Anglesea*. 3 *Geo. 2. cap. 36.*

Lights, Stopping lights of a house is a nuisance; but stopping a prospect is not, being only matter of delight, not of necessity: And a person may have either an *offse of nuisance* against the person erecting any such nuisance, or he may stand on his own ground and abate it. 9 *Rep.* 18. 1 *Mod.* 14. For any nuisance erected or being on the fall of my neighbour, whereby I sustain damage, I may maintain an action on the case. If a man has a vacant piece of ground, and builds thereupon a house, with good lights, which he sells or lets to another; and after he builds upon ground contiguous, or lets the same to another person, who builds thereupon to the nuisance of the lights of the first house, the lessee of the first house may have an action of the case against such builder, &c. And though formerly they were to be lights of an ancient messuage, that is now altered. *Mod. Ca.* 116, 117.

Lights and Lamps, Household in *Middlesex* and *Surrey* within the bills of mortality, at what times to set out lamps, 2 *W. & M. Jff.* 2. c. 8. 18. 15. None but *British* oil to be used for lamps in dwelling-houses, under penalty of 40 s. 2 *Ann. c. 9. Jff.* 18.

With respect to *London* and *Westminster*, there are a variety of new acts, for paving, lighting and cleansing the streets, &c. not necessary to enumerate.

Lighting-tim, Signifies the right which a man hath to the cutting of fuel in woods; and sometimes it is taken for a tribute or payment due for the same.

Lignum Vitæ, An apothecary's drug, of great price. *Lignum vitæ* is the product of the *British* plantations in *America* may be imported free from all customs and impositions. *Stat. 1 Geo. 2. Stat. 2. c. 17.*

Lignum Vitæ, Timber fit for building. *Du Fresno*.

Ligula, A copy or transcript of a court-roll or deed mentioned by *Sir John Maynard* in his *Mem. in Seaccar.* 12 *Ed.* 1.

Ligurion, A flatterer. *Liguriones, mendaces, rapaces, De gromanes habent.* *Leg. Canut.* 29. Mr. *Samner* is of opinion that it signifies a glutton, from the Saxon *li-cara, gulbis.* *Cowell*.

Limbs, The limbs as well as the life of a man are of such high value, in the estimation of the law of England, that it pardons even homicide, if committed *se defendendo*, or in order to preserve them. *Black Com.* 1 P. 130.

Limbs and Limbs-Taxes, To what duties liable, see 4 & 5 *W. & M. c. 1.*

Limitation, (*limitatio*) Is a certain time assign'd by statute, within which an action must be brought.

We shall now consider,

I. *Its nature and origin.*

II. *The limitation of actions as divided into, real, personal, and mixed.*

III. *The time when the right of action accrued, so as to be affected by the statutes, and of the courts of equity.*

IV. *The exceptions in 21 Jac. 1. c. 16. what will save a bar thereof; and of the manner of pleading.*

I. Of the nature and origin, of the limitation of actions.
The time of limitation is two-fold; first, in writs, by divers acts of parliament; secondly, to make a title to any inheritance, and that is by the Common law. *Co. Lit.* 114, 115.

It seems, that by the Common law there was no stated or fixed time to bring actions; for tho' it be said by *Bracton*, that *Omnes actiones in mundo infra certa tempora limitationem habent*; yet my Lord *Coke* says, that the limitation of actions was by force of divers acts of parliament; also, (says he) this general position of *Bracton's* admitted of several exceptions. *Bract. lib. 2 fol. 228. 2 Inst. 95. Co. Lit. 115. 4 Cr. 10. 11.*

But by the ancient law there was a stated time for the heir of the tenant to claim after the death of his ancestor, or else he lost his land, according to the feudal text, *Præterea si quis infensuratus major quatuordecim annis sua incurrit, vel negligentia per ann. 5 diem futuris, quod studi investituram a proprio domino non petierit, transacto hoc spatio, feudum amittit & ad dominum redeat.* *Speim. Gloss. 12.*

The fixing upon this period of a year and a day, upon several other occasions, seems to have been deduced from this ancient rule, and on this occasion was pitched upon, because the services appointed them to be annually computed; therefore the feud was ordered to be taken up within such time as such annual services became due, or else it was lost and returned to the lord; and the same time that was appointed to the tenant to claim from the lord, was also appointed to make his claim upon any disseisor; and if no such claim was made, the disseisor, dying seised, cast the right of possession upon the heir; and this was to keep the same uniformity in point of time thro' the law, as also that the lord might be at a certainty whom he might take for his tenant, and admit upon every descent; and since the heir of the tenant anciently lost the whole land, in case he did not take it up within time, it was fit the tenant should lose the right and possession, in case he did not claim within the same time upon the disseisor, that the heir of the disseisor might be in peace, in case the person that had right did not make his claim upon him, and that from thenceforth the lord might receive him into his feud; and as upon the ancient plan of feudal constitution, if the heir did not take up the feud within a year and a day, a desertion and dereliction was presumed; so also if the disseisor did not claim within the same time, the right of possession was relinquish'd. *Speim. Gloss. annus & dies 12, 23.*

Before the 32 Hen. 8. c. 2. certain remarkable periods were fixed upon, within which the titles upon which men designed to be relieved must have accrued; thus in the time of Hen. 3. by the statute of *Merton*, cap. 8. at which time the limitation in a writ of right was from the time of King Henry 1. by that statute it is reduced to the time of King Henry 2. and for assises of *mort d'ancestor* they were thereby reduced from the last return of King John out of Ireland, which was 18 Johanni; and for assises of *novel disseisin*, a *prima translatio Regis in Normanniam*, which was 5 Hen. 3. and which before that had been *post ultimam redditionem Henrici 3. de Britannia*; and this limitation was also afterwards by the statutes *Westm. 1. cap. 39.* and *Westm. 2. cap. 40.* reduced to a narrower compass, the writ of right being limited to the first coronation of Ric. 1. But for these ancient limitations see *Co. Lit. 14. b. 15. a. 2 Inst. 94, 95. 2 Roll. Abr. 111. Hold's Hist. of the Law 125. 2 Rep. 45.*

II. Of the limitation of assises, or divided into, real, penal, and personal.

1. In real assises.

By 32 H. 8. c. 2. it is enacted, "That no person shall from thenceforth sue, have or maintain any writ of right, or make any prescription, title or claim to or for any manors, lands, tenements, rents, annuities, commons, pensions, portions, corodies, or other hereditaments, of the possession of his or their ancestor or predecessor, and declare and allege any further seisin or possession of his ancestor or predecessor, but only of the seisin or possession of his ancestor or predecessor, which hath been, or now is, or shall be seised of the said manors, lands, tenements, rents, annuities, commons, pensions, portions, corodies, or other hereditaments, within threcore years next before the teste of the same writ, or next before the said prescription, title or claim, to hereafter to be sued, commenced, brought, made or had."

And it is further enacted by the said statute, par. 2. "That no manner of person shall sue, have or maintain any assise of *mort d'ancestor*, *cofenage*, *ayle*, writ of entry upon disseisin, done to any of his ancestors or predecessors, for any manors, lands, tenements or other hereditaments, of any further seisin or possession of his or their ancestor or predecessor, but only of the seisin or possession of his or their ancestor or predecessor, which was or hereafter shall be seised of the same manors, lands, tenements or other hereditaments, within fifty years next before the teste of the original of the same writ hereafter to be brought."

It is further enacted, par. 3. "That no person shall sue, have or maintain any action for any manors, lands, tenements, or other hereditaments, of or upon his or their own seisin or possession therein, above thirty years next before the teste of the original of the same writ hereafter to be brought."

And further, par. 4. "That no person shall hereafter make any avowry or cognizance for any rent, suit or service, and allege any seisin of any rent, suit or service, in the same avowry or cognizance in the possession of any other, whose estate he shall pretend or claim to have, above fifty years next before the making of the said avowry or cognizance."

And it is further enacted by the said statute, par. 5. "That all formedons in reverter, formedons in remainder, and *seire facias* upon fines of any manors, lands, tenements, or other hereditaments, at any time hereafter to be sued, shall be sued and taken within fifty years next after the title and cause of action fallen, and at no time after the fifty years pass."

Note; This statute hath the usual saving, for infants, feme covert, persons in prisons and beyond sea. In the construction of this statute it hath been holden, That in a *formedon* in reverter or remainder, or on a *seire facias*, on a fine of such nature, the demandant need not mention the statute in order to make out his title, but the tenant, if he would take advantage of it, must plead it. *Dyer 115. b. pl. 101. So in an avowry for rent. Moor 31. pl. 102. 1 Roll. Rep. 50.*

It has been held, that this statute being in restraint of the Common law, ought to be construed strictly; that, therefore it does not extend to a *formedon* in descender, *cessavit* nor *cessavit*. 4 Co. B. 1 And. 16. Lit. Rep. 342.

To a bill in Chancery, to be relieved touching a re-charge upon lands by a will, the defendant pleaded the statute of limitations, and that there had been no demand or payment in forty years; and it was held, that this statute concerns only customary rents between landlord and tenant, and not any rent that commences by grant, whereof the commencement may be shewn. 2 Vern. 255. *Collins v. Goddall*.

The statute does not extend to the services of *alcuage* homage and fealty, for a man may live above the time limited by the act; neither doth it extend to any other service which by common possibility may not happen or become due within fifty years, as to cover the hall of the lord, or to attend the lord in the war, &c. *Co. Lit. 115. a. 2 Inst. 95. 4 Co. B. 11. 8 Co. 65. 3 Lev. 21.*

And where the tenure is by homage, fealty and *alcuage* uncertain, and by suit of court or rent, or any other annual service, the seisin of the suit or rent, or any other annual service, is a good seisin of the homage, fealty or *alcuage*, or other accidental services, as wardship, *maritagium*, or the like. 2 Inst. 96. 4 Co. B. 11. *Wick. 12. Moor. 10. 2 Roll. Rep. 102.*

By the 1 Mar. cap. 1. it is enacted, "That the 32 Hen. 8. c. 2. shall not extend to any writ of right of *assize*, *entry*, *assize*, for assise of *darrein presentment*, *assize* of *advowson*, *assize* of *warren*, *assize* of *right of ward*, *assize* of *restitution of ward*, for the wardship of the body, or for the wardship of any *curacy*, *honour*, *manors*, *lands*, *tenements* or *hereditaments* holden by knight-service, but that such suits may be brought as before the making of the said act."

By the 21 Jac. 1. cap. 16. for quieting men's estates, and avoiding of suits, it is enacted, "That all writs of *formedon* in descender, *formedon* in remainder, and *formedon* in reverter, at any time hereafter to be sued or brought of, or for, any manors, lands, tenements or hereditaments, whereunto any person or persons now hath or have any title, or cause to have or pursue any such writ, shall be sued and taken *within twenty years next after the end of this present session of parliament*; and after the said twenty years expired, no person or persons, or any of their heirs, shall have or maintain any such writ of or for any of the said manors, lands, tenements or hereditaments; and that all writs of *formedon* in descender, *formedon* in remainder, *formedon* in reverter, of any manors, lands, tenements or other hereditaments whatsoever, at any time hereafter to be sued or brought by occasion or means of any title, or cause hereafter happening, shall be sued, and taken *within twenty years next after the title and cause of action first descended or fallen, and at no time after the said twenty years*; and that no person or persons that now hath any right, or title of entry, into any manors, lands, tenements or hereditaments, now held from him or them, shall thereafter enter, but *within twenty years next after the end of this present session of parliament, or within twenty years next after any other title of entry accrued*; and that no person or persons shall at any time hereafter make any entry into any lands, tenements or hereditaments, but *within twenty years next after his or their right or title, which shall hereafter first descend or accrue to the same*; and in default thereof such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made; any former law, &c.

Provided, That if any person or persons, that is or shall be intitled to such writ or writs, as that hath or shall have such right or title of entry, do or shall be, at the time of the said right or title first descended, accrued, come or fallen, *within the age of one and twenty years, feme covert, non compos mentis, imprisoned, or beyond the seas*, that then such person and persons, and his and their heirs and heirs, shall or may, notwithstanding the said twenty years be expired, bring his action, or make his entry, as he might have done before this act; so as such person and persons, or his or their heirs and heirs, shall *within ten years next after his or their full age, discovery, coming of sound mind, enlargement out of prison, or coming into this realm, or death, takes benefit of, and sue forth the same, and at no time after the said ten years*.

In the construction of this statute it hath been holden, That the possession of one joint-tenant is the possession of the other, so far as to prevent this statute. 1 Salk. 285.

That a claim of entry to prevent the statute of limitations must be upon the land, unless there be some special reason to the contrary. 1 Salk. 285.

That if a person be barred of his *formedon*, he is not thereby hindered to pursue his right of entry which afterwards accrues to him, no more than a person, who has several remedies, and discharges one of them, is excluded thereby from pursuing the other. 1 Lane. 201. Hunt v. Burne. 1 Salk. 285. 2 Salk. 420. 3 C.

If A. has had possession of lands for twenty years without interruption, and then B. gets possession, upon which A. is put to his election, though A. is plaintiff, yet the possession of twenty years shall be a good title in him, as if he had still been in possession; because a possession for twenty years is like a tenant which only enters, and gives a right of possession, which is sufficient to maintain an ejectment. 1 Salk. 420. held as have been since so ruled by the judges.

That if one tenant in common receives the whole profits for twenty years or more, yet this does not bar his companion; for the statute of limitations never runs against a man, but where he is actually ousted or disabled. 1 Salk. 453.

It has been ruled, that one shall be within the statute of limitations, because an action for the profits of the public's quays, and so were owing to the possessor of the land or tenant. 2 Salk. 410.

But ecclesiastical persons are not bound by any of the statutes of limitations, because it would be a side-wind to evade the statutes made to prohibit their alienations. Comp. Incumb. 429.

2. In penal actions.

By the 31 Eliz. cap. 5. per. 3. it is enacted, "That all actions, suits, bills, indictments or informations, which shall be brought for any forfeiture upon any statute penal, made or to be made, whereby the forfeiture is or shall be limited to the Queen, &c. shall be brought *within two years after the offence*; and that all actions, suits, bills or informations, which shall be brought for any forfeiture upon any penal statute, made or to be made, except the statutes of tillage, the benefit and suit whereof is or shall be by the said statute limited to the Queen, her heirs or successors, and to any other that shall prosecute in that behalf, shall be brought by any person that may lawfully sue for the same *within one year next after the offence committed*; and in default of such person, that then the same shall be brought for the Queen's Majesty, her heirs or successors, any time within the two years after that year ended. Where a shorter time is limited by any penal statute, the prosecution must be that time."

Also vide 18 El. c. 3. and 21 Jac. 1. c. 4. the former requiring a memorandum of the day of exhibiting an information, the latter an oath from the informer.

In the construction of these statutes it hath been holden, that the 21 Jac. 1. cap. 4. does not extend to any offence created since that statute; so that prosecutions on subsequent penal statutes are not restrained thereby, but that statute is to them as it were repealed *pro tanto*. 1 Salk. 272-73. 1 Mod. 445.

That if an offence prohibited by any penal statute be also an offence at Common law, the prosecution of it as of an offence at Common law, is no way restrained by any of these statutes. 1 Mod. 270. 4 Mod. 144.

That if an information *ex parte* be brought after the year on a penal statute, which gives one moiety to the informer, and the other to the King, it is naught only as to the informer, but good for the King. Cro. Gar. 131. Cro. Jac. 366. and vide Dalry. 60.

That if a suit on a penal statute be brought after the limited time, the defendant need not plead the statute, but may take advantage of it on the general issue. 1 Show. 355.

That the party grieved is not within the restraint of these statutes, but may sue in the same manner as before. Cro. Jac. 645. Hey 71. 3 Lane. 237.

It seems doubtful, whether a suit by a common informer on a penal statute, which first gives an action to the party grieved, and in his default, after a certain time, to any one who will sue, be within the restraint of these statutes. 1 Show. 355. 356.

It has been held by three judges, that suing out a *perpetua* within the year was a sufficient commencement of the suit to save the limitation of time on a penal statute, because the *perpetua* is the original of B. R. and may be continued on record as an original. But this held otherwise, for the action being for a penalty given by a statute, the plaintiff might have brought an action of debt by original in B. R. because the statute gives the action; and he held, that there was a difference between a civil action, and an action given by statute; for in the first case, the suing out a *perpetua* within the time, and continuing it afterwards, will be sufficient; but in the other case, if the party proceeds by bill, he ought to file his bill within time, that it may appear to be upon the record itself. Cro. Jac. 312. Calliford v. Blandford. 1 Show. Rep. 113. 2 C.

3. In personal actions.

By the 21 Jac. 1. cap. 16. it is enacted, That all actions for the debt for money shall be commenced and sued *within two years next after the words spoken, and not after*.

In the construction of this breach of the statute it hath been holden,

That an action of *perpetua* *in quantum* is not within the statute. 1 Salk. 246. 5 Mod. 455.

That

That it extends not to actions for slander of title, for that is not properly slander; but a cause of damage, and the slander intended by the statute is to the person. *Cro. Car. 141. Law v. Harwood*, adjudged.

That if the words are of themselves actionable, without the necessity of alleging special damages, altho' a loss ensues, yet in this case the statute of limitations is a good bar; but if the words at the time of the speaking of them are not actionable, but a subsequent loss ensues, which intitles the plaintiff to his action, in such case the statute is no bar. *1 Sid. 95. Sanders v. Edwards. Raym. 61. 8. C. and see 3 Mod. 111. S. C. cited.*

That if an action for words be founded upon an indictment, or other matter of record, it is not within the statute, but such action may be brought at any time. *1 Sid. 95.* But if in case, *qu. if it should not be in six years?*

By the same stat. it is enacted, that all actions of trespass, of assault, battery, wounding, imprisonment, or any of them, shall be commenced and sued within four years NEXT AFTER the cause of such actions or suits, and not after.

It seems, that if a man brings trespass for beating his servant, *per quod servitium amisit*, this is not such an action as is within this branch of the statute, being founded on the special damage. *1 Salk. 206. 3 Mod. 74.*

If to an action of assault, battery and imprisonment, the defendant pleads, as to the assault and imprisonment, the statute of limitations, without answering particularly to the battery, otherwise than by using the words *transgressio prædicta*, it is sufficient, for these words are an answer to the whole. *1 Lev. 31.*

By the same stat. it is enacted, that all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action *per trover* and replevin for taking away of goods and chattels, all actions of account, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, all actions on the case, (other than for slander) all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent within six years NEXT AFTER the cause of action.

Provision is made for feme-coverts, persons that are non compos, imprisoned, or beyond sea.

It hath been adjudged, that an action of debt on the 2 Ed. 6. for not setting out tithes, is not within the statute, the action being grounded on an act of parliament, which is the highest record. *Cro. Car. 513. Talory v. Jackson. 1 Saund. 38. 2 Saund. 66. 1 Sid. 305. 415. 1 Keb. 95. 2 Keb. 462.*

So it hath been adjudged, that an action of debt for rent reserved on a lease by indenture is out of the statute, the lease by indenture being equal to a specialty. *Matt. 109. Freeman v. Stacy. 1 Saund. 38. cited.*

Also it hath been adjudged, that an action of debt for an escape is not within the statute, not only because it is founded in *maleficio*, and arises on a contract in law, which is different from those actions of debt on a lending or contract mentioned in the statute, but also because it is grounded on the 1 Ric. 2. cap. 12. which first gave an action of debt for an escape, there being no remedy for creditors before but by action on the case. *1 Saund. 17. Jones v. Pope. 1 Lev. 191. S. C. adjudged. 2 Keb. 903. S. C. and 1 Sid. 305. S. C.*

So it hath been adjudged, that this statute cannot be pleaded to an action of debt brought against a tenant for money by him levied on a *fi. facias*, because the action is founded in *maleficio*, as also upon the judgment on which the *fi. facias* issued, which is a matter of record. *1 Mod. 245. Cockran v. Welby 212. and 2 Salk. Rep. 75. S. C.*

It hath been adjudged, that an action of debt on an award under the hand and seal of the arbitrators, tho' the submission was by parol, is not within the statute. *2 Saund. 64. Sid. 415. 1 Lev. 273. 2 Keb. 462. 456. 533. S. C.*

An action of debt for a fine of a copyholder is not within the statute. *1 Keb. 536. 1 Lev. 273.*

If a man recovers a judgment or sentence in *Præsumptio* for money due to him, the debt shall be considered here only as a debt by simple contract, and the statute of limitations will run upon it. *2 Vern. 540. per curiam.*

If the plaintiff be in England at the time the cause of action accrues, the time of limitation begins to run, so that if he, or (if he dies abroad) his representative does not sue within six years, he is barred by the statute. *Wyl. par. 1. 134.*

It seems that to an *assumpsit* brought by the assignees of a bankrupt, for a debt due to the bankrupt, this statute is a good bar; for tho' the assignment is by force of an act of parliament, yet the assignees stand only in the place of the bankrupt, and can have no other right nor remedy than he had. *2 Lev. 166. 3 Keb. 645. Comb. 70.*

It seems clearly agreed, that tho' the statutes of limitation bind the courts of equity, that yet a *trust* is not within these statutes. *March 129. 2 Salk. 124.*

A charity is not barred by length of time, nor within the statute of limitations. *2 Vern. 399.*

So it hath been held, that a *legacy* is not within the statute of limitations. *1 Vern. 256.*

It seems to be the doctrine of courts of equity, that mortgages are not within the statute of limitations; yet where a man comes in at an old hand, it hath been sometimes decreed, that the possessor should account no further than for the profits made in his own time, to discourage the stirring in such dormant titles; also the courts have allowed length of time to be pleaded in bar, where the mortgaged estate hath descended *as a fee* without entry or claim from the mortgagor, and where the possessor would be intangled in a long account; and in these cases the statute of limitations has been mentioned as a proper direction to go by. *1 Chan. Ca. 101. See Mortgage.*

III. Of the time when the right of action accrues, so as to be affected by the statute, and of the courts bound thereby.

This statute cannot be a bar unless the six years are expired, after there hath been complete cause of action; as if a man promise to pay 10*l.* to J. S. when he came from Rome, or when he marries, and ten years after J. S. marries, or comes from Rome, the right of action accrues from the happening of the contingency, from which time the statute shall be a bar, and not from the time of the promise. *Godb. 437.*

So in an action of the case wherein the plaintiff declared, that in consideration that he would forbear to sue the defendant, for some sheep killed by the defendant's dog, the defendant promised to make him satisfaction upon request, and that such a time he requested, &c. and it was held, that the right of action accrued from the request, not from the time of killing the sheep; that therefore the defendant could not plead the statute of limitations, the request being within six years, tho' the killing the sheep, and promise of satisfaction was long before. *Godb. 437. Stanford v. Boroughs* adjudged. See *1 Lev. 48. Webb v. Martin. 1 Sid. 66. 1 Keb. 177. S. C.* But if six years had elapsed after request made, the defendant might have pleaded *Non accrevit infra sex annos*.

For similar cases, vide *2 Salk. 422. 1 Kent. 191. 3 Keb. 613. Cro. Car. 245. 6. 333. 1 Jon. 252. 3 Mod. 120. 25. Allen 62. 2 Salk. 420. Comb. 26.*

It is clearly agreed, that the statute of limitations is a good plea in a court of equity. *March 129. 1 Salk. 424.*

But it seems to be agreed, that the statute of limitations is no plea in the courts of Admiralty, or Spiritual court, where they proceed according to their law, and in a matter in which they have cognizance. *6 Mod. 25. 26. 2 Salk. 424. 3 Keb. 166. 194.*

Therefore it hath been agreed, that for a suit upon a contract *super altum mare*, no prohibition should go upon their refusal of a plea of the statute of limitations. *6 Mod. 26.*

So it hath been held, not to be pleadable to a proceeding in the Spiritual court, *pro restitutione maritus in dotem*, because the proceeding is *pro reformatione maritus*, not for damages. *2 Salk. 424.*

It hath been doubted, whether in a suit in the Admiralty for mariners wages, this statute is a good plea; because it is said, that this is a matter properly determinable at Common

Common law; and the allowing the Admiralty jurisdiction therein, only a matter of indulgence. 2 Salk. 424. 6 Mod. 25.

But this is now settled by the 4 & 5 Ann. cap. 16. by which it is enacted, That all suits and actions in the court of Admiralty for seamen's wages, shall be commenced and sued *within six years* next after the cause of such suits or actions shall accrue, and not after.

IV. *The exceptions in 21 Jac. 1. c. 16.—What will save a bar thereof.—And of the manner of pleading.*

As to this it hath been adjudged, that the last proviso in the statute not only extends to those actions therein enumerated, but also to an *assumpsit*, tho' not mentioned, and to all other actions on the case being of equal mischief, and plainly within the intention of the legislature. Cro. Car. 245, 333. 2 Saund. 120. 2 Mod. 71. 1 Sid. 455.

1. *Exception in relation to infants.* As to this it hath been holden, that the statute being general, infants had been included, had they not been particularly excepted. 1 Lev. 31.

It hath been holden, that if an infant, during his infancy, by his guardian bring an action, the defendant cannot plead the statute of limitations; altho' the cause of action accrued six years before, and the words of the statute are, that after his coming of age, &c. 2 Saund. 121.

It hath been held in Chancery, that if one receives the profits of an infant's estate, and six years after his coming of age, he brings a bill for an account, the statute of limitations is as much a bar to such a suit, as if he had brought an action of account at Common law; for this receipt of the profits of an infant's estate is not such a trust, as being a creature of the court of equity, the statute shall be no bar to; for he might have his action of account against him at law, and therefore no necessity to come into this court for the account; for the reason why bills for an account are brought here, is from the nature of the demand, and that they may have a discovery of books, papers, and the party's oath, for the more easy taking of the account, which cannot be so well done at law; but if the infant dies by for six years after he comes of age, as he is barred of his action of account at law, so shall he be of his remedy in this court. Abr. Eq. 304, Lockey v. Lockey.

2. *Exception in relation to merchants accounts.* As to this exception, it hath been a matter of much controversy, whether it extends to all actions and accounts relating to merchants and merchandize, or to actions of account open and current only; the words of the statute being, That all actions of trespass, &c. all actions of account and upon the case, other than such actions as concern the trade of merchants; so that by the words, *other than such actions*, not being said *actions of account*, it has been insisted that all actions concerning merchants are excepted. 1 Jon. 401. 2 Saund. 124, 125. 1 Lev. 287. 2 Keb. 622. 1 Lev. 298. 1 Vent. 90. 1 Mod. 270. 2 Mod. 312. 2 Vern. 456.

But it is now settled, that accounts open and current only are within the statute; that therefore if an account be stated and settled between merchant and merchant, and a sum certain agreed to be due to one of them, if in such case he, to whom the money is due, does not bring his action within the limited time, he is barred by the statute. *Vide the authorities supra.*

So it hath been adjudged, that by the exception in the statute concerning merchants accounts, no other actions are excepted but actions of account. Carth. 226.

Also it hath been adjudged, that bills of exchange for value received, are not such matters of account as are intended by the exception in the statute of limitations. Carth. 226.

3. *Exception in relation to persons beyond sea.* It seems to have been agreed, that the exception as to persons being beyond sea, extends only where the creditors or plaintiffs are absent, and not to debtors or defendants, because the first only are mentioned in the statute; and this construction has the rather prevailed, because it was reputed the creditor's folly, that he did not file an ori-

ginal, and outlaw the debtor, which would have prevented the bar of the statute. Cro. Car. 245, 333. 1 Jon. 252. 1 Lev. 143. 3 Mod. 311. 2 Lutw. 950. 1 Salk. 420.

But as the creditors being beyond sea is saved by the 21 Jac. 1. c. 16. so now by the 4 & 5 Ann. cap. 16. it is enacted, That if any person or persons, against whom there is or shall be any cause of suit or action for seamen's wages, or against whom there shall be any cause of action of trespass, detinue, action sur trover or replevin, for taking away goods or chattels, or of action of account, or upon the case, or of debt grounded upon any lending or contract without specialty, of debt for arrearages of rent, or assault, menace, battery, wounding and imprisonment, or any of them, be, or shall be, at the time of any such cause of suit or action given or accrued, fallen or come beyond the seas; that then such person or persons, who is or shall be intitled to any such suit or action, shall be at liberty to bring the said actions against such person and persons after their return from beyond the seas, *within such times as are limited for the bringing of the said actions by the 21 Jac. 1. c. 16.*

4. *Where an executor or administrator is to sue or be sued.* A. received money belonging to a person who before died intestate, and to whom B. after such receipt took out administration, and brought an action against A. to which he pleaded the statute of limitations, the plaintiff replied, and shewed that administration was committed to him such a year, which was *infra sex annos*; tho' six years were expired since the receipt of the money, yet not being so since the administration committed, the action not barred by the statute. 1 Salk. 421. Currey v. Stephenson, Skin. 555. 4 Mod. 376. Latch. 335. S. C.

It is said in general, that where one brings an action before the expiration of six years, and dies before judgment, the six years being then expired, this shall not prevent his executor. 2 Salk. 424-5.

But if an executor sues upon a promissory note to the testator, and dies before judgment, and six years from the original cause of action are actually expired, and the executor brings a new action in four years after the first executor's death, the statute of limitations shall be a bar to such action; for tho' the debt does not become irrecoverable, by an abatement of the action after the six years elapsed by the plaintiff's death; yet the executor should make a recent prosecution, to which the clause in the statute, that provides a year after the reversal of a judgment, &c. may be a good direction, or shew that he came as early as he could, because there was a contest about the will, or right of administration; for the statute was made for the benefit of the defendants, to free them from actions when their witnesses were dead, or their vouchers lost. Trin. 1 Geo. 2. Wilcox v. Huggins.

If there be no executor against whom the plaintiff may bring his action, he shall not be prejudiced by the statute of limitations, nor shall any laches in such case be imputed to him. 2 Vern. 695.

5. *Where no jurisdiction to sue is, or where hindered by some authority.* It seems agreed, that there being no courts, or the courts of justice being shut, is no plea to avoid the bar of the statute of limitations; as where after the civil war an *assumpsit* was brought, that the defendant pleaded the statute of limitations; to which the plaintiff replied, that a civil war had broke out, and that the government was usurped by rebels, which hindered the course of justice, and by which the courts were shut up, and that within six years after the war ended he commenced his action; and this replication was held ill, for the statute being general, must work upon all cases which are not exempted by the exception. 1 Keb. 157. 1 Lev. 31. Carth. 157. 2 Salk. 420.

It is clearly agreed, that the defendant's being a member of parliament, and intitled to privilege, will not save a bar of the statute; because the plaintiff may have filed an original without being guilty of any breach of privilege. 1 Lev. 31. Carth. 156-7.

It is said, that if a man sues in chancery, and, pending the suit there, the statute of limitations attaches on his demand, and his bill is afterwards dismissed, the matter being properly determinable at Common law; in such case

case the court will preserve the plaintiff's right, and will not suffer the statute to be pleaded in bar to his demand. 1 Vern. 73, 74.

If the statute of limitations be pleaded to an action, the plaintiff to save his action may reply, that he had commenced the suit in an inferior court within the time of limitation, and that it was removed to *Westminster* by *habeas corpus*; and this shall be allowed by a favourable construction of the statute of limitations; altho' in strictness the suit is commenced in the court above, when it is removed by *habeas corpus*. 1 Sid. 228. 3 Keb. 263. *Bruin v. Chapman*. 1 Lev. 143. S. C. Also vide 2 Salk. 424.

6. Where the suing out a writ will save a bar of the statute. It is clearly agreed, that the suing out an original will save a bar of the statute of limitations, and that thereupon the defendant may be outlawed; and that if beyond sea at the time of the outlawry, tho' it shall be reversed after his return, yet the plaintiff may bring another original by journey accounts, and thereby take advantage of his first writ. *Carth.* 136. 1 Salk. 420. 3 Mod. 311.

Also it is agreed, that the suing out a *latitat* is a sufficient commencement of a suit, to save the limitation of time, because the *latitat* is the original of B. R. and may be continued on record as an original writ. 1 Sid. 53, 60. *Carth.* 233. 1 Salk. 421.

Also it hath been ruled, that to a plea of the statute of limitations the plaintiff may reply, that he sued out a *latitat*, and continued it down by a *vicecomes non misit breves*, without concluding *prout patet per recordum*; for the *latitat* roll is only for the private use of the court, and no record. 2 Keb. 46. *Bottle v. Wood*.

The same is law, as to a bill of *Middlesex*.

But tho' the suing out an original, or *latitat*, will be a sufficient commencement of a suit, yet the plaintiff, in order to make it effectual, must show that he hath continued the writ to the time of the action brought. *Carth.* 144. 2 Salk. 420. 1 Lutw. 101, 254. 3 Mod. 33. That the attorney's writing the continuances on the writ in his chambers is sufficient. 1 Sid. 53. 1 Keb. 140. Also vide *Carth.* 144. 2 Salk. 420. S. C. 1 Salk. 421.

7. Where a debt barred by the statute shall be said to be revived. It is clearly agreed, that if after the six years the debtor acknowledges the debt, and promises payment thereof, that this revives it, and brings it out of the statute; as if a debtor by promissory note, or simple contract, promises within six years of the action brought that he will pay the debt; tho' this was barred by the statute, yet it is revived by the promise; for as the note itself was at first but an evidence of the debt, so that being barred the acknowledgment and promise is a new evidence of the debt, and being proved, will maintain an *assumpsit* for recovery of it. 1 Salk. 28, 29. *Carth.* 470. 5 Mod. 425, 426. 2 Show. 126. 2 Vent. 151.

Also it hath been adjudged, that a conditional promise will revive a debt barred by the statute of limitations; as where to an *assumpsit* by an executor for goods sold and delivered by the testator, the defendant pleaded the statute, and upon evidence it appeared, that the defendant within six years, being applied to by the executor for the debt said, *If you prove that I had the goods, I will pay you*; which being fully proved at the trial, it was held that this conditional promise revived the debt; and that tho' made to the executor, after the death of the testator, was sufficient to maintain the issue; because the promise did not give any new cause of action, but only revived the old cause, and was of no other use, but to prevent the bar by the statute of limitations. *Carth.* 470. *Heylin v. Hastings*. 1 Salk. 29. S. C. 5 Mod. 425. S. C. cited.

So it hath been held, that a bare acknowledgment of the debt within six years of the action, is sufficient to revive it, and prevent the statute, tho' no promise was made. *Carth.* 470.

But if an *indebitatus assumpsit* for goods sold, be brought against four persons, who plead the statute of limitations, and it be found that one of them promised within six years, there can be no judgment against him; for the

contract being intire, it must be found that they all promised. 2 Vent. 151.

It seems to be the doctrine of the courts of equity, that if a man by will or deed subject his lands to the payment of his debts, debts barred by the statute of limitations shall be paid, for they are debts in equity, and the duty remains; and the statute hath not extinguished that, tho' it hath taken away the remedy. 1 Salk. 154. 2 Vern. 141.

Also it hath been ruled in equity, that if a man has a debt due to him by note, or a book debt, and has made no demand of it for six years, so that he is barred by the statute of limitations; yet if the debtor, or his executor, after the six years, puts out an advertisement in the Gazette, or any other news-paper, that all persons who have any debts owing to them, may apply to such a plate, and that they shall be paid; this (tho' general, and therefore might be intended of legal subsisting debts only,) yet amounts to such an acknowledgment of that debt which was barred, as will revive the right, and bring it out of the statute again. *Abr. Eq.* 305. *Andrews v. Brown*.

Of pleading.

It seems to be admitted, that the statute of limitations must be pleaded positively by him that would take advantage thereof; and that the same cannot be given in evidence, especially in an *assumpsit*, because the statute speaks of a time past, and relates to the time of making the promise, 1 Lev. 111. 1 Sid. 253. and see *Cro. Jac.* 115.

But in debt for rent, upon *nil debet* pleaded, the statute of limitations may be given in evidence, for the statute has made it no debt at the time of the plea pleaded, the words being in the present tense. 1 Salk. 278. *Per Holt*.

In replevin the defendant pleaded Not guilty *De cap' prædicti infra sex annos jam ultimo claspos*; and tho' it was urged, that this was the same with pleading *non cap'it*, and if he did not take, he could not be guilty of the detainer; and if this way of pleading were not allowed, the statute would be entirely evaded as to this action; yet the plea was held ill, because he ought to have answered to the detainer, as well as to the taking; also a thing may be lawfully distrained, although unlawfully kept; as by being put into a castle, &c. by which means it could not be replevied. 1 Sid. 81. *Arundel v. Trevor*. 1 Keb. 279. S. C.

In trespass, for a trespass done thirteen years before, the defendant pleads, that *infra sex annos, &c. non est inde culpabilis*. Plaintiff replies, that he brought his action such a term, and that within six years before that time the defendant did the trespass; and upon this the defendant takes issue, and is found guilty: And it was held, 1st, That the defendant's plea was good in bar, without pleading the statute, 2dly, That the plaintiff's replication was no departure; altho' it was objected, that he could have replied nothing, but that he was under some of the disabilities, for which there is a saving in the statute; for the plaintiff is not tied to the time or place laid in the declaration, but may vary from it upon evidence; and so when the defendant, by his plea, pleads to a certain time or place, and thereby makes the time or place material, the plaintiff may follow him without any departure. *Raym.* 86. 1 Lev. 110. 1 Keb. 566. S. C. *Lee v. Raynes*. Vide *New Abr.* 3 V. tit. Limitation.

N. B. The King is not within the general acts of limitation; nor ecclesiastical persons, for lands belonging to their churches. 11 Rep. 74. If a debt be set off by way of plea, the statute of limitations may be replied to. 2 Strange 1271. A writ of error to reverse a common recovery cannot be brought after twenty years, tho' the right of the plaintiff in the matter accrued within that time. 2 Strange 1257.

Limitation of the Crown. The statutes 1 W. 1. c. 3. 12 W. 3. c. 2. and 1 G. 2. c. 17. 4 Ann. c. 8. &c. are acts for the limitation of the crown, and settling it on protestant heirs in the house of Hanover. See *Crown*.

Limitation

Limitation of Estate. In a legal sense, imports how long the estate shall continue, or is rather a qualification of a precedent estate. A limitation is generally by such words as *durante vita, quamdiu dum, &c.* And if there be not a performance according to the limitation, it shall determine an estate without entry or claim; which a condition doth not. 10 Rep. 41. 1 Inst. 204. It is taken for the compass and time of an estate: as where one doth give lands to a man, to hold to him and his heirs male; and to him and the heirs female, &c. here the daughters shall not have any thing in it, so long as there is a male, for the estate to the heirs male is first limited. Co. Litt. 3, 13. If a limitation of an estate be uncertain, the limitation is void; and the estate shall remain as if there had been no such limitation. Cro. Eliz. 216. But a thing that is limited in a will by plain words, shall not be afterwards made uncertain by general words which follow. Hill. 23 Car. 3. R. Where a devise is to the eldest son, upon condition that he pays such legacies; and if he refuses, the land shall remain to the legatees: on his refusal, the legatees may enter by way of limitation. Noy 51. And in all cases, where after a condition, an interest is granted to a stranger, it is a limitation. 1 Leon. 269. Cro. Eliz. 204. It was held by Holt C. J. that the statute *de donis*, (13 Ed. 1. c. 1.) ought not to be taken strictly; but all limitations within the meaning of it are to be supported: therefore tho' words of an express condition be not ordinarily construed as a limitation; yet when an estate is to remain over for breach of any condition, which is by the express words thereof, it should be intended a limitation. Trin. 4 Ann. Lands may be given and limited to one in tail, remainder to another, remainder in fee, &c. Tho' a limitation of an estate cannot begin after the determination of an absolute estate in fee-simple; for that would be to suffer perpetuities to be made, which the law abhors. 2 Lill. Abr. 173. Limitations of estates against law, creating a new form of inheritance will not be suffered to take effect. Jenk. Cent. 82. See Black. Com. 2 V. 155.

Limogis, Is a word which we often read in the *Mossificum*, and it signifies enamelled; *opus de limogis*, is enamelled work, *una crux de opere limoceno*, &c. Monast. 3 tom. 331.

Linarium, A flax plat, where flax is sown.—*Et messuagium, &c. cum linario, quod jacet juxta predict. messuagium.* Pat. 22 Hen. 4. par. 1 m. 33.

Lincoln, In attain of a verdict of the city of Lincoln, the jury shall be impanelled of the county of Lincoln, 13 Ric. 2. R. 1. c. 18. 3 Hen. 5. R. 2. c. 5.

Lincoln's Inn fields, To be enclosed by trustees, who may employ artificers, &c. And yearly rates shall be made on all houses there, not exceeding 2s. 6d. in the pound: this square and back streets are to be a distinct ward, as to the scavengers rates and watch; and persons annoying the fields by filth, to forfeit 20s. and assembling to use sports, or breaking fences, &c. incur a forfeiture of 40s. levied by a justice of peace's warrant. Stat. 8 Geo. 2. c. 26.

Lindestern, A place often mentioned in our ancient histories; being formerly a bishop's see, now *Holy Island*.

Lineal Consanguinity, Is that which subsists between persons, of whom one is descended in a direct line from the other.

Lineal Descent. The descent of estates, from ancestor to heir, i. e. from one to another, in a right line. 'Tis peculiar to our laws, that estates cannot lineally ascend. See Black. Com. 2 V. 210.

Lineal Descent of the Crown. The crown lineally descends, unless otherwise settled by parliament. On failure of lineal descendants, it goes to the next collateral relations of the last King, provided they are lineally descended from the blood royal, unless otherwise settled by parliament. See Black. Com. 1 V. 194.

Lineal Warranty. Where the heir derives, or may by possibility derive his title to land warranted, either from or through the ancestor who makes the warranty. Black. Com. 2 V. 301.

Linens. No person shall put to sale any piece of Douglas linen, &c. unless the just length be expressed thereon, on pain to forfeit the same. 28 H. 8. c. 4. Using means

whereby linen cloth shall be made deceitfully, incurs a forfeiture of the linen, and a month's imprisonment. Stat. 1 Eliz. c. 12. Any person may set up trades of dressing hemp or flax, and making thread for linen cloth. Stat. 15 Car. 2. c. 15. And linen of all sorts made of flax or hemp, of the manufacture of this kingdom may be exported duty free. 3 Geo. 1. c. 7. Linen made in Great Britain and Ireland being much improved, to extend it farther, a bounty of one penny for every yard of such linen from 6d. to 12d. per yard and a half-penny for each yard, under 6d. price, is granted on exporting them; payable out of a duty laid on foreign cambricks, by 15 Geo. 2. c. 29. Stealing of linen, &c. from whitening grounds or drying houses, to the value of 10s. is felony. See Felony. Stat. 4 Geo. 2. c. 16. By the Stat. 17 Geo. 2. c. 30. Affixing on foreign linens any stamp put upon Scotch or Irish linens, or affixing a counterfeit stamp on British or Irish linens, incurs a penalty of 5l. By the Stat. 18 Geo. 2. c. 24. for the exportation of foreign linens, under the denomination of British or Irish linens. The stamp master is to be sworn to the true execution of his office; and linens to be stamped, must be sworn to be the manufacture of Scotland or Ireland, and a penalty of 5l. each piece is laid on false stamps. And by the Stat. 18 Geo. 2. c. 25. An additional bounty is allowed on the exportation of British and Irish linens, of one half-penny per yard, for linens of the value of, from 5d. to 12d. per yard, and 1d. per yard for linens of the value of, from 12d. to 1s. 6d. per yard. For duties on linen, see Stat. 24 Geo. 2. c. 46. 29 Geo. 2. c. 15. For encouraging the linen manufactory in Scotland. 24 Geo. 2. c. 31. 26 Geo. 2. c. 20. Bounty on British and Irish linens exported. 29 Geo. 2. c. 15.

Linstithgow, A duty of two pennies Scots upon ale there. 9 Geo. 1. c. 20. 6 Geo. 2. c. 18.

Linteed. All persons may import linteed into this kingdom, without paying any custom for it. Stat. 3 Geo. 1. c. 7. s. 38. How exempt from the payment of the two-third subsidies. 7 Ann. c. 7.

Liquorice, To what duties liable. 4 W. & M. c. 5.

Littera, (from the Fr. *littere*, or *littere*, Lat. *litterum*) Was antiently used for straw for a bed, even the King's bed.—*Petrus A. tenuit, &c. per forsecantiam inveniendi unum servientem cum bambergello per 40 dies, & inveniendi Literam ad lectum Regis, fenum ad palatium Regis, quando jacuerit apud, &c.* Term. Hill. 1 Ed. 2. Litter is now only in use in stables among horses: and *tres carredatas littere* is three cart-loads of straw or litter. Mon. Angl. tom. 2. p. 33.

Literatura, *Ad literaturam ponere*, Signifies to put children out to school; which liberty was antiently denied to those parents who were servile tenants, without the consent of the lord: and this prohibition of educating sons to learning, was owing to this reason; for fear the son being bred to letters might enter into orders, and so stop or divert the services which he might otherwise do as heir to his father.—*Quilibet customarius tenen. non debet filium suum ad literaturam ponere, neq; filium suum maritare, sine licentia a voluntat. dom.* Paroch. Antiq. 401.

Littere Ad faciendum attestationem pro secula faciend. Reg. Orig. 192.

Littere, *Canonici ad exercendam jurisdictionem loco suo.* Ibid. 305.

Littere, *Per quas dominus remittit curiam suam Regi.* Ib. 4.

Littere, *De requestu.* Ibid. 129. See these in their proper places.

Littere solutoz, Were magical characters supposed to be of such power, that it was impossible for any one to bind those persons who carried these about them. Bede, lib. 4. c. 22.

Literary Property, The property that the author, or his assignee, hath in the copy of any work.

This copy right is protected by Stat. 8 Ann. c. 19. But 'tis supposed to exist at Common law. In the case of *Miller and Taylor* in B. R. Pasch. 9 Geo. 3. it was determined (upon solemn argument and great consideration) by the opinion of three judges, against one, that an exclusive copy right in authors, subsists by the Common law. A writ of error was brought in the Exchequer Chamber; and the editor (Y. M.) believes judgment affirmed, but without

without argument. See *Black. Com.* 2 *V.* 405, 406, 407.

Lith of Pickering. In the county of York, viz. the liberty, or a member of *Pickering*, from the Sax. *lid.* i. e. *membrum*.

Litigator, (Lat.) A party pleading, that contends or *litigates* a suit at law. *Lit. Dist.*

Litigious. The *litigiousness* of a church, is where several persons have or pretend to, several titles to the patronage, and present several clerks to the ordinary; it excuses him from refusing to admit any of them, till a trial of the right by *jure patronatus*, or otherwise. *Jenk. Cent.* 11.

Litmus. To what duties liable. 4 *W. & M.* c. 5.

Littera, As, tres sacras litteras, three cart loads of straw or litter. *Mon. Angl.* 2 *par. fol.* 33. b.

Littleton, Was a famous lawyer in the days of King Edward the Fourth, as appeareth by *Staunf. Præf. cap.* 21. *fol.* 72. he wrote a book of great account, called *Littleton's Tenures*.

Liverpoole, For building a church there, and lighting the streets, &c. 21 *Geo.* 2. c. 24.

Livery, (Fr. *livre*, i. e. *infigne gestamen*, or *liverer*, i. e. *traders*) Hath three significations. In one sense, it is used for a suit of clothes, cloak, gown, hat, &c. which a nobleman or gentleman gives to his servants or followers, with cognisance or without; mentioned in 1 *R.* 2. c. 7. and divers other statutes: and formerly great men gave liveries to several, who were not of their family, to engage them in their quarrels for that year; but afterwards it was ordained, that no man of any condition whatsoever, should give any livery, but to his domesticks, his officers, or counsel learned in the law. By 1 *R.* 2. it was prohibited on pain of imprisonment; and the 1 *Hen.* 4. c. 7. made the offenders liable to ransom at the King's will, &c. which statute was farther confirmed and explained anno 2 & 7 *Hen.* 4. and 8 *Hen.* 6. c. 4. and yet this offence was so deeply rooted, that Ed. 4. was obliged to confirm the former statutes, and further to extend the meaning of them, adding a penalty of 5 *l.* to every one that gives such livery, and the like on every one retained for maintenance either by writing, oath, or promise, for for every month. 8 *Ed.* 4. c. 2. But most of the above statutes are repealed by 3 *Car.* 1. c. 4. Livery in the second signification, was a delivery of possession to those tenants who held of the King *in capite*, or knights service; as the King by his prerogative hath *primer seisin* of all lands and tenements so holden of him. *Staunf. Præf. 12.* In the third sense, livery was the writ which lay for the heir of age, to obtain the possession or seisin of his lands at the King's hands. *F. N. B.* 155. By the statute 12 *Car.* 2. c. 24. All *wardships*, *liveries*, &c. are taken away.

Livery of Seisin, (liberatio seisinæ) Is a delivery of possession of lands, tenements and hereditaments, unto one that hath a right to the same; being a ceremony in the Common law used in the conveyance of lands, &c. where an estate of free-simple, free-tail, or other freehold passeth. *Brag. lib.* 2. *cap.* 18. *Wyll. Symb. par.* 1. *lib.* 2. And it is a testimonial of the willing departing of him who makes the livery, from the thing whereof the livery is made; and of the willing acceptance of the other party receiving the livery; first invented, that the common people might have knowledge of the passing or alteration of estates from man to man, and thereby be better able to try in whom the right of possession of lands and tenements were, if the same should be contested, and they should be impanelled on juries, or otherwise have to do concerning the same. *Wyll. Ibid.* This livery may be made of a house, lands, or any thing corporeal; but not of incorporeal things. Where a house and lands are conveyed, the house is the principal, and the lands accessory; and there the livery must be made, and not upon the land. 2 *Rep.* 31. 4 *Lam.* 374.

Of livery and seisin there are two kinds.

A livery in deed,
and
Livery in law.

Livery in deed, is when the feoffor taketh the ring of the door, &c. and delivereth the same to the feoffee, in the name of seisin. 1 *Inst.* 48. 6 *Rep.* 26. And livery in deed may be either by words, and some solemn act; or by words without any solemn act, if the feoffor and feoffee are on the land. *Wood's Inst.* 237.

Livery in law, is when the feoffor himself being in view of the house or land, faith to the feoffee, after delivery of the deed, *I give to you yonder land, &c. to you and your heirs, go into the same and take possession accordingly*: now if the feoffee enters on the land, during the life-time of the feoffor, it is a good feoffment and livery. 1 *Inst.* 48, 52. If a deed of feoffment be delivered upon the land, in the name of seisin of all the lands, it will be a good livery and seisin; but the bare delivery of a deed upon the land, though it may make the deed, it shall not amount to livery and seisin, without those words. 1 *Inst.* 2, 181. If one makes a feoffment to four persons, and seisin delivered to three of them, in the name of all; the estate is vested in all of them. 3 *Rep.* 26. And if lands lie in divers places in one county, livery and seisin in one parcel in one place, in the name of the rest is sufficient; though if the lands lie in several counties, it is otherwise; for then livery and seisin must be in every county. *Lit.* 61.

Precautions to be taken.

No person ought to be in the house, or upon the land, when livery is made, but the feoffor and feoffee; all others are to be removed from it: if the lessor, feoffor makes livery and seisin, the lessee being upon the land contradicting it, the livery is void. *Cre. Eliz.* 321. A lessor enfeoffed a stranger, and came to make livery and seisin; the lessee's wife being in the house, the lessor enters, and by force turns the wife into the backside, which was part of the land let, and then he makes livery in the house, in the name of all the lands let; as the woman was remaining all the while upon the land, and contradicting the livery, the livery was held void: but if she had voluntarily gone out of the house, upon part of the land; or the lessor had turned her into the street, so that she had not been upon any part of the land; it had been good. *Dalif. Rep.* 94.

Of enfeoffing, or making of feoffments, &c. and the operation of livery and seisin.

If a man agrees with me to make a feoffment upon condition, and after makes a charter of feoffment without any condition, and then makes livery and seisin, *secundum formam chartæ*, this is absolute without any condition; for the livery is not made according to the agreement, but according to the charter. 34 *Ass.* 1. But if a person enfeoffs another, as a security for the payment of money, and afterwards makes livery of seisin, to him and his heirs generally; the estate hath been holden to be upon condition, since the intent of the parties was not changed, but continued at the time of the livery. 1 *Inst.* 242. And where a charter of feoffment is made, and in the deed there is no condition; but when the feoffor would make livery of seisin to the feoffee, by force of the deed, he, expressing the estate, makes livery of seisin, upon condition, the feoffment is of force as if it had not been made. *Lit. Sect.* 359. 2 *Danv. Abr.* 13.

Of leases, &c. and livery.

A man makes a lease for years, remainder to another for life, in tail or in fee: here livery and seisin, in deed must be made to the lessee for years; without which nothing passeth to him in remainder, it being for the benefit of him in remainder, and not the lessee, who hath only a term: and if the lessee entereth, before livery and seisin, made to him, the livery shall be void. *Lit.* 60. 1 *Inst.* 49. *Wood's Inst.* 238. A lease for years is granted to A. B. with remainder to his right heirs, whereon livery is made; the remainder is void, because there is not any person is *est.* who can presently take by the livery; and every livery ought to have its operation presently. 4 *Lev.* 67. There was a lease made to a man and his wife, and their daughter; so hold from *Michaelmas* next, and the lessor made livery after *Michaelmas*; this was adjudged good, being

being made by the lessor himself; but it had been otherwise, if it had been to be done by attorney. or if the lessor had made *livery* before *Michaelmas*. 2 *Roll. Rep.* 109. Lease for twenty years to a man to commence from a time past; and after the expiration of the said term, then to him and his wife, and their son, for their lives, and the longest liver of them, with a letter of attorney to make *livery and seisin*, &c. It is a good lease for years, with remainder for life, if *livery and seisin* be made by the attorney at the time of executing the lease; but if the *livery and seisin* be made by the attorney some time afterwards, in such case it is said the *livery* is void. *Moor* 14. A man may make a letter of attorney to deliver *seisin* by force of the deed, which may be contained in the same deed; and a letter of attorney may be likewise made to receive *livery and seisin*. 5 *Rep.* 91. 1 *Inst.* 49, 52.

Of the manner of making livery, &c.

The manner of making *livery of seisin* is thus: the parties to the deed, grantor and grantee, or the attorneys by them authorised, come to the door of the house, or some part of the land; and there having declared the cause of their meeting, in the presence of witnesses, they read the deed or the contents thereof; and if by attorney, the power of attorney; and then, if it be a house they take the ring, latch or key of the door, (all the people being out of the house,) or if it be land, a clod of earth, and a twig or bough of one of the trees thereon; and the same ring or key, clod, &c. with the deed they deliver to the grantee or his attorney, saying the usual words, *viz.* I A. B. do hereby deliver unto you C. D. possession and seisin of this messuage or tenement, &c. To hold to you, your heirs and assigns, according to the true intent and meaning of this indenture, &c. And afterwards, if it be a house, the grantee, &c. enters first alone, and shuts the door; and then he opens it, and lets in others. *Accomp. Curvey.* 2d edit. vol. 1.

Livery and seisin indorsed on the deed.

Memorandum, That on the day, &c. full possession and seisin was had and taken of the messuage or tenement, and premisses within granted, by A. B. one of the attorneys within named, and by him delivered over unto the within named C. D. To Hold to him, his heirs, &c. according to the contents, and true meaning of the within written indenture, in the presence of, &c.

If a house or lands belong to an office, by grant of the office by deed, the house or land passeth without *livery*: and by a fine, which is a feoffment of record; by a lease and release; bargain and sale by deed enrolled; exchange, &c. a freehold passeth, without *livery*; and so in a deed of feoffment to use, by virtue of the statute of uses. 1 *Inst.* 49. So that *livery and seisin* is not so commonly used as formerly; neither can an estate be created now by *livery and seisin* only, without writing. *Stat.* 29 *Car.* 2. c. 3. See *Black. Com.* 2 *V.* 311.

Liberty and Ouster le Main. Is where by inquest before the *eschetor*, it was found that nothing was held of the King; then he was immediately commanded by writ, to put from his hands, the lands taken into the King's hands. *Stat.* 29 *Ed.* 1. 28 *Ed.* 3. c. 4. Vide *Ouster le Maine*.

Liberty-men of London. In the companies of London, livery-men are choicest out of the freemen, as assistants to the masters and wardens, in matters of council, and for better government; and if any one of the company refuse to take upon him the office, he may be fined, and an action of debt will lie for the sum. 1 *Mod. Rep.* 10. See *London*.

Libre, Is the denomination of a sum in foreign coin, in France, &c. Accounts are kept by this money in France, Spain, &c. *Merch. Dic.*

Lobbe, A large kind of North-sea fish. *Stat.* 31 *Ed.* 3. c. 2. And *lobb* comprehends *lob*, *ling*, and *cod*.

Lobsters May be imported by natives or foreigners, and in any vessels, notwithstanding 10 *W.* 3. c. 24. 1 *Geo.* 1. *Act.* 2. c. 28. No person shall, with trunks,

hobb-nets, &c. take any *lobsters* on the sea-coast of Scotland, from the 1st of June to the 1st of September yearly, on pain of 5 *l.* to be recovered before two justices. *Stat.* 9 *Geo.* 2. c. 33.

Local, (*localis*) Tied or annexed to a certain place: Real actions are local; and to be brought in the county where the lands lie; but a personal action, as of trespass or battery, &c. is transitory, not local; and it is not material that the action should be tried, or laid in the same county where the fact was done; and if the place be set down, it is not needful that the defendant should traverse the place, by saying he did not commit the battery in the place mentioned, &c. *Kitch.* 230. A thing is local that is fixed to the freehold. *Ibid.* 180. See *Action*.

Lockman. In the *isle of Man*, the *lockman* is an officer to execute the orders of the governor, much like our under-sheriff. *King's Descrip. isle of Man* 26.

Lockson Rivers. To destroy any sluice or lock on a navigable river, is made felony, to be punished with transportation for seven years, by 1 *Geo.* 2. c. 19. And by 8 *Geo.* 2. c. 20. it is made felony without benefit of clergy, and the offender may be tried, as well in an adjacent county, as in that wherein the act is committed.

Locus, Signifies a coffin. — *Cujus corpus in loculo plumbeo translatus est.* *Sim. Dunelm.* c. 6.

Locus in quo, The place where any thing is alledged to be done in pleadings, &c. 1 *Salk.* 94.

Locus partitus, Is a division made between two towns or counties, to make trial where the land, or place in question, lieth. *Flet. lib.* 4. cap. 15.

Locutorium. The monks and other religious in monasteries, after they had dined in their common hall, had a withdrawing room, where they met and talked together among themselves, which room for that sociable use and conversation, they called *locutorium*, *de loquendo*; as we call such a place in our houses *parlour*, from the *Fr. parler*: and they had another room which was called *locutorium forissecum*, where they might talk with laymen. *Walsing.* 257.

Load-manage, Is the hire of a pilot, for conducting a vessel from one place to another. *Cowell.* The pilot receives *loadmanage* of the master for conducting the ship up the river or into port; but the *loadsmen*, is he that undertakes to bring a ship through the haven, after brought thither by the pilot, to the key or place of discharge: and if through his ignorance, negligence, or other fault, the ship or merchandise receive any damage, action lies against him at the Common law. *Rougham*, fol. 27.

Load-merge, Mentioned in the laws of Oleron, is expounded to be the skill or art of navigation. *Cowell.*

Load-ship, A kind of fishing-vessel, mentioned in *Stat.* 31 *Ed.* 3. cap. 2.

Lodgers and Lodgings, Stealing furniture from lodgings, felony, 3 *W. & M.* c. 9. Householders, not giving an account of their lodgers, to assessors of the land-tax, to forfeit 5 *l.* 30 *Geo.* 2. c. 3.

Loggating, An unlawful game, mentioned 33 *H.* 1. c. 9. now disused.

Lodge, A little house, lodge or cottage. *Mon. Angl.* tom. 1. p. 400.

Logwood, (*liquum tinctorium*) Is wood used by dyers brought from foreign parts; prohibited by *Stat.* 23 *Elin.* c. 9. But allowed to be imported by the 14 *Car.* 2. c. 11. See *Dyers*.

Laitb, or **Loych fish,** A large North sea-fish, mentioned in *Stat.* 31 *Ed.* 3. *Stat.* 3. cap. 2. Vide *Lobbe*.

Lollards, Had their name from one *Walter Lollard*, a German, at the head of them, who lived about the year 1315. And they were certain *hereticks*, (in the opinion of those times) that abounded here in England, in the reigns of King *Edw.* 3. and *Hen.* 5. whereof *Wickliff* was the chief in this nation. *Stow's Annals*, 425. *Sposwood*, in his *History of England*, says, The intent of these *Lollards* was to subvert the Christian faith, the law of God, the church and the realm; and so said the *Stat.* 2 *Hen.* 5. c. 7. But that statute was repealed 1 *Ed.* 6. c. 12. Several decrees were made by our archbishops, against those *sectarists*, as well as *heretics*; and the high sheriff of every county was seriously bound by his oath to suppress them. 3 *Inst.* 41.

Lollardy; The doctrine and opinion of the *Lollards*. 1 & 2 P. & M. c. 6. — *Rogerus Aston miles pro proditione & Lollardia distrabatur & suspendatur, & sic suspensus pendent ad voluntatem Regis.* Middlef. Plac. Hill. 1 Hen. 5 Rot. 7. See Black. Com. 4 V. 47.

Lombards. The company shall be answerable for their debts. 25 Ed. 3. Stat. 5. c. 23.

Lombe (Sir Thomas,) How recompensed, for discovering the art of making, and working, the three capital, Italian engines, for making organzine silk. 1 Geo. 2. c. 8.

London, The metropolis of this kingdom, formerly called *Augusta*, has been built above three thousand years, and flourished for fifteen hundred years. Its exchange, where merchants of all nations meet, is not to be equalled; and for stateliness of buildings, extent of bounds, learning, arts and sciences, traffick and trade, this city gives place to none in the world. *Stow.* It is divided into twenty-six wards, over each of which there is an alderman; and is governed by a lord mayor, who is chosen yearly, and presented to the King, or in his absence to his justices, or the barons of the Exchequer at Westminster. Chart. K. Hen. 3. The lord mayor of London, for the time being, is chief justice of gaol delivery; escheator within the liberties, and bailiff of the river Thames, &c. He is a high officer in the city, having all courts for distribution of justice under his jurisdiction, viz. The court of hustings, sheriff's court, mayor's court, court of common council, &c. 2 Inst. 330. King Hen. 4. granted to the mayor and commonalty of London the assise of bread, beer, ale, &c. and victuals, and things saleable in the city. In London every day, except Sunday, is a market overt, for the buying and selling of goods and merchandise. 5 Rep. 85. But no person, not being a freeman of London, shall keep any shop or other place to put to sale by retail any goods or wares, or use any handicraft trade for hire, gain or sale within the city, upon pain of forfeiting 5 l. 8 Rep. 124. And persons making ill and unserviceable goods in London, the chief officers of the company may seize and carry them to the Guildhall, and have the goods tried by a jury; and if found defective, they may break them, &c. Trin. 34 Car. 2. B. R. A person must be a freeman of London to be intitled to carry on merchandise there. Chart. Car. 1. Where a woman exerciseth a trade in London, wherein her husband doth not intermeddle, by the custom she shall have all advantages, and be sued as a *feme sole merchant*: but if the husband meddle with the trade of the wife, or carry on the same trade, it is otherwise. 1 Cro. 63. 3 Keb. 902. There are three ways to be a freeman of London; by servitude of an apprenticeship; by birthright, as being the son of a freeman: and by redemption, i. e. by order of the court of aldermen. Ibid. 126. 4 Mod. 145. The customs of London are against the Common law, and made good by parliament. 4 Inst. 249. But to set forth a custom or usage in the city of London, it must be said *antiqua civitas*, or it will not be good. 2 Leon. 99.

By *Magna Charta* the city of London shall have all their ancient usages, liberties and customs, which they have used to enjoy; and they are confirmed to them by that statute. 9 Hen. 3. c. 9. and 2 W. & M. sess. 1. c. 8. And there is a custom in London to punish by information in the mayor's court, in the name of the common serjeant of the city, assaults on aldermen, and affronting language, &c. Farress. Rep. 28, 29. Upon the custom of London concerning the payment of wharfage, &c. by every freeman to the corporation, the trial shall not be by the mouth of the recorder, as customs generally are, but by the country, and a jury from Surrey adjoining. Moor, cap. 129. An arrest may be made in London on the plaintiff's entering his plaint in either of the counters, and a serjeant of London need not shew his mace when he arrests one: and the liberties of the city extend to the suburbs and Temple-Bar. Jenk. Cent. 291.

The mayor of London is to cause errors, defaults, and misprisions there to be redressed, under the penalty of 1000 marks; and the constable of the Tower shall execute process against the mayor for default, &c. 28 Ed. 3. cap. 10. Citizens and freemen of London may recover debts under 40 s. in the court of requests at Guildhall, commonly called the court of conscience. 1 Jac. 1. c.

14. 3 Jac. 1. c. 15. 14 Geo. 2. c. 10. After the fire of London, a judicature was erected for determining differences relating to houses burnt; and several rules were laid down for rebuilding the city, the several streets, lanes, &c. The lord mayor and aldermen were to set out markets: the number of parishes and churches was ascertained, and a duty granted on coals for rebuilding of the churches, &c. 19 Car. 2. cap. 23. and 22 Car. 2. cap. 11. And the tithes of the parishes in London, the churches whereof were burnt, were appointed; none less than 100 l. per annum, nor above 200 l. per annum to be assessed, and levied quarterly. 22 & 23 Car. 2. cap. 15.

The lord mayor, &c. is impowered to appoint persons to set out the manner of paving and pitching the streets of London; and also of drains and sewers, and to impose a tax upon houses for maintenance thereof. 22 & 23 Car. 2. c. 17. Scavengers are to be chosen in London, and within the bills of mortality, in each parish, by the constable, churchwardens, &c. to see that the streets be kept clean; and housekeepers are to sweep and cleanse the streets every Wednesday and Saturday, under penalties, 2 W. & M. sess. 2. c. 2. Persons authorized by the lord mayor, aldermen and common council of London shall have the same power in London and liberties thereof, as commissioners of sewers have in any other county or place. 7 Ann. cap. 9. Commissioners are appointed for supplying the city of London with water from the river Thames, &c. And calling filth into water-courses, incurs 40 s. penalty. 8 Geo. 1. c. 26. But *vide* the late paving acts.

By a late statute, for regulating elections within the city, it is ordained, That elections of aldermen and common council men, are to be by freemen householders, paying scot and lot, and having houses of the value of 10 l. a year; and none shall vote at election of members of parliament, but liverymen that have been twelve months on the livery, and who are not discharged from payment of taxes, or those who have received any alms, &c. And freemen of London may dispose of their personal estates as they think fit, notwithstanding the custom of the city; but the act mentions such as should be made free after such a time, and others before unmarried, &c. 11 Geo. 1. c. 18. By-law to confine brewers to certain hours to carry out their drink, good. 2 Strange 1085. Apprentices enrolled before the chamberlain, may be discharged by justices where they live. 1 Strange 663. The child of a freeman when of age, may, in consideration of a present fortune, bar herself of her customary part. 2 Strange 947. An agreement on marriage, that the husband shall take up the freedom of London, binds the distribution of his effects. 1 Strange 455.

In Trinity term 35 Car. 2. a *quo warranto* issued against the lord mayor and citizens of London; on which judgment was given in B. R. that the charter and franchise of the said city should be seized into the King's hands as forfeited; but by 2 W. & M. sess. 1. c. 8. the said judgment was reversed and made void, and all officers and companies were restored, &c. See *Customs of London, and Courts, Lamps, Buildings, Orphan, &c.*

As to the courts of London, see farther 4 Inst. 247, & seq. and Black. Com. 3 P. 80. As to its customs, Black. Com. 1 V. 75. 76. 2 V. 317, &c. As to its franchises, Black. Com. 3 V. 264. 4 V. 417.

London Assurance. See Insurance.

Longellus. Is a word used in *Thorn's Chronicle*, and it signifies a coverlet. Cowell.

Longitude of a place. In geography, is an arch of the equator intercepted between the first meridian, and the meridian passing through the proposed place; which is always equal to the angle at the pole, formed by the first meridian, and the meridian of the place.

The first meridian may be placed at pleasure, passing through any place, as London, Paris, Teneriff, &c. but with us, it is generally fixed at London; and the degrees of longitude counted from it, will be either east, or west, according as they lie on the east or west side of that meridian.

In other words, to explain the subject in a familiar manner, to those wholly unacquainted with it, as by the

the latitude we learn the distance north or south, so by knowing the longitude, we know the distance from any given place, east or west; allowing for the difference of a degree of longitude at the equator (or middle of the globe) and at the arctic circle, &c.

The longitude is, as before described, in other words, the distance of a place, east or west, from that imaginary line drawn from north to south, thro' a place fixed on for that purpose, and called the first meridian, i. e. the meridian, or boundary from whence we reckon, east or west; so that by ascertaining the latitude and longitude of a place, its situation on the natural or artificial globe, with respect to all other places, is known.

For the discovery of the longitude at sea, the Lord Admiral and several others are appointed commissioners, to receive proposals, &c. and if they are satisfied of the probability of such discovery, the commissioners of the navy have power to make bills for any sum not exceeding 2000 l. to make the experiment; and the first discoverer of a method for finding the longitude, is intitled to a reward of 10,000 l. if he determines the same to one degree of a circle, 15,000 l. if to two thirds of that distance, and 20,000 l. if to one half of a degree, to be paid by the treasurer of the navy. 12 Ann. Sess. 2. c. 15. The commissioners for discovering the longitude, may apply part of the 2000 l. ordered for experiments, to be laid out in making a survey, and fixing the longitude and latitude of the chief ports, and headlands, of our coasts, for rendering the discovery at sea useful. See Stat. 14 Geo. 2. c. 39. 26 Geo. 2. c. 25.

Loquela, An imparity. — *Petrus de S. debet 20 s. pro habenda loquela in curia domini Regis contra Will. de F. Rot. Pipm. 2 Johann. linc.* And *loquela sine die*, was a respite in law to an indefinite time. *Faroch. Antiq.* 210.

Lord, (*Dominus*) Is a word or title of honour, diversely used, being attributed not only to those who are noble by birth or creation, otherwise called *Lords of Parliament*, and peers of the realm; but to such, so called, by the *curtesy of England*, as all the sons of a duke, and the eldest son of an earl; and to persons honourable by office, as the *Lord Chief Justice*, &c. and sometimes to a private person, that hath the *fee of a manor*, and consequently the homage of the tenants within his manor; for by his tenants he is called *Lord*. In this last signification, it is most used in our law books; where it is divided into *Lord Paramount*, and *Lord Mesne*; and *Very Lord*, &c. *Old Nat. Br.* 79. See *Nobility*, *Parliament*, *Peers*.

Lord High Admiral. See *Admiral*.

Lord in gross, *F. N. B. fol. 3.* Is he that is *lord*, having no manor, as the King in respect of his Crown, *Ibid. fol. 5.* and *fol. 8.* there is a case wherein a private man is *lord in gross*, viz. A man makes a gift in tail of all the land he hath, to hold of him, and dieth; his heir hath but a *seignior in gross*.

Lord of a manor. See *Copyhold*.

Lord and Vassal. In the time of the feudal tenures, the grantor of land was called the proprietor, or *lord*; being the person who retained the dominion or ultimate property of the feud or fee: and the grantee, who had only the use of possession, according to the terms of the grant, was stiled the feudatory or *vassal*, which was only another name, for the tenant or holder of the lands; though, on account of the prejudices we have justly conceived against the doctrine, which were afterwards grafted on this system, we now use the word *vassal*, opprobriously, as synonymous to slave or bondman. *Black. Com.* 2 V. 53.

Lords Marchers. See *Wales*.

Loriners, (*Fr. Lormiers*, from the Lat. *laurum*) Is one of the companies of *London*, that make bits for bridles, spurs, and such like small iron ware, mentioned in the stat. 1 R. 2. c. 12.

Lossage. Signifies a flatterer, or sycophant. And Godwin, writing of the Bishop of *Notwich* says of Bishop *Herbert*, *Sargis in ecclesiis nostrum genitorem lingua.* *Brompt. Chron. pag. 991.*

Lot, A contribution, or duty. See *Scot*.

Lot or Loth, Is the thirteenth dish, of lead in the mines of *Derbyshire*, which belongs to the King. *Escheat. Ann.* 16 Ed. 1.

Lothertwite, or *Leperwit*, Is a liberty or privilege to take amends of him that defileth your bond-woman without licence, *Rassall's Exposition of Words*; so that it is an amends for lying with a bond-woman. *Cowell*.

Lotteries. In late reigns several statutes have been made for raising money for the use of the government, by way of lottery, and the subjecting duties on beer and ale, malt, paper, &c. for the repayment thereof: As the 5 & 6 W. 3. c. 7. to raise one million, by 10 l. tickets, and the fortunate adventurers to have annuities, &c. The 10 Ann. cap. 19. for raising two millions at 6 per cent. interest. The 1 Geo. 1. c. 1. to raise and complete 1,400,000 l. The 3 Geo. 1. c. 4. for raising the sum of 500,000 l. by 3 l. tickets; and annuities of 4 l. per cent. to the fortunate. The 7 Geo. 1. cap. 20. for raising 700,000 l. by lottery, tickets at 10 l. each. And the 8 & 9 Geo. 1. to raise the like sum, &c. The 12 Geo. 1. c. 2. to raise one million, the highest benefit of fortunate adventurers, to be 20,000 l. and blanks of 10 l. tickets to have 7 l. 10 s. attended with annuities at 3 l. per cent. And the 4 Geo. 2. cap. 9. for raising 1,200,000 l. by way of lottery on the same conditions, &c. These lotteries are publicly drawn by commissioners appointed; and the annuities, and interest for prizes and blanks, are paid till redemption by parliament.

By the 8 Geo. 1. c. 2. for suppression of private lotteries, no person shall set up or keep any office of sales of houses, lands, plate, goods, &c. for improvement of small sums of money, or expose to sale any houses or goods by way of lottery, lots, tickets or numbers, or publish proposals relating to the same, &c. on pain of forfeiting 500 l. And adventurers in such sales to forfeit double the sum contributed. Persons keeping offices, of places for such sales of houses, or goods, &c. by way of lottery, cards or dice, and any game to be determined by the lot or drawing, or by any machine or device of chance; and publishing proposals, or delivering out tickets to that end, shall forfeit 200 l. being convicted before a justice of peace, leviable by distress, &c. And justices refusing to do what is required, are liable to 10 l. penalty, by 12 Geo. 2. c. 28. No persons shall sell the chance of any ticket, in a public lottery, for less than the whole time of drawing; nor any shares therein, or receive money on consideration of repayment, if tickets prove unfortunate, &c. on forfeiture of treble the sum received; to be recovered in the courts at *Westminster*, &c. See 5 Geo. 1. c. 9. Laws against private lotteries extended to *Ireland*. 29 Geo. 2. c. 7. 30 Geo. 2. c. 5. See 6 Geo. 2. c. 35. 16 Geo. 2. c. 13. 12 Geo. 2. c. 28. 28 Geo. 2. c. 15. And 29 Geo. 2. c. 7. See also *Gaming*, and *Black. Com.* 4 V. 168.

Lobe. Provoking unlawful love; was one species of the crime of witchcraft, punishable by statute 1 Jac. 1. cap. 12.

Lourcurus, A ram or bell-wether. *Cowell*.

Lourgulary, Is the casting any corrupt or poisonous thing in the water, which was *lowrgulary*, and felony; and some think it a corruption of *burglary*. Stat. pro *Stratis London*. Anno 1573.

Loubellers, Are such persons as go out in the night-time with a light and a bell, by the light and noise whereof birds sitting upon the ground become stupified, and so are covered and taken with a net: The word is derived from the Sax. *low*, which signified a flame of fire. *Antiq. Warwick. p. 4.*

Lombore, A recompence for the death of a man, killed in a tumult, or, as we say, by the mob. *Cowell*.

Ludi de Rege & Regina, Playing at cards, so called, because there are Kings and Queens in the pack. *Cowell*.

Luminare, A lamp or candle, set burning on the altar of any church or chapel; for the maintenance whereof lands and rent-charges were frequently given to parish churches, &c. *Kennet's Gloss.*

Lunatick, Is defined to be a person, who is sometimes of good and sound memory, and understanding, and sometimes not. *Quandam quidem lucidis intervallis*; And so long as he hath not understanding, he is *Non compos mentis*. As a lunatick, without memory, understands not what he does: in criminal cases, his acts shall not be imputed to him; unless he kill or offer to kill the King, when by our old books

books he might be guilty of treason, and punished as a traitor; though this is contradicted by the late opinions. 1 *Inst.* 247. 3 *Inst.* 46. *H. P. C.* 10, 43. And it is said, if one who has committed a capital offence, become *lunatick* and *non compos* before conviction, he shall not be tried; and if after conviction, that he shall not be executed. 1 *Hawuk. P. C.* 2. Whilst a man is *lunatick*, and he doth a criminal act, it is his madness, and not his intention, which is the cause of the action, and *actus non facit reum, nisi mens sit rea*; and for that reason, his punishment could not be an example to others. *Plowd.* 19. 1 *Inst.* 247. But he who incites a madman or *lunatick* to do a murder, or other crime, is a principal offender, and as much punishable as if he had done it himself. *H. P. C.* 43. *Kyl.* 53.

By the ancient Common law, a dangerous madman may be kept in prison, till he recovers his senses. *Bro. Coron.* 101. And by a late statute, *lunaticks* or madmen wandering may be apprehended by a justice's warrant, and locked up and chained if necessary; or be sent to their last legal settlement; and two justices, by order, may charge their estates for their maintenance, &c. *Stat. 12 Ann. Sess. 2. c. 23.* A *lunatick* cannot lawfully promise or contract for any thing; and the grants of *lunaticks* and infants are parallel. 1 *Inst.* 247. 3 *Mod.* 301. Every deed made by a *lunatick*, who is *non compos*, is voidable; though a *lunatick*, himself, making a purchase, if he recovers his memory, he may agree to it, and afterwards his heir cannot disagree to it: but otherwise his deeds may be avoided by his heir; except he levy a fine, or do any other act of record, &c. *Lit.* 405, 406. 4 *Rep.* 126. The deed of a *lunatick* shall not be avoidable by himself; for he shall not be allowed to work his own disability, by making himself a madman. 4 *Rep.* 124. In equity a *lunatick* may be relieved against his own acts; and where a purchase has been obtained of him, at an under value, or he hath made a settlement, &c. the deeds, fines, &c. in such a case, have been set aside, on a bill brought by the *lunatick* and his committee. 2 *Vern.* 678. *Abr. Ca. Eq.* 278, 279. If a *lunatick* sue an action, it must be sued in his own name; and if an action be brought against the *lunatick*, he is to appear by attorney, if of full age, and by a guardian, if under age. 1 *Inst.* 135.

There are *commissions of lunacy*, issued out of the *Chancery*, to examine whether the person be *lunatick* or not; and to make inquests of his lands, &c. Though if lands are seized by the King, by virtue of a commission of *lunacy*, and he grants the custody of the *lunatick*, *sine computo reddendo*; if he afterwards is of sound memory, he shall have an action of account for the profits. *Dyer* 25. The King hath the guardianship of the lands of *lunaticks*; but not the sole interest in granting, and the custody of their lands or bodies; as he hath of *idiots*: And the King, or other guardian of a *lunatick*, is accountable to him, his executors, &c. 4 *Rep.* 124. As a *lunatick* may recover his understanding, and have discretion enough to dispose and govern his lands, the King shall not have the custody of him and his lands; for after he has recovered his memory and understanding, he is to have his estate at his own disposal. *Dyer* 302. 3 *Salk.* 301. The statute 17 *Ed. 2. cap. 10.* ordains, that the King is to provide that the lands of *lunaticks* be safely kept, and they and their families maintained by the profits; and the residue shall be kept for their use, and be delivered to them, when they come to their right mind; the King taking nothing to his own use, &c. A *lunatick* found by inquisition, upon a commission of *lunacy*, whose person and estate are committed to particular trustees, may not marry before he or she be declared of sound mind, by the Lord Chancellor, &c. If any such do, the marriage is void, by 15 *Geo. 2. c. 30.* See 4 *Geo. 2. c. 10.* and *Idiot.* By the statute 17 *Ed. 2. c. 5.* Two justices may by warrant directed to the constable, &c. cause such, as by *lunacy* are so far disordered in their senses, that they may be dangerous to be permitted to go abroad, to be apprehended and kept safely locked up or sent to their last legal settlement. The charges (being proved on oath) of removal, keeping and curing such person, to be paid by order of two justices out of the *lunatick's* real or personal estate; but if he has none, or not more than sufficient to maintain his family, then to be

paid by the parish. *Lunacy* may be given in evidence, on a plea of *non est factum*. 2 *Strange* 1104. See *Black. Com.* 1 *V.* 304, 439. 2 *V.* 291. 3 *V.* 427. 4 *V.* 24. 388. *Lunda*, A weight formerly used here—*Lunda angulorum constat de 10 Sticis.* *Fleta*, lib. 2. cap. 12.

Lundys, A sterling silver-penny, which had its name from being coined only at *London*, and not at the country mints. *Lounds's Essay on Coin*, p. 17.

Lupanatrix, A bawd or strumpet: And by the custom of *London*, a constable may enter a house, and arrest a common strumpet, and carry her to prison. 3 *Inst.* 206. —*Rex Majori & Vic. London, &c. Intellimus quod plures Roberti & Murdra perpetrantes per receptatores publicas lupanatrices in diversis locis in civitate nostra predicta, &c.* *Claus.* 4 *Ed. 1. p. 1. m. 16.*

Lupinum caput gerere, Signified to be outlawed, and have one's head's exposed like a wolf's, with a reward to him that shall bring it in. *Plac. Coron.* 4 *Johan. Rot.* 2.

Lupulicetum, (*Lat.*) A hop-garden, or place where hops grow. 1 *Inst.* 4.

Luthburghs or *Luxenburghs*, were a base sort of foreign coin, made of the likeness of *English* money, and brought into *England* in the reign of King *Ed. 3.* to deceive the King and his people: on account of which, it was made treason, for any one wittingly to bring any such money into the realm, knowing it to be false. *Stat.* 25 *Ed. 3. 3 Inst.* 1.

Lustrings. A company was incorporated for making, dressing, and lustrating alamoses and *lustrings* in *England*, who were to have the sole benefit thereof, confirmed by the following stat. And no foreign silks known by the name of *lustrings* or alamoses are to be imported, but at the port of *London*, &c. *Stat.* 9 & 10 *W. 3. c. 43.* See *Silk*.

Luxury. There were formerly various laws to restrain excess in apparel, all repealed by stat. 1 *Jac. 1. c. 25.* But as to excess in diet, there still remains one ancient statute unrepealed, viz. 10 *Ed. 3. stat. 3.* which ordains, that no man shall be served, at dinner, or supper, with more than two courses; except upon some great holydays there specified, in which he may be served with three. See *Black. Com.* 4 *V.* 170, 171. *Montesq. Sp. L. B. 7. c. 2 & 4.*

Lysfeld, Lef-silver, A small fine or pecuniary composition, paid by the customary tenant, to the lord, for leave to plow or sow, &c. *Somn. of Gavilkind.*

Lymputta, A lime-pit. *Cowell.*

Lynemore, Was a doctor both of the Civil and Canon laws, and dean of the arches. He was ambassador for *Henry the Fifth* into *Portugal*, anno 1422, as appeareth by the Preface to his Commentary upon the *Provincials.* *Cowell.*

Lynn, An act for regulating worsted-weavers and their apprentices in the town of *Lynn*, &c. See 14 & 15 *H. 8. c. 5.* for rebuilding the houses there. See 26 *Hen. 8. c. 9.*

M.

M Is the letter with which persons convicted of manslaughter, are marked on the brawn of the left thumb. 4 *H. 7. c. 13.*

Mac, In the *Irish* language, signifies a son, *Filius.* *Litt. Dig.*

Macce. See *Spices.*

Macce-grate, or *Macce-griffe*, (*Maccecarii*.) Are such as willingly buy and sell stolen flesh, knowing the same to be stolen. *Britton*, cap. 29. and *Crompton's Justice of Peace*, fol. 193. *Vide Leges Iner*, cap. 20. *De carne furtivum veniente. De macegraribus carnis furtivas scientibus, vendantibus & emantibus.* *Stat. Walliae.*

Maccecaris, *Maccecarina*, (*Macella*), The flesh-market or shambles. *Cowell.*

Maccecarinus, A butcher. *Cowell. Leg. Ed. Reg.* c. 39.

Maccecatillare or *Maccecatulare*, (from the *Fr. Macbecoulir*.) To make a warlike device, especially over the gate

of a castle, resembling a grate, through which scalding water, or offensive things may be thrown on pioneers or assailants. 1 *Inst.* 5. a.

Matto, A mafon. *Corwell*.

Mauckartel, May be sold on Sunday, 10 & 11 *Will.* 3. c. 24.

Madder, To be imported unmixed, 13 & 14 *Car.* 2. 30. repealed 15 *Car.* 2. c. 16. *stat.* 3. To what duties liable, 2 *W. & M.* c. 5. Tithes of madder settled, 31 *Geo.* 2. c. 12. 5 *Geo.* 3. c. 18. Penalty of stealing, or destroying madder roots, 31 *Geo.* 2. c. 35.

Madding-money, Old Roman coins, sometimes found about *Dunstable*, are so called by the country people; they seem to retain this name from *Magintum*, used by the Emperor *Antoninus*, in his *Itinerary*, for *Dunstable*. *Camden*.

Madrigals, is an old word, signifying country songs. *Corwell*.

Maerium, (Derived from the *Fr. Marefme*) Properly signifies any sort of timber, fit for building; *feu quodvis materiamen*. *Clau.* 16 *Ed.* 2. m. 3.

Magbote or **Magbote**, (From the Sax. *Mag*, i. e. *Cognatus* & *bote*, *compensatio*) A compensation for the slaying or murder of one's kinsman, in ancient times, when corporal punishments for murder, &c. were sometimes commuted into pecuniary fines, if the friends and relations of the party killed were so satisfied. *Leg. Canuti*, c. 2.

Magick, (*Magia*, *Necromantia*) Witchcraft and sorcery. See *Conjuration*.

Magister. This title often found in old writings, signified that the person to whom attributed had attained some degree of eminency in *scientia aliqua*, *praesertim literaria*; and formerly those who are now called *doctors*, were termed *magistri*.

Magistrate, (*Magistratus*) A ruler, and he is said to be *custos utriusque tabulae*; the keeper or preserver of both tables of the law. If any *magistrate*, or minister of justice, is slain in the execution of his office, or keeping of the peace; it is murder, for the contempt and disobedience to the King and the laws. 9 *Co.* See *Black. Com.* 1 *V.* 146, 338. 4 *P.* 140.

Magna Assisa eligenda, Is a writ directed to the sheriff, to summon four lawful knights before the justices of assize, there upon their oaths to choose twelve knights of the vicinage, &c. to pass upon the great assize, between A. B. plaintiff, and C. D. defendant, &c. *Reg. Orig.* 8.

Magna Charta, The great charter of liberties granted in the ninth year of King *Hen.* 3. It is so called, either for the excellency of the laws therein contained, or because there was another charter called the *Charter of the Forest* established with it, which was the less of the two; or in regard of the great troubles in obtaining it, and the remarkable solemnity in denouncing excommunication and anathema against the breakers thereof: *Spelman* calls it, *Augustissimum Anglicanum Libertatum Diploma & Sacra Anchora*. King *Edward the Confessor* granted to the church and state several privileges and liberties by charter; and some were granted by the charter of King *Hen.* 1. Afterwards King *Stephen*, and King *Hen.* 2. confirmed the charter of *Hen.* 1. and King *Rich.* 1. took an oath at his coronation to observe all just laws, which was an implicit confirmation of that charter; and King *John* took the like oath; this King likewise, after a difference between him and the Pope, and being imboiled in wars at home and abroad, particularly confirmed the aforementioned charter, with further privileges, but soon after broke it, and thereupon the barons took up arms against him, and his reign ended in wars; to whom succeeded King *Hen.* 3. who in the 37th year of his reign, after it had been several times by him confirmed, and as often broken, came to *Westminster-Hall*, and in the presence of the nobility and bishops, with lighted candles in their hands, *Magna Charta* was read; the King all that while laying his hand on his breast, and at last solemnly swearing faithfully and irrevocably to observe all things therein contained, as he was a man, a Christian, a soldier, and a King; then the bishops extinguished the candles, and threw them on the ground; and every one said, *Thus let him be extinguish-*

ed, and sink in hell, who violates this charter: Upon which the bells were set on ringing, and all persons by their rejoicing approved of what was done.

But notwithstanding this very solemn confirmation of this charter, the very next year King *Henry* invaded the rights of his people, till the barons levied war against him; and after various success, he confirmed this charter, and the *Charter of the Forest*, in the parliament of *Marlbridge*, and in the 52d year of his reign. And his son King *Edward* 1. confirming these charters, in the twenty-fifth year of his reign made an explanation of the liberties therein granted to the people; adding some which are new, called *Articuli super Chartas*: And *Magna Charta* was not only then confirmed, but more than thirty times since. *Co. Litt.* 81.

This excellent statute, or rather body of statute law at that time, so beneficial to the subject, and of such great equity, is the most ancient written law of the land; And it is divided into thirty-eight chapters; the 1st of which after the solemn preamble of its being made for the honour of God, the exaltation of holy church, and amendment of the kingdom, &c. ordains, That the church of England shall be free, and all ecclesiastical persons enjoy their rights and privileges. The 2d is of the nobility, knights-service, reliefs, &c. The 3d concerns heirs, and their being in ward. The 4th directs guardians for heirs within age, who are not to commit waste. The 5th relates to the custody of lands, &c. of heirs, and delivery of them up when the heirs are of age. The 6th is concerning the marriage of heirs. The 7th appoints dower to women, after the death of their husbands, a third part of the lands, &c. The 8th relates to sheriffs and their bailiffs, and requires that they shall not seize lands for debts where there are goods, &c. the surety not to be distrained, where the principal is sufficient. The 9th grants to London, and all cities and towns, their ancient liberties. The 10th orders, that no distress shall be taken for more rent than is due, &c. By the 11th the court of *Common Pleas* is to be held in a certain place. The 12th gives assizes for remedy, on disseisin of lands, &c. The 13th relates to assizes of darrein presentment, brought by ecclesiastics. The 14th enacts, that no freeman shall be amerced for a small fault, but in proportion to the offence; and by the oaths of lawful men. The 15th, no town shall be distrained to make bridges, &c. but such as of ancient times have been accustomed. The 16th is for repairing of sea-banks and sewers. The 17th prohibits sheriffs, coroners, &c. from holding pleas of the crown. The 18th enacts, that the King's debtor dying, the King shall be first paid his debt, &c. The 19th directs the manner of levying purveyance for the King's house. The 20th concerns castleward, where a knight was to be distrained for money for keeping his castle, on his neglect. The 21st forbids sheriffs, bailiffs, &c. to take the horses or carts of any person to make carriage without paying for it. By the 22d the King is to have lands of felons a year and a day, and afterwards the lord of the fee. The 23d requires weirs to be put down on rivers. The 24th directs the writ *precipe in capite*, for lords against tenants offering wrong, &c. The 25th declares that there shall be but one measure throughout the land. The 26th, inquisition of life and member, to be granted freely. The 27th relates to knight's-service, petit serjeanty, and other ancient tenures, (taken away together with wardship, &c. by 12 *Car.* 2.) The 28th directs, that no man shall be put to his law, on the bare suggestion of another, but by lawful witnesses. The 29th, no freeman shall be disseised of his freehold, imprisoned and condemned, but by judgment of his peers, or by law. The 30th requires that merchant strangers be civilly treated, &c. The 31st relates to tenures coming to the King by escheat. By the 32d no freeman shall sell land, but so that the residue may answer the services. The 33d, patrons of abbeys, &c. shall have the custody of them in the time of vacation. The 34th, a woman to have an appeal for the death of her husband. The 35th directs the keeping of the county-court monthly, and also the times of holding the sheriff's turn, and view of frank-pledge. The 36th makes it unlawful to give lands to religious houses in *Mortmain*. The 37th relates to *estnage*, and subsidy, to be taken as usual.

And the 38th ratifies and confirms every article of this great charter of liberties. By the *stat. 25 Ed. 1.* it is ordained, that the great charter shall be taken as the *Common law*. And all statutes made against *Magna Charta*, are declared to be void by *43 Ed. 3.*

See *Blackstone's Law Tracts*, V. 2. And his *Com. 1 V. 127. 4 V. 416, 418.*

Magna precaria, A great or general reap-day. And in *21 R. 2.* the lord of the manor of *Harrow on the Hill*, in *Com. Middlesex*, had a custom that by summons of his bailiff upon a general reap-day, then called *Magna precaria*, the tenants should do a certain number of days work for him; every tenant that had a chimney, being obliged to send a man. *Phil. Purvey. p. 145.*

Magnum Centum, The great hundred, or six score. *Chart. 20 H. 2.*

Magnus Portus, The town and port of *Portsmouth*.

Mahometia, The temple of *Mahomet*; and because the gestures, noise, and songs there, were ridiculous to the *Christians*, therefore they called antick dancing, and any thing of ridicule a *Memoria*. *Matt. Paris.*

Mאים. Taking them away unmarried, without consent of father or mother or their guardians, is punishable by *stat. 4 & 5 P. & M. c. 8.*

Maiden Lifes, Is when at any *assizes* no person is condemned to die.

Maiden Bents, A noble paid by every tenant in the manor of *Builth*, in *Com. Radnor*, at their marriage; anciently given to the lord for his omitting the custom of *Marcheta*, whereby he was to have the first night's lodging with his tenant's wife; but it was more probably a fine for a licence to marry a daughter.

Maignagium, (*Fr. maignen, i. e. faber ararius*) A brasier's shop; tho' some say it signifies a house.—*Idem hugo tenebat unum maignagium in foro ejusdem ville, &c. Lib. Ramef. fect. 265.*

Maimem or **Maphem**, (*maibemium*, from the *Fr. me-baigne, i. e. membri mutilationem*) Signifies a maim, wound, or corporal hurt, by which a man loseth the use of any member, that is or might be of any defence to him: As if a man's skull be broke, or any bone broken in any other part of the body; a foot, hand, finger, or joint of a foot, or any member be cut off; if by any wound, the sinews be made to shrink; or where any one is castrated; or if an eye be put out, any fore-tooth broke, &c. But the cutting off an ear, or nose, the breaking of the hinder teeth, and such like, was held no maimem; as they were not a weakening of a person's strength, but a disfiguring and deformity of the body. *Glauv. lib. 4. cap. 7. Bract. lib. 3. tract. 2. Britton, cap. 25. S. P. C. lib. 1. cap. 41.* By statute, if any one on purpose, by malice fore-thought, and lying in wait, shall cut off the nose, put out the eye, disable the tongue, or cut off or disable any limb or member of any of the King's subjects, with intent to maim or disfigure him, the person offending, his aiders, abettors, &c. are guilty of felony, without benefit of clergy; though no attainder of such felony shall corrupt the blood, or forfeit the dower of the wife, lands or goods of the offender. *Stat. 22 & 23 Car. 2. cap. 1.*

In these cases of maiming, a voluntary act the law judgeth of malice: And if a man attack another, of malice fore-thought in order to murder him with a bill, or any such like instrument, which cannot but endanger the maiming him, and in such attack, happen not to kill but only to maim him, he may be indicted of felony on this statute; and it shall be left to the jury on the evidence, whether there were a design to murder by maiming, and consequently a malicious intent to maim as well as kill, in which case the offence is within the statute. *1 Hawk. P. C. 112.* All maimem by the Common law was felony; And it is said that anciently a maimem by castration was punished with death; and other maimems with the loss of member for member; but afterwards no maimem was punished in any case with the loss of life or member, but only by fine and imprisonment, and damages to the party. *3 Inst. 62, 118. S. P. C. 32. H. P. C. 133.* For maimem, indictment or an appeal may be had; or in common cases action of trespass, at the plaintiff's election: And maimem shall be under the inspection of the court, to increase da-

mages given by the jury, &c. if the court thinks fit. *Sid. 108.* Maimem was commonly tried by the judges inspecting the party; and if they doubted whether it were a maimem or not, they used to take the opinion of some able surgeon in the point. *Homo maimematus*, a man maimed or wounded. See *Appeal of Maimem*. See *Black. Com. 1 V. 130. 3 V. 121. 4 V. 205.*

Maii Inductio, An ancient custom for the priest and people of country villages to go in procession to some adjoining wood on a *May-day* morning; and return in a kind of triumph, with a may-pole, boughs, flowers, garlands, and other tokens of the spring. This *May-game*, or rejoicing at the coming of the *Spring*, was for a long time observed, and still is in some parts of *England*; but there was thought to be so much heathen vanity in it, that it was condemned and prohibited within the diocese of *Lincoln*, by the good old bishop *Grossthead*.—*Faciunt etiam, ut audivimus, clerici ludos quos vocant inductionem Maii, & festum autumnum, &c. quod nullo modo vos latere possit: Si vestra prudentia super hiis diligenter inquireret, &c.*

Mait, (*macula*.) A coat of mail, so called from the *Fr. maille*, which signifies a square figure, or the hole of a net: So *maille de boubergeons* was a coat of mail, because the links or joints in it resemble the squares of a net. Mail is likewise used for the leather bag wherein letters are carried by the post, from *bulga*, a budget.

Maile, Anciently a kind of money; and silver half-pence were termed mailles. *9 Hen. 5.* By indenture in the mint, a pound weight of old sterling silver was to be coined into three hundred and sixty *Sterlings* or pennies, or seven hundred and twenty mailles or half-pennies, or one thousand four hundred and forty farthings. *Lownd's Ess. on Coin 38.*

Maiming. See *Maimem*.

Mainad, A false oath, or perjury.—*Si nolis abjurare, emendet ipsum mainad, i. e. Perjurium dupliciter. Leg. Inax. cap. 34.*

Maine-porte, (*In manu portatum*.) Is a small tribute, commonly of loaves of bread, which in some places the parishioners pay to the rector of their church, in recompence for certain tithes. *Corwell.*

And this mainport bread was paid to the vicar of *Blyth*, as you may read in the *Antiq. of Nottinghamshire*, p. 473.

Mainobze, (from the *Fr. main, i. e. manus*, and *ouvrer, operari*) Is handy-work; or some trespass committed by a man's hand. *7 R. 2. c. 4. Brit. 62.*

Mainour, or **Manour**, or **Meinour**, (from the French *manier, i. e. manu tractare*.) In a legal sense denotes the thing that a thief taketh away, or stealeth. As to be taken with the *mainour*, *Pl. Cor. fol. 179*, is to be taken with the thing stolen about him: And again, *fol. 194*, it was presented, that a thief was delivered to the sheriff or viscount, together with the *mainour*: And again, *fol. 186*. If a man be indicted, that he feloniously stole the goods of another, where, in truth, they are his own goods, and the goods be brought into the court as the *mainour*; and it be demanded of him, what he saith to the goods, and he disclaim them; though he be acquitted of the felony, he shall lose the goods: And again, *fol. 149*. If the defendant were taken with the *manour*, and the *manour* be carried to the court, they, in ancient times, would arraign him upon the *manour* without any appeal or indictment. *Corwell. See Black. Com. 3 V. 71. 4 V. 303.*

Mainpernable, That may be let to bail; and what persons are mainpernable appears by the *stat. Westm. 1. 3 Ed. 1. c. 15. See Bail.*

Mainpernoys, (*manu captores*) Are those persons to whom a man is delivered out of custody or prison, on their becoming bound for his appearing, &c. which if he do not do, they shall forfeit their recognizances; and they are called *manu captores*, because they do as it were *manu capere* & *ducere captivum & custodia vel prisona*.

Mainprise, (*manu captio*, from the *Fr. main, i. e. manus* & *pris, captus*) Signifies in our law the taking or receiving of a person into friendly custody, who otherwise might be committed to prison, upon security given that he shall be forth-coming at a time and place assigned; as to let

let one to mainprise is to commit him to those that undertake he shall appear at the day appointed. *Old Nat. Br.* 42. *F. N. B.* 249.

Manwood makes this difference between mainprise and bail: He that is mainprised is said to be at large, after the day he is set to mainprise, until the day of his appearance; but where a man is let to bail, by any judge, &c. until a certain day, there he is always accounted by the law to be in their ward for the time; and they may, if they will, keep him in prison, so that he that is so bailed shall not be said to be at large, or at his own liberty. *Manw. p.* 167. A man under mainprise is supposed to go at large, under no possibility of being confined by his sureties or mainperners, as in case of bail. 4 *Inst.* 179. Mainprise is an undertaking in a certain sum; bail answers the condemnation in civil cases, and in criminal, body for body: Mainprise may be where one is never arrested, or in prison; but no man is bailed, but he that is under arrest, or in prison; so that mainprise is more large than bail. *H. P. C.* 96. *Wood's Inst.* 582, 618. Upon a *Capias* or exigent awarded against a man, he shall find mainprise for his appearance; and if the defendant make default, his manucaptors are to be amerced, &c. And a bill of mainprise, acknowledged and put into court, is good tho' it be not enrolled. *Jenk. Cent.* 129. There is an ancient writ of mainprise, whereby those who are bailable, and have been refused the benefit of it, may be delivered out of prison; as where persons are imprisoned on suspicion of larceny, or indicted of trespass, before justices of peace, &c. *Reg. Orig.* 269. *F. N. B.* 250. 2 *Hawk. P. C.* 93. See *Manucaptio*. And *Black. Com.* 3 *V.* 128.

Mainmoot, In the North of England is taken for as much as forsworn. *Brownl.* 4.

Maintainers, Are those that maintain or second a cause depending between others, by disbursing money, or making friends, for either party, &c. not being interested in the suit, or attorneys employed therein. *Stat.* 19 *Hen.* 7. c. 14.

Maintenance, (*manutentia*) Signifies the unlawful upholding of a cause or person, metaphorically drawn from the succouring a young child that learns to go by one's hand; and in law is taken in the worst sense. 32 *H. 8.* c. 9. Also it is used for the buying or obtaining of pretended rights to lands. *Stat. Ibid.*

Maintenance is either *ruralis*, in the country; as where one assists another in his pretensions to lands, by taking or holding the possession of them for him; or where one stirs up quarrels or suits in the country: Or it is *curialis*, in a court of justice; where one officiously intermeddles in a suit depending in any court, which no way belongs to him, and he hath nothing to do with, by assisting the plaintiff or defendant with money or otherwise, in the prosecution or defence of any such suit. *Co. Litt.* 368. 2 *Inst.* 213. 2 *Roll. Abr.* 115. And he, who fears that another will maintain his adversary, may by way of prevention have an original writ grounded on the statutes, prohibiting him so to do. 1 *Hawk. P. C.* 225. *Reg. Orig.* 182.

Who are guilty of maintenance.

Not only he who lays out his money to assist another in his cause, but he that by his friendship or interest saves them that expence which he might otherwise be put to, is guilty of maintenance. *Bro. Mainten.* 7, 14, 17, &c. And if any person officiously give evidence, or open the evidence without being called upon to do it; speak in the cause, as if of counsel with the party; retain an attorney for him, &c. or shall give any publick countenance to another in relation to the suit; as where one of great power and interest, says that he will spend twenty pounds on one side, &c. or such a person comes to the bar with one of the parties, and stands by him while his cause is tried, to intimidate the jury; if a juror solicits a judge to give judgment according to the verdict, after which he hath nothing more to do, &c. these acts are maintenance. 1 *Hawk.* 249, 250. But a man cannot be guilty of maintenance, in respect of any money given by him to another, before any suit is actually commenced: Nor is it such, to give another advice, as to what action is proper to be

brought, what method to be taken, or what counsellor or attorney to be employed; or for one neighbour to go with another to his counsel, so as he do not give him any money: And money may be lawfully given to a poor man, out of charity, to carry on his suit, and be no maintenance: Attornies may lay out their money for their clients, to be repaid again; but not at their own expence, on condition of no purchase no pay, if they carry the cause or lose it. *Fitzb. Mainten.* 18. 3 *Roll. Abr.* 118. 2 *Inst.* 564.

It is said that if a man of great power, not learned in the law, tells another who asks his advice, that he hath a good title, it is maintenance. 1 *Hawk.* 250. In case any person who is no lawyer, and that hath no interest in the cause, shall take upon him to do the part of a lawyer; this will be unlawful maintenance. And after a suit is begun, no man may encourage either of the parties, or yield them any aid or help, by money, or the like, but he that hath interest therein: But to lend another money to maintain his law-suit, is no maintenance. 22 *H.* 6. 6. 19 *E.* 4. 3. 2 *Shep. Abr.* 406. If a person hath any interest in the thing in dispute, tho' on contingency only, he may lawfully maintain an action relating to it; as if tenant in tail, or for life, be impleaded, he in reversion or remainder, &c. may maintain the defence of the suit, with his own money; and a lessor may lawfully maintain his lessee. 2 *Roll. Abr.* 115. A lord may justify maintaining a tenant, in defence of his title; and the tenant may maintain his lord: One bound to warrant lands, may lawfully maintain the tenant impleaded; and a man may maintain those who are enfeoffed of lands in trust for him, concerning those lands, &c. An heir apparent, or the husband of such an heir, may maintain the ancestor in an action concerning the inheritance of the land whereof he is seised in fee; a master maintain his servant, and assist him with money, but not in a real action, unless he hath some of his wages in his hands; and a servant by reason of relation may maintain his master in all things, except laying out his own money in the master's suit. 1 *Hawk.* 252, 253. 1 *Inst.* 368.

Of the statute law on this subject.

By the statutes, none of the King's officers shall maintain pleas, or suits, in the King's court, for lands, &c. under covenant to have part thereof, or any profit therein. And clerks of justices are not to take part in quarrels, or delay right, on pain of treble damages. 3 *Ed.* 1. c. 25. No persons shall take upon them to maintain quarrels, to the let and disturbance of the Common law, by themselves or by any other. 1 *Ed.* 3. c. 14. and 20 *Ed.* 3. 4. The King's counsellors, officers or servants, or any other person whatsoever, shall not sustain quarrels by maintenance, upon grievous pain, imprisonment and ransom. 1 *R.* 2. c. 4. No man may obtain or buy any pretended right or title to any land, unless the seller hath taken the profits a year, or been in possession, on pain of forfeiting the value, &c. And none shall unlawfully maintain any suit concerning lands, or retain any person for maintenance, by letters, rewards or promises, under the penalty of 10 *l.* for every offence, to be divided between the King and the prosecutor. 32 *H.* 8. cap. 9.

Of rights and titles within the meaning of the law.

But maintaining suits in the Spiritual court, is not within the statutes relating to maintenance. *Cro. Eliz.* 594. Tho' maintenance in a court baron, is as much within the purview of the stat. 1 *R.* 2. as maintenance in a court of record. 1 *Hawk.* 255. A pretended right to copyhold lands sold, is within the stat. of *H. 8.* 4 *Rep.* 26. If *A.* be owner of land in possession, and another who hath no right granteth the land; altho' the grant upon it be void, yet the grantor and grantee are liable to this statute. 1 *Inst.* 369. So where he that hath a pretended right, and none in truth, shall get the possession wrongfully, and then sell the land, &c. But a remainder-man in fee, may obtain the pretended title of a stranger. 1 *Inst.* 369. 3 *Inst.* 76, 77. And a person who hath good right and title, at the time of the bargain or lease, will not be within the above statute, altho' neither he nor his ancestors have been

been in possession thereof, &c. for a year before. *Plow.* 47. *Dyer* 74.

Of other acts.

The buying of a lease for years, is within the act: Tho' if a person make such lease to try a title in ejectment, unless it be to a great man; it is out of the statute. 1 *Inst.* 369. *Dyer* 374. A lessor having good right to land, but not in possession, made a lease of it, and did not seal it on the land; it was adjudged within the stat. 32 *Hen.* 8. 1 *Leon.* 166.

Of a chose in action.

The law will not suffer any thing in action, entry, &c. to be granted over; this is to prevent titles being granted to men of substance, to oppress the meaner sort of people. 1 *Inst.* 214. And where a bond was given for performance of covenants in a lease, and after the covenants being broken, the lessee assigned both the lease and bond to another, and then the assignee put the bond in suit; this was held maintenance; so it would have been if the lessee had assigned the bond and not the lease, and afterwards the covenants were broken, and the bond put in suit. *Godb.* 81. 2 *Nels. Abr.* 1142.

Of prosecuting offenders.

By the common law, persons guilty of maintenance may be prosecuted by indictment, and be fined and imprisoned; or by action, &c. And a court of record may commit a man for an act of maintenance done in the face of the court. *Heil.* 79. 1 *Inst.* 368.

For more learning on this subject. see 15 *Vin. Abr.* tit. Maintenance.

Majority. The only method of determining the acts of many, is by a majority: The major part of members of parliament enact laws, and the majority of electors choose members of parliament; the act of the major part of any corporation, is accounted the act of the corporation; and where the majority is, there by the law is the whole. *Stat.* 19 *Hen.* 7. *Stud. Compan.* 25.

Mayor. A mayor, doth not come from the Lat. major, but from an old English word *maier*, i. e. *potestas*. *Cowell.*

Maisnada. Signifies a family, *quasi mansionata*.

Maison de Dieu. A monastery, hospital, or almshouse. *Stat.* 2 & 3 *P. & M. cap.* 23. 29 *Elix. cap.* 5, &c. All hospitals, *Maisons de Dieu*, and abiding places for poor, lame and impotent persons, erected by the statute 39 *Elix. c.* 5. or at any time since founded, according to the intent of that statute, shall be incorporated and have perpetual succession, &c. 21 *Jac.* 1. c. 1.

Maisura. A house or mansion; a farm; from the Fr. *majon*.—*Baldwinus Comes Exon. omnibus Baronibus suis & hominibus, dedit Maisuram quam ipse tenet, &c.* MS. *Carter. pen.* *Eliam Ashmole Armig.*

Majus jus. Is a writ or law proceeding in some customary manors, in order to a trial of right of land: And the entry in the old books is thus: *Ad hanc curiam venit A. B. in propria persona sua & dat Domino, &c. ad vidend. Rotul. Curie. Et petit inquirend. utrum ipse habeat Majus jus in uno messuagio, &c. Et super hoc homag. dicunt, &c.* Ex Libro MS. *Episcop. Heref. temp.* Ed. 3.

Make. (*Facere*.) Signifies to perform or execute; as to make his law, is to perform that law which he hath formerly bound himself to: That is, to clear himself of an action commenced against him by his oath, and the oaths of his neighbours. *Old Nat. Brev.* 161. *Kitchen.* 192. *Si placitum debiti vel transgressionis vel aliquod placitum fuerit inter vicinos, & defendentes negaverint & vadierint legem versus Invenientem, solebant facere legem cum tertia manu, &c.* (*Inq. de Consuetud. Manerii de Surton Calfild a tempore Athelstani Regis.*) i. e. The defendants were to bring three persons to swear with them. Which law seemeth to be borrowed from the *Feudists*, who call those men that came to swear for another in this case *sacramentalis*. Of whom *Hotoman* saith thus, *In verbis Feudal. sacramentalis a sacramento, id est, juramento dicebantur ii, qui quavis rei de qua ambigebatur, testes non fuissent, tamen ex ejus, cujus rei agebatur, animi sententia, in eadem quæ illi verba jurabant, illius videlicet*

probatis & innocentia confisi, &c. The formal words used by him that makes his law are commonly these, *Hear, O ye justices, that I do not owe this sum of money demanded, neither in all nor any part thereof in manner and form declared. So help me God, and the contents of this book.* To make services or custom, is nothing else but to perform them. *Old Nat. Brev.* 14. to make oath is to take oath.

Make Services and Customs. Signifies nothing but to perform them. *Old Nat. Br.* 14.

Maila. A male, or port-mail, a bag to carry letters, &c. *Id. ib.*

Malandrinus. A thief or pirate; mentioned in *Walsingham*, 388.

Malberge. *Mons placiti*, A hill where the people assembled at a court, like our assizes; which by the *Scots* and *Irish* are called *Parley-hills*. *Du Cange.*

Malecreditus. Is one of bad credit, who is suspected, and not to be trusted. *Fleta*, lib. 1. cap. 38.

Malediction. (*maledictio*) A curse which was anciently annexed to donations of lands, made to churches and religious houses—*Si quis autem (quod non optamus) hanc nostram donationem infringere temptaverit, perpeffus sit gelidis glaciærum flatibus & malignorum spirituum; terribiles tormentorum cruciatus evolviffe non quiescat, nisi prius in rigius penitentia gemitibus, & pura emendatione emendaverit.* *Chart. Reg. Athelstani Monast. de Wiltune, Anno 933.*—

And we read in a *Charter of William de Warren*, Earl of *Surry*: *Venientibus contra hæc & destruentibus ea, occurrat Deus in gladio ire & furoris & vindictæ et Maledictionis æternæ: Servantibus autem hæc & defendentibus ea, occurrat Deus in pace, gratia & misericordia & salute æterna. Amen, Amen, Amen.*

Malefeasance. (from the Fr. *malfaire*, i. e. to offend) Is a doing of evil, or transgressing. 2 *Cro.* 266.

Malfeuzyn. In the North signifies as much as *forfezorn*, *Brownloe's Rep.* 4. *Hobart's Rep.* 8.

Maletent. Is interpreted to be a toll for every sack of wool, by statute: Nothing from henceforth shall be taken for sacks of wool, by colour of maletent, &c. Statute 35 *Ed.* 1.

Malice. Is a formal design of doing mischief to another; it differs from hatred. 2 *Inst.* 42. In murder, 'tis malice makes the crime; and if a man having a malicious intent to kill another, in the execution of his malice kill a person not intended, the malice shall be connected to his person, and he shall be adjudged a murderer. *Plowd.* 474. The words *Ex malitia præcogitata* are necessary to an indictment of murder, &c. See *Murder*.

Malice exprefs. See *Black. Com.* 4 *V.* 199. Malice implied, *ib.* 4 *V.* 200. Malice prepenſe, *ib.* 4 *V.* 198, 206.

Malignare. Signifies the same as to maim any one. *Qui ordinatum occiderit vel malignaverit emendet ei sicut restum est.* *Leg. Hen.* 1. cap. 11.

Malignus. i. e. *Diabolus*: *proh dolor, hunc populum propria de sede malignus.*

Malo grato. The doing a thing unwillingly. *Liberatatem ecclesie, &c. malo grato stabilierunt,* i. e. he being unwilling. *Mat. Paris.* 1245.

Malt. Bad malt shall not be mingled with good, under penalties; malt is to be three weeks in making and drying; except in *June*, *July* and *August*, and in those months not less than seventeen days; and half a peck of dust must be taken out of every quarter by screening, &c. before it shall be offered to sale, on pain of forfeiting 20 *d.* per quarter. *Stat.* 2 & 3 *Ed.* 6. cap. 10. Where bad malt is made, or bad malt shall be mixed with good, a constable, by the direction of a justice of peace, may search for the same; and order it to be sold at reasonable price, &c. 11 *Jac.* 1. cap. 28. A duty of 6 *d.* per bushel was granted on malt, by *Stat.* 8 & 9 *W.* 3. c. 21. which by subsequent statutes hath been continued yearly ever since; maltsters are, once a month, to make an entry at the excise office of all malt made, under the penalty of 20 *l.* and to pay the duty in three months, or forfeit double value: and if any maltsters alter their steeping vessels, without giving notice, or shall use any private cistern, they shall forfeit 50 *l.* And refusing excise-officers entrance into their houses, &c. forfeit 5 *l.* Also concealing

concealing malt from the sight of the gager, is liable to a penalty of 10 s. per bushel: and wetting barley any where but in the cistern, incurs a forfeiture of 2 s. 6 d. a bushel, &c. But justices of peace have power to mitigate the penalties and forfeitures. 2 Ann. c. 2. 6 Geo. 1. c. 20. Malt made for exportation is discharged from duty; yet must be entered, and kept secrete from other malt; on pain of 50 l. and when made shall be put into store-houses with two locks, and not delivered out without presence of an officer, &c. Stat. 12 Geo. 1. c. 4. If any malt be brought from Scotland into England, it shall pay 3 d. a bushel more, to make up the English duty, and be entered, and the duty paid before landing, &c. or shall be forfeited. 13 Geo. 1. c. 7. An allowance is made for exporting malt, on certificates of officers, and security given not to re-land it; but if landed in any part of Great Britain, the same to be forfeited, and treble value, &c. by 3 Geo. 2. c. 7. 6 Geo. 2. c. 1. 9 Geo. 2. and 10 Geo. 2. c. 1. Annual statutes are made for laying a duty on malt, mum, cyder and perry. 20 Geo. 2. c. 5. 21 Geo. 2. c. 1. 22 Geo. 2. c. 1. &c. By Stat. 33 Geo. 2. c. 7. An additional duty of 3 d. per bushel was laid upon malt. See *Brasum*.

Perpetual duties on malt, &c. 33 Geo. 2. c. 7.

Regulation for securing the payment of malt duties, and to prevent mixtures, 3 Geo. 3. c. 13.

Malt-millina. A quern or malt mill. The word occurs in *Matt. Paris's Lives of the Abbots of St. Albans*, &c.

Malt-shot, *Malt-fet*. Some payment for making malt.

—*Solverit de malt-shot termino circumscriptis Domini 20 denarios*. Somner of Gavelkind, p. 27.

Maltbittles, (from the Fr. *malvoillance*) Is used in our antient records, for crimes and misdemeanors, or malicious practices.—*Ces sont les traisens, felonies, et malveilles faits au nostre seigneur le Roy, et a son peuple per Roger de Mortimer*, &c. Record. 4 Ed. 3.

Maltbessa. A warlike engine to batter and beat down walls. *Matt. Paris*.

Maltbessin, (Fr. *mauvais voisin*, *malus vicinus*) An ill neighbour.

Maltbets Jurors. Are understood to be such as use to pack juries, by the nomination of either party in a cause, or other practice. *Artic. super Chart. cap. 10.*

Malum in se. Our law books make a distinction between *malum in se* and *malum prohibitum*. Vaugh. Rep. 332. All offences at Common law generally are *mala in se*; but playing at unlawful games, and frequenting of taverns, &c. are only *mala prohibita* to some persons, and at certain times, and not *mala in se*. 2 Roll. Abr. 355.

Man, (isle of,) French wines, not exceeding 100 tons in one year, may be imported by strangers, 5 El. cap. 5. *stat. 46*. Liberty given to import cattle and corn into England, 15 Car. 2. c. 7. *f. 21*. No drawback to be allowed for foreign goods exported to the isle of *Man*, 12 Geo. 1. c. 28. *stat. 21*. No goods but of the product of the island to be imported from *Man*, 12 Geo. 1. c. 28. *stat. 22*. The Treasury may purchase the isle of *Man*, 12 Geo. 1. c. 28. *f. 25*. For carrying into execution a contract made pursuant to 12 Geo. 1. between the commissioners of the Treasury and the Duke and Duchess of Athol, proprietors of the isle of *Man*, and their trustees for the purchase of the said island, 5 Geo. 3. c. 26.

Mania, Signified formerly an old woman. *Gera. of Tith. cap. 95*.

Managium, (from the Fr. *manage*, a dwelling or inhabiting) Is a mansion house or dwelling-place.—*Concess. capitale managium meum cap. perimantia*, &c. Mon. Angl. tom. 2. p. 82.

Manbote, (Sax.) A compensation or recompence for homicide; particularly due to the lord for killing his man or vassal. *Saxons de Cons. Vol. 1. pag. 622*. See *Lambard* in his *Explication of Saxon Words*, verbo *astimatio*, and *Hoveden*, in *parte 1^a*. *Annal. Norw. fol. 344*. & *Rut.*

Manca, Was a square piece of gold coin, commonly valued at thirty pence; and *mancausa* was as much as a mark of silver, having its name from *manca*, being coined with the hand. *Leg. Canons*. But the *manca* and *mancausa* were not always of that value; for sometimes the

former was valued at six shillings, and the latter as used by the English Saxons was equal in value to our half crown. *Manca sex solidis astimatur*. Leg. H. 1. c. 69. *Thorn.* In his Chronicle tells us, that *mancausa est pondus duorum solidorum et sex denariorum*; and with him agrees *Du Cange*, who says that twenty *manca* make fifty shillings; *Manca* and *mancausa* are promiscuously used in the old books for the same money. *Spelm.*

Manch, Is sixty shekels of silver, or seven pounds and ten shillings; and one hundred shekels of gold, of seventy-five pounds. *Merch. DiB.*

Manchester, Its collegiate church, how visitable, 2 Geo. 2. c. 29.

Mancipite, (*manceps*) A clerk of the kitchen, or caterer; and an officer in the Inner Temple was antiently so called, who is now the steward there, of whom *Chaucer*, our antient poet, sometime a student of that house, thus writes:

*A manciple there was within the Temple,
Of which all catours might taken ensample.*

This officer still remains in colleges, in the universities. *Conwell*.

Mandamus, Is a writ issuing out of the court of King's Bench, sent by the King to the head of some corporation, &c. commanding them to admit or restore a person into his place or office, &c. 2 Inst. 40.

It is now an established remedy, and every day made use of, to oblige inferior courts and magistrates to do that justice, which, without such writ, they are in duty, and by virtue of their offices, obliged to do; and is a writ of right, which the superior court is obliged to issue, in the ordinary form, without imposing any terms on him who demands it. 3 New Abr. 528.

But tho' it be a writ of right, yet the court seldom grants it, without giving the party, to whom it is pray'd, a day to shew cause why it should not issue; also such matter must be laid before the court, by which it may appear, that the party is intitled to it. 3 New Abr. 528.

A *mandamus* lies to restore a mayor, alderman, or capital burghs of a corporation; a recorder, town-clerk, attorney turned out of an inferior court, steward of a court, constable, &c. 11 Rep. 99. Raym. 153. 1 Keb. 549. 2 Nels. Abr. 1148, 1149. By some opinions it doth not lie, to restore a common council-man. 2 Cro. 540. But see 1 Vent. 302. A *mandamus* may be had to restore a freeman; and also to admit one to the freedom of the city, having served an apprenticeship. *Sid. 107*. To restore a fellow of the college of physicians, it lies; though not for a fellow of a college, in the universities, if there is a visitor. 1 Lew. 19, 23. It hath been resolved, that a *mandamus* shall not be granted to restore a fellow or member of any college of scholars or physick, because these are private foundations. *Carthew's Rep. 92*. And this writ lieth not, for the deputy of an office, &c. yet he who hath power to make such deputy, may have it. *Med. C. 18*. 1 Lew. 306. It lies not, generally, to elect a man into any office; nor for a clerk of a company, which is a private office; or to restore a barrister expelled a society; a proctor, &c. 2 Lew. 14, 18. 2 Nels. 1150, 1151. But a *mandamus* may lie to remove persons as well as restore them; by virtue of any particular statute, on breach thereof. 4 Med. 233.

If justices of peace refuse to admit one to take the oaths, to qualify himself for any place, &c. *mandamus* lies; so to a bishop or archdeacon, to swear a churchwarden; to grant a probate of a will; and to admit an executor to prove a will, or an administrator; to a rector, vicar or churchwarden, to restore a sexton. *Wood's Inst. 568*. *Mandamus* lieth to admit a man to take the oath of allegiance, &c. and to admit according to the act of toleration, in order to be qualified to be a dissenting minister. *Med. Cap. 310*. Also *mandamus* will lie to the bishop, to grant a licence for a parson to preach, where 'tis denied, and he is in orders for it; and this writ lies to restore a person to university degrees. 2 Ed. Raym. 1206, 1334. But after a man is restored on a peremptory *mandamus*, he may be displaced again, for the same matters for which he was before removed, and others. *Ib. 1283*. In the writ of

mandamus,

mandamus, the words are to admit or restore, *vel causam significare quare*, &c. And if a corporation have power to disfranchise a freeman, and they do it accordingly, if a writ is granted to restore him, *vel causam significare quare*, and they certify a sufficient but false cause, the court of B. R. cannot restore him, but there lies an action for a false return; and if then it be found for him, he shall have a *peremptory mandamus*, which is usually granted after the first writ; or if he be imprisoned, he may bring action of trespass and false imprisonment, &c. 11 Rep. 99. 5 Mod. 254.

Of judgment on the return.

There is to be judgment upon the return of the writ, before any action of the case may be brought for a false return of a *mandamus*. 2 Lev. 238. And returns upon writs of *mandamus* must be certain for the court to judge upon. 11 Rep. 99.

By statute, where any writ of *mandamus* shall issue out of B. R. &c. the persons required by law are to make their return to the first *mandamus*; and on the return made thereto, the person suing out the writ may plead to, and traverse all or any of the material facts contained in such return, to which the person making the return shall reply, take issue, &c. And the parties proceed as if action had been brought for a false return; and if judgment be given for the plaintiff, he shall have damages and costs, as in action on the case, &c. 9 Ann. c. 20.

A case has happened, and others of the like kind may happen, where an action could not be brought, nor the return pleaded to, or traversed, under the statute. In such case, it may perhaps be advisable to move the court of King's Bench, for an *information*, against the person or persons, making a false return, or such a return, as will lay the party, who moved for the *mandamus*, under the dilemma mentioned above. Case of *Battersea* parish, about Hilary term, 1769.

All the statutes of *jeofails* shall extend to writs of *mandamus*, and proceedings thereon. A person having a *mandamus* to be admitted to any office or privilege, ought to suggest whatever is necessary to intitle him to be admitted; and if that be not done, or if it is false, it will be good matter to return on the *mandamus*; and on the return of these writs, as well as others of this nature, there are usually great arguments in favour of liberty, &c. Mod. Ca. 310. It has been held, that several persons cannot have one *Mandamus*; nor can several join in an Action on the Case for a false Return. 2 Salk. 433. But there has been an instance to the contrary, where the circumstances of the case were such, that required a variety of persons to join in the application, viz. on the late highway act, to compel the justices to nominate a surveyor out of the list, returned by the inhabitants. Case of *Battersea* parish. In B. R. about Hilary term, 1769.

A writ of *mandamus* may not be directed to one person, or to a mayor and alderman, &c. to command another to do any act; it must be directed to those only who are to do the thing required, and obey the writ. 2 Salk. 446, 701. This writ is not to be *issued* before granted by the court; and if the corporation to which the *mandamus* is sent, be above forty miles from London, there shall be fifteen days between the *return* and the return of the first writ of *mandamus*; but if but forty miles, or under, eight days only; and the *alias* and *pluries* may be made returnable immediately: also at the return of the *pluries*, if no return be made, and there is affidavit of the service, attachment shall go forth for the contempt, without hearing counsel to excuse it. *Ibid.* 434. A motion was made for an attachment, for not returning an *alias mandamus*; and by Holt Ch. Just. In case of a *mandamus* out of Chancery, no attachment lies till the *pluries*, for that is in nature of an action to recover damages for the delay; but upon a *mandamus* out of B. R. the first writ ought to be returned, though an attachment is not granted without a *peremptory* rule to return the writ, and then it goes for the contempt, &c. *Ibid.* 429.

Some modern cases where a *mandamus* will lie, and where not.

A *mandamus* lies to admit, restore, or discharge a constable; for he is a publick officer, and one whose office

relates to the administration of justice. 2 Roll. Rep. 82. 1 Roll. Abr. 535. 1 Salk. 175.

Mandamus to proceed to election, where a clause for holding over. *Stran.* 555.

Mandamus may be granted to go to an election, tho' there is a mayor *de facto*. *Stran.* 1003.

Granted to go to election, notwithstanding a dubious election *de facto*. *Stran.* 1157.

Granted to elect corporation officers, where there were wrongful officers in possession. *Stran.* 1180.

Granted *peremptory* on the reversal of a judgment for the defendant. *Stran.* 697.

Mandamus for a prebend. *Stran.* 1082. To admit a prebendary. *Stran.* 159.

Lies for a chaplain where there is no visitor. *Stran.* 797.

To a university to restore to degrees. *Stran.* 557.

To restore a schoolmaster. *Stran.* 58.

For a parish clerk, sexton, scavenger. *Stran.* 59.

To swear an ale-taster. *Stran.* 608.

To swear a director of the amicable assurance. *Stran.* 696.

Mandamus for yeoman of the wood wharf. *Stran.* 832.

Mandamus to admit a deputy register. *Stran.* 893.

A principal may have a *mandamus* to admit his deputy. *Stran.* 895.

To allow constables their expences of carriages for the troops. *Stran.* 42, 93.

To reimburse a surveyor of highways. *Stran.* 211.

And this general jurisdiction and superintendency of the King's Bench, over all inferior courts to restrain them within their bounds, and to compel them to execute their jurisdiction, whether such jurisdiction arises from a modern charter, subsists by custom, or is created by act of parliament, yet being in *subsidiaria justitia*, has of late been exercised in variety of instances; as a *mandamus* granted to the quarter-sessions, to give judgment for abating a nuisance.

So a *mandamus* was granted, to the court of *Sandwich*, to give judgment in an assault and battery. *Mich.* 5 Geo. 3.

So a *mandamus* was granted to the sheriff's court in London, to give final judgment upon a writ of inquiry. *Mich.* 7 Geo. 1. *Baily v. Brown.*

So a *mandamus* was granted, to the bailiff of *Andover*, to give judgment in a cause there depending; but the court in this case required an affidavit of their refusal, or else it should be presumed that the court would do right. *Trin.* 2 Geo. 2.

So a *mandamus* was granted to the corporation of *Liverpool*, to hold an assembly for doing the publick business, which was making leases. *Mich.* 8 Geo. 1.

But though these kind of writs, are daily awarded to judges of courts, to give judgment, or to proceed in the execution of their authority, yet they are never granted to aid a jurisdiction, but only to enforce the execution of it; nor are they ever granted where there is another proper remedy.

Mandamus to a judge in nature of a *procedendo*. *Stran.* 113.

To justices of peace, to give judgment in an excise case. *Stran.* 536.

Granted to commit administration generally. *Stran.* 552.

To take security on articles of the peace. *Stran.* 835.

Mandamus to the clerk of a company, to deliver books. *Stran.* 879.

To produce the books, at the next assembly. *Stran.* 948.

Granted to attend a court-leet. *Stran.* 1207.

No *mandamus* lies for a lecturer. *Stran.* 1592.

Lies not, to swear in one, who has had judgment, on an *information* against him, for an usurpation. *Stran.* 625.

To call a vestry, for the election of churchwardens, refused. *Stran.* 686.

Mandamus lies not, to grant a licence to keep an ale-house. *Stran.* 881.

Lies not, for an administrator *durante minori aetate*. *Stran.* 892.

No *peremptory mandamus*, pending error, on action for false return. *Stran.* 983.

No *mandamus* lies, to insert particular persons in a poor's rate. *Siran*. 1259.

But though the court of King's Bench be intrusted with this jurisdiction of issuing out *mandamus's*, yet they are not obliged to do so in all cases wherein it may seem proper, but herein may exercise a discretionary power, as well in refusing as granting such writ; as where the end of it is merely to try a private right; where the granting it would be attended with manifest hardships and difficulties, &c. so even since the statute 11 Geo. 1. c. 4. for obliging corporations to elect officers, it hath been held, that this court hath a discretionary power of refusing a writ for that purpose, but may first receive information about the election, and, if dissatisfied about the right, may send the parties to try it in an information. *Hill*. 8 Geo. 2. *The King v. Mayor and Burgeses of Tintagel in Cornwall*.

For more learning on this subject, see 3 New Abr. and 15 Vin. Abr. tit. *Mandamus*, and Black. Com. 3 V. 110, 264. 4 V. 434. Com. Dig. tit. *Mandamus*, and 10 Mod. Table.

Mandamus. Was also a writ that lay after the year and day, where in the mean time the writ, called *diem clausit extremum*, had not been sent out to the *eschator*, on the death of the King's tenant *in capite*, &c. And was likewise a writ or charge to the sheriff, to take into the hands of the King all the lands and tenements of the King's widow tenant, who against her oath married without his consent. *F. N. B.* 253. *Reg. Orig.* 195. See *F. N. B.* 561. *Dyer* 209, pl. 19. 248. pl. 81. *Lamb.* 36.

Mandatarj, (*mandatarius*) Is he to whom a command or charge is given.

Mandate, (*mandatum*) Is a commandment judicial of the King, or his justices, to have any thing done for the dispatch of justice; of which there is great diversity. *Reg. Judic.* And we read of the Bishop's *mandata* to the sheriff, &c. Stat. 31 *Edic.* c. 9. A *mandate* may be issued by the King's Bench to swear a churchwarden, or parish clerk, &c. when refused to be sworn by the bishop's minister. *March. Rep.* 22, 101.

Mandati Dies, (*Mandie* or *Maunday Thursday*) The day before *Good Friday*, when is commemorated and practised the command of our Saviour, in washing the feet of the poor, &c. And our Kings of England, to shew their humility, long executed the antient custom on that day, of washing the feet of poor men, in number equal to the years of their reign, and giving them shoes, stockings and money.

Mandato panes, Loaves of bread given to the poor upon *Maunday Thursday*. *Chartular. Glaston. MS.* fol. 29.

Mantenens. Was antiently used for *tenentes* or tenants; *qui in solo alieno manent*; and it was not lawful for them or their children, to depart without leave of the lord. *Cancil. Synodal. apud Cloverho.* anno 822.

Mangouare, Signifies to buy in the market. *Leg. Athelred.* c. 24.

Mangonellus, A warlike instrument made to cast small stones against the walls of a castle. *Cowell*.

Mangonus, An engine of war made to cast stones; and it differs from a *petrard* as follows, *viz.*

Interca grossos petraras mittit ad intus
Affidus lapides mangonellusque minores.

Maniculus, Was an handkerchief which priests always had in their left hands. *Blount*.

Mannr, (from the *Fr.* *manier*, or *maiser*, i. e. *manu trahere*.) To be taken with the *manner*, is where a thief having stolen any thing, is taken with the same about him, as it were in his hands; which is called *flagrante delicto*. *S. P. C.* 179. Such a criminal is not bailable by law: and antiently if one guilty of felony or larceny had been freshly pursued, and taken with the *manner*, and the goods so found upon him, had been brought into court with him, he might be tried immediately, without any appeal or indictment, and this is said to have been the proper method of proceeding in such *manners* which had the franchise of *infangthefe*. *H. P. C.* 201. *S. P. C.* 28. 2 *Hawk. P. C.* 211.

Manning, (*manopera*) A day's work of a man; and in antient deeds there was sometimes reserved so much rent, and so many *mannings*.

Mannire, Is where one is cited to appear in court; and stand to judgment there: it is different from *bannire*; for though both of them signify a citation, one is by the adverse party, and the other by the judge. *Leg. H. 1. c.* 10. *Du Cange*.

Mannopus, (*manopera*) Goods taken in the hands of an apprehended thief. *Cowell*.

Mannus. A horse, a pad or saddle horse. In the laws of *Alfred*, we find *manstheof*, for a horse-stealer. *Cowell*.

Manor, (*manerium*) Seems to be derived of the *Fr.* *manoir*, *habitatio*, or rather from *manendo*, of abiding there, because the lord did usually reside there. *Est feudum mobile partim vassalis* (quos tenentes vocamus) ob certa servitia concessum; partim Domino in usum familie sue, cum jurisdictione in vassallos, ob concessa prædia reservatum. Quæ vassallis conceduntur, terras dicimus tenementales, quæ domino reservantur dominicales. Totum vero feudum dominium appellatur, olim baronia; unde curia quæ huic præest jurisdictioni bœdæ curia baronis nomen retinet. *Skene de verb. signif.* saith, It is called *manerium* quasi *manu-vini*, because it is laboured by handy-work: it is a noble sort of fee, granted partly to tenants for certain services to be performed, and partly reserved to the use of his family, with jurisdiction over his tenants for their farms. That which was granted out to tenants, we call *tenementales*; those reserved to the lord, were *dominicales*: the whole fee was termed a lordship, of old a barony; from whence the court, that is always an appendant to the manor, is called *The court baron*.

Touching the original of manors, it seems that in the beginning, there was a circuit of ground, granted by the King to some baron or man of worth, for him and his heirs to dwell upon, and to exercise some jurisdiction more or less within that compass, as he thought good to grant, performing such services, and paying such yearly rent for the same, as he by his grant required; and that afterwards this great man parcelled his land to other meaner men, enjoining them such services and rents as he thought good, and so as he became tenant to the King, the inferiors became tenants to him. See *Perkin's Reservations* 670. and *Horne's Mirror of Justices*, lib. 1. cap. de *Rey Alfred*, and *Fulbeck*, fol. 18. And according to this our custom, all lands holden in fee throughout *France* are divided into *fiefs* and *arrieri fiefs*, whereof the former are such as are immediately granted by the King; the second, such as the King's *fundatories*, do grant to others. *Gregorii Syntagm.* lib. 6. cap. 5. num. 3.

In these days, a manor rather significeth the jurisdiction and royalty incorporeal, than the land or site. For a man may have a manor in *gross*, (as the law termeth it) that is, the right and interest of a court-baron, with the perquisites thereunto belonging, and another, or others have every foot of the land. *Kitchin*, fol. 4. *Broke*, hoc titulo per totum. *Bracton*, lib. 4. cap. 31. num. 3. divideth *munerium* into *capitale* & *non capitale*. See *Fœe*.

A manor may be compounded of divers things, as of a house, arable land, pasture, meadow, wood, rent, advowson, court-baron, and such like; and this ought to be by long continuance of time, beyond the memory of man; for at this day a manor cannot be made, because a court-baron cannot now be made, and a manor cannot be without a court-baron, and suitors or freeholders, two at the least; for if all the freeholds, except one, *escheat* to the lord, or if he purchase all, except one, there his manor is gone *causa quæ supra*, although in common speech it may be so called. *Cowell*.

By a grant of the demesnes and services, the manor passeth; and by grant and render of the demesnes only, the manor is destroyed, because the services and demesnes are thereby severed by the act of the party; though it is otherwise, if by act of law, as by partition. 6 *Rep.* 63. There are two coparceners of a manor; the demesnes are assigned to one, and the services to the other, the manor is gone; but if one die without issue, and the manor descends to her who had the services, the manor is revived again, for the severance was by act in law. 1 *Jess.* 122. 8 *Rep.* 79. 3 *Salk.* 25, 40. A new manor may arise and revive by operation of law. 1 *Leon.* 204. A manor cannot be without a court-baron: and it must be time out of mind; at this day a manor cannot be made,

mede, because a court-baron cannot now be made. 1 *Inst.* 58, 108. It may contain one or more villages or hamlets; or only great part of a village, &c. And there are capital manors, or honours, which have other manors under them, the lords whereof perform customs and services to the superior lords. 2 *Inst.* 67. 2 *Roll. Abr.* 72. There may be also customary manors, granted by copy of court-roll, and held of other manors. 4 *Rep.* 26. 11 *Rep.* 17. But it cannot be a manor in law, if it wanteth freehold tenants; nor be a customary manor, without copyhold tenants; so if there are no suitors in a court-baron but one, or there be only one copyholder in a customary manor: for there should be two freeholders, or suitors at least. 1 *Inst.* 58. *Lit.* 73. 2 *Roll. Abr.* 121. But it is said, if there be but one freehold tenant, the seignior continues between the lord and that one tenant. 1 *And.* 257. 1 *Nell. Abr.* 524. The custom remains, where tenements are divided from the rest of the manor, the tenants paying their services; and he who hath the freehold of them, may keep a court of survey, &c. *Cro. Eliz.* 103. See *Copyhold*, and 15 *Vin. Abr.* tit. *Manor*, and *Black. Com.* 2 *V.* 90.

Manse, (*mansa*) An habitation, or farm and land. *Spelm.* See *Mansum*.

Manster, A bastard. *Covarr.*

Manstion, (*mansio a manendo*) Among the ancient Romans, was a place appointed for the lodging of the prince, or soldiers in their journey; and in this sense we read *primam mansionem*, &c. It is with us most commonly used for the lord's chief dwelling-house within his fee; otherwise called the capital messuage, or manor place. *Stene*. Some say it is a dwelling of one or more houses without a neighbour: and mansion-house is taken in law for any house of dwelling of another; in cases of committing burglary, &c. 3 *Co. Inst.* 64. The Latin word *mansio*, according to Sir Edward Coke, seems to be a certain quantity of land: *hida vel mansia*, and *mansa*, are mentioned in some old writers and charters. *Fluta*, lib. 6. And that which in ancient Latin authors was termed *hida*, was afterwards called *mansus*.—*Mansio esse potest constructa ex pluribus domibus vel una, quæ erit habitatio una & sola sine vicino; etiam si alia mansio sit vicinata non erit villa, quia villa est ex pluribus mansionibus vicinata & collata ex pluribus vicinis.* *Bract.* lib. 5. p. 1.

Manlaughter, (*homicidium*, from the Sax. *manslyte*) Is the unlawful killing a man without any premeditated malice; as when two persons meet, and upon some falling out, the one kills the other. It is done in a present heat, on a sudden quarrel, and upon a just provocation; and without any deliberate intention of doing mischief: and it differs from murder only, in that it is not done with foregoing malice; and from *chancemedley*, having no present intent to kill. *Stamf. P. C.* lib. 1. cap. 9. and *Bracton*, c. 9. This crime is felony; but for the first time admits of clergy: and there can be no accessaries to this offence before the fact, because it must be done without premeditation. *H. P. C.* 217. In the laws of *Caustus*, the same distinction was made between murder and manslaughter, as now; for we find, if a man was killed wilfully and premeditatedly, then the offender was to be delivered to the kindred of the slain, &c. But if on his trial, the fact was proved not to be wilful, then he was resigned to the bishop, &c. *Leg.* 53.

What it is, that constitutes manslaughter, and the difference between that, and murder.

Manslaughter must be upon a sudden quarrel, where the party guilty does not appear to be master of his temper, by talking calmly on the quarrel, or afterwards in other discourse, whereby the heat of blood may be presumed to be cooled. *Crompt.* 23. *Kel.* 56. Therefore if two persons meet together, and in striving for the wall, one of them kills the other, this is manslaughter; and so it is, if upon a sudden occasion, they had gone into the fields and fought; and one had killed the other; for all is one continued act of passion, on the first sudden occasion. 3 *Inst.* 51, 55. *H. P. C.* 48. And if two persons who have formerly fought on malice, are afterwards to all appearance reconciled, and fight again on a fresh quarrel, and one of them is killed, it shall not be construed that they were moved on the old grudge, unless it appear by

the whole circumstances of the fact. 1 *Hawk. P. C.* 82. If two men fall out on a sudden and fight, and one breaks his sword, and a stranger standing by lends him another, with which he kills his adversary, it is manslaughter in both. *H. P. C.* 56. And where a stranger to a person, a man's servant, &c. coming suddenly, sees him fighting with another, and sides with him and kills the other; this is only manslaughter: also if a man's friend is assaulted, and he in vindication of his friend, on a sudden takes up a mischievous instrument, and kills the enemy of his friend, this is manslaughter: so where a person in rescuing another, injuriously restrained of his liberty, by pretended press-makers, &c. kills any of them. *H. P. C.* 57. *Plowd.* 101. *Kel.* 46, 136.

Of officers, &c.

But if the person killed were a bailiff, or other officer of justice, resisted by any one in the due execution of his duty, it would be murder. *Kelw.* 67, 86. If a master go with malice to kill a person, and his servants being with him know nothing thereof, and then they join in the assault and murder, it is but manslaughter in the servants: though if the master have malice, and he tells his servants of it, and that his intention is to kill the party, and they go with their master; if they kill him, it is murder in both master and servants. *Dyer* 26. 9 *Rep.* 66. *Plowd.* 100. There were two men in an inner chamber, quarrelling, and together by the ears; a brother of one of them standing at the door, that could not get in, cried to his brother to make him sure, and presently after he gave the other a mortal wound; this was held manslaughter in him that stood at the door. *Trin.* 1 *Jac.* 1. *Shep. Abr.* 493. Several persons having forcible possession of a house, afterwards killed the person whom they had ejected, as he was endeavouring in the night forcibly to regain the possession, and to fire the house; and they were adjudged only guilty of manslaughter, notwithstanding they did the fact in maintenance of a deliberate injury, because the party slain was so much in fault himself: yet if in such, or any other quarrel, whether it were sudden or premeditated, a justice of peace, constable, or even a private person, be killed in endeavouring to keep the peace, he who kills him is guilty of murder. 1 *Hawk.* 85.

Of provocation, &c.

It hath been adjudged, that upon a killing on a sudden quarrel, if a man be so far provoked by another, by words or gestures, as to make a push at him with a sword, or strike at him with any other such weapon as manifestly endangers his life, before the other's sword is drawn, and thereupon a fight ensues, and he who made such assault kill the other, it is murder; for by assaulting the other in such a manner, without giving him an opportunity to defend himself, shewed that he intended to kill him: but in case he who draws upon another in a sudden quarrel, make no pass at him till his sword is drawn, and then fighting with him kill him, he is guilty of manslaughter only; because by giving the other time to be on his guard, he shews his intent is not so much to kill, as to combat with the other, according to the common notions of honour. *Kel.* 61, 131. 1 *Hawk. P. C.* 81, 82.

As to provocations, &c.

And as to provocations, no trespass, breach of a man's word, or affront by words, &c. will be thought a just provocation to excuse the killing of another. *Ibid.* 130. Though if upon ill words, as giving the lie, or calling another a son of a whore, both parties suddenly fight, and one kills the other, this is manslaughter: and if one upon angry words assaults another, by pulling him by the nose, and he that is assaulted draws his sword and immediately kills the other, this is but manslaughter; for an indignity was offered to the slayer, from whence he might reasonably apprehend that there might be some further design upon him. *Ibid.* 55, 60, 135.

If a man is taken in adultery with another person's wife, and the husband draws his sword and presently kills the adulterer; this is a just provocation, and makes it manslaughter. 1 *Vent.* 158. *Raym.* 212.

• *Punishment of manslaughter, as murder, in particular cases, by statute.*

There is *manslaughter* punishable as murder, by statute: By the 1 Jac. 1. c. 8. If any person shall *stab* another, not having then a weapon drawn, or not stricken first, so that he dies within six months, although it were not of malice or fore-thought, it is felony without benefit of clergy: But this doth not extend to persons *stabbing* others *se defendendo*, or by misfortune, &c. with no intent to commit *manslaughter*; and the statute relates to the party only, that actually gave the stroke, or stabbed the other, and not to those that were aiding or abetting. *H. P. C.* 58. A blow given, or weapon drawn at any time during the quarrel, before the thrust or stab given, is within the statute; and drawing out a pistol, and levying it at the party killing, or throwing a pot, bottle, &c. at him, are within the equity of the words, having a weapon drawn. 5 *Lev.* 255, 256. So if the party killed have a cudgel in his hand; clergy shall be allowed. *Godb.* 154. And he that is ousted of clergy by this statute must be specially indicted upon it; though even then, the jury may find *manslaughter* generally: for the statute makes no new offence, but only takes away the benefit of the clergy, which was allowed at Common law. *H. P. C.* 58, 266. The statute is but a declaration of the Common law; and made to prevent the compassion of juries, who oftentimes were persuaded to believe, that to be a provocation to extenuate the crime of murder, which in law was not. *Kel.* 55. And on the Statute 1 Jac. 1. of *Stabbing*, it has been usual to prefer two indictments, one of murder, another upon this statute, and put the prisoner to plead to both; then to charge the jury, first, with the indictment for murder, and if they find it not to be that crime, to inquire on the other bill, because if convicted of either, the offender is excluded his clergy. 1 *Hale's Hist. P. C.* 468.

Of accidents happening, from two persons playing together.

Two masters of defence play at hand-sword, and one wounds the other, of which he dies, it is only *manslaughter*; and it is said not to be felony where they play by the King's command, for that they play by consent to try their manhood, and may be the better able to do the King service upon occasion. 3 *Inst.* 56, 160. *Dalt.* 352. *Hob.* 134. When two persons play at foils, and one kills the other, it is *manslaughter*. *H. P. C.* 32, 57. Though if one kill another at wrestling, or shooting in bow and arrow at butts, &c. this will not be *manslaughter* in the offender. *Kelw.* 168. These last cases are without an ill intent,

Of inconsiderate acts, without evil intention, from which the death of any one ensues. Et c. contra.

If one shoots off a gun in a highway, or throws a stone over a wall, in a place where people often meet, and a person is killed; or at another in play, and kill him; if done without any evil intention, it is *manslaughter*. 3 *Inst.* 57. But if an unlawful act be done with an ill intent, and the act is deliberate, if death happens, it is murder. *H. P. C.* 32, 44. 3 *Inst.* 56. *Kel.* 112. A person shoots at the tame fowl of another, which is an unlawful act, and kills a *stander-by*, it is murder: if he be shooting at a hare, wild fowl, and not qualified to keep a gun, or to kill game, it is *manslaughter*: And where he is qualified to keep a gun, it is only *chancemedley*. 3 *Inst.* 59. Though in cases of this nature, it ought to be considered how far the unlawful act, doth tend immediately, or by necessary consequence, to the injury of another. *H. P. C.* 31. *Kel.* 117. A man drives his cart carelessly, and it goes over a child in the street; if he see the child, and yet drive upon him, it is murder; but if he saw not the child, it is *manslaughter*. And if a child run cross the way, and the cart runs over him, before it is possible to make a stop, it is *per infortunium*. 1 *Hale's Hist. P. C.* 476. See *Chancemedley* and *Murder*.

Manstealing or Kidnapping. The forcible abduction or stealing away of man, woman, or child, from their own country, and selling them into another, was capital, by the Jewish law. *Exod.* xxi. 16. So by the Civil law it was punished with death. *Ps.* 48. 15. 1. The Common law of England hath punished it with fine, imprisonment; and pillory. *Rayn.* 474. 2 *Shew.* 221. *Skin.* 47. *Comb.* 10. and *vide Stat.* 11 & 12 W. 3. c. 7. and *Black. Com.* 4 V. 219.

Manus, Anciently a farm. *Selden's Hist. of Tithes*, pag. 62.

Manus Capitate, The manor-house or *manse*, or court of the lord. *Kennet's Antig.* 150.

Manfura and *Manfura*, Are used in *Domesday* and other ancient records, for *Manfones vel habitacula villicorum*. *Cowell*.

Manus, Anciently a farm. *Selden's Hist. of Tithes*, pag. 62.

Manus Presbyteri, The *manse* or house of residence of the parish-priest; being the parsonage or vicarage-house. *Paroch. Antig.* 431.

Manthor, (From the Lat. *Mannus*, a nag, and Sax. *Theoff*, i. e. Thief) Signified, anciently, an horse-stealer. *Leg. Alfred.*

Mantile, Is a long robe; from the French word *man-teau*, mentioned in the *Stat.* 24 H. 8. c. 13.

Manualia Beneficia, Were the daily distributions of meat and drink to the canons and other members of *Cathedral churches*, for their present subsistence.——*Consuetudinem*, &c. *qua canonici & alii beneficiati seu clerici cathedralium, & aliarum collegiarum ecclesiarum, distributiones que manualia beneficia nuncupantur*, &c. *Lib. Statutor. Eccles. Sancti Pauli London.* MS.

Manualis Obedientia, Is used for sworn obedience, or submission upon oath. *Henricus de Teisdale Rector Ecclesie de G. fecit pro illa Domino Johanni Archiepiscopo Ebor. Manualium Obedientiam apud Ebor.* 11 *Kal. Maii* 1295. *Ex Registr. Ebor.*

Manu capto, A writ that lies for a man taken on suspicion of felony, &c. who cannot be admitted to bail by the sheriff, or others having power to let to *mainprise*. *F. N. B.* 229.

Manual, (*Manualis*) Signifies what is employed or used by the hand, and whereof a present profit may be made: As such a thing in the *manual* occupation of one, is where it is actually used or employed by him. *Staunder. Prerog.* 54.

Manufacture, A commodity produced by the work of the hand; as cloth, &c. *Mereb. Dict.* All persons may work in *manufactures* of hemp, or flax, or tapestry. 15 *Car.* 2. c. 15. Provisions against frauds in the *manufactures* of woollen, linen, and iron. 1 *Ann. Stat.* 2. c. 18. 13 *Geo.* 2. c. 8. Workmen in the woollen *manufactures* to be paid in money only. 10 *Ann.* c. 16. Penalties on *manufacturers* in leather imbezilling their work. 13 *Geo.* 2. c. 8. *Manufacturers* in leather shall be paid their wages in money. *Ibid.* Regulations of the *manufacturers* in woollen, linen, iron, leather, &c. and for the payment of their wages. 22 *Geo.* 2. c. 27. Penalty on seducing *manufacturers* out of the kingdom, and on exporting utensils of the silk and woollen *manufactures*. *Stat.* 23 *Geo.* 2. c. 13. By the *Stat.* 22 *Geo.* 2. c. 27. Any person employed in working up any woollen, linen, silk, leather or iron *manufacture*, who shall *purloin*, *imbezil*, *secret*, *sell*, *pawn*, *exchange*, or unlawfully dispose of any of the materials, shall be committed to the house of correction for fourteen days, and whipped; and for a second offence to be committed for not less than three weeks, and whipped. The receiver to forfeit 20 l. or be whipped; and for a second offence 40 l. or be whipped. See *Labourers*. See *Black. Com.* 4 V. 160.

Manumission, (*Manumissio*) Is the freeing a villein or slave out of bondage; which was formerly done several ways: Some were *manumitted* by delivery to the sheriff, and proclamation in the county, &c. others by charter; one way of *manumission* was for the lord to take the bondman by the head, and say, *I will that this man be free*, and then moving him forward out of his hands. And there was a *manumission* implied; when the lord made an obligation for payment of money to the bondman, or sued him when he might enter without suit, &c. The form of *manumitting* a person in the time of Will. 1. called *The Conqueror*, is thus set down.——*Si quis velit servum suum liberum facere, tradat eum vicecomiti per manum dextram, in pleno comitatu, & quietum illum clamare debet: a iugo servitutis sue per manumissionem, & ostendat ei libera res portus & vias, & tradat illi libera arma, scilicet lanceam & gladium, & deinde liber homo efficitur.* *Lamb. Archai.* 126.

Manu opera, Stolen goods taken upon a thief, apprehended in the fact. See *Mannopus*.

Manuopera, Cattle or any implements used to work in husbandry. *Mon. Angl. tom. 1. pag. 977. Fleta. lib. 1. p. 52.*

Manupastus, Signifies a domestick; *Sæpe obvenit in furensi dialecto, pro famulo & serviente domestico.* Spelm. He shall be culpable as of a thing done by one of his family, or by his own hand—*Erat culpabilis tanquam de manupasto.* *Leg. Hen. 1. cap. 66.*

Manups, A foot of full and legal measure. *Cowell.*

Manure, (*colo, melioro*) To till, plough, or manure land. *Litt. Dic.*

Manus, Was anciently used for an oath, and for him that took it as a compurgator. And it often occurs in old records; *Tertia, quarta, &c. manu jurare*; that is, the party was to bring so many, to swear with him, that they believed what he vouched was true: And we read of a woman accused of adultery; *Mulieri hoc neganti purgatio sexta manu extitit indicta, i. e. she was to vindicate her reputation upon the testimony of six compurgators.* *Reg. Ed. Christ. Cant.* If a person swore alone, it was *propria manu & unita*. The use of this word came probably from its being required at a person's hands, to justify himself; or from laying the hand upon the New Testament, on taking the oath.

Manus mediae & infimae homines, Men of a mean condition, of the lowest degree.—*Et plures mediae manus quos ex iustis & rationabilibus causis Rex pater exheredaverat.* *Radulphus de Diceto sub anno 1112.*—*Inferioris & infimae manus homo.* *Idem sub annis 1138, 1185.*

Manutententia, Is a writ used in case of maintenance. *Reg. Orig. fol. 182 & 189.* See *Maintenance*.

Manwotz, The price or value of a man's life, or head; for of old every man was rated at a certain price, according to his quality, which price was paid to the lord in satisfaction for killing him. *Cowell.*

Maps and Prints. See *Books*. And 8 *Geo. 2. c. 13.*

Mara, A mere, lake, or great pond, that cannot be drawn dry. *Mon. Angl. tom. 1. p. 666.*—*Castrum & manerium de Bolynbroke, cum foket, mara & marisco.* *Paroch. Antiq. 418.*

Marca, A certain quantity of money. See *Mark*.

Marcatu, The rent of a mark by the year, anciently reserved in leases, &c. *Et unum marcatum redditus de,* &c. *Mon. Angl. tom. 1. p. 341.*

March, Earldom of, grants of its lands are to be under the Great Seal. 4 *Hen. 7. c. 14.*

Marchers or Lords Marchers, Were those noblemen that lived on the *Marches of Wales or Scotland*; who in times past (according to *Camden*) had their laws, and *potestatem vite*, &c. like petty Kings; which are abolished by the *stat. 27 H. 8. c. 26.* and 1 *Ed. 6. c. 10.* In old records the lords *Marches of Wales* were styled *Marchianes de Marchia Wallia.* See 1 & 2 *P. & M. c. 15.*

Marches, (*marchia*, from the Germ. *march*, i. e. *limes*, or from the Ft. *marque*, viz. *Signum*, being the notorious distinction between two countries, or territories) Are the limits between *England and Wales*, or between us and *Scotland*; which last are divided into *West* and *Middle Marches*. 4 *Hen. 5. c. 7.* 22 *Ed. 4. c. 8.* 24 *Hen. 8. c. 9.* And there was formerly a court called the *Court of the Marches of Wales*, where pleas of debt or damages, not above the value of fifty pounds, were tried and determined; and if the council of the *Marches* held plea for debts above that sum, &c. a prohibition might be awarded. *Hill. 14 Car. 1. Cro. Car. 384.*

Marchet, (*marchetum*) *Consuetudo pecuniaria, in mancipiorum sive abus maritandis.* *Bract. lib. 2. cap. 8.* This custom with some variation, is observed in some parts of *England and Wales*, as also in *Scotland* and the *isle of Guernsey*: And in the manor of *Dinoror* in the county of *Caermarthen*, every tenant at the marriage of his daughter pays 10 s. to the lord, which in the *British* language is called *Gwaschwr Marched*, i. e. a maid's fee. The custom for the lord to lie the first night with the bride of his tenant was very common in *Scotland*, and the *North of England*: But it was abrogated by *Mahom* the Third, at the

instance of his Queen; and instead thereof a mark was paid to the lord by the bridegroom; from whence it is denominated *marcheta mulieris*. See *Black. Com. 2 V. 83.* and tit. *Maiden Rents*.

Marchlare, To adjoin to, or border upon. *Cowell.*

Marculus, A hammer, a mallet. *Id.*

Marden, alias *Mawarden* in *Herefordshire*, its meadow and pasture how provided for. 3 *Jac. 1. c. 11.*

Mares. See *Horses*.

Marshal. See *Marshall*.

Marcetum, (Fr. *marez*, a fen or marsh) Signifies marshy ground, overflowed by the sea or great rivers. *Co. Litt. 5.*

Marinarius, A mariner or seaman: And *marinarius capitaneus* was the Admiral or warden of the ports; which offices were commonly united in the same person; the word Admiral not coming into use, till the latter end of the reign of King *Ed. 1.* before which time the King's letters ran thus:—*Rex capitaneo marinariorum & eisdem marinariis salutem.* *Paroch. Antiq. 322.*

Who accountable for losses.

The mariners of a ship are accountable to the master; the master to the owners; and the owners to the merchant, for all damages by negligence, or otherwise. *Lex Mercat. or Merch. Compan. 66.* It has been held, that if goods are stolen from a master of a ship, whilst his ship is in the river of *Thames*, he is chargeable; though not when he is gone out of the realm, for a robbery committed at sea: But it is otherwise adjudged, where it was proved there was no negligence in the master. *Mitch. 22 Car. 2. 1 Mod. Rep. 85.*

What subjects a mariner, to the loss of his wages.

If a mariner be hired, and he deserts the service before the voyage is ended, by the law marine, and by the Common law, he shall lose his wages: And if a ship is lost by tempest, &c. the mariners lose their wages, as well as the owners their freight; and this is to oblige them to use their utmost endeavours to preserve the ship. *Leg. Oleron. 1 Sid. 179.*

Provision for a wounded mariner.

Where a mariner is wounded in the service of a ship, he is to be provided for, at the charge of the ship; and if his illness is very violent, he shall be left ashore with necessary accommodations, and the ship is not to stay for him; if he recovers, he is intitled to his full wages, deducting what the master expended for him. *Leg. Ol. c. 7.*

Of the recovery of mariners wages, and other matters, relative thereto.

The Common law hath jurisdiction for mariners wages; and in the Admiralty they may all join, 1 *Vent. 146.* Perforating mariners and receiving their wages; and forging letters of attorney, &c. or falsely taking out letters of administration, for the receipt of seamen's wages, incurs a forfeiture of 200 l. &c. *Stat. 9 & 10 W. 3. c. 41.* A late act hath ordained, That no master of a ship shall retain any seaman or mariner, without a contract in writing for his wages, on pain of forfeiting 5 l. And if a mariner refuse to proceed afterwards on the voyage, he shall forfeit his wages; and on complaint to a justice of peace, he may commit the offender to the house of correction, to be kept to hard labour, not exceeding thirty days, &c. Also mariners absenting from ships, incur a forfeiture of two days pay, for every day's absence, to the use of *Greenwich* hospital; and leaving the same before discharged in writing, forfeit one month's wages: But this shall not debar any mariner, belonging to a merchant ship, from entering into the King's service, &c. On the arrival of any ship, the master is to pay his men their wages in thirty days, or at the time of their discharge (deducting the penalties imposed) on pain of 20 s. *Stat. 2 Geo. 2. c. 36.* No persons shall pay to any mariner or common seaman, for a certain time, by any ways or means whatsoever, nor may any such mariner take more wages, than after the rate of 35 s. a month, on pain of forfeiting treble the value of the sum agreed; but

but this extends not to seamen hired in voyages, from any parts beyond the seas, to other parts there, or to Great Britain, by 14 Geo. 2. c. 35.

Provisions for shipwrecked seamen, &c.

Masters of British and Irish ships, trading to the chief ports of Spain, are to pay a certain tonnage duty, to persons there on the freight of goods and merchandise; as a contribution for relief of seamen shipwrecked; and other distressed subjects, &c. 9 Geo. 2. c. 25.

A like duty to be paid by all masters of vessels, &c. going from any part of his Majesty's dominions to Leghorn, for relieving mariners that are shipwrecked, and taken in war, by Stat. 10 Geo. 2. c. 24.

Of exemption from pressing, and relief of seamen's widows and children, &c.

Mariners serving in merchant ships, exempted from being pressed into the King's service, for two years from their first going to sea, and apprentices three years, &c. By the Stat. 20 Geo. 2. c. 38. for the relief and support of maimed and disabled seamen, and the widows and children of such as shall be killed, slain or drowned in the merchants service, reciting that there is no pension for seamen disabled, &c. in the merchants service, and that they are willing to allow sixpence per month out of their wages for the relief of such as shall be disabled, &c. and the widows and children of such as shall be killed, &c. a corporation is erected, by the name of the president and governors for the relief and support of, &c. who may purchase lands for building an hospital, and are to provide for disabled seamen therein, and to allow pensions to such as they shall think proper, their widows and children. Seamen, who have not served five years in the merchants service, and contributed sixpence per month, not to have any benefit of this act. Seamen in the merchants service to pay sixpence per month, and the master of the ship to retain the same, out of their pay, and pay it over to the receiver of the corporation. Mariners in the East-India company's service, are exempted from the duty, and excluded the benefit of this act. See 13 Geo. 2. c. 17. And see *Navy*.

Mariners, Wandering up and down, and who shall not settle themselves to work, or have not a testimonial under the hand of a justice, shewing where they landed, and whether to go, &c. Or having such testimonial, if they exceed the time limited more than fourteen days, not being sick in their passage home, &c. it is felony by the Statute 39 Eliz. c. 17. But if they cannot work for want thereof, the two next justices upon their complaint shall take order that they may be provided of work; or otherwise may tax the whole hundred, till relief shall be had. Stat. *Ibid.* And every parish may be charged for relieving mariners, as for maimed soldiers; and they shall be relieved by the treasurer of the county, &c. 43 Eliz. c. 3. See *Black. Com.* 4 V. 165.

Marine Forces, While on shore regulated and subjected to Martial law, and to be furnished with quarters, &c. 28 Geo. 2. c. 11. 29 Geo. 2. c. 6. 30 Geo. 2. c. 11.

Mariscus, Is a word used in *Domesday-Book*, and signifies *pains*, or *locus paludosus*, a marshy or fenny ground.

Maritagio amisso per defaultam, Is a writ for the tenant in *frank-marriage*, to recover lands, &c. whereof he is desorced by another. Reg. fol. 171.

Maritagium, That portion which is given with a daughter in marriage. See *Gloss. v. In alio modo accipitur des secundum leges Romanas, secundum quas proprie appellatur dos, id quod cum muliere datur viro, quod vulgariter dicitur maritragium.* Lib. 2. c. 18.

Maritagium, or marriage, strictly taken, is that right which the lord of the fee had, to marry the daughters of his vassals after their death; Others tell us, it was that profit which might accrue to the lord, by the marriage of one under age, who held his lands of him by knight's service. This seems plain by the Statute of Merton, c. 7. Maritagium est quod qui infra matrem est, de vero jure pertinet ad dominum fidei.

Maritagium habere, To have the free disposal of an heir in marriage, a favour granted by the Kings of

England, while they had the custody of all wards or heirs in minority. Corwell.

Maritime, (maritimus) Signifies sea affairs: any thing belonging to the sea.

Maritima Angliæ, The profit and emolument arising to the King from the sea, which anciently was collected by sheriffs; but it was afterwards granted to the Lord Admiral. Richardus de Lucy dicitur habere maritimam Angliæ. Pat. 8 H. 3. m. 4.

Mark, (marca, Sax. *mearc*.) Of silver, is now thirteen shillings and four pence: Tho' in the reign of Hen. 1. it was only six shillings and a penny in weight; and some were coined, and some only cut in small pieces; but those that were coined, were worth something more than the others. In former times, money was paid, and things valued oftentimes by the mark; Assignavimus Regin. pro dote sua mille marcas argenti annuatim, 13 s. 4 d. computatis pro marca. Patm. 3 Job. m. 17. We read of a mark of gold of eight ounces, of 6 l. in silver; or as others write 6 l. 13 s. 4 d. Stow's Annal. 32. Rot. Mag. Pipæ, Ann. 1 Hen. 2.

Mark to Goods, Is what ascertains the property or goodness thereof, &c. And if one man shall use the mark of another, to the intent to do him damage, action upon the case lieth. 2 Cro. 471. A penalty is inflicted in this case, by 23 Eliz. c. 8.

Market, (mercatus, from *mercando*, buying and selling) Is the liberty by grant or prescription, whereby a town is enabled to set up and open shops, &c. at a certain place therein, for buying and selling, and better provision of such victuals as the subject wanteth: it is less than a fair; and usually kept once or twice a week. Brad. lib. 2. cap. 24. v. Inst. 220. And according to Bradon, one market, ought to be distant from another sex leucas (vel miliaria) & dimidium, & tertiam partem dimidia: If one hath a market by charter or prescription, and another obtains a market near it, to the nuisance of the former; the owner of the former may avoid it, 1 Inst. 406. Also where a man has a fair or market, and one erects another to his prejudice, an action will lie: And so it is said of a ferry, 2 Roll. 140. 1 Mod. 69.

The fair or market is taken for the place where kept: And formerly it was customary for fairs and markets to be kept on Sundays; but by statute 27 H. 6. c. 5. no fair or market to be kept upon any Sunday, or upon the feasts of the Ascension, Corpus Christi, Good Friday, All Saints, &c. except for necessary victuals, and in time of harvest: And they ought not to be held in church yards, by 13 Ed. 1. c. 6. All fairs are markets: And there may be a market without an owner; tho' where there is an owner, a butcher cannot prescribe to sell meat in his own house upon a market day; for the market must be in an open place, where the owner may have the benefit of it. 4 Inst. 272. No market shall be held out of the city of London within seven miles: Tho' all butchers, victuallers, &c. may hire stalls and standings in the markets there, and sell meat and provisions, on four days in a week, &c. Cit. lib. 101. In the country, things sold in the markets are to be in the usual place appointed for the sale: But in London every shop is a market overt, for such goods as are put there to be sold, by the trade of the owner; tho' if the sale be in a warehouse, and not publickly in the shop, the property is not altered. 5 Rep. 83. Moor 300. Sed quæ? Sale upon a Sunday, tho' in a fair or market, will not alter the property of the thing sold. This means as to goods stolen, and not the property of the person selling, and which he hath not any legal authority to sell. See *inst.* Persons that dwell in the country, may not sell wares by retail in a market town, but in open fairs: But countrymen may sell goods in gross there. Stat. 1 & 2 P. & M. c. 7.

All contracts for any thing vendible in markets, &c. shall be binding, and sales alter the property, if made according to the following rules, viz. 1. The sale is to be in a place that is open, so that any one that passeth by may see it, and be in a proper place for such goods. 2. It must be an actual sale, for a valuable consideration. 3. The buyer is to know, that the seller hath a wrongful possession of the goods sold. 4. The sale must not be fraudulent, betwixt two, to bar a third person of his right. 5. There is to be a sale, and a contract, by persons able to contract. 6. The contract must be originally, and wholly in the market overt. 7. Toll ought to be paid, where

where required by statute, &c. 8. The sale is not to be in the night, but *between sun and sun*; (tho' if the sale be made in the night it may bind the parties.) A sale thus made shall bind the parties, and those that are strangers, as have a right. 5 Rep. 83.

But it shall not bind the King, for any of his goods sold in market overt; tho' regularly it bindeth infants, feme covert, men beyond sea, and in prison, persons *Non compos*, &c. 2 Inst. 713. And yet if a sale be made by an infant, or feme covert, where they appear, or are known to be such, (except by a woman covert for such things as she usually trades for, by her husband's consent) it bindeth not. 5 Rep. 83. Sale of goods stolen in London to brokers, &c. alters not the property. 1 Jac. 1. c. 21. And the statutes which ordain, that toll-takers shall be appointed in markets and fairs, to enter in their books the names of the buyers, sellers, vouchers and prices of horses sold, and deliver a note thereof to the buyer, &c. secure the property of stolen horses to the owner, although sold in a fair or market, if he repays what was *bona fide* paid for the horse. 2 & 3 P. & M. c. 7. and 31 Eliz. c. 12.

Every one that hath a market, shall have toll for things sold, which is to be paid by the buyer, and by ancient custom may be paid for standing of things in the market, tho' nothing be sold; but not otherwise: *A piepowder court is incident as well to a market as a fair*; and proprietors of markets ought to have a pillory and tumbrel, &c. to punish offenders. 2 Inst. 221. 4 Inst. 272. 1 Inst. 281. Keeping a fair or market, otherwise than it is granted, as by keeping them upon two days, when only one is granted; or on any other day than appointed; extorting toll or fees where none are due, &c. are causes of forfeiture. Finch 164. And if a person erects stalls in a market, and does not leave room for the people to stand and sell their wares, so that they are thereby forced to hire such stalls, the taking money for the use of them, in that case, is extortion. 1 Ld. Raym. 149.

Market-Towns, Penalty on persons living in the country, and selling by retail in market-towns. 1 & 2 P. & M. c. 7.

Marktzeid, or **Marktzeid**, Signifies toll of the market; the word *Zeid* denoting a payment—*Et valent per ann. le shreteward & le marktzeid, xviii's in omni terra pertinen. ad honorem de Haulton. Ex Cod. MS. in Bibl. Cotton.*

Mark-penny, Was a penny anciently paid at the town of Maldon, by those who had gutters laid or made out of their houses into the streets. Hill. 15 Ed. 1.

Marlborough, The honour of *Woodstock* granted to the Duke of Marlborough in reward of the victory at *Blenheim*, &c. 3 & 4 Ann. c. 6. The honours settled upon his posterity, 5 Ann. c. 3. An annuity from the post-office settled on the Duke of Marlborough, 5 Ann. c. 4. For paying the arrears due for building *Blenheim-house*, 1 Geo. 1. st. 1. c. 12. *sect.* 34.

Marle, (*marla*, from the Sax. *margel*, i. e. *medullia*) Otherwise called *Malin*, is a kind of earth or mineral; which in divers counties of this kingdom is used to fertilize land. 17 Ed. 4. *cap.* 4.

Marleberge, Statutes made there, 52 Hen. 3.

Marlerium, or **Marlicum**, A *marle pit*.—*Sciatis quod habens libertatem in marleris, &c. Et quod capiant marlam ad terram suam marland. Chart. Roger de la Zouch.*

Marque, (from the Saxon *mearec signum*.) We use the word in the same sense to this day, when we say, Give such a thing a *mark* or sign; but in our ancient statutes it signifies as much as *reprisals*, as in stat. 4 H. 5. *cap.* 7. where *marque* and *reprisals* are used as *synonyma*; and letters of *marque* are found, in the same signification, in the same chapter. Cowell.

The law of *marque* in what cases to be used, 27 Ed. 3. st. 2. c. 17. Letters of request and letters of *marque* shall be granted by the Chancellor to those that are grieved against us, 4 Hen. 5. c. 7. Goods taken on board enemies ships, to be lawful prize, though belonging to foreigners in amity, 14 Hen. 6. c. 7. See *Reprisal*. See *Black. Com.* 1 P. 258.

Marquess, or **Marquis**, (*Marchio*) Is now a title of honour before an *Earl*, and next to a *Duke*: And by the

opinion of *Hotoman*, the name is derived from the German *March*, signifying originally *Cyffus Limitis*, or *Comes & praefectus limitis*. In the reign of King *Rich. 2.* came up first the title of *Marquis*, which was a governor of the marches; for before that time, those that governed the marches were called commonly *Lords Marches*, and not *Marquesses*, as judge *Doderidge* has observed in his law of *Nobility and Peerage*. *Seldon's Mare claus. lib. 2. c. 19.* A *Marquis* is created by patent; and anciently by *circumference of sword, mantle of state, &c.*

Marriage, (*maritgium*) Is a civil and religious contract, whereby a man is joined and united to a woman, for the ends of procreation; and signifies not only the lawful joining of a man and wife, but also the interest of bestowing a *ward* or widow in *marriage*, in our ancient law. *Magn. Chart. c. 6.*

Maritgium is likewise applied to land given in *marriage*; and that portion which the husband receives with his wife. *Bract. lib. 2. cap. 34. Glanv. lib. 7. c. 1.* In this sense there are divers writs, *De maritagio, &c. Reg. 171.*

There's further a term called *Duty of Marriage*, signifying an obligation on women to *marry*; who formerly held lands, charged with personal services, in order to render them by their husbands. *Cowell.*

Marriage is generally the conjunction of man and woman, in a constant society, and agreement of living together; 'till the contract is dissolved by death or breach of faith, or some notorious misbehaviour, destructive of the end for which it was intended. It is one of the rights of human nature; and was instituted in a state of innocence, for preservation thereof: And nothing more is requisite to a compleat *marriage*, by the laws of *England*, than a *full, free, and mutual consent between parties*, not disabled to enter into that state, by their near relation to each other, infancy, precontract or impotency.

As to the solemnization of *marriage*, this is regulated by the laws and customs of the nation where we reside; and every state allows such privileges to the parties as it deems expedient, and denies legal advantages to those who refuse to solemnize their *marriage*, in the manner the state requires; but they cannot dissolve a *marriage* celebrated in another manner, *marriage* being of divine institution, to which only a full and free consent of the parties is necessary. Before the time of *Pope Innocent III.* there was no solemnization of *marriage* in the church; but the man came to the house where the woman inhabited, and led her home to his own house, which was all the ceremony then used. See 1 *Roll. Abr.* 359. 1 *Sid.* 64.

Marriages by *Romish Priests*, whose orders are acknowledged by the church of *England*, are deemed to have the effects of a legal *Marriage* in some instances; but *marriages* ought to be solemnized according to the rites of the church of *England*, to intitle to the privileges attending legal *marriage*, as *dower*, thirds, &c. And by the statute, popish recusants convicted, married otherwise than according to the orders of the church of *England*, by a minister lawfully authorized, and in some open church, &c. shall be disabled, the man to be tenant by the curtesy, and the woman to claim her *dower*, jointure, or widow's estate, &c. 3 Jac. 1. c. 5.

Marriage at Common law, is either in right, or in possession; and *marriage de facto*, or in reputation, as among *Quakers*, &c. is allowed to be sufficient to give title to a personal estate. 1 *Leon.* 53. *Wood's Inst.* 59. But in the case of a *Disseiner*, married to a woman by a minister of the congregation, who was not in orders; it was held that when a husband demands a right to himself as husband, by the Ecclesiastical law, he ought to prove himself a husband by that law, to intitle him to it: And notwithstanding the wife, and the children of this *marriage*, may intitle themselves to a temporal right by such *marriage*; yet the husband shall not, by the reputation of the *marriage*, unless he hath a substantial right: And this *marriage* is not a mere nullity, because by the law of nature the contract is binding; for tho' the positive law of man ordains *marriage* to be made by a priest, that law only makes this *marriage* irregular, and not expressly void. 1 *Salk.* 119. But this is, in some cases, altered by the *marriage*

riage act, viz. 26 Geo. 2. c. 33. The substance of which see *infra*. Marriages contracted between lawful persons, being solemnized in the face of the church, and consummated, were declared valid, notwithstanding any pre-contract, not consummated, by Stat. 32 H. 8. c. 38. But this was repealed by 2 & 3 Ed. 6. c. 23. And all marriages solemnized by justices of peace during Oliver's usurpation, were ordained to be good and valid, as if solemnized according to the rites and ceremonies of the church. Stat. 12 Car. 2. c. 33.

The marriages that are made in an ordinary course, are to be by asking in the church, and other ceremonies appointed by the book of common prayer. 23 Ed. 6. c. 21. By the ordinances of the church, when persons are to be married, the banns of matrimony shall be published in the church where they dwell three several Sundays or holidays, in the time of divine service; and if at the day appointed for their marriage, any man do alledge any impediment; as pre-contract, consanguinity, or affinity, parents not consenting, where under age, &c. why they should not be married, (and become bound with sufficient oaths to prove his allegation,) then the solemnization must be deferred until the truth is tried. Rubrick. And no minister shall celebrate matrimony between any persons without a faculty or licence, except the banns of marriage have been first published as directed, according to the book of Common Prayer, on pain of suspension *per triennium*; nor shall any minister, under the like penalty, join any persons in marriage, who are so licensed, at any unreasonable times, or in any private place, &c. Canon 62. Also on the granting of licences, bond is to be taken, that there is no impediment of pre-contract, consanguinity, &c. Nor any suit or controversy depending in any Ecclesiastical court, touching any contract of marriage of either of the parties, with any other; that neither of them are of better estate, than is suggested; and that the marriage be openly solemnized in the parish church where one of the parties dwelleth, or the church mentioned in the licence, between the hours of eight and twelve in the morning: Oath is to be likewise made before one of the Doctors of the Commons, that the man and woman live at such a place, are willing to marry, and as to there being no impediment, &c. Licences to the contrary shall be void; and the parties marrying are subject to punishment as for clandestine marriages. Can. 102.

But notwithstanding the canons aforementioned, marriages, especially of persons of quality, are frequently in their own houses, out of canonical hours, in the evening, and often solemnized by others in other churches, than where one of the parties lives, and out of time of divine service, &c.

Parsons, vicars or curates, marrying any persons, or employing other ministers to do it, without publishing the banns of matrimony according to law, or without a licence for the marriage first had and obtained, shall forfeit 100 l. the person so married 10 l. and parish clerks, &c. assisting, knowing it to be so, 5 l. Stat. 2 & 3 W. 3. c. 35. And by a subsequent act, the preceding statute is confirmed; and extends to privileged places; so that if a parson offending be a prisoner in any place, on conviction he shall be removed to the county gaol, there to remain in execution charged with the said penalty of 100 l. &c. 10 Ann. c. 19. Before these statutes, an information was exhibited against certain persons for combination, in procuring a clandestine marriage in the night, without banns or licence, between a maid-servant and a young gentleman who was heir to an estate, the person being in liquor; and they were fined 100 marks, and ordered to be committed till paid; but it doth not appear that the marriage could be made void. Cro. Car. 557.

Marriages are prohibited in Law, and on fasting days, because the mind attending them is not suitable to the humiliation and devotion of that time; yet persons may marry with licences in Law, altho' the banns of marriage may not then be published. And formerly, in popish times, priests were restrained from marriage, and their issue accounted bastards, &c. But on the Reformation, laws were made, declaring that the marriage of priests should be lawful, and their children legitimate; tho' the preambles to those statutes set forth, that it would be better

for priests to live chaste, and separate from the company of women, that they might with the more fervency attend the ministry of the gospel. 2 & 3, and 5 & 6 Ed. 6.

All persons of the age of consent to marry, (viz. a man of fourteen and a woman at twelve) who are not prohibited by the Levitical degrees, or otherwise by God's law, may lawfully marry; i. e. subject to the regulations of 26 Geo. 2. c. 33. but marriages made within the degrees, are incestuous and unlawful. 1 Inst. 24. 2 Inst. 684. Marriage is forbidden to those who are of kindred *lineally*; also between such as are kin in the transverse or collateral line, until the fourth degree be past. So in respect of affinity, which arises betwixt those that are married and the kindred of one of them, as between the husband and the relations of the wife; but this prohibits marriage only to the persons contracted, &c. for the consanguinity to my wife, are of affinity to me only, and not to my brothers, or children by a former wife. 2 Shep. Abr. 414. The son of a father by another wife, and daughter of a mother by another husband, cousin Germans, &c. may marry with each other: a man may not marry his brother's wife, or wife's sister; an uncle his niece, an aunt her nephew, &c. But if a man take his sister to wife, they are baron and feme, and the issue are not bastards, till a divorce. Lewis. c. 18, 20. 2 Inst. 683. 1 Roll. Abr. 340, 357. 5 Mod. 448.

A libel was exhibited against a person for marrying his wife's sister; the defendant suggested for a prohibition, that his wife was dead, and he had a son by her, to whom an estate was descended as heir to his mother; yet the ecclesiastical court proceeded to annul the marriage, and to bastardise the issue: but a prohibition was granted quoad the annulling the marriage, and bastardising the issue, and giving leave to proceed to punish the incest. 2 Salk. 543. 4 Mod. 182. A person may not marry his sister's daughter: and a sister's bastard daughter is said to be within the Levitical law of affinity; it being morally as unlawful to marry a bastard as one born in wedlock, and 'tis so in nature; and if a bastard doth not fall under the prohibition *ad penumbram sanguinis non accedat*, a mother may marry her bastard son. 5 Mod. 168. 2 Nelf. Abr. 1161.

There are persons within the reason of the prohibition of marriage, tho' not mentioned, and must be prohibited; as the father from marrying his daughter, the grandson from marrying the grandmother, &c. 2 Nelf. *ibid*. Vaugh. 321.

The temporal courts by the Stat. 28 H. 8. c. 7. are to determine what marriages are within or without the Levitical degrees; and prohibit the spiritual courts if they impeach any persons, for marrying within these degrees. Vaugh. 206. 3 Vent. 9. And it is said, were it not for that statute, we should be under no obligation to observe the Levitical degrees. *Ibid*. When there is a perpetual impotency; fear or imprisonment, so that there can be no consent; or where persons are pre-contracted; a man or a woman have a wife or husband living, &c. in such cases the marriages are to be adjudged void, as prohibited by God's law. 1 Inst. 235. 2 Inst. 687.

The marriage of a lunatic, or one not of sound mind, is also now void. 15 Geo. 2. c. 30. And altho' matrimonial causes have been for a long time determinable in the ecclesiastical courts, they were not so from the beginning, for as well causes of matrimony as testamentary, were civil causes, and appertained to the jurisdiction of the civil magistrate, until King allowed the clergy cognisance of them. Davie's Rep. 51. If persons married are *infra annos nuptiales*, the ecclesiastical judges are to judge as well of the assent, whether sufficient, &c. as of the first contract; and where they have cognisance, the Common law judges ought to give credit to their sentences, as they do to our judgments. 7 Rep. 23.

Loyalty or invalidity of marriage is always to be tried by the bishop's certificate; or inquisition taken before him, and examination of witnesses, &c. Dyer 303. If the right of marriage come naturally in question, as in dower, &c. the jurisdiction of marriage is to be tried by the bishop's certificate; but in a personal action, where the right of marriage is not in question, it is triable by a jury.

a jury at Common law. 1 *Lev.* 41. Whether a woman is married, or she is the wife of such a person, is triable by a jury: and in personal actions it is right to lay the matter upon the fact of the marriage, to make it issuable and triable by a jury, and not upon the right of the marriage, as in real actions and appeals. 1 *Inst.* 112. 3 *Salk.* 64. If the marriage of the husband is in question, marriage in right ought to be, and that shall be tried by certificate. 1 *Leon.* 53. But if on covenant to do such a thing to another upon the marriage of a man's daughter, the party alleges that he did marry her, &c. this shall be tried *per pais*; for the marriage is only in issue, and not whether he was lawfully espoused. *Cro. Car.* 102.

Conditions against marrying generally, are void in law: and if a condition is annexed to a legacy; as where money is given to a woman, on condition that she marries with consent of such a person, &c. such a condition is void by the Ecclesiastical law, because the marriage ought to be free without coercion; yet it is said it is not so at the Common law. 2 *Nels. Abr.* 1162. *Poph.* 58, 59. 2 *Lill.* 192.

If persons are married before the age of consent, they may at that age disagree and marry again, without any divorce; tho' if they once give consent when at age, they cannot afterwards disagree; and where they are married before, there needs not a new marriage, if they agree at that age. 1 *Inst.* 33. 2 *Inst.* 182. A man at the age of consent, and the woman not; or the woman of age, and the man not; he or she may disagree to the marriage at the other's coming of age to consent, as well as the other, for there is a mutual power of disagreement. 3 *Inst.* 88. 6 *Rep.* 22. 1 *Danv. Abr.* 699. A woman cannot disagree within her age of twelve years, till which the marriage continues; and before her disagreement is void. 1 *Danv.* 699. Tho' if a man marries a woman under that age, and afterwards she within her age of consent, disagrees to the marriage, and at her age of twelve years marries another; now the first marriage is absolutely dissolved, so that he may take another wife; for altho' the disagreement within the age of consent, was not sufficient, yet her taking another husband at the age of consent, and cohabiting with him affirms the disagreement, and so the first marriage is avoided. *Moor* 575, 764. If after disagreement of the parties, at the age of consent they agree to the marriage, and live together as man and wife, the marriage hath continuance, notwithstanding the former disagreement; but if the disagreement had been before the ordinary, they could not afterwards agree again to make it a good marriage. 1 *Danv. Abr.* 699.

If either party be under seven years of age, contracts of marriage are absolutely void; but marriages of Princes made by the state in their behalf, at any age, are held good; tho' many of those contracts have been broken through. *Swinb. Matrimon. Contr.*

A man contracts to marry with A. and after marries B. whereupon A. sues him in the Spiritual court, and sentence is given that he shall espouse A. and cohabit with her, which he doth, and they have issue, such issue shall inherit, tho' there was no divorce from the marriage of B. *Moor* 169. 1 *Danv. Abr.* 700.

By the laws of England, where a mutual contract of marriage in words of present time can be proved, the Ecclesiastical courts will compel the parties to solemnize their marriage, altho' either or both of them are married elsewhere, and children have been the fruits of it; and the children of such marriages are deemed bastards. *Reed. Stat.* 4 Vol. 192. If the contract is made in words of future time, and this is not carried into execution by consummation, &c. and parties marry elsewhere, the marriage is good. A contract of marriage in the present time is when it is said, I marry you; You and I are man and wife, &c. And such contract is a marriage, and not releasable: but a contract of marriage in future time, which is, where it is said, I will marry you, or I promise to marry you, &c. is releasable. *Easter Term*, 2 *Ann. B. R. Holt Ch. Just.* held, that if a contract was in words of future time, as I will take thee, &c. and the man does take her accordingly, and cohabit with her, 'tis a marriage; and the Spiritual Court cannot punish for fornication. *Mich.* 5 *Ann.* 2 *Salk.* 477, 478. And it has been adjudged on a promise of

future marriage, if the parties afterwards lie together, the contract passes thereby into a real marriage, in construction of law. *Swinb.* I will take, and I do take, are words of contract in the future and present time; and the words, I will take thee from henceforth, &c. are as much as I do take thee, and an absolute marriage: If it is demanded of a man, whether he will take the woman to his wife, and he answers, I will; and it is demanded of the woman, if she will take the man to her husband, and she answers, I will; by this marriage, and not spousals, is said to be contracted. *Ibid.* It is not necessary in contracts of marriage, that both parties use the same words or expressions; for if one party says, I will marry thee, and the other answers, I am content, &c. hereby spousals de futuro are contracted: and if a man say to a woman, I promise to marry thee, and if thou art content to marry me, kiss me, or give me thy hand, if the woman do kiss or give her hand, spousals are contracted. *Swinb. p.* 210. Also if a ring be solemnly delivered by a man, and put on the woman's fourth finger; if she accepts and wears it, without any words, the parties are presumed to have mutually consented to marriage. *Ib.* And where the promise of the man is proved, but no actual promise on the woman's side; if she carry herself as one consenting and approving the promise of the man, it is evidence that the woman likewise promised. *Pasch.* 3 *Ann.* 3 *Salk.* 16.

In contracts, it is not necessarily required, that the parties contract matrimony at the same instant, by answering one another; but if there be some distance of time betwixt the promise of the one and the other, the contract may be good, if the party first promising continues in the same mind, until the other party hath promised; but where persons are under age to consent, this is not matrimony, but spousals, if it be either, because at their ages they may dissent; and when the words of the contract are only conditional on one side, and on the other absolute; or if the words are spoken in jest, they are not obligatory. *Swinb.* If a father or mother promise marriage for their child, the silence of the child being present and hearing the same, hath been adjudged a consent to the contract. *Ibid.* 69. And contracts of marriage may be by absent parties by mediation of their proctors, or by messengers, or letters; when by proxy, it is by special power of attorney to contract matrimony or spousals for the party in his name, with such a woman, &c. And the proctor says, I do contract matrimony with thee, in the name of such a one, whose proctor I am, &c. or that such a man doth contract matrimony with thee by me his proctor; to which the woman answers, I do take him to my husband, by thee being his proctor; and both parties are to continue in the same mind until the contract is finished, for before that the proctor may be revoked, and then the contract will be void. *Swinb.*

A promise or contract of marriage, by messenger or letter is good; unless it appear the party dissents before the other consents thereto, and the mutual consent of the other party ought to be sent immediately, or shortly after, or it will not be good. *Ibid.*

Of the new statute relative to marriage.

By the Stat. 26 *Geo. 3. c.* 33. All marriages are to be either in pursuance of banns published, of a licence, or of a special licence. A marriage in pursuance of banns must be solemnized in one of the churches or chapels, where the banns were published. A marriage in pursuance of a licence (except a special licence) must be solemnized in such church or chapel in which the licence shall be granted; all marriages solemnized in any other place than a church or such chapel, unless by special licence, or without publication of banns or a licence of marriage from a person having authority to grant the same, shall be void; and all marriages solemnized by licence, where either of the parties, not being a widower or widow, shall be under the age of 21 years, which shall be had without the consent of father, guardian, &c. shall be void. No parson, vicar, &c. shall be obliged to publish banns of matrimony, unless the persons to be married shall seven days before the time required for the first publication, deliver to him a notice in writing of their true names, and of the house or houses of their respective abode, within such parish, &c. and of the time

time they have dwelt in such house or houses. All banns shall be published upon three Sundays next preceding the marriage in the parish church, &c. where the persons to be married shall dwell. If they dwell in divers parishes, then in the parish church, &c. where each of them shall dwell; if in an extraparochial place, then in the parish church, &c. adjoining.

After solemnization of any marriage under a publication of banns, it shall not be necessary in support of such marriage, to give any proof of the actual dwelling of the parties in the respective parishes, &c. wherein the banns of marriage were published, nor shall any evidence be received to the contrary, in any suit touching the validity of such marriage. No licence of marriage shall be granted by any archbishop, bishop, &c. to solemnize any marriage in any other church, &c. than in the parish church, &c. within which, the usual place of abode of one of the parties shall have been, for four weeks immediately before the granting such licence. If both or either of the parties shall dwell in an extraparochial place, then in some parish church adjoining: nothing herein contained shall extend to prevent the archbishop of Canterbury from granting special licences.

Where any marriage is by licence, it shall not be necessary to give any proof, that the usual place of abode of one of the parties, for four weeks as aforesaid, was in the parish, &c. where the marriage was solemnized; nor shall any evidence be received to the contrary, in any suit touching the validity of such marriage: All marriages by licence, where either of the parties, not being a widower, or widow, shall be under the age of 21 years, which shall be had without the consent of his or her father if living, or if dead, of his or her guardian, and if no guardian, of his or her mother if living and unmarried; and if no mother living and unmarried, then of the guardian appointed by the court of Chancery, shall be void. (If guardian or mother be non compos mentis, beyond sea, or refuses to consent, and the Lord Chancellor shall declare it to be a proper marriage, that shall be as effectual as if the guardian, or mother had consented.) All marriages shall be solemnized in the presence of two or more witnesses besides the minister. No minister, &c. solemnizing marriage between persons, both or one of whom shall be under the age of 21 years, after banns published, shall be punishable by ecclesiastical censure for solemnizing such marriage, without consent of parents or guardians, whose consent is required by law, unless such parson, &c. shall have notice of such dissent. And in case such parent or guardian shall openly declare in the church, &c. at the time of such publication, his dissent to such marriage, such publication of banns shall be void.

If any person shall solemnize matrimony in any other place than a church, &c. where banns have been usually published, unless by special licence, or shall solemnize matrimony without publication of banns, unless licence of marriage be first had and obtained, from some person having authority to grant the same, every such person knowingly so offending, shall be transported for 14 years. The prosecution to be within three years. No suit shall be in any ecclesiastical court to compel a celebration of marriage, by reason of any contract whether *per verba de presenti*, or *de futuro*. This act not to extend to Jews, Quakers, or Scotland, nor to the marriages of any of the Royal Family.

Of the effect of marriage, by operation of law.

By marriage with a woman, the husband is intitled to all her estate real and personal; and the effects of marriage are, that the husband and wife are accounted one person, and he hath power over her person as well as estate, &c. 1 Inst. 357. The marriage of two persons both knit them so fast together, that the husband cannot give any thing to his wife by deed, during the coverture; but by will and devise he may. 2 Inst. 11. But notwithstanding marriage, in some cases the husband and wife are considered as divers persons; and so one of them may perform an act to another: as when they do it *in iure dicitur*, where a feoffment is made to one of them, and letter of attorney to the other to give livery to the feoffee, &c. Perk. Sect. 169. And it is the same, if the wife have power to sell land by

will; she may sell the same to her husband; and being an executrix, may pay a legacy to him: 1 Inst. 187. All the goods and chattels personal of the wife, are by the marriage given to the husband by law; so that he may dispose of, sell or keep them whilst he lives, and give them away when he dies: and that whether he survives her, or not. 1 Inst. 299. And all the chattels real, she hath in possession in her own right, by the intermarriage the man shall have, and these by act executed in his life-time he may give, grant, &c. and in case he survives her, he will have them absolutely. 2 Shep. Abr. 419 Co. L. 46. b. 300. a. 351. a.

But the husband cannot devise a chattel real, which he had in right of his wife. Co. Lit. 351. a. 1 Rol. 344. l. 15. Pl. Com. 418. b. R. Poph. 5.

If the husband does not dispose of the chattel real, of his wife, and she survive him, she shall have it. Co. L. 46. b. 351. a. 1 Rol. 349. c.

It is observed, that altho' all the husband hath before the coverture is his own, be it goods or lands; and the wife has immediately nothing therein, yet all that is the wife's by their marriage together, is made the husband's. Ibid. The husband shall be tenant by the curtesy of the wife's land, after her death, where he hath issue by her, that might inherit; and the wife shall have dower in her husband's lands, after the death of the husband, &c. Litt. 35. 36. Also as the wife doth partake of the name, so of the nature and condition of the husband by the marriage; for if she be an Earl's wife, she is a Countess, if a Knight's wife, a Lady; and if he be an alien and made a denizen, the wife is so likewise. 39 H. 6. 45. 4 H. 7. 31. Bre. 499.

There being divers advantages by marriage, to the man and the woman; therefore on promise of marriage, damages may be recovered, if either party refuse to marry; but the promise must be mutual on both sides, to ground the action. 1 Salk. 24. And if there be reciprocal promises of marriage, as the woman's promise to the man is a good consideration to make his obligatory; so his promise to her is a sufficient consideration to make hers binding: and though no time for marriage be agreed on, if the plaintiff aver that he had offered to marry the woman, and she refused, action lies against her, and damages are recoverable. Caribow 467. But that averment must be proved.

If a man and a woman make mutual promises of intermarriage, and the man gives the woman 100 l. in satisfaction of his promise of marriage, it is a good discharge of the contract. Mod. Caf. 156. By Statute 29 Car. 2. c. 3. No action shall be brought upon any agreement on consideration of marriage, except it be put in writing, and signed by the party to be charged, &c. And where an agreement relating to marriage must be in writing after a year; and when it need not, vide Skinn. 353. Observe the words, they are, upon any agreement on consideration of marriage, which is essentially different from mutual promises of the parties, to marry each other. —And which latter, are not within the statute. A promise of a father by letter to give money in marriage with his daughter, is a sufficient promise in writing, within the statute. 2 Vent. 361. Where a person promises to give his daughter wedding clothes on the marriage, she shall have two suits, one for the wedding day, and the other for the time of feasting afterwards, according to the dignity of the person. Cro. Car. 53.

Contracts and bonds for money to procure marriage between others, have been held void in equity; and where ever a parent or guardian insists upon private gain, on the marriage of children; covenant or obligation for it, shall be set aside in Chancery as extorted from the husband. 3 Lev. 41. 1 Salk. 156.

If a man before marriage gives bond and judgment to the wife, to leave her worth 1000 l. at his death, in consideration of a marriage portion, this shall be made good out of the husband's estate, and be satisfied before any debts; provided a judgment be not obtained against him, with her consent. An intended husband, in consideration of a marriage, covenanted with the intended wife, that if she would marry him, and she should happen to survive him, he would leave her worth 500 l. The marriage took effect, and the wife survived, and he did not leave her

her worth that money; she married a second husband, and he brought an action of debt against the administrator of the first husband for the 500*l*. To which it was objected, that this being a personal action, it was suspended by the marriage, which was a release in law, and so extinct; but the plaintiff had judgment, for the action is not suspended, because during the coverture, there was no cause of action: Nothing in this case is due whilst the coverture takes place, and the debt arises by the death of the husband. *Palm.* 99. 2 *Sid.* 58.

A bond was given by a man, reciting, he was to marry A. S. and that if the marriage took effect, and he did survive her, then within three months after her decease, he would pay to the obligee 300*l*. for such uses as the said A. S. by any writing under hand and seal, subscribed and published in the presence of two witnesses should direct and appoint; this marriage bond was adjudged good. 3 *Cro.* 376. *Yelv.* 226, 227. A man and a woman intending to intermarry, he enters into articles with her before their marriage, by which he agreed to settle such lands upon her, &c. And in pursuance of those articles she marries him; if he dies before any settlement made, the widow in equity shall have the articles executed, and hold the lands for life, &c. 2 *Ventr.* 243.

In case articles are entered into before marriage, and afterwards a settlement is made different therefrom, the court of Chancery will set up the articles against it; but where both are finished before the marriage had, at a time when all parties are at liberty, such settlements will be taken as a new agreement between them: This is the general rule, unless the deed of settlement is expressly mentioned to be made in pursuance of the marriage articles, &c. whereby the intent may still appear to be the same. *Falbot's Cas.* 20. Articles of marriage were made for settling lands on the husband and wife, and the heirs male and female of the body of the husband by the wife, &c. and a settlement was drawn contrary to these articles, long after which the husband suffered a recovery, and devised the land to others; it was here held to be no bar to the heirs female, who were decreed to have the land. 2 *Peera Williams* 349, 355. Yet it is said, where relief is to be given in Equity on a settlement, it must be only to the persons who claim as purchasers, as the first and other sons; and all remainders after to the husband's heirs of his body, or his right heirs, are voluntary and not to be aided. *Abr. Cas. Eq.* 385.

Tho' a term to raise daughters portions, payable at the age of eighteen or day of marriage in a marriage settlement is limited in remainder, to commence after the death of the father generally; or if it be in case he die without issue male of his wife, and she dies first without such issue, leaving a daughter, &c. In equity the term is saleable during the life-time of the father, when the daughter is eighteen years old, or married; because every thing hath happened and is past which is contingent, for 'tis impossible there should be issue male of the wife when she is dead; and as to the father's death, that is not contingent, but certain, by reason all men must die: But if there is a contingency not yet happened, as if the daughters are to be unmarried, or not provided for at the time of the father's death, &c. it is otherwise. 1 *Salk.* 159.

Upon marriages, the settlements generally made of the estate of the husband, &c. are to the husband for life, after his death to the wife for life for her jointure, and to their issue in remainder, with limitations to trustees, to support contingent uses, and leases, to trustees for terms of years, to raise daughters portions, &c. And they are made several ways, by lease and remainder, fine and recovery, covenant to stand seised to uses, &c. *Accomp. Cases.* 143. These settlements the law is ever careful to preserve, especially that part of them which relates to the wife; of which she may not be divested, but by her own free: And if a woman about to marry, to prevent her husband's disposal of her land, conveys it to friends in trust, and they with the husband after marriage make sale of the same; The court of Chancery will decree the purchaser to reconvey to her. *Tobill* 43.

Where a woman on marriage, by the man's consent makes over her estate, to be at her own disposal, the product or increase thereof, she can also dispose of: And if

the wife has a separate maintenance settled on her by the husband; she may by writing in the nature of a will, give away what she saves, if she dies before the husband; and shall have the same herself, in case she outlives him, and it shall not be liable to his debts. *Preced. Canc.* 255, 44. But where a settlement is made on the wife, in consideration of her whole fortune and equivalent to it; here the wife's portion, tho' it be out on bonds, &c., which upon the death of the husband by law survive to the wife, shall in equity be subject to the husband's bond-debts, after his decease, to ease the real estate of the heir. *Ibid.* 63. And it has been likewise held, that if after the wife's death, debts of her's appear; the husband shall be answerable for the debts of the wife, so far as he had any money or estate of hers. *Ibid.* 256.

If a man in mean circumstances, marry a woman of fortune, upon suggestion of lunacy in the wife by her friends, the court will order her estate to be so settled, that she may not be wrought on by her husband to give it to him from her children, by him or any other husband, &c. *Skin.* 110.

N. B. She cannot give it to her husband by will. It must be by deed, aided by a fine, or common recovery.

Marriage is dissolved by the natural death of the husband or wife, or by divorce; and where a marriage is dissolved by the death of the husband, dower, &c. survives to the wife, where no settlement is made of the husband's lands, &c. See *Baron and Feme* and *Chancery*.

See a very excellent marriage settlement, at the end of Blackstone's Analysis, and in the Appendix to the 2d Vol. of his Commentaries.

By statute, to steal or take away any woman, having an estate in lands or goods, or that is her apparent, against her will, and marry or defile her, is felony. 3 H. 7. cap. 2. And if any persons married, do marry any other person, the former husband or wife being alive, it is felony: But where a husband or wife are abroad beyond sea, &c. seven years, the one not knowing the other to be living; or there is a divorce of the husband and wife, &c. they are excepted out of the act 1 Jac. 1. c. 11. A husband being absent seven years in New England or Ireland, this is beyond the sea, and within the words of the exception of the act, yet in the King's dominions: And if the husband or wife, be abroad seven years, tho' the party marrying here hath notice, that he or she is alive, 'tis no felony; but if the absent person be living in England, Wales or Scotland, and the other party hath notice, 'tis felony by the statute. *Hale's Hist. P. C.* 693. And in these cases, the first and true wife, is not allowed as a witness against the husband, but the second wife may be admitted to prove the second marriage; for she is not in-law his wife. *Ibid.* If the first marriage were beyond sea, and the latter in England, the party may be indicted for it here; the latter marriage making the crime: Tho' if the first marriage be in England, and the latter beyond sea, the offender cannot be indicted here. 1 *Sid.* 171. *Kel.* 80. If a married man pretend himself to be a single person, and make love to a single woman and marry her; for this injury in the loss of her credit, &c. as to the marriage of any other man, action lies. *Skinner's Rep.* 119. See *Forcible Marriage*, &c. *Clandestine marriages* made void, 26 Geo. 2. c. 33. Suits to compel celebration of marriage discharged, *Ibid.*

Vide (for farther learning on the subject,) 3 *Nap. Abr.* tit. *Marriage*.

Bartram, Was a lawyer of great account in Henry VIII's days, whose learned readings are extant, but not in print. *Lamb. Biremech.* lib. 1. cap. 10.

Marshall, (*marſcallus*) Is a French word, signifying as much as *Tribunus militum*, with the ancient Romans; and *marſcallus* may also come from the German *marſchalk*, i. e. *Equitum magister*, which *Holman* in his feuds under verb. *Marſchaleu* derives from the old word *marſch*, which signifies a horse; and others make it of the Sax. *mar* i. e. *Equus* & *ſcaleh*, *praefectus*.

In France there are *Marshals of the Camp*, called *Marſchals of France*: And of the nobility and knights, in Poland, &c.

With

With us there are several officers of this name; the chief whereof is the *Earl Marshal of England*, mentioned in the *stat. 1 Hen. 4. c. 7.* and *13 R. 2. c. 2.* &c. whose office consists especially in *matter of war and arms*, as well in this kingdom as in other countries; this office is very ancient, having formerly greater power annexed to it than now; it has been long hereditary in the family of the Duke of Norfolk. Vide *Lupanus de Magistratibus Francia, lib. 1. c. Mariballus*, and *Tikus, lib. 2. c. De Constabili Mariballo, &c.*

The next is the *Marshal of the King's House*, otherwise called *Knight Marshal*; his authority is exercised in the King's palace, in hearing and determining all pleas of the crown, and suits between those of the King's house and other persons within the verge, and punishing faults committed there, &c. *18 Ed. 3. c. 7.* *27 Ed. 3. Stat. 2. c. 6.* and *2 H. 4. c. 13.* *Crompt. Jurisd. 192.*

Fleta mentions a *Marshal of the King's Hall*, to whom it belongs, when the tables are prepared, to call out those of the household and strangers, according to their rank and quality, and properly place them. *Fleta, lib. 2. c. 15.*

There are other inferior officers called *Marshal*, as *Marshal of the Justice in Eyre*. Anno *13 Ed. 1. cap. 19.* *Marshal of the King's Bench*, *Stat. 5 Ed. 3. c. 8.* who hath the custody of the prison called the *King's Bench Prison* in *Southwark*. This officer gives attendance upon the court, and takes into his custody all prisoners committed by the court; he is *sueable for his absence*, and *non-attendance is a forfeiture of his office*. *Hill. 21 & 22 Car. 2.* Grants of the King's Bench and Fleet Prisons to be inrolled. *8 & 9 Will. 3. c. 27.* Office of *Marshal* and warden of the King's Bench and Fleet, to be executed by those who have the inheritance of those prisons. *Ibid.* Power of appointing the *Marshal of the King's Bench*, vested in the crown. *27 Geo. 2. c. 17.*

There is also a *Marshal of the Exchequer*, to whom that court commits the custody of the King's debtors, for securing the debts; he likewise assigns sheriffs, customs and collectors, their auditors, before whom they shall account. *Stat. 51 Hen. 3. 5.*

Marshall of England, Shall not hold plea of matters touching the Common law, & *Ric. 2. c. 5.* shall be restrained by *superfideas* under the privy seal, *13 Ric. 2. st. 1. c. 2.* See *Constable*.

Marshal and Steward of the King's Household and Marshalsea, Of what things they shall hold plea. *Art. super Cartas, 28 Ed. 1. st. 3. c. 3.* *8 R. 2. c. 5.*

Marshalsea, (*Marescallia*,) Is the court or seat of the marshal; of whom see *Crompt. Jur. 120.* It is also used for the prison in *Southwark*; the reason whereof may be, because the marshal of the King's house was wont perhaps to sit there in judgment, or keep his prison. See the *stat. 9 Ric. 2. c. 5.* and *2 Hen. 4. c. 23.* King Charles the First erected a court by letters patent under the great seal, by the name of *Curia Hospitalii Domini Regis*, &c. which takes cognizance more at large of all causes than the *marshalsea* could; of which the knight marshal or his deputy are judges. *Cowell.* See *Court of Marshalsea*, and *Marshal and Steward of the King's Household and Marshalsea*.

Marthes and *sens*, laws concerning them. *Vide Fens.*

Mart, A great fair for buying and selling goods, holden every year. *2 Inst. 221.*

Martial Law, Is the law of war, that depends upon the just but arbitrary power and pleasure of the King, or his lieutenant; for tho' the King doth not make any laws but by common consent in parliament, yet in time of war, by reason of the necessity of it to guard against dangers that often arise, he useth absolute power, so that his word is a law. *Smith de Repub. Angl. lib. 2. c. 4.*

But the *Marshal Law*, (according to *Chief Justice Hale*,) is in reality, not a law, but something *indulged rather than allowed as a law*; and it relates only to members of the army, being never intended to be executed on others, who ought to be ordered and governed by the laws to which they are subject, tho' it be a time of war. *Hale's Hist. L. 39/* And the exercise of *Martial Law*, whereby any person might lose his life or member, or liberty, may

not be permitted, in time of peace; when the King's courts are open for all persons to receive justice. *Ibid. 40.* Alien enemies invading the kingdom, &c. shall be dealt with and executed by *Martial Law*. *H. P. C. 10, 15.* Also soldiers are punished for desertion, &c. in a court *Martial* by various statutes. See *Law of Arms*.

Martilagium, For *Martyrologium*. *Monast. tom. 2. pag. 322.*

Martyrology, (*Martyrologium*) A book of *Martyrs* containing the lives, &c. of those men who die for their religion. Also a calendar or register kept in religious houses, wherein are set down the names and donations of their benefactors, and the days of their death, that upon every anniversary they may commemorate and pray for them: Several benefactors have made it a condition of their beneficence, to be inserted in the *Martyrology*. *Paroch. Antiq. 189.*

Martyn waterworks, The shares how taxable. *30 Geo. 2. c. 3.*

Maslagium, Anciently used for *messuagium*, a messuage. *— Et unum maslagium in Villa de M. &c. Pat. 16. R. 2.*

Masks, The penalty of selling or keeping visor masks. *3 Hen. 8. c. 9.*

Masons. To plot confederacies amongst masons, is declared felony by an old statute; and such as assemble thereon shall suffer imprisonment, and make fine and ransom. *Stat. 3 H. 6. c. 1.*—This was when the nature and secrets of masonry were known only to few. They are now known to many thousands, who are members of the society, and dispersed all over the Christian world.

Masls. See *Rapist*.

Masser, A priest that says mass. *Blount.*

Masse Priests. In former times secular priests, to distinguish them from the regulars, were called *Masse-Priests*, and they were to officiate at the mass, or in the ordinary service of the church: Hence *Masse Priest* in many of our *Spain* canons, for the parochial minister; who was likewise sometimes called *Masse Theologie*, because the dignity of a priest in many cases was thought equal to that of a Thein or lay lord. But afterwards the word *Masse-Priest* was restrained to stipendiaries retained in chantries, or at particular altars, to say so many masses for the souls of the dead.

Mast, (*Gland, pesson*) The acorns and nuts of the oak, or other large tree.—*Glandis nomine continentur glandes, castanea, fagina, ficus & nucis, & alia quaeque quae eduntur pasci poterunt praeter herbam.* *Bract. lib. 4.* *Tempus pasci* often occurs for *mast-time*, or the season when *mast* is ripe; which in *Norfolk* they call *shacking-time*.—*Quia habeat decem porcos in tempore de pascion in bosco meo, &c.* *Mon. Angl. tom. 2. pag. 113, 231.* There is a tree called *Mast tree*; and a *mast* or sail of a ship.

Master, (*magister*) Signifies in a general a governor, teacher, &c. And also in many cases an officer. See *Servant*.

Master and servant. The relation between a master and a servant, from the superiority and power which it creates on the one hand, and duty, subjection, and as it were allegiance on the other, is in many instances applicable to other relations, which are in a superior and subordinate degree; such as lord and bailiff, principal and attorney, owners and matters of ships, merchants and factors, and all others having authority to enforce obedience to their orders, from those whose duty it is to obey them; and whose acts, being conformable to their duty and office, are deemed the acts of their principals.

If a man gives money to his servant to buy goods, and the servant buys upon credit, the master is chargeable. So, a promissory note of a servant will charge his master, if his money came to the master's use, tho' he was not intended to give such note. *Ld. Raym. 134.*

A master is liable for a nuisance done by his servant. *Id. 234.*

So, the owner of a cart is liable for damage done by his servant. *Id. 239.*

Tresspass will not lie for taking a Negro. *Ib. 146.* *Nor, Doe, 117, 1274.*

For the difference between a servant, and an apprentice, see *ib.* 1117. An apprentice must be bound and discharged by deed. *ib.*

This subject is well treated in 3 *New. Abr.* from fol. 344 to 369. See also tit. *Apprentice, Servants*, and 15 *Vin. Abr.* And a book called *Every Man his own Lawyer.* And *Black. Com.* 1 V. 423.

Master of the Armory, (Magister Armorum & Armaturæ Regis) Is an officer who hath the care of his Majesty arms and armory, mentioned in the *stat.* 39 *Elix.* c. 7.

Master of the Ceremonies, (Magister Admissionum) Is one who receives and conducts ambassadors and other great persons to audience of the King, &c. This office was instituted by King James I. for the more magnificent reception of ambassadors and strangers of the greatest quality.

Master of, or, in Chancery, (Magister Cancellaria) In the Chancery there are *Masters*, who are assistants to the Lord Chancellor or Lord Keeper, and Master of the Rolls: Of these there are some ordinary, and some extraordinary; the *Masters* in ordinary are twelve in number, of whom the *Master of the Rolls* is chief; and some sit in court every day, during term, and have referred to them interlocutory orders for stating accounts, computing damages, and the like; they also administer oaths, take affidavits, and acknowledgments of deeds and recognisances: The extraordinary *Masters* are appointed to act in the country, in the several counties of England, beyond ten miles distance from London; by taking affidavits, recognisances, acknowledgments of deeds, &c. for the ease of the suitors of the court. By the *stat.* 13 *Car. 2.* a publick office was ordained to be kept near the Rolls, for the *Masters* in Chancery; in which they, or some of them, are constantly to attend, for the administering oaths, caption of deeds, and dispatch of other business: And their fees for taking affidavits, acknowledgment of deeds, exemplifications, reports, certificates, &c. are ascertained by that act; and to take more, incurs disability for such *Master* to execute his office, and a forfeiture of 100 *l.* &c.

To empower the high Court of Chancery, to lay out upon government securities, a sum of money therein mentioned, out of the common and general cash in the Bank of England, belonging to the suitors of the said court; and to apply the interest arising therefrom, towards augmenting the incomes of the masters of the said court, 5 *Geo. 3.* c. 28.

Master of the Court of Wards and Liveries, Was the chief officer of that court, assigned by the King; to whose custody the seal of the court was delivered, &c. as appears by the *stat.* 33 *H. 8.* c. 33. But as this court was abolished by *stat.* 12 *Car. 2.* c. 24. this office of course dropped with it.

Master of the Faculties, (Magister facultatum) Is an officer under the Archbishop of Canterbury, who grants licences and dispensations, &c. 22 & 23 *Car. 2.*

Master of the Horse, Is he who hath the ordering and government of the King's stables; and of all horses, racers, and breeds of horses belonging to his Majesty: He has the charge of all revenues appropriated for defraying the expence of the King's breed of horses; of the stable, letters, sumpter-horses, coaches, &c. and has power over the equeries and pages, grooms, coachmen, farriers, smiths, saddlers, and all other artificers working to the King's stables, to whom he administers an oath to be true and faithful: But the accounts of the stables, of liveries, wages, &c. are kept by the *avener*; and by him brought to be passed and allowed by the court of *Green Cloth*. The office of *Master of the Horse* is of high account, and always bestowed upon some great nobleman; and this officer only has the privilege of making use of any horses, footmen, or pages belonging to the King's stables: At any solemn cavalcade he rides next to the King, with a led horse of state. He is the third great officer of the King's household; being next to the Lord Steward, and Lord Chamberlain; and is mentioned in the statute 39 *Elix.* c. 7. and 1 *Ed. 6.* c. 5.

Master of the Jewel Office, An officer of the King's household, having the charge of all plate used for the King or Queen's table, or by any great officer at court; and also of all the royal plate remaining in the Tower of Lon-

don, and of chains and jewels not fixed to any garment. 39 *Elix.* c. 7.

Master of the Household, (Magister Hospitii Regis) Otherwise called *Grand Master of the King's Household*, now styled *Lord Steward of the Household*, which title this officer hath bore ever since Anno 32 *H. 8.* But under him there is a principal officer still called *Master of the Household*, who surveys the accounts, and has great authority.

Master of the King's Musters, Is a martial officer in the King's armies, to see that the forces are compleat, well armed and trained; and to prevent frauds, which would otherwise waste the Prince's treasure, and weaken the forces, &c.

Master of the Mint, Is an officer who receives the silver of the goldsmiths, and pays them for it, and oversees every thing belonging to the Mint; he is at this day called *Warden of the Mint*.

Master of the Ordnance, A great officer, to whose care all the King's ordnance and artillery is committed. 39 *Elix.* c. 7.

Master of the Posts, Was an officer of the King's court, who had the appointing, placing, and displacing of all such thro' England, as provided *post-horses*, for the speedy passing of the King's messages, letters, packets, and other business; and was to see that they kept a certain number of good horses of their own, and upon occasion that they provided others for furnishing of those persons who had a warrant from him to take and use *post-horses*, either from or to the seas, or other places within the realm. He likewise paid their wages, settled their allowances, &c. 2 *Ed. 6.* c. 3. The *stat.* 12 *Car. 2.* c. 34. for erecting one *General Post-Office* in London, ordains, that there shall be a *Master of the Post-Office*, appointed by the King, by letters patent, (and of late this office is executed by two jointly) who and his agents, and the persons employed by them, have the sending and carriage of all letters at certain rates; and the *post-master* is to continue constant posts, and provide persons riding post with *post-horses*, under penalties, taking 3 *d.* per mile for the horse, and 4 *d.* for the guide, every stage, &c. Vide *Stat.* 9 *Ann.* c. 10. By the *Stat.* 22 *Geo. 2.* c. 25. Any person may let to hire chaises, or furnish horses for chaises at any stage upon any post-road notwithstanding *stat.* 9 *Ann.* c. 10. See *Post*.

Master of the Revels, An officer to regulate the diversions of dancing and masking, used in the palaces of the King, Inns of Court, &c. and in the King's court is under the Lord Chamberlain.

Master of the Rolls, (Magister Rotulorum) Is an assistant to the Lord Chancellor in the High Court of Chancery, and in his absence hearth causes there, and also at the chapel of the Rolls, and makes orders and decrees. *Crompt. Jurisd.* 41. His title in his patent is, *Clericus parvus. Bagæ, Custos Rotulorum*, &c. And he has the keeping of the Rolls of all patents and grants which pass the Great Seal, and the records of the Chancery. He is called *Clerk of the Rolls*, *stat.* 12 *R. 2.* c. 2. and in *Forrestue*, c. 24. and no where *Master of the Rolls*, until the 11 *H. 7.* c. 20. In which respect Sir Tho. Smith, says, he may not unfitly be styled *Custos Archivorum*. *Master of the Rolls* enabled to grant leases of the houses belonging to the Rolls. 12 *Car. 2.* c. 36. Construction of the power, 20 *Geo. 2.* c. 34. His judicial authority confirmed. 3 *Geo. 2.* c. 30. In his disposition are the offices of the six clerks, and the clerks of the petty bag, examiners of the court, and clerks of the chapel. 14 *H. 8.* c. 1. See *Stat.* 23 *Geo. 2.* c. 25. Whereby 1200 *l.* per Annum is directed to be paid to the *Master of the Rolls*.

Master of the Temple. The founder of the order of the *Knights Templars*, and his successors, were called *Magni Templi Magistri*; and probably from hence he was the spiritual guide and director of the Temple. The *Master of the Temple* here was summoned to parliament Anno 49 *H. 3.* And the chief minister of the Temple Church in London, is now called *Master of the Temple*. Dugd. Warw. 706.

Master of the Wardrobe, (Magister Garderobæ) Is a considerable officer at court, who has the charge and custody of all former Kings and Queens ancient robes remaining

maining in the Tower of London; and all hangings, bedding, &c. for the King's houses: He hath also the charge and delivery out of all velvet or scarlet cloth allowed for liveries, &c. And of this officer mention is made in the Stat. 39 Eliz. c. 7. The Lord Chamberlain has the oversight of the officers of the wardrobe.

Mastinus, A great dog, called a mastiff.—*Cane & mastini per omnes forellas Angliæ occiduntur.* Knyght. lib. 2. cap. 15.

Masts. See *Ships and Stores*.

Masure, An old decayed house, according to *Domesd.*

Masure terræ. *Sunt in eisdem masuris 60 domus plus quam ante fuerunt.* *Domesday.* In Fr. *masure de terre* is a quantity of ground, containing about four oxgangs; with us it is taken for *Domicilium cum fundo, vel pro fundo cum domicilio competent.*

Materia, A great beam, or timber proper for building. *Dedi illis materiam & ligna ad omnia necessaria sua, & ad domos suas Edificand.* Mon. Ang. Tom 1. pag. 821.

Matricula, A register; as in the ancient church there was *matricula clericorum*, which was a catalogue of the officiating clergy; and *matricula pauperum*, a list of the poor to be relieved: Hence to be entered in the register of the universities, is to be *matriculated*, &c.

Matrimonial causes, Or injuries respecting the rights of marriage, are a branch of the ecclesiastical jurisdiction. See *Black. Com.* 3 V. 92.

Matrimonium, Is sometimes taken for the inheritance descending to a man *ex parte matris*.—*Cum omni hereditate patrimonii & matrimonii sui*, &c. Blount.

Matrimony. See *Marriage*.

Matris Ecclesia, The mother church; and is either a cathedral, in respect of the parochial churches within the same diocese; or a parochial church, with respect to the chapels depending on it, and to which the people resort for sacraments and burials. *Leg. H.* 1. c. 19.

Matrons, Jury of. When a widow feigns herself with child, in order to exclude the next heir, and a supposititious birth is suspected to be intended; then upon the writ *de ventre inspiciendo*, a jury of women is to be impanelled to try the question, whether with child, or not. *Cro. Eliz.* 566. So if a woman is convicted of a capital offence, and being condemned to suffer death, pleads in stay of execution, that she is pregnant, a jury of matrons is impanelled to enquire into the truth of the allegation; and if they find it true, the convict is respited, 'till after her delivery.

Mars and Coverts, &c. In the county of Norfolk, by what persons made. See *Stat.* 5 & 6 Ed. 6. c. 24.

Matter in Dred, and Matter of Record, Are often mentioned in law proceedings, and differ thus: the first seems to be nothing else but some truth or matter of fact to be proved by some specialty, and not by any record; and the latter is that which may be proved by some record: For example; If a man be sued to an exigent, during the time he was abroad in the service of the King, &c. this is *matter in deed*, and he that will alledge it for himself, must come before the *seire facias* for execution be awarded against him; but after that, nothing will serve but *matter of record*, that is, some error in the process appearing upon the record. There is also a difference between *matter of record* and *matter in deed*, and *nude matter*; the last being a naked allegation of a thing done, to be proved only by witnesses, and not either by *record* or *specialty*. *Old Nat. Br.* 19. *Kitch.* 216.

Maugre, (From the Fr. *Mal*, and gre, i. e. *Animo iniquo*) Signifies as much as to say with an unwilling mind, or in despite of another; as where it is said, that the wife shall be remitted, *maugre* the husband, that is, whether the husband will or no. * *Lit. Sess.* 672.

Maum, A soft brittle stone in some parts of Oxfordshire; and in Northumberland they use the word *maum* for soft and mellow. *Plot's Nat. Hist. Oxfordsh.* p. 63.

Maund, A kind of great basket or hamper, containing eight bales, or two fats: It is commonly a quantity of eight bales of unbound books, each bale having one thousand pounds weight. *Book Rates*, pag. 3.

Maundy Thursday, The Thursday before Easter. See *Mandati Dies*.

Maupigginuin, An old sort of broth or pottage. *Cowell*.

Maxims in law, Are positions and theses, being conclusions of reason, and universal propositions, so perfect, that they may not be impugned or disputed. For *principia probant, non probantur*, therefore *contra negantem principia non est disputandum.* *Cowell.* Co. Lit. 343.

A maxim is a sure foundation or ground of art, and a conclusion of reason, so called *quia maxima est ejus dignitas & certissima autoritas, atque quod maxime probetur*, so sure and uncontrollable as that it ought not to be questioned; and what is elsewhere called a principle, and is all one with a rule, a common ground, *postulatum* or axiom. *Co. Lit.* 10. b. 11. a.

Maxims are the foundations of the law, and conclusions of reason; therefore ought not to be impugned; but always to be admitted; but they may by reason be conferred and compared the one with the other, tho' they do not vary; or it may be discussed by reason which thing is nearest the maxim, and the mean between the maxims; and which is not; but the maxims can never be impeached or impugned, but ought always to be observed, and held as firm principles and authorities of themselves. *Pl. C.* 27. b.

The alterations of any of the maxims of the Common law are dangerous. *2 Inst.* 210.

The laws of all nations are doubtless raised out of the Civil law, as all governments are sprung out of the ruins of the Roman empire; and it must be owned, that the principles of our law are borrowed from the Civil law, therefore grounded upon the same reason in many things. *12 Mod.* 482.

Maxims are principles and authorities, and part of the general customs or Common law of the land; and are of the same strength as acts of parliament; when the judges have determined what is a *maxim*; which belongs to the judges, and not a jury. *Terms de Ley. Doct. & Stud. Dial.* 1. c. 8. A maxim in law is said to be a proposition of all men; confessed and granted, without argument or discourse. *Maxims of the Law* are holden for law; and all other cases that may be applied to them, shall be taken for granted. *1 Inst.* 11. 67. *4 Rep.* The maxims in our books, which are many and various, are such as the following, *viz.* It is a maxim, *That land shall descend from the father to the son*, &c. It is a maxim, *That as no estate can be vested in the King, without matter of record, so none can be divested out of him, but by matter of record*; for things are dissolved as they are contracted. *Rep.* 1. *Cholmley's case*. Another, that *an obligation, or other matter in writing, cannot be discharged by an agreement by word.* And *Argumentum ab autoritate fortissimum est in lege.* *Co.* on Lit. 141. It is also a maxim, *That if a man have issue two sons by divers wives, and the one of them purchase lands in fee, and die without issue, the other brother shall never be his heir*, &c.

Committre agnum lupo, *St. Hibern.* 14 H. 3.

Qui cadit a syllaba cadit a tota causa, the maxim condemned, *Stat. Wall.* 12 Ed. 1.

Qui pro alieno facto non est puniendus, *St. Westm.* 2. 13 Ed. 1. c. 35.

De transgressione certæ persone facta altera persona commodum aut emendas ne consequatur, *St. de Vast.* 20. Ed. 1. ft. 2.

That allegiance is due more by reason of the crown than of the person of the King, condemned, *Exil. Hug. le Despenser*, 15 Ed. 2. ft. 2.

Necessary alliances among the peers to pursue evil counsellors, not to be punished by rigour of law, *St. ne quis occidat pro felon*, &c. 15 Ed. 2. ft. 3.

The King cannot pardon the suit of others, statute revoking the pardon, &c. 15 Ed. 2. ft. 4.

The father to the bough, and the son to the plough, in *Kent*, *Prærog. Rep.* 17 Ed. 2. ft. 1. c. 16.

Every man is bound to do to the King as his Liege Lord all that pertaineth, 1 Ed. 3. ft. 2. c. 15.

Franchises restraining the freedom of selling merchandise, are to the common prejudice of the King and his people, 25 Ed. 3. ft. 4. c. 2.

Laws without great penalty are more often obeyed, 1 Mar. ft. 1. c. 1. ft. 1. See *Black. Com.* 1 V. 68.

Maxim.

Mayhem. See *Maibem*, and *Black. Com.* 1 *V.* 130. 3 *V.* 121. 4 *V.* 205.

Mayor, (*Præfatus urbis*, anciently *meyr*, comes from the *Brit. mæct*, i. e. *custodire*, or from the old *English* word *maer*, viz. *potestas*, and not from the *Lat. major*) Is the chief governor or magistrate of a city or town; as the *Mayor of London*, the *Mayor of Southampton*, &c. King *Rich. 1.* anno 1189, changed the bailiffs of *London* into a mayor; and from that example King *John* made the bailiff of *King's Lynn* a mayor, anno 1204. Tho' the famous city of *Norwich* obtained not this title for its chief magistrate, till the seventh year of King *H. 5.* anno 1419, since which there are few towns of note, but have had a mayor appointed for government. *Spelm. Gloss.*

Mayors of corporations are justices of peace *pro tempore*, and they are mentioned in several statutes; but no person shall bear any office of magistracy concerning the government of any town, corporation, &c. who hath not received the sacrament, according to the church of *England*, within one year before his election; and who shall not take the oaths of supremacy, &c. *Stat. 13 Car. 2. cap. 1.* The 10 *Ann. cap. 2.* prohibited mayors and officers of corporations from going to conventicles, under the penalty of 40 *l.* &c. But this is altered by 5 *Geo. 1. cap. 6.* *tho' the gown, mace, or other ensigns of magistracy, may not be worn or carried to a conventicle, on pain of disability to enjoy any office, &c.* If any one intrudes into, and thereupon executes the office of mayor, a *quo warranto* information may be brought against him; and he shall be ousted and fined, &c. And no person who hath been or shall be in an annual office in any corporation for one year, shall be chosen into the same office the next year, and obstructing the choice of a successor incurs the penalty of 100 *l.* *Stat. 9 Ann. c. 20.* Also if no mayor be elected in a corporation, on the day appointed by charter, by the proper officers, the next in place is to hold a court, and elect one the day following, &c. or in default thereof, the court of *King's Bench* may compel the electors to choose one, &c. by writ of *mandamus*, requiring the members who have a right to vote, to assemble themselves on a day prefixed, and proceed to election, or shew cause to the contrary; and mayors, &c. voluntarily absenting on the day of election, shall be imprisoned six months, and be disabled to hold any office in the corporation. 11 *Geo. 1. c. 4.*

The authority of mayors is contained in the following particulars: The statute 2 *Ed. 3. c. 3.* gives power to mayors to arrest persons carrying offensive weapons in fairs, markets, &c. to make affrays, and the disturbance of the peace. By *Stat. 23 H. 8. c. 4.* Mayors, &c. have power to set the price of ale and beer: And they are authorized to convict persons selling ale without licence; and also to levy the penalties on the offender by distress, &c. 3 *Car. 1. c. 3.* And they are to cause quart and pint pots for the selling of ale, to be examined whether they hold their full measure; and to mark them, under the penalty of 5 *l.* 11 *Geo. 2. c. 15.* Mayors, bailiffs, and lords of leets, are to regulate the assize of bread, and examine into the goodness thereof; and if bakers make unlawful bread, they may give it to the poor, and pillory the offenders, &c. 5 *Hen. 3. ft. 6.* And the 8 *Ann. c. 18.* and 1 *Geo. 1. c. 26.* direct, that mayors and chief magistrates of towns, &c. may in the day-time enter into any house, shop, bakehouse or warehouse, of any baker or seller of bread, to search for, view, and try all or any of the bread there found; and if the bread be wanting in goodness, deficient in baking, under weight, or not truly marked; or shall consist of any other sort than what is allowed, the same bread shall be seized and distributed to the poor: And the former statute imposes a penalty of 40 *s.* for want of weight, or not being marked as appointed, &c. but this is made 5 *s.* for every ounce wanting in weight, and 2 *s.* 6 *d.* if under an ounce, (complaint being made, and the bread weighed before a magistrate within twenty-four hours) by the 1 *Geo. 1. c. 26.* And bakers selling their large bread at a higher price than set by mayors, &c. shall forfeit 10 *s.* to the informer, to be evied by distress, &c. See 31 *G. 2. c. 29.*

Mayors, &c. are empowered to make enquiry into offences committed against the *Stat. 1 Eliz. c. 2.* which requires that the common prayer be read in churches; and

that the churchwardens do their duty in presenting the names of such persons as absent themselves from church on Sundays, &c. Head officers of corporations are to appoint and swear overseers or searchers to examine into defects of northern cloth, &c. and the overseers shall fix a seal of lead to cloths, expressing the length and breadth; and if they find any faulty, or sealed with a false seal, &c. they are to present the same at the next quarter-sessions.

Mayors, &c. neglecting their duty, are liable to a penalty of 5 *l.* 39 *Eliz. cap. 20.* Mayors may determine whether coin offered in payment be counterfeited or not; and tender an oath to determine any question relating to it. 9 *Geo. 3. c. 21.* Chief magistrates of ports, where goods are conveyed away, which are liable to customs, before entry made, and the duties agreed, are to grant their warrants for the apprehension of the offender, &c. 12 *Car. 2. c. 4.* By 23 *Eliz. c. 9.* Mayors, &c. may call before them and examine dyers, suspected to use logwood in dying; and if they find cause, may bind them over to the quarter-sessions, where on conviction, they are liable to a forfeiture of 20 *l.* But see *Stat. 14 Car. 2. c. 11.* and by the late act 13 *Geo. 1. c. 24.* Mayors and head officers of corporations, are to punish drunkenness, by imposing a fine of 5 *s.* on view, confession, or proof by one witness, or cause the offender to be put in the stocks for six hours. 4 *Jac. 1. c. 5.* 21 *Jac. 1. c. 7.* And persons sitting tipling in an alehouse, inn, &c. are liable to punishment by mayors, who may levy 3 *s.* 4 *d.* on such offenders, for every offence, for the use of the poor, or cause them to be set in the stocks four hours; and the alehouse-keepers, &c. suffering tipling in their houses, are subject to a penalty of 10 *s.* *Ibid.*

Head officers and justices of peace in corporations, may inquire of forcible entries, commit the offenders, and cause the tenements to be seized, &c. within their franchises, in like manner as justices of peace in the county. 8 *H. 6. c. 9.* Mayors, &c. shall enquire into unlawful gaming, against the *Stat. 33 Hen. 8. c. 9.* They are to search places suspected to be gaming-houses, and levy penalties, &c. and they have power to commit persons playing at unlawful games. Horses stolen, found in a corporation, may be redeemed by the owner, making proof before the head officer of the corporation of the property, &c. 31 *Eliz. c. 12.* Mayors and head officers in corporate and market-towns, and lords of liberties and their stewards, are to appoint and swear two skilful persons yearly, to be searchers and sealers of leather; and they are to appoint triers of insufficient leather, and of leather wares: Searchers not doing their duty to forfeit 40 *s.* and triers 5 *l.* 1 *Jac. 1. cap. 22.* Persons robbing orchards, hedge-breakers, &c. are punishable by mayors; and a person on conviction by the oath of one witness, shall pay to the person injured such damage as the mayor, &c. shall think fit, or be whipped. 43 *Eliz. c. 7.*

Mayors, &c. on receipt of precepts from sheriffs, (when writs are issued for elections) requiring them to choose burgesses or members of parliament, by the citizens, &c. are to proceed to election, and make returns by indenture between them and the electors; and making a false return, shall forfeit 40 *l.* to the King, and the like sum to the party chosen, not returned, &c. 23 *H. 6. c. 14.* See the *Stat. 2 Geo. 2. c. 24.*

In time of sickness, a tax may be laid on inhabitants of corporations, for relieving such persons as have the plague, by mayors, &c. who are to appoint searchers and buriers of the dead: And if any infected persons shall go abroad with sores upon them, after an head officer hath commanded them to keep at home, it is felony; and if they have no sores about them, they are punishable as vagrants. 1 *Jac. 1. c. 31.*

The *Stat. 43 Eliz. c. 2.* which directs that the father, grandfather, mother, grandmother, and children, of every poor person, shall be assessed towards their relief by justices, and which impowers justices of peace to order a poor's rate or tax, and overseers of the poor, &c. to place forth apprentices, and sets forth the office of overseers; gives the like authority to the head officers in corporate towns, as justices of peace have in their counties; which said justices are not to intermeddle in corporations for the execution of this law.

Mayors, bailiffs, and other head officers of corporate towns, &c. are to make proclamation for rioters to disperse as follows: *Our Sovereign Lord the King charges and commands all persons assembled, immediately to disperse themselves, and peaceably depart to their habitations, upon pain of imprisonment, &c.* And if the rioters being *travels in number*, do not disperse *within an hour after*, it is felony *without benefit of clergy, &c.* 1 Geo. 1. ft. 2. c. 5.

Matters relating to *servants*, and apprentices, may be determined by *mayors*; who have power to compel persons to go to service, &c. 5 Eliz. c. 4. *Mayors* may arrest *soldiers* departing without licence: And they are to be present at *musters*; *quarter* and *billet* *soldiers*, &c. 18 Hen. 6. c. 18. 1 Geo. 1. c. 47, &c. Persons using games on a *Sunday* forfeit 3 s. and 4 d. to the use of the poor; carriers, &c. travelling on that day 20 s. and persons doing any worldly labour thereon 5 s. all leviable by warrant from *mayors* and head officers of corporations, as well as other justices. 1 Car. 1. c. 1. 3 Car. 1. c. 2. 29 Car. 2. c. 7. And by 3 Car. 1. c. 4. If any person shall profanely *swear* or *curse* in the presence of a *mayor*, &c. or be convicted thereof before him, by the oaths of two witnesses, he shall forfeit for every offence 1 s. to the use of the poor, or be set in the stocks three hours: but the statute 6 & 7 W. 3. confines the forfeiture of 1 s. to servants, labourers, &c. other persons being ordered to pay 2 s. and double, treble, &c. on repeating the offence.

Vagrants, or other idle and disorderly persons, blind, lame, &c. or pretending to be so, begging in streets, a *mayor* or constable may cause them to be whipped. 12 Ann. ft. 2. c. 25. By former statutes, *mayors* are empowered to make passes of *vagrants*; and justices in liberties and corporations are to issue warrants to constables, &c. to make a search for and apprehend *vagrants* before the quarter-sessions.

Mayors are to set the rates and prices of *coopers vessels*; and appoint *searchers* and *gaugers* of vessels for fish, &c. 11 H. 7. c. 4. 8 Eliz. c. 9. In every city, town, &c. there is to be a common balance, and sealed *weights*, under divers penalties: there is also to be a common bushel sealed. 8 Hen. 6. c. 5. 11 H. 6. c. 8. And *mayors*, &c. are to provide a mark for the sealing of weights and measures, being allowed 1 d. for sealing every bushel and hundred weight; and a half-penny for every other measure and half-hundred weight, &c. *Mayors* and head officers of corporations, &c. shall view all weights and measures once a year, and punish offenders using false weights; and they may break or burn such weights and measures, and inflict penalties, &c. If they permit persons to sell by measures not sealed, they shall forfeit 5 l. Sealing weights not agreeable to the standard, is liable to the same penalty; and refusing to seal weights and measures, subjects them to a forfeiture of 40 s. 7 H. 7. See 31 Geo. 2. c. 17. s. 9. *Mayors*, &c. are to inspect and order the size of faggot, billet, tale wood, &c. 43 Eliz. c. 14. See Corporation.

Mead and **Wetherington**, Pay 11 d. excise in all by the statutes 12 Car. 2. c. 23. 12 Car. 2. c. 24. 22 & 23 Car. 2. c. 5. 1 W. & M. c. 3. 5 W. & M. c. 20. 4 Ann. c. 6. 8 Ann. c. 7.

Meal. May be exported duty-free. 11 & 12 W. 3. c. 20. How many sacks of meal may be carried at one load in London and Westminster. 6 Geo. 1. c. 6.

Meal-Rents, Certain rents heretofore paid in meal by the tenants of the honour of Clun, to make meat for the lord's hounds; they are now payable in money.

Meals. The shelves of land, or banks on the sea coasts of Norfolk, are called the *Meals* and the *Males*. Cowel.

Mean, (*medius*) Signifies the middle between two extremes; and that either in time or dignity: In time it is the *interim* betwixt one act and another; and applied to *mean profits* of lands between a *dissolvin* and recovery, &c. As to dignity, there is a *lord mean* or *mesne*, that holds of another *lord*; and *mean tenant*, &c. *Mesne* likewise signifies a writ, which lies where there is *lord mesne* and *tenant*; and the tenant is *disfranchised* by the superior lord, for the right or service of the *mean*, who ought to acquit him to the other lord, then the tenant shall have his writ

of *mesne*; and if the *mean lord* appear not, he shall lose the service of the tenant, and be fore-judged of his *seignior*, and the tenant shall immediately become tenant to the chief lord. Also in such case, the tenant by writ may recover damages if he be *disfranchised*; and the *mean lord* be compelled to pay the rent, and do the services. F. N. B. 135. 13 Ed. 1. c. 9. If a man bring a writ of *mesne* where he is not *disfranchised*, yet it is maintainable, but then he shall not have damages; for it is brought only to be acquitted, &c. And tenant for life, where the remainder is over in fee, shall have this writ against the *mesne*. 7 H. 4. 12. 15 H. 6. New Nat. Br. 330. One brought a writ of *mesne* against a man, because he did not acquit the plaintiff of a rent-charge demanded, &c. when he by his deed bound himself and his heirs to warrant and acquit him; and it was held good: And if a man have judgment to recover in this writ, if he be not afterwards acquitted, he may have a *disfranchising ad acquitandam* against the *mesne*; and *scire facias* against the lord. Stat. Westm. 2. c. 9. 14 Ed. 3. See *Mesne*.

Form of a Writ of Mesne.

GEOFFREY the Third, &c. To the sheriff of S. Com-mand A. B. that justly, &c. he acquit C. D. of the service which E. F. exacts from him, of his freehold that he holds of the said A. B. in W. whereof the said A. who is *mesne* betwixt the said E. and C. ought to acquit him; and whereupon he complains, that for his default he is *disfranchised*; and unjust, &c.

Messuage, (*messuagium*) A messuage or dwelling-house. Kitchen, 139. and F. N. B. 2. Stat. *Hibernie*, 14 H. 3. and 21 H. 8. 13. Also a measure of herrings, containing five hundred; the half of a thousand is called *mease* or *messe*. Merch. Dict.

Maison-dieu, In French *Maison de dieu*, *Domus Dei*; a house of God, a monastery, religious house or hospital; the word is mentioned 2 & 3 P. & M. cap. 23. 39 El. 5. and 15 Car. 2. 7.

Measure, (*mensura*) Is a certain quantity or proportion of any thing sold; and in many parts of England, is one bushel. The learned *Blackstone*, in treating of the King's prerogative, says, "the regulation of *weights* and *measures*, for the advantage of the public, ought to be universally the same throughout the kingdom; being the general criterions which reduce all things to the same or an equivalent value. But, as weight and measure are things in their nature arbitrary and uncertain, it is therefore expedient that they be reduced to some fixed rule or standard: which standard it is impossible to fix by any written law, or oral proclamation; for no man can, by words only, give another an adequate idea of a foot-rule, or a pound weight. It is therefore necessary to have recourse to some visible, palpable, material standard; by forming a comparison with which, all *weights* and *measures* may be reduced to one uniform size: and the prerogative of fixing this standard, our ancient law ascribed in the crown; as in *Normandy* it belonged to the Duke. (Gr. Custom. c. 15.) This standard was originally kept at Winchester: and we find, in the laws of King Edgar, (cap. 8.) near a century before the conquest, an injunction that the one *measure*, which was kept at Winchester, should be observed throughout the realm. Most nations have regulated the standard of *measures* of length by comparison with the parts of the human body; as the palm, the hand, the span, the foot, the cubit, the, *ulna*, (or arm) the pace, and the fathom. But, as these are of different dimensions in men of different proportions, our ancient historians (Will. Malmob. in vita Hen. 1. Spelm. Hen. 1. apud Wilkins 799.) inform us, that a new standard of longitudinal measure was ascertained by King Henry the First; who commanded that the *ulna* or ancient ell, which answers to the modern yard, should be made of the exact length of his own arm. And, one standard of measures of length being gained all others are easily derived from thence; those of greater length by multiplying, those of less by subdividing, the original standard. Thus, by the statute called *compositio ulnarum et peticarum* five yards and a half make a perch

and the yard is subdivided into three feet, and each foot into twelve inches; which inches will be each of the length of three grains of *barley*. Superficial measures are derived by squaring those of length; and measures of capacity by cubing them.—The standard of weights was originally taken from corns of wheat, whence the lowest denomination of weights we have is still called a *grain*; thirty-two of which are directed, by the statute called *compositio menjurarum*, to compose a penny weight, whereof twenty make an ounce, twelve ounces a pound, and so upward. And upon these principles the first standards were made; which, being originally so fixed by the crown, their subsequent regulations have been generally made by the King in parliament. Thus, under King Richard I. in his parliament holden at *Westminster*, A. D. 1197, it was ordained, that *there should be only one weight and one measure throughout the kingdom*, and that the custody of the assise or standard of weights and measures should be committed to certain persons in every city and borough; (*Hoved. M. lib. Paris.*) from whence the antient office of the King's *weigher* seems to have been derived, whose duty it was, for a certain fee, to measure all cloths made for sale, till the office was abolished by the stat. 11 & 12 H. 3. c. 20. In King John's time this ordinance of King Richard was frequently dispensed with for money; (*Hoved. d. D. 1201.*) which occasioned a provision to be made for enforcing it, in the great charters of King John and his son. (9 H. 3. c. 25.) These original standards were called *pondus regis*, and *mensura domini regis*; and are directed by a variety of subsequent statutes to be kept in the Exchequer, and all weights and measures to be conformable thereto. But, as Sir Edward Coke observes, (2 Inst. 41.) tho' this hath so often by authority of parliament been enacted, yet it could never be effected; so forcible is custom with the multitude." *Black. Com.* 1 V. 274, &c. and see the *Preceptor*, Vol. 2. p. 384, &c. *Magna Charta*, c. 25. ordains, "that there shall be but one measure throughout England, according to the standard in the Exchequer." Which standard, was formerly kept in the King's palace, and in all cities, market-towns and villages, it was kept in the churches. 4 Inst. 273. By 17 Car. 1. c. 19. there is to be one weight and measure, and one yard according to the King's standard; and whoever shall keep any other weight or measure, whereby any thing is bought or sold, shall forfeit for every offence 5 s. And by 22 Car. 2. c. 8. *Water measure*, as to corn or grain, or salt, is declared to be within the stat. 17 Car. 1. And if any sell grain, or salt, &c. by any other bushel, or measure, than what is agreeable to the standard in the Exchequer, commonly called *Winchester-Measure*; he shall forfeit 40 s. &c. Notwithstanding these statutes, in many places and counties, there are different measures of corn and grain; and the bushel in one place is larger than in another; but the lawfulness of it is not well to be accounted for, since custom or prescription is not allowed to be good against a statute. *Dalt.* 250.

We have three different measures, viz. one for wine, one for ale and beer, and one for corn: in the measure of wine, eight pints make a gallon, eight gallons a firkin, sixteen gallons a kilderkin, half barrel or rundlet, four firkins a barrel, two barrels a hoghead, two hogheads a pipe, and two pipes make a tun. 15 R. 2. cap. 4. 11 H. 7. c. 4. 12 H. 7. c. 5.

In measure of corn eight pounds or pints of wheat make the gallon, two gallons a peck, four pecks a bushel, four bushels a sack, and eight bushels a quarter, &c. And in other measure; three barley corns in length make an inch, twelve inches a foot, three feet a yard, three feet and nine inches an ell, and five yards and a half, which is sixteen feet and half, make the perch, pole or rod. 27 Ed. 3. c. 10. Selling by false measure, being an offence by the Common law, may be punished by fine, &c. upon an indictment at Common law, as well as by statute. See the Stat. 11 Hen. 7. cap. 4. which inflicts particular fines for offences, pillory, &c.

The respective contents of a barrel of beer and ale, 12 Car. 2. c. 23. sect. 20. c. 24. sect. 34. 1 W. & M. c. 24. sect. 5. The bushel of corn and salt ascertained, 22 Car. 2. c. 8. 22 & 23 Car. 2. c. 12. 5 W. & M. c.

7. f. 18. A measure of brass shall be chained in every market, 22 Car. 2. c. 8. sect. 5. Constables to search for unsealed measures, 22 Car. 2. c. 8. sect. 6. Where there is not a clerk of the market, the mayor, &c. shall seal measures, 22 & 23 Car. 2. c. 12. f. 4. Collectors of the excise to provide quarts and pints of brass for ale in every market town, 11 & 12 W. 3. c. 15. sect. 3. Contents of *Winchester* measure, 1 Ann. st. 2. c. 3. sect. 10. Water measure of fruit ascertained; 1 Ann. st. 1. c. 15. Wine measure, 5 Ann. c. 27. sect. 17.

Measurer, or **Meter** of woollen cloth, and of coals, &c. is an officer in the city of London; the latter of great account. *Chart. Jac.* 1. See *Alnager*.

Measuring Money. The letters patent, whereby some persons exacted for every cloth made, certain money, besides *alnage*, called *measuring money*, shall be revoked. *Ret. Parl.* 11 Hen. 4.

Meceria, Is a mead house, or place where mead or metheglin is made. *Cartular. Abb. Glas.* MS. 29.

Mecete, A bribe or reward; and used for a compensation where things exchanged are not of equal value; It is said to come from the word *meed*, which signifies merit.

Mecia & infimæ manus homines, Men of a mean and base condition, of the lower sort. *Blount.*

Mecianus, Is a word used for middle size; *medianus homo*, A man of middle fortune.

Mediators of Questions, Were six persons authorized by statute, who upon any question arising among merchants, relating to unmercatale wool, or undue packing, &c. might before the mayor and officers of the staple upon their oath certify and settle the same; to whose order and determination therein, the parties concerned were to give entire credence and submit. 27 Ed. 3. stat. 2. c. 24.

Medietas Lingua, or **Medietate Lingua**, Jury *de*, Signifies a jury or inquest impanelled, whereof the one half consists of natives, and the other strangers; and is used in pleas wherein the one party is a stranger, the other a denizen: And this manner of trial was first given by the Stat. 27 Ed. 3. cap. 8. Before which, this was obtained by the King's grant. *Staudf. P. C. lib. 3. cap. 7.* He that will have the advantage of trial *per medietatem linguæ*, must pray it; for (it is said) he cannot have the benefit of it by way of challenge. *S. P. C.* 158. 3 Inst. 127. In petit treason, murder and felony, *medietas linguæ* is allowed; but for high treason, an alien shall be tried by the Common law, and not *per medietatem linguæ*. *H. P. C.* 261. And a grand jury ought not to be *de medietate linguæ*, in any case. *Wood's Inst.* 623. *Egyptians* are excluded from this trial, by 1 & 2 P. & M. c. 4. But we read, That *Solomon de Standford a Jew*, had a cause tried before the sheriff of *Norwich*, by a jury of *sex probos & legales homines, & sex legales Judæus de Civitate Norwici*, &c. Pasch. 9 Ed. 1. See *Black. Com.* 3 V. 30. 4 V. 166, 346.

Medio acquietando, Is a judicial writ to distrain a lord for the acquitting of a mean lord from a rent, which he formerly acknowledged in court not to belong to him. *Reg. Judic.* 129. See *Mean*.

Mediterranean, Is that which passeth through the midst of the earth; hence the sea which stretcheth itself from west to east, dividing Europe, Asia, and Africa, is called the *Mediterranean Sea*. The counterfeiting of *Mediterranean* passes for ships to the coast of *Barbary*, &c. or the seal of the admiralty office to such passes, is felony without benefit of clergy. *Stat.* 4 Geo. 2. c. 18.

Mediese, (From the Fr. *Mesler*) Is that which *Bracon* calls *Medietum*, and signifies quarrelling or brawling. *Bracl. lib. 3. tract. 2. cap. 35.*

Medicta, A sudden scolding at, and beating one another. *Bracl. l. 3. c. 35.*

Meditppp, A harvest-supper, or entertainment given to the labourers at harvest-home. *Placit.* 9 Ed. 1. *Cowell.*

Medmap ribet, Pilots thereon how to be licensed, 5 Geo. 2. c. 20. It was called *Vaga* by the Britons; the Saxons added *Med*. See *Vaga*.

Meer, (*merus*) Tho' an adjective, is used as a substantive to signify *meer right*. *Old Nat. Brw.* 2. in these

these words. This writ hath but two issues; *viz.* joining the *mise* upon the *meere*, and that is to put himself in the Great *Affise* of our Sovereign Lord the King, or to join battle. *Cowell.* See *Mise*.

Meigne, Is the same with *maignada*. *Mon. Ang. Tom.* 2. p. 219.

Meiny, (Fr. *Mefnie*) As the King's *meiny*, the King's family, or household servants. 1 R. 2. c. 4.

Metastis, To what duties liable, 2 W. & M. *Jeff.* 2. c. 4. *sect.* 35.

Meldseoth, (Sax.) Was the recompence due and given to him who made discovery of any breach of *feodal laws*, committed by another person; called the promoter or informer's fee. *Leg. Ina, cap.* 20.

Melius Inquirendum, Is a writ that lieth for a second inquiry, where partial dealing is suspected; and particularly of what lands or tenements a man died seized, on finding an office for the King. *F. N. B.* 255. It has been held, that where an office is found against the King, and a *melius inquirendum* is awarded, and upon that *melius*, &c. it is found for the King, if the writ be void for repugnancy, or otherwise, a new *melius inquirendum* shall be had; But if upon the first *melius*, it had been found against the King, in such case he could not have a new *melius*, &c. for then there would be no end of these writs: And if an office be found for the King, the party grieved may traverse it; and if the traverse be found against him, there is an end of that cause; and if for him, it is conclusive. 8 *Rp.* 169. 2 *Nelf.* 1008. If there is any defect in the points which are found in an inquisition, there may not be a *melius inquirendum*; but if the inquisition finds some parts well, and nothing is found as to others, that may be supplied by *melius inquirendum*. 2 *Salk.* 469. A *melius inquirendum* shall be awarded out of B. R. where a coroner is guilty of corrupt practices; directed to special commissioners. 1 *Vent.* 181. *Vide Mod.* 82. *Mich.* 22 *Car.* 2. B. R. *Anon*. See 15 *Vin. Abr.* tit. *Melius inquirendum*.

Members of Parliament, i. e. Members of the House of Commons, the representatives of the people, elected and deputed in the place of the people, to repeal old and useles laws, make new ones, and grant money, when requisite, for the service of government.

Memorials, Are some kind of remembrances or obsequies for the dead, in injunctions to the clergy. 1 *Ed.* 6.

Memozy, (time of.) Hath been long ago ascertained by the law to commence from the reign of *Richard the First*; and any custom may be destroyed by evidence of its non-existence in any part of the long period, from his days to the present. See *Black. Com.* 2 *V.* 31.

Menagium, A family: Mentioned in *Trivet's Chronicle*, p. 677. and in *Walsingham*, pag. 66.

Mendlefe, Mentioned in *Crom. Justice of Peace*, 193. Is that which *Bracton* calleth *medletum*, lib. 3. tract. 2. cap. 35. It signifies quarrels, scuffling or brawling. *Cowell.*

Mentials, (From *menia*, the walls of a castle, house or other place) Are household servants who live under their lord or master's roof; mentioned in the stat. 2 H. 4. c. 21.

Mensa, Comprehends all patrimony, or goods and necessities for livelihood.—*Dominicum est propriis terra ad mensam assignata.*

Mensalia, Such parsonages or spiritual livings, as were united to the tables of religious houses, and called *menial benefices* among the *Canonists*: And in this sense it is taken, where mention is made of appropriations, *ad mensam suam.* *Blount.*

Mensura, Is taken for a bushel of corn, &c.

Mensura Regalis, The King's standard measure, kept in the *Exchequer*, according to which all others are to be made. See Stat. 17 *Car.* 1. and tit. *Measure*.

Mer, or **Merre**: Words which begin or end with those syllables signify fenny places. *Cowell.* See *Mara*, or *Mere*, a lake or great pond.

Mera noctis, Midnight. *Id.*

Mercennarius, A hireling or servant. *Cartular. Abbat. Glasf.* p. 115.

Merchant, (*mercator*) Is one who buys and trades in

any thing: And as *merchandise* includes all goods and wares exposed to sale in fairs or markets; so the word *merchant* formerly extended to all sorts of traders, buyers, and sellers. But every one who buys and sells is not at this day under the denomination of a *merchant*; only those who traffick in the way of commerce, by importation or exportation, or carry on business by way of emption, vendition, barter, permutation or exchange, and who make it their living to buy and sell, by a continued assiduity, or frequent negotiation, in the mystery of merchandising, are esteemed *merchants*. Those who buy goods, to reduce them by their own art or industry, into other forms than they are of, and then to sell them, are *artificers*, not *merchants*: Bankers, and such as deal by exchange, are properly called *merchants*. *Lex Mercat.* 23.

Merchants were always particularly regarded by the Common law; tho' the municipal laws of *England*, or indeed of any one realm, are not sufficient for the ordering and determining the affairs of traffick, and matters relating to commerce; merchandise being so universal and extensive that it is impossible; therefore of the *Law Merchant* (so called from its universal concern) all nations take special knowledge; and the common and statute laws of this kingdom leave the causes of *merchants* in many cases to their own peculiar law. *Ibid.*

The law of *England*, as a commercial country, pays a very particular regard to foreign *merchants* in innumerable instances. By *Magna Charta*, c. 30. it is provided, That all *merchants* (unless publicly prohibited beforehand) shall have safe conduct to depart from, to come into, to tarry in, and to go thro' *England*, for the exercise of merchandize, without any unreasonable imposts, except in time of war; and, if a war breaks out between us and their country, they shall be attached (if in *England*) without harm of body or goods, till the King or his chief justiciary be informed how our *merchants* are treated in the land with which we are at war; and, if ours be secure in that land, they shall be secure in ours.—This seems to have been a common rule of equity among all the northern nations; for we learn from *Stiernbook*, (*de jure Sueon.* l. 3. c. 4.) that it was a maxim among the *Goths* and *Swedes*, "*quam legem exteri nobis posuere, eandem illis ponemus.*" But it is somewhat extraordinary, that it should have found a place in *Magna Charta*, a mere interior treaty between the King and his natural-born subjects: which occasions the learned *Montesquieu* to remark with a degree of admiration, "that the *English* have made the "protection of foreign *merchants* one of the articles of "their national liberty." But indeed it well justifies another observation which he has made, "that the *English* "know better than any other people upon earth, how to "value at the same time these three great advantage, "RELIGION, LIBERTY, and COMMERCE." *Black. Com.* 1 *V.* 260.

In the reign of King *Ed.* 4. a *merchant* stranger made suit before the King's Privy Council, for several bales of silk feloniously taken from him, wherein it was moved, that this matter should be determined at Common law; but was answered by the Lord Chancellor, that as this suit was brought by a *merchant*, he was not bound to sue according to the law of the land. 13 *Ed.* 4. In former times it was conceived, that those laws that were prohibitory against foreign goods, did not bind a *merchant* stranger: but it has been a long time since ruled otherwise; for in the leagues that are now established between nation and nation, the laws of either kingdom are accepted; so that as the *English* in *France* or any other foreign country in amity are subject to the laws of that country where they reside; so must the people of *France*, or any other kingdom, be subject to the laws of *England* when resident here. 19 *Hen.* 7.

English merchants are not restrained to depart the kingdom without licence, as all other subjects are: they may depart, and live out of the realm, and the King's obedience, and the same is no contempt, they being excepted out of the statute 5 R. 2. c. 2. And by the Common law, they might pass the seas without licence; tho' not to merchandise. *Mich.* 12 and 13 *Eliz.* *Dyer* 206.

If any disturbance or abuse be offered them, or any other *merchants* in a corporation, and the head officer

there do not provide a remedy, the franchise shall be seized; and the disturber shall answer double damages and suffer one year's imprisonment, &c. by Stat. 9 Ed. 3. c. 1. All merchants (except enemies) may safely come into England with their goods and merchandise. 14 Ed. 3. Merchant strangers may come into this realm, and depart at their pleasure; and they are to be friendly entertained. 5 R. 2. c. 1. And merchants alien shall be used in this kingdom, as denizens are in others, by the statute 5 Hen. 4. cap. 7.

If a difference arise between the King and any foreign state, alien merchants are to have forty days notice, or longer time, to sell their effects and leave the kingdom. 27 Ed. 3. cap. 17. All merchants may buy merchandises of the staple: And any merchant may deal in more merchandises than one; he may buy, sell and transport all kinds of merchandise. 27 Ed. 3. c. 3. and 38 Ed. 3. c. 2.

All the King's subjects are to have a free trade to and from France, Spain and Portugal. 3 Jac. 1. c. 6. It shall be lawful for merchants to transport iron, armour, pistols, muskets, saddles, swords, bridles, &c. Stat. 12 Car. 2. c. 4. Merchants, &c. corrupting or adulterating wine, or selling the same adulterated, are liable to penalties, by 1 W. & M. Stat. 1. c. 34. On importation of tobacco, merchants have an allowance of 8 per cent. &c. 12 Ann. cap. 8. Vide Custom of Merchants.

Various restraints are laid on merchants, especially to prevent their carrying of gold and silver out of the nation, &c. by the statute law, vide 18 Ed. 2. c. 21. 4 H. 4. c. 15. 5 H. 4. c. 9. 8 H. 6. c. 24. 3 H. 7. c. 8. 1 R. 3. c. 9. 1 Eliz. c. 11.

If a person, who is otherwise no merchant, being beyond sea, takes up money and draws a bill upon a merchant, he cannot in an action brought upon this bill against him as the drawer thereof, plead that he was no merchant; for the very taking up the money and drawing the bill makes him a merchant to this purpose. Comb. 152.

Merchant includes all sorts of traders as well and as properly as merchant adventurers. D. 279. b. cites Spelm. Guild. A merchant taylor is a common term; per Holt Ch. J. 2 Salk. 445.

The custom of merchants is part of the Common law of this kingdom, of which the judges ought to take notice; and if any doubt arise about the custom, they may send for merchants to know the custom; per Hubart Ch. J. Winch. 24.

The *Lex mercatoria*, is allowed for the benefit of trade, to be of the utmost validity in all commercial transactions: for it is a maxim of law, that "*cuiuslibet in sua arte credendum est.*" Black. Com. 1 V. 75. See 3 New Abr. tit. Merchants.

There are companies of merchants in London for carrying on considerable joint trades to foreign parts, viz. The merchant adventurers, the company established in England for the improvement of commerce; which was erected by patent by King Ed. 1. merely for the exportation of wool, &c. before we knew the value of that commodity, and at a time when we were in a great measure strangers to trade. The next company was that of the Barbary merchants, incorporated in the reign of King Hen. 7. A company of merchants trading to the north, called the Muscovy or Russia Company, was established by King E. 6. and encouraged with additional privileges, by Queen Mary, Queen Elizabeth, &c. The Barbary merchants decaying towards the latter end of Queen Elizabeth's reign, out of their ruins arose the Levant or Turkey Company; who first trading with Persia, and then with Turkey, furnished England that way with the East India commodities: This company hath very considerable stations, at Constantinople, Smyrna, Aleppo, &c. From the flourishing state of the Levant or Turkey Company, in the reign his wife of Queen Elizabeth sprung the Old East India Company, who having fitted out ships of force, brought from thence at the best hand, the Indian commodities, formerly sold to England by distant Europeans; and then, having obtained many charters, and grants from the crown, in their favour, were sole masters of that advantageous trade: until at last a new company was incorporated by King Will. 3. Anno 9 W. 3. on their lending government twenty millions of

money; and both these companies after the expiration of a certain term, were by articles united.

In the 21st year of Queen Elizabeth, the Eastland Company of Merchants was erected; and in King Charles the Second's time, that company was confirmed, with full power to trade in Norway, Sweden, Poland, and other Eastland countries. The Royal African Company had their charter granted them in the 14th year of King Char. 2. And by 9 & 10 W. 3. they are to maintain all forts, &c. King Charles 2. also by commission under the Great Seal of England, constituted his Royal Highness James Duke of York, (afterwards King Jam. 2.) Edward Earl of Clarendon, and others, to be a council for the Royal Fishery of England, and declared himself to be the protector of it; and in the 29th year of his reign, he incorporated them into a company. King Will. 3. in the fourth year of his reign, established a Greenland Company. By Stat. 9 Ann. to pay the debts of the army, navy, &c. amounting to near ten millions, the South-Sea Company of Merchants was erected; who having advanced that money, the duties upon wines, vinegar, tobacco, &c. were appropriated as a fund for payment of the interest, after the rate of 6 l. per cent. &c. The company is to have the sole trade to the South-Seas; and others trading thither shall forfeit their ships and goods, and double value: and the corporation is to continue for ever; but the funds are subject to redemption by parliament. This company had their capital stock very much enlarged in the reign of King Geo. 1. And to raise money lent, were empowered to make calls or take in subscriptions, &c. as they thought fit; and on this foundation, the late South-Sea scheme was executed: but to retrieve credit, afterwards part of the stock of the South-Sea company was ingrafted into the capital stock of the East-India company and the Bank of England; and after that, half the stock was converted into annuities at 4 l. per cent. Since which a farther reduction thereof hath been made.

This short history of our Companies of Merchants, which have ever had many and great privileges, and are at length become of double use, i. e. to enlarge commerce, and supply the necessities of the state, in some measure, shews the progress and increase of our trade, and the wealth of the nation: tho' we must nevertheless observe, that they are a kind of monopolies erected by law; and if the power granted them is abused, are of fatal consequence; for which we need only instance the ever memorable year 1720, when the sub-governor and directors of the South-Sea company incurred a forfeiture of their estates by statute, and were disabled to hold any offices, &c. for their vile conduct, which tended to the ruin of the publick. Over and above these companies, there are the Dutch Merchants; those who trade to the West-Indies; the Canary Merchants; Italian Merchants, who trade to Leghorn, Venice, Sicily, &c. The French and Spanish Merchants, &c.

Mercenlage, (Merciorum Lex) Was the law of the people here called the Mercians. Camden in his Britannia says, That in the year 1016, this kingdom was divided into three parts; whereof the West Saxons had one, governing it by the laws called West Saxon-lage, which contained Kent, Sussex, Surrey, Berks, Hampshire, Wilts, Somerset, Dorset, and Devon: The Danes had the second, containing York, Derby, Nottingham, Leicestershire, Lincoln, Northampton, Bedford, Bucks, Hertford, Essex, Middlesex, Norfolk, Suffolk, Cambridge and Huntingdon; which was governed by the laws called Dane-lage: And the third part was in the possession of the Mercians, whose law was called Mercenlage; and contained Gloucester, Worcester, Hereford, Warwick, Oxford, Chester, Salop and Stafford: from which three, King Will. 1. chose the best, and with other laws ordained them to be the laws of the kingdom. Camden. Brit. 94. See Molatun Law.

Mercet, (Mercectum.) A fine or composition paid by inferior tenants, to the lord, for liberty to dispose their daughters in marriage. No baron, or military tenant could marry his sole daughter and heir, without such leave purchased from the King, *pro maritanda filia*. And many of our servile tenants could neither send their sons to school, nor give their daughters in marriage, without express

express licence from the superior lord. See *Kennet's Glossary* in *Maritagium*. See *Marchet*.

Mercia, Is used in many places in the *Monastic*. for ameriement.

Specimoniatum Anglie, Was of old time used for the impost of England upon merchandise.

Mercuricus, Or venders of printed books or papers. Vide *Hawkers*.

Mercey, The arbitrament of the King or judge, in punishing offences, not directly censured by the law. 11 H. 6. c. 2. See *Miseriordia*.

Merget, Is where a lesser estate in lands, &c. is drowned in the greater: as if the fee comes to tenant for years, or life, the particular estates are merged in the fee: but an estate-tail cannot be merged in an estate in fee; for no estate in tail can be extinct, by the accession of a greater estate to it. 2 Rep. 60, 61. If a lord, who hath the fee, marries with the lessee for years; this is no merger, because he hath the inheritance in his own, and the lease in right of his wife. 2 Plowd. 418. And where a man hath a term in his own right, and the inheritance descends to his wife, so as he hath a freehold in her right, the term is not merged or drowned. Cro. Car. 275. Vide 15 Vin. Abr. tit. *Merger*.

Merscum, A lake; from the Sax. mere, lacus. *Maneria, molendina, mersca, & marisca*. Ingulph. p. 861.

Mersc-ware, (Sax. *Insula paludum*) So the inhabitants of Romney Marsh in Kent were antiently called. Cowell.

Mertlage, Seems to be a corruption of, or a Law-French word for martyrology. See Hill. 9 Hen. 7. 14. b. for it being asked what was meant by *meritlage*, the book says, *Ceo est Kalender universal in l'Eglise de cest realm, les queux priests sont lies d'observer & ne pluiz*. A church kalendar or rubrick. Cowell.

Merton, Statutes made there, 20 Hen. 3.

Mesne, (*medius*) Signifies him who is a lord of a manor, and so hath tenants holding of him; yet himself holds of a superior lord. Cowell. See 15 Vin. Abr. tit. *Mesne*.

Forejudger by default given the writ of *mesne*. Process in the writ of *mesne* regulated, and remedies provided for the tenant *peravalle*, St. West. 2. 15 Ed. 1. c. 9. See *Meun*.

Mesnalty, (*medietas*) Signifies the right of the *mesne*, as the *mesnalty* is extinct. Old Nat. Br. 44. If the *mesnalty* descend of the tenant. Kitchin, 147.

Messarius, (from *messis*) The chief servant in husbandry, or harvest-time, now called a bailiff in some places. Mon. Angl. tom. 2. p. 832. Also this word is used for a mow or reaper; one that works harvest-work. Flea, lib. 2. c. 75.

Messenger, Is a carrier of messages, particularly employed by the Secretaries of State, &c. and to these commitments may be made of state prisoners; for tho' regularly no one can justify the detaining a person in custody out of the common gaol, unless there be some particular reason for it; as if the party be so dangerously sick, that it would hazard his life to send him thither, &c. yet it is the constant practice to make commitments to messengers; but it is said, it shall be intended only in order to carrying the offenders to gaol. 1 Salk. 347. 2 Hawk. P. C. 118. An offender may be committed to a messenger, in order to be examined before committed to prison; and tho' such commitment to a messenger is irregular, it is not void; and a person charged with treason, escaping from the messenger, is guilty of treason, &c. Skin. 599.

Messengers of the Exchequer, Are officers attending that court; they are four in number, and in nature of pursuivants to the Lord Treasurer.

Messe Thane, Signifies a priest. The Saxons called every man *thane*, who was above the common rank; so *messe thane* was he who said mass; and *vorules thane* was a secular man of quality. Cowell.

Messina, Reaping time, harvest. Id. ib.

Messuage, (*Messuagium*) Is properly a dwelling-house, with some adjacent land assigned to the use thereof. West. Symb. tit. *Fines*, sect. 26. Braet. lib. 5. cap. 28. and Plowden, 169, 170. where it is said, that by the name of

a *messuage* may pass also a curtilage, a garden and orchard, a dove-house, a shop, a mill, a cottage, a toft, a chamber, a cellar, &c. yet they may be demanded by their single names. *Messagium* in Scotland, signifies the principal place or dwelling-house within a barony, which we call a *manor-house*. Skene de verbo. signif. verb. *Messuagium*. In some places it is called the site of a manor. A *præcipe* lies not *de domo*, but *de messuagio*. Co. Lit. cap. 8.

Mestilo, *Mesline*, or rather *mesellane*, that is, wheat and rye mingled together.—*Et nonam garbam frumenti, mellilonis, siliginis & omnis generis bladi*. Pat. 1 Ed. 3. par. 1. m. 6.

Metal. The exportation of iron, brads, copper, latin, bell and other metal, antiently restrained. 28 Ed. 3. c. 5. 33 Hen. 8. c. 7. 2 & 3 Ed. 6. c. 37. But permitted by 5 W. & M. c. 17. Metal prepared for battery, to what duties liable. 4 W. & M. c. 5.

Metecorn, A measure or portion of corn, given out by the lord to customary tenants, as a reward and encouragement for their duties of labour. *Stipendia & metecorn, ac cetera debita servitia in monasterio prædicto solvantur*. Ryley's Plac. Parl. 391.

Metegabel, (Sax. *cibi gablum. seu wedigal*) A tribute or rent paid in victuals; which was a thing usual in this kingdom, as well with the King's tenants as others, till the reign of King Hen. 1.

Meter of coals in London, &c. from *metior*, to mete or measure a thing. Vide *Measurer*.

Metheglin, (*Brit. Meddiglin*) An old British drink made of honey, &c. and still continues in repute in England; it is mentioned in the Statute 15 Car. 2. cap. 9.

Metteshep, **Mettenshep**, Was an acknowledgment paid in a certain measure of corn; or a fine or penalty imposed on tenants, for their defaults in not doing their customary services, of cutting the lord's corn. *Paroch. Antiq.* 495.

Meyum & Tuum, Are Latin words used for the proper guides of right; and which being misunderstood, have been the ground of many controversies.

Mey, A mey or mow of corn, as antiently used; and in some parts of England they still say *mei* the corn, i. e. put it on an heap in the barn.—*Cariabunt Bladum per unum diem cum una carecta, & inveniunt unum hominem ad faciendum meyas in grangio*. Blount. Ten. 130.

Micel-gemotes, **Micel-synods**, The great councils in the Saxon times of King and noblemen, were called *Wittena-gemotes*, and after *Micel-synods* and *Micel-gemotes*, i. e. Great and general assemblies. Cowell. See *Black. Com.* 1 V. 147.

Micel Synoth, Same with *Micel-gemote*, or *Micel-gemote*, which see, and also *Black. Com.* 1 V. 147.

Middlesex, The sessions of the peace how often to be held, 14 H. 6. c. 4. In actions triable by *Middlesex* jurors, they shall be called the fourth day, &c. 8 Ed. 4. c. 3. Inhabitants of *Westminster* exempt from serving on juries at the sessions for the peace, 7 & 8 W. 3. c. 32. sect. 9. Deeds and wills to be registered there, 7 Ann. c. 20. No juror to be returned at the *Nisi prius* in *Middlesex*, who hath been returned in two preceding terms or vacations, 4 Geo. 2. c. 7. sect. 2. Leaseholders qualified to serve as jurors in *Middlesex* 4 Geo. 2. c. 7. f. 3. But one county rate to be made for *Middlesex*, 12 Geo. 2. c. 29. f. 15.

Mild-boards. See *Paste-boards*.

Mildernix, A kind of canvas, of which sail-cloths of ships are made. 1 Jac. cap. 14.

Mile, (*Milliare*) In the measure of a country, is the distance or length of a thousand paces; otherwise described to contain eight furlongs, every furlong being forty poles, and every pole sixteen foot and a half. Stat. 35 Eliz. c. 6.

Miles, The statute mile, 35 Eliz. c. 6. to be taken by computation for the distance of the refineries of rock salt from the pits. 8 Geo. 2. c. 12.

Miles, A knight. Mat. Westm. p. 118.

Militare, To be knighted, viz. *Rex per Angliam fecit proclamari, &c. ut qui haberent unde militarent adessent apud Westmonasterium, &c.* Mat. Westm. pag. 118.

Military Causes. See *Black. Com.* 3 V. 103. *Military Courts*, ib. 3 V. 68. *Military Feuds*, ib. 2 V. 56.

Military Offences, ib. 1 V. 414. 4 V. 101. *Military Power of the Crown*, ib. 1 V. 262. *Military State*, ib. 1 V. 407. *Military Testures*, ib. 1 V. 287. *Military Testament*, ib. 1 V. 416.

Militia, (*Lat.*) The being a foldier; and applied to the *trained bands*, under the direction of the lieutenantcy. The *Stat. 13 Car. 2. cap. 6.* is declarative of the King's right to the supreme government of the *militia*, and of all forces by sea and land, &c. And by the 13 and 14 *Car. 2. c. 3.* The King may issue commissions of lieutenantcy for the several counties and cities, &c. *Vide the Stat. 14 & 15 Car. 2. c. 4. 9 & 10 W. 3. c. 12. 10 & 11 W. 3. c. 12.* And for new regulations, 30 *Geo. 2. c. 25. 31 Geo. 2. c. 26.*

The militia laws reduced into one act, 2 *Geo. 3. c. 20.* Explained and amended, 4 *Geo. 3. c. 17.* Application of the money granted for the charge of the militia, 2 *Geo. 3. c. 35. 3 Geo. 3. c. 10. 4 Geo. 3. c. 30. 5 Geo. 3. c. 34.*

Mill, (*molendinum*) Is a house or engine to grind corn, and either a water-mill, wind-mill, horse-mill, hand-mill, &c. And besides corn and grist-mills, there are paper-mills, fulling or tucking-mills, iron-mills, oil-mills, &c. 2 *Inst. 621.* The toll shall be taken according to the strength of the water, *ordin. pro pistor. incerti temp.* Prohibition shall not go in suit for tithe of a new mill. *Art. cler. 9 Ed. 2. stat. 1. c. 5.*

Magistrates may search mills for adulterated meal, &c. 31 *Geo. 2. c. 29. stat. 29.* Miller, baker, &c. not to act as magistrate under this act, 31 *Geo. 2. c. 29. s. 32.* See 15 *Vin. Abr. tit. Mill.*

Milleate, (mentioned in *Stat. 7 Jac. cap. 19.*) A trench to convey water to or from a mill. *Cowell.*

Millet, (*milium*) A small grain so termed from its multitude. *Litt. DiB.*

Mina, A corn measure of different quantity, according to the things measured by it: and *minage* was a toll or duty paid for selling corn by this measure. *Cowell.* According to *Littleton*, it is a measure of ground, containing one hundred and twenty foot in length, and as many in breadth. Also it is taken both for a coin and a weight. *Litt. DiB.*

Minare, To mine or dig mines.—*Minator* a miner. *Record. 16 Ed. 1.*

Minator carucae, A ploughman. *Cowell.*

Mineral, Is any thing that grows in mines, and contains metals. *Shep. Epis.*

Mineral Courts, (*curiae minerales*) Are peculiar courts for regulating the concerns of lead mines; as *Stannary Courts* are for tin. See *Berghmote.*

Mine-Adventurers, A company established by statute, governed by the Duke of Leeds. &c. *Vide 9 Ann. c. 24.*

Mines, (*mineriae*) Quarries or places whereout any thing is digged; they are likewise the hidden treasure dug out of the earth. The King by his prerogative hath all mines of gold and silver to make money; and where gold and silver in mines is of the greater value; they are called *Royal mines*. *Plowd.* But by statute, no mine of copper or tin shall be adjudged a *Royal mine*, tho' silver be extracted. 1 *W. & M. c. 30.* And persons having mines of copper, tin, lead, &c. shall enjoy the same, altho' claimed to be royal mines; but the King may have the ore, (except in *Devon* and *Cornwall*), paying to the owners of the mines, within thirty days after it shall be raised, and before removed, 16*l.* per tun for copper ore, washed and made merchantable; for lead ore, 9*l.* per tun; tin or iron, 40*s.* &c. *Stat. 5 W. & M. c. 6.* If a man hath lands where there are some mines open and others not, and he lets the land with the mines therein, for life or years, the lessee may dig in the open mines only, which is sufficient to satisfy the words in the lease; and hath no power to dig the mines unopened: but if there be no open mine, and the lease is made of the lands, together with all mines therein, *thens the lessee may dig for mines and enjoy the benefit thereof*; otherwise those words would be void. 1 *Inst. 54. 5 Rep. 12. 2 Lev. 184.* To dig mines is waste, where lessees are not authorized by their leases: tho' a mine is not properly so called

till it is opened; being but a vein of iron or coals, &c. before. 1 *Inst. 54. v. 2 Mod. 193.*

For relief of the creditors of the company of mine adventurers. See 9 *Ann. c. 24.* If any person maliciously set on fire any mine, or pit of coal, he shall suffer death as a felon, by *Stat. 10 Geo. 2. c. 32.* And damaging such mines, or any coal-works, by conveying water therein, or obstructing sewers from draining them, &c. shall forfeit treble damages. 13 *Geo. 2. cap. 21. 24 Geo. 2. c. 57.* Mines how taxable, 30 *Geo. 2. c. 3.*

A man opens a mine in his land, and digs till he digs under the soil of another; he may follow his mine there; but if the owner digs there also he may stop his farther progress; and said to be the use in *Cornwall*. 2 *Vent. 342. per Wilde J.* on a case referred to him by Lord *Bridgman*, 22 *Car. 22.*

It was said by the Solicitor General, that there was a great difference between pits and mines; for if a mine be opened, he that may work the mine is not obliged to pursue the vein of ore under ground; but he may sink pits in pursuit of it which are necessary to come at the ore, and as many as he thinks proper; and Lord Chancellor said, it had been so resolved before *Powell J.* on great consideration, and consulting and examining the most able miners. *Cases in Equity* in Lord King's time, 79. *Nov. 10, 1729. Clavering v. Clavering.*

If a man demises lands for life or years, in which there is a coal-mine open, *the lessee may dig in it*; for the mine being open, it shall be intended by his demising all the land, that his intent is as general as his demise; but if the mine was not opened at the time of the demise, the lessee by lease of the land is not empowered to make new mines; but in such case if he leases his land and all mines therein, the lessee may dig for mines there; resolved, 5 *Rep. 12 Trin. 41 Eliz. C. B. Saunderson's case.*

A question was, if copyholder of inheritance may dig mines in his land? The court seemed to think he might; for that otherwise, mines there would never be opened; as in the case of a glebe of a parson. *Sid. 152. Trin. 15 Car. 2. B. R. in the case of Rutland (Lord) v. Gie.*

As to tenant in tail working mines, *vide 2 Wms.'s Rep. 388. Clavering v. Clavering.*

If a person breaks up, or even attempts, or threatens to break up mines which he ought not to do, that is a reason for coming into Chancery to have an injunction; per Lord Chancellor. *Barn. Chan. Rep. 497. Pasch. 1741. in the case of Gibson v. Smith.*

Entering mines of black lead with intent to steal, *felony*. 25 *Geo. 2. c. 10.*

Mines, In another signification are caves or trenches dug under ground, whereby to undermine the walls of a city or fortification.

Miniments, or **Muniments**, (*munimenta*, from *munio*, to defend) Are the evidences and writings concerning a man's possession or inheritance, whereby he is enabled to defend the title of his estate; and this word includes all manner of evidences, deeds, charters, &c. *Terms de Ley. Stat. 5 R. 2. c. 8. and 35 H. 6. c. 37.*

Ministers. If a minister is disturbed in the execution of his office in the church; the punishment upon conviction is a fine of 10*l.* And upon non-payment three months imprisonment, &c. 2 & 3 *Ed. 5. c. 1.* And disturbing a licensed minister incurs a forfeiture of 20*l.* by 1 *W. & M. c. 11.*

Ministri Regis, Extend to judges of the realm; as well as to those who have ministerial offices in the government. 2 *Inst. 208.*

Minor, One under age; more properly an heir male or female, before they come to the age of twenty-one years; during which minority they are generally incapable to act for themselves.

Monks, *Friars Minorites*, of the order of St. Francis that had no prior; they washed each other's feet, and increased very much in the year 1207. *Matt. Westm.*

Minstrel, (*Minstrellus* & *minestrallus*, from the Fr. *monestrier*.) A musician, fidler, or piper; mentioned 4 *Ed. 4. cap. 27. pat. 24 April 9 Ed. 4. Quod mariscalci & minstrelli pradiati per se forant & esse debent*

unum corpus & una communitas perpetua, &c. Upon a *quarranto*, 14 H. 7. *Laurentius Dominus de Dutton clamat, quod omnes minstrelli infra civitatem Cestrie & infra Cestriam manentes, vel officia ibidem exercentes, debent convenire coram ipso vel Senescalco suo apud Cestriam, ad festum Nativitatis S. Johannis Baptiste annuatim, & dabunt sibi ad dictum festum quatuor lagenas vini & unam lanceam; & insuper quilibet eorum dabit ei quatuor denarios & unum obolum ad dictum festum, & habere de qualibet meretrice infra comitatum Cestrie, & infra Cestriam manente, & officium suum exercente, quatuor denarios per annum ad festum pradiatum, &c.* And where by the statute of 39 Eliz. cap. 4. Fiddlers are declared to be *rogues*, yet there is a proviso therein, exempting those in *Cheshire* licensed by *Dutton of Dutton*. The musicians of England, incorporated by King Charles II. anno 1670. See *Claus. 9 Edw. 2. m. 26 Dors.* an ordinance *super mensuratione ferculorum & menestralorum*. It was usual for these minstrels, not only to divert princes, and the nobility, with sports, but also with musical instruments, and with flattering songs, in praise of them and their ancestors. The office and power of the King of the minstrels, is mentioned in the *Monastic. 1 tom. 355. Cowell. See Vagrants, and Black. Com. 2 V. 96.*

Mint, (*officina monetaria. monetarium*) Is the place where the King's money is coined; which is at present and long hath been in the *Tower of London*, tho' it appears by divers statutes, that in antient times the Mint has also been at *Calais*, and other places. 2 R. 2. c. 16. and 9 H. 5. c. 5. The Mint-master is to keep his assay, and receive silver at the true value, &c. 2 H. 6. c. 12. And gold and silver delivered into the Mint is to be assayed, coined, and given out, according to the order and time of bringing in; and persons shall receive the same weight of coin, or so much as shall be finer or coarser than the standard, &c. Stat. 18 Car. 2. c. 5. All silver and gold extracted by melting and refining of metals, shall be employed for the increase of monies, and be sent to the Mint, where the value is to be paid. 1 W. & M. c. 30. By the Stat. 18 Car. 2. 3000*l.* a year was granted out of certain duties on wine, beer, &c. imported, to defray the expence of the Mint; but this was increased by the Stat 4 & 5 Ann. c. 22. and much augmented by 1 Geo. 1. c. 43. by which statute it may be a sum not exceeding 15,000*l.* per ann. for England and Scotland, &c.

The officers belonging to the Mint have not always been alike; they are now the following, viz. the warden, who is the chief of the rest, and is by his office to receive the silver and bullion of the goldsmiths to be coined, and take care thereof, and he hath the overseeing of all the other officers. The master worker receives the silver from the warden, and causes it to be melted, when he delivers it to the *moniers*, and taketh it from them again after made into money. The comptroller, who is to see that the money be made to the just assize, and controul the officers if the money be not made as it ought. The master of the assay, who weigheth the silver, and examineth whether it be according to the standard. The auditor takes account of the silver, &c. The surveyor of the melting, who is to see the silver cast out, and that it be not altered after the assay master hath made trial of it, and it is delivered to the melters. The clerk of the irons, who seeth that the irons be clean and fit for working. The graver, whose office is to engrave the stamps for the money. The melters, who melt the bullion, &c. The blanchers do anneal and cleanse the money. The *moniers*, who are some to shear the money, others to forge and beat it broad, some to round, and some to stamp or coin it. The provost to provide for all the monies, and oversee them, &c. Vide *Coin, Money*.

Mint, A pretended place of privilege in Southwark, near the King's Bench, put down by statute. If any persons within the limits of the Mint shall obstruct any officer in the serving of any writ or process, &c. or assault any person therein, so as he receive any bodily hurt, the offenders shall be guilty of felony, and transported to the plantations, &c. Stat. 9 Geo. 1. c. 28. See *Privileged Places*.

Misnuete, To let blood; *misnuetio*, blood-letting. This was a common old practice among the regulars, and the

secular priests or canons, who were the most confined and sedentary men. In the Register of statutes and customs belonging to the cathedral church of St. Paul's in London, collected by Ralph Baldock, dean, about the year 1300; there is one express chapter *De minutione*. Cowell.

Minute Tithes, (*minuta five minores decimae*) Small tithes, such as usually belong to the vicar, as of wool, lambs, pigs, butter, cheese, herbs, seeds, eggs, honey, wax, &c. See 2 Inst. 649. and *Udal and Tindal's case, Hill. 22 Jac.* where the tithe of wood was adjudged *minuta decima*. Cro. Rep. fol. 21. See *Tithes*.

Mistracula, A superstitious sport or play, practised by the popish clergy for gain and deceit; prohibited by bishop *Groshead* in the diocese of *Lincoln*. Cowell.

Mis: This syllable added to another word signifies some fault or defect; as, *misprison*, *misdicere*, i. e. to scandalize any one; *misdocere*, i. e. to teach amiss. *Si presbyter populum suum misdoceat*. Cowell.

Missa, A compact or agreement, a form of peace, or compromise. *Id. ib.*

Misadventure, (*Fr. misadventure, i. e. infortunium*) Has an especial signification for the killing a man, partly by negligence and partly by chance. S. P. C. lib. 1. c. 8. And *Britton* distinguishes between *adventure* and *misadventure*; the first he makes to be mere chance; as if a man, being upon or near the water, be taken with some sudden sickness, and so fall in and is drowned; or into the fire, and is burnt; *misadventure* he says is, where a person comes to his death by some outward violence, as the fall of a tree, the running of a cart-wheel, stroke of a horse, or such like. *Britt. c. 7.* *Staundford* construes *misadventure* more largely than *Pritton* understands it; and says, it is where one thinking no harm carelessly throws a stone, where-with he kills another, &c. *West* defines *misadventure* to be, when a man is slain by mere fortune, against the mind of the killer; and he calls it *homicide by chance mixed*, when the killer's ignorance or negligence is joined with the chance. *West. Symb. sect. 48, 49.* See *Chancemedley, Homicide*, and *Black. Com. 4 V. 182.*

Miscasting or miscalculating. *Assumpsit* to pay 12*l.* Jury found a promise to pay 7*l.* the judgment was reversed; because it is not the same *assumpsit*. D. 219. b. *Marg. pl. 11*, cites 10 Eliz. *Billingley's case*.

Debt; and declared, that the defendant had bargained with him to give him for the pasturing of every horse by the night 2*d.* and for every ox 1*d.* half-penny, and sheweth, that he had pastured 70 horses and 300 oxen; *Et ideo actio accrevit* to demand, &c. and he demanded more than upon his own shewing it appeared he should have; for the number of the horses and oxen did not amount to the sum he had counted; and this was alledged in arrest of judgment after verdict found for the plaintiff; but judgment was given for the plaintiff notwithstanding. Cro. Eliz. 22. Mich. 25 Eliz. in C. B. *Moore's case*. Mich. 25 Eliz. C. B. cited in *Moore's case*, per *Fenner*, as *Anglow's case*. See 15 Vin. Abr. 402—405.

Miscognisant, Ignorant or not knowing. In the Stat. 32 H. 8. c. 9. against champerty and maintenance, it is ordained that proclamation shall be made twice in the year of that act, to the intent no person should be ignorant or miscognisant of the penalties therein contained, &c.

Miscalculating, In covenant for payment of rent, the miscasting of the sum due doth not make it ill; and if more be laid, it shall be abated as surplus: but is otherwise in debt for rent. Dyer 55.

Discontinuance, Signifies the same with *discontinuance*. *Kitch. 231.* Tho' 'tis generally said to be, where a continuance is made by undue process. *Jenk. Cent. 57.*

Misdemeanor, or *Misdemeanor*. This word, in the laws of England, signifies a crime.—Every crime is a misdemeanor, yet the law hath made a distinction between crimes of an higher and a lower nature, the latter being denominated *misdemeanors*, the former *felonies*, &c. For the understanding of which distinction, we shall give the following definition from Mr. Justice *Blackstone's Commentaries*, 4 P. 5.

A crime or misdemeanor, is an act committed or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes

crimes and misdemeanors; which, properly speaking, are mere synonymous terms; tho' in common usage, the word "crimes," is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprized under the gentler name of "misdemeanors" only.

And as he farther observes in the same page, in making the distinction between *public wrongs* and *private*, between *crimes* and *misdemeanors*, and *civil injuries*: "Public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity."

This term may be considered as, and in fact is, a *genus*, which contains under it a great number of *species*, almost as various in their nature as human actions; and which, to enumerate, would be a work of infinite labour: we are inadequate to that labour, nor will the nature and compass of this work admit of such an enumeration.—We must therefore refer the reader to our several codes of criminal jurisprudence, particularly to *Hale's History of the Pleas of the Crown*, and *Hawkin's Pleas of the Crown*, for further satisfaction, on this very extensive subject. *Vide tit. Misprison.*

Misfe, (a French word, written in Latin *missum*, and sometimes *missa*) Is a law term signifying expences, and it is so commonly used in the entries of judgments, in personal actions; as when the plaintiff recovers, that *recuperet damna sua* to such a value, and *pro missis & custagiis*, for costs and charges so much, &c. This word hath also another signification in the use made of it by law; which is where it is taken for a *word of art*, appropriated to a writ of right, so called because both parties have put themselves upon the mere right, to be tried upon the grand assize; so as that in which all other actions is called an issue, in a writ of right is termed a *mise*; but if in the writ of right, a collateral point be tried, there it is called an issue. To join the *mise* upon the *meer* is as much as to say, to join the *mise* upon the *clear right*, i. e. to join upon this point, which hath the more right, the tenant or demandant. 1 *Inst.* 294. 37 *Ed.* 3. c. 16. See *Black. Com.* 3 *V.* App. v.

Misfs, Are taken for taxes or tallages, &c. An honorary gift or customary present, from the people of *Wales* to every new King and Prince of *Wales*, antiently given in cattle, wine and corn, but now in money, being 5000*l.* or more, is denominated a *mise*: so was the usual tribute or fine of 3000 marks, paid by the inhabitants of the county palatine of *Chester*, at the change of every owner of the said earldoms for enjoying their liberties. And at *Chester* they have a *mise-book*, wherein every town and village in the county is rated what to pay towards the *mise*. The 27 *Hen.* 8. c. 26. ordains, that "Lords shall have all such *misses* and profits of their lands as they had in times past, &c." And *mise* is sometimes corruptly used for *mease* in Law French *mees*, a messuage; as a *mise place* in some manors is such a messuage or tenement as answers the lord a heriot at the death of its owner. 2 *Inst.* 528.

Miselli, Leprous persons. *Corwell.*

Mise-money, Was money given by way of contract or composition to purchase any liberty, &c. *Blount Ten.* 162.

Miserere, The name and first word of one of the Penitential Psalms, and is most commonly that which the ordinary gives to such guilty malefactors as are admitted to the benefit of clergy; being therefore called the *Psalm of Mercy*.

Misericordia, Is in law, used for an arbitrary or discretionary amercement imposed for an offence; and where the plaintiff or defendant in any action is amerced, the entry is *ideo in misericordia*, &c. *Bract.* lib. 4. tract. 5. cap. 6. *Kitch.* 78. It is called *misericordia*, because it ought to be but small, and rather less than the offence, according to *Magna Charta*, c. 14. Sometimes *misericordia* is to be quit of all manner of amercements. *Crompt. Jurisd.* 196.

If a man be unreasonably amerced in a court not of record, as in a court baron, &c. there is a writ called *moderata misericordia*, directed to the lord, or his bailiff,

commanding them that they take moderate amercements according to the quality of the fault. Sometimes *misericordia* is to be quit and discharged of all manner of amercements that a man may fall into in the forest. See *Crompt. Jur.* 196. See *Amerciament*, *Fines for Offences*, *Mercy*, and *Moderata Misericordia*. He shall be in the great mercy of the King. *Westm.* 1. cap. 15.

Misericordia in cibis & potu, Exceedings, or over-commons, or any gratuitous portion of meat and drink given to the religious above their ordinary allowance.—*Hic quoque procuravit—ut detestabiles ingurgitationes misericordiarum (in quibus profecto non erat misericordia) prohiberentur.* *Mat. Par. Vit. Abb. S. Albani*, pag. 71. In some convents they had a stated allowance of these over-commons upon extraordinary days, which were called *misericordia regularis*, as — *In minutionibus vero misericordiarum regularibus duo & duo unam justam de cellario tam ad prandium quam ad cenam.*—*Monast. Angl.* tom. 1. pag. 149. b.

Misericordia communis, Is when a fine is set on the whole county, or hundred. *Mon. Angl.* 1 tom. pag. 976. *Ac de murther ac de communi misericordia quando contigerit, videlicet, comitatus & hundredi coram nobis vel aliquibus iusticiariis nostris, &c.*

Misfeventre, To succeed ill; as, where a man is accused of a crime, and fails in his defence or purgation. *Et si compellatio fit & emendando misfeveniat, fit in episcopi potestas.* *Lex Canut.* 78. apud *Brompton.*

Misfeasance, A misdeed or trespass.—*Jury to inquire of all purprestures and misfeasance.* *Cro. Car.* 498.

Misfeasor, Is a trespasser. 2 *Inst.* 200.

Misfortune, or *Chance*, A deficiency of the will, or committing of an unlawful act, by misfortune or chance, and not by design. In such case the will observes a total neutrality, and does not co-operate with the deed, which therefore wants one main ingredient of a crime. See *Black. Com.* 4 *V.* 26.

Miskennung, (*miskennunga*) Is derived from *mis*, and *San. cennan*, i. e. *citare*. *Leg. H.* 1. c. 12. *Iniqua vel injusta in jus vocatio; inconstanter loqui in curia, vel invariare.* It is mentioned among the privileges granted and confirmed to the monastery of *Ramsay* by *S. Edward the Confessor*. *Mon. Angl.* tom. 1. pag. 237. *Et in Civitate London in nullo Placito miskennagium.* *Chart. H.* 2.

Misketing. *Hoc est quietus esse pro querelis coram quibuscunque in transumptione probata.* *MS. LL.* in *Bibl. Cotton*, fol. 261.

Misnomer, compounded of the *Fr. mes*, signifying *amisi*, and *nomen*, i. e. *nominare*) Is the using one name for another, a misnaming. *Nomen est quasi rei notamen*, and was invented to make a distinction between person and person; and where a person is described, so that he may be certainly distinguished and known from other persons, the omission or in some cases the mistake of the name shall not avoid the grant. 11 *Rep.* 20, 21. A grant to a man by a wrong name may be good, *si constet de persona*, but the demonstratio de persona must appear upon the face of the grant. *Ld. Raym.* 304. Yet a grant to a Knight by the name of *Esquire*, is void. *Ib.* 303. And if the name of a party is mistaken, the judges ought to mould a small mistake therein, to make good a contract, &c. and so as to support the act of the party by the law. *Hob.* 125. But the Christian name ought always to be perfect; and the law is not so precise as to surnames, as it is of Christian names. *Popb.* 57. 2 *Lill. Abr.* 199. Misprisions of clerks in names are amendable: and *Peter* and *Piers* have been adjudged one and the same name. 2 *Cro.* 67, 425. 1 *Leon.* 146. And so *Saunders* and *Alexander*; and *Garret* and *Gerald* are but one name: but *Ranulph* and *Randolph*; *Isabel* and *Sybil*, &c. are several names, and must be named right. 1 *Roll. Abr.* 135. 1 *And.* 211.

Where a christian name is quite mistaken, as *John* for *Thomas*, &c. it may be pleaded, that there was no such man in *verum natura*. *Dyer* 349. If a person pleads, that he was never called by such a name, it is ill; for this may be true, and yet he might be of that name of baptism. 1 *Salk.* 6. One whose name is *Edmund* is bound in a bond

bond by the name of *Edward*; tho' he subscribes his true name, that is no part of the bond. 2 Cro. 640. *Dyer* 279. If a person be bound by the name of *W. R.* he may be sued by the name of *W. R.* alias dictus *W. B.* his true name; not *W. B.* alias dictus *W. R.* 3 Salk. 238. If a person be indicted by two christian and surnames, it will be quashed; for he cannot have two such names. 1 *Ld. Raym.* 562. A lady, wife to a private person, ought to be named according to the name of her husband, or the writ shall abate; so if the son of an Earl, &c. be sued as a Lord, and not as a private person by the name of his family. *Dyer* 76. 2 Salk. 451. Where a man's title is mistaken in a writ, &c. it shall abate, and he must be arrested again. 1 *Vent.* 154. And the plaintiff is to confess the misnomer, and pray an abatement of his writ before he proceeds to a new one. *Trin. 2 Ann.* 1 Salk. 129.

But if a person's title of Lord, &c. be mistaken in a lease or demise, on Not guilty pleaded, the issue is not, whether the person making the lease is a Lord, or not; so that it is sufficient if 'tis the same person who demised, tho' misnamed. *Allen* 58. 2 *Nelf. Abr.* 1172. Misnomer of corporations may be pleaded in abatement. 1 *Leon.* 159. 5 *Mod.* 327. 2 Salk. 451. And if there be any mistake in the name of a corporation, that is material in their leases and grants; they will be void. 2 *Bendl.* 1. *Anders.* 196. Judgment against a corporation by a wrong name is void. *Ld. Raym.* 119. A defendant may avoid an outlawry, by pleading a misnomer of name of baptism or surname; or misnomer as to additions of estate, of the town, &c. 2 *Hawk. P. C.* 460.

Tho' misnomer of a surname may not be pleaded on an indictment; in an appeal it may: And any other misnomers, and defective additions, are as fatal in an indictment as an appeal. *Ibid.* 130. A misnomer must be pleaded by the party himself who is misnamed. 1 *Lutw.* 35. Plea of misnomer by attorney may be refused, but it is no cause of demurrer. *Ld. Raym.* 509. If a man is taken upon a *Cop. Excons.* who is not of the name in the writ, he has no day in court to plead this matter to be discharged; but must bring an action of trespass for false imprisonment. 1 *Mod.* 70. If defendant omits to plead a misnomer, he may be taken in execution by the wrong christian name. 2 *Strange* 1218. Misnomer of the defendant may be pleaded after a full defence, but not after a general appearance and defence. *Ld. Raym.* 118. What words in a plea of misnomer shall be considered as a special imparlance, see *Wils. par.* 1. 261.

If issue is joined on a plea in abatement for a misnomer in an action upon the case on promises, and found against the defendant, the judgment shall be *peremptory*, therefore the jury ought to assess the damages. *Wils. par.* 2. 367.

What foundation will support a name by reputation, see *Ld. Raym.* 301, 304.—*Note*, names of persons not christened are surnames only. *Id.* 303. See *Abatement and Addition*.

It may not be improper, (for the information of the student,) to observe, that for the addition or omission of a letter or two, not making any material alteration in the sound, 'tis not proper to plead a misnomer. The courts of law discourage, (and that justly,) dilatory pleas, as much as they can, as tending to the delay of justice. However, the curious reader, who chooses to pursue his enquiries on this subject, will find it fully treated of by *Campy*, in the first Vol. of his *Digest*, tit. *Abatement*. Also vide 2 *Hawk. P. C.* 230, &c. 3 *New Abr.* tit. *Misnomer and Addition*.

Mispleading. If, in pleading, any thing be omitted, that is essential to the action or defence, as if the plaintiff does not merely state his title in a defective manner, but sets forth a title that is wholly defective in itself, or if to an action of debt (i. e. on bond, contract, &c.) the defendant pleads *Not guilty* instead of *nil debet*, these cannot be cured by a verdict for the plaintiff, in the first case, or for the defendant in the second. Salk. 365. *Cro. Eliz.* 778. *Black. Com.* 3 *P.* 394, &c.

When an issue is joined on an immaterial point, or such a point, as, after trial, the court cannot give judgment, the court regularly awards a repleader. See *New Abr.* 4 *P.* 126. And *Campy's Digest*, 5 *P.* 136.

Misprision, (*mispriso*, from the Fr. *mespris*, contemptus) Signifies a neglect or oversight: As for example; *misprision of treason*, is a negligence in not revealing treason where a person knows it to be committed. *Staudf. P. C. lib.* 1. c. 19. If a man knoweth of any treason or felony and conceals the same; it is *misprision*: In a larger sense, *misprision* is taken for many great offences, which are neither treason nor felony, or capital, but very near them; and every great misdemeanor, which hath no certain name appointed by the law, is sometimes called *misprision*. 3 *Inst.* 36. *H. P. C.* 127. *Wood* 406, 408. When one knows another hath committed treason, and doth not reveal it to the King or his Privy Council, or some magistrate, that the offender may be secured and brought to justice, it is high treason by the ancient Common law; for delay in discovering treason was deemed an assent to it, and consequently high treason: But there must now be an actual assent to some outward act to make it treason. *Bratton* 118. *S. P. C.* 37. 3 *Inst.* 138, 140. And by stat. 1 & 2 *P. & M.* c. 10. a bare concealment of any high treason, shall be only *misprision* of treason. A person having notice of a meeting of conspirators against the government, goes into their company and hears their treasonable consultation, and conceals it, this is treason; so where one has been accidentally in such company, and heard such discourse, if he meets such company a second time; for in these cases the concealment is attended with circumstances which shew an approbation thereof. *H. P. C.* 127. *Kel.* 17, 21. And a man who hath knowledge of a treason cannot secure himself by discovering generally that there will be a rising, without disclosing the persons intending to rise; nor can he do it by discovering these to a private person, who is no magistrate. *S. P. C. H. P. C.* 127. But where one is told in general, that there will be a rising or rebellion, and doth not know the persons concerned in it, or the place where, &c. this uncertain knowledge may be concealed, and it shall not be treason or *misprision*. *Kel.* 22. 1 *H. P. C.* 36. If high treason is discovered to a clergyman in confession, he ought to reveal it; but not in case of felony. 2 *Inst.* 629.

Concealers of Bulls of absolution from Rome are guilty of *misprision* of treason. 13 *Eliz. a.* 2. There is a *misprision* of treason in counterfeiting the Great Seal; forging and uttering counterfeit money brought from another kingdom, &c. 14 *Eliz. c.* 3. And *misprision* being included in every treason or felony, where a man hath committed treason or felony, the King may cause him to be indicted and arraigned of *misprision* only, if he please. *S. P. C.* 32. But if a person is indicted of *misprision* as for treason; tho' he be found guilty, the judges shall not give judgment thereon, he not being indicted of the *misprision*. *Jank. Cent.* 217. Information will not lie for *misprision* of treason, &c. but indictment, as for capital crimes: And there must be two witnesses upon indictments as well as trials of *misprision* of treason, by the statute 7 *W. 3. c.* 3. 2 *Hawk. P. C.* 258, 260. In all cases of *misprision* of treason, the offender shall be imprisoned for life; and forfeit all his goods and chattels, and the profits of his lands during life. *H. P. C.* 128. 3 *Inst.* 36, 218. See *Black. Com.* 4 *P.* 120.

Misprision of Felony. Is not only where a man knows of any felony committed, and concealeth or procures the concealment thereof; but under this title of *misprision*, that of *theft* may be reduced; which is where one knowing of a felony, takes his goods again, or amends for the same. 3 *Inst.* 134, 139. *H. P. C.* 130. Tho' the bare taking goods again which have been stolen is no offence, unless some favour be shewn the thief. 1 *Hawk. P. C.* 125. The stat. 3 *H. 7. c.* 1, provides against concealments of felonies by sheriffs, coroners and bailiffs, &c. And for *misprision of felony*, the offenders shall be punished by fine and imprisonment, and remain in prison till the fine is paid. See *Black. Com.* 4 *P.* 121.

Misprision at large. Are when persons contemn the King's prerogative, by refusing to assist the King according to law; or by speaking or writing against his person or government; receiving a pension from a foreign prince, without his leave; refusing to take the oaths of allegiance and supremacy; and contempts against the King's palace;

for the courts of justice, &c. *H. P. C. 3 Inst.* 139, 149. See *Black. Com.* 4 *V.* 119.

Misprisions of Clerks, Relate to their neglects in writing, or keeping records; and here *misprison* signifies a *mistaking*. 14 Ed. 3. c. 6.

Misrecital of deeds or conveyances, will sometimes hurt a deed, and sometimes not. *Hob.* 18, 19, 129.

If a thing is referred to *time, place and number*, and that is *mistaken*, all is *void*. Arg. Pl. C. 392. b. Trin. 13 Eliz. in the case of the *Earl of Leicester v. Heydon*.

Misrecital in an immaterial point, and where it is only an additional flourish in things circumstantial, shall not avoid a grant; as where the husband has a term in right of his wife, and this term is recited as made to the husband. Per *Archer J. Cart.* 149. *Mitch.* 18 Car. 2. C. B. in the case of *Foot v. Berkley*.

A misrecital in the beginning of a deed, which goes not to the end of a deed, shall not hurt, but if it goes to the end of a sentence, so that the deed is limited by it, it is *void*. Per *Archer J. Cart.* 149. in case of *Foot v. Berkley*. See *Lease*.

Missa, The *mass*, at first used for the dismissal or sending away of the people: And hence it came to signify the whole church service or Common Prayer; but more particularly the communion service, and the office of the sacrament, after those who did not receive it were dismissed. *Litt. Dig.*

Missal, *missale*, The *mass*-book, containing all things to be daily said in the *mass*. *Lindw. Provincial.* lib. 3. cap. 2.

Missaticus, A messenger. *Cowell. Domesday in Chemb.*

Missa Presbyter, Signifies a priest in orders. *Blount.*

Missura, Singing the *Nunc Dimittis*, and performing other ceremonies to recommend and dismiss a dying person. And in the statutes of the church of St. Paul in London, (collected by *Ralph Baldock*, dean about the year 1295. in the chapter de *Frateria*, of the fraternity or brotherhood, who were obliged to a mutual communication of all religious offices,) it is ordained—*Ut fiat commendatio & missura & sepultura omnibus sociis coadunantibus & assistantibus*. Liber Stat. Eccles. Paulinæ, M. S. fol. 25.

Missurium, A dish for serving up meat to a table; whence a *messe*, or portion of any diet;—But *Vossius* tells us 'tis called *mess*, quia dono Mitti soleat a principibus. *Thorn's Chron.* pag. 1762.

Mistake. It was pleaded, that *A.* the husband of *B.* died the 20th of February, 39 Eliz. and that afterwards, viz. the 21st of November, 39 Eliz. *B.* did marry *C.* so that the (afterwards) is sufficient. Arg. *Bridg.* 45. *Mitch.* 13 Jac. in the case of *Smallman v. Agborrow*.

Summons to appear Tuesday the 17th of April, (where Friday was the 17th) before justice of peace on a penal statute, the time being impossible, it was as if no summons had been. 1 Salk. 181. Trin. 2 Ann. B. R. *Qucen v. Dyer*.

The words of a deed were, that "after the death, &c. "the tenements aforesaid shall revert," instead of "re-main" to *J. S.* yet it is a good remainder; because, as it seems, every one's deed shall be taken most strongly against himself. *Br. Fajis*, pl. 26. cites 21 Ed. 3. 49.

Refrain for distrain, if rent be arrear, not being limited to any thing which should be restrained, as on the cattle, or on the land, and so shall not be taken to mean distrain. *Col. R.* 330, 367. *Hill.* 31. and *Pascb.* 14 Jac. B. R. *Moody v. Garnon*.

But there are mistakes of other kinds, i. e. of manual acts, committed unintentionally, or affecting one person, when intending to affect another, &c. According to *Blackstone*, ignorance or mistake is a defect of the will: As when a man intending to do a lawful act, does that which is unlawful. For here the deed and the will acting separately, there is not that conjunction between them, which is necessary to form a criminal act. But this must be an ignorance or mistake of fact, and not an error in point of law. See the *Commentaries*. 4 *V.* 27.

Mistarium, for *Mistarium*, *Mon. Angl.* 3 tom. pag. 102.

Mistrial, A false or erroneous trial; where it is in a wrong county, &c. 3 *Cro.* 284. And consent of parties cannot help such a trial, when past. *Hob.* 5. See *Trial*.

Misuser, Is an abuse of any liberty or benefit; as he shall make fine for his *misuser*. *Old Nat. Br.* 149. By *misuser*, a charter of a corporation may be forfeited: So also an office, &c. See *Black. Com.* 2 *V.* 153.

Mitred Abbots, Were those governors of religious houses, who obtained from the Pope the privilege of wearing the mitre, ring, gloves, and crozier of a bishop. The *mitred Abbots*, says *Cowell*, were not the same with the *conventual prelates*, who were summoned to parliament as spiritual lords, tho' it hath been commonly so held; for the summons to parliament, did not any way depend on their mitres, but on their receiving their temporals from the hands of the King. See *Abbot*.

Mitta, (from the Sax. *mitten*, *mensura*) An ancient Saxon measure; its quantity doth not certainly appear, but it is said to be a measure of ten bushels. *Domesday. Tit. Wirefcire. Mon. Angl. tom. 2. p. 262.* And *mitta*, or *mitcha*, besides being a sort of measure for salt and corn, is used for the place where the caldrons were put to boil salt—*Calderias quoque ad sal conficiendum cum propriis sedibus quæ vulgo mitche vocantur.* *Gale's Hist. Brit.* 767.

Mittendo manuscriptum pedis finis, Was a judicial writ directed to the Treasurer and Chamberlains of the Exchequer, to search for, and transmit, the foot of a fine, acknowledged before justices in Eyre, into the Common Pleas, &c. *Reg. Orig.* 14.

Mittimus, A writ for removing and transferring of records from one court to another; as out of the King's Bench into the Exchequer, and sometimes by *Certiorari* into the Chancery, and from thence into another court: But the Lord Chancellor may deliver such record with his own hand. *Stat. 5 R. 2. c. 15.* 28 & 29 H. 8. *Dyer* 29, 32. *Mittimus* is also a precept in writing, under the hand and seal of a justice of peace, directed to the gaoler, for the receiving and safe keeping of an offender until he is delivered by law. 2 *Inst.* 590. One must be committed by lawful *mittimus*; or breach of prison will not be felony, &c.

Mittre a large, Is generally to set or put at liberty. *Law Fr. Dig.* And there is a *mittre le estate*, and *de droit*, mentioned by *Littleton*; in case of releases of lands by jointenants, &c. which may sometimes pass a fee, without words of inheritance. 1 *Inst.* 273, 274. As to *mitter le droit*. See *Black. Com.* 2 *V.* 325. And as to *mitter le estate*. *Id.* 324.

Mixed Actions, Suits partaking of the nature of *real*, and *personal*, wherein some real property is demanded, and also personal damages for a wrong sustained.

Mixed Larceny, or *compound larceny*, is such as hath all the properties of simple larceny, but is accompanied with one, or both, of the aggravations of a taking from one's house or person.

Mixed Tithes, Are those of cheese, milk, and young beasts, &c. 2 *Inst.* 649. See *Tithes*. And *Black. Com.* 2 *V.* 24.

Mistilio. See *Mistilo*.

Mistum. This word is often mentioned in our *Monkish* historians; it sometimes signifies a breakfast, but always a certain quantity of bread and wine. *Cowell*.

Mothadocs, Stuffs made in England, and other countries; mentioned in the *stat.* 23 *Eliz.* c. 9.

Moderata Misericordia, A writ (founded on *Magna Charta*) which lies for him who is amerced in a court not of record, for any transgression, beyond the quality or quantity of the offence: It is directed to the lord of the court or his bailiff, commanding them to take a moderate amercement of the parties. If a man be amerced in a Court-Baron, on presentment by the jury, where he did not any trespass, he shall not have this writ, unless the amercement be excessive and outrageous; And if the steward of the court of his own head, will amerce any tenant or other person without cause, the party ought not to sue for his writ of *moderata misericordia*, if he be distrained for that amercement; but he shall have action of trespass. *New Nat. Br.* 167. When the amercement which is set on

on a person is affected by his peers, this writ of *moderata misericordia* doth not lie; for then it is according to the statute. See *F. N. B.* 76. 4to edit. 176.

Modiatio, Was a certain duty paid for every tierce of wine. *Mon. Angl. tom. 2. p. 994.*

Modius, A measure, usually a bushel; but various according to the customs of several countries.

Modius Tertæ vel Agri. This phrase was much used in the ancient charters of the *British* Kings, and probably signified the same quantity of ground as with the *Romans*, viz. One hundred foot long, and as many broad. — *Sciendum est quod dedit illas pedum quatuor modiorum agri cum omni censu suo, &c.* *Mon. Angl. tom. 3. p. 200.*

Modo & forma, Are words of art in law pleadings, &c. and particularly used in the answer of a defendant, whereby he denies to have done the thing laid to his charge, *modo & forma declarata*. *Kitch. 232.*

Where *modo et forma* are of the substance of the issue, and where but words of form, this diversity is to be observed; where the issue taken goeth to the point of the writ or action, there *modo et forma* are but words of form, as in the case of the writ of entry *in casu proviso*. But otherwise it is, when a collateral point in pleading is traversed; as if a feoffment be alleged by two, and this is traversed *modo et forma*, and it is found the feoffment of one, there *modo et forma* is material. So if a feoffment be pleaded by deed, and it is traversed *absque hoc quod feoffavit modo et forma*, upon this collateral issue *modo et forma* are so essential as the jury cannot find a feoffment without deed. *Co. Lit. 281. b.* See *Br. Labourers*, pl. 46. cites 38 H. 6. 22.

Modo et forma do not put the day nor place in issue; but only the matter and substance of the plea. *Reg. Plac. 188. c. 5.*

Where a traverse is with a *modo et forma*, &c. that will put the manner, as well as the matter in issue, where the manner is material, as the time, the fact, and other circumstances, when they are the effect of the issue. *Reg. Plac. 189. c. 5.*

Modus Decimandi, Is when lands, tenements, or some certain annual sum, or other profit, hath been given time out of mind to a parson and his successors, in full satisfaction and discharge of all tithes in kind, in such a place. 2 *Rep. 47.* And see 2 *Inst. 490.* And it may be paid in cities and towns, as in *London*, for houses in lieu of the tithe of the lands on which the houses were built: And there may be a *modus decimandi* for personal tithes. 2 *Inst. 657, 659.* A *modus* ought to be for the benefit and advantage of the parson; and is supposed to be of the full value of the tithes, at the time of the original composition; and if it doth not now come up to that value, it shall be intended that the tithes are improved, or that money is become of less value than it was at the time of the *modus* agreed on. 13 *Rep. 152.* *Hob. 40.*

But one tithe must not be paid in consideration of another; it is to be something different from the thing that is due, where the tithes are due of common right; and not by custom only; and it must be something as certain and durable as the tithe: All which are necessary to make a good prescription. 1 *Roll. Abr. 650.* 1 *Cro. 276, 446, 475.* *Hob. 40.*

A *modus* arises either by composition, custom or prescription; a composition is an agreement entered into by deed, executed under hand and seal, that such and such lands shall be discharged of tithes, paying some annual payment, or doing something for the benefit and advantage of the parson, &c. which is a legal exemption from payment of tithes for ever, if made before the *stat. 13 Edw. c. 10.*

Custom is what gives a right to a whole county, city, town or parish, and must be common to all within the limits where it is asserted to be; and prescription is that which gives a right to some particular person, with respect to some particular house, farm, &c. And the Ecclesiastical laws allow forty years to make a good custom and prescription; but by the Common law, it must be beyond the memory of man. 1 *Roll. Abr. 653.* *Comm. Pars. Comp. 159.* A Layman, Lord of a manor, may prescribe *de modo decimandi*, for himself and tenants; also a private person for his own lands, or part thereof, &c.

Tho' in cases of prescription, 'tis only to be discharged of a particular sort of tithes; for a prescription *de non decimando* generally, would undo the clergy, therefore it is not good where there is not sufficient left for their maintenance; as it may be where there is a competent livelihood for the parson. 2 *Rep. 47.* 1 *Cro. 784.* 1 *Roll. Abr. 653.*

A layman cannot prescribe by the Common law *de non decimando*; but he may be discharged of tithes for lands in his own hands, by grant from parson, patron and ordinary. 2 *Rep. 44.* A parish, &c. may not prescribe *de non decimando*, though it may prescribe *de modo decimandi*. 1 *Roll. Abr. 653.* But tithes due by custom only, are not within the rule against prescription in *non decimando* by laymen; for by the like custom persons may be discharged from the payment of such tithes. *Wood's Inst. 179.* And spiritual persons and corporations may prescribe *de non decimando*, to be discharged absolutely of tithes, and pay nothing in lieu thereof; so also may their tenants. 2 *Rep. 44.* 1 *Roll. Abr. 653, 654.* 1 *Cro. 512.*

A parson may sue in the Spiritual court for a *modus decimandi*, or rate tithe; but if the *modus* is denied, or a custom is to be tried, it must be tried in the Common law courts: And where a *modus* is pleaded in the Spiritual court to a demand of tithes in kind, a prohibition lies upon supposition that the Spiritual court will not admit of any plea against tithes. 2 *Ed. 6. c. 13.* *Wood 178.* Where land is converted to other uses, as hay ground to tillage, &c. or the thing is altered or destroyed; as when a fulling-mill is made a corn-mill, or a corn-mill is come to ruin, &c. a *modus* made on good consideration may be discharged, and then tithes shall be paid in kind. 1 *Danv. Abr. 607, 608.* So by the non-payment of the consideration; or by payment of tithes in kind, for so long time, that the prescription for a *modus decimandi* cannot be proved: Tho' short interruption 'tis said shall not destroy it. 1 *Roll. 932.* *Hob. 43.* A payment of different sums, is evidence that there is no *modus*. A custom of paying tithe of wool by the pound, and not by the fleece, is no *modus*. 2 *Strange 783.* See *Black. Com. 2 V. 29.*

Mohair Varn. See *Manufactures, Silk.*

Moitie, (*medietas*, Fr. *moitie*, i. e. *consequa vel media pars*) Is the half of any thing; and to hold by *moities*, is mentioned in our books, in case of jointenants, &c. *Litt. 125.*

Molasses. See *Melasses.*

Molendinum, A mill of divers kinds. See *Mill.*

Molentum, Signifies corn sent to a mill, a grist. *Chart. Abbat. de Rading, MS. fol. 116.*

Molitura, Was commonly taken for the toll or mulcture paid for grinding corn at a mill, and sometimes called *molta*, Fr. *molta*, *molitura libera*, free grinding or liberty of a mill, without paying toll; a privilege which the lord generally reserved to his own family — *Salva mihi & heredibus meis molitura libera familie nostre quæta in dicto molendino.* *Paroch. Antiq. 236.*

Molitor manus imposuit. Several justifications in trespass, i. e. actions of assault, are called by this name, from the words *gently laid his hands upon him* used in the plea; as where the defendant justifies an assault by shewing that the plaintiff was unlawfully in the house of defendant, making a disturbance, and being requested to cease such disturbance, and depart, he refused and continued therein, making such disturbance, he, the defendant, *gently laid his hands on the plaintiff*, and removed him out of the house. So in various other instances, as for separating two persons, fighting, in order to preserve the peace, so in the legal exercise of an office, &c. See *Black. Com. 3 V. 121.*

Molman, A man subject to do service; applied to the servants of a monastery. *Prior. Lewis, p. 21.* *Spelm. Gloss.*

Molmurat, or **Molmuratius Laws**. Were the laws of *Dunwille Molmuratius*, sixteenth King of the Britains, who began his reign above four hundred years before the Birth of our Saviour, and were famous in this land till the time of *William the Conqueror*. This King was the first who published laws in Britain; and his laws, (with those

those of Queen Mercia,) were translated by Gildas out of the British into the Latin tongue. *Usher's Primord.* 126.

Molueda, Molueda, A mill-pool or pond. *Paroch. Antiq.* 135.

Molta, The duty or toll paid to the lord by his vassals, to grind corn at his mill. *Concedo sancto Amando moltam suam & moltam similiter omnium civium St. Amandi.* Monastic. 2 tom. p. 97.

Monarchy. That form of government, where the sovereign power is entrusted in the hands of a single person.

Monasteries and abbeys, &c. dissolved by K. H. 8. See 27 H. 8. c. 28. and *Abbot*, and the *Tables to the Statutes*, tit. *Monasteries*.

Monetarium, Signified a certain tribute paid by tenants to their lord every third year, that he should not change the money which he had coined, formerly when it was lawful for great men to coin money current in their territories; but not of silver and gold: It was abrogated by the *Stat.* 1 Hen. 1. c. 2. The word *monetarium* is likewise used for a *mintage*, and the right of coining or minting money. *Jus & artificium cudendi monetas.*

Moneta, (moneta) Is that metal, be it gold or silver, which receives authority by the prince's imprints to be current; for as wax is not a seal without a print, so metal is not money without impression. Co. Litt. 207. Money is said to be the common measure of all commerce, thro' the world, and consists principally of three parts; the material whereof it is made, being silver or gold; the denomination or extrinsic value, given by the King, by virtue of his prerogative; and the King's stamp thereon. 1 *Hale's Hist. P. H.* 188.

It belongs to the King only, to put a value, as well as the impression on money; which being done, the money is current for so much as the King hath limited. 2 *Inst.* 575. Any piece of money coined is of value as it bears a proportion to other current money, and that without proclamation; and tho' there is no act of parliament, or order of state for *guineas*, as they are taken; yet being coined at the mint, and having the King's insignia on them, they are lawful money, and current at the value they were coined and uttered at the mint. 2 Salk. 446. But it has been observed, that *guineas* were originally coined for 20 s. according to the twenty shilling pieces of money, and that legally, no more ought to be demanded for them: Also that in legal proceedings, they should be mentioned as *pecias auri, vocat. guineas, valoris, &c.* 5 Mod. 7. If an action is brought for damages, the value of *guineas* may be given in evidence to the jury: but if the action be for so many *guineas*, the value ought to be set forth in the declaration, to ascertain the debt. *Carthow.* 255.

Gold and silver coin, &c. is not to be exported without licence, on pain of forfeiture. *Stat.* 9 Ed. 3. cap. 1. And money of silver melted down, is to be forfeited, and double value. 13 & 14 Car. 2. c. 31. But by old statutes, foreign money may be melted down; and no money shall be current but the King's own, &c. 27 Ed. 3. cap. 14. 17 R. 2. c. 1. See *Coin and Exchange*, and *Stat.* 27 Geo. 2. c. 11. See the *Table to the Statutes*, tit. *Money, Coin, &c.* See *Black Com.* 1 V. 276. 4 V. 84, 88.

Money, lending it abroad. The King by proclamation may at any time prohibit all his subjects, not exceeding one year, to lend or advance money to any foreign prince or state, without licence under the Great or Privy Seal; and if any person knowingly offend in the premises, he shall forfeit treble the value of the money lent, &c. two-thirds to the King, and the other to the informer: but persons may deal in foreign stocks, or be interested in any bank abroad, established before issuing his Majesty's proclamation. *Stat.* 3 Geo. 2. c. 5.

Money in Court. In law proceedings, money demanded is oftentimes brought into the court, either by a rule of court, or by pleading a *prossert in curiam* of the money; and then if the money is not paid into court, the plea will not be received; for money is not allowed to be paid into court, after plea pleaded. *Wils. par.* 1. 157. The money must be brought into court, upon a plea of tender: And the defendant may at any time, pending an action on bond with a penalty, bring the money and costs into

court; and it shall be a good satisfaction and discharge; by *stat.* 4 & 5 Ann. c. 16. If a defendant pay money, or part, into court, and it is struck out of the declaration, tho' the plaintiff is nonsuit, he shall not take the money out of court; for by paying into court, the defendant admitted that so much was due; but if the defendant brings money into court, upon a tender and *uncore priss*, and the plaintiff takes issue upon the tender, and it is found against him, then the defendant shall have the money out of court. 2 Salk. 597. Money may be brought into court upon an action of debt for rent: in replevin, when the defendant avows for so much rent arrear, the plaintiff hath been admitted to bring it into court: And in covenant, &c. where a breach is assigned for non-payment of rent, the defendant may bring the money due into court. *Ibid.* In a *quantum meruit* it hath been denied; tho' it was granted in such case, *Pasch.* 5 Ann. In trover the defendant cannot bring the goods and costs into court. *Wils. par.* 1. c. 23.

If an action for the *mesne profits* after a recovery in ejectment, the defendant shall not have leave to pay money into court. *Ib. Par.* 2. 115.

And it is said, where an action is brought by an executor or administrator, the defendant cannot bring the money into court. 2 Salk. 296. *Sed quid?*

Monger, A little sea vessel which fishmen use. *Stat.* 13 Eliz. c. 11. And when a word ends with *monger*, as *ironmonger*, &c. it signifies merchant, from the Sax. *man-ger*, i. e. *Mercator*.

Monks, or Monayers, Monetarii, Are ministers of the Mint, who make and coin the King's money. *Reg. Orig.* 262. and 1 Ed. 6. 15. It appears in ancient authors, that the Kings of England had Mints in several counties; and in the *Tract* in the *Exchequer*, written by *Oakham*, we find, that whereas sheriffs were usually obliged to pay into the King's Exchequer the King's sterling money, for such debts as they were to answer; those of *Cumberland* and *Northumberland* were admitted to pay in any sort of money, so it were silver: And the reason there given is, because those two shires *Monetarios de antiqua institutione non habent; quod abbas & monachi prædicti habeant unum monetarium & unum cunsum apud Rading ad monetam ibidem, tam ad obolos & sterlingos quam ad sterlingos prout moris est fabricand. & faciend.* Memorand. Scacc. de Anno 20 Ed. 3. inter Record. de Trin. Rot. Of later days the title of *moniers* hath been given to *bankers*, that is, such as make it their trade to deal in *monies* upon returns. *Corwell.*

Monks, (Monachus) From the Gr. *Mónos, solus, qui soli*, i. e. *Separati ab aliorum consortio vivunt*, because the first monks lived alone in the wilderness. They were after divided into three ranks; *Canobitarum*, i. e. a society living in common in a monastery, &c. under the government of a single person; and these were under certain rules, and afterwards called *Regulars, Anachoretæ* or *Bremite*, those monks who lived in the wilderness on bread and water. And *Sarabites*, monks living under no rule, that wandered in the world. St. Jerom tells us, that of the *Anachoretæ Paulus fuit Auditor, Antonius illustrator, Jobannes Baptista princeps.*

Monkery. The profession of a monk, mentioned in *Whitlock's* readings upon the *Stat.* 21 H. 8. c. 13.

Monks' Clothes, Made of a certain kind of coarse cloth. Vide 20 H. 6.

Monopoly, (From *Mónos unus & πωλόν vendo*) Is an allowance of the King by his grant, commission, or otherwise, to any person or persons, for the sole buying, selling, making, working or using of any thing, by which other persons are restrained of any freedom or liberty that they had before, or hindered in their lawful trade. 3 *Inst.* 181. It is defined to be where the power of selling any thing is in one man alone; or when one shall ingross and get into his hands such a merchandise, &c. as none may sell or gain by them but himself. 11 *Rep.* 86.

And a monopoly hath three incidents mischievous to the publick: 1. The raising of the price. 2. The commodity will not be so good. 3. The impoverishing of poor artificers. *Ibid.* All monopolies are against the ancient and fundamental laws of the realm: A by-law, which makes a monopoly, is void; so is a prescription for a sole trade to any one person or persons, exclusive of all others.

• *Moor 591.* Monopolies by the Common law are void, as being against the freedom of trade and discouraging labour and industry; and putting it in the power of particular persons to set what prices they please on a commodity. 1 *Hawk. P. C.* 231. Upon this ground it hath been held, that the King's grant to any corporation of the sole importation of any merchandise, is void. 2 *Roll. Abr.* 214. 3 *Inst.* 182. The grant of the sole making, importing and selling of playing cards, was adjudged void. 11 *Rep.* 84. *Moor 671.* And the King's grant of the sole making and writing of bills, pleas, and writs in a court of law, to any particular person, hath been resolved to be void. 1 *Jones* 231. 3 *Mod.* 75.

The King may grant to particular persons the sole printing of the holy scriptures, and law books. 1 *Hawk.* 231. All matters of this nature ought to be tried by the Common law, and not at the council-table, or any other court of that kind; and the making use of or procuring any unlawful monopoly, is punishable by fine and imprisonment at Common law. 3 *Inst.* 181, 182.

By statute, all monopolies, grants, letters patent, and licences, for the sole buying, selling and making of goods and manufactures, are declared void, except in some particular cases; and persons grieved by putting them in use, shall recover treble damages and double costs, by action on the statute; and delaying such action, before judgment, by colour of any order, warrant, &c. or delaying execution after, incurs a *præmunire*: But this does not extend to any grant or privilege granted by act of parliament; nor to any grant or charter to corporations or cities, &c. or to grants to companies or societies of merchants, for enlargement of trade; or to inventors of new manufactures, who have patents for the term of fourteen years; grants or privileges for printing; or making gunpowder; casting ordnance, &c. 21 *Jac.* 1. c. 3.

As to inventors of new manufactures, &c. it has been adjudged on this statute, that a manufacture must be substantially new, and not barely an additional improvement of any old one, to be within the statute; it must be such as none other used at the granting the letters patent; and an old manufacture in use before, cannot be prohibited in any grant of the sole use of any such new invention. 3 *Inst.* 184. Yet a grant of a monopoly may be to the first inventor, by the *Stat.* 21 *Jac.* 1. c. 3. notwithstanding the same thing was practised before beyond sea; because the statute mentions new manufactures within the realm, and intended to encourage new devices useful here; and it is the same thing whether acquired by experience or travel abroad, or by study at home. 2 *Salk.* 447. It is said, a new invention to do as much work in a day by an engine, as formerly used to employ many hands, is contrary to the statute; by reason it is inconvenient, in turning so many men to idleness. 3 *Inst.* 184. *Sed qu?* See *Black. Com.* 4 *V.* 115, 159, 449.

• *Monster*, One who hath not human shape, and yet is born in lawful wedlock: And such may not purchase or retain lands; but a person may be an heir to his ancestor's lands, tho' he be determined in some part of his body. *Co. Lit.* 7.

A monster thewn for money is a misdemeanor. 2 *Chan. Ca.* 110. *Trin.* 34 *Car.* 2. *Harring v. Walrood.* It was a child that had four legs, and four arms and two heads and but one belly, where the two bodies were conjoined; the child died and was embalmed to be kept for shew, but was ordered by Lord Chancellor to be buried in a week. *Ibid.*

• *Monstrans de droit*, Is a showing a right, and signifies a writ out of Chancery to be restored to lands and tenements that are a man's in right, tho' by some office found to be in the possession of one lately dead; by which office the King would be intitled to the said lands, &c. It is given by the *Stat.* 34 *Ed.* 3. c. 14. and 36 *Ed.* 3. 13. *Staundf. Prærog.* c. 21. 4 *Co. Rep.* 54. Lessee of an outlaw, cannot maintain trespass, but must be relieved by *Monstrans de droit*. *Ld. Raym.* 307. See *Traverse*.

• *Monstrans de faits ou records*, Showing of deeds or records is thus; upon an action of debt brought upon an obligation, after the plaintiff hath declared, he ought to shew his obligation; and so it is of records. And the difference between *monstrans de faits* and *oyer de faits*, is,

this; he that pleads the deed or record, or declares upon it, ought to shew the same; and the other, against whom such deed or record is pleaded, may demand oyer of the same. *Cowell.*

Where a man pleads a deed, which is the substance of his plea or declaration, if he doth not plead it with a *profert in curia*, his plea or declaration is naught upon a special demurrer, showing it for cause: And if he doth plead it with a *profert in curia*, if the other party demands a sight of it, he cannot proceed till he hath shewn it, and when the defendant hath had a sight of it, if he demands a copy of the same, the plaintiff may not proceed until a copy is delivered unto him. *Stat.* 4, 5 *Ann.* c. 16. 2 *Lill. Abr.* 201, 202. Vide *Profert in Curia*.

• *Monstraverunt*, Is a writ which lies for tenants in ancient demesne, who hold land by free charter, when they are distrained to do unto their lords other services and customs than they or their ancestors used to do: Also it lieth where such tenants are distrained for the payment of toll, &c. contrary to their liberty, which they do or should enjoy. *F. N. B.* 14. 4 *Inst.* 269. This writ is directed to the sheriff, to charge the lord that he do not restrain them for such unusual services, &c. And if the lord nevertheless distrains his tenants, for other services than of right they ought to do, the sheriff may command the neighbours, who dwell next the manor, or take the power of the county, to resist the lord, &c. And the tenants in such case may likewise sue an attachment against their lord, returnable in C. B. or B. R. to answer the contempt and recover damages. *New Nat. Br.* 32. But the lord shall not be put to answer the writ of attachment sued against him upon the *monstraverunt*, before the court is certified by the treasurer and chamberlains of the Exchequer, from the book of *Domesday*, whether the manor be ancient demesne; so that it is requisite that the plaintiff in the *monstraverunt*, do sue forth a special writ for the certifying of the same. *Ibid.* 35. The writ of *monstraverunt* may be sued for many of the tenants, without naming any of them by their proper names, but generally *monstraverunt nobis homines de*, &c. But in the attachment against the lord the tenants ought to be named; tho' one tenant may sue it in his own name, and the name of the other tenants by general words, *Et homines*, &c. 2 *H.* 6. 26. See *Ne injuste Vexes*. *Sed qu?* If action of trespass is not preferable.

• *Monstrum*, Is sometimes taken for the box in which relics are kept. *Item unum monstrum cum ossibus Sr. Petri*, &c. *Monast.* 3 tom. pag. 173. *Monstrum* is also taken for what we call corruptly mustering foldiers. *Cowell.*

• *Month*, or *Moneth*, Sax. *Monath*, (*Menſis à mensione, lunæ cursus*) Signifies the time the sun goes thro' one sign of the zodiac, and the moon thro' all twelve; properly the time from the new moon to its change, or the course or period of the moon, whence 'tis called month from the moon. *Litt. Diſt.* A month is a space of time containing by the week twenty-eight days; by the kalendar sometimes thirty, and sometimes thirty-one days: And *Julius Cæsar* divided the year into twelve months, each month into four weeks, and each week into seven days. The month by the Common law is but twenty-eight days; and in case of a condition for rent, the month shall be computed at twenty-eight days; so in the case of enrolment of deeds, and generally in all cases where a statute speaks of months: But where the statute accounteth by the year, half year, or quarter of a year, then it is to be reckoned according to the kalendar. 1 *Inst.* 135. 6 *Rep.* 62. *Cro. Jac.* 167. A twelve-month, in the singular number, includes the whole year, according to the kalendar: But twelve months, six months, &c. in the plural number, shall be accounted after twenty-eight days to every month; except in case of presentations to benefices, to avoid lapse, &c. which shall be in six kalendar months. 6 *Rep.* 61. *Cro. Jac.* 141. And if an agreement is to pay 50 s. for the interest of 100 l. at the end of six months, it is said the computation must be by kalendar months; because if it was by lunar months, the interest would exceed the rate allowed by the statute. *Wood's Inst.* 433.

• *Monstrale*, A duty of two-pennies Scots upon beer there, 6 *Geo.* 1. c. 7. 7 *Geo.* 2. c. 5.

Monument, An heir may bring an action against one that injures the monument, &c. of his ancestor; and the coffin and shroud of a deceased person belong to the executors or administrators; but the dead body belongeth to none. 3 *Inst.* 202, 203. See *Black. Com.* 2 V. 428.

Moots, In the *Isle of Man*, who summon the courts for the several *sheadings*, are the lords bailiffs, called by that name; and every *moot* has the like office with our bailiff of the hundred. *King's Descrip. Isle of Man.*

Moot, (From the Sax. *Motian*, *placitare*, to treat or handle) Is a term well understood in the *Inns of Court*, and signifies the exercise or arguing of cases which young barristers and students perform at certain times, the better to enable them for the practice and defence of clients causes. The place where moot-cases were argued, was anciently called the *Moot-hall*: And in the *Inns of Court* there is a *bailiff of the moot* yearly chosen by the benchers, to appoint the *mootmen* for the *Inns of Chancery*; and keep accounts of the performances of exercises, both there and in the house. *Orig. Juridical.* 212.

Moota canum, A pack of dogs. *Cowell.*

Mootmen, Those who argue the reader's cases, called *moot-cases*, in the *Inns of Chancery*, in the term-time, and in vacations.

Moor, A moor, or barren and unprofitable ground, derived from the Sax. *mor*, signifying also marshland. *Mon. Ang. Tom.* 2. pag. 50. 1 *Inst.* 5. Also a heath. *Item de pannagio, herbagio, &c. & de omnibus exitibus boscorum, morarum, &c.* *Fleta*, lib. 2. cap. 71.

Moor, A watery or boggy moor; and such in *Lancashire* they call *mosses*; *moressa* is used in the same sense. *Mon. Ang. Tom.* 2. pag. 306.

Morat in *Leges*, Is the same with *demorat*, and signifies as much as *he demurs*; because the party goes not forward in pleading, but rests or abides upon the judgment of the court in a certain point, as to the sufficiency in law of the declaration or plea of the adverse party, who deliberate and take time to argue and advise thereupon, and then determine it. *Co. Lit.* 71. See *Demur.*

Moretum, A sort of brown cloth, with which caps were formerly made. *Mat. Paris.* Anno 1258.

Morgangina, (from the Sax. *morgen*, the morning, and *gifan*, to give,) The gift on the wedding-day. *Si sponsa virum suum supervixerit, dotem & maritacionem suam, caritarum instrumentis, vel testium exhibitionibus ei traditam, perpetualiter habeat & morganginam suam.* LL. Hen. 1. cap. 70. i. e. her dower. In some books 'tis writ *morgangegiba*. In *Leg. Canuti apud Brompton* 'tis writ *morgagisa*, cap. 99. In *Leg. H.* 1. cap. 11 & 70. 'tis *morgangiva*. It signifies literally *donum matutinale*; and it is what we now call *dowry money*, or that gift the husband presents to his wife on the wedding-day, from the Saxon *morgen*, *aurora*, and *giva*, *dare*; and was usually the fourth part of his personal estate; not here, but amongst the *Lombards*. *Du Cange.* *Cowell.*

Morian, Is all one in signification with the French *morion*, i. e. *casque*, a head-piece, and that seems to be derived from the Italian *merione*. *Stat.* 4 & 5 P. & M. cap. 2. now called a pot.

Morina, Murrain; an infectious distemper in cattle. *Merina* also signifies the wool of sick sheep, and those dead with the murrain. *Fleta*, lib. 2. c. 79. par. 6.

Morting, or **Mortling**, Signifies that *wool* which is taken from the skin of dead sheep, whether being killed or dying of the rot. 4 *Ed.* 4. c. 2 & 3. 27 *H.* 6. c. 2. 3 *Jac.* 1. c. 18. 14 *Car.* 2. c. 88. Vide *Shorling*.

Morofus. See **Mora**. *In viis & semitis per vallem quandam morosam & aquosam.* *Monast.* 1. tom. pag. 648.

Morfellum terrae, A small parcel or bit of land.—*Et unum morfellum terrae juxta horreum suum.* *Charta* 11 *H.* 3. par. fol. m. 33

Morfellus terrae, A small parcel of land. *Mat. Paris.* pag. 438. and *Mon. Angl.* 2 tom. pag. 82.

Mortarium, A light or taper set in churches to burn over the graves or shrines of the dead.—*Tenet duas acras terrae, &c. ad invenendum unum mortarium ardentem in ecclesia de Chepin.* *Farindon.* *Consuetud. Dom. Farindon.* MS. fol. 48.

Mort-dancestoz, A writ now seldom used, mentioned in the statutes 53 *H.* 3. & 6 *Ed.* 1. See *Assise of Mort-dancestoz*, and *Black. Com.* 3 V. 185.

Mortgage, (*Mortgagium*, vel *mortuum vadium*,) Is compounded of two French words, viz. *mort*, i. e. *mors*, and *gage*, i. *pignus*, and signifies a pawn of land or tenement, or any thing immoveable, laid or bound for money borrowed, to be the creditor's for ever, if the money be not paid at the day agreed upon; and the creditor holding land and tenement upon this bargain, is called *tenant in mortgage*. Of this we read in the *Grand Customary of Normandy*, cap. 113. which see. *Glanvill* likewise, lib. 10. cap. 6. defineth it thus; *Mortuum vadium dicitur illud, cujus fructus vel redditus interim percepti in nullo se acquiescant*. So that it is called a *dead gage*, because whatsoever profit it yieldeth, yet it redeemeth not itself by yielding such profit, except the whole sum borrowed be paid at the day. See *Skene de verb. signif. verbo mortgage*. He who pledgeth this pawn or gage, is called the *mortgagor*, and he who taketh it the *mortgagee*. *West. Symbol.* part. 2. tit. *Pines*, *sect.* 145. This, if it contain excessive usury, is forbidden by 37 *H.* 8. cap. 9. But 'tis called *mortgage*, because, if the money is not paid at the day, the land *moritur* to the debtor, and is forfeited to the creditor. *Cowell.*

1. Of the original and several kinds of mortgages.
2. What shall be deemed a mortgage, or an estate redeemable; and of the distinct interests of mortgagor and mortgagee.
3. Of the equity of redemption and foreclosure; and of the manner of redeeming and foreclosing.

1. Of the original and several kinds of mortgages.

The notion of mortgaging and redemption seems to be of Jewish extraction, and from them derived to the Greeks and Romans; the plan of the Mosaic law constitutes a just and equal agrarian, that the lands may continue in the same tribes and families, and the people might not be diverted by any exoticick acts and inventions from the exercise of agriculture, in which innocent employment they were to be continually educated; therefore whoever were compelled by want to sell, could transfer no estate in the lands, farther than to the next general jubilee, which returned once in 50 years; wherefore they computed till the jubilee, that according to the distance from thence, such was the interest that could be transferred to the buyer; but the vendor had power at any time to redeem, paying the value of the lands to the jubilee; but tho' he did not redeem it at the year of jubilee, yet the lands came back again free to the vendor and his heirs. *Cumeus* 11, 12.

But our notion of mortgaging and redemption seems to have come more immediately from the Civil law, therefore it will be necessary herein to consider the distinctions in that law between pledges and things *hypothecated*. *Justin.* 592.

The *pignus* or pledge was, when any thing was obliged for money lent, and the possession passed to the creditor.

The *hypotheca* was, when the thing was obliged for money lent, and the possession remained with the debtor. Now in case of goods pignorated, the creditor was obliged to the same diligence in keeping them, as he used about his own; so that if the goods were lost by the negligence of the creditor, an action lay as for a deposit; for the property being transferred to the creditor for a particular purpose, he was to keep them as his own. See *Bailment*. Also see the case of *Coggs and Bernard*, 2 *L. Ray.* 909, &c. where the case of *bailment*, is very fully and learnedly handled, and its several species shewn in a very judicious manner.

If the debtor did not redeem the thing pledged, the creditor was to foreclose the redemption of the debtor; and if the money was not paid, the creditor had his *actio pignoratitia*, or *hypothecaria*, which, when he had pursued, and obtained sentence thereon, he might sell as his own property; but there was this difference between the *actio pignoratitia* and *hypothecaria*; that the *actio pignoratitia* was only against the person of the debtor to foreclose him, because the *pignus* was already in the possession of the credi-

tor; but the *actio hypothecaria* was *tam in rem, quam in personam*, and was given *ad pignus prosequendum, contra quemcumque possessorem*; because herein the creditor had not the possession of the pledge, but it remained to the debtor; and 'till sentence was obtained in these actions, the creditor could not obtain the property of the pledge; and if the money was paid before sentence, the pledge was subject to redemption; and where the same thing was pledged to several, those were said to be *potiores in pignore*, to whom the things were first hypothecated. *Digest. lib. 20. tit. 6. Corvin. 269, 270, 271.*

If the money was tendered or paid to the creditor, the contract of pignoration was dissolved, and the debtor might have the pledge back, as a thing lent; which seems to have introduced the notion among us of the debtor's right to redemption, and with them the usucaption, or the right of prescription, did not extinguish the pledge, unless a stranger had held it for *thirty years*, or the debtor had held it for *40 years*. *Digest. lib. 20. tit. 6.*

In the feudal law the rule was, *Feudalia, invito domino, aut agnatis, non recte subijciuntur hypotheca, quamvis fructus posse esse receptum est*; and the reason of this rule was, because the feud was filled with a tenant from the lord's original bounty, on whom he depended for his personal service in war and peace; therefore the feudary could not obtrude a tenant on him without his leave, who might be less capable of those services; therefore as the tenant could not originally alien without licence, so he could not mortgage. *Corvin. 268.*

But when a licence of alienation was given about the time of *Hen. 3.* and it became a maxim in law, that *the purity of a fee-simple imported a power of disposing of it as the owner pleased*; there were two ways of mortgaging lands introduced, which *Littleton* distinguishes by the names of *vadium vivum* and *vadium mortuum*. *9 H. 3. 32. 18 Ed. 1.*

The *vadium vivum* is, where a man borrows 100*l.* of another, and makes an estate of lands to him, 'till he hath received the said sum of the issues and profits of the lands; and it is called *vadium vivum*, because *neither the money nor the land die*; for the lands are constantly paying off the money, and the lands are not left as a dead pledge, in case the money be not paid. This seems to be the ancient way of pledging lands; for they held, that *lands could not be hypothecated*; therefore they used to subject the *usufructus*, which continued originally during the life of the feudary; but when there was a free liberty given of alienation, then the feudary could pledge the *usufructus* of the land at pleasure; but because by this way of pledging, the lender received his money by degrees, and in small parcels, which was very troublesome; and those that lend money to usury, are generally willing to receive the whole in a gross sum; therefore this way of pledging is now out of use. *Co. Lit. 205. See Madd. Formul. 136.*

The *vadium mortuum* is so called by *Littleton*, because it is doubtful, whether the feoffor will pay the money at the day limited or not; and if he do not pay, then the land, which is but *in pledge upon condition*, for the payment of the money, is taken from him for ever, and so dead to him; and if he do pay it, then the pledge is dead to the tenant of the land. *Lit. sect. 332. Co. Lit. 205. But vide Division 3.*

Of these mortgages there are again two sorts; 1st, Of the freehold and inheritance; and 2dly, Of terms for years. *Maddox 318, 319.*

1st, Of the freehold and inheritance, and here the ancient way was to make a charter of feoffment, on condition, that if the feoffor or his heirs paid the sum to the feoffee or his heirs, he should re-enter and re-possess; and sometimes the condition was contained in the charter of feoffment, and sometimes it was defeazanced by another charter, as may be seen in the old forms. *Maddox 318, 319.*

For as a man might annex a condition to his feoffment, for *cujus est dare, ejus est disponere*, so he might annex a condition by another deed, bearing date, and executed at the same time; for being executed at the

same time, it is really but one and the same disposition, *quae incontinenti sunt inesse videntur*; but a defeazance or condition annexed after the feoffment executed comes too late; because the livery *coram paribus* attesting the infeudation, in which there is no condition, the tenant must hold the land according to the tenure of the investiture; but rents, annuities or warranties that are things executory, may be defeated by defeasances made at the time of their creation, or any time after; because there is not any necessity of the notoriety of livery to make an investiture; therefore being created by deed only, they may be defeated or destroyed by deed alone. *Co. Lit. 226, 227.*

These sorts of conveyances were subject to these inconveniencies; that if the money were not paid at the day, so that the estate became absolute, the estate was thenceforth subject to the dower of the feoffee, and all other his real charges and incumbrances; for tho' if the feoffor performed the condition, then he might re-enter, and re-possess himself in his former estate, and consequently was in above all the charges and incumbrances of the feoffee; yet if he did not literally perform the condition by payment of the money at the day, then the estate was *legally* subject to the charges and incumbrances of the feoffee, tho' the money was afterwards paid, and the estate reconveyed to the feoffee. *Ib. 221, 222.*

But the courts of equity, as they grew in power, have set this matter right, and have maintained the right of redemption, not only against tenant in dower, and the persons who come in under the feoffee, but even against the tenant by the curtesy, and lord by escheat, that are in the *post*; because the payment of the money doth, in the consideration of equity, put the feoffor *in statu quo*, since the lands were originally only a pledge for the money lent. *Hard. 465.*

As to mortgages by way of creating terms, this was formerly by way of demise and re-demise. As for example; *A.* borrowed money of *B.* thereupon *A.* would demise the lands to *B.* for a term of 500, &c. years absolutely, with common covenants against incumbrances, and for farther assurance, and then *B.* would the day after re-demise to *A.* for 499 years, with condition, to be void on non-payment of the money at the day to come; this manner of mortgaging came in after the 21 *H. 8.* for falsifying recoveries, when there was a fixed interest settled in terms for years; and was esteemed best for the mortgagor, to avoid all manner of pretension from the incumbrances and dower of the feoffee in mortgage; and was reputed best for the mortgagee, to avoid the wardship and feudal duties of the tenure, and was only inconvenient in this; that if the second deed were lost, there appeared to be an absolute term in the mortgagee. *3 New Abr. 633.*

And this is now the common method, *viz.* by a demise of the land for a term, under a condition to be void on the payment of the mortgage money and interest; and a covenant is inserted at the end of such deeds, that till the default shall be made in the payment of the money, that the mortgagor shall receive the rents, issues and profits without account. *3 New Abr. 633.*

This has been ruled to create a tenancy at will to the mortgagor; but if the mortgagor dies, the tenancy at will is determined till there is a receipt of interest from the heir, which seems to make him also tenant at will to the mortgagee. *Raym. 147.*

But now the last and best improvement of mortgages seems to be, that in the mortgage deed of a term for years, or in the assignment thereof, the mortgagor should covenant for himself and his heirs, that if default be made in the payment of the money at the day, that then he and his heirs will, at the costs of the mortgagee and his heirs, convey the freehold and inheritance of the mortgaged lands to the mortgagee and his heirs, or to such person or persons (to prevent merger of the term) as he or they shall direct and appoint; for the reversion, after a term of 50 or 100 years, being little worth, and yet the mortgagee for want thereof continuing but a termor, and subject to forfeiture, &c. and not capable of the privileges of a freeholder; therefore where the mortgagor

gagor cannot redeem the land, 'tis but reasonable the mortgagee should have the whole interest and inheritance of it, to dispose of as absolute owner. 3 *New Abr.* 633.

2. *What shall be deemed a mortgage, or an estate redeemable; and of the distinct interests of mortgagor and mortgagee.*

Herein we may observe in general, that whatever clauses or covenants there are in a conveyance, tho' they seem to import an absolute disposition or conditional purchase; yet, if upon the whole, it appears to have been the intention of the parties, that such conveyance should only be a mortgage, or pass an estate redeemable, a court of equity will always construe it so. 1 *Vern.* 183, 268, 394.

As where the condition of a mortgage is, that the mortgagor should redeem during his life, or that the mortgagor, and the heirs of his body, should redeem, yet equity will admit the general heir of such mortgagor to a redemption; *because this can be no purchase, since there is a clause of redemption*; and when the land was originally only a pledge for money, if the principal and interest be offered, the land is free; and it would be very hard, that it should be in the power of the scrivener, or griping usurer, by such impertinent restrictions, to elude the justice of the court. 1 *Vern.* 33, 190. 2 *Chan. Ca.* 147. S. C. *Howard ver. Harris.*

But if a man borrows money of his brother, and agrees to make him a mortgage, and that if he has no issue male, his brother should have the land; such an agreement made out by proof, will be decreed in equity. 1 *Vern.* 193. *per North Lord Keeper.*

A. in consideration of 1000*l.* made an absolute conveyance to B. of the reversion of certain lands after two lives, which, at that time, were worth little more; and by another deed of the same date, the lands are made redeemable any time during the life of the grantor only, on payment of 1000*l.* and interest; A. died, not having paid the money; and it was held by Lord K. *Nottingham*, that his heir might redeem, notwithstanding this restrictive clause, and that it was a rule, *once a mortgage, and always a mortgage*, and that B. might have compelled A. to redeem in his life-time, or have foreclosed him; but on a re-hearing, Lord *North* reversed the decree on the circumstance of this case; for it appeared by proof, that A. had a kindness for B. and that he married his kinswoman, which made it in the nature of a marriage settlement; he likewise held, that B. could not have compelled A. to redeem during his life, which made it the more strong. 1 *Vern.* 7, 214, 232. *Newcomb. ver. Bonham.* 2 *Vent.* 364. S. C. where it is said, that Lord *North's* decree was affirmed in the house of Lords.

If A. mortgage lands to B. worth 15*l.* per annum, for securing 200*l.* and at the same time B. enters into a bond conditioned, that if the 200*l.* and interest is not paid within a year, then he to pay A. his executors or administrators, the further sum of 78*l.* in full for the purchase of the premises, &c. and A. dies within the year, and the money is paid the next day after, the mortgage is forfeited to his administrator; yet A's heir may redeem, paying the 200*l.* and likewise the 78*l.* that was paid to the administrator. 1 *Vern.* 488. *Willet ver. Winnel.*

So where A. for 550*l.* made an absolute assignment of a church lease for three lives to B. and B. by writing under his hand agreed, that if A. paid 600*l.* at the end of the year, B. would convey; B. died, leaving C. his son and heir; two of the lives died, and the lease was twice renewed by C. and his father; and tho' it was near twenty years since the conveyance was made, yet the Master of the Rolls decreed a redemption on payment of 550*l.* and the two fines. 2 *Vern.* 84. *Mantlove v. Ball.*

A. lends money to B. to carry on certain buildings, and takes a mortgage from him to secure 1600*l.* with interest; and by another deed executed at the same time, takes a covenant from B. that he should convey to him, if he thought fit, ground-rents to the value of 1600*l.* at the rate of 20 years purchase; and on a bill

brought to redeem, the Master of the Rolls decreed a redemption on payment of principal, interest and costs, without regard to that agreement, but set aside the same as unconscionable; for a man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any bye-agreement. 2 *Vern.* 520. *Jennings v. Ward.*

But tho' these and such like restrictions are relieved against, to make them answer the primary intention of the parties; yet if A. on a mortgage, lends money at 5*l.* per cent. but agrees in the deed, that if the money were paid within three months after it became due, that he would accept of 4*l.* per cent. and the mortgagor neglects to pay the interest within the time, equity will not relieve him, but he must pay 5*l.* per cent. for tho' the court relieves against unreasonable penalties, yet this is not so, for the mortgagee might have refused to lend his money under 5*l.* per cent. Preced. *Chan.* 160. *Jory v. Cox.* 1 P. W. 653.

So if the mortgagee devises, that the mortgagor should be remitted part of his mortgage money, provided he pays the principal and interest within three days after his decease; if the condition be not performed, the remittance is lost; because being a voluntary bounty, and not *ex debito justitiæ*, the party must take it as it is limited, for *cujus est dare, ejus est disponere*; and the court cannot relieve in this case after the day. 1 *Chan. Ca.* 52.

But where in a mortgage there was a proviso, that if the interest was behind six months, that then the interest should be accounted principal, and carry interest; this by Lord *Cowper* was decreed to be a vain clause, and of no use; and he said, that no precedent had ever carried the advance of interest so far, and that an agreement made at the time of the mortgage, will not be sufficient to make future interest principal; but to make interest principal, it is requisite that interest be first grown due, and then an agreement concerning it may make it principal. 2 *Salk.* 499.

The mortgagor before forfeiture, and whilst it remains uncertain, whether he will perform the condition at the time limited or not, hath the legal estate in him; also after forfeiture he hath an equity of redemption; so that he is still considered as owner and proprietor of the estate, until the equity of redemption be foreclosed; therefore may make leases or any settlement thereof, which will bind his equity of redemption. It is said, that a tenant in tail of an equity of redemption may devise it for payment of debts. 1 *Vern.* 41. *Turner v. Guim.*

Therefore if a man mortgages his land, and, (as is usual,) still continues in possession, and levies a fine, and five years pass, yet the mortgagee is not barred; for tho' the mortgagee be in reality out of possession, yet when that is done by consent of both parties, and the nature of the contract requires it should be so while the interest is paid, it is against the original design of the contract, that any act of the mortgagor, (except the payment of the money,) should deprive the mortgagee of his security, and is no less than fraud; which the law will not countenance. 1 *Sid.* 460. 1 *Vent.* 82. *Carth.* 101, 414. 2 *Keb.* 522.

And as the mortgagor, being considered only as tenant at will to the mortgagee, cannot, by his act, defeat the interest of the mortgagee, otherwise than by payment of the mortgage money; so neither can the mortgagee defeat the mortgagor of his equity of redemption; therefore if a mortgagee in fee suffers a recovery, this, even at law, shall not bind the mortgagor's right of entry, upon performance of the condition; but if the mortgagor had been a party to the recovery, then his right had been bound, not only on account of the recompence in value, but because he is estopped by the recovery to claim the land against the recoverer or his heirs, when he was called in before the judgment given to defeat his title, and could not do it. *Palm.* 135. *Cro. Jac.* 593.

So if a mortgagee be disseised, and the disseisor levies a fine, and five years pass after the proclamations, tho' the mortgagee is hereby barred, yet if the mortgagor pays or tenders his money, he has five years to prosecute his

his right, by the second saving in the statute 4 Hen. 7. cap. 24. because his title did not accrue 'till payment of the money. Plow. 373. a.

And as the mortgagor, 'till the equity of redemption be foreclosed, is considered as owner of the land, it was ruled, where a bill for a redemption was brought against a mortgagee in possession, and a decree accordingly, that the mortgagee before the account taken, having presented to a church that become void, should revoke his presentation, and present such a person as the mortgagor or his vendee (he having contracted to sell) should appoint. *Preced. Chan.* 71. 2 *Vern.* 401.

By the 7 W. & M. cap. 25. it is enacted, "That no person or persons shall be allowed to have any vote in election of members to serve in parliament, for or by reason of any trust estate or mortgage; unless such trustee or mortgagee be IN ACTUAL POSSESSION, or receipt of the rents and profits of the same, but that the mortgagor, or *cestui que trust* in possession, shall and may vote for the same, notwithstanding such mortgage or trust.

And by the 9 Ann. cap. 7. which requires, that knights of the shire should have 600 l. per ann. and every other member 300 l. per ann. it is enacted, "That no person shall be qualified to sit in the House of Commons, within the meaning of the act, by virtue of any mortgage, whereof the equity of redemption is in any other person, unless the mortgagee shall have been in possession of the mortgaged premises for seven years before the time of election.

The condition must at law be strictly performed, otherwise the mortgagor loses all benefit of redemption; but if upon a mortgage a tender be made of the money at the place, at any time of the day specified in the condition, and the mortgagee refuses, the condition is saved for ever. 7 Ed. 4. 3. 9 H. 6. 12. 22 H. 6. 37. 47 Ed. 3. 26. Plow. 173. 5 Co. 114. Co. Lit. 209.

3. Of the equity of redemption and foreclosure; and of the manner of redeeming and foreclosing.

Altho', after breach of the condition, an absolute fee-simple is vested at Common law in the mortgagee; yet a right of redemption being still inherent in the land, till the equity of redemption be foreclosed, the same right shall descend to and is invested in such persons as have a right to the land, in case there had been no mortgage or incumbrance whatsoever; and as an equitable performance as effectually defeats the interest of the mortgagee, as the legal performance doth at Common law, the condition still hanging over the estate, till the equity is totally foreclosed; on this foundation it hath been held, that a person who comes in under a voluntary conveyance, may redeem a mortgage; and tho' such right of redemption be inherent in the land, yet the party claiming the benefit of it, must not only set forth such right, but also shew that he is the person intitled to it. *Hard.* 465. 1 *Vern.* 182, 193.

As the heir at law is regularly intitled to the benefit of redemption, he is also intitled to the assistance of the personal estate of the mortgagor for that purpose; according to the doctrine established in the courts of equity, that the personal estate, in the hands of the executor, shall be employed in case of the heir, by whatever means the heir becomes indebted as heir; for the personal estate having received the benefit by contracting the debt, and the real considered only as a pledge for it; according to the common rule, *Qui sentit commodum sentire debet & onus.* *Prec. in Chanc.* 477.

And on this foundation it hath been frequently held, that if a man mortgage lands, and covenants to pay the money, and dies, the personal estate of the mortgagor shall, in favour of the heir, be applied in exoneration of the mortgage. 2 *Salk.* 449.

Also it is held by some opinions, that this benefit shall not only extend to the heir at law, or *heir natus*, but also to an *heir factus*, from a presumption, that it is the intention of the testator, that he should have all the privileges of the *heir natus*; and some even held, that an ordinary devisee shall have this benefit; but as to this last point it hath been held otherwise; and that if a man mortgages his land, and devises it to J. S. or to A. for

life, the remainder in fee, to B. that there the charge doth pass with the estate, there appearing no intention of the testator, that he should have it discharged. 2 *Chan. Ca.* 84. 1 *Vern.* 36. 1 *Chan. Ca.* 271.

So if the mortgagor conveys away the equity of redemption, the purchaser shall not have the benefit of the personal estate, but must take it *cum onere*. 2 *Salk.* 450. 1 *Vern.* 37.

It has likewise been held, that the heir of the mortgagor shall have the benefit of the personal estate to pay off the mortgage, tho' there be no covenant in the mortgage-deed for the payment thereof; because the mortgage-money is a debt, whether there be any express covenant for the payment of it or not. 2 *Salk.* 449. 1 *Vern.* 436. *Preced. Chan.* 61. 3 *Preced.* 360.

But where a mortgage in fee was made redeemable at Mich. 1702, or any other Mich. day following, on six months notice; and there was no covenant for payment of the mortgagee money; it was held by Lord Chancellor Cowper, that the mortgagor having devised his personal estate to his wife and daughter, and having during his life paid the interest of the mortgage, the personal estate should not be applied in ease and exoneration of the real estate for the benefit of the heir at law; for, being no covenant for paying of the money, there was no contract at all between them, neither express nor implied; nor would any action lie against the mortgagor to subject his person, to compel him to pay this money; but this was in nature of a conditional purchase, subject to be defeated on payment by the mortgagor, or his heirs, of the sum stipulated between them, at any Mich. day, at the election of the mortgagor, or his heirs; for here was an everlasting subsisting right of redemption, descendible to the heirs of the mortgagor, which could not be forfeited at law like other mortgages; therefore there could be no equity of redemption, or any occasion for the assistance of this court; but the plaintiffs might even at law defeat the conveyance, by performing the terms and conditions of it; which were not limited to any particular time, but might be performed on any Michaelmas day, to the end of the world; and since there was no covenant or contract, either express or implied, to charge the personal estate of the mortgagor, he thought there was no reason to lay the load of this debt upon that which was given to other persons. *Preced. Chan.* 423. 2 *Vern.* 701.

By the Stat. 4 & 5 W. 3. cap. 16. it is enacted, That if any person shall borrow any money, or for any other valuable consideration for the payment thereof voluntarily give, acknowledge, permit or suffer to be entered against him or them, one or more judgment or judgments, statute or statutes, recognizance or recognizances, to any person or persons, creditor or creditors; and if the said borrower or borrowers, debtor or debtors, shall afterwards take up or borrow any other sum or sums of money of any other person or persons, or for other valuable consideration become indebted to such person or persons, and for securing the repayment and discharge thereof shall mortgage his, her or their lands or tenements, or any part thereof, to the second or other lender or lenders of the said money, creditor or creditors, or to any other person or persons in trust for or to the use of such second or other lender or lenders, creditor or creditors, and shall not give notice to the said mortgagee or mortgagees, of the said judgment or judgments, statute or statutes, recognizance or recognizances, in writing under his, her or their hand or hands, before the execution of the said mortgage or mortgages; unless such mortgagor or mortgagors, his, her or their heirs, upon notice to him, her or them given by the mortgagee or mortgagees of the said lands and tenements, his, her or their heirs, executors, administrators or assigns, in writing, under his, her or their hands and seals, attested by two or more sufficient witnesses, of any such former judgment or judgments, statute or statutes, recognizance or recognizances, shall within six months pay off and discharge the said judgment or judgments, statute or statutes, recognizance or recognizances, and all interest and charges due thereupon, and cause and procure the same to be vacated, or discharged by record; that then the mortgagor or mortgagors

gagors of the said lands and tenements, his, her or their heirs, executors, administrators or assigns, shall have *no benefit or remedy* against the said mortgagee or mortgagees, his, her, or their heirs, executors, administrators or assigns, or any of them, in equity or elsewhere, *for redemption* of the said lands and tenements, or any part thereof; but the said mortgagee or mortgagees, his, her or their heirs, executors, administrators and assigns, shall and may hold and enjoy the said lands and tenements for such estate and term therein, as were or was granted and settled to the said mortgagee or mortgagees against the said mortgagor or mortgagors, and all person and persons lawfully claiming from, by or under him, her or them; *freed from equity of redemption*, and as fully, to all intents and purposes whatsoever, as if the same had been purchased absolutely, and without any power or liberty of redemption.

And it is further enacted, That if any person shall mortgage any lands or tenements to any person or persons, for security of any money lent, or otherwise accrued or become due, or for other valuable considerations; and if the said mortgagor or mortgagors shall *again mortgage* the same lands or tenements, or any part thereof, to any other person or persons for valuable considerations (the said former mortgage being in force and not discharged,) and shall not discover to the said *second* or other mortgagee or mortgagees, or some or one of them, the former mortgages, or mortgages, in writing under his or their hands; that then, and in these cases also, the said mortgagor or mortgagors, his, her or their heirs, executors, administrators or assigns, shall have *no relief or equity of redemption*, against the said second or after mortgagee or mortgagees, his, her or their heirs, executors, administrators or assigns, upon the said after mortgage or mortgages; but such mortgagee or mortgagees, his, her or their heirs, executors, administrators and assigns, shall and may hold and enjoy such more than once mortgaged lands and tenements, for such estate and term therein, as were or was granted and conveyed by the said mortgagor or mortgagors, against him, her or them, his, her or their heirs, executors or administrators respectively, *freed from equity of redemption*, and as fully, to all intents and purposes, as if the same had been an absolute purchase, and without any power or liberty of redemption. Provided always, and be it further enacted by the authority aforesaid, That, nevertheless, if it so happen there be more than one mortgage at the same time made, by any person or persons, to any person or persons, of the same lands and tenements, the several late or under mortgagees, his, her or their heirs, executors, administrators or assigns, shall have power to redeem any former mortgage or mortgages, *upon payment of the principal debt, interest, and costs of suit*, to the proper mortgagee or mortgagees, his, her or their heirs, executors, administrators or assigns.

Provided always, That nothing in this act contained shall be construed, deemed or extended to bar any widow of any mortgagor of lands or tenements from her dower and right in or to the said lands, who did not legally join with her husband in such mortgage, or otherwise lawfully bar or exclude herself from such her dower or right.

It hath been held, that if a man mortgages certain lands to one man, and mortgages those lands with some others to another, tho' this seems to be a case omitted out of the above statute against clandestine mortgages; yet if it appears to be a contrivance to evade it, as if an acre or two of land were only added, this will not exempt it; also a person, who will take advantage of the statute, must be an *bonest mortgagee*; therefore, if a man has used any fraud or practice in obtaining a second mortgage, he shall not have the benefit of the statute. 2 Vern. 589, 590.

The methods of redemption and foreclosing being dilatory, expensive, and inconvenient, not only to the mortgagee but also to the mortgagor, the same seem now remedied by the 7 Geo. 2. cap. 20. which enacts, That where any action shall be brought on any bond for the payment of the money secured by such mortgage, or performance of the covenants therein contained; or where any action of ejectment shall be brought by any mortgagee or mortgagees, his, her or their heirs, executors,

administrators or assigns, for the recovery of the possession of any mortgaged lands, tenements or hereditaments, and *no suit shall be then depending* in any of his Majesty's courts of equity, in that part of Great Britain called England, for or touching the foreclosing or redeeming such mortgaged lands, tenements or hereditaments; if the person or persons *having right to redeem* such mortgaged lands, tenements or hereditaments, and who shall appear and become defendant or defendants in such action, shall, at any time *pending such action*, pay unto such mortgagee or mortgagees, or in case of his, her or their refusal, *shall bring into court*, where such action shall be depending, *all the principal money and interest due on such mortgage, and also all such costs as have been expended* in any suit or suits at law or in equity upon such mortgage, (such money for principal, interest and costs, to be ascertained and computed by the court where such action is or shall be depending,) the monies so paid to such mortgagee or mortgagees, or brought into such court, shall be deemed and taken to be *in full satisfaction and discharge of such mortgage*; and the court shall and may discharge every such mortgage, or defendant of and from the same accordingly; and shall and may, by rule or rules of the same court, compel such mortgagee or mortgagees, at the costs and charges of such mortgagor or mortgagors, to assign, surrender or re-convey such mortgaged lands, tenements and hereditaments, and such estate and interest, as such mortgagee or mortgagees have or hath therein, and deliver up all deeds, evidences and writings in his, her or their custody, relating to the title of such mortgaged lands, tenements and hereditaments, to such mortgagor or mortgagors, who shall have paid or brought such monies into court, his, her or their heirs, executors or administrators, or to such other person or persons as he, she or they shall for that purpose, nominate or appoint.

By *sect. 2.* it is further enacted, That where any bill or bills, suit or suits shall be filed, commenced or brought, in any of his Majesty's courts of equity in that part of Great Britain called England, by any person or persons having or claiming any estate, right or interest in any lands, tenements or hereditaments, under or by virtue of any mortgage or mortgages thereof, to compel the defendant or defendants in such suit or suits, (having or claiming a right to redeem the same,) to pay the plaintiff or plaintiffs in such suit or suits, the principal money and interest due on any such mortgage, together with any sum or sums of money due on any incumbrance or specialty, charged or chargeable on the equity of redemption thereof; and in default of payment thereof, to foreclose such defendant or defendants of his, her or their right of equity of redeeming such mortgaged lands, tenements or hereditaments; and upon his, her or their admitting the right and title of the plaintiff or plaintiffs in such suit, such court and courts of equity may and shall, at any time or times before such suit or cause shall be brought to hearing, make such order or decree therein, as such court or courts might or could have made therein, in case such suit or cause had been regularly brought to hearing before such court or courts; and all parties to such suit or suits shall be bound by such order or decree so made, to all intents and purposes, as if such order or decree had been made by such court at or subsequent to the hearing of such cause or suit; any usage to the contrary thereof in any wise notwithstanding.

Provided always, That this act, or any thing herein contained, shall not extend to any case, where the person or persons, against whom the redemption is or shall be prayed, shall (by writing under his, her or their hands, or the hand of his, her or their attorney, agent or solicitor, to be delivered before the money shall be brought into such court at law to the attorney or solicitor for the other side) insist either that the party praying a redemption has not a right to redeem, or that the premises are chargeable with other or different principal sums than what appear on the face of the mortgage, or shall be admitted on the other side; nor to any cause where the right of redemption to the mortgaged lands and premises in question, in any cause or suit, shall be controverted

or questioned, by or between different defendants in the same cause or suit; nor shall be any prejudice to any subsequent mortgagee or mortgagees, or subsequent incumbrancer; any thing in this act to the contrary thereof in any wise notwithstanding.

We have been very full under this head, as it is a title of great use.

For more learning on this subject, see 3 New Abr. and 15 Vin. Abr. tit. Mortgage.

Mortgago; Is he who mortgages or pawns the lands; and he to whom the mortgage is made is called the mortgagee.

Morth, Murder; Sax. *morth*, death. *Morthlaga*, a murderer or manslayer. *Morth-lage*, homicide or murder, &c.

Mortitibus, Dead of the rot, applied to sheep and lambs. Mon. 2 tom. p. 114.

Mortmain, (*manus, mortua*, compounded of two French words, *mort*, i. e. *dead*, & *maine*, i. e. *manus*) Signifies an alienation of land and tenements to any guild, corporation or fraternity, and their successors, as bishops, parsons, vicars, &c. which may not be done without the King's licence, and the lord of the manor, or of the King alone, if it be immediately holden of him. The reason of the name may be deduced from hence, because the services, and other profits due, for such lands as escheats, &c. should not without such licence come into a dead hand, or into such a hand as it were dead, and so dedicated unto God, or pious uses, as to be abstractedly different from other lands, tenements or hereditaments, and is never to revert to the donor, or any temporal or common use. *Magna Charta*, cap. 36. and 7 Ed. 1. commonly called *The statute of mortmain*, and 18 Ed. 3. cap. 3. and 15 Rich. 2. cap. 5. Polydore Virgil, in the seventeenth book of his *Chronicles*, mentions this law, and gives this reason of the name, *Et legem hanc manum mortuam vocarunt, quod res semel datae collegiis sacerdotum, non utique rursus venderentur velut mortuae, hoc est, usui aliorum mortalium in perpetuum adeptae essent. Lex diligenter servatur, sic ut oibilibus possessionum ordini sacerdotali a quoquam detur, nisi regis permisso*: but the fore-mentioned statutes are in some manner abridged by 39 Eliz. cap. 5. by which the gift of lands, &c. to hospitals is permitted, without obtaining licences in mortmain. Hottoman, in his *Commentaries De verbis Feudalibus*, verbo *Manus mortua*, hath these words; *Manus mortua locatio est, quae usurpatur de iis, quorum possessio (ut ita dicam) immortalis est, quia nunquam haereditatem habere desinunt: Quia de causa res nunquam ad priorem dominum revertitur, nam manus pro possessione dicitur mortua per antiphrasin pro immortalis, &c.* Petrus Belluga in *speculo Principum*, fol. 76. *Jus amortizationis est licentia capiendi ad manum mortuam*: To the same effect read *Cassan. de Consuet. Burgund.* p. 348, 387, 1183, 1185, 1201, &c. *Shene de verb. Signif.* faith, *Dimittere terras ad manum mortuam est idem atque dimittere ad multitudinem sive universitatem, quae nunquam moritur, idque per antiphrasin, seu a contrario sensu, because commonalties never die.* Cowell.

William the Conqueror, demanding the cause why he conquered the realm by one battle, which the Danes could not do by many; Frederick, abbot of St. Alban's, answered, that the reason was, because the land which was the maintenance of martial men, was given and converted to pious employments, and for the maintenance of holy votaries: To which the Conqueror said, that if the clergy be so strong, that the realm is infeebled of men for war, and subject by it to foreign invasion, he would aid it. Therefore he took away many of the revenues of the abbot, and of others also. Speed. 418. b.

'Tis proper here to observe, that because the Lords had nothing from the alienees; for by alienation in mortmain they lost their escheats, and many services which were heretofore due to them, as bodies politick never die, nor can perform personal service, commit treason or felony, &c. This occasioned the statutes of mortmain, by virtue whereof the King, or other Lord of whom the land is holden, may enter into lands so aliened. 1 Inst. 2. 2 Inst. 75. The foundation of all the statutes of mortmain was *Magna Charta*. By the 9 H. 3. c. 36. it is declared, "That it shall not be lawful for any to give his lands to any religious house, and to take the same land

again to hold of the same house, &c. upon pain that the gift shall be void, and the land shall accrue to the lord of the fee." This statute is interpreted to extend to lands, which a religious house kept in their own hands, tho' they gave them not back again to hold of the same house. 2 Inst. 75.

But ecclesiastical persons found means to creep out of the statute, by purchasing lands holden of themselves, or by making leases for a long term of years, &c. wherefore by 7 Ed. 1. commonly called the *Statute of Mortmain*, or *de Religiosis*, no persons religious, or others whatsoever, shall buy or sell any lands or tenements, or under the colour of any gift or lease, or by reason of any other title, receive the same, or by any other craft shall appropriate lands in any wise to come into mortmain, on pain of forfeiture; and within a year after the alienation, the lord of the fee may enter; and if he do not, then the next immediate lord, from time to time may enter in half a year; and for default of all the lords entering, the King shall have the lands so alienated for ever, and may enfeof others by certain services, &c.

As this statute extended only to gifts, alienations, &c. made between ecclesiasticks and others, they found out an evasion also of this statute; for pretending a title to the land, which they meant to gain, they brought a feigned action against the tenant of the land, and he by consent and collusion was to make default, and thereupon they recovered the land, and entered by judgment of law: so that the *Stat. Westm.* 2. 13 Ed. 1. c. 32. was thought necessary; by which it is to be inquired by the country whether the demandant had a just title to the land; and if so, then he shall recover seisin; but if otherwise, the lord of the fee shall enter, &c. And by 34 Ed. 1. Lands shall not be alienated in mortmain, where there are mean lords, without their consent declared under hand and seal; nor shall any thing pass where the donor reserves nothing to himself.

Notwithstanding all these statutes, ecclesiastical persons (not being able to get lands, by purchase, gift, lease, or recovery) procured lands to be conveyed by feoffment, or in other manners to divers persons and their heirs, to the use of them and their successors, whereby they took the profits. 2 Inst. 75. To bar this, the *Stat.* 15 R. 2. c. 5. was made, which statute enacts, "That no feoffment, &c. of any lands and tenements, advowsons or other possessions, to the use of any spiritual persons, or whereof they shall take the profits, shall be made without licence of the King, and of the Lords, &c. upon pain of forfeiture." And by 23 H. 8. c. 10. against superflitious uses, forfeitures, fines, recoveries, grants, devises, &c. of lands, in trust to the use of any parish church, or to have perpetual obits, or a continual service of a priest for ever, or for sixty years, &c. to the prejudice of the King and other lords, as in case of lands alienated in mortmain, shall be void: tho' this last act extends not to corporations, where there is a custom to devise lands in mortmain; as in London, a freeman that pays scot and lot, may devise all his lands in the city in mortmain, without licence. 1 Roll. Abr. 556.

And notwithstanding this, or any of the statutes, any man at this day may give lands, tenements, &c. to any persons and their heirs, for finding a preacher, maintenance of a school, reparation of churches, relief of the poor, &c. or for any like charitable uses: tho' it is good policy on every such estate to reserve a small rent to the feoffor and his heirs, when the feoffees shall be seized to their own use, and not to the use of the feoffor; or if a consideration of a small sum be expressed, the 23 H. 8. cannot by any pretence make void the use. 1 Rep. 24. 11 Rep. 70. Wood's Inst. 303.

By the *Stat.* 39 Eliz. cap. 5. The gift of lands, &c. to hospitals is permitted without obtaining licences of mortmain. Owners of impropriations may annex them to the parsonage or vicarage where they lie, or settle them in trust for the curates, where the parsonage is impropriate, and no vicarage endowed, without licence of mortmain: and if the settled maintenance of any benefice with cure shall not amount to 100*l.* per annum, the incumbent may purchase to him and his successors, &c. without licence in mortmain. 17 Car. 2. c. 7. By ancient statutes, the

King's

King's licence may be had for authorizing of lands, and the writ of *ad quod dampnum* is to issue out of Chancery to inquire concerning the same. 27 Ed. 1. *ff.* 2. Prelates, clerks, &c. shall not be impeached for purchasing lands in *mortmain*, on producing the King's charter of licence. 18 E. 3. *ff.* 3. c. 3. And it is declared lawful for the King to grant to any person, body politick or corporate, their heirs and successors, licence to alien in *mortmain*; and purchase and hold in *mortmain* in perpetuity, &c. without incurring any forfeiture, by Stat. 7 & 8 W. 3. c. 37.

A grant of an advowson in fee, or an appropriation of an advowson, hath been adjudged a *mortmain*; but an appropriation of tithes, which are things merely spiritual, or a grant of an annuity, that chargeth the person only, cannot be *mortmain*, to be forfeited. 1 Inst. 2, 304. 2 Inst. 361. 5 Rep. 56. 9 Rep. 96. A late statute has ordained, that no manors, lands, &c. shall be given, granted to, or settled on any persons, bodies politick or corporate, for any estate whatsoever, or charged in trust for charitable uses, *unless done by deed indented, and sealed at least twelve months before the death of the donor or grantor, and inrolled in Chancery, within six months after executed*, &c. and except the same be to take effect in possession immediately; and without any power of revocation, &c. And if otherwise made, shall be void: but not to extend to purchases for a valuable consideration; nor to the two universities, or colleges of Eaton, Winchester, &c. Statute of *Mortmain*, 9 Geo. 2. c. 36.

As to the statutes of 9 H. 3. cap. 36. and 7 Ed. 1. vide Coke's Commentary thereon. 2 Inst. 74.

As to bodies politick purchasing and not being subject to the statutes of *mortmain*, vide 22 Car. 2. c. 6. *ff.* 10. And for the King's power to grant licence to alien or purchase in *mortmain*, vide 7 & 8 W. 3. c. 37. and vide 2 & 3 Ann. c. 11. 9 Geo. 2. c. 36.

For more learning on this subject, see 15 Vin. Abr. tit. *Mortmain*.

Mortuary, (*Mortuarium*, *mortarium*.) Is a gift left by a man at his death to his parish church, for the recompence of his personal tithes and offerings not duly paid in his life-time. A *mortuary* is not properly and originally due to ecclesiastical incumbents from any, but those only of his own parish, to whom he ministers spiritual instruction, and hath right to their tithes. But by custom in some places of this kingdom, they are paid to the parsons of other parishes, as the corps passeth thro' them. See the statute 21 H. 8. c. 6. before which statute *mortuaries* were payable in beasts; the best to the lord for a heriot, the second for a *mortuary*. Nor was it only *de meliori avaria*, sed *de meliori ra.* *Mortuarium* (says Lindwood) *fit dictum est quia relinquitur ecclesie pro anima defuncti.* Custom did so prevail, that *mortuaries* being held as due debts, the payment of them was enjoined as well by the statute *De circumspiciendis agatis*, in 13 Ed. 1. *ff.* 4. as by several constitutions, &c. A *mortuary* was anciently called *Sanlesceat*, which signifies *pecunia sepulchralis*, or *symbolum anime*. After the conquest it was called a *corse-present*, (because the beast was presented with the body at the funeral,) and sometimes a *principal*; of which see a learned discourse in the *Antiquities of Warwickshire*, fol. 679. and see Selden's *History of Tithes*, pag. 287. There is no *mortuary* due by law, but by custom. 2 Inst. 491. See *Spelm. de Council.* tom. 2. 390. This is likewise proved out of *Fleta*, lib. 2. c. 60. par. 30. *Item si rector petat mortuarium ubi dari consuevit.* See *Nonagium*, *Principal*, and *Pretium sepulchri*. In the *Irish* canons 'tis called *Pretium sepulchri*, and *Sedatium*, viz. *Omne corpus sepultum habet in jure suo vaccam & equum & vestimentum & ornamenta lecti sui*, &c. Canon. Hibern. lib. 19. c. 6. And in another place, *Rogas principem loci*, i. e. the bishop, ut *basilicum ejus federet*, &c. & reddat amicum pretium ejus & sedatium commune. The word *mortuarium* was sometimes used in a civil as well as an ecclesiastical sense, and was payable to the lord of the fee, as well as to the priest of the parish. — *Debentur domino* (i. e. *manerii de Wrechwyke*) *nomibus heriotii & mortuarii dua vacca pret. xii sol.* Paroch. Antiqu. pag. 470. Corwell.

Mr. Selden tells us, that the usage anciently was, bringing the mortuary along with the corps when it came to be buried, and to offer it to the church as a satisfaction for the

supposed negligence and omission the defunct had been guilty of in not paying his personal tithes, and from thence it was called a *corse-present*. *Wass. Comp. Incumb.* 8va. 1053. cap. 53. cites Selden's *Hist. of Tithes* 287.

Stat. 13 Ed. 1. *ff.* 4. enacts, That a prohibition shall not lie for mortuaries, in places where mortuaries used to be paid.

By the 21 H. 8. c. 6. *Mortuaries* are to be paid as follows, viz. He who dies possessed of moveable goods to the value of 40 l. or above, (his debts first paid) is to pay 10 s. He that dieth possessed of goods of 30 l. value and under 40 l. is to pay 6 s. 8 d. And dying possessed of goods to the value of 6 l. 13 s. 4 d. and under 30 l. to pay 3 s. 4 d. But if the goods are under 6 l. 3 s. 4 d. value, no *mortuary* is to be paid; and no *mortuary* is to be paid by any feme-covert or child, persons not keeping house, &c. If one happens to die in a place where he does not reside, by this statute the *mortuary* shall be paid in the place where he had his usual abode; no person shall pay *mortuaries* in more places than one, or more than one *mortuary*; and no *mortuary* shall be demanded of any but in such places where *mortuaries* are due by custom, and have used to have been paid: Also there is a proviso in the statute, that in places where *mortuaries* have been of less value than as aforesaid, no person shall pay any more than has been accustomed. If a parson, vicar, &c. take or demand more than is allowed by the statute for a *mortuary*, he shall forfeit all he takes beyond it, and 40 s. more to the party grieved, to be recovered by action of debt, &c. Stat. *Ibid.* Since this statute, whereby *mortuaries* are reduced to a certainty, an action of debt will lie upon the said statute in the courts of Common law, for recovery of the sum due for a *mortuary*, being by custom as aforesaid, altho' before that statute they were recoverable only in the Spiritual court: But as such actions have never been brought, it is said, they are still recoverable in that court only. *Wass. Clergym. Law* 475. *Count. Pars. Campan.* 140. Where by custom a *mortuary* hath not been usually paid, if a person be libelled in the Spiritual court, he shall have a prohibition by virtue of the statute 21 H. 8. c. 6. And upon a prohibition the custom may be tried, &c. 2 Lutw. 1066. 3 Mod. 268. No suit in equity lies for a *mortuary*. 2 Strange 715. *Mortuaries* in Wales taken away, 12 Ann. stat. 2. c. 6. *Mortuaries* in the archdeaconry of Chester taken away, and a recompence made to the bishop of Chester, 28 Geo. 2. c. 6.

Mortuarium, Hath been sometimes used in a civil as well as ecclesiastical sense, being payable to the lord of the fee — *Debentur domino maner. de Wrechwyke nomibus heriotii & mortuarii dua vacca pret. xii sol.* Paroch. Antiqu. 470.

Mortal Law, This law inflicts not a capital punishment for bare thefts, agreeable to which is the Civil law; but our law doth, as in strict justice for the welfare of society it may. *Exod.* 22. *S. P. C.* 25. 1 Hawk. P. C. 89.

Moss-Troopers, A rebellious sort of people in the North of England, that lived by robbery and rapine, not unlike the *Ferries* in Ireland, the *Buccaneers* in Jamaica, or *Banditti* of Italy: The counties of Northumberland and Cumberland, were charged with an yearly sum, and a command of men to be appointed by justices of the peace, to apprehend and suppress them. Stat. 4 Jac. 1. c. 1. 13 & 14 Car. 2. c. 22. 30 Car. 2. c. 2. See 6 Geo. 2. c. 37.

Mote, (*Mota*, Sax. *gemot*; *curia*, *placitum*, *convencus*.) As *Mota* de Hereford, i. e. *Curia vel placita comitatus de Hereford*. In the charter of Maud the Empress, daughter of King Henry the First, we read thus; *Sciatis me fecisse Milonem de Gloucester, Comitum de Hereford, & dedisse ei motam Herefordie cum toto castello*, &c. Hence *Burge-mote*, *curia vel convencus burgi*; *Swainmote*, *curia vel convencus ministrorum, scil. foreste*, &c. From this also we draw our word *mote* and *moot*, to plead. The Scots say, to *mote*, as the *Mute-hill* at Seane, i. e. *Mons placiti de Seane*. We commonly apply the word *moot* to that arguing of cases used by young students in the Inns of Court and Chancery. In the charter of peace between King Stephen and Duke Henry, afterwards King, it is taken to signify a fortress, as *Turris* de London, & *mota* de Windsor, the

the tower of London, and fortrefs of Windsor. *Mote* also signifies a standing pool of water to keep fish in.

It likewise signifies a great ditch encompassing a castle or dwelling-house.—*Hæc indentura, &c. testatur quod prædictus Rogerus tradidit p. æfate Thome tria signa & unam motam piscariam existen. intra manerium, &c. Habend. &c. cum tota piscatione in eisdem & cum incremento piscium in eisdem cum libero ingressu & egressu, &c.* Chart. dat. 18 Feb. 11 Ed. 1.

Motte-bell, or *Mot-bell*, the bell so called, which was used by the English Saxons to call people together to the court. *Leg. Edw. Confess. c. 35.* See *Folcmote*.

Moteer, A customary service or payment at the *mote* or court of the lord: From which some persons were exempted by charter of privilege. *Rot. Chart. 5 Joh. m. 9.*

Mothering, Is a custom of visiting parents on *Midlent Sunday*. See *Lecture Jerusalem*.

Motibilis, One that may be removed or displaced, or rather a vagrant.—*In carcere detenti, canonici vel alii religiosi, motibiles, furiosi, &c. convenire non poterunt, i. e. in iure convenire non possunt.* *leta, lib. 6. c. 6.*

Motion in Court, In the courts of Chancery, King's Bench, &c. *Motion* are made by barristers for what concerns their clients causes: And where any *motion* is made in Chancery, that is not of course, generally an affidavit of the facts alledged must be read in court: And if *motions* are founded on the general rules or usage of the court, and are not of course, but granted or denied as the court thinks fit, on hearing counsel on both sides, notice is to be given in writing to the solicitor of the other party, or his clerk in court, expressing every thing to be moved for, *which must be served two days at least before the day on which the motion is to be made*, whereof affidavit must also be made. *Præfif. Solic. 17.*

In *B. R.* one ought not to move the court for a rule for a thing to be done, which by the common rules of practice may be done without moving the court: Nor shall the court be moved for doing what is against the practice of the court: One ought not to move for several things in one *motion*; and where a *motion* hath been denied, the same matter may not be moved again by another counsel, without acquainting the court thereof, and having their leave for the same: But every person who makes a solemn argument at the bar is allowed by the court a *motion* for his argument. *2 Lill. Abr. 209, 210.* But counsel cannot move for his argument in a matter of course in the paper, in *B. R.* *Wilj. par. 1. 76.*

If there be divers rules of court made in a cause, and the party intends to move thereon, he must produce the rule last made in the cause, and move upon that: But it is necessary to have all the rules and copies of the affidavits, to satisfy the court how the cause hath been proceeded in, and how it stands in court; tho' the last rule is the most material; and where a *motion* is made to set aside a rule grounded on an affidavit, a copy of the affidavit must be produced, that the court may be informed upon what grounds the rule was made, and judge whether there be cause shewn upon the *motion* sufficient to set aside the rule. *Pasch. 13 Car. B. R. Hill. 1649.*

If any thing be moved to the court upon a record, the record is to be in court, or the court will make no rule upon such *motion*. *Hill. 22 Car. B. R.* One party ought not to surprize another by a *motion in court*, but to move in convenient time, that the other party may have time to be heard. *Pasch. 23 Car.* It is against the practice of the court to move for an attachment, or any matters in law, upon the last day of the term, *except the case is peremptory*. *Monday* is a special day for *motions* in *B. R.* by the ancient course; but they are made upon any day, as the business of the court will permit: The three or two last days of the term are days appointed to hear *motions*, and Crown-office causes; and the last day chiefly for *motions* to prepare business against the next term or sittings. *2 Lill. 208, 210.* The courts of law generally on *motions* which are not of course, grant rules to shew cause at a future day, why the thing asked for should not be granted a copy of which being served on the attorney of the adverse party, counsel may shew cause on the day expressed

in the rule, which if not done, the party on whose behalf the rule *is* was obtained, may by counsel on the subsequent day, move to make that rule absolute, which motion being made, counsel on the other side, may oppose it by shewing cause. See farther as to the practice of *B. R.* relative to *motions*, *1 Burr. 9, 57, 58, 334, 651. 2 V. 250, 259, 801.* And *Black. Com. 3 V. 304.* In the Chancery, during term, every Thursday is a day for sealing, and *motions*; and Tuesdays and Saturdays are days for *motions*, as are the first and last days of the term: In vacation, only seal days appointed by the Lord Chancellor, are days of *motion*. *Præfif. Solic. 17.*

After *motion* in arrest of judgment, no *motion* shall be for a new trial, but after *motion* for a new trial, one may move in arrest of judgment. *2 Salk. 647. Turberville v. Stamp.*

One ought not to move the court for a thing against which they have delivered their opinions. *Trin. 22 Car. B. R.* But ought to rest satisfied with the judgment of the court, and submit thereunto. *2 L. P. R. 208.* See *15 Vin. Abr. tit. Motion.*

Movables. All sorts of things moveable are included under the name of things personal, or are personal estate, i. e. all those things which may attend a man's person wherever he goes. See *Black. Com. 2 V. 384.*

Moult, Is an old English word for a mow of corn, or hay; *nullo scani, &c.* Paroch. Antiq. 401.

Mountebanks. Booths and stages for rope-dancers, mountebanks, &c. are publick nuisances, and may, upon indictment be suppressed, and the offenders fined. *1 Hawk. P. C. 192, 225.*

Mountee, An alarm or outcry, to mount and make some speedy expedition, mentioned in the statutes *Hen. 5.*

Musket, Winter-gloves made of ram-skins. In *Leg. H. 1. c. 70.* they are called *Musflur*, and sometimes *Musfla*.

Mulkt, (*multa*) A fine of money set upon one, for some fault or misdemeanor; and fines laid on ships or goods by a company of trade, to raise money for the maintenance of consuls, &c. are called *Mulkt*. *Merch. Dict.*

Mulier, As used in our law, seems to be a word corrupted from *melior*, or the Fr. *melior*; and signifies the lawful issue, born in wedlock, (tho' begotten before) preferred before an elder brother born out of matrimony. *9 Hen. 6. c. 11. Smith's Republ. Angl. lib. 3. c. 6.* But by *Glanvil*, the lawful issue are said to be *mulier*, not from *melior*, but because begotten 2 *muliers*, and not *ex concubina*; for he calls such issue *filios mulieratos*, opposing them to *bastards*. *Glanv. lib. 7. c. 1.* It appears to be thus used in Scotland also; *Skene* saying, *mulieratus filius* is a lawful son, begotten of a lawful wife. If a man hath a son by a woman, before marriage, which is a *bastard* and unlawful, and after he marries the mother of the *bastard*, and they have another son, this second son is *mulier* and lawful, and shall be heir to his father, but the other cannot be heir to any man; and they are distinguished in our old books with this addition. *Bastard signe*, and *mulier puiſne*. *Co. Litt. 170, 243.* Where a man has issue by a woman, if he afterwards marries her, the issue is *mulier* by the Civil law; tho' not by the laws of England. *2 Inst. 99. 5 Rep. 416.* Of ancient time, *mulier* was taken for a wife, as it is commonly used for a woman, particularly one, not a maid; and sometimes for a widow; but it has been held, that a virgin is included under the name *mulier*. See *Co. Lit. 170, 243. 2 Inst. 434.* See *Bastard*. And *Black. Com. 2 V. 248.*

Multery, The being or condition of a *mulier*, or lawful issue. *Co. Lit. 352. b.*

Muliones ſcuti, Cocks or ricks of hay. *Paroch. Antiq. p. 401.* Hence in Old English a *moult*, now a mow of hay or corn. *Corwell.*

Mulmian laws. See *Molmian laws*.

Mulm, A place to build a water-mill. *Mon. 2 tom. p. 284.*

Multae, or **Multura episcopi**, Is derived from the Latin word *multa*, for that it was a fine given to the King, that the bishop might have power to make his last will and testament, and to have the probate of other mens, and the granting administrations. 2 *Inst.* 491.

Multiplication of Gold and Silver, Was prohibited and declared to be felony by statute, 5 *Hen. 4. c. 4.* Which statute was made on a presumption that persons *skilful in chymistry, could multiply or augment these metals, by changing other metals into gold or silver*; and the endeavours of some persons in making use of extraordinary methods for the producing of gold and silver, and finding out the philosopher's stone, were found to be so prejudicial to the publick, from the lavish waste of many valuable materials, and the ruin of many families by such useless expences, that they occasioned the statute 5 *Hen. 4.* But the restraint thereby having no other effect, from the unaccountable vanity of those who fancied those attempts practicable, than to send them beyond sea to try their experiments with impunity in other countries, the 5 *Hen. 4. c. 4.* was at last repealed by 1 *W. & M. c. 30.* *Dyer* 88. 1 *Hawk. P. C.* 47.

Multitude, (*multitudo*) According to some authors, must be *ten persons or more*: But Sir *Edw. Coke* says, he could never find it restrained by the Common law to any certain number. *Co. Litt.* 257.

Multo fortiori, or **Minoꝝ ad majus**, Is an argument often used by *Littleton*, and is framed thus: If it be so in a feoffment passing a new right, much more it is for the restitution of an ancient right, &c. *Co. Lit.* 253. and 260. a. See *Fortiori*.

Multo, **Mutulo**, **Motlo**, **Muto**, **Mutto**, A mutton or sheep, or rather a wether, *quia testiculis mutilati*. *Cowell. Brit. Cartular. Glasen.* 39.

Multones auri, Pieces of gold money impress with an *Agnus Dei*, a sheep or lamb on the one side, and from that figure called *multones*. This coin was more common in *France*, and sometimes current in *England*, as appears by a patent 33 *Ed. 1.* cited by the learned *Spelman*, tho' he had not then considered the meaning of it.—*Rex tenetur Ottoni de Grandisano in decem millibus multonum auri.* *Cowell.*

Multure, (*molitura vel multura*,) Signifies the toll that the miller takes for grinding corn. *Cowell.*

Munt, On importation, pays a barrel excise 3 s. by 12 *Car. 2. c. 3.* and 3 s. by 12 *Car. 2. c. 24.* and 3 s. by 4 *Will. & M. c. 3.* and 3 s. by 5 *Will. & M. c. 20. sect. 10.* and 3 s. by 4 *Ann. c. 6. sect. 10.* and 10 s. by 12 *Ann. st. 1. c. 2. sect. 1.* and 10 s. by 30 *Geo. 2. c. 4. sect. 4.* Duties how to be levied, 2 *Will. & M. sect. 2. c. 10. sect. 3.* 5 *Will. & M. c. 20. sect. 11.* 4 *Ann. c. 6. sect. 16.* 30 *Geo. 2. c. 4. sect. 6.*

Mum may be exported, and the excise how repayable, 1 *Will. & M. sect. 1. c. 22. sect. 1.* Relanding it, what to forfeit, 1 *Will. & M. sect. 1. c. 22. sect. 2.* Excise on foreign mum not to be repaid on exportation, 1 *Will. & M. sect. 1. c. 22. j. 4.*

Mumming, (from the *Tuton. Mummen*, to mimic) Antick diversions in the *Christmas* holidays, to get money and good cheer. *Mummers* to be imprisoned, 3 *Hen. 8. c. 9.*

Mundbrech, (Is derived from the Sax. *mund*, i. e. munio, defensio, & *brice*, fractio) And is mentioned among divers crimes, as *paris fractio*, *lesio majestatis*, &c. *Spelm. Gloss.* Some would have *mundbrech* to signify an infringement of privilege; tho' of later times it is expounded *Clausuram fractionem*, a breach of mounds, by which name ditches and fences are called in many parts of *England*: And we say, when lands are fenced in and hedged, that they are mounded.

Munde, Is peace, and *mundebrec* a breach of it. *Leg. H. 1. c. 37.*

Mundeburde, (*mundeburdum*, from the Sax. *mund*, i. e. tutela, and *bord* or *borb*, i. e. *fidijusser*. *Defensionis vel patroinii sagjussio & stipulatio*) A receiving into favour and protection. *Cowell.*

Munthick. See *Metal*.

Municipal law. A rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong. *Black. Com. 1 V. 44.* Which vide, where this definition is very copiously and judiciously handled.

Muniment-house, (*Munimen*;) In cathedral and collegiate churches, castles, colleges, or such, is a house or little room of strength purposely made for keeping the seal, evidences, charters, &c. of such church, college, &c. such evidences being called *muniments*, corruptly *miniments*, from *munio*, to defend; because inheritances and possessions are defended by them. 3 *Inst.* 170.

Muniments, (*Munimenta*) *Episcopus itaque cum Munimentorum inspectionem habere non potuit.* *Matt. Paris.* 311. See *Miniments*.

Munimina, Are the grants or charters of Kings to churches; so called, because *cum eis mununtur* against all persons who would deprive them of those privileges. *Blount.*

Munus Ecclesiasticum, Signifies the consecrated bread, out of which a little piece is taken for a communicant—*Insuper & omne sacrificium quod nos dicimus Munus Ecclesiasticum*, &c. *Mon. Angl. tom. 2. p. 838.*

Mutage, (*Muragium*) Is a reasonable toll, to be taken of every cart and horse coming laden thro' a city or town, for the building or repairing the publick walls thereof, due either by grant or prescription: It seems to be a liberty granted to a town by the King, for the collecting of money towards walling the same. 3 *Ed. 1. c. 30.* 2 *Inst.* 222. The service of work and labour done by inhabitants and adjoining tenants in building or repairing the walls of a city or castle, was called *murarum operatio*; and when this personal duty was commuted into money, the tax so gathered was called *Mutage*. *Paroch. Antiq.* 114. And in the city of *Chester*, there are two ancient officers called *Murengers*, being two of the principal aldermen, yearly chosen to see the walls kept in good repair; for the maintenance of which they receive certain tolls and customs.

Murale, The city wall.—*Resonabant Colles, resonabant urbis Muralia.* *Huntingd. lib. 8. pag. 392.*

Muratio, A town or borough, surrounded with walls. *Brompt. Vit. K. Steph.*

Murder, (*Murdram*, from the Sax. *Morth*, whence, (as it is said,) comes the barbarous Latin *Mordrum*, & *Murdram*; in French *Meurdre*, tho' the word *Murdare*, evidently comes from the Latin *Morti dare*.) Is a word in use long before the reign of King *Canutus*, which some would have to signify a violent death; and sometimes the Saxons expressed it by *morthdaed* & *morthweorc*, a deadly work: But the Sax. *morth* relates generally to *mors*. See *Black. Com. 3 V. 321.* upon this word *murdram*, where he justly observes, that it was necessarily framed to express a particular offence, since no other word in being, was sufficient to express the intention of the criminal, or *quo animo* the act was perpetrated. Anciently murder signified only the private killing of a man, as appears by the laws of King *Hen. 1.* And it was not murder, except the party slain was an *Englishman*, and no foreigner; tho' by the stat. 14 *Edw. 3. c. 4.* the killing of any *Englishman* or foreigner, living under the King's protection, thro' malice prepense, and whether committed openly or secretly, is declared to be murder, *S. P. C. lib. 1. c. 1.* And doubtless the makers of the statute of 23 *H. 8. c. 1.* which excludes all wilful murder from the benefit of clergy, intended to include open, as well as private homicide within the word *murder*. 1 *Hawk. P. C.* 78.

By murder at this day, we understand the wilful and felonious killing of any man whatsoever, upon malice forebought; so as the party wounded or hurt die within a year and a day after the fact: And if one dies in that time, thro' disorderly living, it shall be no excuse, the wound will be judged the principal cause of his death; but if one wounded die after that time, the law will presume he died a natural death. 3 *Inst.* 53. *H. P. C. 55. Kel. 26.* If a man receive a wound that is not mortal; but either for want of help, or by neglect, it turns to a fever, &c. which causes the

the party's death, it is *murder*: So it is, where a man has some disease, which possibly would terminate his life in half a year, and another wounds him, that it hastens his end, &c. But if by ill applications of the party, or those about him, of unwholesome medicines, the wounded person dies; if this plainly appears, it is not *murder*, by *Hale. Hist. P. C.* 428.

Murder may be committed by weapon, poison, crushing, bruising, smothering, strangling, starving, &c. And where a person having malice to another, strikes or shoots at him, but misseeth him and kills one *not intended*; or if one lays poison to kill a person, and another takes it, and dies, these are *murder*: Also if a sick man be laid in the cold, whereof he dieth, or an infant is laid under leaves or trees, &c. and suffered to be destroyed by vermin, they are *killing*. 3 *Inst.* 51. 9 *Rep.* 81. If a person stir up a dog accustomed to bite, *knowing it to be such*, and it kill a person; and if a man have an ox, or horse, which he *knows to be mischievous*, by being used to gore or strike at those who come near them, and do not tie them up, if they kill a man, (according to some opinions,) the owner may be *indicted*, as having himself feloniously killed him. *Puit.* 122. *H. P. C.* 53. 1 *Hawk. P. C.* 79.

Anotently it was holden that the causing an abortion, by giving a potion to, or striking a woman big with child, was *murder*: But it is said now to be a great misprison only, and not *murder*, *unless the child be born alive*, and die thereof. 1 *Hawk.* 80. If the death of a bastard child newly born be concealed, it shall be supposed to be *murdered*; if the mother doth not prove it was born dead. *Stat.* 21 *Jac.* 1. c. 27. And if one by duress of imprisonment compel a man to accuse an innocent person, who on his evidence is condemned and executed; in judgment of law it is killing of the compeller, &c. *S. P. C.* 36. 3 *Inst.* 91.

All the above cases shew malice; so where a prisoner, by duress of the gaoler, comes to an untimely end; if one is executed contrary to the direction of the law; or if a person kill a man adjudged to death; or one who hath no authority shall execute the judgment; if a person sentenced to be whipped, is whipped with that rigour that he dieth of it, &c. But one under the age of discretion, or *non compos mentis*, cannot be guilty of *murder*; tho' it appears by circumstances that the infant did hide the body, &c. *it is felony*. *H. P. C.* 43. 3 *Inst.* 4, 6, 54. See the case of *William York* at *Bury Summer* assizes in 1748. *Foster's Rep.* 70, &c. before referred to in this work under *Infants*. If an infant under twelve years old, hath an extraordinary wit, that it may be presumed he knows *what he does*, and he kill another, it may be felony and *murder*; otherwise it shall not. 3 *H.* 7. 13. *Plowd.* 191. See the case of *William York* before referred to. *Foster* 70, &c. It is *malice makes the crime of murder*, which is either *express* or *implied*; it is *express*, when it may be evidently proved there was formerly some ill will, and the killing is with a *sedate mind*, and formed design of doing it: And *implied*, where one kills another suddenly, having nothing to defend himself; as going over a stile, or the like. 3 *Inst.* 51. *H. P. C.* 47.

Murder occasioned thro' an express purpose to do some personal injury to him who is slain, is properly said to be of express malice: Such as happens in the execution of an unlawful action, principally intended for some other purpose, and *not expressed in its nature to do a personal injury* to him in particular that is killed, is most properly malice implied. *Kel.* 129, 130. He who doth a cruel and voluntary act, whereby death ensues, doth it of malice prepeted in the esteem of the law: And if a person in cool blood, maliciously and deliberately beats another in such a manner, *beyond any apparent intent of chastisement*, that he dieth, it is *murder* by express malice, altho' he did not design to kill him. *H. P. C.* 49, 50. *Kel.* 64, 127, 135. But if a person on any provocation beat another so, that it might plainly appear he meant not to kill, but only to chastise him; or if he restrains himself till the other hath put himself on his guard, and then in fighting with him killeth him, he will not be guilty of murder, but manslaughter. 1 *Hawk. P. C.* 82. See *Foster's Rep.* 262. When one executes his revenge, upon a sudden provocation, in such a cruel manner, *with a dangerous weapon*, as shews a malicious intention to do

mischiefe; and death ensues, it is express malice and murder from the nature of the fact. *Kel.* 55, 61, 65, 130. A man chided his servant, and upon some cross answer given, he having a hot iron in his hand ran it into the servant's belly, of which he died, this was adjudged murder. *Kel.* 64.

If a person is trespassing upon another, by breaking his hedges, &c. and the owner upon sight thereof take up a hedge-stake, and give him a stroke on the head, whereof he dies, this is murder, because *it is a violent act beyond the proportion of the provocation*. *H. P. C.* And where a boy was upon a tree in a park cutting of wood, and the keeper bid him come down, which he did; and then the keeper struck him several blows with a cudgel, and afterwards *with a rope tied him to his horse's tail*, and the horse ran away with him and killed him; this was held to be murder out of malice, the boy having come down at the keeper's command. *Cro. Car.* 139. *H. P. C.*

A man's son was beaten, and complaining of it to his father, the father in anger beat the other boy with a cudgel whereof he died; the law shall adjudge it to be upon that sudden occasion, and stirring of blood, that he made the assault, and *not upon malice* unless it be found; and if the distance of the place where his son complained was a mile, it is not material, being all upon one passion. *Cro. Jac.* 296. And it is the same in case of a brother, cousin, servant, &c. it is only manslaughter, not murder. 2 *Lill.* 211.

If two having malice fight, and the servant of one of them, not knowing of the malice, killeth the other, this is murder in the master, and manslaughter in the servant: Tho' if there be a conspiracy to kill a man, but no malice against his servant; if the servant be slain, the malice against the master shall be construed to extend to his servant: and the killing the servant is murder. *Dyer* 128. 1 *Moor.* If two persons meet and fight, *in cool blood*, on a precedent quarrel, and one is killed: or if a person in a sudden quarrel appears to be *master of his temper*, and kills another, it is murder. 1 *Hawk. P. C.* 81. For where two persons fight, after a former quarrel, it may be presumed to be out of malice; and when two men fall out in the morning, and meet and fight in the afternoon, if one of them is killed, this is murder; their after-meeting is of malice. *Plowd.* 474.

If a man upon a quarrel with another, tells such other that he will not strike him, but will give him a pot of ale to strike first, and thereupon the other strikes him, and he kills the other, he is guilty of murder; this being only a cover to his malicious intention. *H. P. C.* 48. And where a person kills another, it shall be intended of malice; if he prove not the contrary. *Kel.* 27. A man assaults another person with malice, altho' he be afterwards driven by the other to the wall, and kill him there in his own defence, he is guilty of murder, in respect of his first intent. *H. P. C.* 47. *Kel.* 58, 129. But if the party assaulted flie to the wall, and being still pursued, kills the other, it is only manslaughter in his own defence. *Bract.* 3 Ed. 3. If one resolves to kill the next man he meets, and doth kill him, it is murder; here malice is implied against all mankind. *Kel.* 27.

By poisoning and where one killeth another without provocation, malice is implied; as where any magistrate or minister of justice is killed in the execution of his office; a sheriff, constable or watchman, doing their duty; or any other that comes in aid of the King's officer; and if a watchman be killed in staying of night walkers, it is said to be murder. 3 *Inst.* 51. *Cro. Jac.* 280. *Kel.* 60, 128. In these cases, it is a very high contempt of the laws, for a person to execute his revenge against those who have no way offended him but by doing their duty; and he cannot come off by alledging that what he did was in a sudden fury, &c. 1 *Hawk. P. C.* 84.

And if a bailiff is killed in executing a lawful warrant, &c. it is murder: Nor is it any excuse to the person, that the process was erroneous: or that the arrest was in the night; that the officer did not tell him for what cause he arrested him; or that he did not shew his warrant, &c. being a bailiff commonly known. 9 *Rep.* 68, 69. *Cro. Jac.* 280, 486. But if a bailiff who is not executing his office is killed, it is not murder; for he ought to be duly executing

executing his office, by serving the process of the law, wherein he is assisted *cum potestate Regis & Legis*. Cro. Car. 537. 2 Lill. Abr. 212. Therefore where the warrant by which he acts gives him no authority to arrest the party; as where a bailiff arrests a wrong person, or J. S. a baronet, by force of a warrant to arrest J. S. knight; or if a good warrant is executed in an unlawful manner; as if a bailiff be killed in breaking open a door, or window to arrest a man; or perhaps if he arrest one on a Sunday; since the *stat.* 29 Car. 2. c. 7. by which all such arrests are made unlawful, and he is slain; malice shall not be implied to make it murder, but shall be manslaughter only. H. P. C. 46. Cro. Car. 372. 12 Rep. 49. 1 Hawk. 86. If bailiffs come to a house to arrest a person, and the house being locked they attempt to break in, whereupon the son of the person intended to be arrested, shoots and kills one of them, it is not murder. Jones 429. See Foster's Rep. 135, 138, 270, 308, 312, 318, 321.

A person was arrested, and another not knowing the cause of the struggle, but seeing swords drawn, and to prevent mischief, came and defended the party arrested, and in the scuffle the bailiff was killed; it was resolved to be no murder in the person doing it, but that all that were present and assisting, *knowing of the arrest*, were principal murderers. Kel. 86. Tho' it has been held in such a case, that the person offending is guilty of murder, whether he knew that the person slain were an officer or not; for all fighting is unlawful, and he who seeing persons engaged in it, takes part with one side, and fights in the quarrel, *without knowing the cause of it*, especially where the fight is begun in opposition to the justice of the nation, shews a readiness to break thro' the laws on a small occasion, and must at his peril take heed what he doth. 1 Sid. 160. Noy 50. 1 Hawk. 85.

If one attack another to rob him, and by the resistance of the party kills him, this is murder. 3 Inst. 52. Dalt. 344. A person stands by and encourages or commands another to murder a man; or if he come with others on purpose to kill him, and stand by while the other persons commit the fact: It will be murder in them all. Plowd. 98. 11 Rep. 5. And if two or more persons come together to do an unlawful act, as to beat a man, rob a park, &c. and one of them kills a person, this is murder in all present, aiding or assisting, or that were ready to aid and assist: All will be said to intend the murder. 3 Inst. 56. Dalt. 347. H. P. C. 31. And such persons will be judged to be present who are in the same house, tho' in another room, or in the same park, altho' half a mile off, &c. H. P. C. 47. Kel. 87, 116, 127.

Several persons having conspired to enter the King's park, and to hunt and carry away deer, *with design of killing any one that should oppose them*; tho' the keeper's servant began the assault, and required them first to stand, whereupon they fled, and one of the keeper's men discharged a piece at them, and they continued their flight until he laid violent hands upon one of the offenders, and then, and not before, they killed one of the keeper's servants, this was held to be murder: as they were doing an unlawful act, the law implies malice, and they ought not to have fled, but to have surrendered themselves. Roll. Rep. 20.

By statute murder shall not be adjudged where it is found by misadventure, but when it is done with a felonious intent. 52 H. 3. c. 25. Offenders for murder and accessories being indicted, may be arraigned at any time within the year, at the King's suit, and if the principal or accessory be acquit, yet the justices shall not suffer them to go at large, but either remand them to prison, or let them be bailed, until the year and day be out, allowed for an appeal. 3 H. 7. c. 1. All trials for murder must be in the county where the fact was committed, by the Common law. Cro. Car. 247. But if a person be wounded by a stroke given in one county, and he dieth in another county, the indictment may be found in the county where the party dies, which shall be as well as if the stroke had been given in the same county. Statute 2 & 3 Ed. 6. c. 24. The killing must be in some county; for if the murder be done out of the realm, it cannot be determined by the Common law, but must be determined by the constable

and marshal, &c. 3 Inst. 48. H. P. C. 54. But see the statute 2 Geo. 2. c. 21. And murder is to be expressly found, not by intendment, &c. And where the matters on the finding of the jury, are no more than weak evidence thereof, the court ought not to give judgment on that, but upon the facts arising from it. Fitzgib. 187. Mich. 4 Geo. 2. When one is murdered in the day-time, and the murderer escapes untaken, the township, that suffers it, shall be amerced. 3 H. 7. If one who sees a murder done, does not his best endeavours to apprehend the murderer: Or if where two are fighting, and others looking on do not endeavour to part them, if one is killed, the lookers on may be indicted and fined. 3 Inst. 53. Noy 50. And killing any person endeavouring to part others fighting, tho' without any evil intention against him is murder.

For the sentence to be passed on persons convicted of murder, see the end of the next head. See Duelling, Homicide, Manslaughter, &c. See also Trial. See Foster's discourse on murder per tot. Rep. fol. 307. And Black. Com. 4 V. 138, 194, 196, 393.

Form of an indictment for murder.

Wilts, ff. **T**HE jurors for our Sovereign Lord the King, upon their oath present, that A. B. late of M. in the said county, yeoman, not having the fear of God before his eyes, but being moved and seduced by the instigation of the Devil, on the—day of, &c. in the—year of the reign of, &c. about the hour, &c. in the evening of the same day, at M. aforesaid in the said county, with force and arms made an assault in and upon one C. D. then and there bring in the peace of God, and of our said Lord the King; and that the said A. B. did then and there, to wit, at M. aforesaid in the said county, feloniously, wilfully and of his malice forethought strike and wound the said C. D. with a sword, of the value of three shillings, which the said A. B. then and there had and held drawn in his right hand, and did feloniously and of his malice forethought, then and there, to wit, at M. aforesaid in the said county, give to the said C. D. one mortal wound with the sword aforesaid, in and upon the right part of his thigh, of the length of three inches, and of the depth of two inches, of which said mortal wound the said C. D. at M. aforesaid in the said county, instantly died; and so the said jurors upon their oath aforesaid say, that the said A. B. on the said—day of, &c. in the year abovementioned, at M. aforesaid in the said county, did feloniously, wilfully, and of his malice forethought, kill and murder the said C. D. in manner and form aforesaid, against the peace of our said Sovereign Lord the now King, his crown and dignity, &c.

Murder, or homicide justifiable. There is a killing that is justifiable; as if a person attempts to commit murder, robbery or other felony, a man or any of his servants may lawfully kill him. 2 Inst. 316. See statute, 24 H. 8. c. 5. If a person in defence of the possession of a room in a public house kill another who attempts to turn him out of it, killing the assailant hath been holden to be justifiable. Kel. 51. 1 Hawk. 85. In the defence of the possession of a man's goods, against him that would wrongfully take them away, killing cannot be justified; except he be a thief. Wood's Inst. 361. If a woman kills a man attempting to ravish her, it is justifiable. H. P. C. 39.

Those who are engaged in a riot, or forcible entry, &c. standing in opposition to a justice's command, or lawful warrant: Or if trespassers in a forest or park, will not surrender, but defend themselves: If a felon will not suffer himself to be arrested, and refusing to obey any arrest on lawful warrant, defends himself; or if one either with or without a warrant pursues a felon upon hue and cry, and he flies for it: If a prisoner assaults those who conduct him to gaol, or his gaoler, in endeavouring to escape; or a person arrested, resist the sheriff, &c. the killing these is justifiable; but a sheriff cannot kill one who flies from the execution of a civil process: And as no private person hath this authority, upon an arrest in a civil matter, as he hath upon an arrest for felony; so neither

neither hath the sheriff this power in criminal cases, but upon a necessity; as when an offender cannot be taken without killing, &c. for if he might be taken without killing him, it will be esteemed murder. 3 *Inst.* 56, 221. *H. P. C.* 37. *Dalt.* 150, 355. *Kel.* 28.

When one in danger of drowning, thrusts another from a plank, whereby he is drowned; this is justifiable. *Bac. Max.* 25. And there is a homicide or killing excusable, where a man kills another merely in his own defence, called *se defendendo*. A person indicted for intending to murder the Master of the Rolls, *Term. Mich.* 16 *Car.* 2. and for offering a sum of money to another person to do it, saying, at the same time, that "if he would not perpetrate the crime, he would do it himself;" upon his conviction, the court declared that this was a heinous offence, and not only indictable, but fineable, and the offender was fined one thousand marks, committed to prison for three months, and ordered to find sureties for his good behaviour during life. 1 *Lev.* 146. Firing a pistol out of a chaise into the street, and by accident, death ensuing, held manslaughter. *Strange* 481. A defendant arrested, strikes at the officers, they afterwards kill him, held manslaughter. *Strange* 499.

By *Stat.* 25 *Geo.* 2. c. 37. Persons found guilty of wilful murder shall be executed on the day next but one after sentence passed, unless the same happens on a Sunday, and then on the Monday. The body, (if executed in London or Middlesex,) to be delivered to the surgeons company to be anatomized, if in any other county, to such surgeon as the judge shall direct for that purpose. The sentence to be pronounced in open court immediately after conviction with the time for execution and the marks of infamy hereby directed.

If there be reasonable cause, the judge may stay execution. The judge may order the body of the murderer to be hung in chains, but in no case to be buried, unless after dissection. After conviction the prisoner to be confined separate and apart from other prisoners, and no person but the gaoler, &c. to have access to the prisoner without licence from the judge, sheriff or under-sheriff. Where the judge shall see cause to respite execution, he may relax the said restraints. And after sentence until execution the prisoner to be fed with bread and water, except on receiving the sacrament, and in case of violent wounds or sickness, &c. *Vide Homicide.*

Murozum operatio. The service of work and labour done by inhabitants and adjoining tenants in building or repairing the walls of a city or castle. From which duty some were exempted by special privilege. So King Henry the Second granted to the tenants within the honour of Wallingford.—*Ut quieti sint de operationibus castellorum & murorum.* *Paroch. Antiq.* pag. 114. When this personal duty was commuted into money, the tax so gathered, was called *murage*. *Cowell.*

Muscovy Company of Merchants, established by King *Ed.* 6. This company trades to *Russia* and the north; and any subject of *England*, on request may be admitted into it, and enjoy all privileges, paying only the sum of 5*l.* by *Stat.* 10 & 11 *W.* 3. c. 6. In order to open a trade to *Persia* thro' *Muscovy*, a late statute has ordained, that all persons free of this company may import from any place in *Russia*, raw silk or other commodities of *Persia*, purchased by barter with woollen manufactures exported from *England*, &c. 14 *Geo.* 2. cap. 36.

Musicians. The musicians of *England*, were incorporated by King *Charles* 2. anno 1670. And of late years all foreign music, opera's, &c. have very much increased, thro' the management of this corporation, and the softness and politeness of our modern gentry. See *Minstrels.*

Musters. For the duties on, and other matters relating to them, see *Stat.* 11 & 12 *W.* 3. c. 3. 3 & 4 *Ann.* c. 4. 12 & 13 *W.* 3. c. 11. 7 *Geo.* 1. c. 21. 10 *Ann.* c. 29. See *Lines.*

Mussa. (Lat.) A moss or marsh ground; also a place where sedge grows; a place over-run with moss. *Cowell.* *Mon.* 1 tom. pag. 126.

Muster. (From the *Fr. Mustre*) Is to shew men, and their arms, that are soldiers, and enrol them in a book. *Term. de Ley.* Faire montre general de tout son armis, is as much as *muster an army*; the signification being well known to muster an army: And mustered of record is to be

enrolled in the number of the King's soldiers. *Stat.* 18 *H.* 6. c. 19. If any men commanded to muster, by those who have authority, absent themselves, or do not bring their best arms, they shall be imprisoned ten days, or pay a fine of 40*s.* by 4 & 5 *P. & M.* 3. See *Soldiers.*

Muster-Master general, Mentioned in the 35 *Eliz.* c. 4. See *Master of the King's Musters.*

Muta Canum. (Fr. *Mente de Chiens*) Signifies a kennel of hounds, in ancient records: And the King at a bishop's and abbot's decease, had six things. 1. *Optimum equum sive palefridum ipsius episcopi*, &c. 2. *Unum chlamydem sive cloacam cum capella.* 3. *Unum cibum cum cooperatorio.* 4. *Unum pelvem cum lavatorio.* 5. *Unum annulum aureum.* 6. *Necnon mutam canum; quæ ad dom. regem, rationes prerogative sue spectant & pertinent.* *Hill.* 2 *Edw.* 2. in *Stat.* post *Mortem Episc.* Bath & Willens. & *Claus.* 30 *Ed.* 1. *M.* 16. *Vide Mortuary*, and *Black. Com.* 2 *V.* 427.

Mutare. To mew up hawks, in the time of their molting or casting their plumes. In the reign of King *Ed.* 2. the manor of *Broughton in Com. Oxon.* was held — *Per serjeantiam mutandi unum hostrium domini regis.* &c. *Paroch. Antiq.* 560. *Mutatus accipiter* is a mewed hawk: And hence the *Mews (Muta Regia)* near *Charing-Cross*, London, now the King's stables, was formerly the falconry or place for the King's hawks.

Mutatoarius, Change of apparel. *Mat. Par. Ann.* 1107.

Mutatus accipiter, A mewed hawk. *Cowell.*

Mute. (*Mutus*) One dumb, who cannot or refuses to speak. And by our law a prisoner may stand mute two ways: 1. When he speaks not at all, and it shall be enquired whether he stand mute out of malice, or by the act of God; and if by the latter, then the judge ought to enquire whether he be the same person, and of all pleas which he might have pleaded in his defence, if he had not been mute. 2. When the prisoner pleads not directly, or will not put himself upon the inquest to be tried; and a person feigning himself mad, and refusing to answer, shall be taken as one who stands mute. 2 *Inst.* *H. P. C.* 226.

Also if a prisoner on his trial peremptorily challenge above the number of jurors allowed by law, this being an implied refusal of a legal trial, he shall be dealt with as one who stands mute, and according to some opinions be hanged. *H. P. C.* 259. *Kel.* 36. 2 *Hawk.* 327. A felon obstinately standing mute is to be put to the penance of *pains forte & dure*: In case of high treason where the offender stands mute, he shall have judgment and forfeit lands and goods, as if he had been attainted; likewise in the case of felony and petit treason, if a person by standing mute do not avoid being attainted for such crimes, he shall forfeit his lands and goods in the same manner as on other attainders: tho' whenever a person standing mute is adjudged to his penance for felony, and thereby prevents that attainer which otherwise he might have incurred, he forfeits his chattels only, and not his lands. 2 *Hawk.* *P. C.* 330, 331.

It is said by *Sir Math. Hale*, that an appellee of felony standing mute shall be executed, and not have judgment of penance; but the contrary hath been held by others. *H. P. C.* 226. *S. P. C.* 150. 2 *Inst.* 178. *Kel.* 37. One who stands mute shall have the benefit of clergy, unless it be otherwise specially provided by some statute. And altho' it be enacted by 3 & 4 *W. & M.* c. 9. That if any person shall be indicted of any offence, for which by virtue of any former statute, he is excluded from the benefit of his clergy, if he had been thereof convicted by verdict or confession, if he stand mute he shall not be admitted to the same; yet appeals, and offences excluded from the benefit of clergy, by subsequent statutes, seem not within that act: And a statute taking away the benefit of clergy generally from those who are convicted of a crime, doth not take it away from those who stand mute on an indictment or appeal. 2 *Hawk.* 332.

Hawkins says, that the manner of inflicting this punishment may be best found from the books of entries and other law books, all of which generally agree, that the prisoner shall be remanded to the place from whence he came, and put into some low dark room, and there laid

laid on his back without any manner of covering, except for the privy parts, and that as many weights be laid upon him as he can bear, and more, and that he shall have no manner of sustenance but the worst bread and water, and that he shall not eat the same day in which he drinks, nor drink the same day on which he eats, and that he shall so continue till he die. But that it is said that anciently the judgment was not, that he should continue until he should die, but *until he should answer*, and that he might save himself from the penance by putting himself upon his trial, which he cannot do at this day after judgment of penance once given. 2 Hawk. Pl. C. 330. cap. 30. f. 16. And there in the margin, the serjeant, as to the *remanding him to the place whence he came*, cites H. P. C. 227. S. P. C. 150 (E). Keilw. 70. a. 4 Ed. 4. 11. pl. 18. 14 Ed. 4. 8. pl. 17. Abr. Br. Corone 160. 2 Inst. 178. Ra. Ent. 385. pl. 17. 8 Ed. 4. 1. pl. 2. And as to the words *in some low dark room*, he says, that this clause is omitted in Keilw. 70. a. 4 Ed. 4. 11. pl. 18. But is mentioned in all the other books above cited, but with this difference, that 14 Ed. 4. 11. pl. 17. says only he shall be put in a chamber, without adding that it shall be low or dark. And as to the words *there laid on his back, &c.* he says, that in this all the books above cited seem to agree. And 14 Ed. 4. 8. pl. 17. and S. P. C. 150 (E), and 2 Inst. 178. add, that he shall lie without any litter or other thing under him, and that *one arm shall be drawn to one quarter of the room with a cord, and the other to another*, and that his feet shall be used in the same manner. But that these clauses are wholly omitted in all the other books above cited, except H. P. C. which takes notice of the latter of them only. And Ra. Ent. 385. pl. 2. adds, that *an hole shall be made for the head*. And Keilw. 70. a. says, that *the head shall not touch the earth*; but none of the other mention either of these clauses. And as to the words, *that as many weights shall be laid upon him as he can bear and more, &c.* he says, that in this all the books above cited agree. And as to the word *bread*, he says, that 14 Ed. 4. 8. pl. 17. S. P. C. 150 (E), and 2 Inst. 178. are, that he shall have *three morsels of barley bread a day*. Keilw. 70. a. that he shall have only rye bread, and Ra. Ent. 385. pl. 2. and 2 Hen. 4. 1. pl. 2. generally, that he shall have the *worst bread*. And as to the word *water*, he says, that in 14 Ed. 4. 8. pl. 17. S. P. C. 150 (E), 2 Inst. 178. and 8 Hen. 4. 1. pl. 2. and Keilw. 70. a. are, that he shall have the *water next the prison*, so that it be not current; but Ra. Ent. 385. pl. 5. is general, that he shall have the *worst water*. And as to the words, *not eat the same day in which he drinks, nor drink the same day on which he eats, &c.* he says, this is omitted in Keilw. 70. a. and in 8 Hen. 4. 1. pl. 2. And as to the words *till he die*, he says, this is omitted in none of the books above cited, except 14 Ed. 5. [4.] 11. and H. P. C. 227. But that neither of these books give the whole judgment at large. Hawk. Pl. C. 330, 331. cap. 3.

To *advise* a prisoner to stand mute, is an high misprison, a contempt of the King's court, and punishable by fine and imprisonment. Black. Com. 4 V. 126.

For more learning on this subject, see 15 Vin. Abr. tit. Mute, and see Observations on the Statutes, chiefly ancient, &c. p. 51—54. and Black. Com. 4 V. 319.

Mutilation, The depriving a man of any member, &c. The law pardons even homicide, if committed *se defendendo*, in order to preserve even a member, &c. Black. Com. 1 V. 130. It renders void any deed executed thro' fear of mayhem, *ib.* As to what are considered, by the Common law, as *defensive members*, vide Black. Com. 3 V. 121. And as to the punishments inflicted by law, for mayhems of various kinds, vide *idem*, and see the act called the COVENTRY act, 22, 23 Car. 2. c. 1.

For some offences (tho' seldom done) the law punishes with *mutilation*, or dismembering, by cutting off the hand, or ears. Black. Com. 4 V. 370.

Mutiny. See Soldiers, and the Mutiny Act.

Mutton and Lamb, Not to be imported, 30 Car. 2. c. 2.

Mutual Debts, see Debts and Debtors. Mutual debts, tho' of different natures, may be set against each other,

vide 2 Geo. 2. c. 22. 8 Geo. 2. c. 24. See also Black. Com. 3 V. 305. It may be proper to observe, that where part of a debt is paid, a set off is not necessary, as it may be given in evidence on the general issue.

A set off reducing the plaintiff's demand under 40 s. doth not effect the jurisdiction of B. R. Wilf. par. 1. 19.

The statutes for setting off one debt against another, do not extend to assignees of bankrupts. 1b. 155.

Mutual Promise, Is where one man promises to pay money to another, and he in consideration thereof promises to do a certain act, &c. Such promises must be binding, as well of one side as the other; and both made at the same time. Hob. 88. 1 Salk. 21. Where there are mutual promises, and one of the parties dies, whereby the other party could not charge the executor on the promise of the testator; yet 'tis here said the promise by the survivor shall continue. Yelv. 133. But it is held, that on mutual promises and covenants, equal remedies are on both sides; tho' the performance need not be precisely alleged, &c. 3 Salk. 15, 108. 1 Lev. 88. 2 Mod. 34.

Mutuuus. If a man oweth another 10 l. and hath a note for the same, without suit, action of debt lies upon a *mutuuus*; but in this there may be wager of law, which there may not be in action upon the case, on an implied promise of payment, &c. Comp. attorn. 6. 111.

Mutuo. In a legal understanding, signifies to borrow or to lend. 2 Saund. 291.

Mutus & Surbus, A person dumb and deaf, and being tenant of a manor, the lord shall have the wardship and custody of him. 2 Cro. 105. If a man be dumb and deaf, and have understanding, he may be a grantor or grantee of lands, &c. 1 Inst.

Mysterij, (*Mysterium*, from the Fr. *meistier*, i. e. *ars*, *artificium*) An art, trade, or occupation.

N.

N 3 B, (*nappa*, Swedish,) To nab, or catch a person unexpectedly.—*In ipso articulo aliquem opprimere*. Litt. Dict.

Nacella, A skiff or boat. *Transitum per nacellas & alia vasa preparavit*. Mat. Paris.

Nacka, *Nacka*, A small ship, yacht, or transport vessel. Chartular. Abbat. Rading. MS. fol. 51.

Nam, or **Naam**, (*namium* from the Sax. *niman*, i. e. *capere*) Signifies the taking or distraining another man's moveable goods. And *lawful naam*, which is a reasonable distress, proportionable to the value of the thing distrained for, was anciently called either *wif* or *mort*, *quick* or *dead*, as it consisted of dead or quick chattels; and it is when one takes another man's beasts *damage-feasant*, in his ground, or by a person's particular fact, by reason of some contract made; as for default of payment of an annuity, it shall be lawful to distrain in such or such lands, &c. And there is a *naam unlawful* mentioned in our books. Horn's Mirror, lib. 2.—*Nemo namium capit in comitatu vel extra comitatum, priusquam ter in bundrade suo rectum sibi perquisierit*. Leg. Canut. c. 18. *Non licebit namium sumere vel vadimonium, nec averia sua imparchiare*. Spelm. Gloss.

Namatiou, (*namation*) A taking or distraining; and in Scotland it is used for impounding: *Namatus*, distrained. Charta Hen. 2. See *Vetitum Namium*, and *Withernam*.

Name, (*nomen*, Fr. *nomme*, or *nom*) By which any person is known or called. There is a name of persons, bodies politic, and places; and of baptism and surname; also names of dignity, &c. In some cases a name by reputation is sufficient; but it is not so of a thing, if the matter and substance be not right. 11 Rep. 21. 6 Rep. 65. 4 Rep. 170. What foundation will support a name by reputation. See *Ld. Raym.* 301, 304. Vide *Misnomer*.

Namium vetitum, Is an unjust taking the cattle of another, and driving them to an unlawful place, pretending damage done by them. In which case the owner

of the cattle may demand satisfaction for the injury, which is called *placitum de namio vestito*.

Nappera, (From the Ital. *naperia*, i. e. *lintamina domestica*.) linen cloth, or household linen. *Stat. 2 R. 2. c. 1.*

Narr, An abbreviation of *narratio*, used to signify a declaration in a cause.

Narrator, (*Lat.*) A pleader or reporter; and formerly *serviens narrator* was a serjeant at law.—*Et ulterius in curia regis pro aliquo narrare non audietur, nisi pro semetipso si narrator fuerit.* *Fleta*, lib. 2. cap. 37.

Nassabrough, Its justices, where empowered to determine appeals, 9 *Geo. 1. c. 7.*

Nasse or Nesse, (From the Sax. *Nase*, i. e. *Promontorium*.) The name of the port or haven of Orford in Suffolk, mentioned in *stat. 4 Hen. 7. cap. 21.*

Natale, The state and condition of a man.—*Si quis de homicidio accusatur, & idem se purgare velit secundum natale suum.* *Leg. Hen. 1. cap. 64.*

Nathwyte, Seems to be derived from the Sax. *nath*, i. e. lewdness; and so to signify the same with *lair-wite*.

National Debt, the money owing by government, for which it pays interest, part to our own people, part to foreigners, and which forms our national funds. In *January 1765*, the national debt amounted to upwards of 145,000,000*l.* and the annual interest to about four millions and three quarters. *Vide* this subject very fully explained and judiciously treated of, *Black. Com. 1 V. 325, &c.* and 4 *V. 433.*

Natibi de stipite. In the survey of the dutchy of Cornwall, there is mention of *native de stipite*, and *nativi conventionarii*; the first were villeins or bondmen, by birth or stock; the other by contract or agreement. *LL. Hen. 1. cap. 76.* And in Cornwall it was a custom, that a freeman marrying *nativam*, if he had two daughters one of them was free, and the other villein. *Brañ. lib. 4. c. 21, 22.*

Nativity, (*natiuitas*) birth, or the being born in a place. *The casting the nativity*, or by calculation seeking to know how long the Queen should live, &c. was made felony, by 23 *Elix. cap. 2.* *Natiuitas* was anciently taken for servitude, bondage or villinage. *Leg. Will. 1.*

Natibo habendo, A writ that lay to the sheriff for a lord who claimed inheritance in any villein, when his villein was run away, for the apprehending and restoring him to the lord: and the sheriff might seize the villein, and deliver him unto his lord, if he confessed his villinage; but if he alledged that he was a freeman, then the sheriff ought not to seize him, but the lord was to sue forth a *pone* to remove the plea before the justices of C. B. &c. And if the villain purchased a writ *de libertate probanda* before the lord had taken out the *pone*, it was a *superfideas* to the lord, that he proceeded not on the writ of *natibo habendo*. *Reg. Orig. 7, 8. F. N. B. 77. New Nat. Br. 171, 172.* This writ *natibo habendo* was in nature of a writ of right, to recover the inheritance in the villein; upon which the lord was to pursue his plaint, and declare thereupon, and the villein to make his defence, so as the freedom was to be tried. *New Nat. Br. 171, 173.*

Nativus. He who is born a servant, and so differs from him who suffers himself to be sold, of which servants there are three sorts, *bondmen*, *natives*, and *villains*; *bondmen* were those who bound themselves by covenants to serve, and took their name from the word *bond*; *natives* we spoke of just before; and *villains* were such who belonging to the land, tilled the lord's demesnes, nor might depart thence without the lord's licence. *Spelman's Gloss. See Chart. R. 2. Quia omnes manumittit a bondage in com. Hertf. Walsingham, pag. 254. Cowell. See Servi Nativus, and Nef.* But now there are not in England any such persons, as those mentioned here.

Natural Affection, (*naturalis affectio*) Is a good consideration in a deed; and if one without expressing any consideration, covenant to stand seized to the use of his wife, child, or brother, &c. Here the naming them to be of kin, implies the consideration of *natural affection*, whereupon such use will arise. *Cart. 138. See Consideration.*

Naturalization, (*Naturalizatio*) Is where a person who is an alien, is made the King's natural subject by act of parliament; whereby one is a subject to all intents and purposes, as if he were born so: for by *naturalization*, a person's issue, before the *naturalization*, shall inherit. 1 *Inft. 8, 129.* A stranger *naturalized* by act of parliament, may have lands by descent, as heir at law, as well as have them by purchase: But until *naturalized* or made denizen, a stranger is not generally under the King's protection, to have the benefit of the law; also no person is to be *naturalized*, until he has received the sacrament, and taken the oaths of allegiance and supremacy, &c. And strangers when *naturalized*, are disabled to be of the Privy Council, to hold offices, &c. 7 *Jac. 1. cap. 2.* 12 *W. 3. cap. 2.* but see 1 *Geo. 1. cap. 4.* By the *stat. 7 Ann. cap. 5.* it was declared, that all persons born out of the King's allegiance, taking the oaths, &c. should be deemed natural born; tho' this was repealed, but not to prejudice persons *naturalized*, or children of natural-born subjects, born out of allegiance, by 10 *Ann. c. 5.* And all children born out of the ligeance of the crown, whose fathers were, or shall be natural subjects of Great Britain, at the time of their birth, are adjudged to be *natural-born subjects of this kingdom*, except children of parents attainted of treason, or in the actual service of foreign princes in enmity with England, &c. by the 4 *Geo. 2. c. 21.* All foreigners who shall live seven years or more, in any of our American plantations, and not be absent therefrom above two months at one time, shall on taking the oaths be deemed natural subjects, as if they had been born here; but not be capable of enjoying any place of trust, &c. 13 *Geo. 2. c. 7.* This by the *stat. 20 Geo. 2. c. 44.* is extended to protestants who scruple the taking an oath upon their making and subscribing the declaration of fidelity, and taking and affirming the effect of the abjuration oath, and making and subscribing the profession of their Christian Belief, appointed by the *stat. 1 Geo. 1. c. 4. &c.* Great numbers of foreigners are every year *naturalized* by private acts of parliament. And *vide* 25 *Ed. 3. stat. 2. 9 & 10 W. 3. c. 20. 11 & 12 W. 3. c. 6. 25 Geo. 2. c. 39. 13 Geo. 2. c. 3. and 22 Geo. 2. c. 45. See Alien.*

Natura Pudenda, Privities.—*Pensandum autem est, per visum accusantibus visum concubitus propensus advertendum, ut scilicet ipsas eorum naturas viderint committeri.* *Leg. Hen. 1. c. 83.*

Nabagium, A duty incumbent on tenants, to carry their lord's goods in a ship: *Liberi sint ab omni cariagio, navagio, &c.* *Mon. Angl. Tom. 1 pag. 922.*

Nabal, Signifies any thing belonging to the sea, or maritime affairs. *Merch. Dict.*

Naval Stores. Persons stealing or imbezilling any of the King's naval stores, to the value of 20*l.* are guilty of felony, without benefit of clergy. 22 *Car. 2. cap. 5.* And the treasurer and commissioners of the navy are empowered to inquire of naval stores imbezilled, and appoint persons to search for them, &c. who may go on board ships, and seize such stores; and the commissioners, &c. may imprison the offenders, and fine them double value, the stores being under the value of 20*l.* 1 *Geo. 1. cap. 25.* None but the contractors with the commissioners of the navy, shall make any stores of war, naval stores, &c. with the marks commonly used to his Majesty's stores, upon pain of forfeiting 200*l.* And persons in whose custody such stores shall be found concealed, are liable to the same penalty. 9 & 10 *W. 3. c. 41.* The *Stat. 3 Ann. c. 10.* was made for the encouragement of the importation of naval stores, from the plantations in America, and for preservation thereof in those countries; inflicting penalties for cutting down pine, or pitch trees, under such and such fines, &c. To the like purpose, and for the making the same more effectually is the *Stat. 8 Geo. 1. cap. 12.* Also naval stores are imported here from Scotland, under an encouragement by statute; and a premium is given for the importing of naval stores from America and North Britain, of 1*l.* per ton, for masts and pitch, &c. 2 *Geo. 2. cap. 35. See Ships, Stores.*

Naufrage, A sea term for shipwreck. *Merch. Dict.*

Navigatio,

Navigatio, Is the art of sailing at sea, also the manner of trading: And a *navigator* is one who understands navigation, or imports goods in foreign bottoms. *Ibid.* See *Black. Com.* 1 *V.* 417. 4 *V.* 432.

Navigable Rivers, Divers statutes relating to them. See *Rivers*.

Navis Ecclesiæ, The nave or body of the church, as distinguished from the choir, and wings, or aisle: It is that part of the church where the common people sit, *Du Cange*.

Navis, Navicula, A small dish to hold frankincense before put into the *thuribulum*, censer or smoking pot; and seems to have its name from the shape, resembling a boat or little ship: we have several of these boat-cups in silver, &c. for various uses. *Paroch. Antiq.* 598.

Navithalamus, A ship or barge that noblemen use for pleasure, with fine chambers and other stately ornaments. *Law Lat. Dict.*

Navy, Signifies the fleet or shipping of a prince or state; or an armament at sea. The navy of England it has been observed, excels all others for three things; viz. beauty, strength, and safety; for beauty our ships of war are so many floating palaces; for their strength so many moving castles; and for safety, they are the most defensive walls of the land: and as our naval power gains us authority in the most distant climates, so the superiority of our fleet above other nations, renders the British monarch the arbiter of Europe.

The Kings of England in antient times commanded their fleet in person; and the renowned King Arthur, (famous for his warlike achievements) vindicated the dominion of the seas, making ships of all nations salute our ships of war by lowering the top-sail, and striking the flag, as in like manner they shall do to the forts upon land, by which submission they are put in mind that they are come into a territory, wherein they are to own a sovereign power and jurisdiction, and receive protection from it: and this duty of the flag, which hath been constantly paid to our ancestors, serves to imprint reverence in foreigners, and adds new courage to our seamen; and reputation abroad, is the principal support of any government at home.

King Edgar, successor to Arthur, stiled himself *sovereign of the narrow seas*; and having fitted out a fleet of four hundred sail of ships, in the year 937, sailing about Britain with his mighty navy, and arriving at Chester, was there met by eight Kings and Princes of foreign nations, come to do him homage; who as an acknowledgment of his sovereignty, rowed this monarch in a boat down the river Dee, himself steering the boat; a marine triumph which is not to be paralleled in the histories of Europe.

Canutus, (Edgar's successor,) laid the antient tribute called *Danegeld*, for guarding the seas, and sovereignty of them; with the following emblem expressed, viz. Himself sitting on the shore in his royal chair, while the sea was flowing, speaking, *Tu mæ ditionis es, & terra in qua sedes est*, &c.

And Egbert, Athred and Elfbred kept up the dominion and sovereignty of their predecessors; nor did the succeeding princes of the Norman race, waive this great advantage, but maintained their right to the four adjacent seas surrounding the British shore: the honour of the flag King John challenged, not barely as a civility, but a right to be paid *cum debita reverentia*, and the persons refusing, he commanded to be taken as enemies: and the same was ordained not only to be paid to whole fleets, bearing the royal standard, but to those ships of privilege that wear the Prince's ensigns or colours of service; this decree was confirmed and bravely asserted by a fleet of five hundred sail, in a royal voyage to Ireland, wherein he made all the vessels which he met with in his way, in the eight circumfluent seas, to pay that duty and acknowledgment, which has been maintained by our Kings to this day, and was never contested by any nation, unless by those who attempted the conquest of the intire empire.

Trade gave occasion to the bringing mighty fleets to sea; and on the increase of trade, ships of war were necessary in all countries for the preservation of it, in the hands of the just proprietors.

In antient times the several counties of England were liable to a particular taxation for building ships of war, and fitting out fleets, every one in proportion to their extent and riches; so that the largest counties were each of them to furnish a first rate man of war, and the others every one to build one in proportion; but this method has been long disused, and the fitting out our navy for many ages has been always thrown into the publick charge.

King Edw. 3. in his wars with France, had a fleet of ships before Calais, so numerous, that they amounted to seven hundred sail: but King Hen. 6. it is said, was the first who began to build a royal navy in England; he built a ship called the *Great Henry* of one thousand tuns, the largest ship that had been then seen in this kingdom, (tho' now our first rate ships of war contain at least two thousand tuns, are mounted with above one hundred canon, and carry above one thousand men.) He fitted out a royal fleet, constituted a *Navy Office* &c. And in this King's reign, and the reign of Queen Elizabeth, our navy was in a most flourishing condition, being mostly commanded by our valiant nobility; and it is remarkable, that there are lists of the fleets of Queen Elizabeth, which make it appear there was but one private gentleman a captain, all the rest being Lords and Knights: so high was the esteem for service at sea in those days, when our Princes ruled with the most consummate glory: but the opinion of serving at sea in late times having been very much lessened, it has since been declined by the nobility and gentry.

The navy is at this time in a very flourishing state; for number of shipping, and strength of force of the ships, it was never, perhaps, more formidable than now; and when compleat, is divided into three squadrons, distinguished by the different colours of the several flags, viz. red, white, and blue; the principal commander whereof bears the title of *Admiral*, and each has under him a Vice-Admiral, and a Rear-Admiral, who are likewise flag officers. There are belonging to his Majesty's navy, six great yards, Chatham, Deptford, Woolwich, Portsmouth, Sheerness, and Plymouth; fitted with several docks, and furnished with store of timber, masts, anchors, cables, &c. And for the management of the royal navy, there are several officers of trust and authority, besides the Commissioners of the Admiralty; as the Treasurer, Controller, Surveyor, Commissioners of the Navy, Commissioners of Victualling-Office, &c. the principal whereof hold their offices by patent under the Great Seal. By Stat. 9 & 10 W. 3. c. 37. the sum of 570,000*l.* was appropriated for the building of twenty-seven ships of war, with their guns, rigging, &c. And the 6 Ann. c. 13. enacts, That over and above the ships for the line of battle, forty-three ships of war shall be employed as cruisers and convoys, for the better preserving such ships as shall be made use of in the trade of Great Britain; four of these ships are to be third-rates, and sixteen fourth rates, and the rest of sufficient force to guard our commerce: they are to attend in certain stations; and the Lords Commissioners of the Admiralty may direct the Commissioners of the Navy, or some one or more persons resident at such places as his Majesty shall appoint, to superintend and oversee every thing relating to those cruisers; also the Commissioners of the Admiralty have power to order any of the said ships to be employed in the line of battle, in case of necessity.

This statute likewise empowers the commissioners of the Admiralty, during war, to grant commissions to privateers and commanders of ships, for the taking and seizing ships and goods of enemies. For the furnishing of mariners for the Fleet; by 7 & 8 W. 3. c. 21. it is enacted, That all seamen, watermen, &c. above the age of eighteen years, and under fifty, capable of sea service, who shall register themselves voluntarily for the King's service in the royal navy, to the number of thirty thousand, shall have paid to them the yearly sum or bounty of 40*s.* besides their pay for actual service, and that whether they be in service or not; and none but such mariners, &c. as are registered, shall be capable of preferment to any commission, or be warrant officers in the navy: and such registered persons are exempted from serving on juries, parish offices, &c. also from service aboard the age of fifty five years,

years, unless they go voluntarily; and when by age, wounds, or other accidents, they are disabled for future service at sea, they shall be admitted into *Greenwich hospital*, and there be provided for, during life: and the widows of such seamen as shall be slain or drowned, not of ability to provide for themselves, shall be likewise admitted into the hospital; and their children educated, &c. But if any registered seaman shall withdraw himself from the King's service, in his ships or navy; or if any such mariner relinquish the service, without consent of the Commissioners of the Admiralty, he shall for ever lose the benefit of the act, and be compelled to serve in his Majesty's fleet for six months without pay. See 9 *Ann.* c. 21. s. 23. By a subsequent statute, 4 *Ann.* c. 19. s. 18. Watermen plying on the *Thames* between *Gravesend* and *Windsor*, on notice given by the Commissioners of the Admiralty to the company of watermen, are to appear before the said company, to be sent to his Majesty's fleet, or on refusal, they shall suffer one month's imprisonment, and be disabled working on the *Thames* for two years: The registering seamen is the grand nursery for the fleet; but there are other means of supplying mariners for the royal navy, and training up persons in the sea service: for the *Stat.* 2 *Ann.* c. 6. provides, That poor boys, whose parents are chargeable to the parish, may by churchwardens and overseers of the poor, with consent of two justices of peace, be placed out apprentices to the sea service, until the age of twenty-one years, they being thirteen years old, at the time of their placing forth: those at eighteen years of age may be impressed for service in the fleet, when the owners or masters of such of them as shall prove qualified, shall have able seamen's wages; and all masters and owners of ships, from thirty to fifty tons burden, are required to take one such apprentice, one more for the next fifty ton, and one more for every hundred ton above the first hundred, under the penalty of 10*l*. Masters of apprentices placed out by the parish may, with the consent of two justices, turn over such apprentices to masters of ships for the remainder of their terms: lewd and disorderly servants, vagabonds, &c. are to be taken up and sent to his Majesty's fleet, and poor prisoners for debt, who were to have the benefit of 4 & 5 *Ann.* appearing on their release to be able bodied seamen, were to enter themselves in the service. Thus is the navy recruited with mariners; nor to mention particularly the manner of pressing in cities and populous towns, on extraordinary occasions.

By a late statute, encouragement is given to seamen to enter into his Majesty's service voluntarily: volunteers entering their names with any commission officer of the fleet, and forthwith proceeding on board their ships, on certificate thereof shall be entitled to wages from the date of the certificate, and be allowed the usual conduct money, and also be paid an advance of two months wages, &c. And if any volunteer is transferred to another ship, he shall receive, over and above his wages due, the like advance of two months pay, and not serve in a lower degree than he did before. Persons listed on board ships of war, are not to be taken thereout by any process at law, unless it be for a criminal matter; or where the debt amounts to 20*l*. When seamen die on board, the commander of the ship shall, as soon as may be, make out tickets for their pay, which shall be paid to their executors, &c. without carrying for the ship's return; and seamen's pay shall not be bargained and sold; but tickets may. Governors and consuls in foreign parts, are to provide for shipwrecked mariners at 6*l*. per head each, and put them on board the first ships of war, &c. and on sending bills of disbursement with vouchers to the Commissioners of the Navy, they shall be paid. 1 *Geo.* 2. c. 14.

Also the pay and wages of one man in a hundred, of every ship of war, and value of his victuals, shall be applied for relieving poor widows of officers of the navy, by the 6 *Geo.* 2. c. 25. A late statute has ordained, that able seamen who voluntarily enter on board ships of war, shall receive 3*l*. besides their wages, and ordinary seamen 3*l*. And if any seaman, under a commission or warrant officer, who enters into the service, be killed or drowned, his widow, on certificate to the Commissioners of the Navy that she is such, is to have, by way of

bounty, one year's wages, according to the pay for which he served. 14 *Geo.* 2. c. 38.

The Commissioners of the Navy, &c. have power to examine and punish all persons who make any disturbance, fighting or quarrelling in the yards, and offices, &c. of the navy: and in the 13th year of King *Charles II.* an act passed for the regulating the government of the fleet; and also an act 22 *Geo.* 2. c. 33. which contains the particular excellent articles and orders following.

1. Officers are to cause publick worship, according to the liturgy of the church of *England*, to be solemnly performed in their ships, and take care that prayers and preaching by the chaplains be performed diligently, and that the Lord's Day be observed. 2. Persons guilty of profane oaths, cursing, drunkenness, uncleanness, &c. to be punished as a court martial shall think fit. 3. If any person shall give or hold intelligence or or with an enemy without leave, he shall suffer death. 4. If any letter or message from an enemy be conveyed to any in the fleet, and he shall not in twelve hours acquaint his superior officer with it, or if the superior officer being acquainted therewith, shall not reveal it to the commander in chief, the offender shall suffer death, or such punishment as a court martial shall impose. 5. Spies and persons endeavouring to corrupt any one in the fleet, shall suffer death, or such punishment as a court martial shall impose. 6. No person shall relieve an enemy with money, victuals or ammunition, on like penalty. 7. All papers taken on board a prize shall be sent to the Court of Admiralty, &c. on penalty of forfeiting the share of the prize, and such punishment as a court martial shall impose. 8. No person shall take out of any prize any money or goods, unless for better securing the same, or for the necessary use of any of his Majesty's ships, before the prize shall be condemned; upon penalty of forfeiting his share, and such punishment as shall be imposed by a court martial. 9. No person on board a prize shall be stripped of his cloaths, pillaged, beaten, or ill treated, upon pain of such punishment as a court martial shall impose. 10. Every commander, who, upon signal or order of fight, or sight of any ship which it may be his duty to engage, or who, upon likelihood of engagement shall make necessary preparations for fight, and encourage his inferior officers and men to fight, shall suffer death or such punishment as a court martial shall deem him to deserve. And if any person shall treacherously or cowardly yield or cry for quarter, he shall suffer death. 11. Every person who shall not obey the orders of his superior officer, in time of action, to the best of his power, shall suffer death, or such punishment as a court martial shall deem him to deserve. 12. Every person, who, in time of action, shall withdraw or keep back, or not come into the fight, or do his utmost to take or destroy any ship which it shall be his duty to engage, and to assist every ship of his Majesty or his allies, which it shall be his duty to assist, shall suffer death. 13. Every person, who thro' cowardice, &c. shall forbear to pursue the chase of any enemy, &c. or shall not assist or relieve a known friend in view, to the utmost of his power, shall suffer death. 14. If any person shall delay or discourage any action or service commanded, upon pretence of arrears of wages, or otherwise, he shall suffer death, or such punishment as a court martial shall deem him to deserve. 15. Every person who shall desert to the enemy, or run away with any ship, ordnance, &c. to the weakening of the service, or yield up the same cowardly or treacherously to the enemy, shall suffer death. 16. Every person who shall desert, or induce others so to do, shall suffer death, or such punishment as a court martial shall think fit. If any commanding officer shall receive a deserter, after discovering him to be such, and shall not with speed give notice to the captain of the ship to which he belongs, or if the ship is at a considerable distance, to the Secretary of the Admiralty, or Commander in Chief, he shall be punished. 17. Officers and seamen of ships appointed in convoy or merchant ships, or of any other, shall diligently attend upon that charge according to their instructions; and whosoever shall not faithfully perform their duty, and defend the ships in their convoy, or refuse to fight in their defence, or run away cowardly and submit the ships in their convoy to hazard, or exact any reward for

for conveying any ship, or misuse the master or mariners, shall make reparation of damages, as the court of Admiralty shall adjudge; and be punished criminally by death, or other punishment, as shall be adjudged by a court martial. 18. If any officer shall receive or permit to be received on board any goods or merchandise, other than for the sole use of the ship, except gold, silver or jewels, and except goods belonging to any ship which may be shipwrecked, or in danger thereof, in order to the preserving them for the owners, and except goods ordered to be received by the Lord High Admiral, &c. he shall be cashiered, and rendered incapable of further service. 19. Any person making or endeavouring to make any mutinous assembly shall suffer death. Any person uttering words of sedition or mutiny shall suffer death, or such punishment as a court martial shall deem him to deserve. If any officer, mariner, or soldier, in or belonging to the fleet shall behave himself with contempt to his superior officer, *being in the execution of his office*, he shall be punished according to the nature of his offence by the judgment of a court martial. 20. Any person concealing any traitorous or mutinous practice or design, shall suffer death, or such punishment as a court-martial shall think fit. Any person concealing any traitorous or mutinous words, or any words, practice, or design, *tending to the hindrance of the service*, and not forthwith revealing the same to the commanding officer, or being present at any mutiny or sedition, shall not use his utmost endeavours to suppress the same, shall be punished as a court martial shall think he deserves. 21. Any person finding cause of complaint of the unwholesomeness of victuals, or upon other just ground, he shall *quietly* make the same known to his superior, who, as far as he is able, shall cause the same to be presently remedied; and no person upon any such or other pretence shall attempt to stir up any disturbance, upon pain of such punishment as a court-martial shall think fit to inflict. 22. Any person striking any his superior officer, or drawing or offering to draw or lift up any weapon against him, *being in the execution of his office*, shall suffer death. And any person presuming to quarrel with any his superior officer, *being in the execution of his office*, or disobeying any lawful command of any his superior officer, shall suffer death, or such other punishment as shall be inflicted upon him by a court-martial. 23. Any person quarrelling or fighting with any other person in the fleet, or using reproachful or provoking speeches or gestures, shall suffer such punishment as a court martial shall impose. 24. There shall be no wasteful expence or embezzlement of any powder, shot, &c. upon penalty of such punishment as by a court martial shall be found just. 25. Every person burning or setting fire to any magazine, or store of powder, ship, &c. or furniture thereunto belonging, not then appertaining to an enemy, shall suffer death. 26. Care is to be taken that there be wilfulness or negligence no ship be stranded, run upon rocks or sands, or split or hazarded; upon pain of death, or such punishment as a court martial shall deem the offence to deserve. 27. No person shall sleep upon his watch, or negligently perform his duty, or forsake his station, *upon pain of death*, or such punishment as, &c. 28. Murder. 29. And buggery or sodomy shall be punished with death. 30. Robbery shall be punished with death, or otherwise as a court martial shall find meet. 31. Every person *knowingly* making or signing, or commanding, counselling or procuring the making or signing any false muster, shall be cashiered, and rendered incapable of further employment. 32. Provost martial refusing to apprehend or receive any criminal, or suffering him to escape, shall suffer such punishment as a court martial shall deem him to deserve. And all others shall do their endeavours to detect and apprehend all offenders, upon pain of being punished by a court-martial. 33. If any flag-officer, captain, commander or lieutenant, shall behave in a scandalous, infamous, cruel, oppressive or fraudulent manner, *unbecoming his character*, he shall be dismissed. 34. Every person in actual service and full pay, guilty of mutiny, desertion, or disobedience, in any part of his Majesty's dominions on shore, when in actual service relative to the fleet, shall be liable to be tried by a court-martial, and suffer the like punishment as if the offence had been committed at sea. 35. Every person in actual service and full pay, committing upon shore, in any

place out of his Majesty's dominions, any crime punishable by these articles, shall be liable to be tried and punished as if the crime had been committed at sea. 36. All other crimes not capital, not mentioned in this act, shall be punished according to the laws and customs used at sea. No person to be imprisoned for longer than two years. Court martial not to try any offence (except the 5th, 34th, and 35th articles) not committed upon the main sea, or in great rivers beneath the bridges, or in any haven, &c. within the jurisdiction of the admiralty, or by persons in actual service and full pay, except such persons and offences, as in 5th article; nor to try a land officer or soldier on board a transport ship. The Lord High Admiral, &c. may grant commissions to any officer commanding in chief of a fleet, &c. to call courts martial, consisting of commanders and captains. And if the commander in chief shall die or be removed, the officer next in command may call courts martial. No commander in chief of a fleet, &c. of more than five ships, shall preside at any court martial in foreign parts, but the officer next in command shall preside. If a commander in chief shall detach any part of his fleet, &c. he may empower the chief commander of the detachment to hold courts martial during the separate service. If five or more ships shall meet in foreign parts, the senior officer may hold courts martial and preside thereat. Where it is improper for the officer next to the commander in chief to hold or preside at a court martial, the third officer in command may be empowered to preside at or hold a court martial. No court martial shall consist of more than ~~thirteen~~ *thirteen*, or less than *five* persons. Where there shall not be less than three, and yet not so many as five of the degree of a Port Captain or superior rank, the officer who is to preside may call to his assistance as many commanders under the degree of a Port Captain, as together with the Port Captains, shall make up the number five, to hold the court martial. After trial begun, no member of a court martial shall go on shore, until sentence, except in case of sickness, upon pain of being cashiered. Proceedings shall not be delayed, if a sufficient number remain to compose the court, which shall sit from day to day (except Sunday) till sentence be given. The Judge Advocate, and all officers constituting a court martial, *shall be upon oath*. Persons refusing to give evidence may be imprisoned. Sentence of death within the Narrow Seas (except in case of mutiny) shall not be put in execution till a report be made to the Lord High Admiral, &c. Sentence of death beyond the Narrow Seas, shall not be put in execution but by order of the commander in chief of the fleet, &c. Sentence of death in any squadron, detached from the fleet, shall not be put in execution (except in case of mutiny) but by order of the commander of the fleet, or Lord High Admiral, &c. And sentence of death passed in a court martial, held by the senior officer of five or more ships met in foreign parts (except in case of mutiny) shall not be put in execution but by order of the Lord High Admiral, &c. The powers given by the said articles shall remain in force with respect to crews of ships wrecked, lost, or destroyed, until they be discharged or removed into another ship, or a court martial shall be held to inquire of the cause of the loss of the ship. And if upon inquiry it shall appear, that all or any of the officers and seamen did their utmost to save the ship, and behaved obediently to their superior officers, their pay shall go on: as also shall the pay of officers and seamen taken by the enemy, having done their best to defend the ship, and behaved obediently. If any officer shall receive any goods on board, contrary to the 18th article, he shall further forfeit the value of such goods, or 500*l.* at the election of the informer; one moiety to the informer, the other to Greenwich hospital. *See Seamen's Ships.*

False Bills, Counterfeiting them, &c. punished 1. Geo. 2. c. 25. s. 6. Stealing them felony; 2. Geo. 2. c. 25. s. 3.

Copy Office How rebuilt, 25 Car. 2. c. 10.

De submitas, Is a writ directed to the bishop for the plaintiff or defendant, where a *quare impedit* or assize of *darrein presentment* is depending, when either party fears that the bishop will admit the other's clerk during the suit between them: it ought to be brought within six kalendae

lendar months after the avoidance, before the bishop may present by lapse; for 'tis in vain to sue out this writ when the title to present is devolved unto the bishop. *Reg. Orig.* 31. *F. N. B.* 37. Writ of *Ne admittas* doth not lie, if the plea be not depending in the King's court by *quare impedit*, or *darrein presentment*; therefore there is a writ in the register directed to the Chief Justice of C. B. to certify the King in the *Chancery*, if there be any plea before him and the other judges between the parties, &c. So that the writ should not be granted until that be done: But yet it maybe had out of the *Chancery* before the King is certified that such plea of *quare impedit* is depending; and then the party grieved may require the Chief Justice to certify, &c. *New Nat. Br.* 83, 84. The writ runs, *prohibemus vobis, Ne admittas, &c.*

Feat. Is the weight of a pure commodity alone, without the cask, bag, dross, &c. *Merch. Dist.*

Necessity. The law charges no man with default where the act is compulsory, and not voluntary, and where there is not a consent and election; therefore if there be an impossibility for a man to do otherwise, or so great a perturbation of the judgment and reason, as in presumption of law he cannot overcome, such necessity carries a privilege in itself. *Bac. Elem.* 25.

Necessity is of three sorts; necessity of conservation of life, necessity of obedience, and necessity of the act of God or of a stranger.

And first of conservation of life: If a man steal viands to satisfy his present hunger, this is no felony nor larceny. *Ibid.* But if such necessity be owing to his unthriftiness, surely it is far from being an excuse. *Hawt. Pl. C.* 93. *cap.* 33. *sect.* 20. So if divers be in danger of drowning by the casting away of some boat or barge, and one of them get to some plank, or on the boatside to keep himself above water, and another to save his life, thrusts him from it, whereby he is drowned, this is neither *se defendendo*, nor by misadventure, but justifiable. *Ibid.*—*S. P. Hawk. Pl. C.* 73. *cap.* 28. *sect.* 26.

So if divers felons be in goal, and the goal by casualty is set on fire, whereby the prisoners get forth, this is no escape nor breaking of prison. *Bac. Elem.* 19.

So upon the statute, that every merchant selling his merchandise on land without satisfying the customer or agreeing for it, (which agreement is construed to be in certainty) shall forfeit his merchandise, and it is so that by tempest a great quantity of the merchandise is thrown over-board, whereby the merchant agrees with the customer by estimation, which falls out short of the truth, yet the over quantity is not forfeited; where note, the necessity dispenses with the strict letter of a statute-law. *Ibid.* *sect.* 26.

So if a man have right to land, and do not make his entry for terror of force, the law allows him a continual claim, which shall be as beneficial unto him as any entry.

The second necessity is of obedience; therefore where baron and feme commit felony, the feme can neither be principal nor accessory, because the law intends her to have no will, in regard of the subjection and obedience she owes to her husband.

So one reason among others, why ambassadors are excused of practices against the state where they reside (except it be in point of conspiracy, which is against the law of nations and society) is, because *vis officii* whether they have it in *mandatis*, and that they are excused by necessity of obedience. *Ibid.*

The third necessity is of the act of God, or of a stranger; as, if I be tenant for years of a house, and it be overthrown by tempest, or by floods, or invasion of enemies, or if I have belonging to it some cottage which has been infected, whereby I can procure none to inhabit them, nor workmen to repair them, and so they fall down; in these cases I am excused in waste; but of this last learning when and how the act of God, and strangers do excuse, there be other particular rules. *Bac. Elem.* 26, 27.

Yet necessity is a privilege only *quoad jura privata*; for in all cases if the act that should deliver a man out of the necessity be against the commonwealth, necessity is no excuse; for *privilegium non valet contra rempublicam*;

and another says, *necessitas publica major est quam privata*; for death is the last point of particular necessity, and the law imposes upon every subject, that he prefer the urgent service of his prince and country, before the safety of his life; as if in danger of tempest those who are in the ship throw over other men's goods, they are not answerable; but if a man be commanded to bring ordnance or munition to relieve any of the King's towns that are distressed, then he cannot for any danger or tempest justify throwing them over board; for there it holds which was spoken by the *Roman*, when he alledged the same necessity of weather to hold him from embarking, *necesse est ut tam, non ut vivam*. So in the case put before of husband and wife, if they join in committing treason, the necessity of obedience does not excuse the offence, as it does in felony; because it is against the commonwealth. *Bac. Elem.* 27.

So if a fire happen in a street, I may justify pulling down the wall or house of another, to prevent the fire from spreading; but if I be assailed in my house in a city or town, and distressed, and to save my life I set fire to my house, which spreads and takes hold of other houses adjoining, this is not justifiable, but I am subject to their action upon the case, because I cannot rescue my life by doing any thing which is against the commonwealth; but if it had been but a private trespass, as the going over another's ground, or breaking his inclosure, when I am pursued, for the safeguard of my life, it is justifiable. *Bac. Elem.* 27, 28.

The common case proves this exception; that is, if a madman commit felony, he shall not lose his life, because his infirmity came by the act of God; but if a drunken man commit felony, he shall not be excused, because his infirmity came by his own default; for the reason that loss or deprivation of will, and election by necessity, and by infirmity, is all one, for the lack of *arbitrium liberum* is the matter; therefore as *infirmus culpabilis* excuses not, no more does *necessitas culpabilis*. *Bac. Elem.* 29. See *Black Com.* 4 *V.* 27, 178.

Neckcloths and tassels of glass imported, What duties to pay. 4 *W. & M.* c. 5. *sect.* 2.

Neckcloths. What sorts of neckcloths are not chargeable by the *Act.* c. 19. 12 *Ann.* *stat.* 2. c. 9. *sect.* 5. and c. 19.

Neckcloths. Importing is prohibited, 13 & 14 *Car.* c. 13. May be exported duty free, 11 & 12 *Will.* 3. c. 3. *sect.* 15.

Ne exeat Regno. Is a writ to restrain a person from going out of the kingdom without the King's licence. *F. N. B.* 81. It may be directed to the sheriff to make the party and surety, that he will not depart the realm; and on his refusal, to commit him to prison; or it may be directed to the party himself; and if he then goes, he may be fined. 2 *Lut.* 178. And this writ is granted on a suit being commenced in *Chancery*, when the plaintiff fears the defendant will fly to some other country, and thereby avoid the equity of the court; which hath been sometimes practised: when thus granted, the party must give bond to the Master of the Rolls in the penalty of 1000*l.* or some other large sum, for yielding obedience to it; or satisfy the court by answer, affidavit, or otherwise, that he hath no design of leaving the kingdom, and give security therefore. *Practis. Solis.* 129. A *Ne exeat Regnum* has been granted to stay a defendant from going to *Scotland*; for 'tis not out of the kingdom, yet it is out of the process of the court, and within the same mischief. 2 *Salk.* 702. 3 *Mod.* 127, 169. 4 *Mod.* 179. If the writ be sued for by the King, the party against whom sued may plead licence by letter patent, &c. which shall discharge him: But where any subject goes beyond sea with the King's licence, and continues longer than his appointed time, it hath been held, he loses the benefit of a subject. 4 *Lew.* 29. And if a person beyond sea refuses to return to *England* on the King's letters under his Privy Seal, commanding him upon his allegiance to return; being certified into the *Chancery*, a commission may be awarded to seize his lands and goods for the contempt; and so it is if such person's servants hinder a messenger from delivering his message, on affidavit of it, &c. *Yerk. Cens.* 246. 3 *Nels. Abr.* 211. See *Fugitives.* And

And vide the following books and cases. *F. N. B.* 85. 2 *Chan. Cases*, 245. *Lane* 29. *Farr.* 9. *Chan. Proc.* 171. *Lloyd v. Cardy*. *Wms's Rep.* 263. *Doe's Case*. *Cases in Chancery in Lord Talbot's time* 196. *Hunter v. Macerney* *P. R. C.* 251, 2. 15 *Vin. Abr.* 537, 539.

Negative, Is a proposition by which something is denied; also a particle of denial, as, *not*. An affirmative includes a negative; for every statute limiting any thing to be done in one form, altho' it be spoke in the affirmative, includes a negative; as the statute of *Westm. cap.* 4. of a *quod ei de forcat* is, that the demandant shall vouch *at si teneas esset in priori breve*, includes a negative, *viz.* and not otherwise. *Plow.* 206. *b.* 207. *a.* *Arg. Ubi plura*, in case of *Stradling v. Morgan*.

A negative cannot be proved or testified by witnesses, only an affirmative. 2 *Inst.* 662. Tho' a negative is incapable of being proved directly; yet indirectly 'tis otherwise: for in case one accuses B. to have been at *York*, and there had committed a certain fact, in proof of which he produces several witnesses; here B. cannot prove that he was not at *York*, against positive evidence that he was; but shall be allowed to make out the negative by collateral testimony, that at that very time he was at *Exeter*, &c. in such a house, and in such company. *Fortescue* 37.

Two negatives may be construed as a negative in grants, but not in pleas; for they are to be in *Latin*, and must be construed as *Latin* ought to be. *Per. cur.* 1 *Salk.* 328. *Trin.* 2 *Ann.* *B. R.* *Dillon v. Harper*.

Negative may be implied by an affirmative, but not necessarily *contra*. As the saying, that a papist, unless he conforms, shall not take by devise, does not necessarily imply that if he does conform, he shall take by devise, &c. 2 *Wms's Rep.* 9. *Pasch.* 1722. in case of *Hill v. Felkin*.

Where a trust of a term for raising portions for daughters directs a particular method for raising them, it implies a negative, that they shall not be raised any other way. 2 *Wms's Rep.* 19. *Pasch.* 1722. in case of *Ivy v. Gilbert* & al.

An affirmative oath was made to ground an attachment upon; if the person against whom the motion is, denies the charge by oath positively and fully, the negative oath shall be preferred; and this is the only case in which it shall be so. 8 *Mod.* 81. *Trin.* & *Geo.* *The King v. Ackworth* & al.

Negative pregnant, (*negativa pregnans*) Is a negative, implying also an affirmative: As if a man being impleaded to have done a thing on such a day, or in such a place, denieth that he did it *modo & forma declarata*, which implieth nevertheless, that in some sort he did it: or if a man be said to have alienated land in fee, and he saith he hath not aliened in fee, that is a negative pregnant; for tho' he hath not aliened in fee, yet it may be, he hath made an estate in tail. *Dyer* 17. *num.* 95. and *Bract hoc titulo*, and *Kitchen* 232. and *Terms of the Law*. We read also in some Civilians of *affirmativa pregnans*, and that is, *que habet in se inclusivam negativam, & hoc importare videntur dictiones (solum & tantum) que implicant negativam*. *Pacianus de Probationibus*, lib. 1. *cap.* 31. *num.* 16. fol. 93.

A negative pregnant is a fault in pleading; and there must be a special demurrer to a negative pregnant plea, &c. for the court will intend every pleading to be good, till the contrary doth appear. *Mich.* 23 *Car.* 1. *B. R.* *See* 2 *Leon.* 248. Vide *Bro. Issues join.* pl. 81. *Heath's Max.* 53. 2 *Lee* 199. *Dighton v. Clark*. *Cro. Jac.* 559, 560. *Lee v. Lushell*. 15 *Vin. Abr.* tit. *Negative pregnant*.

Neggitbare, Signifies to claim kindred, *Leg. H.* 1. c. 70. *LL. Inq.* *feud.* 7, 8.

Negligence, Is where a person neglects or omits to do a thing which he is by law obliged to. And where one has goods of another, to keep till such a time, and hath a certain recompence or reward for the keeping, he shall stand charged for injury by negligence, &c. But if he hath nothing for keeping them, he is not bound to answer. *Doct. & Stud.* 269. A man who finds another's goods, if they are after hurt by wilful negligence, 'tis held he is chargeable to the owner; tho' it is otherwise when they are lost

by casualty, as in case they are laid in a house that is accidentally burnt, or if he deliver them to another to keep, who runs away with them, &c. *Ibid.* It is held if an accountant be robbed, and it is without his default and negligence, he shall not be answerable for the money. 1 *Inst.* 89. A right may be lost by negligence; as where an action is not brought in the time appointed by the statute of limitations, &c. 21 *Jac.* 1. c. 16. See 2 *Williams's Rep.* 665. *Cowper v. Earl Cowper*. *Tot.* 76. *Kemp v. Palmer*. *Chan. Rep.* 10. *Earl of Oxford's Case*. *Chan. Proc.* 583. *Ivey v. Gilbert*.

Negro, By the laws of *Virginia*, and the plantations in general, *Negro* servants are saleable; and where a *Negro* is sold here, in action *indebitat assumpsit* for the money, the declaration ought to be, that the defendant was indebted to the plaintiff for the *Negro* sold here at *London*, but the said *Negro* at the time of sale was in *Virginia*, and that by the laws and statutes of *Virginia*, *Negroes* are saleable as chattels. *Per Holt*, Ch. Just. 2 *Salk. Rep.* 666. In action of trover for a *Negro*, and verdict and damages for the plaintiff; it was moved in arrest of judgment, that trover lay not for a *Negro*, for the owner had not an absolute property in him: But the court seemed to think that in trespass *quare captivum suum cepit*, the plaintiff might give in evidence that the party was his *Negro*, and he bought him. *Ibid.* See *Stat.* 13 *Geo.* 1. c. 9. And 2 *Leq.* 201. *Butts v. Penny*. *Carth.* 396. *Chamberlain v. Harvey*. 2 *Salk.* 666. *Smith v. Brown and Cowper*. *Id.* 667. *Smith v. Gould*. And *Black. Com.* 1 *P.* 127, 425. 2 *P.* 402.

Neif, (*Fr. naif*, i. e. *naturalis, nativa*) Was a bond woman, or the *Villein*, born in one's house, mentioned in the *stat.* 9 *R.* 2. c. 2. If a bond woman married a free man, she was thereby made free; and being once free, and discharged of bondage, she could not be *neif* after, without some special act done by her, as by divorce, confession in court, &c. And a free woman taking a villein to her husband, was not thereby bond; but their issue were villeins as their father was; tho' this is contrary to the Civil law, which says, *partus sequitur ventrem*. *Terms de Ley*. Anciently lords or manors sold, gave or assigned their bondmen and *neifs*, as appears by the following deed of gift. *Sciant quod ego Radulphus de C. Miles Dominus de L. Dado Domino Roberto de D. Beatricem filiam Will. H. de L. quendam nativam meam, cum tota sequela sua & omnibus catallis suis perquisitis & perquirendis & habund & censibus, pradiis & beaticem cum tota sequela sua & omnibus catallis suis & omnibus redditibus suis perquisitis & perquirendis pradiis Domino Roberto vel suis assignatis, libere, quiete, bene & in pace imperpetuum, &c. In cuius, &c. huius testibus.* Dat. apud L. in die Sancti Laurentii Martirii, Anno 13 Ed. 3. See *Natiqu*.

Neif, There was an ancient writ called *Writ of Neif*, whereby the lord claimed such a woman for his *neif*; now out of use.

Neighbour, (*vicinus*) One who dwells near another. See *Vicinage*.

Ne injuste tenet, A writ founded on *Magna Charta*, c. 10. that lies for a tenant distrained by his lord, for more services than he ought to perform; and is a prohibition to the lord not to distress or vex his tenant: In a special use, it is where the tenant hath prejudiced himself, by doing greater services, or paying more rent, without constraint, than he needed; for in this case, by reason of the lord's settin, the tenant cannot avoid it by *survay*, but is driven to his writ for remedy. *Reg. Orig.* 4. *F. N. B.* 10. And if the lord distrains to do other services, or to pay other rent than due, after the prohibition delivered unto him, then the tenant shall have an attachment against the lord, &c. and when the lord cometh thereon, the tenant shall count against him, and put himself upon the grand assise, &c. whereupon judgment shall be given. *New Nat. Br.* 22. This writ is always *anterior*, what the tenant and his ancestors have holden of the lord and his ancestors; and the lord hath incroached any rent, &c. A feoffee shall not avoid feoffa of rent had by incroachment of his feoffor, nor have the writ *Ne injuste tenet*; also a man shall not have a writ of *Ne injuste tenet* against the grantee of the feigniory. *Mich.* 18 Ed. 2. 10 Ed. 3. And tenant in tail may not have this

this writ but shall plead and shew the matter, and not be esopped by the payment of his ancestors, &c. *Trin.* 20 Ed. 3.

Form of the writ *Ne injuste vexes*.

GEORGE the Third, &c. To A. B. greeting: We command you, that you do not vex or trouble C. D. or suffer him to be vexed, for his freehold messuages, &c. which he holds of you, in, &c. Nor in any manner exalt, or permit to be exalted from him services which therefore he ought not to do, (or rent which he owes not) nor has been accustomed, &c.

Demine contradicente, Words used to signify the unanimous consent of the members of either house of parliament, to a vote or resolution.

De recipiatur, Against the receiving and setting down a cause to be tried. 2 *Lill. Abr.* See *Tripl.*

De Witecomes, *Colore Mandati Regis, quoniam amoveat a possessione Ecclesie minus iuste*. Reg. Orig. 61.

Devis and St. Christophers, The sum of 103.003 l. 11 s. 4 d. distributed among the proprietors and inhabitants. 9 *Ann.* c. 23. 10 *Ann.* c. 34. 5 *Geo.* 1. c. 32. 8 *Geo.* 1. c. 20. 13 *Geo.* 1. c. 3. 1 *Geo.* 2. stat. 2. c. 8.

Dein assignment. In many actions the plaintiff, who hath alledged in his declaration a general wrong, may in his replication, after an *evasive plea* by the defendant, reduce that general wrong to a more particular certainty, by assigning the injury afresh with all its specific circumstances in such manner as clearly to ascertain and identify it, consistently with his general complaint; which is called a *new or novel assignment*. *Black. Com.* 3 V. 310, 311.

Detachable upon Time, Keels in the haven to be measured and marked. 9 *H.* 3. c. 10. 30 *Car.* 2. stat. 1. c. 8. 6 & 7 *W.* 3. c. 10. No goods shall be shipped in the harbour but at *Newcastle*. The mayor, &c. of *Newcastle* may pull down weirs in the river. 21 *Ed.* 3. c. 18. Goldsmiths, silversmiths, and plate-workers incorporated. 1 *Ann.* stat. 2. c. 9.

Detachable. No person shall take, load or unload any goods to be sold, into or from *Newcastle* any place on the river *Tees*, but at the town of *Newcastle*, in order to the sale of the goods: And none shall raise any war in the haven there, between certain places on the said river, &c. 21 *Ed.* 3. c. 18. At *Newcastle upon Tees* if a trial be had between two inhabitants of the place, and the damages exceed 40 s. the plaintiff is to have no judgment, but defendant shall have costs, by a private act of parliament. 5 *Mod.* 367. See *Quest.*

Detachable Land. Persons residing in *Newfoundland* shall have freedom of fishing, &c. And every fishing ship that first enters any harbour or creek in *Newfoundland*, shall be attend of the said harbour for that season, and determine differences between the masters of fishing vessels, and the inhabitants there, &c. 10 *Ed.* 3. stat. 1. c. 25.

Detachable. By 7 *Geo.* 3. c. 37. The mayor, &c. of *London*, are required to pull down the goal of *Newgate*, and to remove, dispose of, or destroy, the materials; and to build a new goal, and the money arising from the sale of the materials, to be applied towards the expense of such new goal.

Prisoners to be detained in any other publick prison within *London* or *Middlesex*, till the new goal is built.

The new goal when built, to be the *County Goal*, for *London* and *Middlesex*, and the removal of prisoners thence to, not to be a charge.

Persons so removed to be deemed to be in the custody of the keeper of *Newgate*.

Yet, the keeper of other prisons to be answerable for escapes.

Detachable. To be leased to the city of *London*. 22 *Car.* 2. stat. 1. c. 61.

Detachable. See *Detachable*.

Detachable in the Isle of Wight, The poll for knights of the shire may be adjourned to it, 7 & 8 *Will.* 3. c. 25. s. 10.

Detachable River. See *River*.
Detachable, Persons reporting false news or tales, are punishable by statute, 3 *Ed.* 1. c. 34. See *Scandalum Magnatum*. See *Black. Com.* 4 V. 149.

Detachable Papers. For journals or other news papers, a duty of 1 d. is to be paid for every sheet, and every half-sheet one half-penny, levied and subject to the same penalties as by 10 *Ann.* under *Printing*. Stat. 11 *Geo.* 1. c. 8. And by 30 *Geo.* 2. c. 19. an half-penny more. And persons selling any news paper, not being stamped or marked as directed, a justice of peace may commit them to the house of correction for three months; and a reward of 20 s. is to be paid for apprehending any such offender. 16 *Geo.* 1. c. 26. See 30 *Geo.* 2. c. 10. and 32 *Geo.* 2. c. 19.

Detachable. See *Calendar*.

Detachable Trial. Judgments are often suspended by granting new trials. The causes of suspending the judgment by granting a new trial, are at present, wholly extrinsic, arising from matter foreign to, or dehors the record. See *Black. Com.* 3 V. 387. See also *Burr.* 1 V. 393, 395, 398. 2 V. 565, 536, 1228.

Detachable Salt, Salt now imported from *Europe* thither, 3 *Geo.* 2. c. 12.

Detachable, Anciently used for *Lincoln*. In *factis petitionum in curia London*, 30 *Ed.* 1. 7 *E.* 1. & *sepe alibi*. *Cowell*.

Detachable, *Detachable*, or *Detachable*. A vile base person, a ruffian. *Will. of Malmsb.* pag. 121. *Mar. Paris.* Ann. 1082.

Detachable, Is an exception taken to a petition, because the thing desired is not contained in that deed or proceeding whereon the petition is founded: For example; One desires of the court wherein a recovery is had of lands, &c. to be put in possession of a house, formerly among the lands adjudged unto him; to which the adverse party pleads, that this is not to be granted, by reason this house is not comprised amongst the lands and houses for which he had judgment. *New Best Entries*.

Detachable, signifies to suffer judgment to be had against one, by not delaying or opposing it, i. e. by default. 20 *Car.* 2.

Detachable, The *Black Book* or register in the *Exchequer*, is called by this name.

Detachable, Is when it is so dark, that the countenance of a man cannot be discerned; and by some opinions, burglary in the night may be committed at any time after sun set, and before rising. *H. P. C.* 79. 3 *Inst.* 63. 1 *Harol.* 101. See *Newgate*. And *Black. Com.* 4 V. 224.

Detachable, Are such persons as sleep by day and walk by night, being oftentimes pilferers, or disturbers of the peace. 3 *Ed.* 3. c. 14. *Constables* are authorized by the Common law to arrest *nightwalkers* and suspicious persons, &c. *Watchmen* may also arrest *nightwalkers*, and hold them until the morning: And it is said, that a private person may arrest any suspicious *nightwalker*, and detain him till he give a good account of himself. 2 *Harol.* P. C. 61, 80. One may be bound to the good behaviour for being a *nightwalker*; and common *nightwalkers* and haunters of bawdy-houses are to be indicted before justices of peace, &c. 1 *Harol.* 132. 2 *Harol.* 40. *Latch.* 173. *Deph.* also. But 'tis held not lawful for a constable, &c. to take up any woman, as a *nightwalker*, on bare suspicion only, of being of ill fame; much less be guilty of a breach of the peace, or some unlawful act, and ought to be found mistaking. *Hob.* 148. See 2 *Hol.* a *night*. P. C. 89. See *Black. Com.* 4 V. 224.

Detachable, or *Detachable*, or *Detachable*. Is the judgment given against the plaintiff in an action, either in bar of his action, or in abatement of his writ or bill, &c. *Co.* Lit. 364.

Detachable, or *Detachable*, is a common plea to an action of debt, where the money is paid: But 'tis no plea in covenant, or breach of covenant for non-payment of rent, &c. 3 *Lev.* 170. This action of debt be brought against a sheriff or

The statute of *Westm.* 2. 13 *Ed.* 1. c. 30. having ordained, "that all pleas in either bench, which require only an easy examination, shall be determined in the court before justices of assize, by virtue of the writ appointed by that statute, commonly called the writ of *Wig. et. 1. 1.*" It has been held, that an issue joined in the *King's Bench*

Shedder, is the name of a writ, issuing out of Chancery, returnable in the Exchequer, given by *James Wylm. 2. 23 Ed. 2. c. 36.* By virtue of which Statute, where any one having right to *approve* waste, *pollard*, &c. makes and erects a ditch or an hedge, and it is thrown down in the *right* time, and it cannot be known by a ver-

dict of ~~the~~ or a jury, by whom : if the neighbouring vills will not indict such as are guilty, they shall be distrained to make again the hedge or ditch at their own costs, and to answer damages. 2 Inst. 476. And the *Noctanter* writ thereupon is directed to the sheriff of the county, commanding him by the oath *Proborum & legalium hominum com' predict' inquirer. qui malefactores pacis Dom. Regis perturbatores apud, &c. Serps & Fossata A. B. ibidem per ipsum nuper levat' Noctanter aut tali tempore quafacta eorum sciri non credebant profranger, ad dampnum pred. A. B. & contra pacem Dom. Regis, &c.* And on the return of this writ by the sheriff, that the same is found by inquisition, and the jury are ignorant who did it; the return being filed in the *Crown Office*, there goes out a writ of inquiry of damages, and a *Disfringe* to the sheriff to distrain *propinquas villas sepes & Kensturas pred. circumadjacentes sepes, &c. prostrat. levare ad vestis suos proprios*, and also to restore the damages, &c.

The circumadjacent vills intended by the statute, are the contiguous vills round the place; and if they are not contiguous, they are not guilty, and may plead so; And when other vills near of as great value, by favour or negligence of the sheriff are not summoned, &c. they may plead as tenants do, where all are not summoned. As to the pleadings to this writ, where more damages are found than there ought to be; the defendants may by prostration deny the fact, or confess and aver that the damages were but small; and traverse that the party ~~pleaded~~ *dam* to the sum found, or any other sum beyond what they admit; or may plead Not guilty, and in their defence say matter which will be a bar to the prostrator, but satisfaction. 2 Lill. Abr. 277.

Here if the vills repair, damages ought not to be given to the value of the repairs; and if the vills which are liable there to have repaired, it ought to be to help them in the trial of the *quantum damificatus*, that the other damages ought only to be considered; *Id.* The charges of the defence for the several vills must be raised by agreement; and if they cannot agree, each vill is to bear their own charges, as in case of a suit against a *diversed* vill execution; and then the statute of 27 *Edw.* hath provided a remedy.

The writ of *Noctanter*, by the better opinion, lies for the prostration as well of all inclosures as those repaired out of Commons; but if it be not in the right, this writ will not lie: And there ought to be a *commencement* time (which the court is to judge of) before the writ is brought for the country to inquire of, and within the return, which Sir *Edw. Coke* says should be a year and a day. 2 Inst. 476. *Cro. Jac. 400. 11 Feb. 1655.* And if any one of the offenders be indicted, the defendants must plead it, &c.

The word *Noctanter* is so necessary in an indictment of burglary, that it hath been adjudged insufficient without it. *Cro. Eliz. 483.*

Notus & Notus de Notis. In the book of *Druid* day we often meet with *Notus de Notis*, or *Notus de Notis*; which is understood of an agreement of men and drink for so many nights: For in the district of the *Notus* *Saxons*, time was computed not by days, but nights; and so it continued till the reign of King *Edw. 1.* as appears by his laws, cap. 66, 76. And from hence it is still usual in *law & Notus*, i. e. before sunset for a week; and a *Notus* for two weeks, &c. *Notus de Notis*.

Notus de Notis. (Sax.) The ancient *Notus* *de Notis* is derived from the old Saxon word, *Notus*, *de Notis*, and *Notus* *de Notis* in Saxon is *Notus*, and *Notus* *de Notis* in Saxon is *Notus*. But by *Notus* it is said to come from the Saxon word, that is *Notus*; and was used for the *Notus* *de Notis*.

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the plaintiff: This was held erroneous; for the plaintiff ought also to be amerced. 8 Rep. 58.

Where there are two defendants, and one pleads Not guilty, and the other another plea; if on demurrer there is judgment for the plaintiff against one on the demurrer, and a *nolle prosequi* for the other, there it ought to be *eat sine die*, or it is ill; and the entry of *Quid eat sine die* is a discharge to the defendant. *Cro. Jac. 439. Hob. 180.*

In an action brought against three persons, one of them pleads the general issue, and the others specially; the plaintiff demurs on the special plea, and tries the general issue, on which he hath a verdict and judgment; but before judgment on the demurrer he enters a *nolle prosequi* as to the demurrer: and it was adjudged that if the *nolle prosequi* had been entered before verdict and judgment, it had discharged the whole action; being in nature of a release in law to the other: So also if judgment had been against all the defendants, and the plaintiff had entered the *nolle prosequi* for two; for nonsuit or release, or other discharge of one, discharges the rest. *Hob. 70.*

But in trespass against two, one pleaded Not guilty, the other justified; and both issues being found for the plaintiff, and several damages and joint costs assessed; the plaintiff then entered a *nolle prosequi* against one, and took judgment against the other for damages found against him, and the costs; upon which it was insisted on for error, that the entry of a *nolle prosequi* before judgment as to one, is a release to him, and *quasi* a release to both: *The Court*, saying an absolute release, but as it were an agreement that the plaintiff will not proceed against the one; and as to him it is a bar, but he may proceed against the other; and where they sever by pleas, there may be proceedings against one, and a *nolle prosequi* against the other. *Cro. Jac. 400. 243. 2 Lill. 220.* It has been held, in trespass against three defendants; if a *nolle prosequi* were entered against two, before judgment against any of them, it had not amounted to a release to them all; only to a waiver of suit: And the three defendants cannot join in a writ of error; for those against whom the *nolle prosequi* is entered, are not damaged. *Jenk. Cent. 309.*

A *nolle prosequi* does not amount to a *retraxit* or release, where there are more defendants. *Ld. Raym. 599.*

If there are divers issues, or an issue and demurrer in one cause against one person, joined between the parties, the plaintiff may enter on the roll a *nolle prosequi*, that he will not proceed on one or more of the issues, or demurrer joined; and may notwithstanding go to trial upon the rest of the issues, or argue the demurrer. *Hill. 23 Car. 2. 2.*

The King may enter a *nolle prosequi* on an information; but it shall not stop the proceedings of the informer. *Law. 119.* And if an informer cause a *nolle prosequi* to be entered, the defendant shall have costs, &c. by *stat. 1 Ed. 3. c. 15. & M. c. 18.* *Kobbe* mentions a *nolle prosequi* entered by attorney. *3 Kob. 332.* Also the King may, by his *Attorney General*, enter a *nolle prosequi* on an indictment.

And the clerk of the Crown cannot enter a *nolle prosequi* on an indictment, without leave of the *Attorney General*. *Ld. Raym. 599.*

Notus de Notis. One who opens the etymologies of words, interpreted *Notus de Notis* by the learned *Notus*, *Notus*.

Notus de Notis. (Sax.) The ancient *Notus* *de Notis* is derived from the old Saxon word, *Notus*, *de Notis*, and *Notus* *de Notis* in Saxon is *Notus*, and *Notus* *de Notis* in Saxon is *Notus*. But by *Notus* it is said to come from the Saxon word, that is *Notus*; and was used for the *Notus* *de Notis*.

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subservant to the nominator, being contrary to his dignity. *Hugh's Pars. Law* 76, 77. Right of nomination may be forfeited to the crown as well as presentation; where the nominator corruptly agrees to nominate within the statute of *Simony*, &c.

Nomina Villarum. *Edw. 2.* sent his letters to every sheriff in *England*, requiring an exact account and return into the *Exchequer* of the names of all the villages, and possessors thereof in every county; which being done accordingly, the returns of the sheriffs all joined together are called *Nomina Villarum*, still remaining in the *Exchequer*. Anno 9 Ed. 2.

Nomine Pene. A penalty incurred for not paying rent, &c. at the day appointed by the lease or agreement for payment thereof. 2 *Lill. 221.* If rent is reserved, and there is a *nomine pene* on the non-payment of it, and the rent be behind and unpaid, there must be an actual demand thereof made, before the grantee of the rent can distrain for it; the *nomine pene* being of the same nature as the rent, and issuing out of the land out of which the rent doth issue. *Hob. 82; 133.* And where a rent-charge was granted for years, with a *nomine pene* and clause of distress, if it was not paid on the day; on the rent's being behind, and the term expired, the court was moved that the grantee might distrain for the *nomine pene*; but it was held that he could not, because the *nomine pene* depended on the rent and the distress was gone for that, and by consequence for the other. 2 *Nels. Abr. 1182.* See *stat. 8 Ann. c. 17.*

When any sum *nomine pene* is to be forfeited for non-payment of the rent at the time, &c. the demand of the rent ought to be precisely at the day, in respect of the penalty: And debt will not lie on a *nomine pene*, without a demand. 7 *Rep. 28.* *Cre. Elix. 383.* Style 4. If there is a *nomine pene*, of such a sum for every day after rent becomes due, it has been a question whether there must be a demand for every day's *nomine pene*, or one demand for many days: And by the better opinion it hath been holden, that for every day there ought to be a demand; and that one will not be sufficient for the whole: But where a *nomine pene* of 40 s. was limited *quolibet die proximo* the feast-day on which the rent ought to be paid, it was adjudged that there was but one 40 s. forfeited; because the word *proximo* must relate to the very next day following the rent day; so likewise when the rent became due and unpaid at the next rent day after that, and so on. *Palm. 207.* 2 *Nels. 1182.* An assignee is chargeable with a *nomine pene* incurred after the assignment, but not before. *Moor 357.* 2 *Lill. Abr. 221.* Tho' forfeiture is mentioned to be *nomine pene*, on not paying of a collateral sum; it is no *nomine pene*, if it be not of a rent. *Lutw. 1156.*

Non-ability. Is an exception taken against the plaintiff in a cause, upon some just ground, why he cannot commence any suit in law; as *premunire*, *outlawry*, *excommunication*, &c. *F. N. B. 35, 65.* Vide *Disability*.

Pone & Decime. Payments made to the church by those who were tenants of church farms; where there was a rent or duty for things belonging to husbandry, and *decime* were claimed in right of the church. Formerly a ninth part of moveable goods was paid to the clergy in the death of persons in their parish, which was called *maragium*; and claimed on pretence of being distributed to pious uses. *Blount.*

Non-age. In general understanding is all the time of a person's being under the age of one and twenty; and in a special sense, where one is under fourteen, as to marriage, &c.

Non Assumpsit. A plea in personal actions, whereby a man denies any promise made, &c. See *Assumpsit*.

Non Assumpsit infra sex Anos. Where a defendant by virtue of the statute of Limitations, 21 *Jac. 1. c. 16.* pleads that he did not undertake or promise within six years before the commencement of the action: As a plea of *Non accituit infra sex annos* is pleaded by virtue of the same statute. This last plea is proper where the cause of action does not accrue, at the time of the promise made, as in the case of a note, payable at some time, specified, but subsequent to the date.

N. B. The commencement of the action is the actual taking out of the plaintiff's writ. And the computation is to be up to that day, tho' in vacation, and not to the test of the writ only.

Non-claim. Is an omission or neglect of one that claims not within the time limited by law, as within a year and a day, where *continual claim* ought to be made; or in five years after a *fine* levied, &c. By which a man may be barred of his right of entry. *Stat. 4 H. 7. c. 24. 32 H. 8. c. 33.* See *Claim*.

Non compos mentis. Is where a person is not of sound mind, memory, and understanding. And there are four sorts of *Non compos mentis*. 1st, An idiot, or natural fool. 2^{dly}, A madman, or one who was of *sane* memory, but hath lost his understanding by sickness, accident or misfortune. 3^{dly}, A lunatick, sometimes of *sane* memory, at other times not so. 4^{thly}, A drunkard who deprives himself of his memory and understanding for a time. But tho' a drunken person is *Non compos mentis*, it shall give no privilege or benefit to him, as to acts done, &c. And his drunkenness shall not extenuate, but rather aggravate his offence, as well touching his life as his lands or goods. 1 *Inst. 264.* 4 *Rep. 125.*

A deed of feoffment, grant, &c. made by a person *Non compos mentis* is voidable; his heir as privy in blood, may shew the disability of his ancestor, and avoid his grants; and his executors, &c. as privies in representation may do the same, by setting forth the infirmity of the testator or intestate. 4 *Rep. 126.* Where a person of *sane* memory becomes *Non compos mentis*, and afterwards alienates his lands or goods; if he be found *Non compos*, and that he had alienated, the King may protect him, and take the profits of his lands, &c. to maintain him and his family. 4 *Rep. 127.* And he who hath the custody of a man of *Non sane* memory is accountable as bailiff to the *Non compos*, his executors or administrators, *Ibid.* A man *Non compos mentis* shall not lose his life for felony or murder, he cannot be guilty of murder. 3 *Rep. 124.* 3 *Inst. 51, 54.* Tho' if one who wants discretion or understanding, does any corporal hurt to, or trespass against another; he may be compelled by action to render damages. 35 *H. 6. 1 Inst. 247.* 1 *Hawk. P. C. 2.* Vide *Idiot, Lunatick.*

Non-conformists. The statutes, 1 *Elix.* and 13 *Car. 2.* were made for the uniformity of Common Prayer, and service in the church; and persons not conforming thereto are subject to penalties. Statute 10 *Ann. c. 2.* And it has been held, that a dissenting minister is not conforming to bear offices of charge, &c. in the government. 4 *Mod. 273, 274.* *Non-conformists* to be punished by imprisonment, and to submit in three months, or abjure the realm. 35 *Elix. c. 1.* Keeping a *Non-conformist* in the house after notice, subject to the penalty of ten pounds a month. 35 *Elix. c. 1.* Penalties on being at conventicles. 10 *Car. 2. c. 4.* 22 *Car. 2. c. 1.* *Non-conformist* ministers prohibited to come within five miles of a corporate town, &c. 17 *Car. 2. c. 2.* prohibited to teach school. 15 *12 Ann. p. 2. c. 7.*

The penal laws do not extend to Protestant dissenters. Protestant dissenting ministers freed from parish offices, and serving upon juries. 1 *W. & M. c. 18.* Penalty on disturbing their worship. 16 *Dissenters* permitted to qualify according to the toleration act, pending a petition. 10 *Ann. c. 2.* Toleration of the episcopal communion in *Scotland*. 10 *Ann. c. 7.* Penalty on magistrates being at conventicles in their habit. 5 *Geo. 1. c. 4.* Episcopal meeting houses in *Scotland* to be registered. 10 *Geo. 2. c. 38.* Penalty on unqualified ministers officiating in *Scotland*. 16 *Episcopal ministers in Scotland*, to be ordained by a bishop of *England* or *Ireland*. 16 *23 Geo. 2. c. 33.* Peers and others present at unlawful meeting houses in *Scotland* disqualified from voting. 10 *Elix. c. 38.* A form of affirmation to be taken instead of an oath by the members of the *United Fraternity*. 22 *Geo. 2.* Privileges granted to the members of the *United Fraternity*, who shall settle in *America*. *Ib.*

Non Culpaibilis. A plea of Not guilty to any action of trespass, or tort, or to an indictment, &c. See *Non est culpaibilis*.

Non damnificatus, Is a plea to an action of debt upon a bond, with condition to save the plaintiff harmless. 2 Lill. Abr. 224. If the condition of a bond be to save harmless only, *Non damnificatus* generally is a good plea; but if it be to discharge the plaintiff, &c. then the manner of the discharge is to be shewn. 1 Leon. 72. When one pleads a discharge, and that he saved another harmless, he ought to shew how he did it, that the court may judge thereof: Tho' a defendant may plead *Non damnificatus*, without shewing it: because he pleads in the negative, and then the other party shall shew damnification. Cro. Jac. 363. 2 Rep. 3, 4. March 121. It has been adjudged, where a condition of a bond is to save harmless from all suits in general, *Non damnificatus* may be pleaded; and if it is in a particular suit or thing, there the defendant must set forth how he hath saved harmless and discharged; but where a suit is upon a counter-bond, the plea of *Non damnificatus* is good. 8 W. 3. B. R. 5 Mod. 243.

Non Decimando. A custom or prescription: *De Non decimando* is to be discharged of all tithes, &c. See *Modus Decimandi*.

Non Distringendo, A writ not to distrain, used in divers cases. Table of Reg. of Writs.

Nones, (*nona*) of every month is, the seventh day of March, May, July, and October; and the fifth day of all the other months. By the Roman account the *nones* in the afore-mentioned months are the six days next following the first day, or the *calends*; and of others the four days next after the first, according to these verses,

*Sex Nonas Majus, October, Julius & Mars,
Quatuor at reliqui, &c.*

Tho' the last of these days is properly called *Nones*; for the others are reckoned backwards as distant from them, and accounted the third, fourth, or fifth *nones*, &c. And *nones* had their name from their beginning the ninth day before the *ides*. See *Idea*.

Non est Culpabilis, Or *Non Cul.* is the general plea to an action of trespass, whereby the defendant absolutely denies the fact charged on him by the plaintiff: Whereas in other special pleas, the defendant admits the fact to be done, but alleges some reasons why he lawfully might do it. And as the plea of *Non Cul.* is the general answer in actions of trespass, being actions criminal, civilly prosecuted; so it is likewise in all actions criminally followed, either at the suit of the King or any other, where the defendant denies the crime for which he is brought to trial. S. P. C. lib. 2. c. 63.

Non est factum, A plea where an action is brought upon a bond, or any other deed, and the defendant denieth that to be his deed whereon he is impleaded. *Brake*. In every case where a bond is void, the defendant may plead *Non est factum*: But when a bond is voidable only, he must shew the special matter, and conclude judgment *Si assio*, &c. 2 Lill. 226.

This plea is good in all cases where the bond or specialty was not executed.

Or, if it was executed, but was void *ab initio*: As, for default of capacity; if the obligor was a *Monk, feme covert*, &c. he may plead a special *Non est factum*.

It ought to conclude to the country; but if the plaintiff pleads over to the special matter, it will be well. 1 Salk. 274.

A special *Non est factum* puts the proof upon the defendant, which upon *Non est factum* generally, will be upon the plaintiff. *Mod. Cas.* 218.

If a deed is sued in a material part, by which it becomes void, the person bound by it may plead *Non est factum*, and give the matter in evidence; because it was not his deed at the time of the plea. 11 Rep. 27.

A bond was dated November the 10th, and so set forth in the plaintiff's declaration; the defendant pleaded *Non est factum*, and tho' it was found that it was not delivered till the eighteenth, the issue being upon a *Non est factum*, it appeared to be his deed: But it is said the defendant might have helped himself by pleading specially. *Cro. Jac.* 126.

The defendant pleads *Quod factum prædict.* was made and delivered without a date, and that the plaintiff put a date to it, and so *Non est factum*; this was held naught upon a demurrer, for the defendant confesses the deed, by saying *factum prædict.* and afterwards denies it; tho' he might have said generally, *Non est factum*. *Cro. Eliz.* 800. Where two are jointly bound in a bond, and an action is brought on it against one only, he cannot plead *Non est factum*, or demur in that case; but may have his plea in abatement of the writ. 5 Rep. 119. None but the party, his heirs, executors, &c. can plead *Non est factum*. *Lutw.* 662. For a stranger to the deed cannot plead a special *Non est factum*; but must say *Nothing passed by the deed*. 1 Roll. 188. See *Com. Dig.* 5 V. 222, 223.

Non est Inventus, The sheriff's return to a writ, when the defendant is *Not to be found* in his *Bailiwick*. And there is a return that the plaintiff *Non invenit plegium*, on original writs. *Shep. Epit.* 1129.

Nonfeasance. An offence of omission of what ought to be done; as in not coming to church, &c. which need not be alleged in any certain place; for generally speaking it is not committed any where; But *nonfeasance* will not make a man a trespasser, &c. 1 Hawk. 13. *Hob.* 251. 8 Rep. 146.

Non implacitando aliquem de Libero Tenemento sine Rege, A writ to prohibit bailiffs, &c. from distraining or impleading any man touching his freehold; without the King's writ. *Reg. Orig.* 171.

Non intromittendo, quando Breve Practise in Capite subdote imperatur, Was a writ directed to the justices of the Bench, or in Eyre, commanding them not to give one, who had, under colour of intitling the King to land, &c. as holding of him in capite, deceitfully obtained the writ called *Practise in Capite*, any benefit thereof, but to put him to his writ of right. *Reg. Orig.* 4. This writ having dependance on the court of Wards, since taken away, is now disused.

Nonjurors, Are persons who refuse to take the oaths to government, who are liable to certain penalties; and for a third offence to abjure the realm, by 13 & 14 Car. 2. c. 1. Parsons, vicars, &c. are to take the oaths, and give their assent to the declaration 14 Car. 2. c. 4. or they shall not preach, under the penalty of 40 l. &c. *Stat.* 17 Car. 2. c. 2. Ecclesiastical persons not taking the oaths on the revolution, were rendered incapable to hold their livings: but the King was impowered to grant such of the nonjuring clergy as he thought fit, not above twelve, an allowance out of their ecclesiastical benefices for their subsistence, not exceeding a third part. 1 W. & M. sess. 1. c. 8. Persons refusing the oaths, shall incur, forfeit, and suffer the penalties inflicted on Popish recusants, and the court of Exchequer may issue out process against their lands, &c. 7 & 8 W. 3. c. 27. See the *Stat.* 1 Geo. 1. c. 55. and *Oaths*.

Non Spectandizando virtualia, Is a writ to justices of assize, to inquire whether the magistrates of such a town do sell virtuals in gross, or by retail; during the time of their being in office, which is contrary to an ancient statute; and to punish them if they do. *Reg. Orig.* 184.

Non Spectando, A writ that lies for a person who is molested contrary to the King's protection granted him. *Reg. of Writs* 184.

Non obstante, (*Notwithstanding*) Is a clause frequent in statutes and letters patent; and is a licence from the King to do a thing which at the Common law might be lawfully done; but being restrained by act of parliament, cannot be done without such licence, *Vaugh.* 347. *Plowd.* 501. It is ordained by the statutes of 2 E. 3. 14 E. 3. and 13 R. 2. that the King's pardon of notorious felonies, &c. should not be granted, altho' with the words *Non obstante* any statute; Yet patents of pardon of such offences, were allowed with a *Non obstante*, and notwithstanding any clause to defeat the same. *Jenk. Cent.* 308. The *Stat.* 18 Eliz. 1. 2. confirmed all grants of the Queen by letters patent, of any honours, castles, manors, lands, tenements, &c. and that they should stand and be good in law against the Queen, her heirs and successors, *Non obstante* any mis-naming, mis-recital, want of certainty, finding

finding offices or inquisitions, livery of seisin, &c. By 14 Car. 2. c. 11. it was declared, that all grants of pensions, &c. and every *Non obstante* therein contained, should be void. And the 1 W. & M. c. 2. makes dispensations, *Non obstante* to statutes, void; unless allowed therein. See *Dispensations and Grants of the King*. And *Black. Com.* 1 V. 342. 2 V. 273. 4 V. 394.

Non omittas, Is a writ directed to the sheriff, where the bailiff of a liberty or franchise who hath the return of writs refuses or neglects to serve a process, for the sheriff to enter into the franchise and execute the King's process himself, or by his officer: Before this writ is granted, the sheriff ought to return, that he hath sent the bailiff, and that he hath not served the writ; but for dispatch, the usual practice is to send a *Non omittas* with a *capias* or *latitat*. F. N. B. 68, 74. 2 Inst. 453. If a sheriff return that he sent the process to the bailiff of a liberty, who hath given him no answer; a *Non omittas* shall be awarded to the sheriff: And if he returns that he sent the process to such bailiff, who hath returned a *cepi corpus*, or such like matter; and the bailiff bring not in the body, or money, &c. at the day, the bailiff shall be amerced, and a writ issue to the sheriff to distrain the bailiff to bring in the body. 2 Harok. 143. Writs of *capias utlagatum*, and of *Quo minus* out of the Exchequer, and it is said all writs whatsoever at the King's suit, are of the same effect as a *Non omittas*; and the sheriff may by virtue of them enter into a liberty and execute them. 2 Lill. Abr. 229. The Reg. of Writs mentions three sorts of this writ, which was given to prevent liberties being privileged to hinder or delay the general execution of justice: and the clause of the *non omittas* is, *quod non omittas, propter aliquam libertatem* (viz. of the liberty to which the sheriff hath made a *mandavi ballivo, qui nullum dedit responsum*) *quin in eum ingrediari & capias A. B. Si, &c.*

Non plevin, (*non plevina*) Is defined to be *desaltam post desaltam*; and in *Hengham Magna*, cap. 8. it is said, that the defendant is to replevy his lands seized by the King within fifteen days; and if he neglects, then at the instance of the plaintiff at the next court day, he shall lose his seisin, *sicut per desaltam post desaltam*: but by statute it was enacted, that none should lose his land, because of *non-plevin*, i. e. where the land was not replevied in due time. 9 Ed. 3. c. 2.

Non ponendis in Missis & Juratis, Is a writ granted for freeing and discharging persons from serving on assises and juries; and when one hath a charter of exemption, he may sue the sheriff for returning him. This writ is founded on the Stat. of Westm. 2. c. 38. And the Stat. *Articuli Super Chartas*, cap. 9. F. N. B. 165. 2 Inst.

127. 447.

Non procedendo ad Missam Rege inconsulto, A writ to stop the trial of a cause appertaining to one who is in the King's service, &c. until the King's pleasure be farther known. Reg. Orig. 220.

Non Pros, or **Non Prosecutus**. If a plaintiff in an action, doth not declare the defendant within reasonable time, a rule may be entered against him by the defendant's attorney to declare; and thereupon a *non prof.* &c. *Pradis. Solic.* 222. And a plaintiff may enter a *non prof.* against one defendant, where there are two who sever in their pleas, before the record of the cause is sent down by *Nisi prius* to be tried at the assises: but it is said there cannot be a *non prof.* on a trial at the assises. 3 Salk. 246. Tho' in action against several defendants, it has been ruled otherwise. 2 Salk. 456. *Non pros* have been frequent on informations; but never upon indictments, till the reign of Charles II. *Ibid.* See *Nolle Prosequi*, and *Nonsuit*.

Non-Residence, Is applied to those spiritual persons who are not resident, but wilfully absent themselves for the space of one month together, or two months at several times in one year, from their dignities or benefices, which is liable to penalties, by the statute against *non residence*. 21 H. 8. c. 13. But chaplains to the King, or other great persons, mentioned in this statute, and the 25 H. 8. c. 16. may be *non-resident* on their livings; for they are excused from residence whilst they attend those who retain them; and bishops are not punishable by statute for *non residence*; but if a bishop hold a deanery, parsonage, &c. in com-
dam with his bishoprick, he is punishable by 21 H. 8.

for *non-residence* on the same. Also where bishops are *non-resident* on their bishopricks, they are liable to ecclesiastical censure; and the King may issue a mandatory writ for their attendance thereon, and compel them to it by seizing their temporalities, a remarkable precedent whereof we have in the case of the bishop of Hereford, in the reign of Hen. III. 2 Inst. 625. See *Residence*.

Non Residentia pro Clericis Regis, Is a writ directed to the bishop, charging him not to molest a clerk, employed in the King's service, by reason of his *non-residence*; in which case he is to be discharged. Reg. Orig. 58.

Non sane Memory, (*Non sane Memoria*) Is used in law for an exception to an act, declared to be done by another, whereon the plaintiff in any action grounds his plaint; and the effect of it is, that the party who did that act, was not well in his senses when he did it, or when he made his last will and testament. *New Book Entries*. And *sane memory* for the making of a will is not always where the testator can answer Yes or No, or in some things with sense; but he ought to have judgment to discern, and be of perfect memory, or the will shall be void. Moor, c. 1051. See *Non compos Mentis*.

Nonsense. Where a matter set forth is grammatically right, but absurd in the sense and unintelligible, some words cannot be rejected to make sense of the rest, but must be taken as they are; for there is nothing so absurd but what by rejecting may be made sense; but where a matter is nonsense by being contradictory and repugnant to somewhat precedent, there the precedent matter which is sense shall not be defeated by the repugnancy which follows, but that which is contradictory shall be rejected; as in ejectment where the declaration is of a demise the 2d of January, and that the defendant *posse*, *scilicet* the 1st of January, ejected him; here the *scilicet* may be rejected as being expressly contrary to the *posse*, and the precedent matter; per Holt Ch. J. 1 Salk. 324. Trin. 2 Ann. B. R. Wyat v. Aland.—But per Powell J. Words unnecessary might in construction be omitted or rejected, tho' they are not repugnant or contradictory, but in *caeteris omnibus* agreed with the Ch. J. *Ibid.* See *Mistake*.

Non solvendo pecuniam, ad quam clericus multatur pro non residentia, Is a writ prohibiting an ordinary to take a pecuniary mulct, imposed upon a clerk of the King's for non-residency. Reg. of Writs, fol. 59.

Non-suit, (*non est prosecutus*, &c.) Is a renunciation of the suit by the plaintiff or defendant, most commonly, upon the discovery of some error or defect, when the matter is so far proceeded in, as the jury is ready at the bar to deliver their verdict. The Civilians term it *Lists renunciationem*. Cowell.

Where plaintiff is demanded and doth not appear, he is said to be nonsuit; this usually happens, where upon trial, and when the jury are ready to give their verdict, the plaintiff discovers some error or defect in the proceedings, or is unable to prove a material point, &c. and thereupon the plaintiff may be demanded, (as he must be) his default is recorded by the secondary, and the entry is *in misericordia quia non prosecutus est breve suum*; upon which defendant recovers his costs against him; but this arising from some supposed neglect or oversight, the plaintiff, except in some particular cases, is not barred from commencing a new action. For the form of the entry, see Cro. Jac. 213. 2 Leon. 177. 4 Mod. 86. 2 Salk. 456.

Where a plaintiff is nonsuit, if he will again proceed in the same cause, he must put in a new declaration; for by being nonsuit, it shall be intended that he had no such cause of suit as he declared in, so that declaration is void, and he hath no day in court. 2 Lit. Rep. 231. 3 Bar. Abr. 679.

1. Who may be nonsuit; in what action, and at what time there may be a nonsuit.

2. How far the nonsuit of one, shall be the nonsuit of another; and how far a nonsuit for part of the thing in demand shall be a nonsuit for the whole.

3. Of the effect of a nonsuit; and of its being a temporary bar.

1. Who may be nonsuit; in what actions, and at what time there may be a nonsuit.

It is agreed, that the King being in supposition of law always present in court, cannot be nonsuit in any information or action wherein he is sole plaintiff; but it is held, that any informer *qui tam*, or plaintiff in a popular action, may be nonsuit, as well in respect of the King as of himself. *Bro. Nonsuit* 68. *Co. Lit.* 139. b. 2 *Roll. Abr.* 131.

If an infant bring an assise by guardian, altho' the infant disavow the suit in proper person, yet no nonsuit shall be awarded. 39 *Aff. pl.* 1. 2 *Roll. Abr.* 130. S. C.

Where an executor need not name himself executor, he shall pay costs upon a nonsuit, and the naming himself executor shall not exempt him from it. 6 *Mod.* 181.

If an attorney of the Common Pleas sues an action there, he shall not be demanded, because he is supposed always present aiding the court. 2 *H. 6.* 44. b. 1 *Roll. Abr.* 581. S. C.

A person may be nonsuit in a writ of error. 2 *Roll. Abr.* 130. 1 *Sid.* 255. S. P.

A person may be nonsuit in a writ of false judgment. 20 *H. 6.* 18. b. 2 *Roll. Abr.* 130. S. C.

One cannot be nonsuit in an action in which he is not an actor or demandant; and tho' he afterwards becomes an actor, yet not being originally so, he cannot be nonsuit as an avowant; so of garnishees who become actors, but were not so originally. 22 *Ed.* 4. 10.

So if a person outlawed hath a charter of pardon, and sues a *scire facias* against the party, tho' hereby he is an actor, yet he cannot be nonsuit. 2 *Roll. Abr.* 130.

So if a man traverse an office he cannot be nonsuit, altho' he is an actor, for he hath no original pending against the King. 2 *Roll. Abr.* 130. *Dyer* 141. pl. 47. this is made a *querela*.

But in a petition of right against the King the plaintiff may be nonsuit. 11 *H. 4.* 52. 2 *Roll. Abr.* 130.

So in an *audita querela*, to avoid a statute, the plaintiff may be nonsuit, for he is plaintiff in this action. 47 *Ed.* 3. 5. b.

If to two *nibils* returned to a *scire facias* on a charter of pardon, the plaintiff does not appear, he shall be nonsuit; for the statute ordains, that upon his appearing, he ought to count against the defendant. 45 *Ed.* 3. 16.

At the Common law, upon every continuance, or day given over before judgment, the plaintiff was demandable, and upon his non-appearance might have been nonsuit. *Co. Lit.* 139. b. That if at Common law he did not like the damages given by the jury, he might be nonsuit. 5 *Mod.* 208.

But now by 2 *Hen. 4. cap. 7.* it is enacted in the words following: "Whereas, upon verdict found before any justice in assise of *novel disseisin*, *mort d'ancestor*, or any other action whatsoever, the parties before this time have been adjourned upon difficulty in law, upon the matter so found; it is ordained and established, that if the verdict pass against the plaintiff, the same plaintiff shall not be nonsuited."

Notwithstanding this statute, it hath been held, that the plaintiff may be nonsuited after a special verdict, or after a demurrer and argument thereon. *Co. Lit.* 139. 2 *Jon.* 1. 2 *Roll. Abr.* 131-2. 3 *Leon.* 28. and see 2 *Harwk. P. C.* 184.

If there be judgment to account, and auditors assigned, and thereupon a *capias ad computandum*, the plaintiff cannot be nonsuited on the original, because the original is determined by the judgment to account. 2 *Roll. Abr.* 131. See *Co. Lit.* 139. b.

Stat. 14 *Geo. 2. cap. 17.* Where issue is joined in an action at law, and the plaintiff shall neglect to bring such issue to be tried according to the course of the court; it shall be lawful for the judges on motion in open court (due notice having been given thereof) to give the like judgment for defendant as in cases of nonsuit; unless the judge shall on reasonable terms allow further time for trial of

such issue; and if the plaintiff neglect to try such issue within the time allowed, then the judge shall give judgment as aforesaid.

All judgments given by virtue of the act, to be of the like effect as judgments upon nonsuit. The defendant shall upon such judgment be awarded his costs, in any action where he would upon nonsuit be intitled to the same. No indictment, information, or cause shall be tried at *nisi prius* before any judge of assise or *nisi prius*, or at the sittings in London or Westminster, where the defendant resides above 40 miles from the said cities respectively, unless notice of trial in writing has been given 10 days before. In case any party shall have given such notice of trial, and shall not afterwards duly countermand the same in writing six days before such intended trial, every such party shall be obliged to pay unto the party to whom notice was given, the like costs as if such notice had not been countermanded.

2. How far the nonsuit of one shall be the nonsuit of another; and how far a nonsuit of part of the thing in demand shall be a nonsuit of the whole.

In real or mixt actions, the nonsuit of one demandant is not the nonsuit of both; but he who makes default shall be summoned and seivered; but regularly in personal actions, the nonsuit of one is the nonsuit of both. *Co. Lit.* 139. 2 *Inst.* 563. 2 *Roll. Abr.* 132. Several cases to this purpose.

But in personal actions brought by executors, there shall be summons and severance, because the best shall be taken for the benefit of the dead; and so it is in action of trespass, as executors, for goods taken out of their own possession. Like law in account, as executors by the receipt of their own hands. *Co. Lit.* 139. a. See *Executors*.

In an *audita querela* concerning the personalty, the nonsuit of the one is not the nonsuit of the other; because it goeth by way of discharge, and freeing themselves, therefore the default of the one shall not hurt the other. *Co. Lit.* 139. In an *audita querela*, *scire facias*, *attaint*, the nonsuit of one shall not prejudice the other. 6 *Co.* 26.

In a *quid juris clamat*, the nonsuit of the one is the nonsuit of both; because the tenant cannot attorn according to the grant. *Co. Lit.* 139. a.

An appeal against divers, whether they plead the same or several issues, it hath been adjudged, that a nonsuit against one, at the trial of any one of the issues, is a nonsuit as to all, because a nonsuit operates in nature as a release of the whole. *Cro. Eliz.* 460. pl. 6. *Dyer* 120. 2 *Roll. Abr.* 133. 1 *Sid.* 378.

A *latitavit* was sued out against four defendants in trespass, the plaintiff was nonsuit for want of a declaration; and the defendant's attorney entered four nonsuits against him; and it was held to be irregular, because the trespass is joint; and tho' the plaintiff may count severally against the defendants, yet it remains joint till severed by the count. 2 *Salk.* 455. There is a nonsuit before appearance at the return of the writ, or after appearance at some day of continuance. *Co. Lit.* 138. b.

It is laid down as a general rule, that a nonsuit for part is a nonsuit for the whole; but it hath been held, that if a defendant plead to one part, and thereupon issue is joined, and demur to the other, the plaintiff may be nonsuit as to one part, and proceed for the other. 2 *Leon.* 177. *Heb.* 180.

If in debt the defendant acknowledges the action as to part, and joins issue as to the residue, and the plaintiff hath judgment for that which is confessed; but there is a *cessat executio*, by reason of the damages to be assessed by the jury; if the plaintiff be nonsuited in this issue, this shall be a nonsuit for the damages to be given, because that he had judgment. 2 *Roll. Abr.* 134.

If in trover the defendant pleads, that as to some of the goods they were fixed to his freehold, as to others that he had them of the gift of the plaintiff, and as to the rest *Not guilty*; and as to the first, the plaintiff enters *non vult ulterius persequi*; this amounts only to a *retrahit*, and is no nonsuit, so as to bar the plaintiff from proceeding on the other parts of the plea, on the rule, that a non-

suit for part is a nonsuit for the whole. 2 Leon. 177. *Sir John Sands v. Pascal Brocas.*

3. Of the effect of a nonsuit; and of its being a temporary bar.

A nonsuit, as hath been observed, is regularly no peremptory bar; but the plaintiff may, notwithstanding, commence any new action of the same or like nature; but this general rule hath the following exceptions.

1. It is peremptory in a *quare impedit*; and in that action a discontinuance is also peremptory; and the reason is, for that the defendant had, by judgment of the court, a writ to the bishop; and the incumbent, that cometh in by that writ, shall never be removed; which is a flat bar to that presentation.

2. Nonsuit in an appeal of murder, rape, robbery, &c. after appearance, is peremptory, and this *in favorem vite*; but the nonsuit of the plaintiff in an appeal is not such an acquittal, on which the defendant shall recover damages against the abettors, by *Westm. 2. cap. 12.* unless, after the nonsuit, he were arraigned at the King's suit upon the appeal, and acquitted.

3. So if the plaintiff, in an appeal of mayhem, be nonsuit after appearance, it is peremptory; for the words therein are *felonice mayhemavit*.

4. A nonsuit after appearance is also peremptory in a *nativo habendo*, and the nonsuit of one plaintiff in that action nonsuits both *in favorem libertatis*; for in a *libertate probanda* such nonsuit is not peremptory, neither is the nonsuit of one plaintiff the nonsuit of both. *Co. Lit. 139. a. Cro. Eliz. 881.*

5. Such nonsuit is also peremptory in an attain, but a discontinuance in an attain is not; because there is a judgment given upon the nonsuit, but not upon the discontinuance. *Co. Lit. 139. a.*

For more learning on this subject, see 15 Vin. Abr. tit. Nonsuit; and see Costs, Damages, Process.

Non sum informatus, Is a formal answer made of course by an attorney, who is not instructed or informed to say any thing material in defence of his client; by which he is deemed to leave it undefended, and so judgment passeth against his client. *New Book Entries.*

Non-tenure, Is a plea in bar to a real action, by saying, that he (the defendant) holdeth not the land mentioned in the plaintiff's count or declaration, or at least some part thereof. 25 E. 3. c. 16. 1 Mod. Rep. 250. And our books mention *non-tenure* general and special: general, where one denies ever to have been tenant of the land in question; and special is an exception, alledging that he was not tenant the day whereon the writ was purchased. *West. Symb. par. 2.* When the tenant or defendant pleads *non-tenure* of the whole, he need not say who is tenant; but if he pleads *non-tenure* as to part, he must set forth who is the tenant. 1 Mod. 181. *Non-tenure* in part, or in the whole is not pleadable after impleurment. 3 Lev. 55.

Non-term, (*non terminus*) Is the vacation between term and term; formerly called the time or days of the King's peace. *Lamb. Archb. 126.*

Non-user, Of offices concerning the publick, is cause of forfeiture. 9 Rep. 50. And if one have a franchise, and do not use it, he shall forfeit the same; which likewise may be lost by default, as well as *non-user*. *Stat. 3 Ed. 2. c. 9.* See Office.

Nook of Land, (*nocata terra*) In an old deed of Sir Walter de Pedwardyn, twelve acres and a half of land were called a *nook of land*; but the quantity is generally uncertain. — *illi qui tenuerint dimidiam quergatam terræ, vel nocatam terræ, vel cottagium de bondagii tenura.* Dugd. Warwick. pag. 665.

North Quasi North Rey, The Northern King at Arms, mentioned in 14 Car. 2. c. 33. See Herald.

Northampton, Statutes made there. 2 Ed. 3. for building the town, 27 Hen. 8. c. 1. 27 Car. 2. c. 1.

Northleach School, in the county of Gloucester, how founded and incorporated, 4 Jac. 1. c. 7.

Northumberland and West-beru Counties, Provisions for preventing theft and rapine upon the northern borders, 7 Jac. 1. c. 1. 13 & 14 Car. 2. c. 22. 29 & 30 Car. 2. c. 2. 24 Geo. 2. c. 57. Benefit of clergy taken from

notorious spoil-takers in Northumberland, &c. or justices of assize, &c. may transport them not to return, 18 Car. 2. c. 3. The acts for preventing theft and rapine on the northern borders shall be deemed publick acts. 6 Geo. 2. c. 37. sect. 10.

North Wales. See Wales.

Norwich. In the city of Norwich, or county of Norfolk, no persons shall buy any worsted yarn spun there, but such as work at it in Norwich, &c. on pain to forfeit 40 s. for every pound. 33 H. 8. c. 16. The making of Norwich stuffs is regulated by statute, and penalties and forfeitures for defaults in making them, are leviable by justices of peace, &c. They are to be sealed, and persons having them in their possession unsealed, other than the first owner shall forfeit for every piece 40 s. *Stat. 13 & 14 Car. 2. c. 15.* All manufacturers of stuffs, not journey-men, &c. may be made freemen of Norwich; and persons using trades not being free, shall forfeit 10 l. a month. 9 Geo. 1. c. 9. The election of officers, &c. in the city of Norwich, how to be made by statute. See 3 Geo. 2. c. 8.

Note, Slitting or cutting it off, where felony, 22 & 23 Car. 2. c. 1. See Black. Com. 4 V. 207, 245.

Notary, (*Notarius*) Is a person (usually a scrivener) who takes notes, or makes a short draught of contracts, obligations, or other writings and instruments. *Stat. 27 Ed. 3. c. 1.* At this time we call him a *notary publick*, who publickly attests deeds or writings, to make them authentick in another country; but principally in business relating to merchants: they make protests of foreign bills of exchange, &c. And noting a bill is the notary's going as a witness, to take notice of a merchant's refusal to accept or pay the same. *Merch. Dict.*

Note of a fine, Is a brief of the fine made by the chirographer, before it is engrossed. *West Symb. par. 2.*

Notes promissory, For payment of money. See Bill of Exchange.

Not guilty, Is the general issue or plea of the defendant in any criminal action: and *Not guilty* is a good issue in actions of trespass on the case, and upon the case for deceits or wrongs; but not on a promise, &c. *Palm. 393.* If one hath cause of justification in trespass, and pleads *Not guilty*; he cannot give the special matter in evidence, but must confess the fact, and plead the special matter, &c. 5 Rep. 119. *Vide Non est Culpabilis.*

Notice, Is the making something known; that a man was or might be ignorant of before. And it produces divers effects; for by it the party who gives the same, shall have some benefit which otherwise he should not have had: By this means, the party to whom the notice is given, is made subject to some action or charge, that otherwise he had not been liable to; and his estate in danger of prejudice. *Co. Litt. 309.* Notice is required to be given in many cases by law, to justify proceedings where any thing is to be done or demanded, &c. But none is bound by law to give notice to another person of that which such other may otherwise inform himself, 22 Car. B. R. If one be bound by an *assumpsit* generally to do a thing to another, he to whom the promise is made must give notice when he will have him do it; but if he promise that another person shall do it, there he to whom the thing is to be done is not obliged to give notice to that third person when he will have it done, but the party must procure it at his peril; for he may not know that other person, and there is no privity of contract between them two, as there is betwixt the other two. 2 Lill. Abr. 239. And in case of a promise, it has been adjudged, that where a penalty is to be recovered, notice is requisite; but it is not so where damages are to be recovered; in which case the party hath sufficient notice by the action brought. 1 Bull. 12. If a person promise to pay so much to another at his day of marriage; the party at his peril is to take notice of the marriage. *Cro. Car. 34, 35.* And it is a necessary intendment, that when after the marriage the plaintiff requested payment of the money, that notice was given of the marriage. *Cro. Jac. 228.*

It was held, that if a collateral thing is to be done at or after marriage, there notice is to be given of it; tho' when money is to be paid, it is a debt due to the party by the

the marriage, and may be recovered without any notice given. 2 *Bulst.* 254. Notice must be given to an heir at law of a condition annexed to his estate; or he is not bound to take notice of the condition. 1 *Lutw.* 809. 4 *Rep.* 82. 3 *Mod.* 28. Yet it is said, that the heir is bound to take notice of a proviso in a feoffment; and this difference has been taken, that where notice is required to be given by the original deed or agreement, it is hereditary, and descends to the heir; but if it is collateral to the father, it shall not bind his heir, without express notice. *Winch* 108. 2 *Nely. Abr.* 1186.

A man who is a stranger to a deed, that hath an estate by way of remainder, &c. shall not forfeit or determine his estate by virtue of any proviso in such deed, unless he hath notice of it. 8 *Rep.* 92. The feoffee of land, or bargainee of a reversion, shall not take advantage of a condition, for non-payment of rent reserved upon a lease, on demand made by them, without notice thereof given to the lessee. 9 *Rep.* 31. If a manor be conveyed or granted away, by deed of bargain and sale, &c. to another; the present lord must give notice of it to the copyholder, otherwise if he deny to pay his rent, it will be no forfeiture. 5 *Rep.* 13. And copyholders shall not forfeit their estates for not appearing at the lord's court, if they have no notice of the court, &c. 1 *Leon.* 104.

In a covenant to make assurance generally, notice must be given to the party to know what estate he would have made to him. *Style* 61. Where one is bound to another to make such an assurance as *A. B.* shall advise, the obligor is bound to make the assurance, without notice that *A. B.* had advised it; but if he had been bound to make such assurance as the counsel of the obligee should advise, notice ought to be given to the obligor, that the counsel of the obligee had advised it. 1 *Leon.* 105.

If I am bound to enfeoff such persons as the obligee should name, he is to give notice of those which he names, or I am not bound to enfeoff them. 2 *Danv. Abr.* 105. And if the condition of an obligation be to account before such auditors as the obligee shall assign, and the obligee assigns auditors; he is to give notice thereof to the obligor, or he will not be bound to account. *Ibid.* Notice is not to be given so strictly upon a covenant, as upon a bond; which is on the point of forfeiture. *Cro. Jac.* 391. If the agreement be, that a person shall pay so much as *A. B.* hath paid, the defendant is to inquire of him, and the plaintiff is not bound to give notice: but if the person or thing is altogether uncertain, the plaintiff to intitle himself to an action, must give notice. *Cro. Jac.* 432, 433.

If an act is to be done by a stranger, and not by the plaintiff, the cognisance thereof lies as well in the notice of the defendant as of the plaintiff; therefore the plaintiff need not lay a notice. *Cro. Jac.* 492. *Cro. Car.* 132. If a thing lies in the knowledge of the plaintiff, there ought to be notice given to the defendant. *March* 156. 4 *Mod.* 230. And when one may take notice, and not the other; notice is necessary. *Latch.* 15. It has been holden, that a defendant having undertaken to do a thing, undertakes to do all circumstances incident to the doing it, and that without notice; but if he had been ignorant of the thing to be done, then notice must be given. 2 *Bulst.* 143.

If one make a lease for years, with covenant that if the lessee, his executors and assigns, do not repair within six months after notice given, the lease to be void; and the lessee makes a lease for part of his term to another, and then the house is decayed, in this case the notice is to be given to the first lessee in person, and not to the under-tenant. 2 *Cro.* 9, 10.

A notice may not be pleaded to be given to executors, without averring the death of the testator. *Hob.* 93. In all writs of enquiry of damages, as well in real as personal actions, notice must be given to the other party to the suit. *March Rep.* 82. Want of notice, upon various occasions, has been often the cause of arrest of judgment in actions, &c.

Notice is to be given of trials and motions; of a robbery committed, to recover against the hundred; of a prior mortgage, on making a second; of an assignment of a lease, to charge the assignee, only on acceptance of rent; in cases of distress for rent, according to the statute; and of

avoidances of churches, by resignation, deprivation, &c. to the patron that he may present, &c.

See farther 16 *Vin. Abr.* tit. Notice.

Nottingham, (For rebuilding the town of,) 27 *Hen.* 8. c. 1.

Novale, Signifies land newly ploughed or converted into tillage, that without memory of man had not been tilled; and sometimes it is taken for ground which hath been ploughed for two years, and afterwards lies fallow for one year; or that which lies fallow every other year: it is called *novale*, because the earth *novā culturā proficiuntur*. Cartular. Abbat. de Furness in Com. Lanc. in Officio Ducat. Lanc. fol. 41.

Novā Oblata, Mentioned in *Claus.* 12 Ed. 1. m. 7. See *Oblata*.

Novel Assignment, (*novā assignatio*) Is an assignment of time, place, or such like, in action of trespass, otherwise than as it was before assigned; or where it is more particularly in a declaration than in the writ, &c. *Bro. Trespas.* 122. And if the defendant justifies in a place where no trespass was done, then the plaintiff is to assign the close where, to which the defendant is to plead, &c. *Terms de Ley.* Vide *Trespas*, and *New Assignment*.

Novel Disseisin, (*novā disseisina*.) See *Assise of Novel Disseisin*.

Novellæ. Those constitutions of the Civil law, which were made, after the publication of the *Theodosian code*, were called *novellæ*, by the Emperors, who ordained them: but some writers call the *Julian* edition only, by that name. *Blount*, and *Black. Com.* 1 V. 81.

Noyles. No persons shall put any flocks, noyles, thrums, &c. or other deceivable thing, into any broad woollen cloth; by *Stat.* 21 *Jac.* 1. cap. 18.

Nuces colligere, To gather hazle nuts, which was formerly one of the works, or services, imposed by lords upon their inferior tenants. *Paroch. Antig.* 495.

Nude contract, (*nudum pactum*) Is a bare naked contract, without a consideration. If a man bargains or sells goods, &c. and there is no recompence made or given for the doing thereof; as if one say to another, I sell you all my lands or goods, but nothing is agreed upon what the other shall give or pay for the same, so that there is not a *quid pro quo* of one thing for another; this is a *nude contract*, and void in law, and for the non-performance thereof, no action will lie; *ex nudo pacto non oritur actio*. *Terms de Ley.* The law supposes error in making these contracts; they being as it were of one side only.

Nude Matter, Is naked matter, or a bare allegation of a thing done, &c. Vide *Matter*.

Nudum pactum. See *Nude Contract*, and *Black. Com.* 2 V. 445.

Nul disseisin, plea of Is a plea in real actions, of no disseisin, and is one species of the general issue. See *Black. Com.* 2 V. App. xviii. 3 V. 305.

Nul tiel Record, Is the plea of a plaintiff that there is no such record, on the defendant's alledging matter of record in bar of the plaintiff's action. See *Failure of Record*. 'Tis sometimes the plea of a defendant, as in action on a judgment, &c.

Nul tort, plea of, A plea in a real action, i. e. of no wrong done, and is a species of the general issue. 3 V. 305.

Nullum Arbitrium, The usual plea of the defendant prosecuted on an arbitration bond, for not abiding by an award.

Nullity, Is where a thing is null and void, or of no force. *Litt. Dig.* And there is a nullity of marriage, where persons marry within the prohibited degrees, &c.

Numerum. *Civitas Cant.* *Reddit* 241. ad numerum, i. e. by number or tale, as we call it. *Domesday*.

Nummata, Signifies the price of any thing, generally by money; as *denariata* doth the price of a thing, by computation of pence; and *librata* by computation of pounds.

Nummata terræ, Is the same with *denariatus terræ*, and thought to contain an acre; *Sciatus me* (sc. Will. Longospee) *decessit & concessit ecclesie S. Marie de Walsingham & canonicis ibidem Deo servientibus in perpetuum Eleemosynam 40 Nummatis terræ in Walsingham, quæ fuit archiepiscopi & Bruns fratris ejus de socca Wintoniæ, libere, quiete*

quiete & honorifice absque omni servitio & omni consuetudine. Spelman.

Nummus, A piece of money or coin among the Romans; and it is a penny according to *Matt. Westm. sub Ann.* 1095.

Nun, (*nonna*) A consecrated virgin or woman who by vow hath bound herself to a single and chaste life, in some place or company of other women, separated from the world, and devoted to the service of God by prayer, fasting, and such like holy exercises: it is an *Egyptian* word, as we are told by *St. Hierome*.

Nuncius, A *nuncio*, or messenger, servant, &c. And the Pope's *nuncio* is *legatus pontificis*.

Nuncupative Will, (*Testamentum Nuncupatum*) Is a will by word of mouth; it is a verbal declaration of the testator's mind before a sufficient number of witnesses; which being reduced into writing either before or after the death of the testator, is good to dispose of his personal estate, but not his lands. 2 *Nels. Abr.* 1191. Before the 29 *Car. 2. c. 3.* it was necessary not only to put a *nuncupative will* in writing, but to prove it likewise by witnesses in the spiritual court, and to have it under the seal of the ordinary; until which it hath been decreed in equity, that such will was not pleadable against an administrator. 1 *Chanc. Rep.* 122. And by that statute, no *nuncupative will* shall be good, wherein the estate bequeathed exceeds 30*l.* unless proved by three witnesses who were present at the making thereof, and bid by the testator to bear witness; nor except it be made in the time of the last sickness of the deceased, and in his house, or where he hath been resident for ten days before, unless surprized with sickness from home: and no evidence shall be received to prove such will, after six months after speaking of the testamentary words; if the same or the substance of it, be not committed to writing within six days after the making. Nor shall any probate of such *nuncupative will* pass the seals till fourteen days after the death of the testator; and until process hath issued to call in the widow or next of kin to the deceased, to contest it, if they think fit. 29 *Car. 2. c. 3.* And by the same act, no will in writing concerning personal estate, shall be repealed by any words or will by word of mouth, except the same be put into writing in the life-time of the testator, and read to and approved of by him, and proved to be so done by three witnesses, &c. All witnesses who are allowed to be good witnesses upon trials at law, shall be good witnesses to prove any *nuncupative will*, by *Stat. 4 Ann. c. 16. s. 14.* See *Black. Com. 2 V. 500.*

Nuper obiit, Is a writ that lies for a sister and coheir, deforced by her coparcener of lands or tenements, whereof their father, brother, or any other common ancestor, died seised of an estate in fee-simple; for if one sister deforce another of land held in fee-tail, her sister and coheir shall have a *formedon* against her, &c. and not a *nuper obiit*; and where the ancestor being once seised, died not seised of the possession, but the reversion, in such a case a writ of *rationabili parte* lies. *Reg. Orig.* 226. *F. N. B.* 197. *Terms de Ley.* If one coparcener be deforced by another, and a stranger, she shall have a *nuper obiit* against her coparcener: and if two coparceners after the death of their ancestor enter and deforce a third sister, and afterwards they make partition betwixt them, and then one of the two aliens her part to a stranger in fee; yet the third shall have the writ *nuper obiit* against her two sisters, notwithstanding that alienation, and shall recover the third part of what the coparcener who did not alienate was seised, &c. And may sue an assise of *mordantessor*, or writ of *ail*, as the case is, in the name of the other coparcener, to recover her third part in the hands of the stranger. *New Nat. Br.* 437, 438. A *nuper obiit* ought to be brought by that coparcener who is deforced, against all the other coparceners; and altho' some of them have nothing in the tenancy. *Ibid.* And this writ lieth between sisters of the half blood; and likewise between coheirs in *gavelkind*, as well as between women parceners, &c. But *qu.* if an ejectment will not answer the purpose?

Nurture, *Guardian for.* There are guardians to infants, for nurture, which are, of course, the father or mother, 'till the infant attains the age of fourteen years; and in default of father or mother, the ordinary usually assigns some proper person. *Co. Lit.* 88. *Moor* 738. 3

Rep. 38. 2 *Jones* 90. 2 *Lev.* 163. *Black. Com.* 1 *V.* 461.

Nuisance, (*nocumentum*, from the Fr. *nuire*, i. e. *nocere*) Particularly so called, is where one makes any encroachment on the King's lands, or the highways, common rivers, &c. 2 *Inst.* 272. If a man doth any thing upon his own ground, to the particular damage of his neighbour, &c. it is accounted a nuisance: and nuisance signifies not only a thing done to the annoyance of another, in his lands or tenements; but the assise or writ lying for the same. *F. N. D.* 183.

Nuances are publick and common, or private: a common nuisance is defined to be an offence against the publick, either by doing a thing which tends to the annoying of all the King's subjects, and is common against all; or by neglecting to do any thing which the common good requires. 2 *Roll. Abr.* 83. And annoyances in highways, as where a gate, hedge, &c. or ditches are made therein; of bridges and publick rivers, disorderly alehouses, bawdy-houses, gaming-houses, stages for rope-dancers, mountebanks, &c. brewing-houses erected in places not convenient; cottages with inmates; common scolds, evesdroppers, &c. are generally common nuisances. 2 *Inst.* 406.

If a man stops up the light of another's house; or builds so near to and hanging over mine, that the rain which falleth from his house, falls upon mine; the turning or diverting water, running to a man's house, mill, meadow, &c. or stopping up a way, leading from houses to lands; suffering the next house to decay to the damage of my house; and setting up or making a house of office, lincepit, dye-house, tan-house or butcher's shop, &c. and using them so near my house, that the smell annoys me, or is infectious; or if they hurt my lands or trees, or the corruption of the water of lime-pits spoils my water or destroys fish in a river, &c. These are in general private nuisances. 3 *Inst.* 231. 9 *Rep.* 54. 5 *Rep.* 101. 1 *Roll. Abr.* 88. 2 *Roll.* 140. 1 *Danv. Abr.* 173.

For a common nuisance, indictment lies at the suit of the King; and the party shall be fined and imprisoned, &c. No action lieth in this case, because if one man might have an action, all men may have alike; and the indictment must be *ad commune nocumentum omnium ligearum*, &c. 5 *Rep.* 73. 1 *Inst.* 56. 1 *Vent.* 208. But tho' action may not be brought for a common nuisance, but indictment or presentment; yet where the inhabitants of a town had by custom a watering place for their cattle which was stopped by another, it has been held, that any inhabitant might have an action against him, otherwise they would be without remedy; because such a nuisance is not common to all the King's subjects, and presentable in the leet, or to be redressed by presentment or indictment in the quarter-sessions. 5 *Rep.* 73. 9 *Rep.* 103.

And if any one person hath more particular damage by a common nuisance than another; as if by reason of a pit dug in a highway, a man for whose life I held lands is drowned; or my servant falling into it receives injury, whereby I lose his service, &c. for this special damage, which is not common to other persons, action lies. 5 *Rep.* 73. 4 *Rep.* 18. *Cro. Car.* 446. *Vaugh.* 341. 4 *Bull.* 344.

For private nuisances, action on the case lieth, or assise of nuisance by the party grieved; and on action for a private nuisance, if the plaintiff hath a verdict he shall recover damages for the injury sustained. 1 *Roll. Abr.* 391. 1 *Vent.* 208.

There is a difference between an assise for a nuisance, and an action on the case; for the first is to abate the nuisance, but the last is not to abate it, but to recover damages: therefore if the nuisance be removed, the plaintiff is intitled to his damages which accrued before; and tho' it is laid with a *continuando* for a longer time than the plaintiff can prove, he shall have damages for what he can prove, before the nuisance was removed. 2 *Mod.* 253.

A man may have an action for a nuisance, or he may abate or demolish the same; but if he destroy the nuisance himself, before he bring his action, he may not afterwards have an action for the wrong, nor recover any damages. 9 *Rep.* 55. *F. N. B.* 185. 2 *Roll. Abr.* 745. *Sed qu.* for the party's right of action attached before removal.

It is said both of a common and private nuisance, that they may be abated or removed by those who are prejudiced by them; and they need not stay to prosecute for their removal. 2 Lill. Abr. 244. Wood's Inst. 443. And it has been adjudged, that every person may remove a nuisance; and that the cutting a gate set across an highway is lawful. Cro. Car. 184, 185. Also if a house be on the highway, or a house hang over the ground of another, they may be pulled down; but no man can justify the doing more damage than is necessary, or removing the materials farther than requisite. 1 Hawk. 199.

A man builds a house so near mine that it is a nuisance; I may enter and pull it down; and a man indicted for a riot in such a case had only a small fine set on him. 2 Salk. 459. Where two houses, one whereof is a nuisance to the other, come both into one and the same hand, the wrong is purged. See Hob. 131. If a ship be sunk in a port or haven, and it is not removed by the owner, he may be indicted for it as a common nuisance, because it is prejudicial to the commonwealth in hindering navigation and trade. 2 Lill. 244.

Indictment lies for laying logs, &c. in the stream of a publick navigable river: it is a common nuisance to divert part of a publick navigable river whereby the current is weakened, and made unable to carry vessels of the same burden it could before: And if a river be stopped to the nuisance of the country, and none appear bound by prescription to cleanse it; those who have the piscary, and the neighbouring towns that have a common passage and easement therein, may be compelled to do the same. 1 Hawk. P. C. 198, 199, 200.

It is a common nuisance indictable, to divide a house in a town for poor people to inhabit in, by reason whereof it will be more dangerous in the time of sickness and infection of the plague. 2 Roll. Abr. 139. A common play-house, if it draws together such numbers of coaches and people as incommode and disturb the neighbourhood, may be a nuisance; but these places are not naturally nuisances, but become so by accident. 1 Roll. Rep. 102. 1 Hawk. 191.

A prohibitory writ was issued out of B. R. against Betterton and other actors, for erecting a new play-house in Little Lincoln's Inn Fields, reciting that it was a nuisance to the neighbourhood; and they not obeying the writ, an attachment was granted against them: but it was objected that an attachment could not be issued, and that the most proper method was to proceed by indictment, and then the jury would consider whether it were a nuisance or not; and this was the better opinion. 5 Mod. 142. 2 Nels. Abr. 1192.

One Hall having begun to build a booth near Charing-Cross for rope-dancing, which drew together many idle people, was ordered by the Lord Chief Justice not to proceed; he proceeded notwithstanding, affirming that he had the King's warrant and promise to bear him harmless; but being required to give a recognisance of 300 l. that he would not go on with the building, and he refusing, he was committed, and a record was made of this nuisance, as upon the judge's own view, and a writ issued to the sheriff of Middlesex to prostrate it. 1 Vent. 169. 1 Mod. 96.

Erecting a dove-cote is not a common nuisance; tho' action of the case will lie at the suit of the lord of the manor for erecting it without his licence. 1 Hawk. 199. It was antiently held, that if a man erected a dove-cote, he was punishable at the leet: but it has been since adjudged not to be punishable in the leet as a common nuisance, but that the lord for this particular nuisance should have an action on the case, or an assise of nuisance; as he may for building an house to the nuisance of his mill. 5 Rep. 104. 3 Salk. 248. Neither the King, nor lord of a manor, may licence any man to make or commit a nuisance. 1 Roll. Abr. 138.

A brewhouse erected in such an inconvenient place, wherein the business cannot be carried on without incommodeing the neighbourhood; may be indicted as a common nuisance; and so in the like case may a glass-house, &c. 1 Hawk. 199. Where there hath been an ancient brewhouse time out of mind, altho' in Fleet-street, &c. this is not any nuisance, because it shall be supposed to be erected when there were no buildings near: tho' if a

brewhouse should be now built in any of the high streets of London, or trading places, it will be a nuisance, and action on the case lies for whomsoever receives any damage thereby; and accordingly in an action brought against a brewer in the last case, where a person's goods were injured in his shop; the jury gave the plaintiff for two years damages, sixty pounds. 2 Lill. Abr. 246. Palm. 536.

A plaintiff was possessed of an house wherein he dwelled, and the defendant built a brewhouse, &c. in which he burnt coal so near the house, that by the stink and smook he could not dwell there without danger of his health; and it was adjudged that the action lay, tho' a brewhouse is necessary, and so is burning coal in it. Hutton 135. If a person melt lead so near the close of another, that it injures his grass there, whereby cattle are lost; notwithstanding this is a lawful trade, and for the benefit of the nation, action lies against him; for he ought to use his trade in waste places, so as no damage may happen to the proprietors of the land adjoining. 2 Roll. Abr. 140.

Building a smith's forge near a man's house, and making a noise with hammers, so that he could not sleep, was held a nuisance, for which action lies; altho' the smith pleaded that he and his servants worked at seasonable times; that he had been a blacksmith, and used the trade above twenty years in that place, and set up his forge in an old room, &c. For tho' a smith is a necessary trade, and so is a lime-burner, and a hog-merchant; yet these trades must be used not to be injurious to the neighbours. 1 Lutw. 69.

But if a schoolmaster keeps a school so near the study of a lawyer by profession, that it is a disturbance to him; this is not a nuisance for which action may be brought. Wood's Inst. 538. An inn-keeper brought an action on the case against a person for erecting a tallow furnace, and melting stinking tallow so near his house that it annoyed his guests, and his family became unhealthy; and adjudged that the action lay. Cro. Car. 367. So where a person kept a hogsty near a man's parlour, whereby he lost the benefit of it. 2 Roll. Abr. 140.

Yet 'tis said to be no nuisance to a neighbourhood, for a butcher, or chandler, to set up their trades in houses amongst them: but it may be by such tradesmen, laying stinking heaps at their doors; in other cases the necessity of the thing shall dispense with the noisomeness of it. Pasch. 5 Jac. 1. B. R. If a man have a spout falling down from his house, and another person erect any thing above it, that the water cannot fall as it did, but is forced into the house of the plaintiff, and rots the timber; it is a nuisance actionable. 18 E. 3. 2 Roll. Abr. 140. And in trespass for a nuisance, in causing stinking water in the defendant's yard to run to the walls of the plaintiff's house, and piercing them so that it ran into his cellar, &c. judgment was given for the plaintiff. Hard. 60.

An action lies for hindring the wholesome air, and also for corrupting the air. 9 Rep. 58. And none shall cast any garbage, dung, or filth into ditches, waters, or other places, within or near any city or town, on pain of punishment by the Lord Chancellor at discretion, as a nuisance. Stat. 12 R. 2. c. 13. Sed qu. if this is not obsolete and illegal?

The continuation of a nuisance is, as it were, a new nuisance: Where a nuisance is erected in the time of the devisor, and continued afterwards by the devisee, it is as the new erecting of such a nuisance. 2 Leon. 129. Cro. Car. 231. If one hath freehold land adjoining to the highway, and he incroach part of the way, and lay lands to it; and then dying it comes to his heir, if he continues it, tho' he do nothing else, he may be indicted for the continuance of the nuisance. Roll. Abr. 137. A man erects a nuisance, and then lets it; the continuance by the lessee has been held a nuisance, and that action lies against him. Cro. Jac. 373. Moor 353. But it is said in another case of this nature, that admitting the plaintiff might have an assise of nuisance against the builder, the lessor, he cannot have an action against his lessee, because it would be waste in him to pull it down; but the plaintiff may abate the nuisance standing on his own ground; yet where the thing done is a nuisance per intervalla, as a pipe or gutter, action lies

lies against the lessee, because every running is a fresh *nuſance*; and if a man have a way over the ground of another, and ſuch other ſtops that way, and then demises the ground, an action lies againſt the leſſee for continuing this *nuſance*. 1 *Mod.* 54. 3 *Salk.* 248.

If a perſon assigns his leaſe with a *nuſance*, action lies againſt him for continuing it, *becauſe the leaſe was transferred with the original wrong, and his assignment confirms the continuance*; beſides he hath a rent as conſideration for the continuance, therefore he ought to anſwer the damages occaſioned by it. 2 *Salk.* 460. 2 *Cro.* 272, 555. If a *nuſance* is levied in an houſe, &c. to the prejudice of another, and then the houſe is aliened; action of the caſe lies againſt him that levied it, and alſo againſt the alienee for continuing it, by ſtat. 13 *Ed.* 1. c. 24.

If a fair or market be ſet up to the *nuſance* of another, the party grieved may have his writ or action. *F. N. B.* 187. 2 *Saund.* 173. *Lutw.* 69, 91. And no ſpecial *nuſance* need be assigned, when a matter appears to the court to be a *nuſance*. 9 *Rep.* 54. A *nuſance* in a churchyard, is properly of eccleſiaſtical cogniſance. *Cartbrow* 152. If a man ſtraiten a way only, and do not ſtop it up, action of the caſe lieth, not aſſiſe of *nuſance*. 33 *H.* 6. c. 26. But for ſtopping ſuch way belonging to a freehold tenement, an aſſiſe will lie; and where one may have aſſiſe of *nuſance* for an injury to his way, there he ſhall not have action of treſpaſs. 19 *H.* 6. 29. 2 *Shep. Abr.* 468.

When a man hath but a term of years in a houſe or lands, and not a freehold, he ſhall not have an aſſiſe of *nuſance*; but action upon the caſe. *New Nat. Br.* 10. Writs of *nuſance*, called *vicintiel*, are to be made at the election of the plaintiff, determinable before the juſtices of either bench, or the juſtices of aſſiſe of the county, being in nature of aſſiſes, &c. 6 *R.* 2. c. 3. Making great noiſes in the night; a *nuſance* indictable. 1 *Strange* 704. Keeping gunpowder in great quantities a *nuſance*. 2 *Strange* 1167. See *Higbway*.

Tho' in the preceding head, an aſſiſe of *nuſance* is often mentioned, yet that mode of proceeding is now grown obſolete. The method is, if it is a *nuſance* to many to indict, if any individual ſuſtains a peculiar injury, an action on the caſe lies, to recover an adequate ſatisfaction in damages.

For more learning on this ſubject, ſee 16 *Vin. Abr.* tit. *Nuſance*.

Putmegs, (*Nuces muscatæ*) Is a ſpice well known to all, mentioned among ſpices that are to be garbled. 1 *Jac.* 1. c. 19.

Nutritimentum, Nouriſhment, particularly applied to breed of cattle.—*Quilibet cuſtomarius dominæ non debet vendere equum maſculum neque bovem de proprio nutritimento ſuo.* Paroch. Antiq. 401.

Nyas, (*Nidarius accipiter*) A hawk or bird of prey. *Litt. Diſt.*

O.

O Is an *adverb* of calling; or interjection of ſorrow: And the ſeven *Antiphones*, or alternate hymn of ſeven verſes, &c. ſung by the choir in the time of *Advent* was called O, from beginning with ſuch exclamation. In the ſtatutes of St. Paul's church in London, there is one chapter, *De faciendO O.* Liber. Statut. MS f. 86.

Oath, (*Sax. Eotb.* Lat. *Juramentum*) Is an affirmation or denial of any thing, before one or more perſons who have authority to adminiſter the ſame, for the diſcovery and advancement of truth and right, calling God to witneſs, that the teſtimony is true; therefore it is termed *Sacramentum*, a holy band or tie: it is called a *corporal oath*, becauſe the witneſs when he ſwears lays his right-hand on the Holy Evangelists, or New Teſtament. 3 *Inſt.* 165.

There are ſeveral ſorts of oaths in our law, *viz.* *Juramentum promiſſionis*, where *oath* is made either to do, or not to do, ſuch a thing. *Juramentum purgationis*, when a perſon is charged with any matter by bill in *Chancery*, &c. *Juramentum probationis*, where any one is produced as a witneſs, to prove, or diſprove a thing: And *Juramentum*

trialionis, when any perſons are ſworn to try an iſſue, &c. 2 *Nelf.* 1181.

All oaths muſt be lawful, allowed by the Common law, or ſome ſtatute; if they are adminiſtered by perſons in a private capacity, or not duly authorized, they are *coram non judice*, and void; and thoſe adminiſtring them are guilty of a high contempt, for doing it without warrant of law, and puniſhable by fine and imprisonment. 3 *Inſt.* 165. 4 *Inſt.* 278. 2 *Roll. Abr.* 257.

One who was to teſtify on behalf of a felon, or perſon indicted of treaſon, or other capital offence, upon an indictment at the King's ſuit, could not formerly be examined on his *oath* for the priſoner againſt the King; tho' he might be examined without *oath*: but by a late ſtatute, witneſſes on behalf of the priſoner upon indictments, are to be ſworn to depoſe the truth in ſuch manner as witneſſes for the King; and if convicted of wilful perjury, ſhall ſuffer the puniſhment inflicted for ſuch offences. 1 *Ann.* c. 9. And the evidence for the defendant in an appeal, whether capital or not, or on indictment or information for a miſdemeanor, was to be on *oath* before this ſtatute. 2 *Hawk. P. C.* 434.

A perſon who is to be a witneſs in a cauſe may have two oaths given him, one to ſpeak the truth to ſuch things as the court ſhall aſk him concerning himſelf, or other things which are not evidence in the cauſe; the other to give teſtimony in the cauſe in which he is produced as a witneſs: the former is called the *oath* upon a *voyer dire*. *Paſch.* 23 *Car. B. R.*

If *oath* be made againſt *oath* in a cauſe, it is a *non liquet* to the court which *oath* is true; and in ſuch caſe the court will take that *oath* to be true, which is to affirm a verdict, judgment, &c. as it tends to the expediting of juſtice. 2 *Lill. Abr.* 247. And the court will rather believe the *oath* of the plaintiff, than the *oath* of the defendant, if there be *oath* againſt *oath*; becauſe it is ſuppoſed that the plaintiff hath wrong done him, and was forced to ſly to the law to maintain his right. *Ibid.*

A voluntary *oath*, by conſent and agreement of the parties, is lawful as well as a compulſory *oath*; and in ſuch caſe, if it is to do a ſpiritual thing, and the party fail, he is ſuable in the eccleſiaſtical court, *pro leſione fidei*; if to do a temporal thing, and he fail therein; he may be puniſhed in *B. R.* Adjudged on *affumpſit*, where if the defendant would make *oath* before ſuch a perſon, the plaintiff promiſed, &c. *Cro. Car.* 486. 3 *Salk.* 248.

By the Common law, officers of juſtice are bound to take an *oath* for the due execution of juſtice. *Trim.* 22 *Car.* 1. *B. R.* Tho' if *promiſſory oaths* of officers are broken, they are not puniſhed as perjuries, like unto the breach of *aſſertory oaths*; but their offences ought to be puniſhed with a ſevere fine, &c. *Wood's Inſt.* 412. Anci- ciently at the end of a legal *oath*, was added, *So help me God at his holy dome*, i. e. judgment; and our anceſtors did believe, that a man could not be ſo wicked to call God to witneſs any thing which was not true; but that if any one ſhould be perjured, he muſt continually expect that God would be the revenger: And thence probably purgations of criminals, by their own oaths, and for great offences by the oaths of others, were allowed. *Malmſb.* lib. 2. c. 6. *Leg. H.* 1. c. 64.

Oaths to the Government. By *Magna Charta*, the oaths of the King, the biſhops, the King's counſellors, ſheriffs, mayors, bailiffs, &c. were appointed, 9 *H.* 3. The oaths of the judges of both benches; and of the clerks in *Chancery* and the cuſtitors, were ordained by 18 *Ed.* 3. ſt. 4. and ſee 14 *E.* 3. ſt. 1. c. 5. Eccleſiaſtical perſons are required to take the oaths of ſupremacy, &c. And clergymen not taking the oaths, on their reſuſal being certified into *B. R.* &c. incur a *præmunire*. 1 *Eliz. cap.* 1. Officers and eccleſiaſtical perſons, members of parliament, lawyers, &c. are to take the *oath* of allegiance, or be liable to penalties and diſabilities. 7 *Jac.* 1. c. 6. Perſons ſhall take the oaths, and receive the ſacrament, to qualify them to bear any office of magiſtracy in corporations. 13 *Car.* 2. c. 1. And officers of the lieutenantancy and militia are required to take the oaths by 13 *Car.* 2. c. 6. All perſons that bear any office, civil or military, or receive any ſalary, &c. from the King, are to take the oaths of allegiance and ſupremacy; and perſons reſuſing are

the disabled, &c. 25 Car. 2. c. 2. By the 1 W. & M. Sess. 1. c. 6. the coronation oath was altered and regulated; and the oaths of allegiance and supremacy abrogated, and others appointed to be taken and enforced, on pain of disability, &c. by 1 W. & M. c. 8. and 7 & 8 W. 3. c. 27. All that bear offices in the government, peers and members of the House of Commons, ecclesiastical persons, members of colleges, school-masters, preachers, serjeants at law, counsellors, attorneys, solicitors, advocates, proctors, &c. are enjoined to take the oaths of allegiance, supremacy and abjuration; and persons neglecting or refusing, are declared incapable to execute their offices and employments, disabled to sue in law or equity, to be guardian, executor, &c. or to receive any legacy or deed of gift, to be in any office, &c. and to forfeit 50*l*. This extends not to constables, and other parish officers, nor to bailiffs of manors, &c. 13 W. 3. c. 6. The Stat. 1 Ann. c. 22. obliges the receiving the abjuration oath, with alterations: And by 4 Ann. c. 8. the oath of abjuration is settled after the death of Queen Anne, without issue. Also the oath of abjuration, with further alterations relating to the *Protestant Succession*, is required to be taken by the 1 Geo. 1. c. 13. And by a late statute, all persons are to take the oaths to government, or register their estates, on pain of forfeiture, &c. 9 Geo. 1. c. 24. There are almost every other sessions acts made for indemnifying persons, who have omitted to qualify themselves for offices and promotions within the time limited by law, and for allowing further time for that purpose. See *Popish*.

Persons maintaining an oath to be unlawful, are punishable by fine and imprisonment, &c. Stat. 13 & 14 Car. 2. Two justices of peace have power to tender the oaths to suspected persons; and if they refuse them, it is to be certified to the next quarter-sessions, and from thence into B. R. and the offenders shall be adjudged Popish recusants convicted, and forfeit lands, goods, &c. but it hath been held that a person cannot be said to refuse the oaths unless they are read or offered to be read to him. Oaths must be taken in the very words expressed in the act, and cannot be qualified; yet using the words in conscience, instead of my conscience, or *San of Rome*, instead of *San of Rome*, is not material. 1 Bull. 197. See *Black. Com.* 1 P. 368. 4 P. 115, 116, 123.

Ornament. Selling corrupt *ornament*, is punishable by Statute: It shall be forfeited for the second offence, &c. See 51 Ed. 1. *Pub. Kalend. Stat.* 323.

Obedientia. In the *Canon law* is used for an office, or the administration of it; whereupon the word *obedientialis*, in the provincial constitutions, is taken for officers under their superiors. *Can. Law. cap. 1.* And as some of these offices consisted in the collection of rents or pensions, rents were called *obedientia*; *quia colligebantur ab obedientialibus*. But tho' *obedientia* was a rent as appears by *Horiden*, in a general acceptation of this word it extended to whatever was enjoined the monks by the abbot; and in a more restrained sense to the cells or farms which belonged to the abbey to which the monks were sent, *ut visitem obedientia*, either to look after the farms, or to collect the rents, &c. — *Prohibemus ut redditus qui obedientie vocantur ad formam teneant.* Matt. Paris. Ann. 1213.

Obit. (*Lat.*) Signifies a funeral solemnity or office for the dead, most commonly performed when the corpse lies in the church uninterred: Also the anniversary office. 2 Cro. 51. *Dyer* 113. The anniversary of any person's death was called the *obit*; and to observe such day with prayers and alms, or other commemoration, was the keeping of the *obit*: In religious houses they had a register, wherein they entered the *obits* or *obituary* days of their founders and benefactors, which was thence termed the *obituary*. The tenure of *obit* or *chantry lands* is taken away and extinct, by 1 Ed. 6. c. 14. and 15 Car. 2. c. 9.

Oburgationes. Are folds or enclosures, punished with the *enclosure act*. MS. LL. Lib. Burg. Villa de Montgomery temp. Hen. 2. See *Enclosure*, and *Duck-ing-stool*.

Oblate gifts or offerings made to the King by any of his subjects, which in the reigns of King John and K. Hen. 3. were so carefully heeded, that they were entered into the *Fin. Rolls* under the title of *Oblate*; and if not

paid, esteemed a duty, and put in charge to the sheriff. *Philips of Purveyance*. In the Exchequer it signifies old debts, brought as it were together from precedent years, and put on the present sheriff's charge. *Pract. Excheq.* 78.

Oblations, (oblationes) Are thus defined in the *Canon law*: *Dicuntur, quantumque a piis fidelibusque Christianis offeruntur Deo & Ecclesie, sive res solida sive mobiles sunt.* Specul. de Concil. tom. 1. p. 393. The word is often mentioned in our law books; and formerly there were several sorts of *oblations*, viz. *oblationes altaris*, which the priest had for saying mass; *oblationes defunctorum*, which were given by the last wills and testaments of persons dying to the church; *oblationes mortuorum*, or *funerales*, given at burials; *oblationes penitentium*, which were given by persons penitent; and *oblationes pentecostales*, &c. The chief or principal feasts for the *oblations* of the altar, were *All Saints*, *Christmas*, *Candlemas* and *Easter*, which were called *Oblationes quatuor principales*; and of the customary offerings from the parishioners to the parish-priest, solemnly laid on the altar, the mass or sacrament offerings were usually three-pence at *Christmas*, two-pence at *Easter*, and a penny at the two other principal feasts: Under this title of *oblations* were comprehended all the accustomed dues for *sacramentalia* or christian offices; and also the little sums paid for saying masses and prayers for the deceased. *Kennet's Gloss.* *Oblationes funerales* were often the best horie of the defunct, delivered at the church gate or grave to the priest of the parish; to which old custom we owe the original of *mortuaries*, &c. And at the burial of the dead, it was usual for the surviving friends to offer liberally at the altar for the pious use of the priest, and the good estate of the soul deceased, being called the *Soul Seat*: In *North Wales* this usage still prevails, where at the rails of the communion table in churches, is a tablet conveniently fixed, to receive the money offered at funerals according to the quality of the deceased; which has been observed to be a providential augmentation to some of those poor churches. *Kennet's Gloss.* At first the church had no other revenues beside these *oblations*, till in the fourth century it was enriched with lands and other possessions. *Blount.* *Oblations*, &c. are in the nature of tithes, and may be sued for in the ecclesiastical courts, and it is said are included in the act 7 & 8 W. 3. for recovery of small tithes under 40*l*. by the determination of justices of peace, &c. *Count. Parf. Compan.* 137, 138.

Obligation, (obligatio) Is a bond, containing a penalty, with a condition annexed for payment of money, performance of covenants, or the like: it differs from a bill, which is generally without a penalty or condition, tho' a bill may be *obligatory*. *Co. Litt.* 172. And *obligations* may be by matter of record: as statutes and recognizances, to which there are sometimes added defeasances, like the condition of an *obligation*: but when the *obligation* is simple, or single, without any defeasance or condition, it is most properly called so. 2 *Shep. Abr.* 475. Simony or usury against the statutes, is pleadable in avoidance of *obligations*, &c. See *Bond*. See also *Stat.* 38 Ed. 3. *f.* 1. c. 4. 4 Ann. c. 16. *sect.* 12, 13. 2 Geo. 2. c. 25. *sect.* 3. and as to the King 13 R. 2. *f.* 1. c. 14. 33 H. 8. c. 39. *sect.* 50, &c. and *Tab. 10. Stat. tit. Debts to and from the King*. See farther as to *Obligations*. 16 *Fin. Abr.* and 3 *New Abr. tit. Obligation*; and see *Condition*.

Obligatus. Is he who enters into an *obligation*, and obliges the person to whom it is entered into.

Before the coming in of the Normans, writings obligatory were made firm with golden crosses, or other small signs or marks. But the Normans began the making such bills and obligations with a print or seal in wax, impressed with every one's special signet, attested by three or four witnesses. In former times many houses and lands thereto passed by grant and bargain, without script, charter or deed, only with the landlord's sword or helmet, with his horn or cup; and many documents were demised with a spur or curriewrench, with a bow, or with an arrow. *Cowell.* See *Warr.*

Oblata acre. Is according to some accounts, half an acre of land; but others hold it to be only half a perch. *Such. Gloss.*

Obventions, (obventiones) Are offerings or tithes; and *oblations, obventions* and *offerings* are generally the same thing, tho' *obvention* has been esteemed the most comprehensive. The profits of the churches in London were formerly the *oblations* and *obventions*; for which a remedy is given by law: but the tithes and profits arising to the London clergy are now settled and appointed by act of parliament. *Count. Parsl. Compan.* 138. Rents and revenues of spiritual livings are called *obventions*. 12 Car. 2. c. 11.—*Margeria Comitissa de Warwick Univerſis Sanctæ Matris Ecclesiæ filiis, &c. dedi omnes obventiones tam in decimis majoribus & minoribus, quam in aliis rebus de assartis de W. & decimam pannagii, &c.* MS. penes Will. Dugdale, Mil. See *Oblations*.

Occasio, Is taken for a tribute which the lord imposed on his vassals or tenants; *propter occasiones bellorum vel aliarum necessitatum.* *Fleta, lib. 1. c. 24.*

Occasionari, Signifies to be charged or loaded with payments, or occasional penalties. *Non propter hoc occasionentur coram domino rege & iusticiariis.* Stat. Ed. 2 Anno 21. So in *Fleta, Ita quod ipsi vigilantes non occasionentur.* *Lib. 1. cap. 24. par. 7.*

Occationes, Are *assarts*, whereof *Manwood* speaks at large; the word is derived *ab occando, i. e.* harrowing or breaking clods. See *Spelman's Glossary, verbo Effartum.* *Effarta vulgo dicuntur quæ apud Isidorum occasiones nuncupantur.* *Lib. Niger Scacc. par. 1. cap. 13.*

Occupant, (occupans) Is he who first gets possession of a thing. An island in the sea, precious stones on the sea shore, and treasure discovered in a ground that has no particular owner, by the laws of nations belong to him who finds them, and gets the first occupation of them. *Treat. Larus* 342. See *Literary Property*, and *Black. Com. 2 V. 3. 8, 258, 400.*

The law of occupancy is founded upon the law of nature, *viz. Quod terra manens vacua occupanti conceditur.* So as, upon the first coming of the inhabitants to a new country, he who first enters upon such part of it, and manures it, gains the property (as is now used in *Cornwall, &c.* by the laws of the *Stannaries*, under certain regulations, for which see the *Stannary laws*); so that it is the actual possession and manurance of the land, which was the first cause of occupancy, and consequently is to be gained by actual entry. *Sid. 347. Geary v. Bearcroft.*

Where a man finds a piece of land which no other possesses or hath title unto, and enters upon the same, this gains a property, and a title by occupancy: but this manner of gaining property of lands has long since been of no use in England; for lands now possessed without any title are in the crown, and not in him who first enters. *Ibid. 218.* Tho' an estate for another's life, by our ancient laws may be gotten by occupancy: As for example; *A.* having lands granted to him for the life of *B.* dieth without making any estate of it; in this case, whoever first enters into the land after the death of *A.* gets the property for the remainder of the estate granted to *A.* for the life of *B.* For to the heir of *A.* it cannot go, not being an estate of inheritance, but only an estate for another man's life; which is not descendible to the heir, *unless he be specially named in the grant*: And the executors of *A.* cannot have it, as it is not an estate testamentary, that it should go to the executor as goods and chattels; so that in truth no man can intitle himself unto those lands: therefore the law prefers him who first enters, and he is called *occupans*, and shall hold the land during the life of *B.* paying the rent, and performing the covenants, &c. *Bac. Elem. 1.* And not only if tenant *pur terme d'auter vie* dies, living *cestuy que vie*; but if tenant for his own life grant over his estate to another, and the grantee dies before him, there shall be an *occupant.* *Co. Lit. 41, 388.* A man cannot be an *occupant* but of a void possession; and it is not every possession of a person entering that can make an *occupancy*, for it must be such as will maintain trespass without further entry. *Vaugh. 191, 192. Cart. 65. 2 Keb. 250.* There can be no occupancy by any person of what another hath a present right to possess: Occupancy by law must be of things which have natural existence, as of land, &c. and not of rents, advowsons, fairs, markets, tithes, &c. which lie in grant, and are incorporeal rights and estates; and there cannot be an *occupant* of a copyhold estate.

Vaugh. 190. Mod. ca. 66. And occupancy of land in our law now seldom happens; leases and grants being generally made to the lessees or grantees, and their heirs, during the life of *cestuy que vie*, whereby the lands for the remainder of the term descend to the heir, &c. *Wood's Inst. 216.* By statute, any estate *per auter vie* shall be deviseable by will in writing; and if no devise thereof be made, but the heir become special *occupant*, it shall be assets in his hands by descent to pay debts; and if there be no special *occupant*, it shall go to the executors or administrators of the party who had the estate, and be assets in their hands. 29 Car. 2. c. 3. It hath been adjudged, that an heir, executor, &c. shall be charged on this statute with payment of debts only, not legacies, except devised particularly out of the estate; and an estate *per auter vie* of an interest, is not distributable. *Mich. 8 W. 3. B. R. 2 Salt. 464.*

The true ground of occupancy is, that anciently all trials of titles were by real actions, therefore he who had the freehold was one, to whom the law had a special regard. The ancient law, for many respects, did not allow leases for above 40 years, till 21 Hen. 8. 15. And another thing was, there was reason too, that not only he who had right paramount, might know how to try his action, but that the lord might know how to avow for his services (which were considerable things formerly); he ought to know who was his tenant, therefore the law provided there should be a person on whom he should avow; *per Bridgman Ch. J. Cart. 65.* in the case of *Geary v. Bearcroft.*

The subject and object of the occupant are only such things as are capable of occupancy, and not the freehold at all; into which he neither doth, nor can enter; but the law casts the freehold immediately upon him who hath made himself occupant of the land, or other real thing whereof he is occupant, that there may be a tenant to the *præcipe*; *per Vaughan Ch. J. Hill. 19 & 20 Car. 2.* in the case of *Holden v. Smallbrooke.*

See farther, 27 Aff. 31. 2 Rol. Abr. 151. *Cro. Eliz. 158. 1 rev. 201. Geary v. Bearcroft. 6 Mod. 63, 68. Mich. 2 Ann. B. R. Smartle v. Penhallow.* See 16 Vin. Abr. tit. *Occupant*; and see *Life-Estate.*

Occupation, (occupatio) Signifies in our law use or tenure; as we say, such land is in the tenure or occupation of such a man, that is, in his possession or management: Also it is used for a trade or mystery. 12 Car. 2. c. 18. 249. And *occupations* at large are taken for purpures, intrusions and usurpations; and particularly for usurpation upon the King, by the *Stat. de Bigamis, c. 4. 2 Inst. 272.*

Occupabit, Is a writ that lies for him who is ejected out of his freehold in time of war; as the writ *novel disseisin* lies for one *disseised* in time of peace. *Ingham.*

Octave, The eighth day after any feast, inclusive. See *Utaz.*

Odhal right. *Pontoppidan, in his History of Norway (p. 290.)* observes, that in the Northern languages *odh* signifies *proprietas*, and *all totum.* Hence he derives the *ODHAL right* in those countries; and hence too, perhaps, is derived the *odul right* in *Finland, &c.* (See *Mac Dougl. Inst. part. 2.*) Now the transposition of these Northern syllables, *ALLHODH*, will give us the true etymology of the *allodium*, or absolute property of the *Feudists*; as, by a similar combination of the latter syllable with the word *FE* (which signifies a conditional reward or stipend) *FEODUM* or *feodum* will denote stipendiary property. *Black. Com. 2 V. 45. n. **

Odio & Mâ, Was a writ anciently called *breve de bono & malo*, directed to the sheriff to inquire whether a man committed to prison upon suspicion of murder, were committed on just cause of suspicion, or only upon malice and ill will: And if upon the inquisition it were found that he was Not guilty, then there issued another writ to the sheriff to bail him. *Reg. Orig. 133. Bract. lib. 3. cap. 20. Stat. 3 Ed. 1. cap. 11.* But now taken away by *Stat. 28 Ed. 3. cap. 9. S. P. C. 77. 2 Inst. 42. 9 Rep. 506.*

And the party committed, if intitled to be bailed, may have the cause of his commitment inquired into, and be discharged.

discharged on bail, by suing out an *habeas corpus*. See *Habeas Corpus*. As to the writ *De odio et atia*, See *Black. Com.* 3 *V.* 128.

Oeconomus, Is sometimes taken for an advocate or defender; as, *summus secularium oeconomus & protector Ecclesiae*. Matt. Paris. anno 1245.

Oeconomicus, A word used for the executor of a last will and testament, as the person who had the *oeconomy* or fiduciary disposal of the goods of the deceased. *Hist. Dunelm. apud Wharton Angl. Sacr. par. 1. pag. 784.*

Offence, (*delictum*) Is an act committed against a law, or omitted where the law requires it, and punishable by it. *Westm. Symb.* And all offences are capital, or not capital, those for which the offender shall lose his life; not capital, where an offender may forfeit his lands and goods, be fined or suffer corporal punishment, or both; but not loss of life. *H. P. C.* 2, 126, 134. Capital offences are comprehended under *high treason*, *petit treason*, and felony: Offences not capital include the remaining part of the *Pleas of the Crown*, and come under the title of Misdemeanors. An offence may be greater or less, according to the place wherein it is done. *Finch* 25. But the offence will be in equal degree in them, who are equally tainted with it; and those who act and consent thereto, are alike offenders. 5 *Rep.* 80. Some offences are by the Common law; but most by statutes:

Offerings, Are reckoned among personal tithes, payable by custom to the parson or vicar of the parish, either occasionally, as at sacraments, marriages, christenings, churching of women, burials, &c. or at constant times, as at *Easter*, *Christmas*, &c. *Comm. Pars. Campan. 137. Stat. 2 & 3 Ed. 6. Stat. 32 Hen. 8. cap. 7. § 2.* 2. Inforces the payment of offerings according to the custom and places where they grow due. *Vide Oblations.*

By Stat. 2 & 3 Ed. 6. *cap. 13. § 10.* All persons who ought to pay offerings, shall yearly pay to the parson, vicar, proprietary, or their deputies, or farmers of the parishes where they dwell, at such four offering-days as heretofore within the space of four last years past hath been accustomed, and in default thereof shall pay for their said offerings at *Easter* following.

The four offering-days are *Christmas*, *Easter*, *Whitsuntide*, and the feast of the dedication of the parish church. *Gibb.* 739.

Offerings of the King, All offerings made at the Holy Altar by the King and Queen, are distributed amongst the poor, by the dean of the chapel: There are twelve days in the year, called *Offering Days*, as to these offerings; viz. *Christmas*, *Easter*, *Whitsunday*, *All Saints*, *New Year's Day*, *Twelfth Day*, *Candlemas*, *Annunciation*, *Ascension*, *Trinity Sunday*, *St. John Baptist*, and *Michaelmas Day*: All which are high festivals. *See Constitution.* 184.

The offering commonly made by *James 1.* was a piece of gold, having on one side the portrait of the King kneeling before the altar, with four crowns before him, and circumscribed with this motto, *Quid retribuam domino pro omnibus quae tribuit mihi?* And on the other side, a lamb lying near a lion, with this inscription, *Cor contritum & humilitatum non despicies Deus.* *Ibid.*

Offertorium, Is used for a piece of silk, or fine linen, to receive and wrap up the offerings or occasional oblations in the church. *Status. Eccl. S. Pauli London.* 225. *Al. 39.* Offertorium esse Sindonem sericam, seu linteum, in quo fidelium oblationes reponbantur. Sometimes this word signifies the offerings of the faithful; or the place where they are made or kept: Sometimes the singing at the time of sacrament, &c.

Offit, (*Offitium*) Signifies that function by virtue whereof a man hath some employment in the affairs of another, as of the King, or of another person. *Corwell.*

It is said, that the word *offitium* principally implies a duty, and in the next place the charge of such duty; and that it is a rule, that where one man hath to do with another's affairs against his will, and without his leave, that this is an office, and he who is in it, is an officer. *Carth.* 478.

There is a difference between an office and an employment, every office being an employment; but there are employments which do not come under the denomination

of offices; such as an agreement to make hay, plough land, herd a flock; &c. which differ widely from that of steward of a manor, &c. 2 *Sid.* 142.

By the ancient Common law, officers ought to be honest men, legal and sage, & *qui melius sciat & possit officio illi intendere*; and this, says Lord Coke, was the policy of prudent antiquity, that officers did ever give grace to the place, and not the place, only to grace the officer. 2 *Inst.* 32, 456.

Officers are distinguished into civil and military, according to the nature of their several trusts, *Carth.* 479.

Officers are publick, or private; and it is said, that every man is a publick officer, who hath any duty concerning the publick; and he is not the less a publick officer, where his authority is confined to narrow limits; because it is the duty of his office, and the nature of that duty, which makes him a publick officer, and not the extent of his authority. *Carth.* 479.

Also offices are distinguished into ancient offices, and those which are of a new creation; and herein it is observable, that constant usage, hath not only sanctified the first establishment of such ancient offices, as have existed time out of mind, but also hath prescribed and settled the manner in which they have and are to continue to exist, in what manner to be exercised, how to be disposed, &c. 9 *Co.* 97, *Cro. Eliz.* 636. 2 *Roll. Abr.* 182. *Cro. Car.* 513. 1 *Sbrey.* 436.

There is also another distinction of offices into judicial, and ministerial; the first, relating to the administration of justice, or the actual exercise thereof, must be executed by persons of sufficient capacity, and by the persons themselves to whom they are granted; and herein also ancient usage and custom must govern. 1 *Jon.* 109. *Daw.* 35. 9 *Co.* 97.

It may not be improper, here to consider,

1. Who hath a right to create and grant, or assign an office; and of one office being incident to another.
2. Of the offence of buying and selling an office, and what offices are prohibited to be thus disposed of.
3. What remedies a person having a right to an office must pursue, to be let into the enjoyment of it, and how a disturbance is punishable.
4. Of the forfeitures of an office; and where for corruption, bribery, extortion, and oppressive proceedings, officers are punishable.

1. Who hath a right to create and grant, or assign an office; and of one office being incident to another.

The King is the universal officer and disposer of justice within this realm, from whom all others are said to be derived; yet he cannot create a new office inconsistent with our constitution, or prejudicial to the subject. 12 *Co.* 116. 1 *Roll. Rep.* 206. *Carth.* 478.

There are three things, says Lord Coke, which have fair pretences, yet are mischievous; 1st, new courts; 2d, new offices; 3d, new corporations for trade; and as to new offices, either in courts or out of them, these, cannot be erected without act of parliament; for that under the pretence of common good, they are exercised to the intolerable grievance of the subject. 2 *Inst.* 540.

An office granted by letters patent for the sole making of all bills, informations and letters missive in the council of York, was held unreasonable and void. 1 *Jon.* 231. *Mounson v. Lyfter.*

One Chute petitioned the King to erect a new office for registering all strangers within the realm, except merchants and strangers, and to grant the office to the petitioner with or without a fee; and it was resolved by all the judges, that the erection of such new offices for the benefit of a private person, was against all law, of what nature soever. 1 *Co.* 116. and several cases there cited to this purpose.

The King cannot grant to any person to hold a court of equity, tho' he may grant *tenere placita*; for the dispensation of equity is a special trust committed to the King, and

and not by him to be intrusted with any other, except his Chancellor. *Heb. 63.*

Where-ever one office is incident to another, such incident office is regularly grantable by him who hath the principal office; and on this foundation it hath been held, that the King's grant of the office of county clerk was void, it being inseparably incident to the office of sheriff, and could not by any law or contrivance be taken away from him. *4 Co. 32. Mitton's case.*

So the office of chamberlain of the King's Bench prison is inseparably incident to the office of marshal; therefore a grant of the office of marshal with a reservation of the office of chamberlain is void. *1 Salk. 439. Per Holt Ch. J. 1 Leon. 320, 321.*

So it hath been resolved, that the office of Exigenter of London and other counties in England, is incident to the office of Chief Justice of C. B. that therefore a grant thereof by the King, tho' in the vacancy of a Chief Justice, is null and void. *Dyer 175. a. pl. 25. 1 And. 152. and see Show. Par. Ca. Sir. Rowland Holt's case.*

Lord Coke says, that the justices of courts did ever appoint their clerks, some of which after by prescription grew to be officers in their courts; and this right which they had of constituting their own officers, is further confirmed to them by *Wilm. 2. c. 30.* The reasons are; 1st. For that the law ever appoints those who have the greatest knowledge and skill, to perform that which is to be done. 2^{dly}. The officers and clerks are but to enter, inrol, or effect that which the justices adjudge, award or order; the insufficient doing whereof maketh the proceeding of the justices erroneous, than which nothing can be more dishonourable and grievous to the justices, and prejudicial to the party. *2 Inst. 425. 4 Med. 173. cited.*

2. Of the offence of buying and selling an office, and what offices are prohibited to be thus disposed of.

The taking, or giving, of a reward for offices of a publick nature is said to be bribery; and nothing can be more prejudicial to the good of the publick, than to have places of the highest concern, (on the due execution whereof, the happiness of both King and people depends,) disposed of not to those who are most able to execute, but to those who are most able to pay for them; nor can any thing be a greater discouragement to industry and virtue, than to see those places of trust and honour, which ought to be the rewards of those who by their industry have qualified themselves for them, conferred on such who have no other recommendation, but that of being highest bidders; neither can any thing be a greater temptation to officers to abuse their power by bribery and extortion, and other acts of injustice, than the consideration of the great expences they were at in gaining their places, and the necessity of sometimes straining a point, to make their bargain answer their expectations. *2 Inst. 148. 1 Hawk. P. C. 166—8, 9.* It is said to be *malum n/jc.* and indictable at Common law. *Noy 102. Moor 781.*

For which reasons, among many others, it is expressly enacted by *12 Ric. 2. c. 24.* That the chancellor, treasurer, keeper of the Privy seal, steward of the King's house, the King's chamberlain, clerk of the rolls of the justices of the one bench and of the other, barons of the Exchequer, and all others who shall be called to ordain, name, or make justices of the peace, sheriffs, escheators, customers, comptrollers, or any other officer or minister of the King, shall be firmly sworn that they shall not ordain, name or make any of the above-mentioned officers for any gift or brokerage, favour or affection; nor that none who sueth by himself, or by others, privily or openly, to be in any manner of office, shall be put in the same office, or in any other, but that they make all such officers and ministers, of the best, and most lawful men, and sufficient to their estimation and knowledge.

And by the *4 H. 4. c. 5.* it is enacted, That no sheriff shall let his bailiwick to farm to any man for the time he occupieth such office,

But the principal statute relating to this matter is the *6 Ed. 6. c. 16.*

Whereby it is enacted, That if any person bargain or sell any office, or deputation of any office, or any part of any of them, or receive, any money, fee, &c. directly or indirectly, or take any promise, &c. to receive any money, &c. directly or indirectly, for any office, or for the deputation of any office, or any part of any of them; or to the intent that any person should have, exercise or enjoy any office, or the deputation of any office, or any part of any of them, which shall in any wise concern the administration or execution of justice, or the receipt, &c. of any the King's treasure, &c. or the keeping of any of the King's towns, &c. being for a place of strength and defence; or which shall concern or touch any clerkship; or be occupied in any manner of court of record wherein justice is to be ministered; that then every person, that shall so offend, shall not only lose and forfeit all his and their right, interest and estate, in or to any of the said office or offices, &c. but also persons who shall give or pay any sum of money, &c. or shall make any promise, &c. shall immediately, be adjudged a disabled person in the law to all intents and purposes to have, &c. the said office, &c.

"It is further enacted, That bargains, sales, promises, bonds, agreements, covenants and assurances, shall be void to and against him and them, by whom any such bargain, &c. shall be made."

"Provided always, That this act, shall not extend to any office, whereof any person is seized of any estate of inheritance; nor to any office of parkership, or of the keeping of any park, house, manor, garden, shade or forest, or to any of them."

"It is also provided, That this act shall not be prejudicial to the chief justices of the King's Bench or Common Pleas, or the justices of assize; but that they may do in every behalf, concerning any office to be given or granted by them, as they might have done before the making this act."

In the construction of the last mentioned statute, the following opinions have been holden.

1. That the office of chancellor, register and commissary in ecclesiastical courts, are within the meaning of the statute, inasmuch as those who do not only determine matters which are brought before them *pro salute anime*, but also have the decision of disputes concerning the lawfulness of matrimony, and legitimization of children, which touch the inheritance of the subject; and also hold plea of legacies and tithes, &c. in which respects they are courts of justice. *Cro. Jac. 269. 3 Inst. 148. 12 Co. 78. Salk. 468. 3 Lev. 287. 2 Vent. 187, 267.*

2. It hath been adjudged, that offices in fee are out of the statute; for if the King be seized in fee of a bailiwick, and he demise the same to A. who demises to B. rendering the demise to B. is not within the statute; for offices in fee being excepted out of the statute, under leases, of such offices are also excepted inclusively. *2 Lev. 151. Ellis v. Ruddle.*

3. It hath been resolved, that the place of cofferer is within this statute, and a person having once purchased this place is for ever disabled to enjoy the same; and that the King is bound by this statute. *3 Buss. 91. Sir. Arthur Ingram's case. Co. Lit. 234. S. C. and there's said, that the King could not dispense with this statute by any non obstant. Cro. Jac. 385. S. C. cited.*

4. It hath been agreed, that the sale of a bailiwick of a hundred is not within the statute, for such an office doth not concern the administration of justice, nor is it an office of trust. *4 Leon. 33. Godbolt's case. 4 Med. 223. S. C. cited.*

5. It hath been adjudged, that a seat in the six clerks office is not within the statute, being a ministerial office only; and they are but under-clerks, who have so much a seat for copying, &c. but one judge held it not saleable at Common law for the following reasons; 1st. Discouragement of merit and industry. 2^{dly}. It occasions extortion and exaction of excessive fees. 3^{dly}. From its being a great charge to suits. 4^{thly}. It exempts the persons,

Persons, who enter by these means, in a great measure from the due regulations under which they ought to be; for they are not so easily removed, as if they were at the will of him who hath the disposal of them. *Pasch.* 26 *Car.* 2. in *C. B. Sparrow v. Reynolds.*

6. It has been held, that this statute doth not extend to military officers; and that the 7 *W. & M.* which requires, that every commission officer, before his commission is registered, should take the oath there mentioned, that he had not directly or indirectly given any thing for procuring the commission, but the usual fees, extended only to horse, foot and dragoons, but not to the marines. *Preced. Chan.* 199.

7. It hath been adjudged, that the sale of the deputation of the office of provost marshal of Jamaica, is not within this statute; because this statute does not extend to the plantations. 4 *Mod.* 222. *Salk.* 411. *Blankard v. Galdy.* 2 *Mod.* 45. S. P. undetermined, and there said *arguendo*, that so good a law should have as extensive a construction as possible.

8. In a writ on a judgment in Ireland, it was held clearly that the office of clerk of the crown, and clerk of the peace, was within the statute; but that this law did not extend to Ireland, not being enacted there. *Trin.* 9 *Geo.* 2. in *B. R. Maccarty v. Wickford.*

9. It hath been held, that one who makes a contract for an office, contrary to the purport of this statute, is so far disabled to hold the same, that he cannot at any time during life be restored to a capacity of holding it by any grant or dispensation whatsoever. *Hob.* 75. *Co. Lit.* 234. *Cro. Car.* 361. *Cro. Jac.* 386.

10. It is held, that where an office is within the statute, and the salary is certain, if the principal make a deputation, reserving a lesser sum out of the salary, it is good; so if the profits be uncertain arising from fees, if the principal make a deputation, reserving a certain sum out of the fees and profits of the office, it is good; for in these cases the deputy by his constitution is in place of his principal, yet he has no right to his fees, they still continue to be the principal's; so that as to him it is only reserving a part of his own, and giving away the rest to another; but where the reservation or agreement is not to pay out of the profits, but to pay generally a certain sum, it must be paid at all events; and a bond for performance of such agreement is void by the statute. *Salk.* 468. 6 *Mod.* 234. *Gadolphin v. Tudor.* *Comb.* 356. S. P.

11. It hath been held, that this being a publick law, the judges *ex officio* are to take notice of it; but yet it seems the more regular and safe way to plead it; but it hath been resolved, that a person in pleading this statute need not allege, that the party against whom it is pleaded is not within any of the *provisos* or exceptions in the statute; but that if he be, it must come on his side to shew it. *Trin.* 9 *Geo.* 2. in *B. R. Maccarty v. Wickford.* *Sed. qu.* Also vide 2 *And.* 55, 107. *Smith v. Castlehill.* If judicial offices are saleable, that are not within the statute, see *Ld. Raym.* 1445.

12. *What remedies a person having a right to an office may pursue, to be let into the enjoyment of it, and how a disturbance is punishable.*

It is held clearly, that an assise lay at Common law for an office, and that therefore tho' the statute of *Westm.* 2. *cap.* 23. speaks only of offices in fee, yet an assise lies for an office in tail, or for life; but this is to be understood of offices of profit, for of an office of charge and no profit, an assise does not lie. 8 *Co.* 47. a. *John Webb's case.* 2 *Inst.* 412. S. P.

But a man shall not have an assise of the whole office, unless he be dispossessed of the whole; yet if a man be dispossessed of parcel of the profits of an office, he may have an assise for that parcel only. 8 *Co.* 49. b. 2 *Inst.* 412.

In an assise for an office newly erected and constituted, the demandant in his plaint must shew what fee or profit is granted for the exercise thereof; for this office cannot have a fee or profit appurtenant to it, as an ancient office

may, and for an office without fee or profit no assise lies. 8 *Co.* 49. *Webb's case.*

But in an assise for an ancient office, the demandant in his plaint need not shew what fee or profit is belonging to it, for it shall be intended there is some fee or profit. 8 *Co.* 49.

In an assise for an office, the demandant must shew a seisin; but it hath been held, that taking 3 d. for a *capias* against B. is sufficient seisin of the office of *filiner de banco.* 1 *Roll. Abr.* 270.

Also in an assise for an office, the demandant in his patent must set forth a title. 3 *Mod.* 273. *Sawyer v. Lenthall.*

An assise lies for the office of register of the admiralty; for though their proceedings are according to the Civil law, yet the right of their office is determinable at the Common law; so of the mastership of an hospital, being a lay fee. 8 *Co.* 47. 2 *Inst.* 412. 11 *Co.* 99. b. *Dyer* 152.

A man may bring an action on the case for the profits of an office, tho' he never had seisin. 1 *Mod.* 122. *per Hale Ch. J.*

An action by a person claiming an office against the person in actual possession and receiving the fees is perhaps the most eligible method that can be pursued, to try the question of right.

If the King grant the office of comptroller of the customs to A. and B. *durante beneplacito*, and A. dies, and afterwards the King grants the said office to C. and yet B. under pretence of survivorship, exercises the said office, and receives the profits thereof; C. may have an *indebitatus assumpsit* for so much money had and received to his use. 2 *Mod.* 260. adjudged upon a special verdict between *Ardis v. Spink.* Also vide 2 *Lev.* 108. *Cragg v. Norfolk.* And 1 *Mod.* 122.

4. *Of the forfeiture of an office; and where for corruption, bribery, extortion, and oppressive proceedings, officers are punishable.*

It is laid down in general, that if an officer acts contrary to the nature and duty of his office, or if he refuses to act at all, that in these cases the office is forfeited. 11 *Ed.* 4. 1. b. 2 *Roll. Abr.* 155.

But herein it will be necessary to consider more minutely, what shall be said such acts as are contrary to the duty of his office, and how far the same, (whether they are acts of omission or commission,) amount to a forfeiture; wherein it hath been clearly agreed, that a gaoler by suffering voluntary escapes, by abusing his prisoners, by extorting unreasonable fees from them, or by detaining them in goal after they have been legally discharged, and paid their just fees, *forfeits his office*; for that in the grant of every office it is implied, that the grantee execute it *faithfully*, and *diligently*. *Co. Lit.* 233. 9 *Co.* 50. 3 *Mod.* 143.

But it is held, that one negligent escape is not a forfeiture, though a voluntary one is, but that two negligent escapes amount to a forfeiture. 39 *Hen.* 6. 33. 2 *Roll. Abr.* 155. 2 *Vern.* 173. and see stat. 8 & 9 *W.* 3. *cap.* 27. tit. *Gaoler.*

There are, says Lord Coke, three causes of forfeiture or seizure of offices by matter in deed. 1st, By *Abuser.* 2dly, *Nonuser.* 3dly, *Refusal.*

1st, *Abuser*; as by a marshal or other gaoler's permitting escapes. 2dly, By *nonuser*; in which there is this difference, when the office concerns the administration of justice or the commonwealth, the officer *ex officio* ought to attend without request, there by *nonuser* or non-attendance the office is forfeited; but where an officer is not obliged to attend, but upon demand or request made by him whose officer he is, there without such demand or request, there can be no forfeiture; and herein also Lord Coke in another place takes the following diversity, viz. that *non-user* of itself, without some special damage, is no forfeiture of private offices, but that it is otherwise of a publick one, which concerns the administration of justice. 3dly, As to *refusal*, he says, that in all cases where an officer is bound upon request, to exercise his office, if he does not do it upon request, he forfeits it;

it; as if the steward of a manor be requested by the lord to hold a court, if he does not do it, it is a forfeiture. 6 Co. 56. Co. Lit. 233. b.

If a gaoler leave his prison door unlocked, and the prisoners escape, it is not only a negligent but voluntary escape. Cro. Car. 492. per cur'.

If conditions in law, which are annexed to offices, be not observed and fulfilled, the office is lost for ever, for these conditions are as strong and binding as express conditions; therefore if the office of forester, &c. descend to an infant or feme covert, (where by law they may so descend) and these are not exercised by sufficient deputies, they become forfeited. Co. Lit. 233. b. 8 Co. 44. Cro. Car. 556. Hard. 11.

Insufficiency is an original incapacity which creates the forfeiture of an office; so if a superior puts in a deputy into an office, which may be exercised by deputy, who is ignorant and unskilful, this is a forfeiture of the office. 4 Mod. 29. arguendo.

If the King grants an office in any of the courts at Westminster, the judges may remove an officer for insufficiency, and they are the proper judges of his abilities. 4 Mod. 30. arguendo. Where an officer may be removed, but not abridged of his fee. 1 Roll. Rep. 82-3.

A philizer of C. B. being absent two years, and having farmed out his office from year to year, without licence of the court, was discharged by the Chief Justice, *ex assensu sociorum suorum*, by words spoke openly in court; and tho' there was no record made of the discharge, nor no legal summons for him to answer to any accusation, yet the discharge was held good. Dyer 114. b. pl. 64. 1 Roll. Abr. 155. S. C.

An officer was turned out, because that he *spoliavit quendam recorda contra officii sui debitum*; and it was objected, 1st. That it was not certain enough, because not shewn what records: to which the court answered, that it would be prolix, and then he having spoiled the records, they are not perhaps to be had. 2d objection, That it may be he did it by chance, and not wilfully; to which the court said, that the conclusion *contra officii sui debitum* includes that. 1 Keb. 597. Pilkington's case.

But if the King grants an office which concerns trust and diligence to two, and one is attainted, the entire office is forfeited to the King; for he cannot make one occupy in common with another. Plow. 180.

Wherever an officer, who holds his office by patent, commits a forfeiture, he cannot regularly be turned out without a *scire facias*, nor can he be said to be completely ousted or discharged without a writ of discharge; for his right appearing of record, the same must be defeated by matter of as high a nature. But for this see Dyer 155, 198, 211. 9 Co. 98. Co. Lit. 233. Cro. Car. 60, 61. 1 Sid. 81, 134. 8 Co. 44. b. 1 Roll. Abr. 580. 3 Mod. 335. 3 Lew. 288.

All officers are punishable for corruption, and oppressive proceedings, according to the nature of the offence, either by indictment, attachment, action at the suit of the party injured, loss of their offices, &c. 6 Mod. 96.

But besides the punishment by indictment, &c. all courts of record, have a discretionary power over their officers, and are to see that no abuses are committed by them, which may bring disgrace on the courts themselves: The court of King's Bench, by the plenitude of its power, exercises a superintendency over all inferior courts, and may grant an attachment against the judges of such courts for oppressive, unjust, or irregular practice, contrary to the obvious rules of natural justice. Dyer 218. Palm. 564. 1 Salk. 210.

As to extortion by officers, it is so odious, (being more heinous, as Lord Coke says, than robbery, as it is usually attended with the aggravating sin of perjury,) that it is punishable at Common law by fine and imprisonment, and also by removal from the office in the execution whereof it was committed; and is defined to be, the taking of money, by any officer, *by colour of his office*, either *where none is due*, or *not so much is due*, or where it is *not yet due*. Co. Lit. 368. b. 2 Inst. 209.

16 Co. 102. 2 Roll. Abr. 32, 57. Cro. Car. 439, 448. Raym. 315.

But the stated and known fees allowed by the courts of justice to their respective officers; for their labour and trouble, are not restrained by the Common law, or by the statute of Westm. 1. therefore such fees may be legally demanded, without danger of extortion. 21 Hen. 7. 17. Co. Lit. 368.

Also it seems, that an officer, who takes a reward voluntarily given him, and which has been usual in certain cases, for the more diligent or expeditious performance of his duty, cannot be said to be guilty of extortion; for without such premium it would be impossible, in many cases, to have the law executed with vigour and success. 2 Inst. 210. 3 Inst. 149. Co. Lit. 368.

But it has been always held, that a promise to pay an officer money, for doing a thing which the law will not suffer him to take any thing for, is merely void, however voluntarily it may appear to have been made. 1 Roll. Abr. 16. 1 Roll. Rep. 313. Noy 76. 1 Jon. 65. Cro. Eliz. 654. Moor 468. Cro. Jac. 103.

As to bribery, it is said, in a large sense, to be the receiving, or offering, of any undue reward, by, or to, any person, whose ordinary profession relates to the administration of publick justice, in order to incline him to a thing, against the known rules of honesty; but in strict sense, it signifies the taking any thing valuable, by one in a judicial place, for executing his office, or by colour of his office, but of the King only; also it signifies the taking, or giving a reward, for offices of a publick nature, which manifestly tending to discourage men, and to introduce corruption, is highly punishable by the Common law. Fortescue de Laud. cap. 51. 3 Inst. 145, 149. Hob. 9. Cro. Jac. 65.

It is said, that at Common law bribery in a judge, in relation to a cause depending before him, was looked upon as an offence of so heinous a nature, that it was sometimes punished as high treason, before the statute 25 Ed. 3. 3 Inst. 145. 1 Leon. 291. Cro. Jac. 65. Russell's Collection, part 1. a. fol. 31.

Also it is said, in general, that all wilful breaches, of the duty of an office, are forfeitures of it, and punishable by fine, &c. for since every office is instituted, not for the sake of the officer, but for the good of some other, nothing can be more just, than that he, who either neglects or refuses to answer the end, for which his office was ordained, should give way to others, who are both able and willing to take care of it, and that he should be punished for his neglect or oppressive execution; but the particular instances wherein a man may be said to act contrary to the duty of his office, tho' various, are yet so generally obvious, that it is needless to enumerate them. Co. Lit. 233, 234.

See also 2 Inst. 43. Cro. Car. 491. The King v. Rooks. 3 Mod. 146. S. C. 9 Co. 50. a. Cro. Elin. 389. 1 And. 29. Popb. 117. Moor 707. 2 Mod. 121. Cro. Jac. 17, 18. 11 Ed. 4. 1. 20 Ed. 4. 56. 39 Hen. 6. 32. 22 Aff. 34. 8 H. 4. 18. 2 Hen. 7. 11. 14 Hen. 7. 1. 2 Roll. Abr. 155. 7 Co. 34. Popb. 119. 1 Lev. 71. Raym. 216. 3 Lew. 288. 3 Mod. 146. Skin. 114. 2 Vern. 189, 269. Bridgm. 27. Plowd. 378. Sir Henry Nevill's case and 1 Sid. 91. The King v. Cover.

And vide also, 1 Sid. 94, 152. 1 Lev. 75. 1 Kell. 349. Raym. 94. Horst's case. 5 Mod. 431. Carth. 430. The King v. Dr. Burnell. 4 Inst. 200. Bishop of Salisbury's case. Moor 868. S. C. And Black. Cam. 264. 1 V. 272. 2 V. 36.

For more learning on this subject, see 16 Vin. Abr. and 3 New Abr. tit. Office and Officers.

And see the statutes, 1 Ann. c. 2. & c. 8. 6 Geo. 1. c. 4. 9 Geo. 2. c. 26. and 16 Geo. 2. c. 30.

Offices of the Government. The parliament in former times had a right in nominating, placing, and displacing the Great Officers of the Kingdom, when they corrupted or miscounted the King, of which many instances may be given. Pryn.

Office found, is where an inquisition is made to the King's use, of any thing by virtue of his office who inquires,

reth, and it is found by the inquisition. In this signification it is used in the *stat.* 23 H. 8. c. 20. and *Stauford's Prærog.* pag. 60. where to *traverse an office*, is to traverse an inquisition taken of *office*: And to return an *office*, is to return that which is found by virtue of the *office*. *Kitch.* 177.

There are two kinds of *offices* issuing out of the *Exchequer* by commission, *viz.* an *office* to intitle the King, in the thing inquired of; and an *office* of instruction. 6 *Rep.* 52. The *office* of intitling, doth vest the estate and possession of the land, &c. in the King, who had therein before only a right or title; as where an alien purchases lands, a person is attainted of felony, or the like: And the other *office*, is where land is vested and settled before in the King, but the particular thereof doth not appear upon record. 4 *Rep.* 58. *Plowd.* 484. And the effect of this *office* is, that the King from the time of finding, shall be answered the profits without entry, &c. 5 *Rep.* 32. 10 *Rep.* 115. If any *office* be wrongfully found: Those who are grieved, may be relieved by a traverse, or *Monstrans de Droit*, by pleading or petition: For every *office* is in nature of a declaration, to which any man may plead, and either deny or confess, &c. *Plowd.* 448. *Bro.* 506. Where *offices* are found before the escheators, they must be delivered by indenture under the hands and seals of the jurors. *Dyer* 170. The King by the Common law is not in possession of lands, forfeited for treason, during the life of the offender, without an *office found*: But the lands, whereof a person attainted of high treason, dies seised of an estate in fee, are actually vested in the King, without any *office*; because they cannot descend, the blood being corrupted, and the freehold shall not be in abeyance. 2 *Hawk.* P. C. 448. Vide *stat.* 33 H. 8. c. 20. There may be an *office*, and *Scire facias*, and seizure on such *offices*, &c. See *Inquisition*. And *Black. Com.* 3 *V.* 258, 259.

Office of the Court. It is the *office* of the Courts at Westminster, to take notice of customs of London, &c. and to allow many things, grant new trials, prohibitions, &c.

Official, (officialis) By the ancient Civil law, signifies him who is the minister of; or attendant upon a magistrate. In the Canon law, it is he to whom any bishop generally commits the charge of his spiritual jurisdiction; and in this sense there is one in every diocese called *Officialis Principalis*, whom the laws stile *Chancellor*; and the rest, if there are more, are by the Canonists termed *Officiales foranei*, but by us *Commissionaries*. In our statutes this word signified properly him whom the Archdeacon substitutes for the executing his jurisdiction, as appears by *stat.* 32 Hen. 8. c. 15. The archdeacon hath an *official*, or church lawyer to assist him, who is judge of the archdeacon's court. *Wood's Inst.* 30, 505.

Officiarius non faciendis vel amovendis, Is a writ directed to the magistrates of a corporation, requiring them not to make such a man an *officer*, or to put one out of the *office* he hath, until inquiry is made of his manners, &c. *Reg. Orig.* 126.

Officium curtigii Banorum, Granted to William Osborne. Anno 2 Ed. 2. Extract. Fin. Cancell.

Oil. The lord mayor of London, and the master and wardens of the Tallow Chandlers company, are to search all oils brought to London; and if any is deceitfully mixed, they may throw it away, and punish the offenders: And head officers in corporations have like power. *Stat.* 3 Hen. 8. c. 14. Duties on hempseed oil, rape oil, and other seed oil, and olive oil. 2 W. & M. sess. 2. c. 4. s. 9. 41.

No lamps to be used in private houses but of fish oil, 8 Ann. c. 9. sess. 18. See *Gauging, Whalers*.

Old Jury, (Vetus Judæismus) The place or street where the Jews lived in London. See *Jews*.

Oleron Laws, (Ularense Leges) Are the laws of King Rich. 1. relating to Maritime affairs, so called, because made by him when he was at Oleron; which is an island lying in the bay of Aquitaine, at the mouth of the river Charente, and now belongs to the French King. *Co. Lit.* 260. These laws are recorded in the *Black Book* of the admiralty, and are accounted the most excellent composition of Sea Laws in the world. See

Seldon's Mare Clausum, 222, 254. And *Black. Com.* 1 *V.* 417. 4 *V.* 416.

Olympiad, (Olympias) An account of time among the Greeks, consisting of five complete years, (or according to some a space of four years) having its name from the *Olympick Games*, which were kept every fifth year, in honour of Jupiter Olympius, near the city of Olympia: when they entered the names of the conquerors on publick records: The first Olympiad fell in the year of the world 3174. *Ethelred*, King of the English Saxons, computed his reign by Olympiads. *Spelm.*

Omer, A measure made use of by the Jews, of three pints and a half. *Morch. Di2.*

Omissions, Are placed among crimes and offences; and omission to hold a court-leet, or not swearing officers therein, &c. are causes of forfeiture. 2 *Hawk.* P. C. 73. Omissions in law proceedings render them vicious and defective; as want of warrants of attorney entered, &c. 1 *Keb.* 222, 204. Vide *Nonfeasance*.

Ouncune, (Sax. On cunnen) Signifies as much as accused; *Accusatus*. *Leg. Alfred.* c. 29.

Ouerands pro rata portionis, Is a writ that lies for a jointenant, or tenant in common, who is distrained for more rent than his proportion of the land comes to. *Reg. Orig.* 182.

O. Ni. It is the course of the *Exchequer*, that as soon as the *sheriff* enters into and makes up his account for issues, amerciaments, and mean profits, to mark upon each head, O Ni which denotes *oneratur, nisi habeat sufficientem insurationem*, and presently he becomes the King's debtor, and a *debet* is set upon his head; whereupon the parties *paravails* become debtors to the sheriff, and are discharged against the King, &c. 4 *Inst.* 116.

Onus Episcopale, Were customary payments from the clergy to their diocesan bishop, of Synodals, Pentecostals, &c. See *Episcopalia*.

Onus importandi, The charge or burden of importing merchandize, mentioned in the *stat.* 13 Car. 2.

Onus probandi, i. e. The burden of proving. 14 *Car.* 2. c. 11.

Open Law, (lex Manifesta) Is the making of law; which bailiffs may not put men to, upon their bare assertion, except they have witnesses to prove the truth of it. *Magn. Chart.* c. 21.

Open Theft, (Sax. Opentheof) Is a theft that is manifest. *Leg. Hen.* c. 13.

Open-Field, i. e. When corn is carried out of the common fields. *Brit.*

Operarii, Were such tenants who had some little portions of land by the duty of performing many bodily labours and servile works for their lord, being no other than the *servi* and *bondmen*: They are mentioned in several ancient *surveys* of manors.

Operatio, One day's work performed by a tenant for his lord. *Paroch. Antiq.* 320.

Opyofer, An officer belonging to the *Green Wax* in the *Exchequer*. See *Exchequer*.

Oppression, In a private sense, is the trampling upon, or bearing down one, on pretence of law, which is unjust: But where the law is known and clear, tho' it be unequal, the judges must determine according to that. *Vangb.* 37. In another signification, it is said by *Fortescue*, that all the unjust methods invented by princes, to extort money from their subjects, are so many *fountains* of oppression, which never dry up; for succeeding Kings seldom fail to follow the example of their predecessors. *Fortesc. Laud. Leg. Angl.*

Oppression of the Crown, how Remedied. The learned *Blackstone* treating of the King, his dignity, &c. and observing that no suit or action can be brought against him, even in civil matters, because no court can have jurisdiction over him, proceeds as follows,

Are then, it may be asked, the subjects of England totally destitute of remedy, in case the crown should invade their rights, either by private injuries, or publick oppressions? To this we may answer, that the law has provided a remedy in both cases.

And, first, as to *private* injuries; if any person has, in point of property, a just demand upon the King, he must petition him in his court of Chancery, where his Chancellor will administer right as a matter of grace, tho' not of compulsion: And this is entirely consonant to what is laid down by the writers on natural law. "A subject, (says *Puffendorf*;) so long as he continues a subject, hath no way to oblige his prince to give him his due, when he refuses it; tho' no wise prince will ever refuse to stand to a lawful contract. And, if the prince gives the subject leave to enter an action against him, upon such contract, in his own courts, the action itself proceeds rather upon natural equity, than upon the municipal laws." For the end of such action is not to compel the prince to observe the contract, but to persuade him. And, as to personal wrongs; it is well observed by Mr. Locke, "The harm which the sovereign can do in his own person not being likely to happen often, nor to extend itself far; nor being able by his single strength to subvert the laws, nor oppress the body of the people, (should any prince have so much weakness and ill nature as to endeavour to do it)—the inconveniency therefore of some particular mischiefs, that may sometimes happen, when an heady prince comes to the throne, are well recompensed by the peace of the publick and security of the government, in the person of the chief magistrate being thus set out of the reach of danger."

Next, as to cases of ordinary publick oppression, where the vitals of the constitution are not attacked, the law hath also assigned a remedy. For, as a King cannot misuse his power, without the advice of evil counsellors, and the assistance of wicked ministers, these men may be examined and punished. The constitution has therefore provided, by means of indictments, and parliamentary impeachments, that no man shall dare to assist the crown in contradiction to the laws of the land. But it is at the same time a maxim in those laws, that the King himself can do no wrong; since it would be a great weakness and absurdity in any system of positive law, to define any possible wrong, without any possible redress.

For, as to such publick oppressions as tend to dissolve the constitution, and subvert the fundamentals of government, they are cases which the law will not, out of decency, suppose: Being incapable of distrusting those, whom it has invested with any part of the supreme power; since such distrust would render the exercise of that power precarious and impracticable. For, where-ever the law expresses its distrust of abuse of power, it always vests a superior coercive authority in some other hand to correct it; the very notion of which destroys the ideas of sovereignty. If therefore (for example) the two houses of parliament, or either of them, had avowedly a right to animadvert on the King, or each other, or if the King had a right to animadvert on either of the houses, that branch of the legislature, so subject to animadversion, would instantly cease to be part of the supreme power; the balance of the constitution would be over-turned; and that branch or branches, in which this jurisdiction resided, would be completely sovereign. The supposition of law therefore is, that neither the King, nor either house of parliament (collectively taken) is capable of doing any wrong; since in such cases the law feels itself incapable of furnishing any adequate remedy. For which reason all oppressions, which may happen to spring from any branch of the sovereign power, must necessarily be out of the reach of any stated rule, or express legal provision: But, if ever they unfortunately happen, the prudence of the times must provide new remedies upon new emergencies.

Indeed, it is found by experience, that whenever the unconstitutional oppressions, even of the sovereign power, advance with gigantic strides and threaten desolation to a state, MANKIND WILL NOT BE REASONED OUT OF THE FEELINGS OF HUMANITY; nor will sacrifice their liberty by a scrupulous adherence to those political maxims, which were originally established to preserve it. Therefore tho' the positive laws are silent, experience will furnish us with a very remarkable case, wherein NATURE AND REASON PREVAILED. When King James

the Second INVADED the fundamental constitution of the realm, the convention declared an abdication, whereby the throne was rendered vacant, which induced a new settlement of the crown. And so far as this precedent leads, and no farther, we may now be allowed to lay down the law of redress against publick oppression. If therefore any future prince should endeavour to subvert the constitution by BREAKING the ORIGINAL CONTRACT between King and people, should violate the fundamental laws, and should withdraw himself out of the kingdom; we are now authorized to declare that this conjunction of circumstances would amount to an abdication, and the throne would be thereby vacant. But it is not for us to say, that any one, or two, of these ingredients would amount to such a situation; for there our precedent would fail us. In these therefore, or other circumstances, which a fertile imagination may furnish, since both law and history are silent, it becomes us to be silent too; leaving to future generations, whenever necessity and the safety of the whole shall require it, the EXERCISE of those INHERENT (tho' latent) POWERS of SOCIETY, which no climate, no time, no constitution, no contract, can ever DESTROY or DIMINISH. *Black. Com. 1 V. 243, 45.*

Option, When a new suffragan bishop is consecrated, the archbishop of the province by a customary prerogative claims the collation of the first vacant dignity or benefice in that see, at his own choice; which is called his *Option*. *Cowell.*

Optional Writ. A *præcipe* is an optional writ, i. e. it is the alternative, commanding the defendant, to do the thing required, or shew the reason wherefore he hath not done it. There is another species of original writs called *Peremptory*, or a *Si feceris te securum*, from the words of the writ, which directs the sheriff to cause the defendant to appear in court, without any option given him, provided the plaintiff gives the sheriff security effectually to prosecute his claim. *Black. Com. 3 V. 274.*

Pæ. This was Saxon money or coin, valued at sixteen pence, and sometimes according to variation of the standard at twenty pence. It is a word which often occurs in *Domesday*, and the laws of King Canutus.

Orando pro Rege & Regno, An ancient Writ. Before the Reformation, while there was no standing collect for a sitting parliament, when the Houses of Parliament were met, they petitioned the King that he would require the bishops and clergy to pray for the peace and good government of the realm, and for a continuance of the good understanding between his Majesty and the estates of the kingdom; and accordingly the writ *De Orando pro Rege & Regno* was issued, which was common in the time of King Edw. 3. *Nichols. Engl. Hist. par. 3. p. 66.*

Orarium, The hem, or border of a garment. *Cowell.*

Oryth, *Anglice*, A bony, a swelling or knot in the flesh, caused by a blow. *Brass. lib. 3. tit. De Corona, cap. 23. num. 2.*

Orythas and gardens, Robbing them, or destroying trees in them, how punished, 43 *Edw. c. 7.* 9 *Geo. 1. c. 22.* The hundred answerable for the damages, 9 *Geo. 1. c. 22. stat. 7.*

Orythel or **Orythel**, (mentioned in *stat. Rich. 3. cap. 24 H. 8. cap. 2.* and 3 *Edw. 6. cap. 2.*) Seems to be a kind of cork, or rather a kind of stone like alium, which dyers use in their colours. To what duties liable? 4 *W. & M. c. 5. stat. 2.*

Orythel, or **Orythel**, (*ordalium*) Is a Saxon word, compounded of *or*, *magnum* and *deal*, or *del*, *judicium*, or as others, from *or*, which in that language is *præsumptio*, and *del*, *part*, that is, *super criminis*, or Not guilty; but is used for a kind of purgation practised in ancient times, and in the Canon law called *purgatio vulgaris*. There were of this two sorts, one by fire, another by water. Of these see Mr. Lambard, in his *Explication of Saxon Words*, verbo *ordalium*: of this you may read likewise *Holingshead*, fol. 98. and *Maxman* especially, *Dispar. de Feid. p. 41.* where, of five kinds of proofs, which he calleth, *Feudales probationes*, he maketh this the fourth, calling it *Explorationem*, & *hujus jurisjuramentum*.

bationis 6, genera fuisse animadvertit, viz. per flammam, per aquam, per ferrum candens, per aquam vel gelidam vel ferventem, per foras & per corpus Domini, of all which he alledged several examples out of history, very worthy reading. See *Stene de verbor. Significat. verbo Marchianum*.

This *Ordeal* to have been in use in Henry the Second's time, as appeareth by *Glanville, lib. 14. cap. 1. 2.* See also *Verfegan, cap. 3. pag. 63, &c.* See also *Hoveden 556.* This *Ordeal* law was condemned by Pope Stephen the Second, and afterwards here totally abolished by parliament, as appears by *Rot. Puten. de Anno 2 Hen. 3. membr. 5.* Cowell, *Vide Leg. Edw. Confess. cap. 9.* Anciently when an offender being arraigned pleaded Not guilty, he might chuse whether he would put himself for trial upon God and the country, by *swearing*, as at this day, or upon God only; and then it was called the judgment of God, presuming that he would deliver the innocent. *Terms de Ley. 9. Rep. 32.* This trial was two ways, one by *water*, and another by *fire*: the *water ordeal* was performed either in hot or cold; in cold water the parties suspected were adjudged innocent, if their bodies were not borne up by the water contrary to the course of nature; in hot water, they were to put their bare arms or legs into scalding water, which if they brought out without hurt, they were taken to be innocent of the crime. Those that were tried by the *fire ordeal*, passed bare footed and blind-fold over nine hot glowing plow-shares; or were to carry burning irons in their hands, usally of one pound weight, which was called *simple ordeal*; or of two pounds, which was *duplex*; or of three pounds weight, which was *triplex ordeal*; and accordingly as they escaped, they were judged innocent or nocent, acquitted or condemned: this *fire ordeal* was for freemen, and persons of better condition; and the *water ordeal* for bondmen and rusticks. *Glanville lib. 4. c. 1.* And the horrible trial by *fire ordeal*, in the first degree, Queen Emma, mother of *Edward the Confessor*, underwent on a suspicion of her chastity: also an example of the second kind is mentioned in our books of a company of persons suspected to be dealers of the King's deer, in the reign of King *Will. 2.* who having carried burning irons without injury, on its being reported to the King, he received it with a remarkable indignation; and replied,

Quid est id; Deus est justus Iudex: Percat qui deinceps hoc crediderit.

The monarch must mean, that God, whom his priests had taught him to worship, or consider as God; not the great Author of Nature.

The Saxons, besides the trial by *combat*, commonly used their *fire* and *water ordeals*. See *Black. Com. 4 V. 336, 407, 418.*

Ordelite, or *Ordelite*, (*effusio metalli*, derived from the Saxon *ore*, *metallum* and *delfan*, *effodere*) Is often used in charters of privileges, being taken for a liberty, whereby a man claims the *ore* found in his own ground, but properly is the *ore* lying under ground; as also a *delf* of coal, is coal lying in veins under ground, before it is digged up. Cowell.

Ordeals, *Oaths* and *ordels*, Was part of the privileges and immunities granted in old charters, meaning the right of administering oaths, and adjudging *ordel* trials, within such a precinct or liberty. Cowell.

Orders, Are of several sorts, and by divers courts; as of the *Chancery*, *King's Bench*, &c. *Orders of the court of Chancery*, either of course or otherwise, are obtained on the petition or motion of one of the parties in a cause, or of some other interested in, or affected by it; and they are sometimes made on hearings, sometimes by consent of parties. *Pract. Sile. 25.* They are to be pronounced in open court, and drawn up by the *Register* from his notes; and if there be any difficulty in adjusting the notes, a summons is given by the register for the clerk or solicitor of the other side to attend, whereupon they are settled, or the court is applied to, if it cannot be otherwise done: before the *orders* are entered and passed by the register, the other side hath four days allowed to object against them, for which purpose copies are delivered; and when they

are perfected, they are to be served on the parties, or the clerk or solicitor employed by them. *Ibid.* If an *order* is of course, the solicitor usually draws up the notes or minutes, and gives them to the register's clerk, to draw up the *order* from; and when the *order* is drawn up, it is to be entered by the entering clerk, which must be within eight days from the pronouncing; then the register passes and signs it, after which is the service, &c. For not obeying an *order*, personally served, a party may be committed.

Orders of the King's Bench, Are rules made by the court in causes there depending; and when they are drawn up and entered by the clerk of the rules, they become *orders of the court*. 2 *Lill. 261.* This court doth not take notice of *orders* made in *Chancery*, nor in any other court, so as to be bound by them; but will proceed according to their own rules and *orders*. *Trin. 23 Car. B. R.* And if a cause be put in the paper of causes, that it may be spoke unto in the matter of law, by the *order* of the court; and the attorney in the cause doth not attend at the day, the cause is to be put out of the paper, and not be put in again that term, except very good cause be shewn. *Mich. 22 Car. B. R. 2 Lill. 261.* The *King's Bench* hath power to quash any *orders* made at the publick or private sessions of the peace; or by any other commissioners, if they find good reason for it. *Ibid.*

See *Sir George Cooke's Rules and Orders in the Courts of King's Bench and Common Pleas, and Cases in Practice*, 2 vols. 8vo. a very excellent work; from which many things in our modern books of practice are taken, tho' the authors have seldom been so ingenuous as to acknowledge from whence they were taken, or to refer to any authorities, in many of those instances.

Justices of Peace, *Justices of peace*, who make *orders*, must be said in such *orders* to be justices of the county, for residing in the county is not sufficient; but they need not be of the division: it must also appear that one of the justices was of the *quorum*. 2 *Salk. 474; 480.* An *order* signed separately by two *justices of peace*, not being present together at the doing it, was ruled naught upon the statute 14 *Car. 2. c. 12.* See 1 *Ld. Raym. 55.* Also where 'tis said, that two justices doth *order* instead of *do*, the singular number for the plural, it has been adjudged ill. 2 *Raym. 1198.* And if the name of the county be not in the body of *orders*, but only in the margin, they will be quashed: tho' some orders of removal with the name of the county in the margin, have been held good. *Mich 11 Geo. 1. Mod. Ca. in L. and E. 310.* The sessions of the peace, during all their sessions, may alter or revoke their *orders*, and make a new *order* to vacate the former, tho' it be drawn up; as judgments in *B. R.* may be altered during the same term, the sessions as well as the term being in law accounted as one day. *Ibid. 606.* And the quarter sessions is not bound to set forth the reason of their *orders* and judgments, no more than other courts. 2 *Salk. 607.* Justices of peace at the quarter-sessions may rectify defects of form in *orders*, &c. upon appeals, and then shall determine the matters according to the merits of the case; and no *orders* shall be removed into *B. R.* without entering into recognizance of 50 l. to prosecute with effect, &c. otherwise the justices to confirm their *order*, by *Stat. 5 Geo. 2. c. 19.* By the *Stat. 26 Geo. 2. c. 27.* No *order* of justices shall be set aside for not inserting that one of them is of the *quorum*. See *Peer.*

Order of sessions must adjudge, and not state the evidence only. 1 *Wils. 74.*

Ordnale, Is a book which contains the manner of performing divine offices: *in quo ordinatur modus, &c.*

Ordinance, (*ordinatio*) Is a law, decree, or statute, variously used. *Litt. Dist.*

Ordinance of the forest, (*ordinatio forestæ*) Is a statute made touching matters and causes of the forest, anno 34. *Ed. 1.*

Ordinance of Parliament, Is said to be the same with *all of parliament*; for in the Parliament Rolls acts of parliament are often called *ordinances*, and ordinances *acts*: but originally there seems to be this difference between them: that an *ordinance* was but a temporary act, by way

of prohibition, which the Commons might alter or amend at their pleasure; and an act of parliament is a perpetual law not to be altered but by King, Lords and Commons. *Rot. Parl.* 37 *Ed.* 3. *Pryn's Animadver. on 4 Inst.* 13. And Sir Edward Coke says, that an ordinance of parliament is to be distinguished from an act; in as much as the latter can be only made by the King and the three estates, whereas the former is by one or two of them. *Co. Lit.*

Ordinary, (*ordinarius*) Is a Civil law term, for any judge who hath authority to take cognisance of causes in his own right, and not by deputation: by the Common law it is taken for him who hath ordinary or exempt and immediate jurisdiction in causes ecclesiastical. *Co. Lit.* 344. *Stat. Westm.* 2. 13 *Ed.* 1. *cap.* 19.

This name is applied to a bishop who hath original jurisdiction; and an archbishop is the ordinary of the whole province, to visit and receive appeals from inferior jurisdictions, &c. 2 *Inst.* 398. 9 *Rep.* 41. *Wood's Inst.* 25. The word ordinary is also used for every commissary or official of the bishop, or other ecclesiastical judge, having judicial power: an archdeacon is an ordinary; and ordinaries may grant administration of intestates estates, &c. *Stat.* 31 *Ed.* 3. *c.* 11. 9 *Rep.* 36. But the bishop of the diocese is the true and only ordinary to certify excommunications, lawfulness of marriage, and such ecclesiastical and spiritual acts to the judges of the Common law; for he is the person whom the court is to write to, in such things 2 *Shep. Abr.* 472. For the ordinary's power, it is declared by many statutes; as relating to visiting hospitals, by 2 *H.* 5. *c.* 1. The certifying of bastardy, &c. 9 *H.* 6. *c.* 11. Concerning questions of tithes, that shall come in debate before him. 27 *H.* 8. *c.* 20. Allowance of schoolmasters, &c. 23 *Elix.* *c.* 1. 1 *Jac.* 1. *c.* 4. If a man may keep a school without licence of the ordinary, see *Ld. Raym.* 603. And their authority in general is restored, by 13 *Car.* 2. *c.* 1. The ordinary's power and interest in a church, is of admitting, instituting and inducting parsons; of seeing and taking care that it be provided with a pastor, by the patron who has the right of presenting; or in his default, to bestow the church on some proper person to serve the cure, &c. 1 *Roll. Rep.* 453. Before presentation to a church, the ordinary may sequester the profits; and during the vacation, 'tis said he may make a lease. 1 *Keb.* 370. When the ordinaries or their ministers have committed extortion or oppression, they may be indicted, putting the things in certain, and in what manner, &c. 25 *Ed.* 3. *c.* 9. Formerly clerks accused of crimes were delivered to the ordinary, and the bodies of such clerks kept in the ordinary's prison until tried before him by a jury of twelve clerks; and if condemned, they were liable to no greater punishment than degradation, loss of goods, and the profits of their lands; unless they had been guilty of apostacy, &c. This was when they had the privilege of being tried only by ecclesiastical judges; which was so far indulged them, that after they had been once delivered to the ordinary, they could not be remanded to any temporal court, until the *Stat.* 8 *Elix.* *c.* 4. 2 *Hawt. P. C.* 361. No ornaments can be set up in a church, without consent of the ordinary. 1 *Strange* 576. See *Co. lib.* 9. *fol.* 36. *Hensloe's case.* And the statute of *Westminster* 2. *cap.* 19. 31 *E.* 3. *c.* 11. and 21 *H.* 8. *cap.* 5. 2 *Inst.* *cap.* 19. See *Brooke, Ordinary*, and *Linderwode* in *cap. Exterior. tit. de Constitutionibus*, verbo *Ordinarii*. Indictment against ordinary, &c. for extortion, must set forth the fact, 25 *Ed.* 3. *ff.* 3. *c.* 9. See *Administrator, Bishop, Clergy, Hospitals*.

Ordinary of Newgate, Is one who is attendant in ordinary upon condemned malefactors in that prison, to prepare them for death; and he records the behaviour of such persons.

Ordinatione contra Serbientes, A writ that lieth against a servant, for leaving his master contrary to the statute. *Reg. Orig.* 189.

Ordination of Clergy. No man is capable of taking any ecclesiastical promotion, or dignity, unless he be ordained a priest, to qualify him for the same. A clerk is to be twenty-three years old, and have deacon's orders, before he can be admitted into any share of the ministry: and a priest must be twenty-four years of age, before he shall be admitted into orders to preach, or to administer

the sacraments; but the archbishop may dispense with one to be made deacon at what age he pleases, tho' he cannot with one who is to be made a priest. 13 *Elix.* Deacons and priests are to be ordained only on the four Sundays immediately following the *Ember Weeks*, except on urgent occasions; and it is to be done in the cathedral or parish church where the bishop resides, in time of divine service, and in the presence of the archdeacon, dean, and two prebendaries, or of four other grave divines. And no bishop shall admit any person into orders, without a title, or assurance of being provided for; and before any are admitted, the bishop shall examine them in the presence of the ministers, who assist him at the imposition of hands; on pain, if he admits any not qualified, &c. of being suspended by the archbishop from making either deacons or priests for two years. *Can.* 31, 34. If any impediment be objected against one who is to be made either priest or deacon, at the time he is to be ordained, the bishop is bound to surcease from ordaining him, until he shall be found clear of that impediment; and it is generally held, that whatever are good causes of deprivation, are also sufficient causes to deny admission to orders; as incontinency, drunkenness, illiterature, perjury, forgery, simony, heresy, outlawry, bastardy, &c. 2 *Inst.* 631. 5 *Rep.* A person to be ordained priest, must bring a testimonial of four persons, known to the bishop, of his life and doctrine; and be able to give an account of his faith in Latin: and a deacon is not to be made a priest, unless he produce to the bishop such a testimonial of his life, &c. and that he hath been found faithful and diligent in executing the office of a deacon. A bishop shall not make any one a deacon and minister, on the same day; for there must be some time to try the behaviour of a deacon in his office, before he is admitted to the order of priesthood, which time is generally a year, but it may be shorter, on reasonable cause allowed by the bishop: priests and deacons are not only to subscribe the thirty-nine articles, but take the oath of the King's supremacy, &c. as directed and altered by *Stat.* 1 *W. & M.* A priest by his ordination receives authority to preach the word, and administer the Holy Sacraments, &c. (but he may not preach without licence from the bishop, archbishop, or one of the universities.)

None but priests are capable of any benefice, or dignity, or of administering the sacrament, 13 & 14 *Car.* 2. *c.* 4. *ff.* 14.

The *Stat.* 31 *Elix.* *cap.* 6. punishes corrupt ordination of priests, &c. If any persons shall take any reward, or other profit, to make and ordain a minister, or to license him to preach, they shall forfeit 40 *l.* and the party so ordained, &c. 10 *l.* by this statute.

Ordines, A general chapter, or other solemn convention of the religious of such a particular order. *Paroch. Antiq.* p. 576.

Ordines majores & minores, The holy orders of priest, deacon and subdeacon, any of which did qualify for presentation and admission to an ecclesiastical dignity or cure, were called *ordines majores*; and the inferior orders of chanter, psalmist, ostiary, reader, exorcist and acolyte, were called *ordines minores*: for which the persons so ordained had their *prima tonsura* different from the *tonsura clericalis*. *Cowell*.

Ordinum fugitivi, Signified those of the religious who deserted their houses, and throwing off the habits, renounced their particular order, in contempt of their oath and other obligations. *Paroch. Antiq.* 388.

Ordinance, Letters patent for making it not within the statute of monopolies, 21 *Jac.* 1. *c.* 3. *ff.* 10.

Ordo, Is taken for that rule which the monks were obliged to observe. In *Radmer. vita S. Engelmi*, *cap.* 37.

Ordo Albus, The White Friars, or Augustines; and the Cistercians also wore White.

Ordo Niger, Were the Black Friars. *Sub norma Benedicti famulantes*; as *Inglulphus* tells us, p. 851. The Cistercians likewise wore Black. *Matt. Paris.* 321, 514.

Oratio, or **Expiatio**, (from the Saxon *or*, *fecit* and *gild*, *solutio vel redemptio*.) Is a delivery or restitution of cattle. But *Landward* says, 'tis a restitution made by the hundred, or county, for any wrong done by one who was in pledge. *Arch.* pag. 125. Or, rather a penalty for taking away cattle.

Oxford haven, Penalty on selling a net with a stall-boat within the mouth of *Oxford haven*, 27 El. c. 21.

Orfraises, (aurifrisum) A sort of cloth of gold, frizled or embroidered, formerly made and used in *England*. worn by our Kings and nobility; and the cloaths of the King's guards were called *orfraises*, because adorned with such works of gold. Mention is made of these *orfraises* in the *Records of the Tower*.

Orgailous, More truly *orguillous*, that is, proud and high-minded; derived from the *French orgueil, pride*. 4 Inst. 89.

Organs, (mentioned in Stat. 32 E. 2. f. 3. c. 3.) Is the greatest sort of *North-sea fish*, (for the statute says they are greater than lob-fish) which we now call *organ-lings*, corruptly from *Orkney-ling*, because the best are near that island. *Cowell*.

Orgito, (sine compensatione) Without recompence; as where no satisfaction was to be made for the death of a man killed, so that he was judged lawfully slain. *Spelm.*

Oriel college, A prebend of *Rockester*, how annexed to its provostship, 12 Ann. f. 2. c. 6. f. 7.

Original, In the court of King's Bench, the usual original writ issued in actions, as action of trespass upon the case, &c. The court of Common Pleas proceeds by original in all actions: but to arrest and sue a party to outlawry, it is used by both courts. And for originals in trespass on the case, there is a fine payable to the crown, where the damages are laid above forty pounds in proportion to the damage. *Præf. Solic.* 254, 255. The original is the foundation of the *capias*, and all subsequent process; the return whereof is generally the *teste* of the *capias*: tho' the *capias* may be taken out before the original, by leaving the *præcipe* with the filazer, who will make out a *capias* upon it, and afterwards carry it to the curfitor to make an original; and the filazer when it is returned, is to file it with the *custos brevium*. See *Attorney's Pract. in Court of K. B. and C. P.*

Originales. In the treasurer's remembrancer's office in the *Exchequer*, the transcripts, &c. sent thither out of the *Chancery* are called by this name, and distinguished from *recorda*; which contain the judgments and pleadings in suits tried before the *Barons*.

Oryed, Some *orped* knight, i. e. a knight whose clothes shined with gold. *Blount*.

Orphan, (orphanus) Is a fatherless child; and in the city of *London* there is a court of record established for the care and government of orphans. 4 Inst. 248.

The Lord Mayor and Aldermen of *London* have the custody of orphans under age and unmarried, of freemen that die; and the keeping of their lands and goods: and if they commit the custody of an orphan to any man, he shall have the writ of *reavishment of ward*, if the orphan be taken away; or the Mayor and Aldermen may imprison the offender until he produces the infant. 2 *Dauv. Abr.* 311. If any one, without consent of the court of Aldermen, marries such an orphan under the age of twenty-one years, tho' out of the city, they may fine and imprison him, until paid. 1 *Lev.* 32. f. *Centr.* 178. Executors and administrators of freemen dying, are to exhibit true inventories of their estates before the Lord Mayor and Aldermen in the court of orphans, and must give security to the Chamberlain of *London* and his successors by recognizance for the orphan's part; which if they refuse to do, they may be committed to prison until they obey. *Wood's Inst.* 522. If any orphan, who by the custom of *London* is under the government of the Lord Mayor and Aldermen, sue in the spiritual court for any legacy, &c. a prohibition shall be granted; because the Lord Mayor and Aldermen only have jurisdiction of them. 5 *Rep.* 73. But an orphan may waive the benefit of suing in the court of orphans, and file a *bill in equity* for discovery of the personal estate, &c.

The Lord Mayor and Commonalty of *London* being answerable for the orphans' money paid into the chamber of the city, and by some accidents become indebted to the orphans and their creditors, in a greater sum than they could pay; by Stat. 5 & 6 W. & M. cap. 10. it is enacted, that the lands, markets, fairs, &c. belonging to the city of *London*, shall be chargeable for raising eight thousand pounds per ann. to be appropriated for a perpetual fund for orphans; and towards raising such a fund, the

Mayor and Commonalty may assess two thousand pounds yearly upon the personal estates of inhabitants of the city, and levy the same by distress, &c. Also a duty is granted of four shillings per ton wines imported, and on coals; and every apprentice shall pay 2 s. 6 d. when he is bound; and 5 s. when he is admitted a freeman; for raising the fund: the fund is to be applied for payment of the debts due to orphans, by interest after the rate of 4 l. per cent. &c. And no person shall be compelled, by virtue of any custom in the city, to pay into the chamber of *London* any sum of money or personal estate belonging to an orphan of any freeman for the future. 5 & 6 W. & M. By the Stat. 21 Geo. 2. c. 29. The duty of 6 d. per chaldron on coals, given by the Stat. 5 & 6 W. & M. towards the orphan debt, is continued for thirty-five years. See Stat. 21 Geo. 2. c. 29. for the further relief of the orphans of the city of *London*.

Ortelli, (Fr.) Is a forest word, and signifies the claws of a dog's foot. *Kitch.*

Orotagium, A garden plot, or *hortilage*. Mon. Angl. tom. 1.

Oryal, (oriolum) Is a room, or cloister, of a monastery, priory, &c. whence it is presumed that *Oriel* or *Oryel College* in *Oxford* took name. *Matt. Paris. in vit. Abb. St. Alban.*

Osculum Pacis. A custom formerly of the church, that in the celebration of the mass, after the priest had spoke these words, viz. *Pax Domini vobiscum*, the people kissed each other; was called *osculum pacis*: afterwards when this custom was abrogated, another was introduced; which was, whilst the priest spoke the aforementioned words, a deacon offered the people an image to kiss, which was commonly called *paxem*. *Matt. Paris. anno 1100.*

Osmund, A kind of iron ore, antiently brought into *England*. Stat. 32 H. 8. cap. 14.

Ostense, Was a tribute paid by merchants for leave to expose their goods for sale in markets. — *Qui per terras ibant ostensionem dabant & teloneum.* Leg. Ethelred. cap. 23.

Oswald's Law, (Lex Oswaldi) The law by which was understood the ejecting married priests, and introducing monks into churches, by *Oswald* bishop of *Worcester*, about the year 964.

Oswald's Law Hundred, An ancient hundred in *Worcestershire*, so called from bishop *Oswald* who obtained it of King *Edgar*, to be given to St. Mary's church in *Worcester*; it is exempt from the jurisdiction of the sheriff, and comprehends 300 hides of lands. *Camb. Brit.*

Otho, Was a deacon-cardinal of St. Nicholas, in *carcere Tulliano*, a legate for the people here in *England*, 22 H. 3. whose constitutions we have at this day. *Stow's Annals*, 303.

Othobonus, Was a deacon-cardinal of St. Adrian, and the pope's legate here in *England*, 15 H. 3. as appeareth by the award made betwixt the said King and his Commons at *Kenilworth*. His constitutions we have at this day in use.

Ouch, A collar of gold, or such like ornament, worn by women about their necks. Stat. 24 H. 8. c. 13.

Ouer, (Sax. ofer, ripa) In the beginning or ending of the names of places, signifies a situation near the bank of some river; as St. Maryover in *Southwark*, *Andover* in *Hampshire*, &c.

Ouerseyed, (from the Sax. ofer, i. e. super, & cythan, offendere) Is used where a person is convicted of any crime; that it is found upon the offender: this word is mentioned in the laws of *Edw. apud Brompton*, pag. 836.

Ouerhermissa, Contumacy, or contempt of court. In the laws of *Adelstan*, cap. 25. it is used for contumacy: but in a council held at *Winchester*, anno 1027, it signifies a forfeiture. See Leg. Ethelred, cap. 27.

Ouerlameffa, Seems to have been an antient fine before the statute for *hue and cry*, laid upon those, who, hearing of a murder or robbery, did not pursue the malefactor. 3 Inst. 116. — *Si quis furi obviauerit, & sine vociferatione gratis eum dimiserit, emendet secundum Weram ipsius furis, vel plenam lada se adlegiet, quod cum eo falsum no ferit: si quis audito clamore sperpsedit, reddat overlameffa Regis, aut plene se laiderit.* Lib. Rub. cap. 36.

Ouerseers of the Poor, Are public officers created by the Stat. 43 Eliz. c. 2. to provide for the poor of every parish;

Parish; and are sometimes two, three, or four, according to the extent of parishes. Churchwardens by this statute are called *overseers of the poor*, and they join with the *overseers* in making a poor rate, &c. But the churchwardens having distinct business of their own, usually leave the care of the poor to the *overseers* only; tho' anciently they were the sole *overseers of the poor*. Dalt. ch. 27. Wood's Inst. 93. See *Poor*.

Overt, (*Fr.*) Is used for open; *overture*, an opening, also a proposal. *Law Fr. Dict.*

Overt-Act, (*apertum factum*) An open act which by law must be manifestly proved. 3 Inst. 12. Some *overt-act* is to be alledged in every indictment for *high treason*: such as for treason in compassing the death of the King, the providing arms to effect it, &c. 3 Inst. 6, 12. H. P. C. 11. And no evidence shall be admitted of any *overt-act*, that is not expressly laid in the indictment, by Stat. 7 W. 3. Vide *Treason*.

Overt-Word. Is an open plain word, not to be mistaken. Stat. 1 Mar. Sess. 2. 3.

Oures, (*Fr.*) Acts, deeds, or works: and *ouages*, are days works. 8 Rep. 131.

Ourlop, The *leivwite* or fine paid to the lord by the inferior tenant, when his daughter was corrupted or debauched. — *Natawi in villa de Wridthorp* — *soluit quilibet pro filiabus suis maritandis gerfam Domino, & ourlop pro filiabus corruptis, & Roth & alia servitia & auxilium*. Petr. Bles. Contin. Hist. Croyland, 115.

Ousted, (from the *Fr. ouster*, to put out) As *ousted* of possession, is where one is removed or put out of possession. 3 Cro. 349.

Ouster le Main, (*amovere manum*) Signifies a livery of land out of the King's hand, or a judgment given for him that sued a *monsians de droit*; and when it appeared upon the matter, that the King had no title to the land he seized, judgment was given in the *Chancery* that the King's hands be *amoved*, and thereupon an *amoveas manum* was awarded to the escheator, to restore the land, it being as much as if the judgment were given that the party should have his land again. Staundf. Prærog. cap. 24. 28 Ed. 1. cap. 19. It was also taken for the writ granted upon a petition for this purpose. F. M. B. 256. And it is written *outer le mains*, in the 25 Hen. 8. cap. 22. But all wardships, liveries, and *ouster le mains*, &c. are taken away by Stat. 12 Car. 2. cap. 24.

Ouster le Mer, (*oultre*, i. e. ultra, & le mer, mare) Is a cause of esoin or excuse, if a man appear not in court on summons, for that he was then *beyond the sea*.

Outfangthes, (from the Sax. *ut*, i. e. extra, *fang*, captus, & *thoes*, fur) *Fur extra captus, quem Dominus, quanquam in alieno fundo comprehensus, in curiam tamen suam revocat, ibique judicat*. Litt. It is a liberty or privilege, as used in the ancient Common law, whereby a lord was enabled to call any man dwelling in his manor, and taken for felony in another place out of his fee, to judgment in his own court. *Rassal. Stat.* 1 & 2 P. & M. c. 15.

Outhest, Is the same with *outborn*; which is a calling men out to the army, by the sound of an *horn*.

Out-houses, Are those belonging and adjoining to dwelling-houses; and taking away any money, goods, &c. from such *out-houses*, in the day-time, of 5 s. value, is felony without benefit of clergy. Dalt. c. 99. Stat. 32 Eliz. c. 15. 3 & 4 W. & M. c. 9. See *Burglary*.

Outland. The Saxon *Thanes* divided their hereditary lands into *inland*, such as lay nearest their dwelling, which they kept to their own use; and *outland*, which lay beyond the demesns, and was granted out to tenants, at the will of the lord, like copyhold estates. This *outland* they subdivided into two parts, one part they disposed among those who attended their persons, called *Theodens*, or lesser *Thanes*; the other part, they allotted to their husbandmen, or churls. *Spalm. de Feud. cap. 5.*

Outlaw, Sax. *utlaghe*, Lat. *utlagatus*) One deprived of the benefit of the law, and out of the King's protection. *Flota, lib. 1. cap. 47.* If where a person is called into the law, after an original writ, and the writs of *capias*, *alias* and *pluries*, returned *Nou est inventus*, and proclamation made for him to appear, &c. he contemptuously re-

fuses to appear, he is then *outlawed*. 1 Inst. 128. A woman cannot be an *outlaw*, because women are not sworn to the King as men are, to be ever *within law*; therefore they are said to be *waived*, as not regarded but forsaken of the law. F. N. B. 160. And an infant under twenty-one years old, his age to take the oath of allegiance, cannot be *outlawed*. When a person is restored to the King's protection, he is *inlawed* again.

Outlawry, (*utlagaria*) Is the loss of the benefit of a subject, that is, of the King's protection and the realm. *Corwell.*

Outlawry is a punishment inflicted for a contempt, in refusing to be amenable to the justice of that court which hath authority to call him before them; and as this is a crime of the highest nature, being an act of rebellion against that state or community of which he is a member, so it subjects the party to forfeitures and disabilities; for he loseth his *liberam legem*, is out of the King's protection, &c. Co. Lit. 128. Doct. & Stud. dial. 2. cap. 3. 1 Roll. Abr. 802.

And as to forfeitures for refusing to appear, the law distinguishes between *outlawries* in capital cases, and those of an inferior nature; for as to *outlawries* in treason and felony, the law interprets the party's absence a sufficient evidence of his guilt, and without requiring further proof, accounts him guilty of the fact, on which ensues corruption of blood, and forfeiture of his estate, real and personal. Co. Lit. 128. 3 Inst. 161.

But *outlawry* in personal actions does not occasion the party to be looked on as guilty of the fact, nor does it occasion an intire forfeiture of his real estate, yet it is very fatal and penal in its consequences; for hereby he is restrained of his liberty, if he can be found, forfeits his goods and chattels, and the profits of his lands, while the *outlawry remains in force*. Plow. 541. 9 H. 6. 20. b. Show. Parl. Ca. 73.

Anciently *outlawry* was looked upon as so horrid a crime, that any one might lawfully kill a person *outlawed*, as he might a wolf, or other noxious animal; but the law herein was changed in Edward the Third's time, which provides, that a person *outlawed* shall be put to death by the sheriff only, having lawful authority for that purpose. Co. Lit. 128. b.

Also from the heinousness of the offence the sheriff may, on a *capias utlagatum*, break open the house of the person *outlawed*; for it would be unreasonable, that the protection, allowed in other cases, should extend to him who is declared a contemner and violator of the law; therefore the seizing him as an *outlaw*, implies the liberty of entering and seizing him wherever he lies hid. 2 Hale's Hist. P. C. 202. 9 Co. 91. 1 Bulf. 146. Cro. Eliz. 908. Moor 606, 668. Yelv. 28. Cro. Car. 537. 4 Leon. 41. 2 Jon. 233.

1. In what cases process of outlawry lies; and by what jurisdiction such processes are to issue.

2. Against whom process of outlawry may be awarded; whether it may be awarded against a peer, an infant, feme sole or covert, several defendants, and principal and accessory.

3. To what place process of outlawry is to issue; of the quinto exactus, and proclamation on an outlawry.

4. What the party must do in order to intitle him to a reversal; and of the effects and consequences of outlawry.

1. In what cases process of outlawry lies; and by what jurisdiction such processes are to issue.

Originally process of *outlawry* only lay in treason and felony, and was afterwards extended to trespass of an enormous nature; and herein it is laid down by Hawkins, That process of *outlawry* lies in all appeals, and in all indictments of conspiracy and deceit, or other crimes of a higher nature than trespass *vi & armis*; but it lies not in an action, nor, as some say, on an indictment

ment on a statute, unless it be given by such statute, either expressly, as in the case of præmunire, or impliedly, as in cases made treason or felony by statute, or where a recovery is given by an action in which such process lay before, as in the case of forcible entry. *Staundf.* 192. *Bro. tit. Outlawry*, 26, 36, 59. *Co. Lit.* 128. *b.* *Dyer* 213, 214. 2 *Hawk. P. C.* 302, 303. and several authorities there cited.

In an assise, a *capias pro fine* lies, and upon that process of outlawry, if the assise be found with force, but being a mixt action, as favouring of the realty, it is out of the statute of additions, 1 *Hen. 5. cap. 5.* which extends only to personal actions, appeals and indictments. 2 *Inst.* 665. 6 *Mod.* 85.

So process of outlawry lies in replevin, and is given by the statute 25 *Ed. 3. cap. 17.* which gives the *capias* in this manner; when on the *pluries replegiari facias* the sheriff returns *averia conyata*, then a *capias in withernam* issues, and on that's being returned *nulla bona*, a *capias* issues, and so to outlawry; but it does not lie on the original writ of replevin, which is *vicontial* and determined; therefore as no addition is required in such original writ, so neither ought there to be any in the second writ; for where a writ or process is founded on a former, it must pursue the former, and cannot vary from it. 6 *Mod.* 84. 1 *Salk.* 5. *Earl of Banbury v. Wood.*

By the Common law, in all actions of trespass *quare vi & armis*, and in which there is a fine to the King, a *capias* was the process; and herein process of outlawry lay by the Common law. 35 *Hen. 6. 6. b.* 22 *Hen. 6. 13. Rast. Ent.* 293. 10 *Co. 72.* 2 *Roll. Abr.* 805.

But in account, debt, detinue, annuity, covenant, and such actions as are grounded upon negligence or laches merely, no *capias* lay at Common law, but only summons and distress infinite, therefore the *capias* and outlawry in these actions were introduced by acts of parliament. *Co. Lit.* 128. *b.* 3 *Co. 12.* 2 *Bulst.* 63. 2 *Inst.* 143. *Cro. Jac.* 222, 261. *Yelv.* 158. *Raym.* 128. 1 *Keb.* 890, 908. 1 *Sid.* 248, 258. Of detinue of charters. *Dyer* 223. *a. dubitatur.*

By the statute of *Marlebridge, cap. 23.* the writ of *monstravit de compta* was given, where before the process in account was summons, attachment, and distress infinite; and by *Westm. 2. cap. 11.* process of outlawry is given in account. 2 *Inst.* 145, 380. *F. N. B.* 259.

By the 25 *Ed. 3. cap. 17.* Such process shall be made in a writ of debt and detinue of chattels, and taking of beasts, by writ of *capias*, and by process of *exigent*, by the sheriff's return, as is used in a writ of account. 3 *Co. 12.* 2 *Roll. Rep.* 295. 2 *Bulst.* 63.

And by the 19 *Hen. 7. cap. 9.* it is enacted. That like process be had in actions upon the case, as in actions of trespass, or debt.

But it hath been adjudged, that process of outlawry lies in no case but where a *capias* lies; that therefore where the proceeding is by bill, and not by original, as there can be no *capias*, so there can be no process of outlawry, as in a bill of privilege by or against an attorney. 1 *Leon.* 329. 2 *Roll. Abr.* 76. 1 *Sid.* 159. 1 *Keb.* 577.

It is clear, that the courts at *Westminster* may issue process of outlawry, and that the court of King's Bench, either upon an indictment originally taken there, or removed thither by *certiorari*, may issue process of *capias* and *exigent* into any county of England, upon a *non est* returned by the sheriff of the county where he is indicted, and a *testatum* that he is in some other county. 2 *Hale's Hist. P. C.* 198.

Also justices of oyer and terminer may issue a *capias* or *exigent*, and so proceed to the outlawry of any person indicted before them, directed to the sheriff of the same county where they held their sessions at Common law; and by the statute of 5 *Ed. 3. cap. 11.* they may issue process of *capias* and *exigent* to all the counties of England, against persons indicted or outlawed of felony before them. 2 *Hale's Hist. P. C.* 31, 199.

But justices of gaol delivery regularly cannot issue a *capias* or *exigent*; because their commission is to deliver the gaol de prisonibus in ea existentibus, so that those

whom they have to do with, are always intended in custody already. 2 *Hale's Hist. P. C.* 199.

Justices of the peace may make out process of outlawry upon indictments taken before themselves, or upon indictments taken before the sheriff, and returned to the justices of the peace, by the statute of 1 *Ed. 4. cap. 1.* but the power of the sheriff, to make any process upon indictments, taken before him, is taken away by that statute. 2 *Hale's Hist.* 199.

It is made a *querre* by *Hale*, whether a coroner can, by law, make out process of outlawry, against a man indicted by inquisition before him. 2 *Hale's Hist. P. C.* 199.

It hath been held, that though the process in inferior courts be a *capias*, that yet they cannot proceed to outlaw the party. *Yelv.* 158. *Cro. Jac.* 222, 261. *Raym.* 128. 1 *Sid.* 248, 259. 1 *Keb.* 890, 908.

The process to the outlawry, viz. the *capias* and *exigent*, must be in the King's name, and under the judicial seal of the King, appointed to that court, which issues that process, and with the *teste* of the chief justice or chief judge of that court or sessions. 2 *Hale's Hist. P. C.* 199.

2. Against whom process of outlawry may be awarded; whether it may be awarded against a peer, an infant, feme sole or covert, several defendants, and principal and accessory.

If a peer of the realm be indicted, and cannot be found, process of outlawry shall be awarded against him, and he shall be outlawed *per judicium coronatorum*. 2 *Inst.* 49. 3 *Inst.* 31. *Staundf.* 130. 2 *Hawk. P. C.* 424.

But in civil actions, between party and party, regularly a *capias* or *exigent* lies not against a peer, yet in case of an indictment for treason or felony, or for trespass *vi & armis*, as an assault or riot, process of outlawry shall issue against a peer, for the suit is for the King, and the offence a contempt against him; therefore, if a rescue be returned against a peer, or if a peer be convicted of a disseisin with force, or denies his deed, and it be found against him, a *capias pro fine* and *exigent* shall issue, for the King is to have a fine; and the same reason holds upon an indictment of trespass or riot, much more in the case of felony. 2 *Hale's Hist. P. C.* 199, 200. *Cro. Eliz.* 170, 503. 5 *Co. 54.* 1 *Roll. Abr.* 220.

An infant above the age of fourteen may be outlawed, and the outlawry is not erroneous; but an infant under the age of fourteen cannot be outlawed; if he be, it is erroneous. 3 *Hen. 5. utlag.* *Fitz. tit. Outlawry* 11. 2 *Roll. Abr.* 805. *Dyer* 104. 2 *Hale's Hist. P. C.* 207, 208.

But the outlawry of such infant is not void, it being of record, but is voidable only by writ of error. *Dyer* 239. *a.* 2 *Roll. Abr.* 805.

A woman is said to be *waived*, and not outlawed; and the reason why the outlawry of a woman is legally called *waivdiaria mulieris*, is because women are not sworn in leets or torns; therefore men are called *utlagati*, i. e. *extra legem positi*, but women are *waivdiatae*, i. e. *derelictae*, left out, or not regarded, because they are not sworn to the law. *Co. Lit.* 122. *b.* *Litt. sect.* 186.

Therefore where a *capias* and *exigent* were awarded against three men and two women, and the return was *utlagati existunt*, where, as to the women, it ought to have been *waivdiata existunt*, this was held to be error. *Cro. Jac.* 358. *Middleton's case.* 1 *Roll. Rep.* 407. *S. P.* 1 *Roll. Abr.* 804. *S. P.*

If in an action against husband and wife, the husband is outlawed, and wife waived, and she is taken upon the *capias utlagati*, tho' she is to be discharged of the imprisonment, (because the plaintiff cannot proceed against her alone) yet she still remains waived, and when her husband is taken he must bring her in. For this *vide Dyer* 271. *b.* *Cro. Jac.* 445. *Cro. Eliz.* 370. *Hutt.* 86. 1 *Sid.* 21. *Vide Cro. Car.* 58, 59. *Smith ver. Ash & ux.* *Hutt.* 86. *S. C.*

If two are sued in a joint action, and neither of them will appear, process of outlawry must be taken out against both. *Cro. Eliz.* 648. *Beverly ver. Beverly.*

If an *exigent* be awarded against two, and the return is *primo exacti fuerunt & non comparuerunt*, without saying, *nec eorum aliquis comparuit*, it is erroneous. 2 *Rol. Abr.* 802. *Taverner's case*.

As to outlawry in *action of account* vide 41 *Ed.* 3. 3. 1 *Rol. Abr.* 127. S. C. 1 *Brownl.* 25. S. P. 41 *Ed.* 3. 13 b. 1 *Rol. Abr.* 127. and *vide Moor* 188. 2 *Leon.* 76. Also *vide Dyer* 239. pl. 203. *Hawtry ver. Anger.* N. *Bendl.* 148. pl. 205. *Moor* 74. pl. 203. 1 *And.* 10. S. C. and 1 *Sid.* 173. 1 *Keb.* 642. S. C. *Guy ver. Barnard.*

As to awarding outlawry against principal and accessory, by the stat. of *Westm.* 1. cap. 14. it is provided, that none be outlawed upon appeal of commandment, force aid or receipt, unless he who is appealed of the deed be attainted, so that one like law be used therein thro' this realm; nevertheless, he that will so appeal, shall not by reason of this intermit, or leave off to commence his appeal at the next county, against them, no more than against their principals which be appealed of the deed, but their *exigent* shall remain, until such as be appealed of the deed, be attainted of outlawry or otherwise.

In the construction of this statute, the following particulars are laid down by Serjeant *Hawkins*, as most remarkable.

1st, That it seems agreed, that it extends as well to indictments as to appeals, not only because the word *appeal* in the statute may in a large sense be taken for any accusation in general; but because *indictments are certainly as much within the reason of the statute as appeals*; and the Common law, (for the settling whereof this statute was made,) did not make any distinction in this respect between appeals and indictments. 2 *Inst.* 183. 2 *Hawk.* P. C. 306.

2dly, That it seems agreed, that where-ever some of the defendants are expressly charged as principals, and others as accessories, before the award of this *exigent*, the outlawry thereon, of those charged as accessories, cannot but be reversible, because it appears upon record that the *exigent* issued, contrary to the direction of the statute; but if several be outlawed, on a writ of appeal, which chargeth them all alike without any distinction, there can be no advantage taken of the appellant's not having pursued the statute, since it appears not, but that he might have charged them all as principals. 1 *Hawk.* P. C. 306. 2 *Hale's Hist.* P. C. 200.

3dly, That it is strongly holden, that if an appellant take out the *exigent*, at the same time against all the defendants, he must, when they appear, count against them all as principals, and shall be concluded from charging any of them as accessories, because he has taken out such process as is erroneous, where all are not principals; but he makes a doubt, whether this be law at this day, since all errors, as the law seems now to be holden, are salved by appearance. 2 *Hawk.* P. C. 306. and *vide* 2 *Hale's Hist.* P. C. 200.

4thly, That it seems the better opinion, that where there are more than one principal, the *exigent* shall not issue, till all of them are arraigned; and herein it is said by *Hale*, that if A. and B. be indicted as principals in felony, and C. as accessory to them both, the *exigent* against the accessory, shall stay till both be attainted by outlawry or plea; for that it is said, if one be acquitted, the accessory is discharged, because indicted as accessory to both, therefore shall not be put to answer till both be attaint; but hereof he adds a *debitur*, because tho' C. be accessory to both, he might have been indicted as accessory to one, because the felonies are in law several; but if he be indicted as accessory to both, he must be proved so. 2 *Hawk.* P. C. 306. 2 *Hale's Hist.* P. C. 200, 201.

In treason all are principals; therefore process of outlawry may go against him who receives, at the same time as against him that did the fact. 1 *Hale's Hist.* P. C. 238.

3. To what place process of outlawry is to issue; of the *quinto exactus*, and proclamations on an outlawry.

The *exigent* must be sued in the county where the party really resides, for there all actions were originally

laid; and because outlawries were at first only for treason, felony or very enormous trespasses, the process was to be executed at the *Town*, which is the sheriff's criminal court; and this held not only before the sheriff, but before the coroners, who were ancient conservators of the peace, being the best men in each county, to preside with the sheriff in his court, and who pronounced the outlawry in the county court on the party's being *quinto exactus*; therefore anciently there was no occasion for any process to any other county than that in which the party actually resided; but this matter being since altered, and the learning thereof depending on several acts of parliament, it will be necessary to take notice of the statutes. *Fitz. Exigent* 26. *Dyer* 295.

And first, It is enacted by the 6 *Hen. 6.* cap. 1. "That before any *exigents* be awarded against persons indicted in the King's Bench, of treason or felony, writs of *capias* shall be directed to the sheriff of the county, whereof they be named in the indictments;" *vide* the Stat.

And it is further enacted by 8 *H. 6.* cap. 10. "That upon every indictment or appeal, before any *exigent* awarded, presently after the first writ of *capias* returned, another writ of *capias* shall be awarded, directed to the sheriff of the county, whereof he who is indicted is, or was supposed to be conversant, by the same indictment, by which second writ of *capias*, the sheriff shall be commanded to take him, if he can be found within his bailiwick; and if he cannot, to make proclamation in two counties, before the return of the same writ, after which writ so served and returned, if he which is so indicted or appealed, come not at the day of such writ returned, the *exigent* shall be awarded."

This statute not to extend to indictments, or appeals, taken within the county of *Chester*.

It is enacted by 10 *Hen. 6.* cap. 6. "That such second *capias* as is required by 8 *Hen. 6.* cap. 10. shall be awarded upon indictments or appeals removed into the King's Bench, or elsewhere, by *certiorari* or otherwise."

And by the 31 *Eliz.* cap. 3. it is enacted, "That in every action personal, where any writ of *exigent* shall be awarded, one writ of proclamation shall be awarded out of the same court, and delivered of record to the sheriff of the county where the defendant, at the time of the *exigent* so awarded, shall be dwelling; which writ of proclamation shall contain the effect of the same action: And that the sheriff, (as mentioned in the stat. which *vide*,) shall make three proclamations; and that all outlawries pronounced, and no writs of proclamation awarded and returned, according to the form of this statute, shall be utterly void and none effect."

In the construction of these statutes, the following opinions have been holden:

That tho' the words are express, that any outlawry pronounced, contrary to the directions of the statute shall be void; yet it is not to be taken, as if such outlawries were absolutely void, but only voidable by writ of error. *Cro. Eliz.* 179. 3 *Co.* 59. *Plow.* 137. *Hob.* 166.

If a defendant be expressly named of the same county wherein he is indicted, or appealed, and be also named under an *alias dictus* of another, it hath been adjudged, that there is no need of any *capias*, with a command for proclamation according to 8 *Hen. 6.* c. 10. because that which comes under the *alias dictus* is not traversable nor material: Also if a defendant be named of B. and late of C. there is no need of any *capias* to the sheriff of the county wherein C. lies; because it appears, that defendant is at present conversant at B. but if a defendant be named of no certain place at present, but only late of B. and late of C. and late of D. &c. being all in different counties from that in which the prosecution is commenced, a *capias* shall go to the sheriff of each county. 2 *Hawk.* P. C. 304-5. 2 *Hale's Hist.* P. C. 195-6. *Vide Cro. Jac.* 167. *Leche's case*. And also 2 *Hale's Hist.* P. C. 201-2. Where it hath been holden, that in *London*, where the holding of the huffings is uncertain, no *exigi facias* shall issue with an *allocato* huffings, because the court cannot take notice of the set times of holding it, as they may of the times of holding the county-courts; but it is now agreed, that if an *exigent* issues in *London*, and they begin Huffling *de placito terra* (as they may) they shall proceed along at that Huffings to the outlawry,

outlawry, without mingling their Husting *de communibus placitis*; but if an *allocate* Husting comes, they shall proceed without omitting any Husting. *Palm.* 287. 2 *Leon.* 14. 2 *Hale's Hist. P. C.* 202.

4. *What the party must do in order to intitle him to a reversal; and the effects and consequences of a reversal.*

Regularly in all outlawries, as well personal as criminal, the party in order to reverse the same was to appear in person, and could not appear by attorney. 2 *Leon.* 22.

But now by the 4 & 5 *W. & M. cap.* 18. No person who shall be outlawed in the court of *B. R.* for any cause whatsoever, (treason and felony only excepted,) shall be compelled to appear in person in the said court to reverse such outlawry, but may appear by attorney and reverse the same without bail in all cases, (except where special bail shall be ordered by the said court.)

And that if any person outlawed in the said court, (other than for treason or felony,) shall be taken upon any *capias utlagatum* out of the said court, it shall be lawful for the sheriff (in all cases where special bail is not required by the said court,) to take an attorney's engagement under his hand to appear for the defendant, and reverse the outlawries, and thereupon to discharge the defendant; and where special bail is required, the sheriff shall and may take security of the defendant by bond, with one or more sufficient surety or sureties, in the penalty of double the sum for which special bail is required, and no more, for appearance by attorney at the return of the writ, and to perform such things as shall be required by the court; and after such bond taken to discharge the defendant.

And if any person outlawed, and taken upon a *capias utlagatum*, shall not be able within the return of the writ to give security where special bail is required, security may be given after the return, and after the commitment.

It hath been held, that if the party outlawed comes in by *cepi corpus*, he shall not be admitted to reverse the outlawry without appearing in person, as in such case he was obliged to do at Common law; or putting in bail with the sheriff for his appearance, upon the return of the *cepi corpus* and for doing what the court shall order. 2 *Salk.* 496.

Bail must be put in before it can be reversed. 1 *Wils.* 3.

By *Westm.* 1. *cap.* 9. it is expressly provided, that those who are outlawed, have abjured the realm, &c. should be excluded the benefit of replevin; yet it hath been always held, that the court of King's Bench may in their discretion, in special cases, bail a person upon an outlawry of felony; as where he pleads, that he is not of the same name, and therefore not the same person with him that was outlawed, or alleges any other error in the proceedings. 2 *Hawk. P. C.* 98.

By the 31 *Elix. cap.* 3. *sed.* 3. it is enacted, "That before any allowance of any writ of error, or reversing of any outlawry be had by plea, or otherwise, through or by want of any proclamation to be had or made according to the form of this statute, the defendant and defendants in the original action shall put in bail, not only to appear and answer to the plaintiff in the former suit in a new action to be commenced by the said plaintiff for the cause mentioned in the first action, but also to satisfy the condemnation, if the plaintiff shall begin his suit before the end of two terms next after the allowing the writ of error, or otherwise avoiding of the said outlawry."

A foreigner was outlawed and goods, &c. seized, and court would not reverse the outlawry on motion, but put him to his writ of error, whereby the plaintiff got bail. *Cartb.* 459. *Mattbeus v. Erbo.*

H. was outlawed, in two actions, one for 10 l. the other for 40 s. and on reversing the outlawry the court took special bail for the first, and an appearance for the other, upon the statute 4 & 5 *W. & M. c.* 18. and the recognition was taken pursuant to 31 *Elix. c.* 3. 2 *Salk.* 496.

It is clearly agreed, that an attainder of felony of a person who had any lands shall never be reversed by writ of error, without a *scire facias* against all the tenants and lords mediate and immediate; but it is settled,

that such *scire facias* is not necessary in the case of high treason. *Dyer* 3^a. *pl.* 20. *Cro. Eliz.* 235. 1 *Keb.* 141. *pl.* 11. 1 *Sid.* 316. 3 *Keb.* 39. 3 *Mod.* 42, 47. 4 *Mod.* 366. 2 *Hale's Hist. P. C. S. P.* and see *Ld. Raym.* 154.

Also it is said; that it is not necessary in the case of felony, when it is suggested on the roll that the party had no lands, and the attorney general confesses it. 2 *Salk.* 495.

It is agreed, that after an outlawry of treason or felony is reversed, the party shall be put to plead to the indictment, for that still remains good, and he may be tried at the King's Bench bar; or the record may be remitted into the country, if it were removed into the King's Bench by *certiorari*, with a command to the justices below, to proceed by the statute of 6 *Hen. 6. cap.* 1. *Cro. Jac.* 646. *Cro. Car.* 365. 3 *Mod.* 42. 6 *Mod.* 115. 2 *Hale's Hist. P. C.* 209.

So if a man be outlawed by process in an information, and comes in and reverses the outlawry, he must plead *insanter* to the information. 1 *Salk.* 371. *Rex v. Hill.* 5 *Mod.* 141. *S. P.*

The law is the same in civil cases; and therefore if an outlawry in a personal action be reversed, the original remains. *March* 9.

Vide the case of *Whitwick v. Howenden.* 3 *Lev.* 245.

It hath been adjudged, that if the King grant over the lands of a person outlawed for treason or felony, and afterwards the outlawry be reversed, the party may enter on the patentee, and need neither sue a petition to the King, nor a *scire facias* against the patentee. 1 *And.* 188. A person shall, after outlawry reversed, be restored to his law, and to be of ability to sue. *Co. Lit.* 288. b.

If the goods of a person outlawed are sold by the sheriff upon a *capias utlagatum*, and after the outlawry is reversed by writ of error, he shall be restored to the goods themselves; because the sheriff was not compellable to sell these goods, but only to keep them to the use of the King. 5 *Co.* 90. *Hoe's case.* 1 *Roll. Abr.* 778. *S. C.* cited.

If an advowson come to the King, by forfeiture upon an outlawry, and, the church becoming void, the King presents, and then the outlawry is reversed; yet the King shall enjoy that presentment, because the presentment there came to the King as the profit of the advowson. *Moor* 269. *Beverly v. Cromwall.*

But if the church be void at the time of the outlawry, and the presentation is thereby forfeited as a *chattel principally and distinct of itself*, there, upon reversal of the outlawry, the party shall be restored to the presentation. *Cro. Eliz.* 170. agreed *per curiam.*

If a termor being outlawed for felony, grants over his term, after the outlawry is reversed, the grantee may have trespass for the profits taken between the reversal of the outlawry and the assignment; for by the reversal it is, as if no outlawry had been, and there is no record of it. *Cro. Eliz.* 170. *Ognell's case*, and 13 *Co.* 20, 22.

It is said, that if a man be outlawed in the King's Bench, and the party's goods are seized into the King's hands, and then the outlawry is reversed, there can be no restitution; the reason whereof is, for that the court of King's Bench cannot send a writ to the Treasurer; and the court of Exchequer have no record before them to issue out a warrant for restitution. 5 *Mod.* 61. Vide 2 *Vern.* 312. *Peyton ver. Ayliff*; and vide 2 *Lev.* 49. the case of *Pinfold ver. Northey.*

For more learning on this subject, see 3 *New Abr. tit.* Outlawry, and 22 *Vin. Abr. tit.* Outlawry. and see *Capias Utlagatum* and *Exigent.*

Outparters. (mentioned in stat. 9 *H. 5. ff.* 1. c. 7.) A kind of thieves in *Riddesdale*, that stole cattle, or other things, without that liberty: Some are of opinion, that those which in the fore-named statute are termed *outparters*, are now called *outputers*, being such as set matches for the robbing any man or house. *Cowell.* See *Intakers.*

Outriders. Are bailiffs errant, employed by the sheriffs, or their deputies, to ride to the farthest place of their counties or hundreds, with the more speed to summon such

such as they thought good to their county or hundred courts, 14 E. 3. *stat.* 1. c. 9.

Owel, Is a French word for equal. *Law Fr. Dict.*

Owelry, Is when there is Lord, Mesne, and tenant, and the tenant holds of the Mesne by the same service that the Mesne holds over of the lord above him; this is called Owelry of services. *F. N. B.* 136. And Owelry of services is equality of services. *Co. Litt.* 169.

Owlers, Are persons that carry wool, &c. to the Sea side by night, in order to be shipped off contrary to law: And this is prohibited by *stat.* 7 & 8 W. 3. c. 23.

Owling, see Owlers, Customs, Wool.

Oxen, see Cattle.

Oxford, Is said to be a restitution made by a hundred or county, of any wrong done by one that was within the same. *Lamb. Archaion.* 125.

Oxford. No purveyor or badger, &c. shall bargain for, and take away victuals in the markets of Oxford or Cambridge, or within five miles, without licence from the Chancellor, on pain of forfeiting four times the value, and three months imprisonment. 2 & 3 P. & M. c. 15. 13 Eliz. c. 21. A franchise granted to the university of Oxford, excepted out of the general confirmation, 9 Hen. 4. c. 1. 13 Hen. 4. c. 1. Scholars outlawed for riots to be banished the university. 9 Hen. 5. c. 8. See University.

Oxgang, (from Ox, i. e. *bos*, and gang, or gate, *iter*) Is commonly taken for fifteen acres of land, or as much as one ox can plough in a year.

Six oxgangs of land, is so much as six oxen can plough. *Crompt. Jurisd.* 220. But an oxgang seemeth properly to be spoken of such land as lieth in Gaynour. *Old Nat. Br. fol.* 117. *Skene de verb. signif. verbo Bovata terræ*, saith, That an oxengate of land should always contain thirteen acres, and that four oxengates extend to a pound land. *Spelman* says, *Bovatus terræ est quantum sufficit ad iter vel actum unius bovis. Ox enim est bos & gang vel gate iter.* See *Co. on Litt.* 69. *Corwell.*

Oyer. This word was anciently used for what we now call *Affixis*. Anno 13 Ed. 1.

Oyer of a Deed, Is where a man brings an action of debt upon a bond, or other deed, and defendant appears, and prays that he may bear the bond, &c. wherewith he is charged, which shall be allowed him. 2 Lill. Abr. 266.

Defendant may crave oyer of the writ, or of the bond, or other specialty upon which the action is brought, that is to bear it read to him; the generality of defendants in the times of ancient simplicity being supposed incapable to read it themselves: Whereupon the whole is entered *verbatim* upon the record, and the defendant may take advantage of any condition or other part of it, not stated in the plaintiff's declaration. *Black. Com.* 3 V. 299.

The demand of oyer is a kind of plea, and may be counterpleaded: Where there may be oyer, the party demanding it is not bound to plead without it; but defendant may plead without it if he will, on taking upon him to remember the bond or deed; tho' if he plead without oyer, he cannot after waive his plea, and demand oyer. *Mod. Caf.* 28. 3 Salk. 119. In the court of B. R. oyer may be prayed after imparlance; but not in C. B. 5 Rep. 74. See *Ld. Raym.* 970. After imparlance oyer cannot be demanded, because imparlance is always to another term: Also after a plea in abatement, oyer may not be had the same term, to plead another dilatory plea. *Mod. Caf.* 27. 2 Lill. 267. *Sed. qu.* as to oyer after imparlance.

Oyer in C. B. must be demanded, before time for pleading expires. 2 Barnes 265.

Omission of, *per scriptum suum obligatorium*, cured by *proferet* and oyer. *Ld. Raym.* 1056.

An imperfect oyer, if received, makes no variance, *ib.* 1176.

To demand oyer of an obligation, is not only to desire the plaintiff's attorney to read the same; but to have a copy thereof, that the defendant may consider what to plead to the action. *Hob.* 217. And when on oyer of a deed, it is entered, the whole case appears to the court as if the deed were in the plea, and the deed is become parcel of the record: Tho' oyer of a deed can only be demanded, during the term it is produced in court; and

then it may be entered *in hac verba*, and there may be demurrer, or issue upon it, &c. 5 Rep. 76. *Lutw.* 1644. 3 Salk. 119.

If a bond is brought into court, oyer is grantable only the first term, for afterwards it is adjudged in the possession of the party.—Yet oyer of a recognizance was granted in a term subsequent to the declaration. *Ld. Raym.* 84.

Where oyer is prayed, it is always intended that the is in court; which it is not of another term. *Sid.* 308. A defendant ought to crave oyer of the deed plaintiff's deed, on which he hath declared; and cannot set forth another, to plead performance thereof. *Mod. Caf.* 154. 2 Nels. Abr. 1225. If there is *misnomer* in a bond, &c. the defendant is to plead the *misnomer*, and that he made no such deed, without craving oyer; for if he doth, he admits his name to be right. 1 Salk. 7.

If defendant will take advantage of a variance between the writ and count, he must crave oyer of the writ, and spread it on the record, i. e. shew it to the court. *Wils.* par. 2. 395.

Executors bringing action of debt, the defendant may demand oyer of the testament, &c. oyer is not to be dispensed with tho' a deed be lost. Where a deed is in the hands of a third person, the court will oblige him to give oyer and produce it. 2 Strange 1198. And see *Wils.* par. 1. 16. Where a deed is pleaded, the other party cannot alledge that there is other matter contained in the deed, but must set it forth on oyer. *Strange* 227. A party who has had oyer is not obliged to set it forth in pleading. *Strange* 1241. And see *Wils.* par. 1. 97.

Formerly all demands of oyer were in court, as it is now in cases of appeals: But now in other cases, it is demanded and granted between the attornies. *Vide Mod.* 28. *Longwill v. Hundred of Thistleworth.* Salk. 7. *Lynch v. Hooke.* 2 Salk. 498, 499. *Cooke v. Remington.* Popb. 202. *Chambers's case.* Keb. 182. pl. 91. *Russel v. Lee.* Keb. 513. pl. 88. *Pusland v. Cooper.* Vent. 37. *Tapscot v. Woodbridge.* 12 Mod. 35. *Anon.* 12 Mod. 189. *Trag v. Digby.* 6 Mod. 154, 5. *Faxon v. Mosely.*

Declarations, pleas, replications and other pleadings; and also oyer of writs, bonds and other deeds, shall be demanded by a note in writing, *Rules and orders in C. B. Mich.* 1 Geo. 2. 1727. *Vide Lill. Pract. Reg. tit. Oyer.*

Oyer de Record, (*audire recordum*) Is a petition made in court, that the judges, for better proof-take, will bear or look upon any record. And it hath been adjudged, that the craving oyer of an original writ is not like the craving oyer of a deed; because the deed is always produced by the plaintiff, and it is the act of the party, wherefore he shall not be admitted to say that it is not his deed: But the filing a writ, and having it read on oyer demanded, is the act of the court. 2 Lutw. 1641. See *Doct. Plac.* 270-2.

If defendant pleads another action depending for the same cause, in the same court, the plaintiff may pray oyer of the record, being in the same court; and if there is no oyer of the record, the plaintiff may sign judgment by default. For in all cases where a deed or record is pleaded, and oyer prayed; if oyer is not granted, the plea is as no plea. *Ld. Raym.* 347. *Keilw.* 95, 96. *Cartb.* 453. 3 Salk. 119.

A defendant is not intitled to oyer of the writ, after judgment of *respondens oyster*, tho' in the same term. *Ld. Raym.* 970.

Oyer and Terminer, (Fr. *Ouir & Terminer*, Lat. *Audiendo & Terminando*) Is a commission directed to the judges, and other gentlemen of the county to which it is issued, by virtue whereof they have power to bear and determine treasons, and all manner of felonies and trespasses. *Crompt. Jurisd.* 121. 4 Inst. 152. 2 Inst. 419. It is the first and largest of the five commissions, by which our judges of assize sit in their several circuits; And is general, for trying all offenders and offences; or special, to try only particular persons, or offences: And in our statutes it is often printed *Oyer and Determiner*. 4 Inst. 162. The usual commission of *Oyer and Terminer* of justices of assize, is general; and when any sudden insurrection, or trespass is committed, which requires speedy reformation, then a special commission is immediately granted. *Westm.* 2. 13 Ed.

Ed. 1. c. 29. F. N. B. 110. And this commission was formerly issued, only where some insurrection was made, or heinous misdemeanor committed; when the manner and usage was to grant a commission of *Oyer and Terminer*, to hear and determine it: and the *stat. 2 Ed. 3. c. 2.* requireth that no commission of *Oyer and Terminer* be granted, but before the justices of one bench or other, or the justices *itinerant*, and that for horrible trespasses. *New Nat. Br. 243.* A man may have a special commission of *Oyer and Terminer*, to enquire of extortions and oppressions of under-sheriffs, bailiffs, clerks of the market, and all other officers, &c. on the complaint and suit of any one who will sue it out: And the King may make a writ of *Association* unto the justices of *Oyer and Terminer*, to admit those into their company whom he hath associated unto them; also another writ may be sent to the judges to proceed, altho' all the justices do not come at the day of the sessions; and this writ is called the writ of *Si non omnes*, &c. *Ibid. 245, 247.* As to these commissions it is said, that if a commission of *Oyer and Terminer*, &c. be awarded to certain persons to enquire at such a place, they can neither open their commission at another, nor adjourn it thither, or give judgment there; if they do, all their proceedings are, as *coram non iudice*: But it is held, that justices appointed *pro hac vice*, may adjourn their commission, from one day to another, tho' there be no words in their commission to such purpose; for a general commission authorizing persons to do a thing, implicitly allows them convenient time for the doing it. *2 Hawk. P. C. 18.* Upon the general commission of *Oyer and Terminer*, there should issue a precept to the sheriff in the name of the commissioners, bearing date *fifteen days before their sessions*, that he return twenty-four persons for a grand jury *ad inquirendum*, &c. on such a day; and the sheriff is to return his panel annexed to the precept: And by the statute *5 Ed. 3. c. 11.* Justices of *Oyer and Terminer* may issue process of outlawry in any county of *England*, against persons indicted before them; but all their processes are regularly to be in the names, and under the seals of the commissioners, *viz.* three of them, one being of the *Quorum*. *2 Hale's Hist. P. C. 26, 31.* The same justices, at the same time, may execute the commission of *Oyer and Terminer*, and also that of gaol-delivery; and the same persons being authorized by both these commissions, may proceed by virtue of the one in those cases, where they have no jurisdiction by the other, and make up their records accordingly. *Ibid. 20.* But justices of *Oyer and Terminer* cannot proceed but upon indictments taken before themselves, unless they have a commission of gaol-delivery likewise, or a special commission; for the commission of *Oyer and Terminer* is, *Ad inquirendum, audiendum & terminandum*, To inquire, hear and determine. *Wood's Inst. 478.* And tho' justices of gaol-delivery, have a more general commission for trying malefactors, than the commissioners of *Oyer and Terminer* have; yet such justices may not proceed, but on indictments found before other justices, as justices of peace, &c. *2 Hawk. 24.* On indictments found before the justices of *Oyer and Terminer*, they may proceed the same day against the parties indicted.

There is a *Special Commission of Oyer and Terminer* granted upon urgent occasion; and the party suing it, might thereupon take out a writ to the sheriff, commanding him to arrest goods wrongfully taken away, and keep them in safe custody, till order made concerning them, by the justices assigned to determine the matter. *Reg. Orig. 126. F. N. B. 112.*

O Pes. (from the Fr. *Oyez*, i. e. *Audite*, hear ye) Is used to injoin silence and attention.

Oyster-fishery. (In the river *Medway*.) Is regulated by statute, and a court to be kept for that purpose at *Rocheſter* yearly, where by a jury of *free dredger men* of the *oyster-fishery*, the same is to be inquired into; and they may make rules and orders when *oysters* shall be taken, what quantities in a day, and to preserve the brood of *oysters*, &c. And may impose penalties not exceeding *5 l.* Also water bailiffs shall be appointed to examine boats, &c. *Stat. 2 Geo. 2. c. 19.* A duty of *7 d. per bushel* strike measure, is laid upon *oysters* imported from *France*. *10 Geo. 2. cap. 30.*

Oze, Or Oozy ground, (*Solum uliginosum*) Moist, wet and marshy land. *Litt. Dict.*

P.

Page, *pagium*, The same with *passagium*. *Matt. Paris. 767.*

Pacabilis, Payable or passable.—*Recipiet duodecim quarteria bona & pacabilis averia, &c.* *Ex Regis. Gronfeld. Archiep. Ebor. MS.*

Pacare, To pay; as *tolnetum pacare*, is to pay toll. *Mon. Angl. tom. 1. pag. 384.* Hence *pacatio*, payment, *Matt. Paris. Sub. Anno 1248.*

Pace, (*Passus*) A step in going, containing two feet and a half, the distance from the heel of the hinder foot to the toe of the fore foot; and there is a *pace* of five foot, which contains two steps, a thousand whereof make a mile; but this is called *Passus major*.

Paccatur. *Leg. Inx. cap. 45. Et recipiet Agensfrida corium ejus, & carnem, & paccatur de cetero, i. e.* Let him be free, or discharged, for the time to come.

Pacification, (*Pacifratio*) A peace-making, quieting, or appealing; relating to the wars between *England* and *Scotland*, *Anno 1638*, mentioned in the *stat. 17 Car. 1. c. 17.*

Pack of Wool, Is a horse-load, which consists of seventeen stone and two pounds, or 240 pounds weight. *Merch. Dict. Fleta. l. 2. c. 12. See Sarplar.*

Package, A duty set and rated in a table taken of goods and merchandizes; and all goods not specified in the table, are to pay for package duties, after the rate of one penny in the pound, according as they are valued in the *Book of Rates*.

Packers. Are persons appointed to pack up herrings, and sworn to do it pursuant to the statute, *15 Car. 2. c. 14.*

Packets. Packet vessels, exporting or importing goods, what to forfeit, *13 & 14 Car. 2. c. 11. f. 22.*

Packing whites, A kind of cloth so called, mentioned *1 R. 3. c. 8.*

Pact, (*Fr.*) A contract or agreement. *Low French Dict.*

Pagus, A word used in ancient records, for a county: *Alfred Rex Anglo-Saxonum natus est in Villa Regia quæ dicitur Wantage in illa paga quæ nominatur Berks.* &c.

Pain Fort & Dure, (*Lat. pœna fortis & dura, Fr. peine forte & dure*) Signifies a special punishment inflicted on those who being arraigned of felony, refuse to put themselves on the ordinary trial, but stubbornly stand mute; it is vulgarly called *Pressing to Death*. *Stat. Westm. 1. c. 12.*

If a criminal doth not plead directly to the fact, or put himself on trial by the country, he shall be put to the penance of *pain fort & dure*, in cases of petit treason and felony; and forfeit his goods; and some criminals have undergone this punishment, to prevent attainder, corruption of blood, and forfeiture of lands; but on standing mute in high treason, the highest offence, and in petit larceny, the lowest of all felonies, the offenders shall have the like judgment, as if they had been convicted by confession or verdict. *3 Inst. 217. H. P. C. 226. Kel. 27.* Women standing mute in felony, are liable to this punishment as well as men. *2 Inst. 177.*

For the judgment of *pain fort & dure* by the Common law, and according to the usual practice, as recorded in our books, see tit. *Mute*.

Before judgment passes of *pain fort & dure*, the court orders a taste to be given to the criminal of the pain to be endured, if he will not comply; and the court will not proceed to this judgment, before all methods are used to persuade him to plead: This is the constant practice of *Newgate* sessions. *Kel. 27, 28. See Black. Com. 4 V. 320, 321, 2, 3, 4. and tit. Mute.*

Pains and Penalties. Acts of parliament to attain particular persons of treason or felony, or to inflict pains and penalties, beyond or contrary to the Common law, to serve a special purpose, are to all intents and purposes

new

new laws, made *pro re nata*, and by no means an execution of such as are already in being. *Black. Com. 4 V. 256.*

An act passed in the ninth year of King George 1. for inflicting pains and penalties on the late bishop of Rochester, Mr. Kelly, and others, for being concerned in Layer's conspiracy; by virtue of which statute, the bishop was deprived and banished, and disabled to hold any office, dignity, benefice, &c. And the others were imprisoned during life, and to forfeit all their lands and goods; and escaping from prison, or the bishop returning from banishment, to be guilty of felony without benefit of clergy, &c. Also persons corresponding with the bishop, (except licensed under the sign manual) were adjudged felons by the statute. They were condemned by parliament for want of such evidence as is strictly required in the Common law courts. 9 Geo. 1. c. 16, 17.

Painters. The price of painters work is limited by statute; who shall not take above 16 d. a day, for laying any flat colour mingled with oil or size, upon timber, stone, &c. And plasterers are forbid using the trade of a painter in London, or to lay any colour of painting, unless they are servants to painters, &c. on pain of 2 s. But they may use whiting, blacking, red lead, &c. mixt with size only. Plasterers not to exercise the trade of a painter in London, without serving an apprenticeship. 1 Jac. 1. c. 20.

Pais, A county or region. *Trials per Pais*, which *Spelman* in his *Glossary* saith, *Nen intelligendum est de quovis populo, sed de compagesibus, hoc est eorum qui ex eadem sunt comitatu, quem majores nostri pagum dixerunt & incolis, inde pais, g, in i, vel u, converjs.*

Paisley, A duty of excise granted to the town, 2 Geo. 2. c. 96.

Paisso, Pannage, or liberty for hogs to run in forests or woods to feed on mast. *Mon. Angl. tom. 1. p. 682. See Passune.*

Palaces, The steward, treasurer, and comptroller, may inquire by a jury of the King's servants, if any of the servants conspire the death of the King, or of any counsellor, &c. 3 Hen. 7. c. 14. The yeomen of the crown and grooms of the chamber shall attend their offices. 4 Hen. 7. c. 7. The limits of the palace of Westminster, 28 Hen. 8. c. 12. The great master of the King's house, to have the same authority as the lord steward, 32 Hen. 8. c. 39. Repealed, 1 Mar. 2. c. 4. The penalty of striking in the King's court. 33 Hen. 8. c. 12. Inquiries of murders, &c. within the verge, *ib.* Entering into the King's house with intent to steal, made felony, *ib.*

Palatium, A duty to lords of manors, for exporting and importing vessels of wine, in any of their ports.—*Quieti de omni telonio, & passagio, cobuagio, pallagio, &c.*

Palatine, Counties of, and their privileges. See County. And read *Cressan. de Consuetud. Burg. p. 14.*

Palatines, How intitled to naturalization, 1 Geo. 1. c. 2. c. 29.

Palcs. See Inclosures.

Palfrey, (*Paisfredus, palafredus, palefredus, palifredus,*) Is one of the better sort of horses used by noblemen or others for state: And sometimes of old taken for a horse fit for a woman to ride. *Camden* says, that *William Fauconberge* held the manor of *Cuxeny*, in the county of *Nottingham* in sergeantry, by the service of shoeing the King's palfrey, when the King should come to *Mansfield*. See *Co. on Lit. 149.*

Palicen, A park pale. *Cowell.*

Paltingman, (mentioned in stat. 22 Ed. 4. c. 23. and 11 H. 7. c. 23.) Seems to be a merchant denizen, one born within the *English pale*. But Dr. *Skinner* judges it to signify a fishmonger, or merchant of fish. *Cowell.*

Palla, A canopy; also often used for an altar-cloth. *Matt. Paris. sub. Ann. 1236, Chartular. Gloston. MS. fol. 12.*

Pallio cooperire. It was anciently a custom where children were born out of wedlock, and their parents afterwards intermarried, that those children, together with the father and mother, stood under a cloth extended while the marriage was solemnizing, which was in the nature

of adoption; and by such custom, the children were taken to be legitimate.—*In signum legitimisationis nati ante matrimonium confuerunt poni sub pallio super parentes eorum extenso in matrimonii solemnizatione.* *Epist. Rob. Grossthead Episc. Lincoln.*

Pallium, A word often mentioned in our old historians; *Durandus* tells us, that it is a garment made of white wool, after the following manner, *viz.* The nuns of St. *Agnus* every year, on the feast-day of their saint, offer two white lambs on the altar of their church, during the time they sing *Agnus Dei* in a solemn mass; which lambs are afterwards taken by two of the canons of the *Lateran* church, and by them given to the Pope's subdeacons, who put them to pasture till shearing time, and then they are shorn, and the pall is made of their wool, mixed with other white wool: The pall being thus made is carried to the *Lateran* church, and there placed on the high altar by the deacons of that church on the bodies of St. *Peter* and St. *Paul*; and after a usual watching, it is carried away in the night, and delivered to the subdeacons, who lay it up safe. And because it was taken from the body of St. *Peter*, it signifies the plenitude of ecclesiastical power; and therefore it was the prerogative of Popes, who pretend to be the immediate successors of that saint, to invest other prelates with it, which at first was done nowhere but at *Rome*, but afterwards at other places. *Durandus's Rationale.*

Palis, The pontifical vesture made of lamb's wool, in breadth not exceeding three fingers, cut round that they may cover the shoulders; they have two labels or strings on each side, before and behind, and likewise four purple crosses on the right and left, fastened with pins of gold, whose heads are *Saphire*: These vestments the Pope gives or lends to archbishops and metropolitans, and upon extraordinary occasions to other bishops; who wear them about their necks at the altar, above their other ornaments. The pall was first given to the bishop of *Offia*, by Pope *Marcus* the Second, Anno 336. And the preface to an ancient synod here in *England*, wherein *Odo*, archbishop of *Canterbury* presided, begins thus;—*Ego Odo humilis & extremus, divina largiente Clementia, Almi prefulis & palati honore ditatus, &c.* *Selden's Hist. Tithes 227. Cressy's Church Hist. 972. Stat. 25 H. 8.*

Palmetry, A kind of divination, practised by looking upon the lines and marks of the hands and fingers; being a deceitful art used by *Egyptians*, prohibited by the statute of 1 & 2 P. & M. c. 4. See *Black. Com. 4 V. 165, 6.*

Pamphlets, see Table to the Statutes, tit. Stamps.

Pandects, Are the books of the *Civil law*, compiled by *Justinian*; mentioned in the historians of this nation. *Bede, c. 5.* See *Black. Com. 1 V. 17. 81.*

Pandepatrix, An ale wife who both brews and sells ale or beer; from *pandoxatorium*, a brewhouse, *Statut. & Consuetud. Burgi Villæ de Montgom'. Temp. Hen. 2.*

Panell, (*panella, panellum*) According to Sir *Edward Coke*, denotes a little part; but the learned *Spelman* says, that it signifies a *schedula vel pagina*, a schedule or page; as a panel of parchment, or a counterpane of an indenture; But it is used more particularly for a schedule or roll, containing the names of such jurors as the sheriff returns to pass upon any trial. *Kitch. 226. Reg. Orig. 223.* And the impanelling a jury is the entering their names by the sheriff into a panel or little schedule of parchment; in panello *offise*. 8 H. 6. c. 12. Panels of juries are to be returned into court, on writs of *Nisi prius*, &c. before inquests can be taken upon them, by stat. 42 Ed. 3. c. 11. And persons indicted of high treason shall have a copy of the panel of the jurors, who are returned to try them, two days at least before tried. 7 & 8 W. 3. c. 3. But it is said, that in trials before justices of gaol-delivery, the prisoner has no right to a copy of the panel before the time of his trial; except only in cases within that statute. 2 Hawk. P. C. 410. See *Black. Com. 3 V. 354. 4 V. 299, 344.*

Panis armigerorum, The bread distributed to servants. *Mon. 1. p. 420.*

Panis bisus, Coarse bread. *Id. ib.*

Panctia, A pantry, or place to set up cold victuals. *Cowell.*

Panis,

Panls, called *Blackwytlof*, Bread of a middle sort, between white and brown, such as in *Kent* is called *Ravel-bread*. In religious houses it was their coarser bread, made for ordinary guests, and distinguished from their *houfhold loaf*, or *panis conventualis*, which was pure-manchet, or white-bread. *Conwell*.

Panls militaris, Hard bisket, brown george, camp-bread, coarse and black. The prior and convent of *Ely* grant to *John Grove*, a corrody or allowance, — *Ad suum viduum quolibet die unum panem monachalem*, i. e. a white loaf; and to his servant *unum panem nigrum* militare, i. e. a little brown loaf or bisket. *Cartulur. Elyn. MS. f. 47.*

Pannage or **Patonage**, (*pannagium*, Fr. *pasnage*) Is that food which the swine feed upon in the woods, as mast of beech, acorns, &c. *Alimentum, quod in silvis colligunt pecora, ab arboribus dilapsum*: Also it is the money taken by the *Agistors* for the food of hogs in the King's forest. *Crompt. Jurisd. 155. Stat. West. 2. c. 25. Manwood* says *pannage* signifies most properly the mast of the woods or hedge rows: And *Linwood* thus defines it: *Pannagium est pastus pecorum in nemoribus & in sylvis, utpote de glandibus & aliis fructibus arborum sylvestrium, quarum fructus aliter non solent colligi*. It is mentioned in the statute 20 *Car. 2. c. 3.* And in ancient charters this word is variously written; as *pannagium*, *pasnagium*, *patnagium*, *paunagium* & *peffona*. See 8 *Rep. 47.*

Pannus, A garment made with skins. — *Statutum fuit quod nullos habet pannos decisos & laceratos*, *Fleta*, lib. 2. c. 14.

Pantiles, To what duties liable, 4 *W. & M. c. 5.*

Paper, Duties upon paper, paste-board, &c. 2 *W. & M. sess. 2. c. 4. sect. 42. 10 Ann. c. 19. sect. 32. 12 Ann. st. 2. c. 9.*

Penalty on removing painted paper before surveyed, 1 *Geo. 1. c. 36. f. 17.*

Rags may be imported free, 11 *Geo. 1. c. 7. f. 10.*

The drawback on exportation of foreign paper taken away, 10 *Geo. 2. c. 27. f. 4. See Books, Customs.*

Paper-Books, Are the issues in law, &c. upon special pleadings, made up by the clerk of the *papers*, who is an officer for that purpose. And the clerks of the *papers* of the court of *King's Bench*, in all copies of *pleas* and *paper-books* by them made up, shall subscribe to such *paper-books*, the names of the counsel who have signed such pleas, as well on the behalf of the plaintiff as defendant; and in all *paper-books* delivered to the judges of the court, the names of the counsellors, who did sign those pleas, are to be subscribed to the *books*, by the clerks or attornies who deliver the same. *Pasch. 18 Car. 2. 2 Lill. Abr. 268.*

Paper-Office, Is an ancient office within the palace of *Whitehall*, wherein all the publick papers, writings, matters of state and council, letters, intelligences, negotiations of the King's ministers abroad, and generally all the papers and dispatches that pass thro' the offices of the two principal secretaries of state, are lodged and transmitted, and there remain disposed in the way of library. Also an office belonging to the court of *King's Bench* so called.

Papists, Are those who profess the *Popish* religion in this kingdom: And since the *Reformation* there have been many statutes concerning them. By the 35 *Elix. c. 2. Papists* are to repair to their usual place of residence, and not remove above five miles, without licence, &c. The 3 *Jac. 1. c. 5. enacts*, That no *Papists*, or *Popish* recusant convict, shall come to court; practice the Common law, Civil law, physick, &c. or bear any publick office or charge, but shall be utterly disabled to exercise the same; and liable to a penalty of 100 *l.* But offices of inheritance may be executed by deputies taking the oaths, by 1 *W. & M. Papists*, and trustees for *Papists*, are incapable to present to any benefice, school, hospital, &c. or to grant any avoidance of a benefice, and the two universities shall present; the Chancellor, &c. of *Oxford*, to present to benefices lying in such and such counties; and the university of *Cambridge* to benefices in others, particularly mentioned in the statute; and a bill may be brought in a court of equity to discover secret trust, &c. 3 *Jac. 1. c. 5.* It has been adjudged on that statute, that the person is only

disabled to present; and that he continues patron to all other purposes. *Cawley 230.* That such a person by being disabled to grant an avoidance, is not hindered from granting the advowson itself, in fee, or for life, for good consideration. 1 *Jen. 19, 20.* And that if an advowson or avoidance belonging to a *Papist* come into the King's hands, by reason of an outlawry, or conviction of recusancy, &c. the King and not the universities, shall present. 1 *Jen. 20. Hob. 126.* But where a presentment is vested in the university, at the time when the church becomes void, it shall not be defeated again, by the patron's conforming, &c. 10 *Rep. 57.* *Papists*, and *Popish* recusants, married not according to the orders of the church of *England*, are disabled, the husband to be tenant by the curtesy, and the wife to have dower, &c. and incur a forfeiture of 100 *l.* Also not baptizing their children by a lawful minister, is liable to the like penalty: And not being buried according to the Ecclesiastical laws, the executors shall forfeit 20 *l.* &c. And *Papists* are incapable to be executors, administrators, or guardians; disabled to sue actions, and as persons excommunicate till they conform, &c. 3 *Jac. 1. c. 5.* And it is said that being convicted of *Popish* recusancy, they may be taken up by the writ *de excom. capiend.* And shall not be admitted as competent witnesses in a cause: But this seems to be carried beyond the intent of the statute. 2 *Bull. 155, 156. 1 Hawk. P. C. 23.* Persons going beyond sea to be trained up by *Papists*, shall forfeit their goods and chattels, if they do not conform within six months after their return: And sending children abroad to be thus trained up, is liable to a penalty of 100 *l.* Stat. 3 *Car. 1. c. 2.* The Lord Mayor of the city of *London*, and justices of peace, &c. are to cause to be brought before them *Papists*, within the said city and ten miles thereof, and tender them the declaration 30 *Car. 2. c. 1.* against transubstantiation; and refusing to subscribe it, they shall suffer as *Popish* recusants convict: But such as use any trade or manual art; and foreign merchants, servants to ambassadors, &c. are excepted. 1 *W. & M. sess. 1. c. 9.* *Papists* refusing to appear and subscribe the said declaration, are not to keep in their houses any arms, weapons, gunpowder, &c. And justices of peace may order any such to be seized: And they may not keep any horse above the value of 5 *l.* which may be also seized, And persons concealing arms or horses, or hindering a search after them shall be committed, and forfeit treble value. 1 *W. & M. c. 15.* If any person refuse to repeat and subscribe the above-mentioned declaration, and shall thereupon have his name and place of abode certified and recorded at the general quarter-sessions of the peace, as by the act is appointed, he shall be disabled to make any presentation, &c. And presenting contrary to this act shall forfeit 500 *l.* 1 *W. & M. c. 26.* *Papists* who keep schools are to suffer perpetual imprisonment: And persons educated in the *Popish* religion, not taking the oaths and subscribing the declaration in the 30 *Car. 2. c. 1.* within six months after they attain the age of eighteen years, shall be disabled to take or inherit lands, but not their heirs or posterity; and during their lives or refusal, the next Protestant relation shall enjoy, &c. And where the parents of Protestant children are *Papists*, the Lord Chancellor may take care of the education of such Protestant children, and make order for their maintenance suitable to the ability of the parent. 11 & 12 *W. 3. c. 4.* Every trustee, &c. for *Popish* children is disabled to present to any benefice, &c. and presentations by them shall be void; and the Chancellor and scholars of the universities shall present, as by the act 3 *Jac. 1.* And bishops are required to examine persons presented on oath, before institution, whether the persons presenting be the real patron, and made the presentation in his own right, or whether he be not a trustee for a *Papist*, &c. And if the parson presented refuse to be examined, his presentation shall be void. 12 *Ann. sess. 2. c. 14.* Grants of advowsons, or right of presentation to churches, &c. by any *Papists*, or person any ways in trust for him, to be void; except made for valuable consideration to some Protestant purchaser; for the benefit of a Protestant only; and persons claiming under such grant, shall be deemed as trustees for a *Papist*, and they and their presentees be compelled to make discovery thereof and the intent, as directed by 12 *Ann. &c.*

11 *Geo. 2. c. 17.* Papists are to register their estates, as by this statute is directed, on pain of forfeiture; and lands registered must be expressed in what parishes they lie, who are the possessors thereof, the estate therein, and the yearly rent, &c. Persons suing in *Chancery* for forfeitures for default of registry, may demand all discoveries as if purchasers; and they may bring ejectment on their own demise, and give the act and special matter in evidence. 1 *Geo. 1. c. 55.* Sales of lands by Papists (incurring the disabilities 11 *Edw. 3.*) to Protestant purchasers, are confirmed notwithstanding the disability of persons joining in the sale; unless before such sales any person who is to take advantage of the disability, has recovered, or entered his claim, and given notice, &c. No lands shall pass from Papists, by deed or will, without inrollment: and Papists are rendered incapable to purchase lands. 3 *Geo. 1. c. 18.* Deeds and wills of Papists have further time to be inrolled, and not avoidable for want thereof, &c. by 6 *Geo. 2. c. 5.* All persons within *England*, of the age of eighteen years, not having taken the oaths, and who refuse to take the same, shall register their estates as Papists; or neglecting such registry, are to forfeit the inheritance of their lands, two thirds to the King, and the other third to the prosecutor. 9 *Geo. 1. c. 24.* But by a subsequent act, this shall not extend to oblige any woman to take the oaths, or to register her estate; nor any person that hath only an interest in lands in reversion; or to estates under 10 *l.* a year, &c. And only one year's rent and profits of lands is forfeited for default of registering by this statute, recoverable by actions in the courts at *Westminster*, within six months after the offence; persons in prison, beyond sea, *non compos*, &c. are to have six months to take the oaths and register their estates, after the removal of their disabilities; and certificates by the proper officers, shall be allowed as evidence of taking the oaths, &c. 10 *Geo. 1. c. 4.* By a late statute, the reputed owners of estates being Papists, on conforming to the Protestant religion, and taking the oaths, the same to be recorded, and they and all Protestants claiming under them, shall possess the estates freed of disabilities incurred by such owners, &c. And any person's right intitled to a reversion, is saved if his suit be commenced in twelve months after the determination of the precedent estate. But persons conforming as aforesaid, and afterwards returning to the Popish religion, shall be ever after incapable of any benefit by this act 11 *Geo. 2. c. 17.* A Papist tenant in tail suffers a recovery to the use of himself in fee, in order to make a marriage settlement; this is not a purchase within 11 *W. 3. c. 4.* *Strange* 267. Acts are made almost every other sessions, for allowing further time for the inrolment of deeds and wills made by Papists, and for relief of Protestant purchasers. See *Oaths*. Also *vide British Liberties*, where the principal laws, relative to Papists, are collected in one view, with *observations* thereon.

As to cases determined on those statutes, vide *Hob. 73, 74. Ley 59. Thredway's case.* And the case of *Thornby v. Fleetwood*, alias the *Duchess of Hamilton's case*, *Hil. 12 Ann. C. B.* affirmed in the House of Lords. And see 1 *Hawkl. P. C. 32.* 10 *Co. 57. b.* *Cawley* 230. 1 *Jon. 19, 20.* *Hob. 126. Winch. 7. 11.* 3 *New Abr. 795. Roper v. Rudcliffe. ib. 796. Lord Derwentwater's case. ib. 797. Hill v. Filkins, ib. Carrick v. Errington, ib. 798. Marwood v. Dorel, ib. 799. Pelham v. Fletcher, ib. on Lord Dover's will, ib. Mallon v. Bringloe, ib. Smith v. Read. 4 Stran. 267. See Recusants, Rome.*

Papists taxed. Papists, or reputed papists, who refuse to take the oaths 1 *W. & M.* are to pay double to the land tax, &c. *Stat. 8 W. 3. c. 6.* And a tax of 100,000 *l.* for the year 1723. was laid on the lands of all papists, over and above the double taxes, towards reimbursing the publick charges occasioned by late conspiracies; charged so much on every county, &c. and leviable by the commissioners of the land tax, by *Stat. 9 Geo. 1. c. 18.*

Par, Is a term in *Exchange*, where a man to whom a bill is payable, receives of the acceptor just so much in value, &c. as was paid to the drawer by the remitter. *Merch. Dic.* And in exchange of money, *par* is defined

to be a certain number of pieces of the coin of one country, containing in them an equal quantity of silver to that of another number of pieces of the coin of some other country; as where thirty-six shillings of the money of *Holland*, have just as much silver, as twenty shillings *English* money; and bills of exchange drawn from *England* to *Holland*, at the rate of thirty-six shillings *Dutch*, for each pound *sterling*, is according to the *par*. *Lock's Confid. of Money*, pag. 18.

Paracium, The tenure that is between parceners, viz. that which the youngest oweth to the eldest. *Domesday.*

Parage. (*paragium*) Signifies equality of name, blood, or dignity; but more especially of land, in the partition of an inheritance between coheirs: hence comes to *disparage* and *disparagement*. *Co. Litt. 166.*

Paragium, Was commonly taken for the equal condition betwixt two parties, to be contracted in marriage: for the old laws did strictly provide, that young heirs should be disposed in matrimony *cum paragio*, with persons of equal birth and fortune, *sine disparagations*.

Paramount, (compounded of two French words, *par*, i. e. *per* and *monter*, *ascendere*) Signifies in our law the highest lord of the fee, of lands, tenements, or hereditaments. *F. N. B. 135.* As there may be a lord mesne, where lands are held of an inferior lord, who holds them of a superior under certain services; so this superior lord is lord *paramount*: and all honours, which have manors under them, have lords *paramount*. Also the King is chief lord, or lord *paramount* of all the lands in the kingdom. *Co. Litt. 1.*

Paraphernalia, or *Paraphernalia*, (from the Greek *Παρά, Præter*, and *Δορί, Dos*) Are those goods which a wife challengeth over and above her dower or jointure, after her husband's death; as furniture for her chamber, wearing apparel, and jewels, which are not to be put into the inventory of her husband. A wife, after the death of her husband, may claim her *paraphernalia* or necessary apparel for her body, and cloth given her to make a garment, &c. besides her dower; so that the husband cannot give them away by will: but she shall not have excessive apparel, beyond her rank. Pearl necklaces, chains of diamonds, gold watches, &c. may be included under *paraphernalia*, if they were usually worn by the wife, and suitable to her quality, and the fashion of the times, and they are assets to pay debts and legacies; provided the husband does not give these away by will. 1 *Roll. Abr. 911.* 3 *Cro. 343. Kitch. 369. Noy's Max. 168.* It was adjudged in the *Viscountess Bindon's case*, that *paraphernalia* ought to be allowed to a widow, having regard to her quality and degree; and that her husband being a Viscount, she shall be allowed her jewels to the value of 500 marks, &c. 2 *Leon. 166.* A widow retained a chain of diamonds and pearls, against the devise of her husband; and two judges held, that she might detain them, because they were convenient for a woman of her quality; but two other judges were of a contrary opinion, that *paraphernalia* should be not only convenient, but necessary; otherwise the widow shall not detain them against the express devise of the husband: tho' it is said it was adjudged, that the widow might detain necessary apparel, and likewise ornaments, against the devise of her husband; and that he cannot dispose of them by will, tho' he might have sold them in his life-time; for immediately upon his death, the property is vested in the widow. *Cro. Car. 347.* 2 *Nelf. Abr. 1225.* All the wife's wearing apparel, more than that which is necessary and convenient, is a chattel in the husband; and after the husband's death shall go to his executors: but what is necessary for her condition and state, and comes under *paraphernalia*, she shall have as her own goods, and may dispose of at her death; or take after the death of her husband. *Bro. 9. DoB. & Stud. 17.* Tho' by our law the wife may not make a will of and devise them, without the assent of the husband whilst he lives; because the property and possession is in him. 2 *Shep. Abr. 423. Mich. 27 Elix. Vide Com. Dig. 1 V. tit. Baron and Feme, and Black. Com. 2 V. 435.*

Parasitus, A word used for a domestick servant. *Blount.*

Parabasi,

Paravail, (*per-avail*) Signifies the lowest tenant of the fee, or he who is immediate tenant to one who holdeth over of another; and he is called tenant *paravail*, because 'tis presumed he hath profit and *avail* by the land. *F. N. B.* 135. 2 *Inst.* 296. 9 *Rep. Coney's case*. See *Black. Com.* 2 *V.* 60.

Parcelle Terræ, A parcel of land, as used in some ancient charters.—*Sciant, quod ego Stephanus W. dedi, &c. Roberto de D. undm parcellem terræ cum pertinen. jacent. &c. sine dat.*

Parcel-makers, Are two officers in the *Exchequer*, that make the *parcels* of the *escheators* accounts; wherein they charge them with every thing they have levied for the King's use, within the time of their being in office, and deliver the same to the *auditors*, to make up their accounts therewith. *Practice Excheq.* 99.

Parceners, (*quasi parcellers, i. e. rem in parcellas dividentes*) Are of two sorts, *viz. parceners*, according to the course of the *Common law*; and *parceners* according to *custom*. *Parceners* by the *Common law*, are where a man or woman seised of lands or tenements in fee-simple or fee-tail hath no issue but daughters, and dieth, and the tenements descend to such daughters, who enter into the lands descended to them, then they are called *parceners*, and are but as one heir to their ancestor; and they are termed *parceners*, because by the writ *de partitione facienda* the law will constrain them to make partition; tho' they may do it by consent, &c. *Litt.* 243. 1 *Inst.* 164. See *Black. Com.* 2 *V.* 187. And if a man seised of lands in fee-simple, or in tail, dieth without any issue of his body begotten, and the lands descend to the sisters, they are *parceners*; and in the same manner where he hath no sisters, but the lands descend to his aunts, or other females of kin in equal degree, they are also *parceners*: but where a person hath but one daughter, she shall not be called *parcener*, but daughter and heir, &c. *Litt. sēd.* 242.

If a man hath issue two daughters, and the eldest hath issue divers sons and daughters, and the youngest hath issue divers daughters; the eldest son of the eldest daughter shall not only inherit, but all the daughters of the youngest shall inherit, and the eldest son is coparcener with the daughters of the youngest sister, and shall have one moiety, *viz.* his mother's part; so that men descending of daughters may be parceners as well as women, and shall jointly plead and be impleaded, &c. 1 *Inst.* 164. None are parceners by the *Common law*, but either females, or the heirs of females, who come to lands or tenements by descent. *Litt.* 254.

Parceners by custom is, where a person seised in fee-simple, or in fee-tail of lands or tenements of the tenure called *gavelkind*, hath issue, divers sons, and dies; such lands shall descend to all the sons as parceners by the custom, who shall equally inherit and make partition as females do, and a writ of partition lies in this case, as between females, &c. *Litt. sēd.* 265. Women parceners make but one heir, and have but one freehold: but between themselves they have in judgment of law several freeholds, to many purposes; for one of them may infeoff the other of her part; and the parcenary is not severed by the death of any of them; but if one dies, her part shall descend to her issue, &c. 1 *Inst.* 164, 165. If one parcener make a feoffment in fee of her part, this is a severance of the coparcenary, and several writs of *præcipe* shall lie against the other parceners and the feoffee. 1 *Inst.* 167. Tho' if two coparceners by deed alien both their parts to another in fee, rendering to them two, and their heirs, a rent out of the land, they shall have the rent in course of parcenary; because their right in the land out of which the rent is reserved was in parcenary. *Ibid.* 160. If there be two parceners, and each of them taketh husband, and have issue, and the wives die, the parcenary is divided, and here is a partition in law. *Ibid.* Partition of lands held in tail, by the death of one sister, without issue is made void, and the other sister as heir in tail will be intitled to the whole land; and may have writ of *formedon* where the other parcener hath aliened. *New Nat. Br.* 476. And a writ of *unper obit* lies for one parcener deformed by another, &c. *F. N. B.* 197. If any parceners or their issues be disseised, they must join in an assise

against the disseisor; so if they have cause to bring any action of waste, &c. 1 *Inst.* 95, 198. Two parceners are of land, one enters and claims the whole, and is disseised, she alone may maintain assise; but if the disseisin be of rent, the other parceners must be named, or the writ shall abate. *Jenk. Cent.* 41, 42. The possession of one parcener, &c. of land, without an actual ouster, gives possession to the other of them. *Hob.* 120. *Dyer* 128. One parcener may justify detaining the deeds concerning the land, against another, as they belong to one as well as the other. 2 *Roll. Abr.* 31. *Parceners* are to make partition of the lands descended; and estates of coparceners at *Common law* are applicable only to inheritances: Partition may be made between *parceners* of inheritances, which are intire and dividable, as of an advowson, rent charge or such like; but it is otherwise of inheritances which are not intire and indivisible, as of a piscary, common-without number, or such uncertain profits out of lands; for in such case the eldest *parcener* shall have them, and the others have contribution from her out of some other inheritance, left by the ancestor; but if there be no such inheritance, then the eldest shall have these uncertain profits for one time, and the youngest for another time. *Dyer* 153. *Parceners* cannot make partition, so as for one to have the land for one time, and another for another, &c. for each is to have her part absolutely: but if an advowson descend to them, they may present by turns; and if there be a common, &c. which may not be divided, one may have it for one year, and another, for another year, &c. 1 *Inst.* 164. An advowson is an intire thing, and yet in effect, the same may be divided betwixt *parceners*; for they may present by turns: and if there be coparceners of an advowson appendant to a manor, and they make partition of the manor, without mentioning the advowson; the same is still appendant, and they may present by turns. 8 *Rep.* 79. If two parceners be of an advowson, and they agree to present by turns, this is a good partition as to the possession; but it is not a severance of the estate of inheritance. 1 *Rep.* 87. And where there are coparceners of an advowson, the eldest hath privilege to present first; not in respect of her person, but estate: and if one parcener hath a rent granted to her upon a partition made, to make her part equal with the other, she may distrain for the arrears of common right; and so shall the grantee of the rent, because it is not annexed to her person only, but to her estate. 3 *Rep.* 32. If there are two parceners of a manor, and on partition made, each hath demesnes and services allotted; in this case each is said to have a manor. 1 *Leon.* 26. *Davis* 61. A partition may not be made of franchises, as goods of felons, waifs, citrays, &c. which are casual, 5 *Rep.* 3.

How partition may be made.

Partition, between parceners, may be made four ways, *viz.*

First, When they themselves divide the lands equally into as many parts, as there are parceners; and each chuses one share or part, the eldest first, and so one after another, &c.

Secondly, When they agree to chuse certain friends to make division for them.

Thirdly, Partition by drawing lots, where having divided the lands into as many parts as there are parceners, and written every part in a distinct scroll, being wrapt up, they each draw one out of a hat, basin, &c.

And Fourthly, Partition by a writ *de partitione facienda*, which is by compulsion, where some agree to partition, and others do not; and when judgment is given on a writ of partition, it is that the sheriff shall go to the land, and by the oaths of twelve men make partition between the parties, to hold to them in SEVERALTY, without any mention of preference to the eldest sister, &c. *Litt.* 248. 1 *Inst.* 164. But if there be a capital messuage on the land to be divided, the sheriff must allot that wholly to the eldest of the parceners. 1 *Inst.* 165. The partition made and delivered by the sheriff and jurors, ought to be returned into court under the seal of the sheriff, and the seals of the twelve jurors; for the words of the judicial writ of partition, which commands the sheriff to make partition, are, *Assumpsit tecum duodecim, &c. & partitionem inde scire facias*

facias justiciariis, &c. sub sigillo tuo & sigillis eorum per quorum sacramentum partitionem illam feceris, &c. If partition be made by force of the King's writ, and judgment thereof given, it shall be binding to all parties, because it is made by the sheriff, by the oath of twelve men, by authority of law; and the judgment is, *that the partition shall remain firm and stable for ever.* 1 Inst. 171. In a writ of partition, the judgment was, *quod partitio fiat*; and before it was executed by the sheriff, a writ of error was brought; and it was adjudged that a writ of error doth not lie upon this first judgment, because this is not like other actions, where error lies before the *habere facias seisinam* is returned, and the judgment is final; but it is not so in this case, as there must be another judgment, *i. e. quod partitio stabilis maneat*, which cannot be till the partition is made, and returned by the sheriff. *Hetley* 36. *Dyer* 67. Where two persons hold lands *pro indiviso*, and one would have his part in severalty, and the other refuseth to make partition by deed, there the writ *de partitione facienda* lies against him who refuses, directed to the sheriff; and he *must be present* when the partition is made; and if it is objected before the return of the writ, that he was not present, it may be examined by the court; but after the writ is returned and filed, 'tis too late. *Cro. Eliz.* 9. A writ of partition was taken forth, and the sheriff made partition, but was *not* upon the land; and on motion that the return might not be filed, but that a new writ might be awarded, because the sheriff was not on the land, the court staid the filing, and on examining the sheriff, ordered a new writ. *Cro. Car.* 9, 10. On writ of partition to the sheriff to make partition of lands, part of the lands were allotted to one, and the jury would not assist the sheriff to make partition of the other part; which appearing on the return of the writ, the court was moved for an attachment against the jury, and a new writ to the sheriff. *Godb.* 265. Partition was brought by tenant in fee of one moiety, against tenant for life of the other moiety, on the *Stat.* 32 H. 8. c. 32. And tho' it has been resolved, if partition be made between one who hath an estate of inheritance, and another who hath a particular estate for life; that the writ ought to be framed upon the statute, and to be made special, setting forth the particular estate: yet it was held to be good where the writ was general. *Goldsb.* 84. 2 *Lutw.* 1015. A partition may be made by statute of any estate of freehold, or for term of years, &c. of manors, lands, tenements and hereditaments whereof the partition is demanded; and if after process of *pone* return'd upon a writ of partition, and affidavit of notice given of the writ to the tenant to the action, and a copy left with the tenant in possession at least forty days before the return of the said *pone*, &c. there be no appearance entered in fifteen days; the demandant having entered his declaration, the court may give judgment by default, and award a writ to make partition, whereby the demandant's part or purpart will be set out severally; which writ being executed, after eight days notice, and return'd, and thereupon final judgment entered, shall conclude all persons, &c. But the court may suspend or set aside the judgment, if the party concerned move the court in a year, and shew good matter in bar. *Stat.* 8 & 9 W. 3. c. 31. And by this statute, if the high sheriff by reason of distance, &c. cannot be present at the execution of any judgment in partition, then the under sheriff in the presence of two justices of peace of the county, shall proceed to the execution of the writ, by inquisition, and the high sheriff is to make the return, &c. *Ibid.* When the partition is made and returned, the persons who were tenants of the lands, or any part thereof, before divided, shall continue tenants of the lands they held, to the respective owners, under such conditions and rents as before: and no plea in abatement shall be admitted or received in any suit of partition; nor shall the same be abated by the death of any tenant, &c. *Ibid.* In a writ of partition the defendant pleaded, that he formerly brought writ of partition against the plaintiff, and had judgment, to have partition: and held a good plea; but it was a question, whether it should be pleaded in bar or abatement, or by way of estoppel. *Dyer* 52. No damages can be recover'd on a writ of partition, tho' the writ and declaration con-

clude *ad damnum*. *Hetl.* 35. *Noy* 143. 2 *Nels. Abr.* 1237. Where judgment for debt is had against one parcener, the lands, &c. of both may be taken in execution, and the moiety undivided is to be sold, and then the vendee will be tenant in common with the other coparcener: if the sheriff seize only a moiety and sell it, the other parcener will have a right to a moiety of that money. 1 *Salk.* 392. All partitions ought to be according to the quality and true value of the lands, and be equal in value: but if partition be made by parceners of full age, and unmarried, and *sane memoriae*, it binds them for ever, altho' the value be unequal, if it be made of lands in fee; and if it be of lands intailed, it shall bind the parties themselves for their lives, but not their issue *unless it be equal*: if it be unequal, the issue of her who hath the lesser part, may after her decease disagree, and enter and occupy in common with the aunt: also if any be covert, it shall bind the husband, but not the wife, or her heirs; or if any be within age, it shall not bind the infant, but she may at her full age disagree, &c. 1 *Inst.* 166, 170. 2 *Lill. Abr.* 283. Tho' if a wife after coverture, or the infant at her age, accept of the unequal part, they are concluded for ever. 1 *Inst.* 170. And where there be two coparceners, and one hath seven daughters, and dieth; if the other parcener releaseth to any one of the daughters her whole part, here, altho' she to whom the release is made, have not an equal part, the release is good. *Ibid.* 193. It hath been adjudged, that notwithstanding a partition is unequal, *if it is by writ, it cannot be avoided*; but if it be by deed, it may be avoided by entry. 1 *Inst.* 171. If the estate of a parcener be in part evicted, that shall defeat the whole partition; partition implying a warranty and condition in law to enter upon the whole on eviction, as in case of exchange of lands. 1 *Inst.* 173. 1 *Rep.* 87. And if after partition, one of the parts is recovered from a parcener by lawful title, she shall compel the others to make a new partition. *Cro. Eliz.* 902. But as to eviction of parceners, if one sell her part, and then the part which the other parcener hath, is evicted; in this case she who loseth her part, cannot enter on the alienee, for by alienation the privity is destroyed. 1 *Inst.* 173. Among parceners, a partition upon the land may be good without deed; but not among jointenants, &c. *Dyer* 29, 194.

Form of a common writ of partition.

GEORGE the Third, &c. to the sheriff of S. greeting: If A. B. make you secure, &c. then summon E. B. that she be before, &c. to shew why, whereas the said A. B. and E. B. together and undivided hold the manor of, &c. with the appurtenances, twenty messuages, one mill, one dove-house, twenty gardens, three hundred acres of land, two hundred acres of meadow, a hundred and fifty acres of pasture, one hundred acres of wood, two hundred acres of furze and heath, and twenty shillings rent, with the appurtenances of the inheritance which was of N. B. father of the said A. B. and E. B. whose heirs they are, in, &c. the said E. B. doth deny partition thereof to be made between them, according to the law and custom of England, and unjustly will not permit that to be done, as it is said: And have you there the summons, and this writ. Witness, &c.

See Coparceners, Jointenants, Partition.

Parcenary, Is the holding of lands jointly by parceners, when the common inheritance is not divided. *Litt.* 56.

Parcbment, A tax of 20 l. per cent. is laid on parchment, paper, &c. by *stat.* 8 & 9 W. 3. cap. 7. and see 9 *Ann.* c. 11.

Parco fracto, Is a writ which lies against him who violently breaks a pound, and takes out bealls from thence, which for some trespass done, &c. were lawfully impounded. *Reg. Orig.* 166. And if a person hath authority to take bealls out of the pound, if he breaks the pound before he demands the cattle of the keeper thereof, and he refuseth, or interrupts him in the taking of them, &c. the writ *parco fracto* lies. *Dr. and Stud.* 112. Damages are

recoverable in this writ; and the party may be punished, as for a *pound breach* in the court leet. 1 *Inst.* 47. *F. N. B.* 100. The word *parcus* was frequently used for a pound to confine trespassing or straying cattle; whence *imparcare* to impound, *imparcatio* pouncing, and *imparcamentum*, right of pouncing, &c.

Pardon, (*Pardonatio, venia*.) Is the remitting or forgiving of an offence committed against the King; and is either *ex gratia Regis*, or by course of law. *Staundf. Pl. Cor.* 47. Pardon *ex gratia Regis*, is that which the King, affords by virtue of his prerogative. Pardon *by course of law*, is that which the law in equity affords for a light offence; as *casual homicide*, when one killeth a man, having no such meaning. *West. Symbol. part. 2. tit. Indictment, sect. 46.*

1. By whom a pardon may be granted; in what cases, and for what offences.

2. Where a pardon is grantable of common right; of the validity of a pardon; and by what words treasons, murder, felony and other offences may be pardoned.

1. By whom a pardon may be granted; in what cases, and for what offences.

The power of pardoning offences is inseparably incident to the Crown; and this high prerogative the King is intrusted with upon a special confidence, that he will spare those only whose case, could it have been foreseen, the law itself may be presumed willing to have excepted out of its general rules, which the wisdom of man cannot possibly make so perfect, as to suit every particular case. 1 *Shorw.* 284. See *Black. Com.* 4 *V.* 389, &c.

Anciently the right of pardoning offences, within certain districts, was claimed by lords, who had *jura regalia* by ancient grants from the Crown, or by prescription. But now, by 27 *H. 8. cap. 24.* it is enacted, "That no person shall have power to pardon any treasons or felonies, nor any accessaries, nor outlawries; but that the King shall have the authority thereof, united to the crown of this realm, as of right it appertaineth." *Co. Lit.* 114. 3 *Inst.* 233.

It is laid down in general, that the King may pardon any offence, so far as the publick is concerned in it, after it is over, consequently may prevent a popular action on a statute, by pardoning the offence before the suit is commenced; but it seems, that he cannot wholly pardon a publick nuisance, *while it continues such*, because such pardon would take away the only means of compelling a redress; yet it is said, that such a pardon will save the party from any fine, to the time of the pardon. *Plowd.* 487. *Keilw.* 134. 12 *Co.* 29, 30. 3 *Inst.* 237. *Vaugh.* 333.

But it seems agreed, that the King can by no previous licence, pardon, or dispensation, make an offence punishable which is *malum in se*; as being either against the law of nature, or so far against the publick good as to be indictable at Common law; and that a grant of this kind, tending to encourage the doing of evil, which it is the chief end of government to prevent, is against the common good, therefore void. *D. v.* 75. 5 *Co.* 35. 12 *Co.* 29. Vide 2 *Hawk. P. C.* 389. 3 *H.* 7. 15. *pl.* 30.

But where a thing in its own nature lawful, is made unlawful by parliament, it was formerly taken as a general rule, that the King might dispense with it, as to a particular time or place, or person, so far as the public was concerned in it; unless such dispensation could not, but be attended with an inconvenience, as the introducing a monopoly; or frustrating the end for which the law was made; as the licensing a particular person to import foreign cards or wines, &c. in which case, it was commonly taken to be void; also, where a statute gives a particular interest, or right of action to the party grieved, it has been always agreed, that no charter from the King, can bar the right of the party grounded on such statute; also where a statute is express, that the King's charter against the purport of it, tho' with the clause of *non obstante*, shall be void; it seems to have been always generally agreed, that regularly no such clause could dispense with it. 2 *Hawk. P. C.* 389, 390. and several authorities there cited.

It seems to be agreed, that no dispensation of any statute, except the statutes of mortmain, was of any force without a clause of *non obstante*; neither is such clause of any effect at this day, for it is declared and enacted by 1 *W. & M. sess. 2. cap. 2.* That no dispensation by *non obstante* of, or to any statute, or any part thereof, be allowed; but that the same shall be held void, except a dispensation be allowed in such statute; but it is provided, that no charter, grant or pardon, granted before 23d of October 1699. shall be any ways invalidated by that act, but that the same shall be and remain of the same force, and no other, as if the said act had never been made. 2 *Hawk. P. C.* 391.

The King cannot by any charter bar any right of entry or action, or any legal interest, or benefit before vested in the subject; therefore it seems clear, that he cannot bar any action on a statute by the party grieved, nor even a popular action commenced before his pardon, nor a recognizance for the peace before it is forfeited. *Plowd.* 487. 2 *Roll. Abr.* 178. *Cro. Car.* 199. *Keilw.* 134.

Neither can the King pardon an appeal, except only where it is carried on at his suit, after a nonsuit; therefore if a person attainted, on an appeal carried on at the suit of the party, get the King's pardon, he must sue a *scire facias* against the appellant, before the pardon shall be allowed. 2 *Hawk. P. C.* 392.

And if the appellant appear on the *scire facias*, he may pray execution notwithstanding the pardon; but if the sheriff return a *scire facias*, or two *nihilis*, and the appellant appear not, on demand, or if he return the appellant dead, the appellee shall be discharged; but some have holden, that in this last case, a *scire facias* shall go against the heirs of the deceased. 2 *Hawk. P. C.* 392.

But there is no need of any *scire facias* against the lord by escheat, because the pardon no way tends to reverse the attainder whereon the title of escheat is founded. 2 *Hawk. P. C.* 393. which *vide*.

It hath been strongly holden, that the King may pardon the burning of the hand, on a conviction of manslaughter on an appeal, as being no part of the judgment at the suit of the party, but collateral and exemplary punishment inflicted by the statute, and intended only by way of satisfaction to publick justice, like the finding of sureties by one convicted on the statute, against trespass in parks. But for this see 2 *Hawk. P. C.* 393.

A pardon will not only discharge any suit in the spiritual court *ex officio*, but also any suit in such court *ad instantiam partis pro reformatione morum*, or *salute anime*, as for defamation, or laying violent hands on a clerk, &c. See the following cases, 5 *Co.* 51. *Latch* 190. *Cro. Eliz.* 684. *Hob.* 81. *Cro. Jac.* 335. 2 *Hawk. P. C.* 394.

If a person be imprisoned on an *excommunicato capiendo* for non-payment of costs, and the King pardons all contempts, it is said, that he shall be discharged without any *scire facias* against the party, and that the party must begin anew to compel payment of costs; because the imprisonment was grounded on the contempt, which is wholly pardoned. 1 *Jon.* 227. 2 *Roll. Abr.* 178. *Cro. Jac.* 159. 8 *Co.* 68, 69.

But no pardon will discharge a suit in the spiritual court, any more than in a temporal, for a matter of interest or property in the plaintiff; as for tithes, legacies, matrimonial contracts and such like; also it is agreed, that after costs are taxed in a suit, in such court at the prosecution of the party, whether for a matter of private interest, or *pro reformatione morum*, or *pro salute anime*, or for defamation, &c. they shall not be discharged by a subsequent pardon. 5 *Co.* 51. *Latch* 190. *Cro. Car.* 46-7.

And with respect to costs, see 2 *Roll. Abr.* 304. *Noy* 85. *Latch* 155.

By the 12 & 13 *W. 3. cap. 2.* "No pardon under the great seal shall be impleaded to an IMPEACHMENT by the commons in parliament."

2. When a pardon is grantable of common right; and by what words treason, murder, felony, and other offences may be pardoned.

By the statute of *Gloucester*, cap. 9. it is enacted, "That if it be found by the country, that a person tried for the death of a man, *did it in his defence*, or by *misfortune*, then, by the report of the justices to the King, the King *shall* take him to his grace, if it please him." 2 *Inst.* 316.

But it seems to be settled at this day, agreeable to the ancient Common law, in assurance whereof this statute was made, that in such a case, or where one indicted of homicide *se defendendo* confesses the indictment, if the party cause the record to come into Chancery, the Chancellor will of course make him a pardon, without speaking to the King, and that by such pardon the forfeiture of goods may be saved; for these words, "*If it shall please the King*," shall be taken as *spoken only by way of reverence to him*, and not intended to make such a pardon discretionary. But if the party be found to have fled, it is made a *quære*, if the Pardon save the forfeiture of the flight, for that is not grounded on the homicide, but on the contempt of law. 2 *Hawk. P. C.* 380, 381.

If an approver convict all the appellees, whether by battle or verdict, the King *ex merito justitia* ought to pardon him as to his life, and also give him his wages from the time of appeal, to the time of conviction. 3 *Inst.* 139. 2 *Hawk. P. C.* 209. 2 *Hale's Hist. P. C.* 233.

As to persons intitled to pardons, on discovering their fellows, vide 4 & 5 *W. & M. c.* 8. 6 & 7 *W. & M. c.* 17. 10 & 11 *W. 3. c.* 23. 5 *Ann. c.* 31, &c.

It is laid down as a general rule, that wherever it appears by the recital of the pardon, that the King was *misinformed*, or *not rightly apprised*, both of the heinousness of the crime, and also how far the party stands convicted upon record, *the pardon is void*, upon a presumption that it was *gained from the King by imposition*. *Yel.* 43, 47. *Cro. Jac.* 18, 34, 548. 2 *Roll. Ab.* 188. *Dyer* 352. pl. 26. *Raym.* 13. 1 *Sid.* 41. 3 *Inst.* 338.

And on this ground it seems agreed, that if a man attainted of felony get a Pardon, which doth not mention the attainer, the Pardon will be ineffectual; also it hath been holden, that the Pardon of a person convicted by verdict of felony is void, unless it recite the indictment and conviction; also it hath been questioned, if the Pardon of a person barely indicted of felony be good, without mentioning the indictment; but it hath been adjudged, that such a defect is saved by the words *five indictatus five non*. 2 *Hawk. P. C.* 382-3.

Anciently a Pardon of all felonies, included all treasons as well as felonies; and it seems to be taken for granted in many books, that such a general Pardon is even at this day pleadable to any felony, except murder and rape, and piracy; and that the only reason why it may not also be pleaded to murder and rape is, because 13 *Rich. 2.* requires an express mention of them; and that the only reason why it is not pleadable to piracy is, because it is a felony by the Civil law. 2 *Hawk. P. C.* 383-4. 1 *Hale's Hist. P. C.* 466. 2 *Hale's Hist. P. C.* 45. *Vide Stat.* 37 *E. 3. c.* 2.

No Pardon of felony shall be carried beyond the EXPRESS purport of it; therefore if the King, reciting an attainder of robbery, pardon the execution, he thereby neither pardons the felony itself, nor any other consequence of it, besides the execution. 6 *Co.* 13. 2 *Hawk. P. C.* 384.

Vide *Stat.* 2 *Ed. 3. c.* 2. which seems to deprive the King of the power of pardoning WILFUL murder. But see 13 *Ric. 2. c.* 1. and *Hawk. P. C.* 385-6. and the various authorities there cited.

It hath been formerly adjudged, that murder might be pardoned under the general description of a felonious killing, with a clause of *non obstante*; but by 1 *W. & M. sess. 2. cap. 2.* it is declared that no dispensation by *non obstante* of or to any statute shall be allowed. 1 *Sid.* 366. 1 *Show*, 283. *Keiling* 24. 3 *Mod.* 37.

But Pardons of manslaughter remain as they were at Common law; therefore the Pardon of the felonious killing of *J. S.* may be pleaded to an indictment of manslaughter in killing him; but where such a Pardon is pleaded to a coroner's inquest of manslaughter, the court may refuse to allow it, till the fact be found manslaughter

by a jury directed by a higher court. 2 *Keb.* 363, 415. *Keiling* 24. 2 *Jon.* 56.

If a general act expressly pardon petit treason, and except murders, it cannot be avoided by indicting a person guilty of petit treason for murder only, omitting the word *proditorie*; for the less offence being included in the greater is pardoned, by the Pardon of it; therefore such an exception of murder is to be intended of such murder only as is specially so called, and doth not amount to petit treason. *Dyer* 50. pl. 4. 235. pl. 19. 6 *Co.* 13.

Neither doth the exception of murder in a general act of Pardon of all felonies, extend to *felo de se*; for tho' his offence be in strictness murder, yet in common speech, according to which statutes are commonly expounded, it is generally understood as a distinct offence, the word murder seeming *prima facie* to import the murder of another. 1 *Lev.* 8, 120. 1 *Sid.* 130. 1 *Keb.* 66, 548.

It is said, that a general act of Pardon of all felonies, misdemeanors and other things done before such a day, pardons a homicide *from a wound before the day*, whereof the party died not till after; because the stroke being pardoned, the effects of it are consequently pardoned. *Plow.* 401. *Cole's case*. 1 *Hale's Hist. P. C.* 426. *Dyer* 99. pl. 65.

It is said, that a Pardon of all misprisions, trespasses, offences and contempts, will pardon a contempt in making a false return, and a striking in *Westminster Hall*, and barratry, and even a *præmunire*; also it is laid down in general, that it will pardon any crime not capital. 1 *Lev.* 106. 1 *Sid.* 211. 2 *Mod.* 52.

Vide 2 *Hale's Hist. P. C.* 252. *Dyer* 308. a.

As to statutes concerning Pardons, vide *Table to Statutes*.

For more learning on this subject, see 3 *New Abr. tit.* Pardon.

Pardoners, Were persons who carried about the *Pope's indulgences*, and sold them to any who would buy them. *Stat.* 22 *H. 8.*

Parent, (*Parents*) A father or mother; but generally applied to the father: parents have power over their children by the law of nature, and the Divine law; and by those laws they must educate, maintain and defend their children. *Wood's Inst.* 63. The parent or father hath an interest in the profits of the childrens labour while they are under age, if they live with, and are maintained by him: but the father hath no interest in the estate of a child, otherwise than as his guardian. *Ibid.* The eldest son is heir to his father's estate at Common law; and if there are no sons, but daughters, the daughters shall be heirs, &c. And there being a reciprocal interest in each other, parents and children may maintain the suits of each other, and justify the defence of each other's person. 2 *Inst.* 564. See *Black. Com.* 1 *V.* 437, 452.

Parentela, or *De Parentela se tollere*, To renounce his kindred; which was done in open court before the judge, and in the presence of twelve men, who made oath, that they believed it was done lawfully, and for a just cause. We read it in the laws of *H. 1. cap.* 88. *Si quis propter fadum vel causam aliquam de parentela se velit tollere, & eam forisjuraverit, & de societate & hereditate & tota illius ratione se separet, si postea aliquis de parentibus abjuratis moriatur, vel occidatur, nihil ad eum de hereditate vel compositione pertineat, &c.*

Parish, (*parochia*) Did anciently signify what we now call the *diocese* of a bishop: But at this day it is the circuit of ground in which the people who belong to one church do inhabit, and the particular charge of a secular priest. It is derived from the *Saxon* *Preost-scryne*, *Preost-scryre*, which signifies the precinct of which the priest had the care, in *English* priest-shire.

How ancient the division of parishes is, may at present be difficult to ascertain; for it seems to be agreed on all hands, that in the early ages of christianity in this island, parishes were unknown, or at least signified the same that a diocese does now. There was then no appropriation of ecclesiastical dues to any particular church; but every man was at liberty to contribute his tithes to whatever priest or church he pleased, provided only that he did it

to some: Or, if he made no special appointment or appropriation thereof, they were paid into the hands of the bishop, whose duty it was to distribute them among the clergy, and for other pious purposes, according to his own discretion.

Mr. Camden (in his *Britannia*) says, England was divided into parishes by archbishop Honorius about the year 630. Sir Henry Hobart lays it down that parishes were first erected by the council of Lateran, which was held Anno Domini 1179. Each widely differing from the other, and both of them perhaps from the truth; which will probably be found in the medium between the two extremes. For Mr. Selden has clearly shewn, (of tithes. c. 9.) that the clergy lived in common without any division of parishes, long after the time mentioned by Camden. And it appears from the Saxon laws, that parishes were in being long before the date of that council of Lateran, to which they are ascribed by Hobart.

We find the distinction of parishes, nay even of mother churches, so early as in the laws of King Edgar, about the year 970. Before that time the consecration of tithes was in general arbitrary; that is, every man paid his own (as before observed) to what church or parish he pleased. But this being liable to be attended with either fraud, or at least caprice, in the persons paying; and with either jealousies or mean compliances in such as were competitors for receiving them; it was now ordered by the law of King Edgar, (c. 1.) That "*dentur omnes decimæ primariæ ecclesiæ ad quam parochia pertinet.*" However, if anythane, or great lord, had a church within his own demesnes, distinct from the mother church, in the nature of a private chapel; then, provided such church had a coemetry or consecrated place of burial belonging to it, he might allot one third of his tithes for the maintenance of the officiating minister: But, if it had no coemetry, the thane must himself have maintained his chaplain by some other means; for in such case all his tithes were ordained to be paid to the *primariæ ecclesiæ* or mother-church.

This proves that the kingdom was then universally divided into parishes; which division happened probably not all at once, but by degrees. For it seems pretty clear and certain, that the boundaries of parishes were originally ascertained by those of a manor or manors: Since it very seldom happens that a manor extends itself over more parishes than one, tho' there are often many manors in one parish. The lords, as christianity spread itself, began to build churches upon their own demesnes or wastes, to accommodate their tenants in one or two adjoining lordships; and, in order to have divine service regularly performed therein, obliged all their tenants to appropriate their tithes to the maintenance of the one officiating minister, instead of leaving them at liberty to distribute them among the clergy of the diocese in general: And this tract of land, the tithes whereof were so appropriated, formed a distinct parish: which will well enough account for the frequent intermixture of parishes one with another. For if a lord had a parcel of land detached from the main of his estate, but not sufficient to form a parish of itself, it was natural for him to endow his newly erected church with the tithes of those disjointed lands; especially if no church was then built in any lordship adjoining to those out-lying parcels. Thus parishes were gradually formed, and parish churches endowed with the tithes that arose within the circuit assigned. But some lands, either because they were in the hands of irreligious and careless owners, or were situate in forests and desert places, or for other now unsearchable reasons, were never united to any parish, and therefore continue to this day extraparochial; and their tithes are now by immemorial custom payable to the King in stead of the bishop, in trust and confidence that he will distribute them, for the general good of the church. 2 *Instit.* 647. 2 *Rep.* 44. *Cro. Eliz.* 512. Yet extraparochial wastes and marsh lands, *when improved and drained*, are by the statute 17 *Geo. 2. c. 37.* to be assessed to all parochial rates in the parish next adjoining. See *Black. Com.* 1 *V.* 111, 112, 113. And *Wilf. par.* 2. 182.

Lord Holt held, That parishes were instituted for the ease and benefit of the people, not of the parson; and the reason why parishioners must come to their parish church

is, because having charged himself with the cure of their souls, he might be enabled to take care of that charge. 3 *Salk.* 88, 89. A parish may comprise many vills; but generally it shall not be accounted to contain more than one, except the contrary be shewn, because most parishes have but one vill within them. *Hill.* 23 *Car. 1. B. R.* And it shall not be intended that there is more than one parish in a city, if it be not made to appear; for some cities have but one parish. *Ibid.* Where there are several vills in a parish, they may have peace officers, and overseers of the poor for every particular vill: And an ancient vill in a parish, that time out of mind hath had a church of its own, and churchwardens and parochial rights, being reputed a parish, is a parish within the *stat. 43 Eliz. c. 2.* to provide for its own poor, and shall not pay to the poor of the parish wherein it lies. *10. Car. 92.* 384, 396. But to make a vill a reputed parish within 43 *Eliz.* it must have a parochial chapel, chapelwardens and sacraments at the time that statute was made. 2 *Salk.* 501. Parishes in reputation are within that statute, especially when it has been the constant usage of such parishes to chuse their own overseers; who may distrain for a poor tax, &c. 2 *Roll. Rep.* 160. 2 *Nelf Abr.* 1235. Money given by will to a parish, shall be to the poor of the parish, as adjudged in equity. *Chanc. Rep.* 134. If a highway lie in a parish, the parish is obliged to repair it, and it is the most convenient and equal for the parishioners in every parish, to repair the ways within it, if they are able. 2 *Lill.* 272. And if any vill, liberty, &c. that uses to repair their own highways, shall after the usual rate levied and employed, and the ways not sufficiently repaired; the whole parish may be ordered by justices of peace in their sessions to contribute to the repairing thereof. *Stat. 7 & 8 W. 3. c. 29.*

Parish Clerk. In every parish the parson, vicar, &c. hath a parish clerk under him, who is the lowest officer of the church. These were formerly clerks in orders, and their business at first was to officiate at the altar, for which they had a competent maintenance by offerings; but now they are laymen, and have certain fees with the parson, on christnings, marriages, burials, &c. besides wages for their maintenance. *Count. Perf. Compan.* 83, 84. They are to be twenty years of age at least, and known to be of honest conversation, sufficient for their reading, singing, &c. And their business consists chiefly in responses to the minister, reading lessons, singing psalms, &c. And in the large parishes of London, some of them have deputies, to dispatch the business of their places, which are more gainful than common rectories. *Ibid.* The law looks upon them as officers for life: They are regarded by the Common law, as persons who have freeholds in their offices; and therefore tho' they may be punished, yet they cannot be deprived, by ecclesiastical censures. *Black. Com.* 1 *V.* 395. And they are generally appointed by the minister, unless there is a custom for the parishioners or churchwardens to chuse them; in which case the canon cannot abrogate such custom; and when chosen it is to be signified, and they are to be sworn into their office by the archdeacon. *Cro. Car.* 589. *Can.* 91. And if such custom appears, the court of B. R. will grant a *Mandamus* to the archdeacon to swear him in, for the establishment of the custom turns it into a temporal or civil right. *Black. Com.* 1 *V.* 395. He may make a deputy without licence of the ordinary. *Strange* 942. And cannot sue in the Spiritual court for fees as being a temporal officer. 2 *Strange* 1108.

Parishioner. (*Parochianus.*) Is an inhabitant of, or belonging to any parish, lawfully settled therein. Parishioners are compellable to put things in decent order; but the judgment of the majority is the only rule for the degrees of that decency; and the court inclined, that a rate for that purpose is binding; as for moving the communion-table out of the body of the church into the chancel, or raising it higher, &c. *Faw.* 70.

Parishioners have a right to view parish books. 11 *Mod.* 134.

Parishioners are a body politick to many purposes; as to vote at a vestry if they pay scot and lot; and they have a sole right to raise taxes for their own relief, without the interposition of any superior court; may make by-laws

to mend the highways, and to make banks to keep out the sea, and for repairing the church, and making a bridge, &c. or any such thing for the publick good, and by the 3 & 4 W. 3. and 7 Ann. to tax and levy poor rates, and to make and maintain fire-engines, and by 9 Geo. for purchasing workhouses for the poor. Arg. 8 Mod. 354.

Parish Officers. Divers persons are exempted from serving parish offices on account of their professions, viz. Physicians and surgeons, apothecaries, dissenting teachers, registered seamen, and persons having prosecuted any felon to conviction, &c. Stat. 32 H. 8. 1 W. & M. 7 & 8 & 10 & 11 W. 3. 1 & 10 Ann. &c.

Park, (Lat. *parcus*, Fr. *parque*, i. e. *locus incleſus*) Is a large quantity of ground incloſed and privileged for wild beaſts of chafe, by the King's grant or preſcription. 1 Inſt. 233.

Manwood defines a park to be a privileged place for beaſts of venary, and other wild beaſts of the foreſt and chafe, *tam Sylveſtres, quam Campeſtres*; and differs from a chafe or warren, in that it muſt be incloſed; for if it lies open it is good cauſe of ſeizure into the King's hands, as a thing forfeited; as a free chafe is, if it be incloſed; beſides, the owner cannot have an action againſt ſuch as hunt in his park, if it lies open. *Manw. Foreſt Law. Crompt. Jurif.* 148. No man can erect a park, without licence under the broad ſeal; for the Common law does not encourage matter of pleaſure, which brings no profit to the commonwealth. *Wood's Inſt.* 207. But there may be a park in reputation, erected without lawful warrant; and the owner may bring his action againſt perſons killing his deer. *Ibid.*

To a park three things are required. 1. A grant thereof. 2. Incloſures by pale, wall or hedge. 3. Beaſts of a park, ſuch as the buck, doe, &c. And where all the deer are deſtroyed, it ſhall no more be accounted a park; for a park conſiſts of vert, veniſon and incloſure, and if it is determined in any of them, it is a total *diſparking*. Cro. Car. 59, 60.

The King may by letters patent diſſolve his park. 2 Lill. Abr. 273.

Parks as well as chafes are ſubject to the Common law, and are not to be governed by the foreſt laws. 4 Inſt. 314.

Pulling down park walls or pales, the offenders ſhall be liable to the ſame penalty as for killing deer, &c. by ſtat. and the ſtatutes againſt deer-ſtealing, are the 13 Car. 2. c. 10. 3 & 4 W. & M. c. 10. 5 Geo. 1. c. 15. See *Deer-ſtealers*.

Recompence to be made by the townſhip to owners of parks for deſtroying their fences, &c. 6 Geo. 1. c. 16. See *Game*, and 16 Vin. Abr. tit. *Park*. And *Black. Com.* 2 P. 38, 416.

Park bote, Signifies to be quit of incloſing a park, or any part thereof. 4 Inſt. 308.

Parle Hill, The learned *Spelman* gives this deſcription of it; *Collis wallis plerumque munita. in loco campeſtri, ne inſidiis exponatur, ubi convenire olim ſolebant centuriæ aut viciniæ incolæ ad lites inter ſe tractandas & terminandas*: Scotis reor Grith hail, q. *Mons pacificationis, cui aſyli privilegia concedebantur*: & in Hibernia frequentes vidimus, the *Parle* and *Parling Hills*. *Spelm. Gloſſ.*

Parliament, (*Parliamentum*, from the Fr. *Parler*, i. e. *loqui*, & *ment*, *mens*, to ſpeak the mind, ſometimes called *Commune Concilium Regni Angliæ*, *Magnum Concilium*, &c.) Is a grand aſſembly, or convention of the three eſtates of the kingdom, ſummoned to meet the King, to conſult of matters relating to the common wealth; and particularly to enact and repeal laws.

Herein may be conſidered,

1. *The antiquity and original of parliaments;*
2. *The juuriſdiction of parliament.*
3. *The ſpeaker.*
4. *The judicial power of parliament.*
5. *The proper province of the Houſe of Commons, &c.*
6. *The privilege of members, &c.*

1. *The antiquity and original of parliaments.*

Some authors ſay, that the ancient *Britains* had no ſuch aſſemblies; but that the *Saxons* had; which may be collected from the laws of King *Ina*; who lived about the year 712. And *William* the firſt, called the Conqueror, having divided this land among his followers, to that every one of them ſhould hold their lands of him *in capite*, the chief of theſe were called *Barons*, who thrice every year aſſembled at the King's court, viz. at *Chriſtmas*, *Eaſter*, and *Whiſjuntide*, among whom the King uſed to come in his royal robes, to conſult about the publick affairs of the kingdom. This King called ſeveral parliaments, wherein it appears, that the *freemen* or *commons* of *England* were alſo there, and had a ſhare in making laws: He by ſettling the court of parliament ſo eſtabliſhed his throne, that neither *Britain*, *Dane*, nor *Saxon*, could diſturb his tranquility; the making of his laws were by act of parliament, and the accord between *Stephen* and him was made by parliament; tho' all the times ſince have not kept the ſame form of aſſembling the ſtates. *Doderidge's Antiq. Parliament.*

There was a parliament before there were any barons; and if the commons do not appear, there can be no parliament; for the knights, citizens and burgeſſes, repreſent the whole commons of *England*, but the *peers* only are preſent for themſelves, and none others. *Ibid.* Sir *Edward Coke* aſſirms, that many parliaments were held before the conqueſt; and produces an inſtance of one held in the reign of *Alfred*: He likewiſe gives us a concluſion of a parliament holden by *Alhelſian*, where mention is made, that all things were enacted in the great ſynod, or council at *Grately*, whereat was archbiſhop *Welfebelme*, with all the noblemen and wiſemen, whom the King called together. 1 Inſt. 110. It is apparent, (ſays Mr. *Pryn*) from all the precedents before the time of the conqueſt, that our priſtine ſynods and councils were nothing elſe but parliaments; that our Kings, nobles, ſenators, aldermen, wiſemen, knights and commons, were preſent and voting in them as members and judges: And Sir *Henry Spelman*, *Camden*, and other writers, prove the commons to be a part of the parliament in the time of the *Saxons*, but not by that name, or elected as conſiſting of knights, citizens and burgeſſes, *Pryn's Sovereign Pow. Parliament.*

As to the original of the preſent houſe of commons, our authors of antiquity vary very much; many are of opinion that the commons began not to be admitted as part of the parliament, upon the footing they are now, until the 49 H. 3. becauſe the firſt writ of ſummons of any knights, citizens and burgeſſes, is of no ancients date than that time. But the great charter in the 17th year of King *John*, (about which time the diſtinction of *Barones Majores* and *Minores* is ſuppoſed to begin) was made *per Regem, Barones & LIBEROS HOMINES TOTIUS REGNI*.

Mr. *Selden* ſays, that the borough of *St. Albans* claimed by preſcription in the parliament, 8 Edw. 2. to ſend two burgeſſes to all parliaments, as in the reigns of *Edw.* 1. and his progenitors, which muſt be the time of King *John*; and ſo before the reign of King *Hen.* 3. And in the reign of *Hen.* 5. it was declared and admitted, that the commons of the land were ever a part of the parliament. *Selden's Tit. Hon.* 709. *Polydore Virgil*, *Hollinſhead*, *Speed* and others mention, that the commons were firſt ſummoned at a parliament held at *Salisbury*, 16 Hen. 1. Sir *Walter Raleigh*, in his treatiſe of the *Prerogative of Parliaments*, thinks it was Anno 18 H. 1. And Dr. *Heylin* finds another beginning for them, viz. in the reign of King *Hen.* 2.

Thus much for the original of our parliament; which is the higheſt and moſt honourable, and abſolute court of juſtice in *England*; conſiſting of the King, the lords of parliament, and the commons; and again, the lords are divided into ſpiritual, and temporal; and the commons divided into knights of ſhires or counties, citizens out of cities, and burgeſſes from boroughs; the words of the old *Latin* writ to the ſheriff for the election, being *Duos milites gladii cinctos magis idoneos & diſcretos comitatus tui,* & do

Et de qualibet civitate comitatus tui duos cives, Et de qualibet burgo duos burgenſes, de discretioribus Et magis ſufficientibus, &c. Inſt. 109.

2. The jurisdiction of parliament.

The jurisdiction of this court is ſo transcendent, that it makes, enlarges, abrogates, repeals, and revives laws and ſtatutes, concerning matters eccleſiaſtical, civil, criminal, martial, maritime, &c. And for making of laws and in proceeding by bill, this ſupreme court is not confined either for cauſes, or perſons within any bounds; nor is it tied down to any certain rules or forms of law, in proceedings and determinations: The court of parliament hath power to judge in matters of law; and redreſs grievances that happen, eſpecially ſuch as have no ordinary remedy; to examine into the corruption of magiſtrates, and illegal proceedings of other courts; to redreſs errors, and determine on petitions and appeals, &c. and FROM THIS HIGH COURT THERE LIES NO APPEAL. *Ibid.* Affairs of parliament are to be determined by the parliament; tho' the parliament err, it is not reverſible: And not only what is done in the houſe of commons, but what relates to the commons during the parliament, and ſitting the parliament, is no where elſe to be puniſhed but by themſelves, or a ſucceeding parliament.

Every court of juſtice having laws and cuſtoms for its direction, the high court of parliament hath its own proper laws and cuſtoms, called the *Laws and Cuſtoms of Parliament*; inſomuch that no judge ought to give any opinion of matters done in parliament, becauſe they are not to be decided by the Common law: But the parliament, in their judicial capacity, are governed by the Common and Statute laws, as well as the courts in *Weſtmiñſter-Hall*. 4 *Inſt.* 14, 15. *State Trials*, Vol. 2. 735. The lords and commons in their reſpective houſes have power of judicature, and ſo have both houſes together: And in former times both lords and commons ſat together in one houſe of parliament. 4 *Inſt.* 23.

3. The ſpeaker.

The lords have one who preſides as ſpeaker in common affairs, uſually the *Lord Chancellor*; and the commons have their ſpeaker, choſen by the houſe, but to be approved by the King: The commons anciently had no continual ſpeaker, but after conſultation, their manner of proceedings was to agree upon ſome perſon of great abilities, to deliver their reſolutions: In the reign of *William Ruſus*, at a great parliament held at *Rockingham*, a certain knight came forth, and ſtood before the people, and ſpoke in the name and behalf of them all, who was undoubtedly the ſpeaker of the houſe of commons at that time: But the firſt ſpeaker certainly known was *Peter de Mountford*, 44 *H.* 3. when the lords and commons ſat in ſeveral houſes, or at leaſt gave their aſſents ſeverally. *Lex Conſtitution.* 162. *Sir Richard Walgrave*, 5 *R.* 2. was the firſt ſpeaker who made any formal apology for inability, as now practiſed: *Richard Rich*, Eſq; 28 *H.* 8. was the firſt ſpeaker who is recorded to have made requeſt for acceſs to the King. *Thomas Moyle*, Eſq; 34 *H.* 8. is ſaid to be the firſt ſpeaker who petitioned for freedom of ſpeech; and *Sir Thomas Gargrave*, 1 *Eliz.* was the firſt who made the requeſt for privilege from arreſts, &c. *Sir John Buſhey*, 17 *R.* 2. was the firſt ſpeaker preſented to the King in full parliament by the commons. And when *Sir Arnold Savage* was ſpeaker, 2 *Hen.* 4. it was the firſt time that the commons were required by the King to chuſe a ſpeaker. *Ibid.* 163, &c.

4. The judicial power of parliament.

The King cannot take notice of any thing ſaid to be done in the houſe of commons but by the report of the houſe; and every member of the houſe of parliament has a judicial place, and can be no witneſs. 4 *Inſt.* 15. When *Charles* 1. being in the houſe of commons, and ſitting in the ſpeaker's chair, asked the then ſpeaker, whether certain members, whom the King named, were preſent? The ſpeaker, from a preſence of mind which aroſe from the genius of that houſe, readily answered, That "he had

"neither eyes to ſee, nor tongue to ſpeak, but at the houſe was pleaded to direct him." *Atkin's Jurisd. and Antiquity of Houſe of Commons.* Henry 8. having commanded *Sir Thomas Gaudy*, (one of the judges of the *King's Bench*), to attend the chief juſtices and know their opinion, whether a man might be attainted of high treaſon by parliament, and never called to answer; the judges declared it was a dangerous queſtion, and that the high court of parliament ought to give examples to inferior courts, for proceeding according to juſtice, and no inferior court could do the like. *Lex Conſtitution.* 161. The houſe of lords is a diſtinct court from the commons, to ſeveral purpoſes, and is the ſovereign court of juſtice, and dernier reſort: They try criminal cauſes on impeachments of the commons; and have an original jurisdiction for the trial of peers upon indictments found by a grand jury: They alſo try cauſes upon appeals from the court of *Chancery*, or upon writs of error to reverſe judgments in *B. R.* &c. AND ALL THEIR DECREES ARE AS JUDGMENTS; and judgments given in parliament may be executed by the Lord Chancellor. 4 *Inſt.* 21. *Finch* 233. 1 *Lew.* 165. It is ſaid, that the judicial power of Parliament is in the lords; but that the houſe of lords hath no jurisdiction over ORIGINAL CAUSES, which would deprive the ſubject of the benefit of appeal. 2 *Salk.* 510. Alſo the houſe of commons is a diſtinct court to many purpoſes; they examine the right of elections, expel their own members, and commit them to priſon, and ſometimes other perſons, &c. And the book of the clerk of the houſe of commons is a record. 2 *Inſt.* 536. 4 *Inſt.* 23. The commons coming from all parts are the grand inqueſt of the realm; to preſent publick grievances and delinquents to the King and lords to be puniſhed by them: And any member of the houſe of commons, has the privilege of impeaching the higheſt lord in the kingdom. *Wood's Inſt.* 455.

5. The proper province of the houſe of commons, &c.

As the houſe of lords ſeems to be politically conſtituted for the ſupport of the rights of the crown; ſo the proper province of the houſe of commons, is to ſtand for the preſervation of the people's liberties. The commons in making and repealing laws, have equal power with the lords; and for laying taxes on the ſubject, the bill is to begin in the houſe of commons, becauſe from thence the greateſt part of the money ariſes, they repreſent the whole commons of *England*; for which reaſon they will not permit any alteration to be made by the lords in a bill concerning money: And as formerly the laying and levying of new taxes have cauſed rebellions and commotions, this has occaſioned, particularly 9 *E.* 3. when a motion has been made for a ſubſidy of a new kind, that the commons have deſired a conference with thoſe of their ſeveral counties and places, whom they have repreſented before they have treated of any ſuch matters. 4 *Inſt.* 34.

There are no places of precedency in the houſe of commons as there are in the houſe of lords; only the ſpeaker has a chair or ſeat, fixed towards the upper end, in the middle of the houſe; and the clerk, with his aſſiſtant, ſits near him at the table, juſt below the chair: The members of the houſe of commons never had any robes, as the lords ever had, except the ſpeaker and clerks, who in the houſe wear gowns, as profeſſors of the law do during term time. If a lord be abſent from the houſe, he may make another lord his proxy; tho' a member of the houſe of commons cannot make a proxy, for himſelf is only a repreſentative or deputy. *Wood's Inſt.* 456. No knight, citizen or burgeſs of the houſe of commons, ſhall depart from the parliament without leave of the ſpeaker and commons aſſembled; and the ſame is to be entered in the book of the clerk of the parliament. Stat. 6 *Hen.* 8. c. 16. And in the 1 & 2 *P. & M.* Informations were preferred by the attorney general againſt thirty-nine of the houſe of commons, for departing without licence, whereof ſix ſubmitted to fines; but it is uncertain whether any of them were paid.

Calling the houſe is to diſcover what members are abſent, without leave of the houſe, or juſt cauſe; in which caſes fines have been impoſed: On calling over, ſuch of the members as are preſent, are marked; and the de-

faulters being called over again the same day, or the day after, and not appearing, are summoned, or sent for by the serjeant at arms. *Lex Constitution.* 159.

Forty members are requisite to make a house of commons for dispatch of business; and the business of the house is to be kept secret among themselves: In the 23d year of Queen Elizabeth, Arthur Hall, Esq; member of parliament, for publishing the conferences of the house, and writing a book which contained matters of reproach against some particular members, derogatory to the general authority, power, and state of the house, and prejudicial to the validity of the proceedings, was adjudged by the commons to be committed to the Tower for six months, fined 500*l.* and expelled the house. But the speaker of the house of commons, according to the duty of his office, as servant to the house, may publish such proceedings as he shall be ordered by the commons assembled; and he cannot be liable for what he does that way by the command of others, unless those other persons are liable.

If any member of either house speak words of offence in a debate, after the debate is over he is called to the bar, where commonly on his knees he receives a reprimand from the speaker; and if the offence be great, he is sent to the Tower. When the bill of attainder of the earl of Strafford, was passing the house of commons, Mr. Taylor, a member of that house opposed it with great violence and indecency, and being heard to explain himself, was commanded to withdraw; whereupon it was resolved he should be expelled the house, be made incapable of ever serving as a member of parliament, and should be committed prisoner to the Tower, there to remain during the pleasure of the house: And he was called to the bar, where he kneeled down, and Mr. Speaker pronounced the sentence accordingly. And Sir John Elliot, Denzil Hollis, and another person having spoken these words, viz. *The King's Privy Council, his judges and his counsel learned in the law, have conspired to trample under their feet the liberties of the subject, and of this house*, an information was filed against them by the Attorney General; and farther, for that the King having signified his pleasure to the house of commons for the adjournment of the parliament, and the speaker endeavouring to get out of the chair, they violently, &c. detained him in the chair, upon which there was a great tumult in the house, to the terror of the commons there assembled, and against their allegiance, in contempt of the King, his crown and dignity: The defendants pleaded to the jurisdiction of the court; and refused to answer but in parliament; but it was adjudged, that they ought to answer, the charge being for a conspiracy, and seditious acts to prevent the adjournment of the parliament, which may be examined out of it; and not answering, judgment was given against them, that Sir John Elliot should be committed to the Tower, and fined 2000*l.* and the other two were fined and imprisoned. *Cro. Car.* 130.

6. The Privilege of members, &c.

Members of parliament are not only privileged from arrests, but likewise in an extraordinary manner from assaults, menaces, &c. Sir Robert Brandling made an assault upon Mr. Witherington, a member of the house of commons, in the country before his coming up to parliament, and Sir Robert was sent for by the house, and committed to the Tower. And Anno 19 Jac. 1. some speeches passed privately in the house between two of the members, and one of them going down the parliament stairs, struck the other, who catching at a sword in his man's hand, endeavouring to return the stroke; on complaint to the house of commons they were both ordered to attend, where he who gave the blow was committed to the Tower during the pleasure of the house.

Assaulting a member coming to or attending in parliament, the offender shall pay double damages, and make fine and ransom, &c. By Stat. 11 Hen. 6.

All members of parliament, that they may attend the publick service of their country, have privilege of parliament for themselves and their menial servants, to be free from arrests, &c. and for their goods to be free from

distresses: And this privilege of parliament generally holds in all cases except in treason, felony and breach of the peace. 4 Inst. 24, 25.

The law and privilege of parliament is part of the law of the land; and a member cannot be arrested, except in cases of treason, felony, and actual breach of the peace. Willf. par. 2. 159.

There are many remarkable cases in our books treating of the privileges of parliament, relating to arrests of members of the house of commons, and their servants, and the manner of their confinement, release, &c. The first year of King Jac. Sir Thomas Shirley, a member of parliament, was arrested four days before the sitting of the parliament, and carried prisoner to the Fleet; on which a warrant issued to the clerk of the crown for a *habeas corpus* to bring him to the house, and the serjeant was sent for in custody, who being brought to the bar, and confessing his fault, was excused for that time: But on hearing counsel at the bar for Sir Thomas Shirley, and the warden of the Fleet, and upon producing precedent, Simpson the prosecutor, who caused the arrest to be made, was ordered to be committed to the Tower; and afterwards the warden refusing to execute the writ of *habeas corpus*, and the delivery of Sir Thomas being denied, was likewise committed to the Tower; tho' on his agreeing to deliver up Sir Thomas, upon a new warrant for a new writ of *habeas corpus*, and making submission to the house, he was discharged: This affair taking up some time, the house entered into several debates touching their privilege, and how the debt of the party might be satisfied, which produced three questions; First, *Whether Sir Thomas Shirley should have privilege?* Secondly, *Whether presently, or to be deferred?* And, Thirdly, *Whether the house should petition the King for some course for securing the debt of the party, according to former precedents, and saving harmless the warden of the Fleet?* All which questions were resolved; and a bill was brought in to secure Simpson's debt, &c. which also occasioned an act 1 Jac. 1. c. 13. for relief of plaintiffs in writs of execution, where the defendants in such writs are arrested, and set at liberty by privilege of parliament, by which a fresh prosecution and new execution may be had against them when that privilege ceases. *Lex Constitution.* 141. And 19 Jac. 1. one Johnson, a servant to Sir James Whitlock a member of the house of commons, was arrested by two bailiffs, who being told Sir James Whitlock was a parliament man, answered, that they had known greater men's servants than his taken from their masters in time of parliament: And this appearing, the two bailiffs were sentenced to ask pardon of the house and Sir James Whitlock, on their knees; that they should both ride on one horse bare backed, back to back, from Westminster to the Exchange, with papers on their breasts signifying their offence; all which was to be executed presently, *Sedente Curia.* Ibid. In action of debt on a bond, conditioned that B. B. should render himself at such a day and place to an arrest; defendant pleaded, that by privilege of parliament, the members, &c. and their servants ought not to be arrested by the space of forty days before the sitting of the parliament, nor during the session, nor forty days afterwards; and that B. B. was at that time servant to such a member of parliament, so as he could not render himself to be arrested: Upon demurrer to this plea, it was adjudged ill, because he might have rendered himself at the time and place; but then it would be at their peril if he was arrested. *Brownl.* 81.

The commons in parliament claim privilege for forty days before and after each session and prorogation. 2 Lev. 72. Tho' 12 W. 3. c. 2. ordains, That actions may be prosecuted against persons intitled to privilege of parliament, after a dissolution or prorogation, until a new parliament is called, or the same is reassembled: and after adjournment for above fourteen days, and the respective courts may proceed to judgment, &c. Proceedings are to be by summons and distress infinite, &c. until the parties shall enter a common appearance; and the real or personal estates of the defendants may be sequestered for default of appearance; but the plaintiff may not arrest their bodies: and where any plaintiff shall be stayed or prevented from proceeding

proceeding by privilege of Parliament, he shall not be barred by any statute of limitation, or nonsuited, dismissed, or his suit discontinued for want of prosecution; but at the rising of the Parliament shall be at liberty to proceed to judgment and execution. And by 2 *Ann. c. 8.* Actions may be prosecuted against officers of the revenue, or in any place of publick trust, for any forfeiture or breach of trust, &c. and shall not be stayed by colour of privilege; but such officer being a Member of Parliament, is not subject to arrest during time of privilege, but summons, attachment, &c. By the 11 *Geo. 2. cap. 24.* Any person may prosecute a suit in any court of record, &c. in *Great Britain or Ireland*, against any Peer, or Member of the House of Commons, or other person intitled to privilege, in the intervals of Parliaments, or of Sessions, if above fourteen days; and the said courts, after dissolutions or prorogations, are to give judgment, and award execution: and no proceedings in law against the King's immediate debtor, as such, &c. to be delayed under colour of such privilege; only the person of a Member of Parliament, &c. shall not be arrested or imprisoned. A defendant who was a Member of Parliament, brought a letter from the Speaker to the court of *King's Bench* to stay proceedings; but the court would not allow it, but told him he might bring his writ of privilege. *Latch 150.* Judgment was had against the defendant, and afterwards he was chosen a Member of Parliament, and after his election he was taken in execution, yet he had his privilege; tho' the book tells us *minus juste*. *Moor 57.* And where judgment being had against a defendant, and he was taken in execution in the morning, and about three hours afterwards was chosen a Member of Parliament; the House agreed, that being arrested before he was chosen, &c. he shall not have his privilege. *Moor 340. 1 Nels. Abr. 27.*

The courts at *Westminster* may judge of the privilege of Parliament, where it is incident to a suit the court is possessed of: and courts may proceed to execution between the sessions of Parliament, notwithstanding appeals lodged, &c. *State Trials, 2 V. pag. 66, 209.*

But now by *Stat. 10 Geo. 3. c. 50.* No action against any peer, &c. shall be delayed by pretence of privilege of Parliament.

Of elections, and herein,

1. Of the elected, and who are eligible, and who not, and of their qualifications.
2. Of the electors, and their qualifications.
3. Of the duty of returning officers, and the remedies against them.

1. Of the elected, and who are eligible, and who not, and of their qualifications.

The Parliament is called by virtue of the King's writ of summons out of Chancery, at least forty days before the Parliament begins: the Commons are elected by the people; and every Member, tho' chose for one particular place, serves for the whole kingdom. As attendants of this nature is for the service of the publick, the whole nation has such an interest therein, that the King cannot grant an exemption to any person from being elected as a Knight, Citizen, or Burgess in Parliament; and for that elections ought to be free. 29 *Hen. 6.* But an alien cannot be elected, for he is not a liege subject; tho' if an alien were naturalized, he was eligible till the *Stat. 12 W. 3. cap. 2.* A man attainted of treason or felony, or outlawed, &c. is not eligible; nor shall such persons be suffered in the House of Parliament. 4 *Inst. 48.* A person under the age of twenty-one years, may not be elected to sit in Parliament; neither can any Lord sit there, until he be of the full age of twenty-one years. *Ibid.* It was formerly held that Mayors and Baliffs of towns corporate were not eligible; but now they may be elected. And so may a sheriff of a county, for another shire. None of the Judges, or Barons of the Exchequer, who have judicial places, can be chosen Knight, Citizen, or Burgess of Parliament, as it is now holden, because they are assistants in the House of Lords: yet *Thorpe*, Baron of the Exchequer, was Speaker of the House of Commons: persons who have judicial places in the other courts, Ecclesiastical or Civil, are eligible. 4 *Inst. 47.*

Clergymen are not eligible, they being of another body, viz. the Convocation. *Ibid.* Any of the profession of the law, and who are in practice, are eligible; but *Ann. 6 H. 4.* a Parliament was summoned by writ, and by colour of a certain ordinance, it was forbidden that any lawyer should be chosen; by reason whereof Lord *Coke* observes, this Parliament was fruitless: and the prohibitory clause inserted in the writ was against law; for *lawyers are eligible of common right*, and cannot be disabled by ordinance without act of Parliament.

By 12 *W. 3. c. 2.* No person who had any office or place of profit under the King, or pension from the crown, was to serve as a member of the House of Commons. And by 4 & 5 *Ann.* No member of Parliament may enjoy any office in the government, and sit in the house at the same time by virtue of his former election; for by acceptance of an office his election is void: but he may be elected again, on a new writ issued out, and sit in the house; and officers in the army or navy, receiving any new commission, need not be re-elected. 6 *Ann.* When persons are incapable of being elected, the election shall be void; and sitting or voting in the House of Commons they shall forfeit 500 *l.* And the statute 1 *Geo. 1. c. 56.* enacts, That no man having any pension from the crown, either in his own name or in trust for him, shall be elected a member of Parliament; and pensioners presuming to sit and vote, shall forfeit 20 *l.* for every day, &c. The act mentions only a pension for any term or number of years; and not a pension during pleasure, according to the 4 *Ann. c. 8.*

'Tis now enacted, That no person who shall be a Commissioner of the Treasury, Chancellor of the Exchequer, Commissioner of the Admiralty, Paymaster of the Army, Secretary of State, &c. shall be capable of being a member in any Parliament. 15 *Geo. 2. c. 22.* But this statute does not exclude the Secretaries of the Treasury, or those of other offices; or any other person having an office for life. *Ibid.*

By ancient statutes, Knights of the Shire are to be resident in the county, for which they are chosen; so Citizens and Burgesses elected shall be resident in, and free of the same cities and boroughs, the day of the date of the writ of summons, and they are to be notable Knights of the same county, &c. notable Esquires or Gentlemen: also by a late act, no person shall be qualified to serve in Parliament as a Knight of the Shire, who hath not an estate of freehold or copyhold for life, or some greater estate to his own use, of 600 *l.* a year, above all incumbrances; and a Citizen and Burgess 300 *l.* *per annum*, of which oath is to be made at the request of a candidate, or two persons having a right to vote; and if any person be elected and returned not so qualified, the return shall be void. 9 *Ann. cap. 5.* And none shall be qualified by virtue of any mortgage, whereof the equity of redemption is in another; unless the mortgagee shall have been in possession seven years before the election. Tho' the eldest son of a Peer, or of any person qualified to serve as a Knight of the Shire, shall not be incapable of being elected. *Stat. ibid.*

Members of Parliament must take the oaths to the Government before they sit and vote in the House; or shall be adjudged Popish Recusants, and be disabled to sit in Parliament, and liable to certain forfeitures, &c. *Stat. 5 Eliz. cap. 1. 30 Car. 2. c. 1.* And this statute was confirmed and enforced by the 13 & 14 *W. 3. c. 6.*

2. Of the electors and their qualifications.

The election of Knights of the Shire is to be made by the majority of people dwelling in the counties, having each of them lands or tenements to the yearly value of 40 *s.* besides reprises; and he who cannot expend 40 *s.* *per ann.* shall have no vote in the election of Knights for the Parliament. 8 *H. 6. c. 7.* And by the 10 *H. 6. c. 2.* an elector of Knights of the Shire must be resident, and have 40 *s.* *per annum* freehold over and above reprises in the same county. The 7 & 8 *W. 3.* requires, that every freeholder shall take an oath that he is a freeholder of the county, and has freehold lands or hereditaments of the yearly value of 40 *s.* lying at such a place, within the said county, and that he hath not before

polled at the election: no person is to be admitted to vote in any election of a member to serve in Parliament, who is under the age of twenty-one, or be intitled to any vote by reason of any tithe or mortgage; if the trustee or mortgagee be not in actual possession, and receive the rents and profits of the estate: but the mortgagor or *cestui que trust* possession, shall and may vote for the same estate: and all conveyances of lands, tenements, &c. in order to multiply votes, or split and divide the interest in any houses or lands, among several persons, to enable them to vote, shall be void and of none effect.

By 10 *Ann. c. 22.* None shall have a voice for electing Knights of the Shire in right of any lands, who has not been charged or assessed to the publick taxes, church rates and parish duties, in such proportion as other lands and tenements of 40 *s. per annum*, lying within the same parish; and for which he shall not have received the rents and profits, or be intitled to have received the same to the full value of 40 *s.* or more to his own use for one year, before the election; except such lands or tenements come by descent, devise, presentation to some church, or promotion to an office, to which a freehold is annexed; and persons voting contrary shall forfeit 40 *l.* This extends not to restrain persons from voting for Knights of the Shire, in respect of any tithes, or other incorporeal inheritances, or messuages, &c. belonging to offices, by reason the same have not been usually assessed to any publick taxes; or in regard to lands not taxed to all taxes, if they have been generally assessed to some one or more of the said rates, &c. by 12 *Ann. c. 5.*

All estates and conveyances made to any person in a fraudulent manner, on purpose to qualify him to vote, subject to conditions to defeat or determine such estate or conveyance the same, shall be taken against the persons executing them as free and absolute; and all bonds, &c. for redemption shall be void; also persons voting by colour of such conveyance, incur a forfeiture of 40 *l.*

The statutes for preventing fraudulent conveyances to multiply votes on electing Knights of Shires, are made to extend to lands or tenements, for which any persons shall vote for the election of Members to serve in Parliament for any city or town, that is a county of itself; and if any person votes at such election as a freeholder, not having his estate a year before, and assessed as described in the act 10 *Ann.* he is liable to the penalties imposed on unqualified voters. 13 *Geo. 2. c. 20.* Persons refusing to take the oaths of abjuration, &c. are made incapable to vote for Members of Parliament. 1 *Geo. 1. c. 13.*

By 18 *Geo. 2. c. 18.* No person shall vote for the electing a Knight of the Shire in England and Wales, in respect or right of any messuage, &c. which has not been charged or assessed to the land tax twelve kalendar months next before the election. But not to restrain any person from voting in right of any rents or chambers in the inns of courts, &c. or any messuages or seats belonging to any offices, in regard they have not been usually assessed to the land tax. No person shall vote at any such election without having a freehold in the same county, of the clear yearly value of 40 *s.* above all charges, or without having been in the actual possession or receipt of the profits above twelve kalendar months, unless the same come to him within the time aforesaid, by descent, marriage, marriage settlement, devise or promotion to any benefice or office; or shall vote in right of any freehold granted to him fraudulently, or vote more than once at the same election, under the penalty of 40 *l.* No publick tax, rate or assessment, shall be deemed a charge on any freehold.

As to who are, or ought, to be the electors in boroughs, it hath very much exercised the British House of Commons: in the 22 *Jun. 1.* it was resolved, that where there is no charter or custom to the contrary, the election in boroughs is to be made by all the householders and not freeholders only: and in a question whether the commons or the capital burgesses of a certain borough in Lincolnshire, were the electors of Members of Parliament, anno 4 *Car. 1.* it was agreed, that the election of burgesses in all boroughs did of common right belong to the commoners, and that nothing could take it from them but a prescription and constant usage beyond the memory of man. It has been hol-

den, that the commonalties of cities and burghs are only the ordinary and lower sort of citizens, burgesses or freemen; and that the right of election of burgesses to Parliament in all boroughs, belongs to the commoners, *viz.* the ordinary burgesses or freemen; and not the Mayor, Aldermen and Common Council: tho' the meaning of the words *communitates civitatum & burgorum*, has always signified, rightly understood, the Mayor, Aldermen and Common Council, where they were to be found; or the Steward or Bailiff, and capital Burgesses, or the governing parts of cities and towns, by what persons soever they were governed, or otherwise called.

The most extraordinary case which has happened in this age, with relation to the determinations of a committee of privileges and elections, was the case of *Asphy* and *White*, concerning the borough of *Aylesbury*; on a question, "Whether an action at law lies for an elector who is denied his vote?"

In this case the debates ended in the following resolutions, *viz.* That the qualification of electors and of persons elected, is cognizable only before the Commons in Parliament; and that the examining and determining the qualification or right of any elector, &c. belongs to them, where the acts of Parliament give no particular direction; that whoever shall prosecute any action, &c. which shall bring the right of electors to the determination of any other jurisdiction than that of the House of Commons, except in cases specially provided for by some statute, shall be guilty of a breach of the privilege of the House. Several persons were committed to Newgate by a warrant signed by *Robert Harley*, Speaker of the House of Commons, for prosecuting actions at law against the constables of the borough of *Aylesbury*, who refused to take their votes at the election of Members of Parliament, &c. in contempt of the jurisdiction and privileges of the House; and this matter being returned by *habeas corpus* severally, and the several persons defendants brought into court, counsel moved that they might be discharged, for that the prosecution of a suit at law could be no unlawful act, nor a breach of the privilege of the House of Commons: three judges were of opinion, that the House were the proper judges of their own privileges; but *Lord Chief Justice* held, That the AUTHORITY OF THE COMMONS WAS CIRCUMSCRIBED BY LAW; and if they should exceed that authority, then to say they were judges of their own privilege, is to make their privilege to be what they would have them to be; and that if they should wrongfully imprison, there could be no redress, so that the courts at *Westminster* could not execute the laws upon which the liberties of the subject subsist. 2 *Salk. 503.* And in action on the case, by a burgess of *Aylesbury*, against the constables of the said borough, for refusing to receive the plaintiff's vote in the election of a Member of Parliament; the plaintiff had a verdict, but the judgment was arrested by the opinion of three judges, *viz.* That the action is not maintainable, because the constables acted as judges, and the not receiving the plaintiff's vote is *damnum sine injuria*; for when the matter comes before the House, his vote will be received; that the right of electing Members to serve in Parliament, is to be decided in Parliament, and the plaintiff may petition the House for that purpose, and after 'tis determined there, he may then bring his action, and not before. *Holt Chief Justice contra*, That the plaintiff had a right to vote; a freeholder has a right to vote by reason of his freehold; and IT IS A REAL RIGHT, and the value of his freehold was not material till the *Stat. 8 H. 6.* which requires it to be 40 *s. per annum*: that as it is *ratione liberi tenementi* in counties; so in ancient boroughs, they have a right to vote *ratione burgagii*; and in cities and corporation, it is *ratione franchise*, and a personal inheritance, *vested in the whole corporation, but to be used by the PARTICULAR Members*; that this is a noble privilege, which entitles the subject to a share in the government and legislature; and that if the plaintiff hath a right, he must have a remedy to assert that right, for want of right and want of remedy is the same thing; that refusing to take the plaintiff's vote is an injury, and every injury imports a damage; and that where a parliamentary matter comes in incidentally to an action

of property, in the King's court, it must be determined there, and not in Parliament; the Parliament cannot judge of the injury, nor give damages to the plaintiff, and he hath no remedy by way of petition: and according to this opinion, the judgment of the other three judges was reversed upon a writ of error brought in the House of Lords. 1 *Salk.* 10. This case occasioned great disputes between the two Houses of Parliament; the Lords insisting, That if the Commons only could judge of the right of their electors, they would in effect choose their electors, &c. And the Commons alledging, that if the right of electors might be determined in the courts of law, from whence causes are removed by writ of error into the House of Lords, the Lords would become judges of the right of electors to choose, and consequently who were duly elected Members of the Commons House; whereby the Commons would lose their independency, and be subject to the Lords, &c. But the Parliament being soon after prorogued, the dispute was dropped. See the case of *Ashby and White*, which is excellently reported, as well in 6 *Mod.* 45. to 56 *incl.* *see.* as in *Ld. Raym.* from fo. 938 to 958 *inclusive.* And see also *Lord Holt's Life*.

By the Common law of *England*, No Commoner can be subjected to laws made without his consent, and because such consent cannot be given by every individual, by reason of number and confusion; that power is lodged in their Representatives, elected and chosen by them, *viz.* Knights, Citizens, &c. 3 *Salk.* 18. And in several counties, the Citizens and Burgesses were formerly chosen in the county-courts, with the Knights of Shires, and jointly returned, &c. For there were commonly four or five Citizens or Burgesses sent from the respective cities or boroughs to the county-court; and there chosen, with full power for themselves and their several communities, to do and consent to such things, as by the Common Council of the Kingdom assembled in Parliament, should be ordained and enacted.

It is said by some writers, that in ancient times the King hath nominated the very persons to be returned, and did not leave it to the election of the people; for which they give an instance in the 45th year of *Ed. 3.* And among the Parliament writs 14 *Elizabeth.* there appears to be an appointment and return of Burgesses, by the Lord of a Town, &c. But these are single instances in their kind; and the writs for elections in the 23d year of King *Edward. 1.* ran in *English* as follows, *viz.*

Form of an ancient writ for election of Members of Parliament.

TO the sheriff of, &c. greeting: Because we desire to have a conference and treaty with the Earls, Barons, and other great men of our kingdom, to provide remedies against the dangers our kingdom is in at this time; therefore we have commanded them that they be with us at Westminster, on the day, &c. next coming, to treat, ordain, and do, so as those dangers may be prevented: and we command, and firmly enjoin thee, that, without delay, thou dost cause to be chosen, and to come to us, at the time and place aforesaid, two Knights of the County aforesaid, and of every city two Citizens, and of every borough two Burgesses, of the best, most able, and discreet men for business; so as the said Knights may have sufficient power for themselves and the community of the County aforesaid; and the Citizens and Burgesses may have the same power separately from them, for themselves and the communities of Cities and Boroughs, then to do in the premises what shall be ordained by the Common Council of the realm, so that the business aforesaid may not remain undone; and have there the names of the Knights, Citizens and Burgesses, and this Writ. Witness the King, &c.

The Return of the Writ, thereon indorsed was thus:

IA. B. sheriff, by virtue of this writ have caused to be chosen in the county of, &c. two Knights, and of every city of the same county two Citizens, and of every borough two Burgesses, of the best, most able, and discreet Knights, Ci-

tizens and Burgesses of the county, city and boroughs aforesaid, according to the tenor of the writ.

3. Of the duty of Returning Officers, and the remedies against them.

By 7 *H. 4. cap.* 15. The election of Knights of the Shire is to be made in the following manner:

At the next county-court after delivery of the writ, proclamation is to be made by the sheriff of the county, of the day and place the Parliament is to assemble, and that all as are there present shall attend at the election of Knights of the Shire; and then in full county, a free and indifferent election shall be made: and after such choice the names of the parties chosen, are to be written on an indenture under the seals of the electors; which indenture so sealed and tacked to the writ, shall be the sheriff's return thereof. And by the 23 *H. 6. cap.* 7. it is enacted, That the sheriff after receipt of the writ shall deliver a precept under his seal to every Mayor and Bailiff of cities and boroughs within his county, reciting the writ, and requiring them to choose two Citizens and Burgesses to come to the Parliament; and such Mayors and head officers, are to make return of the precept to the sheriff, by indenture, &c. whereupon the sheriff is enabled to make a good return of the writ: the sheriff is to make election between the hours of eight and eleven in the forenoon; and if any Knight, Citizen, or Burgess, returned by the sheriff shall be put out, and the name of another put in, divers penalties are incurred; sheriffs acting contrary to this statute, and not returning a Member duly elected, are subject to a forfeiture of 100*l.* recoverable by action of debt; and officers of corporations, making false returns, liable to a penalty of 40*l.* &c. It has been adjudged on this act, That tho' no election should be made of any Knight of the Shire, but between eight and eleven of the clock in the forenoon; if the election be begun within that time, and cannot be determined in those hours, it may be made after. 4 *Inst.* 48. And if any electors give their voices before the precept for election is read and published, it will be of no force; for after the precept is thus read, &c. they may alter their voices and make a new election. *Ibid.* 49. The Stat. 7 & 8 *W. 3. cap.* 7. ordains, If any person shall return a Member to serve in Parliament for any place, contrary to the determination in the House of Commons of the right of election for such a place, the return so made shall be judged a false return; and the party making it may be prosecuted, and double damages, with costs, recovered against him: officers wilfully and falsely returning more persons than are required to be chosen by the writ or precept, the like remedy may be had against them; and all contracts, promises, &c. to return any Member of Parliament, are not only declared void, but the makers or givers of the contracts, &c. or of any gift or reward to procure a false or double return, shall forfeit 300*l.* one third to the King, another to the informer, and the other third to the poor of the place, to be recovered in any Court of Record at Westminster, &c.

By 7 & 8 *W. 3. cap.* 25. When any new Parliament shall be called, there shall be forty days between the teste and returns of the writs; the Lord Chancellor, &c. is to issue out writs for election of Members of Parliament, with as much expedition as may be; and the several writs shall be delivered to the proper officers for execution, who are to indorse the day of the receipt on the back of the writ, and forthwith make out the precepts to each borough, &c. which are to be delivered to the officers of every such borough, within three days, and they must likewise indorse the day of the receipt, and immediately cause publick notice to be given of the time and place of election, and proceed to election thereupon in eight days: for electing Knights of the Shire, the sheriff is to hold his county-court at the most publick and usual place, and there proceed in the election at the next court, unless it fall out to be within six days after the receipt of the writ, and then the same is to be adjourned, giving ten days notice of the election; if the election be not determined on view, but a poll is demanded, the sheriff is to take the same,

fame, and likewise a *scrutiny*, and he or his under-sheriff shall appoint and swear clerks for that purpose, &c. The county-court is not to be adjourned to any other place, *without consent of the candidates*; nor shall any unnecessary adjournments be made, but the poll to proceed; also every sheriff, &c. is to deliver a copy of the poll to any person desiring it; and officers for every wilful offence against this act, are subject to a forfeiture of 500*l.* And by 6 *Geo. 2. cap. 23.* The county-court for electing Knights of the Shire in Parliament, may be adjourned from day to day, until the election is determined; but not to a *Monday, or Friday, &c.* only, which will be void.

The 10 & 11 *W. 3.* directs, that the sheriff or other officer having execution and return of writs of summons for *parliament*, shall on or before the day of meeting of *parliament*, and with all expedition, (not exceeding fourteen days after election,) make returns to the clerk of the crown in *Chancery* to be filed, on pain of forfeiting 500*l.* And the returning officer, within twenty days after the election, is to deliver over to the clerk of the peace, all the poll books on *oath* made before two justices, to be preserved among the records of the sessions of the peace, &c. 10 *Ann. cap. 23.*

In double returns, it has been formerly a general practice in the House of Commons, that neither one nor the other should sit in the house until it be decided; *anno* 1640, two returns were made for *Great Marlow*, and in both indentures one person was returned, and he was admitted to sit, but the others ordered to withdraw until the question was determined: And in the same year, it was ordered, That where some are returned by the sheriff or such other officer as by law hath power to return, and others returned by private hands; in such case, those returned by the sheriff or other officer, shall sit until the election is quashed by the house. *Ordinan. 1640.* If one be duly elected, and the sheriff, &c. return another, the return must be reformed and amended; and he who is *duly* elected is to be inserted, *for the election is the foundation*, and not the return. 4 *Insh. 49.*

In action of the case, the plaintiff declared, that he was duly elected a member of *parliament* for such a borough, and that the defendant returned two other persons; and that he petitioned the House of Commons, and was adjudged to be duly elected, and his name ordered to be inserted in the Roll, and the name of the other to be razed out: the plaintiff had a verdict; but it was adjudged in arrest of judgment, that this declaration was not founded on the act 7 & 8 *W. 3.* because *that statute gave an action where there was none before*, therefore the fact must be agreeable to it, which not being done, defendant had judgment. 2 *Salk. 504.* The court will not meddle in an action upon a double return, until it is determined in *parliament.* *Lutw. 88.* And it hath been holden that for a double return, no action lay before the Statute 7 & 8 *W. 3. cap. 7.* because it is the only method the sheriff had to secure himself; and when the right was decided in *parliament*, then *one indenture was taken off the file*, so that it is not then a double return; neither can the party have an action for a false return, for the matter may be determined in the house whether true or false; and if so, there will be an inconvenience in contrary resolutions, if they should determine one way, and the courts at law another; but after a dissolution the action may lie for a false return, for then the right cannot be determined in *parliament.* 2 *Salk. 502.*

A double return is the same as a false return, as to action on the case; in both it is grounded on the falsity; but there is another reason why this action will not lie for a double return, (*viz.*) because *the law doth not take notice of such a return*; it is only allowed by the usage of *parliament*, and in cases wherein the proper officer cannot determine who is chosen; therefore when he doubts, he makes a double return, and submits the choice to the determination of the House of Commons; and if that house admits such returns, and make determinations on them, it will be hard for the law to subject a man to the action only for submitting a fact to be determined by a court, which hath a proper jurisdiction to determine it: And by reason of the variety of opinions, that

an action in this case would lie, and would not; it hath been enacted by 7 & 8 *W. 3. cap. 7.* That *THE LAST DETERMINATION OF THE HOUSE OF COMMONS CONCERNING THE RIGHT OF ELECTION, IS TO BE PURSUED.* 2 *Lev. 114. 1 Nels. Abr. 30.*

A member elected and returned for several places, is to make his choice for which place he will serve; and if he doth not, by the time which the house shall appoint, the house may determine for what place he shall continue a member, and writs shall go out for the other place.

Candidates are not to make presents of money to, or treat, &c. electors, after the *teste* of the writ of summons, or issuing out the writs of election, or after any place of a member becomes vacant; if they do, for *THIS BRIBERY* they shall be incapacitated to serve as members. 7 *W. 3. c. 4.* And no officers of the excise, post office, &c. are to make any interest for members of *parliament*, on pain of forfeiting 100*l.* and disability, &c. 5 & 6 *W. & M. cap. 20.*

By a late act, an *oath* is to be taken by electors of members of *parliament*, That they have not received or had any money, gift, reward, office, place or employment, or any promise for money, &c. to them or their use, to give their votes: and if they ask, take, or contract for any money, or reward, by gift or other device, to give or refuse their votes; or if any persons by gift, &c. corruptly procure any one to give his vote; they shall forfeit 500*l.* and be *disabled to vote* in any election, and to hold any office, or franchise, &c. And officers admitting persons to vote, without taking the aforesaid oath, *if demanded*, incur a forfeiture of 100*l.* Likewise an oath is to be administered to returning officers, that they have not received any money, &c. or promise for such, for making any returns, &c. *Stat. 2 Geo. 2. c. 24.* Persons are to be prosecuted *within two years*, after any offence against this last statute, for preventing bribery and corruption in elections of persons to serve in *parliament*, or shall not be liable to any incapacity or forfeiture, &c. by the 9 *Geo. 2. c. 38.* And when election shall be made, the secretary at war shall issue orders *for the removal of all soldiers* quartered in any city, town, or borough, where such election shall be, one day at least before, to the distance of *two or more miles*; and not to make a nearer approach, until after the poll taken, is ended, &c. But this not to extend to the liberty of *Westminster*, &c. in respect of his Majesty's guards; nor to fortified places, &c. *Stat. 8 Geo. 2. cap. 30.*

See 33 *Geo. 2. c. 20.* intitled, An act to enforce and render more effectual the laws relating to the qualification of members to sit in the House of Commons.

To regulate the trials of controverted elections, or returns of members to serve in *parliament*, see 10 *Geo. 3. c. 16.*

By 10 *Geo. 3. c. 41.* The Speaker of the House of Commons, is empowered to issue his warrant to make out new writs for the choice of members, *during the recess of parliament.*

N. B. By 10 *Geo. 3. c. 6. s. 86.* Members of *parliament* are to be taxed at their mansion-houses.

Parliaments holden, and proceedings in.

All *parliaments* are to be held without force. 7 *Ed. 1.* Before the *Conquest*, *parliaments* were held twice every year? The 4 *Ed. 3.* enacted, That a *parliament* should be holden *once a year*, and oftener if necessary; and the 36 *Ed. 6.* requires a *parliament* to be held *every year.* But by the means of Cardinal *Wolsey*, a *parliament* was held but once in fourteen years during that reign; which was upon a remarkable occasion, *viz.* to attain the Duke of *Buckingham.* The *Stat. 16 Car. 2. cap. 1.* ordains, That the sitting and holding of *parliaments* shall not be discontinued above three years. And the 6 *W. & M. cap. 2.* enacts, That new *parliaments* shall be chosen once in three years; and no *parliament* continue longer than three years. But by 1 *Geo. 1. c. 38.* The time of continuance of *parliament* is enlarged to seven years; to be computed from the day appointed for their meeting, by the writ of summons.

The occasional law, 1 *W. & M. Sess. 1. cap. 1.* declared, That the Lords and Commons convened at *Westminster*, were the two houses of *parliament*, notwithstanding the want of any writ of summons, or other defect of form, &c. Tho' 12 and 13 *Car. 2. c. 1.* made it penal, for any person to affirm that the houses of *parliament* have a legislative power without the King. An old statute ordains, That every person and commonalty, having summons to *parliament*, shall come thither, in pain to be amerced, or otherwise punished: And if the sheriff doth not summon them, he shall likewise be amerced, &c. 5 *R. 2. c. 4.*

On holding a *parliament*, the King the first day sits in the upper house, and by himself or the Lord Chancellor, shews the reason of their meeting; then the Commons are commanded to choose their speaker, which done, two or three days afterwards he is presented to the King, and after some speeches is allowed, and sent down to the House of Commons; when the business of *parliament* proceeds. 12 *Rep. 115.*

A *parliament* cannot begin on return of the writs, without the King, in person, or by representation; and by representation two ways, either by a guardian of *England*, by letters patent under the Great Seal, when the King is out of the realm; or by commission, to certain lords in case of indisposition, &c. when his Majesty is at home. 4 *Inst. 6. 7.* And if any *parliament* is to be holden before a guardian of the realm, there must be a special commission to begin the *parliament*; but the *teste* of the writs of summons is to be in the guardian's name: And by an ancient law, if the King being beyond sea, cause a *parliament* to be summoned in this kingdom, by writ under the *teste* of his lieutenant; and after the King returns hither, the *parliament* shall proceed without any new summons. 8 *H. 5.*

In the 5th year of *Henry 5.* a *parliament* was held, before *John Duke of Bedford*, brother to the King, and guardian of the kingdom. Anno 3 *Ed. 4.* a *parliament* was begun in the presence of the King, and prorogued to a further day; and then *William Archbishop of York*, the King's Commissary by letters patent, held the same *parliament*, and made an adjournment, &c. And 28 *Eliz.* the Queen by commission under the Great Seal, (re-citing, that for urgent occasions she could not be present in her royal person,) did authorise *John Whitgift Archbishop of Canterbury*, *William Lord Burleigh*, Lord Treasurer of *England*, and *Henry Earl of Derby*, Lord Steward, to hold a *parliament*, &c. *Ad faciendum omnia & singula, &c. nunc ad parliamentum adjournand' & prorogand'*, &c. And in the upper part of the page, above the beginning of the commission is written, *Domina Regina representatur per commissarios, viz. &c.* These commissioners sat on a form before the cloth of state, and after the commission read, the *parliament* proceeded.

A *parliament* may be holden at any place the King shall assign; but it ought not to be dissolved as long as any bill remains undiscussed, and proclamation must be made in the *parliament*, that if any person have any petition, he shall come in and be heard, and if no answer be given, it is intended the publick are satisfied. *Lex Constitution.* 157.

In former times, by the death of the King during the sitting of *parliament*, the *parliament* was *ipso facto* dissolved; but by the *Stat. 4 Ann. c. 8.* A *parliament* sitting or in being, at the demise of the King, shall continue for six months; unless prorogued or dissolved, by such person to whom the crown shall come; by 1 and 12 *W. 3.* All orders of *parliament* determine by prorogation; and one taken by order of the *parliament*, after their prorogation, may be discharged on an *habeas corpus*, as well as after a dissolution; but the dissolution of a *parliament* doth not alter the state of impeachments brought up by the commons in a preceding *parliament*. *Raym. 120. 1 Lev. 384.* And it hath been resolved, that cases of appeals and writs of error, shall continue, and are to be proceeded in *statu quo*, &c. as they stood at the dissolution of the last *parliament*. *Raym. 381.*

A prorogation of *parliament* is always by the King, and in this case the sessions must begin *de novo*; and if a *parliament* is prorogued upon return of the writ of

summons, it begins at the end of the prorogation: An adjournment is by each house, and the sessions continues notwithstanding such adjournment. 1 *Mod. 242.* By a prorogation of *parliament*, there is a session; and every several session of *parliament* is in law a several *parliament*: tho' if it be only an adjournment, there is no session; and when a *parliament* is called and doth sit, but is dissolved without any act passed, or judgment given, it is no session of *parliament*, but a convention. 4 *Inst. 27.* If a *parliament* is assembled, and orders made, and writs of error brought in the House of Peers, and several bills agreed on, but none signed; this is but a convention, and no *parliament*, or sessions of *parliament*: But every session, in which the King signs a bill, is a *parliament*; and so every *parliament* is a session. 1 *Roll. Rep. 29. Hutt. 61.* And a session doth continue, until it is prorogued or dissolved.

The *parliament* from the first day of sitting is called the first session of *parliament*, &c. *Raym. 120.* And the courts of justice *ex officio* are to take notice of the beginning, prorogation, and ending of every *parliament*; also of all general statutes; and acts of *parliament* take effect from the beginning of the *parliament*, unless it be otherwise ordered by the acts. 1 *Lev. 296. Hob. 111.*

On prorogation, such bills as have passed, not having received the royal assent, must fall: for there can be no act of *parliament*, without consent of the lords and commons, and the royal fiat of the King, giving his consent personally, or by commission; and by the *Stat. 33 H. 8. cap. 21.* The King may pass acts by commission under the Great Seal, signed by his hand; and such acts shall be of equal force as if the King were present in person.

Every man in judgment of law is party to an act of *parliament*; after the royal assent is given, it is the prince's, and whole realm's deed. The determination of the High Court of *Parliament*, being presumed to be the act of every particular subject, who is either present personally, or consenting by his representative.

Publick bills or acts of *parliament* are commonly drawn by such members of the House of Commons as are most inclined to effect the good of the publick, particularly in relation to the bill designed, taking advice thereupon; and acts for the revival, repeal, or continuance of statutes, are penned by lawyers, members of the house, appointed for that purpose.

Of the formality in bringing in, and passing statutes.

In bringing in and passing statutes, the following formalities are observed, *viz.*

Any member may move for a bill to be brought in, except it be for imposing a tax, which is to be done by order of the house; and being granted, the person making the motion, and those who second it, are ordered to prepare and bring in the same: When the bill is ready, some of the members ordered to prepare it, present it; and upon a question being agreed to, it has the first reading by the clerk at the table; after this the clerk delivers the bill to the speaker, who, standing up, declares the substance of it; and if any debate happens, he puts the question, whether the same shall have a second reading: And sometimes upon motion appoints a day for it; for publick bills, unless upon extraordinary occasions, are seldom read more than once a day, the members being allowed convenient time to consider of them; If nothing be said against a bill, the ordinary course is to proceed without a question; but if the bill be generally disliked, a question is sometimes put, *whether the bill shall be rejected?* If it be rejected, it cannot be proposed any more than sessions: When a bill hath been read a second time, any member may move to have the same amended; but no member of the house is admitted to speak more than once in a debate, *except the bill be read more than once that day*; or the whole house is turned into a committee; and after some time spent in debates, the Speaker collecting the sense of the house, reduces the same to a question, which he submits to the house, and is put to the vote: And a question is to be put, after the bill is so read a second time, *whether it shall be committed?* which is

either to a committee of the whole house or a private committee, as the importance of the bill shall require; this committee is to report their opinion of the bill, with the amendments, to the house, the chairman having caused the clerk attending, to read the bill, and read it himself, putting every clause to the question, &c. The chairman makes his report at the side bar of the house, reading all the alterations made, and then delivers the same to the clerk of the *parliament*; who likewise reads all the amendments, and the speaker puts the question, *whether they shall be read a second time?* And if that be agreed unto, he reads the amendments himself, and puts the question, *whether the bill so amended shall be ingrossed, and read a third time some other day?* And then the speaker takes the bill in his hand, holds it up, and puts the last question, *whether the bill shall pass?* If a majority of voices are for it, then the bill passes; and it is sent up to the House of Lords, where, when it is twice read, the question is to be for commitment; or if it be not committed, then it is to be read a third time, and the next question to be for its passing; and on the third reading of the bill, any member may speak against the whole bill to throw out the same, or for amendment of any clause; and if it be amended, it is to be sent back again to the Commons for their concurrence, and being returned, is then passed in the House of Lords, and ready for the royal assent. If a bill pass in one house, but a demur happens upon it when sent to the other house, in this case a conference is demanded; wherein certain deputed members of each house meet in the *painted chamber*, and debate the matter; and when they have agreed, the bill passed is brought to the King in the House of Lords, where having his royal robes on, he declares the royal assent, by the clerk of the *parliament*. *Pract. Solic. in Par.* 397, 398.

As for private bills, leave is to be obtained by *petition*, &c. to bring in the same; and the substance thereof is to be set forth, until which a bill is not to be offered; and when the petition is read, and leave given to bring in the bill, whereupon it is accordingly brought into the house, the persons concerned and affected by it may be heard by themselves or counsel at the bar, or before a committee, to whom such bill is referred; (and in case of a peer, he shall be admitted to come within the bar of the House of Commons, and sit covered on a stool whilst the same is debating.) And after counsel is heard on both sides, and the house is satisfied with the contents of the bill, it is committed, and passed, &c.

All bills, motions and petitions, are by order of *parliament* to be entered on the *parliament* rolls, altho' they are denied, and never proceed to the establishment of a statute, together with the answers. *Lex Constitution.*

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The Speaker of the House of Commons is not allowed to persuade or dissuade in passing a bill, only to make a short narrative of it; opening the parts of the bill, so that all may understand it; if any question be upon the bill, he is to explain, but not enter into argument or dispute; and he is not to vote, except the house is equally divided: When Mr. Speaker desires to speak, *he ought to be heard without interruption*; and when the Speaker stands up, the member standing up is to sit down: If two stand up to speak to a bill, he who would speak against the bill, if it be known, is to be first heard; otherwise he who was first up, which is to be determined by the Speaker: No member is to be taken down, unless by Mr. Speaker, in such cases as the house do not think fit to admit; and if any person speak impertinently, or besides the question, the Speaker is to interrupt him, and know the pleasure of the house whether he shall be further heard: but if he speaks not to the matter, it may be moderated: And whosoever hisses or disturbs any person in his speech, shall answer it at the bar of the house.

In enacting laws, and other proceedings in *parliament*; the Lords give their voices in their house, from the pious Lord *seriatim*, by the word *Content*, or *Not Content*: The manner of voting in the House of Commons, is by

Yea and *No*; and if it be difficult to determine which are the greater number, the house divides, and four tellers are appointed by the Speaker, two of each side, to number them, the *Ay's* going out, and the *No's* staying in; and thereof report is made to the house. When the members of the house go forth, none is to stir, until Mr. Speaker rises from his seat; and then all the rest are to follow after.

See *Peer, Privilege*, and 16 *Vin. Abr.* tit. *Parliament*. and see also *Black. Com.* 1 *V.* 141, 147. 4 *V.* 405, 418, 421.

Parliamentum Diabolicum, Was a *parliament* held at Coventry, 38 H. 6. wherein Edward Earl of March, (afterwards King) and many of the chief nobility were attainted, but the acts then made were annulled by the succeeding *parliament*. *Holingb. Cron.*

Parliamentum Indolozum, A *parliament* 6 H. 4. whereunto by special precept to the sheriffs in their several counties, no *lawyer* or person skilled in the law was to come; therefore it was so termed. *Rot. Parl.* 6 H. 4. *Black. Com.* 1 *V.* 176.

Parliamentum insanum, Was a *parliament* assembled at Oxford, anno 41 H. 3. so stiled, from the *madness* of their proceedings; and because the Lords came with armed men to it, and contentions grew very high between the King, Lords and Commons, whereby many extraordinary things were done. 4 *Inst.*

Parliamentum Religiozorum. In most *convents*, they had a common room, into which the brethren withdrew for conversation; and the conference there had was termed *Parliamentum*. *Matt. Paris.* The abbot of *Croyland* used to call a *parliament* of his monks, to consult about the affairs of his monastery: And at this day, the societies of the two Temples, or *Inns of Court*, call that assembly a *parliament*, wherein they confer upon the common affairs of their several houses. *Crompt. Jurisd.* 1.

Parol. *What things may be done by parol or without deed.*

Stat. 29 Car. 2. cap. 3. enacts, That all leases, estates, interests of freehold, or terms of years, or any uncertain interests in or out of lands, &c. not put in writing, and signed by the parties, or their agents authorized by writing, shall have no greater effect than as estates at will. Except leases not exceeding three years, whereof the rent shall be two thirds of the full value.

No such estates or interests, not being copyhold or customary interest, shall be assigned, granted or surrendered, unless by deed or note in writing signed (as *supra*) or by operation of law. No action shall be brought, to charge an executor on a special promise to answer damages out of his own estate, Or to charge the defendant upon any promise to answer for the debt or miscarriage of another, Or upon an agreement or consideration of marriage, Or on any contract of sale of lands, &c. or any interest concerning them, Or on any agreement not to be performed within a year after the making, Unless such agreement, or some note thereof be in writing, signed by the party to be charged, or some other by him authorized.

All devises of lands or tenements shall be in writing, and signed by the party devising, or some other in his presence and by his direction, and subscribed in his presence by three or four witnesses, or else shall be void.

No such devises in writing shall be recoverable, otherwise than by writing or burning, tearing or cancelling the same by the testator, or in his presence, and by his consent.

All declarations or creations of trusts shall be made by some writing, signed by the party, or by his last will in writing, or else be void.

Assignments of trust shall be in writing, signed by the party granting or assigning by such last will, or else shall be of no effect.

Trusts resulting by implication of law, or transferred or extinguished by act of law, shall be as if this statute had not been made.

No contract for the sale of any goods for 10 *l.* or upwards, shall be good, except the buyer ACTUALLY receive

active part of them, or give something in earnest, or some note thereof in writing be made and signed by the parties to be charged, or their agents.

No will in writing of any personal estate shall be repealed by words only, except the same be in the life of the testator committed to writing, and read to him, and allowed by him, and that be proved by three witnesses.

An use will not pass by parol without deed; but Ch. J. *Pemberton* said, it would be a good trust or Chancery use, if for money. 2 *Show.* 156. *Pasch.* 33 *Car.* 2. B. R. in case of *Berris v. Bowyer*. A parol release is good to discharge a debt by simple contract. Arg. 2 *Show.* 417.

A promise merely executory on both parts; as if I promise B. 5 s. if he goes to Paul's, before B. goes, I may discharge him, and so shall discharge myself of payment of the 5 s. for no debt was yet due, nor any thing executed on either side. 3 *Lev.* 238. An agreement in writing since the statute of frauds and perjuries may be discharged by parol. *Vern.* 240. A rent assigned in lieu of dower may be by parol without deed, though it be a freehold created *de novo*: And though a rent lies in grant, because this is not properly a grant, but an appointment. 12 *Mod.* 201. Lessee for years surrendered to the lessor by parol reserving rent; adjudged, this was a good reservation upon the contract, and that an action of debt would lie for the rent after the first day of payment incurred, though the reservation was by way of contract, and without any deed. 3 *Salk.* 312. *fl.* 7.

If one has a bill of exchange, he may authorise another to indorse his name upon it by parol, and when that is done, it is all one as if he had done it himself; *per Holt Ch. J.* at *Nisi prius*. 12 *Mod.* 564.

An insurance was made from *Archangel* to the *Downs*, and from the *Downs* to *Leghorn*, but there was a parol agreement at the same time, that the policy should not commence till the ship came to such a place, and it was held, that the parol agreement should avoid (or defeat) the writing; cited *per Holt Ch. J.* as adjudged in *Pemberton's* time. 2 *Salk.* 444, 445.

If a thing is granted by a writing, which is grantable by parol, it may be revoked by parol. *Vid.* 10 *Mod.* 74.

Deputation of an office is in it's own nature grantable by parol, and therefore though it should happen to be granted by writing, yet since it is in itself grantable by parol, it may be revoked by parol. 10 *Mod.* 74. See *Black. Com.* 2 *V.* 297.

Parol arrest. Any justice of peace may, by word of mouth, authorise any one to arrest another who is guilty of a breach of the peace in his presence, &c. *Dalt.* 17.

Parol demurrer. Is a privilege allowed an infant, who is sued concerning lands which came to him by descent; and the court thereupon will give judgment, *quod loquela predicta remaneat quousque* the infant comes to the age of twenty-one years. And where the age is granted on parol demurrer, the writ doth not abate, but the plea is put *sine die*, until the infant is of full age; and then there shall be a re-summmons. 2 *Lill. Abr.* 280. 2 *Inst.* 258. *Rass. Entr.* 363.

The granting a parol demurrer is in favour of an infant, and for his benefit, that he may not be prejudiced in his right for want of well knowing his estate, &c. And if his ancestor dies seised, and the land, descended to him, and he enters and takes the profits, it would be a prejudice to the infant to lose the possession which he hath; so that in such case it shall stay until his age. 6 *Rep.* 3.

The tenant in an action, cannot pray parol demurrer, until the infant demandant comes of age: this is expressly provided for by 6 *Ed.* 1. *cap.* 2. And it would damage the infant, if it should be so delayed upon an action brought by him, where an estate is descended to him from his ancestor. 6 *Rep.* 3, 5. In parol demurrer when it may be had, if two are vouched, and there is parol

demurrer for the nonage of the one; it shall be for the other also. 45 *Ed.* 3. 23. See *Age prier*, and *Black. Com.* 3 *V.* 300.

Parol Evidence. See tit. *Witnesses*, and *Black. Com.* 3 *V.* 369.

Parol, or Pleadings. Are the mutual altercations between the plaintiff and defendant; which at present are set down and delivered into the proper office in writing, tho' formerly they were usually put in by their counsel *ore tenus*, or *in voce*, in court, and then minuted down by the chief clerks, or prothonotaries; whence in our old law *French* the pleadings are frequently denominated the *parol*. *Black. Com.* 3 *V.* 293.

It is sometimes joined with *lease*, as *lease parol*, i. e. *lease per parol*, a lease by word of mouth, to distinguish it from a lease in writing. *Cowell.*

Parricide, (Patricida,) Is properly he who kills his father, and may be applied to him who killeth his mother. *Law Lat. Dict.*

By the *Roman* law, *parricide*, or the murder of one's parents or children, was punished in a much severer manner than any other kind of homicide. After being scourged, the delinquents were sewed up in a leather sack, with a live dog, a cock, a viper, and an ape, and so cast into the sea. *Solon*, it is true, in his laws, made none against *parricide*; apprehending it impossible that any one should be guilty of so unnatural a barbarity. And the *Persians*, according to *Hierodotus*, entertained the same notion, when they adjudged all persons who killed their reputed parents to be bastards. And, upon some such reason as this, must we account for the omission of an exemplary punishment for this crime in our *English* laws; which treat it no otherwise than as simple murder, unless the child was also the servant of his parent. 1 *Hal. P. C.* 380.

For, tho' the breach of natural relation is unobserved, yet the breach of civil or ecclesiastical connexions, when coupled with murder, denominates it a new offence; no less than a species of treason, called *parva proditio*, or *petit treason*: which, however, is nothing else but an aggravated degree of murder; altho', on account of the violation of *private* allegiance, it is stigmatized as an inferior species of treason. And thus, in the ancient *Gothic* constitution, we find the breach both of natural and civil relations, ranked in the same class with crimes against the state and sovereign. *Black. Com.* 4 *V.* 203.

Parson, (Persona) Signifies the rector of a church because for his time he represents the church, and in his person, the church may sue for, and defend her right, &c. Or he is called *parson* as he is bound by virtue of his office, in *propria persona* *servire Deum*. *Fleta, lib.* 9. *cap.* 18. 1 *Inst.* 300. Also the word *parson* in a large sense includes all clergymen having spiritual presentments. And there may be two *parsons* in one church, one of the one moiety, and the other of the other; and a part of the church and town allotted to each; and may be two that make but one *parson* in a church, presented by one patron. 1 *Inst.* 17, 18.

To a *parson*, these things are requisite; holy orders, presentation, institution, and induction; and where a person is compleat *parson*, he may cease to be *parson* of the church, by death, or cession, resignation, deprivation for simony, nonconformity to the canons, for adultery, &c. 1 *Inst.* 120. 4 *Rep.* 75, 76. A *parson* hath the entire fee of his church; and where 'tis said he hath not the right of fee simple, that is understood as to bringing a writ of right. *Cro. Car.* 582. And in the time of the *parson*, the patron hath nothing to do with the church; but if the *parson* wastes the inheritance thereof to his own private use, in cutting trees, &c. his patron may have a prohibition, so that to some purposes he hath an interest in the *parson's* time. 11 *H. 6.* 4. 11 *Rep.* 49.

Sir Edward Coke was of opinion, That at Common law a *parson* could not be arrested; and said, he had seen a report grounded on the statutes 50 *Edward* 3. c. 5. and 1 *Henry* 2. c. 15. which are in affirmance of the Common law, and in maintenance of the liberties of the church;

church; that a *parson* ought not to be arrested in going, staying, or returning to celebrate divine service, nor any other person who attended him in such service; and that if he was, he might have an action upon those statutes, against the person making the arrest. 12 Rep. 100. A *parson* ought not to appear at the sheriff's turn, or the court leet, without an absolute necessity, *F. N. B.* 160.

No *parson* or spiritual person, shall take a farm or lease of lands, &c. to himself, or *any one for his use*, on pain of forfeiting 10*l.* a month, one moiety to the King, the other to the informer. Stat. 21 H. 8. cap. 13. Nor shall he buy, *to sell again* any merchandise, corn, cattle, &c. upon forfeiture of treble value: but he may buy horses, or any other cattle, for his necessary use in manuring his glebe and church lands. *Ibid.* On information upon this statute for renting a farm, defendant pleaded in bar, that he had not sufficient glebe for pasturing his cattle, nor corn for his family; but the plaintiff traversed his having spent the product thereof in his family, &c. 1 Lutw. 134. See *Church, Ecclesiastical Courts*, &c. and *Black. Com.* 1 V. 384.

Parson Impersonator (*Persona impersonata*) Is he who is in possession of a church, be it presentative or improper, and *with whom the church is full*.

Persona, according to the *New Book of Entries*, seems to be the patron who has right to give the benefice, by reason he had anciently the tithes in respect of his liberality in erecting or endowing the church, *Quasi justinet personam ecclesie*; and *persona impersonata* is the *parson* to whom the benefice is given in the patron's right. *Persona impersonata* is used for the rector of a church presentative. *Reg. Judic.* 24. A dean and chapter are *parsons impersonates* of a benefice appropriated to them; and *persona impersonata* is one who is inducted and in possession of a benefice. *Dyer* 40, 221. So that *persona* may be termed *impersonata*, only in regard of the possession he hath of the rectory, by the act of another. 1 *Inst.* 300. In a *quare impedit* the *parson* is to plead *persona impersonata*; but if he doth not say *at the time of obtaining the writ*, it will be inferred by the writ that he is. *Cro. Car.* 105. And this is a plea that he is admitted and instituted in the church, &c. 7 Rep. 26. See *Black. Com.* 1 V. 391.

Parsonage, (*Personatus, personagium*,) Is sometimes taken for a dignitary in a church, and sometimes for the benefice itself. *Cowell*.

Parsonage, or rectory, is a parish church, endowed with a house, glebe, tithes, &c. Or a certain portion of lands, tithes, and offerings, established by law, for the maintenance of the minister who hath the cure of souls: And tho' properly a *parsonage* or rectory doth consist of glebe land and tithes; yet it may be a rectory, tho' it have no glebe, but the church and church-yard: Also there may be neither glebe nor tithes, but annual payments in lieu thereof. *Purf. Conne.* 190. The rights to the *parsonage* and church lands are of several natures; for the *parson* hath a right to the *possession*; the patron hath the right of *presentation*; and the ordinary a right of *investiture*, &c. But the rights of the patron and ordinary are only collateral rights: neither of them being capable of possessing or retaining the church themselves; tho' no charge can be laid on the church or *parsonage*, but by the consent and agreement of all of them. *Hugh's Purf. Law.* 188.

Parson mortal. The rector of a church instituted and inducted, for his own life, was called *Persona mortalis*: And any collegiate or conventual body, to whom the church was for ever appropriated, were termed *Persona immortalis*. *Cartular. Rading.* MS. fol. 182.

Partes suis nihil habuerunt, &c. Is an exception taken against a fine levied. 3 Rep. 88. *The case of Fines*.

Participatio. Is the charity so called, by which the poor are made *participes* of other mens goods. We read it in several places in the *Monast.* 2 tom. pag. 321.

Parties. Are those who are named in a deed or fine, as parties to it; as those who levy the fine, and to whom the fine is levied: so they who make any deed, and they

to whom it is made, are called *parties to the deed*. *Cowell.* See 16 *Vin. Abr.* tit. *Party*. and *Black. Com.* 2 V. 298, 355.

Partition, (*Partitio*,) Is dividing land descended by the Common law, or custom, among *cobairs* or *parceners*, where there are two at least. In *Kent*, where the land is of *gavelkind* nature, they call their partition *sfisting*, from the Saxon *sfistan*, to divide. In *Latin* it is called *herciffere*. Partition also may be made by joint-tenants, or tenants in common, by assent, deed, or writ. 31 H. 8. 1. 32 H. 8. 32. See *Joint-tenants, Parceners*, and *Black. Com.* 2 V. 189, 323.

Partitione facienda, (Mentioned in stat. 31 H. 8. cap. 1.) Is a writ that lies for those who hold lands or tenements *pro indiviso*, and would sever to every one his part, against those who refuse to join in *partition*, as *copartners*, *tenants in gavelkind*, &c. *Old Nat. Brev.* 142. *F. N. B.* 61.

Partners. Are where two or more persons agree to come in share and share alike to any trade or bargain. If there are two partners in trade, and judgment is recovered against one of them, his moiety of the goods in partnership only shall be taken in execution. *Shew.* 174. Partnership, is cognisable in equity. See *Black. Com.* 3 V. 437. and 16 *Vin. Abr.* tit. *Partners*.

Part-owners. Are those who are concerned in ship matters, and have joint shares therein. And when there are part-owners of a ship, the majority may fit her out, without consent of the rest; and if they do, such majority run all hazard, and are to partake of the profits. *Shew.* 13, 30. Action lies as well against the part-owners of a ship, for the loss or spoiling of goods delivered to the master, as against the master; for as the master of a ship is chargeable in respect of his wages, so are part-owners in respect of the freight; but the action against the part-owners must be brought against all of them, or defendants may take advantage of it, by pleading in abatement, &c. *Shew.* 30, 105. 3 *Law.* 259.

Party-walls. See *Buildings, Fire*.

Parvise, (*parvise, parvisus, non à parvus adj. sed à gal. le parvis*) *Sed placitantes, tunc, i. e. post meridiem, se divertunt ad parvisum & alibi consulentes cum servientibus ad legem & alius consiliariis*, &c. *Fortescue de Laudibus LL. Angl. cap.* 51. pag. 124. And *Selden* (in his notes on *Fortescue*) defines it to be, an afternoon's exercise, or moot for the instruction of young students; bearing the same name originally with the *Parvisia* at *Oxford*. *Seld. Notes* pag. 56. Of which *Chaucer* has mention in one of his prologues.

*A Serjeant at Law, that ware and wise,
That often had been at the Parvise.*

Pascha clausum, The Octaves of *Easter* or *Low Sunday*, which *closes* that solemnity: And *die (sali) post pascha clausum*, is a date in some of our old deeds. The first statute of *Westminster*, anno 3 Ed. 1. is said to be made the Monday after *Easter week*; *post de la cluse de pasche*, &c.

Pascha floridum, Is the Sunday before *Easter*, called *Palm Sunday*; when the proper hymn or gospel sung was, *occurrunt turbe cum floribus & palmis*, &c. *Cartular. Abbat. Glaston.* MS. 75.

Paschal Bents, Rents or yearly tributes paid by the clergy to the bishop or archdeacon, at their *Easter visitations*.

Pascua, A meadow or pasture ground, set apart to feed cattle. See *Pastura*.

Pascuage, (*pascuagium*, Fr. *pascege*) The grazing or pasturing of cattle.—*Et habere viginti porcos quietos de pascuagio*, &c. *Mon. Angl. Tom.* 2. 23. The same with *pannage*.

Pasnage, And *pathnage* in woods, &c. See *Pannage*.

Passage, (*Passagium*) Is properly over water, as way is over land; it relates to the sea, and great rivers, and is a French word signifying *transitum*. In the stat. 4 Ed. 3. c. 7. it is used for the hire a man pays for being transported over sea, or any river: And it is mentioned among

customs and duties, as theolonia, passagio, & lastagio. Chari. Hen. 1.

All persons shall have free *passage* on the river *Severn*; and if any be disturbed, he may have his remedy by action. Stat. 9 H. 6. c. 5. There are other statutes for regulating the *passage* of this river, and preventing disorders therein by the *Welsh*, &c. 19 H. 7. c. 18. 26 H. 8. c. 5.

Also *passagio* is a writ directed to the keepers of the ports to permit a man to *pass* over sea, who has the King's leave. Reg. Orig. 193. The prices of *passage* at *Dover*, &c. are limited by 4 Ed. 3. c. 8. None to *pass* out of the realm without the King's licence. 5 R. 2. ft. 1. c. 2. *Passage* from *Kent* to *Calais* restrained to *Dover*. 4 Ed. 4. c. 10.

Passagium, A voyage or expedition to the Holy Land, when made by the Kings of *England* in person, was called *Passagium*, or *Passagium regis*. Cowell.

Passator, Is he who has the interest or command of the *passage* of a river, or the lord to whom a duty is paid for *passage*. Cowell.

Pass-port, A compound of two *French* words, viz. *passer*, *transire*, and *port*, *portus*, a haven. It signifies a licence, for the safe *passage* of any man from one place to another. 2 E. 6. cap. 2. See *Black. Com.* 1 V. 260. 4 V. 68.

Passagiarius, A ferry-man. We meet with the word in *Thorn's Chronicle*, in anno 1287.

Pastitium, A pasture field. *Castrum Arundel*. T. R. E. *reddebat a quodam molino 40 s. &c. & de uno pastitio 20 s. Domejdy, per Gale 761.*

Pastoral staff. The form of it was streight, which signified *rectum regimen*. All the top part of it was crooked, and the other part sharp: The crooked signified, that the bishop presided over the people; and the sharp signified, to punish the stubborn. Cowell.

Pasture, Is generally any place where cattle may feed; and feeding for cattle is called *pasture*, wherefore feeding grounds are called common of *pasture*: But common of *pasture* is properly a right of putting beasts to *pasture* in another man's soil; and in this there is an interest of the lord and of the tenant. *Wood's Inst.* 196, 197. For in those waste grounds, which are usually called *Commons*, the property of the soil is generally in the lord of the manor; as in common fields it is in the particular tenants. And common of *pasture* is either *appendant*, *appurtenant*, because of *vicinage*, or in *gross*. *Black. Com.* 2 V. 32. See *Adme furement*.

Pastura differs from *pastua*, as appears from what follows, viz. *pastura omne genus pascendi significat, sive fiat in partibus, sive in stipula, sive in agris, sive in campis; sed pastua est locus principaliter deputatus pecoribus pascendis, ut puta in montibus, moris, mariscis & planis non cultis aratis*. *Lindewood. Provin. Angl.* lib. 3. c. 1.

Pastus, Is the same with *procuracion*, or the provision which tenants are bound to make for their lords at certain times, or as often as they make a progress to their lands: This in many places was turned into money. *Hoc modo per annum liberabo a pastu Regis & principum*. *Chart. Walgati Regis Merciorum* in *Mon. Angl.* tom. 1. p. 123.

Patentee, One to whom the King grants his letters patent. 7 Edw. 6. c. 3.

Patents, Are the King's writings, sealed with the *Great Seal*, having their name from being open: And they differ from writs. *Grompt. Jurisd.* 126. The King is to advise with his council touching grants and *patents* made of his estate, &c. And in petitions for lands, annuities or offices, the value is to be expressed; also a former *patent* is to be mentioned where the petition is for a grant in reversion, or the *patents* thereupon shall be void. 1 Hen. 4. c. 6. 6 Hen. 8. c. 15. And *patents* which bear not the date and day of delivery of the King's warrants into *Chancery*, are not good. Statute 18 Hen. 6. c. 1. Where the King's *patent* creates a new estate, of which the law does not take knowledge; the *patents* are void. 8 Rep. 1. 5 Rep. 93. But *patents* shall not be avoided by nice constructions: If a *patent* may be taken to two intents; and is good as to one, and not as to the other; it is valid. *Jenk. Cent* 138. When the King would *pass* a freehold, it is necessary that the *patent* be

under the *Great Seal*; and it ought to be granted *de advisamento* of the Chancellor of the *Exchequer* and Lord Treasurer, in the usual manner. *Fitzgib.* 291. See *Grants of the King*. And *Black. Com.* 2 V. 346.

As to *patents* for new inventions, see *Black. Com.* 4 V. 159. For *patents* of *peerage*, ib. 1 V. 400. For *patents* of *precedence*, ib. 3 V. 28.

Patria, Properly signifies the country; but in law it denotes the men of a neighbourhood; so when we say *inquiratur per patriam*, we mean a jury of the neighbourhood. In like manner, *Assisa vel recognitio per assisam, idem est quod recognitio patrie*. *Cowell*. See *Black. Com.* 3 V. 349. 4 V. 342.

Patrimony. An hereditary estate, or right descended from ancestors. The legal endowment of a church or religious house, was called *ecclesiastical patrimony*; and the lands and reversions united to the see of *Rome*, are called *St. Peter's Patrimony*. *Cowell*.

Patrinus, Is used for godfather, and *matrina* a god-mother, in the laws of *King Hen. 1*.

Patritius, An honour conferred on men of the first quality, in the time of the English Saxon Kings.—*Pro ampliori firmitatis testamento, principes & senatores, judices & patritios subscribere fecimus*. *Mon. Angl.* tom. 1. p. 13.

Patron, (*Patronus*) Signifieth in the *Civil law* him who hath manumitted a servant; and thereby is accounted his great benefactor, and claims duty of him during life. *Digest tit. de Jure Patronatus*. In the *Canon* and *Common law*, it is he who hath the disposition of an ecclesiastical benefice; and the reason is, because the gift of churches and benefices belonged unto such good men as either built or endowed them with great part of their revenues. *Terms de Ley*.

He who has the right of advowson is called the *Patron* of the church. For, when lords of manors first built churches on their own demesnes, and appointed the tithes of those manors to be paid to the officiating ministers, which before were given to the clergy in common, (from whence arose the division of parishes) the lord, who thus built a church, and endowed it with glebe or land, had of common right a power annexed of nominating such minister as he pleased (provided he were canonically qualified) to officiate in that church, of which he was the founder, endower, maintainer, or, in one word, the *patron*. *Black. Com.* 2 V. 21.

This original of the *jus patronatus* by building and endowing the church appears also to have been allowed in the *Roman empire*. *Nov.* 56. s. 12. c. 2. *Nov.* 118. c. 23.

There are three causes of *patronage*: *Ratione foundationis*, where one solely founds a church; *Ratione donationis*, when a man only endows it; and *Ratione fundi*, where a person erects a church on his own ground. *Litt.* 137. 2 *Lill. Abr.* 286.

The *patron* is to present within six calendar months after an avoidance of the church; and where the church becomes void by the death of the incumbent, the *patron* at his peril must take notice of it, in making presentation; but if there be an avoidance by deprivation, &c. he shall have notice, and six months after to present. 6 Rep. 61. 3 *Leon.* 46. If a church becomes litigious by the presentation of two *patrons* of their clerks, a *jus patronatus* may be awarded by the bishop to inquire who is rightful *patron*, and he is to admit accordingly. 2 *Roll. Abr.* 384, 385.

The *patron's* right is the most worthy and first act and part of a promotion to a benefice, and is granted and pleaded by the name of *libera dispositio ecclesie*. *Hob.* 152. But during the vacancy of a church, the freehold of the glebe is not in the *patron*; for it is in *abeyance*. 8 H. 6. 24. *Litt.* 144. A *patron* shall not have an action for trespass done when the church is vacant: And if a man who hath a right to glebe lands, releaseth the same to the *patron*, that is not good; because the *patron* has not any estate in the land. 11 H. 6. c. 4. If the *patron* grants a rent out of a church, it is void even against himself. 38 Ed. 3. 4. See *Advowson, Parson, Presentation*, &c. And *Black. Com.* 2 V. 21. And 3 V. 242.

Pavage, (Pavagium,) Money paid towards paving the streets or highways. *Rex* (Edw. 1.) *concessit pavagium villæ de Huntingdon per quinquennium.* Pla. Parl. 35. Edw. 1.

Paving, &c. See the *Table to the Statutes.*

Pauper, Signifies a poor man according to which we have a term in law, to sue *in forma pauperis.* See *Forma Pauperis.* Also vide the stat. 11 Hen. 7. c. 12.

Before a person is admitted to sue *in forma pauperis.* he must have counsel's hand to his petition, certifying the judge to whom the petition is directed, that he conceives the petitioner hath good cause of action; he must also annex an affidavit to his petition, that he is not worth 5 l. all his debts paid, *except wearing apparel, and his right to the matter in question.* Lill. Reg. 633.

None ought to be admitted to sue *in forma pauperis* in an action on the case, for words. Lill. Reg. 633. *per Wild.*

A person admitted to sue *in forma pauperis,* can only sue in that cause for which he is admitted, & *fi. testis quoties.* Lill. Reg. 633.

It seems that, after the statutes which introduced costs, neither plaintiffs nor defendants could sue *in forma pauperis,* for that would be a means of depriving the other party of the costs given him by statute; and as the 11 Hen. 7. c. 12. enables persons only to sue as paupers; and as the statute 23 Hen. 8. c. 15. excepts only plaintiffs who are paupers from paying costs, it seems, that defendant cannot be admitted in a civil action to defend as a pauper. But it hath been adjudged, that a person may be admitted to defend an indictment *in forma pauperis* for a misdemeanor, such as a conspiracy, keeping a disorderly house, &c. for in such proceedings there being no costs, the judges have a discretionary power of admitting or refusing them by the Common law. *Pasch. 9 Geo. 2. The King v. Wright.* See stat. 2 Geo. 2. c. 28. *fi. 8.*

It is said, that paupers ought not to be admitted to remove causes out of inferior courts, but ought to satisfy themselves with the jurisdiction within which their actions properly lie. 1 Mod. 368. *per North.*

By the orders of the courts, if the party admitted to sue *in forma pauperis* give any fee or reward to his counsel or attorney, or make any contract or agreement with them, he shall from thenceforth be dispaupered, and not be afterwards admitted again in that suit to prosecute *in forma pauperis.* Ord. Cur' 94.

Also if it shall be made appear to the court, that any person prosecuting *in forma pauperis* hath sold or contracted for the benefit of the suit, or any part thereof, while the same depends, such cause shall be from thenceforth totally dismissed the court. Ord. Cur' 95.

It is said, that if a pauper gives notice of trial, and does not proceed, he shall be dispaupered. 1 Salk. 506.

In the statute 23 Hen. 8. c. 15. there is a provision, "That whoever sues *in forma pauperis* shall not pay costs, but shall suffer such other punishment as the court shall think fit."

But notwithstanding this statute, if he be dispaupered or nonsuited, the usual practice is to tax the costs, and for non-payment to order him to be whipped. 2 Salk. 506. *Stile* 386.

A. brought a bill *in forma pauperis,* to which the defendant put in a plea and demurrer, which were both over-ruled; and it was insisted upon, that he should not have costs, being at none; but Lord Somers, (after long debate and inquiry of all the ancient counsel and clerks, who agreed, that he should have costs,) ordered him his costs like other suitors; for tho' he is at no, or but small costs, yet the counsel and clerks do not give their labour to defendant, but to the pauper. *Abr. Eq.* 125. See *Black. Com.* 3 V. 400.

Pawn, (Pignus) A pledge or gage for payment of money lent: It is said to be derived à pugno, *quia res quæ pignori dantur, pugno vel manu traduntur.* Litt. Dist. The party who *parvns* goods, hath a general property in them; they cannot be forfeited by the party who hath them in *parvns* for any offence of his, nor be taken in execution for his debt; neither may they other-

wife be put in execution, till the debt for which they are *parvned* is satisfied. *Litt. Rep.* 332.

If a man *parvns* goods for money, and afterwards a judgment is had against the *parvner* at the suit of one of the creditors; the goods in the hands of the *parvnee* shall not be taken in execution, until the money is paid to the *parvnee*, because he had a qualified property in them, and the judgment creditor only an interest. 3 Fulst. 17. And when a person hath jewels in *parvns* for a certain sum, and he who *parvned* them is attainted, the King shall not have the jewels *unless he pay the money.* *Plowd.* 487.

The *parvnee* of goods hath a special property in them, to detain them for his security, &c. and he may assign the *parvns* over to another, subject to the same conditions: And if the *parvnee* die before redeemed, his executors shall have it upon the like terms as he had it.

If goods *parvned* are perishable, and no day being set for payment of the money, they lie in *parvns* till spoiled, without any default in him who hath them in keeping; the party who *parvned* them shall bear the damage, for it shall be adjudged his fault that he did not redeem them sooner; and he to whom *parvned* may have action of *debt* for his money: Also if the goods are taken from him, he may have action of *trespass, &c.* Co. Litt. 89. 208.

Where goods are *parvned* for money borrowed, without a day set for redemption, they are *redeemable at any time* during the life of the borrower. They may be redeemed after the death of him to whom *parvned*; but not after the death of him who *parvned* the goods. 2 Cro. 245. But where a day is appointed, and the *parvner* dieth before the day, his executors may redeem the *parvns* at the day, and this shall be *assets* in their hands. 1 Bulst. 30, 31. Goods *parvned* generally, without any day of redemption, if the *parvner* dies, the *parvns* is absolute and irredeemable; if the *parvnee* dies, it is not so. *Noy* 137. 1 Bulst. 9. If goods are redeemable at a day certain, it must be strictly observed; and the *parvnee*, in case of failure of payment at the day, may sell them. 1 Roll. Rep. 181, 215. In other cases brokers commonly stay but a year for their money lent on *parvns*, at the end of which, if not redeemed, they may sell the goods. *Larc Secur.* 99.

He who borrows money on a *parvns*, is to have the pledge again when he repays it, or he may have action for the detainer; and his tender of the money revests the special property. 2 Cro. 244. And it hath been held, that where a broker or *parvnee* refuses (upon tender of the money) to redeliver the goods in *parvns*, he may be indicted; because being secretly *parvned*, it may be impossible to prove a delivery for want of witnesses, if *trover* should be brought for them. 3 Salk. 268. Adjudged, that if goods are lost, after the tender of the money, the *parvner* is liable to make them good to the owner; for after tender he is a *wrongful detainer*, and he who keeps goods wrongfully must answer for them at all events, his wrongful detainer being the occasion of the loss: but if they are lost before a tender, it is otherwise; the *parvnee* is not liable, if his care of keeping them was exact; and the law requires nothing of him, but only that he should use an ordinary care in keeping the goods, that they may be restored on payment of the money for which they were deposited; and in such case if the goods are lost, the *parvnee* hath still his remedy against the *parvner* for the money lent. 2 Salk. 522. 3 Salk. 268.

If the *parvns* is laid up, and the *parvnee* robbed, he is not answerable: Tho' if the *parvnee* useth the thing, as a jewel, watch, &c. that will not be the worse for wearing, which he may do, it is at his peril; and if he is robbed, he is answerable to the owner, as *the using occasioned the loss, &c.* Ibid. If the *parvns* is of such a nature that the keeping is a charge to the *parvnee*, as a cow or a horse, &c. he may milk the one, or ride the other, and this shall go in recompence for his keeping: Things which will grow the worse by usage, as apparel, &c. he may not use. *Owen* 124.

A person borrows 100 l. on the *parvns* of jewels, and takes a note from the lender acknowledging them to be in his hands, for securing the money; afterwards he borrows several other sums of the same person, for which he gave

gave his notes, without taking any notice of the jewels. As in this case it was natural to think the lender would not have advanced the sums on note only, but on the credit of the pledge in his hands before; it was decreed in equity, that if the borrower would have his jewels, he must pay all the money due on the notes. *Preced. Chanc.* 419, 421.

A factor cannot pawn the goods of his principal, *Strange* 1178. He to whom goods are delivered for safe custody cannot pawn them. *Strange* 1187. There can be no market-overt for pawning. *Ibid.* Where money is lent on a pledge, the borrower is personally liable to the payment, unless there be an agreement to the contrary. *Strange* 919. Regulations of pawnbrokers, 30 *Geo.* 2. c. 24. Penalty of pawning or taking in pawn goods without leave of the owner. *Ib.* See *Cheats, Pledging.* And *Black. Com.* 2 *V.* 452.

Pannage, In woods and forells for swine. Vide *Pannage.*

Payment of money before the day appointed, is in law payment at the day; for it cannot, in presumption of law, be any prejudice to him to whom the payment is made, to have his money before the time; and it appears by the party's receipt of it, that it is for his own advantage to receive it then, otherwise he would not do it: Yet it is said, that defendant must not plead, that the plaintiff accepted it in full satisfaction; but that he PAID it in full satisfaction. 5 *Rep.* 117. Payment of a lesser sum in satisfaction of a greater, cannot be a satisfaction for the whole, unless the payment be before the day: Tho' the gift of an horse, or robe, &c. in satisfaction may be good. *Ibid.* And where damages are uncertain, a less thing may be done in satisfaction of a greater. 4 *Mod.* 89.

Upon *solvit ad diem* pleaded, it is good evidence to prove payment at any time after the day, and before action brought; and payment, altho' after the day, may be pleaded to any action of debt, upon bill, bond or judgment, or *Scire facias* upon a judgment. 2 *Lill. Abr.* 287. Statute 4 & 5 *Ann.* But tho' payment after the day, is good by way of discharge, it will not be so by way of satisfaction. 4 *Mod.* 250. Payment is no plea to debt on covenant, or an obligation, without acquittance; but if the obligation have a condition, it is otherwise. *Dyer* 25, 160. If a bond, &c. be for payment of money, and no day is set, damages cannot be recovered till a demand is made. *Bridgm.* 20.

For payment of rent there are said to be four times; 1. A voluntary time, that is not satisfactory, and yet good to some purpose; as where a lessee pays his rent before the day, this gives seisin of the rent, and enables him to whom paid to bring his assise for it. 2. A time voluntary and satisfactory in some cases; when it is paid the morning of the last day, and the lessor dies before the end of the day, this is a good payment to bind the heir or executor, but not the King. 3. The legal, absolute and satisfactory time, which is a convenient time before the last instant of the last day, and then it must be paid. 4. Is satisfactory, and not voluntary, but coercive, when forced and recovered by suit at law. *Co. Litt.* 200. 10 *Rep.* 127. *Plovid.* 172.

Payment of money shall be directed by him who pays it, and not by the receiver, &c. 5 *Rep.* 117. *Cro. Eliz.* 68. If the payer does not apply the payment, the receiver may, but he must not apply it to an uncertain demand, as to a debt from a testator. *Strange* 1194. In the payment of a testator's debts by executors, they are to pay first judgments, mortgages, rent due by lease, &c. then bonds and bills, &c. 1 *Roll. Abr.* 927. Vide *Bond and Rent.*

A bill drawn on A. to pay money for value received, is a good discharge of a debt, tho' the bill be not paid, unless the creditor return the bill in convenient time. *Per Holt Ch. J. Show.* 155.

A. gives B. a bill of exchange on C. in payment of a former debt; this is not allowable as evidence on non assumpsit, unless paid; for a bill shall never go in discharge of a precedent debt, except it be part of the contract that it should be so. 1 *Salk.* 124.

When a merchant draws a bill upon a correspondent, who accepts it, this is payment; for it makes him debtor to another person, who may bring his action. 10 *Mod.* 37.

4 & 5 *Ann.* cap. 16. *sess.* 12. enacts, That in debt on single bill, debt, or *scire facias* on judgment, defendant may plead payment in bar. In debt on bond, if defendant before action brought hath paid the principal and interest due by the condition, tho' such payment was not strictly made according to the condition, yet it may be pleaded in bar, and shall be as effectual as if the money had been paid at the day and place, according to the condition, and had been so pleaded. Vide *Bond, and Rent.*

Peace, (Pax,) In the general signification is opposite to war or strife: But particularly with us it intends a quiet behaviour toward the King and his subjects. And if any man is in danger from another, and makes oath of it before a justice of peace, he shall be secured by good bond, which is called binding to the peace. *Lamb. Eiren.* lib. 2. cap. 2. 77. *Crompt. Just.* of Peace, 118. 129. And also frank-pledge and conservator of the peace. Time of peace is when the courts of justice are open, and the judges and ministers of the same may by law protect men from wrong, and administer justice to all. *Co. Litt.* 249.

All authority for keeping the peace comes originally from the King, who is the supreme magistrate for preservation thereof; tho' it is said the King cannot take a recognizance of the peace, because it is a rule in law that no one can take any recognizance, who is not either a justice of record, or by commission: Also it is certain, that no duke, earl, or baron, as such, have any greater power to keep the peace, than meer private persons. *Lamb. lib.* 1. ch. 3. *Dalt. ch.* 1. But the Lord Chancellor, or Lord Keeper of the Great Seal, the Lord High Steward, the Lord Marshal, and every justice of the King's Bench, have as incident to their offices, a general authority to keep the peace throughout the realm, and to award process for surety of the peace, and take recognizances for it. 2 *Haruk. P. C.* 32. And every court of record hath power to keep the peace within its own precinct: As have likewise sheriffs, who are intrusted with the custody of the counties, consequently have by it an implied power of keeping the peace within the same; and corners may bind persons to the peace who make an affray in their presence; but may not grant process of the peace, &c. *Ibid.*

It is said every man is to be a constable, to keep the peace among others, and justices of peace are to do the same especially; and no man may break it. 3 *Shep. Abr.* 14.

Peace shall be kept, and justice and right duly administered to all persons. *Stat.* 1 *R.* 2. c. 2, &c. Breakers of the peace to be imprisoned, and to find sureties, &c. 2 *Ed.* 3. c. 6. 34 *Ed.* 3. c. 1. Other statutes enforcing the keeping of the peace. 1 *R.* 2. c. 2. 1 *H.* 4. c. 1. 2 *H.* 4. c. 1. 7 *H.* 4. c. 1. Recognizances for keeping the peace to be certified to the quarter-sessions. 3 *H.* 7. c. 1. The Chancery and King's Bench, restrained from granting process of the peace or behaviour without motion and affidavit; and to give costs and damages to persons wrongtully vexed by such process. 21 *Jac.* 1. c. 8. The said courts restrained from granting *subpoenas* unless the process is granted in the manner required by the statute. *Ibid.* The said courts to punish insufficient sureties. *Ibid.* Actions against peace officers made local. 21 *Jac.* 1. c. 12. And the general issue pleadable. 7 *Jac.* 1. c. 5. 21 *Jac.* 1. c. 12. See *Justice of Peace and Good Behaviour.*

Peace of God and the Church, (Pax Dei & Ecclesiae) Was antiently used for that cessation which the King's subjects had from trouble and suit of law between the *trrps.* *Tempus dicitur cultui divino adhibitum, eaque appellations omnes dies dominici, festa & vigiliae censentur.* *Spelman.* See *Vacation.*

Peace of the King, (Pax Regis, mentioned in *Stat.* 6 *R.* 2. *stat.* 1. cap. 13.) Is that peace and security both for life and goods, which the King promiseth to all his subjects,

subjects, or others taken into his protection. And where an outlawry is reversed, a person is restored to the King's peace, called *ad pacem redire*. Bract. lib. 3. c. 11. See *Suit of the King's Peace*. This point of policy seems to have been borrowed by us from the *Feudists*, which in the second book of the *Feuds*, cap. 53. intitled, *De pace tenenda*, &c. Hotoman proveth. Of this *Hoveden* setteth down many branches *Par. poster. suorum Ann.* l. in H. 2. fol. 144. and 330. There is also *peace of the church*, for which see *Sanctuary*. There is besides, the *peace of the King's highway*, which is the immunity that the King's highway hath to be free from annoyance or molestation. *The peace of the plough*, whereby the plough and the plough cattle are secured from distresses. *F. N. B.* 90. And *fairs* have been said to have their *peace*; because no man might be troubled in them for any debt contracted elsewhere.

Pecia, A piece or small quantity of ground.—*Cum duabus peciis*, &c. *dictæ terræ pertinentibus*. Paroch. Antiq. 240.

Pectorale, A word often met with in old writings. Most authors agree that it is the same with that garment called *rationale*, which the high priest in the old law wore on his shoulders, as a sign of perfection. 'Tis worn also by the high priest of the new law, as a sign of the greatest virtue. *Quæ gratia & ratione perficitur*; for which reason it is called *rationale*. 'Tis by some taken to be that part of the pall which covers the breast of the priest, and from thence called *pectorale*. But all agree that it is the richest part of that garment, embroidered with gold, and adorned with precious stones. *Cowell. Item capa cum pectorale optime brendato cum rotundis pectoralibus aurifrigiis*, &c. *humerali vin. ato de fino auro brendato*, & *lapidibus insertis*, &c.

Pectoral, Armour for the breast, a breast-plate or *petrel*, for a horse; from the Lat. *pectus*: it is mentioned in the *Stat. 14 Car. 2. c. 3.*

Peculiar, (Fr. *peculier*, i. e. private) Is a particular parish or church, that hath jurisdiction within itself, and power to grant administration or probate of wills, &c. exempt from the ordinary.

There are *royal peculiars*, and *archbishops peculiars*: the King's chapel is a *royal peculiar*, exempted from all spiritual jurisdiction, and reserved to the immediate government of the King; there are also some *peculiar ecclesiastical jurisdictions* belonging to the King, which formerly appertained to monasteries and religious houses. *Wood's Inst.* 504. It is an ancient privilege of the see of *Canterbury*, that wherever any manors or advowsons belong to it, they forthwith become exempt from the ordinary, and are reputed *peculiars* of that see; not because they are under no ordinary, but because they are not under the ordinary of the diocese, &c. For the jurisdiction is annexed to the *Court of Arches*, and the judge thereof may originally cite to these *peculiars* of the archbishop. *Ibid.*

The *Court of Peculiars* of the archbishop of *Canterbury*, hath a particular jurisdiction in the city of *London*, and in other dioceses, &c. within his province, in all fifty-seven *peculiars*. 4 Inst. 338. *Stat. 22 & 23 Car. 2.* There are some *peculiars* which belong to *Deans* and *Chaplers*, or a *Prebendary*, exempted from the Archdeacon only: they are derived from the Bishop, of ancient composition, and may be visited by the Bishop in his primary or triennial visitation: in the mean time an official of the Dean and Chapter, or Prebendary, is the judge; and from hence the appeal lies to the Bishop of the diocese. *Wood* 504. Appeal lieth from other *peculiar* courts to the King in *Chancery*. *Stat. 25 H. 8.* The Dean and Chapter of *St. Paul's* have a *peculiar* jurisdiction; and the Dean and Chapter of *Salisbury* have a large *peculiar* within that diocese; so have the Dean and Chapter of *Litchfield*, &c. 2 Neli. Abr. 1240, 1241. There is mention in our books of *Peculiars* of *Archdeacons*; but they are not properly *Peculiars*, only subordinate jurisdictions; and a *Peculiar* is *prima facie* to be understood of him who hath a co-ordinate jurisdiction with the Bishop. *Hob. 185. Mod. Ca. 308.* If an Archdeacon hath a *peculiar* authority by commission, this shall not take away the authority of the Bishop; but if he hath authority and

jurisdiction by prescription, it is said it shall. 2 *Roll. Rep.* 357. Where a man dies intestate, leaving goods in several *Peculiars*, it has been held that the Archbishop is to grant administration. *Sid. 90. 5 Mod. 239.* See 16 *Vin. Abr.* tit. *Peculiars*. See *Black. Com.* 3 V. 65.

Pecunia, Properly money, but anciently used for cattle, and sometimes for other goods as well as money. So we find often in *Domesday*, *Pastura ibidem ad pecuniam villæ*, that is, pasture-ground for the cattle of the village. And in *Emendat. Willelm. Primi ad Leg. Edw. Conf.* *Intenti sumus etiam ut nulla vivæ pecunia vendantur, aut emanent nisi infra civitates, & hoc ante tres j. d. & c.* And *Leg. Edw. Conf. cap. 10.* *Qui habuerit 30 denarios vivæ pecuniæ.* *Cowell.*

Pecunia sepulchralis, (*L. L. Canuti*, 102.) Was money anciently paid to the priest at the opening the grave for the good of the deceased soul. This the Saxons called *saulscad*, *saulscot*, and *animæ symbolum*. *Spei. de Concil. T. 1. f. 517.*

Pecuniary. All punishments of offences were antiently pecuniary, by mulct, &c. See *Fine*.

Pecuniary Causes, Cognizable in the Ecclesiastical courts, are such as arise either from the withholding Ecclesiastical dues, or the doing or neglecting some act relating to the church, whereby damage accrues to the plaintiff; towards obtaining a satisfaction for which he is permitted to institute a suit in the Spiritual Court. For the principal of these causes, see *Black. Com.* 2 V. 88.

Pecuniary Legacy, Cannot be taken without consent of the executor: for in him all the chattels are vested; and it is his business first to see whether there is a sufficient fund left to pay the debts of the testator: the rule of equity being, that a man must be just, before he is permitted to be generous. And in case of a deficiency of assets, all the general, or *pecuniary* legacies, must abate proportionably, in order to pay the debts. *Black. Com.* 2 V. 512.

Pedage, (*pedagium*) Signifies money given for the passing by foot or horse thro' any country. *Pedagium à pede dictum est, quod a transeuntibus solvitur*, &c. *Cassian. de Conf. Burgun. p. 118.* *Padagia dicuntur quæ dantur a transeuntibus in locum constitutum a principe*, &c. *Et capiens pedagium, debet dare saluum conductum, & territorium ejus tenere securum.* *Spelm.* This word is likewise mentioned by *Matt. Paris.* anno 1256. And *Edw. 3.* granted to Sir *Nele Loring* *pedagium Sancti Macharii*, &c. *Rot. Pasch. 22 Ed. 3.*

Pedale, A foot cloth, or piece of tapestry laid on the ground to tread on for greater state and ceremony. *In gulph. pag. 41.*

Pedis abicisso, Cutting off the foot, was a punishment of criminals, inflicted here, instead of death; as appears by the laws of *William*, called *The Conqueror*, viz. *Interdicimus ne quis occidatur vel suspendatur pro aliqua culpa, sed eruantur oculi, abicindantur pedes, vel testiculi, vel manus.* *Leg. Will. 1. cap. 7.* So in *Ingulphus*, p. 856. *Sub panno peditationis dextri sui pedis.* *Fleta, lib. 1. c. 38.* *Bracton, lib. 3. cap. 32.* *Monast. 1 tom. pag. 166.*

Pedones, Foot-soldiers. *Simon of Durham, Anno 1085.*

Pedlars. See *Hawkers*.

Pier, or **Pier**, (*Pera*, Fr. *pierre*, *saxum*, quod a *saxis fieri solebat*,) Is a fortress made against the force of the sea, or great rivers, for the better security of ships that lie at harbour in any haven. So is the peer of *Dover* described in *Cam. Britan.* 259. 14 *Car. 2. cap. 27.* The haven and peer of *Great-Yarmouth*, mentioned 22 *Car. 2. cap. 2.*

Peerage, A duty or imposition for maintenance of a sea peer: Also the dignity of the lords or peers of the realm.

Peers, (*Parus*) Signify in law, those who are impelled in an inquest upon a man, for convicting or clearing him of any offence; the reason is, because the custom of the realm is, to try every man in such case by his peers or equals. *Westm. 1. cap. 6. Mag. Car. c. 29.* And in this sense is, in use with other nations: for *parus sunt convassalli quorum sententia vassallus propter feloniam est condemnatus.* *Bartilayus de Regno, lib. 4. cap. 2. Et parus sunt*

funt qui ab eodem domino feudum tenent. Lib. 1. Feudor. cap. 26. Corvell.

And as every one of the nobility being a Lord of Parliament, is a *Peer* or equal to all the other Lords, tho' of several degrees; so the Commons are Peers to one another, altho' distinguished as Knights, Esquires, Gentlemen, &c. 2 *Inst.* 29. 3 *Inst.* 31.

Peers of Fees. The word *peer* denoted originally one of the same rank; afterwards it was used for the vassals or tenants of the same Lord, who were obliged to serve and attend him in his courts, being equal in function: these were termed *peers of fees*, because holding fees of the lord, or because their business in court was to sit and judge under their lord, of disputes arising on fees: but if there were too many in one lordship, the lord usually chose twelve, who had the title of *peers*, by way of distinction, from whence it is said we derive our common juries, and other *peers*. Cowell.

Peers of the Realm, (*Pares Regni, proceres*) Are the Nobility of the kingdom, and Lords of Parliament; who are divided into Dukes, Marquesses, Earls, Viscounts, and Barons: and the reason why they are called *peers*, is that notwithstanding a distinction of dignities in our nobility, yet in all publick actions they are *equal*; as in their votes of Parliament, and trial of any nobleman. S. P. C. lib. 3. And this appellation seems to be chiefly borrowed from France, from those *twelve peers* that *Charlemaine* instituted in that kingdom, (called *pares vel patricii Franciæ*) but we have applied this name to all our Lords of Parliament, and have no set number of *peers*, for they are more or less at the King's pleasure.

All nobility and peerage is granted by the crown; and created either by writ, or letters patent: the calling up a lord by writ is the most antient way, and gives a fee-simple in a barony, without words of inheritance, viz. *To him and his heirs*; but the King may limit the general estate of inheritance to heirs male, or the heirs of the body; and as soon as the person called sits in parliament by virtue of this writ, his blood is enobled, and he is a *peer*; but if he dies before he sits in parliament, he is not, the bare direction and delivery of the writ having no effect. 1 *Inst.* 9. 16. But creation by letters patent is good, and makes the *peerage* sure, altho' he never sits in parliament, and his heirs shall inherit the honour pursuant to the words of the patent: tho' the persons created must in this case have the inheritance limited by apt words; as to him and his heirs, or the heirs male of his body, heirs of his body, &c. otherwise he shall have no inheritance. 1 *Inst.* 2 *Inst.* 48.

The King may create either man or woman noble for life only: and *peerage* may be gained for life, by act of law; as if a Duke take a wife, she is a Duchess in law by the intermarriage; so of a Marquis, Earl, &c. 1 *Inst.* 16. 9 *Rep.* 97. Also the dignity of an Earl may descend to a daughter, if there be no son, who shall be a Countess; and if there are many daughters, it is said, the King shall dispose of the dignity to which daughter he pleases. 1 *Inst.* 165. Wood's *Inst.* 42. It has been resolved in the House of *Peers*, that if a person is summoned as a Baron to Parliament by writ, and sitting die, leaving two or more daughters, who all dying, one of them only leaves issue a son, such issue has a right to demand a seat in the House of *Peers*. Skin. 441.

Before the time of King *Edw.* 3. there were but two titles of nobility, viz. Earls and Barons: the Barons were originally by tenure, afterwards created by writ, and after that by patent; but Earls were always created by letters patent. Seld. 536. And *Hen.* 6. created *Edmond of Haddingham*, Earl of *Richmond*, by patent, and granted him precedence before all other Earls. *Mary* I. likewise granted to *Henry Ratcliff*, Earl of *Suffex*, a privilege by patent beyond any other nobleman, viz. that he might at any time be covered in her presence, like unto the *grandees* of Spain; and some few others of our nobility have had this honour.

The 31 *H.* 8. c. 10. settles the precedence of the Lords or Parliament, and great officers, &c. After whom, the Dukes, Marquisses, Earls, Viscounts, and Barons, take place according to their antient; but it is declared, that PRECEDENCE IS IN THE KING'S DISPOSITION. *Thomas de la Mare* was summoned to parliament by writ,

anno 3 *Hen.* 8. and *William* his son, *anno* 3 *Ed.* 6. was disabled by attainder to claim any dignity during his life, but was afterwards called to parliament by Queen *Elizabeth*, and sat there as *puisne* Lord, and died; then *Thomas*, the son of the said *William*, petitioned the Queen in parliament to be restored to the place of *Thomas* his grandfather; and all the Judges to whom it was referred, were of opinion that he should, because his father's disability was not absolute by attainder, but only personal and temporary during his life; and the acceptance of the new dignity by the petitioner shall not hurt him, so that when the old and new dignity are in one person, the old shall be preferred. 11 *Rep.* 1.

A dignity of Earl, &c. is a title by the Common law; and if a patentee be disturbed of his dignity; the regular course is to petition the King, who indorses it and sends it into Chancery. Straundf. *Prærog.* 72. 22 *Edw.* 3. And where nobility is gained by writ, or patent, without descent, it is triable by record; but when it is gained by matter of fact, as by marriage, or where descents are pleaded, nobility is triable *per pais*. 22 *Affs.* 24. 3 *Salk.* 243. A person petitioned the Lords in Parliament to be tried by his peers; the Lords disallowed his peerage, and dismissed the petition: and it was held in this case, that the defendant's right stood upon his letters patent, which could not be cancelled but by *scire facias*; and that the parliament could not give judgment in a thing which did not come in a judicial way before that court. 2 *Salk.* 510, 511. 3 *Salk.* 243. Where *peerage* is claimed *ratione Baronii*, as by a Bishop, he must plead, that he is *unus parium Regni Angliæ*; but if the claim is *ratione nobilitatis*, he need not plead otherwise than pursuant to his creation. 4 *Inst.* 15. 3 *Salk.* 243.

There are now no feudal Baronies; but there are Barons by succession, and those are the Bishops, who by virtue of antient Baronies held of the King, (into which the possessions of their bishopricks have been converted) are called by writ to parliament, and have place in the House of *Peers* as Lords Spiritual: the temporal possessions of Bishops are held by their service, to attend in parliament when called; and that is in the nature of a Barony; and all the Bishops, it hath been said, made one of the three estates in parliament; but this is denied, because they have separately from the other Lords no negative vote, &c. And tho' the Bishops are Lords of Parliament, and called by the King's writ, and have a vote there; they shall not be tried by the *Peers*, as they do not sit in parliament by reason of their nobility, but of their Baronies which they hold in right of the church: they are not of the degree of nobility; their blood is not ennobled, nor their *Peerage* hereditary; so that they are to be tried by the country, i. e. by a common jury: and when one of the nobility is to be tried by his *Peers* in parliament, the Spiritual Lords must withdraw, and make their proxies. 1 *Inst.* 70, 97, 110. 3 *Inst.* 30. 4 *Inst.* 1, 2. Some Bishops have been tried by *Peers of the realm*; but it hath been when impeached by the House of Commons, as upon special occasions many others have been who have not been *Peers*: and the Bishops may claim all the privileges of the Lords Temporal; saving they cannot be tried by their *Peers*, because the Bishops cannot in like cases pass upon the trial of any other *Peers*, they being prohibited by canon to be judges of life and death, &c.

When a Lord is newly created, he is introduced into the House of *Peers*, by two Lords of the same form in their robes, Garter King at Arms going before, and his Lordship is to present his writ of summons, &c. to the Lord Chancellor; which being read, he is conducted to his place: and Lords by descent, where nobility comes down from the ancestor, and is enjoyed by right of blood, are introduced with the same ceremony, the presenting of the writ excepted. *Lex Constitution.* 79.

A nobleman, whether native or foreigner, who has his nobility from a foreign state, altho' the title of dignity be given him, (as the highest and lowest degrees of nobility are universally acknowledged) in all our legal proceedings no notice is taken of his nobility, for he is no *Peer*: and the laws of England prohibit all subjects to receive any hereditary title of honour or dignity, from any foreign Prince, without consent of the Sovereign. *Ibid.* 80, 81.

Tho' dignities of *peerage* are granted from the crown; yet they cannot be surrendered to the crown, except it be, in order to new and greater honours; nor are they transferable, unless they relate to an office: and notwithstanding there are instances of Earldoms being transferred, and wherein one branch of a family sat in the House of *Peers*, by virtue of a grant from the other branch, particularly in the reigns of *Hen. 3.* and *Ed. 2.* these precedents have been disallowed; and the Duke of *Bedford*, who in the reign of King *Edw. 4.* was degraded for poverty, and want of possessions to support his title, lost not his *peerage* by surrender, but by the authority of parliament: and as dignities may not be surrendered or transferred without authority of parliament; so it hath been holden, that honour and *peerage* cannot be extinguished but by act of parliament, the King and kingdom having an interest in the *peerage* of every Lord. *Lex Constit. 85, 86, 87.*

An Earldom consists in office, for defence of the kingdom; and of rents and possessions, &c. and may be intailed as any other office may, and as it concerns land: but the dignity of *peerage* cannot be transferred by fine, because it is a quality affixed to the blood, and so merely personal, that a fine cannot touch it. *2 Salk. 509. 3 Salk. 244.*

A personal honour or dignity may be forfeited, on committing treason, &c. for it is implied by a condition in law, that the person dignified shall be loyal; and the office of an Earl, &c. is *ad consulendum Regem tempore pacis & defendendum tempore belli*, therefore he forfeits it when he takes counsel or arms against the King. *7 Rep. 33. 2 Nelf. Abr. 934.*

All *peers of the realm* are looked upon as the King's hereditary counsellors and may be called together by the King to impart their advice in all matters of importance to the realm, either in time of parliament, or, which hath been their principal use, when there is no parliament in being. *Co. Lit. 110.*

Instances of conventions of the *peers*, to advise the King, have been in former times very frequent, tho' now fallen into disuse, by reason of the more regular meetings of parliament. Many instances of this kind of meeting are to be found under our antient Kings: tho' the former method of convoking them had been so long left off, that when *Charles I.* in 1640, issued out writs under the Great Seal to call a great council of all the *peers of England* to meet and attend his Majesty at *York*, previous to the meeting of the long parliament, the Earl of *Clarendon* mentions it as a new invention, not before heard of; that is, as he explains himself, so old, that it had not been practised in some hundreds of years. But, tho' there had not so long before been an instance, nor has there been any since, of assembling them in so solemn a manner, yet, in cases of emergency, our Princes have at several times thought proper to call for and consult as many of the nobility as could easily be got together; as was particularly the case with King *James the Second*, after the landing of the Prince of *Orange*; and with the Prince of *Orange* himself, before he called that convention parliament, which afterwards called him to the throne.

Besides this general meeting, it is usually looked upon to be the right of each particular *peer* of the realm, to demand an audience of the King, and to lay before him, with decency and respect, such matters as he shall judge of importance to the publick. And therefore, in the reign of *Edward II.* it was made an article of impeachment in parliament against the two *Hugh Spencers*, (father and son) for which they were banished the kingdom, "that they by their evil covin would not suffer the great men of the realm, the King's good counsellors, to speak with the King, or to come near him; but only in the presence and hearing of the said *Hugh* the father and *Hugh* the son, or one of them, and at their will, and according to such things as pleased them." *4 Inst. 53. See Black. Com. 2 V. 227, 8, 9.*

As to the privileges belonging to the *peerage*, they are very great. At Common law, it was lawful for any *peer* to retain as many chaplains as he would; but by *Stat. 21 Hen. 8.* their number is limited, viz. a Duke to have

six, Marquis or Earl five, Viscount four, Baron three, &c. In many cases, the protestation of honour shall be sufficient for a *peer*; as in trial of *peers*, they proceed upon their honour, not upon oath; and if a *peer* is defendant in a court of equity, he shall put in his answer upon his honour; (tho' formerly it was to be on oath;) and in action of debt upon account the plaintiff being a *peer*, it shall suffice to examine his attorney, and not himself on oath: but where a *peer* is to answer interrogatories, or make an affidavit, or to be examined as a witness, he must be upon his oath. *Brass. lib. 5. c. 9. 9 Rep. 49. 3 Inst. 29. W. Jones 152. 2 Salk. 512.* A *subpoena* shall not be awarded against a *peer* out of the Chancery, in a cause; but a letter from the Lord Chancellor, or Lord Keeper, in lieu thereof. In any trial where a *peer* is plaintiff or defendant, there must be two or more Knights on the jury. *2 Mod. 182.* Tho' it is said, if a Knight is returned on a jury where a nobleman is concerned, it is not material whether he appear and give his verdict or not. *1 Mod. 226.* A *peer* may not be impanelled upon any inquests, tho' the cause hath relation to two *peers*; and if a *peer* be return'd on a jury, a special writ shall issue for his discharge from service. No *peer* can be assessed towards the militia, but by an assessment made by six or more *peers*; and the Houses of *peers* shall not be searched for conventicles, but by warrant under the sign manual, or in the presence of the Lord Lieutenant, or one Deputy Lieutenant, and two justices of the peace. *13 & 14 Car. 2. and 22 Car. 2.*

A *peer* of the realm being sent for by the King, in coming and returning may kill a deer or two in a forest thro' which he passes; being done by the view of the forester, or on blowing a horn, if the forester be absent, that he may not seem to take the King's venison by stealth. *See Black. Com. 1 V. 168. and 9 H. 3.*

The *peers* have a right to be attended, and constantly are, by the judges, and such of the Barons of the Exchequer as are of the degree of the coif, or have been made Serjeants at Law; as likewise by the Masters of the court of Chancery; for their advice in point of law, and for the greater dignity of their proceedings. The Secretaries of State, the Attorney and Solicitor General, and the rest of the King's learned Council being Serjeants, were also used to attend the House of *Peers*, and have to this day their regular writs of summons issued out at the beginning of every parliament; but, as many of them have of late years been members of the House of Commons, their attendance is fallen into disuse.

Every *peer*, by licence obtained from the King, may make another Lord of Parliament his proxy, to vote for him in his absence.

Each *peer* has also a right, by leave of the House, when a vote passes contrary to his sentiments, to enter his dissent on the Journals of the House, with the reasons for such dissent; which is usually stiled his *protest*.

All bills likewise, that may in their consequences any way affect the rights of the *peerage*, are by the custom of parliament to have their first rise and beginning in the House of *Peers*, and to suffer no changes or amendments in the House of Commons. *See Black. Com. 1 V. 168.*

If any person shall divulge false tales of any of the Lords of Parliament by which dissension may happen, or any slander arise, the offender shall be imprisoned, &c. *Stat. Westm. 1. c. 34.*

A nobleman menacing another person, whereby such other person fears his life is in danger, no writ of *supplicavit* shall issue, but a *subpoena*; and when the Lord appears, instead of surety, he shall only promise to keep the peace. *35 H. 6.* No *captias* or outlawry can be sued out against *peers of the realm*, in civil cases; and no essoign lies against them. *9 Rep. 49.*

The person of a *peer*, as well out, as in parliament-time, is privileged from all arrests; unless for treason, felony, or breach of the peace, &c. *Peers* are not to be arrested upon mean process, or on execution for debt or trespass, because they are presumed not only to attend the King and the publick affairs, but the law doth intend that they have sufficient lands wherein they may be distrained; but they may be arrested or apprehended in criminal cases. *6 Rep. 52, 53.* And tho' a *peer* may not be arrested by his

his body; yet his estate may be sequestred for debt, &c. upon a proceution after a dissolution and prorogation of parliament, or adjournment for above the space of fourteen days, when he refuses to appear and answer. 12 W. 3. See the 11 Geo. 2. c. 24. And of late years, on non-appearance, &c. the coaches and horses of several peers of this kingdom, have out of the time of privilege been distrained, and cattle seized upon their lands, to compel them to appear; but the privilege of a peer is so great in respect of his person, that the King may not restrain him of his liberty, without order of the House of Lords, except it be in cases of treason, &c. A memorable case wherein was that of the Earl of Arundel imprisoned by the King in the reign of King Charles I. Every Lord of Parliament is allowed his clergy in all cases, where others are excluded by the Stat. 1 Ed. 6. c. 12. except wilful murder; and cannot be denied clergy for any other felony wherein it was grantable at Common law, if it be not ousted by some statute made since the first of King Ed. 6. S. P. C. 130. Lord Morley, who was tried by his peers for murder, and found guilty of manslaughter, was discharged without clergy. Sid. 277. 2 Nelf. Abr. 1181.

Peers of the realm are to be tried by their peers in parliament. Magna Charta, c. 29. and 15 Ed. 3. c. 2. But noblemen who are not Lords of parliament, shall not be permitted to have this trial. 2 Inst. 50. A peer shall be tried by his peers on indictment for treason, murder or felony; tho' in appeal of felony, he shall be tried by freeholders: and indictments of peers for treason or felony, are to be found by freeholders of the county, and then they plead before the Lord High Steward, &c. 1 Inst. 156. 3 Inst. 28.

1. Of the privilege of peers; and proceedings at law and in equity against them.

2. In what cases peers are to be sworn; and for what degraded.

3. Of the trial of peers, and the order and process of trial.

1. Of the privilege of peers; and proceedings at law and in equity against them.

Peers are created for two reasons;

1. Ad consulendum.

2. Ad defendendum regem.

For which reasons the law gives them certain great and high privileges, such as freedom from arrests, &c. even when no parliament is sitting; because the law intends, that they are always assisting the King with their counsel for the commonwealth; or keeping the realm in safety by their prowess and valour. Black. Com. 1 V. 227.

A bill of Middlesex was issued out of B. R. by an attorney of the court, against the Countess of H. which was discharged by *superfedeas* without pleading; because it appeared by the record, that she was a peeress, and the attorney was committed for suing out the process. Vent. 293.

Widows of peers are to have the privilege of peers not to be arrested; but as to privilege of parliament, it was determined both ways in 1676. See 2 Chan. Cases 224.

In ejectment a special verdict was found on a trial at bar, and judgment for defendant, and costs taxed; and after affidavit of the demand of costs, a motion was made for an attachment against the Dutchess, (the Duke being dead) she being one of the lessors, for non-payment of costs; and it was alledged, that if the court did not grant it, the defendant would be remediless; for tho' in other cases a *distringas* issues against peers, yet in this case no process can go but an attachment. The court refused to grant an attachment against the person of the Dutchess, but ordered her to shew cause why an attachment, as to her goods and chattels, should not be issued; which rule was afterwards made absolute. Rep. of Pract. in C. B. 7, 8.

A peer, or lord of parliament, cannot be an approver; for it is against Magna Charta for him to pray a coroner.

3 Inst. 129. cap. 56. 2 Hawk. Pl. C. 205. cap. 24. sect. 3.

If a bill in Chancery be exhibited against a peer, the course is first for the Lord Keeper to write a letter to him; and if he doth not answer, then a *subpoena*; then an order to shew cause why a sequestration should not go; and if he still stands out, then a sequestration. Because *there can be no process of contempt against his person*. 2 Vent. 342.

It is said, if a trustee be made defendant in Chancery he shall not have privilege, tho' he be a member of parliament. Quere. Cur. Canc. 499. cap. 18.

Distringas is the first process against a peer on an information for an intrusion on the King's lands, or for a conversion of the King's goods. 2 Hawk. Pl. C. 284. cap. 27. sect. 12. cites Co. Ent. 387.

Now by a new act, said to be planned and procured by Lord Mansfield, viz. 10 Geo. 3. c. 50. Suits may be prosecuted against peers, and members of the House of Commons and their servants, &c. DURING TIME OF PRIVILEGE, but the persons of members of the House of Commons not to be arrested or imprisoned. Issues returned on writs of *distringas* may be sold, and the costs of applying, &c. for and relative to those writs, paid to plaintiff. Vide the act.

2. In what cases peers are to be sworn; and for what degraded.

In the pleas of parliament, 18 Ed. 1. between the Earl of Gloucester and Earl of Hereford, on long debate whether John de Hastings, a baron, ought to be sworn, because he was a peer of the realm, it was resolved; that *he ought to lay his hand on the book*. The like was resolved, 10 Car. in B. R. by the court where the Lord Dorset's testimony was requisite. See D. 314. b. marg. pl. 98.

A bill was against a peeress to discover deeds, she answers on her honour and confesses deeds. She shall produce them only upon her honour, and not on oath, Ch. Prec. 92.

Where a peer is to answer a bill, his answer put in on his honour is sufficient; but where a peer is to answer interrogatories, to make an affidavit, or be examined as a witness, he must be on his oath; per Harcourt Lord Keeper. 2 Salk. 513.

George Newil, Duke of Bedford, was degraded by act of parliament, 16 June 17 Ed. 4. reciting that as the said George hath not, nor may have any livelihood to support his name, estate and dignity, or any name of estate; and often when a lord is called to high estate, and hath not convenient livelihood to support the dignity, it induceth great poverty, and often causeth great extortion, embracery and maintenance. Wherefore the King by advice of his Lords and commons ordaineth, establisheth and enacteth, That from henceforth the same creation and making of the said Duke, and all the names of dignity given to the said George, or to John Newil his father, be from henceforth void and of none effect, &c.

In which act these things are to be observed: First, That altho' the Duke had not any possessions to support his dignity; yet his dignity cannot be taken from him without an act of parliament. Secondly, The inconveniencies appear, where a great state and dignity is, and no livelihood to maintain it. Thirdly, It is a good reason to take away such dignity by act of parliament, therefore the said act of the 28 H. 8. shall be expounded, according to the general words of the writ, to take away such inconvenience. 12 Rep. 106, 107.

3. Of the trial of peers, and the order and process of trial.

All the barons of parliament shall be tried for treason, felony, misprision, or as accessory, at the suit of the King by their peers. By Magna Charta 9 H. 3. 39. *Non super eum ibimus*, &c. NISI PER LEGALE JUDICIUM PARTRUM SUORUM. 2 Inst. 49. 9 Co. 30. b. Sta. 152, 153. So all the nobility, who are peers of parliament. So by the Common law, which is now affirmed by the Stat.

stat. 20 H. 6. cap. 9. All dutchesses, countesses and baronesses, who are noble by descent, creation or marriage. 2 Inst. 50. And marchionesses and viscountesses, &c. tho' not named by the stat. 20 H. 6. 9. 2 Inst. 50. So the queen consort, or dowager. 2 Inst. 50. And a peer cannot waive the trial by his peers: Kel. 56. in marg. 621. 1 Tr. 265. 2 Rusb. 94.

But nobles who are not barons of parliament, shall not be tried by the peers of parliament. By the Common law, confirmed by parliament, 4 Ed. 3. 2 Inst. 50. 7 Co. 15, 16. Calvin. 3 Inst. 30. Nor a woman, noble by marriage, who has lost her dignity by subsequent marriage under the degree of nobility. 2 Inst. 50. Nor an archbishop or bishop; for they are not peers inheritable. Sheld. J. P. If he be not accused in parliament. 4 Seld. 3 vol. 2. p. 1541. 3 Inst. 30. For they make proxies after plea, and withdraw themselves. 3 Inst. 31. So a baron of parliament shall not be tried by his peers in an appeal, which is the suit of the party. 2 Inst. 49. 9 Co. 30. b. Sta. P. C. 152. a. 10 Ed. 4. 6. b. 3 Inst. 30.

By stat. 7 W. 3. cap. 3. s. 11. it is enacted, That upon the trial of any peers or peeresses, all the peers who have a right to sit and vote in parliament, shall be duly summoned 20 days at least before the trial, and every peer so summoned and appearing shall vote in the trial, first taking the oaths of allegiance and supremacy required by 1 W. & M. s. 1. c. 8. and subscribing and repeating the Test enjoined by 30 Car. 2.

Not to extend to impeachments or other proceedings in parliament. Nor to the treasons of counterfeiting the coin, the Great seal, Privy seal, Sign manual or Privy signet.

By the 6 Ann. cap. 23. s. 12. Peers shall be indicted in Scotland as in England.

If a peer be impeached by a commoner, yet such cause shall not be tried by peers, but by a jury of the country; for tho' the peers are the proper pares to a lord of parliament in capital matters, where the life and nobility of a peer is concerned; yet in matter of property, the trial of fact is not by them, but by the inhabitants of those counties where the facts arise, since such peers living thro' the whole kingdom could not be generally cognizant of facts arising in several counties, as the inhabitants themselves where they are done; but this want of having noblemen for their jury was compensated as much as possible, by returning persons of the best quality; therefore a knight is necessary to be summoned in any cause where a peer is party. G. Hist. C. B. 78, 79.

It has been adjudged, that if a peer on arraignment before the lords, refuse to put himself on his peers, he shall be dealt with as one who stands mute; for it is as much the law of the land, that a peer be tried by his peers, as a commoner by commoners; yet if one who has a title to peerage, be indicted and arraigned as a commoner, and plead Not guilty, and put himself upon his country, it hath been adjudged, that he cannot afterwards suggest that he is a peer, and pray trial by his peers. 2 Hawk. Pl. C. 425.

The order and process of this trial.

On the trials of peers in criminal matters, all the peers who have a right to sit and vote in parliament are to be duly summoned twenty days at least before the trial, to appear and vote at the same; every such peer first taking the oaths required by the 1 W. & M. s. 1. c. 8. The peer being indicted for the treason or felony, before commissioners of oyer and terminer, or in the King's Bench, if the treason, &c. be committed in the county of Middlesex; then the King by commission under the Great Seal, constitutes some peer (generally the Lord Chancellor) Lord High Steward, who is judge in these cases; and the commission commands the peers of the realm to be attendant on him, also the Lieutenant of the Tower, with the prisoner, &c. A certiorari is awarded out of Chancery, to remove the indictment before the Lord High Steward: and another writ issues for bringing the prisoner; and the Lord High Steward makes his precepts for that purpose, assigning a day and place, as in Westminster-Hall inclosed with scaffolds, &c. and for summoning the peers, which are to be twelve and above at least present: At the day, the Lord High Steward takes place under a cloth of state; his com-

mission is read by the clerk of the crown, and he has a white rod delivered him by the Usher, which being returned proclamation is made, and command given for legitimizing of indictments, &c. and the Lieutenant of the Tower to return his writ, and bring the prisoner to the bar; after this, the serjeant at arms returns his precept with the names of the peers summoned, and they are called over, and answering to their names are recorded, when they take their places: the ceremony thus adjusted, the High Steward declares to the prisoner at the bar, the cause of their assembly, assures him of justice, and encourages him to answer without fear; then the clerk of the crown reads the indictment, and arraigns the prisoner, and the High Steward gives his charge to the peers; this being over, the King's counsel produce their evidence for the King; and if the prisoner hath ANY MATTER OF LAW to plead, he shall be assigned counsel; but if he pleads Not guilty, and has nothing farther, he shall be allowed no counsel; for the court are instead of it; after evidence given for the King, and the prisoner's answer heard, the prisoner is withdrawn from the bar, and the Lords who are triers go to some place to consider of their evidence: but the Lords can admit no evidence, but in the hearing of the prisoner; they cannot have conference with the judges, or demand it, (who attend on the Lord High Steward, and are not to deliver their opinions before hand) but in the prisoner's hearing; nor can they send for the opinion of the judges, or demand it, but in open court; and the Lord Steward cannot collect the evidence, or confer with the Lords, but in the presence of the prisoner; who is at first to require justice of the Lords, and that no question or conference be had, but in his presence: Nothing is done in the absence of the prisoner, until the Lords come to agree on their verdict; and then they are to be together as juries until they are agreed, when they come again into court and take their places; and the Lord High Steward, publicly in open court, demands of the Lords, beginning with the passive Lord, whether the prisoner, calling him by his name, be guilty of the treason, &c. whereof he is arraigned, who all give in their verdict, and he being found guilty by a majority of votes more than twelve, is brought to the bar again, and the Lord Steward acquainting the prisoner with the verdict of his peers, passes sentence and judgment accordingly: After which, an O Yes is made for dissolving the commission, and the white rod is broken by the Lord High Steward; whereupon this grand assembly, breaks up, which is esteemed the most solemn and august court of justice upon earth. 2 Hawk. P. C. 421, 422, &c. See Black. Com. 4 V. 256-7, 342.

The Lord High Steward gives no vote himself on a trial by commission; but only on a trial by the House of Peers, while the parliament is sitting: Where a Peer is tried by the House of Lords in full parliament, the house may be adjourned as often as there is occasion, and the evidence taken by parcels; and it hath been adjudged, that where the trial is by commission, the Lord Steward, after a verdict given, may take time to advise upon it, and his office continues till he gives judgment. But the triers may not separate upon a trial by commission, after evidence given for the King; and it hath been resolved, that the peers in such case must continue together, till they agree, to give a verdict. State Trials, Vol. 2. 702. Vol. 3. 657. 2 Hawk. 425.

It is said a writ of error lies in the King's Bench of an attainder of a peer before the Lord High Steward. 2 Hawk. P. C. 462. If a peer be attainted of treason or felony, he may be brought before the court of B. R. and demanded, what he has to say why execution should not be awarded against him? And if he plead any matter to such demand, his plea shall be heard, and execution ordered by the court, upon its being adjudged against him. 1 H. 7. 22. pl. 15. Bro. Coro. 129. Fitz. Coro. 49. Likewise the court of King's Bench may allow a pardon pleaded by a peer to an indictment in that court. But that court cannot receive his plea of Not guilty, &c. but only the Lord Steward on arraignment before the Lords. 2 Inst. 49.

The sentence against a peer for treason, is the same as against a common subject; tho' the King forgives all but beheading, which is a part of the judgment: for other capital crimes, beheading is also the general punishment.

nishment of a peer; but 33 H. 8. the Lord *Dacres* was attainted of murder, and had judgment to be hanged; and anno 3 & 4 P. & M. the Lord *Stourton* being attainted of murder, had judgment against him to be hanged, which sentences were executed.

If execution be not done; the Lord Steward may by precept command it to be done according to the judgment. 3 Inst. 31.

Trial by peers is very ancient: In the reign of Will. 1. the Earl of *Hereford* for conspiring to receive the *Danes* into *England*, and depose the conqueror, was tried by his peers, and found guilty of treason, *per judicium parium suorum*. 2 Inst. 50. The Duke of *Suffolk*, 28 H. 6. being accused of high treason by the Commons, put himself upon the King's grace, and not upon his peers, and the King alone adjudge'd him to banishment; but he sent for the Lord Chancellor, and the Lords who were in town, to his palace at *Westminster*, and also the Duke, and commanded him to quit the kingdom in their presence: The Lords nevertheless entered a protest to save the privilege of their peerage; and this was deemed no legal banishment, for the King's judging in that manner was no judgment; he was extrajudicially bid to absent himself out of the realm, and in doing it he was taken on the sea and slain. The case of the Lord *Cromwell*, in the reign of K. H. 8. was very extraordinary; this Lord was attainted in parliament, and condemned and executed for high treason, without being allowed to make any defence: And several great persons during this reign were brought to trial before Lord Commissioners. Anno 32 Car. 2. the Lord *Stafford* was tried for treason; and after evidence given for the King, and the prisoner had made his objections to the King's evidence, he insisted upon several points of law, viz. That no overt-act was alleged in his impeachment; that they were not competent witnesses who swore against him, but that they swore for money; and whether a man could be condemned for treason by one witness, there not being two witnesses to any one point, &c. But the points insisted upon being over-ruled, he was found guilty by a majority of twenty-four voices; and executed on *Tower-Hill*. See more of Peers under Baron, Descent of Dignities, Lords, &c.

Peers. As we have noblemen, so we have noble women, and these may be by

Creation, Descent, or Marriage.

And first, Hen. 8. made *Anne Bullen*, Marchioness of *Pembroke*: James 1. created Lady *Compton*, wife to Sir *Tho. Compton*, Countess of *Buckingham* in the life-time of her husband, without any addition of honour to him; and also made Lady *Finch* Viscountess of *Maidstone*, and afterwards Countess of *Winchelsea*, to her and the heirs of her body. Geo. 1. made Lady *Schulinsburgh*, Duchess of *Kendal*. A woman noble by creation or descent marrying one under the degree of nobility, still remaineth noble; but if she be noble by marriage only, she loseth her dignity if she afterwards marry a Commoner; tho' not if the second husband is noble, and inferior in dignity to the first. And by the courtesy of *England*, women noble by marriage always retain their nobility. 1 Inst. 16, 50. 6 Rep. 53. If any *English* woman, takes to husband a *French* nobleman, she shall not bear the title of dignity; and if a *German* woman, &c. marry a nobleman of *England*, unless she be made denizen, she cannot claim the title of her husband, no more than her dowry, &c. *Lex Constitution* 80.

If a duke, marquis, earl, &c. marries, the wife shall be noble for her life. And if a woman marries a duke, who dies, and afterwards she marries a baron; yet she continues a dutchess. *Co. Lit.* 16. b. 2 Inst. 50. If a duke, earl, &c. who has the dignity in fee, has not a son, but several daughters; the King may confer the dignity on him who marries any of the daughters, as he pleases. 12 Co. 111. But if a woman, noble by marriage, afterwards takes a husband under the degree of nobility, she shall lose her nobility. *Co. Lit.* 16. b. 2 Inst. 50. *Dyer* 79. b. *Ow.* 81. Otherwise if a woman, noble by descent, takes a husband not noble. *Co. Lit.* 16. b. 2 Inst. 50. *per Brook*, *Ow.* 82. Or if a Queen Dowager takes a husband, noble or not noble; for she

by her subsequent marriage shall not lose her dignity. 2 Inst. 50. Yet if a woman, noble by descent, marries to an inferior degree of nobility, as, if the daughter of a duke marries a baron, she shall have precedence only as a baroness. *Ow.* 82.

A countess or baroness may not be arrested for debt or trespass; for tho' in respect of their sex, they cannot sit in parliament, yet they are peers of the realm, and shall be tried by their peers, &c. But a *capias* being awarded against the Countess of *Rutland*, it was held that she might be taken by the sheriff; because he ought not to dispute the authority of the court from whence the writ issued, but must execute it, for he is bound by oath so to do; and altho' by the writ itself it appeared, that the party was a countess, against whom a *capias* would not generally lie, for that in some cases it may lie, as for a contempt, &c. therefore the sheriff ought not to examine the judicial acts of the court. 6 Rep. 52.

By 20 Hen. 6. cap. 9. a duchess, countess, or baroness, married or sole, shall be put to answer, and judged upon indictments of treason and felony, before such judges and peers as the peers of the realm shall be: And it hath been agreed, that a Queen Consort, and Queen Dowager, whether she continue sole after the King's death, or take a second husband, and he be a peer or commoner; and also all peeresses by birth, whether sole or married to peers or commoners; and all marchionesses and viscountesses are intitled to a trial by the peers, tho' not expressly mentioned in the act. 2 Inst. 50. *Crompt. Jurisd.* 33. 2 *Hawk. P. C.* 423. See *Black. Com.* 1 V. 402.

A duchess, marchioness, countess, or baroness, may retain two chaplains, by 21 Hen. 8. cap. 13. But it is said that a baroness, &c. may not retain chaplains during coverture. *Wood's Inst.* 44. 4 Rep. 89. Vide *Chaplain*.

Peine fort & dure, see *Paine fort & dure*.

Peila, A peel, pile or fort; and the citadel or castle in the *Isle of Man* was granted to Sir *John Stanley* by this name. *Pat.* 7 H. 4. m. 18.

Peles, Issues arising from, or out of a thing. *Fitzb. Just.* 205.

Pelfe and Pelfre, (*Pelfra*.) In time of war, the Earl Marshal is to have of preys and booties, all the gelded beasts, except hogs, &c. which is called *pelfre*. Old MS. And we read, that *Tho. Venables arm. clamat quod si aliquis tenent. sive resident, infra dominium sive manerium de Kinderton feloniam fecerit, & corpus ejus per ipsum Thomam super factum illud captum, & convict. fuerit, habere pelfram, viz. Omnia bona & catalla hujusmodi seiscire*, &c. *Plac. in Itin. apud Cestr.* 14 Hen. 7.

Pellage, The custom or duty paid for skins of leather. *Rot. Parl.* 11 H. 4.

Pellista, A pilch, *Tunica vel indumentum pelliceum; hinc super pelliceum*, a fur-pilch, or fur-plice. *Spelman*.

Pelliparius, (*Pat.* 15 Ed. 3. pag. 2. m. 45) A leatherfeller or skinner.

Pellota, (*Fr. Pelote*) The ball of the foot. See 4 Inst. 308.

Pelt-wool, Is the wool pulled off the skin, or pelt of dead sheep. 8 H. 6. cap. 20.

Pen, A word used by the *Britains* for a high mountain, and also by the ancient *Gauls*; from whence those high hills, which divide *France* from *Italy*, are called the *Apennines*. *Camd. Britan.*

Penal Laws, Are of three kinds, viz. *Pæna po unia-ria*, *pæna corporalis*, and *pæna exilii*. *Cro. Jac.* 415. And penal statutes are made on various occasions, to punish and deter offenders; and they ought to be construed strictly, and not extended by equity; but the words may be interpreted beneficially, according to the intent of the legislators. 1 Inst. 54, 268. Where a thing is prohibited by statute under a penalty, if the penalty, or part of it be not given to him who will sue for the same; it goes and belongs to the King. *Rast. Entr.* 433. 2 *Hawk.* 265. But the King cannot grant to any person, any penalty or forfeiture, &c. due by any statute, before judgment thereupon had; tho' after plea pleaded, justices of assize, &c. having power to hear and determine offences done against any penal statute, may compound the penal-

ties with the defendant, by virtue of the King's warrant or Privy Seal. Stat. 21 Jac. 1. c. 3.

There are *penalties* ordained by several *penal* acts of parliament, to be recovered in any court of record; but this is to be understood only of the courts at *Westminster*, and not of the courts of record of inferior corporations. *Jenk. Cent.* 228. The spiritual court may hold plea of a thing forbidden by statute upon a *penalty*; but they may not proceed on the *penalty*. 2 Lev. 222. See *Information*, and *Black. Com.* 1 V. 88. 4 V. 422.

Penalty of Bonds, &c. If a man brings an *action of debt* upon a bond for performance of covenants, the plaintiff shall recover the *whole penalty of his bond*; because in debt, the judgment must be according to the demand, and the demand is to be for the whole *penalty*; but on defendant's bringing a bill in equity, and praying an injunction to the suit at Common law, the court of equity usually grants it till the hearing of the cause, and upon hearing cause, they will continue the injunction farther, and order a trial at law on a *quantum damnificatus*, for the jury to find what damage the plaintiff received by reason of the breach of covenant, &c. And they farther order, that after such verdict given at Common law, both parties shall resort back for the decree of that court: so that here must be several actions and suits at law and equity; whereas a bare *action of covenant*, without suing for the *penalty of the bond*, will make an end of the business in less time, and for a much less charge. 2 Lill. Abr. 288, 289.

A person being intitled to the *penalty* by law, a court of equity will not relieve against it, without paying principal, interest and costs; and where a *penalty* is recovered at law and paid, Chancery may decree the party to refund all, except the principal and interest, &c. *Chan. Rep.* 437. This court will not generally carry the debt, beyond the *penalty of a bond*: Yet where a plaintiff came to be relieved against such *penalty*, tho' it was decreed, it was on the payment of the principal money, interest, and costs; and notwithstanding they exceeded the *penalty*, this was affirmed. 1 Vern. 350. Abr. Ch. Eq. 92. See 16 Vin. Abr. tit. *Penalty*, and *Black. Com.* 3 V. 435.

Penance, is an ecclesiastical punishment, which affects the body of the penitent; by which he is obliged to give a publick satisfaction to the church, for the scandal he hath given by his evil example. So in the primitive times, they were to give testimonies of their reformation, before they were re-admitted to partake of the mysteries of the church. In the case of incest, or incontinency, the sinner is usually enjoined to do a publick penance in the cathedral, or parish church, or publick market, bare-legged and bareheaded in a white sheet, and to make an open confession of his crime in a prescribed form of words; which is augmented or moderated according to the quality of the fault, and the discretion of the judge.

So in smaller faults, a publick satisfaction or penance, as the judge shall decree, is to be made before the minister, churchwardens, or some of the parishioners, *respecting* being had to the quality of the offence, as in the case of defamation, or laying violent hands on a minister, or the like. *God. Append.* 18. *Wood's Inst.* 507. *Penance* may be changed into a sum of money, to be applied to pious uses called *commuting*. 3 Inst. 150. 4 Inst. 336. See *Prohibition*, and *Black. Com.* 4 V. 105, 217, 272, 361.

Penance, At Common law, where a person stands mute. See *Paine Fort & Dure*.

Pencarius, An ensign bearer; as *John Paricent* was Squire of the Body, and *Pencarius* to King *Rich.* 2.

Penny-weight. As every pound contained twelve ounces, each ounce was formerly divided into twenty parts, called *penny-weights*; and tho' the *penny-weight* be altered, yet the denomination still continues. Every *penny-weight* is sub-divided into twenty-four grains. *Cowell*.

Penon, (mentioned in stat. 11 Ric. cop. 1.) Is a standard, banner or ensign, carried in war. *Cowell*.

Pensa satis, *Cassei*, &c. A way of salt, or cheese, containing 256 pounds. *Cowell*.

Pensam, *Ad pensam*, The ancient way of paying into the Exchequer as much money for a pound sterling, as weighed twelve ounces *Troy*. Payment of a pound *de numero*, imported just twenty shillings; *ad scalam* twenty

shillings and six-pence; and *ad pensam*, imported the full weight of twelve ounces. See *Lowndes's Essay on Coin*, p. 4. See *Scalam*.

Pension (Fr. *Pension*) An allowance made to any one, without an equivalent. *Johns.* And to receive pension from a foreign prince or state, without leave of our King, has been held to be criminal, because it may incline a man to prefer the interest of such foreign prince to that of his own country. 1 Hawk. P. C. 58. See *Black. Com.* 4 V. 122, 175. Sixpence in the pound to be deducted of all salaries, 7 Geo. 3. 1. c. 27. *sect.* 19. 12 Geo. 1. c. 2. What pensions are chargeable with the land-tax, and what exempt, 30 Geo. 2. c. 3. *sect.* 3, 94, 95, 96, 97.

Persons having pensions from the crown are declared incapable of being elected members of parliament, &c. by statute 1 Geo. 1. c. 56. See *Parliament*.

Pensions of Churches, Are certain sums of money paid to clergymen in lieu of tithes. And some churches have settled on them annuities, *pensions*, &c. payable by other churches; which *pensions* are due by virtue of some decree made by an ecclesiastical judge on a controversy for tithes, by which the tithes have been decreed to be enjoyed by one, and a pension instead thereof to be paid to another; or they have arisen by virtue of a deed made by consent of the parson, patron and ordinary; and if such pension hath been usually paid for twenty years, then it may be claimed by prescription, and be recovered in the spiritual court; or a parson may prosecute his suit for a *pension* by prescription, either in that court or at Common law, by writ of annuity; but if he takes his remedy at law, he shall never afterwards sue in the spiritual court: If the prescription be denied, that must be tried by the Common law. *F. N. B.* 51. *Hardr.* 230. *Ventr.* 120. A spiritual person may sue in the spiritual court, for a *pension* originally granted and confirmed by the ordinary; but where it is granted by a temporal person to a clerk, he cannot; as if one grant an annuity to a parson, he must sue for it in the temporal courts. *Cro. Eliz.* 675. If a parson or vicar have a *pension* out of another church, and it is not paid, they may bring a writ of annuity; because a pension issuing out of a rectory is the same thing as a rent; for it may be demanded in a writ of entry and a common recovery may be suffered of it. 2 Nelf. Abr. 1243.

Upon a bill in the Exchequer for a pension, issuing out of a vicarage, it has been held, that tho' there is no glebe nor tithes, but only offerings, &c. yet the vicar is chargeable; and a suit may be brought in this court as well: as at Common law, &c. for a pension by prescription. *Hardr.* 230. A pension out of an appropriation by prescription is suable in the spiritual court; and if the duty is traversed, it may be tried there. 1 Salk. 58. A libel was had in the spiritual court for a pension, to which the plaintiff made a title by prescription; and a prohibition was prayed, for that the court had no cognisance of prescriptions; but adjudged, that they having cognisance of the principal, it shall draw the accessory. 1 Vent. 3. The curate of a chapel of ease libelled against the vicar of the parish for the arrears of a pension, which he claimed by prescription; tho' a prohibition was granted, because the curate is removable at the will of the parson, therefore cannot prescribe; he must bring a *quantum meruit*. 2 Salk. 506. The statute 13 Edw. 1. appoints a remedy for pensions in the ecclesiastical court: And the 34 & 35 H. 8. c. 19. gives damages to the value and costs, &c. See *Ecclesiastical Courts*, and *Black. Com.* 1 V. 281. 4 V. 40.

Pensions of the Inns of Courts, Are annual payments of each member to the houses. And also that which in the two Temples is called a parliament, and in *Lincoln's Inn* a council, in *Gray's Inn* is termed a *pension*, being usually an assembly of the members to consult of the affairs of the society.

Pensioner, from *pension*, one who is supported by an allowance at the will of another; a dependant. *Johnson*, cites *Collier*.

A slave of state hired by a stipend to obey his master. *Johnson*, cites *Pep.*

Pensioners, (*Pensionarii*.) Are a band of gentlemen so called, who attend as a guard on the King's person: They

They were instituted anno 1539, and have an allowance of fifty pounds a year, to maintain themselves and two horses for the King's service, See *Stow's Annals* 973.

Pension-writ. When a pension-writ is once issued, none sued thereby in any inns of court, shall be discharged or permitted to come into commons, till all duties be paid. Order in *Gray's Inn*, wherein it seems to be a peremptory order against such of the society as are in arrear for pensions and other duties. *Cowell.*

Pentecostals, (Pentecostalia.) Were certain pious oblations made at the feast of *Pentecost*, by parishioners to their priest, and sometimes by inferior churches or parishes, to the principal mother church. Which oblations were also called *Whitson furthings*, and were divided into four parts, one to the parish-priest, a second to the poor, a third for repair of the church, and a fourth to the bishop. *Stephens of Procurations and Pentecostals.* See *Kennet's Glossary* in *Pentecostalia*.

Peny, (Saxon Penig.) Was our ancient current silver. 2 *Inst.* 575. The *Saxons* had no other sort of silver coin. It was equal in weight to our three-pence: Five made one shilling *Saxon*, and thirty made a mark, which they called *manche*, and weighed as much as three of our half-crowns. The *English peny* called *sterling*, is round, without clipping, and weighs 32 *grana frumenti in medio spica*; twenty pence make an ounce, and twelve ounces make a pound. *Stat. Edw. 1.* It was made with a cross in the middle, and broke into half-pence and farthings. *Cowell.* Vide *Mat. Paris* 1279. And see *Denarius*.

Perambulation, (Perambulatio) Signifies a travelling through, or over: As *perambulation of the forest* is the surveying or walking about the forest, and the utmost limits of it; by justices, or other officers thereto assigned, to set down and reserve the metes and bounds thereof. 17 *Car. c. 16.* 20 *Car. 2. c. 3.* 4 *Inst.* 30. *Perambulation of parishes* is to be made by the minister, churchwardens and parishioners, by going round the same once a year, in or about *Ascension week*: And the parishioners may well justify going over any man's land in their *perambulation*, according to usage; and it is said may abate *nuisances* in their way. *Cr. Eliz.* 441. And there is a *perambulation of manors*; and a writ *perambulatione faciendæ*, which lies where any incroachments have been made by a neighbouring lord, &c. then by the assent of the lords, the sheriff shall take with him the parties and neighbours, and make a *perambulation*, and settle the bounds: Also a commission may be granted to other persons to make *perambulation*, and to certify the same in the *Chancery*, or the *Common Pleas*, &c. And this commission is issued to make *perambulation* of towns, counties, &c. *New N. B.* 206.

If tenant for life of a lordship, and one who is tenant in fee-simple of another lordship adjoining, sue forth this writ or commission, and by virtue thereof a *perambulation* is made; the same shall not bind him in reversion: Nor shall the *perambulation* made with the assent of tenant in tail, bind his heir. *Ibid.* And 'tis said this assent of the parties to the *perambulation* ought to be acknowledged and made personally in *Chancery*, or by *dedimus potestatem*; and being certified, the writ or commission issues, &c. The writ begins thus: *The King to the sheriff, &c. We command you, that taking with you twelve discreet lawful men of your county, in your proper person you go to the land of A. B. of, &c. And the land of C. D. of, &c. And upon their oaths you cause to be made perambulation betwixt the lands of the said A. in, &c. and of the said C. in, &c. So that it be made by certain metes, or bounds and divisions, &c. And make known to our justices at Westminster, &c.*

If *perambulation* be refused to be made by a lord, the other lord who is grieved thereby shall have a writ against him, called *de Rationabilibus Divisiis*. See *F. N. B.* 133. *Reg. Orig.* 157. and *Rationabilibus Divisiis*.

Pertica, For pertica, a perch of land. Et unam arcam prati per majorem percam. *Mon. Angl.* 10m. 2. pag. 87.

Petractura, Is a place in a river made up with banks, &c. for the better preserving and taking fish. *Paroch. Antiq.* 120.

Perch Is a rod or pole of sixteen foot and a half in length, whereof forty in length and four in breadth,

make an acre of ground. *Crompt. Jurisd.* 222. But by the customs of several counties, there is a difference in this measure: In *Staffordshire* it is twenty-four foot; and in the forest of *Sherwood* twenty-five foot, the foot there being eighteen inches long: And in *Herefordshire*, a *perch* of ditching is twenty-one foot; the *perch* of walling sixteen foot and a half; and a pole of denfierièd ground is twelve foot, &c. *Skene.*

Per cui & post, Writs of entry so called. See *Entry*.

Per my et per tout. Jointenants are said to be seised *per my et per tout*, by the half or moiety, and by all that is, they each of them have the entire possession, as well of every parcel as of the whole. They have not, one of them a seisin of one half or moiety, and the other of the other moiety; neither can one be exclusively seised of one acre, and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety. *Black. Com.* 2 *V.* 182.

Per quod, see *Black. Com.* 3 *V.* 124, &c.

Perdings, Signifies the dregs of the people, viz. Men of no substance. *Leg. H.* 1. c. 29.

Perdonatio Atlagaria, Is a pardon for a man who for contempt in not yielding obedience to the process of the King's court is outlawed, and afterwards of his own accord surrenders. *Reg. Orig.* 28. *Leg. Ed. Confess.* c. 18. 19.

Peremptory, (Peremptorius, from the verb. *perimere*, to cut off,) Joined with a substantive, as action or exception, signifies a final and determinate act, without hope of renewing or altering. So *Fitzherbert* calleth a *peremptory action*. *Nat. Brev.* 35, 38, 104, 108. and *non suit peremptory*, *Idem*, 5. 11. A *peremptory exception*. *Bracton*, lib. 4. cap. 20. *Smith de Rep. Anglor.* lib. 2. cap. 13. calleth that a *peremptory exception*, which makes the state and issue in a cause. *Cowell.*

If defendant in an action, tender an issue in abatement, and the plaintiff demurs, if on arguing the demurrer the issue is over-ruled as not good; the court will give defendant a day over to answer peremptorily, viz. to plead to the merits of the cause; the former plea which was over-ruled, being only in abatement of the writ: But it is otherwise where such an issue and demurrer is in bar of the action; for there the merits of the cause are put on it. *Trin.* 24 *Car.* 1. *B. R.* 2 *Lill. Abr.* 190. A *peremptory day* is when business by rule of court is to be spoke to at a precise day; but if it cannot be spoken to then, the court at the prayer of the party concerned, will give a farther day without prejudice to him; and this is called the *putting off a peremptory*, and is moved for by counsel at the rising of the court, when it is granted of course. 2 *Lill. Ibid.*

Peremptory challenge. In criminal cases, or at least in capital ones, there is, *in favorem vitæ*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without shewing any causes; which is called a *Peremptory Challenge*: A provision full of that tenderness and humanity to prisoners, for which the laws of *England* are justly famous. See *Black. Com.* 4 *V.* 346, &c. 389.

Peremptory Mandamus, see *Black. Com.* 3 *V.* 111. 265.

Peremptory Writ, see *Black. Com.* 3 *V.* 274. and tit. *Optional Writ*.

Perfection of the King, see *Black. Com.* 1 *V.* 246.

Perinde valere, Is a term in the *Ecclesiastical law*, and signifies a dispensation granted to a clerk, who being defective in capacity for a benefice, or other ecclesiastical function, is *de facto* admitted to it; and it hath the appellation from the words, which make the faculty as effectual to the party dispensed with, as if he had been actually capable of the thing, for which he is dispensed with, at the time of his admission. 25 *II.* 8. cap. 21. it is called a *writ*.

Perindurare, To stay, remain, or abide in a place, *Patri qui tunc Londiniis perinduravit nuntios dirigens.* *Matt. Westm.* anno 1016. *Fortescue*, cap. 36.

Periphrasis,

Periphrasis, Circumlocution ; use of many words to express the sense of one. *Johns.*

No periphrasis, or circumlocution will supply words of art, which the law hath appropriated for the description of offences in indictments : No periphrasis, intendment or conclusion shall make good an indictment, which doth not bring the fact within all the material words of a statute ; unless the statute be recited, &c. *Cro. Eliz.* 535, 749. 2 *Hawk. P. C.* 224, 249.

Perjury and Subornation. Perjury, (*Perjuriū est mendacium cum juramento firmatum*.) Is a crime committed, when a lawful oath is administered by any who hath authority, to a person in any judicial proceeding, who swears absolutely and falsely, in a matter material to the issue, or cause in question, by their own act, or by the subornation of others. And if a man call me *perjured man*, I may have an action on the case, but it must be intended contrary to my oath in a judicial proceeding : But for calling me a *forsworn man*, no action lies ; because the *forswearing* may be *extra judicial*. 3 *Inst.* 163.

Perjury by the Common law is defined a wilful false oath by one who, being lawfully required to depose the truth in any proceeding in a court of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not. 2 *Hawk. P. C.* 272.

Subornation of perjury by the Common law is an offence in procuring a man to take a false oath amounting to perjury, who actually takes such oath ; but if the person, incited to take such oath, do not actually take it, the person by whom he was so incited is not guilty of subornation ; yet he is liable to be punished, not only by fine, but also by infamous corporal punishment. 1 *Roll. Abr.* 41, 57. *Yelv.* 72. *Cro. Jac.* 158. 2 *Keb.* 399. 3 *Mod.* 122. 1 *Hawk. P. C.* 177. See *Black. Com.* 4 V. 136, 138, 196.

1. What is perjury by the Common law, and how restrained and punished.
2. How restrained and punished by statute.

1. What is perjury by the Common law, and how restrained and punished.

1st, It is necessary to constitute the offence perjury, that the false oath be taken wilfully, viz. with some degree of deliberation, not merely owing to surprize or inadvertency, or a mistake of the true state of the question. 5 *Mod.* 350.

2dly, The oath must be taken either in a judicial proceeding, or in some other publick proceeding of the like nature, wherein the King's honour or interest is concerned ; or before commissioners appointed by the King to inquire of the forfeitures of his tenants, or of defective titles wanting the supply of the King's patents ; but it is not material whether the court, in which a false oath is taken, be a court of record or not, or whether it be a court of Common law, or a court of equity, or Civil law, &c. or whether the oath be taken in face of the court, or out of it, before persons authorized to examine a matter depending in it ; as before the sheriff on a writ of inquiry, &c. or whether it be in relation to the merits of a cause, or in a collateral matter ; as where one, who offers himself to be bail for another, swears that his substance is greater than it is, &c. but neither a false oath in a mere private matter, as in making a bargain, &c. nor the breach of a promissory oath, whether publick or private, are punishable as perjury. 1 *Hawk. P. C.* 173.

3dly, The oath ought to be taken before persons lawfully authorized to administer it ; for if it be taken before persons acting merely in a private capacity, or before persons pretending to a legal authority of administering such oath, but having no such authority, it is not punishable as perjury ; yet a false oath taken before commissioners, whose commission at the time is in strictness determined by the demise of the King, is perjury ; if taken before such time as the commissioners had notice of such demise ; for it would be of the utmost ill consequence, in such case, to make their proceedings wholly void. 1 *Hawk. P. C.* 173. 4.

4thly, The oath ought to be taken by a person sworn to depose the truth ; therefore a false verdict comes not under the notion of perjury, because the jurors swear not to depose the truth, but only to judge truly of the depositions of others ; but a man may be as well perjured by an oath in his own cause, as in an answer in Chancery, or in an answer to interrogatories concerning a contempt, or in an affidavit, &c. as by an oath taken by him as witness in another's cause. 1 *Hawk. P. C.* 174.

5thly, It is not material, whether the thing sworn be true or false, where the person who swears it in truth knows nothing of it. 1 *Hawk. P. C.* 175.

6thly, The oath must be taken absolutely and directly ; therefore if a man only swears as he thinks, remembers or believes, he cannot be guilty of perjury. 1 *Hawk. P. C.* 175.

7thly, The thing sworn ought to be some way material ; for if it be wholly foreign from the purpose, or immaterial, and neither pertinent to the matter in question, or tending to aggravate or extenuate the damages, nor likely to induce the jury to give credit to the material part of the evidence, it cannot amount to perjury, because it is wholly insignificant ; as where a witness introduces his evidence, with an impertinent preamble of a story concerning previous facts, no way relating to what is material, and is guilty of a falsity as to such facts ; but a witness may be guilty of perjury in respect to a false oath concerning a mere circumstance, if such oath have a plain tendency to corroborate the more material part of the evidence ; as if in trespass for spoiling the plaintiff's close, with defendant's sheep, a witness swears that he saw such a number of defendant's sheep in the close ; and being asked how he knew them to be defendant's, swears that he knew them by such a mark, which he knew to be the defendant's, where in truth defendant never used any such mark. 1 *Hawk. P. C.* 175.

8thly, It is not material, whether the false oath was credited or not, or whether the party, in whose prejudice it was taken, was in the event damaged by it ; for the prosecution is not grounded on the damage to the party, but on the abuse of publick justice. 1 *Hawk. P. C.* 177.

2. How restrained and punished by statute.

By the 5 *Eliz. c.* 9. it is enacted, " That whoever shall unlawfully and corruptly procure any witness, to commit any wilful and corrupt perjury, or shall unlawfully or corruptly procure or suborn any witness, who shall be sworn to testify in perpetuam rei memoriam, shall for such offence, being thereof lawfully convicted or attainted, forfeit the sum of 40 l. And if such offender, so convicted or attainted, shall not have goods, &c. to the value of 40 l. then such person shall suffer imprisonment by the space of one half year, without bail, and stand upon the pillory the space of one hour in some market town next adjoining to the place where the offence was committed, in open market there, or in the market town itself where the offence was committed."

And, That no person, so convicted or attainted, shall be received as a witness in any court of record, till such judgment shall be reversed, and that on such reversal the party grieved shall recover damages against the party who procured the judgment so reversed to be first given.

And, That if any person shall either by the subornation, unlawful procurement, sinister persuasion, or means of any other, or by their own act, consent or agreement, wilfully and corruptly commit wilful perjury, that then every offender being duly convicted shall forfeit 20 l. and have imprisonment by the space of six months, without bail, and the oath of such offender shall not from thenceforth be received in any court of record, until such judgment be reversed, &c. on which reversal the party grieved shall recover damages in the manner before-mentioned.

And, That if such offender shall not have goods or chattels to the value of 20 l. then he shall be set on the pillory, where he shall have both ears nailed.

One moiety of the forfeitures to the King, the other to the person grieved, who will sue for the same, &c. and that as well the judge of every court where any suit shall be, and whereon any such perjury shall be committed, as also the justices of assize and gaol-delivery, and justices of peace at their quarter sessions, may inquire of, hear and determine offences against the act.

The act shall no way extend to any spiritual or ecclesiastical court, but every offender, shall be punished by such usual laws as are used in the said courts.

The statute shall not restrain the authority of any judge having absolute power to punish perjury before the making thereof, but every such judge may proceed in the punishment of all offences punishable before making the statute, as they might have done to all purposes, so that they set not on the offender *les* punishment than contained in the act.

In the construction of this statute the following opinions have been holden:

That every indictment, or action, on this statute *must* *pur*ue the words of it; therefore if it alledge, that defendant depofed such a matter *salso* & *deceptive*, or *salso* & *corrupte* or *salso* & *voluntarie*, without saying, *voluntarie* & *corrupte*, it is not good, tho' it concluded, that *sic voluntarium* & *corruptum commisit perjuriū contra formam statuti*, &c. Also it is necessary *expressly* to shew, that defendant was sworn; and it is not sufficient to say, that *tucto per se sacro evangelio depofuit*. Cro. Eliz. 147. Heth. 12. Savil 43. 2 Leon. 211. 1 Show. 198. Cro. Eliz. 105.

But there is no need to shew, whether the party took the false oath thro' the subornation of another, or of his own act, tho' the words of the statute are, "If persons by subornation, &c. or their own act, &c. shall commit wilful perjury;" for there being no medium between the branches of this distinction, they express no more than the law would have implied, therefore operate nothing. 3 Bull. 147.

It hath been adjudged, that a man cannot be guilty of perjury within this statute, in any case wherein he may not possibly be guilty of subornation of perjury within it; for it is reasonable to give the whole statute the same construction; neither can it be well intended, that the makers of the statute meant to extend its purview farther as to perjury, which they seem to esteem the *lesser* crime, than to subornation of perjury, which they seem to esteem the *greater*; therefore since the clause concerning subornation of perjury mentioning only matters depending by writ, bill, plaint or information, concerning hereditaments, goods, debts or damages, &c. extends not to perjury on an indictment or criminal information; the clause concerning perjury, tho' penned in more general words, hath been adjudged to come under the like restriction: Also since the clause concerning subornation of perjury relates only to perjury by witnesses, that concerning perjury shall extend only to the like perjury; therefore not to perjury in an answer in Chancery; or in swearing the peace against a man; or in any presentment by homage in a court baron; or in wager of law, or in swearing before commissioners of inquiry of the King's title to lands; and by the opinions of some, a false affidavit against a man in a court of justice is not within the statute; but if such affidavit be by a third person, and relate to a cause depending in suit before the court, and either of the parties in variance be grieved, in respect of such cause, by reason of the perjury, it may strongly be argued that it is within the purview of the statute; also a false oath before the sheriff, on a writ of inquiry, is within the statute. 5 Co. 99. Cro. Jac. 120. 3 Inst. 164. 2 Leon. 201. Yelv. 120. Cro. Eliz. 148. 2 Roll. Abr. 77.

It hath been collected from the clause which gives an action to the party grieved, that *no false oath is within the statute, which doth not give some person a just cause of complaint*; therefore, if the thing sworn be true, tho' it be not known by him who swears it to be so, the oath is not within the statute, because it gives no just cause of complaint to the other party, who would take advantage of another's want of evidence to prove the truth; from the

same ground no false oath can be within the statute, *unless the party against whom it was sworn suffered some disadvantage by it*; therefore in every prosecution on the statute, you must set forth the record wherein you suppose the perjury to have been committed, and must prove at the trial, that there is such a record, either by actually producing it, or an attested copy; also in the pleadings you must not only set forth the point wherein the false oath was taken, but *must also shew how it conduced to the proof or disproof of the matter in question*; and if an action on the statute be brought by more than one, you must shew how the perjury was prejudicial to each of the plaintiffs; but it seems that a perjury, which tends only to aggravate or extenuate the damages, is as much within the statute as a perjury which goes directly to the point in issue; and a perjury, in a cause wherein an erroneous judgment is given, is a good ground of prosecution upon the statute till the judgment be reversed. 1 Hawk. P. C. 181.

If perjury be committed, that is within this statute, but concludes not *contra formam statuti*; yet it is a good indictment at Common law, but not to bring him within the corporal punishment of the statute. 2 Hale's Hist. P. C. 191-2.

By 2 Geo. 2. c. 25. s. 2. 'The more effectually to deter persons from committing wilful and corrupt perjury, or subornation of perjury, it is enacted, "That besides the punishment to be inflicted by law for so great crimes, it shall be lawful for the court or judge before whom any person shall be convicted of *wilful and corrupt* perjury, or subornation of perjury, to order such person to be sent to some house of correction, for a time not exceeding seven years, there to be kept to hard labour during the time, otherwise to be transported for a term not exceeding seven years, as the court shall think proper; therefore judgment shall be given, that the person convicted shall be committed or transported accordingly, besides such punishment as shall be adjudged to be inflicted on such person agreeable to the laws in being; and if transportation be directed, the same shall be executed in such manner as is provided by law for transportation of felons; and if any person so committed or transported shall voluntarily escape or break prison, or return from transportation before the expiration of the time, such person being lawfully convicted shall suffer death as a felon, and shall be tried for such felony in the county where he so escaped, or where he shall be apprehended."

Stat. 23 Geo. 2. c. 11. s. 1. In every information or indictment for perjury, it shall be sufficient to set forth *the substance of the offence charged*, and by what court, or before whom the oath was taken (*averring such court or person to have authority to administer the same*) together with the proper averment to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding; and without setting forth the commission or authority of the court or person before whom the perjury was committed.

Sec. 2. In every information or indictment for subornation of perjury, it shall be sufficient to set forth *the substance of the offence charged*, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, and without setting forth the commission or authority of the court or person before whom the perjury was committed, or agreed to be committed.

Sec. 3. It shall be lawful for any justice (sitting the court, or within 24 hours after) to direct any person examined as a witness before them, to be prosecuted for perjury, in case there appear a reasonable cause; and to assign the party injured, or other person undertaking such prosecution counsel, who shall do their duty without fee. And every prosecution so directed shall be carried on without payment of any tax, and without payment of any fees in court, or to any officer of the court. And the clerk of assize, or his associate or prothonotary, or other officer of the court attending when such prosecution is directed, shall without fee give the party injured, or other person undertaking such prosecution, a certificate of the same being directed, with the names of the counsel assigned him; which

which certificate shall be deemed sufficient proof of such prosecution having been directed. Provided, that no such direction or certificate shall be given in evidence upon any trial against any person upon a prosecution so directed.

Perjury and subornation excepted out of the general pardon, 20 Geo. 2. c. 52. s. 19, 21.

Permissive Waste. Waste is either voluntary, which is a crime of commission, as by pulling down a house; or it is *permissive*, which is a matter of omission only, as by suffering it to fall for want of necessary reparations. *Black. Com.* 2 V. 281.

Permit, (from *permitto*) Is a licence for persons to pass with and sell goods, on having paid the custom duties for the same. See *Customs*.

Permutatione archidiaconatus & ecclesiae eidem annexae cum ecclesia & praebenda, Is a writ to an ordinary, commanding him to admit a clerk to a benefice, upon exchange made with another. *Reg. Orig.* 307.

Perannancy, (from the Fr. *prendre*.) Signifies a taking or receiving; as *tithes in perannancy*, are tithes taken or that may be taken in kind.

Perpetrator of Profits, Is he who receives the profits of lands, &c. and is all one with *cessui que use*. Stat 1 Hen. 7. cap. 1. 1 Rep. 123. The King has the perannancy of the profits of the lands of an outlaw, in personal actions; and by seizure shall hold against the alienation of such outlaw, &c. *Raym.* 17. See *Co. Litt.* 589. b. and 12 R. 2. c. 15. and *Black. Com.* 2 V. 163.

Perparts, A part of the inheritance. — *Tanquam eram quae sibi descendit in perpartem de hereditate*, &c. *Fleta*, lib. 2. c. 54. par. 19.

Perpetuating the Testimony of Witnesses. If witnesses to a disputable fact are old and infirm, it is usual to file a bill to perpetuate the testimony of those witnesses, altho' no suit is depending; for, it may be, a man's antagonist only waits for the death of some of them to commence his suit. See *Black. Com.* 3 V. 450.

Perpetuity, As it is a legal term of art, is the limiting an estate either of inheritance or for years, so as to render it *unalienable longer than for a life or lives* in being at the same time, and some short or reasonable time after. 2 *Wms. Rep.* 688.

Perpetuities are absolute or qualified. And estates-tail from the time of the statute *de donis*, till common recoveries were found out, were looked upon as perpetuities. 12 *Mod.* 282.

A perpetuity is, where if all who have interest join, yet they cannot bar or pass the estate. But if by concurrence of all having interest the estate-tail may be barred, it is no perpetuity. *Ch. Cases* 213.

A perpetuity is a thing *odious in law*, and destructive to the commonwealth; it would put a stop to the commerce, and prevent the circulation of the property of the kingdom. *Vern.* 164.

Every executory devise is a perpetuity as far as it goes, i. e. an estate unalienable, tho' all mankind join in the conveyance. 1 *Salk.* 229.

A. seised in fee gives his lands after his death without issue male to B. in tail male, until he or they effectually go about to do any acts to alter or discontinue this estate-tail, and then to C. and the heirs male of his body, with several remainders over; the deviser dies without issue; B. enters; C. dies leaving issue D. B. levies a fine; D. enters; and the question was, if the entry was good? Resolved. That *this was a perpetuity and not allowable, being repugnant to law*; for by such a limitation an estate-tail cannot be determined and given to another; for by the fine the remainder is discontinued and divested, so as D. cannot enter; for it is no limitation to enter but after the effectual going about to do any acts, &c. and it is not effectual till the act done; and when it is done the remainder is discontinued, and then he cannot enter. *Cro. J.* 696. See *Vern.* 161.

It is absolutely against the constant course of Chancery to decree a perpetuity, or give any relief in that case. 1 *Chan. Rep.* 144.

Trustees of a term limited over in tail, remainder in tail, were decreed in Chancery to convey the estate over; for otherwise there would be a perpetuity. *Sid.* 37.

The father settles land on his son in tail male, and takes bond from him, that he will not dock the entail; decreed the bond good. Had not the son agreed to give the bond, the father might have made him only tenant for life; and tho' the alienation is not made by the son, but by his issue, the bill was dismissed with costs. 2 *Vern.* 233.

An attempt to make a perpetual succession of estates for life is vain and not practicable. 2 *Vern.* 738.

Perpetuity of the King. The law ascribes to the King, in his *POLITICAL CAPACITY*, an absolute immortality. THE KING NEVER DIES. *Henry, Edward, or George* may die; but the King survives them all. For immediately upon the decease of the reigning Prince in his *natural capacity*, his Kingship or imperial dignity, by act of law, without any *interregnum* or interval, is vested at once in his heir; who is, *eo instanti*, King to all intents and purposes. And so tender is the law of supposing even a possibility of his death, that his *natural dissolution* is generally called his *demise*; *dimissio regis, vel coronae*: an expression which signifies merely, a *transfer of property*; for, as is observed by *Plowden*, (177. 234.) when we say the demise of the crown, we mean only that in consequence of the disunion of the King's body natural, from his body politick, the kingdom is transferred or demised to his successor; and so the royal dignity remains perpetual. Thus too, when *Edward the Fourth*, in the tenth year of his reign, was driven from his throne for a few months by the house of *Lancaster*, this temporary transfer of his dignity was denominated his *demise*; and all process was held to be discontinued, as upon a natural death of the King. *Black. Com.* 1 V. 249.

Per quae servitia, Is a judicial writ issuing from the note of a fine, and lieth for cognicee of a manor, feigniory, chief rent, or other services to compel him who is tenant of the land at the time of the note of the fine levied, to attorn unto him. *West. Symbol. part 2. tit. Fines, sect. 126.* *Old Nat. Brew.* 155. See 16 *Abr. tit. Per quae servitia*.

Perquisite, (Perquisitum) Is any thing got by industry or purchased with money, different from that which descends from a father or ancestor; and so *Bracon* uses it, when he says, *Perquisitum facere*, lib. 2. cap. 30. num. 3. & lib. 4. c. 22.

Perquisites of Courts, Are commonly those profits which arise to lords of manors, from their court-baron, above the yearly revenue of the land; as fines of copyholds, heriots, amerciaments, &c. *Perk.* 20, 21. *Perquisites of Officers.* See *Fees*.

Per quod consortium amisit, And *per quod servitium amisit*, are words necessary in declarations for trespass, &c. where a man's wife or servant is beaten, or taken from him, by which means he loses their service, &c. 2 *Lill. Abr.* 595, 596.

Person, A man or woman; also the state or condition, whereby one man differs from another.

Person, injuries to, see *Black. Com.* 3 V. 119, &c.

Personable, (personabilis) Signifies as much as enabled to maintain plea in court: as for example, the defendant was judged personable to maintain this action. *Old Nat. Brew.* 142. and in *Kitchen*, 214. The tenant pleaded, that the wife was an *alien*, born in *Portugal*, and judgment was demanded whether she should be answered: the plaintiff saith, she was made personable by parliament, that is, as the *Civilians* would speak it, *Habere personam standi in judicio*. Personable is also as much as to be of capacity to take any thing granted or given. *Plowd.* 27.

Personal, (personalis) Being joined with the substantives, things, goods or chattels, as things personal, goods personal, chattels personal; signifies any *moveable thing*, quick or dead: so it is used in *West Symbol, part 2. sect. 58.* in these words: theft is an unlawful felony taking away another man's moveable personal goods, so also 61. And *Kitchen*, 139. saith, Where personal things shall be given to a corporation, as a horse, a cow, sheep, or other goods, &c. And *Staundf. Pl. Cor. fol. 25.* *Contradictio rei alienae*, is to be understood of things personal; for in things real it is not felony, as the cutting of a tree is not felony. See *Chattels*, and *Black. Com.* 2 V. 384, 387.

Personal Action, (actio personalis) Is that which one man may have by reason of a contract for money or goods against another: it is such an action whereby a debt, goods and chattels are demanded, or damages for them; or damages for a wrong done to a man's person. *Terms de Ley.* In the *Civil-law*, it is called *actio in personam*, and is brought against him who is bound by covenant, to grant or to do any thing, &c. And in our law, *Actio personalis moritur cum persona.* 1 Inst. 53.

Action of debt lieth not against executors, upon a contract for the eating and drinking of the testator; for that action, in such case dieth with him. 9 Rep. 87. If a person commit a battery or trespass, and he or the person beaten, &c. die; the action dieth, and is gone. *Noy's Max.* 5. An executor cannot bring an appeal, for larceny, from the testator; for it is a meer personal action, vested in the testator, and dies with him as all actions for torts do. *H. P. C.* 184. *S. P. C.* 50. And an appeal of death is a personal action given to the heir, in respect to his immediate relation to the person killed; and like other personal actions, shall die with the person. 2 Hawk. P. C. 165. See *Black. Com.* 3 V. 117, 302.

Personal Security, The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation, for which see *Black. Com.* 1 V. 129, &c.

Personal Tithes, Are tithes paid of such profits as come by the labour of a man's person; as by buying and selling, gains of merchandise, and handicrafts, &c. See *Black. Com.* 2 V. 24.

Personalty, (Personalitas) Is an abstract of personal: the action is in the personalty, i. e. it is brought against the right person, or the person against whom in law it lies. *Old Nat. Br.* 92. Or it is to distinguish actions and things personal, from those that are real.

Personate, To represent by a fictitious or assumed character, so as to pass for the person represented. *John.*

A. had a warrant to arrest J. S. and A. demanded of a stranger what his name was, who said his name was J. S. whereupon A. arrested him. The stranger brought false imprisonment; and adjudged it lay; for the bailiff ought at his peril to take notice of the party. *Mo.* 457.

If one of my name levies a fine of my land in my name, I may well confess and avoid this fine, by shewing the special matter. But if a stranger, who is not of my name, levies a fine of my land in my name, I shall not be received to aver that I did not levy the fine, but another in my name; for that is merely contrary to the record; and so it is of a recognizance, and other matters of record. But when the fraud appears to the court, they may enter a vacat on the roll, and so make it no fine, altho' the party cannot avoid it by averment, during the time it remains a record. *Cro. Eliz.* 531.

B. was taken in execution upon a recognizance of bail, and he made it appear to the court, that he never acknowledged the recognizance, but was personated by another; and thereupon it was moved, that the bail might be vacated, and he discharged, as was done in *Cotton's case.* 2 Cro. 256. But the court said since 21 Jac. cap. 26. by which this offence was made felony without clergy, it is not convenient to vacate it until the offender is convicted; and so it was done in *Spicer's case*; wherefore it was ordered, that B. should bring the money into court, and be let at large to prosecute the offender. *Twisden* said it must be tried in *Middlesex*, tho' the bail was taken at a judge's chambers in *London*, because filed here, and the entry is *venit coram Domino Rege*, &c. so it differs from a recognizance acknowledged before Lord *Hobart*, upon 23 H. 8. at his chambers, and recorded in *Middlesex*; there the *scire facias* may be either in *London* or *Middlesex*. *Hob.* 195, 196. *Ven.* 301. *Mod.* 46. *S. P. Cockerel* who personated *Besley* was hanged at *Tyburn*, but the rope was immediately cut; and afterwards *Besley* on motion had restitution of his goods in the hands of the sheriff. 2 Jo. 64.

A commission of rebellion was awarded against A. whereupon B. came before the commissioners and affirmed himself to be the person. The commissioners apprehended him by virtue of their commission; but *per Hale*

Ch. B. the commissioners have no warrant to take him by their commission; his affirming himself to be the person will not excuse them in false imprisonment, as has been held on executing a *capias*. *Hard.* 323.

As to personating others in courts, &c. and proprietors of stock, see *Black. Com.* 4 V. 128, 246.

Persons, Are divided by law into either natural persons, or artificial. Natural persons are such as the God of Nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic. See *Black. Com.* 1 V. 123, 467.

As to the rights of persons, see ib. 122. &c.

Perticata terræ, The fourth part of an acre. See *Perib.*

Perticulas, Poor scholars of the *Ile of Man*. The King granted to L. Macguin de insula de Man scholarum, quandam elemosynam vocat. particulas, ad sustentationem cuiusdam pauperis scholaris de insula predicta ad exercendum. *Scholas, per progenitores nostros quondam Reges Angliæ datam & concessam.* Pat. Hen. 4.

Perdite, According to *Sommer* signifies *Palatii atrium* vel area illa a fronte *Aulæ Westm.* hodie the palace yard vulgo nuncupata. *Sommer.* Gloss. See his Gloss. in 10 scriptores, verbo *Triforium*. And see *Wood's Hist. of Oxford*, 2 Jar. fol. 6. See also *Parvise*.

Peta, Pensa, Pesa, A wcy or weigh, or certain weight and measure of cheese and wool, &c. containing two hundred and fifty-six pounds. *Corwell.*

Pesage, (Pesagium) A custom or duty paid for weighing merchandise, or other goods.—*Gulfridus Plantagenet Regis Henrici filius, Dux Britannię & Comes Richmundiæ, Dedit Thronagium & Pesagium de Nundinis Sancti Botulphi, &c.* *Selden's Tit. Hen.*

Pesarius, A weigher. *Corwell.*

Pessona, Mast of oaks, &c. or money taken for mast, or feeding hogs. *Mon. Ang. tom.* 2. p. 213. See *Mast*.

Pesturable, Pestarble, or Pestarable Places, Seem to be such wares or merchandize as pester, and take up much room in a ship. 32 H. 8. c. 14.

Peter-corn, Is mentioned in some of the ancient registers of our bishops, particularly in that of St. Leonard de Ebor, which contains a grant thereof by King *Atthelstane*, &c. *Collect. Dodsw. M.*

Peter-pence, (Denarii Sancti Petri) Otherwise called in the Saxon tongue *Romefob*, the fee of Rome, or due to Rome; also *Romefot* and *Rome-pennyng*, was a tribute given by *Inas*, King of the *West-Saxons*, being in pilgrimage at Rome, in the year of our Lord 720. which was a penny for every house. *Lamb.* Explication of Saxon Words, Verbo Nummus. And the like given by *Offa*, King of the *Mercians*, thro' his dominions, in anno 794. not as a tribute to the Pope, but in sustentation of the English school or college there; and it was called *Peter-pence*, because collected on the day of St. Peter ad Vincula, which was a penny for every house. *Spelm. de Circul.* tom. 1. fol. 2. 3. And in St. Edward's Laws, num. 10. where we may read these words, *Omnes qui habent 30. denariatus vivæ pecuniæ in domo sua de suo proprio, Anglorum lege dabit denarium Sancti Petri, & lege Danorum dimidium marcam; iste vero debet summoniri in solennitate apostolorum Petri & Pauli & collegii ad festivitatem quæ dicitur ad Vincula, ita ut ultra illum diem non detineatur, &c.* See also King *Edgar's Laws*, 78. c. 4. which contain a sharp constitution touching this matter. *Stow*, in his *Annals*, p. 67. saith, that he who had twenty pennyworth of goods of one sort in his house, was to give a penny at *Lammas* yearly. See *Romefot*.

It was prohibited by *Edw.* 3. and by 25 H. 8. c. 21. But it revived 1 & 2 Ph. & Mar. c. 8. and was wholly abrogated 1 Eliz. c. 1. See *Black. Com.* 4 V. 106.

Peter ad vincula, Mentioned in the *Stat.* 4 Ed. 4. cap. 1, &c. See *Gula of August*.

Petition, (Petitio) A supplication made by an inferior to a superior, and especially to one having jurisdiction. *S. P. C.* c. 15. It is used for that remedy, which the subject hath to help a wrong done by the King, who hath a prerogative not to be sued by writ: in which sense it is either general, That the King do him right, whereupon follows a general indorsement upon the same, *Let right be done*

done the party; or it is special, when the conclusion and indorsement are special, for this or that to be done, &c. *Standf. Prærog. c. 22.* See *Black. Com. 3 V. 256.*

By statute, the soliciting, labouring or procuring the putting the hands or consent of above twenty persons to any petition, to the King, or either House of Parliament, for alterations in church or state; unless by assent of three or more justices of peace of the county, or a majority of the grand jury, at the assizes or sessions, &c. and repairing to the King or Parliament to deliver such petition, with above the number of *ten* persons, is subject to a fine of 100*l.* and three months imprisonment, being proved by two witnesses, within six months, in the court of B. R. or at the assizes, &c. *13 Car. 2. c. 5.* And if what is required by this statute be observed, care must be taken that petitions to the King contain nothing which may be interpreted to reflect on the administration; for if they do, it may come under the denomination of a libel: and 'tis remarkable, that the petition of the city of London, for the sitting of a parliament was deemed libellous; because it suggested that the King's dissolving a late parliament was an obstruction of justice. *Read. Stat. Vol. 4, 353.* Also the petition of the seven bishops, sent to the Tower by James II. was called a libel, &c. *3 Mod. 212.* To subscribe a petition to the King, *to frighten him into a change of his measures, intimating that if it be denied, many thousands of his subjects will be discontented, &c.* is included among the contempts against the King's person and government, tending to weaken the same, and punishable by fine and imprisonment. *1 Harok. P. C. 60.*

Petition in Chancery, Is a request in writing, directed to the Lord Chancellor or Master of the Rolls, shewing some matter whereupon he prays somewhat to be granted him. *P. R. C. 269.*

Most things which may be moved for of course, may be petitioned for.

Sometimes it is upon a collateral matter only, as it has relation to some precedent suit, or to an officer of the court; as to have a clerk or solicitor's bill taxed, or to oblige him to deliver up papers. *P. R. C. 270.*

The Master of the Rolls is not to be petitioned for rehearings, but the Chancellor; also the Chancellor only is to be petitioned touching pleas, demurrers or exceptions, or touching decrees or special orders made before the Chancellor. In most cases of petition, the Master of the Rolls may be applied to. *P. R. C. 270.* See *16 Vin. Abr. 337, 338.*

Petition of Right. In the reign of Charles I. there was a famous petition of right: that none should be compelled to make or yield any gift, loan, benevolence, tax, and such like charge, without consent by act of parliament; nor upon refusal so to do, be called to make answer, take any oath not warranted by law, give attendance, or be confined, or otherwise molested concerning the same, &c. And that the subject should not be burdened by the quartering of soldiers or mariners; and all commissions for proceeding by martial law, to be annulled, and none of like nature to be issued, lest the subject (by colour thereof) be destroyed or put to death, contrary to the laws of the land, &c. See *Stat. 3 Car. 1. c. 1.* See *Black. Com. 1 V. 128. 4 V. 430.*

As to what petitions are declared lawful by statute, see *1 W. & M. sess. 2. c. 2.* And as to the right of petitioning, see *Black. Com. 1 V. 143. 4 V. 147.*

Petit Cape. See *Cape.*

Petit Larceny. See *Larceny.*

Petit Serjeanty, Parva Serjeantia. To hold by *petit serjeanty*, is to hold lands or tenements of the King, yielding him a knife, a buckler, an arrow, a bow without a string, or other like service, *at the will of the first feoffor*; and there belongs not ward, marriage or relief. None can hold by grand or petit serjeanty, but of the King. But see *12 Car. 2. c. 24.* and *Black. Com. 2 V. 81.*

Petit Session. In both corporations and counties at large, there is sometimes kept a special or petty sessions, by a few justices, for dispatching smaller business in the neighbourhood between the times of the general sessions; as, for licensing alehouses, passing the accounts of parish officers, and the like. *Black. Com. 4 V. 269.*

Petit Treason, (Parva Proditio) In French *petit trahison*, i. e. *proditio minor*, treason of a lesser kind, for as high treason is an offence against the security of the commonwealth, so is petit treason, tho' not so expressly: petit treason is, if a servant kills his master, a wife her husband, a secular or religious man his prelate. *25 Ed. 3. c. 2.* whereof see more in *Staundf. Pl. Cor. lib. 1. c. 1. Crompton's Justice of Peace 2.* See *Treason*, and *Black. Com. 4 V. 75, 203.*

Petra, Is a sort of weight, we call it a *stone*, but differing in many places of England; in some places consisting of 16, in others of 14, 12 or 8 pounds. *Cowell.*

Petraria, Is sometimes taken for a quarry of stone, and in other places for a great gun called *petrard*: 'tis often mentioned in old records and historians in both senses. *Cowell.*

Pews, In a church, may descend by immemorial custom, without any ecclesiastical concurrence, from the ancestor to the heir. *3 Inst. 202. 12 Rep. 105. Black. Com. 2 V. 429.*

Pharos, (from *Pharus*, a small island in the mouth of the Nile, wherein stood a high watch tower) A watch-tower or sea-mark: and no man can erect a *Pharos*, light-house, beacon, &c. without lawful warrant and authority. *3 Inst. 204.*

Physicians. No person within London, or seven miles thereof, shall practise as a physician or surgeon, without licence from the bishop of London, or dean of St. Paul's; who are to call to their assistance four doctors of physick, on examination of the persons, before granted: and in the country, without licence from the bishop of the diocese, on pain of forfeiting 5*l.* a month. *3 Hen. 8. c. 11.*

By *14 & 15 H. 8. c. 5.* The charter for incorporating the college of physicians is confirmed; they have power to choose a president, and have perpetual succession, a common seal, ability to purchase lands, &c. Eight of the chiefs of the college are to be called elects, who from among themselves shall choose a president yearly: and if any practise physick in the said city, or within seven miles of it, without licence of the college *under their seal*, he shall forfeit 5*l.* Also persons practising physick in other parts of England, are to have letters testimonial from the president and three elects, unless they be graduate physicians of Oxford or Cambridge, &c.

The *32 H. 8. c. 10.* ordains, that four physicians (called censors) shall be yearly chosen by the college, to search apothecaries wares, and have an oath given them for that purpose by the president; apothecaries denying them entrance into their houses, &c. incur a forfeiture of 5*l.* And physicians refusing to make the search are liable to a penalty of 40*s.* And every member of the college of physicians is authorized to practise surgery. Popish recusants are disabled to practise physick, or to use the trade of an apothecary, &c. under penalties. *3 Jac. 1. c. 5.* The four persons called censors, annually chosen by the president and college of physicians, calling to their assistance the wardens of the apothecaries company, or one of them, are empowered to enter into the houses, shops, or warehouses of apothecaries, &c. and examine medicines, and to destroy those that are not fit for use; but subject to appeal to the college of physicians, &c. *10 Geo. 1. c. 20.*

In the case of Dr. Bonham, *7. Jac. 1.* is shewn the power of the college of physicians, in punishing persons for practising physick without licence: they imprisoned the doctor for practising without a licence; but it was adjudged that they could not lawfully do it, for in such case they had no power by the statute to commit, but they ought to sue for the penalty of 5*l.* per month, *quædam*, &c. But in case of male practice, the censors have power to commit, for they may in such case fine and imprison by their charter, and they are judges of record, and not liable to an action for what they do by virtue of their judicial power. *8 Rep. 107. Carth. 494.*

Apothecaries taking upon them to administer physick, without advice of a doctor, has been adjudged practising physick within the statutes; the proper business of an apothecary being *to præpare the prescriptions of the doctor*: the practice of physick was said to consist in judging of the disease and constitution of the patient; and of the proper remedy

remedy for the distemper; and in directing the application of the remedy. And so it was resolved, that no fee was given the apothecary. 2 *Salk.* 451. But this judgment was afterwards reversed in the House of Lords. *Mod. Caf.* 44.

It has been holden, that if a person not duly authorised to be a physician or surgeon, undertakes a cure, and the patient dies under his hands, he is guilty of felony; but 'tis said not to be excluded the benefit of clergy. 1 *Hawk. P. C.* 87.

One who has taken his degree of doctor of physick in either of the universities, may not practise in London, and within seven miles of the same, without licence from the college of physicians; by reason of the charter of incorporation, confirmed by 14 & 15 *Hen. 8. c. 5.* penn'd in very strong and negative words. As to the testimonials granted by the universities on a person's taking the doctor's degree, these may have the nature of a recommendation, and give a man a fair reputation, but confer no right; consequently those statutes which have confirmed the privileges of the universities would revive or confirm nothing but the reputation that this testimonial might give such graduates. And as to the last clause of this statute, that "none shall practise in the country without licence from the president and three elects, unless he be a graduate of one of the universities;" all the inference from that would be, that possibly two licences may be necessary where a person is not a graduate. In the case of *Dr. Lewet*, Lord Ch. J. *Holt* did not think this question worth being found specially. The college of physicians, without doubt, are more competent judges of the qualifications of a physician than the universities; and there may be many reasons for taking particular care of those who practise physick in London. 10 *Mod.* 353, 354.

For more learning on this subject, see 16 *Vin. Abr. tit. Physicians*, and *Black. Com.* 3 V. 122. 4 V. 197.

Philosopher's Stone. Henry VI. granted letters patent to certain persons, who undertook to find out the philosopher's stone, and to change other metals into gold, &c. to be free from the penalty of the *Stat. 5 Hen. 4.* made against the attempts of chymists of this nature. *Put.* 34 *Hen. 6.* 3 *Inst.* 74. See *Multiplication of Gold and Silver.*

Picards, A sort of boats of 15 tuns or upwards, used on the river *Severn*, mentioned 34 & 35 *H. 8. c. 3.* Also a fisher-boat, 13 *Eliz.* 11.

Picage, (*picagium*, from the Fr. *piquer*, i. e. *effodere*) A consideration, paid for the breaking up ground to set up booths, stalls or standings, in fairs; payable to the Lord of the soil.

Picte, (*picellum*) A small parcel of land inclosed with a hedge; a little close: this word seems to come from the Italian *picciola*, i. e. *parvus*; and in some parts of England it is called *pigbel*.

Pie-powder Court, (*curia pedis pulverisati*) from the French *pie*, i. *pes*, and *poudreux* i. *pulverulentus*; Is a court held (*de hora in horam*) in fairs, to administer justice to buyers and sellers, and for redress of disorders committed in them; so called from the dusty feet of the suitors; or according to Sir *Edward Coke* (4 *Inst.* 272.) because justice there is done as speedily as dust can fall from the foot. Upon the same principle that justice among the Jews was administered in the gate of the city, that the proceedings might be the more speedy, as well as publick. *Ruth. c. 4.* But the etymology given us by a learned modern writer is much more ingenious and satisfactory; it being derived, according to him, from *pie* *puldreaux*, a pedlar, in old French, and therefore signifying the court of such petty chapmen as resort to fairs or markets. *Barring. Observ. on Stat.* 337. *Black. Com.* 3 V. 32. So, *Skene de verbor. signif. verbo Pede-pulverosus* says, the word signifies a vagabond; especially a pedlar, who hath no dwelling, therefore must have justice summarily administered to him, viz. within three ebbings and three flowings of the sea. *Brass. lib. 5. tract. 1. c. 6. num. 6.* calleth it *Justitiam pedpoudreus*. Of this court, read the statute 17 *Ed. 3. c. 2. 4 Inst.* 272. and *Crompt. Jur.* 221. See *Justices of the Pavilion*. This among our old Saxons was called *ceapung-gemot*, i. e. a court for merchandize, or handling

matters of buying and selling. 'Tis mentioned in *Doct. and Student*, c. 5. who tells us, 'tis a court incident to fairs and markets, to be held only during the time that the fairs are kept. *Corwell.*

The fair of *St. Giles*, held on the hills of that name, near the city of *Winchester*, by virtue of letters patent of *K. Edw. 4.* hath a court of piepowder of a transcendent jurisdiction; the judges whereon are called *justices of the pavilion*, and have their power from the bishop of *Winchester*. *Prin. Animad.* on 4 *Inst.* 191. See *Court of Piepowder*, and *Black. Com.* 3 V. 32, &c. See 7 *Vin. Abr.* p. 16.

Pics, *Freres pics*, Were a sort of monks; so called, because they wore black and white garments, like magpies. They are mentioned by *Walsingham*, p. 124.

Pictantia, A small portion of meat and drink, distributed to the members of some collegiate body, or other people, upon a high festival, or stated anniversary. *Libr. Statut. Eccl. Paul. Lond. A. D.* 1298.

Pictantiarius, The pittancer or officer in collegiate churches, who was to distribute the several pittances at such times, and in such proportions as the several founders or donors had appointed. See *Pittance*.

Pig of Lead. See *Fother.*

Pigeons. Every person who shall shoot at and kill a Pigeon, may be committed to the common gaol for three months, by two or more justices of the peace, or he shall pay 20s. to the Poor of the Parish. *Stat. 1 Jac. 1. c. 27.* And to steal Pigeons in a Pigeon-house, shut up so that the owner may take them, is felony. 1 *Hawk. P. C.* 94.

Pigeon-house, Is a place for safe keeping Pigeons. A lord of a manor may build a Pigeon-house or Dovecote upon his land, parcel of the manor; but a tenant of the manor cannot, without the lord's licence. 3 *Salk.* 248. Formerly none but the lord of the manor, or the parson, might erect a Pigeon-house; tho' it has been since held, that any freeholder may build a Pigeon-house, on his own ground. 5 *Rep.* 104. *Cro. Eliz.* 548. *Cro. Jac.* 382, 440. A person may have a Pigeon-house, or Dovecote, by prescription. *Game-Law*, 2 *Pa.* 133. See *Nu-jance*.

Pila, Is that side of money which is called *pile*, because it is the side on which there was an impression of a church built on piles; and he who brings an appeal of robbery against another, must shew the certain quantity, quality, price, weight, &c. *valorem & pilum*, where *pilum* signifies *figuram monetæ*. *Fleta*, lib. 1. c. 39.

Pilettus, Was antiently used for an arrow, as had a round knob, a little above the head, to hinder it from going far into a mark; from the Lat. *pila*, which signifies generally any round thing like a ball.—*Et quod forestarii non portabunt sagittas barbata, sed piletos.* *Chart. 31 H. 3.* Persons might shoot without the bounds of a forest with sharp or pointed arrows; but within the forest, for the preservation of the deer, they were to shoot only with blunts, bolts, or Piles: and *sagitta pileta* was opposed to *sagitta barbata*; as blunts to sharps, in rapiers. *Matt. Paris.*

Pileus suppositationis, A cap of maintenance. Pope *Julius* sent such a cap, with a sword, to *Hen. 8.* anno 1514. *Holling.* 827. but there is mention made of such a cap by *Hovedon*, pag. 656. at the coronation of *Richard the First.* *Corwell.*

Pillory, (*collistrigium*, *collum stringens*; pilloria from the Fr. *pilleur*, i. e. *defeculator*, or *felori* derived from the Greek *Πῆλν*, *janua*, a door, because one standing on the pillory, puts his head, as it were, thro' a door, and *Opᾶν*, *video*) Is an engine made of wood to punish offenders, by exposing them to publick view, and rendering them infamous. There is a statute of the pillory, 5 *H. 3.* And by statute, it is appointed for bakers, forcellers, and those who use false weights, perjury, forgery, &c. 3 *Inst.* 219. Lords of leets are to have a pillory and tumbrel, or it will be cause of forfeiture of the leet; and a vill may be bound by prescription to provide a pillory, &c. 2 *Hawk. P. C.* 73.

Pilot, Is he who hath the government of a ship, under the master. Pilots of ships, taking on them to conduct any ship from *Dover*, &c. to any place up the river

Thames, are to be first examined and approved by the master and wardens of the society of *Trinity House*, &c. or shall forfeit 10*l.* for the first offence, 20*l.* for the second, and 40*l.* for every other offence; one moiety to the informer, the other to the master and wardens; but any master or mate of a ship, may pilot his own vessel up the river: and if any ship be lost, thro' the negligence of any pilot, he shall be for ever after disabled to act as a pilot. 3 *Geo.* 1. c. 13. Also the *Lord Warden of the Cinque Ports* may make rules for government of pilots, and order a sufficient number to ply at sea to conduct ships up the *Thames*. 7 *Geo.* 1. c. 21. No person shall act as a pilot on the *Thames*, &c. (except in collier ships) without licence from the master and wardens of *Trinity House* at *Deptford*, on pain of forfeiting 20*l.* And pilots are to be subject to the government of that corporation; and pay antient dues not exceeding 1*s.* in the pound out of wages, for the use of the poor thereof. *Stat.* 5 *G.* 2. c. 20.

By the laws of *France*, no person shall be received as a pilot, till he has made several voyages, and passed a strict examination; and after that, on his return in long voyages, he is to lodge a copy of his journal in the *Admiralty*: and if a pilot occasion the loss of a ship, he is to pay 100 *livres* fine, and be for ever deprived of the exercise of *pilotage*; and if he doth it designedly, be punished with death. *Lex Mercat.* 70, 71.

The laws of *Oleron* ordain, That if any pilot designedly misguide a ship, that it may be cast away, he shall be put to a rigorous death, and hung in chains: And if the lord of the place where a ship be thus lost, abet such villains in order to have a share in the wreck, he shall be apprehended, and all his goods forfeited for the satisfaction of the persons suffering; and his person shall be fastened to a stake in the midst of his own mansion, which being fired on the four corners, shall be burnt to the ground, and he with it. *Leg. Ol.* c. 25. And if the fault of a pilot be so notorious, that the ship's crew see an apparent wreck, they may lead him to the hatches, and strike off his head; but the Common law denies this hasty execution: An ignorant pilot is sentenced to pass thrice under the ship's keel, by the laws of *Denmark*. *Lex Mercat.* 70.

Masters of ships shall not oblige pilots to pass thro' dangerous places, or to steer courses against their wills; but if there be a difference in opinions, the matter may in such case be governed by the advice of the most expert mariners. *Ibid.* Before the ship arrives at her place or bed, while she is under the charge of the pilot, if she or her goods perish, or be spoiled, the pilot shall make good the same: But after the ship is brought to the harbour, then the master is to take charge of her, and answer all damages, except that of the act of God, &c. *Leg. Ol.* cap. 23.

In charter parties of affreightment, the master generally covenants to find a pilot, and the merchant to pay him: And in case the ship shall miscarry thro' the insufficiency of the pilot, the merchant may charge either the master or the pilot; and if he charges the master, such master must have his remedy against the pilot. *Lex Mercat.* 70. See *Lodmanage*. And *Strange* 249. for the construction of the statute relating to the piloting of ships. 3 *Geo.* 1. c. 13. See also 7 *Geo.* 1. c. 21. 5 *Geo.* 2. c. 20. And 4 *Geo.* 3. c. 12.

Pimp-Tenure.—Willielmus Hoppeshort, senet dimidima virgatum terræ in Rockhampton de Domino Rege, per servitium custodiendi sex demifellas, scil. meretricos, ad usum Domini Regis. 12 Ed. 1. viz. by Pimp-Tenure. Blount's Ten. 39.

Pinnas bibere, Or *Ad pinnas bibere*. The old custom of drinking brought in by the *Danes*, was to fix a pin in the side of the wassal bowl, and to drink exactly to the pin; as now is practised in a sealed glass, &c. This kind of drunkenness was forbid the clergy, in the council at *London*, Anno 1102. *Presbyteri non eant ad potationes, nec ad pinnas bibant.* *Cowell.*

Pipe, (*Pipa*,) Is a roll in the Exchequer, otherwise called *The Great Roll*, anno 37 E. 3. c. 4. See *Clark of the pipe*. It is also a measure of wine, containing two

hogheads, or half a ton, that is, one hundred and twenty six gallons; mentioned in 1 R. 3. c. 3.

Piquant, A *French* word for sharp, made use of to express malice or rancour against any one. *Law Fr. Di.*

Pirates, (*Pirate*) Are common sea rovers, without any fixed place of residence, who acknowledge no sovereign and no law, and support themselves by pillage and depredations at sea: But there are instances wherein the word *pirata* has been formerly taken for a sea captain. *Spelm.*

The crime of *piarcy*, or robbery and depredation upon the HIGH SEAS, is an offence against the universal law of society; a pirate being, according to Sir *Edward Coke*, (3 *Inst.* 113.) *hostis humani generis*. As therefore he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: So that every community hath a right, by the rule of self-defence, to inflict that punishment upon him, which every individual would in a state of nature have been otherwise entitled to do for any invasion of his person or personal property. *Black. Com.* 4 V. 71.

Pirates are enemies to all: They are denied succour by the law of nations; and by the Civil law, a ransom promised to a pirate, if not complied with, creates no wrong; for the law of arms is not communicated to such, neither are they capable of enjoying that privilege, which lawful enemies are intitled to in the caption of another. *Lex Mercat.* 183. If a pirate enters a port or haven, and assaults and robs a merchant ship at anchor there; this is not piracy, because it is not done upon the *high sea*; but it is a robbery at the Common law, the act being *infra corpus comitatus*: And if the crime be committed either *super altum mare*, or in great rivers within the realm, which are looked upon as common highways, there it is piracy. *Moor* 756.

It has been held, that piracy being an offence by the Civil law only, shall not be included in a statute speaking generally of felonies, as to benefit of clergy, &c. which shall be construed only of those felonies which are such by our law; as those piracies are which are committed in a port or creek, within the body of a county. 2 *Hawk.* P. C. 345.

If a ship be riding at anchor at sea, and the mariners part in their ship boat, and the rest on shore, so that none are left in the ship; and a pirate attack her, and commits a robbery, it is piracy. 14 *Ed.* 3. And where a pirate assaults a ship, and only takes away some of the men, in order to sell them for slaves; this is piracy: And if a pirate make an attack on a ship, and the master for the redemption is compelled to give his oath to pay a certain sum of money, tho' there be no taking, the same is piracy by the Marine law; but by the Common law there must be an actual taking, as in case of robbery on the highway. *Lex Mercat.* 185. But the taking by a ship at sea, in great necessity, of victuals, cables, ropes, &c. out of another ship, is no piracy; if that other ship can spare them, and paying or giving security therefore. *Ibid.* 183.

A pirate takes goods upon the sea, and sells them, the property is not altered, no more than if a thief on land had stolen and sold them. 27 *Ed.* 3. cap. 13. *Godb.* 193. Yet by the laws of *England*, if a man commit piracy upon the subjects of any other prince, and brings the goods into *England* and sells them in a market-over, the same shall be binding, and the owners be concluded. *Hob.* 79.

When goods are taken by a pirate, and afterwards the pirate making an attack upon another ship, is conquered and taken by the other, by the law marine the admiral may make restitution of the goods to the owners, if they are fellow subjects of the captor's, or belong to any state in amity with his sovereign, on paying the costs and charges, and making the captor an equitable consideration for his service. *Lex Mercat.* 184. If a pirate at sea assault a ship, and in the engagement kills a person in the other ship, by the Common law all the persons on board

board the pirate ship are principals in the murder, altho' none enter the other ship; but by the Marine law, they who give the wound only shall be principals, and the rest accessories, if the parties can be known. *Telv.* 135. It has been holden, that there cannot be an accessory upon the sea, such accessory may be punished by the Civil law before the Lord Admiral: And it was made a doubt, whether an accessory at land to a felony at sea, was triable by the admiral, within the purview of 28 *Hen.* 8. Tho' this is settled by 11 & 12 *W.* 3. which provides that accessories to piracy, before or after, shall be inquired of, tried and adjudged according to the said statute. 2 *Hawk.* 222.

In case the subjects of a prince in enmity with the crown of England, enter themselves sailors on board an English pirate, and a robbery is committed by them, who are afterwards taken; it is felony in the English, but not in the strangers: But in ancient times it was petit treason in the English, and felony in the strangers: And if any Englishman commits piracy upon the subjects of any prince or state in amity with England, they are within the stat. 28 *H.* 8. If the subjects of any nation or kingdom in amity with England shall commit a piracy on the ships or goods of the English, the same is felony, and punishable by this statute: And piracy committed by the subjects of France, or any other country in friendship with us, upon the British seas, is properly punishable by the crown of England only. *Lex Mercat.* 186, 187.

A piracy is attempted on the ocean, if the pirates are overcome, the takers may immediately inflict a punishment, by hanging them up at the main-yard end; tho' this is understood where no legal judgment may be obtained; hence if a ship on a voyage to any part of America, or the plantations there, on a discovery of those parts; is attacked by a pirate, but in the attempt the pirate is overcome; the pirates may be forthwith executed, without any solemnity of condemnation, by the Marine law. *Ibid.* 184.

By the antient Common law, piracy, if committed by a subject, was held to be a species of treason, being contrary to his natural allegiance; and by an alien to be felony only: But now, since the statute of treasons, 25 *Ed.* 3. c. 2. it is held to be only felony in a subject. 3 *Inst.* 113.

Formerly it was only cognizable by the admiralty courts, which proceed by the rules of the Civil law. But, it being inconsistent with the liberties of the nation, that any man's life should be taken away, unless by the judgment of his peers, or the Common law of the land, the statute 28 *Hen.* 8. c. 15. established a new jurisdiction for this purpose; which proceeds according to the course of the Common law. *Black. Com.* 4 *V.* 71.

By stat. 28 *Hen.* 8. c. 15. all robberies committed by pirates, shall be inquired of, heard and determined in any county of England, by the King's commission, as if the offences had been committed on land; and such commission shall be directed to the Lord Admiral, and other persons, as shall be named by the Lord Chancellor, who shall determine such offences after the common course of the laws of the kingdom used for felonies and robberies, &c. and award judgment and execution as against felons for any felony done on the land; and the offenders shall suffer death, loss of lands and goods, as if they had been attainted of such offence committed on land, &c.

This statute doth not alter the offence of piracy, but leaves it as it was before, viz. Felony only by the Civil law; but giveth a trial according to the Common law, and inflicts death, &c. as if the offenders had been convicted of any felony done upon the land. 3 *Inst.* 112. *H. P. C.* 77. And no attainer for this offence corrupts the blood, the statute mentioning only that the offender shall suffer death, loss of lands, &c. as if he were attainted of a felony at Common law; but says not, that the blood shall be corrupted. 3 *Inst.* 112. Likewise the offender is to be tried on the statute, to forfeit his lands, &c. which are not forfeited by the Civil law. 1 *Lill. Abr.*

11 & 12 *W.* 3. c. 7. enacts, That all piracies, committed on the sea, or in any haven, &c. where the admiral hath jurisdiction, may be tried at sea, or on the land, in any of his Majesty's islands, &c. abroad, appointed for that purpose, by commission, under the Great Seal, or seal of the admiralty, directed to such commissioners as the King shall think fit; who may commit the offenders, and call a court of admiralty, consisting of seven persons at least, or for want of seven, any three of the commissioners may call others; and the persons so assembled may proceed according to the course of the admiralty, pass sentence of death, and order execution, &c. And commissions for trial of offences within the Cinque Ports, shall be directed to the warden of the Cinque Ports, and the trial to be by the inhabitants of the ports. And if any natural born subjects or denizens, shall commit piracy against any of his Majesty's subjects at sea under colour of any commission from any foreign prince, they shall be adjudged pirates: If any master of a ship, or seamen give up his ship to pirates, or combine to yield up, or run away with, any ship; or any seaman lay violent hands on his commander, or endeavour a revolt in the ship, he shall be adjudged a pirate, and suffer accordingly; also if any person discover a combination for running away with a ship, he shall be intitled to a reward of 10 *l.* for every vessel of 100 tons, and 15 *l.* if above: And all persons who set forth any pirate, or be assisting to those committing piracy; or that conceal such pirates, or receive any vessel or goods piratically taken, shall be deemed accessory to the piracy, and suffer as principals. The 6 *Geo.* 1. makes the stat. 11 & 12 *W.* 3. c. 7. perpetual.

And by 8 *Geo.* 1. c. 24. Masters of ships trading with pirates, or furnishing them with stores, &c. and persons corresponding with pirates, are declared guilty of piracy; and shall be tried according to 28 *Hen.* 8. and 11 & 12 *W.* 3. and suffer death, forfeit lands, &c. Ships fitted out with design to trade with pirates, and the goods shall be forfeited: And masters of ships, and seamen of ships carrying guns, being attacked by pirates, if they do not defend their ships, shall forfeit their wages, and be imprisoned six months; but seamen wounded in defence of ships against pirates, shall be admitted into Greenwich hospital, &c.

When an English ship shall have been defended by fight against pirates, and any of the officers or seamen be killed or wounded, the judge of the admiralty, or mayor or chief officer of any port, assisted by four merchants, may by process levy a sum not exceeding 2 per cent. of the value of the ship and goods defended, to be distributed among the officers and seamen, or the widows and children of the persons killed. *Lex Mercat.* 186. Pirates are always excepted in general pardons: And indictment for piracy must alledge the fact to be done UPON THE SEA: and have both the words *felonice* and *piratice*, &c.

By 18 *Geo.* 2. c. 30. All subjects who during any war, shall commit hostilities on the sea against any of his Majesty's subjects by colour of any commission from the enemy, or adhere, or give aid to the enemy upon the sea, may be tried as pirates, in the court of Admiralty, on ship-board or on land, and being convicted shall suffer death, &c. as other pirates, &c. by the stat. 11 *W.* 3. But persons convicted on this act, shall not be tried for the same crime as for high-treason; but if not tried on this act, may be tried for high-treason on the stat. 28 *H.* 8. c. 15. Vide *Staunf. P. C.* 10. 3 *Inst.* 112. 2 *Hale's Hist. P. C.* 369, 370: 1 *Hawk. P. C.* 98.

In the construction of 28 *H.* 8. c. 15. the following opinions have been holden:

That it does not alter the nature of the offence, so as to make that, which was before a felony only by the Civil law, now become a felony by the Common law; for the offence must still be alleged as DONE UPON THE SEA, and in no way cognizable by the Common law, but only by virtue of this statute; which, by ordaining that in some respects it shall have the like trial and punishments as are used for felony at Common law, shall not be carried so far as to make it also agree with it in other particulars which are not mentioned; from hence it follows that this offence remains, as before, of a special nature, and that

that it shall not be included in a general pardon of all felonies. 3 *Inst.* 112. 2 *Hale's Hist. P. C.* 370. *Moor*, 756. 3 *Inst.* 112. *Co. Lit.* 391.

From the same ground it follows, that no person in respect of this statute be construed to be, or punished as accessaries to piracy before or after, as they might have been, if it had been made felony by the statute, whereby all those would incidentally have been accessaries in the like cases in which they would have been accessaries to a felony at Common law; therefore accessaries to piracy, being neither expressly named in the statute, nor by construction included, remain as they were before, and were triable by the Civil law, if their offences were committed on the sea; but on the land, by no law, until 11 *Ed. 12 W. 3. c. 7.* for 2 *Ed. 6. c. 24.* which provides against accessaries in one county to a felony in another, extends not to accessaries to an offence committed in no county, but on the sea; but by 11 *Ed. 12 W. 3.* they are triable in like manner as the principals are by 28 *H. 8.* 3 *Inst.* 112. 1 *Hawk. P. C.* 99.

From the same ground it follows that an attainder for this offence corrupts not the blood, for tho' the statute says, that the offender shall suffer such pains of death, &c. as if he were attainted of a felony at Common law, yet it says not, that the blood shall be corrupted. 3 *Inst.* 112. 1 *Hawk. P. C.* 99.

Yet it has been resolved, that an offender standing mute on an arraignment, by force of this statute, shall have judgment of *paine fort & dure*; for the words of the statute are, that a commission shall be directed, &c. to hear and determine such offences after the common course of the laws of the land. 3 *Inst.* 114. *Dyer* 241. *pl.* 49. 308. *pl.* 73.

It hath been holden, that the indictment for this offence must allege the fact to be done *at sea*, and must have the words *felonice* and *piratice*; and that no offence is punishable by virtue of this act as piracy, which would not have been felony if done on the land, consequently taking an enemy's ship, by an enemy is not within the statute. 3 *Inst.* 112. 1 *Roll. Rep.* 175. 1 *Hawk. P. C.* 100.

It is agreed, that this statute extends not to offences done in creeks or ports within the body of a county, because they are and always were, cognizable by the Common law. *Moor* 756. 1 *Roll. Rep.* 175. 1 *Hawk. P. C.* 100.

Piracies on the sea, excepted out of the general pardon, 20 *Geo. 2. c. 52. sect. 13.* See 16 *Vin. Abr. tit. Pirates.*

Pirates Goods. In the patent to the admiral he has granted him *bona piratarum*: The proper goods of pirates only pass by this grant; and not piratical goods. So it is of a grant *de bonis felonum*, the grantee shall not have goods stolen, but the true and rightful owner. But the King shall have piratical goods, if the owner be not known. 10 *Rep.* 109. *Dyer* 269. *Jenk. Cent.* 325.

Piscary, (*Piscaria, vel privilegium piscandi*) Is a right or liberty of *fishyng* in the waters of another person: And there are three sorts of *piscaries*, *libera piscaria*; *Separalis piscaria*; and *communis piscaria*. See *Fishyng*, and *Common of Piscary*. And *Black. Com.* 2 *V.* 34. 39.

Piscarius, Is used in our records for a fishmonger. *Pat.* 1 *E. 3. part. 3. m.* 13.

Pit, Is a hole wherein the Scots used to drown women thieves; and to say condemned to the pit, is as when we say condemned to the gallows. *Skene.*

Pit and Gallows. See *Fossa* and *Furca*.

Pitching-Pence, Money, (commonly a *peny*.) paid for pitching, or setting down every bag of corn, or pack of goods, in a fair or market.

Pittance, (*Pitancia, modicum*) A little repast, or refectiō of fish or flesh, more than the common allowance.

—Johannes Dei Gratia, &c. *Concessimus, &c. In usus pauperum, & ad refectorem monachorum, qui illis diebus officia divina pro defunctis celebrabant, quæ refectio pitancia vocat'*, &c. *Rot. Char. ad Hospital. S. Salvator. Sancti Edmundi, &c. An. 1 Reg. Johan. p. 2.*

Placard, (*Fr. plaquant, Dutch plaacaert*) Hath several significations: In *France*, it is a table, wherein laws, orders, &c. are written and hung up; in *Holland*, it is an

edict or proclamation; also it signifies a writing of safe conduct; with us it is little used, but is mentioned as a licence to use certain games, &c. in the *stat. 2 & 3 P. & M. c. 7.* See 33 *H. 8. c. 6.*

Place, (*Locus*) Where a fact was committed, is to be alledged in appeals of death, indictments, &c. And place is considerable in pleadings, in some cases: Where the law requires a thing to be set down in a certain place, the party must in his pleadings say, it was done there. *Co. Litt.* 282. When one thing comes in the place of another, it shall be said to be of the same nature; as in case of an exchange, &c. *Shep. Epit.* 700. See *Local*.

Placita, Pleas, or pleadings, or debates and trials at law. *Placita* is a word often mentioned in our histories, and law books: At first it signified the publick assemblies of all degrees of men where the King presided, and they usually consulted upon the great affairs of the kingdom, and these were called *generalia placita*, because *generalitas universorum majorum tam clericorum quam laicorum ibidem conveniebat*: This was the custom in *France*, as well as here, as we are told by *Bertinian*, in his *Annals of France*, in the year 767. Some of our historians, as *Simeon of Durham*, and others, who wrote above 300 years afterwards, tells us, that those assemblies were held in the open fields: and that the *placita generalia*, and *curia regis*, were what we now call a parliament: It is true, the lords courts were so called, *viz. Placita generalia*, but often *curiæ generales*, because all their tenants and vassals were bound to appear there.

We also meet with *placitum nominatum, i. e.* the day appointed for a criminal to appear and plead, and make his defence. *Leg. H. 1. cap. 29. 46, 50. Placitum fractum, i. e.* when the day is past. *Leg. H. 1. cap. 59.* Lord Coke tells us, that the word is derived from *placendo, quia bene placitare super omnia placet*: this seems to be a very fanciful derivation of the word: it seems rather to be derived from the German *plats*, or from the Latin *plateis, i. e.* fields or streets where these assemblies or courts were first held. But this word *placita* did sometimes signify penalties, fines, mulcts, or emendations, according to *Gervase of Tilbury*, or the *Black Book* in the Exchequer, *lib. 2. tit. 13. Placita autem dicimus pœnas pecuniarias in quas incidunt delinquentes.* So in the laws of *Hen. 1. cap. 12, 13.* Hence the old rule of custom, *Comes, habet tertium denarium placitorum*, is to be thus understood; the Earl of the county shall have the third part of the money due upon mulcts, fines, and amerçements imposed in the assises and county courts. *Corwell.*

Placitare, i. e. Litigare & causas agere, to plead: And the manner of pleading before the Conquest was, *Coram aldermannis & proceribus, & coram hundredariis, &c.* MS. in B. bl. Cotton.

Placitator, A pleader: *Ralf Flambard* is recorded to be *totius regni placitor.* *Temp. W. 2.* See *supra*, the last clause of *placita*.

Plaint, (*Fr. plainte, Lat. querela*) Is the exhibiting any action, in writing; and the party making his *plaint* is called the *plaintiff*. *Kitch.* 231. A *plaint* in an inferior court is the entry of an action, after this manner: *A. B. complains, of C. D. of a plea of trespass, &c. and there are pledges of prosecuting, that is to say, John Doe and Richard Roe.*

The first process in an inferior court is a *plaint*, which is in the nature of an original writ, because therein is briefly set forth the plaintiff's cause of action; and on this *plaint* there may issue a *poena*, till the return of a *nihil*, upon which a *capias* will lie against the body of the defendant. 2 *Lill. Abr.* 294.

Where a *plaint* is levied in an inferior court, the defendant must be first distrained for non-appearance, by something of small value; then if he doth not appear, a farther distress is to be taken to a greater value, and so on; if all his goods are distrained on the first distress, attachment may be issued out of *B. R.* against the officers, &c. *Ibid.* A plaintiff in an *assise* may abridge his *plaint* of any part whereupon a bar is pleaded. 21 *Hen. 8. c. 3.* See *County Courts.* And *Black. Com.* 3 *V.* 273.

Plaint

Plaint in a *superior court*, is said to be the cause for which the plaintiff complains against the defendant; and for which he obtains the King's writ: For as the King denies his writ to none, if there be cause to grant it; so he grants not his writ to any, without there be cause alleged for it. 2 *Litt.* 294.

Planchia, A plank of wood. *Corwell.*

Plasterers, Not to exercise the art of a painter in London. 1 *Jac.* 1. c. 20.

Plantation, (*Plantatio, Colonia*) Is a place where people are sent to dwell; or a company of people transplanted from one place to another, with an allowance of land for their tillage. *Litt. Dict.*

All wastes, which the natives in any country make no use of, nor can receive any damage by their being in the hands of others, may lawfully be possessed by *planters*: If a nation or people be expelled out of their own land, they may seek void places in some other country, and there may justly plant; and the immediate possessing such *plantations* creates a right against all persons but he who hath empire there. *Lex Mercat.* 156. And where persons having arrived in any territories and planted there, if before they can reap the fruits of their labour, the necessities of human life are wanting, by the laws of nature they may force a subsistence from a neighbour *planter*; because a subsistence belongs to every man unless he has merited to lose the life he seeks to preserve. *Ibid.*

Our *plantations* abroad are chiefly islands in America, over which there are particular governors; and the islands of *J. maica* and *Barbadoes*, with some others, are very populous, and much frequented by unfortunate persons, who have so great advantages in trade, that by their industry, their present misfortune is often attended with a future happiness, by accumulating wealth from the product of these foreign colonies. *Geograph. Epitom.* 228.

The *English Plantations* contain *Jamaica, Barbadoes, Virginia, Maryland, New England, New-York, Carolina, Bermudas*, and the *Leeward Islands, &c.* And there is lately a settlement in America much encouraged, called *Georgia*, under the management of trustees, &c. The *plantation Islands* being got by conquest, or by the King's subjects going in search of some prize, and planting themselves there, the King is not restrained by the laws of England to govern them by any particular laws, but may govern them by what law he will: but it has been adjudged, That the laws and customs by which the people of any island or *plantation* were governed before the conquest thereof, bind them until new laws are given; for there is a necessity that the former shall be in force till the new are obtained, and even then some of their old customs may remain, as they do in *Barbadoes, &c.* If an uninhabited country be newly found out by *English* subjects, all the laws of the kingdom of England are immediately in force there. 2 *Salk.* 411. 3 *Mod.* 159. 4 *Mod.* 225, 226. See *Black. Com.* 1 *V.* 106. 4 *V.* 245.

For the several statutes relating to the plantations, see *Table to the Statutes.*

Plate, Hoy, or small water vessel. 13 *Eliz.* cap. 15. A tax laid on persons possessed of silver plate. 29 *Geo.* 2. c. 14.

Also vessels, &c. of gold and silver are called *plate*, as well in law, as in trade.

By 7 & 8 *W.* 3. c. 19. *f.* 3. Publick houses were prohibited to use plate. After this part of the act had lain dormant many years, a set of informers suddenly arose, and brought a number of actions for the penalties, forfeited by virtue of the act, whereupon many publicans raised a sum of money to pay the expence of a bill to repeal this clause, and obtained an act for the repeal, which is the 9 *Geo.* 3. c. 21. *f.* 1. See *Table* to the *Statutes* tit. *Gold.*

Playhouse, *Playhouses* were originally instituted with a design of recommending virtue and exposing vice and folly; therefore are not in their own nature nuisances: but it hath been holden, that a common *playhouse* may be a nuisance, if it draw together great numbers of coaches, &c. as prove generally inconvenient to the places adjacent. 5 *Mod.* 142.

If any persons in *plays, &c.* jestingly or profanely use the name of God, they forfeit 10 *l.* 1 *Jac.* 1. c. 21.

And *players* speaking any thing in derogation of religion, &c. are liable to forfeitures and imprisonment. 1 *Eliz.* Also acting *plays* or interludes on a *Sunday*, is subject to penalties, by 1 *Car.* 1. cap. 1.

No person shall act any new *play*, or addition to an old one, &c. unless a true copy thereof, signed by the master of the *playhouse*, be sent to the Lord Chamberlain fourteen days before acted; who may prohibit the representing any stage *play*: And persons acting contrary to such prohibition, forfeit 50 *l.* and their licences, &c. *Stat.* 10 *Geo.* 2. c. 28. And by this statute, no licence is to be given to act *plays*, but in the city and liberties of *Westminster*, or places of his Majesty's residence. *Ibid.* See *Nuisance.*

Plays and Games. See *Nuisance, Gaming.*

Plea, (*Placitum*) Is that which either party alleges for himself in court, in a cause there depending to be tried:

Pleading in a large sense, contains all the matters which come after the declaration, till issue is joined; but is commonly taken for the defendant's answer to the declaration.

Pleas are divided into *pleas of the crown*, and *common pleas*; *pleas of the crown* are all suits in the King's name, for offences committed against his crown and dignity, and also against the peace. *Common pleas* are those that are agitated between common persons, in civil cases: And *pleas* may be further divided into as many branches as action; for they signify all one. *S. P. C. cap.* 1. 4 *Inst.* 10.

A *plea* to the action is that which goes to the merits of the cause or action; and is *general* to the declaration, or a *special plea*: A *general plea* in debt or contract, is *He owes nothing*: In debt on bond, *'Tis not his deed*, or *He paid it at the day*; in action of the case upon a promise, *He did not promise*; in trespass upon the case, *Not guilty*; in covenant, *performance of covenants, &c.*

A *special plea* contains the matter at large, concluding to the declaration or action; and *special pleas* are many, as by *duress* and *per minas*, and in *justification*, that in assault and battery, the plaintiff struck the first blow, &c. In waste, on *nul waste* pleaded, the defendant cannot plead justifiable waste; but he may give in evidence, lightning, enemies, &c. to prove it to be no waste: He is to confess the fact, and plead specially in these cases. *Finch* 362, 378. 1 *Inst.* 282, 372.

Special pleas in answer to the declaration, are *pleas in bar*, or in *abatement*; and every *plea* must be pleaded either in bar to the action, or in abatement of the writ upon which the action is framed, or it is but a discourse, and not a *plea*.

Special pleas are drawn up in form, setting forth the matter pleaded, &c. and must be signed by counsel, or they will not be received: A *foreign plea* is to be ingrossed in parchment, and signed by counsel, and be put in, on the oath of defendant, that the *plea* is true. *Practif. Attorn. Edit.* 1. pag. 80. And when a defendant hath pleaded, the plaintiff answers the defendant's *plea*, which is called a *replication*; and the defendant answers the replication, by *rejoinder*; which the plaintiff may answer by *surrejoinder*; and sometimes, (tho' seldom,) pleadings come to *rebutter*; in answer to *surrejoinder*; and *surrebutter.* 1 *Inst.* 303.

The order of pleading.

In good order of pleading, a person ought to plead,

- 1st, To the jurisdiction of the court.
- 2dly, To the person of the plaintiff, and next of the defendant.
- 3dly, To the writ.
- 4thly, To the action of the writ.
- 5thly, To the count or declaration.
- 6thly, To the action itself, in bar thereof:

A *plea* to the jurisdiction is called a *foreign plea*, because it alleges that the matter ought to be tried in another court, &c.

Pleas to the person, have been formerly six, viz. *villeinage*, *outlawry*, *excommunication*, the party an alien, 8 O out

out of protection, and professed in religion; but the last is now no *plea*.

The *plea* to the writ, &c. is for variance between the writ and record, death of parties, misnomer, jointenancy, &c. and may be to the writ and bill, or count together.

Pleas to the count or declaration, are variance between the writ and count, specialty or record, incertainty, &c. and all these are properly *pleas* in abatement.

Plea to the action of the writ is where one pleadeth such matter which sheweth the plaintiff had no cause to have the writ brought. And a *plea* in bar to the action itself, is when defendant pleadeth a *plea* which is sufficient to overthrow the action. *Kitch.* 95. *Litt.* 196. *Pleas* in bar, such as a release, the statute of limitations, agreement with satisfaction, &c. destroy the plaintiff's action for ever: but *pleas* in abatement are temporary and dilatory, and do not destroy the action, only stop the cause for a while, till the defect is removed; as where there is some fault in the writ or declaration, misnomer of the defendant, where the plaintiff is excommunicate, &c. A *plea* to the jurisdiction, of misnomer, or any other *plea* in abatement, cannot be pleaded after an imparlance; tho' a *plea* in bar may, because that goes to destroy the action. 2 *Lutw.* 1174.

Pleas in bar may come after a continuance, or general imparlance; but if such *plea* be first pleaded, the defendant shall not be admitted afterwards to plead in abatement of the writ, which is allowed to be good by pleading in bar to the action: yet matter of record may be shewn in arrest of judgment, and thereby the writ be abated. *Hob.* 280, 281.

By imparlance a writ or bill is admitted to be good, so that after it, *plea* in abatement ought not to be received; but if it be accepted, and the plaintiff doth demur to it, the demurrer is good: After defendant hath pleaded in abatement, and before he pleads directly in bar, he may demur to the declaration, as he may where he is advised that the declaration is insufficient, &c. *Pract. Solic.* 235, 236.

It has been resolv'd, That where a *plea* is in abatement, if it be of necessity that the defendant must disclose matter of bar, he shall have his election to take it either by way of bar, or abatement. 2 *Mod.* 65. If defendant can have no advantage by pleading in abatement, or by demurring, he may afterwards plead in bar; and before he pleads any special matter in bar, he may plead in general, viz. A release or discharge; acceptance of other things; tender of amends; concord or accord; arbitrament; *auterfoits* bar by former judgment; the statute of limitation; disability of plaintiff; privilege of defendant, or other matter; for several matters pleadable in abatement, may be pleaded in bar. *Pract. Attorn.* 1 Edit. 82. Also he may plead another action depending of the same nature, for the same thing, &c. and if a person mistaking his first action, bring another action without discontinuing the first, this *plea* may be pleaded. 1 *Salk.* 392.

There is likewise a *plea puis darrein continuance*, where defendant hath pleaded a *plea*, and before trial there happens some new matter, which will avoid the action: It may be pleaded after issue joined, at any time before verdict; but after verdict, and before day in bank, there is no day to plead it; so that the remedy is by *audita querela*. *Cro. Jac.* 646.

A defendant with leave, may plead several matters; but if any such matter be excepted to, and found insufficient, costs shall be given: And no dilatory *plea* shall be allowed in any court of record, unless the truth of it be proved by affidavit; or some probable matter be shewn. 4 *Ed.* 5 *Ann.* cap. 16.

When a declaration, or bar, are defective in circumstances of time, place, &c. this may be helped by the pleading of the adverse party to it; but not if it be insufficient in matter. 2 *Ventr.* 222. 1 *Danv. Abr.* 156. If defendant pleads a dilatory and frivolous *plea*, to hinder plaintiff from going to trial; the court, on motion, will order defendant to plead such a *plea* as he will stand to, or accept of a demurrer to his *plea*, on arguing whereof, if the *plea* be not good, the court will not after permit him to amend it; and when a dilatory *plea* in abatement is over-ruled, there shall be a *respondeas ouster*, except

an issue be joined on it. 6 *Mod.* 102. And if a *plea* in bar, is over-ruled, judgment shall be given against defendant. *Lutw.* 42.

Where it is doubtful between the parties, whether a *plea* be good or not, it cannot be determined by the court on motion, but there ought to be a demurrer to the *plea*; and on arguing thereof, the court will judge of the *plea*, whether good or bad: And no advantage can be had of double pleading, without special demurrer. 2 *Lill. Abr.* 310. *Lutw.* 422. But tho' the court is to judge of pleading, they will not direct any person how to plead, notwithstanding the matter be difficult; for the parties must plead at their peril, and counsel are to advise, &c.

If plaintiff's attorney will consent, defendant may waive his *plea* pleaded, without moving the court; and if he will not consent, it cannot be done without moving the court. *Trin.* 1651. A defendant may waive his special *plea*, and plead the general issue, if there be no joinder in demurrer. 2 *Salk.* The defendant, before joinder in demurrer, may amend his *plea*; and so after joinder in demurrer, before argued: And where defendant has demurred, and the plaintiff joined; the court will often allow him to withdraw his demurrer, and plead to the action, if plaintiff hath not been put by a trial. *Practif. Solic.* 303.

Defendant had leave to plead *de novo* in four days, within which time he ought to have pleaded in chief; but instead of that, he pleaded an outlawry of the plaintiff, &c. and thereupon plaintiff signed judgment for want of a good *plea*; but on payment of costs, &c. and pleading to issue immediately, judgment was set aside. *Mod. Ca. in L. and E.* 289.

A *plea* may be amended, if it be but in paper, and not entered, paying costs: If after the defendant hath pleaded, the plaintiff alters his declaration, the defendant may alter his *plea*. 2 *Lill.* 322. *Pleas*, &c. in English, may be amended in paper, or on record, and even after judgment, on payment of costs, &c. by Stat. 4 Geo. 2. Falshood in a *plea*, if not hurtful to plaintiff, nor beneficial to defendant, doth no injury; as it doth where detrimental to plaintiff, &c. *Ibid.* 297. Tho' if an attorney pleads a false *plea* by deceit, it is against his oath, and he may be fined. 1 *Salk.* 515.

Concerning pleas in general.

All *pleas* are to be succinct, without unnecessary repetitions, and be direct and pertinent to the case, not by way of argument or rehearsal; and the *plea* of every man shall be taken most strongly against himself. 2 *Lill.* 304. The *plea* must directly answer the charge in the declaration, or it will not be good. 1 *Danv. Abr.* 235. If it doth not answer all the matter contained in the declaration, the plaintiff shall have judgment, as for want of a *plea*. 1 *Lew.* 16.

Defendant pleads that he did not receive 80 *l.* but doth not say or any part thereof; and the *plea* was adjudged ill, for he might receive 79 *l.* and yet not the whole, &c. 2 *Mod.* 146.

In pleading a tender, at the putting in of the *plea*, the money is to be brought into court, or the *plea* will not be accepted, but the plaintiff shall sign judgment. 2 *Lill. Abr.* 308. But when judgment in ejectment is signed for want of a *plea*, if possession be not delivered, a judge before the assizes may compel plaintiff to accept a *plea*. 2 *Salk.* 516.

If a thing is shewed in pleading, and it is not afterwards traversed or averred specially to the contrary, it will be taken to be confessed: Tho' the confession of one defendant in his *plea*, shall not prejudice another. *Plowd.* 48. *Hob.* 64. A release pleaded to an action of trespass, without shewing when it was made, shall be taken before the trespass done: And a *plea* of discharge or giving notice, &c. must shew how given. 10 *Rep.* 40. *Plowd.* 128. *Dyer* 41.

Every man must plead such *plea* as is proper; but that need not be pleaded on one side, which will come properly on the other. *Hob.* 3, 78, 162.

Pleadings which amount to no more than the general issue, are not to be allowed, but the general issue shall be entered; and where defendant pleads the general issue, he

he ought to plead, so that the whole matter in question may be tried. 2 Lill. 302. 2 Nelf. Abr. 1246. 1 Salk. 394.

If defendant is not constrained to plead a special plea, he may plead the general issue, and give the special matter in evidence: And in many cases general pleadings are permitted, to avoid tediousness and multiplicity, and the particular shall come on the other side; as in case of a condition to perform covenants; but *where a thing rests in a man's own notice, he must plead it particularly.* 1 Inst. 303. 8 Rep. 133. 2 Danv. Abr. 249. 2 Nelf. 1249.

If a party pleading derives an estate to another, under which he doth not claim any thing, there general pleading is sufficient, because he hath no means to know another man's title; but 'tis otherwise where he himself claims under it. *Cartb.* 209.

General estates in fee-simple may be generally alledged: Estates in tail, and particular estates, must be shewed. A plea of conveyance of lands, &c. *inter alia*, where the conveyance contains more than relates to the matter of the plea, is good. 1 Roll. Rep. 72.

Bonds and deeds are to be pleaded with a *proferet hic in curia*, &c. *Ibid.* 1261.

If one comes in by act of law, the general allegation will suffice; and things spiritual, or where the plea consists of matter infinite, may be generally pleaded: All necessary circumstances implied by law, need not be expressed in the plea; but when any special or substantial matter is alledged, it shall be specially answered; so matters of record, where they are the foundation of the suit, or substance of the plea. 10 Rep. 94. 3 Cro. 749. *Plowd.* 65.

That which is alledged by way of inducement to the substance of the matter, need not be certainly alledged, as the substance itself. *Plowd.* 81. He who pleads in the negative, is not bound to plead so exactly as he who pleads in the affirmative: And that which a man cannot have certain knowledge of, he is not bound certainly to plead. *Plowd.* 33, 80, 126, 129.

Every affirmative in pleading, ought to be answered with an express negative; and if a person be named to be dwelling at A. 'tis no plea to say, that he is an inhabitant at some other place; unless it conclude in the negative, and not at A. 1 Inst. 126. 19 H. 6. 1.

It is a rule in pleading, That when a man pleads special matter, and concludes generally, he thereby waives the special matter. *Farrell.* Rep. 53. Pleas that are too general are not good. 1 Lutw. 239. 2 Salk. 521. And every plea ought to be single and certain; and not double, or contain a multitude of distinct matter to one and the same thing, whereto several answers are required, which will not be allowed; nor where defendant pleads two matters, each being a sufficient bar to the action, unless one depends on the other, or defendant cannot come at the one, without shewing the other, when it is good. 11 Rep. 52. 1 Vent. 48, 272. 2 Nelf. Abr. 1254.

A double plea will not be good; for *where there is double matter, no certain issue can be taken*: But a plea is not double which contains divers matters, if it would not have answered the whole declaration without alledging all those matters in it, and which are necessary in defendant's just defence. 2 Lill. Abr. 300.

Where the matter is indifferent to be well or ill, and the party pleads over, the court will intend it well, *Mod.* Caf. 136. If there be a repugnancy in pleading, it is error. 2 And. 182. *Jenk. Cent.* 21. And a man shall not take advantage of his own wrong, by pleading, &c. *Cro. Jac.* 588. A man cannot plead any thing afterwards which he might have pleaded at first. *Ibid.* 318. Tho' surplusage shall never make the plea vicious, but *where it is contrary to the matter before.* *Raym.* 8.

When a matter is expressly pleaded by one party in the affirmative, which is expressly denied by the other party, the next thing is to be an issue in order to trial, that they may not plead *in infinitum.* *Raym.* 199.

If a plea to the writ on issue joined, be found for defendant, the writ shall abate: And if to the person, action, or jurisdiction, it be found for plaintiff, he shall recover the thing in demand. *Jenk. Cent.* 306.

The law requires in every plea two things, *viz.* matter sufficient; and that it be *express'd according to the form of the law.* *Hob.* 164. But it is said a man is not bound to one form of pleading, so he plead the substance of the matter. *Plowd.* 435.

The old way of pleading a record was to begin at the original, and not omit any continuance, &c. And there is a diversity where a judgment is several, and when 'tis entire; for if forty acres of land are recovered, here a plea of recovery of twenty acres is ill; but it should be pleaded of the forty acres, whercof twenty are parcel. *Comber.* 253.

All pleas are to be in English, and not in Latin: Each plea is to have its proper conclusion; and regularly all pleas that are affirmative conclude, *And this he is ready to verify*, &c. A plea in abatement begins, *That the defendant ought not to answer the bill*, &c. and concludes to the declaration thus: *Whereupon he prays judgment of the bill, or declaration aforesaid; and that the bill be quashed*, &c. In a plea in bar, the defendant in the beginning says, *That the plaintiff ought not to have or maintain his action against him*; and concludes to the action, *viz.* *He prays judgment if the plaintiff ought to have or maintain his action against him*, &c. A plea of a record ought to conclude, *And this he is ready to verify by the record*, &c. *Pract. Solic.* 236. 2 Nelf. 1269. 'Tis said that the conclusion makes the plea; for if it begins in bar, and concludes in abatement, it is a plea in abatement. *Ld. Raym.* 337.

The practice of the courts, respecting pleading.

The court never orders a defendant to plead peremptorily, till all the rules are out: And where the plaintiff amends and give an imparlance, there shall be new rules given to plead, but not if there is no imparlance. 2 Salk. 517.

In the court of C. B. if defendant doth not plead on rule to answer, before the rule is expired, the plaintiff's attorney may afterwards enter up judgment by *nil dicit.* *Pract. Solic.* 303.

If a copy of the declaration be delivered to defendant's attorney before the *essoyn* day of the term, he may be compelled to plead that term, or judgment shall be entered against him.

By the usual course, defendant is to answer the same term in which he appears, if it be an issuable term, and the writ is returnable at the beginning thereof; but generally defendant hath time to plead till the next term. *Pract. Attorn. Edit.* 1.

By an order of court, reciting that by the former practice, defendants had usually been allowed eight days time to plead; it was ordered, that four days only should be allowed such defendants from the time of giving any rules. *Ord. Trin.* 1727. And on process returnable the first or second returns of terms; defendant is to plead in four days, if he lives within twenty miles of London, and eight days if farther off; after delivery of the declaration, with notice to plead, &c. or on default, plaintiff may sign judgment. *Ord. Trin.* 5 *Geo.* 1.

On there being special pleadings in any action, the secondary will give rules to reply; and if defendant come to issue, or there be a demurrer, the pleas are to be given to the clerk of the papers, who gives rule for the defendant to rejoin, &c.

Special pleas are left with one of the clerks of the papers, and the plaintiff's attorney is to take a copy thereof from him, for which he pays 6 d. per sheet, and put in his replication; and then he carries the declaration to him, who will make up the paper-book, and write a rule on the side: this paper-book is to be delivered to defendant's attorney, and he must pay for entering his warrant of attorney, and 10 d. a folio for his pleading, &c. And if defendant doth not receive the paper-book, and return it to the attorney for the plaintiff, on his calling for it to be entered in four days; then a *non prof.* may be entered for want of a plea. See 6 *Mod.* 22.

Pleading. See Pleadings.

Pleas in criminal cases. One indicted of felony, &c. ought not to be allowed to plead to the indictment, till he

he holds up his hand at the bar; which is in nature of an appearance, &c. A prisoner on his arraignment may plead the general issue, or in abatement, &c. or demur to the indictment; and he may plead in bar, *auterfoits acquit*, *auterfoits convict* before judgment, *auterfoits attain*, &c. *viz.* That he was *heretofore* acquitted, convicted, or attainted of the same felony. *H. P. C.* 228. 3 *Inst.* 213, 214. A criminal may also plead a pardon, or benefit of clergy; tho' this last is not usually pleaded until he has otherwise pleaded before. Vide *Auterfoits, Acquit*, and *Black. Com.* 3 *V.* 40. 4 *V.* 2, 417.

Plea and Demurrer in equity. See 16 *Vin. Abr.* 361—376. and *Comyn's Digest*, 2 *V.* 54, 56, &c.

Pleadings. Are all the sayings of the parties to the suit after the count or declaration, to wit, whatever is contained in the bar, replication and rejoinder, and not in the count itself; therefore defaults in the matter of the count are not comprized within *mis-pleading*, or insufficient *pleading*, nor are remedied by the statute of *jeofails*, 32 *H.* 8. but only the *mis-pleading*, or insufficient *pleading* committed in the bar, replication and rejoinder; but those are now remedied also by 18 *Eliz. cap.* 13. *Cowell.*

Pleading in general, signifies the allegations of parties to suits when they are put into a proper and legal form; and are distinguished, in respect to the parties who plead them, by the names of *bars*, *replications*, *rejoinders*, *sur-rejoinders*, *rebutters*, *surrebutters*, &c. and tho' the matter in the declaration or count does not properly come under the name of pleading, yet being often comprehended in the extended sense of the word, it is generally considered under this head. 4 *New Abr.* 1.

Pleading, in strictness, is no more than *setting forth that fact, which in law shews the justice of the demand made by the plaintiff, or the discharge and defence made by defendant*; and herein no greater certainty is required than is sufficient to bring on a trial without inveigling judge or jury; and it seems, that originally pleadings were so formed, and were very plain and concise; but in progress of time pleaders and judges became too curious in them, so that the art of pleading, which in its use and design was only to render the fact intelligible, and to bring the matter to judgment with convenient certainty, began to degenerate from its primitive simplicity and true use, and end in nicety and curiosity, which how it hath improved therein in latter times, the length of the pleadings, the many unnecessary repetitions, and the many miscarriages of causes upon small and trivial objections, sufficiently testify. 4 *New Abr.* 1.

Pleas were anciently *ore tenus*, and afterwards minuted down by the prothonotaries, and entred of record in the *Latin* tongue, that being a dead language, and least subject to variation, to remain as monuments and precedents of the law; that the pleading should be in *Latin* is expressly enacted by the 36 *Ed.* 3. c. 15. which statute was made to abolish a law introduced by *William the Conqueror*, which ordained, that the pleadings in the courts of justice should be in *French*. 4 *New Abr.* 1. 10 *Co.* 132.

But now by 4 *Geo.* 2. c. 26. it is enacted, "That all proceedings in courts of justice shall be in *English*, and be written in such common hand as acts of parliament are usually ingrossed in, the lines and words to be written at least as close as the said acts usually are, and not abbreviated; and all persons offending against this act forfeit 50*l.* to any person who will sue."

But by 6 *Geo.* 2. c. 14. it is provided, "That the above penalty shall not be extended to the expressing the names of writs, or *technical* words in the same language, as hath been used, nor to abbreviations used in the *English* language."

In pleading there are several general rules laid down in our books; as, that *good matter must be pleaded in right form, apt time and due order*, but that which is only inducement or conveyance to the substance, need not be so certainly alledged, as that which is the git of the plea. *Co. Lit.* 303. *Plow.* 65, 81. *Cro. Jac.* 362.

That which is apparent, and appears from a necessary implication in the record, need not be averred. *Co. Litt.* 303. 7 *Co.* 40.

That every man's plea shall be taken most strongly against himself, as *every body is presumed to make the most of his own case*. *Dyer* 16. *Co. Litt.* 303. *Hob.* 234. *Latch* 186.

That *what the parties have agreed in pleading shall be admitted*, tho' the jury find otherwise. 2 *Mod.* 5.

That when a man will recover a thing from another, it is not enough for him to destroy such person's title, but he must prove his own a better, according to the rule, *melior est conditio possidentis*. *Vaugh.* 58, 60.

That every man shall plead such pleas as are proper, according to the quality of his case, estate or interest. *Co. Lit.* 285, 303.

That the law requires in every plea, that it be in matter sufficient, and that it be deduced and expressed according to the forms of law; and if either be wanting, it is cause of demurrer. *Hob.* 164.

That every plea in bar, being a confession and avoidance of the plaintiff's action, must be substantive and certain, with an avoidance of plaintiff's demand, which he may traverse, and thereon go to issue, because the declaration stands confessed, as far as it is not avoided by defendant. *Dyer* 66. *Godb.* 253. 1 *Leon.* 78.

That if a count, avowry (which is in nature of a count) replication, &c. want form, or omit circumstance of time, place, &c. they may be made good by the replication, and the replication by the rejoinder, &c. 7 *Co.* 25. a. 8 *Co.* 120. b. *Co. Lit.* 303.

That all pleas must be alledged directly, and not by way of rehearsal; nor is it sufficient, that what ought to be expressly pleaded, may be deduced by argument from what is pleaded. *Co. Lit.* 303.

That in matters triable by law, all things shewable ought to be specially alledged in order to have a convenient trial; but in matters spiritual, the law is otherwise, because there is no peril in the trial, therefore if certain enough to ground a certificate, it is sufficient. 3 *Leon.* 300.

That where one is authorized to do a thing by Common law, statute, custom, grant or commission, he ought to shew, that he hath pursued the substance of it accordingly. *Co. Lit.* 303.

That general estates in fee-simple may be generally alledged; as that *J. S.* was seised in fee; but the commencement of particular estates must be shewed, because they could not originally commence without a conveyance, which must be shewed, unless they be alledged by way of inducement only. *Co. Lit.* 121. a. 303.

For more learning on this subject, see 4 *New Abr.* and 16 *Vin. Abr.* and *Com. Dig.* tit. Pleas and Pleadings, and *Black. Com.* 3 *V.* 293. 4 *V.* 420.

Pleas of the sword, Placita ad gladium. *Ranulph* the third Earl of *Chester*, in the second year of *Henry* the Third, granted to his barons of *Chester* an ample charter of liberties, *Exceptis placitis ad gladium meum pertinentibus*. *Rot. Pat. in archiepis Regis infra castellum Cestrie.* 3 *E.* 4. m. 9. The reason was, because *William* the Conqueror gave the earldom of *Chester* to his kinsman *Hugh*, commonly called *Lupus*, ancestor to this Earl *Ranulph*, *Tenera ita libere per gladium, sicut ipse Rex Willielmus tenuit Angliam per coronam*. And consonant thereto in all indictments for felony, murder, &c. in that county palatine, the form was anciently, *Contra pacem Domini comitis, gladium & dignitates suas*, or *Contra dignitatem gladii Cestrie*. These were the pleas of the dignity of the Earl of *Chester*. *Sir Peter Leicester's Hist. Antiq.* 164. *Cowell.*

Plebana, Plebanalis ecclesia, A mother church, which has one or more subordinate chapels. *Cowell.*

Plebanus, A rural dean, because the deaneries were commonly affixed to the *plebania*, or chief mother church within such a district, at first commonly of ten parishes: but it is inferred from divers authorities, that *plebanus* was not the usual title of every rural dean; but only of such a parish priest in a large mother church, exempt from the jurisdiction of the ordinary, who had the authority of a rural dean committed to him by the archbishop, to whom the church was immediately subject. *Whartoni Angl. Sacr. Pa.* 1. 569. *Reg. Eccl. Christi. Cantuar.* MS.

Plebiscitum, A law or statute made by the joint consent of the people or commons without the senate. *Litt. Dist.* See *Black. Com.* 1 V. 80.

Pledge, (*plegius*, may be derived from the Fr. *pleige*, *fulgur*) As *pleiger auctum*, i. *side jure pro aliquo*, to be surety for a person; in the same signification is *plegius* used by *Glanvil*, lib. 10. ca. 5. and *plegiatio* for the act of suretiship in the interpreter of the *Grand Customary of Normandy*, c. 60. *Plegii dicuntur personae, quae se obligant ad hoc, ad quod qui eos mittit, tenebatur*; and in the same book, c. 89, 90. *plegiatio* is used in the same sense with *Glanville*; so *alvi plegii* are used for *plegii*. *Pupil. Oculi*, part 5. c. 22. *Charta de Foresta*. This word *plegius* is used also for *frankpledge* sometimes, as in the end of *William the Conqueror's laws*, set out by *Lanbard*, in his *Archaeologia*. 175. in these words: *Omnis homo qui voluerit se teneri pro libero, sit in plegio ut plegius cum habeat ad justitiam, si quid offenderit*, &c. and these are called *capital pledges*. *Kitchin*, 10. See 4 *Inst.* 180.

When writs were delivered to the sheriff to be by him returned into C. B. he was obliged, before the return, to take pledges of prosecution, which when the fines and amercements were considerable, were real and responsible persons, and answerable for those amercements. But they being now so inconsiderable, there are only formal pledges entered, viz. *John Doe* and *Richard Roe*. But there is a difference in debt and in trespass; for in trespass the attachment of the goods is the first process, and because the defendant is thereby hurt, therefore the writ commands the sheriff to take pledges before he executes the process. But in debt they begin with a summons, and so the defendant is not hurt in the first instance, therefore there is no command in the writ to the sheriff to take pledges, but unless he does, there is not a sufficient authority from the return to warrant further process, unless pledges are put in above, as in B. R. they always do on the bill. The reason why pledges were not taken in Chancery, but committed to the sheriff, was, that he living in the county was supposed to know who were sufficient security, and being to levy the amercement afterward, they were to take ample security for them. *G. Hist. of C. B.* 6, 7.

The plaintiff's pledges that he shall prosecute his suit may be entered at any time pending the action; and the putting in of pledges is now a meer formal thing; yet if the pledges be not entered, it is error, because the law directs plaintiff to find pledges. *Trin. 22 Car. B. R.* In the return of a *venire facias*, the omission of returning the pledges is but matter of form, and not like to where pledges are omitted on an original writ; wherefore it has been adjudged to be helped by the statute of *Joefails*. 2 *Nel. Abr.* 944.

Want of pledges hath been held to be substance; but it is aided by the statute 4 & 5 *Ann.* unless particularly set forth for cause, on a demurrer. 2 *Lill.* 39. 2 *Lill. Abr.* 329. The pledges, *John Doe*, &c. are entered by defendants on his being arrested, and giving common bail for his appearance, &c. See 16 *Vin. Abr.* tit. *Pledge*.

Pledgers of Goods for money, &c. See *Parvns*, and there is a pledge in law; where the law without any special agreement between parties doth enable a man to keep goods in nature of a distress, &c. 2 *Shep. Abr.* 442. See *Black. Com.* 2 V. 452.

Pledgery or **Pleggery**, (French *pleigerie*, Latin *plegiagium*) Suretiship, an undertaking or answering for. Also the appellant shall require the constable and mareschal to deliver his pledges, and to discharge them of their pledgery; and the constable and mareschal shall ask leave of the King to acquit his pledges, after the appellant is come into his lists, &c. *Cowell*.

Pledging, Is where goods and chattels are delivered in security for money lent, and by such pledging the pawnbroker hath more than the naked possession in the nature of a bailment; for he hath the property and interest in the thing itself; and by the better opinions, shall have a reasonable use of it, so that it be without damage to the thing pledged. *Doct. and Stud.* 130. 1 *Rel. Abr.* 338, 673. *Owen* 124. 2 *Salk.* 522.

See the case of *Coggs and Barnard*. 2 *L. Raym.*

If a man pledge goods to B. and they are stolen, B. shall not answer for them, because he hath a property in them; and his custody is but a consequent of that property; therefore he undertakes to keep them as his own; for a man who undertakes to secure what is another's, is bound to keep them at all adventures, since the right owner might possibly defend them with his life; but where a man is only obliged to keep them as his own, no unavoidable accident is to be imputed to him. *Co. Lit.* 89. a. 3 *Inst.* 108. 4 *Co.* 83. *Palm.* 551. *Owen* 123. *Yelv.* 178. *Cro. Jac.* 244. 1 *Bullst.* 29, 30. 1 *Rel. Rep.* 181.

But if a man pledge goods, and tenders the money to the pawnbroker, and he refuses, this determines the qualified property, therefore if after such tender the goods are stolen, &c. the bailor shall have satisfaction in an action of *trover*; for a tender and a refusal must in those cases amount to a payment; because otherwise no man could again come to his own, since pawns are over the value lent. *Cro. Jac.* 243. *Yelv.* 179. 1 *Bullst.* 29. *Br. Bailment* 7. 1 *Rel. Rep.* 129. *Co. Lit.* 89.

And tho' the borrower tender the money, and recover the goods in an action of *trover*, yet the pawnbroker may have an action of *debt* for his money; because tho' the security ceases, yet the duty remains, inasmuch as the money lent is not paid back to the party from whence it came. *Cro. Jac.* 243. *Yelv.* 179. 1 *Bullst.* 29, 31.

So if a man lend perishable goods as a pledge, and they decay, yet the person to whom they are pledged, may have an action of debt for his money, because the duty continues. *Yelv.* 179. *Co. Lit.* 209.

Goods thus taken to pledge, cannot be forfeited by the pawnbroker for his offence, nor can they be taken in execution, nor attached for his debt; for the absolute property is in another; therefore they are not alienable, nor by consequence forfeitable; because they cannot be forfeited without loss and danger to the absolute owner; and all qualified possessors do take the property under the restriction to preserve the property of the right owner. *Br. Attachment in Assise* 20.

If a man pledge goods, and after is attainted of felony, the King shall not have the goods without paying the sum for which they were pledged; for the alteration of the general property doth not alter the special property in the pawnbroker. 2 *H. 7.* 1. 1 *Bullst.* 29.

If a man pledge goods, and then is outlawed, he cannot redeem them, because then the absolute property is in the King; but if the outlawry is reversed, then the person is reinstated in his property as if there had been no outlawry, therefore may redeem them. 1 *Bullst.* 29.

If the money be not paid at the day, the property is absolute at law, but still the right owner has his redemption in equity, as in case of a mortgage. *Co. Lit.* 205. *Shep.* 106.

See farther 2 *Vern.* 177, 691, 698. *Abr. Ca. in Eq.* 324. 2 *Leon.* 30. *Yelv.* 164. As to estates in pledge, see *Black. Com.* 2 V. 117.

Plegius Acquistandis, Is a writ that lies for a surety, against him for whom he has surety, if he pay not the money at the day. *F. N. B.* 137. If the party who becomes surety be compelled to pay the money, &c. he shall have his writ against the person who ought to have paid the same: And if a man be surety for another, to pay a sum of money, so long as the principal debtor hath any thing, and is sufficient, his sureties shall not be distrained by the statute of *Magna Charta*; if they are distrained, they shall have a special writ on the statute to discharge them. *Magna Charta.* 9 *H. 3.* c. 8. But if the plaintiff sue the sureties in C. B. where the principal is sufficient to pay the debt, whether the sureties may plead that, and aver that the principal debtor is sufficient to pay it; or whether they shall have a writ to the sheriff not to distrain in such a case, hath been made a question. *New Nat. Br.* 306. It was adjudged, (*Pasch.* 43 *Ed.* 3.) that the writ *de plegijs acquistandis* lieth without any specialty shewed thereof: As it has been held, that a man shall have an action of debt against him who cometh pledge for another upon his promise to pay the money, without any writing made of it. *New Nat. Br.* 270, 304.

Plena forfeitura, A forfeiture of all that one hath, &c. See *Forfeiture*.

Plenary, Is an abstract of the adjective *plenus*, and is used in the Common law in matters of benefices, and where a church is full of an incumbent: *plenary* and vacation are direct contraries. *Staudf. Prærog. cap. 8. fol. 32. Westm. 2. cap. 5.* A clerk inducted may plead his patron's title; and being inducted by the space of six months, his patron may plead *plenary* against all common persons. *Plowd. 501.* Institution by six months, before a writ of *quare impedit* brought, is a good *plenary* against a common person; but *plenary* is no plea against the King, till six months after induction. *1 Inst. 119, 344.* *Plenary* for six months is not generally pleadable against the King, because he may bring *quare impedit* at any time, and *nullum tempus occurrat regi*: Tho' if a title devolves to the King by lapse, and the patron presents his clerk by usurpation, who is instituted and inducted, and enjoys the benefice for six months, this is such a *plenary* as deprives the King of his presentation. *2 Inst. 361.* And *plenary* by six months after institution is a good plea against the Queen Consort; altho' she claims the benefice of the King's endowment. *Wood's Inst. 160.* Upon collation of a bishop by lapse, *plenary* is not pleadable; for the collation doth not make a *plenary*, by reason the bishop would be judge in his own cause: *The bishop must certify whether the church is full, or not*; and his collation is interpreted to be no more than to supply the cure till the patron doth present; and 'tis for this cause a *plenary* by collation cannot be pleaded against the right patron: But by collation, *plenary* may be a bar to any lapse of the archbishop, and to the King, tho' 'tis no bar to the right patron. *6 Rep. 50. 1 Inst. 344. 2 Cro. 207.* *Plenary* or not shall be tried by the bishop's certificate, being acquired by institution, which is a spiritual act; but in a *quare impedit*, the *plenary* must be tried by a jury. *6 Rep. 49.*

By the Common law, where a person is presented, instituted and inducted to a church, the church is full, tho' the person presented be a layman; and shall not be void, but from the time of the deprivation of the incumbent for his incapacity. *Count. Parf. Compan. 99.* Avoidance is contrary to *plenary*; as where there is a want of a lawful incumbent, &c. See *Adwovson, Presentation.* And *Black. Com. 3 V. 243.*

Plene administrabit, Is a plea pleaded by an executor or administrator, where they have administered the deceased's estate faithfully and justly before the action brought against them.

On *plene administravit* pleaded by an executor, if it be proved that he hath goods in his hands which were the testator's, he may give in evidence that he hath paid to the value of his own money, and need not plead it specially; for when executor before the action, hath paid the money in equal degree with that demanded by plaintiff, he may plead fully administered generally, and give the special matter in evidence. *2 Lill Abr. 330.* And where a testator, or intestate, was indebted to the executor or administrator, upon bond, they may plead *plene administravit*, and give their own bonds in evidence against any other bond; so likewise upon an *indebitatus*, having the privilege of paying themselves first. *Ibid. Plene administravit* is no plea where an executor, &c. is sued in the debt and detinet, because he is charged for his own occupation. *1 Mod. 185.* And if *plene administravit* be pleaded, omitting the words, *And that he hath not any goods or chattels of the testator, nor had on the day of exhibiting the bill aforesaid, or at any time after, &c.* it is bad on a demurrer, and not helped by verdict. *Cro. Jac. 132. 3 Lev. 28.* Where the executor, &c. is to shew specially, how he hath administered the goods, vide *Alegn 48.* See *Executors.*

Plight, Is an old English word, signifying sometimes the estate with the habit and quality of the land, and extends to rent-charge, and to a possibility of dower. *1 Inst. 221. b.*

Plowbets, A kind of coarse woollen cloth. *Stat. 1 R. 3. c. 8.*

Plow-lands, (*Elemosyna aratralis*) Was anciently 1 d. paid to the church for every plowland. *Mon. Angl. tom. 1. p. 256.*

Plow-bote, A right of tenants to take wood to repair ploughs, carts and harrows; and for making rakes, forks, &c. See *Black. Com. 2 V. 35.*

Plow-land, Is the same with a *bide* of land; and a *bide* or *plow-land*, it is said, do not contain any certain quantity of acres: But a *plough-land*, in respect of repairing the highway is settled at 50 l. a year, by the stat. 7 & 8 W. 3. c. 29.

Plow-Silver, In former times, was money paid by some tenants, in lieu of service to plough the lord's lands. *W. Jones Rep. 280.* See *Socage.*

Plurality, (*Pluralitas*) Signifies the plural number; mostly applied to such clergymen who have more benefices than one: And *Selden* mentions *trialities* and *quadralities*, where one person hath three or four livings. *Seld. tit. Hon. 687.*

Plurality of livings is where the same person claims two or more spiritual preferments, with cure of souls; in which case the first is void *ipso facto*, and the patron may present to it, if the clerk be not qualified by dispensation, &c. for the law enjoineth residence, and it is impossible that the same person can reside in two places at the same time. *Count. Parf. Compan. 94.*

By the Canon law, no ecclesiastical person can hold two benefices with cure *simul & semel*, but that upon taking the second benefice, the first is void: But the Pope by usurpation did dispense with that law; and at first every bishop had power to grant dispensations for pluralities, till it was abrogated by a general council, held anno 1273, and this constitution was received till the statute 21 H. 8. c. 13. *Moor 119. 2 Nels. Abr. 1271.*

The stat. 21 H. 8. ordains, that if any parson having one benefice with cure, of the yearly value of 8 l. or above in the King's books, accepts of another benefice with cure, and is instituted and inducted, then the first shall be void: So that there may be a plurality within the statute; and a plurality by the Canon law. *2 Lutw. 1306.*

The power of granting dispensations to hold two benefices with cure, &c. is vested in the King by the aforesaid statute: And it has been adjudged, that a dispensation is not necessary for a plurality, where the King presents his chaplain to a second benefice; for such a presentation imports a dispensation, which the King hath power to grant as supreme ordinary; but if such a chaplain be presented to a second benefice by a subject, he must have a dispensation before he is instituted to it. *1 Salt. 161.*

The archbishop's dispensation, and King's confirmation, regularly are necessary to hold pluralities: And the statute 21 H. 8. ought to be construed strictly, because it introduces non-residence, and plurality of benefices against the Common law. *Jenk. Cent. 272.*

A man by dispensation may hold as many benefices, without cure, as he can get; and likewise so many with cure as he can get; all of them, or all but the last being under the value of 8 l. per annum in the King's books; if the person to be dispensed withal be not incapable thereof. Yet if a dispensation is made to hold three benefices with cure, whereof the first is of the yearly value of 8 l. the dispensation is void, unless it be in case of the King's chaplains, &c. who may hold three benefices with cure, above the value of 8 l. a year, where one of them is in the King's gift. *Hob. 148.*

If there be two parsons of one church, and each parson hath the intire cure of the parish, and their benefices be severally of the value of 8 l. per ann. if one dies and the other succeeds, this is a plurality within the statute. *Cro. Car. 456.* And tho' the act mentions instituted and inducted, when one is instituted into the second church, the dispensation to hold two benefices comes too late, tho' he be afterwards inducted; for by institution, the church is full of the incumbent. *4 Rep. 79.*

By the statute, if the first benefice be of the value of 8 l. a year, or more, by the acceptance of a second, it is actually void, to all intents: But benefices under that value, being not within the statute, are only avoidable by accepting a second,

second, and not void on such *plurality*, without a declaratory sentence, &c. *Maller. 2. Imped. 104.* In these cases it hath been held, that the value of livings to make *pluralities* shall be determined by the King's books in the first-fruits office: Tho' the court hath been divided, whether the value should be taken as it was in the King's books, or according to the true value of the living. 2 *Lutw. 1301. 2 Nels. 1271.*

No deanery shall be taken by our law, to be a benefice with cure, to need dispensation on having another benefice, &c. 21 *H. 8. 1 Leon. 316.* And a parsonage and vicarage make not a *plurality*, but are only one cure; the vicarage being endowed out of the parsonage. 2 *Cro. 691.*

Parsons may purchase a licence or dispensation, to take and keep two or more benefices with cure, according to the directions and qualifications in the said statute 21 *H. 8. c. 13.* And in some cases, parsons may hold *pluralities*, without being retained as *Chaplains*, &c. pursuant to that statute, *viz.* by birth, as being the son or brother of a lord; by university degree, where a man is doctor of divinity, law, &c. or by office or employment, as a bishop, *stat. 26 H. 8.* But when a parson is made a bishop, his former qualification to hold *plurality* of livings is void. *Heb. 158. See Chaplain.*

Pluries, Is a writ that issues in the *third* place, after two former writs have been disobeyed; for first goes out the *original* writ or *capias*, which if it has not effect, then issues the *alias*; and if that also fails, then the *pluries*. *Old Nat. Br. 33.* It is used in proceedings to outlawry; and in many cases. See *Black. Com. 3 V. 283. 4 V. 314.*

As to *pluries habeas corpus*, see *ib. 3 V. 135.*

Pocket Sheriff, see *Black. Com. 1 V. 342.*

Pocket of Wool, Is a quantity of wool containing half a sack. 3 *Inst. 96.*

Poison, The killing a person by *poisoning*, has been held more criminal than any other murder, because of its secrecy, which prevents all defence against it; whereas most open murders give the party killed, some opportunity of resistance: For this reason offenders guilty of *poisoning* any person, were anciently judged to a severer punishment than other offenders. See 3 *Nels. Abr. 363.*

Richard Cole was attainted of *high treason*, for putting *poison* into a pot of pottage boiling in the bishop of *Roche*'s kitchen, by which two persons were poisoned; and there was a particular statute made for his punishment, *viz.* by the statute 22 *H. 8. cap. 9.* it was enacted, That he should be *boiled to death.* Anno 22 *H. 8. Richard Cole's case.*

At this day, to *poison* any one wilfully, is murder and felony, if the party die in a year; and the aiders and abettors, &c. shall suffer death. *Stat. 1 Ed. 6. c. 12.*

Persons poisoned in one country dying in another, the indictment found where the death happens, shall be good. 2 & 3 *Ed. 6. c. 24.*

If a man persuade another to drink a *poisonous* liquor, under the notion of a medicine, who afterwards drinks it in his absence; or if *A.* intending to *poison B.* put *poison* into a thing, and deliver it to *C.* who knows nothing of the matter, to be by him delivered to *B.* and *C.* innocently delivers it accordingly, in the absence of *A.* In this case the procurer of the felony is as much a principal as if he had been present when it was done. 2 *Hawk. P. C. 313.* And so likewise all those seem to be, who are present when the *poison* was infused, and *privity* and *consenting* to the design: But persons who only abet their crime by command, counsel, &c. and are absent when the *poison* was infused, are accessories only. *Ibid.*

Note, see *Perch. .*

Polein, Was a shoe, sharp or picked, and turned up at the toe; first came in use in the reign of *William Rufus*, and by degrees became of that length, that in *Richard* the Second's time they were tied up to the knees with gold or silver chains: They were restrained Anno 4 *Ed. 4.* but not wholly laid aside till the reign of *Hen. 8.* *Malmf. in Vit. Will. 2.*

Police, offences against, see *Black. Com. 4 V. 162, &c.*

Policy of Insurance, or Insurance, (from the Ital. *Polizza*, i. e. *sebedula & assicuratio*) Is an instrument entered into by insurers of ships and merchandise, &c. to merchants obligatory for the payment of the sum insured, in case of loss. *Merch. D. 2.*

It is a course taken by those who adventure goods to sea, that they, unwilling to hazard the whole, give unto some other, called an *Insurer*, a certain rate or proportionable sum of so much *percent.* to secure the safe arrival of the ship and goods, &c. at the place agreed on; so that if the ship and merchandise miscarry, the *insurer* maketh good to the adventurer so much as he promised to secure; but if the ship arrive safely, he gains that clearly, which the merchant compoundeth to pay him: And for the more equal dealing between the *insurer* and *insured* in this case, there was an officer ordained by statute to set down in writing the sum of their agreement, which is subscribed or underwritten by the *insurer*; and this was called *Policy*, to prevent any difference that might after happen between them. *Stat. 43 Eliz. c. 12. and 14 Car. 2. c. 23. See Insurance, And Black. Com. 2 V. 460. 4 V. 434.* And as to the Court of Policies of insurance, erected in pursuance of 43 *Eliz. c. 12. See Black. Com. 3 V. 74.*

Pollards, or pollengers, are such trees as have been usually cropped, therefore distinguished from timber-trees; *Plowd. 469.*

Poll (vered) A deed made by one party only, is not indented, but polled or shaved quite even; and is therefore called a *deed-poll*, or a single deed. *Black. Com. 2 V. 296.*

Polls, Where one or more jurors are excepted against it is called a challenge to the Polls. 1 *Inst. 156. See Black. Com. 3 V. 361. 4 V. 346.*

Polygamy, (*Polygamia*) Is where a man marries two or more wives together, or a woman has two or more husbands at the same time; when the body of the first wife or husband may be said to be injured by the second marriage, while either are living. 3 *Inst. 88. Wood's Inst. 363.*

Such second marriage, living the former husband or wife, is simply void, and a mere nullity, by the Ecclesiastical law of England: And yet the legislature has thought it just to make it felony, by reason of its being so great a violation of the publick œconomy and decency of a well ordered state. For polygamy can never be endured under any rational civil establishment, whatever specious reasons may be urged for it by the Eastern nations, the fallaciousness of which has been fully proved by many sensible writers: But in Northern countries the very nature of the climate seems to reclaim against it; it never having obtained in this part of the world, even from the time of our German ancestors, who, as *Tacitus* informs us, "*Prope soli barbarorum singulis uxoribus contenti sunt.*" It is therefore purchased by the laws both of antient and modern Sweden with death. And with us in England it is enacted by statute 1 *Jac. 1. c. 11.* that if any person, being married, do afterwards marry again, the former husband or wife being alive, it is felony; but within the benefit of clergy. The first wife in this case shall not be admitted as an evidence against her husband, because she is the true wife; but the second may, for she is indeed no wife at all; and so, *vice versa*, of a second husband.

This act makes an exception to five cases, in which such second marriage, tho' in the three first it is void, is yet no felony.

1. Where either party hath been continually abroad for seven years, whether the party in England hath notice of the others being living or no.

2. Where either of the parties hath been absent from the other seven years, within this kingdom, and the remaining party hath had no notice of the other's being alive within that time.

3. Where there is a divorce or separation *a mensa et thoro*, by sentence in the Ecclesiastical court.

4. Where the first marriage is declared absolutely void by any such sentence, and the parties loosed a vinculo. Or,

5. Where either of the parties was under the age of consent at the time of the first marriage; for in such case the

the first marriage was voidable by the disagreement of either party, which this second marriage very clearly amounts to. But, if at the age of consent the parties had agreed to the marriage, which completes the contract, and is indeed the real marriage; and afterwards one of them should marry again; it is apprehended, that such second marriage would be within the reason and penalties of the act. *Black. Com. 4 V. 163, 4.*

Pondus, Pound-ge, which duty with that of *tonnage*, was anciently paid to the King according to the weight and measure of merchants goods. *Cowell.*

Pondus Regis, Is the standard weight appointed by our ancient Kings. 35 *Ed. 1.* And what we now call *Troy Weight*, was this *pondus regis*, or *Le Roy Weight*, with the scales in *equilibrio*: Whereas the *aver de pois* was the fuller weight, with a declining scale. *Cowell.* See tit. *Measure.*

Pone, Is a writ whereby a cause depending in the county, or other inferior court is removed into the Common Pleas; and sometimes into the King's Bench: As when a *replevin* is sued by writ out of Chancery, &c. then if the plaintiff or defendant will remove that plea out of the county-court into C. B. it was done by *pone*. *F. N. B. 69. 2 Inst. 339.* And the writ *pone* lies to remove actions of debt, and of detinue, writ of right, of nuisance, &c. *New Nat. Br.* Also *pone* is a writ willing the sheriff to summon the defendant to appear and answer the plaintiff's suit, on his putting in sureties to prosecute, &c. *Wood's Inst. 570.* And the writ to the sheriff to take surety of one for his appearing is called *Pone per Vadium*.

A *pone* to remove causes, is of this form: Put at the petition of A. B. before our justices at Westminster, the day, &c. The plea which is in your court by our writ, between the said A. B. and C. D. of, &c. and summon the said C. that he be then there to answer the said A. &c. See *Black. Com. 3 V. 34, 195, 280. ii. xiii.*

Ponendis in Jussis, A writ granted by the statute of *Westm. 2. c. 38.* which statute shews what persons sheriffs ought to impanel upon *assise* and juries. *Reg. Orig. 175. F. N. B. 165.*

Ponendum in Ballium, A writ commanding that a prisoner be bailed in cases bailable. *Reg. Orig. 133.*

Ponendum Agillum ad Exceptionem, A writ by which justices are required to put their seals to exceptions, exhibited by defendant against the plaintiff's evidence, verdict, or other proceedings before them, according to the statute *West. 2.*

Pone per vadium, Is a writ commanding the sheriff to take surety of one for his appearance at a day assigned. Of this see five sorts in the table of the *Register Judicial*, verbo *Pone per vadium*.

Pontage, (*Pontagium*.) Is a contribution towards the maintenance, or re-edifying bridges. *West. 2. cap. 25.* It may also signify toll taken to this purpose of those who pass over bridges. *Stat. 1 Hen. 8. cap. 9. 22 Hen. 8. cap. 5. and 39 Eliz. cap. 25.* *Per pontagium clamat esse quiet. de operibus pontium. Plac. in Itin. apud Cestrium. 14 Hen. 7.*

This was accounted one of the three public charges from which no person of what degree soever was exempted. viz. from the charge of an expedition to the wars, from building of castles, and from building and repairing bridges: And this was called *Trinoda necessitas*; from which *Ingulpbus* tells us, *Nulli possunt laxari.* And *Selden* in his *Notes upon Eadmerus* writes, that *Ne quidem episcopi, abbates & monachi immunes erant.* And *Matt. Paris. anno 1244.* tells us, that in all the grants of privileges to monasteries, these three things were always excepted, *propter publicam regni utilitatem*, that the people might the better resist the enemy. *Cowell.*

Pontibus reparandis, Is a writ directed to the sheriff, &c. requiring him to charge one or more, to repair a bridge, to whom it belongeth. *Reg. Orig. 153.*

Poor (*Pauper*) A poor person is such as is a burden to and charge upon a parish. The poor our law takes notice of, are,

1st, Poor by impotency and defect; as the aged or decrepit, fatherless and motherless, poor under sickness,

and persons who are idiots, lunatics, lame, blind, &c. these the overseers of the poor are to provide for.

2^{dly}, Poor by casualty; such as housekeepers decayed or ruined by unavoidable misfortunes; poor persons overcharged with children, labourers who are disabled, and these, having ability, are to be set to work, but if not able to work, they are to be relieved with money.

3^{dly}, Poor by prodigality and debauchery, also called *Tristeleji* Poor; as idle slothful persons, pilferers, vagabonds, strumpets, &c. who are to be sent to the house of correction, and be put to hard labour, to maintain themselves; or work is to be provided for them, that they do not perish for want; and if they become impotent by sickness, or if their work will not maintain them, there must be an allowance by the overseers of the poor, for their support. *Dalt. c. 73. f. 35.*

The law not only regards life and member, and protects every man in the enjoyment of them, but also furnishes him with every thing necessary for their support. For there is no man so indigent or wretched, but he may DEMAND a supply sufficient for all the necessities of life, from the more opulent part of the community, by means of the several statutes enacted for relief of the poor. A humane provision; yet, tho' dictated by the principles of society, discountenanced by the Roman laws. For the edicts of the Emperor *Constantine* commanding the public to maintain the children of those who were unable to provide for them, in order to prevent the murder and exposure of infants, an institution founded on the same principle as our Foundling Hospitals, tho' comprized in the *Theodosian* code, were rejected in *Justinian's* collection. *Black. Com. 1 V. 121.*

It is not true, what some people imagined, that the Common law of England made no provision for the poor: The Mirror shews the contrary; but how it was done does not appear. *Bur. 450.*

None shall give alms to a beggar able to work, 23 *Ed. 3. c. 7.* Poor persons who are impotent, shall abide in the same town, or in the next within the hundred that is able to maintain them, 12 *Ric. 2. c. 7.* Improprizors shall be obliged to distribute a yearly sum to the poor parishioners, 15 *Ric. 2. c. 6.* 4 *Hen. 4. c. 12.* Provision to be made for the impotent poor, 19 *H. 7. c. 12.* 22 *H. 8. c. 12.* 27 *H. 8. c. 25.* 1 *Ed. 6. c. 3.* 3 & 4 *Ed. 6. c. 16.* 5 & 6 *Ed. 6. c. 2.* 2 & 3 *P. & M. c. 5.* 5 *El. c. 3.* 14 *El. c. 4.* 18 *El. c. 3.* 35 *El. c. 7. f. 25.* 39 *El. c. 3.*

1. Statutes concerning the poor.
2. Of appointing overseers; their duty; and of compelling them to account.
3. Of the poor rate, who, and what shall be liable thereto; and of taxing others in aid.
4. Of the remedies for recovering rates; and of setting aside rates.
5. Of relieving, and ordering maintenance for the poor.
6. Of parents and children being obliged to maintain each other.
7. Of the settlements of poor people.

1. Statutes concerning the poor.

By stat. 43 *Eliz. c. 2.* The churchwardens of every parish, and four, three, or two substantial householders there, as shall be thought meet, to be nominated yearly, shall be called overseers of the poor of the same parish: And shall take order from time to time, with consent of two or more justices for setting to work the children of such whose parents shall not by the said churchwardens and overseers, be thought able to maintain their children; and also for setting to work all such persons, having no means to maintain them, and use no ordinary trade to get their living by: And also raise weekly, or otherwise, a convenient stock of flax, &c. to set the poor on work: And also competent sums of money for the necessary relief of the lame, impotent, old, blind, and such other among them, being poor, and not able to work, and also for the putting out such children apprentices, to be gathered out of the parish, according to the ability of the parish;

parish; and to do all other things, as well for disposing of the said stock, or otherwise, as to them shall seem convenient.

Which churchwardens and overseers shall meet together at the least once every month, in the church after Divine service, there to consider of some good course to be taken, and for some meet order to set down in the premisses.

If the justices perceive, that the inhabitants of any parish, are not able to levy among themselves sufficient money for the purposes aforesaid, then two justices may tax any other, of other parishes, or out of any parish within the hundred wherethe said parish is, to pay such money to the churchwardens and overseers of the said parish for the said purposes, as the justices shall think fit, according to the intent of this law. And if the hundred shall not be thought able to relieve the several parishes not able to provide for themselves, then the justices at their general quarter-sessions, or the greater number of them, shall rate any other, of other parishes, or out of any parish within the county for the purposes aforesaid, in their discretion.

And it shall be lawful, for the churchwardens and overseers, or any of them, by warrant from any two justices of the peace, to levy as well the sums of money, and all arrears, of every one who shall refuse to contribute according as they shall be assessed, by distress and sale of the offender's goods, as the money or stock which shall be behind on any account to be made, as aforesaid, rendering to the parties the overplus: And in default of such distress, it shall be lawful for any two justices to commit him or them to the common gaol of the county, there to remain without bail until payment of the sum, arrears and stock.

Churchwardens and overseers may bind poor children apprentices, and may by leave of the lord of the manor build houses on the waste for the poor to inhabit, but not to be afterwards used for the habitation of any other, on the pains contained in the 31 *Elizabeth*.

Provided, That if any person is grieved with any act done by the churchwardens or other persons, or by the justices; then it shall be lawful for the justices at their general quarter-sessions, or the greater number of them, to take such order therein, as to them shall be thought convenient; the same to bind all parties.

The father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame and impotent person, or other poor person not able to work, being of sufficient ability, shall at their charges relieve and maintain every such poor person in that manner, and according to that rate, as by the justices, or the greater number of them, at their general quarter-sessions shall be assessed; on pain that every one of them shall forfeit 20 s. for every month they shall fail therein.

Mayors, &c. of corporations being justices, have the same authority within their limits, as justices of the county. And every alderman of London shall do so much, as is appointed to be done by one or two justices.

If any parish extend into more counties than one, or part lie within the liberties of any city, town or place corporate, and part without, then as well the justices of every county, as also the head officers of such city, town or place corporate, shall intermeddle only in so much of the parish as lieth within their liberties, and not any farther. And every of them respectively within their several jurisdictions, to execute the ordinances concerning the nomination of overseers, the consent of binding apprentices, the giving warrant to levy taxations unpaid, the taking account of churchwardens and overseers, and the committing to prison such as refuse to account, or deny to pay the arrears due on their accounts; yet the churchwardens and overseers, or the most part of them, of the parishes that extend into such several limits and jurisdictions, shall without dividing themselves duly execute their office within the parish, in all things to them belonging, and duly exhibit and make one account before the head officer of the town or place corporate, and one other, before the justices of peace, or any two of them.

For not appointing overseers yearly, every justice, &c. of the division forfeit 5 l. The justices, or the more part of them, in their general sessions to be holden next after the feast of Easter next, and so yearly as often as they shall think meet, shall rate every parish to such a weekly sum of money as they think convenient, so as no parish be rated above the sum of 6 d. nor under the sum of one halfpenny, weekly to be paid, and so as the total sum of such taxation of the parishes in every county amount not above the rate of 2 d. for every parish within the county. Which sums so taxed, shall be yearly assessed by the agreement of the parishioners within themselves, or in default thereof, by the churchwardens and petty constables of the parish, or the more part of them, or in default of their agreement, by order of such justice or justices as shall dwell in the same parish, or (if none be there dwelling) in the parishes next adjoining.

And if any person refuse or neglect to pay any portion of money so taxed, it shall be lawful for the churchwardens and constables, or any of them, or in default thereof, for any justice of the liberty, to levy the same by distress and sale, rendering to the party the overplus. And in default of such distress, it shall be lawful to any justice of that limit to commit such person to prison, there to abide without bail till he have paid the same.

There is a provision by the act, (c. 18.) for the inhabitants of the island of Foulness in the county of Essex.

Stat. 3 W. & M. c. 11. sect. 11. There shall be kept in every parish, a book wherein the names of all persons who receive collection shall be registered, with the day and year when they were first admitted to have relief, and the occasion: and yearly in Easter week, or as often as shall be thought convenient, the parishioners shall meet, before whom the book shall be produced, and all persons receiving collection to be called over, and the reasons of their taking relief examined, and a new list made of such persons as they think fit and allow to receive collection; and no other person shall be allowed to receive collection at the charge of the parish, but by authority under the hand of one justice residing within such parish, or (if none be there dwelling) in the parts next adjoining, or by order of the justices in sessions, except in cases of pestilential diseases, plague or small pox, for such families as shall be therewith infected.

Stat. 8 & 9 W. 3. c. 30. sect. 2. Every person who shall be on the collection, and receive relief of any place, and the wife and children of any such person cohabiting in the same house, such child only excepted, as shall be by the churchwardens and overseers permitted to live at home, in order to attend an helpless parent, shall upon the shoulder of the sleeve of the uppermost garment, in a visible manner, wear a large Roman P. together with the first letter of the name of the parish or place, whereof such poor person is an inhabitant, cut either in red or blue cloth, as by the churchwardens and overseers shall be directed: and if any such poor person shall neglect or refuse to wear such mark, it shall be lawful for one justice to punish such offender, either by ordering his allowance to be abridged, suspended or withdrawn, or otherwise by committing him to the house of correction, to be whipt, and kept to hard labour, not exceeding 21 days; and if any churchwarden or overseer shall relive any such poor person, not wearing such badge, and be thereof convicted on oath of one witness before one justice, he shall forfeit 20 s. by distress, half to the informer, and half to the poor.

Stat. 5 Geo. 1. c. 8. sect. 1. Whereas sometimes men run away, leaving their wives and children, and sometimes women run away leaving their children on the charge of the parish, altho' such persons have estates which should ease the parish of their charge; it shall be lawful for the churchwardens or overseers, where any such wife, child or children shall be so left, on application to, and by warrant or order of two justices, to seize so much of the goods, and receive so much of the annual profits of the lands and tenements of such husband, father or mother, as such two justices shall direct, towards the discharge of the place where such wife, child or children

children are left, for bringing up and providing for such wife, child or children; which warrant or order being confirmed at the next quarter-sessions, it shall be lawful for the justices there, to make an order for the churchwardens or overseers, to dispose of such goods by sale or otherwise, or so much of them, for the purposes aforesaid, as the court shall think fit, and to receive the profits, or so much of them as shall be ordered by the said sessions, of his or her lands and tenements for the purposes aforesaid.

And the churchwardens and overseers shall be accountable to the justices at the quarter-sessions for all money they shall so receive.

9 *Geo. 1. c. 7. s. 1.* enacts, That no justice of peace shall order relief to any poor person dwelling in any Parish till oath made of some reasonable cause for it, and that he had applied to the Parishioners, or to two overseers of the Poor, and was refused, and till summons of two overseers of the Poor to shew cause.

And any person ordered to be relieved shall be entred in the Parish books, to be relieved so long as the cause for such relief continues, and no longer. And if any parish officer (except upon emergent occasions) shall charge to the Parish account any monies given to any person not registred, he shall forfeit 5*l.* to be levied by distress and sale, by warrant of two justices, to be applied to the use of the Poor of the Parish by direction of such justices.

It shall be lawful for the churchwardens and overseers, with consent of the major part of the parishioners, to purchase or hire any house in the same parish, township or place, and to contract with any for the lodging, keeping, maintaining and employing such Poor as desire relief, and there to keep, maintain and employ such poor persons, and take the benefit of their labour. And if any poor person refuse to be lodged, &c. in such house, he shall be put out of the Parish book, and shall not be intitled to receive relief: and where any parish or township shall be too small to purchase or hire such house, it shall be lawful for two or more such parishes, townships or places, with consent of the major part of the Parishioners, and with the approbation of any justice of the peace, &c. to unite in purchasing or taking such house for lodging, &c. the Poor, and there to keep, maintain and employ the Poor, and to take and have the benefit of their labour, for the better relief of the Poor there kept, &c. And if any Poor in the respective Parishes, &c. so uniting shall refuse to be lodged, &c. in the house so hired, &c. he shall be put out of the collection book, and not intitled to ask relief: and it shall be lawful for the churchwardens and overseers, &c. to contract with the churchwardens and overseers of any other parish, &c. for the lodging, &c. of any poor person of such other Parish, &c. as to them shall seem meet. And if any poor person of such other parish, &c. shall refuse to be lodged, &c. in such house, he shall be put out of the collection book, and not be intitled to relief.

Stat. 17 Geo. 2. c. 3. Persons authorized to take care of the Poor, shall give publick notice in the church, of every rate for relief of the Poor, allowed by the justices of peace, the next Sunday after the same shall have been so allowed; and that no rate shall be valid so as to collect the same, unless such notice shall have been given.

And that persons authorized as aforesaid, shall permit every inhabitant to inspect every such rate, at seasonable times, paying one shilling for the same, and on demand, forthwith give copies of the same, or any part thereof, to any inhabitant, paying at the rate of sixpence for every twenty-four names, on pain of forfeiting to the party grieved twenty pounds.

By *Stat. 17 Geo. 2. c. 37.* Where there shall be any dispute or uncertainty in what parish or place, lands improved, or drained, lie, and ought to be rated; every occupier of such lands, or houses built thereon, tenements, tythes arising therefrom, mines therein, and saleable underwoods therein growing, shall be rated to the relief of the Poor, and to all other parochial rates within such parish and place which lies nearest to such lands, in like manner, and subject to the same regulations, as other lands within such parish and place are by law liable

to be rated thereunto; if any difference arise touching what parish or place such lands ought to be rated in, it shall be lawful for the justices, at their next general quarter-sessions, to determine the same on the appeal of any person interested, and at such sessions to cause such lands, &c. to be allotted to, and fairly assessed in such parish or place as they see just. But not to affect or determine the boundaries of any parish or place, to any intent other than for the purpose of rating such lands, &c. to relief of the Poor, and to all other parochial rates within such Parish or Place to which they shall be so allotted.

Vide the Stat. 17 Geo. 2. c. 38. which regulates the mode and time of accounting by churchwardens and overseers to their successors, as also the delivery over of the money, goods and chattels in their hands, &c.

Also see *Post, Division 3.*

The same statute, *sect. 4.* gives an appeal to the sessions to any party aggrieved by any assessment, or having any material objection to any person being put on, or left out of such rate, or to the sum charged on any person, or shall have any material objection to such account, or any part therein, or who shall find him, her or themselves aggrieved by any thing done.

And by *sect. 6.* it is enacted, That on all appeals from rates, the justices (where they shall see just to give relief) are required to amend the same in such manner only, as shall be necessary for giving relief, without altering such rates, with respect to other persons mentioned in the same; but if on an appeal from the whole rate it be found necessary to quash the same; then the justices are required to direct the churchwardens and overseers of the poor to make a new equal rate.

And by *sect. 7.* The goods of any person assessed and refusing to pay, may be levied by warrant of distress, not only in the place for which such assessment was made, but in any other place within the county or precinct; and if sufficient distress cannot be found within the county or precinct, on oath made thereof before some justice of any other county or precinct, (which oath shall be certified under the hand of such justice on the warrant) such goods may be levied in such other county or precinct by virtue of such other warrant and certificate; and if any person be aggrieved by such distress, it shall be lawful for such person to appeal to the next general or quarter-sessions of the peace for the county or precinct where such assessment was made, and the justices there are required to finally determine the same.

In case any person refuse to pay to overseers, any sum they shall be legally rated or assessed to, it shall be lawful for the succeeding overseers to levy such arrears, and out of the money levied to reimburse their predecessors all sums of money which they have expended for the use of the poor, and which are allowed to be due to them in their accounts.

And where any person shall occupy any house, &c. from which any other person assessed shall be removed, or which at the time of making such rate was unoccupied, then every person removing from, and every person coming into or occupying the same, shall be liable to pay to such rate in proportion to the time that such person occupied the same respectively, in the same manner, and under the like penalty of distress, as if such person so removing had not removed, or such person so coming in or occupying had been originally rated in such rate; which proportion in case of dispute shall be ascertained by any two or more justices.

And it is further enacted, That true copies of all rates for relief of the poor be fairly entered in a book, to be provided for that purpose, by the churchwardens and overseers, who shall take care that such copies be entred accordingly, within fourteen days after all appeals from such rates are determined, and shall attest the same by putting their names thereto; and every such book shall be carefully preserved by the churchwardens and overseers, or one of them, in some place whereto all persons assessed or liable to be assessed may freely resort; and shall be delivered over from time to time to the succeeding churchwardens and overseers, as soon as they enter into

into their office, and shall be produced by them at their general or quarter-sessions, when any appeal is to be determined.

And overseers of the *poor* within every township or place, where there are no churchwardens, shall execute every act, concerning the *poor*, as churchwardens and overseers of the *poor* may execute by this act, or any former statute concerning the *poor*, and shall suffer such pains and penalties for neglect, as churchwardens and overseers are liable to.

2. Of appointing overseers; their duty; and of compelling them to account.

Churchwardens of every parish] See the Stat. 43 Eliz. c. 2. sect. 1. The justices of peace, by the general words of this statute, have power to name overseers in all Parishes; and it must extend as well to extraparochial places as to all Parishes in general, and no subsequent words shall controul the general words in the enacting part; and certainly all the *poor* acts shall be construed to extend to such places, as well as to other Parishes, when they are within the same mischief, and shall be subject to the controul of the justices of peace. Most of the forests in England are extraparochial, and so is Christ-church in Oxford, but they ought to maintain their own *poor*; therefore a peremptory *mandamus* was granted to the justices of peace to choose overseers in the town of Rufford, being an extraparochial place. - 8 Mod. 39. But such extraparochial place must be a township or village. See Stran. 1004, 1071, 1143.

Four, three, or two] On motion to quash an indictment against B. for that he, with four others, being appointed overseers of the *poor*, refused to take upon him that office, &c. It was objected, that the statute directs the nomination but of four, three, or two, with the churchwardens. And per Parker Ch. J. That is very true, tho' in many places more are appointed than four; for the act says four, three, or two shall be nominated of the inhabitants, at the discretion of the justices (*scil.*) they may nominate four, three, or two; it is not a limitation of the justices power, but it is in the very authoritative part thereof. Where more than four are added, they are not punishable by the act, and they can be only added as assistants. Per Powell, the question will be whether the words of the act will be any more than directory, or a limitation of their authority. In most of the parishes about London there are more than four, therefore we need not determine this point; but the indictment was quashed for another fault. 16 Vin. Abr. 415.

But no greater number than four can be appointed. Burrow 445, 453.

Substantial householders there] The appointment of overseers must stile them *substantial householders*. Stran. 1261.

It was moved for a *mandamus* to J. H. and J. T. justices of peace in the county of Dorset, &c. to nominate two *substantial householders* to be overseers of the *poor* upon this statute; and there was an affidavit, that at a meeting of the parish after Easter, one John B. and Mary F. were elected overseers, and at a meeting of the justices they approved of Mr. B. and refused the woman, as being an unfit person to serve as overseer; and the old overseers refusing to nominate any other, the justices approved B. only. Per Powell, A woman is not to be an overseer of the *poor*; and there can be no custom in a Parish to put her in, because of her being a housekeeper; because this is an officer created by act of parliament. Per Parker Ch. J. The nomination is to be by the justices, and it seems the overseers are to continue but one year. The Parish here was obstinate in not having another instead of the woman, and the justices should have nominated one of the old ones, since they were so stiff; but (because the justices had done well in refusing the woman) he directed that they should apply to the justices to have another nominated; and if they refused, then to apply to the court for a *mandamus* the next term. 16 Vin. Abr. 415.

A citizen of London who lived in the country in the summer, was chose overseer of the *poor*, the court seemed to discountenance such choice of one who was resident there only some part of the summer, and was actually an inhabitant of another Parish in London. Cath. 161.

Early in Easter week, or within one month after Easter] The court seemed to think an appointment of overseers on a Sunday, to be a good appointment: for it may be in Easter week, and this is the first day of the week. Foley 4.

An appointment of overseers is good, tho' not made within one month after Easter. Stran. 1123.

And many other counties in England and Wales.] See stat. 13 & 14 Car. 2. c. 12. sect. 21. — In trespass a special verdict found this statute, and that the Parish of Kenilworth in the county of Warwick (not being any of the counties named in this statute) is a large Parish, having two townships, but it is not found that it is so large that parochial distribution cannot be made; and the question was, if the county of Warwick, not being named in the statute, shall be taken within the general words, (and divers other counties;) and Hopkins serjeant cited a case to be adjudged in C. B. that the statute did not extend to other counties than those which are expressly named; and to this Hale inclined; but the court would see the precedent before they gave judgment; by which adjournatur. 2 Lev. 142. But afterwards it was adjudged, that this statute did not extend to any other counties, but only to those that are named therein. Ibid. Freem. 401. Hale Ch. J. said, by the words it seems to be intended for all counties in England, because the words are (or other counties;) but serjeant Hopkins cited the judgment in C. B. in case of Wilson and Bonner, between Chipping-Campden and Broad-Campden in Gloucestershire, where the judges held, that this act extended to no counties but those named. Ibid. 412. The court gave judgment for the defendant because tho' it was found to be a large Parish, yet it was not found to be so big that by reason of the largeness they could not reap the benefit of the act of 43 Eliz. according to the statute, and for that reason the court gave judgment, and so did not positively rule, that no other counties were within the act but those named; but Hale strongly inclined that no other counties were within the act, and said the inconvenience would be very great; for by that means the *poor* boroughs would be charged with *poor*, and the vills where men of good estates lived, but perhaps no *poor*, would be at no charge at all. But 2 Salk. 486. pl. 44. in marg. there is a note, That in the case of the inhabitants of Stokelane and Dolting, Hill. 11 Ann. it was adjudged, That by virtue of this act the justices may exercise the powers given by 43 Eliz. and this act in all extraparochial places containing more houses than one, so as to come under the denomination of a vill or township. And in the case of Hinam and Churcham Parishes in Gloucestershire, Hill. 1738. Lee Ch. J. cited the said case of Stokelane and Dolting, in which he said it was held, that this statute extended by equity to all the counties in England, and that it was so held upon great deliberation. 16 Vin. Abr. 421.

Every poor, needy, impotent and lame person] This statute relates only to the maintenance of poor and impotent persons, and not to bachelors, who are provided for by other statutes. 1 Salk. 123.

Two or three overseers of the poor] The court held, that this clause plainly extends to towns and villages in extraparochial places as well as within Parishes; for the law makers had in view the inconvenience, that some towns and villages would have the benefit of 43 Eliz. This statute is of (towns, &c. in counties) and not (in Parishes); and towns and villages in extraparochial places are plainly within the words, tho' not directly within the view of the act; and tho' there be not officers appointed in extraparochial places, yet the justices ought to do it upon complaint. 16 Vin. Abr. 421.

When the Parish is not large, and consisting of several townships, so as the 43 Eliz. may be of benefit to them, the justices ought not to appoint particular overseers

Overseers according to this statute. 16 *Vin. Abr.* 421.

As to the duty of the overseers of the poor, see *Stat. 43 Eliz. c. 2. sect. 2, 6, 11.* and *Stat. 17 Geo. 2. c. 38. sect. 1, 11, 13, 14.*

Make and yield up to such justices of peace a true and perfect account] See *Stat. 43 Eliz. c. 2. s. 2.*—The justices authority in stating this account, cannot be delegated to any other. 16 *Vin. Abr.* 415.

Shall pay and deliver over] *Mandamus* to the justices, to grant a warrant for levying 30*l.* 17*s.* 11*d.* being the balance of the last overseers account in their hands. They return, that there was such a balance, but that the vestry had ordered them to return it, and employ an attorney to sue for charity money, and get it laid out for the benefit of the poor; that one *Young* was so employed, and the balance exhausted in fees, and that the overseers had engaged to pay *Young*; & *ca de causa* they had refused to grant the warrant: and *per curiam*, There must go a peremptory *mandamus*, for the statute 43 *Eliz. c. 2.* says, the balance shall be paid over to the new overseers, under a penalty: and it is not in the power of the vestry to dispense with the statute. *Stran.* 992.

Negligent in their office] If an overseer does not provide for the poor, he is indictable; and if he relieves the poor when there is no necessity, it is a misdemeanor. *MS. Cases. Pasch. 3 Ann. B. R. Farney's case.*

For every such default of absence or negligence 20 shillings] This penalty for not meeting in the church shall never be inflicted on the overseers of extraparochial places, because they have no church to meet in. 8 *Mod.* 40.

If any of these officers be convicted of any of the penalties in this act; the other must levy it. 16 *Vin. Abr.* 415.

To commit every one of the said churchwardens and overseers] See *Stat. 43 Eliz. c. 2. sect. 4.* If accounts be adjusted, and the overseers refuse to pay the balance, they cannot be committed immediately, but a warrant must issue to distrain them, and upon a return thereof there may be a commitment. 16 *Vin. Abr.* 416.

The justices cannot commit an overseer for bringing in an account to which they object, but they ought to hear it, strike out what is amiss, and balance the account. 16 *Vin. Abr.* 416.

The defendant being an overseer, was committed by two justices of peace by a warrant, which recited, that he had appeared before them, and being demanded to give a just account of all monies he had received and paid, he had only produced an account in gross of his receipts and payments, and refused to give a particular account, or produce his books, &c. and they believing this to be no account according to this statute, and defendant refusing to give any other, therefore they commit him to be detained till he shall make a true account. And upon a *habeas corpus* he was discharged. *Per tot. cur.* Because the justices had no authority to commit in this manner by this statute, for that an account was confessed to have been rendered. &c. *Shaw.* 395.

An order made at the sessions relating to accounts of overseers of the poor was moved to be quashed, because it did not appear the accounts had been before two justices *quorum unus*, and they cannot come *per saltum* to the sessions; and *Salk.* 533. was cited. On the other side it was said, that it appeared there was an allowance, for the appeal is said to be against the disbursements and allowance thereof, which the court will presume was regular; and being in general, is not like the case in *Salk.* Which was said to be by two justices without *quorum unus*. *Sed per curiam*, It does not follow, that this was an allowance by two justices, for the Parish might do it; therefore for want of jurisdiction this order must be quashed. *Stran.* 983.

3. Of the poor rate, who, and what shall be liable thereto; and of taxing other parishes in aid.

By taxation of every inhabitant] See *Stat. 43 Eliz. c. 2. sect. 1, 3.* & 17 *Geo. 2. c. 38. sect. 12.* Assessments for the poor ought to be made according to the visible estate

of the inhabitants there, both real and personal, and no inhabitant there is to be taxed to contribute to the relief of the poor in regard of any estate he hath elsewhere in any other town or place, but only in regard of the visible estate he hath in the town where he dwells, not for any other land he hath in any other place or town. 2 *Bulf.* 354.

Rent is no standing rule for making a poor rate; for circumstances may differ, and there ought to be a regard *ad statum ad facultates.* *Comb.* 478.

The sessions, upon setting aside a rate, may make a new one themselves, or order the churchwardens and overseers to make a new one, they having it in their discretion to make a new rate at sessions, or remand it to the churchwardens, &c. to make a new one. 2 *Salk.* 483.

The churchwardens and overseers may make a rate of themselves. 2 *Salk.* 531.

H. took part of a house in the Parish of *D.* on the third of *December*; he was rated as an inhabitant, and was distrained for a quarter's rate the *Christmas* following; but the distress was taken before *Christmas* on a general warrant made for the whole year: and in replevin it was ruled upon evidence by *Holt*, 1st, That if two several houses are inhabited by several families, who make and have but one common entrance for both; yet in respect of their original, both houses are rateable severally; for they were at first several houses; and if one family goes, one house is vacant: but if one tenement be divided by a partition and inhabited by different families, viz. the owner in one, and a stranger in another, these are several tenements, severally rateable while they are thus severally inhabited, but if the stranger and his family go away it becomes one tenement. 2dly, That *H.* could not be rated for the whole quarter, for poor rates are to be assessed MONTHLY by the statute, and by this means a man cannot move in the middle of a quarter, but he must be twice charged. 2 *Salk.* 532.

When goods are rated, it ought to be according to the value of lands, viz. goods of the value of 100*l.* shall be rated 5*l.* per annum, as lands are, and the person must be charged only in the place where the goods are at the time of the assessment; for if he has no goods where assessed, if distrained he may have an action of trespass, &c. *Dalt. Just.* 2, 3, cap. 73.

By the words and meaning of the statute 43 *Eliz. 2.* the occupiers of the land are to be assessed, and not the lessor who receives the rents; the occupier of the land being by law only to pay the assessment, unless it be specially provided for as to this payment between him and his lessor. 2 *Bulf.* 354.

Parsons ought to contribute to the poor. 3 *Keb.* 252.

A *mandamus* was prayed to the mayor of *Chichester*, to sign a tax made on the palace, &c. of the bishop of *Chichester*, being within the parish of *Subdeanry*, and *per cur.* it was granted; because against this there can be no prescription, and all the prebendaries who live in the same close, which is a fourth part of the town, pay it. 3 *Keb.* 573.

A parson who lets his tithes to the parishioners may be taxed upon the poor rate; for the letting is but an agreement with the parishioners to retain the tithes, and the parson has a *modus* for his tithes; tho' it was objected that the parishioners were occupiers, and so the parson not taxable. *MS. cases Pasch. 7 Ann. The Queen v. Bartlet.*

Those ought only to be contributory who were livers there the year before, and none else. *Settlements* 48. pl. 71.

A. seised of lands, demised the same to *B.* reserving the yearly rent of 10*l.* *A.* covenanted with *B.* that he should quietly enjoy the land, and to indemnify him against all charges and taxes whatsoever to be imposed upon the lands, except tithes. *B.* entered, and was possessed, and the churchwardens and overseers of the Parish where the land lay, and of which *A.* was an inhabitant, made a poor rate, and *B.* by reason of the lands was charged with such a sum of the rate which he paid, and he brought covenant against *A.* and assigned the breach, in that *A.* did not indemnify against the poor rate, &c. And after argument

gument on both sides the court unanimously agreed that the poor rate was not within the covenant, and therefore have judgment for defendant. *Gibb. 297.*

The Doctor agreed with several of the parishioners to take so much for his tithes, and made a lease to F. The Doctor was rated for the tithes to the parish levies, who appeal'd; and the matter being found specially, the question was, *who should be said to be the occupier*, the Doctor's lessee, or the inhabitants; and *per cur.* The lessee must be said to be the occupier, in regard there is no certain time limited for *how long*, but only from year to year; and *per Eyre J.* The letting of them is in nature of a sale, and the party looked upon as a vendee; no manner of advantage is given to the inhabitants; for they give the full value for their tithes; otherwise had it been a contract for years. *Poor's Settlements 104. pl. 140.*

Defendant being assailed towards the poor rate for his tithes as vicar, appealed to the sessions, where he is absolutely discharged. But by the court; As vicar he is chargeable by 43 Eliz. and the sessions hath only power to moderate, not discharge: And the order of sessions was quashed. *Stran. 77.*

Where the parson agrees that the tenant shall retain the tithes, yet the rate for them must be upon the parson. *Stran. 525.*

All things which are real and bring in a yearly revenue may be rated and taxed to the poor. *Shaw's Parish Law 221.*

On a motion to confirm a tax laid by the justices of peace on a toll of the corporation of W. for a rate to the poor, *Hale Ch. J.* said, that he was of opinion that this toll was chargeable, tho' part of it were to maintain the mayor; and *per cur.* A mandamus was granted to the mayor and justices to execute the order, nisi. 3 Keb. 540.

Note; It hath been resolved by the court, that ground rents are liable to pay the poor's rate. *Comb. 62.*

Hospital lands are chargeable to the poor, as well as others; for no man by appropriating his lands to an hospital, can exempt them from taxes to which they were subject before, and throw a greater burden upon their neighbours. 2 Salk. 527.

The question was, whether a house converted into a conventicle, and used for no other purposes, was rateable to the poor's tax; the court said, they never knew it, and order'd them to shew cause; and afterward the order was quashed. *Poor's Settlements 124. pl. 109.*

A farmer is not to be taxed to the poor for his necessary stock according to the lands he holds; but if he has a super-abundant stock, i. e. more than the land requires, he shall be taxed for that. *Just. Cas. Law 233.*

Yet it is a *quære* still if a farmer is to pay a rate or tax for stock upon land. *Ibid.*

A shopkeeper shall be charged to the poor's rates for the goods, &c. in his shop. *Just. Cas. Law 233.*

On a motion to quash a poor's rate made at the quarter-sessions in Marlborough, because it was assessed for trade, and the corporation would not assess the toll of their market, or their own lands, and they would not hear the matter at their sessions. *Per cur.* It will be inconvenient to quash poor rates; but you may take a mandamus to assess you according to law, as in the case of *The town of Cambridge MS. cases.* 16 Vin. Abr. 426.

In the case of the governor and company for smelting lead against *Richardson* and others, it was determined by the court of King's Bench in *Michelmass term 3 Geo. 3.* That a lessee of lead mines, whereon no rent is reserved other than a certain proportion of the ore to be raised, is not rateable to the poor, under the stat. 43 Eliz.

As to taxing other parishes in aid, see 43 Eliz. c. 2. sect. 3.

If several inhabitants of A. have lands in the parish of B. and their tenants are so poor that they are not able to pay to the relief of the poor of A. the landlord's inhabiting in the parish of A. shall be no discharge to them, but they shall pay for their lands, which they have in the parish of B. 2 Bulstr. 352.

Sir James Macnaghten attorney general moved to quash an order of two justices made upon this statute; his exception was, that it does not appear that

the parishes taxed are within the hundred; for it is only said that they are within the county of the city of Norwich; and two justices by the act have not power to tax the county but only the hundred, or the parishes within the hundred. To which it was answered, that if two justices cannot relieve in this case, there can be no relief given; for it is well known there are no hundreds within cities, and the city, and the county of the city are the same, and the power given to the justices must arise upon a defect in the hundred, and where there is no hundred there can be no such defect, and the sessions could have made no order in this case. But *per Powell*; This is not *casus emissus* out of the statute; and tho' the two justices have no power, here being no hundred, yet the sessions have a jurisdiction, and may tax the county of the city in part or at large, to which the rest agreed, and quashed the order, being made by two justices only. 11 Mod. 269.

There are two ways by this statute to make one parish contributory to the poor of another, viz. either the justices may tax particular persons in aid to that parish which cannot relieve its own poor; or they may assess the whole parish in a certain sum, and leave it to the churchwardens and overseers to levy the same on particular persons. 2 Salk. 481. *Shaw's Parish Law 219.*

Mandamus to the justices to make a rate for support of the poor which was opposed, because the parish officers ought to make the rate, and the justices are only to sign it; to which it was answered, that this motion was grounded on this clause of the statute, and thereupon a mandamus was granted, directed to the justices; and as this is a matter of right, they ought to make a return. 2 *Shaw's Pract. Just. 47.* *Shaw's Parish Law 219.*

An order of sessions was returned upon stat. 43 Eliz. for rating the adjacent parishes, &c. for relief of a poor parish. Exception was taken, that by the statute this ought to have been done by the two next justices, whereas this order was made at sessions. And by the solicitor general, If it be made by all the justices, &c. then it is by two, and they shall be supposed to be at the general sessions. And *per Wythens*, You have not pursued the stat. and do hereby prevent the appeal. *Adjournatur*; and it was afterwards at another day quashed for that reason, *Comb. 25.*

A parish in Colchester being surcharged with poor, the justices made an order that two other parishes in Colchester should pay to the relief of the poor within this parish, viz. the one 5 s. and the other 8 s. per week, and that the overseers should collect it; and the order being removed by *certiorari*, *Alibone* moved to quash it, because not pursuant to the direction of 43 Eliz. which says, *others, of other parishes*; so that it ought to be assessed by the justices upon particular persons, and not generally: But the court seemed to be of opinion, that it was right; and that the justices are only to assess the quantum, and then the rate is to be made by the overseers of the poor of the parish, and such was the opinion of the court. *Skin. 258.*

It was moved to quash an order made by two justices, that the inhabitants of L. G. should pay a yearly sum to *Whetstone*, 1 s. Because it was not said *quorum unus*, but that exception was disallowed, zdly. For that it was only said, that *Whetstone* was at great charge in maintaining the poor, but not that they were unable. Note; Upon an appeal the justices made an order at the sessions, wherein it is said they were oppressed, which implies inability. *Comb. 241.*

Upon an order for contribution to the relief of a poor parish it was ruled, that the justices may either charge particular persons or the whole parish, and they to levy it; but here a sum in gross was laid for a whole year, which (it was objected) was unreasonable; for their ability may change; nevertheless the order was confirmed, *Comb. 309.*

Holt Ch. J. said, that possibly a place extraparochial may be taxed in aid of a parish; but a parish shall not be taxed in aid of that. 2 Salk. 486.

In a city where one parish is not able to relieve their poor, the next parish, being able, is to aid them by a weekly

weekly allowance, but when the cause ceases, such allowance is to cease also. *Just. Case Law* 234.

In case a parish is not able to maintain its poor, two justices may tax any other parish *within the hundred* towards their relief, and if the hundred be not of ability to relieve their parishes, the justices in their sessions may tax any other parish or parishes *within the county*. 2 Show's Pr. Ct. Just. 42.

An order was made by the justices of the borough, for the parish of *St. Peter's* to pay to the officers of *St. Mary's* the sum of 20s. weekly, *until the justices should see fit to order the contrary*. It was objected, 1st, That it does not appear that the parish of *St. Mary's* is over-burthened with poor, but over-ruled; for the order follows the words of the statute. 2dly, It is said, that they are justices of the town and borough, and it appears upon the order, that the parish of *St. Mary's* is within the borough, but not within the town and borough. But *per cur.* they are justices of both. 3dly, The order is, *until we shall see fit to order the contrary*, where the act never gave the justices such an authority, and it is in effect making a perpetual order; for if one of the justices die or be removed, no other justice can alter it till the said justices shall see fit to alter. And it was quashed for the last objection. *Poor's Settlements* 121. 11. 165.

The parish of *H.* and a vill called *S.* was time out of mind within the rectory of *H.* But there is a church in *S.* which from the time of *H. 6.* hath been used and reputed as a parish, and had all parochial rights, and churchwardens, and *S.* distant two miles from *H.* *Richardson Ch. J.* held clearly, that this is a parish within 43 *Eliz.* and that the overseers, &c. might assess it to the relief of the poor; and the finding that from *Henry the VIth's* time till now it hath been used as a parish, does not exclude, that it was not used so before. And this statute being made for relief of the poor, to prevent their wandering, the intent of it was to confine the relief to parishes then *in esse*, and so used. Judgment for plaintiff. *Hutt. 93. Litt. Rep. 73.*

Cro. Car. 92. *S. C.* adjudged, that this is such a parish as is chargeable for relief of *Stoke-Godlingham*, and not for the poor of *Linkley*; and tho' by the finding it should not be intended to be a parish before *Henry the VIth's* time, yet being found that it was a church then, and that there were churchwardens there, it is a parish within the statute, altho' it be but a reputative parish; for being in use so long before, and at the time of the statute, the statute appoints that the churchwardens and three or four overseers joined with them shall, &c. Now no churchwardens of *H.* are churchwardens of *S.* and so have nothing to do there; and the churchwardens of *S.* are only to meddle with the church there, and consequently with the poor of the parish.—*S. P.* As to *Tateridge* and *Hatfield*, where for 60 years *then* past, and at the time of making the statute, and ever since, *T.* was commonly reputed a parish of itself, and the inhabitants there chose constables, churchwardens and overseers of the poor, and made and levied their own rates to the poor, and repaired their church, without contributing to that of *H.* and tho' it was also found that anciently the vill of *T.* was parcel of the parish of *H.* and never severed by any legal act, and that the tithes of *T.* have been time out of mind paid to the parson of *H.* who always used to find a curate at *T.* and that there is no parson at *T.* yet *T.* shall be charged by itself, and for their own poor only. *Cro. Car. 394. 395.*

Parishes in reputation only are within the statute, as other parishes are, if the usage of such parish to choose overseers has been constant without interruption; but otherwise the overseers and collectors of the mother church are only within the statute. 2 *Roll. Rep. 160.*

There were two vills in one parish, which had used severally to maintain their own poor, and now there being overseers made of the whole parish, they were rated together. The question was, whether having been used time out of mind to pay severally, they might now by the statute of 43 *Eliz. cap. 2.* be rated together? *Per Hale Ch. J.* If there be no chapel within the vill, where the church does not stand, it is not sufficient to make it

a reputed parish within the statute of 43 *Eliz. Freem. 401.*

The parish of *St. Botolph* without *Algate* lies in two counties, *viz. London* and *Middlesex*, and hath one churchwarden and several overseers, and the parish rates are several. And in regard that it was made to appear that each part of the parish had distinct officers, and made distinct rates, and had used time out of mind to make distinct accounts to the justices of each county, the court looked upon each division as a several parish, and ordered it accordingly. *Raym. 476, 477.*

Upon a dispute whether *A.* was a vill in the parish of *B.* or a parish of itself, to prove it a vill the evidence was, that there were but two churchwardens, two overseers of the poor, and that all parochial rites were done at *B.* and that the inhabitants of *A.* contributed to the repair of the church at *B.* And to prove that *A.* was a parish of itself, the evidence was, that in the reign of *Edward 3.* there was a publick chapel there, and divine service read in it at the time of making this statute, that they had formerly distinct constables, and repaired their own highways in 1634, and then the difference between *A.* and *B.* was settled by a judge of assize, that a rate was made in *A.* in 1654. But this was held not sufficient to make *A.* a parish in reputation at the time of the statute, without all other parochial rites, and therefore held to be a vill in the parish of *B.* 4 *Mod. 158.*

To make *A.* a reputed parish within the 43 *Eliz.* it must have a parochial chapel and chapel wardens, and sacraments, at the time the statute was made; and because *A.* had but one chapel warden, whose office was to collect the rates taxed upon *A.* and pay them to *B.* they were held part of the parish of *B.* and not a reputed parish within the 43 *Eliz.* and their having a distinct overseer, and maintaining their own poor, was not sufficient to make them a distinct parish. 2 *Salk. 501.*

A chapel's having sacraments *only*, makes it not independent of the parish, but it must have other badges, as sepulchres, &c. 12 *Mod. 504.*

As to questions relative to the description of two places, *within the same hundred*, see *Foley Poor 31.* (or 42 in the 3d edition,) *Reports temp. Qu. Ann. 269. Viner, 416. and Bur. 576, 577.*

4. Of the remedies for recovering rates; and of setting aside rates.

See stat. 43 *Eliz. c. 2. sect. 4, 13, 19.*

Holt Ch. J. said, that a man could not be distrained by virtue of a general warrant made before the rate, but there ought to be a special warrant on purpose; and he said that a distress could not be taken for a quarter's rate before the quarter ended; but the jury said, the custom was otherwise. *Holt* answered, If he remove into another parish in the same county, they might distrain by warrant from the justices as well as in the same parish; but if he removed out of the county, he agreed the remedy failed. So he gave way to the usage in that point. 2 *Salk. 532. 6 Mod. 214. S. C.*

A warrant to distrain for a poor's rate ought not to be granted before demand made; for the first ought to be only a confirmation of the assessment for the poor, and afterwards upon refusal, &c. a new warrant is to be made for distress, &c. and *Holt* said, that strictly it was so, but the practice having been in the case of taxes to grant such a conditional warrant to distrain, *communis error facit jus.* *Comb. 341.*

If the poor rates are unreceived, and the overseers lay out a sum of their own, they are remediless if they do not raise it before they are put out of their office. *Just. Cas. Law. 235.*

The churchwardens and overseers, by warrant from an two justices of the peace (*quor. 1.*) may levy the tax by distress and sale, where any person refuses payment of the sum assessed; and if there be no distress whereby the same may be levied, he shall be committed to the common gaol, there to remain till payment. 2 *Shaw Praes. Just. 42.*

A *mandamus* was moved for, and a rule obtained for an alderman to shew cause why he refused to grant his warrant to distrain for a tax for relief of the poor; who shewed that the churchwardens had made a tax for the whole year, when they should have made only a quarterly tax, and thereupon a rule was made that he should grant his warrant to quarterly. 8 *Mod.* 10.

Working tools in a shop may be distrained for a poor rate. 2 *Show.* 126. Before this act, the justices of peace nor constables had no power concerning poor. *Sid.* 282.

It was affirmed on error in *B. R.* on this statute, that tho' the statute expresses by name only *sale and distress of goods*, yet if the plaintiff voluntarily delivers any goods for what he is assessed to the poor, and after brings trespass thereof against the overseers, this is within the statute; for these words *sale and distress*, are put in the act only for examples; and the statute shall be construed largely, because it tends *ad opus charitatis*; and trespass brought after such voluntary delivery of money is a vexation which the statute extends to suppress. *Telv.* 176.

B. brought trespass against certain persons who pleaded Not guilty, and at *Nisi prius* the defendants justified as overseers of the poor, and shewed this special matter in evidence by this statute; and after the jury was charged, and returned again, plaintiff was nonsuited. And now the court was moved to grant a writ of inquiry, for the treble damages which they ought to recover against the plaintiff by this statute; and on oyer of the statute, which was, that the damages shall be assessed, &c. *Dod.* said, This is to be intended that it shall be tried by writ of inquiry of damages in such cases as it ought to be by law, *viz.* upon discontinuance or demurrer; for the words, "*as the case requires*", imply as much; and by the law, when a jury ought to have found a thing, and do not find it, this shall not be supplied by a writ of inquiry of damages; and this was so ruled that such defect shall not be supplied by writ of inquiry of damages, because then the party shall not be ousted of his attain. But in the case at bar, the writ of inquiry of damages was granted inasmuch as the plaintiff was nonsuited, so that the jury could not assess the damages; and damages were found accordingly. *Roll. Rep.* 272.

As to setting aside rates, see stat. 43 *Eliz. c. 2. s. 6.* — Upon an appeal from a poor rate, the justices refused to hear the appeal, because it was not made at the next quarter-sessions. But *per cur.* The party grieved may appeal at any sessions; the justices may not have power to alter the rate at discretion, but they ought not to refuse to hear the appeal. *MS. Cases, Mich. 8 Ann. B. R. The Queen v. The inhabitants of St. Giles.*

T. P. and *S.* being overseers of the poor, got their account allowed by the justices. The parish appealed against it, and the sessions set aside this account, and then directed a re-examination of the matter to the same two justices. This order being removed, it was objected, that here was a matter delegated by the court, who were finally to determine the matter in question. *Per Parker Ch. J.* The overseers have *four days* time to pass their accounts, and they may go before any two justices for the doing it; till the time is past there is no compulsion used, but if this time is spent, the parish may go before any two justices, and when these have entered upon the examination, no other justice is afterwards to intermeddle; and when this matter comes to the sessions, they are to take such order therein as to them shall seem convenient, but need not finally determine. *MS. Cases, Hill. 10 Ann. B. R. Townsend, Parsons and Smith's case (overseers of Whitechapel.)*

There are four adjacent towns within the parish of *Bury*, and there is an overseer within each town, and also an overseer within the borough; they all join in one account, and there is but one rate made for all the parish, but the overseers of each particular town collect and pay the money within such town; one who is tenant of lands in one of these towns lives in the borough, and is assessed by the overseer of the borough for the lands within the town, and paid to the overseer of the borough; and the like is done in the other towns; so that the overseer

of the borough had a surplussage for the poor within the borough, and the overseers of the towns wanted money for relief of the poor within the towns, tho' the poor within the towns were less than those within the borough; and upon this the justices ordered, that there should be a distribution made; and this order with others being removed, it was moved to be quashed, but confirmed; and tho' the statute of 14 *Car. 2.* was cited, and this case urged to be within that statute, it was not agreed to be within that statute. *Skin.* 258.

Altho' a poor's rate be really made at the sessions on an appeal, yet if it does not appear by the order itself, as by recital of the former order, &c. the latter order shall be quashed, and the court refused to supply this defect in the order by affidavits. *Comb.* 133, 134.

The churchwardens and overseers, and some of the inhabitants made a poor's rate, which was confirmed by two justices, in which several were not taxed for their personal estates, (which was erroneous) but the whole lay on the real estates of the parish; on which several of the inhabitants appealed to the sessions, and they ordered that the rate should be annulled, and a new one made; accordingly the churchwardens made a new rate both on the real and personal estates, which rate was confirmed by two justices. But in the new rate there was a great inequality, the real estates being rated in proportion ten times more than the personal; for which several of the inhabitants appealed again to the sessions, where another order was made to discharge the rate. And these two orders of sessions being removed by *certiorari* into *B. R.* it was moved to quash them; because the sessions can only relieve particular persons grieved by the rate, and cannot set aside the whole rate. *Sed per tot. cur.* The justices at sessions on an appeal by particular persons grieved, may, if they see reason, set aside the whole rate. The justices have a large power, and in both these cases, either on the first rate where the personal estates were not charged, or upon the second where they are unequally charged, it is impossible for them to give relief without setting aside the whole rate; which therefore they may legally do, being impowered by the act to take order herein according to their discretion; by virtue of which, as they may set aside the whole rate, so they may make a new rate themselves, or order the overseers, &c. and churchwardens to make a new one, as was done in this case; wherefore those two orders were confirmed. 12 *Mod.* 212.

If a poor rate be made for a whole year, it cannot be confirmed in part, but must be for the whole year or no part. 8 *Mod.* 10.

If the rate be illegal, the justices may refuse to sign it, but as to the sums, or parties assessed they have nothing to do with it, the remedy is by appeal; and tho' the aldermen of *Dorchester* refused to sign a rate, because of inequality; yet the court granted a *mandamus*, and after a return a peremptory *mandamus*, and then an attachment, in order that the parties grieved might appeal, cited *per cur.* *MS. Cases, Mich. 8 Geo. B. R.* in case of *The King v. Beecher.*

A rate that is of itself good, may be quashed, where it says it shall be a *standing rate*. *Poor's Settlements* 23. pl. 33.

To quash a poor's rate the parties aggrieved appealed to the sessions, the sessions made an order to levy the money on account of the rate according to the land tax; it was moved to quash it, because persons who do not pay to the land tax, yet contribute to the poor's rate, as persons who have a considerable sum of money. Quashed, *per cur.* *Poor's Settlements* 73. pl. 96.

5. Of relieving, and ordering maintenance for the poor.

See stat. 43 *Eliz. c. 2. sect. 1, 13.* 3 *Will. & M. c. 11.* 8 & 9 *Will. 3. c. 30.*

Exception was taken to an order of the justices made against the parish of *Stretton*, because the justices ordered them to keep a woman, being poor, the cottage wherein she lived, being uncertain whether in this vill or another; but the court refused to quash it, tho' it was not averred that

that she was *impotent*, because in these cases the courts use a discretion. 2 *Keb.* 37.

An order of justices for the maintenance of a poor woman was confirmed, tho' it appeared that she was able of body to work; but the justices of the peace are judges of *th. t.* Vent. 69.

A poor child was left in *Christ-Church* hospital; upon complaint of the wardens of the hospital two justices made an order on the overseers of the poor of the parish to receive and maintain the child; but this order was quashed, because it was not said, that the parents were *unknown*, or *likely to become chargeable to the parish*: For tho' a child of three months old be helpless, yet the parents are bound to provide for it. As to the principal matter which was hinted, *viz.* that the hospital was bound to provide for poor children *there exposed*, the court thought there was nothing in that. 2 *Salk.* 485.

An order of justices was made for relieving a woman and four poor children, *until further order*, but did not set forth she was *indigent*; it was quashed for the last matter, and bad for the other, which should have been during her *poverty*. 10 *Mod.* 220.

It was moved to quash an order of sessions, which ordered that the overseers should pay to one *R. D.* 2 *s.* per week for his maintenance. It was objected 1st, That it is not said that they had any money in their hands; 2^{dly}, That it is not said that *R. D.* is a parishioner *there*. Quashed *nisi*. *Poor's Settlements* 12. pl. 17.

Two justices made an order for the overseers of the poor to pay 2 *s.* per week to *Elizabeth Reddish*. It was objected, That it is not said that she is *poor and impotent*; otherwise the statute gives them no such power. *Per cur.* The 43 *Eliz.* does not give them power, unless they are upon the *poor rate*; let them shew cause. *Poor's Settlements* 21. pl. 30.

An order to continue the weekly payment of 2 *s.* to *R. G.* and all the arrears, *till they find him a house*; quashed, because the overseers have no power to find him a house; that must be done by the lord of the manor, or by the justices. *Shaw's Parish Law* 200.

An order of justices, requiring the churchwardens to pay a scrivener 5 *l.* due to him for drawing indentures for setting out children to trades, was quashed, as being a thing out of their power; but the way had been to order a parish rate for levying so much a week till a convenient sum were raised; and in that case as soon money was raised, an action would lie for the scrivener against the churchwardens. 12 *Mod.* 417.

6. Of parents and children being obliged to maintain each other.

See *Stat.* 43 *Eliz.* c. 2. *sec.* 7. and 5 *Geo.* 1. c. 8.

If a man marries a grandmother, and has an estate with her in marriage; for this estate he shall be charged towards the maintenance of the grandchild within the meaning of this statute, but otherwise, if he has not any estate of advancement by marriage with her. But he shall be charged with keeping the grandchild during the life of his wife; and if she dies, he shall not be charged after death. 2 *Bulst.* 346. But if the grandmother has no means, and she marries with one who has, he shall not be charged with keeping the child. 2 *Bulst.* 346. So if the husband becomes of ability after marriage, the grandmother having no means at the time of the marriage, he shall not be bound to provide for the child. *Ibid.* *Contra per Holt Ch. J.* That if the wife dies he must maintain the grandchildren, tho' the relation be determined. *Comb.* 321, 495.

[But in the case in *Bulst.* 346. it does not appear that the grandmother was dead, nor is there any resolution, the justices differing in their opinions.]

A son-in-law was obliged by an order to maintain his wife's mother, having an estate with her at the intermarriage. *Per cur.* He is not within the words of the statute, nor within the meaning of it; the statute extends to those persons who ought by the law of nature to relieve their parents; and some persons were so hard-hearted as to refuse; therefore this law was made to enforce them to do

that which by the law of nature they were obliged to before. *Poor's Settlements*, 91. pl. 123.

It was moved to discharge an order made against a feme covert to keep a grandchild of hers; because a feme covert was not bound by such an order. *Roll Ch. J.* answered, That the husband is to keep his wife's grandchild by the statute; but in regard that the husband is not charged by the order, but the wife who is covert is only charged; therefore let the order be quashed. *Sty.* 283.

An order of sessions was made, That defendant should pay 2 *s.* a week towards the support of his father till the court should order the contrary, which was held good, because it was indefinite, and no set time limited, and if an estate happened to fall to him they might apply to the justices; otherwise if a time was limited. 2 *Salk.* 534.

An order that the grandfather should keep the grandchild, the father being living, but unable to do it, and also to pay so much money for the time past, while he was chargeable as well as for the time to come, was allowed good *per cur.* *MS. Cases, Mich. 6 Ann. B. R. The Queen v. Joyce.*

An order of two justices to compel *Darvison* to allow so much a week for the maintenance of his wife and family. It was moved to quash the order, for that the justices have not jurisdiction in this case, it being properly *alimony*, and belonging to the spiritual court. *Penzell* said, that the justices have no jurisdiction in this case, but this is not *alimony*. If a man runs away from his family, he may be punished as a rogue and a sturdy beggar; but whilst he continues resident, they cannot charge him in this manner; and quashed the order. 11 *Mod.* 268.

An order of justices was made, that the father-in-law should maintain his son's widow. But it not being set forth in the order, that the father was of sufficient ability, in which case only the act enables the justices, it was quashed. 10 *Mod.* 221.

An order of sessions for the father to pay so much a week for maintenance of his daughter was quashed, because it was not set forth that she was *unable to work*, without which the justices have no jurisdiction. 10 *Mod.* 307.

Justices at their quarter-sessions, upon complaint of the overseers, that *Nicholas Tripping* had left his wife, and that she was become *poor and impotent*, and become chargeable to the parish, and that *Richard Tripping*, her father-in-law was of sufficient ability, did (upon its being proved that *Richard* was of ability to relieve her) order him to pay 2 *s.* 6 *d.* per week. The order was quashed for want of an adjudication that she was chargeable; and it was held, that an adjudication that the person is become chargeable, is as necessary in an order of the quarter-sessions, as in an order of two justices. *MS. Cases, Trin. 4 Geo. B. R. The King v. Tripping.*

Upon complaint made to the quarter-sessions, that *Valentine Rush*, his wife and family, were impotent and unable to maintain themselves, the court does order *Emery Rush* to pay them 4 *s.* per week. It was objected, that it does not appear that he was *resiant*, and lived in the county; that the charge is personal, and the justices had no power over him unless he lived in the county. They were ordered to shew cause. Note, An affidavit was made that he lived in another county, but not read. *Poor's Settlements* 99. pl. 134.

Order, reciting, that *Munden* had a good fortune with his wife, and that her mother was *poor*, therefore he is ordered to provide for her. Affid in maintenance of the order 1 *Bulst.* and 2 *Bulst.* 345. *Sty.* 283. were cited. *Et per Pratt Ch. J.* On consideration, we are all of opinion, that the son-in-law is not bound, either within the words or intent of the statute, which provides only for *natural* parents. By the law of nature a man was bound to take care of his own father and mother; but there being no temporal obligation to enforce that law of nature, it was found necessary to establish it by act of parliament, and that can be extended no farther than the law of nature went before, and the law of nature doth not reach to this case in 1 *Bulst.* it is plain the word *not* was left out only by mistake, for the sense of the clause leads you to read it *not* obliged, and besides the judges were divided.

The case indeed in *2 Bulst.* is an authority in point as far as it will go, but that is no judicial authority, only a case at a judge's chamber. The same was also said *obiter* in the case of *The Queen v. Fane, Pasch. 10 Ann.* but it never came judicially before the whole court. And therefore as it is *res integra*, we are of opinion the order must be quashed. *Stran. 190.*

If justices of peace in sessions, &c. make orders for maintenance of persons who are not impotent, but able to work, or having any thing to live upon; those orders are against law. *Dalt. 166.* A father has been ordered to make an allowance to his son's wife, while his son was beyond sea: and if the father of children leaves the Parish, and there is a grandfather to be found, this grandfather, if he be of ability, is chargeable with keeping the children, and not the Parish. *2 Bulst. 2 Lill. 333.* A father-in-law, or a grandfather-in-law, married to the mother or grandmother of children, of ability to keep them, is within *43 Eliz. Style 283.* A person was ordered by justices in sessions to pay so much a week towards the support and maintenance of his father, till that court should order the contrary; and it was held good; and if an estate happen to fall to the father, the justices might be applied to: otherwise if a time was limited. *2 Salk. 534.*

7. Of the settlements of poor people.

Settlements of poor are gained,

By inheritance; as when a child claims a settlement in a parish, because his father was there settled.

By being born in a Parish; and

By commorancy.

As to the first, if the father has a legal settlement, the child is settled where the father is: and if the father has no legal settlement, the child regularly gains a settlement in the Parish where born. *2 Bulst. 351.* But this settlement by birth may be defeated several ways;

1st, If the parent is removed by an illegal order; and from the order an appeal is duly made, pending which the child is born; in this case, on quashing the order, the child shall be sent back with the mother.

2. By practice; if a woman near her time is clandestinely sent to another Parish, and there delivered.

3. If a woman with child be sent to the house of correction, and is there delivered, the child shall not gain a settlement by its birth in the Parish where the house of correction is; but in the Parish where the mother dwelt when sent to the house of correction, as the place where she had otherwise probably been delivered. *2 Bulst. 358, 381. 1 Salk. 121.*

If a travelling woman, having a small sucking child, shall be apprehended for felony, and be sent to gaol, and afterwards arraigned and hanged, this child is to be sent to the place of its birth, there to be settled and maintained, if the same be known; but otherwise it must be sent to the town where the mother was apprehended: and children born in common gaols, their parents being prisoners, are to be maintained at the charge of the county. *Dalt. 157.*

If a man and his family be illegally thrust out of a Parish, and during that time he have a child born; he must be returned to the place where he was legally settled, and the child with him: and persons, whose interest in houses or lands is determined, cannot be put out of the town where they were legally settled, nor can they be sent to the place of their birth, or last habitation, but according as they are able or impotent shall be set to work, or relieved in the town where so settled; tho' if they wander and beg, then they may be taken up and sent to the place of their birth. *Dalt. 58, 166.*

Bastard children gain a settlement by their birth; but it has been usual for preventing any charge to the Parish, if a single woman with child come into a Parish, by a justice's warrant to remove her to the place of her last legal settlement: bastards of vagrants must be with the mother while nurse children until seven years of age; and then be sent to the Parish where born. *Ibid.* Till seven years of age, children are accounted nurse children; yet afterwards they must have maintenance from the Parishes where they themselves were settled.

If a poor man settled at A. marries a poor woman who is settled at B. and has children by a former husband, the wife shall be removed with him to A. and the children under seven years old shall be removed, but only for nurture; so that they shall be kept at the charge of the Parish from whence they are removed: but the children above seven years of age are not removeable. *2 Salk. 470, 482.*

Generally a wife is to be sent to, and settled with the husband, tho' he be an inmate or servant; as all children are generally to be sent to, and settled with the parents: but if a man hireth a house in A. and being there with his wife and children, afterwards bind himself a servant to one in B. his wife and children are not to be sent to B: but are to remain still at A. where they were once settled. *Dalt. 166.* Tho' it hath been adjudged, where a man served and had board wages, and lay out of his master's house in another Parish, he gained a settlement in the Parish where he lived and served, and not in the Parish where he lay. *Mod. Caf. in L. & E. 370.*

A man and his wife settled at one parish, came privately into another parish, and there a child was born; the father died in the King's service; the question was, *Who should keep the child?* Per Holt Ch. J. The death of the father doth not alter the child's settlement; which must be settled where the father was last settled as well as the mother. *Comberb. 380.*

Settlement gained by commorancy, is where a person continues in some other place than that in which he was before legally settled; and such continuation makes a settlement: formerly, every one who was settled as a native, householder, apprentice, or servant, for a month, without a just complaint made to remove them, were lawfully settled. *Dalt.* But since, this month has been enlarged to forty days, where a person shall come into a parish, and rent a tenement under 10 *l. per annum*, by the statutes 13 & 14 Car. 2. 3 W. & M. And by statute renting 10 *l.* a year; executing a publick office in the parish on a man's own account; paying a share to the parish taxes, as church or poor rates, &c. Living as a hired servant for a year in the parish, being unmarried, &c. and serving or being bound as an apprentice in a parish, all make a legal settlement: so that a person being settled by any such means, and not having acquired a settlement elsewhere, if he falls into poverty, shall be intitled to relief from the parish where he last gained such settlement; and where he is settled his family must follow him. *Wood's Inst. 94.*

It has been held, in respect to a settlement within the statute 13 & 14 Car. 2. That coming into a parish publickly, taking a house, and being rated to the poor on the parish book, is sufficient notice; the statute being made against private and clandestine removals, and not publick ones, which the parish can take notice of itself. *Shorro. 12.*

A person rented a house of 3 *l. per annum* in a town, and his landlord paid the taxes; and whilst he lived in the parish, he took his freedom of the corporation, and voted as a freeman at the election of bailiffs, &c. And it was adjudged that since the explanatory act of 3 & 4 W. 3. nothing makes a settlement that is not within the words of the statute, which implies a negative to any thing else not contained in it; and that as to his voting, it doth not imply a settlement, for 'tis an act which relates to the corporate body, and not to the parish. *2 Salk. 534.*

A man rents two tenements of 5 *l. per annum* each, he thereby gains a settlement; but if he rent a piece of land of 10 *l.* a year, and there is no house belonging to it, it is otherwise. If one rents a house of 10 *l. per annum* by continuing therein 40 days, he gains a settlement within the meaning of 13 & 14 Car. 2. By Parker C. J. Renting a water-mill of 10 *l. per annum*, &c. makes a settlement; for a mill is a tenement. *2 Salk. 536.*

But no settlement can be legal in any parish, when the residence of the party is uncertain, as coming now and then, and lying in barns, outhouses, &c. or where the party is under disturbance by officers. A poor man appointed to be a parish clerk, and executing the office a year, has been adjudged to make a good settlement; and 'tis not material whether he come in by the appointment of

the parson, or by the election of the parishioners, for he is in *for life*; and this is executing a publick annual office and charge within the meaning of the statute. 2 Salk. 536.

A servant was hired first from *Lady-Day* to *Michaelmas*, and from thence to *Lady-Day* following; and this was resolved to be a good settlement, for there was a hiring for a year: but it must be one *intire biring*, and one *intire service* (tho' different times are mentioned) for one whole year, that must make a settlement according to the statute. A servant being hired at *A.* for a year, his master lives there half a year, and then at *B.* another half year; adjudged the servant is settled in the last place, for the statute doth not tie the servant down to one place. 'Tho' if a poor man be hired for a year, to serve in a boat which plies between one place and another; by this service, he gains no settlement. *Fitzgib.* 255.

An unmarried person, hired as a servant for a year, married before the year was expired; and it was held, that he could not be removed, and that on performing his service he would gain a settlement. 3 Salk. 527.

A man hired a maid servant for a year; but she falling sick, her master turned her out of his service: The servant in her passage to the place of her nativity, begged for relief, and she was sent as a vagrant to the parish where she was born; whereupon she was sent back by that parish, to the parish where she was an hired servant; but by order of sessions she was settled at the place of her birth: This was removed by *certiorari* into *B. R.* and the court determined the settlement to be at the parish where she was an hired servant, and not where she was born. *Style* 168.

A person is a lodger in any parish, his servant acquires a settlement: if a servant continues in the service of a visitor in a parish, he gains a settlement there; and is not removeable, unless the parish shew that he was brought or came thither *on purpose* that he might have such settlement: and tho' a master or mistress are only visitors, and no lodgers, yet their servants may be said to be hired in every parish where they serve. *Mod. Caf. in L. & Eq.* 50, 51. If an apprentice be bound to one who is a lodger only in a parish, and hath no settlement; resolved that the apprentice is well settled there, altho' the master is not, nor doth his settlement depend upon his master, as that of a wife on her husband. Where an apprentice continues forty days in the service of his master, there it is said he will have a settlement: and wherever any person serves the last forty days of his apprenticeship, that is the place of his last legal settlement. An apprentice bound to a master living in one parish, and serving some part of his apprenticeship there, was by agreement turned over to another master in another parish; and this was held a good settlement in that parish where he last served; for it shall be intended it was but a continuance of his apprenticeship upon that agreement. *M. C. in L. & E.* 169.

A person served an apprenticeship in a parish, where he married and had several children; his wife dying, he married another woman, who had a term for years in another parish, to which place he removed, and resided there for a year; afterwards he returned to the first parish, was rated to the poor, lived there two years, and then he died: in a short space after his death, his widow and children were removed by order of two justices to the other parish where he had lived a year, but on appeal to this order at the sessions, the sessions adjudged them to be inhabitants settled in the first parish. Where a man lives in a parish, and hath lands of his own there, or in right of his wife, this will make a settlement; but if he hath lands in one parish, and lives in another, the land will not make a settlement of him in that parish where it lies and he doth not live. 2 Salk. 524.

If a man be settled where he will, he cannot, tho' likely to become chargeable to the parish where he goes to reside in, be removed from thence, if he have any estate there. 5 Mod. 416. But see *Stat. 9 Geo. 1. supra.*

A man who was not legally settled in a parish, but had lived there some time, procured a certificate, by virtue of which he went into another parish; afterwards being poor, the parish from whence he came took him again; and

on enquiry found, that he was never lawfully settled with them, but had gained a settlement in another place, before they gave this certificate; and thither they removed him by order: the parish to which he was removed appealed, because the person who had given the certificate, had owned him to be lawfully settled with them; but the certificate was held to be an evidence of a settlement, and thereupon the first order was confirmed. 2 Salk. 530. It has been since adjudged, that a certificate concludes the parish giving it, not only against the parish to which it is given, but as to all other parishes. *Ibid.*

The law unsettles none who are lawfully settled, nor permits it to be done. If one had but hired a house, the law unsettles not such person; and if any by indirect means hinder a poor man from hiring a house, he may be indicted; also it is finable to remove any out of the parish who ought not to be put out, and the persons removed may be sent back. *Dalt.* 98. And if a parish will have a man born in *A.* but settled with them, to go and wander and beg in *B.* that he may be sent to *A.* and he doth so, he shall be sent back to the parish from whence he came. *Ibid.* But when two justices of peace of one county, send a poor person to a parish in another county, two justices of the county whither such person is sent, cannot make an order to remove him back again, or to send him to any other place; the town to which such person was sent, hath no other remedy than by appeal to the sessions of that county from whence the party was sent. 2 Salk. 488.

A settlement by order of sessions on an appeal is good and binding; but if it doth not appear that the cause came before the justices in sessions *by way of appeal*, it may be quashed; for without that they have no jurisdiction: if a poor family, after order of sessions for their removal on appeal, return to the parish from whence they were removed, the sessions must see their order of settlement obeyed; tho' if such poor family go into another parish not concerned in the appeal, two justices of peace ought by an original order to remove them to the parish where they were settled by the sessions order. 2 Salk. 481, 482, 489.

The sessions having made an original order for removal of a poor person to a third parish, after an order of two justices, it was quashed upon motion: and adjudged, that the sessions could only confirm, or reverse the order of settlement of the two justices; and thereupon a new order might be made by two justices for removal to the third parish, &c. 2 Salk. 475. A general order to remove a man and his family is not good; it must be particular, for some of the family may be chargeable, and others not: And where justices make such orders of settlement, it must appear, that the parties are likely to become chargeable; and that the person removed is removeable; and contain an adjudication of the last legal settlement of the party, &c. 2 Salk. 485, 491. 5 Mod. 149, 321. And according to the opinion of *Holt*, the most regular way to proceed on the statute 14 Car. 2. in removing a poor person, is for the justices to make a record of the adjudication of the last settlement, and the complaint of the churchwardens and overseers, and upon that to make a warrant or order under their hands and seals to the churchwardens, &c. to convey the persons to the parish to which they ought to be sent, and to deliver in the record at the next sessions, to be kept among the records; and this record may be removed by *certiorari*. 1 Salk. 406. But on a motion in *B. R.* to set aside an order for the settling a poor person in a parish, sent thither by warrant of two justices, and confirmed in the sessions, upon an appeal: the court refused to enter into the merits of the cause; the order of sessions being in this case final, unless it be made to appear that there is error in the form of proceeding. *Ventr.* 310. And it is a standing rule in the court of King's Bench, That if on an appeal, the order of two justices is either affirmed or quashed, upon the merits of the case, in relation to settlements, it shall be conclusive between the two parishes. *Pasch.* 10 Ann.

The order of two justices not appealed from, binds the parish upon which it is made, till a new settlement is gained: an order reversed is final only between the parties;

ties; but an order confirmed, &c. is final to all the world. 2 Salk. 472, 492.

A poor person himself, as well as the parish, may appeal from an order of removal, tho' it has been objected that appeal is only given to the parish aggrieved. *Carib.* 223. And where a poor person is visited with sickness, he ought not to be removed from the parish where he is, farther to endanger his health; and if two justices grant an order to remove him, it is a misdemeanor in the justices. *Mod. Caf. in L. and E.* 326.

On appeals to justices in sessions, they are to cause defects in form in orders to be rectified without charge, and then to proceed, &c. 5 Geo. 2. c. 19. By law, the place that the poor were last legally settled at, is the place that is to provide for them. *Trin. 5 Ann. B. R.*

By the Stat. 17 Geo. 2. c. 5. If a woman wandering and begging, be delivered of a child in a parish to which she does not belong, she may be committed to the house of correction till the next sessions, where the justices may order her to be whipp'd, and detained in the house of correction not exceeding six months. The churchwardens of the place where she shall be delivered to be repaid all by the treasurer of the county, and the settlement of the mother shall be deemed the settlement of the child tho' it be a bastard.

By the Stat. 17 Geo. 2. c. 38. The churchwardens and overseers of the poor shall yearly, within 14 days after other overseers be nominated, deliver to such succeeding overseers an account of all sums received, or rated and not received by them, and of all goods in their hands, and monies paid by them, and of all other things concerning their office, which account shall be verified by oath. Any person assented may inspect such account paying 6d. and have copies paying 6d. for every 300 words. Person not accounting, &c. as aforesaid, may be committed until he shall. If an overseer dies, removes, or becomes insolvent before the expiration of his office, two justices may appoint another in his room. If any overseer removes, he shall before his removal account as aforesaid, under the same penalty. And if any overseer dies, his executors shall within forty days deliver over all things belonging to his office, and pay what due, previous to other debts. No distress for money justly due for relief of the poor shall be deemed unlawful, or the party a trespasser, on account of any defect or want of form in the warrant, for appointment of such overseer, or in the rate or warrant of distress; nor shall the party be deemed a trespasser *ab initio*, on account of any irregularity afterwards done by the party. And no plaintiff shall recover for any such irregularity, if tender of amends be made before the action brought. Succeeding overseers may levy arrears to reimburse former overseers. If any person remove out of a parish, and another comes to occupy the house, &c. he left, the person removing, and the person coming in, shall be liable to pay to the rate assented, in proportion to the time he occupied the same. Fair copies of all rates for the poor, shall be entered in a book within 14 days after all appeals determined, and all persons assented shall have access to them. See *Vagrants*.

For forms of appointments, warrants, &c. see *Burn's Justice*.

For more of poor in general, see *Apprentice*, *Bastard*, *Removal*, *Sessions*, *Settlement of the Poor*, and see *Black. Com.* 1 V. 359, &c. and 4 V. 425. And see also *Burn's Justice*, and an 8vo book intitled, *Definitions on the Poor Laws*.

Pope, (*Papa*) Was antiently applied to some clergymen in the *Greek church*; but by usage is particularly appropriated in the *Latin church* to the bishop of *Rome*, who is called the *Pope*; and formerly had great authority here. As to the incroachments of the *see of Rome*, it is said to be the general opinion, that Christianity was first planted in this island by some of the *Eastern church*; which is very probable from the antient *Britains* observing *Easter* always on the fourteenth day of the month, according to the custom of the *East*: But the *Saxons* being converted about the year 600, by persons sent from *Rome*, and wholly devoted to the interest thereof, it could not be expected that such an opportunity of enlarging the jurisdiction of that see, should be wholly neglected; and yet there are

few instances of the *Papal* power in *England* before the *Norman conquest*, tho' four or five persons were made bishops by the *Pope* at the first conversion, and there was an instance or two of appeals to *Rome*, &c. But *Pope Alexander II.* having favoured and supported *William the First*, in his invasion of this kingdom, made that a handle for enlarging his incroachments; and in this King's reign, began to send his legates hither. He sent hither *Ermenroy*, bishop of *Sion*, as his legate; and this prelate was the first who had ever appeared with that character in any of the *British* islands. And afterwards *Pascal II.* prevailed with King *Hen. I.* to give up the donation of bishopricks. In the reign of King *Stephen* the pontifical authority was permitted to make farther encroachments: Appeals to the *Pope*, which had been always strictly prohibited, became now common in every ecclesiastical controversy. And in the reign of *Hen. II.* *Pope Alexander III.* exempted all clerks from the secular power: Indeed this King at first strenuously withstood those innovations; but on the death of *Becket*, who for having violently opposed the King, was slain by some of his servants, the *Pope* got such an advantage over him, that he was never able to execute the constitutions of *Clarendon*. And not long after this, by a general excommunication of the King and people, for several years, because they would not suffer an archbishop to be imposed on them, King *John* was reduced to such straits, that he surrendered his kingdoms to *Pope Innocent III.* to receive them again, and hold them of him under the rent of a thousand marks: And in the reign of *Hen. III.* partly from the profits of our best church benefices, which were generally given to *Italians*, and others residing at the court of *Rome*, and partly from the taxes imposed by the *Pope*, there went yearly out of the kingdom seventy thousand pounds sterling, a great sum in those days: The nation being thus burdened and under a necessity, was obliged to provide for the prerogative of the prince, and the liberties of the people, by many strict laws. And hence in the reign of *Edw. I.* it was declared in parliament, that the *Pope's* taking upon him to dispose of *English* benefices to aliens, was an encroachment not to be endured; and this was followed with the Stat. 25 Ed. 3. called the statute of *provisors*, against popish bulls, and disturbing any patron to present to a benefice, &c. The 12, 13 and 16 R. 2. the Stat. 2 H. 4. and 6, 7 & 9 *ejusdem*; the 3 H. 5. 23 & 28 Hen. 8. &c. And maintaining by writing, preaching, &c. the *Pope's* power here in *England*, is made a *præmunire* upon the first conviction; and high treason on the second. 5 Eliz. In the construction of which statute, it has been held, that he who knowing the contents of a popish book, written beyond sea, brings it over, and secretly sells, or conveys it to a friend; or having read the book, or heard of its contents, doth after in discourse allow it to be good, &c. is in danger of the statute; but not he who having heard thereof, buys and reads the same. *Selden's Janus Anglor.* Davis 90, &c. *Dyer* 282. 2 Inst. 580. See *Bull* and *Præmunire*.

Popery. There are several statutes made against persons perverting or withdrawing others to popery, and being perverted to the *Romish* religion, which was made treason by 23 Eliz. and 3 Jac. 1. But if any one reconciled to the see of *Rome* beyond the seas, return into the realm, and submit himself, &c. and take the oaths within six days, he is to be excused. 3 Jac. 1. c. 4.

Popish Recusants. See *Recusants*.

Popular Action, Is an action given in general, to any one who will sue for a penalty on the breach of some penal law. Actions popular, which may be brought before justices of assize, &c. are to be generally prosecuted in the counties where the offences were done. And popular actions, where the King only hath the penalty or forfeiture, are to be commenced in two years; and where an inferior hath a part, in one year, &c. 31 Eliz. cap. 5. 21 Jac. 1. cap. 4. *Black. Com.* 2 V. 437. 3 V. 160. Vide *Information*.

Port, (*Portus*) A harbour or place of shelter, where ships arrive with their freight, and customs for goods are taken. The ports in *England* are *London*, *Ipſwich*, *Yarmouth*, *Lynn*, *Boston*, *Hull*, *Newcastle*, *Berwick*, *Carlisle*, *Chester*, *Milford*, *Cardiff*, *Gloucester*, *Bristol*, *Bridgwater*, *Plymouth*, *Exeter*, *Poole*, *Southampton*, *Chichester* and *Sandwich*;

utich; all which are declared lawful ports, & *infra corpus comitatus*: To these ports there are certain members belonging, and a number of creeks, where commonly officers are placed, by way of prevention of frauds in the customs; but they are not lawful places of exportation or importation, without particular licence from the port, or member under which they are placed. *Lex Mercat.* 132. See 1 *Eliz.* c. 11.

The King has the prerogative of appointing ports and havens, or such places only, for persons and merchandize to pass into and out of the realm, as he in his wisdom sees proper. By the feudal law all navigable rivers and havens were computed among the *regalia*, and were subject to the sovereign of the state. And in England it hath always been held, that the King is lord of the whole shore, and particularly is the guardian of the ports and havens, which are the inlets and gates of the realm: And therefore, so early as the reign of King John, we find ships seized by the King's officers for putting in at a place that was not a legal port. *Madox Hist. Exch.* 530. These legal ports were undoubtedly at first assigned by the crown; since to each of them a court of portmote is incident, the jurisdiction of which must flow from the royal authority: The great ports of the sea are also referred to, as well known and established, by *Stat. 4 Hen. 4. c. 20.* which prohibits the landing elsewhere under pain of confiscation: And 1 *Eliz.* c. 11. recites that the franchise of lading and discharging had been frequently granted by the crown.

But tho' the King had a power of granting the franchise of havens and ports, yet he had not the power of resumption, or of narrowing and confining their limits when once established; but any person had a right to load or discharge his merchandize in any part of the haven: Whereby the revenue of the customs was much impaired and diminished, by fraudulent landing in obscure and private corners. This occasioned the statutes of 1 *Eliz.* c. 11. and 13 & 14 *Car. 2. c. 11. s. 14.* which enable the crown by commission to ascertain the limits of all ports, and to assign proper wharfs and quays in each port, for the exclusive landing and loading of merchandize. *Black. Com.* 1 *V.* 264.

Porter, In the circuit of justices, is an officer who carries a white rod before the justices in *eyre*, so called a *portando virgam*. *Stat. 13 Edw. 1. c. 41.* See *Vergers*. There is also a porter bearing a verge before the justices of either bench. *Cowell*. But a porter, in the general signification, is a carrier of things from place to place, &c.

Porter of the door in the parliament house, Is an officer belonging to that high and honourable court, and enjoys privileges accordingly. *Crompt. Juris.* 11.

Porterage, A kind of duty paid at the Custom-house to those who attend the water-side, and belong to the *package-office*, and these porters have tables set up ascertaining their dues for landing of strangers goods, and for shipping out the same. *Merch. Dict.*

Portgreve, or **Portreeve**, (*Portgreivius*, in Saxon *portsefer*, that is, *urbis vel portus prefectus*) Signifies with us a magistrate in certain sea-coast towns; and as *Camden*, in his *Brit.* 325. saith, The chief magistrate of London was so called, as appears by a charter of King William the Conqueror to the same city in these words: William King, greeteth, William Bishop and Godfrey Portgreve, and all the burghers within London, French and English: And I grant you, that I will that you be all your law-worth that ye were in Edward's days the King: And I will that each child be his father's eyer, and I will suffer that any man yeu any wrongys beed. And God you keep. *Ex libro perveusto*.

Instead of the portgreve, Richard the first ordained two bailiffs, but presently after him King John granted them a mayor for their yearly magistrature. And *Camden*, speaking of *Maidstone* in *Kent*, says, *Immunitates plurimas Regina Elizabetha fert acceptas. quæ majorem summum magistratum instituit pro portgrevio quem primum habuit, &c.* Vide *Black. Com.* 4 *V.* 406.

Portion, Is that part of a person's estate, which is given or left to a child. And if a term of years settled to raise a daughter's portion, is so short that the ordinary

profits of the land are not sufficient, the court of Chancery may order timber to be felled, &c. to make up the money at the time appointed. *Preced. Canc.* 27. A sale of lands has been also decreed, for payment of of portions devised at a certain time, out of the rents and profits, where they were not judged sufficient for raising the money; altho' the land subject to the portions was given to others in remainder. *Ibid.* 396.

Where a portion was devised by will to a daughter, to be raised out of a real and personal estate, and paid at her age of twenty-one years, without saying or marriage; the daughter married, and died under age: It was here said, that the portion was then due and payable, marriage being the cause of daughters portions. *Ibid.* 109. But see 267, 268.

A husband must make a suitable provision for his wife, when he sues for her portion in equity. 2 *Vern.* 494. If any child marry under the age of twenty-one, without consent of the father or mother; or any man-child be a thief, common whore hunter, or gameller; or a woman child commit whoredom, &c. they are barred to demand their portions, by the custom of the city of London: This is by an act of common council, 5 *Edw. 6.* but it is observed. *Cit. Lib.* 132. See *Children*, and *Vin. Abr.* 16 *V.* tit. *Portions*. As to the method of raising portions, see the Appendix to 2 *V.* of *Black. Com.* vii.

Portioner, (*Portionarius*) Where a parsonage is served by different ministers alternately, the ministers are called portioners; because they have but their portion or proportion of the tithes or profits of the living: And portion is that allowance which a vicar commonly has out of a rectory or impropriation. 27 *H. 8. c. 28.*

Portmen, The burghesses of Ipswich are so called. So also are the inhabitants of the cinque ports, according to *Camden.* 13 *Eliz.* c. 24.

Portmote, (from *portus* & *gemot*, *conventus*) Is a court kept in haven towns or ports; and is called the *portmote court*. 43 *Eliz.* cap. 15.—*Curia portmotorium est curia in civitate Cestrie coram majore in aula motorum tenenda. Pl. in Itin. Ibid.* 14. *Hen. 7.* The portmote, or portmannimote, i. e. portmen's court, is said to be held not only in port towns, as generally rendered; but in inland towns, the word port in Saxon signifying the same with city.

Portsale, Is a publick sale of goods to the highest bidder; or of fish presently on its arrival in the port or haven. *Stat.* 35 *H. 8. c. 7.*

Portfoka, or **Portfokne**, The suburbs of a city, or any place within its jurisdiction; from the Saxon word, which is *civitas*, and *foea*, *jurisdiction*. *Concessit quod nulus de civitate vel portfoka sua captus, &c.* Somner's Gavelkind 135. *Hen. 3.* granted by charter to the city of London—*Quintantiam murdri, &c. infra urbem & in Portfokne, &c.* within the walls of the city, and the liberties without the walls. *Placit. Temp. Ed. 1.*

Portuas, (mentioned in 3 & 4 *Edw. 6. 10.*) Is reckoned amongst books prohibited by that statute; it is a breviary. *Cowell*. It is also by some, called *portus* or *portose*.

Positive Proof, Is always required, where from the nature of the case it appears it might possibly have been had. But, next to positive proof circumstantial evidence, or the doctrine of presumptions must take place: For when the fact itself cannot be demonstratively evinced, that which comes nearest to the proof of the fact, is the proof of such circumstances which either necessarily, or usually, attend such facts; and these are called presumptions, which are only to be relied on till the contrary be actually proved. *Black. Com.* 3 *V.* 371.

Poss, Is an infinitive mood, but used substantively, to signify a possibility, as we say, such a thing is *possible*, that is, such a thing may possibly be; but of a thing in being, we say it is in *esse*.

Poss Comitatus, The power of the county, according to *Lambard*, contains the aid and attendance of all knights, and other men above the age of fifteen, within the county; because all of that age are bound to have harness, by the statute of *Winchester*: But ecclesiastical persons, and such as labour under any infirmity, are not compellable to attend. Persons able to travel being required to be assistant in

in this service; it is used where a riot is committed, a possession is kept on a forcible entry, or any force or rescue made contrary to the commandment of the King's writ, or in opposition to the execution of justice. *Stat. 2 H. 5. c. 8.*

Sheriffs are to be assisting to justices of peace in suppressing riots, &c. and raise the posse comitatus, by charging any number of men to attend for that purpose, who may take with them such weapons as shall be necessary; and they may justify the beating, and even killing such rioters as resist, or refuse to surrender, and persons refusing to assist herein, may be fined and imprisoned. *17 R. 2. cap. 8. 13 Hen. 4. cap. 7. 2 Hen. 5. cap. 8. Lamb. 313, 318. Crompt. 62. Dalt. cap. 46. 2 Inst. 193.*

Justices of peace, having a just cause to fear a violent resistance, may raise the posse in order to remove a force in making an entry into or detaining lands: And a sheriff, if need be, may raise the power of the county to assist him in the execution of a precept of restitution; therefore if he make a return thereto, that he could not make a restitution by reason of resistance, he shall be amerced. *1 Hawk. P. C. 152, 156.*

It is the duty of a sheriff, or other minister of justice, having the execution of the King's writs, and being resisted in endeavouring to execute the same, to raise such a power as may effectually enable them to quell such resistance; tho' it is said not to be lawful for them to raise a force for the execution of a civil process, unless they find resistance. *2 Inst. 193. 3 Inst. 161.*

It is lawful for a peace officer, or a private person, to assemble a competent number of people, and sufficient power to suppress rebels, enemies, rioters: but there must be great caution, lest under a pretence of keeping the peace, they cause a greater breach of it; and sheriffs, &c. are punishable for using needless violence, or alarming the country in these cases, without just grounds. *1 Hawk. P. C. 156, 161. See Black. Com. 1 V. 343. 4 V. 122.*

Possessio fratris. Where a man hath a son and a daughter by one woman or *Venter*, and a son by another *Venter*, and dies, if the first son enters and dies without issue, the daughter shall have the land as heir to her brother, altho' the second son by the second *Venter* is heir to the father: But if the eldest son dies without issue, not having made an actual entry and seisin, the younger brother by the second wife, as heir to the father, shall enjoy the estate; not the sister. *1 Inst. 11, 15.*

Lands are settled on a man, and the heirs of his body, and he hath issue a son and a daughter by one woman, and a son by another, and dieth; and then the eldest son dies, before any entry made on the lands either by his own act, or by the possession of another, the younger brother shall inherit, he claiming as heir of the body of the father, and not generally, as heir to his brother; yet if the elder brother enter, and by his own act gained the possession; or if the lands were leased for years, or in the hands of a guardian, there the possession of the lessee or guardian doth vest the fee in the elder brother, and then on his death the sister shall inherit as heir to her brother, for there is *possessio fratris*. *3 Rep. 42.* There can be no *possessio fratris* of a dignity; in such case the younger brother is *heir natus*: Lord Grey being created a baron to him and his heirs, had issue a son and a daughter by one *Venter*, and a son by another; and after his death, the eldest being possessed of the barony, and dying without issue, it was adjudged, that the younger brother, and not the sister should have it. *Cro. Car. 437. 2 Nels. Abr. 923.*

Possession. (*Possessio, quasi pedis positio*) Is either actual, where a person actually enters into lands or tenements descended or conveyed to him; or in law, when lands, &c. are descended to a man, and he hath not actually entered into them: Also before, or till an office is found of lands escheated to the King by attainder, he hath only a possession in law. *Brañ. lib. 2. cap. 17.*

Possession beyond the memory of man, establishes a right; but if by the knowledge of man, or proof of record, &c. the contrary is made out, tho' it exceeds the memory of man, this shall be construed within memory. *1 Inst.*

115. A long possession the law favours, as an argument of right, altho' no deed can be shewn; rather than an ancient deed, without possession. *1 Inst. 6.* Continued quiet possession is a violent presumption of a good title: And where two persons enter into, and claim the same land, the possession will always be adjudged in him who has right, &c. *2 Inst. 256, 323.*

He who is out of possession, if he brings his action, must make a good title: And to recover any thing from another, it is not sufficient to destroy the title of him in possession; but you must prove your own better than his. *Vangb. 8, 58, 60.* But in action against a person for digging of coney-boroughs in a common, &c. it was held, that the action being grounded on the possession of the tenement, to which the common belonged, the plaintiff need not shew a title; and in this case the defendant may be a stranger; besides the title is not traversable, but ought to be given in evidence upon the trial of the issue. *3 Salk. 12.*

A defendant in trespass, &c. for taking cattle damage-secant, has been allowed to justify the taking on his possession, without shewing his title; the matter of justification being collateral to the title of the land. *2 Mod. 70. 3 Salk. 220.* Tho' in such a case, on its being insisted, that there was the same reason for justifying on a possession, as there was for maintaining an action on a bare possession; it hath been adjudged, that a justification on a possession, only, is not good; for a possession may not be but by contract, but a seisin may be by right or wrong. *Hill. 2 & 3 Jac. 2.*

In replevin, if defendant had the possession, it is a good bar against the plaintiff if he has no title; but there cannot be a return, unless he shews a property in the goods. *Pasch. 2 Ann.*

Action of the case lies for shooting at and frightening away ducks from a decoy pond, which is in the plaintiff's possession, without shewing that he had any property in them. *3 Salk. 9.*

A man on a lease and release of lands, &c. is in possession to all intents, except bringing trespass, which cannot be without an entry, *pedis positio*. *2 Lill. Abr. 335.* And to make possession good on entry, the former possessor and his servants, &c. are to be removed from the land; and if possession be lost by entry of another, it must be regained by re-entry, &c. *Pasch. 1650.*

A person in possession may bring an action, for loss of his shade, shelter, fruit, when trees are injured; and he in reversion, for spoiling the trees. *3 Lev. 209.* One in defence of his lawful possession, may assemble his friends to resist those who threaten to make an unlawful entry into a house, &c. *5 Rep. 91.* There is an unity of possession, when by purchase the seignory and tenancy, become in one man's possession. *Kitch. 134. See 16 Lill. Abr. 454, 460. And Black. Com. 2 V. 163, 195, 389. 3 V. 177, 179, 180, 202, 412. xii. 253 to possession action, see ib. 2 V. 198. 3 V. 180.*

Possibilitas. Is taken for an act wilfully done, and impossibilitas for a thing done against our will. *Si autem ocales asnas reddat veram ejus, & possibilitatis accusetur in eo facto, where factum possibilitatis is a wilful act. Leg. Alfred. cap. 38.* So in the laws of Cambrus, c. 66. *Et si quis agat impossibiliter, non est omnino simile si voluntarie faciat.* Leg. Sax. Edw. senior. c. 88.

Possibility. In our law is defined to be an uncertain thing, which may or may not happen. *2 Lill. Abr. 336.* And it is either near or remote; as for instance: Where an estate is limited to one, after the death of another, this is a near possibility; but that one man shall be married to a woman, and then that she shall die, and he be married to another; this is a remote or extraordinary possibility: And the law doth not regard a remote possibility, that is never like to be. *15 H. 7. 10. Hardr. 417. 2 Rep. 50.* A possibility cannot be granted over; no possibility, right or chose in action, &c. may be granted or assigned to a stranger. *4 Rep. 66. 10 Rep. 48.*

A lease was made to husband and wife of a term of years, for their lives, remainder to the executors of the survivor; the husband granted the term, and it was adjudged, that it should not bind the wife, the husband having only a possibility to have it, if he survived his wife, and no interest till then. *2 Nels. Abr. 1274.*

If husband and wife are tenants in *special tail*, and the husband only levies a fine of the lands, &c. the wife's estate is turned into a *possibility*, and only reducible by entry, if she survive. *Heb. 257.*

Where a lease is made for life, the remainder to the right heirs of J. S. this is good; for by *common possibility* J. S. may die during the life of tenant for life. 2 H. 7. 13. 3 *Rep. Abr. 36.*

A man made a lease to his brother for life, and that if he married, and his wife should survive, then *she* should have it for *her* life; the lessee before he married, made a feoffment of the lands to another, and afterwards the lessor levied a fine to him; then the lessee married, and died, and his wife survived: And it was held, that the remainder to the wife for life was *gone* by this feoffment, and the *possibility* of her having it was included in the fine, which was likewise barred. *Moor. 554.*

A testator possessed of a lease for years, devised the profits thereof to W. R. for life, remainder to another; and afterwards the devisee for life entered *with the assent of the executor*, and then he in remainder for life assigned all his interest to another, and after the devisee for life died; it was resolved, that this assignment was void, because whilst the devisee for life was living, he in remainder had only a *possibility* to have the term, for the devisee for life had an interest in it *sub modo*, and might have survived the whole term. 4 *Rep. 64.*

The devise of the *possibility* of a term is void; as where a term is devised to A. for life, remainder to B. and B. devises this remainder to C. and dies; and then A. dies; this devise to C. is void, and the executors of B. shall have it. 3 *Lev. 427.* A *possibility* founded on a trust, differs from a mere *possibility*; the first may be devised, but the other cannot. *Moor. 808. 2 Nels. 1275.* See *Black. Com. 2 V. 290.*

Post, A swift or speedy messenger to carry letters, &c. And the *Post Office* is of the greatest consequence to this kingdom, being a country of trade. The first law that introduced this very great convenience, was made in the reign of King Car. 2.

By the 12 Car. 2. cap. 35. a general letter or *Post Office* was erected, &c. and the rates for carriage of letters appointed. See the Table to the Statutes.

A person having inclosed *Exchequer* bills in a letter sent by the *post*, which were lost, the owner brought an action against the *Postmaster*; and by three judges it was held, that the action did not lie, because the office is for INTELLIGENCE ONLY; and it is impossible the *Postmaster General*, who is to execute this office in such distant places, by so many several hands, should be able to secure every thing, and for that, *this is not a conveyance for treasure*: But Holt was of a contrary opinion; he considered this as a letter lost in the office, not on the road, and held that the *Postmaster General* is liable, the whole care being committed to him, and the law makes the officer answerable for himself and his deputies; he has a reward, which is the reason why innkeepers, carriers, &c. are liable for goods lost; and where a man takes on him a publick employment, he is bound to serve the publick, or action lies against him, &c. 1 *Salk. 17.*

The *Post-Office* in London is managed by the *Postmaster*, and other officers to the number of seventy-seven; one of which is called the *Court Post*, constituted by patent for life, with a handsome salary: And the *Postmaster General* has under him one hundred eighty-two deputy *Postmasters* in England and Scotland, most of them keeping regular offices in their stages, and *Sub Postmasters* in their branches.

The conveyance of *post* letters extends to every considerable market-town, and is so expeditious, that every twenty-four hours the *post* goes sixscore miles.

By 26 Geo. 2. c. 13. Letters containing inclosed several patterns of cloth, silk, or other goods, not exceeding one ounce weight, shall be paid for only as for a double letter. See *Master of the Posts.*

Penny-Post, Letters or parcels, not exceeding sixteen ounces weight, or ten pounds value, are conveyed daily by the *penny-post*, to and from all places within the Bills of Mortality, and ten miles distance from the General *Post-Office*, for 1 d. each packet, letter, &c. stat. 9 Ann. c.

10. And several general offices: re kept at convenient distances, to receive *penny-post* letters every day, *Sundays* excepted: Also letters that come from all parts by the general *post*, directed to persons in any country-towns to which the *penny-post* goes, are delivered the same day they come to London: And the answers are carried every 1st night to the General *Post-Office* in Lombard street, being left at the receiving houses.

Penny-post men carrying letters out of the cities of London and Westminster, or borough of Southwark, and the suburbs thereof, may demand and take 1 d. at delivery for every letter, above the penny paid on putting the letters into the *Penny-Post Office*; except letters passing by the general *post*, &c. stat. 4 Geo. 2. c. 33.

Post, writ of entry in, see *Black. Com. 3 V. 182.*

Post Conquestum, Were words inserted in the King's title, by King Edw. 1. and constantly used in the time of Edw. 3. *Clayt. 1 Edw. 3. indors. m. 33.*

Post Dicitur, Is where a writ is returned after the day assigned, for which the *custos brevium* hath a fee of 4 d. whereas he hath nothing if it be returned at the day.

Post-Disseisin, Is a writ that lies for him who having recovered lands or tenements by *præcipe quod reddat*, upon default or reddition, is again disseised by the former disseisor; then he shall have this writ, and recover double damages, and the party shall be punished by imprisonment, &c. Stat. Westm. 2. c. 26. Reg. Orig. 258. F. N. B. 190.

The writ of *post-disseisin* ought to be brought by the parties who first recovered, or some of them, and of the same land which was recovered, or part thereof, and against those or some of them, against whom the recovery was: But if a man recover by a *præcipe quod reddat*, and after is disseised by him against whom he recovered, and the disseisor makes a feoffment, and takes back an estate to him and another, a *post-disseisin* may be had against him and his jointenant; and if he who lost the land by default, &c. after disseise him who recovered, and make a feoffment to another person, he who recovered shall have this writ against the disseisor, altho' he be not tenant of the land; for in a writ of *post-disseisin*, the demandant shall not have judgment to recover the land; but the sheriff shall restore the plaintiff to his possession, if the disseisin be found, and take the defendant and keep him in prison. *New Nat. Br. 423.* And the defendant is not to be delivered out of prison, until he hath paid a fine to the King, and without the King's special command, upon a *certiorari* to remove the record into B. R. whereupon a writ shall go to the sheriff to deliver him. *Ibid.*

Nontenure is no plea in a *post-disseisin*, for the defendant ought to answer the disseisin, &c. See *Black. Com. 3 V. 188.*

Postea, Is the return of the judge, before whom a cause was tried, after a verdict, of what was done in the cause; and is indorsed on the back of the *Nisi prius* record: It begins, *POSTEA die & loco*, &c. wherefore it is so called. 2 *Lill. 337.*

A *postea* is a record of the court, trusted with the attorney in the cause by the clerk of the assize; and the attorney so intrusted, is to deliver it into the office, that the judgment may be entered by it by the officer of the court. *Trin. 1651.*

It is brought into court at the day in bank, and recorded there and delivered back to the attorney, who gives a rule for judgment upon it; and if there be no rule to the contrary, after the rule for judgment is out, the attorney brings his *postea* to the secondary, who signs his judgment, and then he enters all this matter on the issue roll. 2 *Lill. 337.*

The court may stay the bringing in of the *postea*, and entering up the judgment upon a verdict, if they find cause to do it, for any undue practice in the proceedings to trial: And if the party for whom the verdict passed, will not bring in the *postea*, upon notice given by the other party, that he intends to move in arrest of judgment; the court, on motion will order judgment to be stayed, until four days after the *postea* is brought in, allowed to speak in arrest of judgment. *Mish. 22 Car. B. R.*

Altho' the verdict, be prejudicial to the plaintiff, he ought to bring in the *possea*; for *he must abide by the trial*.

There is no general rule of court for the clerk of assize, &c. to bring the *possea* into court of B. R. by a precise time; but if it be not returned in convenient time, the court may be moved at the side bar for a rule to bring it in speedily. 2 Lill. 337. If the clerk of assize hath mistaken in drawing up the *possea*, he may amend it by his notes, before it is filed; and the return of a *possea* hath been amended by the memory of a judge, who tried the cause. Cro. Car. 338. See Black. Com. 3 V. 386. xi

Posterority, (*Posterioritas*) Signifies the being or coming after, and is a word of comparison and relation in tenures, the correlative whereof is *priority*: As a man holding lands or tenements of two lords, holds of his ancestor lord by *priority*, and of his latter lord by *posterority*. Staundt. Prerog. 10, 11. 2 Inst. 392.

Post-fine, Is a duty to the King for a *fine* formerly acknowledged in his court, paid by the cognizee after the *fine* is fully passed, and it is so much, and half so much as was paid to the King for the *pre-fine*, collected by the sheriff of the county where the land lies of which the fine was levied, to be answered by him into the Exchequer. Stat. 22 & 23 Car. 2. See stat. 32 Geo. 2. c. 14. See Black. Com. 2 V. 350.

Posthumous, Is where a child is born after his father's death, &c. And *posthumous* children are enabled to take estates by remainder in settlements, as if born in their father's life-time, tho' no estate be limited to trustees to preserve them till they come in *offe*. 10 & 11 W. 3. cap. 16. See in *Ventre ja mere*. And Black. Com. 2 V. 169.

Post-man, in the Exchequer. In the court of Exchequer two of the most experienced barristers, called the *Post-man* and the *Tub-man*, (from the places in which they sit) have a precedence in motions. Black. Com. 3 V. 28.

Postnatus, Is a word that signifieth the second son, or one born afterwards; often mentioned in *Bracton*, *Glanville*, *Fleta*, and other ancient writers; and as to *postnati* and *antenati*, it was solemnly adjudged, that those who after the descent of the crown of England to King James 1. were born in Scotland, were not aliens here in England: But the *antenati*, or those born in Scotland, before the descent, were aliens here, in respect of the time of their birth. *Calvin's case*. Children of persons attainted of treason, born after the King's pardon, may inherit lands; tho' not those born before, &c. 1 Inst. 391.

Posts, see Highways, Inclosures.

Post-terminum, Is the return of a writ, not only after the return thereof, but after the term; on which the *costs* *brevium* takes 20 d. It is also used for the fee so taken.

Postulation, (*Postulatio*) Signifies a petition. Formerly, when a bishop was translated from one bishoprick to another, he was not elected to the new see; for the Canon law is *electus non potest eligi*; and the pretence was, that he was married to the first church, which marriage could not be dissolved but by the *lope*; thereupon he was petitioned, and consenting to the petition, the bishop was translated, and this was said to be by *postulation*: But being an usurpation, and against law, it was restrained by 16 R. 2. and 9 H. 4. c. 8. Since which, translations of bishops have been by *election*, and not by *postulation*. 1 Jones 160. 1 Salk. 137.

Postulations were made on the unanimous voting any person to a dignity or office; of which he was not capable by the ordinary canons or statutes, without special dispensation: And by the ancient customs, an election could be made by a majority of votes; but a *postulation* must have been *nemino contradicente*.

Pound, (*Parcus*) Is generally any place inclosed, to keep in beasts; but especially a place of strength to keep cattle which are distrained, or put in for any trespass done by them, until they are replevied or redeemed. In this signification, it is called *pound overt* and *pound covert*; a *pound overt* is an open pound, usually built on the lord's waste, and which he provides for the use of himself and

tenants, and is also called the lord's or the *common pound*; and a backside, yard, &c. whereto the owner of beasts impounded may come to give them meat, without offence, is a *pound overt*: A *pound covert* is a close place, as the owner of the cattle cannot come to, without giving offence; such as a house, &c. *Kitch. 144. Terms de Ley. 1 Inst. 96*. There is a difference between a common pound, an open pound, and a close pound, as to cattle impounded: For where cattle are kept in a common pound, no notice is necessary to the owner to feed them; but if they are put into any other open place, notice is to be given; and if beasts are impounded in a *pound close*, in part of the distrainer's house, &c. he is to feed them, at his peril. 1 Inst. 47.

A common pound belongs to a township, lordship or village; and ought to be in every parish, kept in repair by them who have used to do it time out of mind: The oversight whereof, and want of it, is to be by the steward in the leet, where any default herein is punishable. *Dyer 288. Ney 52. See Distress. And Black. Com. 3 V. 12*.

Poundage, Is a subsidy to the value of twelve-pence in the pound, granted to the King, of all merchandize exported or imported; and of such subsidies see 1 & 2 Edw. 6. cap. 13. and 1 Jac. c. 33. 12 Car. 2. cap. 4. 14 Car. 2. cap. 24. and Black. Com. 1 V. 315. 4 V. 430.

Pound-breach, If a distress be taken and impounded, tho' without just cause, the owner cannot break the pound, and take away the distress; if he doth, the party distrained may have his action, and retake the distress where-ever he finds it: And for pound-breaches, &c. action of the case lies, whereon treble damages may be recovered. 1 Inst. 261. 2 W. & M. c. 5. Also pound-breaches may be inquired of in the sheriff's turn; as they are common grievances, in contempt of the authority of the law. 2 Hawk. P. C. 67. See Black. Com. 3 V. 146.

Pound in Money, (from the Sax. *pund*, i. e. *poundus*) Is twenty shillings: In the time of the Saxons it consisted of 240 pence, as it doth now: and 240 of those pence weighed a pound, but 720 scarce weigh so much at this day. *Lambard 219*.

Pour fait proclamier, que null insect fimes on *Ordures en fosses, ou Rivières, pres Citiez, &c.* Is an ancient writ directed to the mayor or bailiff of a city or town, requiring them to make proclamation, That none cast filth into places near such city or town, to the nuisance thereof: and if any be cast there already, to remove the same; It is founded on the stat. 12 R. 2. c. 13. F. N. B. 176.

Pourparty, (*Propars, propartis, propartia*,) Is contrary to *pro indiviso*: For to make *pourparty* is to divide the lands that fall to parceners, which before partition they hold jointly and *pro indiviso*. Old Nat. Brev. 11.

Pourpresture, (*Pourprestura*, from the French *pourpris. consuetum*, an inclosure) Is thus defined by *Glanville, lib. 9. cap. 11*. *Pourprestura est proprie quando aliquid super Dominum Regem injuste occupatur; ut in Dominicis Regis, vel in viis publicis obsistuntis vel in aquis publicis transverfis a recto cursu, vel quando aliquis in civitate super Regiam plateam aliquid edificando occupaverit, & generaliter quoties aliquid fit ad nocumentum Regi tenementi vel Regie vie vel civitatis*.

Crompton, in his *Jurisd.* 152. defines it thus: *Pourpresture* is properly when a man taketh unto himself, or incroacheth any thing he ought not, whether it be in any jurisdiction, land or franchise; and generally when any thing is done to the nuisance of the King's tenants. See *Kitchin, 10. and Manwood's Forest Laws, cap. 10.*

Stene de verbor. signif. verbo Pourpresture, makes three sorts of this offence, one against the King, a second against the lord of the fee, the third against a neighbour by a neighbour. See 2 Inst. 38 & 272. Et lib. niger in *facc.* 37 & 38. That against the King happens by the negligence of the sheriff or deputy, or by the long continuance of wars, inasmuch as those who have lands near the

the crown lands, take or inclose part of it, and lay it to their own.

Pourpresture against the lord, is when the tenant neglects to perform what he is bound to do for the chief lord, or in any wise deprives him of his right. *Cowell.*

Pourpresture against a neighbour is of the same nature: 'Tis mentioned in the *Monast.* 1 tom 843. and in *Thorn.* 2623. *Et de purprestura quam Bercharius abbas purprestavit super prædictum Heliam.*

Pour seisir terres le feme que tient en dower, &c. Was a writ whereby the King seised the land which the wife of his tenant who held in *capite* deceased, had for her dowry, if she married without his leave; was grounded on the statute of the King's prerogative, *cap.* 3. See *F. N. B.* 174.

Poursuivant, (from the French *poursuivre*, i. e. *persequi*.) Signifies the King's messenger attending him, to be sent on any occasion or message; as for the apprehending a person accused or suspected of any offence: Those employed in martial causes are called *pursuivants at arms*, 24 H. 8. 13. See *Herald.*

Stow speaking of *Richard* the Third's death, *pag.* 784. hath these words, *His body was naked to the skin, not so much as one clout about him, and was trussed behind a PURSUIVANT AT ARMS like a hog, or a calf, &c.* The rest are used upon other messages in time of peace, and especially in matters touching jurisdiction. *Nicholas Upton*, in his book *De Militari Officio*, viz. lib. 1. *cap.* 11. mentions the ancient form of making these *pursuivants*, and tells us, that they were called *militæ linguæ*, because their chief honour was in *custodia linguæ*, and he divides them into *cursores equitantes* and *profutores*. *Cowell.*

Pourveyance or *Purveyance*, Is the providing necessities for the King's house.

By 12 Car. 2. c. 24. it is provided, "That no person by colour of buying or making provision or *purveyance* shall take any thing of any subject, without the full and free consent of the owner, obtained without menace or force," &c. See the *Antiquity of Pre-emption and Purveyance*, and 3 *Inst.* 82.

The profitable prerogative of *purveyance* and *pre-emption*, was a right enjoyed by the crown of buying up provisions and other necessities, by the intervention of the King's purveyors, for the use of his royal household, at an appraised valuation, in preference to all others, and even without consent of the owner; and also of forcibly impressing the carriages and horses of the subject, to do the King's business on the publick roads, in the conveyance of timber, baggage, and the like, however inconvenient to the proprietor, upon paying him a settled price. A prerogative, which prevailed pretty generally throughout Europe, during the scarcity of gold and silver, and the high valuation of money consequential thereupon. In those early times the King's household (as well as those of inferior lords) were supported by specific renders of corn, and other victuals, from the tenants of the respective demesnes; and there was also a continual market kept at the palace gate to furnish viands for the royal use. 4 *Inst.* 273. And this answered all purposes, in those ages of simplicity, so long as the King's court continued in any certain place. But when it removed from one part of the kingdom to another (as was formerly very frequently done) it was found necessary to send purveyors beforehand, to get together a sufficient quantity of provisions and other necessities for the household: And, lest the unusual demand should raise them to an exorbitant price, the powers before-mentioned were vested in these purveyors; who in process of time greatly abused their authority, and became a great oppression to the subject, tho' of little advantage to the crown; ready money in open market (when the royal residence was more permanent, and specie began to be plenty) being found upon experience to be the best provider of any. Wherefore by degrees the powers of *purveyance* have declined, in foreign countries as well as our own; and particularly were abolished in Sweden by *Gustavus Adolphus*, towards the beginning of the last century. And, with us in England, having fallen into disuse during the suspension of monarchy, King *Charles* at his restoration consented, by 12 Car. 2. c. 24.

to resign intirely these branches of his revenue and power; And the parliament, in part of recompence, settled on him, his heirs, and successors, for ever, the hereditary excise of fifteen pence per barrel on all beer and ale sold in the kingdom, and a proportionable sum for certain other liquors. *Black. Com.* 1 V. 287. 8. and 4 P. 116, 417, 432.

Pourveyer; or *Purveyor*, (*Provisor*, derived from the French *pourvoir*, i. e. *providere*) Signifies an officer of the King or Queen, or other great personage, who provides corn and other victual for their house. See *Magna Charta*, c. 22. and 3 *Edw.* 1. *cap.* 7. § 31. § *ann.* 28. *ejusdem.* *Articuli super chartas* 2. and other statutes. The name of *purveyor* was so odious in times past, that by *statute* 36 *Edw.* 3. 2. the heinous name of *purveyor* was changed into *buyer*; but the office is restrained by *stat.* 12 Car. 2. c. 24.

Pow-dike. To *perversely* and *maliciously* cut down or destroy the *pow-dike*, in the fens of *Norfolk* and *Ely*, is felony, by 22 Hen. 8. c. 11.

Power, Is an authority which one man gives another to act for him; and is sometimes a reservation which a person makes in a conveyance for himself to do some acts, as to make leases, or the like. 2 *Litt. Abr.* 339.

1. Upon what estate, and by what words a power shall be raised.

2. How a power shall be expounded.

1. Upon what estate, and by what words a power shall be raised.

In conveyances to an use, a man may direct or model the use, as he pleases, and the *stat.* 27 H. 8. c. 10. executes the possession to the use: Therefore he may annex powers to estates, which cannot be annexed to them by a conveyance at the Common law. *Co. L.* 237. c. *Mod.* 610. And therefore to the limitation of an use for life, he may annex a power to make leases for years, or lives, or to make a jointure to a wife. *Mo.* 381. 2 *Low.* 58. Or to grant annuities, raise portions, &c. *Mo.* 381. Or to make a jointure, and also a lease to commence after his death for portions, &c. *Hard.* 413. So he may annex a power of revocation of all uses limited, and to make a limitation of new uses, and this will not be repugnant. *Co. L.* 237. a. *Mod.* 610.

So a power may be annexed to an estate by another deed, executed at the same time, tho' it be not in the same conveyance by which the estate is conveyed. 1 *Vent.* 279. So a man may give a power or authority by will, which is a naked authority, not annexed to an estate: A, if he devises to A. for life, and afterwards that it shall be at his disposal to any of his children then living; he hath but an estate for life, with a naked power to dispose, in the manner directed by the will. 1 *Sul.* 24. 3 *Sul.* 276. So he may give a power to a stranger, which is a naked collateral power, and annexed to an estate. Or a power in gross, which takes effect after his estate is determined. *Hard.* 415.

If a power be to A. or his assigns, to make leases, &c. the power runs with the estate to the assignee in deed, &c. in law. 1 *Vent.* 340. 2 *Jen.* 110. So in all cases a power coupled with an interest may be assigned: As, a power to a lessor, and his assigns, to cut down trees. 2 *Mod.* 317. But a man cannot annex a power of revocation to a feoffment, or grant; for that will be void. *Co. L.* 237. 2. *Mo.* 610. So if a man seised in fee, covenant to stand seised to the use of himself for life, with power to make leases, remainder to another in fee, the power is not well raised. *Ca.* 66. 161. If the consideration of the covenant does not extend to the power to make leases. *Mo.* 145. 1 *Co.* 175. *Ray.* 248. Upon such covenant he cannot reserve a power to make leases, jointures, or for preferment of younger children, &c. *Mr.* 383, 383.

Words which show the intent of the party, are sufficient to create a power; as if a power be to demise or lease, tho' the intent is, that he declare the uses of the first settlement for life or years: For the lease does not take effect by

by demise, but by declaration of the uses. *Mo. 611.* So, if a man expresses the power only by implication, it is well: As, provided, that he shall not have power to alien, &c. otherwise than to make a jointure, and leases for 21 years; it is a good power to make a jointure and leases. *1 Leo. 148.* So, if a devise be to *A.* for life, to set, let and make estates out of it as I might, and afterwards to his daughter in tail; *A.* has power to make leases, it being the custom of the country where the land lies, to let for lives or years. *2 Roll. 261. l. 35.*

But a power, being executory, may be restrained or enlarged by a subsequent deed: As, if a power be general, to revoke; by a covenant afterwards, that he will not revoke without the consent of *B.* the power is restrained. *Jon. 411.* So, if the consideration upon which the power was founded, does not extend to the person to whom the lease is made, the lease shall be void: As, if a man covenant, in consideration of natural affection, to stand seised to the use of himself for life, &c. with power to make leases, &c. a lease to a stranger is void: For he is not within the consideration. *2 Roll. 260. l. 30.* So, if a power, at its creation, be to make leases to a person, to whom the consideration does not extend, it will be void, tho' the lease be executed to a person within the consideration. *2 Roll. 260. l. 35.*

2. How a power shall be expounded.

A power shall be expounded strictly; therefore if a man has power to make leases generally, this extends to make leases in possession only, and not in reversion. *2 Roll. 261. c. 5. 2 Cro. 318. Yel. 222. Ry. 248. 1 Ld. Raym. 267. 2 Sal. 537. 1 Lew. 168. 6 Co. 33. a. Mo. 199. 1 Leo. 35. 3 Leo. 131.* Nor a lease to commence in futuro. *Ray. 248. 1 Leo. 35. Yel. 222. 2 Cro. 318. Mo. 494.* So, if the power be to make leases for two or three lives, he cannot make a lease to one not in esse; as, to the son of *B.* not born, &c. *Per Wind. Ray. 163.* So, if the power be to make leases in possession, he cannot make a lease of land in reversion, tho' it be to commence in presenti. *1 Sid. 101. Ca. Ch. 18.*

So, if part of a lease be in reversion, the whole lease shall be void. *3 Sal. 276.* So, if the power be to make leases in possession, or in reversion, he cannot make a lease in possession, and another lease of the same land in reversion; but his power to lease in reversion extends only to make leases of the land, which was not then in possession. *1 Ld. Ray. 269. 2 Sal. 537.* So a power to make leases in reversion does not warrant a lease to commence at the end of an estate then in esse. *1 Ld. Ray. 269. 2 Sal. 537.* So a power to make a lease of three lives or three years in possession, or for two lives or thirty years in reversion, warrants only a concurrent lease for two lives; for a lease for lives cannot commence at a future day. *1 Ld. Ray. 269. 2 Sal. 537.*

But if a power be annexed to the estate of him in reversion, to make leases generally, he may make a lease in presenti of the reversion. *1 Lew. 168.* Tho' the power be to make leases in possession. *Ca. Ch. 18. 1 Lew. 168. 1 Sid. 260, 261.* So, if a fine be to the conusee for 15 years, afterwards to *B.* for life, &c. with power to lease for three lives, or twenty-one years in possession; he may make a lease during the 15 years of land in lease at the time of the fine, when such lease expires. *2 Roll. 260. l. 50. 2 Cro. 347. 2 Roll. 216. 1 Roll. 12.* So if husband and wife lease pursuant to the Stat. 32 H. 8. And then, by act of parliament, the estate is settled to the husband for life, with power to lease for three lives or 21 years; he may make leases of the reversion during the first lease by the husband and wife. *2 Roll. 261. l. 15. 1 Lew. 36. Cuth. Dyer 357. a.* So, if a power be to make leases in reversion for three lives, &c. he may lease for three lives, when there is another life in esse, tho' the power does not say to make leases of the reversion; for there is no prejudice. *2 Roll. 261. l. 30.* So he may make a lease for years determinable upon three lives, to commence after the end of the former lease in esse. *8 Co. 70. See 16 Vin. Abr. tit. Power.*

Power of the Crown. See *Black. Com. 1 V. 250.*

Power of the Parson. See *ib. 452.*

Poyning's Law, Is an act of parliament made in Ireland in the reign of Hen. VII. so called because Sir Edward Poyning was Lieutenant there when it was made, whereby all the statutes in England were declared of force in Ireland; which before that time were not, nor are any since that time, but by special words. *12 Rep. 109. See Black. Com. 1 V. 102—3.*

Practice. The law loves plain and fair practice, and will not countenance fraud in proceedings, nor suffer advantage to be taken thereby. *2 Lill. 342.* Private clandestine proceedings, in several cases, are said to be by practice.

Præceptories, (Præceptorie) Were a kind of benefices, having their name from being possessed by the more eminent Templars, whom the chief master by his authority created and called *Præceptores Templi*: And of these *Præceptores* there are recorded sixteen, as belonging to the Templars in England, viz. *Cressing Temple, Balphal, Shengay, Newland, Tevely, Wisbam, Templebrure, Wallington, Rokeley, Ovington, Temple Combe, Trebigh, Ribstone, Mount St. John, Temple Newsum and Temple Harst.* *Mon. Angl. tom. 2. 543.* But some authors say, these places were cells only, subordinate to their principal mansion the Temple in London. *32 Hen. 8. c. 24.*

Præcipe. Original writs are either optional or peremptory; or, in the language of our law, they are either a *præcipe*, or a *sic fecerit securum*. The *præcipe* is in the alternative, commanding the defendant to do the thing required, or shew the reason wherefore he hath not done it. The use of this writ is where something certain is demanded by the plaintiff, which is in the power of defendant himself to perform; as, to restore the possession of land, to pay a certain liquidated debt, to perform a specific covenant, to render an account, and the like: In all which cases the writ is drawn up in the form of a *præcipe* or command, to do thus, or shew cause to the contrary; giving the defendant his choice, to redress the injury or stand the suit. *Black. Com. 3 V. 274.*

Præcipe in capite, Was a writ issuing out of the Chancery, for a tenant holding of the King in capite, viz. in chief as of his crown. *Magn. Chart. cap. 24. Reg. Orig. 4. Black. Com. 3 V. 195.*

Præcipe quod reddat, Is the form of a writ, which extends as well to a writ of right, as to other writs of entry or possession, beginning *præcipe A. quod reddat B. unum messuagium, &c.* *Old Nat. Bx. 13. See Black. Com. 2 V. 358. xvii. As to Præcipe in Fines, see ib. 350. xiv. And as to Tenant to the Præcipe, see ib. 3 V. 182.*

Præcipitium, Was a punishment inflicted on criminals, by casting them from some high place. *Malmf. lib. 5. p. 155.*

Prædicti, Prædictus (Lat.) In English, aforesaid, Is a word used in pleadings, applied to places, towns, lands, names, parties, &c. before mentioned. In a deed or grant, the words *prædicti manerii* are a description of the manor before named: And a town, repeated by the name of parish *prædicti*, shall be held all one; for the word aforesaid couples them. *Hob. 6.* A difference as to *prædicti* term granted, &c. see *10 Rep. 65.*

Præfatus Willæ, Is the same as *propofitus willæ*, i. e. the mayor of a town. *Leg. Ed. Confess. c. 28.*

Præfine, Is that fine which on suing out the writ of covenant on levying fines, is paid before the fine is passed. *22 & 23 Car. 2.*

Præmunire, Is taken either for a writ so called, or for the offence whereon the writ is granted; the one may be understood by the other.

The church of Rome, under pretence of her supremacy, and the dignity of St. Peter's chair, took on her to bestow most of the ecclesiastical livings of any worth in England, by mandates, before they were void; pretending therein great care to see the church provided of a successor before it needed. Whence these mandates or bulls were called *gratie expectativæ* or *provisiones*, whereof see a learned discourse in *Duarenus de beneficiis. lib. 3. cap. 1.*

These provisions were so common, that at last Edward the Third, not digesting so intolerable an encroachment, made a statute in the twenty-fifth year of his reign, *stat. 5. cap. 28.* and another *stat. 6. cap. 1.* and a third *anno 27.* against those who drew people out of the realm, to

answer things belonging to the King's court; and another *anno 28 stat. 2. cap. 1. 2. 3 & 4* whereby he greatly restrained this liberty of the pope; who notwithstanding still adventured to continue the *provisions*; inasmuch that *Richard* the Second likewise made several statutes against them, but most expressly that of *16 Ric. 2. 5.* which appoints their punishment to be thus, *That they should be out of the King's protection, attached by their bodies, and lose their lands, tenements, goods and chattels.* After him *Henry* the Fourth, in like manner aggrieved at other abuses, not fully met with in the former statutes, in the second year of his reign, *c. 3 & 4.* adds certain new cases, and lays on the offenders the same punishment. See also *9 Hen. 4. c. 8.* and *3 Hen. 5. c. 4.* and *Smith de Republ. Angl. lib. 3. cap. 9.*

Some later statutes inflict this punishment upon other offenders.

The word is most commonly applied to the punishment first ordained by the statutes beforementioned, for such as transgressed them: For where it is said, that any man for an offence committed, shall incur a *præmunire*, it is meant that he shall incur the same punishment as is inflicted on those who transgress *16 Ric. 2. c. 5.* commonly called the statute of *præmunire*; which kind of application is not unusual in our statutes.

As to the etymology of the word, it proceeds from the verb *præmonere*, being barbarously turned into *præmunire*, to forewarn or bid the offender to take heed: For which a reason may be gathered from the words of *27 Ed. 3. c. 1.* and the form of the writ, in *Old Nat. Brev. 143.* *Præmunire facias præfatum præpositum, & J. R. procuratorem, &c. quod tunc sint coram nobis, &c.* which words can be referred to none but parties charged with the offence. *Corwell.* See *3 Inst. 110.* and *Black. Com. 4 V. c. 8. p. 102, 421.*

1. What offences come under the notion of a *præmunire*.
2. Of the punishment in a *præmunire*.
3. To what time the attainder shall relate.
4. To what estates the statute of *præmunire* doth not extend, and of the suit, &c.
5. Of the King's power as to pardoning a *præmunire*, &c.

1. What offences come under the notion of a *præmunire*.

The offences coming under the notion of a *præmunire*, or for which the party incurs a *præmunire*, are reduced by *Hawkins* to the following particulars:

1. Making use of papal bulls is made a *præmunire*, by many statutes, to which purpose it is enacted by *25 Ed. 3.* called the statute of *provisors*, that whoever shall by a papal provision disturb any patron to present to a benefice, &c. shall be fined and imprisoned till he make full renunciation. And by *25 Ed. 3. stat. 5. cap. 22.* If any one purchase a provision of an abbey or priory, he shall be out of the King's protection; and by *38 Ed. 3.* and *12 Ric. 2. cap. 15.* and *13 Ric. 2. stat. 2. cap. 2.* Whoever shall accept a benefice contrary to *25 Ed. 3.* shall be banished; and by *13 Ric. 2. stat. 2. cap. 3.* Whoever shall bring a sentence of excommunication against any person for executing the statute of *25 Ed. 3.* shall suffer pain of life and member; and by *16 Ric. 2. c. 5.* Whoever shall purchase or pursue, or cause to be purchased or pursued, in the court of *Rome* or elsewhere, any translations, processes, sentences of excommunication, bulls, instruments, or other things contrary to the tenure of that statute, or bring them within this realm, or receive, &c. shall be out of the King's protection; and their lands and tenements, goods and chattels forfeited to the King, and be attached by their bodies; and by *2 Hen. 4. c. 3.* Whoever shall purchase from *Rome* a provision of exemption from ordinary obedience; and by *2 Hen. 4. cap. 4.* Whoever shall put in execution bulls purchased by those of the order of *Cisterciens*, to be discharged of tithes, shall incur the like penalty; they are further restrained by *6 Hen. 4. cap. 1.* *7 Hen. 4. cap. 8.* *9 Hen. 4. cap. 8.* and *3 Hen. 5. cap. 4.* by which the statutes abovementioned are enforced and explained; and by *23 Hen. 8. cap. 2. sect. 22.* Whoever shall sue for or execute any licence, dispensation or faculty from the see of *Rome*; and by *28 Hen. 8. cap. 16.* (by which all bulls, briefs, &c. obtained from *Rome*

are made void) Whoever shall use, allege, or plead the same in any court, unless they were confirmed by this statute, or afterwards by the King, shall incur the like penalty. *Vide Reg. 54. 3 Inst. 127.*

By the *13 Eliz. cap. 2.* Those who purchase any bulls, &c. from *Rome*, are guilty of high treason; but those ancient statutes continue still in force, and it is in the election of the crown to proceed either upon them, or *13 El.* Also the aiders of such offenders, after the offence, to the intent to uphold the same usurped power, incur a *præmunire*. *Davis 84.*

Secondly, Derogating from the King's Common law courts, is said to have been an high offence at Common law, and is made a *præmunire* by many ancient statutes; for by *27 Ed. 3. cap. 1.* of provisors, If any subject draw any out of the realm in plea, wherein the cognizance pertains to the King's court, or of things whereof judgments be given in the King's courts, or in any other court to defeat or impeach the judgments given in the King's courts, he shall be warned to appear, &c. in proper person, at a day, containing the space of two months, at which if he appear not, he and his proctors, &c. shall be put out of the King's protection, his lands and chattels forfeited, his body imprisoned, and ransomed at the King's will, &c. See *16 R. 2. c. 5.*

In the construction of these statutes it hath been held, that certain commissioners of *travel*, for summoning one before them who had got a judgment at law, and imprisoning him till he would release it, were guilty of a *præmunire*. *2 Bull. 299. 3 Inst. 127. Cro. Jac. 336.*

Also suits in the admiralty or ecclesiastical courts within the realm, for matters which upon the face of the libel itself appear to belong only to the cognizance of the temporal courts, are said to be within *16 Ric. 2.* by force of the words, "or elsewhere." *1 Hawk. P. C. 51.*

And it hath been formerly holden, that even suits in a court of equity, to relieve against a judgment at law, are within the danger of these statutes, especially if they tend to controvert the very point determined at law, or to relieve in a matter relievable at law. *4 New Abr. 146.*

Thirdly, Appeals to *Rome* are made *præmunires* by *24 Hen. 8. cap. 12.* and *25 Hen. 8. cap. 19.* by which it is enacted, That such appeals as formerly were made to *Rome* shall be made henceforth to Chancery.

Fourthly, Exercising the jurisdiction of a suffragan without the appointment of the bishop of the diocese, is made a *præmunire* by *26 Hen. 8. cap. 14.* which sets forth at large how suffragans are to be nominated, &c.

Fifthly, By *25 Hen. 8. cap. 20.* If a dean and chapter refuse to elect one named in the King's letter for a bishoprick, and to certify such election to the King within twenty days after the licence come to his hands, or if any archbishop or bishop after such election (or nomination by the King in default thereof, &c.) refuse to confirm and consecrate within twenty days the person signified to them by the King's letters patent, they incur a *præmunire*.

Sixthly, Maintaining the pope's power is made a *præmunire* by *5 Eliz. cap. 1.*

Seventhly, By *13 Eliz. cap. 7.* "If any one bring into the realm, &c. any superstitious things, pretended to be hallowed by the bishop of *Rome*, &c. and deliver or offer the same to any subject to be used in any wise; or if any one receive the same to such intent, and not discover the offender, &c. or if a justice of peace, having any offence in that act declared to him, do not within sixteen days declare it to a privy counsellor, he incurs a *præmunire*."

Eighthly, By *27 Eliz. c. 2.* "Sending relief to any jesuit, seminary priest, or college of priests or jesuits beyond the seas, or to one not returning out of such college into England, incur a *præmunire*."

Ninthly, Persons refusing to take the oaths, incur a *præmunire* by several statutes, as *1 and 5 Eliz. 3.* and *7 Jac. 1. 1 W. & M. &c.*

Tenthly, By the *6 Ann. cap. 7.* If any person maliciously and directly, by preaching, teaching, or advised speaking, declare, maintain and affirm, that the pretended Prince of *Wales* hath any right or title to the crown of this realm;

realm; or that any other person hath any right or title to the same, otherwise than according to 1 *W. & M. cap. 2.* and 2 *W. 3. cap. 2.* and the acts then lately made in England and Scotland mutually for the union of the two kingdoms; or that the Kings or Queens of this realm with the authority of parliament are not able to make laws to limit the crown and the descent, &c. thereof, shall incur a *præmunire*.

2. Of the punishment in a *præmunire*.

Most of the statutes of *præmunire* refer the punishment to 16 *Rich. 2. c. 5.* which enacts, "That those who offend shall be put out of the King's protection, and their lands and tenements, goods and chattels forfeited to the King; and that they be attached by their bodies if they may be found, and brought before the King and his council, to answer; or that process be made against them by *præmunire facias*, in manner as is ordained in other statutes of provisors."

The judgment in *præmunire* at the suit of the King, against the defendant being in prison, is, that he shall be out of the King's protection; and that his lands and tenements, goods and chattels shall be forfeited to the King; and that his body shall remain in prison at the King's pleasure; but if the defendant be condemned on his default of not appearing, whether at the suit of the King or party, the same judgment shall be given as to the being out of the King's protection and the forfeiture; but instead of the clause, that the body shall remain in prison, there shall award a *capiatur*. Co. Lit. 129. b. 3 Inst. 125, 218. 2 Hawk. P. C. 444.

As the 16 R. 2. cap. 5. expressly saith, that such offenders shall be put out of the King's protection; and also the statute of 25 Ed. 3. stat. 5. cap. 22. had farther added, that any one might do with a purchaser of the provisions therein prohibited, as with the King's enemy; and that he who should offend against such an one in body, lands or goods, should be excused; it was formerly holden, that a person attainted in a *præmunire* might lawfully be slain by any one, as being the King's enemy, and out of the protection of the laws; but the later opinions seem to have disapproved of this severity; and it is now expressly enacted by 5 Eliz. cap. 1. sect. 21, 22. "That it shall not be lawful to kill any person attainted in a *præmunire*, saving such pains of death or other punishment, as might with danger of law be done on any person that shall send or bring into the realm, or within the same shall execute any process, &c. from the see of Rome." Co. Lit. 12. 68. 130. 3 Inst. 128. Bro. Car. 197. Jenk. 199.

It is clearly agreed, that a person attainted in a *præmunire* can bring no action; neither is it safe for any one, knowing him to be guilty, to give him any relief. Co. Lit. 130.

A statute, by appointing that an offender shall incur the penalty and danger mentioned in 16 Ric. 2. c. 5. does not confine the prosecution for the offence to the particular process thereby given. 1 Vent. 173.

It is holden, that the statute of *præmunire*, which gives a general forfeiture of all the lands and tenements of the offender, extends not to lands in tail. Co. Lit. 130.

It hath been adjudged, that a pardon of all misprisions, trespasses, offences and contempts, will pardon a *præmunire*. Cro. Jac. 336. 2 Bull. 299.

The defendant in a *præmunire* must regularly appear in person, whether he be a peer or commoner, unless he is dispensed with by some writ of grant for that purpose; but in the case of Sir Anthony Mildmay, he was allowed to plead a pardon to a *præmunire* by attorney; but it has been thought that there was some clause to this effect in the pardon. 3 Inst. 125. 1 Roll. Rep. 190. 2 Bull. 290. 2 Hawk. P. C. 273.

On an indictment of a *præmunire*, a peer of the realm shall not be tried by his peers. 12 Co. 92.

On an information on 6 Geo. 1. c. 18. for setting up a bubble called the South Sea, it was determined that the court was not obliged by that act to give the whole judgment, as in case of a *præmunire*, against defendant, but only such parts of it as in their discretions they should think fit; and accordingly a fine of 5*l.* was set on the

party convicted, and judgment that he should remain in prison during the King's pleasure. 2 *Ld. Raym.* 361.

3. To what time the attainder shall relate.

A person being seized in fee of lands, was indicted for a *præmunire* upon 13 Eliz. but before conviction he made an entail of his lands; and it was adjudged, that the attainder should relate to the time of the offence, and that was before he entailed the lands, and not the time of the judgment, which was afterwards; and the freehold being in him at the time of the attainder, shall not be devested without an inquisition under the Great Seal. Cro. Car. 123, 172.

4. To what estates the statute of *præmunire* doth not extend, and of the suit, &c.

It is said the statute of *præmunire* doth not extend to the forfeiture of rents, annuities, fairs, &c. or any other hereditaments that are not within the word *terra*. 3 Inst. 126.

This suit need not be by original in B. R. for if defendant be in *custodia marischalli*, the suit may be against him by bill; and defendants cannot be sued in any other court when they are in *custodia marischalli*. And if a defendant come not at the day, &c. or if he appears and pleads, and the issue be found against him, or he demurs in law, &c. judgment shall be given, that he shall be out of protection, &c. 3 Inst. 124.

Tenant in tail is attainted in a *præmunire*, he shall forfeit his lands only during life; and afterwards the issue in tail shall inherit. 11 Rep. 56.

5. Of the King's power as to pardoning a *præmunire*, &c.

The laws making offences to be *præmunire*, it has been observed, are so very severe, that they are seldom put in execution: And notwithstanding the statutes, the King may protect and pardon an offender; for this protection is given him by the law of nature. 2 Bull. 299. A *præmunire* is said to be a defence of the crown, and the laws of the land, from the tyranny and oppression of the pope's jurisdiction, &c. The *præmunire* clause in the bubble act leaves power in the court to moderate the judgment. 1 Strange 472. See Pope.

Præpositus Ecclesiæ, Is used for a church reeve, or church warden.

Præpositus Villæ, Sometimes is used for the constable of a town, or petit-constable. Crompt. Jurisd. 205. Yet the same author, 194. seems to apply it otherwise; for there *quatuor homines præpositi* are those four men, who must appear for every town before the justices of the forest in their circuit. It is sometimes used for an head or chief officer of the King, in a town, manor or village, or a reeve. See Reeve. *Animalia & res inventæ coram ipso (præposito) & sacerdote ducenda erant.* LL. Edw. Confessor. cap. 28. This *præpositus villæ*, in our old records, does not answer to our present constable, or headborough of a town; but was no more than the reeve, or bailiff of the lord of the manor, sometimes called *serviens villæ*.

By the laws of Henry the First, the lord answered for the town where he was resident; where he was not, his dapifer, or seneschal, if he were a baron: But if neither of them could be present, then *præpositus & quatuor de unaquaque villa*, i. e. the reeve and four of the most substantial inhabitants were summoned. See Dr. Brady's Glossary to Introduction to English History, pag. 97.

Præter. See Service and Sacraments.

Prayers of the Church. Vide Common Prayer.

Preaching. Every beneficed preacher, residing on his benefice, and having no lawful impediment, shall in his own cure, or some neighbouring church, preach one sermon every Sunday of the year: And if any beneficed person be not allowed to be a preacher, he shall procure sermons to be preached in his cure by licensed preachers; and every Sunday whereon there shall not be a sermon, he or his curate is to read one of the homilies: No person not examined and approved by the bishop, or not licensed to preach, shall expound the Scripture, &c. nor shall any be permitted to preach in any church, but such as appear to be authorized thereto, by shewing their licence; and church-

churchwardens are to note in a book the names of all strange clergymen who *preach* in their parish; to which book every *preacher* is to subscribe his name, the day he *preached*, and the name of the bishop of whom he had licence to *reach*. Can. 44, 45, 49.

If any person licensed to *preach*, refuses to conform to the ecclesiastical laws, after admonition, the licence of every such *preacher* shall be void: And if any parson *preach* doctrine contrary to the word of God, or the articles of religion, notice is to be given of it to the bishop by the churchwardens, &c. So likewise of matters of contention and impugning the doctrine of other *preachers* in the same church; in which case, the *preacher* is not to be suffered to *preach* except he faithfully promise to forbear all such matter of contention in the church, until the bishop hath taken farther order therein. Can. 53, 54.

No minister shall *preach* or administer the sacrament in any private house, *unless* in times of necessity, as in case of sickness, &c. on pain of suspension for the first offence, and excommunication for the second; which last punishment is also inflicted on such ministers as meet in private houses, to consult on any matter tending to impeach the doctrine of the church of England. Can. 71, &c.

Preamble, (*Proœmium*, from the preposition *præ*, before, and *ambulo*, to walk; as to walk before) The beginning of an act is called the *preamble*; which is a key to the intent of the makers of the act, and the mischiefs which they would remedy by the same.

Pre-audience. A custom has of late years prevailed of granting letters *patent of precedence* to such barristers, as the crown thinks proper to honour with that mark of distinction; whereby they are intitled to such rank and *pre-audience* as are assigned in their respective patents; sometimes next after the King's Attorney-General, but usually next after his Majesty's counsel then being. These (as well as the Queen's Attorney and Solicitor-General) rank promiscuously with the King's counsel, and together with them sit within the bar of the respective courts, but receive no salaries, and are not sworn; therefore are at liberty to be retained in causes against the crown.

Pre-audience in the courts is reckoned of so much consequence, that it may not be amiss to subjoin a short table of the precedence which usually obtains among the practitioners.

1. The King's *premier* Serjeant, (so constituted by special patent.)
2. The King's *antient* Serjeant, or the eldest among the King's Sejeants.
3. The King's Advocate-General.
4. The King's Attorney-General.
5. The King's Solicitor-General.
6. The King's Serjeants.
7. The King's Counsel, with the Queen's Attorney and Solicitor.
8. Serjeants at Law.
9. The Recorder of London.
10. Advocates of the Civil law.
11. Barristers.

In the court of Exchequer two of the most experienced barristers, called the *post-man* and the *sub-man*, (from the places in which they sit) have also a precedence in motions. *Black. Com.* 3 V. 28.

Prebend (*Præbenda*) Is the portion which every *prebendary* of a cathedral church receives, in right of his place, for his maintenance; as *canonica portio* is properly used for that share, which every canon receiveth yearly out of the common stock of the church. And *præbenda* is a several benefice rising from some temporal land, or some church, appropriated towards the maintenance of a clerk, or member of a collegiate church, and is commonly named of the place whence the profit arises.

Præbenda, strictly taken, is that maintenance which daily *præbatur* to another; but now it signifies the profits belonging to the church, divided into those portions called *præbenda*, and is a right of receiving the profits for the duty performed in the church, sufficient for the support of

the parson in that divine office where he resides. *Decret. tit. De Præbend.*

The spirituality and temporality make a *prebend*, but the spirituality is the highest and most worthy; and a person is not a complete *prebend*, to make any grant, &c. before installation and induction. *Dyer* 221.

Prebends are simple and dignitary.

A simple *prebend* hath no more than the revenue for its support; but a

Prebend with dignity hath always a jurisdiction annexed, and for this reason the *prebendary* is stiled a dignitary, and his jurisdiction is gained by prescription.

Prebends are some of them donative; and some are in the gift of laymen, but in such case they must present the *prebendary* to the bishop, and the dean and chapter inducts him, and places him in a stall in the cathedral church, and then he is said to have *locum in choro*; at Westminster, the King collates by patent, and by virtue thereof the *prebendary* takes possession, without institution or induction. 3 *Roll. Abr.* 356.

As a *prebend* is a benefice without cure, &c. a *prebend* and a parochial benefice are not incompatible promotions; for one man may have both without any avoidance of the first: For tho' *prebendaries* are such as have no cure of souls, yet there is a sacred charge incumbent on them in those cathedrals where they are resident, and they are obliged to preaching by the canons of the church; and it is not lawful for a *prebendary* to possess two *prebends* in one and the same collegiate church. *Roll. Abr.* 361.

Prebendaries are said to have an estate in fee-simple in right of their churches, as well as bishops of their bishopricks, Jeans of their deaneries, &c.

Corpus præbendæ is that which is received by a *prebendary* above the profits which are always for his daily maintenance. *Præbenda* and *probenda* were also in old deeds used for provisions, provand or provender.—*Pro equo suo unum bushel avenarum pro præbenda capiendæ.* *Coucher Book in Dutchy-office*, tom. 1. fol. 45. *Cowel.*

Prebendary, (*Præbendarius*) Is he who hath such a *prebend*; so called, not a *prebendo auxilium & consilium* episcopo, &c. but from receiving the *prebend*: And if a manor be the body of a *prebend*, and is evicted by title paramount; yet the *prebendary* is not destroyed. 3 *Rep.* 75.

There is a golden *prebendary* of Hereford, otherwise termed *præbendarius episcopi*, who is one of the twenty-eight minor *prebendaries* there, and has *ex officio* the first canon's place that falls; he was antiently *confessarius* of the cathedral church, and to the bishop, and had the offerings at the altar, whereby, in respect of the gold commonly given there, he had the name of golden *prebendary*. *Blount.* See *Black. Com.* 1 V. 383.

Præcariae, Are days works, which tenants of some manors are bound, by reason of their tenure, to do for their lord in harvest; and in divers places are vulgarly called *bind-days* for *biden-days*, which in the Saxon *dies præcarias* sonat: For *biden* is to pray or intreat. This custom is plainly set forth in the great book of the Customs of the Monastery of Battel, tit. *Appelderham*, fol. 60. *Cowell.*

Precedence, Statute for regulating precedence of lords and other great officers in parliament, 31 Hen. 8. c. 10. As to patent of precedence, see tit. *Pre-audience*, and *Black. Com.* 3 V. 28.

Precedent Conditions. See *Black. Com.* 2 V. 154.

Precedents, Are authorities to follow, in determinations in courts of justice.

Precedents have always been greatly regarded by the sages of the law: The precedents of the courts are said to be the laws of the courts; and the court will not reverse its judgment, contrary to many precedents. 4 *Rep.* 93. *Cro. Eliz.* 65. 2 *Lill. Abr.* 344. But new precedents are not considerable; precedents without judicial decision on argument are of no moment; and an extrajudicial opinion given in or out of court, is no good precedent. *Vaugh.* 169, 382, 399, 429.

It has been held, that there can be no precedent in matters of equity, as equity is universal truth; but according to Lord Keeper Bridgman, precedents are necessary in equity to find out the reasons thereof for a guide; and besides the authority

authority of those who made them; it is to be supposed they did it *on great consideration*, and it would be strange to set aside what has been the course for a long series of time. 1 *Mod.* 307. If a man doubt whether a case be equitable, or no, in prudence he will determine as the precedents have been; especially if made by men of good authority and learning. *Ibid.*

Precedents must be shewed by plaintiff for the court to go *ag inst* what is generally held. 1 *Keb.* 47. And where precedents are alledged contrary to the opinion of the court, *day may be given to produce them.* *Mod. Caf.* 199.

Precedents in some cases may make an act good, which otherwise would be void in strictness of law: And tho' the forms of writs ought not to be altered, yet precedents and constant usage must be observed. *Jenk. Cent.* 162, 172.

If there be cause to alter an ancient precedent of a writ, by reason of any new statute, &c. the cursitors are not to keep to the old form, but to alter it as the case requires; to prevent abatement of writs, and vexation to the people. *Trin.* 1650.

Lord C. Talbot said, He thought it much better to stick to the *known general rules*, than to follow any one particular precedent which may be founded on reasons unknown to us. Such a proceeding would confound all property. And then citing the case of *Lady Laneborough v. Fox*, as of the *strongest authority* to the case in point, his Lordship said, that tho' it had not been in the house of Lords, he should have thought himself bound to go according to the general and known rules of law. *Cases in Chan. in Ld. Talbot's time* 26, 27.

It is dangerous to alter old established forms. *Cases in Chan. in Ld. Talbot's time* 196. See 16 *Vin. Abr.* tit. *Precedents.* And vide *Innovation.*

Proce partium, Is when a suit is continued by the prayer, assent or agreement of both parties. *Stat.* 13 *Ed. 1. c.* 27.

Precept, (*Præceptum*) Is diversly taken in law, as sometimes for a command in writing, by a justice of peace, or other officer, for bringing a person or records before him; of which there are many examples in the table of the *Register Judicial.* And in this sense it seems to be borrowed from the customs of Lombardy, where *præceptum* significeth *scripturam vel instrumentum.* *Hotom. in verb. Feudal. & lib. 3. Commentar. in libros feudor. in præfatione.* Sometimes it is taken for the provocation, whereby one man incites another to commit a felony, as theft, murder, &c. *Standf. Pl. Cor.* 105. *Brañon, lib. 3. tract. 2. cap. 9.* calls it *præceptum* or *mandatum.* Whence we may observe three divisions of offending in murder, *præceptum, fortia, consilium*; *præceptum* being the instigation used beforehand; *fortia* the assistance in the fact, as to help to bind the party murdered or robbed; *consilium*, advice either before, or in the fact. The *Civilians* use *mandatum* in this case. *Cowell.* Precept of election to parliament, see *Black. Com.* 1 *V.* 177.

Precontract, (mentioned in *stat. 2 & 3 Ed. 6. c. 23.*) Is a contract made before another contract, but hath relation especially to marriage, see *Black. Com.* 1 *V.* 434.

Prædial tithes, (*Decimæ prædiales*.) Are those which are paid of things arising and growing from the ground only, as corn, hay, fruit of trees, and such like. 2 *Ed.* 6. 13. See *Inst.* 649^o and *Black. Com.* 2 *V.* 24. See *Tithes.*

Pre-emption, (*Præemptio*) Signifies the first buying of a thing; and it was a privilege allowed the *King's Purveyor*, to have the choice and first buying of provisions for the *King's house.* 12 *Car. 2. c.* 24. See *Purveyance.*

Pregnancy, (*Plea of.*) Where a woman is capitally convicted, and pleads her pregnancy, tho' this is no cause to stay the judgment, yet it is to respite the execution till she is delivered. This is a mercy dictated by the law of nature, in *favorem prolis*; and therefore no part of the bloody proceedings, in the reign of *Queen Mary*, hath been more justly detested than the cruelty, that was exercised in the island of *Guernsey*, of burning a woman big with child: For when thro' the violence of the

flames, the infant sprang forth at the stake, and was preserved by the by-stander, after some deliberation of the priests who assisted at the sacrifice, they cast it again into the fire AS A YOUNG HERETICK. A barbarity which they never learned from the laws of *antient Rome*; which directs, with the same humanity as our own, "*quod prægnantis mulieris damnatæ poena differatur, quoad pariat*:" Which doctrine has also prevailed in *England*, as early as the first memorials of our law will reach. In case this plea be made in stay of execution, the judge must direct a jury of twelve matrons, or discreet women to enquire the fact: And if they bring in their verdict *quick with child* (for barely *with child*, unless it be alive in the womb, is not sufficient) execution shall be staid generally till the next session; and so from session to session, till either she is delivered, or proves by the course of nature not to have been with child at all.

But if she once hath had the benefit of this reprieve, and been delivered, and afterwards becomes pregnant again, she shall not be intitled to the benefit of a farther respite for that cause. For she may now be executed before the child is quick in the womb; and shall not, by her own incontinence, evade the sentence of justice. *Black. Com.* 4 *V.* 387, 8.

Premises, Is that part in the beginning of a deed, the office of which is to express the grantor and grantee, and the land, or thing granted. 5 *Rep.* 55.

The office of the premises is to name the grantor and grantee, and the thing to be granted or conveyed.

No person, not named in the premises, can take any thing by the deed, tho' he be afterwards named in the *habendum*, because the premises of the deed makes the gift; therefore when the lands are given to one in the premises, the *habendum* cannot give any share of them to another, because that would be to retract the gift made, and consequently to make a deed repugnant in itself; thus for instance, If a charter of feoffment be made between A. of the one part, and B. and C. of the other part, and A. gives lands to B. *habendum* to B. and C. and their heirs; C. takes nothing by the *habendum*, because all the lands were given to B. consequently C. cannot hold those lands which are given before to another; but in this case, if the *habendum* had been to B. and C. and their heirs, to the use of B. and C. this had been a good limitation of a use, consequently the statute of uses would carry the possession to the use, and B. and C. thereby become joint-tenants. *Co. Lit.* 6. a. 9 *Co.* 47. b. *Hob.* 275, 313. 2 *Roll. Abr.* 65. *Cro. Jac.* 564. *Cro. Eliz.* 58. 13 *Co.* 54. *Poph.* 126.

If lands be given to a husband, *habendum* to him and his wife, and to the heirs of their two bodies, the wife takes nothing, because she was not mentioned in the premises; therefore shall take nothing of that which was before given intirely to her husband. 2 *Roll. Abr.* 67.

But there are four exceptions to this rule: 1. If lands be given in frank-marriage, the woman who is the cause of the gift may take by the *habendum*, tho' she be not named in the premises; as if lands be given to J. S. *habendum* *maritagium una cum* the woman who is daughter of the donor; this is a good estate in frank-marriage to them both; because the gift being totally on her account, 'tis necessary to the creation of the estate in the husband that the wife should take. *Co. Lit.* 21. *Plow.* 158. *Cro. Jac.* 454. *Poph.* 126. 2 *Roll. Abr.* 67.

2. In grants of copy of court roll; as if a copyholder surrenders to his lord, without limiting any use, and then the lord grants it in this manner; J. S. *cepis de domino; habendum* to the said J. S. and his wife, and the heirs of their bodies begotten, this is a good estate-tail in the wife; for these customary grants, that are made in pursuance of a former surrender, are construed according to the intention of the parties, as wills are; besides the custom of the manor is the rule for the exposition of such sort of grants, and in many manors such form is usual. *Poph.* 125, 126. *Cro. Jac.* 434. 2 *Roll. Abr.* 67. *Cro. Eliz.* 323.

3. A man not named in the premises may take an estate in remainder by limitation in the *habendum.* 2 *Roll. Abr.* 68. *Hob.* 313. *Cro. Jac.* 564.

4. In wills; for if a man devises lands to J. S. *habendum* to him and his wife, this is a good devise to the wife: because

because in construction of wills, the intention of the deviser is chiefly regarded; and wherever that discovers itself it shall take place, tho' it be not expressed in those legal forms that are required in conveyances executed in a man's life-time. *Plow.* 158, 414. 2 *Roll. Abr.* 68. See *Black. Com.* 2 V. 298.

Premium, (*Præmium*.) A reward: Amongst merchants it is used for the money the insurer gives the insurer for ensuring the safe return of any ship or merchandize. *Stat.* 19 *Car.* 2. c. 4.

Prender, Is the power or right of taking a thing before it is offered; from the French *prendre*, i. e. *accipere*: It lies in render, but not in prender. *Rep.* 1. Sir John Peter's case.

Prender de Baron, Signifieth literally to take an husband; and it is used for an exception to disabla a woman from pursuing an appeal of murder, against one who killed her former husband. *S. P. C. lib.* 3. c. 59.

Prepensel, (*Præpensus*) Forethought; as *prepensel* Malice is *Malitia Præcogitata*, which makes killing, murder: and when a man is slain on a sudden quarrel, if there were malice *prepensel* formerly between the parties, it is murder, or as it is called by the statute *prepensel* Murder. 12 H. 7. c. 7. 3 *Inst.* 51. See *Murder*.

Prerogative, (from *præ*, ante, and *rogare*, to ask or demand) Is a word of large extent, including all the rights which by law the King hath, as chief of the Commonwealth, and as intrusted with the execution of the laws. 4 *New Abr.* 149. See *Stamf. Prærog.* cap. 1. *Co. Lit.* 90.

The nature of our constitution is that of a limited monarchy, in which the legislative power is lodged in the King, Lords and Commons; but the King is intrusted with the executive part, and from him all justice is said to flow; hence he is stiled the head of the Commonwealth, supreme governor, *parens patriæ*, &c. but still he is to make the law of the land the rule of his government; that being the measure as well of his power, as of the subjects obedience: for as the law asserts, maintains and provides for the safety of the King's royal person, crown and dignity, and all his just rights, revenues, powers and prerogatives; so it likewise declares and asserts the rights and liberties of the subject. 1 *And.* 153. *Co. Lit.* 19, 75. 4 *Co.* 124. 4 *New Abr.* 149.

Hence it hath been established as a rule, that all prerogatives must be for the advantage of the people, otherwise they ought not to be allowed by law. *Moor* 672. *Shou.* P. C. 75. 4 *New Abr.* 149.

The rights and prerogatives of the crown are in most things as ancient as the law itself; for tho' the stat. 17 *Edw.* 2. c. 1. commonly called the statute *De prærogativa Regis*, seems to be introductive of something new, yet for the most part it is but a collection of certain prerogatives that were known law long before: As that the King's wardship of lands held in capite, did attract the wardship of land held of others; that the grant of a manor did not pass an advowson appendant, unless named; that the King hath a right to escheats, wrecks, royal fishes and many others which were ancient prerogatives of the crown. *Bendl.* 117. 2 *Inst.* 263, 496. 10 *Co.* 64. 4 *New Abr.* 149.

1. Of the commencement of the King's reign, and his prerogative as universal occupant.

2. Of the King's prerogative in escheats; in seas and navigable rivers; in swans and fish; in beacons and light-houses; in wreck; in coins and mines; in derelict goods, and in waifs, strays and treasure trove.

3. Of the King's prerogative over the persons of his subjects, in restraining them from going abroad, and commanding them to return home.

4. Of the King's prerogative in relation to Civil and Ecclesiastical jurisdiction: in creating officers, and making war and peace.

5. Of the King's prerogative in relation to his debts.

1. Of the commencement of the King's reign, and his prerogative as universal occupant.

On the death or demise of the King, his heir is that moment invested with the regal power, and commences his reign the same day his ancestor dies; whence it is held as a maxim, that the King never dies. 7 *Co.* 12. in *Calvin's* case. 6 *Co.* 27. 7 *Co.* 30. See *Perpetuity of the King*.

N. B. Discontinuance of process by demise of the King, is remedied by statute.

It may not be improper here to explain another maxim in law, viz. "That the King can do no wrong": The King cannot misuse his power without the advice of evil counsellors, and the assistance of wicked ministers. These men may be examined and punished. The constitution hath provided by means of indictments and parliamentary impeachments, that no man shall dare to assist the crown in contradiction to the laws of the land. But it is at the same time a maxim in those laws, that the King himself can do no wrong. Since it would be a great weakness and absurdity in any system of positive law, to define any possible wrong without any possible redress. *Black. Com.* 1 V. 244.

See the author's sentiments as to the exertion (on particular occasions) of the inherent, (tho' latent) powers of society, which no climate, no time, no constitution, no contract can ever destroy, or diminish.

N. B. He is treating of the glorious revolution. *Com.* 1 V. 245. And see tit. *Oppression of the Crown*.

But, to proceed, as to the King's prerogative, &c.

With respect to the descent of the crown, the rules of descent are the same with those that govern private inheritances, except only as to the rule of *possessio fratris*; which does not hold in the descent of the crown or its possessions: Neither is half blood any impediment in such case; for the brother of the half blood shall be preferred to the sister, in the enjoyment of the crown, as the most capable of the two, by the advantage and prerogative of his sex.

Therefore, if the King hath issue a son and a daughter by one venter, and a son by another venter, and purchases lands and dies, and the eldest son enters, and dies without issue, the daughter shall not inherit those lands, nor any other fee-simple lands of the crown, but the younger brother shall have them together with the crown. *Co. Lit.* 15. b.

As the King commences his reign from the day of the death of his ancestor, it hath been held, that compassing his death before coronation, or even before proclamation, is compassing of the King's death within the statute of 25 *Ed.* 3. he being King presently, and the proclamation and coronation only honourable ceremonies for the further notification thereof. 3 *Inst.* 7. 1 *Hale's Hist.* P. C. 101.

Every King for the time being in the actual possession of the crown, is a King within the intention of the above-mentioned statute; for there is a necessity that the realm should have a King, by whom, and in whose name, the laws are to be administered; and the King in possession, being the only person who either doth or can administer those laws, must be the only person who hath a right to that obedience which is due to him who administers those laws; and since by virtue thereof he secures to us our lives, liberties and properties, and all other advantages of government, he may justly claim return of duty, allegiance and subjection. 1 *Hart.* P. C. 35.

All judicial acts done by Henry the Sixth, while he was King, and also all pardons of felony and charters of denization granted by him, were valid; but a pardon made by *Ed.* 4. before he was actually King, was void even after he came to the crown. 1 *Hart.* 36.

The right heir of the crown, during such time as the usurper is in plenary possession of it, and no possession thereof in the heir, is not a King within this act; as was the case of the house of York, during the plenary possession of the crown in *Hen.* 4. *Hen.* 5. *Hen.* 6. But if the right heir had once the possession of the crown, as King, tho' an usurper had got the possession thereof, yet the other continues his title, title and claim thereto, and afterwards.

afterwards re-obtains the full possession thereof; a compassing the death of the rightful heir, during that interval, is compassing of the King's death within this act; for he continued a King still, *quasi* in possession of his kingdom; which was the case of *Ed. 4.* in that small interval wherein *Hen. 6.* re-obtained the crown; and the case of *Ed. 5.* notwithstanding the usurpation of his uncle *Rich. 3.* 1 *Hal. Hist. P. C.* 104.

King *Car. 2.* was King *de facto* as well as *de jure*, from his father's death; therefore all those who acted against and kept him out of possession, in obedience to the powers then in being, were traitors. *Keeling 14, 15.* 1 *Keb.* 315. No person was in possession of any sovereign power known to our laws. 1 *Harwk. P. C.* 36.

By the 1 *M. ft. 3. cap. 1. sect. 3.* "The kingly office of this realm, and all prerogative, royal power, authorities, and jurisdiction thereunto annexed, being invested in either male or female, are as absolutely invested in the one as the other."

By 1 *W. & M. ft. 2. c. 2. sect. 9.* "Every person who shall be reconciled to, or hold communion with the see or church of *Rome*; or shall profess the popish religion; or shall marry a papist, shall be incapable to inherit or enjoy the crown, and in such case the people shall be absolved of their allegiance, and the crown shall descend to such persons, *being protestants*, as should have inherited the same, in case the person so reconciled, &c. were dead."

And by *stat. 10.* "Every King and Queen, who shall succeed in the crown, shall on the first day of the meeting of the first parliament, next after coming to the crown, sitting in the throne in the house of peers, in the presence of the lords and commons, or at the coronation, before such person as shall administer the coronation oath, at the time of taking the oath, (which shall first happen) make, subscribe and repeat the declaration mentioned in the statute 30 *Car. 2. ft. 2.* for preserving the King's person and government, by disabling papists from sitting in either house of parliament."

The King, as King, cannot be a minor; so that grants, leases, &c. made by him, tho' under age, bind presently, and cannot be avoided by him, either during his minority, or when he comes of age; for the politic rules of government have thought it necessary, that he who is to govern the kingdom, should never be considered as a minor incapable of governing his own affairs. *Dyer 209. pl. 22. Plow. 209. Co. Lit. 43. 5 Co. 27. Raym. 90.*

The King by law is *universal occupant*, and all property is presumed to have been originally in the crown; and that he partitioned it out in large districts to the great men who deserved well of him in the wars, and were able to advise him in time of peace. Hence the King hath the direct dominion; and all lands are holden mediately or immediately from the crown. *Co. Lit. 1. Dyer. 154. 1 Bendl. 237. Seld. Mare Claus.*

If the sea leaves any shore by a sudden falling off of the water, such derelict lands belong to the King; but if a man's lands lying to the sea are increased by insensible degrees, they belong to the soil adjoining. *Dyer 326. 2 Roll. Abr. 170.*

So, if a river, so far as there is a flux of the sea, leaves its channel, it belongs to the King; for the *English* sea and channels belong to the King; and he hath a property in the soil, having never distributed them out to subjects. 2 *Roll. Abr. 170.*

But if a river, in which there is no tide, should leave its bed, it belongs to the owners on both sides; for they have in that case the property of the soil; this being no original part or appendix to the sea, but distributed out as other lands. 2 *Roll. Abr. 170.*

If land be drowned, and so continue for years; if it be after regained, every owner shall have his interest again, if it can be known by the boundaries. 8 *Co. Sir Francis Barrington's case.*

It is said, that there is a custom in *Lincolnshire*, That the lords of the manors shall have derelict lands; and that as such it is a reasonable custom; for if the sea wash away the lands of the subject, he can have no recompence, unless he should be intitled to what he regains from the sea. 8 *Mod. 197.*

2. Of the King's prerogative in *escheats*; in *seas and navigable rivers*; in *swans and fish*; in *beacons and light-houses*; in *wreck*; in *coins and mines*; in *derelict goods*, and in *waisifs, Arays and treasure trove.*

An *escheat* may be either *per defectum sanguinis*, or *per delictum tenentis*; but it is said, That in case of an attainder of felony, the *escheat* to the lord is *pro defectu tenentis*; and the not descending, the consequence of the corruption of the blood; but in case of treason, the lands come to the crown as an *immediate forfeiture*, and not as an *escheat*. *Co. Lit. 13, 92. Godb. 211.*

If the King's tenant dies without heir, the lands shall *escheat* and revert again to the crown; but the lands holden of any other lord shall, for want of heirs of the tenant, *escheat* to the lord. 2 *Inst. 34. Kelw. 104. 2 Roll. Rep. 251. 4 Inst. 224.*

If lands be held of the King, as of an honour come to him by a common *escheat*, as the tenants dying without heir, or committing felony, these lands are part of the honour; otherwise if forfeited for treason, for then they come to the King by reason of his person and crown; and if he grants them over, &c. the patentee shall hold of the King in chief. 2 *Inst. 64.*

It was found by special verdict, That the prior of *Menton* was seised of a house in *Southwark*, held of the archbishop of *Canterbury*, as of his borough of *Southwark*; and 30 *Hen.* surrendered it to the King *Hen. 8.* who granted it and other lands to *J. S.* and his heirs, to hold of him in *libero burgagio*, by fealty, for all services and demands, and not in *capite*; and afterwards Queen *Mary* granted the manor and borough of *Southwark* to the mayor and commonalty of *London*; and the tenant of the messuage died without issue; and the question was, whether Queen *Eliz.* or the patentees of the borough should have the *escheat*; and adjudged for the Queen; for the first patentee of the messuage held it of the Queen in *foage in capite*, as of a *seignory* in *gross*; and the words in *libero burgagio* are merely void; for the land out of the borough cannot be held in *libero burgagio*; and there shall not be several tenures, for one tenure was reserved by the King for all; therefore of necessity it shall be a tenure in *foage* of the King. *Cro. Eliz. 120.*

The King hath the sovereign dominion in all seas and great rivers; which is plain from *Selden's* account of the ancient *Saxons* who dealt very successfully in all naval affairs; therefore the territories of the *English* seas and rivers always resided in the King. *Seld. Mar. Cl. 251, &c. 1 Roll. Abr. 168, 169. 5 Co. 106. 1 Co. 141.*

And as the King hath a prerogative in the seas, so hath he likewise a right to the fishery and to the soil; so that if a river as far as there is a flux of the sea leaves its channel, it belongs to the King. *Dyer 326. 2 Roll. Abr. 170.*

Hence the Admiralty court, which is a court for all maritime causes or matters arising on the high seas, is deemed the King's court; and its jurisdiction derived from him who protects his subjects from pirates, and provides for the security of trade and navigation. 4 *Inst. 142. Molloy 66.*

From the King's dominion over the sea it was holden, That the King, as protector and guardian of the seas, might before any statute made for commissions of sewers, provide against inundations by lands, banks, &c. and that he had a prerogative herein as well as in defending his subjects from pirates, &c. 10 *Co. 141.*

But notwithstanding the King's prerogative in seas and navigable rivers, yet it hath been always held, That a subject may fish in the sea; which being a matter of common right, and the means of livelihood, and for the good of the commonwealth, cannot be restrained by grant or prescription. 8 *Ed. 4. 18, 19. Bro. Custom, 46. Fitz. Bar. 1 Mod. 105. 2 Salk. 637.*

Also it is held, That every subject of common right may fish with lawful nets, &c. in a navigable river as well as in the sea; and the King's grant cannot bar them thereof; but the crown only has a right to royal fish, and that the King may only grant. 6 *Mod. 73. 1 Salk. 357. S. C. & S. P.*

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The King, as a perpetual sign and acknowledgment of his dominion of the seas, hath several creatures reserved to him under the denomination of royal creatures, as swans, sturgeons and whales; all which are natives of seas and rivers. 7 Co. 16.

It is clearly agreed, that the King only has a prerogative in beacons and light-houses; and that he may erect any such, and in such places as will be most convenient for the safety and preservation of ships, mariners and navigation; also it seems to be the better opinion, that this being for the publick utility, and one of the prerogatives that he is intrusted with for the safety of the whole realm, he may erect such beacon, &c. as well in the soil of a subject as in that of the crown; and that he may do this without the subjects consent. 4 Inst. 148. 12 Co. 13. Carter 90. 2 Keb. 114. 3 Inst. 204.

Also it is clear, that the subject hath not any power to erect any such beacon, &c. without the King's licence and authority for that purpose. See the authorities *supra* and Carter 90.

But by the 8 *Elix.* it is enacted, "That the master, wardens and assistants of the Trinity house of Deptford Strand, may erect such beacons, marks and signs for the sea, as to them shall seem meet; whereby dangers may be avoided, and the ships better come to their ports; and all beacons, marks and signs so erected, shall be maintained at the charges of the master, wardens and assistants."

By the Common law the King hath an undoubted rights to wrecks; and his prerogative herein is founded on the dominion he has over the seas; and being sovereign thereof and protector of ships and mariners, he is intitled to the derelict goods of the merchant; which is the more reasonable, as it is a means of preventing the barbarous custom of destroying persons who in shipwrecks approach the shore, by removing the temptations to inhumanity. *Gro. Jur. Belli* 117, 132, 141. 2 Inst. 167. *Molloy* 237. *Moor* 224.

The King hath a prerogative in, and is intitled to, all royal mines of gold and silver, and treasures of gold and silver hid in the earth; and is intrusted with the coinage and making money current; and he alone can bring the treasure of any conquered country into use, by coining them into his money; and this prerogative is lodged in the King as he administers justice to all: therefore the regulation of that which is the common standard and measure of commerce is committed to his care. *Dav.* 19. 2 *Roll. Abr.* 166. 5 C. 114. 1 Co. 146.

Also this prerogative is given to the King as a necessary consequence of the power of war and peace; for there can be no war without the expence and consumption of treasure. *Plow.* 315.

Besides, if any other persons had power of mines of gold and silver, they might by these immense treasures grow too formidable, and wrest that authority from the King which was deposited in his hands only. *Plow.* 316.

All derelict goods, and in which no man hath a property, belong to the King as well as derelict lands; so of extraparochial tithes, tho' things of an ecclesiastical nature. *Bro. tit. Prærog. pl.* 12. 2 *Vent.* 267, 8. 5 Co. 18. 2 Inst. 646.

So if a person dies intestate, and without kindred, his goods belong to the King; and herein the usual course is said to be for a person to procure the King's letters patents, and then the ordinary admits the patentee to administration. 1 *Salk.* 37.

As to goods waived, these belong to the King, and are in him without any office; because the property is in nobody, therefore by publick agreement is put out of the finder, in whom it was by the state of nature, and is vested in the King, in recompence for his trouble in the execution of justice. 5 Co. 109.

But at the Common law, the owner pursuing the felon, and the felon waiving the goods, the owner may retake them; also upon an appeal of felony, the owner is intitled to a writ of restitution; and as a farther encouragement for the prosecution of felons, by the 21 *H. 8. c. 11*, it is provided, that if the party comes in as evidence on the indictment, and attaint the felon, he shall

have a writ of restitution awarded by the judge of assize. 4 *New Abr.* 164.

3. Of the King's prerogative over the persons of his subjects, in restraining them from going abroad, and commanding them to return home.

All persons born in any part of the King's dominions and within his protection are his subjects, and also those born in *Ireland, Scotland, Wales*, the King's plantations or on the *English* seas; who by their birth owe such an inseparable allegiance to the King, that they cannot by any act of theirs renounce or transfer their subjection to any foreign prince. 7 Co. 1, &c. *Calvin's case.* *Molloy* 370. *Co. Lit.* 129. *Dyer* 300. See *Alienf.*

All the subjects of a foreign prince coming into *England*, and living under the protection of our King, may, in respect of that local ligeance which they owe him, be guilty of high treason, and indicted that they *contra dominum regem* (the words *naturalem dominum suum* being omitted) did compass &c. *contra ligeantiam suam debitam*; and it is said, that even an ambassador committing treason against the King's life, may be condemned and executed here, and that for other treasons he shall be sent home. 3 Inst. 4, 5. *Dyer* 145. *Salk.* 630. 1 *Hawk.* P. C. 35. 1 *Hal. list.* P. C. 59.

But aliens who in an hostile manner invade the kingdom, whether their King were at war or peace with ours, and whether they come by themselves, or in company with *English* traitors, cannot be punished as traitors, but shall be dealt with by martial law. 1 *Hawk.* P. C. 35.

If the King makes a new conquest of any country, the persons there born are his subjects; for by saving the lives of the people conquered he gains a right and property in such people, and may impose on them what law he pleases. *Dyer* 224. *Vaugh.* 281.

But until such laws given by the conquering prince, the laws of the conquered country hold place; (unless where these are contrary to our religion, or enact any thing that is *malum in se*, or are silent;) for in all such cases the laws of the conquering country prevail. 2 *P. Will.* 75, 76.

If there be a new and uninhabited country found out by *English* subjects, as the law is the birth-right of every subject, so wherever they go they carry their laws with them, therefore such new found country is to be governed by the laws of *England*; tho' after such country is inhabited by the *English*, acts of parliament made in *England* without naming the foreign plantations, will not bind them. 2 *P. Will.* 75. 2 *Salk.* 411.

By the Common law every subject may go out of the kingdom for merchandize or travel, or other cause, as he pleases, without any licence for that purpose; this appears from the statute 5 *R. 2. cap. 2.* made to restrain persons passing out of the realm, but excepts lords, great men and notable merchants; as also by the statute 26 *H. 8. cap. 10.* which gave power to the King during his life to restrain persons from trading to certain countries; which acts had been vain and idle, if the King by his prerogative might have done it. *F. N. B.* 85. *Dyer* 165, 296. 2 *Roll. Rep.* 12. 3 *Mod.* 131. *Stil.* 442.

But notwithstanding this general liberty allowed by the Common law, it appears plainly that the King by his prerogative, and without any help of an act of parliament, may prohibit his subjects from going out of the realm; but this must be by some express prohibition; as by laying on embargoes, which can be only done in time of danger, or by writ of *Ne exeat Regno*, which, from the words *Quamplurima nobis & corona nostra præjudicialia ibidem prosequi intendis*, appears to be a state writ, but is never granted universally, but to restrain a particular person, on oath made that he intends to go out of the realm; indeed *Fitzherbert* says, that the King may restrain his subjects by proclamation; and assigns as a reason for it, that the King may not know where to find his subjects, so as to direct a writ to him. 12 *Cp.* 33. 11 Co. 92. *Fitz. N. B.* 89. 2 Inst. 54.

As the King may restrain any of his subjects from going abroad, in like manner he may command them to return home; and disobeying a privy seal for *this purpose* is the highest contempt. 1st, It is a disobedience to the command of the King *himself* directed to the party. 2dly, The command is, that he shall return upon his faith and allegiance, which is the strongest compulsion that can be used. 3dly, The thing required by the King is the principal duty of a subject, *viz.* to be at the service of his King and country. *Dyer* 128. b. *Lane* 44. *Moor* 109. 3 *Inst.* 179.

The punishment for this offence is, *seizing the party's estate till he return*; and of this there are many instances in our books. And when he does return he shall be fined. 1 *Hawk. P. C.* 59, 60.

William de Brittain in the 19 of *Ed. 2.* refusing to return on the King's writ, his goods and chattels, lands and tenements, were seized into the King's hands; so in the case of *Edward of Woodstock*, Earl of *Kent* in the same reign. *Dyer* 128. b.

So in the case of one *Bartue*, who married the Dutchess of *Suffolk*, they obtained a licence from *Q. Mary* to go out of the realm, under pretence of recovering debts as executors to the Duke; when in reality it was on account of the religion established by *Queen Mary*, and living with other fugitives under the protection of the *Palsgrave* of the *Kine* in *Germany*, who was an eminent *Calvinist*, were sent to by privy seal; but the messenger, in endeavouring to serve them with his letters, being obstructed and abused by their attendants, a certificate was made of this, and their lands and tenements seized. *Dyer* 176. *jenk. Cent.* 220.

So in the case of *Sir Francis Englefield*, who departed the kingdom on a licence obtained for three years; but not returning at the expiration of the three years, a privy seal was sent to him by *Queen Elizabeth*, which he not obeying, and this matter certified into Chancery by the Queen, under her sign manual, in the fifth year of her reign, by virtue of a commission under the Great seal, his lands and tenements were seized. 1 *Leon.* 9. *Moor* 109. 1 *And.* 95. *S. C.* See also 7 *Co.* 18. *Popb.* 18. 4 *Leon.* 135.

So in the case of *Sir Robert Dudley*, who intending to travel, obtained a licence from *James* the First to go to *Venice*; but before his departure he by indenture inrolled for valuable consideration, as was expressed in the deed (but none paid) conveyed the manor of *Killingworth* with other lands to the Earl of *Nottingham* and others in fee, with a proviso, that on tender of an angel of gold all should be void; and with a covenant on the part of the bargainees that they should make all such estates as the said *Sir Robert* should appoint; the bargainees were not parties to the deed, nor had they notice of it 'till some time after; but afterwards they made a lease to *Sir Robert Lee*, to the intent that *Lady Dudley* should take the profits of part of the premises for ten years, if their estate continued so long unrevoked. The King hearing that *Sir Robert* had been guilty of some bad practices beyond sea, in the fifth year of his reign sent his Privy seal to him, which he not obeying, the great question in this case was, *Whether those lands thus conveyed were forfeited*; and adjudged that they were, the conveyance being fraudulent as to the King. *Lane* 42, &c.

In these cases it hath been held, that the King hath only an interest in the offender's lands, *till he return*; and that his restoring them is not a matter of grace but of right. *Lane* 48.

4. Of the King's prerogatives in relation to Civil and Ecclesiastical jurisdiction; in creating officers, and making war and peace.

All jurisdiction exercised in these kingdoms that are in obedience to our King, is derived from the crown; and the laws, whether of a temporal, ecclesiastical or military nature, are called his laws; and it is his prerogative to take care of the due execution of them. Hence all judges derive their authority from the crown, by some commission warranted by law; and must exercise it in a lawful manner, and without any the least deviation from

the known and stated forms. *Flota, c.* 17. *Co. Lit.* 99. a. 144.

So altho' the King is the fountain of justice, and intrusted with the whole executive power of the law, yet he hath no power to alter the laws which have been established, and are the birthright of every subject; for *by those very laws he is to govern*; and as they prescribe the extent and bounds of his prerogative, in like manner they declare and ascertain the rights and liberties of the people, therefore admit of no innovation or change but by act of parliament. 4 *Inst.* 164. 2 *Inst.* 54, 478. 2 *Hal. Hist. P. C.* 131, 282. *Vaugb.* 418. 2 *Salk.* 510.

From the inherent right inseparable from the King to distribute justice among his subjects, it hath been held, that an appeal from the *Ist* of *Man* lies to the King in council, without any reservation in the grant of the *Ist* of *Man* of any such right; and tho' there had been exclusive words, yet the grant must have been construed to be void on the King's being deceived, rather than the subject should be deprived of a right inseparable to him as a subject, of applying to the crown for justice. 1 *P. Will.* 329.

The supremacy of the crown of *England* in matters ecclesiastical, is a most unquestionable right, which may be proved by records of undoubted authority; and tho' the pope made great incroachments on this right, yet these were always complained of as illegal; and those incroachments are now taken off by the 25 *Hen. 8. cap.* 19, 20, 21. and 26 *Hen. 8. cap.* 1.

So that the King doth not recognize any foreign authority in this kingdom, neither do the laws of the emperor or pope of *Rome*, as such, bind in the kingdom of *England*; but all the strength that either the papal or imperial laws have obtained in this kingdom, is only because they are and have been admitted in this kingdom, either by consent of parliament, or immemorial usage and acceptance in some particular courts and matters, and not otherwise. 1 *Hal. Hist. P. C.* 16.

The King therefore is said to have two jurisdictions, one temporal, the other ecclesiastical; the latter of which is derived from the Common law, tho' the form of the proceedings, and the coercive power exercised in the ecclesiastical courts, is after the form of the Canon and Civil law, and this being an indulgence, the judges give credit to their proceedings in matters in which they have a jurisdiction, and believe them consonant to the law of holy church, altho' against the reason of the Common law; and if there be a *gravamen* it must be redressed by appeal. 1 *Show. Rep.* 218. 1 *Roll. Abr.* 530. 4 *Co.* 29. 7 *Co.* 42. 5 *Co.* 7. 2 *Vent.* 43.

The King, as the fountain of justice, hath an undoubted prerogative in creating officers, and all officers are said to derive their authority mediately or immediately from him; those who derive their authority from him are called the officers of the crown, and are created by letters patents; such as the great officers of state, judges, &c. and there needs no stronger evidence of a right in the crown herein, than that the King hath created all such officers time immemorial. *Dyer* 176. 2 *Roll. Abr.* 152. 4 *Co.* 32. 2 *Inst.* 425, 540. 12 *Co.* 116. 1 *Roll. Rep.* 206. *Show. Par. Ca.* 111. * 1 *Lev.* 219.

But tho' all such officers derive their authority from the crown, and from whence the King is termed the universal officer and disposer of justice, yet it hath been held, that he hath not the office in him to execute it himself, but is only to grant or nominate; nor can the King grant any new powers to such officers, but they must execute their offices according to the rules prescribed by law. *Co. Lit.* 3, 114. 2 *Vent.* 270. 4 *Inst.* 125. 6 *Co.* 11, 12.

Neither can the King create any new office inconsistent with our constitution or prejudicial to the subject. 2 *Inst.* 540. 2 *Sid.* 141. *Moor* 808. 4 *Inst.* 200.

And on this foundation an office created by letters patents for the sole making of all bills, informations and letters missive in the council of *York*, was unreasonable and void. 1 *Jow.* 231.

The power of making war or peace is *inter jura summi imperii*, and in *England* is lodged singly in the King; tho' it ever succeeds best when done by parliamentary advice. 1 *Hal. Hist. P. C.* 159. 7 *Co.* 25.

A general war is of two kinds, 1. *Bellum solenniter denunciatum*. 2. *Bellum non solenniter denunciatum*. The first is, When war is solemnly declared or proclaimed by our King against another prince or state; which is the most formal solemnity of a war now in use. 2dly, When a nation slips suddenly into a war without any solemnity, which happens by granting letters of marque, by a foreign prince invading our coasts, or setting on the King's navy at sea; and hereupon a real, tho' not a solemn war may and hath formerly arisen; therefore to prove a nation to be at enmity with England, or to prove a person to be an alien enemy, there is no necessity of shewing any war proclaimed; but it may be averred, and so put upon the trial of the country, whether there was a war or not. 1 *Hal. Hist. P. C.* 163.

5. Of the King's prerogative in relation to his debts.

By 9 *H. 3. c. 8.* "The King nor his bailiffs shall levy any debts upon lands or rents so long as the debtor hath goods and chattels to satisfy, neither shall the pledges be distrained so long as the principal is sufficient; but if he fail, then shall the pledges answer the debt; howbeit they shall have the debtor's lands and rents until they be satisfied, unless he can acquit himself against the pledges."

Goods and chattels] By order of the Common law, the King for his debt had execution of the body, lands and goods of his debtor; *this is an act of grace*, and restrains the power the King had before. 2 *Inst.* 19.

Pledges be distrained] This act does not extend, nor was ever taken to extend to sureties in a bond or recognizance, if they may be so called, *being bound themselves equally with the principal*, as sureties to perform covenants and agreements are in like manner; but to pledges and manucaptors only, who by express words are not responsible, unless their principals become insolvent, and so are conditional debtors only. And so the act has always been construed, and the words themselves imply as much. *Hard.* 378.

By *Stat. 9 Hen. 3. c. 18.* "The King's debtor dying, the King shall be served before the executor."

By this statute, the King by his prerogative shall be preferred in satisfaction of his debt by the executors before any other. And if the executors have sufficient to pay the King's debt, the heir nor any purchaser of his lands shall not be charged. 2 *Inst.* 32.

Stat. Westm. 1. 3 Ed. 1. c. 19. enacts, "That the sheriff having received the King's debt, upon his next account shall discharge the debtor thereof, in pain to forfeit three times so much to the debtor, and to make fine at the King's will. And the sheriff and his heirs shall answer all monies that they whom he employed receive; and if any other that is answerable to the Exchequer by his own hands do so, he shall render thrice so much to the plaintiff, and make fine as before. And on payment of the King's debt, the sheriff shall give a tally to the debtor, and the process for levying the same shall be shewed him on demand without fee, on pain to be grievously punished."

The King's debt] Under this word *debt* all things due to the King are comprehended, and not only debt in the proper sense, but duties on things due, as rents, fines, issues, amercements and other duties to the King received or levied by the sheriff; for debt in its large sense signifies whatever a man doth owe; and *debere dicitur quia deest habere; debitori enim deest quod habet, cum sit creditoris, maxime in casu domini regis.* 2 *Inst.* 198.

The sheriff and his heirs shall answer] This is to be understood, *quoad restitutionem*, but not *quoad penam*; that is for the civil but not for the criminal part; for it is a maxim in law, *pena ex delicto defuncti heres teneri non debet*; and again *in restitutionem non in penam heres succedit.* 2 *Inst.* 198.

Stat. 28 Ed. 1. cap. 12. enacts, "That beasts of the plough shall not be distrained for the King's debts so long as others may be found, on such pain as is elsewhere ordained by statute (*viz.* by the statute *de districtione scaccarii*, 51 *H. 3.*) And the great distresses shall not be taken for his debts, nor driven too far; and if the debtor can find convenient surety, the distress shall in the mean

time be released; and he that does otherwise shall be grievously punished."

This is an act of grace, and on this act there lies a writ directed to the sheriff, commanding him to receive surety according to this act, which if he refuses, an attachment lies against him, or the party offering surety according to this act, if it be refused, may have an action against the sheriff, &c. 2 *Inst.* 565.

Stat. 25 Ed. 3. stat. 5. cap. 19. enables a common person to sue a debtor of his (who is likewise a debtor to the King) to judgment, but he cannot proceed to execution, unless the plaintiff gives security to pay the King's debt first, and then he may take execution for his own and the King's debt too.

For otherwise, if without giving such security, the party takes forth execution upon his judgment, and levies the money, the same money may be seized upon to satisfy the King's debt.

Stat. 33 H. 8. c. 39. s. 2. enacts, "That all obligations and specialties concerning the King and his heirs, or made to his or their use, shall be made to his Highness and to his heirs, Kings, in his or their name or names, by these words, *domino regi*, and to no other person to his use, and to be paid to his Highness, by these words, *solvend' eidem domino regi heredi vel executoribus suis*, with other words used in common obligations, which obligations and specialties shall be in the nature of a statute staple."

None other is to be charged, but such as were liable to the bond when it was made. *Sav.* 10.

An obligation for performance of covenants is within this act, after the covenants are broken. 7 *Rep.* 20. b. *Hard.* 368, 442.

By *stat. 3.* of the said act 33 *Hen. 8. c. 39.* All such obligations, the debt not being paid, shall come, remain, and be to the heirs or executors of the King as he shall appoint; and if any person take any obligation to the use of the King or his heirs, otherwise than as aforesaid, he shall suffer such imprisonment as shall be adjudged by the King or his honourable council.

Stat. 6. Costs and damages are given to the King.

Stat. 7. Directs debts to be sued for in proper courts.

Stat. 13. And every of the courts are impowered to set such fines, &c. on persons for their defaults, &c. as to the courts seem expedient. And all trials shall be by due examination of witnesses, writings, proofs or such other way as by the courts shall be thought expedient.

Stat. 25. And in all actions in any of the courts for any debt due to the King by reason of any attainder, outlawry, forfeiture, gift of the party, or by any other collateral ways or means, it shall be sufficient in law to shew and alledge generally, that the party to whom the said debt did belong, such a year and day did give the same to the King, or was attainted, outlawed, &c. whereby the said debt did accrue to the King; and the same shall be of the same effect, as if the whole matter had been declared at large according to the order of the Common law.

Stat. 26. If any suit be commenced, or any process awarded for the King, for the recovery of any debt, then the same suit and process shall be preferred before any person. And that the Lord, his heirs and successors, shall have first execution against any defendant for his debt, before any person; so always that the King's suit be commenced, or process awarded for the debt, at the suit of the King, his heirs or successors, before judgment given for the other person.

This statute abridges the prerogative, and controuls the Common law; and here is a negative implied, tho' the statute sounds in the affirmative; for it enacts a new thing, and the *ita quod* makes a condition precedent and a limitation: And the words are introductive. *Hard.* 27.

Strange Arg. said That on this act he took it, the suit must be said to be then taken or commenced when the first step is made towards the proceeding to execution, and the first step to be taken is to procure a *fiat* of a baron, and then it is in fact that the process is awarded. *G. Eq. R.* 222.

Stat. 27. All manors, lands, tenements, possessions and hereditaments, which be, or that hereafter shall be in the

the hands, possession, occupation, or seisin of any person, to whom the manors, &c. have heretofore or hereafter shall descend, revert or remain in fee-simple or in fee-tail, general or special, by, from or after the death of any ancestor as heir, or by gift of his ancestors whose heir he is, which ancestor was, is or shall be indebted to the King or to any person to his use, by judgment, recognizance, obligation or other specialty, the debt whereof is or shall not be paid; then in every such case the same manors, &c. shall be chargeable for payment of the debt.

All manors] *A.* seised of the manor of *F.* in consideration of a marriage to be had between *B.* his son and *M.* daughter of *J. S.* covenanted to levy a fine to the use of himself and wife for their lives, remainder to the use of *B.* and *M.* and the heirs of their bodies with remainders over; afterwards *A.* acknowledged a recognizance to the Queen and died. His wife died; *the manor is extended for the Queen's debt*, by force of the statute. It was argued by *Coke*, that the manor is not chargeable by the statute; but it was made for the King's benefit in two points. 1. To make lands intailed liable for the King's debts, where they were not so before, against the issue. 2. To make bonds taken by the officers of the King to the use of the King, as effectual as statutes; that the words (*was or shall be indebted*) shall not be intended after the gift made; that (*shall be*) is to be intended of future debts after the statute, whereas at the time of the settlement *A.* was not receiver or other officer to the Queen; the words are (*by gift after the debt acknowledged to the Queen*); that this case is not within the statute; for the words are (*of the gift of his ancestor*) but here *B.* has not the manor of the gift of *A.* but rather by the statute of uses, and so he is in the *post*, and not in the *per*, by his ancestor; for the fine was levied to divers persons to the uses aforesaid, nor was the gift a meer gratuity, but in consideration that he should marry the daughter of *J. S.* and *the debt accrued not till after the gift*. He admitted that had there been any fraud in the case, or any purpose in *A.* when he made the conveyance, to become the King's debtor or officer, it would be within the statute, and the gift had been a meer gratuity, &c. and afterwards (as *Coke* reported) *B.* and his lands were discharged. 2 *Le.* 90, 91.

Shall be indebted] This is intended an immediate debt, and not such debts as are due to the subject and accrue to the King by any collateral means; for which this statute has a clause for the writ and general manner and form of pleading in such cases, of the part of the King for the recovery of them, that the party such a year and day, &c. (which see at *f.* 25. above.) So that the several manners of penning these two branches manifest the intention of the makers of the act to prefer immediate debts due to the King by judgment, &c. before debts of the subject which accrue to the King by assignment, attainder, outlawry, &c. and the reason was, because debts due immediately to the King by judgment, recognizance, obligation, or other specialty, are in their nature more high, and may be better known, and upon search found, than debts due to subjects. 7 *Rep.* 2. *a.* *Jenk.* 226. *pl.* 99. *S. P.* But for such debts the King is left at Common law. If the King's debtor, officer or accountant has leases for years or goods; these leases and goods are not liable if the debtor sold them *bona fide*: But if he sold them by *cowin* it is otherwise. If land be purchased with the King's money, it is liable to satisfy the King.

The debt ought to be immediately to the King himself, or if it be to any other than to the King, it ought to be originally to the use of the King. 7 *Rep.* 22. *a.*

If tenant in tail becomes indebted to the King, unless it be by judgment, recognizance, obligation or other specialty, and dies, the lands in the seisin of the issue in tail by force of this act shall not be extended by this act for such debt; for the statute extends only to the said four cases, and all other debts remain at Common law. 7 *Rep.* 21. *b.*

The issue in tail (the land being in his hands) is also liable in either of the said four cases, but not the *bona fide* alienee of the issue; for the words of the statute do not

extend to this alienee; the Common law did not help the King in these cases; the statute helps the King in the case against the issue in tail. *Jenk.* 226. *pl.* 99. *S. P.* *Ibid.* 285. *pl.* 19.

The issue in tail shall not be charged by this statute for the penalty on a conviction of reculancy of the tenant in tail by proclamation, by the statute 28 *Eliz.* but otherwise it had been if he had been convicted by the 23 *Eliz.* 1 *Roll. Rep.* 94.

In every such case] By the express purview of this act, the land shall be solely extended as long as it is in the possession or seisin of the heir in tail; for this act says, *That in every such case the land shall be charged*. And as the land against the issue in tail was not extendable before this act, the King has benefit to extend it in the possession of the heir in tail, which he could not do before; but *the King cannot extend the lands of the alienee*; for the statute does not extend to this, and the makers of the act have reason to favour the purchasers, farmers, &c. of the heir in tail, more than the heir himself; for *they are strangers to the debts of tenant in tail*, and they come to the land on good consideration. 7 *Rep.* 21. *b.*

The same manors] If the goods and chattels of the King's debtors be sufficient, and so can be made appear to the sheriff, whereupon he may levy the King's debt, then the sheriff ought not to extend the lands of the debtor or his heir; or of any purchaser or tenant. 2 *Inst.* 19.

Sec. 28. The King shall not be excluded to demand his debts against any of his subjects, as heretofore to any person indebted to his Highness or to his use, albeit this word *heir* be not comprized in such recognizance or specialty, or that such persons shall say, that they have not any hereditaments to them descended, but only such as be intailed or given to them by the ancestors.

By this clause the intent of the makers of the act appears, that the *heir in tail* shall be only charged with the debt of the King; but lands in fee-simple were extendable at the Common law in whatever hands they came, therefore as to them this statute was only *declarativum antiqui juris*: But as to the estates in tail, it was *introducivum novi juris* against the issue in tail. 7 *Rep.* 21. *b.*

One *P.* was indebted to the Queen, and one *W.* was bound to *P.* in 100*l.* in which obligation *W.* did not mention *his heirs*; *P.* assigned the obligation in which *W.* was bound to him, to the Queen, and on this process was made against the heir of *W.* And it was held by the court, that as *W.* did not oblige himself and *his heirs*, that the heir by the death of the father was discharged: And if the assignment had been made in the life-time of the father, and then the father had died, the heir should be discharged, but the son may be charged as executor or administrator, &c. *Sav.* 2.

Sec. 29. Provided, That the King may at his liberty demand his debts of any executors or administrators of any person indebted, if the executors, &c. have assets.

J. S. was obliged to Sir Richard Cavendish, Treasurer of the Chamber to Henry VIII. in 100*l.* who was indebted to the King, on which process was made against those who were tenants of *J. S.* *tempore confessionis scripti præd.* made to the said Sir Richard. *Per Manwood* Ch. B. The tenants are not chargeable in this case, but the heirs and executors. *Per Shute* second Baron, If an obligation be made to the King, it shall be of the same nature as a statute staple to all intents, by this statute; but obligations made to other persons to the use of the King, shall be executory against the obligor, his heirs, executors or administrators, and not against other persons, but if *J. N.* be bound to *J. S.* and *J. S.* assigns this to Sir Richard Cavendish, and he over to the King, no process shall be made thereon, which the court and all the clerks agreed. And it was held, that if obligor, after the obligation made, voluntarily makes feoffment of lands, such feoffees shall be charged; otherwise it is of purchasers before the obligation made in case of the King. *Sav.* 12.

Sec. 30. If the hereditaments be evicted out of the possession of such persons by just title without fraud, whose hereditaments shall be chargeable as is aforesaid; then such hereditaments shall be acquitted of the debts.

B. was indebted to the Queen, for the payment of which debt certain lands, of *B.* at the time of the debt, were

were purchased by one *W.* against whom and one *C.* and *D.* the said *B.* exhibited his bill in the Exchequer-chamber, praying, that the equity of the case might there be examined. Before any answer made *W.* paid the debt, and then demanded judgment if the court would hold further plea, as the cause of privilege was determined, which is the debt due to the Queen. And it was held, that on this reason the court ought to dismiss the cause, and so it was done. *Sav. 15.*

Sett. 31. If any person of whom any such debt shall be demanded, shew sufficient matter, in law, reason, or good conscience, why such persons ought not be charged with the same, and it be sufficiently proved, the courts have power to allow the proof, and acquit all persons so impleaded.

Sufficient matter in law] This *provisi.* does not give benefit only to him who has matter in good conscience, but also to him who has good and sufficient cause, and matter in law, reason (and then comes) good conscience; and without question the first words, *viz.* cause and matter in law, shall extend to all the debts of the King, and process thereupon, as well at Common law as on this act. And the conclusion of the branch does not make against it. For the sense thereof was, that he should plead matter in law or good conscience, and that nothing contained in the act should be an impediment thereto. *7 Rep. 19. b.*

Scire facias issued against Sir *W. H.* as heir, to *M. H.* his father, on a recognizance acknowledged to *Edward VI.* by the said *M. H.* the sheriff returned *scire feci*, and on his default judgment was given. And because in truth he never was summoned, and had good matter, if he had had notice thereof, to plead in discharge of the recognizance acknowledged, all which he shewed in certain in a bill in the Exchequer; upon which, on conference had by *Manwood* and the other Barons, with the two Ch. J. he was discharged of the recognizance. *7 Rep. 20. a.* As *3 Rep. Trin. 37 Eliz.* Sir *William Herbert's* case.

In law, reason or good conscience] *A.* obtained of the King a privy seal, whereby the forfeiture of certain recognizances for appearing at the sessions, amounting in the whole to 800 *l.* was granted her. And it was made a question, Whether the court might compound those forfeitures by virtue of their privy seal which was granted before the privy seal and grant to *A.*? And it was doubted whether the privy seal did not take away and revoke the power given to the court in this particular? But it was held clearly, that the court might upon good matter in equity discharge these debts by virtue of this statute. And the case in question seemed a hard case to the court, because the party himself was the cause why there was no appearance, by beating the party so heinously the very day before they ought to have appeared, that they were disabled thereby to appear. *Hard. 334.*

W. put 100 *l.* out at interest to defendant, and took bond in the name of one *J.* who became *felo de se*, and the plaintiff was relieved against the King on this trust, in equity upon this statute. *Sett. quere*, Whether this statute extends to any equity against the King, otherwise than in case of pleas by way of discharge? But it was likewise decreed in this cause that the plaintiff should be saved harmless from all others. *Hard. 176.*

And the matter so shewed be sufficiently proved] *Scire facias* issued against *T.* the father and *T.* the son, to shew cause wherefore they did not pay the King 1000 *l.* for the mean profits of certain lands holden by them from his Majesty, for which land judgment was given for him in the Exchequer. and the mesne rates were found by inquisition, which returned that the said mesne profits came to 1000 *l.* upon which inquisition this *scire facias* issued; whereupon the sheriff returned that *T.* the father was dead; and *T.* the son appeared, and pleaded that he took the profits but as a servant to his father, and by his command, and rendered an account to his father for the profits, and also the judgment for the lands was given against his father and him for default of sufficient pleading, and not for the truth of the fact; and he shewed this statute, which he pretended aided him for his equity: Whereupon the King demurred. *Tanfield* Ch. B. said, that the matter in equity ought to be sufficiently proved, and here is nothing but the allegation of the party, and the demurrer for the

King; and if the demurrer be in law an admittance of the allegation, and so a sufficient proof within the statute, is to be advised on; and for that joint the case is but this: A *scire facias* issues to have execution of a recognizance, which within this act ought by pretence and allegation of the defendant to be discharged for matter in equity, and the defendant pleads his matter in equity, and the King supposing this not to be equity within this statute, demurs in law, whether that demurrer be an insufficient proof of the allegation within the statute or not? *Adjournatur. Lane 51.*

Sett. 33. This act shall not take away any liberties belonging to the dutchy and county palatine of *Lancaster.*

Sett. 34. Process and executions for debts in the court of Exchequer shall be made in the Exchequer by such officer as hath been used, as by this act is limited.

13 Eliz. cap. 4. Sett. 1. enacts, That all the lands, &c. which any accomptant of the Queen, her heirs and successors, hath while he remains accountable, shall for the payment of the debts of the Queen, her heirs and successors, be liable, and put in execution in like manner, as if such accomptant had stood bound by writ obligatory (having the effect of the statute-staple) to her Majesty, her heirs and successors, for payment of the same.

The Queen by her letters patents, granted *catalla ut legatorum & felonum de se*, within such a precinct; one who was indebted to the Queen is *felo de se* within the precinct. It was ruled, that notwithstanding the grant by the letters patents, the Queen shall have the goods for satisfying her debt. *3 Le. 113. Mo. 126, 127. S. C.* between *The Queen* and *Bishop of Sarum and Coxhead*; and there *per Manwood* Ch. B. the patent does not extend to have the goods of *felo de se* against the Queen for her debt, because it wanted the words (*licet tangat nos*;) but he agreed, that if the lands of the felon be liable [*sufficient to answer*] all the debt of the Queen, the court may in discretion take all the lands in extent, and leave the goods to the patentee. And as to a petition of *Coxhead* praying a discharge of the lands, &c. by him purchased of the officer debtor to the Queen, it was answered, that the land was subject to the Queen's extent for all arrears of receipts by his office received before the conveyance thereof, tho' the receipt be after the conveyance, and that by reason of this statute; but as to another office accepted after the conveyance of the land, the arrears of that shall not charge the land so conveyed.

B. L. having purchased a long term for years in houses, afterwards purchased the inheritance; afterwards he became receiver of *North Wales*, and having occasion for 500 *l.* assigned over the term by way of mortgage to *J. S.* Afterwards on the marriage of *E. L.* his son, he settled the houses in *St. Clement's (inter alia)* on himself for life, remainder to *E. L.* his son, and the heirs of his body. There was issue of the marriage a daughter, the wife of *P.* after this *B. L.* mortgages these houses to *N.* for 1800 *l.* The King extends these houses for the debt of *B. L.* *N.* gets an assignment of the extent, and a privy seal for the debt. Resolved, 1st, That by the statute of *Elizabeth* the land and the real estate of *B. L.* was bound and stood liable to answer the King's debt, altho' he was not actually a debtor to the King, nor any extent against him in several years after. 2^{dly}, That where a term is attendant on the inheritance, if the King extends the inheritance, he shall have a right to the term; but if it be a term in gross, and assigned before any actual extent, the assignment will stand good, and the term not liable to the King's debt. *2 Vern. 389, 390.*

Sett. 2, 3. If this *super* be not paid within six months after the account paid, the Queen, &c. may sell so much of his estate as will answer the debt, and the overplus of the sale is to be rendered to the accomptant or his heirs, by the officer that receives the purchase money, without further warrant.

Upon this statute many questions were moved. 1st, If the debtor died, whether the land might be sold 2^{dly}, When the account is determined after his death? 3^{dly}, When the accountant, after becoming debtor, and in arrears, makes feoffment, or other estate over, or charges or incumbers the land, either to his issue, or others of his blood,

lood, to prevent the Queen's selling, or on other consideration, whether she may sell the land, the words of the Act being make sale, &c. of so much of the lands, &c. of every such accountant or debtor so found in arrears, &c. and that the sale shall be good and available in law against the party accountant, and his heirs claiming as theirs. 4thly, If the accountant was seized of land in tail, whether this land might be sold to be good against the issue; for the ousting of which doubts the statute of 27 Eliz. cap. 3. was made, but this gives remedy only, that the land shall be sold after the death of the debtor, and when the account is made after his death, therefore to remedy the other mischiefs, the statute 29 Eliz. cap. 7. was made [But the same being only a temporary act is expired.] Mo. 646, &c. pl. 895. *Anon.*, [where part of the last mentioned act is set forth and explained.]

Sect. 5. If such accountant or debtor purchase lands in others names in trust for their use, that being found by office or inquisition, those lands also shall be liable to satisfy the debt in such manner as before is expressed.

Sect. 6. Lands purchased by accountants since the beginning of the Queen's reign, either in their own names, or in the names of others in trust for their use, shall be also liable to be sold for the discharge of their debts as aforesaid, rendering the overplus to the accountant.

Sect. 9. Provided, That bishops lands shall be only chargeable for subsidies or tenths, as they were before making this act, and not otherwise.

Sect. 10. Neither shall this act extend to charge any accountant whose yearly receipt exceeds not 300*l.* otherwise than as he was lawfully chargeable before this act.

Sect. 11, 12. Neither shall this act extend to such accountants, as by order of their offices, and charge, immediately after their accounts past, are to lay out money again; such as are Treasurers of war, garrisons, navy, provision of victuals, or for fortifications or buildings, and the master of the wardrobe; unless the Queen, &c. command present pay.

Sect. 13. Neither does this act extend to sheriffs, escheators or bailiffs of liberties, concerning whose accounts the course remains the same as before.

Sect. 14. Lands bought of an accountant *bona fide*, and without notice of any fraudulent intent in the accountant, shall be discharged; and if they be bound by office, yet shall they on traverse be discharged without livery, *ouster le main* or other suit.

If a man is receiver to the King, and not indebted, but is clear, and sells his land, and ceases to be receiver, and afterwards is appointed receiver again; and then a debt is contracted with the King, the former sale is good. 2 *Mod.* 247.

Sect. 15. The Queen, &c. being satisfied by sale of lands, the sureties shall be discharged for so much, and if any yet remain unpaid, the sureties shall pay the residue ratably according to their abilities.

By 27 Eliz. cap. 3. *Sect. 2.* The Queen, &c. may make sale of the accountant's lands, &c. as well after his death as in his life-time, and as well where the account is made, and the debt known within eight years after his death, as where the account is made, and the debt known in his life-time.

Sect. 3. Provided, that after the accountant's death, and before the lands be sold, a *scire facias* shall be awarded to garnish the heirs, to shew cause why lands, &c. should not be sold, &c. whereupon, if the heir, upon such garnishment or two *nibils* returned, do not prove that the executors or administrators of the accountant have sufficient, then ten months after such two *nibils* or garnishment returned, the land, &c. shall be sold and disposed according to the statute of 13 Eliz. cap. 4.

Sect. 4. Nevertheless, the heir's sale *bona fide* upon good consideration before the *scire facias* awarded, shall be good to him who is not consenting to defraud the Queen, &c.

Sect. 5. This statute shall extend to all officers of receipts and accounts to her Majesty, and to no other.

Sect. 6. If the debt grow in the courts of the dutchy of wards, a Privy seal shall issue out against the heir to appear at a certain day, to shew cause, &c. when, if he appear not, on affidavit made that it was duly served, an attachment with proclamation shall issue against him, to be proclaimed in some open market in the county where he dwelt twenty days (at least) before the return thereof, whereupon, if he appear not, the lands, &c. shall be sold and disposed as aforesaid.

Sect. 7. The heir's land shall not be sold during his minority; but at any time within eight years after his full age they shall be liable as aforesaid.

For more learning concerning the King's prerogative, see 4 New Abr. and 16 & 17 Vin. Abr. iii. Prerogative. And see also Blackstone's Commentaries, where this subject is treated, with great judgment, and ingenuity.

Prerogative court, (*Curia prerogativa Archiepiscopi Cantuariensis*,) Is the court wherein all wills are proved, and all administrations taken which belong to the Archbishop by his prerogative; that is, in case where the deceased had goods of any considerable value out of the diocese wherein he died; and that value is ordinarily 5*l.* except it be otherwise by composition between the Archbishop, and some other Bishop, as in the diocese of London it is ten pounds: And if any contention grow between two or more, touching such will or administration, the cause is properly decided in this court. The judge whereof is termed *Judex curia Prærogativæ Cantuariensis*, the Judge of the Prerogative court of Canterbury.

The Archbishop of York hath also the like court, which is termed his Exchequer, but inferior to this in power and profit. 4 *Inst.* 335. As to the Prerogative of the Bishop of Canterbury or York, (*Prærogativa Archiepiscopi Cantuariensis sive Eboracensis*,) See the book, intituled, *De Antiquitate Britannicæ Ecclesiæ Cantuariensis Historia*, especially the eighth chapter, pag. 25. *Corwell.*

Presbyter, A priest, elder, or honourable person. *Isidore*, lib. 7.

Presbyterium, A Presbytery; or that part of the church where divine offices are performed, applied to the choir or chancel, because it was the place appropriated to the bishop, priests and other clergy, while the laity were confined to the body of the church. *Mon. Ang. Tom. 1. pag. 243.*

Presbyterian, A sectarist, or dissenter from the church. 13 *Car. 2.* See *Black. Com.* 4 *V.* 53.

Prescription, (*Præscriptio*) Is a title acquired by use and time, and allowed by law; as when a man claims any thing, because he, his ancestors, or they whose estate he hath, have had or used it all the time, whereof no memory is to the contrary: Or it is where for continuance of time, *ultra memoriam hominis*, a particular person hath a particular right against another. *Kitch.* 104. 1 *Inst.* 114. 4 *Rep.* 32.

Prescriptions are properly personal, therefore are always alleged in the person of him who prescribes, *viz.* That he, his ancestors, or all those whose estate he hath, &c. or of a body politick or corporation, they and their predecessors, &c. Also a parson may prescribe, *quod ipse & prædecessores sui*, and all they whose estate, &c. for there is a perpetual estate, and a perpetual succession, and the successor hath the very same estate which his predecessor had, which continues, tho' the person alters, like the case of ancestor and heir. 3 *Salk.* 279.

There is a difference between prescription, custom and usage.

Prescription hath respect to a certain person, who by inheritance may have continuance for ever; as for instance; he and all they whose estate he hath in such a thing, this is a prescription: But

Custom is local, and always applied to a certain place, as time out of mind there has been such a custom in such a place, &c. And prescription belongeth to one or a few only; but custom is common to all:

Usage differs from both, for it may be either to persons or places; as to inhabitants of a town, to have a way, &c. 2 *Nels. Abr.* 1277.

A custom and prescription are in the right; usage is in possession; and a prescription that is good for the matter and substance,

substance, may be bad by the manner of setting it forth; but where that which is claimed *as a custom*, in or for many, will be good, *that* regularly will be so when claimed by prescription for one. *Godb. 54.*

Prescription is to be *time out of mind*; tho' it is not the length of time, that begets the right of prescription, nothing being done by time; altho' every thing is done in time, but it is a *presumption in law*; that a possession cannot continue so long quiet, if it was against right, or injurious to another. 3 Salk. 278.

A prescription cannot be annexed to any thing but an estate in fee, which must be set forth; but it is always applied to incorporeal inheritances, one cannot make title to land by prescription; but only to rent, or profit out of land. 2 Mod. 318. 4 Rep. 31.

A person may make title by prescription, to an office, a fair, market, toll, way, water, rent, common, park, warren, franchise, court-leet, waifs, estrays, &c. But nothing may be prescribed, which cannot be raised by grant, and a prescription must not be laid in an uncertainty; no person can prescribe against an act of parliament, or against the King where he hath a certain estate and interest, against the publick good, religion, &c. Nor can one prescription be pleaded against another, unless the first is answered or traversed; or where one may stand with the other. *Lutw. 381. Raym. 232. 2 Roll. Abr. 264. 2 Inst. 167. 7 Rep. 28. Cro. Car. 432. 1 Bullf. 115. 2 Lill. 346.*

Tenants in fee-simple are to prescribe in their own name, and tenants for life or years, &c. tho' they may not prescribe in their own names, yet they may in the name of him who hath fee: and where a person would have a thing that lies in grant by prescription, he must prescribe in himself and his ancestors, *whose heir he is by descent*; not in himself, and those whose estate, &c. (unless the *que estate* is but a conveyance to the thing claimed by prescription;) for he cannot have their estate that lies in grant without deed, which ought to be shewed to the court. 1 Inst. 113. *Wood's Inst. 297.*

A copyholder, by reason of the baseness of his tenure, cannot lay a prescription in himself and his ancestors; but he may prescribe in the name of the lord of the manor, that the lord and his ancestors have had common, &c. for themselves and tenants, &c. And this serves where persons cannot prescribe in their own name, or of any certain person.

Parishioners cannot generally prescribe, but they may allege a custom; and inhabitants may prescribe in a matter of easement, way to a church, burying place, &c. 2 Saund. 325. 1 Lev. 253. *Cro. Eliz. 441. Cro. Car. 419. 2 Roll. 290.*

To lay a prescription for common, a man must shew, that he and his ancestors, or all those whose estate he hath, have time out of mind had and used to have common of pasture in such a place, *being the land of another, &c.* And as a prescription is a title or claim of a real interest or profit in the land of another person, it must be pleaded according to certain rules; and they are not like customs, or improper prescriptions, that are by way of discharge, or for easements, or for matters of personal exemption or privilege. *Wood's Inst. 298, 299.*

A prescription may be laid in several persons, where it tends only to matters of easement or discharge; tho' not where it goes to matter of interest or profit in *alieno solo*, for that is a title, and the title of one doth not concern the other; therefore several men having several estates, cannot join in making a prescription. 1 Mod. 74. 3 Mod. 250.

The word easement is a genus to several species of liberties, which one may have in the soil of another, without claiming any interest in the land itself; but where the thing was set forth in a prescription to catch fish in the water of another, &c. and no instance could be given of a prescription for such a liberty by the word easement, a rule was made to set the prescription right, and to try the merits. 4 Mod. 362.

In trespass for breaking the plaintiff's close, the defendant prescribed, that the inhabitants of such a place, time out of mind, had used to dance there, at all times of the year, for their recreation, and so justified; issue be-

ing taken on this prescription, defendant had a verdict; it was objected against it, that a prescription to dance in the freehold of another, and spoil his grass was ill; especially as laid in the defendant's plea, *viz. At all times of the year, and not at seasonable times, and for all the inhabitants; who tho' they may prescribe in easements which are necessary, as a way to a church, &c. they cannot in easements for pleasure only*: But adjudged, that the prescription is good, *issue being taken on it, and found for defendant; altho' it might have been ill on demurrer.* 1 Lev. 175. 2 Nels. 1280.

A custom that the farmers of such a farm have always found ale, &c. to such a value at perambulations, was held naught; because it is no more than a prescription in occupiers, which is not good in matter to charge the land. 2 Lev. 164.

Prescription by the inhabitants of a parish to dig gravel in such a pit, the soil of W. R. it was doubted whether this was good or not, tho' it was to repair the highway; but the inhabitants may prescribe for a way, and by consequence for NECESSARY MATERIALS to repair it. 2 Lutw. 1346.

Defendant pleaded, that within such a parish, all occupiers of a certain close *habent, & habere consueverunt*, a way leading over the plaintiff's close, to the defendant's house; this was held ill, for it is not like a prescription to a way to the church or marker, which are necessary, & *pro bono publico.* 2 Ventr. 186.

Where a man prescribes for a way to such a close, he must shew what interest he hath in the close: *Aliter* if he prescribes for a way to such a field; because that may be a common field by intendment. *Lutw. 160.*

Plaintiff declared, that the occupiers of the adjoining field have, *time out of mind*, repaired the fences, which being out of repair, his beasts escaped out of his own ground, and fell into a pit; it is good, *without shewing any estate in the occupiers*; but it had not been to if defendant had prescribed. 1 Ventr. 264.

Prescription, &c. to take underwood growing on the lands of another, to make hedges, is not good. 1 Leon. 313.

A man may claim a fold-course, and exclude the owner of the soil by prescription. 1 Saund. 153. But a diversity has been taken where a prescription takes away the whole interest of the owner of the land; and where a particular profit is retained: In one case it is good, in the other void. 1 Leon. 11.

If a person prescribes for common appurtenant it is ill, unless it be for cattle *levant & couchant, &c.* And the reason is, because by such a prescription the party claims only some part of the pasture, and the quantum is ascertained by the levancy and couchancy, the rest being left for the owner of the soil; therefore if he who thus prescribes, should put in more cattle than are levant and couchant on his tenement, he is a trespasser. *Noy 145. 2 Saund. 324.*

In a prescription to have common, the jury found it to be paying every year a penny: Here the prescription is entire, whereof the payment of one penny is parcel; which ought to be entirely alledged in the prescription in the plea, or it will not be good. *Cro. Eliz. 563, 564.* But where the payment is collateral from the prescription, a prescription may be good without alledging it. *Cro. Eliz. 405.*

It was a question, Whether a toll, independent of markets and fairs, might be claimed by prescription, without shewing that the subject hath some benefit; and some arguments were brought for it, from an authority in *Dyer 352.* Tho' by *Holt* this prescription cannot be good, *because there was no recompence for it*; and every prescription to charge the subject with a duty, must import some benefit to him who pays it; or else some reason must be shewed why the duty is claimed. 4 Mod. 319.

A court-leet is derived out of the hundred; and if a man claims a title to the leet, he may prescribe that he and his ancestors, and all those whose estate he hath in the hundred, time out of mind had a leet. 1 Inst. 125.

There may be a prescription for a court to hold pleas of all actions, and for any sum or damage, and it will be good. *Jenk. Cent. 327.* If a court held by prescription is granted and confirmed by letters patent; this doth not

not destroy the prescription, but it is said the court may be held by prescription as before. 2 Roll. Abr. 271.

A grant may *enure as a confirmation* of a prescription; and the prescription continue *unaltered* by a new charter, &c. where the charter is *not contrary* to the prescription. Moor 818, 834. But in some cases it is intended, that a prescription shall begin *by grant*; and as to prescriptions in general, the law supposes a *descent*, or purchase originally. Cro. Eliz. 709. 1 Inst. 113.

Every prescription is taken strictly: And a man ought not to prescribe to that which the law of common right gives. 3 Leon. 13. Noy 20.

A prescription must have a *lawful commencement*, and peaceable possession and time are inseparably incident to it. 1 Inst. 113. Tho' a title gained by custom or prescription, will not be lost by interruption of the possession for ten or twenty years; but it may be lost by interruption in the right. 1 Inst. 114. 2 Inst. 653.

Prescription at Common law, is time out of memory of man; and by statute, where a certain time is limited, as from the reign of Rich. 1, &c. Co. Litt. 115. See Black. Com. 2 V. 263. As to prescription by corporations, see ib. 1 V. 472. and as to the time of prescription, see ib. 2 V. 31. Prescriptions for repairing highways, see Highways.

Prescriptions against Actions and Statutes, The 7 Hen. 8. ordains, That four years being past after the offences committed, provided against by this statute, no suit can be commenced.

By 31 Eliz. cap. 5. all actions, &c. brought on statutes, the penalty whereof belongs to the King, shall be brought within *two years* after the offence done, or shall be void. And the stat. 23 Eliz. cap. 1. enacts, that offences comprised in that statute, &c. are determinable before justices of peace and assize, *within a year and a day* after the offence, &c. so that whoever offendeth against any of these statutes and escapes unquestioned for four years, two, or one year, may be said to prescribe against the actions and punishments ordained by those statutes: And there are other statutes which have the like appointments or limitations of time, whence may arise the like prescription and bar. 4 Rep. 84. 2 Inst. 652. Vide Action.

Prescription by the Ecclesiastical Law, as to tithes, &c. See Modus Decimandi.

Presence. Sometimes the presence of a superior magistrate, takes away the power of an inferior. 9 Rep. 118. And the presence of one may serve for all the feoffees or grantees, &c. 3 Rep. 26. When presence of a man, in the place where an offence is done, may make him guilty, vide Accessary.

Presentation, (Presentatio) Is properly the act of a patron, offering his clerk to the bishop of the diocese, to be instituted in a church or benefice of his gift, which is void. 2 Lill. Abr. 351.

Anciently presentation was said to be in the bishop of common right, till since it has been indulged to the laity, to encourage them to build and endow churches; and now if the patron neglects to present to the church, then this right returns to the bishop by lapse, &c. 1 Nelf. Abr.

An alien born cannot present to a benefice in his own right; for if he purchase an advowson, and the church becomes void, the King shall present after office found that the patron is an alien. 2 Nelf. 1290. And by statute no alien shall purchase a benefice in this realm; nor occupy the same, without the King's licence, on pain of a *præmunire*. 7 R. 2. cap. 12.

Papists are disabled to present to benefices, and the universities are to present, &c. But a Popish recusant may grant away his patronage to another, who may make presentation, where there is no fraud. Stat. 3 Jac. 1. 1 W. & M. 1 Jon. 19.

All persons who have ability to purchase or grant, have likewise ability to present to vacant benefices: but a dean and chapter cannot present the dean; nor may a clergyman who is patron present himself, tho' he may pray to be admitted by the ordinary, and the admission shall be good.

An infant may present, because guardians have not power to do it in right of the heir; a guardian in socage cannot present to a church, he being not to meddle with any thing, but for what he may account, which he cannot

do for a presentation, for he is to take nothing for it: If a *feme covert* hath title to present, the presentation ought to be in the name of husband and wife, and not by her alone; or he may present in his own name during coverture: Coparceners are but as one patron, and ought to agree in the presentation of one person; if they cannot agree, the eldest shall present first alone, and the bishop is obliged to admit her clerk, and afterwards the others in their order shall prefer their clerks; jointenants and tenants in common must regularly join in presentation, and if either present alone, the bishop may refuse his clerk, as he may also the clerk presented by the major part of them; but if there are two jointenants of the next avoidance, one may present the other, and two jointenants may present a third, but not a stranger.

The next presentation was granted to four persons, & eorum cuilibet conjunctim & divisim, &c. And the church becoming void, one of the grantees alone presented one of the others; and it was adjudged, that this presentation by one was good.

When an aggregate corporation presents, it must be under their common seal, and by the true name of their corporation. The King may present by letters patent under the Great Seal, and by these words, viz. *Damus & concedimus*; for this amounts to a warrant for the bishop to admit the clerk; it is said the King may present by word, or in writing under any seal, who cannot do any other legal act but by matter of record; and in the opinion of some, the King may present to a church by his letter sent to the ordinary to institute and induct such a one his clerk to the living; but the most secure way is to have a presentation under the Great Seal. If a rector is made bishop, the King shall present to the rectory, unless he grant to the bishop before he is consecrated, a dispensation to hold it with his bishoprick; and if an incumbent of a church is made a bishop, and the King presents or grants that he should hold the church in commendam, which is quasi a presentation, a grantee of the next avoidance or presentation hath lost it, the King having the next presentation. If the King present to a church by lapse, where he ought to present pleno jure, and as patron of the church, such a presentation is not good; for the King is deceived in his grant, by mistaking his title, which may be prejudicial to him; the presenting by lapse intitling only that presentation: The Lord Chancellor presents to the King's benefices under 20 l. &c. 2 Roll. Abr. 354. 3 Inst. 156. 1 Inst. 186. 2 Nelf. Abr. 1288, 1290. 2 Lill. 351.

The King may repeal a presentation, before his clerk is inducted; and this he may do by granting the presentation to another, which without any farther signification of his mind is a revocation of the first presentation. Dyer 293, 360.

A patron may revoke his presentation before institution, but not afterwards; a presentation being no more than a power given to the ordinary to admit the clerk, and if the patron die before induction, his presentation is determined. But this was in the case of the King; for in the case of a common person, if he die after institution, and before induction, the presentation is not determined by his death. Latch. 191. Dyer 348.

If two patrons present their clerks to a church, the bishop is to determine who shall be admitted by a *jus patronatus*, &c. And two patrons pretending a title to present, one of them presented W. R. but the bishop refused institution; whereupon he sued in the court of audience of the Archbishop, and had an inhibition to that bishop, and on that suit he obtained an institution by the archbishop, on which he was inducted; afterwards the bishop who was inhibited, granted institution upon the presentation of the other patron, and his clerk was likewise inducted; and thereupon W. R. who had been instituted and inducted before, on a motion procured a prohibition, because by the first induction the incumbency was determined: So that quoad the incumbency, the prohibition was granted, but not as to the contempt of the ordinary after he had been inhibited. Moor 499.

The father was incumbent, and after his death the patron presented his son, who was refused by the bishop, because by the Canon law *Filius non potest succedere patri in eadem*

eadem ecclesia, and the patron presented another person; then the son who was first presented; obtained a dispensation *non obstante* the canon; but the ordinary admitted the second presentee, who was also instituted and inducted; thereupon the son sued him and the bishop in the Spiritual court, but a prohibition was granted. *Latch* 191.

A clerk may be refused by the bishop, if the patron is excommunicate; or if the clerk is not *persona idonea*, which includes ability of learning, and honesty in conversation, &c. But in a *quare impedit* brought against the bishop for refusal of a clerk, he must shew the cause of his refusal specially and directly; and because the clerk is of ill life, or a schismatic in general, is not sufficient, without shewing what crimes, or sort of schism he has been guilty of: And the temporal court then will judge whether the cause be just or not; and if the party denies the same, the court may write to the metropolitan to examine the matter, and certify; and tho' the matter be of a spiritual nature, it shall be tried by a jury: For whether the cause be temporal or spiritual, the examination of the bishop concludes not the clerk; he is judge of the ability, but not the ultimate judge: but in case of refusal for insufficiency in learning, it hath been adjudged, that the ordinary is not accountable to any temporal judge; and that in *literatura minus sufficiens*, &c. is a good plea, without setting forth the kind of learning, or degrees of it. *5 Rep.* 58. *2 Inst.* 631. *3 Lev.* 311. *Show.* 88. *Wood's Inst.* 32, 33. That the presentee has a benefice already, is no good cause of refusal, &c. *1 Roll. Abr.* 355.

If the bishop refuses to admit the clerk presented, he must give notice of his refusal, with the cause of it forthwith; and on such notice the patron must present another clerk, *within six months from the avoidance*, if he thinks the objection against his first clerk contains sufficient causes of refusal; but if not, he may bring his *quare impedit* against the bishop. *2 Roll. Abr.* 364. And where a church becomes void by deprivation by the Canon law, or resignation, the patron must have notice from the ordinary, to present another person: But if the church becomes void by the act of God, as death of the incumbent; or by creation, or cession, &c. the patron is bound to take notice himself of the avoidance, and to present, &c. *Wood's Inst.* 154.

If a defendant, or any stranger, presents a clerk pending a *quare impedit*, and afterwards the plaintiff obtains judgment, he cannot by virtue of that judgment remove him who was thus presented; but he is to bring a *scire facias* against him to shew cause *quare executionem non habet*; and then, if it be found that he had no title, he shall be removed.

The way to prevent such a presentation, is to take out a *ne admittas* to the bishop; and then the writ *quare incumbravit* lies, by virtue whereof the incumbent shall be removed, and put to his *quare impedit*, let his title be what it will; but if a *ne admittas* be not taken out, and another incumbent should come in by good title *pendente lite*, he shall hold it. *Sid.* 93. *2 Cro.* 93.

A man must set forth a presentation in himself, or those under whom he claims, in a *quare impedit*; and it ought to be alledged in him who hath the inheritance: And when six months pass hanging the writ, &c. by the disturbance of any one, so that the bishop hath a right to present by lapse, damages shall be recovered by two years value of the church, if the person lose his presentation; and if he recovers his presentation within the six months, damages to half a year's value, &c. *2 Inst.* 362. *Vaugh.* 7, 57. *Cro. Eliz.* 518. *13 Ed.* 1. c. 5.

Where a person gets the fee to his presentation, which is his title, he must in his declaration alledge the presentation to be *tempore pacis*, or it may be intended to be *tempore belli*, and then it is no title; but where the bare presentation is not his title, but only in pursuance of a former right, in such case he may alledge it generally: As for instance; where he declares that A.B. was seised of the manor of D. as of fee, to which an advowson was appendant, and that being so seised he presented W. R. and afterwards granted the next avoidance to the plaintiff; this is good, for plaintiff shews a precedent right, and doth not make the presentation itself his title. *1 Mod.* 130. *2 Mod.* 183. *3 Salk.* 280.

If a church becomes void in the life-time of a bishop, he cannot devise the next presentation; but if the bishop, or any incumbent of a church, has the advowson in fee, and then either of them deviseth, that on the next avoidance his executor shall present; this is good, tho' they devise the inheritance to another. *Dyer* 285.

When a bishop hath a presentation in right of his bishoprick, and dies, his executor, nor heir, shall not have the void turn; but the King, in whose hands are the temporalities, and he hath a right to present on an avoidance after the seizure, on death of the bishop; tho' where an incumbent was seised of the advowson in fee, and died; on a question who should present, either his heir or executor, the advowson not descending to the heir till after the death of his ancestor, and immediately upon his death the church was void, therefore that avoidance was vested in the executor; it was adjudged, that the heir shall present, because the descent to him, and the avoidance to the executor, happened at one and the same instant, and where two titles concur in an instant, the elder title shall be preferred. *3 Lev.* 47.

A grant was made of the next presentation to a church, the grantee died, and then the church became void; and it was held, that the executor of the grantee shall have the presentation as a chattel. *Glanvil.* lib. 6. c. 7. *2 Nels. Abr.* 1286. But in *quare impedit*, defendant pleaded, that the patron granted the next presentation to B. B. who died, and made his executor, who presented the defendant; issue was taken upon *non concessit*, and the jury found, that the patron granted the presentation to B. B. during his life, and that he died before the church became void; adjudged that this was not an absolute grant of the next presentation, but restrained during the life of the grantee; wherefore it shall not go to the executor, unless the church became void in the life-time of the testator. *Cro. Car.* 363.

Tenant in tail of an advowson, and his son and heir, joined in a grant of the next presentation, tenant in tail died; this grant was held void as to the son and heir, because he had nothing in the advowson at the time that he joined with his father in the grant. *Hob.* 45.

The right of presenting to the next avoidance, may be devised by will to any person; and by deed, the next avoidance of a church may be granted, where the church is then full; also whilst a church is void, the next avoidance that shall happen, or the inheritance of the advowson may be granted away, and by deed or grant, the right of presenting will pass: but the void turn itself is not grantable by any common person, tho' it may be granted by the King, and be good; for it is a meer spiritual thing annexed to the person of the patron, and during the time of the vacation it is a thing in right and in action, the fruit and execution of the advowson, not the advowson itself. *2 Cro.* 371. *Clergym. Law* 154.

As a void turn is not grantable; so if two have a grant made to them of a next avoidance, and after the church is void, one release all his right and title which he had in the advowson and presentation to his companion, who presents to the church, this presentation is void; because after the avoidance, the interest was attached in both, and both had a power to present, which could no more be released by one to the other, than it could be granted in that manner, being but a right, and not a chattel in possession: But a release in this case may be good, if it be made before the church is void; and the party to whom made may present, &c. *1 And.* 223. *3 Cro.* 173. *Moor* 467.

If a presentation itself bears date whilst the church is full of another clerk, it is void: And where two or more have a title to present by turns, one of them presents, his clerk is admitted, instituted and inducted, and afterwards deprived, he shall not present again, but that presentation shall serve his turn: tho' where the admission and institution of his clerk is void, there the turn shall not be served; as if after induction he neglects to read the thirty-nine articles, &c. his institution is void by the *Stat.* 13 *Eliz.* and the patron may present again. *F. N. B.* 33. *5 Rep.* 102.

The right of presenting to a church, may pass from one seised of the same by the patron's acknowledging of a statute, &c. which being extended, if the church be-

comes void, during the *conusee's* estate, the *conusee* may present. *Owen* 49.

Every church living is to be given and received by presentation, collation, &c. And wherever a writ of *quare impedit*, or right of advowson will lie for any man on a disturbance; there he hath a right to the presentation for that time at least. 1 *Shep. Abr.* 240, 241.

Where the patron of a church hath an estate in the manor or other thing to which it is appendant, or has it in gross for life or years only; if the church becomes void during his estate, he may present to it: Or he may grant the next avoidance to another for a term; and this will be good, if it happen in the time. But if one be disseised of his manor, and the disseisor die seised, and after the church become void; in this case the disseisor cannot present till he hath recontinued the manor, but before the dying seised he might do it. *Co. Litt.* 120. 8 *Rep.* 145. *Dyer* 29. *Plowd.* 500.

A presentation by a person who had not right, at Common law, put the rightful patron out of possession, and obliged him to bring the writ of right of advowson, &c. And presentment by usurpation, and admission upon it, gains the fee to the presenter, till he be evicted by action. 6 *Rep.* 30. 1 *And.* 300. *Yel.* 91.

One may not make a deputy to present for him: And yet a presentation by a proctor is said to be good, as if done by the party himself. *F. N. B.* 35. If a man present in time of war, the law hath such regard to the original act, viz. the presentation, that all which follows thereon is void. 6 *Ed.* 3, 41. 2 *Rep.* 93.

Where a common person is patron, he may present by parol; as well as by writing to the bishop. *Co. Litt.* 120. A presentation doth not carry with it the formality of a deed; but is in the nature of a letter missive, by which the clerk is offered to the bishop; and it passeth no interest, as a grant doth, being no more than a recommendation of a clerk to the ordinary to be admitted. *Young Clergym. Lawyer* 17, 18. But where a plaintiff declared upon a grant of the next presentation, and on oyer of the deed it appeared to be only a letter written by the patron to the father of the plaintiff, that he had given his son the next presentation; adjudged, that it would not pass by such letter, without a formal deed. *Owen* 47.

Where the crown has a right to present on promoting the incumbent to a bishoprick, it is not necessary to be done during the life of the promotee. 2 *Strange* 841. See *Black. Com.* 1 *V.* 389. 2 *V.* 23. As to *Presentative Advowsons*, see *ib.* 2 *V.* 22.

Form of a Presentation to a Benefice.

Reverendo in Christo Patri & Domino, Domino B. Permissione Divina Episcopo S. &c. ejus vel in Absentia Vicario suo in spiritualibus Generali, aut alii cuicunque in hac parte sufficientem Auctoritatem habenti; Praenobilis A. B. Baro de, &c. verus & indubitatus Patronus Rectoriae Ecclesiae Parochialis de, &c. Salutem in Domino Sempiternam. Ad Ecclesiam Parochialem de, &c. praedictae vestrae Dioecesis modo per mortem naturalem C. D. ultimi incumbentis ibidem vacantem, & ad meam Praesentationem pleno jure spectantem, dilectum mihi in Christo E. F. Clericum, Artium Magistrum, Paternitati vestrae Praesento, humiliter supplicans ut praesatum E. F. ad dictam Ecclesiam admittere, ipsumque in Rectoriam ejusdem Ecclesiae Institui & Induci facere, cum suis juribus & pertinentiis Universis, ceterisque; omnia & singula peragere & adimplere in hac parte, quae ad vestrum munus Episcopale pertinere videbuntur, dignemini cum favore. In cuius rei Testimonium, his Praesentibus sigillum meum apposui. Dat' die, &c. Anno Regni, &c. Annoque Dom. 1727.

A Grant of the next Presentation to a Church.

TO all to whom these presents shall come, A. B. of, &c. the true and undoubted patron of the rectory or parish church of D. in the county and diocese of, &c. send greeting. Know ye, that the said A. B. for divers good causes and considerations him thereunto moving, hath given,

granted and confirmed, and by these presents, doth for him and his heirs, give, grant and confirm unto C. D. of, &c. his executors, administrators and assigns, the first and next advowson, presentation, free disposition and right of patronage, of and to the parsonage, rectory, or parish church of D. aforesaid, with all its appurtenances, with full power and authority to and for the said C. D. his executors, administrators and assigns, to present a learned and fit person to the said parsonage, rectory, or parish church, with all its rights and appurtenances, whenever the same shall first and next happen to become void, by the death, resignation, cession, or deprivation of E. F. the present incumbent, or otherwise howsoever; and to do and perform all and every other act and acts, thing and things whatsoever, in order to the same, in as full and ample manner, to all intents and purposes, as the said A. B. or his heirs might, or hereafter could have done, if this present grant had not been made. In witness, &c.

Right of presentation may be forfeited in several cases: As by attainder of the patron, or by outlawry, and then the King shall present; and if the outlawry be reversed, where the advowson is forfeited by the outlawry, and the church becomes void after, the presentation is vested in the crown; but if at the time of the outlawry the church was void, then the presentation is forfeited as a chattel, and on reversing the same, the party shall be restored to it. By appropriation without licence from the crown, right of presentation may be forfeited; tho' the inheritance in this case is not forfeited, only the King shall have the presentation in nature of a distress, till the party hath paid a fine for his contempt. By alienation in fee of the advowson, by a grantee for life of the next avoidance, a presentation is forfeited; and after such alienation the grantor may present, but then he must enter for the forfeiture of the grantee in the life-time of the incumbent, to determine his estate before the presentation vests in him on the incumbent's death. And by simony it may be likewise forfeited and lost, where any person for money, &c. present to a benefice. *Moor* 269. *Plowd.* 299. 2 *Roll. Abr.* 352. *Stat.* 31 *Eliz.* See *Advowson, Patron, Simony, &c.*

Presentee, The clerk presented to a church by the patron. In our statutes there is mention of the King's presentee, that is, he whom the King presents to a benefice. 13 *R. 2. c.* 1.

Presentment, Is a mere denunciation of jurors, or some officers, &c. (without any information) of an offence inquirable in the court whereto it is presented. *Lamb. Eiren. lib.* 4. *c.* 5. Or presentment is an information made by the jury in a court, before a judge who hath authority to punish an offence: It is that which a grand jury finds and presents to the court, without any bill or indictment delivered; and it is afterwards reduced into the form of an indictment. 2 *Inst.* 739.

The presentment is drawn up in English by the jury, in a short note, for instructions to draw the indictment by; and differs from an indictment, in that an indictment is drawn up at large, and brought ingrossed to the grand jury to find. 2 *Lill. Abr.* 353.

There are presentments of justices of peace in their sessions, of offences against statutes, in order to their punishment in superior courts; and presentments taken before commissioners of sewers, &c. But a presentment of commissioners of sewers was quashed, because it did not appear in the presentment by what authority the commissioners did sit who took the presentment, or that any of them were of the quorum, as directed by statute. *Hill.* 1649. And presentments are made in courts leet and courts baron, before stewards; and in the latter of surrenders, grants, &c. Also by constables, churchwardens, surveyors of the highways, &c. of things belonging to their offices. See *Black. Com.* 2 *V.* 369. 4 *V.* 298.

President, (*Præses*) Is used for the King's lieutenant in any province, as *President of Wales*, &c.

President of the Council, Relates to the function of the person, and is the fourth great officer of state: He is as ancient as the reign of King John; and hath sometimes been called *Principalis Consiliarius*, and other times *Capitalis Consiliarius*.

The office of *President of the Council* was ever granted by letters patent under the Great Seal *durante bene placito*; and

and this officer is to attend on the King, to propose business at the council table, and report to his Majesty the transactions there: Also he may associate the Lord Chancellor, Treasurer and Privy Seal, at naming of sheriffs; and all other acts limited by any statute, to be done by them. 21 H. 8. c. 20. See *Black. Com.* 1 V. 230.

Press, (*Liberty of the*) See *Black. Com.* 4 V. 151.

Pressing, for sea-service. In time of war, the King has power to impress seamen; tho' he ought not to imprison them. *Comber.* 340. But watermen withdrawing themselves during the time of pressing, shall be liable to imprisonment, &c. *Stat.* 2 & 3 P. & M.

Where a man receives press money to serve the King, and is delivered over to a captain; (not common pressmasters) if he runs away without licence, it is felony, having benefit of clergy, by the 7 Hen. 7. cap. 1. *Hale's Hist. P. C.* 678.

Every person who serves in any merchant ship belonging to the subjects of Great Britain, being fifty-five years of age, or under eighteen; and also every foreigner in such ships are privileged from being pressed into his Majesty's service; and all others of any age, for the space of two years after their first going to sea; but apprentices are thus exempted three years. *Stat.* 13 Geo. 2. cap. 17. See *Navy*.

It is not improper to observe, that the power of impressing men for the sea service by the King's commission, has been a matter of dispute, and submitted to, with great reluctance, tho' (as observed by *Blackstone* 1 V. 418.) it hath been very clearly and learnedly shewn, by Sir *Michael Foster*, that the practice of impressing and granting powers to the admiralty, for that purpose, is of very ancient date, and hath been uniformly continued by a regular series of precedents to the present time: whence he concludes it to be part of the Common law. See *Foster's Reports*, fo. 154. *Broadfoot's case*.

Pressing to Death. See *Mute*, and *Black. Com.* 4 V. 323.

Press, Is used for a duty in money, to be paid by the sheriff on his account, in the *Exchequer*, or for money left, or remaining in his hands. 2 & 3 Ed. 6. cap. 4.

Præstation-money, (*Præstatio*, a paying or performing) Is a sum of money paid by archdeacons yearly to their bishop *pro exteriore jurisdictione—Et sint quieti a præstatione muragii.* *Cart. H. 7.* *Burgens. Mount-Gomer.* *Præstatio* was also antiently used for *purveyance*. See *Philip's* book on that subject, pag. 222. And see *Spiritualties*.

Press-money, Is so called from the *French* word *press*, that is, *promptus expeditus*, for that it binds those who receive it, to be ready at all times appointed, being meant commonly of soldiers. 18 H. 6. 19. 7 H. 7. 1. 3 H. 8. 5. and 2 Ed. 6. 2.

Presumption, (*Præsumptio*) Is a supposition, opinion or belief previously formed; and is of three sorts; 1. *Violent*, which is many times a full proof; as if one be killed in a house, and a man is seen to come out of the house with a bloody sword, and no other person was at that time in the house; this, tho' but presumption, is as a proof. 2. *Probable*, which hath but a small effect. 3. *Levius, seu temeraria*, which is of no prevalence at all: So in case of a charter of feoffment, if all the witnesses to the deed be dead; the *violent presumption*, which stands for a proof, is continual and quiet possession. *Co. on Lit. lib. 1. c. 1. sect. 1.* *Præsumptio stat in dubio*, it is doubted of, yet accounted *veritatis comes*, *quatenus in contrarium nulla est probatio, ut regula se habet, stabitur præsumptio donec probetur in contrarium.* *Cowell.*

If defendant pleads payment to a bond, and it appears that the debt is long standing by the bond, and hath not been demanded, nor interest paid for many years, it shall be presumed that the money is paid, tho' the plaintiff hath the bond in his custody: Also if a rent be behind and in arrear for twenty years, and the landlord gives a receipt for the last year that is due, all the rest is presumed to be paid, &c. 1 Inst. 6, 373. *Wood's Inst.* 599.

Where many houses are let by one lease, the court will presume that the lessee is in possession of them all, if he be in possession of any one of them, and the contrary doth not appear to the court: So in other cases, tho' presump-

tion is what may be doubted of, yet it shall be accounted truth, if the contrary be not proved. 2 Lill. Abr. 354. But no presumptions ought to be admitted against the presumptions of law, and wrong shall never be presumed. 1 Inst. 232, 273.

If the eldest son be beyond sea at the death of the ancestor, and the youngest enters into the land, he is not accounted in law a disseisor; because the law presumes, that he preserves the possession for his brother; but if on his brother's return he keeps him out of possession, then the law looks on him as a disseisor. *Lat.* 68.

Where the law intrusts persons with the execution of a power, the court ought to give credit to them in the execution of that power; tho' if they make a false return whereby the party and justice are abused, they may be punished. 12 Mod. 382. See *Black. Com.* 3 V. 371.

Presumptio, Was antiently taken for intrusion, or the unlawful seizing of any thing. *Leg. Hen.* 1. c. 11.

Presumptive Evidence of Felony, Should be admitted cautiously; for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer. And Sir *Matthew Hale* in particular lays down two rules, most prudent and necessary to be observed:

1. Never to convict a man for stealing the goods of a person unknown, merely because he will give no account how he came by them, unless an actual felony be proved of such goods: And

2. Never to convict any person of murder or manslaughter, till at least the body be found dead; on account of two instances he mentions, where persons were executed for the murder of others, who were then alive, but missing. 2 Hal. P. C. 290.

Presumptive Heirs, Are such, who, if the ancestor should die immediately, would in the present circumstance of things be his heirs; but whose right of inheritance may be defeated by the contingency of some nearer heir being born: As a brother, or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose present hopes may be hereafter cut off by the birth of a son. Nay, even if the estate hath descended, by the death of the owner, to such brother, or nephew, or daughter; in the former case the estate shall be devested and taken away by the birth of a posthumous child; and, in the latter, it shall also be totally devested by the birth of a posthumous son. *Black. Com.* 2 V. 208.

Pretended Titles. No one shall sell or purchase any pretended right or title to land, unless the vendor hath received the profits thereof for one whole year before such grant, or hath been in actual possession of the land, or of the reversion or remainder; on pain that both purchaser and vendor shall each forfeit the value of such land to the King and the prosecutor. This offence relates chiefly to the commencement of civil suits. 32 Hen. 8. c. 9. *Black. Com.* 4 V. 135.

Pretended Right (*Jus Prætesum*) Is where one is in possession of land, and another who is out of possession claims and sues for it; here the pretended right or title is said to be in him who so claims and sues for the same. See *Mod. Caf.* 302.

Pretium Sepulchri, Is applied to those goods which accrue to the church when a corpse is buried. *Irish Can. lib.* 19. c. 6.

Price. Things are to be sold at reasonable prices: And, justices in corporations, &c. may set the price of victuals and other things, by statute 23 Ed. 3. c. 6. 3 H. 8. c. 8. See *Black. Com.* 2 V. 446, 454.

Prime-gavel, (from *prim.* the last syllable of *lamprim*, and *gavel*, a rent or tribute) In the manor of *Rodeley* in the county of *Glocester* is a rent paid to the lord, by certain tenants, in duty and acknowledgment to him for the privilege of fishing for *lamprays* or *lamprids* in the river *Severn*. *Tayl. Hist. Gavelk.* 112.

Priests, In general signification, are any ministers of a church; but in our law, this word is particularly used for ministers of the church of *Rome*. Priests saying mass forfeit 200 marks, by *Stat.* 23 Eliz. c. 1. And persons apprehending a *Romish* priest, saying mass, have 100*l.* from the sheriff of the county, to be paid within four months after conviction of the offence, &c. And such priests,

priests, &c. keeping schools, are liable to perpetual imprisonment. 11 & 12 H. 3. c. 4. See *Jesuits, Papists, Recusants, Rome*, and *Black. Com.* 1 V. 388.

Primage, Is a duty at the water-side, due to the master and mariners of a *ship*; to the master for the use of his cables and ropes, to discharge the goods of the merchant; and to the mariners for loading and unloading in any port or haven; it is usually about 12 d. per tun, or six-pence per pack or bale, according to custom. *Merch. Dict.* See 32 H. 8. c. 14.

Primer Fine, On suing out the writ or *præcipe*, called a writ of covenant, there is due to the King, by ancient prerogative, a *primer fine*, or a noble for every five marks of land sued for; that is, one tenth of the annual value. *Black. Com.* 2 V. 350.

Primicerius, The first of any degree of men; sometimes it signifies the nobility. *Primicerios totius Angliæ* were the nobility of England. *Mon.* 1 tom. p. 838.

Primer seisin, (*Prima seisin*) The first possession, *seisin* was heretofore used as a branch of the King's prerogative, whereby he had the first possession, that is, the entire profits for a year of all the lands and tenements, whereof his tenant (who held of him *in capite*) died *seised* in his demesne as of fee, his heir being then at full age, until he do homage, or if under, until he were of age. *Staundf. Prærog. cap.* 3. and *Brañton, lib.* 4. tract. 3. c. 1. But all the charges arising by *primer seisin* are taken away by 12 Car. 2. c. 24. See *Black. Com.* 2 V. 66, 88. 4 V. 411.

Primer Serjeant, Is the King's first Serjeant at Law.

Primo beneficio, The first benefice in the King's gift, &c. See *Beneficio*.

Primogeniture, (*Primogenitura*) The title of an elder brother in right of his birth: The reason of which *Co.* upon *Lit.* says, is, *Qui prior est tempore, potior est jure*; affirming moreover, *That in King Alfred's time, knights fees descended to the eldest son; because by the division of such fees between males, the defence of the realm might be weakened.* And *Doderidge* in his treatise of nobility saith, (*pag.* 119.) it was anciently ordained, That all knights fees should come unto the eldest son by succession of heritage, whereby he succeeding his ancestors in the whole inheritance, might be the better enabled to maintain the wars against the King's enemies, or his lords: And that the socage should be partible among the male children, to enable them to increase into many families, for the better furtherance in, and increase of husbandry. *Cowell.* and *Leg. Alfred Dodd. Treat. Nobil.* 119. See *Black. Com.* 1 V. 194. 2 V. 214. 4 V. 414.

Prince, (*Princeps*) Is sometimes taken at large for the King himself; but more properly for the King's eldest son, who is called *Prince of Wales*.

It is said by some writers, that the King's eldest son is *Prince of Wales* by nativity; but others say, that he is born *Duke of Cornwall*, and afterwards created *Prince of Wales*, tho' from the day of his birth he is stiled *Prince of Wales*, a title originally given by *Edward 1.* And all his titles are, *Prince of Wales*, *Duke of Cornwall*, and *Earl of Chester*.

Before *Edw. 2.* who was the first *Prince of Wales*, and born at *Carnarvan* in that principality, (his mother being sent there big with child by *Edward 1.* to appease the tumultuous spirit of the *Welch*) the eldest son of the King was called *Lord Prince*; but *Prince* was a name of dignity long before that time in England. *Staundf. Prærog. cap.* 22. 75. See 27 H. 8. c. 26. and 28 H. 8. 3. And *Stowe's Annals*, p. 303. But *Prince* was a name of dignity long before that time in England; for in a charter of King *Offa*, after the bishops had subscribed their names, we read, *Brordanus Patritius, Binnanus princeps*; and afterwards the dukes subscribed their names. And in a charter of King *Edgar* in *Mon. Ang.* tom. 3. pag. 302. *Ego Edgarus Rex rogatus ab episcopo meo Deorivulfe, & principe meo Alfredo, &c.* And in *Matt. Paris*, pag. 155. *Ego Hallden princeps Regis pro viribus assensum præbeo, & ego Turketillus dux concedo.*

As *Duke of Cornwall*, and likewise *Earl of Chester*, the *Prince of Wales* is to appoint the sheriffs, and other officers in those counties, by 1 Geo. 2. c. 5. The *Prince*

of *Wales*, besides the principality of *Wales*, dutchy of *Cornwall*, &c. has also a revenue, settled on him by parliament. See the *Table to the Statutes*. See also *Black. Com.* 1 V. 225. 4 V. 81.

Principal, (*Principalium*) Is variously used in our law; as an heir loom, &c.

The word *principal*, was also sometimes used for a mortuary, or *corse-present* — *Item lego equum meum vocatum le Bay-Gelding, ut offeratur ante corpus meum in die sepulture meæ, nomine Principalii. Ult. volun. Johannis Murcfield.* 9 Hen. 5.

In *Urchensfield*, in the county of *Hereford*, certain *principals*, as the best beast, the best bed, the best table, &c. pass to the eldest child, and are not liable to partition. Also the chief person in some of the inns of *Chancery* is called *principal* of the house. *Cowell.*

Principal and accessory. The *principal* is the person who actually commits a crime; and the *accessory* he who is assisting in the doing thereof. 2 *Lill. Abr.* 355. And if one wilfully hold a man in his arms, whilst another kills him, he is a *principal*. 9 *Rep.* 67.

A man is present, and moves a person to kill another, who doth so; by this he is as much a *principal* as he who killeth the person: And all those who come in company in any place or assembly, where any murder, robbery, or felony is committed, if they come there for that cause, are *principals*, altho' they do nothing. *Staundf. P. C. cap.* 45. *Fitz. Coron.* 314, 350. *Poult.* 138. But if one happen to be present when another is killed, or a felony done, and he came not in company of the felons, nor is of their confederacy; he will not be a *principal* or *accessory*. *Fitz. Coron.* 314, 395.

No man can regularly be a *principal* in felony, without being present, unless it be in case of wilful poisoning, wherein if the persons intended or any others take the poison in the absence of him who lays it, he is a *principal*. *Hale's Hist. P. C.* 615.

In the highest offences, as in treasons, &c. all are *principals*; so in the lowest, such as riots, forcible entries, and other trespasses, there are no accessories. 1 *Inst.* 71.

By the Common law, if a *principal* be pardoned before judgment, or hath his clergy, the accessory may not be tried; but if it be after attainder, the accessory shall be arraigned: And where the *principal* dies before attained, or is acquitted by verdict, &c. the accessory shall be discharged: Also if the *principal* appears not, tho' the accessory may be put to answer, he shall not be tried till the *principal* is attained, &c. 4 *Rep.* 43 H. P. 47. *Dalt.* 339. But this is altered by stat. 1 Ann. cap. 9.

Whatever will make a man an accessory before in felony, will make him a *principal* in high treason and trespass; as battery, riot, forcible entry, and even in forgery and petit larceny. Therefore, wherever a man commands another to commit a trespass, who afterwards commits it in pursuance of such command, he seems by necessary consequence to be as guilty of it, as if he had done it himself; from whence it follows, that being in judgment of law a *principal* offender, he may be tried and found guilty, before any trial of the person who actually did the fact. 2 *Haw. P. C.* 310.

It seems agreed, that whoever agrees to a trespass on lands or goods done to his use, thereby becomes a *principal* in it; but that no one can become a *principal* in trespass on the person of a man by any such agreement: also it seems agreed, that no one shall be adjudged a *principal* in any common trespass, or inferior crime of the like nature, for barely receiving, comforting and concealing the offender, tho' he knew him to have been guilty, and that there is a warrant out against him, which by reason of such concealment cannot be executed. And if he cannot be punished as a *principal*, it is certain that he cannot be punished as an accessory; because in such offences, all who are punished as partakers of the guilt of him who did the fact, must be punished as *principals* in it, or not at all. Yet if a man knowing there is a warrant against such offender; advise him to absent himself, perhaps he may be indictable for a contempt of the law in hindering the due course of justice. 2 *Haw. P. C.* 311. See *Accessory*, and 2 *Haw. P. C.* 311—326. and *Black. Com.* 4 V. 34.

Principal challenge. See *Black. Com.* 3 *V.* 363.

Principal money, On mortgages, &c. Vide *Scrivenor and Usury*.

Printing. See the *Table to the Statutes*, and vide *Libel*.

Prior, Was first in dignity next to the *Abbot*, or the chief of a convent, &c. And there was a *Lord Prior* of *St. John's of Jerusalem*. 26 *H. 8. cap. 2.* See *Black. Com.* 1 *V.* 155.

Priors aliens, (*priores alieni*) Were certain religious men, born in *France* and *Normandy*, governors of religious houses erected for outlandish men here in *England*; but were suppressed by *Henry 5.* and afterwards their livings were given to other monasteries and houses of learning, and especially towards the erecting of the King's colleges, at *Cambridge* and *Eaton*. 2 *Inft.* 584. See *Stow's Annals*, pag. 582. and 1 *Hen. 5. c. 7.*

Priority, (*Prioritas*) Is an antiquity of tenure, in comparison of another less ancient. *Old Nat. Br.* 94. So, to hold by *posteriority*, is used in *Staundf. Præreg. cap. 2. 11.* And *Crompton* in his *Jurisd. fol.* 117. useth this word in the same signification. The lord of the *priority* shall have the custody of the body, &c. and *fol.* 120. If the tenant hold by *priority* of one, and by *posteriority* of another, &c. To which effect, see also *F. N. B.* 142.

Priority of debts and suits. A *prior suit* depending may be pleaded in abatement of a *subsequent* action or prosecution.

A *prior mortgage* ought to be first paid off; and *debts first due* should be first satisfied; for as the first creditor advances his money before his debt is incumbered, it is but reasonable he should be paid his debt before the discharge of the subsequent incumbrances: but *debts first due* must likewise be first prosecuted; otherwise in some cases *priority* will not be allowed. *Comp. Attorn.* 120.

There is no *priority* of time, in judgments; for the judgment first executed shall be first paid.

Wherever any suit on a penal statute may be said to be actually depending, it may be pleaded in abatement of a subsequent prosecution, being expressly averred to be for the same offence. Neither will it be any exception to such a plea, that the offence in the subsequent prosecution is laid on a day different from that in the former. Neither doth a mistake in such a plea of the very day, whereon the suit pleaded as prior was commenced, seem to be material on the issue of *nil in record*, if it appear in truth to have been commenced before the other, and for the same matter.

And if two informations be exhibited on the very same day, it seems that they may mutually abate one another, because there is no priority to attach the right of the suit in one informer, more than in the other. Alto it seems, that an information or bill the same day that they are filed, may be so far said to be depending before any process sued on them, that they may be pleaded in abatement of any other suit on the same statute. And from the same reason it seems also, that a writ of debt may be so pleaded in abatement of any other suit on the same statute. And from the same reason it seems also, that a writ of debt may be so pleaded after it is returned; because then it seems to be agreed, that it may be properly said to be depending; and whether it may not also be so pleaded before it be returned, seems questionable; because, according to some opinions, a writ may be said to be depending as soon as purchased. 2 *Hawk. P. C.* 275.

Those points of law, where *Hawkins* seems to doubt, are now, in general, pretty clearly settled, according to what seemed to be his opinion. See *Black. Com.* 2 *V.* 511.

Prisage, (*Prisagium*) Is that share which belongs to the King, or Admiral, out of such merchandises as are taken at sea, by way of lawful *prize*, which is usually a tenth part.—*Prisagium est jus prisas capiendi*, &c. Stat. 31 *Eliz. c. 5.*

And *prisage of wines* is an ancient duty or custom on wines, payable at certain ports, except *London*, *Southampton*, &c. It is where the King claims out of every ship or vessel laden with wines, containing twenty tons or more, two tons of wine, the one before, the other behind the

mast, at his price, which is twenty shillings for each ton; but this varies according to the custom of places; and at *Boston* every bark laden with ten tons of wine or above, pays *prisage*: This word is almost out of use, being now called *builrage*, because the King's chief butler receives it. 1 *Hen. 8. cap. 5.* 4 *Inft.* 20. *Calib:rp's Rep.* 20. See *Black. Com.* 1 *V.* 314.

Prize, or *Prize*, (*Captio, Præda*, from the *Fr. Prendre*) Signifies a booty taken from an enemy in time of war, &c.

If ships are laden with contraband goods, both ship and goods may be taken as *prize*; and instruments and provisions of armature for sea or land, bound for an enemy from a neutral nation, &c. shall be taken as a *prize*; so money, &c. in time of necessity. *Lex Mercat.* 178.

Whether a ship be *prize* or not, shall be tried in the Admiralty, and no prohibition be granted: And if a suit be commenced between the captor of a *prize* and a claimant, and a decree is obtained either for, or against the claimer; on giving security, such sentence or decree shall be put in execution, notwithstanding any appeal. 1 *Sid.* 320. 2 *Keb.* 158. See *Privatcers*, and *Table to the Statutes*.

Priso, Is used for a prisoner taken in war. *Hoveden. pag.* 541.

Prison, (*Prisona*) Is a place of confinement for the safe custody of persons, in order to their answering any action, civil or criminal: And it has been observed, that the *Salva custodia* must be only *custodia*; for *carcer ad homines custodiendos, non ad puniendos dari debet*. *Co. Litt.* 1b. 3. *cap. 7.*

Any place where a man is restrained of his liberty, is a *prison*: And when any one is arrested on process, he is to be committed to *prison*, or be bound in recognisance with sureties, or give bail, according to the nature of the case, to appear at a day in court, and answer what is alleged against him. *Dalt.* 421.

If one is brought before a justice of peace for suspicion of felony, where a felony has been committed, the justice may send him to prison, or bail him; and if no felony be done, he hath power to discharge him. *H. P. C.* 98. But when a person is committed to prison for treason, or felony, he cannot regularly be discharged from prison, till indicted, and acquitted, &c. Tho' one taken and committed to prison in a civil cause, may be released by the plaintiff in the suit. 3 *Inft.* 209. *H. P. C.* 94. But see *Habeas Corpus*, &c. Vide *Gaul*.

Prison-breaking, Is not only where a felon is formally committed to gaol by *mittimus*; but if he be put in the stocks, or kept in the constable's house, &c. and he break prison, it is felony. 1 *Hale's Hist. P. C.* 610. And if *A.* arrest *B.* for suspicion, and carry him to the common gaol, and there deliver him; if he breaks prison, and be indicted on it, there must be an averment in the indictment, that there was a felony done, and that *A.* having probable cause did suspect *B.* and arrested and committed him, and that he broke the prison, all which must be proved on the evidence: But where a felon is taken by *capias*, and committed, and break prison, there needs no such averment, &c. because all appears by matter of record. 2 *Inft.* 590. *Hale's Hist. P. C.* 610.

The felony of *breach of prison* is within clergy, tho' the offence for which the party was committed be excluded clergy. 1 *Hale's Hist. P. C.* 612. See *Escape*, and *Black. Com.* 4 *V.* 130.

Prisoner, (*Prisonarius, Fr. Prisonnier*) Signifies one confined in prison, on an action, or commandment: And a man may be a prisoner on matter of record, or of fact; a prisoner on matter of record, is he who being present in court, is by the court committed to prison; and the other is on an arrest, by the sheriff, &c. *Staundf. P. C.* 34. 35.

A prisoner for the King may not be charged in an action at the suit of the subject, without leave of the court. 1 *Lev.* 125, 146.

The court of King's Bench hath power to send for a prisoner out of the *Marshalsea* court, by rule of court, and need not issue an *habeas corpus*, as that prison belongs to this court; but they cannot send for a prisoner out of any other prison, without writ of *habeas corpus*. *Mich.* 1650. Every

Every judge of B. R. may remit prisoners, with their indictments, to the places where the offences wherewith they are charged were committed; and a prisoner for debt may be removed from the *Fleet* to the *King's Bench*, and thence to the *Marshalsea*, on something charged against him in the *habeas corpus* or return, or on bringing him into court. *Dyer* 275. 2 *Lill. Abr.* 357.

Prisoners in the *King's Bench* and *Fleet* prisons, on mesne process, &c. are to be actually confined within the prisons, or rules of the same, till discharged; and the profits of the *marshal's* and *warden's* places are liable to sequestration for payment of debt on judgment, on an escape, besides the common remedy.

Judgment may be signed against a prisoner, in the *Fleet*, in a personal action, entering a declaration, and leaving a copy thereof with the prisoner, &c. after a rule to plead, to be out at eight days, &c. Prisoners in the *King's Bench* are not to pay above 2 s. 6 d. per week, chamber-rent, on pain of keepers taking more, to forfeit 20 l. *Stat. 8 & 9 W. 3. cap. 7.* And prisoners going at large, may be taken up, on an escape warrant. 1 *Ann. cap. 6.* But prisoners may go out of the rules, on a day-rule of court, about their business, so as they do not go into the country, or to plays, diversions, &c. 2 *Lill.* 366.

A person in execution in the *King's Bench* prison, was put in irons by the *marshal*; and the court ordered the *marshal* to keep his prisoner according to law: tho' they said he might justify putting him in irons, if he feared an escape, or if the prisoner was unruly. *Farrest.* 52. In the second year of *Geo. 2.* Sir *William Rich* being laid in irons in the *Fleet* prison, had his irons taken off by order of the House of Commons; who thereupon began an inquiry into the conduct of gaolers to prisoners, &c.

Prisoners discharged. A variety of acts have been made, on liberal principles, for relief of insolvent debtors. 'Tis immaterial to set them forth, as they in general vary in some particulars; and the last is too prolix, to insert at large, and yet too particular, to admit of a proper abridgment. Vide the *Stat. 9 Geo. 3. c. 26.*

Privat. See *Black. Com.* 4 P. 333.

Privateers, Are a kind of private men of war, the persons concerned wherein administer at their own costs a part of a war, by fitting out these ships of force, and providing them with all military stores; and they have, instead of pay, leave to keep what they take from the enemy, allowing the Admiral his share, &c.

Privateers may not attempt any thing against the laws of nations; as to assault an enemy in a port or haven, under the protection of any prince or republick, whether he be friend, ally, or neuter; for the peace of such places must be inviolably kept; therefore by a treaty made by King *William* and the States of *Holland*, before a commission shall be granted to any privateer, the commander is to give security, if the ship be not above 150 tons, in 1500 l. and if the ship exceeds that burden, in 3000 l. that they will make satisfaction for all damages which they shall commit in their courses at sea, contrary to the treaties with that state; on pain of forfeiting their commissions, and the ship is made liable. *Lex Mercat. or Mercb. Compan.* 177, 178.

Besides these private commissions, there are special commissions for privateers, granted to commanders of ships, &c. who take pay, who are under a marine discipline; and if they do not obey their orders, may be punished with death: And the wars in latter ages, have given occasion to princes to issue these commissions, to annoy the enemies in their commerce, and hinder such supplies as might strengthen them, or lengthen out the war; and likewise to prevent the separation of ships of greater force from their fleets or squadrons. *Ibid.*

Ships taken by privateers, were to be divided into five parts; four parts whereof to go to the persons interested in the privateer, and the fifth to his Majesty: And as a farther encouragement, privateers, &c. destroying any French man of war, or privateer, shall receive for every piece of ordnance in the ship so taken 10 l. reward, &c. 4 & 5 W. & M.

By a particular statute lately made, the Lord Admiral, or Commissioners of the Admiralty, may grant commissions to commanders of privateers, for taking ships, &c.

which being adjudged prize, and the tenth part paid to the Admiral, &c. wholly belong to the owners of the privateers and the captors, in proportions agreed on between themselves; and the officers and seamen of ships of war, are to have the sole property of all ships they take, to be divided as his Majesty shall order by proclamation: Also if any ships belonging to the English be taken by the enemy, and afterwards retaken by any of our men of war or privateers, they are to be restored to the owners, on paying an eighth part of the value, in lieu of salvage, after having been in the enemy's possession 24 hours; and if above that time, paying further to a moiety, &c. And ships of war or privateers, taking any ship of war or privateer of the enemy, the officers and seamen shall be paid by the treasurer of the navy 5 l. for every man who was on board such ship at the beginning of the engagement. *Stat. 13 Geo. 2. c. 4.* See 29 *Geo. 2. c. 34.* for what duties shall be paid on prize goods. See *Stat. 30 Geo. 2. c. 18.*

Privation, (Privatio) A taking away or withdrawing; most commonly applied to a bishop or rector, when by death, or other act they are deprived of their preferments; it seems to be an abbreviation of the word *deprivation*. *Co. Litt.* 329.

Privement enffent, Is where a woman is with child by her husband; but not quick with child. *Wood's Inst.* 662.

Privies, (From the Fr. Privee, i. e. Familiaris) Are those who are partakers, or have an interest in any action or thing, or any relation to another: As every heir in tail is *privy* to recover the land entailed, &c. *Old Nat. Br.* 117. There are five several kinds of *privies*, viz. *Privies of blood*, such as the heir to the ancestor; *privies in representation*, as executors or administrators to the deceased; *privies in estate*, between donor and donee, lessor and lessee, &c. *Privies in respect of contract*; and *privies on account of estate and contract* together. 3 *Rep.* 23, 123. 4 *Rep.* 123. *Latch.* 260.

If a fine be levied, the heirs of him who levied it, are termed *privies*. If a lessor grants his reversion, the grantee and lessee are *privies* in estate: And *privies* in contract extend only to the persons of the lessor and lessee; and where the lessee assigns all his interest, here the lessor and lessee remain *privy* in contract, but not in estate, which is removed by the assignment. 3 *Rep.* 23.

Privies in respect of estate and contract appears, where the lessee assigns his interest, but the contract between the lessor and lessee as to action of debt continues, the lessor not having accepted of the assignee. 3 *Lev.* 295. But where there are *privies* in contract, and the *privy* is altered by assignment of an executor, &c. before any rent due, and after the *privy* of estate by the assignment of the executor's assignee, nothing remains whereby to maintain any action. *Latch.* 260.

There are likewise *privies* in deed, or in law; where the deed makes the relation; or the law implies it, in case of escheats to the lord, &c. And only parties and *privies* shall take advantage of conditions of entry on lands, &c. 1 *Inst.* 516. See *Black. Com.* 2 V. 355. and *Privy* and *Privy*.

Privilege, (Privilegium,) Is defined by *Cicero* in his oration *pro domo sua*, to be *lex privata homini irrogata*. It is, says another, *Jus singulare*, whereby a private man, or a particular corporation is exempted from the rigor of the Common law. It is sometimes used in law for a place which hath some special immunity. *Kitchin,* 118.

Privilege is either *personal* or *real*: A personal privilege is, that which is granted to any person, either against or beyond the course of the Common law: As for example, A member of parliament may not be arrested, nor any of his servants, during the sitting of parliament; nor for a certain time before and after. A *privilege real* is that which is granted to a place, as to the universities, that none of either may be called to *Westminster Hall*, on any contract made within their own precincts, or prosecuted in other courts: And one belonging to the court of *Chancery* cannot be sued in any other court, certain cases excepted; and if he be, he may remove it by writ of *privilege*, grounded on the statute 18 E. 3. *Conwell.*

Privilege is an exemption from some duty, burthen or attendance, to which certain persons are intitled, from a supposition of law, that the stations they fill, or the offices they are engaged in, are such as require all their care; that therefore without this indulgence it would be impracticable to execute such offices to that advantage which the publick good requires. 4 *New Abr.* 215.

1. *Of privilege in suits allowed officers and attendants in the courts of justice.*

2. *Of the privilege of peers and members of parliament.*

3. *Of the proceedings in courts by and against persons intitled to privilege of parliament.*

1. *Of privilege in suits allowed officers and attendants in the courts of justice.*

The officers, ministers and clerks of the courts in *Westminster-Hall* are allowed particular privileges in respect of their necessary attendance on those courts; they are regularly to sue and be sued in the courts *they respectively belong to*, and cannot, (except in certain cases,) be impleaded elsewhere; which privilege arises from a supposition of law, that the business of the court or their clients causes would suffer by their being drawn into another than that in which their personal attendance is required. 2 *Inst.* 551. 4 *Inst.* 71. *Vaugb.* 154. *Dyer* 377. a. pl. 30.

Anderson Ch. J. of *C. B.* brought trespass by bill for breaking his house in the city of *Worcester*, against a citizen of the city; the mayor and commonalty came and shewed a charter granted by *Edward VI.* and demanded continuance of pleas; but it was refused, because the privilege of that court, of which the plaintiff was a chief member, is more ancient than the patent; for the justices clerks and attorneys ought to be there attending their business, and shall not be impleaded or compelled to implead others elsewhere; and this privilege was given the court on the original erection of it. 3 *Leon.* 149.

An attorney so long as he remains on record, shall have his privilege; therefore where it was moved, that *J. S.* should put in special bail, being an attorney at large, and having discontinued his practice, the court said, that attorneys at large have the same privilege with the clerks of the courts, and are to appear *de die in diem*; and they were not satisfied that he had discontinued his practice. *Bro. tit. Attorney* 67. *Tit. Bill* 24. 1 *Vent.* 1.

But where *J. S.* was arrested in *B. R.* and after the arrest he procured himself to be made an attorney of *C. B.* and prayed his privilege, it was disallowed, because it accrued *pendente lite*. 2 *Roll. Rep.* 115.

In debt against the warden of the *Fleet*, by bill of privilege, he refused to appear; the court doubted how they could compel him, as they could not forejudge him the court, he having an *inbriance* in his office; but it being surmised that he made a lease of his office, it was held, that he should not have his privilege, for that the lessee, and not he, was the officer during the lease. 2 *Leon.* 173.

So if the marshal of *B. R.* grants his place for life; the grantor has no privilege during that time. 1 *Vent.* 65.

A clerk of *B. R.* was sued in an inferior court for a debt under five pounds, and had a writ of privilege allowed; for the stat. 21 *Jac.* 1. c. 23. never intended to take away the privilege of attorneys. *Palm.* 403.

In the court of Exchequer there are three sorts of privilege: 1st, *As debtor.* 2dly, *As accountant.* 3dly, *As officer.* *Hard.* 365.

J. S. was sued in *London*, which he removed into *B. R.* and afterwards prayed his privilege of the court of Exchequer; and on the puisne Baron's coming into court, and bringing the red book of the Exchequer, which shewed that he was an escheator, and so an accountant to the King, the privilege was allowed. *Noy* 40.

If one holds of the Queen as of her manor, he shall not have the privilege of the Exchequer for that cause; but if the King grants tithes, and thereupon reserves a rent *nominis decimarum*, and a tenure of him, there he shall have privilege. 2 *Leon.* 21.

A *latitat* being sued out against the commissioners of the Treasury, the puisne Baron of the Exchequer came into the court of *B. R.* and brought the red book of the Exchequer, which is deemed *record in that court*; and thereby it appeared, that the Treasurer had privilege of being sued only in *that court*; and the patent being produced in court which constituted defendants, &c. and granted them the office of Treasurer of *England*, their privilege was allowed without putting them to bring a writ of privilege; the court grounding themselves on the record before them. 2 *Show.* 299.

It hath been held, that the Treasurer of the navy is *eo ipso* an accountant; and that an accountant's privilege will hold against a special privilege in another court, *as officer of the court* or otherwise; tho' it be not alleged, that such an accountant is entred on his account; for that every accountant may be attached by the court to make up his account, and must attend for that purpose *de die in diem.* *Hard.* 316. See *Moor* 753. 2 *Inst.* 23, 551. *Bro. Privilege* 16.

In debt in *B. R.* against *J. S.* he pleaded to the jurisdiction, That none of the privy chamber ought to be sued in any other court, *without the special licence of the lord chamberlain of the household*, and that he was one of the privy chamber; on demurrer to this plea, the court overruled it with great resentment, and awarded a *Respondens ouster.* *Raym.* 34. 1 *Keb.* 137.

It was agreed, that the privilege of the court of *C. B.* which Serjeants claimed, extended only to inferior courts, not to the courts in *Westminster-Hall*; and that he may be sued in any of these, because he is not confined to that court alone, but may practise in any other court; but it is otherwise as to attorneys or prolocutors, who cannot practise in their own name in any other court but such as they respectively belong to; that therefore a Serjeant at law is to be sued *by original*, not by bill of privilege. 2 *Lev.* 129. 3 *Keb.* 42. *Moor* 296. *S. C.*

So in action by bill brought in *C. B.* against a serjeant at law, he pleaded that *he ought to have been sued by original, and not by bill*; and on demurrer, the court held, that the case of a serjeant and prothonotary's clerk were on the same foot, neither of them being bound to personal attendance, as prothonotaries and attorneys were; that therefore he ought to have been sued *by original*, accordingly gave judgment for defendant. *Trin.* 7 *Geo.* 2. Serjeant *Girdler's* case.

J. S. being arrested by a writ out of *C. B.* brought his writ of privilege as clerk of the crown office; but it appearing that he was only a clerk to a clerk of that office, and not an immediate clerk of the office, a *supersedeas* to the writ of privilege was granted on motion; the court having agreed, That he had no more privilege than an attorney's clerk. 2 *Show.* 287.

A Serjeant at law, barrister, attorney or other privileged person, whose attendance is necessary in *Westminster-Hall*, may lay his action in *Middlesex*, tho' the cause of action accrued in another county; and the court on the usual affidavit will not change the venue. *Stil.* 460. *Moor* 64. 2 *Show.* 242.

But it hath been held, That if a privileged person be sued, and the action brought against him in the right county, his privilege will not intitle him to have it tried in *Middlesex.* *Carth.* 126. 1 *Show.* 148.

If an attorney lays his action in *London*, the court will change the venue on the usual affidavit; for by not laying it in *Middlesex*, he seems regardless of his privilege, and is to be considered as a person at large. 2 *Vent.* 47. *Salk.* 668.

On a motion to discharge a rule which had been obtained for changing the venue, it appeared, That the plaintiff was a barrister and master in Chancery; and the court held that he had privilege, by reason of his attendance, to lay his action in *Middlesex*, therefore discharged the rule. 2 *Raym.* 1556.

2. *Of the privilege of peers and members of parliament.*

All peers, without distinction are intitled to privilege; for they are equally obliged to attend the service of the publick, and are always supposed amenable, and to have sufficient

sufficient property to answer in suits brought against them, and on these grounds are not to be arrested or molested in their persons. This privilege extended formerly to abbots, as it does to bishops, members of the convocation, and members of the house of commons at this day. 4 Inst. 24. Stil. 222, 253. Dyer 314. 1 Mod. 66. Bro. Exig. 3. Moor 767. Scobel's Memorials 88, 103. Sir Simon Dew's Journals 414. Finch 355. Dyer 60. a. in margin. Noy 102. Moor 78. Standf. P. C. 38.

The privilege of parliament according to the law of parliament is of a very extensive nature; but all that is here intended to be treated of is only the taking notice of, and pointing out such cases relative hereto, as are to be found in the books of law; not to determine concerning this privilege as settled by the rules and orders of each house, of which they themselves are the sole judges, tho' the King's courts incidentally take notice thereof, and are bound to determine in matters of privilege when so directed by act of parliament. Lord Coke says of this law, *ab omnibus querenda est, a multis ignorata, a paucis cognita*. 4 Inst. 15. 13 Co. 63. 4 Inst. 23, 50, 363. Prinne's Animad. on 4 Inst. 12. Cro. Car. 181, 604. Lord Raym 1111. See 1 Mod. 66.

This privilege extends only to the peers of Great Britain; so that a nobleman of any other country, or a lord of Ireland, hath not any other privileges in this kingdom than a common person; also the son and heir apparent of a nobleman is not entitled to the privilege of being tried by his peers, which is confined to such person as is a lord of parliament at the time; but it seems that an infant peer is privileged from arrests, his person being held sacred. Co. Lit. 156. 2 Inst. 48. 3 Inst. 30.

The peers of Scotland had no privilege in this kingdom before the union, but now by the 23d article of the union, the sixteen elected peers have all the privileges of the peers of parliament of Great Britain; also all the rest of the peers of Scotland have all the privileges of the peerage of England, excepting only that of sitting and voting in parliament. 9 Co. 117. 1 P. Will. 583.

A peeress by birth is intitled to privilege; so of a peeress by marriage, and that as well during coverture as after; but as a peeress by marriage, is said to lose her dignity by marrying a commoner, 2. If after such marriage she is intitled to any privilege. 2 Inst. 50. Stil. 222, 234, 252. 2 Cha. Ca. 224. Co. Lit. 16. 6 Co. 53. Dyer 79.

It was holden by Holt, that where a person is called by writ to the house of Peers, he is no peer 'till he sits in parliament, the writ giving him no nobility or honour; but that it was the sitting in the house of Lords, and associating himself with them that ennobled his blood; that therefore, if the King or he dies before a parliament meets, the writ is determined, and the party remains a commoner; but he held it otherwise in a creation by letters patents, by which the party is immediately noble without any other act or ceremony; and tho' the parliament never meets, or the King dies, the nobility remains to him and his posterity, according to the limitations in the patent. 4 New Abr. 229.

A member of parliament shall have privilege of parliament, not only for his servants, but for his horses, &c. or other goods distrainable. 4 Inst. 24.

J. S. brought debt against H. who pleaded that he was tenant and servant to Lord Moon, and prayed writ of privilege might be allowed him; plaintiff demurred; it was argued, that the matter of the plea was against the Common statute law; but per Roll Ch. J. you ought not to argue generally against the privilege of parliament; every court hath its privilege; I conceive a writ of privilege belongs to a parliament man, so far as to protect his lands and estate; and you have admitted his privilege by your demurrer. Stil. 139. See Litch 150. and the S. C. Stil. 167, 223. 1 Jon. 155.

The warden of the Fleet insisted on a writ of privilege, alledging that he was obliged to attend the house of Lords; but it appearing that he was sued on an escape, and the court considering the great inconvenience that would ensue, and being of opinion that it was in their discretion whether they would grant such writ or no, on a motion they said he might plead if he would, but

they would not award such writ, or if his privilege was infringed, he might complain to the house of Lords. 2 Vent. 154.

In debt, the defendant pleads he was a servant to a member of parliament, and *ideo capi seu arrestari non debet*; the plaintiff prays judgment, and *quia videtur quod tale privilegium quod magnates, &c. & eorum familiares capi seu arrestari non debent; sed nullum habetur privilegium quod non debent implacitari, ideo respondeat onster*. 1 Mod. 146.

Defendant after a general imparlance pleaded, That he was servant to a peer, and by North Ch. J. it is not receivable, for it is the privilege of the master and not the servant; but the defendant ought to sue his writ of privilege, for perhaps his master will not protect him; and if he will not, he is then left to answer; like to the case of a counsellor, where it is the privilege of the client that he shall not be compelled to discover the secrets of his client; but if the client be willing, the court will compel the counsel to discover what he knows; North said, as it was a matter of great consequence, he would advise with the Chancellor and judges, what used to be done in such cases; afterwards it was moved again, and North said it was moved in the house of Lords, and that they had left it to the judges; therefore the plea was rejected. Pasch. 30 Car. 2. in C. B. Lea v. Wheatley.

By an order of the 24th of January 1696, in the house of Lords, it was resolved, That no common attorney or solicitor, tho' employed by a peer, should have the privilege of that house.

By an order of the 24th of May 1724, this privilege was restrained to menial servants, and others necessarily employed about the estates of peers.

By an order of the 22d of January 1715, it was resolved, That every peer should upon his honour certify to the house, that the persons protected were within the privilege of the house; and should by letter acquaint the party, arresting such privileged person, with the same.

An attorney was taken in execution on a *ca. sa.* but upon a letter under the hand and seal of the Lord Say and Seal, the sheriff discharged him as steward to his lordship; a rule was obtained at the side-bar for the return of the writ; and on motion to discharge this rule, it was urged in behalf of the sheriff, that this privilege belonged only to the peer, not to the party, and was not returnable to the process; that therefore the court ought not to insist upon a return, as the sheriff could not justify the detention of defendant, but under peril of the house of peers; but on consideration of the above-mentioned orders, and on considering the nature of this case, that the plaintiff was within the ordinary justice of the court intitled to a return of his writ; that without such return he might be debarred from any further execution; but principally from the great inconvenience that might arise by allowing attorneys, who are officers to the courts in which they respectively practise, and therefore amenable to those courts, this kind of privilege; the court gave the plaintiff liberty to proceed against the sheriff, but gave him time to make his return. 4 New Abr. 230.

In all civil causes this privilege is regularly to be allowed; so that a peer, or member of the house of Commons, is not to be arrested or molested in his person or estate. Bro. Exigent.

But privilege of parliament doth not extend to high treason, felony, breach of the peace, or surety of the peace. 4 Inst. 25.

Therefore in an indictment for treason or felony, trespass *vi & armis*, assault or riot, process of outlawry shall issue against a peer; for the suit is for the King, and the offence is a contempt against him; but in civil actions between party and party, regularly a *capias* or *exigent* lies not against a lord of parliament. 2 Hal. Hist. P. C. 199. 2 Hawk. P. C. 424.

If a peer of parliament be convicted of a disseisin with force, a *capias pro fine* and *exigent* shall issue; for the fine is given by statute, in which no person is exempted. Cro. Eliz. 170. See Dyer 314.

So in debt on an obligation against the Earl of Lincoln, who pleaded *non est factum*, which being found against him, the judgment was *ideo capiatur*; which on

a writ of error brought by him was objected to, in that a *capias* does not lie against a peer, *sed non allocatur*; for by this plea found against him, a fine is due to the King, against whom none shall have any privilege. *Cro. Eliz.* 503.

An information was exhibited in *B. R.* against the Earl of *Devonshire*, for striking in the King's palace; which being in time of parliament, he insisted on his privilege, and refused to plead in chief, but put in his plea of privilege, to which there was a demurrer, and the plea over-ruled, and he was fined 30,000*l.* *Comb.* 49.

In the case of the seven bishops it was insisted, that peers of the realm could not be committed in the first instance, for a misdemeanor before judgment; and that no precedent could be shewed where a peer had been brought in by a *capias*, which is the first process for a bare misdemeanor; and they put in a plea in writing of their being peers, &c. but the plea was rejected. 3 *Med.* 215.

Peers are punishable by attachment for contempts in many instances; as for rescuing a person arrested by due course of law; for proceeding in a cause against the King's writ of prohibition; for discharging other writs, wherein the King's prerogative, or the liberty of the subject are nearly concerned; and for other contempts which are of an enormous nature. 2 *Hawk.* P. C. 152.

If a peer be returned on a jury, on his bringing a writ of privilege he may be discharged; also it seems the better opinion, that without such writ he may either challenge himself, or be challenged by the party. *Dyer* 314. *Moor* 767. 9 *Co.* 49. *Co. Lit.* 157. 1 *Jon.* 153.

Also in the case of Sir *Edward Bainton*, who being returned on a jury, the court would not force him to be sworn against his will, he being a parliament man, and the parliament then sitting. *Pasch.* 27 *Car.* 2. in *B. R.*

A day of grace shall not be given against a lord of parliament; for he is presumed to be attendant on the service of the publick. 9 *Co.* 49. a.

So if a peer be made steward of a base court, or ranger of a forest, he may from the dignity of his person, and the presumption that he is engaged in the more weighty affairs of the Commonwealth, exercise these offices by deputy; tho' there are no words for this purpose in his creation. 9 *Co.* 49. a.

So if a licence be granted to a peer to hunt in a chase or forest, he may take such a number of attendants with him as are suitable to his dignity. 9 *Co.* 49. b.

A peer or lord of parliament cannot be an approver; for it is against *Magna Charta* for him to pray a coroner, 3 *Inst.* 129.

If a peer bring an appeal, defendant shall not be admitted to wage battle, by reason of the dignity of his person. 2 *Hawk.* P. C. 427.

In *Jenkins* the following privileges are laid down as belonging to peers: 1. They are intitled to a letter misfiv. 2. They have a knight to try an issue which concerns them. 3. They are not to be arrested for any personal action. 4. They are exempted from serving on juries. 5. To have no day of grace against them. 6. Upon the trial of a peer for treason or felony, they try him on their honour only not on oath. 7. When they pass thro' any of the King's forests to attend the King, on blowing a horn they may have a buck or doe, as the season of the year is. 8. They have power in their house to reverse judgments given in the King's Bench. 9. They have the benefit of clergy, tho' they cannot read. 10. They are not liable to find carriages for the King when he removes from one place to another. *Jenk.* 107.

In the case of Colonel *Pit*, the parliament was prorogued the 16th of April 1734, dissolved the 17th, and the new writs bore teste the 18th following, and *Pit*, who was a member of that parliament, was arrested on the 20th; one of the questions in this case was, Whether the arrest was within the time of privilege? And it was determined that it was, altho' defendant had lived for two years before no farther distant from London than *Exmouth*; but the court did not think it necessary, in

the determination of this cause, to ascertain the exact time of privilege that members of the house of Commons were intitled to after a dissolution of parliament. *Trin.* 8 *Geo.* 2. in *B. R.* Col. *Pit's* case. See *Stran. Rep.* 985. and *Reports in Time of Lord Hardwicke* 6—27.

3. Of the proceedings in courts by and against persons intitled to privilege of parliament.

By 12 & 13 *W.* 3. cap. 13. *sect.* 1. Any person may prosecute any suit against any person intitled to privilege of parliament, at any time immediately after the dissolution or prorogation of parliament until a new parliament shall meet, or the same be re-assembled, and immediately after any adjournment of both houses for above fourteen days until both houses meet; and the courts may after such dissolution, prorogation or adjournment, proceed to give judgment, and to make final decrees and sentences; any privilege of parliament notwithstanding.

sect. 2. Provided, That this act shall not subject the person of any person intitled to privilege of parliament, to be arrested during time of privilege; nevertheless if any person have cause of action against any peer, such person after dissolution, prorogation or adjournment, or before any sessions of parliament, may have such process against such peer, as he might have had out of time of privilege; and if any person have cause of action against any person intitled to privilege of parliament, after any dissolution, prorogation or such adjournment, &c. such person may prosecute such person intitled to privilege, by summons and distress infinite, or by original bill and summons, attachment and distress infinite, which the courts are empowered to issue, until they enter a common appearance, or file common bail; and any person having cause of suit may in the times aforesaid exhibit any bill or complaint against any person intitled to privilege, in the Chancery, Exchequer or Dutchy court, and proceed thereon by letter or subpoena as usual; and on leaving a copy of the bill with defendant, or at his last place of abode, may proceed thereon; and for want of an appearance or answer, or for non-performance of any order or decree, may sequester the estate of the party, as is used where the defendant is a peer, but shall not arrest the body of any privileged person, during the continuance of privilege of parliament.

sect. 3. Where any plaintiff by reason of privilege of parliament be stayed from prosecuting any suit commenced, such plaintiff shall not be barred by any statute of limitation, or nonsuited, dismissed, or his suit discontinued for want of prosecution, but shall on the rising of the parliament be at liberty to proceed.

sect. 4. No suit or proceeding against the King's original and immediate debtor, for the recovery of any debt originally and immediately due to his Majesty, or against any person liable to render an account to his Majesty for any part of his revenues, or other original or immediate duty, or the execution of any such process, shall be impeached or delayed by privilege of parliament; yet so that the person of such debtor or accountant, being a peer, shall not be liable to be arrested, or being a member of the house of Commons, shall not, during the continuance of privilege, be arrested by any such proceeding. See *stat.* a & 3 *Ann.* c. 18. 11 *Geo.* 2. c. 24.

sect. 5. This act shall not give any jurisdiction to any court to hold plea of any real, or mixed action in other manner than such court might have done before.

A great improvement hath been made on this law, by the *Stat.* 10 *Geo.* 3. c. 50. whereby liberty is given to proceed against persons intitled to privilege during the sitting of parliament. See the statute, and tit. *Parliament*, and *Peers*.

A peer is to put in his answer to a bill in equity, on his honour only, not on oath; but when he is examined as a witness, he must be sworn.

Also if a peer is by order of court to be examined on interrogatories, as to make an affidavit, the same must be on oath. *Salk.* 513. & *vid. Preced. Chan.* 92.

Lord *Stourton* brought a bill against Sir *Thomas Meers*, to compel him to a specifick performance of articles for purchasing Lord *Stourton's* estate. Sir *Thomas* in his defence

fence insisted, that there were defects in Lord *Stourton's* title to the estate; and it being ordered that Lord *Stourton* should be examined *ex interrogatories* touching his title; it was objected, that Lord *Stourton* being a peer ought to answer on honour only; but it was ruled by Lord *Harcourt*, that tho' privilege did allow a peer to put in his answer on honour only, yet this was restrained to an answer; and as to all affidavits, or where a peer is examined as a witness, he *must* be on oath; and that this examination on interrogatories, being in a cause wherein his Lordship was plaintiff, to force the execution of an agreement, as *his Lordship would have equity, so he should do equity*, and allow the other side the benefit of a discovery, and that in a legal manner; and accordingly ordered Lord *Stourton* to put in his examination on oath. 1 P. Will. 145.

It hath been held, that in an action founded on the 12 W. 3. defendant should have an imparlance; and that the practice is to file a bill in nature of a special *capias* against defendant, and then to summon him; and if he appears on such summons, plaintiff may declare against him, as in *custodia mariscalii*. Hill. 10 Geo. 1. in B. R. *Wadsworth v. Handiside*.

Peers are intitled to a *letter missive*, which method was introduced on a presumption that peers would pay obedience to the Chancellor's letter; and is founded on that respect which is due to the peerage. *Jenk.* 107.

If the Lord doth not appear on the letter, a *subpoena* on motion, is awarded against him; because no subsequent process can be awarded but on a contempt to the Great Seal, and the Chancellor's letter is only *ex gratia*.

If on the service of the *subpoena*, the peer doth not appear, or if he appears, and does not put in his answer, no attachment can be awarded against him, because *his person cannot be imprisoned*; but the proceedings must be by *sequestration*, unless cause, &c. And this is regularly made out, on affidavit made of the service of the letter and *subpoena*, tho' sometimes it is moved for without, since the peer may shew want of service at the day assigned to shew cause why the sequestration should not issue; and this order for a sequestration is never made *absolute without an affidavit* of the service of the order to shew cause, and a certificate of no cause shewn. 2 *Vent.* 342.

A bill being filed against a peer or peers, the first application is for the Chancellor's letter returnable in term time; or it may be *immediate*, if the peer lives in town; but in this case there must be an affidavit, that the original letter is left with the peer at his house, with a copy of the petition as answered; and therewith also is left an office copy of the bill signed by the fix clerk; for if the bill is not signed, the service is irregular. 4 *New Abr.* 238.

This letter is only a *compliment*, and no process to found proceedings on; so that the peer may appear or not, as he pleases; if he fails, a *subpoena* issues against him, and his time for appearing and answering being out, an attachment must be *actually* sealed and entered against him, tho' never executed, to ground a sequestration. It is a motion of course for a sequestration on an attachment *for want of an answer*. 4 *New Abr.* 238.

The peer *must be personally served* with this order, and he hath eight days to shew cause after personal service of the order; if no cause, the order is *absolute*; but if the sequestration is for want of an appearance, and he appears, the plaintiff must run the same race over again for want of an answer, and the peer must pray time to answer, as suitors do. 4 *New Abr.* 238.

The same proceeding is against a member of the house of Commons; there the party proceeds by way of sequestration, only with this difference, that instead of a letter, there always a *subpoena* sued out. *Id.*

A sequestration was granted, unless cause, against Lord *Clifford* for want of an answer; he afterwards put in answer, which being reported insufficient, it was moved for a sequestration absolutely, *an insufficient answer being as no answer*; but the court thought it a hardship in the case of a peer or member of the House of Commons, that a sequestration, which in some respects is in nature of an execution, should be the first process against them; therefore allowed, that in case of an answer which is reported

insufficient, the plaintiff is to move again *de novo*, for a sequestration *nisi*. 2 P. Will. 385.

It was moved for a sequestration *nisi*, for want of an answer, against a menial servant of a peer, as the first process for contempt, in the same manner as in the case of the peer himself; and tho' the motion was granted by the Master of the Rolls, yet the Register refused to draw it up as thinking it against the course of the court; which being moved again before the Chancellor, his Lordship, on reading the Stat. 12 W. 3. likewise granted the motion, *it appearing to be both within the meaning and words of the statute*; and if it were not so, as it was plain no attachment would lie against their persons, consequently there would be no remedy against them, and they would have a greater privilege than their Lord, if the process against such menial servant were to be a *subpoena*. 1 P. Will. 535.

For more learning on this subject, see 17 Vin. Abr. and 4 New Abr. tit. Privilege. See also tit. Parliament, and Peers; and Black. Com. 1 V. 163, 166, 272. 3 V. 289.

Privileged Places. Formerly one of the greatest obstructions to publick justice, both of the civil and criminal kind, was the multitude of pretended privileged places, where indigent persons assembled together to shelter themselves from justice, (especially in London and Southwark) under the pretext of their having been antient palaces of the crown, or the like: All of which sanctuaries for iniquity are now demolished, and the opposing of any process therein is made highly penal. Black. Com. 4 V. 129.

A person was arrested in the Temple, and on motion to set it aside, it was insisted for him, that the Temple is privileged from arrests by the King's grant; for which the authority of *Stow's Chronicle* and *Dugdale* were alledged: But by *Holt*, If the King hath made any such grant to that society, 'tis void in law, they having no court of justice within themselves: 'Tis true, the Temple is *extraparochial*, and not within any parish, nor in the city, so as to come within the customs of the city, but 'tis within the county of the city; and *White Friars* is within the jurisdiction of the city: Yet the court inclined not to countenance arrests in the Temple, especially in term time; tho' they would not set aside this arrest; so defendant was held to special bail.

By 8 & 9 W. 3. c. 26. for preventing the many ill practices used in privileged places to defraud persons of their debts; the pretended privileges of *White Friars*, the Savoy, *Salisbury-Court*, *Ram-Alley*, *Mitre Court*, *Fuller's Rent*, *Baldwin's Gardens*, *Montague Close*, the *Minorie*, *Mint*, *Clink*, or *Deadman's Place* are taken away. And the sheriffs of London or their officers are enabled to take the *posse comitatus*, and such other power as shall be requisite, and enter such privileged places to make any arrest on legal process, and in case of refusal to break open doors.

The Stat. 9 Geo. 1. c. 28. enacts, That if any person within *Suffolk Place*, or the *Mint*, or the pretended limits thereof, wilfully obstruct persons in executing any writ, &c. or abuse any person executing the same, whereby he receive damage or bodily hurt, the person offending shall be transported. And on complaint to three justices, &c. by any person who shall have a debt owing from any one who resides in the *Mint*, having a legal process taken out for recovery thereof, if the debt be above 50 l. on oath thereof the justices are empowered to issue their warrant to the sheriff of *Surrey*, to raise the *posse*, and to enter the pretended privileged place, and arrest the party, &c.

See the several statutes of 8 & 9 W. 3. c. 27. f. 15. 9 Geo. 1. c. 28. 11 Geo. 1. c. 22.

Privy, (*Privitas*) Private familiarity, friendship, inward relation: If there be lord and tenant, and the tenant holds of the lord by certain services, there is a privy between them in respect of the tenure. *Cowell*.

There are three sorts of privities, *viz.* Privy in estate, in blood and in law.

Privies in blood are intended of privies in blood inheritable, and this is in three manners, *viz.* inheritable as general heir, or as special heir, or as general and special heir. Privies in estate are as joint tenants, baron and feme, donor and donee, lessor and lessee, &c. Privies in law

law are, when the law without blood or privity of estate casts the land on one, or makes his entry lawful, as lord by escheat, lord who enters for mortmain, lord of villain, &c. 8 Rep. 42. b. Jo. 32.

There are *three* other sorts of privities, *viz.* in respect of estate only, contract only, estate and contract together.

Privy of estate is, as if the lessor grants over his reversion, (or if the reversion escheat.) Now between the grantee (or the lord by escheat) and the lessee, there is privy in estate only. So between the lessor and assignee of lessee; for *no contract was made between them.*

Privy of contract only, is *personal* privy, and extends only to the person of the lessor, and to the person of the lessee; as in the principal case when the lessee assigned over his interest, notwithstanding his assignment the privy of the contract remained between them, tho' privy of the estate be removed by the act of the lessee himself; and the reason of this is, 1st, Because the lessee himself shall not prevent by his own act such remedy which the lessor had against him by his own contract; but when the lessor granted over his reversion, there, against his own grant, he cannot have remedy, because he has granted the reversion to the other, to which the rent is incident. 2dly, The lessee may grant the term to a poor man, who shall not be able to manure the land, and who will by indigence, or for malice, permit it to lie fresh, and then the lessor shall be without remedy, either by distress, or by action of debt, which shall be inconvenient, and will concern in effect every man, (because for the most part every man is a lessor, or a lessee;) and for those two reasons all the cases of entry by tort, eviction, suspension and apportionment of the rent are answered; for in such cases it is either the act of the lessor himself, or the act of a stranger, and in none of the cases, the sole act of the lessee himself shall prevent the lessor of his remedy, and will introduce such inconvenience as has been said.

Privy of contract and estate together, is between the lessor and lessee himself. 3 Rep. 23.

Privy, (derived from the French *prive*, *familiaris*) signifies him who is partaker, or hath an interest in any action or thing; as *privies* of blood, (Old Nat. Brew. 117) are those who are linked in consanguinity; every heir in tail is *prive* to recover the land intailed. *Lit. fol. 147.* No *privy* was between me and the tenant. *Lit. fol. 106.*

If I deliver goods to a man, to be carried to such a place, and he, after he hath brought them thither, steal them, 'tis felony; because the *privy of delivery* is determined as soon as they are brought thither. *Stamf. Pl. Cor. lib. 1. cap. 15. 25.* Merchants *privy* are opposite to merchant strangers. 2 Ed. 3. 9 & 14.

The author of the *New Terms of the Law* maketh many sorts of *privies*, *viz.* privies in estate, privies in deed, privies in law, privies in right, and privies in blood. See Perkins 831, 832, 833. and Co. l. 3. fol. 23. and lib. 4. 123, 124. mentions four kinds of *privies*, *viz.* *Privies in blood*, as the heir to his father; *privies in representation*, as executors, or administrators to the deceased; *privies in estate*, as he in the reversion, and he in the remainder, when land is given to one for life, to another in fee, for that their estates are created both at one time: The fourth is *privy in tenure*, as the lord by escheat, that is, when the land escheateth to the lord for want of heirs. Cowell.

Privies inheritable, as heir general, shall take benefit of the infancy, as if infant tenant in fee-simple makes feoffment, and dies, his heir shall enter. The same law of him who is heir general and special, and also of him that is heir special, and not general. But privies in estate (unless in some special cases) shall not take advantage of the infancy of the other. 8 Rep. 42. b. 43. See *Privies and Privy*.

A surrender by an idiot of an estate for life to destroy a contingent remainder is void *ab initio*, therefore any person may take advantage of it, as well privy in estate as heir at law. But a feoffment in livery made *proprio manu* of the idiot, not being merely void, makes a difference. *Carth. 436.*

Privilegium Clericale, Or in common speech the benefit of clergy. See *Black. Com. 4 ff. 358, &c.*

Privilegium Property propter. See *ib. 2 ff. 394.*

Privy Council, (*Consilium Regii*, *Privatum Consilium*) Is a most honourable assembly of the King and Privy Counsellors in the King's court or palace, for matters of state. 4 Inst. 53.

The King sits himself in council, and appoints Privy Counsellors without patent or grant, by putting them on the list, and on their removal striking them out, which he may do as he pleases: They take an oath to the King, justly to advise him, to keep secrecy, &c. Their number at the first institution was twelve; but at this time is without limitation, at the King's will.

Next to the Lord Privy Seal of the Council, the Lord Privy Seal sits in Council, the Secretaries of State, and many other Lords and Gentlemen: And in all debates of the Council, the lowest delivers his opinion first, and the King declares his judgment last; and thereby the matter of debate is determined. 4 Inst. 55.

It is consistent with safety for a Privy Counsellor to give the King counsel when demanded; and the best counsel is ever given to a Prince, when the question is to evenly pronounced, as the Counsellor cannot discern which way the King himself inclines; resolution should never precede deliberation, nor execution go before resolution; and when on debate and deliberation, any matter is well resolved by the Council, a change of it on some private information is neither safe nor honourable. 4 Inst.

The Court of Privy Council is of great antiquity: The government in England was originally by the King and Privy Council; tho' at present the King and Privy Council only intermeddle in matters of complaint on sudden emergencies; their constant business being to consult for the publick good in affairs of state. 4 Inst. 53.

The Lords and Commons assembled in Parliament have often transmitted matters of high concern to the King and Privy Council: And acts of the Privy Council, whether orders or proclamations, were of great authority; and Hen. 8. procured an act of parliament to be made, that with the advice of his Privy Council, he might set forth proclamations, which should have the force of acts of parliament; but that statute was repealed in the reign of Ed. 6.

Tho' acts of the Privy Council still continued of great authority until the reigns of Charles the First and Second: And by these were controversies sometimes determined touching lands and rights, as well as the suspension of penal laws, &c. But this seemed to be contrary to the 25 Ed. 3. cap. 4.

And by 16 Car. 1. cap. 10. it is declared, that neither the King, nor the Privy Council, have authority by petition, &c. to determine or dispose of lands, &c. of any subject.

The King, with advice of his Council, publishes proclamations binding to the subject; but they are to be consonant to, and in execution of the laws of the land.

It is in the power of the Privy Council to inquire into crimes against government; they may commit persons for treason, and other offences against the state, in order for their trial in other courts; and any of the Privy Council may lawfully do it.

But they take cognizance of no private matters that may be determined in other courts; yet the kingdom of Ireland and the Plantations are in many respects subject to the controul, and under the direction of the Privy Council; and law controversies among the subjects of Jersey and Guernsey, &c. are determined by the Privy Council. 3 Inst. 182. 4 Inst. 53. Wood's Inst. 458.

By 33 Hen. 8. cap. 23. Persons examined by the Privy Council, on treasons, &c. done within or without the realm, may be tried before commissioners of Oyer and Terminer, appointed by the King in any county of England: This statute, as far as it relates to treason committed within the kingdom, is repealed by 1 & 2 P. & M. cap. 10.

If a person be killed beyond sea, out of the realm, the fact may be examined by the Privy Council, and the offender tried according to the aforesaid statute.

Conspiracy by the King's servants, against the life of a Privy Counsellor, &c. is felony. 3 Hen. 7. cap. 14. And persons attempting to kill or unlawfully assault any Privy Counsellor, when in the execution of his office, are guilty of felony without benefit of clergy, by the 9 Ann. cap. 16. And antiently if one did strike another in the house of a Privy Counsellor, or in his presence, the party offending was to be fined. 4 Inst. 53.

No person born out of the King's dominions, except of English parents, shall be of the Privy Council. 12 W. 3. c. 2.

There is to be but one Privy Council in Great Britain: And the Privy Council is not dissolved by death of the King; but continue for six months, &c. 6 Ann. c. 5, 7. Vide the Stat. 3 H. 7. c. 14. Also 9 Ann. c. 16, and 1 Hawk. P. C. c. 17. sect. 25. c. 18. sect. 8. 2 Hawk. P. C. c. 16. sect. 4. c. 15. sect. 66 to 72. And see Black. Com. 1 V. 229, &c.

Privy Seal, (*Privatum Sigillum*) Is a seal which the King useth to such grants or things, as pass the Great Seal. 2 Inst. 554.

First, they pass the Privy Signet, then the Privy Seal, and lastly, the Great Seal of England; and the clerks of the Privy Signet office write out such grants, patents, &c. as pass the *Sign Manual*, which being transcribed and sealed with the signet, is a warrant to the Privy Seal, as the Privy Seal is a warrant to the Great Seal. Wood's Inst. 457.

How the King's grants, writings, and leases, shall pass the Privy Signet, Privy Seal, and Great Seal; and the duties of the clerks of the Privy Signet, and Privy Seal, and what fees shall be paid them and many articles concerning passing the King's grants, &c. are mentioned in the statute 27 H. 8. cap. 11.

No protection can be granted under the Privy Seal, but under the Great Seal: But a warrant of the King under the Privy Seal to issue money out of his coffers, is sufficient; tho' not under the Privy Signet. 2 Inst. 555. 2 Rep. 17. 2 Roll. Abr. 183. And the Privy Seal is sometimes used in things of less consequence, that never pass the Great Seal; as to discharge a recognisance, debt, &c. But no writ shall pass under the Privy Seal, which touch the Common law. 2 Inst. 555. And matters of the Privy Seal are not issuable, or returnable in any court, &c. 3 Nels. Abr. 211. See *Keeper of the Privy Seal*, and Black. Com. 2 V. 347.

Prizes. See *Privateer*, and *Table to the Statutes*.

Privy Council. See *Verdict*, and Black. Com. 3 V. 377.

Pro, Is a preposition, signifying for, or in respect of a thing; as *pro consilio*, &c. And in law, *pro* in the grant of an annuity *pro consilio*, shewing the cause of the grant amounts to a condition: But in a feoffment, or lease for life, &c. it is the consideration, and doth not amount to a condition; and the reason of the difference is, because the state of the land by the feoffment is executed, and the grant of the annuity is executory. Plowd. 412. Wood's Inst. 231.

Probate, In the laws of Canutus, was used for to claim a thing as a man's own. Leg. Canut. cap. 44.

Probate of Testaments, (*Probatio Testamentorum*) Is the exhibiting and proving wills and testaments before the ecclesiastical judge, delegated by the bishop, who is ordinary of the place where the party dies: And if all the deceased's goods, chattels and debts owing to him, were in the same diocese, then the bishop of the diocese, &c. hath the probate of the testament; but if the goods and chattels were dispersed in divers dioceses, so that there were any thing out of the diocese where the party lived, to make what is called *bona notabilia*, then the archbishop of Canterbury or York, is the ordinary to make probate by his prerogative. Blount.

The probate of a will is usually made in the spiritual court, and is done by granting letters testamentary to an executor under seal of the court, by which the executor is enabled to bring any action, &c. And if such letters testamentary are granted to the party who exhibits the will, merely on his oath, by swearing that he believeth it to be the last will of the deceased; this is called proving it in common form, and such a probate may

be controverted at any time: But if the executor, besides his own oath, produces witnesses to prove it to be the last will of the deceased, and this in the presence of the parties who claim any interest, or in their absence, if summoned and do not appear; this is termed a *probate per testes*, which cannot be questioned after thirty years. 2 Nels. Abr. 1301.

On an issue whether the deceased made an executor or no, the probate of the will was adjudged good proof. 2 Lill. Abr. 375. And where the probate of a will is produced in evidence at a trial, defendant cannot say that the will was forged, or that the testator was *non compos mentis*, because it is directly against the seal of the ordinary, in a matter where he had a proper jurisdiction; but defendant may give in evidence that the seal itself was forged, or that the testator had *bona notabilia*, or he may be relieved on appeal. 1 Lev. 235. Raym. 405. 1 Strange 481.

As the judge of the Spiritual Court only can determine the validity of wills for things personal; therefore the probate of such a will is undeniable evidence to a jury, and may not be controverted at Common law. 1 Ld. Raym. 262.

A probate, according to Holt, is evidence of a will only as to chattels: But if a will of lands be lost, it shall be allowed for such a will concerning lands. Ibid. 731, 735.

When probate is to be granted of a will, wherein a legacy is interlined in a different hand, and supposed to be forged, the executor has no remedy but in the Spiritual Court; where the will ought to be proved, with a special reservation as to that clause. 1 Peer Will. 358.

Notwithstanding appeal from a will, a person is complete executor by the probate; tho' the probate may be traversed, if an executor plaintiff do not conclude with a *profert hic in curia*, or defendant may demand oyer of the will. 3 Bulst. 72.

An executor being made by the act of the party deceased, the law intitles him to the probate of the will; and the probate cannot be revoked or altered, which would in effect make a new will; yet it may be suspended by an appeal: But if administration be granted to one, this is by act of the court; and if he afterwards become bankrupt, &c. the administration may be repealed. 1 Kell. Rep. 226. Show. 293. 1 Salk. 36. 2 Nels. Abr. 1302.

By 21 Hen. 8. c. 5. it is ordained, that on probate of wills, &c. 6 d. and no more shall be taken by the Register, where the goods of the deceased do not exceed five pounds value; and when the goods are above the value of 5 l. and under 40 l. the fee to the Judge shall be 2 s. 6 d. and to the Register 1 s. and if the goods exceed 40 l. in value, the Judge's fee is 2 s. 6 d. and to the Register 2 s. 6 d. but this he may refuse, and take a penny for every ten lines of the will, &c. And if the officer takes more than his due fees, he shall forfeit 10 l. to be divided between the King and the party grieved.

But it hath been held on this statute, that a transcript of the will must be brought to the Register ready ingrossed, and with wax to be sealed, so that the Register, &c. may have nothing to do but to annex the probate to it; and then no fee shall be taken for such transcript. 4 Inst. 336. Co. Ent. 166.

The power of granting probates and administrations of the goods of persons dying, for wages or work done in the King's docks and yards, shall be in the ordinary of the diocese where the person dieth, or in him to whom power is given by such ordinary, exclusive of the prerogative court, &c. Stat. 4 & 5 Ann. c. 16. See *Executor*, &c. and Black. Com. 2 V. 508.

Probator, An accuser, or approver, or one who undertakes to prove a crime charged upon another.

The word was strictly meant of an accomplice in felony, who to save himself confessed the fact, and accused any other principal or accessory, against whom he was bound to make good the charge by duel, or trial by the country, and then was pardoned life and members, but yet to suffer transportation. — Cum probator persequitur quod promissit, tenetur ei conventio, scilicet ut vitam habeat & membra. Sed in regno remanere non debet, etiam si velit plegios invenire. Bracton. Vid. Fleta, lib. 2. cap. 52. sect. 42, 44.

Procedendo,

Procedendo, Is a writ which lieth where an action is removed from an inferior to a superior court, as the *Chancery*, *King's Bench*, or *Common Pleas*, by *habeas corpus*, *certiorari*, or writ of *privilege*; to send down the cause to the court from whence removed, TO PROCEED ON it, it not appearing to the higher court that the suggestion is sufficiently proved. *F. N. B.* 153. 45 *Rep.* 63. 21 *Jac.* 1. *cap.* 23.

And if the party who sues out a *habeas corpus*, or *certiorari*, doth not put in good bail in time, (where good bail is required) then there goes this writ to the inferior court TO PROCEED *non obstante* the *habeas corpus*, &c. 2 *Lill. Abr.* 376.

If a *certiorari* or *habeas corpus*, to remove a cause, be returned before a judge, the judge will give a rule thereon to put in good bail, by such a day, which if defendant on serving his attorney with a copy of the rule, doth not do, then the judge will sign a warrant for a *procedendo*, to remove the cause where the action was first laid: Also if bail be put in at the time, and do not prove good, the judge will grant a rule for better bail to be put in by such a day, or else to justify the bail already put in; which if defendant doth not do, the judge will then likewise grant a warrant for a *procedendo*. 2 *Lill.* 377.

Where bail put in on removal of a cause into *B. R.* is disallowed by the court, if defendant on a rule for that purpose, and notice given, refuse to put in better bail, such as the court shall approve of, a *procedendo* may be granted; for disallowing the bail makes defendant in the same condition as if he had put in no bail, and until the bail is put in and filed, the court is not possessed of the cause so as to proceed in it. *Mich.* 24 *Car. B. R.*

After a record returned, and defendant hath filed bail in *B. R.* on a cause being removed, a *procedendo* ought not to be granted; because by giving and filing bail in this court, the bail below is discharged. *Sid.* 313. 2 *Nels. Abr.* 1304. And it hath been held, that by the *Common law*, if a *certiorari* be once filed, the proceedings below can never be revived by any *procedendo*. *Hawk.* *P. C.* 294.

When a cause by the *custom of London* is actionable, and will not bear an action at the *Common law*, if on *habeas corpus* or *certiorari*, brought to remove such cause into *B. R.* it doth so appear to the court; the court will grant a *procedendo* to authorise the court of *London* to proceed in the matter; otherwise the party who brought the action would be without remedy. 2 *Lill. Abr.* 376. This writ of *procedendo* is called a *procedendo in loquela*. See *Black. Com.* 1 *V.* 353.

Procedendo on Aid Prayer. If a man pray in aid of the King, in a real action, and aid be granted; it shall be awarded that he sue to the King in *Chancery*, and the justices in the *Common Pleas* shall stay until the writ of *procedendo de loquela* come to them: And if it appear to the judges by pleading, or shewing of the party, that the King hath interest in the land, or shall lose rent, &c. there the court ought to stay until they have from the King a *procedendo in loquela*: And then they may proceed in the plea, until they come to give judgment; when the justices ought not to proceed to judgment, without a writ for that purpose. *New Nat. B. R.* 342. So in a personal action, if defendant pray in aid of the King, the judges are not to proceed till they receive a *procedendo in loquela*. And tho' they may then proceed and try the issue joined, they shall not give judgment until a writ comes to them to proceed to judgment. *Ibid.*

Procedendo ad Judicium. Lies where the judges of any court delay the party, plaintiff or defendant, and will not give judgment in the cause, when they ought to do it. *Wood's Inst.* 570.

If verdict pass for the plaintiff in *assise of novel disseisin* before the justices of assise, and before they give judgment, by a new commission, new justices are made; the plaintiff in assise may sue forth a *certiorari*, directed to the other justices to remove the record before the new justices; and another writ to the new justices to receive and inspect the record, and then proceed to judgment, &c. *New Nat. Brev.* 342, 343.

Where the authority of commissioners of *oyer and terminer*, &c. is suspended by writ of *superseas*; their

power may be restored by a writ of *procedendo*. *Regist.* 124. 12 *Aff.* 21. *H. P. C.* 162. See *Black. Com.* 3 *V.* 109.

Processus, (*Processus a procedendo ab initio usque ad finem*) Is so called, because it proceeds & goes out, upon former matter, either original or judicial; and hath two significations: First, it is largely taken for all the proceedings in any action, real or personal, civil or criminal, from the beginning to the end: Secondly, We call that the *process* by which a man is called into any temporal court; because it is the beginning or principal part thereof, by which the rest is directed; or if taken strictly, it is the proceeding, after the original, before judgment. *Britton* 138. *Lamb. lib.* 4. *Crompt.* 133. 8 *Rep.* 157.

Process is general or special; and special *process* is that which is especially appointed for any offence, &c. by statute: And there is great diversity of *process*. *F. N. B.*

Process to call persons into court, &c. must be in the name of the King; and if it issue from the court of King's Bench, it ought to be under the *teste* of the Chief Justice, or of the senior Judge of the court, if there be no Chief Justice; and if it issueth from any other court, it is to be under the *teste* of the first in commission, &c. *Dalt. cb.* 132. *Finch* 436. *Cro. Car.* 393.

No *process* shall regularly issue in the King's name and by his writ, to apprehend a felon or other malefactor, unless there be an indictment or matter of record in the court, upon which the writ issues. 1 *Halt's Hist. P. C.* 575.

All legal proceedings commence by original writ, indictment, or information; or in *B. R.* by bill of *Middlesex*, or *latitat*, which is the original *process* of this court; and is in nature of an original to cause appearance. 2 *Lill. Abr.* 377.

There is no need of *process* on an indictment, &c. where defendant is present in court; only where he is absent. 2 *Hawk.* 281.

The *process* on indictment of *capias*, &c. is appointed by the 25 *Ed.* 3. and 8 *Hen.* 6. In actions of the case, and writs of annuity and covenant, by *Stat.* 19 *Hen.* 7. 23 *Hen.* 8. And no writ, *process*, &c. shall be discontinued by the King's death. 4 & 5 *W. M.* 1 *Ann.*

If *process* is awarded out of a court, which hath not jurisdiction of the principal cause, it is *coram non judice* and void: And the sheriff executing it will be a trespasser. 2 *Leon.* 89.

Proceedings in the superior and inferior courts must be regularly and formally entered, according to the legal course; or they may be reversed for error, in *B. R.* 2 *Lill.* 379.

Antiently all law proceedings, &c. were in *French*: Tho' by statute since made, it was enacted, that it should be pleaded and answered in *English*, and entered and enrolled in *Latin*. 36 *Ed.* 3. c. 15. 22 *Car.* 2. c. 3. The old entries of the law proceedings in *French* was required by *William the Conqueror*, it being a language which he himself knew; and the use of *Latin* is said to be introduced by the clergy, when the bishops and other spiritual persons were judges, and chief officers of our courts; and this they did, as knowing whatever alterations there were in national languages, the *Latin* would be generally understood. Yet some give another reason for it, that it was done to keep the people in ignorance, and to have in their own power only the interpretation of the laws. *Forsters* 100.

By a late statute, all proceedings in the courts of justice shall be in the *English* tongue, and be written in a common ingrossing hand, not court hand, in words at length, &c. on pain of forfeiting the sum of 50*l.* And mistranslations, errors in form, and mistakes of clerkship, may be amended before or after judgment: Also the statutes of *jeofails* extend to all forms, and proceedings in *English*, except in criminal cases. But this statute extendeth not to the court of *Admiralty*, as to certifying any proceedings beyond the seas, &c. which may be in *Latin* as formerly. *Stat.* 4 *Geo.* 2. c. 26. And in the court of Receipt of the *Exchequer* in *England*, officers and clerks may carry on their business in their usual course; also writs, *process*, pleadings, &c. may be written expressing numbers by figures, and with usual abbreviations in *English*; and names of

of writs, &c. to be expressed in the same language as hath been commonly used, by 6 Geo. 2. c. 6. 14.

As to *civil process*, see *Black. Com.* 3 V. 279. xiii.— And as to the *criminal process*, see *ib.* 4 V. 313.

Obstructing the execution of *lawful process*, is an offence against public justice, of a very high and presumptuous nature; but more particularly so, when it is an obstruction of an *arrest upon criminal process*. And it hath been holden, that the party opposing such *arrest* becomes thereby *particeps criminis*; that is, an accessory in felony, and a principal in treason. *Black. Com.* 4 V. 129.

Procession. In *cathedral* and *conventual churches*, the members had their *stat d processions*, wherein they walked in their most ornamental habits, with musick, singing hymns, and other suitable solemnity: And in every parish, there was a customary annual *procession* of the parish priest, the patron of the church, with the chief flag, or holy banner, and the other parishioners, to take a circuit round the limits of the parish or manor, and pray for a blessing on the fruits of the earth; to which we owe our present custom of *perambulation*, which in most places is still called *processioning* and *going in procession*, tho' we have lost the order and devotion, as well as pomp and superstition of it.

Processum Continuando, Is a writ for the continuance of *process*, after the death of the Chief Justice, or other justices in the commission of *oyer and terminer*. *Reg. Orig.* 128.

Prochein Amy, (*Proximus Amicus*) Is used in law for him who is the *next friend*, or next of kin to a child in his nonage, and in that respect is allowed to deal for the infant in the management of his affairs; as to be his guardian if he holds lands in *socage*, and in the redress of any wrong done him. *Stat. West.* 1. c. 48. *West.* 2. c. 15. 2 *Inst.* 261.

Prochein amy is commonly taken for *guardian in socage*; but otherwise it is he who appears in court for an infant who sues any action, and aids the infant in pursuit of his action: For to sue, an infant may not make an attorney, but the court will admit the *next friend* of the infant plaintiff; and a *guardian* for an infant defendant.

If no guardian is appointed by the father, &c. of an infant, the course of *B. R.* hath been to allow one of the officers of the court to be *prochein amy* to the infant to sue. *Terms de Ley.* 2 *Lill. Abr.* 52.

It hath been held, that a guardian and *prochein amy* are distinct, tho' either of them may be admitted for the plaintiff being an infant.

Prochein amy was never before the Statute *Westm.* 1. and was appointed in *case of necessity*, where an infant was to sue his guardian, or the guardian would not sue for him; for which reason he may be admitted to sue by *prochein amy*, when he is to demand or gain any thing. 2 *Nelf. Abr.* 997.

The plaintiff infant may sue *per guardianum*, or *per proximum amicum ad prosequendum*; and if the admission is to sue *per guardianum*, when it should be *per proximum amicum*, it will be well enough, there being many precedents both ways: But if he is sued, it must be *per guardianum*. *Cro. Car.* 86, 115. *Hut.* 92. If an infant be disturbed by the chief lord, so that he cannot bring *assise*, his *prochein amy* shall be admitted. 3 *Ed.* 1. cap. 48. So where the infant is *elained*, &c. 13 *Ed.* 1. c. 15. See *Infant*, and *Black. Com.* 1 V. 464.

Prochein Avoidance, Is nothing but a power to present a minister to a church when it shall become void: As where one hath presented a clerk to a church, and then grants the *next avoidance* to another, &c. See *Avoidance*.

Proclamation, (*Proclamatio*) Is a notice publicly given of any thing, whereof the King thinks fit to advertise his subjects, and so it is used. 7 *Ric.* 2. cap. 6.

It is plain that the King by his prerogative may, in certain cases and special occasions issue out *Proclamations for prevention of offences*, to ratify and confirm an antient law, or as some books express it, *quoad terrorem populi*, to admonish them that they keep the laws on pain of his displeasure; and such *Proclamations* being grounded on the laws of the realm are of *great force*. *Fortesc. de Laud.* cap. 9. 12 *Co.* 74, 75. 11 *Co.* 87. *Dalf.* 20. pl. 10. 2 *Roll. Abr.* 209. 3 *Inst.* 162.

It is likewise clear, that the subject is obliged on pain of fine and imprisonment to obey every *Proclamation* legally made; and that tho' the thing prohibited were an offence before, that yet the *Proclamation* is a circumstance which highly aggravates it; and on which alone the party disobeying may be punished. 12 *Co.* 74. *Hob.* 251.

It is clearly agreed, that no private person can make any *Proclamation* of a publick nature except by custom, as is usual in some cities and boroughs; this being a prerogative act, with which alone the King is intrusted. *Bro. Proclamat.* pl. 1. 12 *Co.* 75. *Crom. Jur.* 41.

But the King cannot by his *Proclamation* change any part of the Common law, statutes or customs of this realm; nor can he by his *Proclamation* create any offence which was not an offence before; for these things cannot be done without a legislative power, of which in our constitution the King is but a part. *Dalf.* 20. pl. 10. 12 *Co.* 75. 11 *Co.* 87. b.

On this foundation it hath been held, that the King's *Proclamation* prohibiting the importation of wines from France on pain of forfeiture, was against law and void; there being no war at that time subsisting between the nations. 2 *Inst.* 63.

So where an act was made by which foreigners were licensed to merchandize within London; and *H.* 4. by *Proclamation* prohibited the execution of it, and ordered that it should be in suspense *usque ad proximum parliamentum*; and this was held to be against law. 12 *Co.* 75.

On a conference between some Lords of the Privy Council and the two Chief Justices (of which Lord Coke was one) and Ch. B. and Baron Altham, the question was, 1st, Whether the King by *Proclamation* might prohibit new buildings in and about London. 2dly, If the King might prohibit the making starch of wheat. And the judges were of opinion, that the subject could not be restrained in these particulars by the King's *Proclamation*. 12 *Co.* 74.

The King by *proclamation* may call or dissolve parliaments, declare war or peace; for these are prerogative acts with which he is intrusted as the executive part of the law; but if there be an actual war, it is not necessary in pleading to shew that such war was proclaimed. 3 *Inst.* 162. 1 *Hal. Hist. P. C.* 163. *Owen* 45. *Raff. Ent.* 605.

The King by *proclamation* may legitimate foreign coin, and make it current money of this kingdom, according to the value imposed by such *proclamation*; he may legitimate base coin, or mixed below the standard of sterling; he may enhance coin to a higher denomination or value; and may decry money that is current in use and payment; and in all these cases a *proclamation*, with a *proclamation writ* under the Great seal, is necessary. *Co. Lit.* 207. b. 5 *Co.* 114. b. *Daw.* 21. 1 *Hal. Hist. P. C.* 192, 197.

The King by *proclamation* may appoint fasts and days of thanksgiving and humiliation; and issue *proclamations* for preventing and punishing immorality and profaneness; and injoin reading the same in churches and chapels. *Comp. Incumb.* 354.

A *proclamation* must be under the Great seal, and if denied is to be tried by the record thereof; but if a man pleads that he was prevented doing a thing by *proclamation*; it seems the better opinion, that he need not aver that such *proclamation* was under the Great seal; for alleging, that such *proclamation* was made, it shall be intended to have been duly made. *Cro. Car.* 180. See 1 *Roll. Rep.* 172.

By the stat. 31 *Hen.* 8. c. 8. The King's *proclamation* was to be of the same effect as an act of parliament; not to prejudice life, liberty, &c. and contemnors of it to be adjudged traitors.

But, as very justly observed by Mr. Justice Blackstone in his *Com.* 1 V. 271. this was "a statute, calculated to introduce the most despotic tyranny, and which must have proved fatal to the liberties of this kingdom, had it not been luckily repealed in the minority of his successor, about five years after," viz. by stat. 1 *Ed.* 6. c. 12. See also *Black. Com.* 4 V. 424.

The King may make a *proclamation* to his subjects, *Quoad terrorem populi*, and put them in fear of his displeasure;

pleasure; but not on any other certain pain, as forfeiture of their land or goods, or to undergo the penalty of a fine and imprisonment, &c. *Dalif.* 20. 2 *Lill. Abr.* 381, 382. Yet the King by his proclamation may inhibit his subjects that they go not out of the realm, without licence; and if the subject act contrary, for this contempt he shall be fined to the King. 12 & 13 *Eliz. Dyer* 296.

There are proclamations of divers kinds; and a proclamation is to be pleaded under the Great seal, without which it doth not bind, &c. *Cro. Car.* 130. Vide *King and Privy Council.* And *Black. Com.* 1 *V.* 270. 4 *V.* 424.

Proclamation of Courts. Is used particularly in the beginning or calling of a court, and at the discharge or adjourning thereof; for the attendance of persons, and dispatch of business: And before a parliament is dissolved, &c. Publick proclamation is to be made, that if any person hath any petition, he shall come in and be heard. *Lex Constitut.* 156.

At the latter end of the assizes, there is usually proclamation made, that no more records of *Nisi prius* shall be put in to be tried at that assizes; after which they will not be received, and all persons who have not then put in their records of *Nisi prius* may depart, and are bound to give no longer attendance at that assizes. 2 *Lill. Abr.* 381.

Proclamation is made in *Courts Baron*, for persons to come in and claim vacant copyholds, of which the tenants died seised since the last courts; and the lord may seize a copyhold, if the heir come not in to be admitted on proclamation, &c. 1 *Lev.* 63.

Proclamation of Exigents. On awarding an exigent, in order to outlawry, a writ of proclamation issues to the sheriff of the county where the party dwells, to make three proclamations for defendant to yield himself, or be outlawed. *Stat.* 6 *Hen.* 8. c. 4. 31 *Eliz.* c. 3. 4 & 5 *Will.* & *Mar.* See *Black. Com.* 3 *V.* 284, xvi. 3 *V.* 314.

Proclamation of a Fine. When any fine of land is passed, proclamation is solemnly made thereof in the court of *Common Pleas* where levied, after ingrossing it; and transcripts are also sent to the justices of assize, and justices of the peace of the county in which the lands lie, to be openly proclaimed there. 1 *R.* 3. c. 7. See *Black. Com.* 2 *V.* 352. xvi.

Proclamation of Nuisances. By statute, proclamation is to be made against nuisances, and for the removal of them, &c. 12 *R.* 2.

Proclamation of Rebellion. Is a writ whereby a man not appearing upon a *subpoena*, or an attachment in the Chancery, is reputed and declared a rebel, if he render not himself by a day assigned. See *Commission of Rebellion.* And *Black. Com.* 3 *V.* 444.

Proclamation of Recusants. There is a proclamation of recusants, by which they shall be convicted, on non-appearance at the assizes. 29 *Eliz.* 3 *Jac.* 1.

Pro confesso. Is where a bill is exhibited in Chancery, to which defendant appears, and is afterwards in contempt for not answering; when the matter contained in the bill shall be taken as if it were confessed by defendant. *Terms de Ley.*

If a defendant is in custody for contempt in not answering, on a *habeas corpus*, which is granted by order of court, to bring him to the bar, the court assigns him a day to answer; and the day being expired, and no answer put in, a second *habeas corpus* is issued, and the party being brought into court a further day is assigned; by which day, if he answer not, the bill on the plaintiff's motion shall be taken *pro confesso*, unless cause be shewed by a day; and for want of such cause shewed on motion, the substance of the bill shall be decreed to plaintiff. *Hill.* 1662. Also after a fourth insufficient answer, the matter of the bill not sufficiently answered unto by the defendant shall be taken *pro confesso*, and decreed accordingly.

Stat. 5 *Geo.* c. 25. enacts, That if in any suit in equity any defendant, against whom process shall issue, shall not cause his appearance to be entered according to the rules of the court, in case such process had been served, and affidavit shall be made, that such defendant is beyond the seas; or that, on inquiry at his usual place of abode, he

could not be found, *se as to be served*, and that there is just ground to believe that such defendant is gone out of the realm, or absconds to avoid being served; the court may make an order, appointing defendant to appear at a day therein to be named, and a copy of such order shall, within 14 days, be inserted in the *London Gazette*, and published on some Lord's day, after divine service, in the parish church where defendant made his usual abode within 30 days next before his absenting; and a copy of such order shall be posted up, viz. a copy of such order made in Chancery, Exchequer or Dutchy Chamber, shall be posted up at the *Royal Exchange*; and a copy of every such order made in any of the courts of equity of the counties Palatine, or of the great sessions in Wales, shall be posted up in some market town within the jurisdiction of the court, nearest to the place where defendant made his usual abode, such place of abode being also within the jurisdiction of the court; and if defendant do not appear within such time as the court appoint, then, on proof made of publication of such order as aforesaid, the court may order plaintiff's bill to be taken *pro confesso*, and make such decree as shall be just; and the court may order plaintiff to be paid his demands out of the estate sequestered according to the decree; such plaintiff giving security, to abide such order touching the restitution of such estate, as the court shall make on defendant's appearance. But in case plaintiff refuse to give security, then the court shall order the effects sequestered to remain under the direction of the court, until the appearance of defendant to defend such suit.—Provided, That this act shall not affect persons beyond the seas, unless affidavit be made of their being in England within two years before the *subpoena*: Nor extend to courts having a limited jurisdiction, unless oath be made of personal residence in such jurisdiction one year before the *subpoena*.

Barnardiston (401 to 404.) tells us, That it is not sufficient on this statute to make affidavit, that the party making it was informed, and believes that defendants withdrew themselves, in order to avoid being served with the process of the court. But it must be likewise sworn by whom the deponent received such information.

Defendant appeared, and stood out to a sequestration, and afterwards, on getting time, put in an answer, which was reported insufficient in near twenty exceptions, and was served with a *subpoena* to make a better answer. The defendant put in another answer, a-like insufficient. It was insisted for defendant, that the practice of taking bills *pro confesso* is not of long standing, the ancient way being to put the plaintiff to make proof of the substance of the bill; and that, in this case, taking all the bill *pro confesso*, where part had been sufficiently answered, seemed very strange. But it was answered, that an insufficient answer is as no answer, therefore the whole to be taken *pro confesso*; and the Master of the Rolls decreed for plaintiff. But Lord Chancellor King, on an appeal, said, He would consider how matters stood at the time of such decree, and that it was sufficient that there then was an answer, and which the plaintiff had admitted to be so by suing his process for a better; and that so defendant confessed the whole bill true, when by the Master's report, (which was a record of the same court) he had answered the greatest part; and when the plaintiff himself had taken the first answer to be an answer in part by serving the defendant with process to put in a better, was against common sense; and reversed the former decree. 2 *Will.* liam's Rep. 556.

If defendant obstinately insists on his demurrer, and refuses to answer, where the court is of opinion, that sufficient matter is alleged in the bill to oblige him to answer, and for the court to proceed upon, the court will decree the matter of the plaintiff's bill; for by the demurrer are confessed all matters of fact that are alleged. *Curf. Canc.* 209.

Proctor, (*Procurator*) Is he who undertakes to manage another man's cause, in any court of the Civil or Ecclesiastical law, for his fee: *Qui aliena negotia gerenda suscipit.* Proctor not to practise, if a popish recusant. 3 *Jac.* c. 5. Not to act as justice of peace: 5 *Geo.* 2. c. 18. See *Black. Com.* 3 *V.* 25.

Proffors of the Clergy. (*Procuratores cleri*) Are those who are chosen and appointed to appear for cathedral or other collegiate churches; as also for the common clergy of every diocese, to sit in the *Convocation* house in the time parliament.

On every new parliament the King directeth his writ to the archbishop of each province, for the summoning of all bishops, deans, archdeacons, &c. to the convocation, and generally of all the clergy of his province, assigning them the time and place in the writ; then the archbishop of *Canterbury*, on his writ received, according to custom directeth his letters to the bishop of *London*, as his provincial dean, first citing him peremptorily, and then willing him to cite in like manner all the bishops, &c. and generally all the clergy of his province, to the place, and against the day prefixed in the writ; but directeth withal, that one *proffor* be sent for every cathedral or collegiate church, and two *proffors* for the body of the inferior clergy of each diocese; and by virtue of these letters authentically sealed, the bishop of *London* directeth his like letters severally to the bishop of every diocese of the province, citing them in like sort, and willing them not only to appear, but also to admonish the deans and archdeacons personally to appear; and the cathedral and collegiate churches, and the common clergy of the diocese to send their *proffors* to the place at the day appointed; and also willet them to certify to the archbishop the names of every person so warned by them, in a schedule annexed to their letter certificatory: Then the bishops proceed accordingly, and the cathedral and collegiate churches, and the body of the clergy make choice of their *proffors*; which being done and certified to the bishop, he returneth all at the day. *Cowell*.

Proconsules, Were those who were called justices in eyre, or *Justiciarii errantes*, in England. *Cowell*.

Procurations, (*Procuraciones*) Are certain sums of money which parish priests pay yearly to the bishop or archdeacon, *ratione visitationis*; formerly the visitor demanded a proportion of meat and drink for his refreshment, when he came abroad to do his duty, and examine the state of the church; afterwards these were turned into annual payments of a certain sum, which is called a procuration, being so much given to the visitor, *ad procurandum cibum et potum*. And complaints were often made of the excessive charges of the procurations, which were prohibited by several councils and bulls; and that of *Clement* the Fourth is very particular, wherein mention is made that the *Archdeacon of Richmond*, visiting the diocese, travelled with one hundred and three horses, twenty-one dogs, and three hawks, to the great oppression of religious houses, &c.

These are also called *Proxies*; and it is said there are three sorts of procurations or proxies; *ratione visitationis*, *consuetudinis*, & *parochialis*; and that the first is of ecclesiastical cognifiance, but the two last are triable at law. *Hardr.* 180.

A libel was brought in the Spiritual court for procurations by the archdeacon of *York*, setting forth, that for ten or twenty years, &c. there had been due and paid to him so much yearly by a parson and his predecessors; who suggested for a prohibition, that the duty had been payable, but denied the prescription, and that the Ecclesiastical court cannot try prescriptions; but it was adjudged, that procurations are payable of common right, as tithes are, and no action will lie for the same at Common law; if he had denied the quantum, then a prohibition might go. *Raym.* 360. See *stat. 34 Hen. 8. c. 19.*

Procurator, Is one who hath a charge committed to him by any person; in which general signification it hath been applied to a vicar or lieutenant, who acts instead of another; and we read of *procurator regni*, and *procurator reipublice*, which is a publick magistrate: Also proxies of lords in parliament are in our law-books called *Procuratores*; the bishops are sometimes termed *procuratores ecclesiarum*; and the advocates of religious houses, who were to solicit the interests, and plead the causes of the societies, were denominated *procuratores monasterii*; and from this word comes the common word *proffor*. It is likewise used for him who gathers the fruits of a benefice

for another man; and *procuracy* for the writing or instrument whereby he is authorized. 3 *R. 2. c. 3.*

Procuratores ecclesiae parochialis, The churchwardens who were to act as proxies and representatives of the church, for the true honour and interest of it. *Paroch. Antiq.* 562.

Procuratorium, The *procuratory*, or instrument by which any person or community did constitute or delegate their proffor or proffors, to represent them in any judicial court or cause.

Prodes homines, Is a title often given in our old books to the Barons of the realm, or other military tenants, who were summoned to the King's council, and were no more than *discreti & fideles homines*, who according to their prudence and knowledge were to give their counsel and advice.

Proditorie, A word necessary to indictments of treason. 2 *Hawk. P. C.* 224.

Profaneness, (*Qu. procul à sano*) Is a disrespect paid to the name of God, and to things and persons consecrated to him. *Wood's Inst.* 396.

Profaneness is punishable by statute; as for reviling the Sacrament of the Lord's Supper, *profanely* using the name of God in plays, &c. *Profaning* the Lord's Day, cursing and swearing, &c. 1 *Ed. 6. c. 1.* 1 *Elix. c. 1.* 3 *Jac. 1. c. 21.* 1 *Car. 1. c. 1.* 13 *Car. 2. c. 9.* 6 & 7 *W. 3. c. 11.* See *Black. Com.* 4 *V.* 59.

Profer, (*Profrum, vel proferum*, from the Fr. *proferer*, i. e. *producere*) Is the time appointed for the accounts of officers in the Exchequer, which is twice in the year. *Stat.* 51 *H. 3.*

As to the *profers of sheriffs*, tho' the certain *debet* of the sheriff could not be known before the finishing of his accounts; yet it seems there was anciently an estimate made of what his constant charge of the annual revenue amounted to, according to a *medium*, which was paid into the Exchequer at the return of the writ of summons of the *pipe*; and the sums so paid were and are to this day called *profer vicecomitis*: But altho' these *profers* are paid, if on the conclusion of the sheriff's accounts, and after allowance and discharges had by him, it appears that there is a surplusage, or that he is charged with more than he could receive, he hath his *profers* paid or allowed him again. *Hale's Sher. Account* 52.

There is a writ, *De attornato vicecomitis pro proffo faciendo*. *Reg. Orig.* 139. And we read of *proffors* in the statute 32 *H. 8. c. 21.* in which place *profer* signifies the offer and endeavour to proceed in an action. See *Brit. c. 28.* and *Flota, lib. 1. c. 38.*

Profer the Half-Mark, That is to offer or tender the half mark. *Vide Half Mark.*

Profer in Curia, Is where the plaintiff in an action declares on a deed, or defendant pleads a deed, he must do it with a *proffert in curia*, to the end that the other party may at his own charges have a copy of it, and until then he is not obliged to answer it. 2 *Lill. Abr.* 382. And if a man pleads by virtue of an indenture, which is lost, on affidavit made thereof, the court will compel the plaintiff to shew the counterpart, that defendant may plead thereto; or will grant an imparlance. *Cro. Jac.* 429.

When he who is party or privy in estate or interest, or who justifies in the right of him who is party or privy, pleads a deed; notwithstanding the party privy claims but part of the original estate, yet he must shew the original deed. 10 *Rep.* 92, 93. But where a man is a stranger to a deed, and claims nothing in it, &c. there he may plead the patent or deed, without a *proffert in curia*. *Ibid.*

A man may claim under a deed of uses, without shewing it; because the deed doth not belong to him, tho' he claims by it, but the convenantor's, and he hath no means to obtain it; and for that it is an estate executed by the statute of uses, so as the party is in by law, like to tenant in dower, or by statute, &c. who may have a rent-charge extended, and need not shew the deed. *Cro. Car.* 442. And in things executed, or estates determined, there need not be any *proffert in curia*. 3 *Lev.* 204. Also an assignee of commissioners of bankrupts need not shew the

the bond to the bankrupt, because he comes in by act of law, &c. *Pro. Car.* 209.

No advantage or exceptions shall be taken for want of a *proferit in curia*; but the court shall give judgment according to the *very right* of the cause, without regarding any such omission and defect, *except* the same be *specialty* and *particularly* set down, and shewn for cause of demurrer. 4 & 5 *Ann. c.* 16.

Where a deed is pleaded and shewn in court, the deed in judgment of law *remains in court all the term* in which it is shewn; and if it be not denied, then at the end of the term it is delivered to the party whose it is: And if it be denied, it shall still remain in court, for if it be found *Non est factum*, it shall be damned. 3 *Rep.* 47, 74, 75. See *Monfrans de fait*, and *Oyer, &c.* And *Black. Com.* 3 *V.* xxii.

Profession, (Professio) Is used particularly for the entering into any *religious order*, &c. By which a monk offered himself to God, by a vow of obedience, chastity, and poverty, which he promised constantly to observe; and this was called *Sanctæ religionis professio*, and the monk a *religious professed*. This entering into religion, whereby a man is shut up from all the common offices of life, is termed a *Civil Death*. See *Black. Com.* 1 *V.* 132. &c.

Profits. A devise of the *profits* of lands, is a devise of the land itself. *Dyer* 210.

A husband devised the *profits* of his lands to his wife, until his son came of age, this was held to be a devise of the lands until that time: Tho' if the lands were devised to the son, and that his mother should take the *profits* of it until he came of age, &c. this would give the mother only an *authority*, not an interest. 2 *Leon.* 221.

By devise of *profits*, the lands usually pass; unless there are other words to shew the intention of the testator. *Moor* 753, 758. 2 *Nelf. Abr.* 1051.

Profits of Courts. The *profits* arising from the King's ordinary courts of justice, make a branch of his revenue. And these consist not only in fines imposed upon offenders, forfeitures of recognizances, and amercements levied on defaulters; but also in *certain fees* due to the crown in a variety of legal matters, as, for setting the Great Seal to charters, original writs, and other forensic proceedings, and for permitting fines to be levied of lands in order to bar entails, or otherwise to insure titles. As none of these can be done without the immediate intervention of the King by himself or his officers, the law allows him certain perquisites and profits, AS A RECOMPENCE FOR THE TROUBLE HE UNDERTAKES FOR THE PUBLIC. These, in process of time, have been almost all granted out to private persons, or else appropriated to certain particular uses: So that, tho' our law proceedings are still loaded with their payment, very little of them is now returned into the King's Exchequer; for a part of whose royal maintenance they were originally intended. All future grants of them, however, by the statute 1 *Ann. stat. 2. c.* 7. are to endure for no longer time than the life of the prince who grants them. *Black. Com.* 1 *V.* 289.

Prohibition, (Prohibitio) Is a writ to forbid any court, to proceed in any cause there depending, on suggestion that the cognizance thereof belongeth not to the court. *F. N. B.* 39. But it is now most usually taken for that writ which lieth for one who is impleaded in the court *christian*, for a cause belonging to the temporal jurisdiction, or the consueance of the King's court, whereby as well the party and his counsel, as the judge himself, and the register are forbidden to proceed any further in that cause. *Conwell.*

As all external jurisdiction, whether ecclesiastical or civil, is derived from the crown, and the administration of justice is committed to variety of courts; hence it hath been the care of the crown, that these courts keep within the limits and bounds of the several jurisdictions prescribed them; for this purpose the writ of *prohibition* was framed; which issues out of the superior court of Common law to restrain inferior courts, whether such courts be temporal, ecclesiastical, maritime, military, &c. on a suggestion that the cognizance of the matter belongs not

to such courts; and in case they exceed their jurisdiction, the officer who executes the sentence, and in some cases the judge who gives it, are in such superior courts punishable, sometimes at the suit of the King, sometimes at the suit of the party, sometimes at the suit of both, according to the variety of the case. 2 *Inst.* 601. *F. N. B.* 40. 12 *C. 6.* 1 *And.* 279. 2 *Jen.* 213. *Skin.* 628.

The reason of *prohibitions* in general is, that they preserve the right of the King's crown, and courts, and the quiet of the subject; that it is the wisdom and policy of the law, to suppose both best preserved when every thing runs in its right channel, according to the original jurisdiction of every court; that by the same reason that one might be allowed to incroach, another might; which would produce nothing but confusion in the administration of justice. *Shew. Par. Ca.* 63.

So that *prohibitions* do not import that the ecclesiastical or other inferior temporal courts are *alia* than the King's courts, but signify that the cause is drawn *ad aliud examen* than it ought to be; therefore it is always said in all *prohibitions* (be the court ecclesiastical or temporal to which it is awarded) that the cause is drawn *ad aliud examen contra coronam & dignitatem Regiam*. 2 *Ink.* 602. 1 *Roll. Rep.* 252. 3 *Bull.* 120. *Palm.* 297.

1. What courts may grant a prohibition; and whether the granting it be discretionary, or ex debito iustitiæ.
2. Who have a right to, and may demand, and join in a prohibition.
3. Of the suggestion for, and manner of obtaining a prohibition.
4. At what time a prohibition is to be, and in what cases it may be granted, to inferior temporal courts.
5. In what cases prohibitions are to be granted to the spiritual courts.

1. What courts may grant a prohibition, and whether the granting it be discretionary, or ex debito iustitiæ.

The superior courts of *Westminster*, having a superintendency over all inferior courts, may in all cases of innovation, &c. award a *prohibition*; in this the power of the court of *B. R.* has never been doubted, being the superior Common law court in the kingdom. *F. N. B.* 53. 4 *Inst.* 71.

Also the court of Chancery may award a *prohibition* which may issue as well in vacation as in term time, but such writ is returnable into *B. R.* or *C. B.* *Bro. Prohibition*, pl. 6. 4 *Inst.* 81. 1 *Peer Will.* 43.

If one be sued in an inferior court for a matter out of the jurisdiction, defendant may either have a *prohibition* from one of the Common law courts of *Westminster-Hall*; or in regard this may happen in vacation, when only the Chancery is open, he may move that court for a *prohibition*; but then it must appear by oath, that the fact did arise out of the jurisdiction, and that defendant tendered a foreign plea, which was refused; and if a *prohibition* has been granted out of Chancery *improvidè*, and without these circumstances attending it, the court will grant a *superfedeas* thereto. 1 *Peer Will.* 475.

As the jurisdiction of the court of *C. B.* is founded on original writs issuing out of Chancery, it hath been doubted, whether this court could without writ or plea depending, award a *prohibition*; but this point has been determined, *viz.* that this court may on a suggestion grant *prohibitions*, to keep as well temporal as ecclesiastical courts within their jurisdictions, and that without any original writ or plea depending; the Common law being, in these cases, a *prohibition* of itself, and standing instead of an original. *Bro. Prohibition*, pl. 6. *Noy* 153. 12 *C.* 58, 108. *Bro. Consultation*, pl. 3. 4 *Inst.* 99. 2 *Brownl.* 17.

Accordingly it hath been adjudged, That a *prohibition* ought to be granted by *C. B.* to the court of delegates, for suing there to avoid the institution of a clerk to a church, after induction, tho' the *quære impedit* for the church could not be brought in *C. B.* but only in the county; because the title of the advowson was not questioned by this *prohibition*, but the intrusion on the Com-

mon law, of which this court has special care. *Moor* 861. 2 *Roll. Abr.* 317. *Hob.* 15.

But as to the courts of *B. R.* and *C. B.* this difference hath been made, That in the first of those courts a *prohibition* may be awarded on a *bare* surmise, *without any suggestion on record*; and such writ is only in nature of a *commission prohibitory*, which is discontinued by demise of the King; but that as to a *prohibition* issuing out of *C. B.* the suggestion *must be on record*, therefore is considered as the suit of the party, and in which he may be nonsuited, and is not discontinued by demise of the King. *Noy* 77. *Palm.* 422. *Latch* 114.

If the King's farmer, or copyholder of the King's manor, be sued in the ecclesiastical court for tithes, on a suggestion in the court of Exchequer that he prescribes to pay a certain *modus* in lieu of tithes, he shall have a *prohibition*, and such *modus* shall be tried there. *Palm.* 525. *Lane* 39. 1 *Roll. Abr.* 539.

The grand sessions of *North Wales* may send a *prohibition*, and write to the spiritual courts there. 1 *Sid.* 92. but for this see *Cro. Car.* 341. 1 *Jon.* 330. *Vaugh.* 411.

It is laid down, that tho' a surmise be a matter of fact, and triable by a jury, yet it is in the discretion of the court to deny a *prohibition* when it appears to them that the surmise is not true. *Hob.* 67.

But it hath been held, that awarding a *prohibition* is a matter discretionary, that is, That from the circumstances of the case, the superior courts are at liberty to exercise a legal discretion therein, but not an arbitrary one in refusing *prohibitions*, where in such like cases they have been granted, or where by law they ought to be granted. *Winch* 78.

It hath been determined in the house of Lords, That no writ of error will lie on the refusal of a *prohibition*; but when a consultation is awarded, it is with an *ideo consideratum est*, and then a writ of error will lie. 1 *Lord Raym.* 545.

If the master of a ship sues in the Admiralty for his wages, and a *prohibition* is moved for, on a suggestion that the contract was made on land, and the court is of opinion that a *prohibition* ought to be granted; in this case they will not compel the party to find special bail to the action in the court above. *Salk.* 33. *Carth.* 518. *Cum.* 74. 1 *Lord Raym.* 576.

If there is judgment against a simonist, who by the assent of parties is to continue for a certain time on the benefice, and who at the expiration of the time refuses to remove, but commits waste, a *prohibition* to stay waste may be had by the patron, incumbent or any other person, because that is the King's writ; and any one may pray a *prohibition* for the King, and it is grantable *ex debito iustitie*, and not honorary, and in the discretion of the court. *Comp. Incumb.* 43. 1 *Sid.* 65. *Hob.* 247.

2. *If he have a right to, and may demand, and join in a prohibition.*

The King may sue for a *prohibition*, tho' the plea in the spiritual court be between two common persons, because the suit is in derogation of his crown and dignity. *F. N. B.* 40.

So if the ecclesiastical court hold plea of any matter which belongs not to their jurisdiction, on information thereof to the King's courts, a *prohibition* will issue. 2 *Inst.* 607.

As if a man libels in the spiritual court for a matter which does not appertain to that court, but to the Common law, as a matter of frank-tenement; yet he himself, against his own suit, may pray a *prohibition*, and have it. 2 *Roll. Abr.* 342. 1 *Leon.* 130. *Gould.* 149. 12 *Co.* 56.

So where plaintiff in the spiritual court brought a *prohibition* to stay his own suit there, for that he suing for tithes by virtue of a lease made by the vicar of *A.* for three years, defendant claimed to be discharged of tithes by a former lease and composition by deed; and in this case it was held, that the plaintiff himself may have a *prohibition* to stay the suit; for the ecclesiastical judges are not to meddle with the trial of leases or real contracts, tho' they have jurisdiction of the original cause (*viz.* the tithes);

for the lease is in the *reality*, and is not merely accidental; and it makes no difference, that the plaintiff brings *prohibition* to stay his own suit; for if the temporal court has knowledge by any means, that the spiritual court meddles with temporal trials, a *prohibition* ought to be awarded. *Cro. Jac.* 351. 2 *Bulst.* 283. *Lit. Rep.* 20.

If a vicar sues a parishioner for tithes in the spiritual court, and the parson appropriate appears there *pro interesse suo*, and prays a *prohibition*, it shall be granted. 2 *Roll. Abr.* 312. *Cro. Eliz.* 251. *Kelov.* 110.

If lessee for years is sued in the spiritual court for tithes *be in reversion* may have a *prohibition*. *Moor* 915. *Cro. Eliz.* 55.

But no man is intitled to a *prohibition* unless he is in danger of being injured by some suit actually depending, therefore on a petition to the archbishop, or other ecclesiastical judge no *prohibition* lies. *March* 22, 45. A *prohibition quia timet* does not lie. *Allen* 56.

If several libels are exhibited against *A.* and *B.* in a matter in which the court hath not consueance, *A.* and *B.* cannot join in a *prohibition*; so if the griefs be several, as some books say. *Noy* 131. 1 *Leon.* 286. *Cro. Car.* 129.

But where the vicar of *A.* libelled several persons severally for tithes, who joined in a *prohibition*, suggesting a *modus*; and tho' the court held in this case, that the *prohibition* was not regularly brought, being in all their names, when there were several libels; yet inasmuch as this was on a custom, and matter triable at Common law, in which the Ecclesiastical court was properly prohibited, tho' not in exact form, they refused to award a consultation, but directed that the parties should put in several declarations, as if there had been several *prohibitions*. *Yelv.* 128—9. *Owen* 13. *L. P.* adjudged.

So if *A.* libels against *B.* and *C.* for defamation, and they sue a *prohibition*, they shall join in attachment on it; and it is no objection to say, that the defamation was several. 1 *Ld. Raym.* 127. and see 1 *Vent.* 266. *Raym.* 425. *Comb.* 448.

Where two or more are allowed to join in a *prohibition*, and one dies, the writ shall not abate; because nothing is to be recovered; they are only to be discharged. *Owen* 13.

3. *Of the suggestion for, and manner of obtaining a prohibition.*

Where the matter suggested for a *prohibition* appears on the face of the libel, an affidavit is *never* insisted on; but if it does not appear on the face of the libel, or if a *prohibition* is moved for, for more than appears on the face of the libel, to be out of their jurisdiction, there ought to be an affidavit of the truth of the suggestion. 2 *Salk.* 549. 1 *Peer Will.* 65. 477.

The suggestion in the temporal courts may be traversed. 2 *Inst.* 611. 2 *Co.* 44. *Moor* 525.

On a rule to shew cause, why a *prohibition* should not be granted to stay a suit against plaintiff in the court of the archdeacon of *Litchfield*, for not going to church, nor receiving the sacrament thrice a year, on suggestion of the statute of *Eliz.* and toleration act, and then qualifying himself within the act, and alledging, that he pleaded it below, and they refused to receive his plea; cause was shewn, that this fact was false, and that the plaintiff was not a dissenter, nor had qualified himself *ut supra*, therefore hoped the court would not suffer the rule to stand unless there was an affidavit of the fact; for by that means any person might come and suggest a false fact, and oust the spiritual court of their jurisdiction, which the court admitted; therefore for want of such affidavit the rule was discharged. 1 *Ld. Raym.* 1211.

If a plea to an inferior jurisdiction be properly tendred, which they refuse, tho' this be a good cause for a *prohibition*, yet an affidavit must be made of the refusal. *Skin.* 20. *Hard.* 406. 3 *Keb.* 217.

A motion was made for a *prohibition* to the Ecclesiastical court of *London*, for calling a woman *widore*, on a suggestion that the words were actionable there by custom.

custom of the place; but the court would not grant a prohibition *without oath made*, that if any such words were spoken, as it was in *London*, and *not elsewhere*. 4 Mod. 367.

On a libel for calling the plaintiff old thief and old whore; defendant suggested for a prohibition, that if any such words were spoken, they were spoken *at the same time*; but this suggestion was held ill, because the words ought to have been *fully confessed*. 1 Vent. 10.

By 2 & 3 Ed. 6. cap. 13. it is enacted, "That if any party sue for any prohibition, that then the same party, before any prohibition shall be granted, shall bring and deliver to the hands of some of the judges of the same court, where such party demanded prohibition, the *very true copy of the libel* depending in the Ecclesiastical court concerning the matter where the party demandeth prohibition, subscribed with the hand of the same party, and under the copy of the libel shall be written the suggestion, wherefore the party demandeth the prohibition; and in case the suggestion, by two witnesses at the least, be *not proved* true in the court where the prohibition shall be granted, then the party, that is hindered of his suit in the Ecclesiastical court by such prohibition, shall on his request *without delay, have a consultation* granted in the same case in the court where the prohibition was granted, and shall recover double costs and damages against the party that so pursued the prohibition; the costs and damages to be assessed by the court where the consultation shall be granted; for which costs and damages the party to whom they shall be awarded may have an action of debt by bill, plaint or information, in any court of record. See 27 H. 8. cap. 20. and 32 H. 8. c. 7. to which this act refers.

In the construction of the above-mentioned statute the following opinions have been holden.

That this statute referring to the statutes 27 & 32 H. 8. which extend to tithes and offerings *generally*, all such tithes and church duties as are mentioned in those statutes are as much within this act, as if particularly enumerated. 2 Inst. 662. Comp. Incumb. 600. Dyer 170, b.

Therefore it extends to prohibitions to suits of small tithes as well as great. *Yelv.* 102. 2 *Ld. Raym.* 1172.

So it hath been adjudged, that the suggestion of a *modus decimandi* ought to be proved *within six months*, being *within the act*. *Noy* 148. *Yelv.* 104. L. P.

So where one, who was sued for tithe of hay in the spiritual court, suggested for a prohibition, that he was to pay so much on an arbitrament; and it was held, that this suggestion ought to be proved, as well as one made of a *modus decimandi*: so on a suggestion on the statute 31 H. 8. that lands are tithe free, because the clause requiring the proof of a suggestion is general, and not limited to real composition. 1 *Roll. Rep.* 55.

So on a suggestion, that the suit in the spiritual court was for tithes of heath and barren ground improved within seven years after the improvement, contrary to the statute; in this case proof of the suggestion *within six months* was held necessary. 1 *Jos.* 231. *Cro. Car.* 208.

But it hath been held, that there needs no proof of the suggestion where the suit is for tithes contrary to common right, or where the contract of the party is suggested. *Cumb.* 147.

It hath been held, that the suggestion need not be proved *strictly*, nor *with precise certainty* as to all its circumstances; but that if it be proved *in substance*, or in such a manner as to shew that the Ecclesiastical court has not jurisdiction, it is sufficient. *Cro. Eliz.* 736. *Moor* 911.

The suggestion must be proved by honest and sufficient witnesses, which is required by the *express* words of the statute; therefore the testimony of one attainted of felony, excommunicated or convicted of recusancy, is, as in other cases, to be rejected. 2 *Bull.* 154.

But it hath been held, that persons, such as parishioners, &c. who may not be sufficient and able witnesses at a trial *at law*, may notwithstanding be sufficient witnesses to prove the suggestion; the chief intent of the statute being to prevent vexatious suggestions; also it hath been held, that after the admitting and recording the proof of

the suggestion, nothing is to be objected against the persons of the evidence. *Mich.* 27 *Car.* 2. in *C. B. Sharp v. Hobart*.

If a suggestion consists of two parts, it is said to be sufficient to produce one witness to one, and another to another. 1 *Vent.* 107.

It hath been held, that the *fix* months for proof of the surmise shall be accounted *according to the calendar*; for that this being a computation which concerns the church, it is but reasonable that it should be done according to the computation used in the Ecclesiastical law. *Hob.* 197. *Lit. Rep.* 19. 2 *Mod.* 58.

It is said, that the time of six months given by the statute to prove the suggestion ought to be intended *fix months in term time*, and that the vacation should be *no part* of the time; but this hath been since adjudged otherwise, and that the time shall commence from the *teste* of the writ of prohibition, and not from the time of the rule made for awarding it. *Moor* 573. *Noy* 30. 2 *Ld. Raymond* 1172. 2 *Salk.* 554.

If the surmise be proved before one of the judges *within the six months*, altho' it be not recorded till after the six months by the court, it is well enough. *Noy* 30. It must be entered in the office. 2 *Shew.* 308.

It hath been held, that proof which is not sufficient, may be supplied by better proof *within the six months*, but not after. *Litt. Rep.* 155.

The party on failure of proof of the suggestion, shall not only have double costs and damages, but also his costs and damages in the action he brings for recovery of them. *Bendl.* 143. See stat. 8 & 9 *W.* 3. cap. 11.

But if the prohibition be grounded partly on a *modus*, which needs no proof, and partly on the contract of the parties, which needs no proof, there ought not to be double costs; for mixing the contract with the manner of tithing privileges the whole. *Brownl.* 99. *Yelv.* 119.

So where for a variance between the libel and suggestion, a consultation was awarded, and double costs adjudged defendant; this was held to be error by the *very letter* of the statute, which gives double costs only for want of proving the suggestion, and for no other cause. *Yelv.* 79, 80.

So where a prohibition was obtained on a suggestion which was not proved *within the six months*, in which defendant took issue with the plaintiff, which was found for plaintiff; and in this case it was resolved, that defendant should not have double costs for want of the suggestion's being proved; for the statute is, that *he shall have a consultation and double costs*; but in this case he could not have a consultation, the matter in issue being found against him; but ought to have prayed a consultation on the suggestion not being proved, and *then* should have had his double costs. *Latch* 140.

The surmise or suggestion may be brought in by attorney, and need not be in proper person. 1 *Leon.* 286.

A prohibition is *not* to be granted the *last day* of term, but on motion a rule may be obtained to stay proceedings till the ensuing term. *Latch* 7. 2 *Roll. Rep.* 456.

4. At what time a prohibition is to be, and in what cases it may be granted, to inferior temporal courts.

In all cases where it appears on the face of the libel, that the spiritual court, &c. have not a jurisdiction, a prohibition may be awarded, and is grantable as well *after as before sentence*; for the King's superior courts have a superintendency over all inferior jurisdictions, and are to take care that they keep within their due bounds. 2 *Inst.* 602. 2 *Roll. Abr.* 319. *Noy* 137. 1 *Sid.* 65. *Cro. Eliz.* 571. *Moor* 462, 907. *Skin.* 299. *Carlb.* 463. *March* 153. 2 *Roll. Rep.* 24. *Comb.* 356.

But where the court has a *natural* jurisdiction of the thing, but is restrained by some statute; as by 23 H. 8. for not *ciding out* of the diocese, there the party must come *before sentence*; for after pleading and admitting the jurisdiction of the court below, it would be hard and inconvenient to grant a prohibition. See the authorities

supra.

Mira, and *Cro. Car.* 97. 2 *Show.* 145. *Vent.* 61. 6 *Mod.* 252. *Farefl.* 137. *Godb.* 163, 243. 5 *Mod.* 341. *Hastl.* 19. 12 *Co.* 76. *Salk.* 543.

On a motion for prohibition the case was, defendant libelled in the spiritual court for tithes of faggots made of loppings of trees; and the suggestion for a prohibition was, that these loppings were cut from the stumps of timber trees above the growth of twenty years; and it was alledged, that sentence was given in the spiritual court, therefore plaintiff comes here too late to have a prohibition: but *per Holt*, the sentence will not hinder the having a prohibition in any case, but in case of prohibitions grounded on 23 *H. 8. c. 9.* for citing out of the diocese; but because the plaintiff had not pleaded this matter in the spiritual court, they denied the prohibition, because *the spiritual court has a general jurisdiction of tithes*; and if any special matter deprives them of their jurisdiction, it *must* be pleaded there; and if it had been pleaded there, and issue joined on it, and on the trial it had been found not to be *silva cadua*, it had been well; but if they had refused to admit the plea, a prohibition should have been granted. 2 *Ld. Raym.* 835.

A prohibition doth lie as well to a temporal court as to the spiritual, court of admiralty or other court, *whose proceedings are different from the common law*, if such temporal court exceed the bounds of its jurisdiction, or take cognizance of matters not arising within its jurisdiction. *F. N. B.* 45. 2 *Inst.* 229, 243, 601. 2 *Rel. Rep.* 379. 1 *Rel. Rep.* 252.

As if trespass *vi & armis* be brought in the county, a prohibition lies to plaintiff. *F. N. B.* 47.

So if one sueth another in a court baron or other court, which is not a court of record, for charters concerning inheritance or freehold, he shall have a prohibition. *F. N. B.* 47.

A person having obtained judgment in *B. R.* for his debt and damages, brought action for recovery of them against the bail in the court of the *Tower of London*, in which action the party was taken on a *capias*, and was rescued, after which plaintiff brought his action on the case in the court for the rescue; and all this appearing to the court of *B. R.* they granted a prohibition. 1 *Rel. Rep.* 54.

So where an action of debt was brought in the *Marsbalsea*, on a judgment in *B. R.* and a prohibition was granted. 2 *Salk.* 439.

A suit was surmised to be before the Lord president of the marches, for an office, between the grantee of the Lord president and a stranger, wherein the only question would be, whether the grant of that office belonged to the Lord president; and because in this case he would be as it were both judge and party, a prohibition was granted. 1 *Keb.* 648.

If there be one intire contract above 40 *s.* and a man sues for it in a court baron, severing it into small sums under 40 *s.* a prohibition shall be granted, because this is done to defraud the court of the King. 19 *H. 6.* 54. 2 *Rel. Abr.* 280. *F. N. B.* 46.

An action was brought in the hundred court for 40 *s.* in which action plaintiff confessed that he was satisfied one shilling, which being done with an intent to give that court jurisdiction, and to defraud the superior courts, a prohibition was granted. *Palm.* 564.

If there be several contracts between *A.* and *B.* at several times for divers sums, each under 40 *s.* but amounting in the whole to a sum sufficient to intitle the superior court to a jurisdiction, they shall be sued for in such superior, and not in an inferior court, which is not of record. 1 *Vent.* 65.

So in a prohibition to the court of the honour of *Eve*, where the case was, one contracted with another for divers parcels of malt, the money to be paid for each parcel being under 40 *s.* he levied divers plaints thereupon in the said court; wherefore the court here granted a prohibition; because tho' there be several contracts, yet as plaintiff might have joined them all in one action, he ought to have so done, and sued here, and not put defendant to unnecessary vexation, any more than he can split one intire debt into divers, to give the inferior court

jurisdiction in fraudem legis. 1 *Vent.* 73. 2 *Keb.* 617. 1 *Show.* 11.

It is laid down by *Coke*, and admitted in a variety of cases, that no inferior court can hold plea of any transitory action, if not made within the jurisdiction, and that the cause of action must be alledged to arise within such jurisdiction. 2 *Inst.* 231. 1 *Sand.* 74. 2 *Jen.* 230. 1 *Show.* 10. and see tit. Courts.

Therefore, in an action on a promise in an inferior court, not only the promise, but the consideration must be alledged to arise within the inferior jurisdiction, and must be so proved on the trial. 1 *Rel. Abr.* 545.

But if plaintiff had shewn that the money had been lent *infra jurisdictionem curie*, or if it had been for goods there sold, the plaintiff would have had no need to say, that the defendant assumed to pay *infra jurisdictionem curie*; because the law creates the promise on the creation of the debt, which debt being within the jurisdiction, the promise shall be intended there also. *Lord Raym.* 211.

In all cases where inferior courts assume a jurisdiction, or hold plea of a matter not arising within their limits, the party hath his remedy, and may stay their proceedings by prohibition; but such prohibition can only regularly be obtained by its appearing on oath made, that the fact did arise out of the jurisdiction, and that the defendant tendered a foreign plea, which was refused. 6 *Mod.* 146. *Carth.* 402. 1 *Salk.* 201. 1 *Peer Will.* 476.

In the case of *Mendyk v. Stint* it was greatly insisted upon, that tho' the party neglected to plead to the jurisdiction, that yet the matter arising out of the inferior jurisdiction, the superior courts ought to grant a prohibition; for otherwise the parties, their counsel and attorneys, would give a jurisdiction to inferior courts which they were not intitled to by law; but it was otherwise adjudged in this case; and it seems to be now agreed, that after admitting the jurisdiction, or after imparlance, the party cannot apply for a prohibition. 2 *Mod.* 271.

But these things were agreed by the court.

1. If any matter appears in the declaration, which sheweth that the cause of action did not arise *infra jurisdictionem*, there a prohibition may be granted at any time.

2. If the subject matter in the declaration be not proper for the judgment and determination of such court, there also a prohibition may be granted at any time.

3. If defendant, who intended to plead to the jurisdiction, is prevented by any artifice, as by giving a shore day, or by the attorney's refusing to plead it, &c. or, if his plea be not accepted, or is over-ruled; in all these cases a prohibition likewise will lie at any time. 2 *Mod.* 273.

A motion was made for a prohibition to be directed to the sheriff's court in *Bristol*, on suggestion that causes of action arising out of the jurisdiction of the sheriff's court ought not to be sued there; and this motion was made in behalf of defendant in the action, before he had appeared, to stay the proceedings of the court, who proceeded to attach his goods in the hands of a garnishee; and Sir *B. Shower* opposed the motion; because defendant could not pray a prohibition on suggestion of a matter which he could not plead; and as here he could not plead this before appearance, so he ought not to make such a motion before appearance. And *per Holt*, a man shall not plead to the jurisdiction until he appear; but if the original cause of action arose out of the jurisdiction of the court, the garnishee may plead it; and of that opinion was *Hale Ch. J.* but if it was debt on a simple contract, it is attachable where the person of the debtor is. 1 *Lord Raym.* 346.

So in the case of *Clerk v. Andrews*, where *Shower* moved for a prohibition to the court of the sheriffs of *London* to stay proceeding, where they attached the debts of the garnishee, because it arose out of the jurisdiction, but it was denied, because the debt was on simple contract, which follows the person of the debtor. *Lord Raym.* 347.

5. In what cases prohibitions are to be granted to the spiritual courts.

If one sues another in the spiritual court for a *chattel* or *debt*, defendant shall have a *prohibition*. So if he sues for a *trespass*. F. N. B. 40

If the spiritual courts take on them to try the boundaries of a parish, a *prohibition* lies. 2 *Rel. Abr.* 291. 7 *Co.* 44. 1 *Rel. Rep.* 332. *Cro. Eliz.* 228. 3 *Leon.* 829. 3 *Keb.* 286. S. P. because the prescription is the ground thereof.

As if a suit be by a parson for tithes, and defendant plead, that the place *where*, is in another parish, a *prohibition* lies; because they meddle with that which is out of their jurisdiction, tho' the original thing be of their cognizance, and this comes in obliquely. 2 *Rel. Abr.* 282. 1 *Show.* 10. *Noy* 147. S. P.

So if the vicar of a parish libels against another to avoid his institution to the church of D. which he supposes to be a chapel of ease, appertaining to his vicarage, and defendant suggests, that D. is a parish of itself, and not a chapel of ease; a *prohibition* will be granted, for they shall not try the bounds of the parish. 2 *Rel. Abr.* 291.

So if the question be in the court christian, whether a church be a parochial church, or a chapel of ease; a *prohibition* lies. 2 *Rel. Abr.* 291.

But if the bounds of two villis lying in the same parish come in question in the spiritual court, no *prohibition* lies; for such bounds are triable in the ecclesiastical court, tho' those of parishes are not. 1 *Lev.* 78.

The ecclesiastical courts have cognizance of a way to a church, and for not repairing such way the parties may be proceeded against in the spiritual court. *March* 45.

So if a parson is prevented from carrying away his tithe by the stopping up the usual way, he may have his remedy in the ecclesiastical court, grounded on the statute 2 *Ed.* 6. *Bulst.* 67. 1 *Jen.* 230.

But if the question be, whether he is to have one way or another, or whether such a way be a highway or not; this cannot be tried in the spiritual court. *March* 15. 1 *Bulst.* 67. 2 *Rel. Abr.* 287. S. P. adjudged.

So if the churchwardens of a church sue for a way to the church, which they claim to appertain to all the parishioners by prescription, a *prohibition* shall be granted; for this right being grounded on the prescription, is to be tried in the temporal courts. 2 *Rel. Rep.* 287. 2 *Rel. Rep.* 41.

If a man be admitted, instituted and inducted, and a suit is commenced in the ecclesiastical court to avoid the institution, supposing it not valid; tho' the thing be of their cognizance, yet because the induction, which is temporal, and gives a lay right, may depend on it, a *prohibition* lies. *Hob.* 15. *Latib.* 205. 1 *Bulst.* 179. *Lit. Rep.* 165. *Poph.* 133. 1 *Rel. Abr.* 282. 1 *Show.* *Rep.* 10.

If there be a suit for tithes in the ecclesiastical court, and the tenant pleads, that the party who sues is not incumbent, but that J. S. is; and this plea, because it goes to the right of the incumbency, is rejected, a *prohibition* lies; for by denying the tenant this liberty he might be twice charged for tithes. *Cro. El.* 228. 3 *Leon.* 265.

There are frequent instances of *prohibitions* being granted to the ecclesiastical courts, to stay suits for fees by chancellors, registers and proctors in those courts, on this foundation, that demands *pro opere & labore* are properly determinable at Common law, and fees cannot be settled by the canon law; and that the spiritual court can only give costs and expences of suit, but that no action of debt will lie for such costs at Common law; and that the profits of an office being temporal, the remedy for them ought to be by *quantum meruit*; or in case it be an office of freehold, by assize; the denial of just fees being a *disfranchisement*; therefore it seems to be now settled, that neither a proctor nor register can sue for fees in the spiritual court, but that the proper remedy is, in case of a fee certain, by an *ind. bitatus assumpsit*, or in case of an uncertain fee, by *quantum meruit*; and in such suits it is not necessary to prove a retainer, that being implied by law. 2 *Rel. Rep.* 59. 3 *Leon.* 268. 1 *Mod.* 176. 2 *Keb.* 615. 3 *Keb.* 303, 441, 516. 1 *Salk.* 333. and 4 *Mod.* 254.

If a legatee takes a bond from the executor for payment of the legacy, and afterwards sues him in the spiritual court for the legacy, a *prohibition* will be granted; for by taking the obligation the nature of the demand is changed, and becomes a debt or duty recoverable in the temporal court. *Yelv.* 38. 2 *Vern.* 31. but 2 *Rel. Rep.* 160. S. P. cont.

Matters of freehold, and the rights of inheritances, are only determinable in the temporal courts; so that if the ecclesiastical courts intermeddle with those, a *prohibition* lies. F. N. B. 40. 2 *Rel. Abr.* 286. *Lit. Rep.* 164.

As in a seoffment of tithes and lands, where there is no livery, if they adjudge the tithes to pass, notwithstanding there is no livery, a *prohibition* will lie. *Cro. Jac.* 270. 1 *Vent.* 41. cited.

So if a man devises, that his lands shall be sold for the payment of his debts, and that the overplus shall be paid to such persons in certain shares; the legatees in this case cannot sue in the ecclesiastical court; for the provisions intended them arise originally out of lands, and their proper remedy in this case is in a court of equity. *Dyer* 151, 264. *Hob.* 265. 2 *Rel. Abr.* 284—5. 2 *Show.* 50. *Cro. Car.* 16.

But if a rent be devised out of a farm for years, the ecclesiastical courts may hold plea thereof; for the term for years being only a chattel is testamentary, consequently the rent devised thereout. 1 *Sid.* 279. 2 *Keb.* 5. 1 *Lev.* 179.

The rights of offices for life in the ecclesiastical or courts of Admiralty are determinable at Common law; as in the question concerning the validity of two patents, by which the office of register to a bishop was granted; it was held, that this should not be tried in the spiritual court, tho' the subject matter be spiritual; because the office itself being matter of freehold is for that reason of temporal cognizance. 2 *Rel. Abr.* 285—6. *Noy* 91. *Latib.* 228. *Palm.* 450. *Godb.* 390. *Cro. Car.* 65. 2 *Rel. Rep.* 306. *Raym.* 88. 1 *Lev.* 125. 4 *Mod.* 27. *Comb.* 305.

Trespass on a glebe being freehold, cannot be determined in the ecclesiastical court. *Bro Jurisdiction*, pl. 41.

A parson libelled against defendant in the spiritual court of York for having cut elms in the church-yard; and a prohibition was granted, on suggestion that they grew on his freehold. 1 *Ld. Raym.* 212.

For more learning on this subject, see 4 *New Abr.* and 17 & 18 *Vin. Abr.* tit. Prohibition, and *Black. Com.* 3 *V.* 112, 113.

A suggestion for prohibition begins, *Re it remembered, that on, &c. comes before our Lord the King at Westminster, C. D. in his proper person, and gives this court here to understand and be informed, That whereas A. B. &c. (setting forth the complaint and proceeding in the other court, contrary to the laws and customs of the kingdom) Wherefore the said C. imploring the aid of this honourable court, before the King himself, prayeth to be relieved, and that he may have his Majesty's writ of prohibition, directed to the judge of the said court; &c. to prohibit him and them from taking any further cognizance of the said plea before them, touching or concerning the premises: And it is granted him accordingly, &c.*

The common form of a prohibition runs thus: *George, &c. To A. B. &c. Greeting: We prohibit you, that you hold not plea in the court, &c. of, &c. whereas C. D. complains, that E. F. draws him into plea before you, &c. And to the party himself; We prohibit or forbid you E. F. that you follow not the plea in the court of, &c. whereas C. D. complains, that you draw him into the court, &c.*

Prohibitio de vasis directis wastis, A judicial writ directed to the tenant, prohibiting him from making waste on the land in controversy, during the suit. *Rep. Judic.* 21.

It hath been adjudged, that a *prohibition* shall be granted to any one who commits waste, either in the house or buildings of the incumbent of a spiritual living; or who cuts down trees on the glebe, or doth any other waste. *Moore* 917. 3 *Nelf. Abr.* 5.

Pro indiviso, For undivided, is taken in law for a possession or occupation of lands or tenements belonging to two or more persons, whereof *nemo novus bis feodal partition*; as coparceners before partition. *Bract. lib. 5.*

Proles, (Lat.) In English progeny, are such issue as proceed from a lawful marriage; tho' if the word be used at large, it may denote others.

Prolocutor of the Convocation-House, (*Prolocutor domus convocationis*) Is an officer chosen by ecclesiastical persons, publickly assembled in convocation by virtue of the King's writ at every parliament: And there are two *Prolocutors*, one of the higher House of Convocation, the other of the lower House; the latter of which is chose by the lower House; and presented to the Bishops of the higher House as their *Prolocutor*, that is the person by whom the lower House of Convocation intend to deliver their resolutions to the upper House, and have their own House especially ordered and governed: His office is to cause the clerk to call the names of such as are of that House, when he sees cause; to read all things propounded, gather suffrages, &c.

Promissio, (*Promissio*) Is when on a valuable consideration, persons bind themselves by words to perform such a thing as is agreed on; upon which action may be brought: And a *promise* against a *promise* made at one and the same time, is a sufficient ground for an action. *Cro. Eliz. 543. 703. 848.*

If *promissor* are executory on both sides, performance need not be averred; because it is the *counter-promise*, and not the performance which raises the consideration. *4 Mod. 189.*

Where a *promise* is made to do a thing, and there is no breach, the same may be discharged by parol; but if it be once broken, it cannot be discharged without release in writing, being then a debt. *1 Mod. Rep. 206. 2 Mod. 44.* And when an action is grounded on a promise, payment or some other legal discharge must be pleaded. *1 Mod. 210.*

If a promise be to pay a sum of money, by several monthly payments, the promise being intire, a breach of payment of the first month, is a breach of the whole promise. *2 Roll. Rep. 47.* See *Mutual Promise, Assumpsit*, and *Action on the Case*, and *Black. Com. 3 P. 157.*

Promissory Note. See *ib. 2 P. 467.*

Promoters, (*Promotores*) Are those who in popular and penal actions prosecute offenders, in their name and the King's, as *informers* do, having part of the fines or penalties for their reward; They belonged chiefly to the *Exchequer* and *King's Bench*; and Sir Edward Coke calls them *turbidum hominum genus*. *3 Inst. 191.*

Promulga a Latin, (*Promulgare Legem*) Is to declare, publish, and proclaim a law to the people; and so *Promulgatus*, *Promulgatus*, signifies published or proclaimed. *6 H. 6 c. 4. See Black. Com. 1 P. 45.*

Pronotary. See *Procurator*.

Proof, Is shewing the truth of any matter alleged, or the trial or making out of any thing, by a jury, witnesses, &c.

Bracton says, there is *Probatio duplex*, viz. *Proxima*, by witnesses; and *Probatio mortua*, deeds, writings, &c.

Proof, according to *Lilly* is either in giving evidence to a jury on a trial, or else an interrogation, or by copies of records, or exemplifications of them. *1 Lilly. 193.* Tho' where a man speaks generally of *Proof*, it shall be intended of *Proof* by a jury, which in the strict signification is legal *Proof*. *3 Inst. 56.*

Condition of a bond was to pay money as an apprentice should mispend, the *Proof* made by the confession of the apprentice or otherwise; and it was held, that altho' generally *Proof* shall be intended to be made at a trial by jury, in this case it being referred to the confession of the party, it is sufficient if he confess it under his hand. *2 Cro. 381. 3 Noy. 24.*

It hath been insisted, that the law knows no other *Proof* but before a jury in a judicial way, and that which is on record; but if the proof is modified by the agreement of the parties, that it shall be in such a manner, or before such a person, that modification which allows another manner of *Proof* shall be observed and prevail against the

legal construction of the word *Proof*. *Ibid. 314. 2 Lilly. 436.*

Where in agreements, &c. required to be proved, ad particular form is directed how the *Proof* shall be made; the plaintiff may bring his action, and *aver* that the thing was done; and defendant may take issue that it was not done, and then plaintiff must prove the doing it. *Brownl. 53, 57. Cro. Eliz. 205. Cro. Jac. 232.*

Plaintiff said, that a wager was won by deceit; defendant replied, Give me a shilling, and if you can prove that it was won by me by deceit, I will give you five pounds; and in an action on the case brought against defendant on his promise to pay the five pounds, plaintiff alleged *in fact* that he had got the wager by deceit; and it was adjudged, that he need not make any other *Proof* of it but in this action. *3 Balf. 56. Cro. Eliz. 205.*

In articles the parties bound themselves in the penalty of 100 l. &c. to be paid on due *Proof* of a breach; *Proof* at a trial will maintain the action. *Larow. 441.* And *Proof* may be in the action, in several other cases. *Cro. Jac. 188, 488. Proof* by witnesses, &c. See *Evidence*, and *Black. Com. 3 P. 368.*

Pro partibus Liberandis, An ancient writ for partition of lands between co-heirs. *Reg. Orig. 316.*

Propter Reus See *Black. Com. 2 P. 58.*

Propriety, (*Proprietas*) Is the highest right a man can have to any thing; being used for that right which one hath to lands or tenements, goods or chattels, which no way depend on another man's curtesy; and was first introduced, that every man might know his own. *Stud. Compan. 159.*

Before the flood, there was no such thing as particular *Propriety*, but an universal right instead of it; every man might then take to his use what he pleased; and what he had so possessed himself of, another could not, without manifest injury, take from him: But on the increase of people, trade and industry, *Propriety* was gained by purchase, and other lawful means; for the securing whereof, proper laws were ordained. *Ben. Meritt. 2.*

Propriety in lands and tenements is acquired either by *injury*, *disseisin* by law, or *conveyance*; and in goods and chattels, it may be gained many ways, tho' usually by *deed of gift*, or *bargain and sale*. *2 Lill. Abr. 400.*

For preserving *Propriety* the law hath these rules,

1st, No man is to deprive another of his *Propriety*, or disturb him in enjoying it.

2^{dy}, Every person is bound to take due care of his own *Propriety*, so as the neglect thereof may not injure his neighbour.

3^{dy}, All persons must so use their right, that they do not, in the manner of doing it, damage their neighbour's *Propriety*. *Mod. Entr. Bt. 1. 219.*

There are also three sorts of *Proprietas*, viz. *Propriety* absolute; *Propriety* qualified; and *Propriety* possessory; And an absolute *Proprietor* hath an absolute power to dispose of his estate as he pleases, subject to the laws of the land. The husband hath a qualified property in his wife's land, real chattels and debts; but in her chattels personal he hath an absolute property. *Pleas. 5.*

Every owner of goods, &c. hath a general property in them: Tho' a legatee of goods hath no property in the goods given him by will until actually delivered him by executors, so that he hath the possession. *Mish. 23 Car. B. 2.*

And tho' by a bare agreement, a bargain and sale of goods may be so far perfected, without delivery or payment of money, that the parties may have an action of the case for non performance, yet no property vests until delivery; therefore in a sale of a house the buyer gets delivery, he has the house. *3 Inst. 61. 62.*

But the contract with me, that if I pay him so much money such a day, I shall have his goods in such a place, and deliver him the money: This is a good sale, and by it I have the property of the goods. *27 H. 6. 16.*

Propriety of things is *possessio* or *actio*.

In *possessio*, it is generally, when no other can have them from the owner, or with him, without his act or default; or *partial*, when some other hath an interest with him, or where there is a property also in another, as well as in the owner; as by bailment, delivery of things to a carrier,

carrier, or innkeeper, where goods are pawned or pledged; distrained or leased, &c. And property in action, is when one hath an interest to sue at law for the things themselves, or for damages for them; as for debts, wrongs, &c. and all these things, in possession, or action, one may have in his own right, or in the right of another, as executor. *Wood's Inst.* 312.

A person hath such a special property in goods delivered him to keep, that he may maintain actions against strangers who take them out of his possession: So of things delivered to a carrier, and when goods are pawned, &c. *Lill. Abr.* 400, 401.

An executor or administrator hath the property of the goods of the deceased: But a servant hath neither a general or special property in his master's goods; therefore to take them from his master may be trespass or felony, as the case is. *Goldb.* 72.

If a man hires a horse, he hath a special property in the horse during the time against all men, *even against the right owner*; against whom he may have an action if he disturbs him in the possession. *Cro. Eliz.* 236. But it hath been adjudged, that if a man deliver goods, &c. to another to keep for a certain time, and then to re-deliver them; if he to whom they were delivered sell them in open market, *before the day appointed for the re-delivery*, the owner may seize them wherever he finds them, because the general property was always in him, and not altered by the sale. *Godb.* 160. 3 *Nelf. Abr.* 18. And if one delivers a horse, or other cattle, or goods, to another to keep, and he kills the horse, or spoils the goods, trespass lies against him; for by the killing or spoiling, the property is destroyed. 5 *Rep.* 13.

If a swarm of bees light on a tree, they are not the owner's of the tree, *ill covered with his bees*; no more than hawks that have made their nests there, &c. But their young ones will be his property, and for them he may have trespass. *Doct. & Stud.* r. 5. *Co. Litt.* 145.

A man's geese, &c. fly away out of sight, wherever they go, he hath still a property in them: And it is said, that whilst a person's hawk is in flight of a partridge, or his hounds in pursuit of a hare, &c. in these cases he hath a kind of property in the wild creature. *Staudf. lib.* 1. r. 16. 3 *Shep. Abr.* 111.

Wild beasts, deer, hares, conies, &c. tho' they belong to a man on account of his game and pleasure, none can have an absolute *real property* in; but if they are inclosed and made tame, there may be a qualified and possessory property in them.

One may have absolute property in things of a base nature, as mastiff dogs, hounds, spaniels, &c. but not in things *feræ naturæ*, unless when dead. *Dalt.* 571. *Finch* 176. 11 *Rep.* 50. *Raym.* 16.

Property in lands, goods and chattels, may be forfeited or lost, by treason, felony, flight, outlawry; also of goods by their becoming dead, waif, estray, &c. *Bac. Elem.* 77, 78.

Property in Highways, &c. He who hath the land which lies on both sides the highway, hath the property of the soil of the highway in him, notwithstanding the King hath the privilege for his people to pass thro' it at their pleasure; for the law presumes that the way was at first taken out of the lands of the party who owns the lands lying on both sides the way: And divers lords of manors claim the soil as part of their waste. 2 *Lill. Abr.* 400.

If the sea or a river, by violent inturion carries away the soil or ground in so great a quantity, that he who had the property in the soil, can know where his land is, he shall have his land; but if his soil or land be inturibly wafted by the sea or river, he must lose his property, because he cannot prove which is his land. *Regis.* 1650.

A tenant hath only a special property in the trees on the lands demised, so long as they remain part of the freehold; for when they are severed, his property is gone. 11 *Rep.* 82.

Property altered. A man borrows, or finds my goods, or takes them from me; neither of these acts will alter the property. *Bro. Propert.* 27.

If one having taken away corn, make it into malt; turn plate into money, or timber into a house, &c. the property of them is altered. *Doddridge Law* 132, 133.

And where goods are generally sold in a market, *where, for a valuable consideration*, and without fraud, it alters the property thereof. 5 *Rep.* 83.

To alter or transfer property, is lawful; but to violate property is never lawful, property being a sacred thing which ought not to be violated. And every man (if he hath not forfeited it) hath a property and a right allowed him, to defend his life, liberty, and estate; and if either be violated, it gives an action to redress the injury, and punish the wrong. 2 *Lill. Abr.* 400.

Prophecies, (*Prophetia*) Is foretelling of things to come, in hidden mysterious speeches; whereby commotions have been often caused in the kingdom, and attempts made by those to whom such speeches promised good success, tho' the words were mystically framed, and pointed only to the cognizance, arms or some other quality of the parties: But these, for distinction sake, are called *false or phantastical prophecies*. 3 *Ed.* 6. c. 15.

False prophecies, (where persons pretend extraordinary commissions from God) to raise jealousies in the people, or terrify them with impending judgments, &c. are punishable at Common law, as *impostures*: And by 5 *Eliz.* c. 15. None shall publish or set forth any false prophecy, with an intent to raise sedition, on pain of 10*l.* for the first offence, and a year's imprisonment; and for the second offence to forfeit all his goods and chattels, and imprisonment during life: The prosecution to be within six months. 3 *Inst.* 128, 129.

To prophesy when the King shall die, hath been anciently held to be treason. *Roll. Rep.* 88. See *Black. Com.* 4 *V.* 149.

Proportion, (*Proportio*.) See *De Omerando pro Rata Portionis*.

Proposuit, (*Purpose*) Intention or meaning. *Cowell. Secundum propositum dicti cyrographi inter eas confecti. Carta Rogeri de Quincy*, 31 *Hen.* 3.

Propounders. The 85th chapter of *Coke's three Institutes* is intituled against monopolists, propounders, and projectors, where it seems to signify the same as *monopolists*. *Cowell.*

Proprietary, (*Proprietarius*) Is he who hath a property in any thing, *que nullus arbitrio est obnoxia*; but was heretofore chiefly used for him who had the fruits of a benefice to himself, his heirs and successors, as *abbots and priors* had to them and their successors. See *Appropriation*.

Proprietate probanda, Is a writ to the sheriff to inquire of the property of goods distrained, when defendant claimeth property on a *replevin* sued; for the sheriff cannot proceed till that matter is decided by writ; and if it is found for plaintiff, then the sheriff is to make replevin; but if for defendant, he can proceed no farther. *F. N. B.* 77. *Finch* 316, 450. *Inst.* 145. See *Black. Com.* 3 *V.* 148.

Pro rata, Is as much as *pro proportionem*; as jointenants, &c. are to pay *pro rata*, i. e. in proportion to their estates, 16 *Car.* 2. c. 6.

Prologue, (*Prologus*) Signifies to prolong, or put off to another day. 6 *Inst.* 145.

Prorogation of parliament, and adjournment were anciently used as *synonyms*; but of late there hath been a distinction, a prorogation making a session, and an adjournment only a continuance. Vide *Parliament*, and *Black. Com.* 1 *V.* 186.

Protection, (*Protectio*) Is generally taken for that benefit and safety which every subject hath by the King's laws; every man who is a loyal subject is, in the King's protection; and in this sense to be out of the King's protection, is to be excluded the benefit of the law. 25 *Ed.* 3. c. 2.

In a special signification, a protection of the King is an act of grace, by writ issued out of Chancery, which lies where a man will pass over the sea in the King's service; and by this writ (when allowed in court) he shall be quit of all manner of suits between him and any other person, except

except assises of *novel disseisin*, assise of *darrein presentment*, attainder, &c. until his return. 2 *Lill. Abr.* 398.

Protection is an immunity granted by the King to a certain person, to be free from suits at law for a certain time, and for some reasonable cause; and 'tis a branch of the King's prerogative so to do: There are two sorts of these *protections*; one is *cum clausula volumus*; and of that *protection* there are three particulars; one is called *quia profecturus*, and is for him who is going beyond sea in the King's service; another is *quia moraturus*, which is for him who is already abroad in the King's service, as an ambassador, &c. and another is for the King's debtor; that he be not sued till the King's debt is satisfied: And the other sort of *protection* is *cum clausula volumus*, &c. which is granted to a spiritual corporation, that their goods or chattels be not taken by the officer of the King; for the King's service; it may likewise be granted to a spiritual person single, or to a temporal person. *Reg. Orig.* 23. 3 *Nelfi Abr.* 20.

On a person's going over sea, in the service of the King, writ of *protection* shall issue, to be quit of suits till he return; and then a return may be had against him: But one may proceed against defendants having such *protection*, until he comes and shews his *protection* in court, and hath it allowed; when his plea or suit shall go *per illos*, tho' if after it appears that the party who hath the *protection*, goes not about the business for which the *protection* was granted, the plaintiff may have a repeal, *24. Terms de Ley* 2 *Lill. Abr.* 398.

A *protection* is to be made for one year, and may be renewed from year to year; but if it be made for two or three years, the justices will not allow it: And if the King grant a *protection* to his debtor, that he be not sued till his debt is paid; on these *protections* none shall be doctored; the party is to answer and go to judgment, and execution shall be stayed. 1 *Inst.* 130. 25 *Ed.* 3.

The King granted a *protection* to one of his debtors; and on demurrer it was alledged, that by 23 *Ed.* 3. c. 19 *protections* of this kind are expressly, that none shall be delayed on them; but the party shall answer and proceed to judgment, and execution shall stay: And the court ordered, that when it came to execution they would advise; to a *respondens oster* was awarded. *Cro. Jac.* 477.

In all *protections* there ought to be a *causa shews* for granting them: If obtained pending the suit, they are nought, and a person giving bail to an action on arrest; it is said may not plead his *protection*; one may not be discharged out of prison to which he is committed in execution, by *protection* to serve the King, &c. Not will a *protection* be allowed where a person is taken on a *capias utlagatum*, after judgment; for tho' the *capias utlagatum* is at the King's suit in the first place, it is in the second degree for the subject. *Lamb.* 197. 1 *Leon.* 183. *Dyer* 162. *Hob.* 115.

But in action on *assumpsit* a *protection* under the Great Seal was brought into court, for that defendant was in the wars in Flanders, &c. and it was allowed tho' after an *exigent*. 3 *Lev.* 332.

Plaintiff in an action cannot call for *protection* for the *protection* is for defendants, and shall be always for him, and it be not in special case, where plaintiff becomes defendant. *New Nat. Br.* 6. And no *protection* shall be allowed against the King. 1 *Inst.* 131.

A *protection* to live a default, is not good for any time within the kingdom of England: And required is the only where the defendant or tenant is demanded; for the *protection* is to protect his default, which cannot be made when he is not demanded. *Term. Ann.* 66. 94.

There are many kinds of *protections*; but they are rarely used, being often abused by act of parliament. *Madox.* 157. 1. See *Black. Com.* 3 *V.* 389.

When the King grants a *protection*, the writ thereon in some cases has been as follows:

Writ of *Protection* by the King.

GEORGE the Third, &c. To all and singular Sheriff, &c. and others, who shall hereafter have our present letters, greeting. Know you, that we have taken into our

special protection A. B. and all his servants, lands and tenements, goods and chattels in, &c. in the county of S. and in, &c. and also all his writings whatsoever: Therefore we command you that you protect and defend the said A. B. and his servants, &c. aforesaid, not doing to him or them, or any of them, or permitting to be done to them, any injury, damage or violence, on pain of grievous forfeiture, &c. In testimony of which, &c. for one year to endure. In witness, &c.

Protection of Ambassadors. See *Ambassadors* and *Privileges*.

Protection of Children, is a natural duty, rather permitted than enjoined by any municipal law; nature, in this respect, working so strongly as to need rather a check than a spur. A parent may, by our laws, maintain and uphold his children in their law suits, without being guilty of the legal crime of maintaining quarrels: A parent may also justify an assault and battery in defence of the persons of his children: Nay, whose a man's son was beaten by another boy, and the father went near a mile to find him, and there revenged the son's quarrel by beating the other boy, of which beating he afterwards unfortunately died; it was not held to be murder, but manslaughter merely. *Cro. Jac.* 296. 1 *Harr. P. C.* 83.

Such indulgence does the law shew to the frailty of human nature, and the workings of parental affection! *Black. Com.* 1 *V.* 450.

Protection of Parliament. Peers, and members of parliaments, by their privilege, may protect their mutual servants, and those actually employed by them in service; but by a late order, this extends not to others, on written *protections*.

One *Commons* gentleman to the Earl of Suffolk, was by order of the House of Lords committed to Newgate, on proof of his being guilty of procuring and selling written *protections*, from and in the name of that peer, to several persons, to the great damage of their creditors, and in breach of the orders of that house; and being charged with other crimes, respecting on the House of Peers, he was sentenced to pay a fine, and to stand in the pillory, &c. *Mod. Caf. in L. & E.* 341. See *Privileges*.

Protection of the Courts at Westminster. The *protection* of the court of B. R. is allowed for any person who attends his own business in this court, or by virtue of any *subpoena*; but this is more properly *privilege*.

Protestations. The Statute allowing a challenge to be answered against a *protestation*, see. 33 *Edw.* 1.

Protest, (*Protestatio*) Hath two applications; one by way of denunciation, to call witnesses (as it were) or openly affirm, that he doth either not at all, or but conditionally yield his consent to any act, or unto the proceeding of a judge in a court, wherein his jurisdiction is doubtful, as to answer on his oath further than by law he is bound. See *Plowden* 676. and *Reg. Orig.* 306. The other is by way of complaint, as to *protest* a man's bill. For example, If I give money to a merchant in France, taking his bill of exchange to be repaid in England, by one whom he assigneth; if at my coming I find not myself satisfied, but either delayed or denied, then I go to the Exchange, or open discourse of merchants, and *protest*, that I am not paid; and thereupon, if he hath any goods remaining in any man's hands within the realm, the law of merchants is, that it be paid out of them to my full satisfaction. *Cowell.* See *Bills of Exchange*, and *Black. Com.* 2 *V.* 468; 3.

Each peer has a right, by leave of the house, when a vote passes contrary to his sentiments, to enter his dissent on the journals of the house, with the reasons for such dissent; which is usually called *his protest*. *Har.* 1 *V.* 168.

Protestation, (*Protestatio*) is a defence or safeguard to the party who makes it, from being concluded by the other party, that he is guilty of some crime, which cannot be joined by it. *Black. Com.* 1 *V.* 326.

The *protestation* of standing when one does not directly affirm or deny any thing alledged by another, or which he himself alledged. *Cowell.* As *protestants* that he made no testament *pro testante* because if he made no testament he could make no executor. *Harr. Man.* 26. cites *1^{l.}* 1 *178.*

Protestation is of two kinds. 1st, When a man pleads any thing which he dare not directly affirm, or cannot plead, for fear of making his plea double; as if in conveying to himself by his plea a title, he ought to plead diverse descents by diverse persons, and he dare not affirm that they were all seized at the time of their death, or altho' he could do it, yet it will be double to plead two descents, of both which every one by himself may be a good bar, then defendant ought to plead and alledge the matter, interlacing the word *protestando*; as to say (by protestation) that such a one died seized, &c. and that the adverse party cannot traverse. 2dly, When one is to answer two matters, and yet by law he ought to plead but to one, then in the beginning of his plea he may say *protestando* & *non cognoscendo* such part of the matter to be true, (and then making his plea further) *sed pro placito in hac parte*, &c. and so he may take issue on the other part of the matter; and then he is not concluded by any of the rest of the matter which he hath by protestation so denied, but may afterwards take issue on it. *Reg. Plac.* 70, 71. See 18 *Vin. Abr.* tit. *Protestation*.

Protestant Children of Papists and Jews. The Lord Chancellor, how to make an order on Popish and Jewish parents refusing to allow their protestant children a maintenance, 11 & 12 *Will.* 3. c. 4. *stat.* 7. 1 *Ann.* 8. 1. c. 30.

Protestant Dissenters, Exempt from penalties. See *Dissenters, Nonconformists*.

Protestant Succession. See *King, Prerogative, &c.*

Prothonotary, (*Protonotarius, vel Primus Notarius*) is a chief officer or clerk of the *Common Pleas* and *King's Bench*; and for the first court there are three *Prothonotaries*, and the other hath but one: He of the *King's Bench* records all civil actions; as the *Clerk of the Crown Office* doth all criminal causes in that court: Those of the *Common Pleas*, since the order 14 *Jac.* 1. on agreement entered into between the *Prothonotaries* and *Filers* of that court, enter and enrol all manner of declarations, pleadings, assises, judgments, and actions: They make out all judicial writs, except writs of *habeas corpus* and *distringas jurator*, (for which there is a particular office erected, called the *habeas corpora office*.) Also writs of execution, and of seisin, of privilege for removing causes from inferior courts, writs of *procedendo*, *scire facias*, in all cases, and writs to enquire of damages; and all process upon prohibitions, on writs of *audita querela*, false judgment, &c. They likewise enter recognizances acknowledged in that court; and all common recoveries; and make exemplifications of records, &c. 5 *H. 4.* c. 14.

Proctor, Probator, mentioned in *Stat.* 28 *Ed.* 1. and 5 *H. 4.* c. 2.) See *Approver*, and 3 *Inst.* 129. A man became an *approver*, and appealed five, and every of them joined battle with him: *Et duellum percussum fuit cum omnibus, & probator devixit annis quinque in duello, quorum quatuor suspendebantur, & quintus clamabat esse clericum & allocatur. & probator pardonatur.* *Mich.* 39 *E.* 3. coram Rege. *Rot.* 97. *Suff.*

Province, (Provincia) signifies an out country, governed by a deputy or lieutenant. *Litt. Dist.*

It was used among the *Romans* for a country, without the limits of *Italy*, gained to their subjection by the sword; whereupon that part of *France* next the Alps was so called by them, and still retains the name.

But with us a province is most usually taken for the circuit of an archbishop's jurisdiction; as the province of *Canterbury*, and that of *York*: Yet it is mentioned in some of our statutes, for several parts of the realm; and sometimes for a county. 32 *H. 8.* c. 23.

Provincial, (provincialis) Of or belonging to a province; also a chief governor of a religious order; as of friars, &c. *Stat.* 4 *H. 4.* c. 17.

Provision, (provisio) Is used with us as in the Canon law for providing a bishop, or any other person, an ecclesiastical living, by the Pope, before the incumbent be dead: It is also called *gratia expectativa*, or *mandatum de providendo*: The great abuse whereof may be read not only in *Duarenus de sacris Ecclesie Ministeriis & Beneficiis*, lib. 3. cap. 2. but also in many statutes, viz. 35 *E.* 3. 22 *stat.* 4 & 5. commonly called the statute *De provisionibus*, & 27 *E.* 3. c. 1. & 38 *E.* 3. 2.

c. 1; 2; 3; 4. & 2 *Ric.* 2. c. 7. 3 *Ric.* 2. c. 3. 2. 12. 12 *Ric.* 2. 2. c. 2; 3; 4. & 3 *H.* 5. c. 4. See *Præsumptio*, and *Black. Com.* 1 *V.* 60. 4 *V.* 107.

Provisions. The acts to restrain the exorbitant abuse of arbitrary power made in the parliament at *Oxford* 1258, were called *provisions* by *Rishanger*, who continued *Mat. Paris.* anno 1260. *Rex autem quia juraverat cum Edwardo primogenito suo & Baronibus, provisiones Quondam se inviolabiliter servaturum, &c.* being to provide against the King's absolute will and pleasure. See *Mat. Paris.* sub annis 1244 & 1258. *Provisions* signified also *providentia*, or provisions of victual. *Cowell*

Provisions (selling unwholesome) Is an offence against publick health. To prevent which the statute 51 *Hen.* 3. 6. and the ordinance for bakers, c. 7. prohibit the sale of corrupted wine, contagious or unwholesome flesh, or flesh that is bought of a Jew; under pain of amercement for the first offence, pillory for the second, fine and imprisonment for the third, and abjuration of the town for the fourth. And by 12 *Car.* 2. c. 25. s. 11. Any brewing or adulteration of wine is punished with the forfeiture of 100 *l.* if done by the wholesale merchant; and 40 *l.* if done by the vintner or retail trader.

Proviso, Is a condition inserted in any deed, on the performance whereof the validity of the deed depends; and sometimes it is only a covenant, *secundum subjunctam materiam.* 2 *Rep.* 70. 2 *Lill. Abr.* 399.

The word *proviso* is generally taken for a condition; but it differs from it in several respects; for a condition is usually created by the grantor or lessor, but a *proviso* by the grantee or lessee; there is likewise a difference in placing the *proviso*, as if immediately after the *habendum*, the next covenant is that the lessee shall repair, *provided* always that the lessor shall find timber, this is no condition; nor is it a condition, if it comes among other covenants after the *habendum*, and is created by the words of the lessee; as if the lessor covenants to scour the ditches, *proviso* that the lessee carry away the soil, &c. 3 *Nels. Abr.* 21.

It hath been held, that the law hath not appointed any proper place in a deed to insert a *proviso*; but that when it doth not depend on any other sentence, but stands originally by itself, and when it is created by the words of the grantor, &c. and is restrictive or compulsory, to enforce the grantee to do some act, in such case the word *proviso* makes a condition, tho' 'tis intermixed with other covenants, and doth not immediately follow the *habendum.* 2 *Rep.* 70.

A *proviso* always implies a condition, if there be no words subsequent which may change it into a covenant: Also it is a rule in *provisions*, that where the *proviso* is, that the lessee, &c. shall do, or not do a thing, and no penalty is added to it; this is a condition; or it is void; but if a penalty be annexed, it is otherwise. *Cro. Eliz.* 242. 1 *Lev.* 155. And where a *proviso* is a condition, it ought to do the office of a condition, i. e. make the estate conditional, and shall have reference to the estate, and be annexed to it; but shall not make it void without entry, as a limitation will.

A lease was made for years, rendering rent at such a day, *proviso* if the rent be not paid for one month after, the lease to be void; the condition was, Whether this was a condition of limitation; for if it was a condition, then the lease is not determined without entry; adjudged, that it was a limitation, tho' the words were conditional, because it appeared by the lease itself, that it was the express agreement of the parties that the lease shall be void on non-payment of the rent; and it shall be void without entry. *Moor.* 291. 1 *Nels. Abr.* 22, 26.

If a *proviso* be the mutual words of both parties to the deed, it amounts to a covenant: And a *proviso* by way of agreement to pay, is a covenant, and an action well lies upon it. 2 *Rep.* 72.

Plaintiff conveyed an office to defendant, *proviso* that out of the first profits he pay plaintiff 500 *l.* And it was resolved, that an action of covenant lay on this *proviso*; for it is not by way of condition or determination, but is nature of a covenant to pay the money. 1 *Lev.* 155. But defendant in consideration of 400 *l.* granted his lands to plaintiff for ninety-nine years, *proviso* if he pay so much yearly

yearly during the life of S. T. &c. or 400^l. within two years after his death, then the grant to be void, and there was a bond for performance of covenants; in action of debt brought on this bond, it was adjudged, that there being no *express* covenant to pay the money, there could be no breach assigned on this *proviso*. 2 Mod. 36.

In articles of agreement to make a lease, *proviso* that the lessee should pay so much rent, &c. altho' there be no special words of reservation of rent, the *proviso* is a good reservation. Cro. Eliz. 486. And *proviso* with words of grant added to it, may make a grant and not a condition. Moor 174. Yet in the case of a lease for life, *proviso* if the lessee died before the end of sixty years, that his executors should enjoy it for so many years as would make up the sixty; it was held, that by this *proviso* the lessee had no estate for years, nor his executors any remainder of a term, because *nothing was limited thereby to the lessee for life as a remainder*, to him and his executors. 1 And. 19.

When uses are raised by covenant, in consideration of paternal love to children, &c. and after in the same indenture, there is a *proviso* to make leases, without any particular consideration, it is void; tho' such a *proviso* might be good, if the uses were created by fine, recovery, &c. because of the transmutation of the estate; and for that in this case, *uses arise without consideration*. 1 Rep. 176. Moor 144. 1 Lev. 30. 2 Lill. Abr. 402.

In a deed, a *proviso*, that if the son disturb the other uses, &c. that then a term granted to him, and the uses to the heirs of his body, shall be void; this *proviso* is sufficient to cease the other uses, on disturbance. 8 Rep. 90, 91. But a *proviso* to make an estate, limited to one and the heirs male of his body, to cease as if he was naturally dead, on his attempting any act by which the limitation of the land, or any the estate in tail, should be undone, barred, &c. hath been adjudged not good; because the estate-tail is not determined by the death of tenant in tail, but by his dying without issue male. Dyer 351. 1 Rep. 83.

A testator devised lands to one and the heirs male of his body, *proviso* that if he attempt to alien, then his estate to cease, and remain to another; the *proviso* is void. 1 Vent. 521.

A *proviso* that would take away the whole effect of a grant, as not to receive the profits of lands granted, &c. is void; and so is a *proviso* which is repugnant to the express words of the grant: In a will, testator made another his executor, provided he did not administer his estate, adjudged this *proviso* is void for repugnancy. Cro. Eliz. 107. Dyer 3.

And if a *proviso* is good at first, and afterwards it happens, that there is no other remedy but that which was restrained; the remedy shall be had notwithstanding the restraint. Wood's Inst. 431. Where a *proviso* is parcel of, or abridgeth a covenant, it makes an exception; when 'tis annexed to an exception in a deed, 'tis an explanation; and where added at the end of any covenant, there it extends only to defeat that covenant. 2 Leon. 72, 73. Moor 105, 471. See Deeds.

Proviso, (concerning judicial matters). Is where the plaintiff in an action desires in prosecuting his suit, and doth not bring it to trial in convenient time; the defendant in such case may take out the *venire facias* to the sheriff, which hath in it these words, *proviso quod*, &c. To the end, that if plaintiff take out any writ to that purpose, the sheriff shall summon but one jury on them both; and this is called going to trial by *proviso*. Old Nat. Br. 159.

By the standing rules of the court of B. R. if plaintiff will not enter his issue, defendant may by rule compel him to enter it; and if he entered, and he will not carry down the cause to trial, defendant may carry it down by *proviso*. 3 Salk. 361. See 7 & 8 W. 3. cap. 32.

Process may be taken out by defendant in criminal cases by *proviso* on appeal, in the same manner as in other actions, on default of the appellant; but not in indictments, nor in actions where the King is sole party; and it hath been questioned, whether there can be any

such process in informations *Qui tam*. 2 Hawk. 407, 408.

Provisor, is he who sues to the court of Rome, for a *provision*, which is called *gratia expectativa* according to Spelman. See also Old Nat. Brew. 243. they were prohibited by proclamation 42 Hen. 3. anno 1258. Hill. pag. 259. It is sometimes also taken for him who hath the care of providing things necessary, a purveyor. Cowell. See *Provision*. As to the statutes against provisors, see Black. Com. 4 V. 110.

Provost monasterii, The treasurer or steward of a religious house, who had the custody of goods and money, and supervised all accounts. Cowell.

Provost vicualium, The King's purveyor, who provided for the accommodation of his court, is so called in our historians. Cowell.

Proportion, To make killing a person man-slaughter, &c. See Murder.

Provost Marshal, Is an officer of the King's navy, who hath the charge of prisoners taken at sea: And is sometimes used for like purpose at land. 13 Car. 2. c. 9.

Proxies, Are persons appointed instead of others, to represent them.

Every peer of the realm called to parliament, hath the privilege of constituting a proxy to vote for him in his absence, on a lawful occasion; but such proxies are to be entered in person, and sometimes proxies have been denied by the King; particularly Anno 6, 27 & 39 Edw. 3. Marriage contracts have been often made by proxy, &c. See Black. Com. 1 V. 168.

Proxies, Also are annual payments made by parochial clergy to the bishop, &c. on visitations. See Procurations.

Pricks, Is a kind of service or tenure; and according to Blount, signifies an old fashioned spur, with one point only, which the tenant holding land by this tenure, was to find for the King.—*Per servitium inveniendi unum equum unum saccum & unum pryk in Guerra Wallia*. 1 R. 2.

And in the time of Hen. 8. Light horsemen in war were called *prickers*; because they used such spurs or *pryks*, to make their horses go with speed.

Puberty, (*Pubertas*) The ripe age of fourteen in men and twelve in women, when they are fit for marriage: But as to crimes and punishment, it is the age of 14 years, in both the male and female sex, and not before. 1 Hals' Hist. P. C. 18. See Black. Com. 4 V. 22.

Publication, Is used of depositions of witnesses in a cause in Chancery, in order to the hearing, and rules may be given to pass publication; which is a power to shew the depositions openly, and to give out copies of them, &c. There is also a publication of a will, which is a solemnity requisite to the making thereof, by declaring it to be the last will of the testator, in the presence of such a number of witnesses; and a will which hath been made many years, may be now published with additions, and that makes it equivalent to a new will. 3 Nels. Abr. 27. Publication of libels. Vide Libels. And Black. Com. 3 V. 450.

Public Accounts. Commissioners are to enquire of the accounts of sheriffs, customers, and other the King's officers; after passed in the Exchequer, and if detected of fraud, they shall pay treble damages, by stat. 6 H. 8. c. 3. And all the lands, tenements and hereditaments, which any person hath, shall for the payment of debts to the crown, be liable and put in execution in like manner as if he had stood bound by writing obligatory, having the effect of a statute staple, &c. Stat. 13 Eliz. c. 4.

And there have been several statutes for taking the public revenue of the kingdom, and examining and determining the debts due to the army and navy; Also corporations in the management of the King's transfers, &c. empowering commissioners for that purpose, who were to give an account of their proceedings to the King and parliament. Stat. 2 W. & M. 1 Ann. 2 Geo. 1, &c.

Public Act of parliament. A general or public act is an universal rule, that regards the whole community:

And of this the courts of law are bound to take notice judicially and *ex officio*, without the statute being particularly pleaded, or formerly set forth by the party who claims an advantage under it. *Black. Com.* 1 V. 86.

Publick Faith, (*Fides publica*) In the reign of Charles 1. was a pretence or cheat, to raise money of the seduced people, upon what was termed the *publick faith* of the nation, to make war against the King about the year 1642. *Stat. 17 Car. 1. c. 18.*

Public worship. See *Nonconformists, Recusants, Service and Sacraments.*

Pueritia, see *Puberty.*

Quis darrein continuance. Is a plea of new matter, pending an action, *post ultimam continuationem*. See *Plea.*

Puifne (Fr. *Puifne*) Younger, puny, born after. See *Mulier.*

Pulsator, The plaintiff or actor; and *pulsare* signifies to accuse any one. *Leg. Hen. 1. c. 26.*

Punishment, (*Pœna*) Is the penalty for transgressing the law: And as debts are discharged to private persons by payment; so obligations to the publick, for disturbing society, are discharged when the offender undergoes the punishment inflicted for his offence.

Kings, and such as have equal power with them, have a right to require punishment for injuries committed against themselves or their subjects, on the violation of national law; tho' the right of inflicting punishments to provide for the safety of society, was originally (before Commonwealths were erected and courts of justice ordained) in the hand of every man being equal to, and independent of others; but since, it has resided in the hands of the highest powers, as subjection to others hath taken away that primitive right: However, this power and natural right of punishing an equal, still remains in those places where the people are not subject to some form of government. *Grot. de Jure Belli, lib. 2. c. 21.*

The punishment of offences are many and various, adapted to the several degrees of crimes, and the countries wherein committed; and in England are beheading, hanging, imprisonment, fine, amercement, &c.

Sur auter vie, Is where lands, &c. are held for another's life. See *Occupant*. And *Black. Com.* 2 V. 120.

Purchase, (*Acquisitum, perquisitum, purchaseum*) Signifies the buying or acquisition of lands, or tenements with money, or by deed or agreement; and not obtaining it by descent, or hereditary right, and *conjunctum perquisitum* is where two or more persons join in the purchase. *Litt. 12. Reg. Orig. 143.*

One cometh in by purchase when he comes to lands by legal conveyance, and he hath a lawful estate: And a purchase is always intended by title, either from some consideration, or by gift; (for a gift is in law a purchase) whereas descent from an ancestor cometh of course by act of law; also all contracts are comprehended under this word purchase. *1 Inst. 18. Doct. and Stud. c. 24.*

Purchase in opposition to descent is taken largely; if an estate comes to a man from his ancestors without writing, that is a descent: But where a person takes any thing from an ancestor, or others, by deed, will or gift, and not as heir at law; that is a purchase. *2 Litt. Abr. 403.*

When an estate doth originally vest in the heir, and never was nor could be in the ancestor, such heir shall take by way of purchase: But when the thing might have vested in his ancestor, tho' it be first in the heir, and not in him at all; the heir shall have it in nature of descent. *1 Rep. 95, 106.*

An heir takes an estate by will in another manner than the Common law would have given it; there he takes by purchase, and not by descent; but then he must be the right heir. *2 Lev. 79.*

1. Who shall be deemed purchasers.
2. Of purchasers for a valuable consideration.
1. Who shall be deemed purchasers.

A. enters into partnership in 5ths, with three others, for 21 years, for digging mines in A.'s lands, A. to have

two 5ths, and also in consideration of his ownership of the land, to have a tenth more out of the share of the other partners. Pursuant to the articles, they searched for the mines, and after two years time, and the expence of about 120*l.* they discovered a valuable mine, and worked for about three months, and then A. dies, and his widow sets up a voluntary settlement, made after marriage. The court inclined that the partners were as purchasers, and that the voluntary settlement should not stand against them. *2 Vern. 326.*

The wife joins with the husband in letting in an incumbrance on her jointure, and barring the estate-tail, and then limits the uses to the husband for life, remainder to the wife for life, remainder to their daughter. Per Lord Keeper Wright, The daughters are not purchasers so as to shut out a judgment creditor of the husband's, antecedent to barring the estate-tail; it might have been a good consideration for both, but it was not expressed in the deed, to be any consideration for settling the estate on the daughters, but was a voluntary gift of the wife to her husband, therefore the daughter's estate must be taken to be voluntary; and so a judgment-creditor ought to have the assistance of this court before them. *Cant. Prec. 114.*

Every lessee is a purchaser. *9 Mod. 59. See 2 Vern. 327.*

A. seised in fee, settled his estate in 1712. to the use of himself for life, remainder to B. in tail, but with power of revocation, by any writing signed, &c. and attested by three, &c. credible witnesses. In 1715, A. by deed, attested by two witnesses only, reciting, that he was indebted, as in a schedule annexed, conveyed his estate to W. R. and W. S. and their heirs, in trust to pay his said debts by profits, mortgage or sale; and after payment thereof, to pay the overplus, and reconvey such part as should be unfold, to A. or such other person, &c. and for such uses, &c. as he, by any writing signed and sealed, and attested, &c. should direct. A. died without issue, but left the said B. and C. the daughters of two sisters, his heirs at law. The deed of 1715 was kept private till after the death of W. S. the surviving trustee in 1724. and was then laid before counsel, who directed, that the heir W. S. should assign the legal estate to the trustees in the deed of 1712. which was done. Afterwards, in 1726. on a treaty of marriage between Lord Fauconbridge and B. a marriage settlement was prepared by the same counsel, as counsel for Lord Fauconbridge, who made a settlement on B. in consideration of the great estate in land which he was to have with her. The surviving trustee in the deed of 1712, joined in this marriage settlement. C. brought a bill claiming a moiety of the estate of A. as coheirs with B. for that the deed in 1715, was a revocation of the deed in 1712. Lord F. pleaded, that he was a purchaser under the deed of 1712, without notice of that in 1715, and that the settlement made by him on B. was in contemplation of that settlement in 1712, and that the surviving trustee in that settlement was party to the marriage settlement; and that tho' the purchase was not of the legal estate, but the trust only, that it will make no difference, according to Wilker and Redington's case, *1 Vern. 501.* and that neither will it differ the case, tho' there was no actual conveyance; for as the trustee in the deed of 1712, always acted under that deed for B. that trust shall subsist as to himself, who is a fair purchaser; and that he shall not be affected by constructive notice to his counsel, as having been advised with on these two deeds in 1724; for it must be intended, that at the time of the counsel's being concerned for him, which was in 1726, he had forgot that he had ever seen this deed of 1715, there being an interval of two years between his first seeing it, and his being counsel for defendant. And for these reasons, the court held, that this could not be notice to his lordship. *Id. Ch. B. Reynolds* who assisted the Lord Chancellor, held, that the Lord F. could be a purchaser of no more than B. had, as no actual conveyance was made to him. The Master of the Rolls said, that to be a purchaser in the notion of equity, there must be an actual contract, and a consideration paid; therefore, if at the time of the marriage the deed of 1712 stood revoked, the trustees could be seised only of a moiety for the use of B. consequently Lord F. can be a purchaser

purchaser of no more. Lord Chancellor decreed a moiety of the estate, and an account of the rents and profits to C. since the death of A. See *Gibb. 277.* and *L. P. Case. 391 to 402.*

2. Of purchasers for a valuable consideration.

A purchaser who comes in without notice of a rent-charge shall not be chargeable therewith, altho' given to a charitable use. *Tosh. 258.*

A bill was, to be relieved on a trust, and charged defendant with notice; defendant pleaded his being a purchaser for a valuable consideration; this was objected to as not good, because he did not say *what* the valuable consideration was; for *5s.* is a valuable consideration, but yet it is not an equitable one; but the court declared that in this case the plea was good enough.

Notice of an incumbrance before the conveyance is executed, shall charge the purchaser. *Chan. Cases 34.*

Purchaser shall not be affected by a judgment in equity, without *express* notice of it *before* the purchase, otherwise it is atlaw. *Chan. Cases 37.*

A purchaser of lands from A. which B. makes title to, getting the deeds which make out B.'s title, is not bound to discover them. *Chan. Cases 69.*

Plea of his being a purchaser for a valuable consideration was over-ruled, because he did not plead the purchase made *from* one of the plaintiff's ancestors; for a purchase from a stranger, who might have no good title, was held no good plea. *N. Cb. R. 135.*

A. having a long lease of a house, in which his wife had some interest, by her consent renews it for eighty-one years, and in consideration of 400*l.* assigns it to B. who assigns it to C. his son, who married M. and died, leaving M. his executrix; M. on a second marriage, conveys it to trustees, &c. A. by bill sets forth this assignment, and that it was a mortgage, and that B. agreed to execute a reconveyance thereof, &c. and prayed a redemption. The executrix pleads she was a purchaser *without* notice of such agreement; and in consideration of a marriage with J. S. and of his undertaking to pay her debts, she assigned the original lease, &c. such a day to trustees, to the use of her intended husband, not having any notice of the agreement prior to the executing the said deed on marriage. It was decreed, that defendants were in nature of purchasers; and the plea was allowed. *Finch R. 9.*

A. indebted by bond, devised a debt to be paid out of his personal estate; but if it was not sufficient, then to sell his real estate, and pay it: The estate was sold, and by several mesne conveyances came to defendant, who was sued for the debt as charged on the lands which he had bought. Defendant pleaded, that he had no notice of the demand, and was a purchaser for a valuable consideration, and that the personal estate was first liable, and that the purchase money which was paid to two other of the defendants was liable in the next place; and that there were other lands, which descended to one of them on the death of A. which ought to come in aid of him, and decreed accordingly. *Fin. R. 37.*

A purchaser for a valuable consideration, without notice was decreed to pay arrears of annuity charged on the lands purchased, tho' the same were due thirty years before, and no demand in all that time. *Finch R. 252.*

A voluntary conveyance decreed against a (jointress) purchaser for a valuable consideration; (but it seems, that the not having notice was the fault of the jointress, &c.) See *Chan. Cases 291, 292.*

A purchaser from J. S. who has a decree against him in Chancery for land, shall be bound by the decree, tho' he has no notice of it. *Chan. Cases 43.*

But by a dowress to remove a fruit term, defendant pleads himself a purchaser, but does not deny notice, and so was ordered to answer. *Fern. 179.*

Bill was brought to prove a will, and perpetuate the testimony of witnesses; defendant pleaded himself a purchaser without notice of such will, and insisted there had been a verdict in affirmance of such will, (nothing hindering the plaintiff, but that if he had a title he might

renew it at law) the plaintiff ought not to be admitted to examine his witnesses, thereby to hang a cloud over the purchaser's estate; and on debate the court allowed the plea. *Fern. 354.*

A. mortgaged land to B. and afterwards by his will (having sons C. and D.) devised the equity of redemption to D.—B. and C. join in an assignment of the mortgage to E. tho' E. pleaded *want of notice of the will*, and that C. was the visible heir; yet decreed, that D. should have the equity of redemption on the foot of the first mortgage. *N. Cb. R. 153.*

A. purchases, having notice of a settlement whereby B. the vendor was but tenant for life, remainder to his first, &c. son in tail. Afterwards A. sells to C. who had no notice; B. dies, leaving a son; the bill was dismissed as to C. but decreed A. to account for the consideration money, for which he sold the estate, with interest from the decease of B. thereout discounting what was due on a mortgage prior to the settlement which he had bought in. *2 Fern. 384.*

Cowper C. said, He took it to be a rule in equity, that where a man is a purchaser without notice, he shall not be annoyed in equity; not only where he has a prior legal estate, but where he has a better title or right to call for the legal estate than the other; therefore dismissed the bill. The case was; A. purchases of B. who had done an act of bankruptcy, but *without* notice of it; afterwards a commission is taken out, and there being a term standing out in trustees, assignee brings a bill against them, and the purchaser to have the term assigned to him. *2 Fern. 599.*

A bill was to redeem lands mortgaged in 1694. to defendant's grandfather by plaintiff's father for 500 years, to be void on payment of 126*l.* and interest. Defendant pleads, that he is a devisee of those lands under his grandfather's will, who in 1692. purchased them for a 200 years term without condition of redemption, and had enjoyed 15 years quiet possession. But the court over-ruled the plea for defendant's not answering *sufficiently* as to the mortgage, and the plea of the purchase may be true, for it may be only a term for years to attend the inheritance. *G. Equ. R. 185.*

For more learning on this subject, see 18 Vin. Abr. tit. Purchaser.

Purchase and value of Land. Lands are purchased at diverse rates in this kingdom; according to their situation, &c.

An estate of fee-simple in lands, is usually valued in the country at twenty years purchase. Lands near London yield about twenty-five years purchase; and in Wales, not above eighteen or nineteen.

The fee of tithes of perpetual advowsons is worth about twenty-two years purchase: And fee-farm rents issuing out of lands, and the fee of ground-rents, are rated at twenty-four or twenty-five years purchase.

The fee of houses in London sells for seventeen or eighteen years purchase, if in good repair, and the ground rents are not high; otherwise for less: Houses not in London, but well situated, without any lands to them, are sold for fifteen or sixteen years purchase: For a lease of a house for thirty years, about eight years purchase is given in London; and for one and twenty years about six years value.

A freehold lease for three lives absolute, or a copyhold estate for the like term, where the quit-rents and heriots selected are not higher than usual, is rated at fourteen years purchase; for the first life eight, for the second four, and two for the third life; or seven, five and two. A chattel lease for three lives, thirteen years purchase.

The exchanging one life for another is generally one year's purchase; but if a fee-simple be exchanged for a lease for one, two or three years purchase. A widowhood in a copyhold, after death of the husband a third life, is valued at one year's purchase. The fee in reversion after three lives, is worth nine, seven, and five years purchase, after one, two or three lives; and more where there is timber, or the estate improveable. *Land. Purch. Comp. 1, 2, 3, 4, &c.*

Purgation, (*Purgatio*) Is the clearing a man's name of a crime, whereof he is publicly suspected, and accused before a judge: Of which there was formerly great use in England.

Purgation is either *canonica*, or *vulgaris*.

Canonical purgation is, that which is prescribed by the Canon law, the form whereof used in the *Spiritual court*, is that the person suspected take his oath, that he is clear of the fact objected against him, and bringing his honest neighbours with him to make oath, that they believe he swears truly.

The *vulgar purgation*, according to the ancient manner, was by fire or water *ordal*, or by combat, abolished by canon. *Staudf. P. C. lib. 2. cap. 48. Stat. Westm. 1. cap. 2.*

Purgation is one of the punishments of the Ecclesiastical courts; but the *Stat. 13 Car. 2. c. 12.* having taken away the oath *ex officio*, of persons accusing or purging themselves, &c. some maintain that all the proceedings of *purgation* on common fame fall too; others say, there is still a legal *purgation* left, but not canonical. *Wood's Inst. 506, 507. Vide Clergy, &c. And Black. Com. 3 V. 100, 342, 447. 4 V. 361.*

Purificatio Beate Mariæ Virginis, Mentioned in the *Stat. 32 Hen. 8. c. 21.* See *Candlemas*.

Purlicu-Men, Are those who have ground within the *purlieu*, and being able to dispend forty shillings a year *freehold*; who, on these two points, are licensed to hunt in their own *purlieus*, observing what is required. *Manw. For. Laws 151, 157, 180, 186.* See the next word.

Purlue, or **Purlieu**, (from the Fr. *pur*, i. e. *purus*, & *lieu*, locus) Is all that ground near a forest, which being added to the ancient forests by King *Hen. 2. Ric. 1.* and King *John*, was afterwards disafforested and severed by the *Charta de Foresta*, and the perambulations and grants thereon, by *Hen. 3.* so that it become *purlue*, *viz.* pure and free from the laws and ordinances of the forest. *Manwood's For. Laws. par. 2. c. 20.*

Our ancestors called this ground *purlieu*, *purum locum*, because it was exempted from that servitude which was formerly laid on it: As *Manwood* and *Crompton* call it *pourallee*, we may derive it from *pur*, *purus*, & *allee*, *ambulatorio*, because he who walketh or courseth within that circuit, is not liable to the laws or penalties incurred by them who hunt within the forest precincts; but *pourallee* is said to be properly the perambulation whereby the *purlieu* is disafforested. *Stat. 33 Edw. 1. 4 Inst. 304.*

Owners of grounds within the *purlieu* by disafforestation, may fell timber, convert pastures into arable, &c. inclose them with any kind of inclosure; erect edifices, and dispose of the same as if they had never been afforested; and a *purlieu-man* may as lawfully hunt to all intents within the *purlieu*, as any man may in his own grounds which were never afforested: He may keep his dogs within the *purlieu* unexpeditated; and the wild beasts belong to the *purlieu-man ratione soli*, so long as they remain in his grounds, and he may kill them. *4 Inst. 303.*

If the *purlieu-man* chase the beast with grey hounds, and they fly towards the forest for safety, he may pursue them to the bounds of the forest, and if he then do his endeavour to call back and take off his dogs from the pursuit, altho' the dogs follow the chase in the forest, and kill the King's deer there; this is no offence, so as he enter not into the forest, nor meddle with the deer so killed: And if the dogs fasten on the deer before he recover the forest, and the deer drag the dogs into the forest, in such case the *purlieu-man* may follow his dogs and take the deer. *4 Inst. 303, 304.*

But in the case of *Sir Richard Wyss*, it was said, that there was no *purlieu* in law to hunt; that it cannot be by prescription, and there is nothing in statutes as to hunting; therefore *purlieu-men* may only keep out the deer, but cannot kill them, tho' they be in their ground. *1 Jones Rep. 278. See Moor 706, 987.*

And notwithstanding *purlieus* are absolutely disafforested, it hath been permitted, that the ranger of the forest shall, as often as the wild beasts of the forest range into the *purlieu*, with his hounds recatch them back to the forest. *4 Inst. See 33 Ed. 1. Stat. 5.*

Purparty, (Fr. *four part*, i. e. *pro parte*) Is that part or share of an estate, first held in common by parceners, which is by partition allotted to any of them: To make *purparty* is to divide and sever the lands which fall to parceners, which till partition they held jointly, and *pro indiviso*. *Old Nat. Br. 11.*

Purpresture, (*Purprestura*, from the Fr. *pourpreist*, an inclosure) Is when any thing is done to the nuisance of the King's demesnes, or the highways, &c. by inclosure, or buildings; endeavouring to make that private which ought to be publick. *Glanvil. lib. 9. c. 11. 1 Inst. 38, 272.* And when a man takes to himself, or incroaches any thing which he ought not, it is a *purpresture*. *Kit. b. 10. 2 Inst. 38. See Pourpresture.*

Purse, A certain quantity of money, containing 500 dollars, or 125 *l.* in *Turkey*. *Merch. Dist.*

Pursuivant, (from the Fr. *poursuivre*, i. e. *agere*, *persequi*) Signifies the King's messenger attending on him to be sent on any business or message. *See Pursuivant.*

Purbepance. See *Purbepance*. As well before as after the conquest, the King, on his ancient demesnes of the crown of England, had houses of husbandry, and stocks for the furnishing necessary provisions for his household, and the tenants of those manors did by their tenures manure, till, &c. and reap the corn on the King's demesnes, mowed his meadows, &c. repaired the fences, and performed all necessary things belonging to husbandry on the King's demesnes: In respect of which services, and to the end they might apply the same the better, they had many liberties and privileges, as that they should not be sued out of the court of that manor, nor impanelled of any jury or inquest, nor appear at any other court, but only at the court of the manor, nor be contributory to the expences of the knights of the shire which served at parliament, nor pay any toll, &c. which liberties and immunities continue to this day, altho' the original cause is ceased. *2 Inst. 542, 543. c. 2.*

Hawkins (Pl. C. 114. c. 47. f. 1.) says, that this method being troublesome and inconvenient, was by degrees disused, and afterwards the King used to appoint certain officers to buy in provision for his household, who were called *purveyors*, and claimed many privileges by the prerogative of the crown, and seem to have had the pre-emption of all such victuals as were bought by any to sell again.

Purview, (Fr. *pourveu*, a patent or grant) Is the body, or that part of an *Act of Parliament* which begins with *Be it enacted*, &c. The statute *3 Hen. 7.* stands upon a *preamble* and *purview*. *2 Inst. 403. 12 Rep. 20.*

Putage, (*Putagium*, *Fornicatio ex parte faminæ*, quod vox nulla Latina exprimit, quasi putam agere: From the French *putain*, or the Italian *putta*, i. e. *meretrix*) *fornication*.

This crime was so odious, that if any heir-female under guardianship were guilty thereof, they forfeited their part to their coheirs, or if she were an only heiress, the lord of the fee took it by escheat. *Spelman. Corwell.*

Putative, Putative, reputed, or commonly esteemed, in opposition to notorious and unquestionable.—*Pater putativus* the reputed father of the child. *Jr. Brompton 963.*

Putting in test, See *Black. Com. 4 V. 242.*

Putna, (*q. Putna*) Is a custom claimed by *lorders* in *forest*, and sometimes by *baillifs* of *hundreds*, to take man's meat, horse meat, and dog's meat, of the tenants and inhabitants within the perambulation of the forest, hundred, &c. and in the liberty of *Knareburgh* it was long since entered into the payment of 4 *d.* in money by each tenant. *M. de Temp. Ed. 3. 4 Inst. 207.* The land subject to this custom is called *Terra Putnarum*. *Plac. apud C. 31 Ed. 3.*

Pyper, or **Pyet**, A small ship or herring boat. *31 Ed. 3. c. 2.*

Quadragesima, The fortieth part; also the time of Lent, from our Saviour's *Ferry Day* to *Asc. Litt. Dist.* and *Quadragesima Sunday*, is the first Sunday

day in Lent; so called, because about the fortieth day before Easter. Blount.

Quadragesimalia. In former days it was the custom for people to visit their mother church on Midlent-Sunday, and to make their offerings at the High Altar; as the like devotion was again observed in *Whitsun-Week*: but as the processions and oblations at *Whitsuntide* were sometimes commuted into a rated payment of *Pentecostals*; so the Lent or Easter offerings were changed into a customary rate called *Quadragesimalia*, and *Denarii Quadragesimales*, also *Lature Jerusalem*.

Quadrans, a fourth part of a penny: and before the reign of *Ed. 1.* the smallest coin was a *sterling* or penny, marked with a cross, by the guidance whereof a penny might be cut into halves for a half-penny, or into quarters or four parts for farthings; till to avoid the fraud of unequal cutting, that King coined half-pence and farthings in round distinct pieces. *Matt. Westm. Anno 1279.*

Quadrantata Terra, The fourth part of an acre. See *Fardingdeul*, or *Quadrarium*.

Quadrivium, The center of four ways, where four roads meet and cross each other. By statute, posts with inscriptions are to be set up at such cross ways, as a direction to travellers, &c. 8 & 9 W. 3. c. 16.

Quæ est eadem, In pleading is used to supply the want of a traverse. 2 Lill. Abr. 405.

In a *clausum fregit* such a day, defendant pleads plaintiff's licence to him to enter on the same day, and that *virtute inde* he entered; he need not say *Quæ est eadem transgressio*: so in trespass for taking goods; if defendant justifies the same day and place: And in trespass and battery, if defendant justifies that the same day and place the plaintiff assaulted him, and that what damages happened to him was of his own wrong; this is good without *Quæ est eadem transgressio*, &c. tho' he doth not directly answer the assault laid by plaintiff; but whilse he justifies at another day, or at other place, then he ought to say, *Quæ est eadem*. 21 Hen. 7. pl. 2.

A fact laid Nov. 1. and a justification Nov. 2. *Quæ est eadem*, is well enough without a traverse, the day not being material; but it had been naught, if the day had been material. 1 Lev. 241.

If a trespass is alledged 10 Nov. and justification the 11 Nov. and there be an averment of *Quæ est eadem*, it is here held good without making any traverse. *Lattw. 1457.*

Where defendant justifies *dicto tempore* in the plaintiff's declaration, he hath no occasion to say *Quæ est eadem transgressio*; because he agrees with plaintiff in the time and place mentioned in his declaration, and gives an answer to it. *Mich. 5 W. & M. B. R.*

Quæ plura, Was a writ which lay where an inquisition had been taken by an *escheator* of lands, &c. that a man died seised of, and all the land was supposed not to be found by the office or inquisition; this writ was therefore to enquire of what other lands or tenements the party died seised: But it is now useless, since the taking away the court of wards and offices *post mortem*. 12 Car. 2. c. 24. Reg. Orig. 293.

Quærit, or Querit, Is where any point of law, or matter in debate is doubted, as not having sufficient authority to maintain it. 2 Lill. Abr. 406.

Quærens non invenit plegium, A return made by the sheriff, on a writ directed to him with this clause, *vin. Si A. fecerit B. securum & clamore suo prosequatur*, &c. F. N. B. 38.

Quæ servitia. See *Per quæ servitia*.

Quæsta, An indulgence or remission of penance exposed to sale by the Pope, and the retailers of them were called *Quæstarii*, and desired charity for themselves or others. *Matt. Westm. Anno 1240.*

Quæstus, Is that which a man hath by purchase; as *hereditas* is what he hath by descent—*Aut habet hereditatem tantum, vel quæstum tantum*, &c. Glanv. lib. 7. cap. 1.

Quakers, (From *Tremulus*.) Are such who pretend to tremble or quake, in the exercise of their religion. The 7 & 8 W. 3. cap. 27. enacts, That Quakers making and subscribing the declaration of fidelity mentioned in 1 W. & M. and owning King William to be rightful and lawful King, shall not be liable to the penalties against others

reverting to take the oath, or for subscribing the declaration of fidelity, &c. they are disabled to vote at election of members of parliament.

Quakers, where an oath is required, are permitted to make a solemn affirmation or declaration, declaring in the presence of God the witness of the truth, &c. But they are not capable of being witnesses in a criminal cause. 7 & 8 W. 3. c. 34. Unless they are sworn like other Protestants.

On the affirmation of a Quaker, the court will not grant an attachment for non-performance of an award. 1 Strange 441. Nor security for the peace. *Ibid.* 527. Nor a rule for an information. 2 Strange 856, 872, 946. But a rule, to shew cause why an appointment of overseers should not be quashed being served by a Quaker, was made absolute on his affirmation; this not being looked on as a criminal prosecution, tho' on the crown side, and the rule in the King's name. 2 Strange 1219.

The Quakers affirmation is ordained to be in force for ever, and the form of it appointed by 1 Geo. 1. cap. 6. And the 8 Geo. 1. cap. 6. authorizes the affirmation of Quakers with the words, *I do promise and sincerely declare in the presence of you, &c.* without saying in the presence of God; but false and corrupt affirming, incurs the penalties of wilful perjury.

And by 22 Geo. 2. c. 46. an affirmation shall be allowed in all cases where by any act of parliament an oath is required, tho' no provision therein for admitting a Quaker to make his affirmation. Quakers refusing to pay tithes, or church rates, justices of peace are to determine them, and order costs, &c. 7 & 8 W. 3. 1 Geo. 1. And Quakers may be committed to prison for non-payment of tithes, on 27 H. 8. c. 20. which is not repealed by 7 & 8 W. 3. which gives another remedy. *Ld. Raym.* 323. In all cases, except criminal, where by any act of parliament an oath shall be required, the affirmation of a Quaker shall be allowed, tho' no provision for that purpose in the act.

Quale jus, A judicial writ which was brought where a man of religion had judgment to recover land, before execution was made of the judgment; it went forth to the escheator between judgment and execution, to inquire whether the religious person had right to recover, or the judgment were obtained by collusion between the parties, to the intent that the lord might not be defrauded. *Reg. Jucis* 8, 16, 46. Stat. Westm. 2. cap. 32.

Qualified, signifies enabled to hold two benefices. See *Plurality*.

Qualified (or base) Fee, is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it, is at an end. As, in the case of a grant to A. and his heirs, TENANTS OF THE MANOR OF DALE; in this instance, whenever the heirs of A. cease to be tenants of that manor, the grant is entirely defeated. So when Hen. 6. granted to John Talbot, lord of the manor of Kingston-Lishe in Berks, that he and his heirs, LORDS OF THE SAID MANOR, should be peers of the realm, by the title of Barons of Lishe; here John Talbot had a base or qualified fee in that dignity; and the instant he or his heirs quitted the lordship of this manor, the dignity was at an end. *Co. Lit.* 27.

This estate is a fee, because by possibility it may endure for ever in a man and his heirs; yet as that duration depends on the concurrence of collateral circumstances, which QUALIFY and DEBEAT the purity of the donation, it is therefore a qualified or base fee. *Black. Com.* 2 V. 109.

Qualified property. See *Possession, Property*, and *Black. Com.* 2 V. 393.

Quædam se bene gesserit, Is a clause often inserted in letters patent, the grant of offices, as in those to the Bishops of the Exchequer, &c. which must be intended in matters concerning their offices; and is nothing but what the law would have implied, if the office had been granted for life. 4 Inst. 179.

Quædam mactis, i. e. How much he has destroyed, is an action on the case, so called, grounded on a promise to any plaintiff for doing any thing so much as he should deserve or merit.

If a man retains any person to do work or other thing for him; as a taylor to make a garment, a carrier to carry goods, &c. without any certain agreement; in such case, the law implies that he shall pay for the same, as much as they are worth, and shall be reasonably demanded; for which quantum meruit may be brought: And if one sue another on a promise to satisfy him for work done, &c. he must shew and aver in his declaration how much he deserved for his work. See *Black. Com.* 3 *V.* 161.

Quantum valebat, Is where goods and wares sold are delivered by a tradesmen at no certain price, or to be paid for them as much as they are worth in general; then quantum valebat lies, and plaintiff is to aver them to be worth so much: so where the law obliges one to furnish another with goods or provisions; as an innkeeper his guests, &c. *Practif. Astorn. Edit.* 1. pag. 72.

Quare clausum fregit. See *Black. Com.* 3 *V.* 281.

Quare cum, Are general words used in original writs, &c. See *Original*.

Quare eiecit infra Terminum, Is a writ which lies for lessee, where he is cast out of his farm before his term is expired, against a feoffee of the lands, or the lessor who ejected him; and the effect of it is to recover his term again, and damages. *Reg. Orig.* 227. *F. N. B.* 197. *New Nat. Br.* 439.

This writ was devised for the following cause:

If a man make a lease of land for years, and after oust his lessee, and then makes a feoffment of the land to a stranger in fee; now the lessee cannot have a writ of *ejectione firme* against the feoffee, because he did not put him out, and in that case the lessee hath no other remedy but to enter again into the land; and if the feoffees then put him out, the lessee may bring *ejectione firme vi & armis*; but before entry made by lessee, he had no remedy against the feoffee: therefore, by the equity of the statute of *Westm.* 2. cap. 24. which enacts, "That where it shall happen in one case, a writ is found, and in the like case falling under the same law; and wanting the same remedy, &c. it is not so, the clerks of the Chancery are to agree upon a proper writ," &c. By reason of that statute, this writ was devised. *New Nat. Br.* 439.

And if a person lease lands for years, and the lessor suffer a recovery to be had against him on a feigned title, and the recoverer entereth; the lessee shall have his writ of *quare eiecit infra terminum*, &c. And the words of the writ are, *Occasione cujus venditionis*; and yet the same is not properly a sale, but those words are only of form. *Ibid.*

It is in the election of lessee, or if he grants over his term, the second lessee, to sue a writ of *ejectione firme*, or a *quare eiecit infra terminum*, against the lessor, or his heir, or against the lord by escheat, &c. if they put the termor out of his term. 19 *Hen.* 6. See *Black. Com.* 3 *V.* 206.

Quare impedit, Is a writ lying for him who hath purchased an advowson, against a person who disturbs him in his right of advowson by presenting a clerk thereto, when the church is void. *F. N. B.* 32. *Stat. Westm.* 2. cap. 5.

It differs from assise of *darrein presentment* (or *ultime presentmentis*) because that lies where a man or his ancestors, under whom he claims, have formerly presented to the church; and this is for him who is purchaser himself; but in both plaintiff recovers the presentation and damages; tho' in the writ of *darrein presentment*, &c. he recovers only the presentation, not the title to the advowson, as he doth in a *quare impedit*; for which reason that assise is seldom brought, and for that the proceedings in it are very tedious; where a man may have assise of *darrein presentment*, he may have *quare impedit*. 2 *Inst.* 356. 3 *Nels. Abr.* 31.

The writ *quare impedit* is to be brought in six months after the avoidance; and by it a patron may be relieved, not only on his presentation to a church, but to a chapel, prebend, vicarage, &c. And this writ lies of a donative, and the special matter is to be set forth in the declaration: It also lieth for a deanery by the King, altho' it be elective; and for an archdeaconry, but not for a mere office of the church. 1 *Inst.* 344. 1 *Lion.* 205. And the

chapter may have a *quare impedit* against the dean, of their several possessions. 40 *Ed.* 3. 48.

If the *quare impedit* be for a donative; the writ shall be *quare impedit* to present to the donative; if of a parsonage, then *quare impedit presentare ad ecclesiam*; if to a vicarage, *ad vicariam*; if to a prebend, *ad prebendam*, &c. 3 *Nels. Abr.* 35.

If a bishop be disturbed to collate, where he ought to make collation, he may have a writ *quare impedit*, and the writ shall be *quod permittat ipsum presentare*, &c. and he shall count on the collation: and if the King be disturbed in his collation by letters patent, he shall have *quare impedit*, &c. *New Nat. Br.* 73.

Grantee of a next avoidance may bring this writ against the patron who granted the avoidance. 39 *Hen.* 6.

It may be brought by executors, for a disturbance in vita testatoris; and executors being disturbed in their presentation, may bring *quare impedit* as well as their testator might. *Owen* 99. *Lutw.* 1.

Husband and wife jointly, or the husband alone without his wife may have the writ *quare impedit*; and if a man who hath an advowson in right of his wife be disturbed in his presentation, and dies, the wife shall bring it on that disturbance. 14 *Hen.* 4. 5 *Rep.* 97.

The heir shall not have *quare impedit*, for a disturbance tempore patris; nor can he have execution on a recovery by the ancestor. *Br.* 2. *Imp.* pl. 7, 9. But by 13 *Ed.* 1. c. 5. Usurpation of churches during wardship, particular estates or vacancy, &c. shall not bar an heir at full age, reversioner in possession, or a spiritual person in succession, from having a writ possessory of *quare impedit*, &c. as the ancestor or predecessor might have had, if such usurpation had been in their time: And the same form of pleading shall be had in *darrein presentment*, and *quare impedit*.

Where partition is made on record, to present by turns, the coparcener who is disturbed shall not be put to a *quare impedit*; but may have remedy on the roll, by *seire facias*: it is otherwise on an agreement to present. *Stat. ibid.* 22 *Ed.* 4. 8.

If tenant in tail suffer an usurpation, and die, and six months pass, the issue in tail cannot bring *quare impedit*; but at the next avoidance he may have it within the six months. 46 *Assise* 4.

This writ is all in the possession; and the presentment of grantee of the next avoidance is a good title for the grantor and patron in fee to bring it; and likewise for his heir, and other grantees. 9 *Hen.* 7. 23. 5 *Rep.* 97.

Presentment alledged in lessee for life, or years, or it is said, in tenant at will, is sufficient in *quare impedit*: so of tenant in dower, or by the curtesy; also of tenants by statute merchant, staple or elegit, &c. 21 *Ed.* 4. 2, 5. *Rep.* 97. *Mallory's Q. Imped.* 155.

It supposes both a possession and a right; and plaintiff must alledge a presentation in himself, or in those under whom he claims; unless it be in case of lapse, &c.

In the declaration of plaintiff, it is not sufficient for him to alledge, that he, or such a person from whom he claims, were seised of the advowson of the church; but he must alledge a presentation made by one of them; for if he doth not, defendant may demur to the declaration: and the reason is, that defendant, by joining the last presentation to his own title, makes it appear, that he hath a right to present now as well as then. *Cro. Eliz.* 518. 5 *Rep.* 57. *Vaugh.* 57. The writ must be brought in that county where the church is; the patron and incumbent are to be named in it, the one as he may be disposed of his patronage, the other of his presentation; and it is usual to make the bishop a defendant, to prevent a lapse, where the church is void. *Prudentia* 12.

Quare impedit will not lie against the ordinary and incumbent, without naming the patron; because a Common law the incumbent could not plead any thing which concerned the right of patronage, therefore it is unreasonable that he alone should be named in the writ who could not defend the patronage; but 25 *Ed.* 3. c. 7. enables him to plead against the King, and to defend his incumbency, altho' he claims nothing in the patronage; and by that statute he shall plead against any common person;

son; tho' with this difference, that when the inheritance of the patron is to be divested by judgment in a *quare impedit*, there he must be named in the writ; but where the next presentation only is to be recovered, he need not be named: yet where the King presents *without a title*, and his clerk is inducted, the *quare impedit* is to be against the ordinary and incumbent; for it will not lie against the King; but if he is plaintiff, the writ may be brought against the patron alone, without naming the incumbent. 7 Rep. 25. 2 Cro. 650. Palm. 306.

If the church be full of a presentation, so that there is no danger of lapse, the bishop need not be named in a *quare impedit*; but it is otherwise where it stands on a disturbance only: And tho' this writ will lie against a patron alone; yet in a common case, where any clerk is presented and inducted, the incumbent shall not be removed, without naming him also. Hob. 320. Giff. & Giff. 235. Jenk. Cent. 200.

The only plea the bishop hath by the Common law on a *quare impedit* is, that he claimed nothing but as ordinary; he could not counterplead the patron's title, or any thing to the right of patronage, nor could the incumbent counterplead such title, till the 25 Ed. 3. by which both the bishop and incumbent may counterplead the title of the patron; the one, when he collates by lapse, or makes title himself to the patronage; the other being *persona impersonata*, may plead his father's title, and counterplead the title of plaintiff: And it has been adjudged, that incumbents cannot plead to the title of the patronage, without shewing that he is *persona impersonata* of the presentation of the patron. W. Jones 4. March 159. 3 Nels. Abr. 38.

In a *quare impedit*, though it was found that the church was full of another, who was a stranger to the writ, and it did not appear whether he came in by a better title than that which was found for plaintiff; it was held, that plaintiff might have a general writ to the bishop, which he is bound by law to execute, or shall be amerced, &c. and he cannot return that the church is full of another; for no issue can be joined between the bishop and plaintiff, because he has no day in court. 6 Rep. 51. 3 Leon. 136.

But where plaintiff recovered an advowson in ejectment, and thereupon had a writ to the bishop, there being another incumbent in the church, who was not a party to the action; adjudged that this writ would not lie without a *seire facias* to the incumbent. *Id.*

If it appears in *quare impedit*, either in pleading, or by confession of the parties, that neither of them have a title, but that it is in the King; the court may award a writ to the bishop for the King, to remove the incumbent, and admit *idoneam personam ad presentationem regis*; but this must be when his title is very plain. Hob. 126, 163. 1 Leon. 323.

In *quare impedit*, plaintiff and defendant are both actors, so that defendant may have a writ to the bishop, as well as plaintiff; but not without a title appearing in the court; wherefore if defendant never appears, plaintiff must make out a title *for form sake*, and so must defendant if plaintiff be non-suited. Hob. 189.

If plaintiff, after appearance, in a *quare impedit* be non-suited, it is *peremptory*; because defendant on title made, whereby he becomes actor, shall have a writ to the bishop; and it is the same in case of a discontinuance. 7 Rep. 27.

It is the nature of a *quare impedit* to be final, either on a discontinuance or nonsuit; and a man cannot have two suits for the same thing in this case against one person, tho' he may have several *quare impedit*s against several persons. 7 Rep. 27. Hob. 137.

The patron, patron, and ordinary are sued; the ordinary disclaiming, and the patron loses by default; plaintiff shall have judgment to recover his presentation, and a writ issue to the bishop, &c. with a *cessat executio*, until the plea is determined between the plaintiff and patron. Vaughan 6.

Several were plaintiffs in a *quare impedit*, defendant pleaded the release of one of them pending the writ; and it was resolved, that this release shall only bar him who made it, and that the writ shall stand good for the rest. 5 Rep. 97.

There are *quare impedit*s against the archbishop, the bishop, and three defendants; the archbishop pleaded that he claimed nothing but as metropolitan; and the bishop pleaded that he claimed nothing but as ordinary; and the defendants made title; but there was a verdict against them: It was a question, Whether the writ of execution should be awarded to the archbishop, or the bishop; and it was held, that where neither of them are parties in interest, it may be directed to either; but if the bishop is party in interest, it must be directed to the archbishop. 6 Rep. 48. 3 Bull. 274. And if the Bishop of Canterbury be plaintiff in a *quare impedit*, the writ must be directed to the archbishop of York, &c. Show. 329.

If defendant pleads *no disturbance*, which is in effect the general issue in a *quare impedit*, this will be only a defence of the wrong with which he stands charged, and is so far from controverting the plaintiff's title, that it, as it were confesses it; and plaintiff may presently pray a writ to the bishop, or maintain the disturbance in order to recover damages. Hob. 163.

There must be a disturbance to maintain this action; in a *quare impedit*, the patron declared on a disturbance of him to present 1 November; the incumbent pleaded, that 1 May next after, the presentation devolved on the Queen by lapse, and she presented him to the church, &c. And on demurrer the plea was held ill; because defendant had not confessed and avoided, nor traversed the disturbance, as forth in the declaration: And tho' by the demurrer the Queen's title was confessed, it appearing that it was already executed, and defendant having lost his incumbency by ill pleading, the writ shall not be awarded to the bishop for the Queen to present again, but for the patron. 1 Leon. 294.

In all *quare impedit*s, defendant may traverse the presentation alleged by plaintiff, if the matter of fact will bear it; but defendant must not deny the presentation alleged, where there was a presentation. Vaugh. 16, 17. And if a presentment is alleged in the grantor and grantee, the presentment in the grantor is only traversable; for that is the principal. Cro. Elix. 518.

The courts at Westminster are very cautious not to abate the writ of *quare impedit*, for any want of form, &c. yet if the bishop against whom the writ is brought, or any of the defendants are misnamed, it is good cause of abatement: if the patron be not named in the writ, it may be pleaded in abatement; tho' death of the patron pending the writ doth not abate it, if the *quare impedit* is brought against the bishop, patron, and incumbent: And if the incumbent dies, pending the writ, and a disturber present again, and die, *quare impedit* would lie on the first disturbance by *journal account*; but the first writ is abated by plaintiff's death; also if plaintiff bring a new writ within fifteen days after the abatement, that shall be a continuance of the first writ, and prevent defendant taking any advantage; but if the writ abate for any fault in the declaration, defendant shall have a writ to the bishop to admit his clerk; so if judgment is given on demurrer, &c. Cro. Elix. 324. Cro. Car. 651. 7 Rep. 57. Dyer 240.

In a plea of *quare impedit*, days are given from 15 to 16, or from three weeks to three weeks, according to the distance of place: And if the disturber come not in on the great distress, a writ is to be sent to the bishop, that he claim not to the prejudice of plaintiff for that time; and on recovery, judgment is to be given to the party to recover the presentation and advowson. Stat. 52 H. 3. c. 13. 2 Roll. Abr. 377. And damages are given by Westm. 2. 2. 5. that damages shall not be had against the bishop, where he claims nothing but as ordinary, and is no disturber. 4 Lev. 59.

Before this statute no damages were allowed on a *quare impedit*; and the King hath none at this day, for altho' he declares *ad damnum*, &c. he is not within that statute, because by his prerogative he cannot lose his presentation. 6 Rep. 52. If plaintiff hath a verdict, and the church is vacant, the patron may have the fruits of the presentation, and so not be intitled to damages; in which case, a *restitutio ad damnum* is entered. 3 Lev. 99.

There

There are two judgments in a *quare impedit*, viz.

That plaintiff shall have a writ to the bishop; and this is the final judgment, that goes to the right between the parties, and is the judgment at Common law: And

Judgment for damages, since the Stat. of Westm. 2. after the points of the writ are inquired into; which judgment is not to be given but at the instance of the party. 1 Mod. 354, 355.

The points to be inquired of, where the jury find for plaintiff, &c. are; of whom, and on whose presentment the church is full; how long since it was void; the yearly value of the church, &c. which being found, damages are to be given accordingly. 6 Rep. 51.

No costs are recoverable in *quare impedit*, because of the great damages given by the statute of Westm. 2. c. 5. which ordains, that *when six months pass hanging a quare impedit*, &c. so that the bishop presents by lapse, the patron shall recover damages to TWO YEARS VALUE of the church; otherwise to have only half a year's value. See 10 Rep. 36.

Where judgment is given to have a writ to the bishop in *quare impedit*; it shall not be reversed on writ of error brought on the whole judgment, tho' the judgment by the statute for damages be erroneous and reversed. 5 Rep. 58, 59.

Quare impedit was brought against two, one of them cast an essoin, and *idem dies datur* to the other, &c. Then an attachment issued against them for not appearing at the day, and process continued to the Grand Cape; which being returned, and the parties not appearing, it was ruled that final judgment should be entered according to the stat. 32 H. 3. But on motion to discharge this rule, because defendants were not summoned either on the attachment or grand distress, the summoners being only the feigned names of John Doe and Richard Roe, the judgment was set aside; for the design of the statute was to have process duly executed, and that must be with notice, &c. And where the right is for ever concluded, this being so fatal, the process must never be suffered to be a thing of course. 1 Mod. 248.

A writ of *quare impedit* is had against two; one doth not appear at the grand distress; the other pleads in bar; there shall be a writ to the bishop for plaintiff, without making any title, by stat. Marl. cap. 12. And if the bar pleaded by the other defendant be found for him, he shall also have a writ to the bishop; and these two persons being admitted, instituted and inducted on the two writs, shall try their right in an assize, or trespass. Jenk. Cent. 95.

Tho' where two defendants in a *quare impedit* plead several bars, and one of them is found against plaintiff, and the other with him; he shall not have his writ to the bishop.

If there are many defendants, pleading several pleas; plaintiff shall not have judgment before all the pleas are tried; for tho' some be for plaintiff, others may be found against him, and he cannot have judgment without good title. F. N. B. 30. Hob. 70.

When one recovers in a *quare impedit* against an incumbent, the incumbent is so removed by judgment, that the recoverer may present without any thing farther; but the incumbent continues incumbent *de facto*; till such presentation is made: And if plaintiff in this suit be instituted on a writ to the bishop, defendant cannot appeal; if he doth, a prohibition lies; because in this case, the bishop acts as the King's minister, not as a judge. 2 Roll. Abr. 365. 1 Roll. Rep. 62.

If one brings a *quare impedit* against the patron and incumbent of a church within six months, and recovers after the six months, he shall remove the incumbent, if named in the writ. 2 Roll. Abr. 373. And the King cannot remove an incumbent, presented, instituted and inducted altho' on a usurpation, but by *quare impedit* in a judicial way. 2 Cro. 385.

If a man, by the King's licence, creates a church which shall be presentable, if he be disturbed to present to it, he may have a *quare impedit* without alleging a presentation in any person; but anciently it was held he might not, because he could not alledge a presentment. 20 Ed. 4. 14. Mallory's 2. Imped. 153.

It is generally necessary to alledge a presentation in a *quare impedit*, but the want thereof may be cured by verdict. 2 Strange 1006. See Presentation, &c. and Black. Com. 3 V. 246.

Quare incumbat, A writ which lieth against the bishop, who within six months after the vacation of a benefice, confers it on his clerk, whilst two other are contending at law for the right of presentation. Reg. Orig. 32.

Or it is a writ brought after a recovery in *quare impedit*, or assize of *darein presentment*, against the bishop who thus admits a clerk, notwithstanding the writ *Ne admittas* served on him: for if the bishop incumber the church before a *ne admittas* issued, then the party shall have a *quare impedit*; as the ordinary can have no notice till the *ne admittas*. F. N. B. 32, 33. Wood's Inst. 571.

And if a man hath a right of advowson depending between him and another, and the church is void pendant the writ, the plaintiff shall not have a *quare incumb.* or *ne admittas*, altho' the bishop incumber the church; because plaintiff shall not recover the presentment on this writ, but the advowson: And where he hath title to present he may do it; and have *quare impedit*, if he be disturbed. New Nat. Br. 108, 109.

If the bishop delay the true patron in his presentation, and the patron sue *quare impedit*, he may thereupon have a *ne admittas*; and if the bishop after receipt of such writ, admit the clerk of any other person without a verdict in a *juris patronatus*, the true patron shall have *quare incumbravit* against the bishop, and thereby recover the presentment with damages.

Also a writ is to be directed to the bishop to disincumber the church. F. N. B. 37.

This writ may be brought after the six months; and if plaintiff be nonsuit in a *quare incumbravit*, he may have another writ, and vary from his first declaration, &c. Ibid. 48.

After *ne admittas* delivered, if the six months pass, the bishop may present his clerk for lapse, and shall not be charged by the writ of *quare incumbravit* for the presentation; but he cannot admit the clerk of the other man, for that would be against the writ *ne admittas* delivered to him. F. N. B. 48.

If the bishop incumber the church, where there is no dispute about it, yet this writ *quare incumbravit* lies; but according to the best opinions there ought to be a suit depending, tho' there is no actual recovery. 18 E. 3. 17. Fitz. 2. Imped. 3. See Black. Com. 3 V. 248.

The writ is to summon the bishop, to be before the justices, &c. to show cause why he hath incumbered the church to the great damage and injury of plaintiff contrary to the laws and customs of the kingdom, &c.

Quare non admittit, is a writ which lies against a bishop where a man hath recovered his advowson, or presentation in a writ of right of advowson, or in *quare impedit*, or other action, and the bishop refuse to admit his clerk, on pretence of lapse, &c. It is requisite in the writ to mention the recovery; and it is to be brought in the county where the refusal was. F. N. B. 47. 7 Rep. Dyer 40.

In a *quare non admittit* the plaintiff shall recover damages: And if plaintiff have judgment in *quare impedit*, and a writ is awarded to the bishop; if on this writ the bishop makes a false return, plaintiff may have *quare non admittit* against him, and have his damages. Dyer 250.

King Edw. 1. presented his clerk to a benefice in York-shire and the archbishop of that province refused to admit him; on which the King brought a *quare non admittit*, and the Archbishop pleaded that he had a long time before provided for that church, as one having full power authority in that case, therefore he could not admit the King's clerk. It was adjudged, that for his contempt to execute the King's writ, the Archbishopric should be seised. &c. 5 Rep. 12.

If the bishop refuse the King's presentment, and afterwards admit him, yet the King shall have *quare non admittit* for the refusal; and so it is presumed may a common person. New Nat. Br. 106. See Black. Com. 3 V. 250.

Quare

Quare non permittit. Is mentioned as an ancient writ which lieth for one who hath a right to present to a church for a turn, against the *proprietary*. *Fleta*, lib. 5. cap. 6.

Quarentine or Quarentaine, (Quarentena) Is a benefit allowed by law to the *widow* of a man dying seized of lands, whereby she may challenge to continue in his capital messuage, or chief mansion-house, (not being a *castle*) by the space of *forty days* after his decease, in order to the assignment of her dower, &c. And if the heir, or any other eject her, she may bring the writ *de quarentena habenda*; but the widow shall not have meat, drink, &c. tho' if there be no provision in the house, according to *Fitzherbert*, she may kill things for her provision. *Magn. Charta*, cap. 7. *Bract. lib. 2. cap. 40. F. N. B. 161.* See *Black. Com. 2 V. 135.*

Quarentine. Is also the term of *forty days* wherein any persons coming from foreign parts infected with the *plague*, are not permitted to land or come on shore, until so many days are expired. See *Ann. cap. 2. 7 Geo. 1. cap. 3. 1 Geo. 2. c. 17.* See *Plague and Black. Com. 4 V. 162.*

Quarentine. Likewise signifies a quantity of ground, containing *forty perches*. *Leg. Hen. 1. cap. 16.*

Quare obstructit. Is a writ which lies for him, who having a liberty to pass thro' his neighbour's ground, cannot enjoy his right, because the owner has so obstructed it. *Fleta*, lib. 4. c. 26.

Quarel, (Querela, a querendo.) Extends not only to actions personal, but also to mixt, and the plaintiff in them is called *querens*, and in most of the writs it is said *queritur*; so that if a man release all *quarrels*, (a man's deed being taken most strongly against himself) yet it is as beneficial as all actions, for by it all actions real and personal are released. *Co. lib. 8. 153. and Co. Litt. lib. 3. c. 8. f. 511.*

Quarrelling in church or church-yard. All affrays in a church or church-yard, are esteemed very heinous offences, as being indignities to him to whose service those places are consecrated, therefore mere *quarrelsome words*, which are neither an affray nor an offence in any other place, are penal *here*. For it is enacted by 5 & 6 *Edw. 6. c. 4.* That if any person shall, by words only, quarrel, chide, or brawl, in a church or church-yard, the ordinary shall suspend him, if a layman, *ab ingressu ecclesiæ*; and, if a clerk in orders, from the ministrations of his office *during pleasure*. And, if any person in such church or church-yard proceed to smite or lay violent hands on another, he shall be excommunicated *ipso facto*; or if he strikes him with a weapon, or draws any weapon with intent to strike, he shall besides excommunication (being convicted by a jury) have one of his ears cut off; or, having no ears, be branded with the letter F. in his cheek. *Black. Com. 4 V. 145.*

Quartelois. Were upper garments with coats of arms quartered on them, the old habit of *English knights*. *Walsing. in vit. Ed. 2.*

Quarterisari. To be quartered, or cut into four quarters in execution. — *Eccit decollari & membratim dividi, & quarterisari, & corpus ejus quarterias ad regni certas civitates transmitti jussit.* *Artic. Richardi Scrope Archiep. Ebor. apud Angl. Sacr. par. 2. 266.*

Quarterisatio. Is part of the punishment and execution of a traitor, by dividing his body into four quarters. See *Quarterisari*.

Quarter Sessions. Is a general court held by the *justices of peace* in every county, once every quarter of a year; originally erected only for matters touching the breach of the peace, but now its power is greatly increased, and extends much farther by many statutes.

The holding these sessions quarterly was first ordained by the 25 *Ed. 3. Stat. 1. cap. 8.* and the particular times are appointed by 36 *Ed. 3. c. 12.* See *Justices of Peace*.

By 2 *Ed. 3. c. 1.* they are appointed to be in the first week after *Michaelmas*, day 1 the first week after the *Epiphany*; the first week after the close of *Easter*; and in the week after the translation of *Saint Thomas a Becket*, or the seventh of *July*. See *Black. Com. 4 V. 268.*

Quarto die post. See *Black. Com. 3 V. 278.*

Quash, Quassare. (from the French word *quasser*, id est, *causum facere*.) To overthrow or annul. *Bracton*, lib. 5.

tract. 2. c. 3. nu. 4. As if the *balliff* of a liberty return any out of the franchise, the array shall be quashed. And *Co. Litt. 120.* An array returned by one who hath no franchise shall be quashed.

The court of *B. R.* hath power to quash orders of sessions, presentments, indictments, &c. Tho' this quashing is by favour of the court, and the court may leave the party to take advantage of the insufficiency by pleading; as they generally do where an indictment is for an offence very prejudicial to the Commonwealth, as for perjury, &c. 2 *Lill. Abr. 410.* 2 *Hawk. P. C. 258.*

The court will not quash an information; but there must be a demurrer to it, if it be insufficient. 2 *Lill. 411.* Vide *Stat. 7 W. 3. c. 3.* See *Indictment, Plea, and Black. Com. 3 V. 303.* 4 *V. 315.*

Quays. See *Ports*.

Queen, (Lat. Regina, Sax. Cwen, i. e. Uxor, a wife, sed propter excellentiam, the wife of the King) In our law is, either she who holds the crown of this realm by right of blood, or who is married to the King; the first of which is called *Queen Regnant*, the last *Queen Consort*: She who holdeth by blood is, in construction of law, the same with the King, and hath the like regal power in all respects; but the *Queen Consort* is inferior to the King, and his subject. *Staudf. Prærog. 10. 3 Inst. 7. 1 Marl. Parl. 2. cap. 1.*

To compass the death of, or violate the *Queen's* person, &c. is treason; and if she consents to the adulterer, it shall be treason in her. 25 *Ed. 3. 3 Inst. 9.*

The *Queen*, as the King's wife, partakes of several prerogatives above other women, viz.

She is a publick person, exempt from the King; and is capable of lands or tenements of the gift of the King, which no other *feme covert* is; she is of ability, without the King, to purchase, grant, and make leases; and may sue and be sued alone, in her own name only, by *præcipe*, not by petition: She may have in herself the possession of personal things during her life, &c. But both real and personal estate goes to the King after her death; if she doth not in her life-time dispose of them, or devise them by will. 1 *Inst. 3, 31, 133.* *Finch 86. 1 Roll. Abr. 912.*

Acts of parliament relating to her, need not be pleaded; for the court must take notice of them, because she is a publick person. 8 *Rep. 28.*

If a tenant of the *Queen* aliens a part of his tenancy to one, and another part to another; the *Queen* may distrain in any one part for the whole, as the King may do. *Wood's Inst. 22.* And in a *quare impedit* brought by the *Queen*, some say that *plenary* is no plea; but see 2 *Inst. 361.* The *Queen* shall pay no toll, &c. 1 *Inst. 133.*

By statute, the late King might grant to his *Queen* out of the crown revenues, an annuity of 100,000*l.* per annum, to commence after his death, and continue during the *Queen's* natural life, for supporting her royal dignity, &c. *Stat. 1 Geo. 2. cap. 3.*

And his Majesty constituted the *Queen Regent* of the kingdom, during his absence abroad; to be capable of the office, without taking the oaths, or doing any act required by law to qualify any other. 2 *Geo. 2. c. 27.*

Queen Dowager. No man may marry the *Queen Dowager* without licence from the King, on pain to forfeit his lands and goods: But if she marry any of the nobility, or under that degree, she loseth not her dignity; but by the name of *Queen* may maintain an action. 1 *Inst. 18, 50.*

The statute 25 *Ed. 3.* making it treason to violate the *Queen*, extends not to a *Queen Dowager*, but the *King's wife and companion*: And a *Queen Consort* and *Queen Dowager* shall be tried, in case of treason, by the peers. 2 *Inst. 50.*

Queen's Gold, (Aurum Reginae) Is a Royal duty or revenue belonging to every *Queen of England*, during her marriage to the King, payable by persons in this kingdom and *Ireland*, on divers grants of the King, by way of fine or oblation, &c. being one full tenth part above the entire fines, on pardons, contracts, or agreements, which becomes a real debt to the *Queen*, by the name of *Aurum Reginae*, upon the party's bare agreement with the King,

King for his fine, and recording the same. *Lib. Nig. Stat. pag. 43. 12 Co. Rep. 21, 22.*

Que Estate, Signifies *which estate*; and is a plea, where a man intilling another to land, &c. saith that the same estate such other had, he has from him: As for example, in a *quare impedit*, plaintiff alledges that two persons were seised of lands, whereunto the advowson in question was appendant in fee, and did present to the church, and afterwards the church was void: *Which estate* of the two persons he hath now, by virtue whereof he presented, &c. *Broke 175. Co. Litt. 121.*

A man cannot plead a *que estate* in an estate-tail, nor can it be pleaded in estates for life, or for years; a *que estate* of a term may not be pleaded, by reason a term cannot be gained by disseisin, as a fee may; but one may plead a *que estate* in a term in another person, under whom he doth not claim, and be good; for he is not privy to the estate of the stranger, to know his title. *1 Rep. 46. 3 Lev. 19. 1 Lev. 190. Lutw. 81.*

A thing which lies in grant, cannot be claimed by a *que estate*, directly by itself; yet it may be claimed as *appurtenant* to a manor, by *que estate* in the manor. *1 Mod. 232.*

A man may not prescribe by a *que estate* of a rent, advowson or toll; but he may of a manor, &c. to which these are appendant. *2 Mod. 144. 3 Mod. 52.*

A person cannot plead a *que estate*, without shewing the deed how he came by it. *Cro. Jac. 673.* This is in case of a rent in gross or lands which cannot pass from one man to another without deed. *Jenk. Cent. 26. See 18 Vin. Abr. fo. 133, 140. Black. Com. 2 V. 264.*

Que est eadem. See *Quæ est eadem*, &c.

Que est mesme, (signifying *verbatim*, the same thing) Is a word of art, in actions of trespass, &c. for a direct justification of the *very act* complained of by plaintiff as a wrong: And if where tenants at will bringing an action against their lord, plaintiffs say, that he threatened them so, that he forced them to give up their lands; to which the lord pleads, that he said unto them, if they would not depart he would sue them at law; this being the same threatening that he used, or to speak artificially *que est le mesme*, the defence is good. *Kitch. 236.*

Quem redditum reddat, Is a judicial writ which lies for him, to whom a rent-seck or rent-charge is granted, by fine levied in the King's court against the tenant of the land who refuseth to attorn to him, thereby to cause to attorn. *Old Nat. Brev. 126. West. Symbol. par. 2. tit. Fines, fol. 156.*

Querela, An action preferred in any court of justice, in which the plaintiff was *querens* or complainant, and his brief, complaint or declaration, was *querela*, whence our quarrel against any person.

Quietus esse a querelis was to be exempted from the customary fees paid to the King or lord of a court, for the purchase of liberty to prefer such an action. But more usually to be exempted from fines and amercements, imposed for common trespasses and faults. So King Henry II. to Bernard de S. Walery.—*Terræ suæ sint quietæ de omnibus placitis & querelis, exceptis murthero & latrocinio.* Paroch. Antiquit. pag. 123. See Kennet's Glossary.

Querela coram Rege & concilio discutienda & terminanda, Is a writ whereby one is called to justify a complaint of a trespass made to the King himself, before the King and his council. *Reg. Orig. 124.*

Querela fustiae fortiae. See *Fresh Force*.

Quest, (*Questia*) A quest or inquest, inquisition or inquiry on the oaths of an impanelled jury. *Cowell.*

Question, or *Torture*. See *Black. Com. 4 V. 320.*

Questus. See *Quæstus*.

Questus est nobis, Is the form of a writ of *nusance*, which by the statute 13 Edw. 1. c. 24. lies against him to whom the house or other thing which occasions the *nusance*, is alienated, whereas before the statute, this action lay only against him who first levied the thing to the annoyance of his neighbour. *Cowell.*

Quia Dominus remisit Curiam, writ of right see *Black. Com. 3 V. 195.*

Quia emptores, statute of, see *ib. 2 V. 91. 4 V. 419.*

Quia impossibile, Seems to be a *superedeas* granted in behalf of a clerk of the Chancery sued against the privilege of that court in the Common Pleas, and pursued to the *exigent*, or in many other cases where a writ is erroneously sued. See *Dyer 33. n. 18.*

Quick with Child. See *Pregnancy*.

Quick-sets, Damage sustained by destroying, burning or defacing them, how recompensed, 6 Geo. 1. c. 16. See *Wood*.

Quid juris clamat, Is a judicial writ issuing out of the record of the *fine*, which remaineth with the *Custos Brevium* of the Common Pleas, before it be engrossed; and it lies for the grantee of a reversion or remainder, when the particular tenant will not attorn. *West. Symbol. par. 2. tit. Fines, fol. 118. Reg. Judic. 36, 57. See 18 Vin. Abr. 143.*

After the fine is ingrossed, the cognisee shall not have a *quid juris clamat* against tenant for life: But the course is, when he in reversion on the writ of covenant sued against him, maketh recognisance of the reversion by fine, &c. then on that the cognisee may have this writ against tenant for life; and if he be sick or not able to travel, a *dedimus potestatem* shall be granted to take his cognisance, and to certify the same into C. B. When after plea pleaded, the tenant may make attorney; and if he be adjudged to attorn, a *distringas ad attornandum* shall be awarded against him, &c. *New Nat. Br. 328.* This writ seems to be obsolete and disused, since the Stat. 4 & 5 Ann. See *Attornment*.

Quid pro quo, Signifieth *what for what*; and is used in the law, for the giving one thing of value, for another thing, being the mutual consideration and performance of both parties to a contract. *Kitch. 184.* And as this is the consideration of a good and binding contract or bargain: So that which is contrary to it, is what the law calleth *nudum pactum*. *5 Rep. 83. Dyer 98.*

Quictantia, (*Acquittance*). See *Acquittance*.

Quictare, To quit, acquit or discharge, or save harmless. The common form in old deeds of donation or other conveyance.—*De prædictis nos & hæredes nostri quietabimus dictos, &c.*

Quiete clamare, Is to quit claim or renounce all pretensions of right and title.—*De una virgata terræ in M. Richardus & Aldreda remiserunt & quiete clamaverunt de se & hæredibus, &c. prædictis. Nos & hæred. suis, & pro hac remissione quietæ clamatione idem A. dicit, &c.* *Bract. lib. 5.*

Quietus, (freed or acquitted) Is a word made use of by the Clerk of the Pipe and Auditors in the *Exchequer*, in their discharges given to *Accountants*; usually concluding with *abinde recessit quietus*, which is called a *quietus est*: A *quietus est* granted to the sheriff, will discharge him of all accounts due to the King. *Stat. 21 Jac. 1. cap. 5.* And these *quietus's* are mentioned in the acts of general pardon. *12 Car. 2. c. 11. and 14 Car. 2. c. 21.*

Quietus Redditus. See *Quit-Rent*.

Quinquagesima Sunday, Is that we call *Shrove-Sunday*, and was so named, because it is about the fiftieth day before Easter.

Quinque Portus, The Cinque ports, which are, 1. *Hastings*, 2. *Romney*, 3. *Hythe*, 4. *Dover*, and 5. *Sandwich*. To the first, *Winchelsea* and *Rye* belong, which are reckoned as part, or members of the Cinque ports. *Cowell. See Cinque Ports.*

Quinzime, or *Quinzime*, (*Decima Quinta*) Is a French word, signifying a *fifteenth*; with us it is a tax, so called, because it is raised after the *fifteenth* part of men's lands or goods. *Anno 10 Rich. 2. cap. 1. and 7 H. 7. c. 5.*

It is well known by the *Exchequer* roll, what every town throughout England is to pay for a *fifteenth*. See *Fifteenth*.

Sometimes this word *Quinzime* or *Quinzime*, is used for the *fifteenth* day after any feast, as the *Quinzime* of St. John Baptist. *Stat. 13 Ed. 1. in the preamble.*

It is a mistake that this was a tax of the *fifteenth* part of all lands, for it was of the goods only, and it was first granted by the parliament 18 Ed. 1. viz. *Compositus quinta decima Regi*, anno 18. per archiepiscopos, episcopos, abbates, priores,

prioris, comites, barones, & omnes alios de Regno. de omnibus bonis suis mobilibus concessit: The city of London paid this year for the *fifteenth*, 2860 l. 13 s. 8 d. and the abbot of St. Edmunds 666 l. 13 s. 4 d. which was by compositions, and thereupon had all his temporal goods, and the goods of his convent discharged of the *fifteenth*.

The way of collecting it was, by two assessors appointed in every county by the King; and they appointed twelve in every hundred, who made a true valuation of every man's personal estate, and then caused the *fifteenth* part to be levied. Cowell.

Quintal, (*Quintallus*) A weight of lead, iron and common metals, usually one hundred pounds, at six score per cent. Cowell.

Quintane, (*Quintena*) Was a Roman military sport or exercise, by men on horseback, formerly practised in this kingdom to try the agility of the country youth: It was tilting at a mark made in the shape of a man to the navel, in his left hand having a shield, in his right a wooden sword; the whole made to turn round, so that if it was struck with the lance in any other part but full in the breast, it turned with the force of the stroke, and struck the horseman with the sword which it held in its right hand: This sport is recorded by Matt. Paris. anno 1253.

Quinto crast (*Quinto exactus*, mentioned in stat. 31 Eliz. cap. 3.) Is the last call of defendant, who is sued to outlawry, where, if he appear not, he is by the judgment of the courtiers returned *outlawed*; if a woman, *waived*. See *Exigent*, *Outlawry*.

Qui tam, I. when an information is exhibited against any person on a *penal statute*; at suit of the King and the party who is informer, where the penalty for breach of the statute is to be divided between them; and the party informer prosecutes for the King and himself. Finch 340.

If the whole sum is given by statute to any person who will sue for the same, the prosecutor may bring action *Qui tam*, or sue in his own name. 2 Lill. Abr. 59. See *Information*, and *Black. Com.* 3 V. 160. 4 V. 303.

Quit-claim, (*Quita clamantia*) Is a release or acquitting of a man, for any action which he hath, might, or may have against him. Also a *quitting of one's claim or title*. Bracton, lib. 5. tract. 5. c. 9. num. 6. lib. 4. tract. 6. c. 13. num. 1.

Quit-rent, (*Quietus Redditus, quasi quit-rent*) Is a certain small rent, payable by the tenants of manors, in token of subjection, and by which the tenant goes *quiet* and free: In antient records, it is called *whites rent*; because paid in silver money, to distinguish it from rent-corn, &c. 2 Inst. 19. See *Chief-Rents*, and *Black. Com.* 2 V. 42.

Quod hoc, Is often used in law pleadings and arguments, to signify, *as to the thing named the law is so*, &c.

Quod clerici beneficiarii de cancellaria, Is a writ to exempt a clerk of the Chancery from the contribution towards the proctors of the clergy in parliament. Reg. Orig. 261.

Quod clerici non eligantur in officio ballivi, &c. Is a writ which lies for a clerk, who, by reason of some land he hath, is made, or about to be made bailiff, beadle, reeve, or some such officer. See *Clérico infra sacros*, &c. Reg. Orig. 187. and F. N. B. 261.

Quod cum, In indictments, &c. As A. B. was indicted *Quod cum* C. D. he had done such a thing: And this being *by way of recital*, and not *positively*, is not good. 2 Hawk. P. C. 227. 3 Salk. 188.

In forgery, a *Quod cum* has been held well enough, where it was but an *inducement to the fact*; and when the inducement came to charge the offence, it did it in a particular manner; but it is otherwise in action of trespass, &c. for there it is *only recital*. Trin. 2 Annz.

Quod ei deforceat, A writ for tenant in tail, tenant in dower, by the curtesy, or for term of life, having lost their lands by default, against him who recovers, or his heir. Reg. Orig. 171. Stat. Westm. 2. c. 4.

And *Quod ei deforceat* may be brought against a stranger to the recovery; as if a man recover by default, and maketh a feoffment, this writ may be had against the feoffee.

If a woman lose by default, and taketh husband, she and her husband shall have the *Quod ei deforceat*, but where tenant in tail loseth by default, and dieth, his heirs shall not have a writ of *Quod ei deforceat*, but a *formedon*: And if husband and wife lose by default the land of the wife, which she holdeth *for term of life*, and the husband dieth, she may not have this writ, for *cui in vita* is her remedy; and when one bringeth *Quod ei deforceat*, he counts that he was seised of the land in *his demesne, as of freehold*, or in tail, &c. without shewing of whose gift he was seised; also he ought to alledge *eplees* in himself, and then defendant is to deny the right of plaintiff, &c. and shew how *that at another time* he recovered the land against plaintiff, by *formedon*, or other action; and shall say in the end of his plea, *Quod ipse paratus est ad manutenendum jus & titulum suum prædictum per donum, &c. unde peris judic. &c.* New Nat. Br. 347, 349.

If tenant in tail, or such other tenant, who hath a particular estate, lose by default, where he is not summoned, &c. he may have have either a *Writ of disseit*, or *Quod ei deforceat*. Ibid. See 16 Vin. Abr. 145, 148. and Black. Com. 3 V. 193.

Quod permittat, Is a writ which lieth against any person who erects a building, tho' on his own ground, so near to the house of another, that it hangs over, or becomes a *nusance* to it. 2 Lill. Abr. 413.

Formerly, where a man built a wall, a house, or any thing which was a *nusance* to the freehold of his neighbour, and afterwards died; in such case, he who received any damage thereby, sued a *Quod permittat* against the heir of him who did the *nusance*; and the form of it was *Quod permittat prosterne murum, &c.* 3 Nelf. Abr. 44. The writ was given by the Stat. West. 2.

And at the Common law an *assise of nusan* did not lie against the alienee of a wrong doer, for the purchaser was to take the land in the same condition it was conveyed to him; but by the Statute of West. 2. c. 24. Damages may be recovered against the person who sold the land, if the *nusance* be not abated on request made to him, or against the person to whom he sold it; tho' this doth not extend to the alienee of the alienee. 3 Nelf. 45. Lutw. 1588. This writ is seldom brought, being turned into action on the case. Vide *Nusance*.

Quod permittat lies also for the heir of him who is disseised of his common of pasture, against the heir of the disseisor, being dead. *Terms de Ley*.

And according to Broke, this writ may be brought by him whose ancestor died seised of common of pasture, or other like thing *annexed to his inheritance*, against the *disseisor*: If a man is disturbed by any person in his common of pasture, so that he cannot use it, he shall have a *Quod permittat*; so of a turbary, piscary, fair, market, &c. New Nat. Br. 272, 273, 275, 276. And a person may have a *Quod permittat* against a disseisor, &c. in the time of his predecessor. 13 Ed. 1. c. 24.

The writ *Quod permittat*, on a disseisin of common of pasture, directed to the sheriff; Commands A. *that justly, &c. he permit B. to have common of pasture in, &c. which he ought to have, as it is said; and unless he shall do it, &c. then summon, &c.*

See Bro. hoc tit. Reg. Orig. fol. 155. See 18 Vin. Abr. 150. and Black. Com. 3 V. 240. And as to the writ of *Quod permittat prosterne*, see ib. 221.

Quod persona nec prebendarii, &c. Is a writ which lies for spiritual persons who are distrained in their spiritual possessions, for payment of a *fifteenth* with the rest of the parish. F. N. B. 176.

Quod iure, Is a writ which lies for him who has land, wherein another challengeth *common of pasture* time out of mind: And is to compel him to shew *by what title* he challenges it. F. N. B. 128. and Britton more largely, c. 59. Reg. Orig. 156.

Quod minus, Is a writ which lies for him who hath a grant of *burg-bote*, and *bay-bote* in another man's woods, against the grantor, making such waste as the grantee cannot enjoy his grant. Old Nat. Br. 148. and Kitchen 178.

This writ also lies for the King's farmer in the Exchequer, against him to whom he selleth any thing by way of bargain touching his farm, or against whom he hath any cause of *personal action*. Perkins, Grants, 5. For he supposeth

supposeth by the vendee's detaining any due from him, he is made *less liable to pay the King's rent*.

Formerly it was allowed only to such persons, as were *tenants or debtors to the King*; at this day the practice is become general for the plaintiff to surmise that for the wrong which defendant doth him, he is *less able to satisfy his debt to his Majesty*; which surmise gives jurisdiction to the court of *Exchequer*, to hear and determine the cause. *Pract. Excheg.* 225.

In this case a debtor hath a kind of prerogative remedy granted to him, supposing that he is disabled to pay the King: And in this suit, plaintiff hath many privileges above other men in their ordinary suits. *Old Nat. Br.* 148. *Kitch.* 178 *Finch* 66.

If a privileged person of the *Exchequer* court sue out a *Quo minus* in any action in which the King is party, the sheriff in execution thereof may, after request to open doors, break them open, &c. *Pract. Solic.* 194. See *Black. Com.* 3 V. 45, 286. xix.

Quorum, (Lat.) Often occurs in our statutes, and commissions both of the peace and others, but particularly in commissions to justices of the peace; and a justice of the quorum is so called, from the words in the commission, *quorum A. B. unum esse volumus*: As where a commission is directed to five persons, whereof A. B. and C. D. to be two: In this case A. B. and C. D. are said to be of the quorum, and the rest cannot proceed without them. They are usually persons of greater quality or estates than the common commissioners. 3 Hen. 7. c. 3. 32 Hen. 8. c. 43. See *Black. Com.* 1 V. 351.

Quorum nomina. In the reign of Hen. 6. the King's collectors, and other accountants, were much perplexed in passing their accounts, by new extorted fees, and forced to procure a then late invented writ of *quorum nomina*, for allowing and suing out their *quietus* at their own charge, without allowance of the King. *Cron. Angl.*

Quota, A tax to be levied in an equal manner. *Chart. Ric.* 2.

Quo Warranto, Is a writ which lies against any person or corporation, that usurps any franchise or liberty against the King, without good title; and is brought against the usurpers to shew by what right and title they hold or claim such franchise or liberty: It also lies for mis-user, or non-user of privileges granted; and by *Bracton* it may be brought against one who intrudes himself as heir into land, &c. *Old Nat. Br.* 149. *Finch* 322. 2 *Inst.* 279.

The statute of *Quo Warranto* is the 18 Ed. 1. §. 2. which is commented on 2 *Inst.* 494, 495, &c.

The Attorney General may exhibit a *Quo Warranto* in the Crown-Office against any particular person, body politick or corporate, who claim or use any franchises, privileges or liberties, not having a legal grant or prescription for the same; and compel them by process to appear in the Crown-Office; and shew cause or set forth by way of pleading what title they have to the privileges claimed, and the issue shall be joined and tried thereon by *nisi prius*, or the plea be determined by the judges on demurrer, as in other cases: But tho' on demurrer, &c. the question be determined for defendant, yet he has no costs allowed; if against him, he must be fined for the usurpation, and pay large costs to the prosecutor. *Instit. Legal.* 147, 148, 157.

But this is altered by statute 9 Ann. c. 20. It has been adjudged, that the stat. 4 & 5 W. & M. c. 18. by which informations in the Crown-Office are not to be filed without express orders in open court, &c. being a remedial law, extends to informations in the nature of a *Quo Warranto*, which always suppose a usurpation of some franchise; and it is the general practice not to make such an order for an information, without first making a rule on the person complained of to shew cause to the contrary; and this rule is grounded on an affidavit of the offence, &c. and if the person on whom the rule is made and personally served, do not at the day given satisfy the court by affidavit, that there is no reasonable cause for the prosecution, the court generally grants the information; and on special circumstances, will grant it against those who cannot be personally served with such rule; as if they purposely ab-

sent themselves, &c. but if the party on whom such a rule is made, shew to the court a reasonable cause against such prosecution; as against a *Quo Warranto* information, that his right in the franchise in question hath been already determined on a *mandamus*; or been acquiesced in many years; or that it depends on the right of others which hath not been tried; or that the franchise no way concerns the publick, but is wholly of private nature, &c. the court will not generally grant the information. 2 Hawk. P. C. 262, 263.

A *Quo Warranto* was brought for vexation, on forty-eight points; and the court on motion, ordered the prosecutor should waive that *Quo Warranto*, and bring a new one, and therein insist only on three points; but that he might proceed to trial on his new *Quo Warranto*, in such time as he might have done upon the old. 2 Lill. Abr. 414.

A *Quo Warranto* requires to know of defendant by what authority he claims the liberties, and charges him with the wrongful usurpation of them: In a *Quo Warranto* to shew by what authority a person claimed to have a *Court Leet*, and alledging farther *quod usurpavit libertatem sine aliqua concessione*, &c. defendant pleaded *Non usurpavit*; and it was objected that this was no good plea, for the answer to a *Quo Warranto* is either to claim or disclaim; but the better opinion was, that by this plea defendant had answered the usurpation, tho' it did not shew by what title he claimed. *Godb.* 91.

In *Quo Warranto* for using a fair and market, and taking toll, issue was taken, whether they had toll by prescription, or not; and it was found they had; it was moved in arrest of judgment, that here was a discontinuance, because there was no issue as to the other liberties claimed: but it was held, they were too soon to make this objection, and that there can be no discontinuance against the King before judgment; for by virtue of his prerogative, the Attorney General may proceed to take issue on the rest, or may enter a *nolle prosequi*; but if he will not proceed, the court may make a rule on him *ad replicandum*, and then there may be a special entry made of it. *Hardres* 504. 3 Nels. Abr. 43.

A motion was made for an information in nature of a *Quo Warranto*, against a mayor and aldermen, to shew by what authority they admitted persons to be freemen of the corporation, who did not inhabit in the borough. The motion was said to be in behalf of the freemen, who by this means were encroached on; and an information was granted, there being no other way to try it, nor to redress the parties concerned. 1 Salk. 374.

Quo Warranto Information may be brought against a person voting in the election of a mayor, or other chief magistrate of a corporation, who hath no right to do it, on affidavit made that defendant voted in such an election, and that the deponent (the prosecutor) believes he had no right to do it, &c.

And by stat. 9 Ann. c. 20. If any person usurp, intrude into, or unlawfully hold or execute the office of a mayor, bailiff, or other office, the proper officer of the court of King's Bench, &c. may exhibit informations in the nature of a *Quo Warranto*, at the relation of any person desiring to prosecute, who shall be mentioned therein to be the relator against such usurper, and proceed as usual; and if the right of divers persons may properly be determined in one information, one information shall serve, and defendants shall appear and plead as of the same term, the information is filed, unless the court give further time; and the prosecutor shall proceed with all convenient speed: And if defendants be found guilty of an usurpation, &c. the courts may as well give judgment of *ouster*, as fine defendants; and also give judgment that the relator recover costs: If judgment be given against relator, defendants shall have costs to be levied by *Ca. Sa. Ri. &c.* &c.

In a *Quo Warranto*, judgment is final, because that is a writ of right; but judgment on information, in nature of a *Quo Warranto*, is not conclusive; the proceedings in one are summons, and judgment that the liberties be seized, if defendant doth not appear; but in the other the process is a *venire facias* and *disfringas*. *Sid.* 86. *Kelv.* 159, &c. 3 Nels. Abr. 43.

Upon *Quo Warranto*, when liberties are seized *quousque*, &c. and they do not replevy them, the course is, that judgment final be given, *nisi* they plead within such a time. *Comberbach* 18, 19.

Wherever judgment is given for the King on a *Quo Warranto*, for liberties usurped, the judgment is *Quod extinguatur*, and that the usurpers *libertates*, &c. nullatenus intromittant; and in such case the writ must be brought against particular persons: But where the *Quo Warranto* is for a liberty claimed by a corporation, there it is to be brought against the body politic; and the liberties may be seized, but the corporation still subsists, and is not dissolved without cause of forfeiture. 4 *Mod.* 52, 58.

A judgment of seizure cannot be proper where a thing is dissolved: And by the judgment in the *Quo Warranto* against the city of London, which was *quod libertates & franchisæ capiuntur & seiscanter in manus Regis*, the corporation was not dissolved; for it implied that they were not extinguished. *Ibid.*

It has been observed, that frequent and violent prosecutions on *Quo Warranto*'s, in behalf of the crown, have been fatal to both King and people.

An information, in the nature of a *Quo Warranto*, lies for acting as a trustee, under an act of parliament, without due appointment. 1 *Strange* 299. Against one for usurping the office of steward of a court-leet. *Ibid.* 621. For creating a new office. 2 *Strange* 836. For the office of constable. *Ibid.* 1213. For a ferry. *Ibid.* 1161. But not for creating a warren. 1 *Strange* 637. Nor for the office of churchwarden. *Ibid.* 1196.

R.

Rachetum, (from the Fr. *racheter*, i. e. *redimere*) The compensation or redemption of a thief. — *Nihil capiat rachetum de latrocinio*. 1 *Stat. Rob. K.* Scot. c. 9.

Rack, An engine to extort confession from delinquents. See *Black. Com.* 4 V. 329.

Rack-rent, Is the full yearly value of the land let by by lease, payable by tenant for life or years, &c. *Wood's Inst.* 185.

Rack-vintage, A second vintage, or voyage made by our merchants for *Racked Wines*, i. e. Wines drawn from the lees. *Stat.* 32 *Hen. 8.* c. 14.

Ragman, Is a statute of justices assigned by *Ed. 1.* and his counsel, to hear and determine all complaints of injuries done throughout the realm, within the five years next before *Michaelmas*, in the fourth year of his reign.

Raglespis, A word mentioned in the charter of *Edward III.* whereby he made his eldest son *Edward Prince of Wales*, in parliament at *Westminster* the seventeenth year of his reign, recited by *Selden* in his *Titles of Honour*, 597. — *Cum forestis, parcis, chaseis, boscis, waremis, hundredis, comotis, ragloriis, ringeldiis, wodwardis, constabulariis, lullivis*, &c. *Davis* in his *Dictionary* says, that *raglaw* among the *Welsh* signifies *seneſchallus, surrogate, praepositus*.

Raglorius, A steward. *Selden*, tit. of *Honour*, 597. *Cum hundredis, comotis, ragloriis, ringeldis*, &c.

Ragman's Roll, *Rollius Ragimund's Roll*, so called from one *Ragimund* a legate in *Scotland*; who calling before him all the beneficed clergymen in that kingdom, caused them on oath to give in the true value of their benefices; according to which they were afterwards taxed by the court of *Rome*: And this roll among other records, being taken from the *Scots* by *Ed. 1.* was redelivered to them in the beginning of the reign of *Ed. 3.*

Sir Richard Baker, saith, That *Ed. 3.* surrendered by charter, all his right of sovereignty to the kingdom of *Scotland*, and restored divers instruments of their former homages and fealties, with the famous evidence called *Ragman's Roll*. *Bak. Chron.* 127.

Ran, (a Saxon word,) Signifies *aperta rapina*, open or publick theft. *Lamb. Archæi.* 125. defines it thus, *Rap dicitur aperta rapina, quæ negari non potest.*

In the Saxon laws of *Canute*, cap. 58. *Si in professione militari ran commiseris, pro facti ratione emendato*, *Hoveden* in the latter part of *Henry II.* speaking of some things, which *William the Conqueror* amended in the laws of *England*, saith. *Decretum est etiam ibi, ut si Francigena appellaverit Anglicum de perjurio aut murthero, furto, homicidio, ran quod dicunt apertam rapinam quæ negari non potest, Anglicus se defendat, per quod melius voluerit, aut judicio ferri aut duello*. We still say, when a man takes away the goods of another by violence, he hath taken all he could rap and ran. *Rap.* from *rapio*, to snatch. *Cowell*.

Range, From the French *ranger*, to order, dispose of. It is used in the *Forest Laws*, both as a verb, as to range, and a substantive as to make range. *Charta de Foresta*, cap. 6. To range also, signifies to wander and stray about.

Ranger, Is a sworn officer of the forest; of which there are twelve. *Id.* c. 7. whose authority is in part described by his oath set down by *Manwood*, part 1. 50. but more particularly part 2. cap. 20. num. 15, 16, 17. His office chiefly consists in three points, To walk daily thro' his charge, to see, hear and inquire, of trespasses in his bailiwick; To drive the beasts of the forest both of venary and chase out of the deafforested into the forested lands: And to prevent all trespasses of the forest at the next court holden for the forest.

This ranger is made by the King's letters patent, and hath a fee of twenty or thirty pounds paid yearly out of the Exchequer, and certain fee-deer. *Rangator Forestæ de Whittlewood. Pat.* 14 *R. 2. m. 3.*

Ransome, (Fr. *Rancon*, i. e. *Redemptio*) Is properly the sum paid for redeeming a captive or prisoner of war; and sometimes taken in our law for a sum of money paid for pardoning some great offence, and setting the offender at liberty who was under imprisonment. *Stat. 1 H. 4. c. 7.* 11 *Hen. 6. c. 11.*

Fine and *Ransom* go together, and some writers tell us, that they are the same; but others say, that the offender ought to be first imprisoned, and then delivered or *ransomed* in consideration of a fine. 1 *Inst.* 127. *Dalt.* 203.

Ransom differs from *Amerciament*, being a redemption of a corporal punishment due to any crime. *Lamb. Eiren.* 556.

A ship was taken by the *French*; the master (having a share in her) ransomed her for 1800 *l.* and was taken to *France* as an hostage for this money. The ransom money must be raised out of the profits, notwithstanding any former mortgage of the ship; for if there was a precedent mortgage, what would become of that security, if the ship had not been redeemed? After the ship was redeemed, she performed her intended voyage, and the freight money received after redemption was the first profits arising, and out of them the ransom money is to be satisfied; the insurers always pay a part of the ransom money. 2 *Eq. Abr.* 690.

Rape, (*Rapus vel Rapa*) Is part of a county, signifying as much as a hundred, and oftentimes contains in it more hundreds than one.

Suffex is divided into six *Rapes* only, viz. The *Rape* of *Chichester*, *Arundel*, *Bramber*, *Lewis*, *Pawsey* and *Hastings*; every of which, besides hundreds, hath a castle, river, and forest belonging to it. *Camb. Britann.* 225, 229. These *Rapes* are incident to the county of *Suffex*; as *Lathes* are to *Kent*; and *Wapentakes* to *Yorkshire*, &c.

Rape of the Forest, (*Rapius Forestæ*) Trespass committed in the forest by violence; and is reckoned among those crimes, whose cognisance belonged only to the King. — *Infra quibus numeratur, quarum cognitio ad unicum regem pertinet*. *Leg. Hen. 1. c. 10.*

Rape of Women, Is an unlawful and carnal knowledge of a woman, by force and against her will: A ravishment of the body, and violent deflowering her; which is felony by the Common and Statute law. *Co. Litt.* 190. The word *Rapuit* is so appropriated by law to this offence, that it cannot be expressed by any other; even the words *Carnaliter Cognovit*, &c. without it, will not be sufficient. 1 *Inst.* 124. 2 *Inst.* 180.

There must be *penetration* and *emission*, to make this crime; and it is said *emission* may be evidence *prima facie* of penetration, tho' not *full* evidence: If there be no penetration and emission, an attempt to ravish a woman, tho' it be never so outrageous, will be an assault only. 1 Hawk. P. C. 108.

It was a question before 18 Eliz. c. 7. whether a *rape* could be committed on the body of a child of the age of six or seven years; and a person being indicted for the *rape* of a girl of seven years old, altho' he was found guilty, the court doubted, whether a child of that age could be ravished; if she had been nine years old she might, for at that age she may be *endowed*. Dyer 304.

By the stat. 18 Eliz. whoever shall carnally know and abuse any woman child under the age of ten years, he shall suffer as a felon, without benefit of clergy: And on an indictment for this offence, it is no way material whether such child consented or were forced; but it must be proved that the offender entered her body, &c. 3 Cro. 332. Dalt. 393.

It is no excuse or mitigation of the crime, that the woman at last yielded to the violence, and consented either after the fact or before, if such consent was forced by fear of death or duress; or that she was a common strumpet, for she is still under the protection of the law, and may be forced: But it was anciently held to be no *rape* to force a man's own concubine; and 'tis said by some to be evidence of a woman's consent, that she was a common whore. 1 Hawk. 108. 1 Inst. 123.

Also formerly it was adjudged not to be a *rape* to force a woman, who conceived at the time; because if she had not consented, she could not have conceived: Tho' this opinion hath been since questioned, by reason the previous violence is no way extenuated by such a subsequent consent; and if it were necessary to shew the woman did not conceive, to make the crime, the offender could not be tried till such time as it might appear whether she did or not. 2 Inst. 190.

The sooner complaint is made of a *rape*, the better: In Scotland it ought to be complained of the same day or night it is committed; and our law mentions forty days: It is a strong presumption against a woman, that she made no complaint in a reasonable time after the fact. 1 Inst. 123. 7 Inst. 59. H. P. C. 117.

On a bill of conspiracy, &c. where defendant did not indict plaintiff for a *rape*, in a short time after the injury supposed to be done, but concealed it for half a year, and then would have preferred an indictment against him; this was refused to be malicious, and that there not being *Retens prosecutio* argued a consent. 3 Nels. Abr. 45.

A woman ravished may prosecute and be a witness in her own cause. 3 Rep. 37. Yet a woman's positive oath of a *rape*, without concurring circumstances, is seldom credited: If a man can prove himself to be in another place, or in other company, at the time she charges him with the fact, this will overthrow her oath; so if she is wrong in the description of the place, or swears the fact to be committed in a place where it was impossible the man could have access at that time; as if the room was locked up, and the key in the custody of another person, &c.

Aiders and abettors in committing a *rape*, may be indicted as principal felons, whether men or women; and Lord Audley was indicted and executed as a principal, for assisting his servant to ravish his own wife, who was admitted a witness against him. Dalt. 107. State Trials, Vol. 1. p. 265.

By Hale Ch. J. A party ravished may give evidence on oath; but the credibility of her testimony, and how far she is to be believed, must be left to the jury, being more or less credible according to the circumstances of fact, and signs of the injury, which are many; and tho' a *rape* is a most detestable crime, it is an accusation easily made, and hard to be proved, but harder to be defended by the man accused, altho' ever so innocent: And there are several instances of *rapes* fully proved, but have after been discovered to be malicious contrivances. 1 Hale's Hist. P. C. 636, 635.

Of old time, *rape* was felony, and punished with death; especially if the party ravished were a virgin, unless such virgin would accept of the offender for her husband, in which case she might save his life; by marrying him; for if she demanded him for her husband before judgment passed, he escaped punishment; but by the stat. Westm. 2. her election is taken away: Afterwards it was looked on as a great misdemeanor only, and not felony, but punished, by loss of eyes and privy members; and by the statute of Westm. 1. 3 Ed. 1. c. 13. it was reduced to trespass, subjecting the offender to two years imprisonment, and a fine at the King's will: But the stat. Westm. 2. c. 34. made it felony again; and it is excluded from the benefit of the clergy, by 18 Eliz. c. 7. *Rape* was excepted out of the general pardon. 2 W. & M. c. 10, &c. See Appeal of Rape. And Black. Com. 4 V. 210. And see 1 Hale's P. C. 633, 635, 636.

All who are present, and actually assist a man to commit a *rape*, may be indicted as principal offenders, whether men or women. 1 Hawk. 108.

Rapine, (*Rapina*.) To take a thing in private against the owner's will, is properly theft; but to take it openly, or by violence, is *rapine*. 14 Car. 2. c. 22. and 18 Car. 2. c. 3. See Black. Com. 4 V. 241.

Raptu heredis, Is a writ for taking away an heir holding in *feage*; of which there are two sorts, one when the heir is married, the other when he is not; see Reg. Orig. 163.

Rase, (*Rasuria*) Seems to have been a measure of corn now disused. Tell shall be taken by the rase, and not by the heap or cantel. Ordinance for bakers, brewers, &c. c. 4.

Rasure of a deed, so as to alter it in a material part, without consent of the party bound by it, &c. will make the same void, and if it be rased in the date, after delivery, it is said it goes thro' the whole. 5 Rep. 23, 119.

Rasure, &c. is most suspicious, when it is in a deed poll, that there is but one part of the deed, and it makes to the advantage of him to whom made. And where a deed by *rasure*, addition or alteration becomes no deed, the defendant may plead *non est*. Ibid. See Black. Com. 2 V. 308.

Rate, A valuation of every man's estate; or the appointing and setting down how much every one shall pay, or be charged with to any tax. Stat. 43 Ed. 2.

Rate-tithe, Is where any sheep or other cattle are kept in a parish for less time than a year, the owner must pay tithe for them *pro Rata*, according to the custom of the place. F. N. B. 51.

Ratification, (*Ratificatio*) A ratifying or confirming: It is particularly used for the confirmation of a clerk in a prebend, &c. formerly conferred on him by the bishop, where the right of patronage is doubted or supposed to be in the King. Reg. Orig. 304.

Ratihabitio, Confirmation, agreement, consent. See 18 Vin. Abr. 156.

Ratio, Properly signifies reason; but we take it mostly for an account, as *reddere rationem*, to give an account, and so it is frequently used. According to some it is a cause, or judgment given therein; and *ponere ad rationem*, is to cite one to appear in judgment. Walsing. 88.

Rationabilibus diisio, Is a writ which lies where two lords, in divers towns, have seignories joining together, for him who findeth his waste by little and little to have been encroached on, against the other who hath encroached, thereby to rectify their bounds; in which respect Fitzherbert calls it in its own nature a writ of right. The Old Nat. Brev. says, That this is a kind of *Justicies*, and may be removed by a *pone* out of the county to the Common Bench. See the form and use in F. N. B. 128. and Reg. Orig. 157. The Civilians call this *Judicium finium regendorum*.

Rationabile Estoverium, Was alimony heretofore so called. Ros. 7 H. 3.

Rationabili parte, A writ of right for lands, &c. See *Reple de Rationabili parte*. And Black. Com. 3 V. 194.

Rationabili parte Bonorum, Is a writ which lies for wife, after the death of her husband, against the executors of the husband denying her the third part of his goods after debts and funeral charges paid. F. N. B. 222.

It appears by *Glanville*, that by the Common law of England, the goods of the deceased (his debts first paid) shall be divided into three parts; one for the wife, another for his children, and the third to the executors: And this writ may be brought by the children, as well as the wife. *Reg. Orig.* 142.

But it seems to be used only where the custom of the country serves for it; and the writs in the register rehearse the customs of the counties, &c. *New Nat. Br.* 270, 271.

As to children bringing this writ, their marriage is no advancement, if the father's goods be not given in his life-time; but where a child is advanced by the father, this writ will not lie. *Ibid.* See 18 *Vin. Abr.* 158. and *Black. Com.* 2 V. 492.

Rationale, Was the same with *pallium*: It was worn by the high priest of the old law, as a sign of the greatest perfection, and by the pope and bishops as a token of the highest virtue, *quæ gratia & ratione perficitur*, hence 'tis called *rationale*.

Ravishment, (*Fr. Ravissement*, i. e. *Direptio, captio*) Signifies an unlawful taking away either a woman, or an heir in ward; sometimes it is used in the same sense with *rape*.

Ravishment de gard, A writ which lay for the guardian by knight's service, or in socage, against a person who took from him the body of his ward. *F. N. B.* 140.

By 12 *Car. 2. c. 24.* this writ is taken away, as to lands, held by knights-service, &c. but not where there is guardian in socage, or appointed by will.

The Mayor and Aldermen and Chamberlain of London, who have the custody of orphans, if they commit any orphan to another, he shall have a writ of *ravishment* of ward against him who taketh the ward out of his possession. *New Nat. Br.* 317.

Ray, A word appropriated to cloth never coloured or dyed. *Stat. 17 R. 2. cap. 3.* 11 *H. 4. cap. 6.* and 1 *R. 3. cap. 8.*

Reafforested, Is where a forest which had been *disafforested* is again made forest; as the forest of Dean is by *Stat. 2. c. 3.*

Realty, Is an abstract of *real*, as distinguished from *personalty*.

Reason, Is the very life of law; and what is contrary to it is unlawful.

When the *reason* of the law once ceases, the law itself generally ceases; because *reason* is the foundation of all our laws. *Co. Lit.* 97, 183.

If maxims of law admit of any difference, those are to be preferred which carry with them the more perfect and excellent *reason*. *Ibid.* See *Black. Com.* 1 V. 70.

Reasonable assu, Was a duty claimed by the lord of the fee of his tenants holding by knights service, to marry his daughter, &c. *Stat. Westm. 2. c. 24.* See the *Stat. 2. c. 24.*

Reasonable part. See *Black. Com.* 2 V. 492; 516. 4 V. 461, 417.

Reattachment, (*Reattachiamentum*) Is a second attachment of him who was formerly attached and dismissed the court without day, by the not coming of the justices, or some such casualty. *Broke Reg. Orig.* 35.

A cause discontinued, or put without day, cannot be revived without *reattachment* or *resummons*; which if they are special, may revive the whole proceedings; but if general, the original record only. 2 *Hawk.* 300. And on *reattachment*, the defendant is to plead *de novo*, &c. See *Day*.

Rebate, Is an abating what the interest of money comes to, in consideration of prompt payment. *Merch. Dia.*

Rebellion, (*Rebellio*) Among the Romans, was where those who had been formerly overcome in battle, and yielded to their subjection, made a second resistance: But with us it is generally used for the taking up of arms *traitorously* against the King, whether by natural subjects, or others when once subdued; and the word *rebel* is sometimes applied to him who wilfully breaks a law; so to a villein disobeying his lord. *Stat. 25 Ed. 3. c. 6.* 1 *R. 2. c. 6.*

There is a difference between *enemies* and *rebels*; enemies are those who are out of the King's allegiance; therefore subjects of the King, either in open war, or *rebellion*, are not the King's enemies, but traitors. And *David Prince of Wales*, who levied war against *Ed. 1.* because he was within the allegiance of the King, had sentence pronounced against him as a *traitor and rebel*. *Fleta*, lib. 1. *cap.* 16. Private persons may arm themselves to suppress *rebels, enemies*, &c. 1 *Hawk. P. C.* 136.

Rebellious assembly, Is a gathering together of *troublesome persons*, or more, *intending or going about to practise or put in use unlawfully, of their own authority*, any thing to change the laws or statutes of the realm; or to destroy the inclosures of any ground, or banks of any fish-pound, pool or conduit, to the intent the same shall lie waste and void; or to destroy the deer in any park; or any warren of conies, dove-houses, or fish in ponds; or any house, barns, mills or bays; or to burn stacks of corn; or abate rents, or prices of victuals, &c. *Stat. 1 Mar. cap. 12.* 1 *Ed. 6.* See *Assembly unlawful*.

Rebutter, (from the *Fr. bouster*, i. e. *repeller*, to put back or bar) Is the answer of defendant to plaintiff's *surrejoinder*: And plaintiff's answer to the *rebutter* is called a *surrebutter*; but it is very rare the parties go so far in pleading. *Pract. Attorn. edit.* 1. 86.

Rebutter is also where a man by deed or fine grants to warranty any land or hereditament to another; and the person making the warranty or his heir, sues him to whom the warranty is made, or his heir or assignee, for the same thing; if he who is so sued, *plead the deed or fine with warranty*, and pray judgment if the plaintiff shall be received to demand the thing which he ought to warrant to the party, against the warranty in the deed, &c. this is called a *rebutter*. *Terms de Ley*. And if I grant to a tenant to hold without impeachment of waste, and afterwards implead him for waste done, he may *debar me of this action by shewing my grant*; which is *rebutter*. *Co. Entr.* 284. 1 *Inst.* 365. See *Black. Com.* 3 V. 310.

Recaption, (*Recaptio*) Signifies the *taking a second distress* of one formerly distrained, during the plea grounded on the former distress; and it is a writ to recover damages for him whose goods being distrained for rent, or service, &c. are distrained *again for the same cause*, hanging the plea in the county-court, or before the justices. *F. N. B.* 71, 72. *Stat. 47 Ed. 3. c. 7.*

And a *recaption* lies where the lord distrains *other* cattle of the tenant than he first distrained, as well as if he had distrained the same cattle again, *if it be for one and the same cause*; but 19 *Ed. 3.* issue was taken whether the cattle were other cattle of the plaintiff, &c. *New Nat. Br.* 161.

If the lord distrain the cattle of a stranger for the same rent, and not his cattle who was first distrained; neither the stranger, nor the party first distrained, shall have the writ of *recaption*: And if the lord distrain for rent or service, and afterwards the lord's bailiff takes a distress on the same tenant for the same rent or service, *pending the plea*; the tenant shall not have a *recaption* against the lord, or against the bailiff, altho' the bailiff maketh cognizance in right of the lord, &c. for it may be the lord had no notice of that distress, or the bailiff had no notice of the distress taken by the lord; tho' in such case action of *trespass* lies; and if the lord agree to the distress taken by his servant or bailiff, the tenant may have this writ against the lord. *Ibid.* 159.

A man is distrained within a liberty, and sues a *replevin* there by plaint or writ, and pendant that plaint in the liberty he is distrained again for the same cause, by the person who distrained before; he shall not on that distress bring a writ of *recaption*, because the plaint is not pendant in the county-court before the sheriff, nor in C. B. before the justices: But if the plaint be removed by *pone* or *recordare* out of the liberty before the justices, then the party distrained may have a *recaption*, &c. And if a person be convicted before the sheriff in a writ of *recaption*, he shall not only render damages to the party, but be amerced for the contempt; and be fined. 39 *Ed. 3.*

For damage feasant beasts may be distrained as often as they be found on the land; because every time is for a new trespass and a new wrong, and no *recaption* lies.

Recaption is also a species of remedy by the mere act of the party injured. This happens, when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant; in which case the owner of the goods, and the husband, parent, or master, may lawfully claim and retake them, wherever he happens to find them; so it be not be in a riotous manner, or attended with a breach of the peace. 3 *Inst.* 134. *Hal. Anal.* f. 46.

The reason for this is obvious; since it may frequently happen that the owner may have this only opportunity of doing himself justice: His goods may be afterwards conveyed away or destroyed; and his wife, children, or servants, concealed or carried out of his reach; if he had no speedier remedy than the ordinary process of law. If therefore he can so contrive it as to gain possession of his property again, without force or terror, the law favours and will justify his proceeding. But, as the publick peace is a superior consideration to any one man's private property; and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided, that this natural right of *recaption* shall never be exerted, where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a publick place, I may lawfully seize him to my own use: But I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen; but must have recourse to an action at law. 2 *Roll. Rep.* 55, 56, 208. 2 *Roll. Abr.* 565, 566. *Black. Com.* 3 *V.* 4, 5. and 4 *V.* 356.

Receipt, or *Receit*. See *Receipt*.

Receiver, (*Receptor*) Is by us, as with the *Civilians*, commonly used in the evil part, for such as receive stolen goods, &c. And receiving a felon, and concealing him and his offence, makes a person accessory to the felony. 2 *Inst.* 183. But the receiver of a felon, &c. must have notice of the felony either express or implied, which is to be expressly charged in the indictment; and the felony must be compleat at the time of the receipt, and not become so afterwards by matter subsequent: If a person knowing one to have been guilty of felony, barely receive him and permit him to escape, without giving him any advice, assistance or encouragement, it is a high misdemeanor, but no capital offence; and a wife, in regard to the duty and love she owes her husband, may receive him when he hath committed felony; but no other relation will exempt the receiver of a felon from punishment. S. P. C. 41. H. P. C. 218, 219. 2 *Hawk. P. C.* 122, 319, 320.

By statute, if any person receive or buy knowingly any stolen goods, or conceal felons knowing of the felony, he shall be accessory to the felony, and suffer death as a felon. Stat. 5. Ann. c. 31. Such receivers, &c. may be transported, by 4 Geo. 1. c. 11. See *Black. Com.* 4 *V.* 132.

Receiver, Annexed to other words, as receiver of rents, signifies an officer belonging to the King or other personage. *Comp. Jurisd.* 18. See *Account*.

Receiver of the fines, An officer who receives the money of all such as compound with the King on original writs sued out of Chancery. *West. Symb. par. 2. sect.* 106. Stat. 1 Ed. 4. c. 1.

Receiver General of the Duchy of Lancaster, An officer of the *duchy court*, who collects all the revenues, fines, forfeitures and assessments, within the *duchy*, or what is there to be received arising from the profits of the *duchy* lands, &c. 39 *Elix. cap. 7.*

Recital, (*Recitatio*) Is the rehearsal or making mention in a deed or writing of something which has been done before. 2 *Lill. Abr.* 416.

A recital is not conclusive, because it is no direct affirmation; and by feigned recitals in a true deed, men might make what titles they pleased, since false recitals are not

punishable. 1 *Inst.* 352. 2 *Lev.* 108. *Wood's Inst.* 225.

If a person by deed of assignment recite that he is possessed of an interest in certain lands, and assign it over by the deed, and become bound by bond to perform all the agreements in the deed; if he is not possessed of such interest, the condition is broken; and tho' a recital of itself is nothing, yet being joined and considered with the rest of the deed, it is material. 1 *Leon.* 112. And where it is but a recital, that before the indenture the parties were agreed to do such a thing, it is a covenant; and the deed itself confirms it. 3 *Reb.* 466.

The recital of one lease in another, is not a sufficient proof that there was such a lease as is recited. *Vaugh.* 74. But the recital of a lease in a deed of release, is good evidence of a lease against the lessor and those who claim under him. *Mod. Ca.* 44.

A new reversionary lease shall commence from the delivery, where an old lease is recited, and there is none, &c. *Dyer* 93. 6 *Rep.* 36.

A recites that he hath nothing in such lands, and in truth he hath an estate there, and makes a lease to B. for years: The recital is void, and the lease good. *Jenk. Cent.* 255. In this case if the recital were true, the lease would not bind. *Ibid.* See *Black. Com.* 2 *V.* 298. iv.

Recognition, (*Recognitio*) Signifies an acknowledgment, and is the title of the first chapter of the Stat. 1. Jac. 1. whereby the parliament acknowledged the crown of England, on the death of Queen Elizabeth, RIGHTFULLY to have descended to King James.

Recognitio aduandanda per Wm. & Darnley facta, Is a writ to the justices of C. B. for sending a record touching a recognizance, which the recognizer suggests was acknowledged by force and duress; that if it so appear, the recognizance may be disannulled. *Reg. Orig.* 183.

Recognitors, (*Recognitores*) Are the jury impanelled on an assize, so called, because they acknowledge a disseisin by their verdict. *Bract. lib.* 5.

Recognizance, (*Fr. Reconnaissance*, I. e. *Recognitio Obligatio*) Is a bond or obligation of record, acknowledged to the King, &c. And some are for debt, some for bail; others to appear at the sessions or assizes to prosecute felons, and to be of good behaviour, &c.

For debt, or bail, they are taken or acknowledged before the Judges, a Master in Chancery, &c. And to appear at the assizes, or sessions, they may be taken by justices of peace; which recognizances are to be returned by the justices to the sessions, or an information lies against them, 2 *Lill. Abr.* 417.

When a recognizance of the peace is made, the condition is to be read to the parties bound, calling them by their names thus: You A. B. do acknowledge to come unto our sovereign Lord King George, &c. And then it is to be ingrossed on parchment, and the justice is to subscribe it. *Dalt.* 479, 480. In these recognizances, the principal is bound in double the sum of the sureties; and the usual numbers of sureties are two, and the usual penalty 40 *l.* at least; tho' if the party be a very dangerous person, a justice may insist on a recognizance of 1000 *l.* penalty. *Style* 322.

Recognizances in general are of several sorts; one is founded on 23 H. 8. c. 6. By which statute, the Chief Justices of the King's Bench and Common Pleas in term-time, or in their absence out of term, the Mayor of the Staple at Westminster, and the Recorder of London jointly, have power to take recognizances for the payment of debts, in this form, *Notum universis per preces nos A. B. & C. D. teneri & firmiter obligari E. F. in centum libris, &c.* They are to be sealed with the seal of the recognizer, and of the King appointed for that purpose, and the seal of one of the Chief Justices, &c. And the recognizances, their executors and administrators, have the like process and execution against the recognizer, as on obligations of statute staple. 2 *Lill.* 678.

The execution on a recognizance, or statute, pursuant to 23 Hen. 8. is called an extent; and the body of the recognizer, (if a layman) and all his lands, &c. into whose hands soever they come, are liable to the extent; goods (not

(not of other persons *in his possession*) and chattels, as leases for years, cattle, &c. which are in his *own* hands, and not sold *bona fide* and for valuable consideration, are also subject to the extent. 3 Rep. 13. But the land is not the debtor, but *the body*; and land is liable only in respect that it was in the hands of the cognisor at the time of the acknowledgment of the recognizance, or after; and *the person is charged*, but the lands chargeable only. Plowd. 72.

Lands held in tail are chargeable only *during life*, and not effect the issue in tail; unless a recovery be passed, when it is as fee-simple land: Cophold lands are subject to the extent, only *during the life of the cognisor*: The lands a man hath in right of his wife, shall be chargeable but *during the lives of husband and wife together*; and lands which the cognisor hath in jointenancy with another, are liable to execution *during the life of cognisor* and no longer; for after his death, if no execution was sued in his life, the surviving jointenant shall have all; but if the cognisor survive, all is liable. 2 Inst. 673.

If two or more join in the recognizance, &c. the lands of all ought equally to be charged: And where a cognisor, after he hath entered into a recognizance or statute, conveys his lands to divers persons, and the cognisee sues execution on the lands of some of them, and not all: In this case he or they whose lands are taken in execution, may by *audita querela* or *scire facias* have contribution from the rest, and have all the lands equally and proportionably extended. 3 Rep. 14. Plowd. 72. But the cognisor or his heirs, when he sells part of his lands, and leaves the remainder, shall not have any contribution from a purchaser, if his land only is put in execution.

If there be a recognizance, and after a statute entered in to by one man to two others; his lands may be extended *pro rata*, and so taken in execution. Telv. 12.

This kind of recognizance may be used for payment of debts; or to strengthen other assurance. Wood 288. If a recognizance is to pay 100*l.* at five several days, viz. 20*l.* on each day, immediately after the first failure of payment, the cognisee may have execution by *elegit* on the recognizance for the 20*l.* and shall not stay till the last day of payment is past, for *this is in the nature of several judgments*. 1 Inst. 292. 2 Inst. 395, 471. When no time is limited in statute or recognizance for payment of the money, it is due presently; as in case of a bond. Law Secur. 61.

A recognizance for money lent, tho' it is not a perfect record till entered on the roll; yet when entered, it is a recognizance from the first acknowledgment, and binds persons and lands from that time. Hob. 196. But by 29 Car. 2. c. 3. No recognizances shall bind lands in the hands of purchasers for valuable consideration, but from the time of inrollment, which is to be set down in the margin of the roll: and recognizances, &c. in the counties of York and Middlesex, shall not bind lands unless registered, 2, 5, 6 & 7 Ann. Also the clerk of the recognizances is to keep three several rolls for the entering recognizances taken by the Chief Justices, &c. and the persons before whom the recognizances are taken, and the parties acknowledging are to sign their names to the roll, as well as to the recognizance. 8 Geo. 1. cap. 25.

To make a good recognizance or obligation of record, the form prescribed must be pursued; therefore they may not be acknowledged before any others, besides the persons appointed by the statutes; and the substantial forms of the statute are to be observed herein. But a recognizance may be taken by the judges in any part of England. Dyer 21. Hob. 195.

Recognizances and statutes are like judgments; and the cognisee shall have the same things in execution, as after judgments. The body of the cognisor himself, but not of his heir, or executor, &c. may be taken, tho' there be lands, goods, and chattels to satisfy the debt: And if a cognisor is taken by the sheriff, and he let him go; yet his lands and goods are liable. 12 Rep. 1, 2. Plowd. 62. 1 And. 273.

By recognizances of debt, and bail, the body and lands are bound; tho' some opinions are, that the lands of bail are bound from the time of the recognizance entered into; and some, that they are not bound but from the recovery of the judgment against the principal. 2 Leon. 24. Cro. Jac. 272, 449.

In B. R. all recognizances are entered *as taken in court*; but in C. B. they enter them specially *where taken*, and their recognizances bind from the caption, but those in B. R. from the time of entry: In C. B. a *scire facias* may be brought on their recognizances either in London or Middlesex; on those in B. R. in the county of Middlesex only. 2 Salk. 659. 3 Nels. Abr. 46.

A recognizance of bail in C. B. is entered specially; the bail are bound to pay a certain sum of money, if the party condemned doth not pay the condemnation, or render his body to prison; and in B. R. recognizances are entered generally; that if the party be condemned in the suit or action, he shall render his body to prison, or pay the condemnation money, or the bail shall do it for him. 2 Lill. Abr. 417.

It was formerly a question whether a *ca. sa.* would lie on a recognizance taken in Chancery; but adjudged, that immediately after the recognizance is acknowledged, it is a judgment on record; and then by 25 Ed. 3. cap. 17. a *ca. sa.* will lie, it being a debt on record. 2 Bull. 62.

If a recognizance be made before a Master in Chancery, for a debt; or to perform an order or decree of the court; if the condition be not performed, an extent shall issue; or a *scire facias* is the proper process, for the recognisor to shew what he can say why execution should not be had against him; upon which and a *scire fac.* or two *nibils* returned, and judgment thereupon, the proper execution is to be had. Cro. Jac. 3.

Where a man is bound by recognizance in Chancery; and the cognisor hath certain indentures of defeasance; if the recognisee will sue execution on the recognizance, the recognisor may come into Chancery, and shew the indentures of defeasance, and that he is ready to perform them, and thereon he shall have a *scire facias* against the recognisee, returnable at a certain day; and in the same writ, he shall have a *superfideas* to the sheriff not to make execution in the mean time. New Nat. Br. 589.

If a person is bound in a recognizance in Chancery, or other court of record, and afterwards the recognisee dieth; his executors may sue forth an *elegit*, to have execution of the lands of the recognisor; and if the sheriff return that the recognisor is dead, then a special *scire facias* shall go against the heir of the recognisor, and those who are tenants of the lands which he had at the day of the recognizance entered into. Ibid. 590.

One of the best securities we have for a debt is the recognizance in Chancery, acknowledged before a Master of that court; which is to be signed by such Master, and afterwards inrolled: And the King may by his commission, give authority to one to receive a recognizance of another man, and to return the same into Chancery; and and on such a recognizance, if the recognisor do not pay the debt at the day, the recognisee shall have an *elegit* on the consufance so taken, as it it were taken in the Chancery. Praes. Solic. 131. New Nat. Br. 589.

In case lands are mortgaged, without giving notice of a recognizance formerly had, if the recognizance be not paid off and vacated in six months, the mortgagor shall forfeit his equity of redemption, &c. 4 & 5 W. & M. c. 16.

Recognizances may be discharged by defeasance on condition, on performance of such condition; by release; payment of the money; delivery up of the recognizance, &c.

See Peace, Statute-merchant, Statute-staple, and 18 Vin. Abr. 163—170.

Recognizant, He to whom one is bound in a recognizance, mentioned in stat. 11 H. 6. c. 10.

Recognitor, He who enters into the recognizance.

Record, (Recordum, from the Lat. Recordari, to remember) Signifies a memorial or remembrance, or an authentic testimony in writing, contained in rolls of parchment, and preserved in a court of Record. Britton. c. 27. It is a writing in parchment, wherein are inrolled pleas of land, or common pleas, and criminal proceedings in courts of record; and records are retained to such courts only, and do not extend to the rolls of inferior courts, the registers of proceedings whereof are not properly called records. 1 Inst. 260. 2 Lill. Abr. 418. There are three kinds of records, viz. A judicial record, as an attainer, &c. a ministerial record on oath, being an office or inquisition found; and a record made by conveyance and consent, as a fine, or a deed inrolled. 4 Rep. 54. But it has been held, that a

deed inrolled, or a decree in Chancery inrolled, are not records, but a deed and a decree recorded; and there is a difference between a record and a thing recorded. 2 Lill. 421.

Records being the rolls or memorials of the judges, import in themselves such *incontrovable verity*, that they admit of no proof or averment to the contrary, inasmuch that THEY ARE TO BE TRIED ONLY BY THEMSELVES; for otherwise there would be no end of controversies; but during the term wherein any judicial act is done, the roll is alterable in that term, as the judges shall direct; when the term is *past*, then the record admitteth of no alteration, or proof that it is false in any instance. 1 Inst. 260. 4 Rep. 52.

Matter of record is to be proved by the record itself, and not by evidence, because no issue can be joined on it to be tried by a jury like matters of fact; and the credit of a record is greater than the testimony of witnesses. 21 Car. B. R. Tho' where matter of record is mixed with matter of fact, it shall be tried by a jury. Hob. 124.

A man cannot regularly aver against a Record; yet a jury shall not be elopped by a Record to find the truth of the fact: And it was adjudged that on evidence, it is at the discretion of the court to permit any matter to be shewn to prove a Record. 1 Vent. 362. Allen 18. 3 Nelf. Abr. 48, 49.

A Record may be contradictory in appearance, and yet be good: And tho' it hath apparent falshood in it, it is not to be denied; but a Record may in some cases be avoided by matter in fact. Style's Reg. 281. Co. Litt. 3 Cro. 329. Hutt. 20.

The judges cannot judge of a Record given in evidence, if the Record be not exemplified under seal: But a jury may find a Record altho' it be not so, if they have a copy proved to them, or other matter given in evidence sufficient to induce them to believe that there was such a record. 2 Lill. Abr. 421. By statute, judges may reform defects in any record, or process, or variance between Records, &c. And a Record exemplified or inrolled may be amended for variation from the exemplification. Stat. 8 H. 6.

A Record of an issue made up ready for trial of a cause, on motion and leave of court, may be amended so as not to deface the Record; and notwithstanding it be entered for trial, on paying costs to defendant: But the court will not give leave to amend it, if it may not be done without defacing or much altering the Record. 2 Lill. 420. B. R. will amend a Record removed thither out of C. B. and also Records removed out of inferior courts, as to faults and misprisions of clerks, which are adjudged amendable by the statutes of *jeofails*; tho' formerly B. R. would not amend Records out of inferior courts, but the law in this case is now altered by the Stat. 4 & 5 Ann. 2 Lill. Abr. 421, 422.

If the transcript of a Record be false, the court of B. R. will, on motion, order a *certiorari* to an inferior court, to certify how the Record is below; and if it be on a writ of error on a judgment of the Common Pleas, they will grant a rule to bring the record out of C. B. into this court, and then order the transcript to be amended in court, according to the roll in C. B. And a Record cannot be amended without a rule of the court, grounded on motion. *Ibid.*

Where a Record is so drawn, that the words may receive a double construction, one to make the record good, and another to make it erroneous, the court will interpret the words that way which will make the record good, as being most for the advancement of justice: So if a letter of a word in a Record be doubtful, that it may be taken for one letter or another, the court will construe it to be that letter which is for upholding the Record. See 1 Cro. 161. 2 Cro. 119, 153, 244, &c.

A Record that is rased, if legible, remains a good Record notwithstanding the rasure; but he who rased it is not to go unpunished for his offence. Mich. 1649. And in case of a rasure in a judgment, done by practice to hinder execution, the Record hath been ordered to be amended, and a special entry thereof to be made; but tho' the Record by this means be made perfect, the offender may be indicted for felony, for not only such an alteration whereby a judgment is actually reversed, but also such whereby it is revertable, whether it be or be not afterwards amended by the court, is within the act 8 H. 6. c. 12. making it

felony to take away, or avoid any Record, &c. 2 Pall. Rep. 81. 1 Hawk. P. C. 113.

The court will not supply a blank left in a Record, to make it perfect, when before it was defective; as this would be to make a Record, which is not the office of the court to do, but to judge of them. 2 Lill. Abr. 420. If a subsequent Record hath any relation to one that is precedent; in such case it must appear in pleading, &c. to be the same without any variation. 3 Lutw. 905.

Where Records are pleaded, they must be shewn; and one may not plead any Record, if it be not in the same court where it remaineth, unless he shew it under the Great Seal of England, if denied: Acts of Record must be specially pleaded. Bro. ca. 20. 2 Cro. 560. 10 Rep. 92. 5 Rep. 218. Style 22. And Records are to be pleaded intire, and not part of them, with an *inter alia* referring to the Record; and so should a special verdict find a Record, unless a judgment be pleaded, or you declare on a judgment in a superior court, when the plaintiff may say *recuperavit* generally; but not in an inferior court, for there all the proceedings must be set forth particularly. Mich. 21 Car. B. R.

When a Record is pleaded, it is to conclude *propter prius per Recordum*, or the other side may answer *Antidictum Record*; but this being only matter of form, may be sometimes helped by a general demurrer; and writs are matter of Record, but they need not be so pleaded. 1 Saik. 1. 1 Lou. 211. 3 Nelf. Abr. 49. If a record is to be read in court, the counsel at the bar must open the effect of it, after read by the clerk of the court, by custom and practice; altho' the court may suffer it to be read afterwards if they please; and after reading, &c. it is then by rule of court ordered to be read down for a *confilum*. 2 Lill. Abr. 421.

Records certified out of inferior courts, on writs of error, and the judgments on such Records are to be entered in B. R. for until then the Records are not perfected: And if a Record once comes into B. R. by writ of error, it never goes out again; but a transcript of it may go to the House of Lords, on a writ of error there. 2 Lill. 422. Writ of error removes the Record; but the original is no part of it. Jenk. Cent. 164. A Record cannot be removed by writ of error, until the judgment in that Record is entered: And when and how a Record may be removed; and where and how demanded, see 2 Cro. 206. 2 Brownl. 145.

Attornies are to enter the whole Record on the roll, after a cause is tried, before the next term after the trial, on pain of 20 s. That the Record may be spoken to the next term, if there be cause, and the client be not delayed. Hill. 1649. Justices of assize, gaol-delivery, &c. are to send all their Records and processes determined to the Exchequer at Michaelmas in every year; and the Treasurer and Chamberlains, on sight of the commissions of such justices, are to receive the same Records, &c. under their seals, and keep them in the Treasury. Stat. 9 Ed. 3. c. 5. Record of a Cause made up for trial, see Trial.

Recordare facias Loqueliam, Is a writ directed to the sheriff to remove a cause depending in an inferior court, to the King's Bench or Common Pleas, and it is called a *Recordare*, because it commands the sheriff to make a Record of the proceedings in the county-court, and then to send up the cause. F. N. B. 71. 2 Inst. 339.

This writ is in the nature of a *certiorari*; on which plaintiff may remove the plaint, in the county-court, without cause; but defendant cannot receive it without cause shewn in the writ, as on a plea of freehold, &c. If the plaint is in another court, neither plaintiff or defendant can remove it without cause. Wed's Inst. 164.

If a plea is discontinued in the county, plaintiff or defendant may remove the plaint into the Common Pleas or King's Bench by *Recordare*, and it shall be good, and plaintiff may declare on the same, and the court hold plea thereof. New Nat. Br. 158.

The form of this writ in the Register is, *Es Recordum illud habeas*, &c. But in a *Recordare* to remove a Record out of the court of antient demesne, the writ shall say, *Loqueliam &c. proffum*, &c. And there is a writ to call a Record, &c. to an higher court at Westminster, called *Recordo &c. processu mittendis*. Tab. Reg. Orig. By the usual writ *recordare*, the sheriff is commanded in his full court, to cause to be recorded the plea which is in the said court.

court between A. and B. of, &c. And have that record before the justices at Westminster the day, &c. under the seals, &c. And to the said parties appoint the same day, that they be then there to proceed in that plea, as shall be just, &c. See *Black. Com.* 3 *N.* 34. 195.

Recorder, (*Recordator*) is a person whom the mayor and other magistrates of any city or town corporate, having jurisdiction, and a court of record within their precincts by the King's grant, associate unto them for their better direction in matters of justice, and proceedings according to law: therefore he is generally a counsellor or other person experienced in the law.

The *Recorder of London*, is one of the justices of eye and terminer; and a justice of peace of the quorum, for putting the laws in execution for preservation of the peace and government of the city: And being the mouth of the city, he learnedly delivers the sentences and judgments of the courts therein; and also certifies and records the city-customs, &c. *Chart. K. Charles 2.* 1 *Inst.* 288. He is chosen by the Lord Mayor and Aldermen; and attends the business of the city, on any warning by the Lord Mayor, &c.

Recovery, (*Recuperatio*, from the Fr. *recouverer*, *recuperare*.) Signifies (in a legal acceptance,) obtaining any thing by judgment or trial of law, as *evictio* doth among the *Civilians*. There is a *true recovery* and a *feigned one*. A *true recovery* is an actual or real recovery, of any thing, or the value thereof, by judgment; as if a man sue for any land, or other thing moveable or immoveable, and have a verdict or judgment for him. A *feigned recovery* is (as the *Civilians* call it) *Quodammodo fictiojuris*, a certain form or course set down by law to be observed, FOR THE BETTER ASSURING LANDS OR TENEMENTS: And the effect thereof is (according to *West. Sym.* par. 2. tit. *Recoveries*, f. 1.) to discontinue and destroy estate-tail, remainders and reversions, and to bar the entails thereof. And in this formality are required three persons, viz. the *demandant*, *tenant* and *vouchee*. The *demandant* is he who brings the writ of entry, and may be termed the *recoverer*. The *tenant* is he against whom the writ is brought, and may be termed the *recoveree*. The *vouchee* is he whom the tenant voucheth, and calls to warranty for the land in demand. A *recovery with double voucher* is, where the tenant voucheth one, and another voucheth another, or the common vouches. And a *recovery with treble voucher* is, where three are vouched.

But to explain this point a little more: A man who is desirous to cut off an estate-tail, to the end to sell, give, or devise it, causeth a feigned writ of entry *sur dissein en le poss*, to be brought for the lands the intail which of he intends to cut off, and in a feigned count or declaration thereon made, pretends he was disseised by him, who by a feigned fine or deed of bargain and sale is named and supposed to be tenant of the land. This feigned tenant, if it be a *single recovery*, is made to appear and vouch the *bastard* of writs for the *custos brevium*, or the *crier* in the Common Pleas (for there only can such recoveries be suffered) who makes default. Whereupon the land is recovered by him who brought the writ, and judgment is by such *fictio* of law entered, that *demandant* shall recover, and have a *writ of seisin* for the possession of the lands demanded, and that the tenant shall recover the value of the lands against the lands of the *vouches*. This feigned recovery is also called a *common recovery*, because it is a *barren* and *common path* to the end for which it is appointed, viz. to cut off the estates above specified. But a *true recovery* is as well of the value as of the thing: For example, If I buy land of another with warranty, which land a third person afterwards by suit of law recovereth against me, I have my remedy against him who sold it me, to recover in value, that is, to recover so much in money as the land is worth, or other lands of equal value by way of exchange. *F. N. B.* 134. *Cowell*.

A recovery in a large sense is a *restitution* to a former right by solemn judgment; and judgments, whether obtained after a real defense made by the tenant to the writ, or whether pronounced on his default or feint plea, had the same efficacy to bind the right of the land in question; this was the notion of the Common law, and from hence men took an opportunity of making use of the decisions of the court to their own advantage, and to the prejudice

of others, who tho' in some cases strangers to the action, yet were interested in the land for which it was brought. 2 *Inst.* 75. 429.

For whilst these recoveries were governed by the strict rules of the Common law, particular tenants, as tenant in dower, courtesy, in tail after possibility of issue extinct, and for life only; all those who had made leases for years, and those whose wives were intitled to dower, often took advantage of them, and by selling the lands, and suffering their purchasers to recover them, thereby defeated the right of those in remainder or reversion, &c. which were inconveniencies so great, that it was thought necessary to provide against them by positive laws; as stat. *West. 2. c. 3.* which makes provision for him in reversion, against the recoveries suffered either by the tenant in dower, by the courtesy, or in tail after possibility of issue extinct, or for life; and by the 4th chapter of this statute, the wife is secured as to her dower; and the statute of *Gloucester*, c. 11. and stat. 7 & 21 *Hen. 8.* have established the right of termors, and enabled them to falsify such recoveries. See *Co. Lit.* 104. *Kel.* 109. *F. N. B.* 468. *Plow.* 57. *Dr. & Stud.* 45.

But there is no express provision made by any statute to preserve the interest of the issue in tail, or of him in reversion, against a recovery suffered by the donee, yet it seems to have been for two hundred years after the making the statute *de donis*, that they were protected by that statute; therefore we find no express resolution, where such recovery was allowed to bar the issue in tail, or those in remainder or reversion, till the reigns of *Ed. 4.* and *H. 7.* tho' in some cases the donee in tail was allowed to charge the intail, and even to bar it. See 1 *Rel. Ab.* 342. *Co. Lit.* 343. 10 *Co.* 37. *Plow.* 436. 2 *Inst.* 335. *Co. Lit.* 374. 4 *Leon.* 132. 133. See *Estate-tail*.

When these recoveries were established as a common conveyance, and the best way of barring the issue in tail, and those in reversion or remainder, the tenant for life began to apply them once more to the prejudice of those who had the inheritance; and tho' the former statutes gave those who had the inheritance a remedy, yet the provision made by them being tedious and expensive, it was thought proper to make the 32 *H. 8. c. 31.* which declares all such *conveyances recoveries against the particular tenants to be void in respect to him in reversion or remainder*; and tho' the judges very reasonably determined recoveries against that act to be not only void, but a *forfeiture* of the particular estate, because it was a manner of conveyance as much known at that time as a fine or feoffment, therefore by parity of reason ought to have the same operation; yet that statute did not fully answer the end for which it was made. *Co. Lit.* 356. a. 1 *Co.* 15. *Vaugb.* 51.

For if A. had been tenant for life, and made a lease for years to B. and B. had made a feoffment in fee, if the feoffee had suffered a recovery, and vouched the tenant for life, this was no void recovery within the statute; because A. the tenant for life was not seised at the time of the recovery, for the feoffment of the termor was a disseisin to A. and him in reversion; and the statute makes recoveries of tenants for life in possession only void against them to whom the reversion then belongs. 10 *Co.* 45. a. *Co. Lit.* 362.

Yet where tenant for life bargained and sold his land in fee by indenture inrolled, and the bargainee suffered a recovery, and vouched the bargainor, this was a void recovery, and a forfeiture within the 32 *H. 8.* for tho' the bargain and sale was of the inheritance, yet it *pass only an estate for life of the bargainor*, which was the greatest estate he could lawfully pass; consequently the reversioner was not defeated; therefore the bargainee being a *legal tenant for life in possession*, the recovery against him, tho' with a voucher of the bargainor, was void within that act against him in reversion, whose reversion was not turned to a right as in the former case of a disseisin. 1 *Co.* 15. 1 *Leon.* 123.

But the former defect was cured by 14 *Eliz.* which declares all recoveries (had by agreement of the parties, or by *comp.*) against tenant for life, of any lands whereof he is seised, or against any other with voucher over of him, to be void, as against the reversioners and their heirs.

These statutes made no provision for reversions or remainders *expectant* on estates-tail; therefore if there be tenant for life, remainder in tail, remainder in fee, and tenant for life suffers a recovery, and vouches the remainder-man in tail, who vouches the common vouchee; this is so far from being a void recovery within those statutes, that *the reversion in fee is actually barred by it*; for the intended recompence, which the remainder-man in tail is to have against the common vouchee, is to go in succession, as the estate-tail would have done; and it can't be a covinous recovery within the act, because *the remainder in tail joined in it*, who may at any time suffer such a recovery to destroy the remainder in fee. 10 Co. 39. b. 45. Co. Lit. 362. a. 3 Co. 60. b. Cro. Eliz. 562. Moor 690. Cro. Eliz. 570.

These common recoveries were no sooner allowed by the judges to bar estates-tail, but men began to improve them into a common way of conveyance, and to declare uses on them, as on fines and feoffments. Hence it is, that the statutes, which provide against any alienations or discontinuances of particular tenants, provide at the same time against their recoveries; thus 11 H. 7. c. 20. declares all recoveries, as well as other discontinuances by fine or feoffment of women tenants in tail, of the gift of their husbands, or their ancestors, to be void; so a recovery against husband and wife of the inheritance of the wife, without any voucher, is declared to be void within 32 H. 8. c. 28. tho' the statute says, "*suffered or done by the husband*;" for this, like a feoffment by baron and feme in substance, is the act of the baron only; and so within the statute, but a common recovery suffered by a feme covert, where her husband joins with her, is good to bar her and her heirs. Doct. and Stud. 54. Co. Lit. 326. a. 8 Co. 72. 2 Inst. 342. 2 Rol. Abr. 205. 10 Co. 43.

1. Who may suffer a recovery; of what things a recovery may be suffered, and by what names.

2. What estates and interests may be barred by a common recovery; and of single and double voucher.

3. Of erroneous and void recoveries, who may avoid them, and by what method.

1. Who may suffer a recovery; of what things a recovery may be suffered, and by what names.

When recoveries were improved into a common way of conveyance, it was thought reasonable that those, whom the law had judged incapable to act for their own interest, should not be bound by the judgment given in recoveries, tho' it was the solemn act of the court; for where defendant gives way to the judgment, 'tis as much his voluntary act and conveyance, as if he had transferred the land by livery, or any other act *in pais*; therefore if an infant suffers a recovery, he may reverse it, as he may a writ of error, during his minority; and this was formerly taken for law, as well where the infant appeared by guardian, as by attorney, or in person; but now the distinction turns on this point, that if an infant suffers a recovery *in person*, 'tis erroneous, and he may reverse it by writ of error; but even in this case *the writ of error must be brought during his minority, that his infancy may be tried by the inspection of the court, for at his full age it becomes obligatory and unavoidable*; yet in cases of necessity, the court has admitted the infant to appear by guardian, and to suffer a recovery, or come in as vouchee; but this too is seldom allowed by the court; and on emergencies, when it tends to the improvement of the infant's affairs, or when lands of equal value have been settled on him, and these recoveries have been allowed and supported by the judges, the infant could not set them aside or shake them; besides, if such recoveries be to the prejudice of the infant, he has remedy for it against his guardian, and may reimburse himself out of his pocket, to whom the law hath committed the care of him. 1 Bull. 235. 2 Rol. Abr. 395. Co. Lit. 381. b. 10 Co. 43. 1 Rol. Abr. 731. 742. 1 Sid. 321, 322. 1 Lev. 142. 2 Saund. 94. Cro. Eliz. 471. Hob. 169. Cro. Car. 307. 5 Mod. 209. But 10 Co. 43. and 2 Rol. Abr. 395. cont. See 2 Salk. 567. And 1 Vern. 461.

If an infant suffers a recovery, and appears by attorney, it seems he may reverse it AFTER his full age; because here it may be discovered, whether he was within age

when the recovery was suffered, because it may be tried *per pais*, whether the warrant of attorney was made by him when an infant. Sid. 321. 1 Lev. 142. 2.

A recovery, as well as a fine by a feme covert, is good to bar her; because the *præcipe* in the recovery answers the writ of covenant in the fine to bring her into court, where the examination of the judges destroys the presumption of law, that this is done by the coercion of her husband, for then 'tis presumed they would have refused her. 10 Co. 43. a. 2 Rol. Abr. 395.

Recoveries, being now settled as common assurances to establish men in their purchases, are very much favoured by the judges, and not compared to judgments in other real actions or adversary suits. 2 Inst. 353. Popb. 22, 23. 2 Vent. 32.

So if a man be seised of a reputed manor, which really is no manor, and he suffers a common recovery of this by the name of a manor, this is a good recovery of the lands which constituted the reputed manor; tho' strictly speaking there is no manor recovered, because the law supports this, as all other conveyances, according to the intention of the parties; for it would be severe to vacate this conveyance, when the purchaser recovered them by the assent of the vendor under such a denomination. 2 Rol. Abr. 396. 6 Co. 64. 2 Roll. Rep. 67. 2 Vent. 32. 3. P. See See, Edm. 524, 707. and 1 Keb. 591, 691. cont.

So if a recovery be suffered of a manor with its appurtenances, lands which have been reputed parcel of the manor shall pass; for 'tis but equitable, *quod voluntas Domini volentis rem suam in alium transferre rata habeatur*; and tho' the recovery does not mention the lands reputed parcel of the manor, but only the manor itself, yet this was supplied by the indenture which was of the manor, and all lands reputed parcel thereof, and tho' occupied together but two years. 1 Sid. 190. 1 Lev. 27. 1 Keb. 591, 691. 2 Mod. 235. S. C. between Thynn and Thynn; and note, that in all the books which report this case, 'tis said, that as to Sir Myles Finch's case, (which see 6 Co. 33.) all the judges of England, gave their opinions under their hands, that the lands in reputation, belonging to that manor, should not pass; but that Coke, after he was made Chief Justice, set it adjudged otherwise, and so it hath been held ever since; and well it was that it was so adjudged, because many settlements depended thereon.

If a man having a third part of a manor suffers a recovery of a moiety, this is good to pass his interest in the third part; for where the words of a conveyance (which a recovery is agreed to be,) contain more than the grantor can convey, it would be an unreasonable interpretation to make this void and entirely useless, when they are sufficient to convey so much as he might lawfully pass; so if the recovery had been in this case, of the third part of the manor, by the name of the moiety, part and purparty of the manor, this had been good for the whole third part, and not only for a moiety of the third part. Car. 109, 110.

In ejectment a special verdict found, that there was a parish of Ribton, and the vill of Ribton, but the latter not of equal extent with the former; and that J. S. was seised of land in tail in the parish, but not in the vill; and bargained, and sold the land in the parish of Ribton, with covenant to levy a fine, and suffer a recovery to the uses in the deed; but the fine and recovery were only of the lands in Ribton; the question was, Whether this recovery would serve for the land in the parish of Ribton; the court, in favour of common recoveries, extended the recovery to the lands in the parish of Ribton; because the verdict found, that he who suffered the recovery, had no lands in the vill, consequently that the recovery must be void, if not extended to the parish; and the parish is not so ancient as vill, and therefore till lately were never inserted in writs, yet now they are, and the law takes notice of them. 2 Vern. 31, 32. 1 Mod. 250. and 2 Mod. 233. S. C. But for this see Hunt. 105. Cro. Car. 269. 2 Rol. Abr. 20. Cro. Jac. 120, 124. 1 Mod. 206. 2 Mod. 47. 1 Vent. 143, 170. 3 Mod. 78. 2 Keb. 802, 821, 848. Owen 60. and added 256. which seems against this case, but is reconcilable with this diversity, that

that in those cases there were lands on which the fine might operate, viz. the lands in the vill of *Street*, without taking in the parish of *Street* to carry the lands in *Walton*, a vill of that parish; but here if those in the parish should not pass, there were no other to pass.

2. *What estates and interests may be barred by a common recovery; and of single and double voucher.*

In respect to estates-tail, and barring them by recovery, what is principally to be regarded is, that there must be a legal tenant to the *præcipe* at the time of the writ purchased, or at the return; for since estates-tail are only barred on account of the intended recompence which is to follow the descent of the tail, where there happens to be no tenant to the *præcipe*, the demandant can really recover nothing; consequently the supposed tenant can have no recompence in value against the vouchee, for that is only given against the vouchee in consideration of what the tenant lost. *Hob. 262.*

As if there be tenant for life, remainder in tail, remainder in fee, and tenant for life with the remainder in tail suffer a recovery, with voucher over, this shall not bar the remainder in tail, nor the remainder in fee, because the remainder-man in tail was not tenant to the *præcipe*, consequently could not have the intended recompence, because that was given in lieu of the estate recovered, which was no greater than the estate for life, he only, being legal tenant to the *præcipe*. 1 *Roll. Abr. 395.* *Dyer 352.* *Cro. Eliz. 670.* *Moor 255; 256.*

In a writ of error to reverse a common recovery, the tenant to the *præcipe* was made by a fine, the recovery was suffered, and the fine reversed; yet it was held a good recovery, for there was a good tenant to the *præcipe* at the time. 2 *Salk. 568.*

If a manor be given to a man and a woman, and the heirs of the body of the man begotten on the woman, and they intermarry, and then the husband suffers a recovery of the whole manor; this is good for a moiety, because the gift being made before marriage, they had each an undivided moiety, which they may transfer, but the recovery can operate but for a moiety, because the husband only was tenant to the *præcipe*, consequently the demandant only could recover his interest in the manor, which was but a moiety. *Moor 95.*

If lands are given to a man and his wife, and the heirs of the body of the husband, and a recovery is had against him only, this recovery will neither bar the reversion nor the tail; for the recompence being to go in succession, as the estate which the tenant lost would have done, the husband could not lose all the land, because he was not a legal tenant to the whole, his wife being jointenant with him who was no party to the writ; nor could the recovery be good for a moiety, because there are no moieties between baron and feme, but both are considered as one person in law. If the husband had levied a fine, and the wife suffered a recovery, and vouched the husband, who touched the common vouchee; this had been a good bar of the intail, for there the husband came in to defend the estate-tail, which the wife was a stranger to, and the assets which he recovered over is a recompence for the estate-tail, which he only had a right to without the feme, and which the law gives him a power to dispose of. *Moor 210.* *Co. 5.* 2 *Roll. Abr. 395.* 4 *Leon. 93.* 1 *And. 162.* 2 *Salk. 568.*

In a settlement, on special verdict the case was, *B.* seised in fee of the lands in question hath issue *B.* his eldest son, *C.* his second, and *D.* his third son; on a marriage entered between *D.* his youngest son and one *E.* before marriage covenants to stand seised to the use of himself for life, remainder to *D.* and *E.* and the heirs male of their two bodies, remainder to *D.* and the heirs male of his body, remainder to *E.* and the heirs male of his body, remainder to *B.* and the heirs male of his body, the remainder to his own right heirs. *A.* dies, a *præcipe* is brought against one *Upton* as tenant of the freehold, and after, before the return of the writ, *D.* by bargain and sale conveys the land to *Upton* and his heirs, and the deed was inrolled after the return of the writ, and within six months; *Upton* vouches *B.* only without his wife, and a

common recovery was suffered to the use of *D.* and his heirs; then *E.* dies, and after *D.* dies without issue male, having issue four daughters, and between them and *C.* in remainder was the question, what was barred by this recovery. 1st, It was agreed on both sides, that here was a good tenant to the *præcipe*, the bargain and sale being made to *Upton* before the return, yet it being inrolled in due time, the freehold was in *Upton* ab initio. 2dly, That this settlement being made before marriage, when the husband and wife took by moieties and not by intiercies, the husband had absolute power over his own moiety, therefore for that the recovery was an absolute bar, wherein this differs from the case of *Owen* and *Morgan*, 3 *Co. 5.* where they took by intiercies. 3dly, That this recovery was no bar to the other moiety of *E.* because she was not party, but her estate-tail in that continued untouched, tho' it was urged also to be a bar for her moiety, she dying first, and so her husband in as sole tenant of the whole ab initio, and that during the coverture the husband had power to make a good tenant of the whole; but the court held otherwise. 4thly, It was held, that the estate-tail to *D.* and *E.* being determined, the remainder to *D.* in tail male general, and all the other remainders depending thereon were barred absolutely by this recovery; for *D.* coming in as vouchee, comes in privily and representation of all the estates he hath or had, consequently he comes in representation of the remainder to himself in tail male general, and then the recompence in value goes to that, and also to all the other remainders depending thereupon, and by consequence all are barred by the recovery. 3 *Lev. 107.*

Tenant in tail, in consideration of his son's marriage, covenants to stand seised to the use of himself and his heirs till the marriage, and then to the use of himself for life, and after to the use of his son and to the heirs of his body, and suffers a common recovery with single voucher to this purpose, and then dies without issue; this recovery did not bar the remainder expectant on the estate-tail, for the covenant had changed the estate-tail into a fee, consequently the recompence could not be in lieu of the intail, since the tenant to the *præcipe* was not seised of the estate-tail at the time of the recovery suffered. *Yelv. 51.* sec 2 *Salk. 619.* which seems contrary.

A. tenant for life, remainder to *B.* in tail, the remainder to *C.* in fee, *A.* and *B.* join in a fine come coo, &c. to a stranger, who renders it to *A.* for life, remainder to *B.* and his heirs; afterwards *A.* and *B.* suffer a recovery with single voucher to the use of *B.* and his heirs; this recovery did not bar the remainder in fee, because by the render they were seised of a new estate, and *B.* was not either tenant in possession, or seised in right of the intail; consequently the recompence being given in lieu of the estate recovered, the tail could not be docked, nor the remainder man barred by this recovery, because the tenants to the *præcipe* were not seised of it at the time of the recovery suffered. *Cro. Eliz. 807.* *Moor 634.*

As to the use of the single and double voucher, it is to be observed, that the tenant who loses the land has, on his vouching over, a recompence in value adjudged against his vouchee, which is to go in the same succession as the land recovered would have done: Now a recovery with single voucher is sufficient to bar an estate tail where the tenant in tail is tenant to the *præcipe*, and seised of the lands in tail at the time of the *præcipe* brought against him, for the recompence in value must follow the descent of the land which he loses, and when that proves to be the estate-tail, then the issue is supposed to have an equivalent for it, consequently not prejudiced by the recovery; but because a single voucher can bar only the estate which the tenant is seised of at the time of the *præcipe* brought, and not any right which he hath, it was found necessary to admit the use of a double voucher; for if such tenant in tail discontinue the tail, and take back an estate or discontinue the discontinuee, a recovery against him with a voucher over could not bar the estate-tail; for the recompence comes in lieu of the land recovered, which was the defeasible estate, consequently the issue has nothing in value for the estate tail, without which he cannot be barred. *Bro. tit. Recovery. Yelv. 51.* 3 *Co. 5.* *Moor 256.*

But if in this case tenant in tail after disseisin had either by fine, or release, made a tenant to the *præcipe*, and came in himself as vouchee, and then vouched over the common vouchee; this double voucher had been sufficient to bar the tenant in tail and his heirs of every estate which he was at any time seised; for when the tenant in tail comes in as vouchee, 'tis presumed he will, and he has an opportunity to set up every title he had, to defeat the demandant; and since what he offered was not sufficient to bar demandant, the court takes it for granted, he had no other title than what he set up, therefore will give him but one recompence for all. 3 Co. 6. b. Plow. 8. Cro. Eliz. 562. Popb. 100. Moor 365. Hob. 263.

Thus if A. be tenant for life, remainder to B. in tail, and a stranger disseises A. and enfeoffs B. if a *præcipe* be brought against B. and a recovery suffered as usual; this shall not affect the estate-tail, because B. had only a right to that, and was not seised of it, and the recompence was not given in lieu of the tail, because the estate-tail was not in question on the recovery, for B. could not lose the estate he had not; but if in this case B. had made another tenant to the *præcipe*, and came in himself as voucher, this had barred the intail. 3 Co. 58. b. 2 Roll. Abr. 395.

If A. be tenant for life, remainder to B. in tail, and B. disseises A. and suffers a common recovery, himself being tenant to the *præcipe*; this recovery with a single voucher is sufficient to bar the estate-tail in B. because he was actually seised of that, at the time of the *præcipe* brought against him; for his disseisin did not devert his own estate, but only gave him a defeasible estate for life, which was immediately merged in his remainder, because the estate for life, and his inheritance, could not subsist together at the same time in him. 2 Roll. Abr. 395.

Thus we see how estates-tail are barred by recoveries, and the uses of the single and double voucher; and in this respect the operation of a recovery is correspondent to that of a fine, for they are but different ways of transferring estates-tail for security of purchasers; but the operation of a fine differs from a recovery in respect to strangers who have reversions or remainders expectant on estates-tail; for a fine does not bar them, unless they omit to make their claim within five years after their reversion or remainder is to execute; but a recovery reaches them immediately, and at the same time bars the estate-tail and all reversions and remainders on account of this supposed and imaginary recompence. Co. Litt. 372. a. 2 Roll. Abr. 396. Moor 156. Bro. tit. Recovery 28, 55.

And as a common recovery suffered by tenant in tail bars all reversions and remainders expectant, so it avoids all charges, leases and incumbrances made by those in reversion or remainder, and the recoveror shall enjoy the land free from any charge, for ever; as where he in remainder on an estate-tail, granted a rent-charge, and the tenant in tail suffered a recovery; it was adjudged, that the grantee could not distrain the recoveror; for since the rent was only at the first good, because of the possibility of the grantor's remainder coming in possession, when that possibility ceases by the recovery of tenant in tail, such grant must then become void. Moor 158. Cro. Eliz. 718. 1 Co. 62. 2 Roll. Abr. 396. Moor 154. 4 Leon. 150, &c. Popb. 5, 6.

3. Of erroneous and void recoveries, who may avoid them, and by what method.

It is already observed, that a recovery suffered by an infant in person shall not bind him; but tho' he may avoid it, yet it cannot be done by any entry in pais, but by writ of error, and this too during his minority; for the judgment of the court being on record must be set aside by an act of equal notoriety; but an infant may avoid a recovery by writ of error, as well where he comes in as vouchee, as where he is tenant to the *præcipe*; for tho' strictly speaking the recovery is not against him where he is not tenant to the *præcipe*, yet for the greater security of the purchaser, and to strengthen the recovery by the use of the double voucher, the person, who really has the right to the land in demand, comes in as vouchee, and then by vouching over the common vouchee, has one

recompence for all his titles; consequently if he be the person who really loses the land, he ought in reason to reverse the recovery, as well where he comes in as vouchee, as where he is seised of the land, and tenant to the *præcipe*. 1 Roll. Abr. 742. 1 Lev. 142.

If tenant in tail within age comes in as vouchee by attorney in a common recovery, *but in remainder may assign this for error*, for he is party in interest to the recovery; and where a man's interest is bound by another's act, 'tis but reasonable he should be allowed to free himself from the mischief by taking advantage of any error in it. 1 Roll. Abr. 755, 796.

If A. be tenant in tail, remainder to B. and A. suffers an erroneous recovery, and the common voucher releases to the recoveror; yet if A. dies without issue, B. may, notwithstanding the release, reverse it by writ of error, for the common voucher is only called in for form; and as he has really no interest in or title to the land; so really neither does he make any recompence to the person who loses the land; therefore 'twere unreasonable to carry the notion of the imaginary recompence so far as to suppose him a real sufferer, and thereby give him the privilege of setting aside a conveyance, which he is no way affected by. Cro. Eliz. 2, 3.

In a writ of error to reverse a recovery suffered by an infant who appeared by guardian, the error assigned was in the entry of his admission by guardian, viz. *Concessit per curiam hic quod A. B. sequatur pro J. S. Armig. qui infra ætas existit ut guardianus prædicti J. S.* whereas it was objected, that since the infant was tenant to the writ, it ought to have been entered, that the guardian was admitted to defend for the infant; but this exception was disallowed, because the words *ad sequend.* for the infant signify the same with *ad defendend.* for the infant; for *ad sequend.* is to follow and attend the business and suit of the infant; and the guardian being assigned to do that must likewise have been assigned to take care of, or take upon him the defence of the infant's suit. 2 Saund. 94, 95. 1 Mod. 48.

In a common recovery the writ of error bears date 1 Martii 7 Eliz. ret. die Lunæ in quarta septimana quadragesimæ proximæ futuræ, the first day of March being that year the first day in Lent, the recovery pait in the usual form that lent; and in a writ of error to reverse it, the error assigned was, that the words *proximæ futuræ* should be referred to *Quadragesimæ*, and then the writ of entry was not returned till Monday in the fourth week of Lent, 8 Eliz. which was the time the tenant was to appear; consequently this recovery must be void, because here was judgment on a voucher, and a recovery in value, before the writ was returned, before which the court has no power to proceed. But it was answered and resolved, that since *proximæ futuræ* were not written at large, they may be indifferently applied either to *die Lunæ*, by supposing them to stand for *proximo futuro*, or to *quarta septimana*, by supposing them to stand for *proxima futura*; and where words abbreviated may be indifferently referred, 'tis but reasonable to give them such a relation, as will best support the recovery, which is but a voluntary conveyance, *ut res magis valeat quam pereat*; but if the words had been at large *proxima futura*, then they must necessarily be referred to *quadragesimæ*, and then the objection had been good, and the recovery for that reason must have been void.

In error to reverse a recovery, the errors assigned were, 1. That the writ of entry was brought of an advowson of a rectory, and of a rent issuing out of the rectory, which was a *bis petitum*, therefore the writ vicious; but this was disallowed, because the advowson and rectory are different things; for he who has the advowson has only the right of presentation, but he who has the rectory has the profits of the church, out of which the rent issues; consequently there can be no *bis petitum* in this case, because by the demand of the advowson of the rectory, and of the rent issuing out of the rectory, the demandant recovers more than by a demand of the rectory only: another error assigned was in the demand of a rent or pension of four marks issuing out of the rectory, which is so uncertain a demand, a pension being a different thing from a rent, and recoverable in the Spiritual court; but this was disallowed; because

because it is plain there is but one sum of four marks demanded, and the pension or rent must be synonymous here, because they are demanded as *issuing out of the rectory*; therefore the pension cannot be in nature of an annuity, which charges the person only, because it is expressly to issue out of the rectory. *Popb. 23. § Co. 41. a.*

In a writ of error to reverse a common recovery, the error insisted on was, that the warrant of attorney of the vouchee bore date before the *summonas ad warrantizandum* issued, yet the judgment was affirmed, because the vouchee may come in, if he will, before the *summonas ad warrantizandum*, and make his attorney; therefore to support the common recovery, it shall be presumed the vouchee was present in court and appointed his attorney; and so the *dedimus* for the warrant and the *summonas ad warrantizandum* void. *1 Sid. 213. 1 Lev. 130. Raym. 70.*

In a *quare impedit* plaintiff intitles himself to an avowson by a recovery suffered by tenant in tail, in pleading which recovery he alleges two to be tenant to the *præcis*, but doth not shew how they came to be so, or what conveyance was made to them, by which it may appear that they were tenants to the *præcis*; and after search of precedents as to the form of pleading common recoveries, the court inclined that it was not well pleaded, but delivered no judgment. *2 Mod. 70. See Estate-tail, and 3 Vin. Abr. tit. Recovery, and Black. Com. 2 V. 116, 271, 357, 358. xvii. xix. 4 V. 422.*

Recoupe, (from the Fr. *recouper*) Signifies the keeping back or stopping something which is due, and in our law, we use it for; *to defalk or discount*; as if a person hath a rent of ten pounds out of certain lands, and he disseises the tenant of the land; in an *assise* brought by the disseisee, if he recover the land and damages, the disseisor shall recoupe the rent due in the damages: So of a rent charge issuing out of land, paid by the tenant to another, &c. he may recoupe the same. *Terms de Ley. Dyer 2.* And an inn-keeper may keep back and detain his guest's horse, &c. till he pay for his entertainment: But a man who receives another's cattle to pasturage, it is said may not do so, unless it be agreed between them at first. *1 Cro. 196, 197.*

Recreant, (Fr.) Cowardly, faint-hearted; and was formerly a word very reproachful. *Fleta, lib. 3. see Black. Com. 3 V. 340. 4 V. 342.*

Regia pissa Regis, The King's right to a prize, or taking of one butt or pipe of wine before, and another behind the mast, as a custom for every ship laden with wines. *Edw. I.* in a charter of many privileges to the barons of the Cinque-ports, discharged them of this duty. *Cowell.*

Restitutio, Right or justice; sometimes it signifies legal dues, a tribute or payment. *Leg. Edw. Confess. c. 30. Si quis Dei reſtitutiones per vim deſorceat, emendat, &c. viz.* If any one violently detain the rights of God, (i. e. tithes and oblations) let him be fined or amerced, to make full satisfaction. *Leg. Hen. 1. c. 6.*

Recto, Is used for a writ of right, which is of so high a nature, that as other writs in real actions are only to recover the possession of the lands, &c. in question; this aims to recover the seisin, and the property, and thereby both the rights of possession and property are tried together. *1 Inst. 158.*

It hath two species; writ of right patent, and writ of right close: The first is so called, because it is *ſent or ſan*, and is the highest writ of all others, lying for him who hath *fee-simple* in the lands or tenements sued for, against tenant of the freehold at least, and in no other case. *F. N. B. 1, 2, &c.* But this writ of right patent seems to be extended farther than originally intended; for a writ of right of dower, which lies for tenant in dower, is patent, as appears by *F. N. B. 7.* And the like may be said in some other cases. *Table Reg. Orig.* Also there is a special writ of right patent in London, otherwise termed a writ of right according to the custom, which lieth of lands or tenements within the city, &c. And the writ of right patent is likewise called *breve magnum de recto*. *Reg. Orig. 9. Fleta, lib. 5. c. 32.*

A writ of right close is brought where one holds lands and tenements by charter in ancient demesne, in fee-simple,

see tail, or for term of life, or in dower, and is disseised; and is directed to the bailiff of the King's manors, or to the lord of ancient demesne, if the manor is in the hands of a subject, commanding him to do right in his court: This writ is also called *breve parvum de recto*. *F. N. B. 11. Reg. Orig. 9. Britton, c. 120.* And he who holds lands in ancient demesne by court-roll, if he be ousted, shall not have the writ of right close, but is to sue by bill in the lord's court, &c.

If a person seised in fee-simple dies seised of such estate, and a stranger doth abate and enter into the land, and deforce the heir; the heir may sue a writ of Right patent against the tenant of the freehold of the same land, or an assise of Mortd'anceſſor. *11 Aff. 17.*

In a writ of right patent, the demandant is to count of his own seisin, or of the seisin of his ancestor; if one bring the writ as heir to an ancestor, he may lay the seisin and esplees as in parcenary of the profits of the lands in his ancestors; and where it is brought by a bishop or body politick, seisin of the esplees is to be laid in themselves, or in their predecessors. *New Nat. Br. 10.*

Where a writ of right close is directed to the lord of whom the lands are holden, and he will not hold his court to proceed on it; a writ shall issue requiring him to hold his court, &c. And if the lord hold his court, but will not do the demandant right, or delay it, the plea may be removed by the writ called *Tuit* into the county-court of the sheriff; and from thence by recordare into the Common Pleas. *Ibid. 6, 7.*

Glanvil seems to make every writ, whereby a man sues for any thing due unto him, a writ of right. *Glanvil. 10, 11, 12.*

Writ of right may be had after an assise, writ of entry sur disseisin, &c. or other real action, where demandant is barred by action tried; so if he lose by default in a writ of right, before the mise is joined, &c. But if a person once loſeth his cause on a writ of right by trial and judgment, &c. he is without remedy, and shall be finally concluded. *New Nat. Br. 2.*

Recto de Advocatione Ecclesie, Is a writ lying where a man hath right of advowson, and the parson of the church dying, a stranger presents his clerk to the church, the party who hath right not having brought his action of *quare impedit* nor *darreign presentment*, but suffered the stranger to usurp on him: And it lieth only where an advowson is claimed in fee to him and his heirs. *F. N. B. 30. 4 Ed. 3. c. 18.*

Recto de custonia terrae & hæreditis, Was a writ which lay for him whose tenant holding of him in chivalry, died in nonage, against a stranger who entered on the land, and took the body of the heir; but by the statute of 12 Car. 2. c. 24. it is become useless as to lands holden in capite, or by knights service, but not where there is guardian in socage, or appointed by the last will and testament of the ancestor. The form of it, see in *F. N. B. 139. and Reg. Orig. 161.*

Recto de Dote, A writ of right of dower, which lies for a woman who has received part of her dower, and demands the residue against the heir of the husband, or his guardian. *F. N. B. 7, 8, 147. 1 Inst. 32, 38.*

Recto de dote unde nihil habet, Is a writ of right, which lies in case where the husband having divers lands or tenements, hath assured no dower to his wife, and she thereby is driven to sue for her thirds against the heir, or his guardian. *Old Nat. Br. 6. Reg. Orig. 170.*

Recto quando Dominus remittit, Is a writ which lieth where lands or tenements in the seigniorship of any lord, are in demand by a writ of right: If the lord in such case holdeth no court at the prayer of demandant or tenant, but sends to the King's court his writ to put the cause thither for that time, (saying to him at other times the right of his seigniorship) then this writ shall issue out for the other party, and hath its name from the words therein contained. *F. N. B. 16.*

Recto de Rationabili parte, A writ lying between privies in blood, as brothers in Germain, sisters, and other coparsons, for land in fee-simple. If there be two sisters, and the ancestor dieth seised of land in fee, and one of the sisters enters into the whole, and deforces the other, she who is deforced shall have the writ of right

de rationabili parte: And if, where there are two sisters, after the death of the ancestor they enter and occupy in common as coparceners, and then one of them deforce the other to occupy that which is appendant or appurtenant to the messuage, &c. which they have in coparcenary; she who is deforced shall have this writ. Also if the ancestor were disseised of lands, and dieth, and one sister entereth into the whole land, and deforce her sister, she shall have the writ against her other sister: For it lieth as well on a dying seised of the ancestor, if one sister enter on all, as where the ancestor doth not die seised; and it is a writ of *right patent*, &c. F. N. B. 9. New Nat. Br. 19, 20.

In this writ the demand shall be of a certain portion of land, *to hold in feoffment*; and voucher and view do not lie in it, because of the privity of blood; but in a *rationabili parte* the view was granted. 15 H. 5. for that the ancestor did not die seised, &c. The process in the writ, after removing into C. B. is *Summons, Grand Cape, and Petit Cape*, &c. Ibid. See *Booth*.

Recto sur Disclaimers, Is a writ which lies where the lord, in the court of Common Pleas, avows on his tenant, and the tenant *disclaims* to hold of him; on which *disclaimer* the lord shall have this writ; and if he avers and proves that the land is holden of him, he shall recover the land for ever: This writ is grounded on the statute of *Westm. 2. c. 2.* Old Nat. Br. 150.

Rector, (Lat.) A governor; and *rector ecclesie parochialis*, Is he who hath the charge and cure of a parish church. It has been held, that *rector ecclesie* is one who hath a parsonage where there is a vicarage endowed. And when dioceses were divided into parishes, the clergy who had the charge in those places were called *rectors*; afterwards when their *rectories* were appropriated to monasteries, &c. the Monks kept the great tithes; but the bishops were to take care that the *rector's* place should be supplied by another, to whom he was to allow the small tithes for his maintenance, and this was the *vicar*. *Comm. Parj. Comp. 75.*—*Rector tantum jus in ecclesia parochiali habet, quantum praelatus in ecclesia collegiata.* Black. Com. 1 V. 384.

Rectorial tithes, see Black. Com. 1 V. 388.

Rectory, (*Rectoria*) Is taken *pro integra ecclesia parochiali, cum omnibus suis juribus, prædictis, decimis aliisque proventibus speciebus.* Spelm. Also the word *rectoria* hath been often applied to the *rector's* mansion or parsonage house. *Paroch. Antiq. 549.* See *Parsonage*.

Rectum, Right; and anciently it was used for a trial or accusation. *Bract. lib. 3.*

Rectum, Esse, ad rectum in curia domini, is the same with *stare ad rectum*. *Leg. H. 1. c. 43.* See *infra*.

Rectum Rogare, Is to petition the judge to do right. *Leg. Inæ. c. 9.*

Rectum, Stare ad rectum, To stand trial at law, or abide the justice of the court. *Hoved. 655.*

Rectus in Curia, i. e. Right in court, is he who stands at the bar, and no man objects any offence against him. *Smith de Repub. Angl. lib. 2. c. 3.* And when a person outlawed hath reversed the outlawry, so that he can participate of the benefit of the law, he is said to be *rectus in curia*.

Recusants, Are such as adhere to the Pope as supreme head of the church, and who refuse or deny supremacy to the King.

At the reformation, those were deemed *recusants* who disputed the authority of the crown in causes ecclesiastical, and denied the King's supremacy; but the acts of parliament made against *recusants*, particularly the 35 *Eliz.* describe a *recusant* to be one who does not repair to some church or chapel, or usual place of common prayer, to hear divine service: Afterwards, receiving the sacrament of the church was made a farther test of conformity: And by the 25 & 30 *Car. 2.* a declaration against transubstantiation was required, to distinguish papists and popish *recusants* from protestants.

All persons are judged popish *recusants* convicted, who refuse the oaths of allegiance and supremacy, or abjuration; and are liable to suffer and forfeit accordingly, viz. they incur a *præmunire*, whereupon they forfeit all their goods

and chattels, with their lands, &c. *Read. Stat. 4 Vol. pag. 315.*

Recusants convicted, above the age of sixteen years, are to go to their place of abode or settlement, and not travel above five miles from thence, without licence from the King, three of the privy council, or four justices of the peace, with the assent of the bishop of the diocese or the lieutenant, or deputy lieutenant of the county, on pain of forfeiting their goods, &c. And not having lands worth twenty *marks per ann.* or goods to the value of 40 *l.* if they do not make the submission of conformity mentioned in 35 *Eliz. c. 2.* being required by a justice of peace, they may be compelled to abjure the realm; which abjuration must be certified to the next assizes; and it is felony if they do not depart within the time limited by the justices, or departing and returning again without the King's licence: But if any person offending, before conviction, come to some parish church on a Sunday, and make a publick declaration of his conformity, he shall be discharged from all penalties, &c. tho' if such offender afterwards relapse, and become a *recusant* again, he shall lose the benefit he might otherwise have had on his submission: And *recusants* required by process to make their appearance, shall not incur any forfeiture for travelling on such occasions. 35 *Eliz. c. 2.* 3 *Jac. 1. c. 5.*

As to licensing a *recusant* to travel, the bishop, lieutenant, or deputy lieutenant, who gives his assent to it, must be a distinct person from the justices of peace who gave the licence; therefore if one and the same person be a justice of peace, and deputy lieutenant, he cannot act in both capacities, but if he sign and seal the licence as a justice of peace, the assent of some other deputy lieutenant, &c. must be had: And it is a good exception to a licence by four justices, that no particular cause of the *recusant's* travelling is expressed in it. *Cro. Jac. 352. Cawley 210.*

A person was indicted for *recusancy*, but conformed before conviction: And so again the second time, and was indicted a third time for a relapse; and on motion, that it might be certified into the Exchequer, because by the stat. 35 *El. c. 2.* he is to lose all the benefit which he was to have by his former conformity, the relapse was certified accordingly. 1 *Bulst. 133.*

Justices in their sessions are to cause proclamation to be made, that popish *recusants* shall render themselves to the sheriff or bailiff of the liberty where they are, before the next assizes or sessions, &c. And if they do not, the default being recorded, shall be taken as a sufficient conviction. 3 *Jac. 1. c. 5.* And constables and churchwardens of every parish, or one of them, or if none such, the constables of the hundred there, are to present once a year at the quarter-sessions such *recusants* as shall absent from the church for a month together; the forfeiture of which is 20 *l.* per month, &c. *Stat. Ibid.* If a *recusant* conform, and not receive the sacrament once a year at least; he shall forfeit for the first year 20 *l.* for the second 40 *l.* and for every default after 60 *l.* And if a person hath once received it, he make default therein in the space of one year, he shall forfeit 60 *l.* to be recovered at the quarter-sessions by indictment, and divided between the King and prosecutor: But the husband is not chargeable with the offence of the wife; nor the wife for the husband after his death. *Ibid.*

It hath been adjudged, that a writ of error will not lie on a conviction of a *recusant*, for not rendering himself to the sheriff, &c. because the conviction is no judgment, but the statute gives process on it for the forfeiture: So that if there be any faults in it, the same is to be quashed in the Exchequer, the party first conforming. *Raym. 433.*

An information *tam quam* was brought against defendant, setting forth, that before and on such a day he was a *recusant* convicted, and that afterwards he conformed, &c. and for three years after had not received the sacrament, and so demanded 60 *l.* for every year: On Not guilty pleaded, plaintiff had verdict; and thereupon it was moved that the information was uncertain, because neither the time was alledged, nor how, or in what court, nor before whom the conviction was; and the informer demands the penalty

penalty for three years, when by statute no informer can demand a penalty upon the penal law, but by an information exhibited within a year after the offence: But it was resolved, that the first exception had been good on demurrer; but defendant having pleaded Not guilty, all the circumstances of his conviction were admitted, and nothing remained to be tried but the fact: And as for the second exception, it was good against the informer for his part, but should not prejudice the King. 2 Cro. 365. 3 Nels. Abr. 52.

The Stat. 23 Eliz. c. 1. gives several remedies against Recusants; one for the King alone, and there the prosecution must be by indictment in B. R. The other for a common person, and that is to be by action of debt, bill, plaint or information. And the 28 Eliz. c. 6. was made for the benefit of the crown on indictments, and doth not extend to informations; therefore such informations may be brought in any court of record. Hob. 204.

Where the defendant is indicted on the statute of Recusancy, CONFORMITY is a good plea; but not if an action of debt be brought. 1 Mod. 213. But vide 2 Show. 332.

A Recusant certified into the court of King's Bench, according to the 23 Eliz. c. 1. shall give security for his good behaviour, &c. 2 Bull. 155. The judgment in Recusancy is quod convictus est. 2 Strange 1048. See Papists, and Black. Com. 4 V. 55, 124.

Red, (Sax. raed) Is an old word signifying advice; and *redhana* is one who advised the death of another. See *Dedhana*.

Red Book of the Exchequer, (*Liber Rubens Scaccarii*) Is an antient record, wherein are registred the names of those who held lands *per Barroniam* in King Henry the Second's time. Ryley 667. It is a manuscript volume of several miscellany treatises in the keeping of the King's remembrancer in his office in the Exchequer; and hath some things (as the number of the hides of lands in many of our counties, &c.) relating to the times before the Conquest. There is likewise an exact collection of the escuages under King Hen. 1. Rich. 2. and King John; and the ceremonies used at the coronation of Queen Eleanor, wife to King Henry the Third, &c. See *Privilege*.

Reddendum, Is used substantively for the clause in a lease, whereby the rent is reserved to the lessor; and antiently corn, flesh, fish, and other victuals, were for the most part reserved on leases. 2 Rep. 72. Wood's Inst. 226.

In debt for rent, plaintiff declared on a lease made 25 August 11 W. 3. of a messuage, &c. for seven years, to commence from the 24th day of June before; *reddendum* quarterly at Michaelmas, St. Thomas's day, Lady day, and Midsummer, three pounds ten shillings, the first payment to be made at Michaelmas then next; and assigned for breach that fourteen pounds of the rent was in arrear for one year, ending 24 December anno 13 Will. And on demurrer to this declaration, it was objected that on this lease there was no year could be ended on the 24th of December, but on St. Thomas's day, according to the *reddendum*; which was held to be true, because *where special days are limited in the reddendum, the rent must be computed from those days, not according to the habendum*; and that the rent is never computed from the *habendum*, but when the *reddendum* is general, i. e. paying quarterly so much; so plaintiff had leave to discontinue, &c. 1 Salt. 141. See *Deci, Lease and Reservation*, and *Black. Com.* 2 V. 299. i. iii.

Reddit se, Is where a man procures bail for himself to an action in any court at law; if the party bailed at any time before the return of the second *scire facias* against the bail, renders himself in discharge of his bail, they are thereby discharged. 2 Lill. Abr. 430.

A *ca. sa.* was returned *non est inventus* against the principal, and one *scire fac.* and a *nihil*; and on the second *scire fac.* he rendered himself, and was received; But if there had been a *scire faci* and judgment thereon, he had come too late. Cro. Jac. 109.

If defendant renders himself to the Marshal of B. R. on any action in that court, in discharge of his bail, the defendant's attorney is forthwith to give notice of such render to plaintiff's attorney, and shall make oath of the notice, &c.

And a *reddidit se* will not discharge the bail, unless the attorney who is concerned for defendant or his bail, enters it in the Marshal's book; and having given notice thereof to the attorney for plaintiff, brings the bail-piece to the Secondary, who on producing a note from the Marshal or his clerk, that defendant is in custody, will discharge it; and until this is done, plaintiff may notwithstanding proceed to judgment and execution against the bail; for until the bail-piece is discharged, there is a record still remaining in court against them. 2 Lill. 431.

A *reddidit se* of the principal, in discharge of the bail, is no plea in a writ of error; for the recognizance is not to render the body, but to pay the debt; adjudged, 3 Jac. 1. c. 8. Vide *Bail*.

Redditarius, A renter; and *redditarium* hath been used for a rental of a manor, or other estate. *Cartular. Abbat. Glasen. MS.* 92.

Reddition, (*Redditio*) A surrendering or restoring; being also a judicial acknowledgment that the thing in demand belongs to the demandant, and not to the person so surrendering. Stat. 34 & 35 H. 8. c. 24.

Redditus Missus, Is set or standing rent. Vide *Affisus*.

Re-delivery, Is a yielding and delivery back of a thing; If a person has committed a robbery, and stolen the goods of another, he cannot afterwards purge the offence by any re-delivery, &c. 1 Inst. 69. H. P. C. 72.

Redemise, Is a regranting of lands demised or leased. See *Demise* and *Redemise*.

Redemption, (*Redemptio*) A ransom or commutation; and by the old Saxon laws, a man convicted of a crime paid such a fine, according to the estimation of his head, *pro redemptione sua*.

Redisseisin, (*Redisseisina*) Is a *disseisin* made by him, who once before was found and adjudged to have *disseised* the same man of his lands or tenements, for which there lies a special writ called a writ of *redisseisin*. Old Nat. Br. 106. F. N. B. 188.

The writ of *redisseisin* lieth where a person recovers by *assise* of *novel disseisin* any lands, &c. and is put in possession by verdict and judgment, and afterwards is *disseised* of the same by him by whom he was disseised before. Statute of Merton, c. 3. New Nat. Br. 417. Also this writ lies against him who committed the *redisseisin*, and another who was not disseisor, if he be tenant of the land; and if a man recover by *redisseisin*, and after he is disseised again by the person who made the first *redisseisin*, he shall have a new writ of *redisseisin*; and so one *redisseisin* after another, every time he is redisseised. *Ibid.* 418, 420. And the *redisseisin* being found on the sheriff's inquisition, the party who did it is to be committed to prison, and the lands re-seised; and he who recovereth in *redisseisin*, shall have double damages, &c. Stat. Westm. 2. c. 26. The punishment for *redisseisin* see in the statute 52 H. 3. c. 8.

If plaintiff be *redisseised* of parcel of the tenement formerly recovered, he shall have a *redisseisin*: And when coparceners are disseised, and recover in an *assise*, if after they make partition and are severally disseised, they may bring several writs of *redisseisin*. &c. Co. Lit. 154.

A recovery in *assise* of *novel disseisin* is against two disseisors, and one of them disseises the plaintiff again, he may have a *redisseisin* against him: But where the recovery is against a woman in *assise*, and she taketh husband, and both of them disseise the plaintiff, he shall not have this writ; because the husband is *alius*, and not the same first disseisor. *Ibid.* And if in a writ of right, &c. the demandant makes his protestation to sue in the nature of an *assise*, and after is redisseised; he shall not have a writ of *redisseisin*, the first recovery not being by writ of *assise* of *novel disseisin*. See 2 Inst. Com. on West. 2. c. 26. See *Post-Disseisin*, and *Black. Com.* 3 V. 188.

Revers of Injuries. See *Black. Com.* 3 V. 2.

Reubbers, Are those that buy stolen cloth, and turn it into some other colour or fashion, that it may not be known again. *Britton*, c. 29. 3 Inst. 134.

Re-entry, (from the Fr. *re-entrer* i. e. *reursus intrare*) Is the returning or retaking a possession lately had, as if a man makes a lease of lands, &c. to another, he thereby quits the possession; and if he covenants with the lessee, that for non-payment of rent at the day, it shall be lawful for him to re-enter; this is as much as if he conditioned

tioned to take again the land into his own hands, and to recover the possession by his own act, without assistance of the law. But words in a deed give no re-entry, if a clause of re-entry be not added. Wood's Inst. 140.

One may reserve a rent on condition in a feoffment, lease, &c. That if the rent is behind he shall re-enter, and hold the lands till he is satisfied, or paid the rent in arrears; and in this case if the rent is behind, he may re-enter; tho' when the feoffee, &c. pays or tenders on the land all the arrears, he may enter again. Litt. 327. 1 Inst. 203. And the feoffor, &c. hath only an interest, not the freehold, to take the profits in the nature of a distress: Here the profits shall not go in part of satisfaction of the rent; but it is otherwise if the feoffor was to hold the land till he was paid by the profits thereof. *Ibid.*

All persons who would re-enter on their tenants for non-payment of rent, are to make a demand of the rent; and to prevent the re-entry, tenants are to tender their rent, &c. 1 Inst. 201. If there is a lease for years, rendering rent with condition, that if the lessee assigns his term, the lessor may re-enter; and the lessee assigneth, and the lessor receiveth the rent of the assignee, not knowing or hearing of the assignment, he may re-enter notwithstanding the acceptance of the rent. 3 Rep. 65. 1 Cro. 553.

A feoffment may be made upon condition, That if the feoffor pay to the feoffee, &c. a certain sum of money at a day to come, then the feoffor to re-enter, &c. Litt. 322.

Re-exchange, Is the like sum of money payable by the drawer of a bill of exchange which is returned protested, for the exchange of the sum mentioned in the bill back again to the place whence it was drawn. *Lex Mercat.* 98.

Re-extent, Is a second extent on lands or tenements, on complaint that the former was partially made, &c. *Broke* 313.

Refare, (from the Sax. *reaf*, or *rafan*) To bereave, take away, or rob. *Leg. H. 1. c. 83.*

Reference, In acceptance of law is, where a matter is referred by the court of Chancery to a Master, and by the courts at law to a Prothonotary or Secondary, to examine and report to the court. 2 Lill. Abr. 432.

In Chancery, by order of court, irregularities, exceptions, matters of account, &c. are referred to the examination of a Master of that court. In the court of B. R. matters concerning the proceedings in a cause, by either of the parties, are proper matters of reference under the Secondary, and for him in some ordinary cases to compose the differences betwixt them; and in others to make his report how the matters stand, that the court may settle the differences according to their rules and orders. *Palsb.* 1650.

If a matter in difference between plaintiff and defendant be referred to the Secondary, and one of the parties will not attend at the time appointed, after notice thereof given, to hear the business referred; the other party may proceed in the reference alone, and get the Secondary to make his report without hearing of the party not attending. 2 Lill. 342. See Report, and Black. Com. 3 V. 453.

Reference to words. The King granted to A. and D. and their heirs all those messuages, &c. late in the tenure of J. S. situated, &c. in the city of W. and in the suburbs thereof, and out of the city within the jurisdiction and liberties thereof belonging to the late priory of, &c. which messuage, &c. in the city and suburbs belonging to the late priory, were of the clear yearly value of 40 l. Resolved, that the words (all those messuages, &c.) make a necessary reference by reason of the word (those) as well to the villas to the tenure of J. S. so if the one or the other fails, the general grant is void; for (those) is not satisfied till the sentence be ended. *Doddington's case*. See 18 Vin. Abr. 272.

Referendary, (*Referendarius*) An officer abroad, of the same nature as Masters of Request were to the King among us: The Referendaries being those who exhibit the petitions of the people to the King, and acquaint the judges with his commands. And there was such an officer in the time of the English Saxons here, — *Ego Augemundus* Referen-

darius approbavi, &c. And we read of a *Referendarius Angliae*. Spelm.

Reformation of Religion. See Black. Com. 4 V. 423.

Refunding. A. an attorney being ill, takes B. for his clerk, and receives 120 l. and by articles agrees with the father of B. to return 60 l. of the money if he died within a year. A. died within three weeks. The executor of A. was decreed to pay back 100 guineas. *Ver.* 466.

A. was indebted to B. by mortgage in 400 l. principal monies and died. B. died leaving J. S. executor. On a bill in Chancery, for payment of debts of A. out of lands charged with the same, the master reported 700 l. due on the mortgage, and the executor received the whole 700 l. but afterwards it appeared that 353 l. 13 s. 1 d. had been paid to B. the testator by A. in his life-time; whereupon the trustees and *cestui que trust*, an infant, brought a bill to be relieved against this over-payment; the executor (defendant) pleaded all the former proceedings, and also that he, before any notice of the over-payment, as executor of B. had paid away the 700 l. in the debts of B. The Master of the Rolls decreed the executor to repay the surplus, and he to be at liberty to sue such creditors, as thro' mistake he had paid, TO REFUND; and this decree was affirmed by Lord Chancellor Cowper, who compared it to the case of a judgment obtained by executor, and after reversed in error, and to that of a decree which is afterwards reversed by appeal; tho' he said that in the last case of an appeal if defendant had delayed the appeal, and willingly stood by whilst the executor paid away the money to the testator's creditors, it would be otherwise; for this would be drawing the executor into a snare. 1 Wm's Rep. 355.

A. for 600 l. purchases B.'s interest and possibility in such an estate to him and his heirs; the land is evicted. A. is not intitled to have his 600 l. back, but his bill was dismissed. *Fin. Rep.* 288.

Cross bill was brought for creditors to take their proportionable share, but the debts having been paid to and releases given by them, it was dismissed. 2 Chan. R. 173.

Refusal, Is where one hath by law a right and power of having or doing something of advantage to him, and he refuseth it. An executor may refuse an executorship; but the refusal ought to be before the ordinary: if an executor be summoned to accept or refuse the executorship, and he doth not appear on the summons and prove the will, the court may grant administration, &c. which shall be good in law till such executor hath proved the will; but no man can be compelled to take on him the executorship, unless he hath intermeddled with the estate. 1 Leon 154. Cro. Eliz. 858. Where there are several executors, and they all refuse, none of them shall administer afterwards; but if there is a refusal by one, and the other proves the will, the refusing executor may administer when he will, during the life of his co-executor. 1 Rep. 28. 1 Nels. Abr. 63. There is a difference where there is one executor, and where there are more executors than one, as to refusal of an executorship; for if there is but one, and in such case he administers, he cannot refuse afterwards; and if once he refuse, he cannot administer afterwards: As for instance; the testator being possessed of lands, &c. for a term of years, devised the same to the Chief Justice *Carlisle*, and made him executor, and died; afterwards the executor wrote a letter to the judge of the prerogative court, intimating that he could not attend the executorship, and desiring him to grant administration to the next of kin to the deceased, which was done accordingly; and after this the executor entered on the lands, and granted the term to another; but it was adjudged void, because the letter which he wrote was a sufficient refusal; and he may not once refuse, and afterwards take upon him the executorship. *Moor* 272.

An executor, after a caveat entered against the will, took the usual oath of an executor, and afterwards refused to prove the will; and it was held, that having taken the oath of executor, the court could not admit him to refuse afterwards, but ought to grant probate to him notwithstanding

standing the *caveat*, on another's contesting for the administration, &c. 1 *Vent.* 335.

There is a refusal of a clerk presented to a church, for illiterature, &c. And if a bishop once refuses a clerk for insufficiency, he cannot accept of him afterwards, if a new clerk is presented. 5 *Rep.* 58. 1 *Cro.* 27.

In *trover*, a demand of the goods and refusal to deliver them, MUST BE PROVED, &c. 10 *Rep.* 56. 1 *Danv.* Abr. 20.

Refutantia, A discharge; or renouncing of all future claim.—*Visis libris, instrumentis, registris, refutationibus, aliisque evidentiis*, &c. Thorn. anno 1389.

Regale Episcoporum, The temporal rights and privileges of a bishop. *Mandatum est Roberto de B. quod faciat habere Episcopo Norwicensi totum Regale quod ad Episcopatum suum pertinet.* Brady's Append. to the History of England, pag. 108.

Regales, The King's servants or officers. *Walsingham*, anno 1291.

Regal fishes, (mentioned in 1 *Eliz.* cap. 5.) Are whales and surgeons, some add porpoises.

The King by his prerogative ought to have every whale cast on shore, or wrecked, in all places within this realm, (unless granted to subjects by special words) as a royal fish. The King himself shall have the head and body to make oil and other things, and the Queen, the tail, to make whalebones for her royal vestments. *Pat. Ed.* 1. m. 25. *Dors.* See *Tract. de auro Reginae*, p. 127.

Regalia, (*dicuntur jura omnia ad fiscum spectantia*, saith *Spelman*) The royal rights of a King, which the *Civilians* reckon to be six.

1. Power of judicature.
2. Power of life and death.
3. Power of war and peace.
4. Masterless goods, as waifs, estrays, &c.
5. Assessments. And
6. Minting of money. See *Royalities*.

Also the crown, scepter with the cross, scepter with the dove, St. Edward's staff, four several swords, the globe, the orb with the cross, and other such like things used at the coronation of our Kings, are called *regalia*. See the relation of the coronation of King Charles the Second in *Baker's Chronicle*.

Regalia is sometimes taken for the dignity and prerogative of the King. *Regalia* is also taken for those rights and privileges which the church enjoys by the grants and other concessions of Kings. And sometimes for the patrimony of the church; as *regalia Sancti Petri*, &c. It signifies also those lands and hereditaments which have been given by Kings to the church, viz. *Cepimus in manum nostram baroniam & regalia quæ archiepiscopus Eborum de nobis tenet.* *Pryn.* lib. Angl. 2 tom. p. 231. These, whilst in the possession of the church, were subject to the same services as all other temporal inheritances; and after the death of the bishop they of right returned to the King, until he invested another with them; which in the reign of William the Conqueror, and some of his immediate successors, was often neglected or delayed; and as often the bishops complained thereof. This appears in *Ordericus Vitalis*, lib. 10. and other writers in those days. *Neubrigenfis*, lib. 3. cap. 26. tells us, they complained against Henry 2. for that *Episcopatus vocantes & provenientia perciperet commoda, diu vacare voluit, & ecclesiasticis potius usibus applicanda in fiscum redegit.* So in *Malmibury*, lib. 11. de *Gest. Pontificum*, pag. 285. See *Black. Com.* 1 V. 241.

Regalia facere, Is to do homage or fealty when he is invested with the *regalia*, viz. *Regalia pro more istius temporis faciens principi* 7 *Calend. Octobris Cantuariæ affedit.* *Malmibury*, de *Gestis Pontificum*, pag. 219. de *Anselmo*.

Regard, (*regardum* and *rewardum*, Fr. *regard*, i. e. *aspectus, respectus*) Signifies generally any care or diligent respect, yet it hath also a special acceptation, wherein it is only used in matters of the forest; and there two ways, one for the office of *regarder*, the other for the compass of the ground belonging to that office. *Crom. Jur.* 175, 199. Touching the former, see *Manwood*, part 1. 194, & 198. And touching the second signification, the com-

pass of the *regarder's* charge is the whole forest, that is, all the ground which is parcel of the forest; for there may be woods within the limits of the forest, that are no parcel thereof, and those are without the *regard*. *Manwood*, part 2. c. 7. num. 4. anno 20 *Car.* 2. c. 3. As to the court of *regard*, see tit. *Forest*, and *Black. Com.* 3 V. 72.

Regardant, (Fr. *seeing, marking, vigilant*) As a *villain* *regardant* was called *regardant* to the manor, because he had the charge to do all base services within the same, and to see the same freed of all things that might annoy it. *Co. Litt.* 120. This word is only applied to a *villain* or *nief*, yet in old books it was sometimes attributed to services. *Ibid.* See *Black. Com.* 2 V. 93.

Regarder, *regardator*, (Fr. *regardeur, spectator*) Is the officer of the King's forest, who is sworn to make the *regard* of it, and has been used in antient time; and to view and enquire of all offences of the forest as well of *vert* as of *venison*; and of concealment of any offences or defaults of the foresters, and all other officers of the King's forest, relating to the execution of their offices, &c. *Cromp. Jurisd.* 153. *Manwood*.

This officer was ordained in the beginning of the reign of Hen. 2. And the *regarders* of the forest must make their *regard*, before any general sessions of the forest, or justice seat can be holden; when the *regarder* is to go thro' the forest, and every bailiwick, to see and inquire of the trespasses therein; *ad videndum, ad inquirendum, ad imbreuiandum, ad certificandum*, &c. *Manw.* part 1. pag. 194. A *regarder* may be made either by the King's letters patent; or by any of the justices of the forest, at the general *eyre*, or such times as the *regard* is to be made, &c. *Manw.* See *Forest*.

Rege inconsulto, Is a writ issued from the King to the judges not to proceed in a cause which may prejudice the King, until he is advised.

James I. granted the office of *superseदार* in C. B. to one *Mitchel*, and thereupon *Brownlow*, chief prothonotary, brought an *assise* against him; and defendant *Mitchel* obtained the King's writ to the judges, reciting the grant of this office, commanding them not to proceed *rege inconsulto*: And it was argued against the writ, that the court might proceed, because the writ doth not mention that the King had a title to the thing in demand, nor any prejudice which might happen to the King, if they should proceed: The cause was compromised. *Moor* 844.

A *rege inconsulto* may be awarded, not only for the party to the plea, but on suggestion of a stranger, on cause shewn that the King may be prejudiced by the proceeding, &c. *Jenk. Cent.* 97.

Rege assensu, A writ whereby the King gives his royal assent to the election of a bishop. *Reg. Orig.* 294.

Register, (*registrarius*) An officer who writes and keeps a *registry*.

Register is the name of a book, wherein are entered most of the forms of writs original and judicial, used at Common law, called the *Register of Writs*: Sir Edward Coke affirms, that this *Register* is one of the most antient books of the Common law. *Co. Litt.* 159.

The learned *Blackstone* says, it is "the most antient and highly venerable collection of legal forms, upon which *Fitzherbert's Natura Brevium* is a comment, and "and in which every man who is injured will be sure to find a method of relief, exactly adapted to his own case, "described in the compass of a few lines, and yet without the omission of any material circumstance." *Com.* 3 V. 183.

Register of the Parish Church, (*registrum ecclesiæ parochialis*) Is that wherein baptisms, marriages, and burials are registered in each parish every year; which was instituted by Lord Cromwell, anno 13 Hen. 8. while he was vicar general to that King.

These parish registers are to be subscribed by the minister and churchwardens; and the names of the persons shall be transmitted yearly to the bishop, &c.

Registry, (*registrum*, from the old Fr. *gister*, i. e. *in lecto repōnere*) Is properly the same with *repository*, and the office books, and rolls wherein the proceedings of the *Chancery*, or any spiritual court, are recorded, &c. are called by this name.

Registry of Deeds. The registering of deeds and incumbrances is a great security of titles to purchasers of lands and mortgages; and some laws have been made requiring the same. By the 2 Ann. c. 4. A registry is to be kept of all deeds and conveyances affecting lands executed in the West-Riding of Yorkshire; and a publick office erected for that purpose; and the register is to be chosen by freeholders having 100*l.* per annum, &c. The 6 Ann. c. 35. ordains, that a memorial and registry of all deeds, conveyances, wills, &c. which affect any lands or tenements, shall be made in the East-Riding of the county of York; and the register is to be sworn by the justices in quarter-sessions, and every leaf of his book signed by two justices. By 7 Ann. c. 20. A memorial and registry is to be made of all deeds and conveyances, and of all wills whereby lands are affected, &c. in the county of Middlesex, in the like manner as in the West and East Ridings of Yorkshire. And by these statutes, deeds, conveyances and wills, shall be void against subsequent purchasers or mortgagees, unless registered before the conveyances under which they claim: Also no judgment, statute, or recognizance, shall bind any lands in those counties, but from the time a memorial thereof shall be entered at the register's office; but the acts do not extend to copyhold estates, leases at a rack-rent, or to any leases, not exceeding 21 years, where the possession goes with the lease; nor to any chambers in the inns of court. By the 8 Geo. 2. c. 6. A registry shall be of all deeds made in the North Riding of the county of York: The deeds and conveyances registered to be in parchment, under the hand and seal of some of the grantors, or grantees, &c. attested by two witnesses, who shall on oath prove the signing and sealing of the memorial and execution of the deeds. Memorials of wills must be registered within six months after the death of the testator; the Register neglecting his duty, or guilty of fraudulent practices, shall forfeit his office, and pay treble damages; and persons counterfeiting any memorial, &c. be liable to the common penalties of forgery.

An annuity was granted out of lands lying in Middlesex; A. B. who had notice of the grant, purchases the lands; the grantee shall have the annuity against A. B. tho' the grant of the annuity was not registered, for the statute was intended to give notice of incumbrances to purchasers, that they might not be defrauded; but if a man knows of an incumbrance, and will notwithstanding purchase, he is bound, tho' the incumbrance was not registered. 1 Strange 664.

A mortgage of a lease was registered, but not the lease itself; this will not bar a subsequent purchaser. 2 Strange 1064. Deputy of the chief clerk of the King's Bench, appointed a Register for Middlesex, instead of the chief clerk. 25 Geo. 2. c. 4.

Registry of Papists Estates. Papists are to register their estates, or on default forfeit them. 1 Geo. 1. c. 55. And all persons refusing to take the oaths, are obliged to register their estates as papists, &c. 9 Geo. 1. c. 24. See Papists.

Regius Professor. A reader of lectures in the universities, founded by the King: King Hen. 8. was the founder of five lectures in each university of Oxford and Cambridge, viz. of Divinity, Greek, Hebrew, Law and Physick, the readers of which are called in the university statutes *regii professores*.

Regni Populi. A name given to the people of Surrey and Sussex, and on the sea coasts of Hampshire. Blount.

Regnum Ecclesiasticum. In some countries formerly, the clergy held there was a double supreme power, or two kingdoms in every kingdom; the one a *regnum ecclesiasticum*, absolute and independent of any but the Pope, over ecclesiastical men and causes, exempt from the secular magistrature; the other a *regnum seculare*, of the King or civil magistrate, which had subordination and subjection to the ecclesiastical kingdom. But these usurpations and absurdities were exterminated here by H. 8. 2 Hale's Hist. P. C. 324.

Regrator. (*Regratarius*, Fr. *Regrateur*) Signifies him who buys and sells any wares or victuals in the same market or fair: And *regrators* are particularly described to be those who buy oxen into their hands in fairs or markets, any grain, fish, butter, cheese, sheep, lambs, calves,

swine, pigs, geese, capons, hens, chickens, pigeons, conies, or other dead animals whatsoever, brought to fair or market to be sold there, and do sell the same again in the same fair, market, or place, or in some other within four miles thereof. Stat. 5 & 6 Ed. 6, cap. 14. 13 Eliz. cap. 25.

Regrating is a kind of *huckstry*, by which victuals are made dearer; for every seller will gain something, which must of consequence enhance the price. 3 Inst. 195. And in ancient time, both the *inregressor* and *regrator* were comprehended under the word *foresaller*. Ibid. *Regrators* are punishable by loss and forfeiture of goods, and imprisonment, in proportion to the first, second, or third offence, &c. Vide *Foresaller*, and *Black. Com.* 4 V. 158.

Regulars. (*regulares*) Are such as profess to live under some certain rule; such as monks or *canon regulars*, who ought always to be under some rule of obedience.

Regulus. *Subregulus*, Are words often mentioned in the councils of the English Saxons: The first signifies comes, the other *vicecomes*. But in many places they signify the same dignity; as in the old book in the archives of Worcester cathedral. Cowell. See *Subregulus*.

Rehabere facias scilicet, (*Quando vicecomes literavit seisinam de majore parte, quam deberet*) Is a writ judicial; of which there is another of the same name and nature. Reg. Judic. 13, 51, 54.

Rehabilitation. (*rehabilitatio*) A restoring to former ability; and is one of those exactions claimed by the Pope heretofore in England, by his bull or brief, for re-enabling a spiritual person to exercise his function who had been disabled. Stat. 25 Hen. 8. c. 21.

Reif. (*Sax. reifian*, i. e. *spoliare*) In our old laws signifies robbery. Cowell.

Rejoinder. (*rejunctio*) Is where defendant in any action makes answer to plaintiff's *relication*: It is an exception or answer thereto, and it ought to be a sufficient answer to the replication, and follow and enforce the matter of the bar pleaded. 2 Lill. Abr. 433.

Defendant is not to rejoin on such words as are not contained in the declaration, or replication: and if defendant do in his rejoinder depart from his plea pleaded in bar, the rejoinder is not good, because this is uncertain, and to say and unsay, which the law doth not allow. Mich. 22 Car. B. R.

It is observed that in many cases, if plaintiff in his replication alleges any new matter, defendant may there make a new answer in the rejoinder; tho' if defendant pleads a general plea, he shall not commonly make that good afterwards, by a particular thing in his rejoinder. 5 Hen. 7. 19. Raym. 22.

Where a replication is pleaded, which is issuable, the clerk of the papers when he makes up the paper-book, doth of course make up the rejoinder, and joins the issue in it; and if the Rejoinder be issuable, he hath the making up of the Surrejoinder to it, and the issue thereupon. 2 Lill. 433. See *Departure*, and *Black. Com.* 3 V. 310.

Relation. (*relatio*) Is where, in consideration of law, two different times or other things are accounted as one; and by some act done, the thing subsequent is said to take effect by relation from the time preceding: As if one deliver a writing to another, to be delivered to a third person, as the deed of him who made it, when such third person hath paid a sum of money; now when the money is paid, and the writing delivered, this shall be taken as the deed of him who made and delivered it, at the time of its first delivery, to which it has relation; and so things relating to a time long before, shall be as if they were done at that time. Terms de Ley. Shep. Epit. 837.

This device is most commonly to help acts in law, and make a thing take effect: and shall relate to the same thing, the same intent, and between the same parties only; and it shall never do a wrong, or lay a charge upon a person that is no party, 1 Inst. 190. 2 Rep. 99. Plot. 188.

And when the execution of a thing is done, it hath relation to the thing executory, and makes all but one act or record, altho' performed at several times. 1 Rep. 199. A judgment had in full term shall have relation to the

the first day of the term, which is the *Esse* day; but this is not understood of a judgment given *after appearance*; but if be on default, then the *quarta dies post* is the day. *Cri. Car. 73. 1 Bull. 33.* Judgment shall have relation to the first day of the term, as if given on that very day, unless there is a memorandum to the contrary; as where there is a continuance till another day in the same term. *3 Salk. 212.* A verdict was given in a cause for plaintiff, and there was a motion in arrest of judgment within four days; the court took time to advise, and in four days afterwards plaintiff died; it was adjudged, that the favour of the court shall not prejudice the party, for the judgment ought to have been given *after the first four days*; and tho' it is given after the death of the party, it shall have relation to the time when it ought to have been given. *1 Leon. 187.*

Rule was had for judgment, and two days after plaintiff died; yet the judgment was entered, because it shall have relation to the day, when the rule was given, which was when the plaintiff was alive. *Poph. 132.* Judgment against an heir on the obligation of his ancestor, shall have relation to the time of the writ first purchased; and from that time it will avoid all alienations made by the heir. *3 Cro. 102.* And if one be bail for defendant, and before judgment he leases his lands; they shall be liable to the bail, and judgment by relation. *Poph. 112, 132.*

Defendant in a suit after the *teste* of the *seri facias*, but before the sheriff had executed it, sold the goods, and delivered them to the buyer; and it was resolved, that the sheriff might take them in execution in the hands of the buyer; for when such execution is made, it shall have relation to the *teste* of the *Fi. Fa.* *1 Leon. 304.*

Sale of goods of a bankrupt, by commissioners, shall have relation to the first act of bankruptcy; and be good, notwithstanding the bankrupt sells them afterwards. *1 Jac. 1. c. 15. Wood's Inst. 311.* And if a man buys cattle in a market which are stolen, and selleth them out of the market, tho' the cattle are afterwards brought into the market, and the second bargain confirmed, and money paid, &c. this bargain will not be good; for it shall have relation to the beginning, which was unlawful. *Dyer 99.*

Fines being but common assurances, shall be guided by the indentures precedent; and the execution thereof have relation to the original act. *2 Cro. 110.* A bargain and sale was made to *A. B.* and before it was inrolled, the same bargainor levied a fine to the bargainee, and afterwards and within the six months the deed was inrolled, adjudged that the bargain was in by the fine, and not by the deed inrolled, because tho' the inrollment shall have relation to the delivery of the deed, that is only to protect the lands from all incumbrances to be made by the bargainor to others after the deed, and before the inrollment, but not to defeat any lawful estate made by him before. *4 Rep. 70.* After an indenture of bargain and sale is inrolled, according to the statute, it relates to the delivery; nothing passes till inrollment, but then it relates. *3 Nels. Abr. 68.*

One made a lease for years, rendering rent at certain feasts, he in reversion bargained and sold the land to a stranger, who gave notice to the lessee; and the day of payment coming, he paid the rent to the bargainor, and then the deed was inrolled: It was held, that the bargainee should not have this rent by relation. *Hugh's Abr. 1644.*

If an infant or feme covert disavows to a feoffment to them made, when they are of age, or discover it, it shall relate as to this purpose, to discharge them of damages from the time. *3 Rep. 29. Co. Litt. 310.* But generally in cases at Common law, there is no relation; as between the feoffment of lands and livery and seisin; or between the grant of a reversion and the attornment, which is only the assent of the particular tenant, and shall not relate to the grant. *Ibid.* Tho' if one distrains for rent as bailiff, when in truth he is not; if he in whose name he took the distress will afterwards assent to it, he shall not be a trespasser, for the assent shall have relation to the time of the distress taken. *1 Leon. 196.*

Letters of administration relate to the death of the intestate, and not to the time when they were granted. *Style 341.* And when the wife is endowed of lands by the heir, she shall be in immediately from the husband by relation. *36 H. 6. 7.*

It is a rule in pleadings, grants, &c. *Ad proximum antecedens fiat relatio*; but that rule has an exception, (*vinc.*) *nisi impediatur sententia*: And it hath been held, that this rule hath many restrictions, i. e. *Fiat relatio*, so as there is no absurdity or incongruity; therefore it is always *secundum subjectum materiam*. *Hard. 77. 3 Salk. 199.*

A person granted *totam illam portionem decimarum* in *B.* with all other his tithes in *B.* then or late in occupation of *J. C.* here the words in occupation of *J. C.* have relation to the whole sentence, and not only to the precedent words, with all other his tithes, because the pronoun *illam* relates as well to the tenure of the tithes, as to the place where they arise. *4 Rep. 34.*

In debt upon bond conditioned that if *J. M.* died before Midsummer day, without issue male of her body then living, that in such case the bond should be void: Defendant pleaded that before Midsummer day, she did die without issue male THEN living; and the question was, whether the adverb then should relate to Midsummer day, or to the death of *J. M.* And it was agreed, that it might relate to either; but because it happened in fact that she had a son living at her death, which son died before Midsummer day, therefore the words then living shall relate to that day, and not her death; because it is most beneficial to the obligor, that it should be so. *Dyer 17. 3 Nels. Abr. 65.*

'Tis a general rule, that relation shall not do wrong to strangers. *Per Ventris, J. 2 Vent. 200. Trin. 2 W. & M. C. B.* in the case of *Thompson v. Learb.* See *18 Vin. Abr. 285—294.*

As to private relations, see *Black. Com. 1 V. 422: Public Rights, ib. 146.* And as to relative rights and duties, see *ib. 1 V. 123, 146.*

Relator, (*Lat.*) A rehearser, or teller; also applied to an informer. *Stat. 9 Ann. c. 20.* See *Quo Warrants.* And *Black. Com. 3 V. 264, 427. 4 V. 304.*

Release, (*Relaxatio*) Is an instrument whereby estates, or other things, are extinguished, transferred, abridged, or enlarged. *West. Symbol. part 1. lib. 2. sect. 509.*

1. Of releases, generally.
2. Of the words and ceremony required in a release; and how far a covenant, agreement, or a disposition by will, may operate as a release.
3. What shall be released, by a release of ALL CLAIMS AND DEMANDS.
4. What shall be released, by a release of ALL ACTIONS AND SUITS.
5. How far a possibility, or contingent interest, may be released.

1. Of releases, generally.

There is a release in fact, and a release in law. *Perkin's Grants 71.* A release in fact, is that which the very words expressly declare. A release in law, is that which doth acquit by way of consequence or intendment of law; an example whereof you have in *Perkins, ubi supra.* How these are available and how not, see *Littleton* at large, *lib. 3. c. 8. Couell.*

A release is the giving or discharging of a right of action which a man hath or may claim against another, or that which is his; or it is the conveyance of a man's interest or right which he hath to a thing, to another who hath possession thereof, or some estate therein. *4 New. Abr. 265.*

Releases are distinguished into express releases in deed, and those arising by operation of law; and are made of lands and tenements, goods and chattels, or of actions real, personal and mixt. *Co. Litt. 264. a.*

They are to be adapted to the nature of the case, and the purposes for which the release is intended; so that if a man be dispossessed of lands, or dispossessed of goods, and release all actions, he may notwithstanding enter into his lands, or retake his goods, the right and property being still

kill in him, who' he has devised himself of his remedy. *Hob. 163. 4 Co. 63.*

So where a man has divers means to come to his right, he may release one, and yet take advantage of the other; but if a man has not any means to come to his right but by way of action, there by a release of all actions, his right by judgment of law is gone, because by his own act he has barred himself of all means to come at it. *8 Co. 152. Co. Litt. 286.*

Heterofore releases were construed with much nicety and great strictness, and being considered as the deed or grant of the party, were according to the rule of law taken strongest against the releasor; they now receive such interpretation as these grants and agreements do, and are favoured by the judges as tending to repose and quietness. *Dyer 56. Plowd. 289. Heil. 15. 8 Co. 148.*

Hence it hath been established as a general rule in the construction of releases, that where there are general words only in a release, they shall be taken most strongly against the releasor; but where there is a particular recital in a deed, and then general words follow, the general words shall be qualified by the special words. *1 Mod. 99. 1 Ld. Raym. 235.*

2. Of the words and ceremony required in a release; and how for a covenant, agreement, or a disposition by will may operate as a release.

Littleton tells us, that the proper words of a release are *remisisse, relaxasse & quietum clamasse*, which have all the same signification. Lord Coke adds, *Renunciare, acquiescere*; and says, that there are other words which will amount to a release; as if the lessor grants to the lessee for life, that he shall be discharged of the rent; this is a good release. *Litt. s. 445. Co. Litt. 264. Plow. 140.*

So a pardon by act of parliament of all debts and judgments amounts to a release of the debt, the word pardon including a release. *1 Sid. 261.*

An express release must regularly be in writing and by deed, according to the common rule, *eadem modo oritur, eodem modo dissolvitur*; so that a duty arising by record must be discharged by matter of as high a nature; so of a bond or other deed. *Co. Litt. 264. b. 1 Roll. Rep. 43. 2 Leon. 76, 213. 2 Roll. Abr. 408. 2 Sand. 48. Moor 573. pl. 787.*

But a promise by words may before breach be discharged or released. *1 Sid. 177. 2 Sid. 78. Cro. Jac. 483, 620. Vide Cro. Car. 383. 1 Mod. 262. 2 Mod. 259. 1 Sid. 293.*

A release of a right in chattels cannot be without deed. *1 Leon. 283.*

A covenant perpetual, as that the covenantor will not sue without limitation of time, is a defeasance or absolute release; and this construction has been made to avoid circuitry of action; for if in such case the party should contrary to his covenant sue, the other party would recover precisely the same damages which he sustained by the other's suing; but if the covenant be, that he will not sue till such a time, this does not amount to a release, nor is it pleadable in bar as such, but the party hath remedy only on his covenant. *Moor 23. pl. 80, 811. 1 Roll. Abr. 939. Bridg. 118. 2 Bulf. 95, 290. Hard. 113. 3 Lev. 41. 2 Salk. 573, 5. Carth. 210. 1 Ld. Raym. 419, 691. See Cro. Eliz. 352. 1 And. 307. 1 Roll. Abr. 939. Carth. 63. Salk. 373. 1 Show. 46.*

If two are jointly and severally bound in an obligation, and the obligee by deed covenants and agrees not to sue one of them; this is no release, and he may notwithstanding sue the other. *Cro. Car. 551. March 95. 2 Salk. 575.*

But if two are jointly and severally bound, a release to one discharges the other. *1 Ld. Raym. 420. See 2 Vent. 217. 1 Ld. Raym. 691. 1 Lev. 152.*

It seems agreed, that a will, tho' sealed and delivered, cannot amount to a release, because it is ambulatory and revocable during the testator's life; and by reason of the executor's consent requisite to every disposition of a personal thing by will, and the injury that might accrue to the

testator's creditors, were a will allowed to operate as a release. *Stil. 286. 1 Vent. 39.*

Therefore where in debt on an obligation, by the representative of a testator, defendant pleaded, that the testator by his last will in writing released to defendant; this was adjudged ill, and that no advantage could be taken by plea. *1 Sid. 421.*

But it hath been held in equity, that tho' a will cannot enure as a release, yet provided it were expressed to be the intention of the testator that the debt should be discharged, the will would operate accordingly; and that in such case it would be plainly an absolute discharge of the debt tho' the testator had survived the legatee. *1 Peer Will. 85. 2 Vern. 521.*

So in another case it was held, that a release by will can only operate as a legacy, and must be assets to pay the testator's debts; and if a debt so released by will be afterwards received by the testator himself in his life-time, the legacy is extinct, and such release by will intimates no more than that the executors should not after the testator's death trouble or molest the debtor. *2 Peer Will. 332.*

If a debt is mentioned to be devised to the debtor without words of release or discharge of the debt, and the debtor die before the testator; this will be a lapsed legacy, and the debt will subsist. *2 Vern. 522. admitted.*

3. What shall be released, by a release of ALL CLAIMS and DEMANDS.

Littleton says, that a release of all demands is the best release to him to whom it is made; and Cote says, that the word demand is the largest word in law except claim; and that a release of demands, discharges all sorts of actions, rights and titles, conditions before or after breach, executions, appeals, rents of all kinds, covenants, annuities, contracts, recognizances, statutes, commons, &c. *Litt. sect. 508. Co. Litt. 291.*

But notwithstanding the large import of the word demands, yet there are several instances (which vide infra) where the generality of the words hath been restrained to the particular occasion for which the release was made.

By a release of all demands, all actions real, personal and mixed, and all actions of appeal, are extinct. *Litt. sect. 509. 8 Co. 154.*

So a release of all demands extends to inheritances, and takes away rights of entry, seizures, &c. *Co. Litt. 291.* But if the King releaseth all demands, yet as to him the inheritance shall not be included. *Bro. Prerogative, pl. 62. Bridg. 124.*

By a release of all demands made to the tenant of the land, a common of pasture shall be extinct. *Co. Litt. 291.*

A release of all demands will bar a demand of a relief, because the relief is by reason of the feignory to which it belongs. *Cro. Jac. 170.*

If A. being possessed of goods loses them, and they come to the hands of B. who being in possession, &c. by deed releases to B. all actions and demands personal which at any time before *habuit vel habere putuit* against B. for any cause, matter or thing whatsoever; this shall bar A. of the property of the goods, so that B. has the absolute right in him by this release. *2 Roll. Abr. 407.*

By a release of all demands, all manner of executions are gone, for the recoverer cannot sue out a *fi. faciat*, *capias* or *elegit*, without a demand. *Litt. sect. 508. 2 Roll. Abr. 407.*

By a release of all demands to the consuror of a statute merchant before the day of payment, the consuror shall be barred of his action, because the duty is always in demand; yet if he releases all his right in the land, it is no bar. *Co. Litt. 291. Bridgm. 124.*

So a bond conditioned to pay money at a day to come, is a debt and duty presently, and may be discharged by a release of all actions and demands before the day of payment. *Cro. Jac. 400.*

But in an action of debt for non-performance of an award made for payment of money at a day to come, there is no present debt, nor any duty before the day of payment.

is come, therefore it cannot be discharged before by a release of all actions and demands. *Yelv. 211. Cro. Jac. 300.*

So if a man devises a legacy of 20 l. to J. S. at the age of 23, tho' the legatee, after he attains the age of 21, and before the day of payment, may release it, yet by the word *demands* it is not released, but there must be special words for the purpose. *10 Co. 51.*

A release of all demands does not discharge a covenant not broken at the time; but a release of all covenants will release the covenant. *Cro. Jac. 173. 2 Roll. Abr. 407. Noy 123.* For the difference when broken or not, see *Dyer 217. Litt. Rep. 86. 3 Leon. 69. 5 Co. 71. Hor's case. 10 Co. 51. Co. Litt. 292. 8 Co. 153. 1 And. 8. 64.*

If a lessee for life grants over his estate by indenture reserving rent during the continuance of the estate, and afterwards releases to the assignee *all demands*; this shall discharge the rent, for he had the freehold of the rent in him at the time. *2 Roll. Abr. 408. Cro. Jac. 486. Bridgm. 123. 2 Roll. Rep. 20. Poph. 136.*

So if lessee for years grants over by indenture all his estate, reserving a rent during the term, and afterwards releases to the assignee *all demands*; this shall release the rent, for tho' he cannot have an action to demand all the estate, yet this is an estate in him of the rent, and assignable over; and in an action of debt for any arrears after, he shall claim it *as a duty accrued from the estate*; and it shall not be said that the duty arises annually on taking the profits, but this had its commencement and creation by the reservation and contract, which was before. *2 Roll. Abr. 408.*

If there be lessee for years rendering rent, and the lessor grants over the reversion, and the lessee attorns, and after lessee assigns over his estate, and after the assignee of the reversion releases *all demands* to the first lessee, yet this shall not release the rent, for there is neither privity of the estate or contract between them after the assignment; but if the release had been made to the assignee, it had extinguished the rent. *2 Roll. Abr. 408. Moor 544. Cro. Eliz. 606.*

If he who has a rent-charge in fee releases to the tenant of the land *all demands* from the beginning of the world till the making of the deed of release; this shall discharge all the rent, as well that to come as what is past. *20 Aff. pl. 5. 2 Roll. Abr. 408.*

It is said by *Littleton* and *Coke*, that by a release of *all demands* a rent-service shall be released; but this it is said is to be intended of a rent-service *in gross*, as a seigniority. *Litt. sect. 510. Co. Litt. 291.* Therefore in the case of *Hen v. Hanson*, where in covenant brought on a covenant in a lease for years to pay the rent reserved, defendant pleaded release by the plaintiff of *all demands* at a day before the rent in question became due; plaintiff replied that the release was in performance of an award of all matters in controversy between the plaintiff and defendant; and on demurrer it was adjudged, that *the rent was not discharged by this release*, as it became due by the perception of the profits, and was not like to a rent-charge, or a rent parcel of a seigniority; and that this rent being incident to the reversion, and part thereof, was no more released than the reversion itself; and this construction should the rather prevail, as it was not the intention of the party to release this rent: But *Twistleton* said, that in releases and deeds when words are heaped up, the party who is to take advantage may take the strongest word and the strongest sense, and that is the reason they are put in; and as to the intent, that must be gathered from the words; and men must take care what words they use, *oportet politum obediare legibus, non leges politum*; and he said, he could see no difference between this rent and a rent in fee, both are rent-services, and neither demandable before they become due, otherwise than as in *40 Ed. 3. 47.* it is said, there is a continual demand betwixt lord and tenant; and in this case there is a tenure between the lessee and him in reversion; and the reason why the reversion is not touched by this release is, because it can work only by way of extinguishment, and not by way of passing an interest; but it was adjudged

as supra. 1 Lev. 99. 100. 1 Sid. 141. 1 Keb. 499. 510. See 2 Salk. 578.

4. What shall be released, by a release of ALL ACTIONS and SUITS.

A release of all actions discharges a bond to pay money on a day to come; for it is *Debitum in presenti, quamvis sit solvendum in futuro*; and it is a thing merely in action, and the right of action in him who releases, tho' no action will lie when the release is made. *Co. Litt. 292.*

But a release of actions does not discharge a rent before the day of payment, for it is neither *debitum* nor *solvendum* at the time of the release; nor is it merely a thing in action, for it is grantable over. *Co. Litt. 292.*

So if a man has an annuity for a term of years, for life or in fee, and he before it be behind releases all actions; this shall not release the annuity, for it is not merely in action, because it may be granted over. *Co. Litt. 292. 1 Bull. 178. Cro. Eliz. 897. Moor 113.* But such release shall release the arrears incurred before. *39 H. 6. 43. 2 Roll. Abr. 404.*

If one release *omnes querelas aut loquelas*, this is as large as a release of all actions, and releases all causes of action, tho' no action be then depending. *Co. Litt. 292.*

By a release of all manner of actions, all actions as well criminal as real, personal and mixed, are released. *Co. Litt. 287.*

A release of actions *real* is a good bar in actions mixed; as assise of novel disseisin, waste, *quare impedit*, annuity; and so is a release of actions personal. *Co. Litt. 284.* But not after the grantee has made his election. *Jones 215.*

In an appeal of robbery or felony, a release of all actions personal will not bar, because an appeal, in which the appellee is to have judgment of death, is higher than a personal action; but a release of all manner of actions, or of all actions criminal, or of all actions mortal, or of all actions concerning the pleas of the crown, or of all appeals, or of *all demands*, will be a good bar of any such appeal. *Co. Litt. 287. 2 Hawk. P. C. 196.*

And in an appeal of maihem a release of all actions personal may be pleaded, because damages, only, are recovered. *Co. Litt. 288.*

A release of all actions is regularly no bar to an execution, for *execution is no action, but begins when the action ends*. *Co. Litt. 289. 8 Co. 153.*

Also a release of all actions does not regularly release a writ of error, for it is *no action*, but a commission to the justices to examine the record; but if therein the plaintiff may recover, or be restored to any thing, it may be released by the name of action. *2 Inst. 40. Telp. 209. Co. Litt. 288.*

But a release of all actions is a good bar to a *scire facias*, tho' it be a judicial writ, for defendant may plead to it, and *and it is in nature of a new original* given by the statute. *Co. Litt. 290. Comb. 255.*

So in replevin a release of all actions is a good bar, for the avowant is defendant, tho' in some respects he is plaintiff. *2 Roll. Rep. 75.*

By a release of all suits a man is barred of a writ of error. *Latch 110.*

So by a release of all suits a man is barred of execution, because it cannot be had without application to the court, and prayer of the party, which is *his suit*. *Co. Litt. 291. 8 Co. 153.*

If a disseisor releases to the disseisor all actions; this is no release of his right of entry, for when a man has several means to come at his right, he may release one and yet take benefit of the other. *Co. Litt. 2S. b. 8 Co. 142.*

So if a man by wrong takes away my goods; if I release to him all actions personal, yet by law I may take the goods out of his possession. *Co. Litt. 286. Salk. 57.*

If a man releases all actions, by this he shall release as well actions which he has as executor, as those in his own right. 39 Ed. 3. 26. 2 Roll. Abr. 404. 2 Ld. Raym. 1307. S. C. cited by Powell, and said by him to be clearly so, unless there was an action of his own for the release to work upon.

If a man releases all quarrels; a man's deed being taken most strongly against himself, it is as beneficial as all actions, for by it all actions real, personal and mixed, are released. Co. Litt. 292.

5. How far a possibility or contingent interest may be released.

It is a general rule in our books that a mere possibility cannot be released, and the reason hereof is, that a release supposeth a right in being, and it was thought to countenance maintenance to transfer choses in action, possibilities and contingent interests. Co. Litt. 48. a. Cro. Eliz. 552.

Hence it is held, that an heir at law cannot release to his father's disfeisor in the life-time of the father, for the heirship of the heir is a contingent thing, for he may die in the life-time of the father, or the father may alien the lands. Litt. 368. 446. Co. Litt. 265. a. 10 Co. 51. Bridgm. 76. S. P.

So if the donee of a statute releases to the donor all his right to the land, yet he may afterwards sue execution, for he has no right to the land, but only a possibility. 1 And. 133. Co. Litt. 265. 2 Roll. Abr. 405. Cro. Eliz. 552.

So if a creditor releases to his debtor all the right and title which he hath to his lands, and afterwards gets judgment against him, he may extend a moiety of the same land, for he had no right to the land at the time of the release, and the land is not bound but in respect to the person. 2 Mod. 281. 2 Lev. 215.

So if plaintiff releases all demands to the bail in the King's Bench, and afterwards judgment be given against the principal, execution may be sued against the bail, for that at the time of the release there was only a possibility of the bail becoming chargeable. 5 Co. 70. Co. Litt. 265. Moor 469. Cro. Eliz. 579. Hut. 17. and see Moor 852.

So if A. recovers in trespass against B. in B. R. and B. brings a writ of error, pending which A. releases to B. all executions, and after the judgment is affirmed, and new damages given to A. for the delay, on the statute of 3 H. 7. this release shall not bar A. to have execution of those damages, because he had not any right to have execution, nor to any duty when the release was made. 2 Roll. Abr. 404. Cro. Jac. 337. 1 Roll. Rep. 11.

A lease to the husband and wife for life, remainder to the survivor of them for twenty-one years; the husband grants it over, and tho' he survived, yet the grant was held void because it was contingent. Poph. 5. 10 Co. 51. Hut. 17. Raym. 146.

If the next presentation to a church be granted to A. and B. and living the incumbent, A. releases all his estate, title and interest to B. this release is void, it being of a chose in action; *scilicet* had the release been made after the avoidance, at which time the interest would have been vested in A. Cro. Eliz. 173. 600. Owen 85. 1 Leon. 167. 3 Leon. 256. and Dyer 244. 10 Co. 48. like point.

From the reasons herein it was held, that if at Common law a woman before marriage had accepted of a jointure in bar and satisfaction of dower, that this would not have bound her, because at the time she had no right to dower. 4 Co. 1.

A city orphan cannot at law release her orphanage part to her father, for she hath no right in her during the life of her father; but it hath been held in equity, that such release being for a valuable consideration, as on the marriage of a daughter, and a portion given her by the father, such release may operate as an agreement to waive the orphanage, and hath accordingly been so decreed in equity. 1 Peer Will. 638. 2 Peer Will. 527. Broad. Chan. 545.

If there be a devise of a term for years to A. for life, remainder to B. — B. may release his right to A. and

such release shall extinguish his interest, tho' it were, that B. had only a possibility at the time the release made. 10 Co. 47.

But it was held, that B. could not assign over his interest to a stranger in the life-time of A. the same being only a chose in action, and a mere possibility, inasmuch as an estate for life is in supposition of law a larger estate than for any number of years. 10 Co. 47. 4 Co. 66. 1 Sid. 185. Raym. 146.

But later resolutions, especially those which have been in courts of equity, have made a great alteration in this doctrine. 2 Vern. 563.

As where one possessed of a term devised it to A. for life, remainder to B. and made A. executor; B. devised this remainder to C. and died in the life-time of A. and in order to defeat C. of his interest, A. assigned his term to a third person: And it was decreed by Lord Chancellor Ellesmere, that A. the executor and devisee, for life was a trustee for B. and should not be at liberty to destroy this remainder, but that the executor should preserve the lease, so as it might go according to the will, with the performance whereof the executor was intrusted. Moor 806.

So where the trust of a term was devised to A. for life, remainder to B. It was agreed by all, that B. might assign over this trust, which shews that a trust of a term in remainder may be transferred over by deed. 1 Chan. Co. 4.

One possessed of a term for years devised it to A. for life, remainder to B. — B. in the life-time of A. devised his remainder to J. S. who devised it over; and the question was, Whether A. (the devisee for life) being dead, the devisee of J. S. should have the term, or whether it should go to the administrator *de bonis non*; and it was decreed for the devisee of J. S. and the administrator *de bonis non* of B. was directed to assign over the term to him. 1 Peer Will. 572.

And in the case of *Theobald v. Duffay* in the house of Lords, March 1729-30; it was (*inter alia*) determined that a possibility of a term, is assignable for a good consideration.

A duty uncertain at first, which on a condition precedent is to be made certain afterwards, is but a possibility, which cannot be released. 5 Co. 703. 2 Mod. 281.

As a *nomine parvo* waiting on a rent which cannot be released till the rent is behind, as the non-payment of the rent makes the *nomine parvo* a duty. Yelv. 215. Brownl. 116.

So if a man covenants to pay 10*l.* on the birth of a child, the covenantor cannot be released of the 10*l.* it resting merely in contingency whether such child will ever be born or not. Yelv. 192.

So if an award be, that on plaintiff's delivering defendant by a certain day, a load of hay, defendant shall pay him 10*l.* in this case the 10*l.* cannot be released before the day, for it rests merely in possibility and contingency, whether the money shall ever be paid, for it becomes a duty on delivery of the hay only, and not before. Yelv. 215.

In debt on bond against defendant as administrator, &c. defendant pleaded a release, whereby the plaintiff, reciting there were several controversies between defendant and him about a legacy and the right of administration, releases to defendant all his right, title, interest and demand of, in and to the personal estate of the intestate; and on demurrer this was held to be no plea; and a difference was taken by Hale, between a release of all demands to the person of the obligor or administrator, and a release of all demands to the personal estate of the obligor or administrator; that the last will not discharge the bond as the other may, because the bond does not give any right or demand upon the personal estate, &c. until judgment and execution sued. Salt. 575. 2 Ld. Raym. 786.

If A. promises B. in consideration that he will sell to his son, certain merchandises at such a price, that if his son does not pay it at the feast of St. Michael next ensuing, he himself will pay it; and before Michaelmas A. releases all actions and demands to him who made the promise.

imise, this shall not release the *assumpsit*, for till Michaelmas it cannot be known whether his son will have paid it, and till default by him, the other is not bound to pay, so it is a mere contingency till Michaelmas, which is not to be released. 2 *Rel. Abr.* 407-8.

For more learning on this subject, see 4 New Abr. and 18 *Rel. Abr. tit. Release.*

Relegation, (Relegatio). A banishing, or sending away; as *abjuratio* is forswearing the realm for ever, so *relegation* is banishment for a time only. *Co. Litt.* 133.

Relief, (Relevamen, but in *Domestick*, *Relevatio, relevium*.) Signifies a certain sum of money which the tenant, holding by knights service, grand serjeanty, or other tenure, (for which homage or legal service is due) and being at full age at the death of his ancestor paid unto his lord at his entrance. *Mag. Chart. cap. 2.* and 34 *Elix. 1. Stat. 1.*

Bracton, lib. 2. c. 36. affirms, That it is called a relief, *Quia hereditas que jacens fuit per antecessoris decessum relevatur in manus hereditum, et propter factum relevationem, facienda erit ad heredes quedam prestatio que dicitur relevium;* and *Britton, c. 69.* Of this also speaks the Grand Customary of Normandy, c. 34. *Skene de verbor. signif. verb.* Relevium, saith, Relief, is a French word, from the Latin *relevare*, which is to relieve or take up that which is fallen; for it is given by the tenant or vassal who is of perfect age, after the expiring of the wardship to his superior lord, of whom he held his lands by knight-service, that is, by ward and relief: For by payment thereof he relieves, and, as it were, raiseth up again his lands after they were fallen down into his superior's hands, by reason of wardship, &c. See *stat. 12 Car. 2. c. 24.*

Relief is otherwise thus explained, *viz.* A feudatory or beneficiary estate in lands was at first granted only for life; and after death of the vassal it returned to the chief lord, for which reason it was called *feudum caducum, viz.* fallen to the lord by the death of the tenant; afterwards these feudatory estates being turned into an inheritance by the connivance and assent of the chief lord, when the possessor of such an estate died, it was called *hereditas caduca, i. e.* it was fallen to the chief lord, to whom the heir having paid a certain sum of money, he did then *relevum hereditatem caducam* out of his hands; and the money thus paid was called a relief. This must be understood after the conquest; for, in the time of the Saxons, there were no reliefs, but *heriot* paid to the lord at the death of his tenant, which in those days were horses, arms, &c. and such tributes could not be exacted of the English immediately after the conquest, for they were deprived of both by the Normans; and instead thereof in many places, the payment of certain sums of money was substituted, which they called *arraria*, and which continues to this day. Relief reasonable: It is likewise sometimes called *lawful* and *ancient relief*, which is enjoined by some law, or becomes due by custom, and doth not depend on the will of the Lord, *viz.* In a chapter of King John, mentioned by *Matt. Paris. 178.* *Si quis comitum vel baronum natorum, five aliorum tenentium de nobis in capite, per servitium militare, mortuus fuerit, et cum decesserit heres suus plenam etatis fuerit, et relevium debeat, habeat hereditatem suam per antiquum relevium:* What that was we may read in the laws of William the Conqueror, c. 22. and of Henry I. c. 14. and before that time in the laws of Canutus, c. 97. *Ans.* The relief of an earl was eight war-horses with their bridles and saddles, four *lorians*, four helmets, four shields, four pikes, four swords, four hunting-houses and a palfrey, with their bridles and saddles; the relief of a baron or *thane* was four horses, two with furniture, and two without, two *brodes*, four lances, four shields, and a helmet, two *lorians*, and fifty marks in gold. The relief of a knight was his father's horse, his helmet, shield, lance and sword, which he had at his death. The relief of a villan or a cottager was his best head, &c. *Cowell.* See *Black. Com. 2. P. 36, 65, 87. c. 4. P. 411, 413, 414.*

Religion, (Religio) is a stress, as founded on reverence of God, and expectation of future rewards and punishments; a system of duties, faith and worship as opposite to others. *John.* This notion of reverence towards the Divine nature, where by we are enabled and inclined to

serve and worship him after such a manner as we conceive most acceptable to him, is called religion. *Watkins.*

All blasphemies against God, as denying his being or providence, all profane scoffing at the Holy Scripture, or exposing any part to contempt or ridicule, all impurities in religion, as falsely pretending to extraordinary commissions from God, and terrifying or abusing the people with false denunciations of judgments, &c. All *open lewdness* grossly scandalous, such as was that of those persons who exposed themselves naked to the people in a balcony in *Covent-garden*, with most abominable circumstances;—offences of this nature, because they tend to subvert all religion or morality, which are the foundation of government, are punishable by the temporal judges with fine and imprisonment, and also such corporal infamous punishment as to the court in discretion shall seem meet according to the heinousness of the crime. 1 *Howk. P. C.* 6, 7. Seditious words in derogation of the established religion are indictable, as tending to a breach of the peace. 1 *Howk. P. C.* 7. See *Black. Com. 4 V. 43.*

The six articles of religion established, 31 *Hen. 8. c. 14.* 35 *Hen. 8. c. 5.* Commissions to be granted concerning religion, 32 *Hen. 8. c. 15.* The authority of the King and the clergy in matters of faith. 32 *Hen. 8. c. 26.* 34 & 35 *Hen. 8. c. 1.* Repeal of the former acts relating to religion, 1 *Ed. 6. c. 12. stat. 3.* Images in churches, &c. to be destroyed, 3 & 4 *Ed. 6. c. 10.* Repeal of the several acts of *Ed. 6.* 1 *Mar. st. 2. c. 2.* Preachers, &c. to subscribe the articles. 13 *Elix. c. 12.* Articles to be subscribed by protestant dissenting teachers, 1 *W. & M. c. 18. stat. 8, 10.* Profession of Christian belief to be subscribed by Quakers, 1 *W. & M. c. 18. stat. 13.* See *Blasphemy, Heresy, Nonconformists, Papists, Quakers, Recusant, Service and Sacraments.*

Religious houses, (Religiose domus.) Are houses set apart for pious uses, such as monasteries, churches, hospitals and all other places where charity is extended to the relief of the poor and orphans, or for the use or exercise of religion. See *Notitia Monastica, or A short History of the Religious Houses in England and Wales, by Thomas Tanner, Octavo*, who in an alphabetical order of counties, has accurately given a full account of the founders, the time of foundation, the titular saints, the order, the value and the dissolution, with reference to printed authors, and manuscripts which preserve any memoirs relating to each house; with a learned and judicious Preface of the institution of religious orders, &c. *Cowell.* See *Monasteries.*

Religious men, (Religiosi) Such as enter into some monastery or convent, there to live devoutly: And in ancient deeds of sale of land, the purchasers were often restrained by covenant from giving or alienating it, *viris religiosi*, to the end the land might not fall into mortmain. *Cowell.*

Religious Orders. For the qualification of clergy: See *Ordination.*

Relinquishment, (Relinquitment) Is forsaking, abandoning, or giving over. It hath been adjudged, that a person may relinquish an ill demand in a declaration, &c. and have judgment for that which is well demanded. *Style 175.* In assise the count was of a messuage, and four acres of land in B. and the jury having a view only of the land, the demandant relinquished his plaint to the house. *Dym 66.* But on assise where the plaint was for fifty three shillings and four pence rent, no part of that rent could be relinquished, because a rent is an *incorporeal thing*. *Ibid. 61.* In a writ of annuity, where the jury found the arrears, but did not assess damages or costs, which could now be supplied by a writ of enquiry, a plaintiff was admitted to relinquish and release the damages, and had judgment for the arrears. 21 *Rep. 99.*

Reliques, (Reliquia) Are some remainders, such as the bones, &c. of saints who are dead, preserved by persons living with great veneration, as sacred memorials of saints. They are forbidden to be used or brought into England, by several statutes; and justices of peace are empowered at church houses for popish books and reliques, which when found are to be defaced and burnt, &c. 3 *James 1. c. 5.*

Remainder,

Remainder, (Remanentia) Is an estate limited in lands, tenements or rents, to be enjoyed *after the expiration of another particular estate*. For example, A man may let to one for term of his life, and remainder to another for term of his life. *Lit. cap. Attornment*. And this remainder may be either for a certain term, or in fee-simple, or fee-tail, as appears by *Brooke, tit. Donee and Remainder, 245. and Glanville, lib. 7. cap. 1.* The difference between a remainder and reversion, according to *Spelman*, is this, That by a reversion after the appointed term, the estate returns to the donor, or his heirs, as the proper fountain; whereas by remainder it goes to some third person, or a stranger. *Cowell.*

Remainder is described to be a remnant of an estate in lands or tenements, *expectant on a particular estate created together with the same, and at the same time*, and is so expectant on the particular estate, that unless it can take effect when the particular estate determines, it is void. *Co. Lit. 49; 143. 2 Co. 51. Moor 344. Vaugh. 269.*

1. Of the several kinds of remainders, as distinguished into remainders vested, or in contingency and abeyance.
2. Of cross remainders, or those arising by implication and construction of law.
3. Of what things a remainder may be made, or limited.
4. What words are sufficient to create a remainder.
5. Of the continuance of the particular estate, and when the remainder is to commence.

1. Of the several kinds of remainders, as distinguished into remainders vested, or in contingency and abeyance.

If an estate be limited, either at Common law, or by way of use, to one for life, or in tail, remainder to the right heirs of *J. S.* who is then dead, this is a good remainder, and vests presently in the person who is heir at law to *J. S.* by purchase; and tho' a daughter be then heir at law, and after a son is born, yet shall the daughter retain the land against him; for she being heir, and coming within the description at the time when the remainder was limited, it then vests and settles in her immediately as a remainder by purchase, and shall not by any accident after be defeated. *2 Rol. Abr. 415. 1 Co. 95, 103. Plow. 56.*

But contingent remainders are of three sorts; First, When it is a limitation to one not *in esse*, for in that case, if the remainder-man never does come *in esse*, it is a void remainder. Secondly, When the particular estate may determine before the remainder can commence; as an estate to *A.* for life; and from and after the determination of his estate, then to *C.* during the life of *A.* this is good by contingency, that is, if *A.* forfeit his estate by alienation, or otherwise, in his life-time. Thirdly, When there is a limitation precedent, or something to happen before the remainder can take effect, which may happen; as a remainder to commence when *J. S.* shall return to England from Rome. In the case of *Dormer v. Fortescue, Mich. 14 Geo. 2. Per Lee Chief Justice.*

But if *J. S.* in the case above, be living at the time of the remainder limited to his right heirs, this puts such remainder in abeyance or contingency, that is, it is in no person but *in nubibus* till the contingency happens, for it is not in the feoffor or donor, because he has limited it out of him, and all remainders must pass out of him at the time of the limitation. tho' they do not presently vest in the person intended; and in the right heirs of *J. S.* it cannot be, because he cannot have heirs during life; so there is no person *in rerum natura* within the description, to take it; therefore it is in the mean time in abeyance or expectancy, to vest or not vest, as the case happens; for if *J. S.* dies during the particular estate, then the remainder presently takes place in his heirs; but if the particular estate determines by death or otherwise in the life of *J. S.* then such remainder is become totally void, and can never vest, but the estate settles again in the feoffor or donor, as if no such limitation in remainder had been; and he becomes tenant to the *præcipe*, and is obliged to do the services; and tho' *J. S.* die soon after, yet his heir can have no benefit by it, not being capable of

taking the remainder when it fell. *1 Co. 135. Co. Lit. 378. a. 2 Co. 51. 2 Rol. Abr. 415. Plow. 28, 56. Popb. 74. Moor 720. 3 Co. 20. 10 Co. 50. 145. Pollex. 56.*

But if there be no such *J. S.* at the time of the limitation, tho' he be after born, and dies, during the particular estate; yet his heirs shall never have the remainder. So if a remainder be limited to *A.* son of *B.* in tail, &c. or to *E.* wife of *D.* where in truth there is no such *A.* or *E.* tho' *B.* has a son called *A.* or *D.* marries one *E.* yet they can never take the remainder; because if there be such persons as the words of the gift import, there the remainder ought to vest in them presently, and they will never after be made capable of taking it; but if there be no such person then *in esse*, none who come within that description after can lay claim to it, because the limitation was present to such persons; but a remainder limited *primogenito filio*, or *proximo hæredi masculino* of *A.* or *propinquioribus hæredibus de sanguine puerorum*, or *seniori puero* of *A.* or to the right heirs of *A.* there being then such *A.* *in esse*, or to the wife *A.* shall marry; these are good remainders, and vest when such persons come *in esse* as are within the description; because here appears no present regard for any person in particular, therefore if they answer the description at any time before the particular estate determines, it is time enough; and so there is a diversity between a remainder limited to one by name in particular, and such remainder limited by description or circumlocution, or between a general name and a special name. *Co. Lit. 3. 1 Co. 66. 2 Co. 51. Hob. 33. Moor 104. Dyer 337. 2 Leon. 210. 1 Rol. Rep. 254.*

A. makes a lease to *B.* for life of *B.* and after the death of *A.* to remain to *B.* and his heirs; this remainder is contingent, and cannot vest presently, for if *A.* survives *B.* it is void; and because otherwise the operation of livery would be interrupted during the life of *A.* for he cannot give himself any estate, his livery operating to pass estates from him, not to give any to him who had the whole before; therefore during his life the operation of the livery must cease, and by consequence no remainder can take effect in virtue of that livery, which *pro tempore* being at an end, all that depended thereon ceases too, and can never after be revived; for the livery must carry out all the estates at once from the feoffor, and if he comes again into the possession before they can all take effect, this breaks the force of the livery, and brings back again to him all that such livery had taken out from him, and then they can never take effect but by a new livery; this is the reason of the common case, that one cannot give lands to another to begin after his death, because being to make livery presently, if that cannot operate presently, it can never operate at all, for it is a contradiction to give lands to one by a solemn livery, which is an act executed and works presently, and yet by words to restrain that operation to a future time; but in the principal case, where *A.* dies first, there no interruption is of the livery, for *B.* had an estate for life by virtue thereof, and before that determines, the same livery, which carried the remainder in abeyance, for the uncertainty of its taking effect, does on *A.*'s death direct and settle, or bring down the remainder to *B.* and his heirs. *10 Co. 85.*

If a lease be made to *A. B.* and *C.* for their lives, and if *B.* survives *C.* then to remain to *B.* and his heirs, this remainder is in abeyance, because tho' the person be certain, yet since it depends on *C.*'s dying before him, till that be known the remainder cannot vest. So if a lease be made to *A.* for life, and after the death of *B.* who is a stranger, to remain to *C.* in fee, or to *A.* in fee, these remainders are in abeyance or contingency, and depend on *B.*'s dying before *C.* or *A.* for if he survives them, the remainder cannot take effect. *3 Co. 20. 10 Co. 85. Co. Lit. 378.*

If a lease be made to *A.* for life, remainder to the abbot of *D.* and his successors, tho' the abbot be then dead, so as there is then no abbot at all, yet the remainder shall be good if an abbot be made before the death of *A.* So of a remainder to a mayor and commonalty, dean and chapter, prior and convent, &c. tho' there be

mayor, dean or prior. So of a remainder to the son of D. parson of D. or other sole corporation and his successors; these remainders not being limited to them specially, but to them generally, and so as to come within the description before the determination of the particular estate, as capable of taking by virtue thereof, are good remainders in abeyance, &c. But if there be no such corporations at the time of the limitation, then the remainders are totally void; and none created after, tho' by the same name, can take these remainders, not even if a patent be then patied to make such corporation. Co. Litt. 264. Hb. 33. 2 Cr. 51. 10 Co. 30. Moor. 104. 1 Rol. Rep. 254. 2 Bulst. 275.

2. Of *cross remainders*, or those arising by implication and construction of law.

A. having issue five sons, his wife being enfeint, devised two thirds of his lands to his four younger sons, and the child in ventre sa mere if he were a son, and their heirs; and if they all die without issue male of their bodies or any of them, that the lands revert to the right heirs of the devisor; by this devise the younger sons were tenants in tail in possession, with cross remainders in tail to each other, and no part shall revert to the heir of the devisor till all the younger sons be dead without issue male of their bodies. Dyer 303.

But where one having issue three sons, A. B. and C. devises one house to A. and his heirs, another to B. and his heirs, and a third to C. and his heirs, provided that if all his said children die without issue, that then the messuages remain and be to his wife and her heirs; it was held by three judges, that on the death of one of the sons without issue the wife might enter, and that here there were no cross remainders from one son to another, because being devised to them severally by express limitation, there shall be no greater estate to them by implication; but Lee Ch. J. doubted; and Doderidge said, that tho' perhaps cross remainders may be by implication where there is a devise to two several persons, yet not so if to more; for when one dies there cannot be several estates by moieties to several persons, and when another dies, remainder again to another, because of the uncertainty and inconvenience; and that it was never seen in any book, where an estate is limited to divers, that there could be cross remainders. Cro. Jac. 655. 2 Roll. Rep. 281. Cart. 173. cited, and admitted to be law. As in 4 Leon. 14.

One seised of lands in fee, by will devises Black Acre to A. his daughter, and heirs, and White Acre to his daughter B. and her heirs; and if she die before the age of sixteen years living A. then A. to have White Acre to her and her heirs; and if A. die, having no issue, living B. then B. to have the part of A. to her and her heirs; and if both die, having no issue, then to J. S. and his heirs, and dies; B. attains her age of sixteen years; and then dies without issue in the life of A. and first it was held by three justices against Dyer, that the daughters had an estate-tail on the whole will, and not a fee determinable on a contingency subsequent; secondly, that by the words "if both die without issue," no cross remainders in tail were created by implication, but that on B.'s death without issue, after sixteen, J. S. should have her part presently without staying till the death of A. without issue. Dyer 330. 1 Benl. 212. 1 Rol. Abr. 839. Vaugh. 267.

A. seised of lands in fee, by will devises all his lands in the county of, &c. to his two daughters B. and C. and their heirs, equally to be divided between them; and in case they happen to die without issue, then to his nephew J. S. and the heirs male of his body, and dies; and it was adjudged, that on the death of B. one of the daughters of the other sister took her moiety as a cross remainder. Raym. 452. Skin. 17. 2 Jon. 172. 2 Show. 136. Pollex. 434. And see 1 Vern. 545. 3 Mod. 109.

Cross remainders can never arise between more than two, from the great confusion it would otherwise create. Cro. Jac. 655. 1 Vent. 224. Raym. 455. Plow. 97. 2 Jon. 82.

It is clearly agreed, that cross remainders can only arise in last wills, and are not to be allowed of in any deed or

conveyance. Co. Litt. 25. 1 Roll. Abr. 837. 3 Show. 136.

Richard Holden seised in fee, and having issue a son and three grandchildren, by his will devised part of his estate to his wife for her life, and the reversion of such part expectant on her death, and all other his freehold tenements, &c. he gave to his son Richard Holden for life, and after his death to his first and other sons successively in tail male; and for default of such issue, and after the determination of the said estates, he gave the premises to his grandson Richard Holden, and his granddaughter Elizabeth Holden, so be equally divided between them, and to the heirs of their respective bodies issuing; and for default of such issue he gave the premises to his grand-daughter Anne in fee: the testator died seised, Richard the son died without issue male, whereupon Elizabeth and the grandson entered, and Elizabeth died without issue generally; Anne Holden married John Jarvis; and the question was, whether there were cross remainders between Elizabeth and Richard the grandson, or whether the moiety of Elizabeth should go to Anne or to Richard? And it was resolved, that there were no cross remainders between them, because here are no express words, nor is there a necessary implication, without either of which cross remainders cannot be raised; that the words, and for default of such issue, being relative to what goes before, mean only, and for default of heirs of their respective bodies, and there it is no more than as if it had been a devise of one moiety to Richard and the heirs of his body, and of the other moiety to Elizabeth and the heirs of her body, and for default of heirs of their respective bodies remainder over; in which case there could be no doubt; and it was held that this case differed from the case *supra*, the word *respective* being in that case, and the first devisees were the testator's daughters, and the remainder-man only a nephew; whereas in the present case, Anne was as near to the testator as Richard. Comber v. Hill, Pasch. 7 Geo. 2. in B. R. and Mich. 8 Geo. 2. a like case in B. R. between Browns v. Williams.

3. Of what things a remainder may be made, or limited.

As to estates of inheritance, there can be no doubt but that the grantor, having a perpetual and durable interest in the estate, may share and divide it, or grant as many remainders over as he thinks proper. 4 New Abr. 492.

But as to personal goods and chattels, it was formerly held, that they in their own nature were incapable of any limitation over, being things transitory, and by many accidents subject to be lost, destroyed or otherwise impaired, and the exigencies of trade requiring a frequent circulation thereof, in which they differ from lands and tenements which are permanent, therefore what is called an estate in lands is termed *property* in personal chattels; hence it was held, that a grantor's devise of a personal thing to one, tho' but for an hour or minute, was a gift for ever; and an absolute disposition of the intire property. Bro. Devise 13. Plow. 321. Dyer 74. 8 Co. 94.

Hence it was a long time before the courts of justice could be prevailed upon to have any regard for a devise over even of a chattel real, or a term for years after an estate for life limited thereon, because the estate for life being in the eye of the law of greater regard and consideration than an estate for years, they thought he, who had it devised to him for life, had therein included all that the devisor had a power to dispose of; but now such remainders over are allowed under the name of *executory devises*, and are established both in courts of law and equity, provided they tend not to a perpetuity, so as to make estates unalienable. 2 New Abr. 294.

Also a distinction was formerly taken between a devise of a personal chattel to one for life, with a remainder over, and of the use only; thus in the first case the devise for life had the absolute property, but not so in the second; for that the first devise had not the property of the goods, but only a special interest in them, so that there still remained a property which might be limited over;

over; but this distinction is now exploded in conformity to the Civil law, and the devisee in remainder is allowed in equity the like remedy in both cases. *Plow.* 521. *Cro. Car.* 346. 1 *Rel. Abr.* 610. *March* 106. *Owen* 33. 1 *Ch. Ca.* 129. 2 *Vern.* 245. 1 *P. Will.* 1. 502, 651.

But a devise of a term for years, or personal chattel to one for a day or an hour, is a devise of the whole term or interest, if the limitation over is void, and it appears at the same time that the whole was intended to be disposed of from the executors. 1 *P. Will.* 666.

A. being possessed of a term for ninety-nine years, devised it to *B.* for life, and after to six others successively, for their lives, if the term so long continue; and all the seven persons being dead, and the term continuing, it was adjudged, that it should revert to the executors of the testator, and that it did not vest in the survivor of the devisees so as to transmit it to his representatives. 1 *Salk.* 231. 1 *Ld. Raym.* 325.

A farmer devised his stock (which consisted of corn, hay, cattle, &c.) to his wife for life, and after her death to plaintiff. It was objected, that no remainder can be limited over of such chattels as these, because the use of them is to spend and consume them; but the Master of the rolls said *the devise over was good*, but added, if any of the cattle were worn out in using, defendant was not to be answerable for them; and if any were sold as useless, defendant was only to answer the value of them at the time of the sale; and an account was decreed to be taken accordingly. *Abr. Eq.* 361.

A. gives his sister, by will, 10 *l.* and directs that such part of his personal estate, as his wife should leave of her substance, should go to the sister; whatever the wife has not employed in that way, shall go over and be accounted for. 1 *P. Will.* 651.

But if a chattel real, money, goods or other personal things, are devised to one, and the heirs of his body, or to one, and if he dies without heirs of his body, *remainder over*; this *remainder* is totally void, and the courts of equity will not allow of a bill by the remainder-man to compel security, &c. or to have the money, &c. after the death of the first devisee, but it shall go to his executors or administrators; for the first devise gives the absolute property of a personal estate, as the like devise of a real estate before the statute *de donis* gave the absolute fee, upon which no limitation could be made further, and as the heirs are the representatives to take the real estate, so are the executors to take the personal estate; and this is not within the statute *de donis*, but remains as at Common law. 2 *Vent.* 349. 2 *Vern.* 600. 1 *Salk.* 156. *Abr. Eq. tit. Devise.*

If *A.* devise that his goods and furniture shall remain in his house to be enjoyed according to the limitations of his will, by those intitled to the house, the first who would be tenant in tail of the house becomes absolute owner of the goods. *Saunders v. Saunders* admitted.

Not only lands and tenements, but also rents, commons, estovers, or any other interest or profits in *esse*, wherein the grantor hath the absolute property to him and his heirs, may be granted *with remainder over*. *Plow.* 379. 9 *Co.* 48, 97.

So if one hath the office of park-keeper, forester, gaoler, sheriff, &c. to him and his heirs, he may grant those offices to one for life, remainder to another for life, &c. for *omne majus continet in se minus*, and as they are grantable over in fee, so may they be granted in succession to one for life, with remainders over, &c. 9 *Co.* 48. 1 *And. pl.* 201.

It was formerly doubted whether there could be a *remainder* of a rent *de novo*, that is, whether a man seized of lands in fee, could thereout grant a rent-charge to one for life or years, *remainder* to another in fee, or in tail; and this doubt arose from *the rent not having any existence before it was created*, consequently no reversion could be left to the grantor, out of which the remainder was to arise; but it hath been adjudged, and is now settled, that *such grant in remainder is good*, the grantor having the absolute interest in the estate out of which it is to arise, and his intention gives it being for the whole, out of which the lesser estates are carved.

But if he grant such rent for life or years, to one without going further, he cannot after grant the reversion thereof to another, because he has no reversion. 2 *Rel. Abr.* 415. 2 *Co.* 70, 76. 2 *Vent.* 245. 144. 1 *Sid.* 285. 2 *Salk.* 577. 2 *Lutw.* 172. *Mo.* pl. 100.

The King may grant an estate in an office to commence *in futuro*, or on a contingency, for he hath no inheritance in the office, or to the execution of it, but in point of interest only to grant. And there is a diversity between offices in fee existing, and such as are granted only for life, which being as a new thing created, may, as a rent *de novo*, be granted to commence *in futuro*. 4 *Mod.* 275. 1 *Ld. Raym.* 52. *Carth.* 350. *Salk.* 465. *Comb.* 334.

If one be created Baron, Viscount, Earl, &c. by patent, and after, in the same patent, the same honour is granted to another in *remainder*, yet *this operates as a new grant*, and not as a *remainder*, for the King had no reversion of that honour in him, tho' he had still the same power of appointing one in succession to take it, as he had of granting it to the first. *Show. Par. Ca.* 5, 11.

A licence to sell wine may be granted to one for life, *remainder* to another for life; because by such licence not only an authority passeth, but an *interest* by way of restitution, to that which was the subjects right before it was prohibited by statute. 1 *Lev.* 220. *Bridg. Rep.* 113.

4. What words are sufficient to create a remainder.

The word *remainder* is no term of art, nor is it necessary to create a *remainder*. So that any words, sufficient to shew the intent of the party, will create a *remainder*; because such estates take their denomination of remainders more from the nature and manner of their existence, after they are limited, than from any previous quality inherent in the word *REMAINDER*. To make them such therefore, if a man gives lands to *A.* for life, and that after his death the land shall revert, or descend to *B.* for life, &c. this is a good *remainder*, and may be pleaded as such. 1 *Roll. Abr.* 416. *Plow.* 29. 1 *Roll. Rep.* 319. *Dyer* 125.

So if lands are given to one and the heirs male of his body, and to him and the heirs female of his body, this limitation to the heirs female is a *remainder*; because it is not to take place till the estate to the heirs male is spent. *Co. Litt.* 377. *a.*

So if lands are given to a widow, and to the heirs of the body of her late husband, *on her begotten*. This is a *remainder* to the heirs of the body of the husband; because it cannot take effect till after the widow's death, who has an estate for life. *Co. Litt.* 26, 200. 2 *Mod.* 210.

So an estate limited to *A.* for life, or in tail, & *post decessum ejus*, or *pro defectu talis exitus*, to *B.* and the heirs of his body, is good, tho' there be not the word *remainder*. So if a lease be made to *A.* for life, and that after his death *B.* shall have the profit, this is a good *remainder* to *B.* *Plow.* 159. *Moor. pl.* 54. *Dyer* 125. 1 *Roll. Rep.* 319. *Cro. Elix.* 10, 742.

So a lease to *A.* for life, and that after his death his children shall have it, is a good *remainder*. 6 *Co.* 17. *b.* *Raym.* 83.

Nay, tho' an estate be limited expressly as a *remainder*, yet if it be not so in construction of law, the word *remainder* will have no force to make it such. As if *A.* seized of lands in fee, he and *B.* levy a fine to *C.* in fee, who grants and renders to *B.* in tail, rendering rent to *A.* and if *B.* died without issue, *tenementa pred' integre remaneant* to *A.* and his heirs; *B.* suffers a common recovery; *A.* distrains for his rent; and *this was adjudged a reversion*, and as such the rent passed with it to *A.* and was chargeable on the land in whose hands it ever came, by virtue of the contract which cannot be destroyed by the recovery, tho' the reversion is thereby barred. *Cro. Elix.* 727, 768, 792. *Moor. pl.* 795. *Co. Litt.* 299. *Raym.* 142.

But here it may be proper to take notice of a set of words sometimes used in leases for years, which are so far a part of the limitation and description of the first interest, that they cannot again be made use of to pass any further interest in the same land. As if one make a lease

lease to *A.* for eighty years, if he so long live; and if he happen to die within the term; then the lands for the residue of the term, or for so many years as shall then remaining of the term, to go over to another, this limitation over is void; because the time, or term of eighty years was not absolute to *A.* but was determinable after his death, and by his death the whole term is at an end; as if a lease had been made to him barely for his life, and then to finish the residue of a term, when nothing thereof remains, is repugnant and void; but some opinions incline, that a devise in such a manner would be good, by reason of the intent of the party, and the equivocal signification of the word *terminus*, which may, tho' not strictly, signify also the time or space of eighty years, as well as the estate or interest for eighty years determinable as aforesaid. But now if a lease be made to *A.* for eighty years, if he so long live, and if he die within the term, then the land to go over to another for the residue of the eighty years, this is a good remainder, because tho' the term or interest be determined, yet the land, and part of the years, still remain; these years may be made the measure of the succeeding interest, as any other number of years may be. *Cro. El.* 216. *1 Leon.* 218. *1 Co.* 153. *3 Leon.* 195. *2 Roll. Abr.* 415. *Flow.* 198. *Moor* 247, 520. *pl.* 441. *1 And.* 259.

J. S. leased of lands in fee by indenture demises them to *A.* for life, *habendum* to *A. B. C.* and *D.* his three sons for their lives, and the life of the survivor of them successively; after the death of the latter it was adjudged in this case, First, That if the sons could take, it must be by way of remainder, they not being parties to the deed, and then it must be as joint-tenants, which could not be by reason of the word "*successive*." Secondly, That they could not take in succession, for the uncertainty whose estate or interest was to commence first. *Hob.* 313. *Hutt.* 87.

A. by indenture makes a lease to *B.* for 40 years, if *A.* so long live, and after his death to *C.* (who was no party to the deed) for one thousand years, and then *A.* levies a fine and dies, and five years pass after his death, and then plaintiff claiming under *C.* enters, &c. this is no remainder at all to *C.* for first, presently it cannot vest by reason of the lessor's life interposing, therefore no remainder is vested. Secondly, As a contingent remainder it cannot be good; because then it ought to have a particular estate to support it, and ought to be in abeyance, or contingency, to vest or not vest when that determines; but here the first lease is no such particular estate; because that reaches not to the commencement of the remainder, nor is the remainder limited with any regard to the particular estate; because it is not to commence on the determination of that, but at a future time, viz. on death of the lessor, and there is no contingency in the case, for it is to take effect at all events, on the death of the lessor, be it before or after the end of the term, therefore it can be no other than a future interest termini to begin after the death of the party who grants it, which being but for years it may well do; because it occurs by way of contract, and tho' the grantee there was no party to the deed, and therefore, as objected, could take nothing, yet it appears, that judgment was given for plaintiff, which proves, First, That the grantee had an interest; Secondly, That this interest was not barred by the fine, and five years non-claim after the death of the grantor, not being touched, devested or turned to a right; Thirdly, That tho' the grantee was no party to the indenture, yet he might well take by virtue thereof, if he gets the indenture to make out his title, for the grantor can't derogate from his own grant, or avoid his own acts. *Raym.* 340.

5. Of the continuance of the particular estate, and when the remainder is to commence.

If a man makes a lease to *A.* for life, and that after the death of *A.* and one day after, the land shall remain to *B.* for life, &c. this is a contingent remainder, because not to take effect immediately on the determination of the first estate, and so lasting that time there would be an interruption of the livery, and no tenant of the freehold,

either to do the services, or answer to strangers' *principis*: *Plow.* 25. *Raym.* 144. that the law is nice to an instant. *1 Id. Raym.* 316.

A. seised in fee, devises his lands to *B.* eldest son of his brother *C.* for life, remainder to the first son of *B.* in tail, and so to all his other sons in the same manner successively, remainder to *D.* second son of *C.* for life, remainder to his first and other sons in tail successively, and dies; *B.* enters and dies, leaving his wife enfeint with a son, then *D.* enters as in his remainder, and six months after the son is born; and all this matter being found specially, 'twas adjudged in *C. B.* for *D.* against the son; First, Because this being a contingent remainder to the son, and he not being born at the time when the particular estate determined, became void; Secondly, *D.* being the next in remainder, and having entered before the birth of the son, was in by purchase, therefore shall not lose his estate by a son born after; and this judgment was affirmed in *B. R.* for they held it plainly to be a contingent remainder, and not an executory devise, or a springing remainder, for that would introduce a perpetuity not to be barred by a common recovery, because 'twould be the same to all the other sons; but here it being a contingent remainder, and not happening in time, 'tis gone for ever; they relied on *Archer's* case, but on a writ of error brought in parliament, the judgment was reversed; because being in a will, they thought that by the meaning and equity thereof they ought not to disinherit the heir for such a nicety, and a will was otherwise to be expounded than a deed; therefore they construed it an executory devise, or springing remainder to the first and other sons, and that the freehold should vest in *D.* till the son was born; but all the judges were much dissatisfied with it, and did not change their opinions, but blamed the judge who permitted it to be found specially where the law was so certain and clear. *4 Mod.* 259. *3 Lev.* 408. *1 Salk.* 227. *Carib.* 309.

Now by the 10 *U. 11 W.* 3. cap. 16. Provision is made that after-born sons and daughters, to whom remainders are limited in contingency, shall take in the same manner as if they had been born in the father's life-time, tho' no estate be limited to trustees to preserve and support such contingent remainders, which act was made by reason of this case, and of the strictness of the law herein.

For more learning on this subject, see *4 New Abr.* and *18 Vin. Abr.* tit. Remainder, and tit. Executory Devise and Recovery. See also *Black. Com.* 2 V. 164. 398. *3 V.* 192.

Remanentes, (remansi) Are words used to signify belonging to ——— *As de hominibus sive tenentibus qui hanc manerio remansi sunt.* *Domestday.*

Remanet in Custodia, Entry of an action in the Marshal's book, by *reman. custod.* where a man is actually in custody, is a good commencement of an action in *B. R.* *3 Salk.* 150.

Remedy, (Remedium) Is the action or means given by law for recovery of a right; and *whenever the law giveth any thing, it giveth a remedy for the same.* There is a maxim, *Lex semper dabit remedium.* *Stud. Compan.* 177. 179.

Remedies are favourably extended, and sometimes to be had without action or applying to the courts of justice, viz. by accord and agreement of the parties, by arbitration; retaking goods wrongfully taken away; taking distresses for rent; entry on lands, to regain possession, &c. *Wood's Inst.* 528, 529, 530.

Remembrances, (Reminiscere) Formerly called *Clerks of the Remembrance*, are officers of the Exchequer, of which there are three, distinguished by the names of the King's Remembrancer, the Lord Treasurer's Remembrancer, and the Remembrancer of Fleet Prison: Upon whose charge it lies, to put the Lord Treasurer and the justices of that court in remembrance of such things as are to be called on and done by the King's Exchequer.

The King's Remembrancer, when in his office all requests are made before the Barons for any of the King's debts, for arrears, &c. and he takes all bonds for such debts, and makes the parties for breach of them; also he orders, directs, and calls the Collectors of Customs, Subsidies, Excise, and other public payments for their accounts:

All informations on penal statutes are entered and sued in his office; and he makes the bills of composition on penal laws, and takes the stallment of debts: And all matters on *English* bills in the Exchequer-Chamber remain in the office of this Remembrancer. He has delivered into his office the indentures, fines, and other evidences, which concern the passing any lands to or from the King. In *Crasino animarum* yearly he reads in the court the oath of all the officers of the court, when they are admitted Writs of prerogative or privilege, for officers and ministers of the court are made out by him, and so commissions of *Nisi prius*, by the King's warrant, on trial of any matters within his office at the assizes in the country; he hath the entering of judgments, of pleas, &c. And all differences touching irregularities in proceedings shall be determined by the King's Remembrancer; who is to settle the same if he can, and give costs where he finds the fault; but if not, the court is to determine it, &c.

By order of court, his Majesty's Remembrancer, or his deputy, are diligently to attend in court, and to give an account touching any proceedings as they shall be required; and they enter the rules and orders of the court.

The Treasurer's Remembrancer issues out process of *feri facias* and extents, for debts to the King; and against sheriffs, escheators, &c. not accounting, he takes the accounts of all sheriffs, and makes the record, whereby it appears whether sheriffs and other accountants pay their *proffers* due at *Easter* and *Michaelmas*; and he makes another record, whether sheriffs and other accountants keep their days prefixed: There are also brought into his office all the accounts of customers, controllers, and accountants, to make entry thereof on record. All estreats of fines, issues and amerciaments, set in any of the courts at *Westminster*, or at the assizes or sessions, are certified into his office; and by him delivered to the clerk of the estreats to make out process on them; and he may issue process for discovery of tenures; and all such revenue as is due to the crown by reason thereof, &c.

The Remembrancer of the First Fruit's office is to take all compositions, and bonds for payment of first fruits and tenths; he makes process against all such persons as do not pay the same. *Stat. 35 Eliz. cap. 5. 5 R. 2. c. 14. 37 Ed. 3. c. 4.*

Remitter, (from the Lat. *remittere*, to restore or send back) is where a man hath two rights or titles to land, and he comes to land by the last title, but that proving defective, he is restored to and judged in by force of his elder or surer title, by operation of law. *Litt. 659. 1 Inst. 347.*

The reason of this invention of the law, is IN FAVOUR OF RIGHT; and that title which is first and most antient, is always preferred. *Dyer 68. Finch's Law 119.*

In *Remitters* to restore rights, the first interest which works such *Remitter*, must be a right, and not a title of entry; and there can be no *Remitter* before an entry. *1 Inst. 348. 2 Bulst. 29.*

It is a rule, that *Remitter* shall not be, where there is not both an *action* and a *right*, with a descent of the possession of the estate to the same party that is to be *remitted*: Nor may it be, when the party comes to his last title by his own wrong, or any folly of his own; or on a void estate. *1 Inst. 347. 353.*

If land descend to him who has right to it before, he shall be *remitted* to his better and more antient title, if he will: And a *remitter* must be to a precedent right; for regularly to every *remitter* there are two incidents, viz. AN ANCIENT RIGHT, AND A DEFENSIBLE ESTATE OF FREEHOLD COMING TOGETHER. *Doll. & Stud. cap. 9. Wood's Inst. 528.*

Tenant in tail makes a feoffment in fee on condition, and dieth, and his issue being within age enters for the condition broken by virtue of the feoffment; he shall be first in as tenant in fee-simple, and be *remitted* as heir to his father: But if the heir be of age, he shall not be *remitted*; but is to bring this writ of *formedon* against the feoffee. *1 Inst. 252, 349.* And if tenant in tail infeoff his son or heir apparent, who is within age, and after dies, that is a *remitter* to the heir: Tho' if he were at full age at the time of such feoffment, it is no re-

mitter, because it was his folly, that being of full age would take such a feoffment. *Litt. 655.*

If a husband alien lands which he hath in right of his wife, and after take an estate again to him and his wife for their lives, this is a *remitter* to the wife, for the alienation is the act of the husband, and not of the woman; yet if the alienation be by fine in a court of record, such a taking again afterwards to the husband and wife shall not make the wife to be in her *remitter*, she being excluded by the fine for ever. *Terms de Ley.*

Lands are given to a man and his wife, and the heirs of their two bodies; and after the husband aliens the land in fee, and then takes back an estate to him, and his wife for their lives; here they will be both *remitted*: But if he take an estate again to himself for life, *remitter* will not be allowed against his own alienation. *1 Inst. 354.*

When the entry of a person is lawful, and he takes an estate in the land for life; or in fee, &c. (except it be by matter of record, or otherwise to conclude or estop him) he shall be *remitted*. *1 Inst. 363.* And a *remitter* to one in possession, may be a *remitter* to another in remainder; if the remainder be not bound, which estops it. *Cro. Car. 145.*

If there be tenant in tail, remainder in fee to *A. B.* and the tenant in tail discontinueth, and takes back an estate in fee; and then devises the lands to his wife for life, with remainder to *W. R.* for years, remainder to the same *A. B.* in fee, and dies, and his wife enters and dies: It has been held, that he in remainder in fee may enter and avoid the term for years to *W. R.* because he is *remitted* to his first remainder in fee; and a *remitter* avoids a lease for years, without entry. *Noy 48.*

A father was tenant for life, remainder to his son for life, remainder to the right heirs of the body of the father; he and his son conveyed the lands to the uncle in fee, who died without issue, so that the son who was *heir in tail* to the father, was now *heir at law* to the uncle, and the fee descended on him; the wife of the uncle brought dower, but the son being *remitted* to his former estate, no dower accrued to the wife, for the estate of which she claims dower is gone. *1 Leon. 37. 9 Rep. 136.*

Lands were purchased by a man, and settled on himself and his wife in tail, and they had issue two sons; then he made a feoffment to the use of himself for life, remainder to the wife for life, remainder in fee to his second son: The wife after his death entered, and made a feoffment to the issue of the second son; and then the eldest son entered for a forfeiture, on the *Stat. 11 H. 7. cap. 20.* and it was adjudged a forfeiture, by reason the wife having two titles, one as tenant in tail, the other as tenant for life, by her entry she is *remitted* to her estate for life, so that the feoffment made by her is a forfeiture of her estate. *Sid. 63. 3 Nelf. Abr. 100.*

If land be given to a woman *in tail*, the remainder to another and a third in tail, remainder to a fourth in fee; the feme takes husband, and he discontinues the lands in fee, and after an estate is made to the husband and wife for their lives, or other estate: This is a *remitter* to all in remainder, and if she die without issue, they may enter; and so it is of them who have the reversion after such entails. *Lit. Sect. 673.*

Where a person lets land for term of life to another, who granteth it away in fee; if the alienee make an estate to the lessor, it will be a *remitter* to him, because his entry is lawful. *Ibid. 694.*

If one be disseised, and the disseisor makes a feoffment to the disseisee; in this case the disseisee may be *remitted* to his elder title, or he may choose to take by the feoffment; and if it be with warranty, he may if he will make use of the warranty. *1 H. 7. 29. 3 Shep. Abr. 237.*

Tenant in tail, hath two sons, and leases the land in tail to his elder son for life, remainder to his youngest son; it is no *remitter* to the eldest: But if he die without issue of his body, the youngest son shall be *remitted*. *Litt. 682.*

If tenant in tail make a feoffment to the use of himself and his heirs, he shall not be *remitted*; but his issue shall. *3 Nelf. 100.* On *remitter* of issue in tail, leases and other charges on the lands are avoided. *Litt. 659, 660.*

For more learning on this subject, see 18 Vin. Abr. tit. Remitter, and Black. Com. 3 V. 19. 189.

Remittitur, The entry in B. R. on a writ of error abating in the Exchequer-chamber, &c. is called by this name. See Error.

Removal of Poor. See Settlement of the Poor.

Remover, Is where a suit or cause is removed out of one court into another; and for this there are divers writs and means. 11 Rep. 41. Remanding of a cause, is sending it back into the same court, out of which it was called and sent for. Marj. 106. See Habeas Corpus.

Renant, Or rather *reniant*, i. e. *negant*, from the Fr. *renier*, *negare*, to deny or refuse. 32 H. 8. cap. 2.

Rendre, (Fr. *rendre* viz. *reddere*) Signifies to yield, give again, or return.

This word is used in levying a fine, which is either *single*, where nothing is rendered back by the cognisee; or *double*, when it contains a grant and render back again of the land, &c. to the cognisor. West's Symb.

And there are certain things in a manor which lie in *prender*, that is, which may be taken by the lord or his officers when they happen, without any offer made by the tenant, such as escheats, &c. and certain which lie in *render*, i. e. must be rendered or answered by the tenant, as rents, heriots, and other services: Also some services consist in *seisance*; and some in *render*. West. Symb. par. 2. Perkin's Reserva. 696.

Renovant, (from *renovo*) To renew or make again: The parson tued one for tithes, to be paid of things *renovant*, &c. 2 Cro. 430.

Rent, (*redditus* in Latin, from *reddendo*, because, as Fleta tells us, *Retroit et quotannis reddit*. Lib. 3. c. 14.) Signifies with us a sum of money, or other consideration ISSUING YEARLY out of lands or tenements. Plowden, 132, 138, 141.

1. Of the several sorts of rent.
2. Statutes concerning rent.
3. Of recovering and demanding rent, and in what cases a demand is necessary.
4. Of the time of demanding rent, and the place where the demand is to be made.

1. Of the several sorts of rent.

There are three several sorts, viz. *rent-service*, *rent-charge* and *rent-seck*.

Rent-service is, where a man holds his lands of his lord by fealty and certain *rent*, or by fealty-service, and certain *rent*. Litt. lib. 2. cap. 12. Or that which a man making a lease to another for term of years, reserveth yearly to be paid him for them. In the terms of the law, this reason is given for it, because it is at his pleasure either to distrain, or bring an action of debt.

Rent-charge is, where a man makes over his estate to another, by deed indented, either in fee, or fee-tail, or for term of life, yet *reserves to himself, by the same indenture, a sum of money yearly to be paid to him, with clause of distress for non-payment*. See Littleton *ubi supra*.

Rent-seck, otherwise a dry *rent*, is that, which a man making over his estate by deed indented, reserveth yearly to be paid him, *without clause of distress* mentioned in the indenture. Litt. *ibid*. See the difference between a *rent* and an annuity in Doer and Student, pag. 30. Dial. primo. Cowell.

Littleton describes a *rent-service* to be where the tenant holdeth land of his lord by fealty and certain *rent*, or by other services and certain *rent*. Litt. *ibid*. 213.

The services are of two sorts, either expressed in the lease or contract, or raised by implication of law. When the services are expressed in the contract, the *quantum* must be either certainly mentioned, or be such as to a reference to something else may be reduced to a certainty; for if the lessor's demands be uncertain, it is impossible to give him an adequate satisfaction or compensation for them, as the jury cannot determine what injury he has sustained. Co. Lit. 96. a. Bril. 397. 2 Ld. Raym. 1160.

The services implied are such as the law obliges the tenant to perform when there are none contracted for in the grant; and these are more or less according to the

duration of the gift; as at Common law, before the statute *Quia emptores terrarum*, if the tenant made a feoffment in fee without any reservation of services, the feoffee held by the same services by which the feoffor held over; because the services being an incumbrance on the land, which the tenant could not discharge without his lord's consent, *must follow the land into whose hands soever it comes*. Co. Lit. 22, 23.

Where a man seised of lands grants by deed poll or indenture a yearly rent, to be issuing out of the same land, to another in fee, in tail, for life or years, with a clause of distress; this is a *rent-charge*, because *the lands are charged with a distress by the express grant or provision of the parties*, which otherwise it would not be. See Annuity.

So if a man make a feoffment in fee, reserving rent, and if the rent be behind, that it shall be lawful for him to distrain, this is a *rent-charge*, the word *reserving* amounting to a grant from the feoffee. Litt. *ibid*. 217. Co. Lit. 170. a. Plow. 134.

A rent granted for equality of partition by coparceners to another is a *rent-charge*, and *distrainable of common right without clause of distress*; and altho' there be no tenure of the sister who grants it; for as the law for the conveyancy of coparceners allows of such grants, it must consequently give a remedy to the grantee for recovery of it. Litt. *ibid*. 252.

A *rent-seck* is so called, because *it is unprofitable to the grantee*, as before seisin had he can have no remedy for recovery of it; as where a man seised in fee grants a rent in fee for life or years, or where a man makes a feoffment in fee or for life, remainder in fee, reserving *rent without any clause of distress*, these are *rents-seck*; for which, by the policy of the ancient law, there was no remedy, as there was no tenure between the grantor and grantee, or feoffor and feoffee, consequently no fealty could be due. Litt. *ibid*. 215, 218. Cro. Car. 520. Kekw. 104. Cro. Eliz. 656.

And it hath been ruled in equity, that where an annuity was devised by will to A. and the land subject to the annuity to B. that B. should give seisin of the *rent-seck* to A. that he might have remedy for recovery of it at Common law, it being the original intention of the gift, that the devisee should have some benefit from it. Moor 626. 3 Chan. Ca. 92.

So when a bill was brought for 3 l. for a rent of 5 s. arrear for twelve years, the equity of the bill being that the deeds by which the rent was created were lost, consequently no remedy for the rent at law; and the court, on plaintiff's proving constant payment till the last twelve years, decreed defendant to pay the arrears and growing rent; for since by payment it was evident plaintiff had a right to the rent, and that he could not without his deeds make a title at law, therefore the court decreed defendant to pay the rent, and so *subjected his person*, which possibly might not have been liable by the deed which created the rent. 1 Chan. Ca. 120. But see Stat. 4 Geo. 2. c. 28. in the next division of this title.

2. Statutes concerning rent.

Stat. 32 Hen. 8. c. 37. *stat*. 1. The executors or administrators of tenants in fee-simple, tenants in fee-tail, and tenants for term of life, of *rent-services*, *rent-charges*, *rent-secks*, and *fee-farms*, unto whom any such rent or fee-farm be due, shall have an action of debt for such arrears against the tenants who ought to have paid in the life-time of their testator, or against their executors and administrators, and distrain for the arrears on the land charged with the payment, so long as the lands continue in the seisin or possession of the tenant in demean, who ought to have paid the rent or fee-farm, or in the seisin or possession of any other person claiming only from the tenant by purchase, gift or descent, in like manner as they might have done.

stat. 2. This act shall not extend to any manor in Wales, whereof the inhabitants have used to pay to every lord at his first entry, any sum of money for discharge of all duties and penalties wherewith the inhabitants were chargeable to any of the lord's ancestors.

Stat. 3. If any man have in right of his wife, any estate in rents or fee-farms, and the same be unpaid in the wife's life; the husband, after death of his wife, his executors and administrators, shall have action of debt for the arrears, or may distrain.

Stat. 4. If any have any rents or fee-farms for term of life of any other person, and the rent, &c. be unpaid in the life of such person, and after the said person doth die, he to whom the rent or fee-farm is due, his executors and administrators, shall have an action of debt, or distrain for the same.

Stat. 8 Ann. cap. 14. sect. 1. On any execution, arrears of rent, not exceeding one year to be paid, which the sheriff is to levy and pay to plaintiff, as well as the execution money, the plaintiff paying the landlord.

Landlord dead, and after execution executed, administration is granted to A. he is not intitled to a year's rent. *1 Strange 97.*

The administrator of the landlord may have an action against the officer for taking the goods in execution, and removing them from the premises before the landlord was paid a year's rent. *1 Strange 212.*

On motion on behalf of the landlord, the sheriff was ordered to pay him his year's rent without deducting poundage. *1 Strange 643.*

This statute extends to the immediate landlord, and not to the ground landlord. *2 Strange 787.* After the landlord had been paid a year's rent on one execution, another execution came in, and he moved to be paid another year's rent on the last execution, but was denied, for the intent of the act was only to continue a lien as to one year, and to punish him for his laches, if he lets more run in arrear. *2 Strange 1024.*

Stat. 4. It shall be lawful for any person, having rent due on any lease for life, to bring an action for such arrears, as on a lease for years.

Stat. 5. All distresses hereby impowered to be made, shall be liable to such sales, and in such manner, as by *Will. & Mar. stat. 1. cap. 5.*

Stat. 6. It shall be lawful for any person having rent due on any lease for life, years, or at will, determined, to distrain such arrears, after determination of the leases.

Stat. 7. Provided, That such distress be made within six calendar months after the determination of such lease, and during the continuance of such landlord's title, and during the possession of the tenant from whom such arrear became due.

Stat. 4 Geo. 2. cap. 28. sect. 1. In case any tenant for life or years, or other person who shall come into possession of any lands, &c. under or by collusion of such tenant, wilfully hold over after the determination of such term, and after demand made in writing, for delivering possession, such person holding over shall pay double the yearly value of the lands, &c. so detained.

Stat. 2. In all cases between landlord and tenant, on half a year's rent in arrear, the landlord having a right by law to re-enter for non-payment, may, without any formal demand or re-entry, serve a declaration in ejectment; and in case of judgment, or nonsuit for not confessing lease, entry and ouster, it shall appear that half a year's rent was due before declaration served, and no sufficient distress to be found, and that the lessor in ejectment had power to re-enter; the lessor in ejectment shall recover judgment and execution, not to bar the right of any mortgagee of such lease, who shall not be in possession, so as such mortgagee, within six calendar months after execution executed, pay all rent in arrear, and costs and damages, and perform all covenants and agreements on the part of the first lessee. *Vide the act as to bills in equity.*

Stat. 4. If tenant at any time before trial tender or pay into court all arrears with costs, proceedings on ejectment shall cease.

Stat. 5. All persons have like remedy by distress, and impounding and selling the same, in cases of rents-ferm, rents of assize, and chief rents, as in case of rent reserved on lease.

Stat. 10. It shall be lawful for any person lawfully taking any distress for rent to impound or secure the distress on such part of the premises chargeable with the rent as shall be most convenient, and to appraise, sell and dispose of the same on the premises, as any person may now do of the

premises, by virtue of *2 Will. & Mar. stat. 1. cap. 5.* or of *4 Geo. 2. cap. 28.*

Stat. 14. It shall be lawful for the landlord, where the agreement is not by deed, to recover a reasonable satisfaction for the tenements occupied by defendants, in an action on the case for the use and occupation of what was held; and if in evidence on the trial any parol demise, or agreement not by deed, whereon a certain rent was reserved, shall appear, plaintiff may make use thereof as an evidence of the quantum of the damages.

Stat. 15. Where any tenant for life dies before or on the day, on which any rent was reserved on any demise which determined on the death of such tenant for life, the executors or administrators of such tenant for life may in an action on the case recover of the under-tenants, if such tenant for life die on the day on which the same was made payable, the whole; or if before such a day, then a proportion, of such rent, according to the time such tenant for life lived of the last year or quarter, or other time, in which the rent was growing due, making all just allowances.

Stat. 16. If any tenant holding tenements at a rack-rent, or where the rent reserved be full three fourths of the yearly value of the premises, who shall be in arrear for one year's rent, desert the premises, and leave the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears; it shall be lawful for two justices of peace (having no interest in the premises) to go up and view the same, and to affix on the most notorious part notice in writing, what day (at the distance of fourteen days at least) they will return to take a second view; and if on such second view the tenant, or some person on his behalf, shall not appear and pay the rent in arrear, or there shall not be sufficient distress on the premises, the justices may put the landlord in possession, and the lease to such tenants, as to any demise therein contained only, shall become void.

Stat. 18. In case any tenant give notice of his intention to quit, and shall not accordingly deliver up the possession at the time in such notice contained, the tenant, his executors or administrators, shall pay to the landlord double the rent which he should otherwise have paid.

Stat. 21. In actions of trespass, or on the case, brought against persons intitled to rents or services, their bailiffs or receivers, or other persons, relating to an entry on the premises chargeable with such rents or services, or to any distress or seizure, sale or disposal, of any goods thereupon, it shall be lawful for defendants to plead the general issue; and in case plaintiffs become nonsuit, &c. defendant shall recover double costs.

By *Stat. 4 Ann. c. 16. sect. 10.* Tenants shall not be prejudiced by payment of rent to a grantor before notice of the grant. And by *stat. 20 Geo. 2. c. 52. sect. 42.* Arrears of rent due from farmers of revenue are excepted out of the general pardon.

3. Of recovering and demanding rent, and in what cases a demand is necessary.

Here the material difference is between a remedy by re-entry, and a remedy by distress, for non-payment of the rent; for where the remedy is by way of re-entry for non-payment, there must be an actual demand made previous to the entry, otherwise it is tortious; because such condition of re-entry is in derogation of the grant, and the estate at law being once defeated is not to be restored by any subsequent payment; and it is presumed that the tenant is there residing on the premises in order to pay the rent for preservation of his estate, unless the contrary appears by the lessor's being there to demand it; therefore unless there be a demand made, and the tenant thereby, contrary to the presumption, appears not to be on the land ready to pay the rent, the law will not give the lessor the benefit of re-entry, to defeat the tenant's estate, without a wilful default in him; which cannot appear without a demand hath been actually made on the land. *Co. Lit. 201. 3. Hob. 207, 331. 5 Co. 56. Dy. 51. Flow. 70. 7 Co. 15. Fench. 32.*

So if there had been a written lease given to lessor for non-payment, the lessor must demand the rent before he can be intitled to the penalty; or if the lease had been,

been, that if the rent were behind, that the estate of the lessee should cease, and be voided; in these cases *there must be an actual demand made*, because the presumption is, that the lessee is attendant on the land to save his penalty and preserve his estate, therefore shall not be punished without a wilful default; and that cannot be made appear without a demand be proved, and that it was not answered; and the demand in these cases must be made *at the day prefixed for payment*, and alleged expressly to have been made in the pleading. *Hutt. 114, Hob. 207, 331. 7 Co. 56.*

But where the remedy for recovery of rent is by distress, there needs no demand previous to the distress; tho' the deed says, that if the rent be behind, being lawfully demanded, that the lessor may distress, but the lessor, notwithstanding such clause may distress when the rent becomes due. So it is, if a rent-charge be granted to A. and if it be behind, being lawfully demanded, that then A. shall distress; he may distress without any previous demand, because this remedy is not in destruction of the estate, for the distress is only a pledge for payment of it, and taking of distress is a legal demand of the tenant to pay the rent, which was all that was required by the deed; and the tenant is not injured by the taking of the distress, because on tender of the rent the pledges are immediately to be restored, or a writ of detinue lies after the quantum of the rent has been settled in a replevin; whereas in the case of re-entry or of the penalty, the tenant is really injured either by loss of his estate, or the payment of a greater sum than the rent, which cannot be restored on payment of the rent; therefore he shall not be punished in such cases without a wilful default in him, which cannot otherwise appear than by the proof of a demand, which was not answered by the tenant. *Hob. 207. Hutt. 13, 23. Moor 883. 2 Rol. Abr. 426.*

But this general distinction must be understood with these restrictions.

That if the King makes a lease, reserving rent with a clause of re-entry for non-payment, he is not obliged to make any demand previous to his re-entry, but the tenant is obliged to pay his rent for the preservation of his estate, because it is beneath the King to attend his subject to demand his rent. *5 Co. 56. 4 Co. 73. Latch 28. Moor 152. Dyer 87, 88.*

But this exception is not to be extended to the dutchy lands tho' they be in the hands of the King, for the King must make a demand before he can re-enter into such lands; but this is by the *H. 4.* which provides, that, when the dutchy lands come to the King, they shall not be under such government and regulations as the demesnes and possessions belonging to the crown. *Moor 149, 160.*

So if a prebend make a lease, reserving rent, and if the rent be arrear and demanded, that it should be lawful for the prebend to re-enter; if the reversion in this case comes to the King the King must in this case demand the rent, tho' he shall be by his prerogative excused of an implied demand; for the implied demand is the act of the law, the other, the express agreement of the parties, which the King's prerogative shall not defeat; therefore in case of the King, if he makes a lease, reserving rent, with a proviso, that if the rent be in arrear for such a time (being lawfully demanded, or demanded in due form), that then the lease shall be void; it seems that not only the patentee of the reversion in this case, but also the King himself, whilst he continues the reversion in his own hands, is obliged to make an actual demand by reason of the express agreement for that purpose. *Dyer 87, 280.*

But if the King, in cases where he need not make a demand, assigns over the reversion, the patentee cannot enter for non-payment, without a previous demand, because the privilege is specially annexed to the person of the King. *4 Co. 73. Moor 404. Cro. Eliz. 452. Dyer 87.*

Another exception is, where the rent is payable at a place off the land, with a clause that if the rent be behind, being lawfully demanded, the lessor may distress, or where the clause is, that if the rent be behind, being lawfully demanded of the person who is to pay it, that then he may distress; in these cases, tho' the remedy be by dis-

trass only, yet the grantee cannot distress without a previous demand: because here the distress and demand being not complicate, but different acts, to be performed at different places and times, the demand must be previous to the distress; for distress is an act of grace, not of common right, and therefore must be used in the manner that it is given. *Hob. 208. 2 Rol. Abr. 426, Moor 883. Brownl. 171. and vid. Hutt. 23. com'.*

But where the clause is no more than that if the rent be behind, being lawfully demanded, (without saying at any place off the land, or of the person of the grantor) that then the grantee may distress, there needs no actual demand, because here the distress and demand is but one complicate act, the one included in the other, and all done at one time and place, viz. on the land; for the distress is in itself a lawful demand, therefore needs no actual demand previous to it; because all that was required by the deed was a lawful demand, which the distress in its own nature is. *2 Rol. Abr. 426. Hob. 208. and see Dyer 348.*

And there seems to have been formerly another exception admitted, that where the remedy was by way of entry for non-payment, that yet there needed no demand, if the rent were made payable at any place off the land; because they looked on the money payable off the land to be in nature of a sum *in gross*, which the tenant had at his own peril undertaken to pay; but this opinion has been intirely exploded, for the place of payment does not change the nature of the service, but it remains in its nature a rent, as much as if it had been made payable on the land; therefore the presumption is, that the tenant was there to pay it, unless it be overthrown by the proof of a demand, and without such demand, and a neglect or refusal, there is no injury to the lessor, consequently the estate of the lessee ought not to be defeated. *Plow. 70. 4 Co. 73. Moor 408, 598. Cro. Eliz. 415, 435, 536.*

But when the power of re-entry is given to the lessor for non-payment, without any further demand, there it seems that the lessor has undertaken to pay it, whether it be demanded or not; and there can be no presumption in his favour in this case; because, by dispensing with the demand, he has put himself under the necessity of making an actual proof that he was ready to tender and pay the rent. *Dyer 68.*

There is another exception when the remedy is by distress, and that is, when the tenant was ready on the land to pay the rent at the day, and made a tender of it; there it seems there must be a demand previous to the distress, because where the tenant has shewn himself ready on the day by the tender, he has done all that in reason can be required of him; for it would put the tenant to endless trouble to oblige him every day to make a tender; it being altogether uncertain when the lessor will come for his rent, when he has omitted to receive it the day he appointed by the lease for payment and receipt; wherefore as the lessee must expect the lessor, and be ready to pay it at the day appointed, or else the lessor may distress for it without any demand; so where the lessor has lapsed the day of payment, and was not on the land to receive it, he must give the tenant notice to pay it before he can distress; for the tenant shall be put to no trouble where it appears that he has omitted nothing on his part. *Hob. 207. 2 Rol. Abr. 427.*

And where the tender was made by tenant on the land at the day, there a demand on the land is sufficient to justify a distress after the day; because the demand in such case is of equal authority with the tender, and by parity of reason the tenant ought to give notice of such demand, as well as the lessor of the tender on the land. *Hob. 207.*

But if the tenant had tendered the rent on the day to the person of the lessor, and he refused it, it seems by the better opinion, that the lessor cannot distress for that rent, without a demand of the person of the tenant; because the demand ought to be equally notorious to the tenant, as the tender was to the lessor. *Hob. 207. 2 Rol. Abr. 427.*

So if the services by which the tenant holds be personal, as homage, fealty, &c. the demand must be of the PERSON

PERSON of the tenant, because this service is only performable by the very person of the tenant; therefore a demand, where he is not, would be improper. *Hob. 13. Hob. 207.*

Again, if the rent be seek, and the tenant be ready at the last instant of the day of payment to pay the rent, and the grantor is not there to receive it, he must afterwards demand it of the person of the tenant on the lands before he can have his assise; because the tenant, by the tender at the day, has done all that was required on his part; and if the grantee might have his assise, after such tender on the day, without a demand of the person, the tenant might be made a disseisor, and damages for the disseisin laid on him, without any wilful default in him; but in the case of a rent-charge, after such tender of the tenant on the land, the grantee may afterwards demand the rent on the land, because he has his remedy by distress, which is no more than a pledge for the rent; and this being to be found and taken of the land, the grantee, need only demand his rent where he can find his remedy, which is on the land; but in this case if the grantee cannot find the tenant on the land to demand the rent, he may, on the next feast on which the rent is payable, demand all the arrears on the land; and if the tenant is not there to pay it, he has failed of his duty, and is guilty of a wilful default, which amounts to a denial; and that denial being a disseisin of the rent, the grantee may have his assise, and by that shall recover the arrears. *Cro. Car. 508. 7 Co. 57. Hob. 207. 2 Rol. Abr. 427.*

But if there has been neither a tender of the rent, nor a demand of the grantee on the day, there the grantee may afterwards demand the rent on the land; because the tenant having omitted to do his duty by a tender on the day, he is still obliged to answer the legal demands of the grantee, which is well made on the land, because the rent issues thereout; for where there is no tender on the day of payment, the rent is due and payable every day afterwards; therefore a demand in the same manner as the law requires is sufficient; consequently the non-payment, after a demand on the land, is a denial and disseisin, for which the grantee may have his assise. *Lit. sect. 233. 7 Co. 57. 2 Rol. Abr. 427.*

If a lease be made reserving rent, and a bond given for performance of covenants and payment of the rent, the lessor may sue the bond without demanding the rent. *Cro. Eliz. 332. Cro. Car. 76. Hob. 8.*

If there be several things demised in one lease, with several reservations, with a clause, that, if the several yearly rents reserved be behind or unpaid in part, or in all, by the space of one month after any of the days on which the same ought to be paid, that then it shall be lawful for the lessor, into such of the premises, whereupon such rents being behind is or are reserved, to re-enter; these are in the nature of distinct demises, and several reservations; consequently there must be distinct demands on each demise to defeat the whole estate demised. *Vaugh. 71, 72.*

Also as to the necessity of a demand of the rent, there is a difference between a condition and a limitation; for instance, if tenant for life (as the case was by marriage settlement with power to make leases for twenty-one years, so long as the lessee, his executors or assigns shall duly pay the rent reserved) makes a lease pursuant to the power; the tenant is at his peril obliged to pay the rent without any demand of the lessor; because the estate is limited to continue only so long as the rent is paid; therefore for non-performance according to the limitation, the estate must determine; as if an estate be made to a woman *dom sola fuerit*, this is a word of limitation which determines her estate on marriage. *Vaugh. 31, 32.*

Note; It seems the better way for the lessor to have a clause of re-entry for non-payment of the rent, than a clause that the lease shall be void for non-payment; because, in the case of a re-entry, a demand by the lessor, and non-payment by the lessee does not avoid the lease; for there must be an actual entry to determine it, to which, as it is said, there must be an actual demand precedent; so that in this case an actual demand does not determine the lease, but only puts it in the power of the lessor to avoid it; and this being discretionary in the lessor,

he may either recover the rent by action of debt, and suffer the lease to continue; or after such actual demand he may by entry defeat it. But if the clause be, that for non-payment the lease shall be void, then if the lessor unadvisedly make an actual demand of the rent, and the lessee be not able at that time to pay it, he has thereby actually determined the lease; because there is no re-entry previous to determine an estate already void in itself: Yet even in this case, if the lessor forbears to make an actual demand when the rent is in arrear, he may recover it by action of debt or distress, and so continue the lease, because these remedies, being not in defeasance of the grant, the lessor may pursue without an actual demand; but this observation is to be intended only of a lease for years; for in case of a lease for life, no demand can determine it without actual entry, tho' the clause be, that for non-payment of the rent the lease shall cease, and be void. *Hob. 331. 2 Rol. Abr. 429. 2 Mod. 264. 3 Co. 64. See Dyer 87, 88. Noy 145.*

4. Of the time of demanding rent, and the place where the demand is to be made.

The time for payment of rent, and consequently for a demand, is such a convenient time before the sun-setting of the last day, as will be sufficient to have the money counted; but if the tenant meet the lessor on the land at any time of the last day of payment, and tender the rent, that is sufficient tender, because the money is to be paid indefinitely on that day, therefore a tender on the day is sufficient. *Co. Lit. 202. a. Dalt. 44. Sav. 253. 4 Leon. 171. 1 Saund. 287.*

If a lease is made, rendering rent at Michaelmas between the hours of one and five in the afternoon, with a clause of re-entry, and the lessor comes at the day about two in the afternoon, and continues to five, this is sufficient. *Cro. Eliz. 15.* The demand may be by attorney. *4 Leon. 479.* But the power must be special, for such land and of such tenant. *Yelv. 37. 1 Brownl. 138.* Demand must be proved by witnesses. *Dyer 68.* Must be made of the precise sum due. *1 Leon. 305. Sav. 121. Mo. 207.*

If a lease be made, reserving rent, on condition that if the rent be behind at the day, and ten days after, (being in the mean time demanded) and no distress to be found upon the land, that the lessor may re-enter; if the rent be behind at the day, and ten days after, and a sufficient distress be on the land till the afternoon of the tenth day, and then the lessee takes away his cattle, and the lessor demands the rent at the last hour of the day, and the lessee does not pay it, and there is not any distress on the land; yet the lessor cannot enter, because he made no demand in the mean time between the day of payment and the ten days, which by the clause he was obliged to do. *Cro. Eliz. 63.*

As to the place of demanding rent, we must observe the difference between a remedy by re-entry and distress; for when the rent is reserved, on condition that if it be behind, that the lessor may re-enter, in such case the demand must be upon THE MOST NOTORIOUS PLACE on the land; therefore if there be a house on the land, the demand must be at the fore-door thereof, because the tenant is presumed to be there residing, and the demand being required to give notice to the tenant that he may not be turned out of possession without a wilful default, such demand ought to be in the place where the end and intention will be best answered. *Co. Lit. 153, 201. 2 Rol. Abr. 428.*

And it seems the better opinion, that it is not necessary to enter the house, tho' the doors be open, because that is a place appropriated for the peculiar use of the inhabitant, into which no person is permitted to enter without his permission, and it is reasonable that the lessor shall go no further to demand his rent, than the tenant shall be obliged to go, when he is bound to tender it; and a tender by the tenant at the door of the house of the lessor is sufficient, tho' it be open, without entering; therefore by parity of reason a demand by the lessor at the door of the tenant, without entering, is sufficient. *Dalt. 59. Co. Lit. 201. 1 And. 17. 3 Leon. 4. and see Cro. Eliz. 15.*

But when the demand is only in order for a distress, there it is sufficient, if it be made on any notorious part of the land, because *this is only to intitle him to his remedy for his rent*; therefore the whole land being equally debtor, and chargeable with the rent, a demand on it, without going to any particular part of it, is sufficient. *Co. Lit.* 153.

See other cases, on this subject, *Co. Lit.* 202. *Bendl.* 59. *Cro. Eliz.* 324. *Cro. Car.* 507, 521. *Co. Lit.* 153. 4 *Co.* 73. *Co. Lit.* 201. *Cro. Eliz.* 462. *Mo.* 404. *Dyer* 37. 2 *Rel. Abr.* 428. *Dyer* 229. But this learning is, in general, rather useless, since the Stat. 4 *Geo. 2. c.* 25. Vide an abstract of the 2d section under the 2d division of this title.

For more learning on this subject, see 4 *New Abr.* and 18 *Vin. Abr.* tit. Rent, and *Black. Com.* 2 *V.* 41, 42, 57, 299. 3 *V.* 6, 206, 230, 231. 4 *V.* 434.

Rental, A roll wherein the rents of a manor are written and set down, by which the lord's bailiff collects the same: It contains the lands and tenements let to each tenant, and the names of the tenants, the several rents arising, and for what time, usually a year. *Compl. Court Keep.* 475.

Rents of Waste, The certain rents of freeholders, and ancient copyholders, so called, because they were *officed*, and different from others which were uncertain, paid in corn, &c. 2 *Inst.* 19.

Rents resolute, (*Redditus-resoluti*.) Are accounted among the fee farm rents, to be sold by 22 *Car. 2. c.* 6. and are such rents or tenths as were anciently payable to the crown, from the lands of abbies and religious houses; and after their dissolution, notwithstanding the lands were demised to others, yet the rents were still reserved, and made payable again to the crown. *Conwell.*

Reparations, A tenant for life or years may cut down timber-trees to make reparations, altho' he be not compelled thereto; as where a house is ruinous at the time of the lease made, and the lessee suffers it to fall, he is not bound to rebuild it, and yet if he sell timber for reparations he may justify the same. 1 *Inst.* 54.

Lessee covenants, That from and after the amendment and reparation of the houses by the lessor, he at his own charges will keep and leave them in repair: In this case the lessee is not obliged to do it, unless the lessor first make good the reparations: And if it be well repaired at first, when the lease began, and after happen to decay; the lessor must first repair, before the lessee is bound to keep it so. 2 *Cro.* 645.

If one covenant for the reparation of a house, on request of the lessor, and he repair without it; this is no performance of the covenant. 2 *Leon. c.* 72. See *Lease, Covenant*, and *Waste*.

Reparatione facienda, Is a writ which lies in many cases; one whereof is where there are tenants in common or jointenants of a house, &c. which is fallen to decay, and one is willing to repair it, but the others are not: In this case the party willing to repair the same, shall have this writ against the others. *F. N. B.* 127.

And if a man have a house adjoining to my house, and he suffer his house to lie in decay to the annoyance of my house, I may have a writ against him to repair his house. So if a person have a passage over a bridge, and another ought to repair the bridge, who suffers it to fall to decay. &c. *New Nat. Br.* 281.

Repeal, (from the Fr. *rappeler*, i. e. *revocatio*.) Signifies the same with revoke; as the repealing of a statute is the revoking or disannulling it. *Rastal.*

It is said a pardon of felony, &c. may be repealed on disproving the suggestions. 1 *Keb.* 19.

A deed or will may not stand good as to part, and be repealed for the rest. *Style* 241. And a defendant in a suit cannot repeal or revoke his warrant of attorney, given to an attorney to appear for him, &c. 2 *Lill. Abr.* 452. without first paying his bill.

Repleader, (*Replacitare*) Is to plead that again which was once pleaded before. *Broke.*

On an immaterial issue in a cause, repleader may be awarded; and repleader is to be had where the pleading hath not brought the issue in question, which was to be tried: Also if a verdict be given where there was no issue

joined, there must be a repleader to bring the matter to trial, &c. 2 *Lill. Abr.* 460.

In debt on a sheriff's bond, for defendant's appearance in B. R. upon the return of the writ, the defendant pleaded that he had appeared *secundum*, &c. and on this they were at issue; and there being a verdict for plaintiff, a repleader was allowed, because the appearance was not triable by a jury, but by the record. 1 *Leon.* 90. 3 *Nell.* Abr. 123.

It was held, that at Common law, a repleader was granted before trial, because a verdict did not cure an immaterial issue; but that now a repleader ought never to be awarded before trial, because the fault in the issue may be helped by the statutes of *jeofails*: That if a repleader is denied where it should be granted, or *converso*, it is error; and the judgment in repleader is general, (*vic.*) *Quod partes replacent*: They must begin again at the first fault, which occasioned the immaterial issue; if the declaration and the bar, and the replication be all ill, they must begin *de novo*; but if the bar be good, and the replication ill, they must begin at the replication; and no costs are allowed on either side; and a repleader cannot be awarded after a default. 2 *Salk.* 579.

Tho' a repleader is allowed after verdict; it has been adjudged not so be awarded after demurrer: (But a repleader hath formerly been granted after demurrer, and likewise after the demurrer argued) and that a repleader can never be awarded after a writ of error; but only after issue joined, &c. *Latch* 147. 3 *Lev.* 440. *Mod. ca.* 102. See the *Form of a Repleader*, *Lutw.* 1622. And see *Black. Com.* 3 *V.* 395. and *New Abr.* tit. *Repleader*.

Replegiare, Is to redeem a thing detained or taken by another, by putting in legal sureties. See *Replevin*.

Replegiare de averiis, A Writ brought by one whose cattle are distrained, or put in the pound on any cause by another person, on surety given to the sheriff to prosecute or answer the action at law. *F. N. B.* 68. *Reg. Orig.* Stat. 7 *H. 8. c.* 4.

Repleviti, (*Plovina* from *replegiare*, to deliver to the owner on pledges.)

1. Of the definition, and of replevin generally.
2. For what things a replevin lies.
3. Of the different kinds of replevins; out of what courts they issue, and of the power and duty of the sheriff.
4. Of the pledges in replevin, and the proceedings against them.
5. Of the original writ, and the Withernam, in replevin.
6. Of the writ of second deliverance, and the writ *De proprietate probanda*.
7. Of the writ *de returno habendo*; of returns irrepleviable, and in what manner the sheriff is to return and execute such processes.

1. Of the definition, and of replevin generally.

According to some, a replevin is, a remedy grounded and granted on a distress, being a re-deliverance of the thing distrained, to remain with the first possessor, on security (or pledges) given by him to try the right with the distrainer, and to answer him in a court of law. 1 *Inst.* 145.

According to others it is bringing the writ called *replegiare facias* by him who has his cattle or goods distrained by another, and putting in surety to the sheriff, that on delivery of the thing distrained, he will prosecute the action against the distrainer. *Co. Lit.* 13. s. c. 12. *feet.* 219.

We read of *Causes replegiat*, *bona repleviti*, in a case between the abbot of *St. Albans* and *Gosfray Chiltonwick*, 24 *Hen. 3.*

Goods may be replevied by writ, which is by the Common law, or by *placet*, which is by Statute law, for the more speedy having again their cattle and goods.

Replevi is also used for bailing a man. *Stamdf.* Pl. *Cor.* fol. 72, 74. and *Westm.* 1. c. 11. § 15. *Replegiare* is *replegiare bona mobilia dato apud praesentem velle sine fide-jussore; sive* *Anglia* *brevis per quod bona in repleviti*, to

to replevy, &c. *Voffus de vitulis fermonis, lib. 2. c. 25.* See *Shene* *cod. verbo.*

Replevin is re-delivering to the owner, (by the sheriff,) his cattle or goods distrained on any cause, on surety that he will pursue the action against him who distrained; and if he pursue it not, or if it be adjudged against him; then he who took the distress shall have it again, and for that purpose may have a writ of *retorno habendo*. Co. Lit. 145. b. 4 Inst. 139.

Replevin is a writ, and usually granted in cases of distress, and is a MATTER OF RIGHT; so that if a man grants a rent *with clause of distress*, and grants further, that the distress taken shall be irrepleviseable, yet they may be replevied; for *such restraint is against the nature of a distress*, and no private person can alter the common course of the law. Co. Lit. 145.

In this writ, or action, both plaintiff and defendant are called *ACTORS*; the one, i. e. the plaintiff, suing for damages, and the avowant, or defendant, to have a return of the goods or cattle. 2 Bend. 84. Cro. Eliz. 799. 2 Mod. 149.

That the avowant is in nature of a plaintiff, appears, 1st, from his being called an actor, which is a term in the *Civil law*, and signifies plaintiff; 2dly, from his being being intitled to have judgment *de retorno habendo*, and damages as plaintiff; 3dly, from this, that plaintiff may plead in abatement of the avowry, consequently such *avowry must be in nature of an action*. Carth. 122. 6 Mod. 103. Yelv. 148.

The avowant being in nature of a plaintiff, need not aver his avowry with an *hoc paratus est verificare*, more than any other plaintiff need aver his count. Plow. 263.

Nor shall have a protection cast for him more than any other plaintiff. 2 Inst. 339.

But tho' an avowry be in nature of an action, yet one tenant in common may avow for taking cattle damage feasant. Cro. Eliz. 530.

Replevin is an action founded on the right, and different from *trespass*. Carth. 74. Yelv. 148. Hob. 16. Cro. Eliz. 799.

It is now held, that as no lands can be recovered in this action, it cannot with any propriety be considered as a real action, tho' the title of lands may incidently come in question, as it may do in an action of trespass, or even of debt, which are actions merely personal. Finch's law 316. and see Comb. 476. Fitzg. 109.

2. For what things a replevin lies.

It is a general rule, that plaintiff ought to have the property of the goods in him at the time of the taking: Not only a general property which every owner hath, but also a special property, such as a person hath who hath goods pledged with him, or who hath the cattle of another to manure his lands, &c. is sufficient to maintain a *replevin*, and in such cases either party may bring a *replevin*. Co. Lit. 145. Winch 26.

A *replevin* doth not lie of things which are *ferre nature*, as conies, hares, monkeys, dogs, &c. but if things wild by nature are made tame, or are reclaimed, so long as they continue in that condition, they belong to the person who hath the possession of them, and he may bring *replevin*; and the general rule herein seems to be, that a *REPLEVIN LIES FOR ANY THING THAT MAY BY LAW BE DISTRAINED*. 2 Rol. Abr. 430. Godb. 124.

A *replevin* lies of a leveret; for it has *animum revertendi*; for the same reason it lies of a ferret; but it is said not to lie for a mastiff dog, tho' an action of trespass will. Br. Repl. 64. 2 Rol. Abr. 430.

Replevin lies of a swarm of bees. F. N. B. 68.

But not of trees, or timber growing; nor of things annexed to the freehold, because such things cannot be distrained; yet *replevin* lies of certain iron belonging to the party's mill. F. N. B. 68.

So *replevin* doth not lie of deeds or charters concerning lands; for they are of no value, but as they relate thereto. Br. Repl. 34.

Nor of money, or leather made into shoes. Moor 394. 2 Brownl. 139.

If a mare in foal, a cow in calf, &c. are distrained, and they happen to bring forth their young, whilst they are in the custody of the distrainer, a *replevin* lies for the foal, calf, &c. Bro. Repl. 41. F. N. B. 69. 1 Sid. 82.

Replevin lies for a ship; so for the sails of the ship. March 110. Raym. 232. Per Pollenfen Ch. J. *replevin* lies not for goods taken beyond sea, tho' brought hither by defendant afterwards. 1 Show. 91.

3. Of the different kinds of replevins; out of what courts they issue, and of the power and duty of the sheriff.

Replevin may be made either by original writ of *replevin* at Common law, or by plaint by the stat. of Marl. c. 21. Co. Lit. 145. F. N. B. 69.

By this stat. enacted 52 H. 3. it is provided, "That if the beasts of any person be taken, and wrongfully withholden, the sheriff, after complaint made to him thereof, may deliver them without let or gainsaying of him that took the beasts, if they were taken out of liberties; and if the beasts were taken within any liberties, and the bailiff of the liberty will not deliver them, then the sheriff for default of those bailiffs shall cause them to be delivered."

The mischiefs before this act were the great delay and loss the party was at, by having his beasts or goods withholden from him; as also that when cattle were distrained and impounded within any liberty which had return of writs, the sheriff was obliged to make a warrant to the bailiff of the liberty to make deliverance; and there was another mischief when the distress was taken without and impounded within the liberty. 2 Inst. 139. 13 Co. 31. To remedy which,

By this statute the sheriff, on plaint made to him without writ, may either by parol or precept command his bailiff to deliver the beasts or goods, that is, to make *replevin* of them, and by these words (*post querimoniam sibi factam*) the sheriff may take a plaint out of the county court, and make a *replevin* presently, which he is to enter in the court, as it would be inconvenient, and against the scope of the statute that the owner, for whose benefit the statute was made, should tarry for his beasts till the next county court, which is holden from month to month. And by this act the sheriff may hold plea in the county court on *replevin* by plaint, tho' the value be of 20 l. or above; and yet in other actions he shall hold plea where the matter is under 40 s. value. 2 Inst. 139. 1 Keb. 205. Dalt. Sb. 430.

By the words of this law, *Si averia capiant, vicecomes post querimoniam sibi factam deliberare possit*; so that it becomes the sheriff's duty on such complaint, by parol or by precept to his bailiff, to replevy them, which precept may be given before any county court; but such plaint is afterwards to be entered, and (as holden in Cum.) by the party who made the complaint, and not by the sheriff. Cum. 591.

Replevins by writ issue properly out of the courts of K. B. and C. B. at Westminster, and are returnable into such courts. Dyer 246.

Replevins by plaint are made by the sheriff by force of the above-mentioned statute of Marle. by which he is directed, on complaint made to him by the party, that his goods or cattle are distrained, to command his bailiff (which may be by parol or precept) to make deliverance; and which plaint may be taken at any time, and as well out of, as in court. Br. Repl. pl. 4. Co. Lit. 145. 2 Inst. 139.

Also it hath been agreed, that the hundred court, and courts of lords of manors, may by prescription hold plea in *replevin*, so may incidently have power to replevy goods or cattle; but that, it seems, must be by process of the court after a plaint entered, but not by parol complaint out of court. Carth. 380.

Therefore where in trespass for taking goods, &c. defendant justified that the place where, &c. was a hundred, and time out of mind had a court of all actions, *replevins*, &c. grantable in or out of court, *averia impia*, &c. The question was, *if good or not?* And the reason of the doubt was, because the county court could not hold plea in *replevin*.

plevin at Common law; but were enabled by the statute of *Marlebridge*, which extends not to the hundred court, which is a court derived out of the county court; but *per cur.* clearly, Supposing they may grant them in court, yet they cannot prescribe to grant them out of court. 2 *Salk.* 580. 5 *Mod.* 252. *Skin.* 674. *Carth.* 380. 1 *Ld. Raym.* 219.

The sheriff is obliged to grant *replevin* in all such cases as they are allowed by law; and the officer, who takes the goods by virtue of a *replevin* issuing for what cause soever, is not liable to an action of trespass, unless the party in whose possession the goods were, claims property in them; and note, that in all cases of misbehaviour by the sheriff or other officers, in relation to *replevins*; they are subject to the controul of the King's superior courts, and punishable by attachment for such misbehaviour. *Carth.* 381.

And tho' the sheriff may grant *replevins* by *plaint*, and may proceed thereon in his county court, yet if any thing touching freehold come in question, or ancient demesne be pleaded, the sheriff can proceed no further; nor can any such proceedings be carried in the hundred court, court baron, or any other court claiming a jurisdiction herein by prescription. 4 *H. 6.* 30. 2 *H. 7.* 6. *Co. Lit.* 145.

So when the King is party, or the taking is in right of the crown, in these cases the sheriff is to surcease. *Bro. Repl. pl.* 3. 1 *Brownl.* 53.

It was ruled in the case of one *Bradshaw*, that where an act of parliament orders a distress and sale of goods, this is in nature of an execution, and *replevin* does not lie; but if the sheriff grants one, yet it is not such a contempt as to grant an attachment against him; and *Powell* Justice said, He remembered a case in the Exchequer, where a distress was taken for a fee-farm rent due to the King, yet on debate no attachment was granted, tho' it was in the King's case. *Trin. 12 W. 3.* in *C. B. Bradshaw's* case. See 14 *Car. 2.* c. 12.

And for the great ease in bringing *replevins*, and as a duty incumbent on the sheriff, it is enacted, by the 1st and 2d of *Ph. & Mar. c. 18.* "That the sheriff shall at his first county day, or within two months after he receives the patent, depute and proclaim in the shire town four deputies to make *replevins*, not dwelling 12 miles distant from one another, in pain to forfeit for every month he wants such deputy or deputies 5 *l.* to be divided between the King and the prosecutor."

4. Of the pledges in *replevin*, and the proceedings against them.

When the sheriff makes *replevin*, he ought to take two kinds of pledges; *plegii de proseguendo*, by the Common law, and *plegii de retorno habendo*, by the statute of *Westm. 2. c. 2.* by which it is provided, "That sheriffs or bailiffs from thenceforth shall not only receive of plaintiff pledges for pursuing the suit, before they make deliverance of the distress, but also for return of the beasts, if return be awarded; and if any take pledges otherwise, he shall answer for the price of the beasts, and the lord that distrains shall have his recovery by writ, that he shall restore to him so many beasts or cattle; and if the plaintiff be not able to restore, his superior shall restore."

• In the construction hereof the following cases have been ruled, and opinions holden:

That if the sheriff returns insufficient pledges, he shall answer according to the statute; for insufficient pledges are no pledges in law; and such pledges must not only be sufficient in estate, viz. capable to answer in value, but likewise sufficient in law, and under no incapacity; therefore infants, feme-coverts, persons outlawed, &c. are not to be taken as pledges, nor are persons politick, or bodies corporate. *Co. Lit.* 145. 2 *Id.* 346. 10 *Co.* 102.

In *replevin* the sheriff does not return any pledges, and after issue joined and found, it was moved, if they could be put in by the court after verdict; and the court held they might, notwithstanding the statute of *Westm. 2.* as before that statute the court might take pledges on the omission of the sheriff, and a diversity was taken between pledges for prosecuting which were at Common law, and

pro retorno habendo given by this statute; and the court held, that tho' on default of the sheriff he was subject to the action of the party, that yet the taking of pledges by the court did not make the judgment erroneous. *Noy* 156.

A *replevin* by *plaint* was sued in the sheriff's court in London, and pledges were found *de retorno habendo* fi, &c. this *plaint* was removed according to their custom into the mayor's court, and after into the King's Bench by *certiorari*, and thereoyer of the *certiorari* being demanded, the party declared in *B. R.* on this a return was awarded, and on an *elongat* returned, a *scire facias* went against the pledges in the sheriff's court of London. On demurrer the question was, whether this case being removed by *certiorari*; the pledges in the inferior court are discharged, or whether they remain liable to be charged by this *scire facias*? It was adjudged, that the pledges were not discharged. *Skin.* 244. 2 *Shew.* 421. *Comb.* 1, 2. 3. *Mod.* 56. *S. C.*

Plaintiff declared, that he distrained for 7 *l.* 10 *s.* rent, reserved on a lease, and that defendant delivered the cattle without taking pledges; to which defendant pleaded, that plaintiff in *replevin* delivered to him 3 *l.* 10 *s.* for pledges, which he accepted; and on demurrer the court held, that pledges being to be found to answer the party, if he had good cause of avowry, and to be answerable for enforcement to the King, if nonsuited, or if it be found against him; the taking of money, or a pledge was not lawful; and that altho' he might take money for pledges, yet he ought not to accept less than plaintiff's demands; on which account the court likewise held the plea vicious; but they agreed, that if the mayor had taken but one pledge, (if he had been sufficient) it had been well enough. *Exo. Car.* 446. 1 *Jon.* 378.

But it hath been adjudged, that a bond taken by the sheriff, conditioned that if the party applying for the *replevin* should appear at the next county court, &c. and prosecute his action with effect, and should make return of the thing replevied, if return should be adjudged, and save the sheriff harmless, &c. was good in law, and agreeable to the intent of the statute of *Marlebr.* which requires pledges or sureties, of which nature the obligors are; and this method of taking bond instead of pledges was said to be of ancient usage; and that in the old books *plegi* signified the same as sureties; and that there being a proper remedy on such bond, it differed from the case of taking a deposit or sum of money; but the court agreed, that at Common law this bond had been void; because it had been to save the sheriff harmless in making *replevin* by *plaint*, which he could not have done before the statute of *Marlebr.* 1 *Ld. Raym.* 278. 2 *Lutw.* 686.

If in *replevin* in an inferior court, the condition of the bond is, if he prosecute his suit commenced with effect in the court of, &c. and make return, &c. if a return be adjudged by law, and it happens, that the plaintiff hath judgment in the court below, which is afterwards reversed on a writ of error in *B. R.* in such case, unless the party make a return, he forfeits his bond; for tho' he had judgment in the court below, yet the words, if he prosecute his suit commenced, &c. extend to the prosecution of the writ of error, which is part of the suit commenced in the court below; and in this case, the taking such bond was held to be lawful; and said to be common practice. *Carth.* 248. 1 *Shew.* 400. *Fitzg.* 158.

In debt on a *replevin* bond taken by the sheriff, conditioned that if *C. B.* appear at the next county court, and prosecute with effect for taking, &c. and make return, &c. if return be adjudged, and save harmless the sheriff, &c. then, &c. defendant afteroyer pleaded, that at the next county court, *nil* *est* *ver.* he did appear, and prosecuted, &c. until it was removed by *recordari*, and did save the sheriff harmless, but doth not say, that no return was adjudged; on demurrer the court inclined for plaintiff; for defendant should have said, that *return* was adjudged at all; and tho' he prosecuted to the *scire facias*, yet *return* *habendo* might be adjudged afterwards; and the condition goes to any adjudication of return, *Comb.* 228.

But

An action was brought on a bond in replevin to prosecute his suit with effect, and also to make return, &c. defendant pleaded, that E. G. did levy a plaint in replevin in the court before the steward of *Westminster*, and that afterwards, and before the suit was determined, viz. such a day, &c. E. G. died *per quod* the suit abated; plaintiff replied, *quod bene & verum est*, that E. G. levied such a plaint against the defendant, who immediately afterwards exhibited an *English* bill in the Exchequer against plaintiff in that suit, and by injunction hindered the proceedings below until such a day, &c. on which E. G. died; so that he did not prosecute his suit with effect: on demurrer to this replication the defendant had judgment; for *per Holt*, This was a prosecution with effect, because there was neither a nonsuit or verdict against E. G. Carth. 519.

In action on a replevin bond common bail shall be filed. 1 Salk. 99.

There are two sorts of pledges, *plegii de proseguendo*, and *plegii de returno habendo*; the pledges of prosecuting were at Common law, but those *de returno habendo* were appointed by *Westm. 2. cap. 2.* by which statute an action lies against the sheriff, if he omits to take pledges, or if he takes those that are insufficient; for the party may have a *scire facias* against the pledges, where the suit is in any court of record; and tho' in the county-court, &c. a *scire facias* will not lie against the pledges, because these are not courts of record, and every *scire facias* ought to be grounded on a record, yet there the party may have a precept in nature of a *scire facias* against the pledges. 1 Ld. Raym. 278. See *Comb. 1, 2. Cum. 593.*

An action on the case was brought against a sheriff for taking insufficient pledges on a replevin; to which he pleaded not guilty, and a verdict being found against him, and judgment given thereon in the court of C. B. on a writ of error brought in B. R. it was objected, first, That an action on the case was not the proper remedy; 2dly, Supposing such action lay, that there ought to have been a *scire facias* first sued out against the pledges. As to the first, the court held, that the party distraining has by the statute of *Westminster 2.* an interest in the pledges, and if the sheriff omits to take such, or which is the same thing, takes insufficient ones, he is aggrieved, and consequently intitled to his action. 3dly, That tho' a *scire facias* may be brought against the pledges, yet it does not follow from thence, that an action does not lie against the sheriff; and such *scire facias*, which is only to certify the sufficiency of the pledges, is the less necessary in the present case, such insufficiency being set forth in the declaration, and found by the verdict. *Mich. 12 Geo. 2. Rouje v. Patterson in B. R.*

And for the greater security of persons distraining for rent, it is enacted by stat. 11 Geo. 2. c. 19. *sect. 23.* That officers having authority to grant replevins, shall in every replevin of a distress for rent take in their own names, from plaintiff and two sureties, a bond in double the value of the goods distrained, (such value to be ascertained by the oath of one or more witnesses not interested, which oath the person granting such replevin is to administer) conditioned for prosecuting the suit with effect without delay, and for returning the goods, in case a return shall be awarded, before any deliverance be made of the distress; and such officer taking such bond, shall, at the request and costs of the avowant, or person making conscience, assign such bond to the avowant, &c. by indorsing the same, and attesting it under his hand and seal in the presence of two witnesses, which may be done without stamp, provided the assignment be stamped before any action brought thereon; and if the bond be forfeited, the avowant, &c. may bring an action thereupon in his own name, and the court may by rule give such relief to the parties on such bond, as may be agreeable to justice; and such rule shall have the effect of a DEFEASANCE.

5. Of the original writ, and of the *writbern* in replevin.

The original writ of replevin issues out of Chancery, and neither it nor the *alias* replevin are returnable, but are only in nature of a *justices* to empower the sheriff to hold plea in his county court, when a day is given the parties;

but the *pluries* replevin is always with this clause *vel causam nobis significes*, and it is a returnable process. F. N. B. 69, 70. Doct. pl. 313, 314. 2 Inst. 139. Salk. 410. it is usual to take out the *alias* and *pluries* at the same time. *Dalt. Sh. 273.*

A *pluries* replevin returned in *Michaelmas* term, the defendant claimed property, and after nothing done, nor any appearance nor continuance till *Easter* term following, at which term they appeared and pleaded, and judgment was thereupon given; tho' no continuance was between *Michaelmas* and *Easter*, yet this was not any discontinuance, because there is not any continuance till appearance; for the parties have not any express day in court, and where there is not any continuance, there cannot be any discontinuance. 1 Roll. Abr. 485.

The *pluries* replevin supercedes the proceedings of the sheriff, and the proceedings are on that, and not on the plaint, as they are when that is removed by *recordari*, and tho' there is no summons in the writ, yet it gives a good day to defendant to appear; and if he does not appear, then a *pone* issues, and then a *capias*. 1 Ld. Raym. 617.

Capias and process of outlawry lies in replevin; for when on the *pluries* *replegiari fac'* the sheriff returns *averia elongata*, then a *capias* in *writbern* issues, and on that being returned *nulla bona*, a *capias* issues, and so to outlawry. *Capias* and process of outlawry in replevin were given by 25 Ed. 3. 17. 6 Mod. 84.

If on the *pluries* replevin the sheriff return, that the cattle are eloiigned to places unknown, &c. so that he cannot deliver them to plaintiff, then shall issue a *writbern* directed to the sheriff, commanding him to take the cattle or goods of defendant, and detain them till the cattle or goods distrained are restored to plaintiff; and if on the first *writbern* a *nihil* be returned, there an *alias* and *pluries* replevin issue, and so to a *capias* and *exigent*. F. N. B. 73.

The writ of *writbern* ought to rehearse the cause which the sheriff returns, for which he cannot replevy the cattle or goods; so that it does not lie on a bare suggestion, that the beasts are eloiigned, &c. F. N. B. 69, 73.

If on the *writbern* the cattle are restored to the party who eloiigned them, yet he shall pay a fine for his contempt. 2 Leon. 174.

Cattle taken in *writbern* may be worked, or if cows, may be milked; for the party has them in lieu of his own. 1 Leon. 220. Dyer 280.

And as the party is to have the use of the cattle, he is not to have any allowance made him for the expences he has been at in maintaining them. Owen 46. Cro. Eliz. 162. 3 Leon. 235.

Scire facias against an executor, reciting, that where replevin was brought against testator for a cow, and judgment against him *de returno habendo*, which was not executed, that he should shew cause why he should not have execution. The executor pleads *plene administ'avit*, upon which plaintiff demurred; and *Wyld* justice said, that upon the judgment the cow is in the custody of the law, therefore he ought to have execution; but the doubt is, because the replevin is determined by the death of the party; yet (by him and *Rainsford*, being only in court,) plaintiff shall have execution, for defendant cannot be prejudiced; for if the sheriff return *averia elongata*, he shall not have a *writbern*, but of the goods of the testator; or if there are no goods of the testator, the sheriff can take nothing, but shall return *nulla bona*, and then plaintiff hath his ordinary way to charge defendant, if he hath made a *devastavit*; and it was adjudged for plaintiff. *Pasch. 27 Car 2. in B. R. Suckley v. Green.*

W. sues a replevin, H. removes it by *recordari* into the King's Bench, plaintiff does not declare, and on that a return awarded to H. upon which the sheriff returns *averia elongata*, and then a *writbern* was awarded and executed; and now plaintiff comes and prays he may be admitted to declare, and prays a deliverance of the *writbern*; and it was testified by the clerks, that on plaintiff's submission to a fine for not declaring, and that being imposed on him by the judges, he shall have deliverance of the *writbern*; and a fine of 3s. 4d. being accordingly imposed on plaintiff, he then declared, and had deliverance.

ance. *Noy* 50. The course of *B. R.* is contrary to that of *C. B.*

If on an *elongata* returned, the sheriff's cattle are taken in *withernam*, yet on the defendant's appearance, and pleading *non cepit*, or claiming property, defendant shall have his cattle again; and if they are eloiigned, a *withernam* against plaintiff; for if the property or taking be in question, there is no reason that plaintiff should have defendant's cattle. 1 *Ld. Raym.* 614.

The *withernam* is but *MANS PROCESS*, and cannot be on execution, because it is granted before judgment. 1 *Ld. Raym.* 614. and see *Comb.* 201. *Salk.* 582.

6. Of the writ of second deliverance, and the writ De proprietate probanda.

At Common law, if plaintiff in replevin had been nonsuited either before or after verdict, defendant who distrained should have had return, but not irreplevisable; so as plaintiff after nonsuit might have had as many replevins as he would, which was vexatious and mischievous; for remedy whereof the act of *Westm. 2. cap. 2.* restrains plaintiff from any more replevins after nonsuit, but gives a writ of second deliverance. 2 *Inst.* 340.

And if in such writ of second deliverance plaintiff be nonsuited, or if the plea be discontinued, or the writ abates, or if he prevails not in his suit, returns irrepleviable shall be granted. 2 *Inst.* 341.

If defendant in replevin has return awarded on nonsuit of plaintiff, on which he sues a writ de *retorno habendo*, upon which writ the sheriff returns *averia elongata per quarentem*, and on this a *withernam* is awarded, and on the *withernam* defendant has *tot catalla* to him delivered of the goods of plaintiff, and thereupon plaintiff sues a second deliverance; he shall sue it for the first distress taken, not for the *withernam*; and this by the nature and form of the writ of second deliverance. 2 *Roll Abr.* 435.

If a *retorno habendo* be awarded to sheriff after a writ of second deliverance prayed by plaintiff, this is a *superfedeas* to the *retorno habendo*, and closes the sheriff's hand from making any return thereto; and if the sheriff will not execute the writ of second deliverance, the party has his remedy against him. *Dyer* 41. *Dalt. Sb.* 275.

This statute of *Westm. 2.* gives the writ of second deliverance out of the same court where the first replevin was granted, and a man cannot have it elsewhere; for if he may, then he shall vary from the place limited as to this by the statute. *Plowd.* 206.

In replevin defendant avowed, that plaintiff being nonsuited brought a writ of second deliverance, whereupon it was moved to stay the writ of inquiry of damages; *Et per curiam*, This is a *superfedeas* to the *retorno habendo*, but not to the writ of inquiry of damages; for these damages are not for the thing avowed for, but are given by 21 *H. 8. c. 19.* As a compensation for the expense and trouble the avowant has been at. 1 *Salk.* 95. and like point adjudged, *Palm.* 403. *Latch* 72.

Error of a judgment in *C. B.* in a second deliverance; on demurrer in pleading the error assigned was, because there was not any writ of second deliverance certified, and in *nullo est erratum* being pleaded, it was moved not to be material, because it is awarded on the roll, and the parties had appeared and pleaded to it; but it was adjudged ill, and reversed for that cause; for there ought to be a writ, and if it vary from the declaration in the replevin, it shall be abated. *Cro. Jac.* 424.

No second deliverance lies after a judgment on a demurrer, or after verdict, or confession of the avowry; but in all these cases the judgment must be entered with a return irreplevisable; but on a nonsuit, either before or after evidence, a second deliverance will lie, because there is no determination of the matter, and there a writ of second deliverance lies to bring the matter in question; but in the case of demurrer and verdict the matter is determined by confession of the party. 2 *Lill. Reg.* 457.

If plaintiff's writ abates, he may have a new writ, and is not put to his writ of second deliverance. *Cum.* 122.

If plaintiff in replevin be nonsuited for want of delivering a declaration, if it happened thro' any cause which would have entitled him to a writ of second deliverance,

as sickness of the person employed, &c. the court will order defendant to accept a declaration on payment of costs; otherwise plaintiff would be remediless, the writ of second deliverance being taken away by the 17 *Car. 2. c. 7.* 1 *Fent.* 64. See *Avowry*.

If defendant in replevin claims property, the sheriff cannot proceed; for PROPERTY MUST BE TRIED BY WRIT; and in this case plaintiff may have the writ de *propriestate probanda* to the sheriff; and if it be found for plaintiff, then the sheriff is to make deliverance; if for defendant, then he is to proceed no further; but as this is but an inquest of office, if it be found against plaintiff, he may have a replevin to the sheriff; and if he return the claim of property, yet shall it proceed in the *C. B.* where the property shall be put in issue and finally tried. *Co. Litt.* 145. b. *F. N. B.* 77. *Dier* 173. *Cum* 592.

None but he who is party to the replevin shall have the writ de *propriestate probanda*; so that if on a replevin the beasts of a stranger are delivered to plaintiff, such stranger being no party to the replevin, shall not have this writ. 14 *Hen. 4. 25.* 2 *Roll. Abr.* 431.

The sheriff is to return the claim of property on the *pluries*, before which time the writ de *propriestate probanda* does not issue, for it recites the *pluries*. *Reg.* 83. *Cum.* 595.

The writ de *propriestate probanda* is an inquest of office, and the sheriff is to give notice to the parties of the time and place of executing it. *Dalt. Sb.* 274.

If defendant claims property in replevin, plaintiff may have the writ de *propriestate probanda* without continuance of the replevin, tho' it be two or three years after, because by claim of property the first suit is determined. *M. or* 403.

If the party who hath the cattle claims property, the sheriff cannot determine it without a writ de *propriestate probanda*; and then if the property be found for the party claiming, it is but an inquest of office, and the party who made the plaint may after sue a writ of replevin, to which property may again be pleaded. 7 *H. 4. 46.* *Cum.* 594.

If plaintiff has property, and omits to claim it before the sheriff, he may notwithstanding plead property in himself or in a stranger, either in abatement or in bar, tho' it was formerly held, that property in a stranger could only be pleaded in abatement. *Cro. Eliz.* 475. *Winch.* 26. 1 *Show.* 402. *Salk.* 5, 94. 6 *Mod.* 81.

In replevin defendant in his avowry pleads, that the beasts taken belong to a third person, and not to plaintiff, therefore prays a return; to which plaintiff demurs; for on avowant's own shewing he ought not to have return, having admitted the property of the beasts to be in another; but judgment was given for defendant, for the prior possession was in him, and he hath a right against all others but the right owner, and plaintiff by his demurrer hath admitted, that he hath no property in them. *Comb.* 477. See 6 *Mod.* 68, 139. And 2 *Mod.* 242.

7. Of the writ de retorno habendo; of returns irreplevisable, and in what manner the sheriff is to return and execute such process.

The *retorno habendo* is a judicial writ, which lies for him who has avowed the distress, and proved the same to be lawfully taken; or where on removal of the plaint into the courts above, plaintiff, whose cattle were replevied, makes default, or does not declare or prosecute his action; and thereby becomes nonsuited, &c. and by this writ the sheriff is commanded to make a return of the cattle to defendant in the replevin. 35 *Hen. 6. 40.* *Dyer* 280. *Co. Litt.* 145.

A bailiff who makes conveyance may have judgment of a return, and consequently a writ de *retorno habendo* grounded on such judgment. *Ch. Ent.* 59.

The writ de *retorno habendo* is not a returnable process. 2 *Roll. Abr.* 431.

If defendant hath a return awarded him, and he sueth a writ de *retorno habendo*, and the sheriff return on the *pluries*, *quod averia elongata sunt*, &c. he shall have a *scire facias* against the pledges, &c. According to the statute of *Westm. 2.* and if they have nothing, then they shall have a *withernam* against plaintiff of plaintiff's own cattle. *F. N. B.* 172.

Return irreplevifable is a judicial writ directed to the sheriff for the FINAL RESTITUTION or return of cattle unjustly taken by another, and so found by verdict, or after a nonsuit in a second deliverance. 2 Roll. Abr. 434.

If the plea be to the writ, or any other plea be tried by verdict, or judged on demurrer, return irreplevifable shall be awarded, and no new replevin shall be granted, nor any second deliverance by the act of Westm. 2. but only on nonsuit. 2 Inst. 340. Dyer 280.

If on issue joined in replevin plaintiff does not appear on the trial, being called for that purpose, yet return irreplevifable shall not be awarded, as in case of a verdict's being given, but the party may have a writ of second deliverance, as well as if it had been a nonsuit before declaration, or appearance. 3 Leon. 49.

If a man has return irreplevifable, and a beast die in the pound, he may distrain a-new; so if the beast die before judgment. Hob 61.

If return irreplevifable be awarded, the owner of the cattle may offer the arrears; and if defendant refuses to deliver the distress, plaintiff may have detinue, because the distress is only in nature of a pledge. 1 Ld. Raym. 720.

By the statute of Westm. 1. cap. 17. If the party who distrains, conveys the distress into any house, park, castle or other place of strength, and refuses to suffer them to be replevied, the sheriff may take the posse com. and on request and refusal break open such house, castle, &c. and make deliverance; and this was a necessary law so soon after the irregular time of Hen. 3. 2 Inst. 193. 5 Co. 93. Dalt. Sh. 373.

If the sheriff returns, that the beasts are inclosed in a park among savages, or inclosed in a castle, &c. he shall be amerced, and another writ of replevin shall be awarded; for he ought to have taken the posse com. for this was a denial. F. N. B. 257.

If the sheriff return, quod mandavi ballivo libertatis, &c. qui nullum dedit mihi responsum, or that the bailiff will not make deliverance of the cattle, these are not good returns; for by statute of West. 1. the sheriff on such return made to him by the bailiff, ought presently to enter into the franchise, and make deliverance of the cattle taken. F. N. B. 157.

If a man sue a replevin in the county court without writ, and the bailiff return to the sheriff, that he cannot have view of the cattle to deliver them, the sheriff by inquest of office ought to inquire into the truth thereof, and if it be found by a jury, that the cattle are cloigned, &c. the sheriff in the county court may award a withernam to take defendant's cattle; and if the sheriff will not award a withernam, then plaintiff may have a writ out of Chancery directed to the sheriff rehearing the whole matter, commanding him to award a withernam, &c. and he may have an alias, and after a pluries, and an attachment against the sheriff, if he will not execute the King's command F. N. B. 158.

If the sheriff return, quod averia elongata ad loca incognita, this is a good return, and the party must pursue his writ of withernam; but if the sheriff return averia elongata ad loca incognita INFRA COMITATUM MEUM, he shall be amerced, for the law intends that he may have notice in his county. Bro. Retur. de Br. pl. 100.

If in replevin the sheriff return, quod averia mortua sunt, that is a good return. Bro. Retur. de Br. pl. 125.

It is a good return, quod nullus venit ex parte querentis ad demonstranda averia; but it seems the sheriff is not obliged to require this. Dalt. Sh. 556. Allen. 33.

If the sheriff be shewn a stranger's goods, and he takes them, an action of trespass lies against him, for otherwise he could have no remedy; for being a stranger he cannot have the writ de proprietate probanda, and were he not intitled to this remedy, it would be in the power of the sheriff to strip a man's house of all his goods; but Kelw. seems to hold, that the action lies more properly against the person who shews the goods. 2 Roll. Abr. 552. Cum. 596.

The sheriff comes to make replevin of beasts impounded in another man's soil; if the place be inclosed, and has a gate open to the inclosure, he cannot break the inclosure,

and enter thereby, when he may enter by the open gate; but if the owner hinders him, so that he cannot go by the open gate for fear of death, he may break the inclosure, and enter there. 20 H. 6. 28. 2 Roll. Abr. 532.

The sheriff is to return, that the cattle are cloigned, or that no person came to shew, &c. or a delivery; but he cannot return, that the defendant non cepit the cattle, because it is supposed in the writ, and is the ground of it, which the sheriff cannot falsify. 1 Ld. Raym. 613. 1 Lutw. 581. See Avoiry, Distress.

And for more learning concerning Replevin, see 4 New Abr. and 18 Vin. Abr. tit. Replevin, and Black. Com. 3 V. 13, 145, 170.

A plaint entered in replevin.

A. B. complains against C. D. of his beasts unjustly taken in his house, (or his freehold) in, &c.

Pledges, &c.

Form of a writ of replevin, or replegiare de averiis.

GEORGE the Third, &c. We command you, that A. B. justly and without delay you cause to be replevied to A. B. his beasts which C. D. took, and unjustly detaineth, as is said; and after do you cause justly to be done to him, &c. that we may hear no more clamor for defect of justice, &c.

Replevy. Tenants having their goods taken as a distress for rent, are to replevy them in five days, or they may be appraised and sold, by Stat. 2 W. & M. sess. 1. c. 5.

Where are any goods are sold, if property is claimed in them, and notwithstanding the party doth replevy, trespass will lie, &c. Mod. Caf. 69. 2 Lill. 459.

To replevy is used for the bailing a man. Stat. Westm. 1. c. 11. Vide Homine Replegiando.

Replevish, Signifies to let one to mainprise on surety.

Replication, (replicatio) Is an exception or answer made by plaintiff to defendant's plea: And it is also that which the complainant replies to the defendant's answer in Chancery, &c. West's Symb. par. 2.

The replication is to contain certainty, and not vary from the declaration, but must pursue and maintain the cause of plaintiff's action; otherwise it will be a departure in pleading, and going to another matter. 1 Inst. 304. Tho' as a faulty bar may be made good by the replication; so sometimes a replication is made good by a rejoinder; but if it wants substance, a rejoinder can never help it. 2 Lill. Abr. 462. A replication being entire, and ill in part, is ill in the whole: But if there be three replications, and one is superfluous, and the other two sufficient, and defendant demurs generally, plaintiff may have judgment on those which are sufficient. 1 Saund. 338. 2 Saund. 17.

Where defendant pleads in bar, and plaintiff replies insufficiently; if defendant demurs specially on the replication, and the bar is insufficient, if the action be of such a nature that a title is set forth in the declaration or count, as in a formedon, &c. judgment may be given for plaintiff on the insufficient bar of defendant: And where the title doth not appear till set forth in the replication, and that is insufficient, there judgment shall be had for defendant for the ill replication. Godb. 198. 1 Leon. 75. 3 Nelf. Abr. 133.

If the bar is naught, and the replication likewise, plaintiff shall never have judgment; So if there is a variance between the declaration and the replication, tho' there be a verdict, &c. Hob. 13. Style 356.

Replication concludes either with hoc paratus est verificari, or to the country. In action on a bond to pay all sums expended about certain business, &c. on defendant's pleading he paid all; plaintiff replies that he had not, et hoc paratus, &c. Upon a demurrer it was held plaintiff ought to have concluded to the country; because there is an affirmative and negative, and if he might be

be admitted to *aver* his replication thus, there would be no end in pleading. *Keyn. 98.*

But where new matter is offered in a replication, plaintiff should aver his plea, so as to give defendant an opportunity to reply. *4 Mod. 285. Lucas, 98.*

Replication in criminal cases. See *Calveris*, and *Black. Com. 4 P. 223.*

Report, (from the Lat. *reportare*) is a public relation, or bringing again to memory, of cases judicially adjudged in courts of justice, with the reasons as delivered by the judges. *Co. Litt. 293.*

There are likewise reports, when the court of Chancery, or other court, refer the trying some case, &c. to a Master of Chancery, or other referee, his certificate therein is called a Report: On which the court makes an absolute order. *Pratt's Sols. 67.*

A Master in Chancery, having an order of reference, is to issue his summons for the parties to attend him at a certain time and place; when and where they may come with their counsel, clerk or solicitor, to defend themselves, and maintain, or object, against his Report, or certificate, &c. And Masters are to draw their Reports briefly and as succinctly as may be, *preserving the matter clearly for the judgment of the court*; without recital of the several points of the order of reference, or the debates of counsel before them; *unless in cases doubtful*, when they may shortly represent the reasons which induce them to what they do. *Ibid.*

Reports and certificates of Masters in Chancery are to be filed with the register in four days after the making and signing; and to be confirmed by the court, to which exceptions may be made, &c.

None shall take any money for Report of an order, or cause referred to them by any judges, on pain of 5*l.* &c. so as not to prohibit the clerk from taking 1*2d.* for the first, and 2*d.* for every other sheet. *Stat. 1 Jac. 1. cap. 10.* But Masters in Chancery, may take for every Report or certificate, made on an order on hearing of a cause 20*s.* And for any other Report, &c. made on petition or motion 10*s.* And their clerks shall have 5*s.* for writing every Report; by 13 Car. 2. *Vide Reference.*

A Report by a Master in Chancery, is as a judgment of the court. *1 Wms's Rep. 653.*

By a standing order of the court of Chancery, made by the Lords Commissioners in the 4 W. & M. it was directed, That all Reports should be filed within four days after the making, otherwise no decrees or proceedings to be had thereupon; but the Register reporting, that it was sufficient if the Report were filed before any proceedings had thereupon, tho' not done within four days after making, Ed. C. J. King agreed thereto. And the court took it to be well enough, tho' in this case the motion to confirm the report *was made the same day that the Report was filed.* *2 Wms's Rep. 517.*

It is not usual to confirm Reports of Receiver's accounts, per Master of the Rolls. *2 Wms's Rep. 661.*

Reposition of the forest, (*repolitio foreste*), i. e. a putting to) Was a statute whereby certain forest-grounds being made parkland on view, were by a second view put to the forest again. *Madox. par. 1.*

Repository, (*Lat.*) A northhouse or place wherein things are kept; also a warehouse. *3 Cr. 55.*

Representation, (*representatio*) is personating another: There is an heir by representation, where a child dies in the life of the grandfather, leaving a son, who shall inherit his grandfather's estate, before the father's brother, &c. *Bro. Abr. 103.* Also executors represent the person of the testator, to receive money and debts. *Co. Litt. 209.*

Reprisal, (from the Fr. *repris*, tho' *Black. Com.* takes it from *repraesentare*) signifies to take back or demand a prisoner from the execution, and proceeding of law for the time. *Town. & Keyn.* Every judge who hath power to order execution, hath power to grant a reprisal, and execution is often made on a reprisal of a man's person. But no prisoner convicted of any felony, on which he cannot have his clergy, at the discretion of the Court may be taken by a reprisal; &c. *Black. Com.* he may be taken in the sessions; and reprisals are not to be granted unless without the King's express command, and by order of any

justice of gaol delivery. *Kel. 4. 2 Hawk. P. C. 463; Wood's Inst. 64.*

If a woman is condemned for treason or felony, and is found by an inquest or jury of matrons impeached by the sheriff, &c. to be *quick with child*, execution shall be respited, and the woman reprieved till her delivery; tho' she shall take this favour but once; and cannot save herself by this means from pleading on her arraignments nor from having judgment pronounced against her on conviction. *3 P. C. 198. H. P. C. 278. Finch 478.*

Where it is found by a jury of women, that a woman convicted of felony, is *with child*, some judges have respited her execution till a convenient time, i. e. a month after her delivery, then to be executed, but this is irregular, for she may have a pardon to plead, therefore to be reprieved till the next sessions. *12 Aff. 10. 1 Hale's Hist. P. C. 368, 369. See Pregnancy, and Black. Com. 4 P. 387.*

Reprisal, (*reprisale*, or *reprisalia*) is taking one thing in satisfaction for another, derived from the Fr. *repris*; and is all one in the Common and Civil law.

Hen. IV. enacted, That application be made to the Keeper of the Privy Seal, by persons injured in the loss of shipping at sea, contrary to treaties, &c. on evidence shown, he shall sign letters of request to demand restitution and reparation; which if not made in convenient time, the Lord Chancellor is to grant letters of reprisal, to obtain the same by force, and for the indemnity of the persons interested: And this is confirmed by the Stat. 4 H. 5. c. 7.

Reprisals are ordinary and extraordinary; ordinary reprisals are to arrest and take the goods of merchant strangers within the realm; and the other is for satisfaction out of the realm, and is under the Great Seal, &c. *Len Mon. 120.*

If any person be killed, wounded, spoiled, or any ways damaged in a hostile manner, in the territories of any potentate, to whom letters of request are transmitted, and no satisfaction be made, there is no necessity to resort to the ordinary prosecution, but letters of reprisal issue forth; and the Prince against whom the same are issued, is obliged to make satisfaction out of the estates of the persons committing the injuries; and in case of a deficiency there, it will then be adjudged a common debt on his country. But where misfortunes happen to persons, or their goods, residing in a foreign country in time of war, reprisals are not to be granted: In this case they must be contented to sit down under the loss, for they are at their liberty to relinquish the place on the approach of the enemy, when they foresee the country is subject to spoil; and if they continue, they must partake of the common calamity. *Lex Mercat. or Merch. Customs 174. 175.*

Reprisals may be granted on illegal prosecutions abroad; where wrong judgment is given in matters not doubtful, which might have been redressed either by the ordinary or extraordinary power of the country or place, and which was apparently denied, &c. See *Letters of Marque*, and *Black. Com. 1 P. 258.* And as to Reprisal of Goods, see *Reprisals*, and *Black. Com. 3 P. 4.*

Requies, (*Fr. requiescens*, or a taking back) is used for deductions and payments out of a manor or lands, as rent-charges, annuities, &c. Therefore when we speak of the clear yearly value of a manor or estate or land, we say it is so much per annum *ante requies*, besides all requies.

Republishing of wills. See *Will*, and *Black. Com. 3 P. 370, 301.*

Rescission, (*rescissio*) is what is contrary to any thing laid before. And rescission is made, grants, indentments, charters, &c. made them void. *3 Nels. 132.*

The common law abhors contingencies and all incongruities; but the former part of a deed, &c. shall stand, when the latter part is repugnant to it. *Jenk. Cent. 251.*

Residue, (*residuum*) are in several parts of deeds or wills, &c. and shall stand; in wills, the last. If the residue be not made unattachable. *Jenk. 59. H. 10.*

In contracts, gifts, verdicts, evidence, &c. where direct contraries are for the same thing at the same time, all is void. *Jess. 96. 91. 86.*

A. made B. and C. executors, provided that C. shall not administer his goods. B. and C. brought debt on bond as executors. It was held that the action was well brought; for the *proviso* is void. *D. 3. 3. 4. pt. 7. Cr.*

A. gives lands to B. in tail, provided A. shall take the profits of part for 1000 years; the *proviso* is void; for in common presumption it takes away the benefit and interest of the grantee in that parcel. *Cr. Eliz. 35.*

An award, that each shall give the other a general release within four days after the award; *proviso* that if either disliked the award within 10 days after made, and should pay to the other within the said 20 days 10s. that then the arbitrement should be void, the *proviso* is *repugnant*, and judgment for plaintiff. *Cr. B. 291.*

A *proviso* good in the commencement may by consequence become *repugnant*, as grant of rent by deed for life, provided that it shall not charge his person; the *proviso* is good, but if the rent be arrear, and the grantee die, his executors shall charge the person of the grantor in debt; for otherwise they be remediless; and so 'tis now *repugnant*, by consequence void. *6 Rep. 41. 3. See Black. Com. 2 P. 156.*

Reputation, (*reputatio*) Is defined by Sir Edw. Coke to be *vulgaris opinio solita et vitiosa*; and he tells us, that *vulgaris opinio est duplex, viz. Una orta inter graves & discretos & quæ vulgum veritatis habet; altera orta inter leves & vulgares homines absque specie veritatis.* *4 Rep. 104.* That is not reputation which this or that man says; but that which generally hath been, and many men have said or thought. *1 Loh. 15.*

A little time is sufficient for gaining Reputation, which needs not a very ancient pedigree to establish it; for general acceptance will produce a Reputation. *2 Cro. 308.* But it has been held, that common Reputation cannot be intended of an opinion which is conceived of four or five years standing; but of long time. *2 Lill. Abr. 464.* And some special matter must be averred to induce a Reputation. *Ibid.*

Land may be *reputative* parcel of a manor; tho' not really so. *1 Feur. 51. 2 Mod. 69. 3 Nels. Abr. 137.* And there is a parish, and office in Reputation, &c.

Reputation of Name, Is under the protection of the law, as all persons have an interest in their good name; and scandal and defamation are injurious to it; tho' defamatory words are not actionable, otherwise than as they are a damage to the estate of the person injured. *Will. 3. 37.*

The security of Reputation or good name from the arts of detraction and slander, are rights to which every man is intitled, by reason and natural justice; Right without which it is impossible to have the perfect enjoyment of any other advantage or right. *Black. Com. 1 P. 134.*

Request, q' things se de done: Where one is to do a collateral thing, agreed on making a contract, there ought to be a request to do it. *2 Lill. Abr. 464.* If a duty is due, it is payable without request; on promise to pay a duty precedent on request, there needs no actual request; but on a promise for a penalty or collateral sum, there should be an actual request before the action is brought. *Cr. Eliz. 74. 1 Sams. 33. 1 Loh. 289.*

If a debt is before a promise, a request is not necessary, for then a request is not any cause of the action; tho' a promise generally to pay on request, the action lies on request, and not before. *Cr. Jac. 201. 1 Loh. 28.*

Action of debt, for money due on a bond, may be brought without alledging a special request; and if the action is for debt, not appointed to be paid on request, there needs no special request to be laid in the declaration; otherwise if it is of a thing collateral. *Cr. Eliz. 129. 523.*

A man promises to re-deliver on request, such goods as were delivered to him; if an action of detinue is brought, plaintiff need not alledge a special request, because the action is for the thing itself. But if an action of the case is had for these goods, then the request must be specially alledged; as it is not brought for the thing itself, but for damages. *Sid. 66. 3 Salk. 309.*

If a promise is made to pay money to plaintiff on request, no special request is required; But where there are mutual promises between two persons to pay each other money on request, if they do not perform such an award, the request is to be specially alledged. And if there is a promise to pay money to a man on request, and he dies before any request made, it shall be paid to his executors; but not till request made. *3 Salk. 309. 3 Buss. 259.*

When a person promises to pay a precedent duty, the general allegation *hinc sequitur request* is sufficient, because there was a duty without a promise: As for instance; If one buys or borrows a horse, and promises to pay so much on Request: But where the promise is collateral, as to pay the debt of a stranger on Request, &c. the Request is part of the agreement, and *traversable*, there being no duty before the promise made; and for that reason the Request must be specially alledged, for bringing the action will not be a sufficient Request. *Lamb 93. 3 Loh. 260. 1 Sams. 35. 3 Salk. 308.*

If a debt or duty arises either on bond or contract, *hinc sequitur request* is good; contra where it becomes a duty by the Request itself, when it is to be alledged specially. *3 Nels. Abr. 144.*

It has been adjudged, that where the thing is a duty before any request made, a Request is only alledged to aggravate damages, and such Request is not *traversable*; but if the Request makes the duty, as in *assumpsit* to do such a thing on Request, there the duty, &c. of the Request ought to be alledged, because it is *traversable*. *Palm. 389.*

An *assumpsit* to do a thing on Request, a Request must be alledged; and a special Request must be laid to be made such a day, at such a place; where the duty is not on bond, &c. If a Request is to be specially made, the day and year when made should be specially alledged. *1 Loh. 231. 2 Lill. Abr. 466. Cr. Gar. 280.* But where a person is not restrained to make the Request by a time limited, if made at any time during his life, it has been held to be good. *Cr. Eliz. 136.* And a Request at any other time than named may be given in evidence. *Sid. 268.*

Defendant pleaded the statute of limitations in an action on a promise to pay so much money on Request, &c. And on demurrer, plaintiff had judgment; for tho' the promise was within the statute, yet the duty was not, being no duty till the request was made, and the action being then brought within time after the breach, it is good. *Cr. Gar. 98.*

At a trial, defendant would have plaintiff to prove the Request; but it was ruled that he need not; for not being traversed in the plea, it is admitted. *1 Lev. 166.*

In a special action on the case for keeping a passage stopp'd up, so that plaintiff could not come and cleanse his gutter, &c. after verdict for plaintiff, it was objected in arrest of judgment, that plaintiff ought to have set forth a Request to defendant to open the passage; and this was held a good objection after demurrer, but not after verdict. *1 Mod. 27.*

Unreasonable Requests are not regarded in law; and there is no difference where a thing is to be done on Request, and reasonable Request. *Dyer 218. Cr. Gar. 176. 3 Nels. Abr. 140. 142.*

Request, (court of) The place where held being antiently called *Camera Alba*, is taken away by act of parliament. See Court of Requests.

Here Causer, Writs shall be delivered in the fall, or next county. Stat. 2 Ed. 3. cap. 5. *Vide Rier County.*

Request, (*compelle*) Is an admission or receiving of a third person to plead his right in a cause formerly commenced between two other persons; as where an action is brought against tenant for life or years, or any other particular tenant, and he makes default, in such case he is in *request* may move that he may be received to defend his right, and to plead with defendant.

Request is likewise applied to the admittance of a plea, where the controversy is between the same two persons. *Dyer 203. Cr. Eliz. 194. Nels. 3 Abr. 246.*

It is a reversion may come into court, and may to be returned in a suit against his particular tenant; and after such return the business shall be hastened, as much as may be by law, without any delay of either side. *Stat. 13 R. 2. cap.*

rep. 17. And it is said a wife shall be received, in the fault of her husband, &c. *2 Litt. Abr. 467.* But *rescui* is admitted only for them who have estates depending on particular estates for life, tenants by the curtesy, or other possibility, &c. and not for him in remainder after an estate tail, which is perdisseable. *1 And. 133.*

Husband and wife were tenants for life, remainder to another in fee; a *formosa* was brought against the husband, who made default after default; and thereupon the wife prayed that she might be received to defend her right; but it was denied by the court; because if defendant should recover against her husband, it would not bar her right if she survived him, therefore it would be to no purpose. Then he in remainder prayed to be received, which at first the court doubted; by reason if the husband should recover, he might falsify such recovery; and because his estate did not depend on the estate of the husband alone, but on the estate of the husband and wife; but at last he was received. *1 Kent. 46.*

The statute of *Gloucester* enacts, that a tervor may be received to falsify, if he hath a deed, and comes before judgment; this is where he is reversion causes himself to be impleaded, by collusion, to make the tervor lose his term, &c. *6 Ed. 2. cap. 11.* And if any stranger come in by a collateral title, before he is received, he shall find surety to satisfy the demandant the value of the lands if he recovers from that time till final judgment; and demandant recovering, he shall be grievously amerced, &c. by Stat. 20 Ed. 1.

Receit of Homage. (*Receptio Homagii*) The lord's receiving homage of his tenant, at his admission to the land. *Kitch. 148.*

Releious or Reloue. (*Relasus*, from the French *releuse*, i. e. liberatio) Is a resistance against lawful authority.

1. Of the different kinds of rescues, &c.
2. Of the offence of making a rescue, and how the offenders are to be proceeded against, and punished.
3. Of the form of the proceedings in a rescue.
4. In what cases the sheriff may return a *rescue*, of the form of the return, and for what defects it may be quashed.

1. Of the different kinds of rescues, &c.

If a bailiff, or other officer, on a writ arrest a man, and others by violence take him away, or procure his escape; this is a *rescue in viâ*. So if one distress another for damage feasant, in his ground, as he drives them in the highway towards the pound, they enter into the owner's house, and he withholds them there, and will not deliver them on demand, this is *rescue in viâ*. *1 R. 2. c. 11.* *Co. Lit. lib. 2. cap. 12.* *Gloucester* is his word *De Causa* *factud. Burg. f. 294.* hath the same words coupled with *resistentia*. It is also used for a writ which lies for this fact called *Breve de rescussa*, whereby you may sue both the form and use in *E. N. B. 101.* *Reg. of Wills. 115.* and *New Book of Entries, verb. Rescussa*. This is false cases, in matters relating to treason, is *rescue*; and in matters concerning felony, is *felony*. *Chap. 308. 14. Cowell.*

Refus is the taking away and taking of liberty against law any distress taken for rent, or services, or damage feasant; but the more general notion of *refus* is, *resistentia* *proving another from an arrest or legal commitment*, which being a high offence, subjects the offender not only to an action at the suit of the party injured, but likewise to fine and imprisonment at the will of the King. *Co. Lit. 150.* *E. N. 101.*

If a man distrain cattle, and as he is driving them to the pound they go into the owner's house, and he refuses to deliver them, this is *refus* at law. *1 R. 2. c. 11.*

But here there can be no rescue but where the party has had the actual possession of the goods or other things whereof the rescue is supposed to be made; for if a man come to arrest another, or to distress, and is disturbed, regularly *refus* is not made. *1 R. 2. c. 11.* *Co. Lit. 161. a.* *Lit. Rep. 106.* *Hall. 145.*

If on a *A. B.* the sheriff's bailiffs come to take away by a stranger, this is *refus* at law. *1 R. 2. c. 11.* *Co. Lit. 161. a.* *Lit. Rep. 106.* *Hall. 145.*

or *refus* for them; also the party injured may have an action on the case against the wrong-doer. *Hall. 145.* *Lit. Rep. 106.*

If on a *fi. fac.* the sheriff returned that he had seized the goods, but that they were rescued by B. and C. *Co. Lit. 161. a.* *Lit. Rep. 106.* *Hall. 145.* *Lit. Rep. 106.*

If the lord distrain for rent when none is due, the tenant may lawfully make *refus*; so may a stranger, if his beasts be distrained when no rent is due. So if the tenant distrain the rent when the lord comes to distrain, and yet he does not distrain, or if he distrain any thing not distrainable, as beasts of the plough, when other sufficient distress may be taken, the tenant may make *refus*; so if the lord distrain in the highway or out of his fee. *Co. Lit. 161. a.* *Lit. Rep. 106.* *Hall. 145.*

But tho' there must be reason for the distress, and that otherwise the rescue cannot be unlawful; yet it hath been held in a *parce plein*, that defendant cannot justify breaking the pound, and taking out the cattle, tho' the distress was without cause, because they are now in the actual custody of the law. *Salt. 247.*

There is a difference between a man's being arrested by a warrant on record, and by a general authority in law; for if a *capias* be awarded to the sheriff to arrest a man for felony, tho' he be innocent, he cannot make rescue; but if a sheriff will by the general authority committed to him by law arrest any man for felony, if he be innocent he may refuse himself. *Co. Lit. 161. a.* *Salt. 247.* *Co. 68.* *Co. 11.* *Cro. Jac. 485.*

2. Of the offence of making a rescue, and how the offenders are to be proceeded against, and punished.

It is agreed, that the rescuing a person imprisoned for felony, is also felony by the Common law. *1 Hal. Hist. P. C. 606.*

Also it is agreed, that a stranger who rescues a person committed for, and guilty of high treason, knowing him to be so, is in all cases guilty of high treason. *Statute P. C. 11. 1 Jac. 455.* Whether he knew that the prisoners were so committed or not. *1 Cro. Car. 583.*

To make a rescue felony, it is necessary that the felon be in custody, or under arrest for felony; therefore if A. murder B. at night, whereby the felon escapes, the town-ship shall be amerced for the escape, and A. shall be fined for the hindrance of his taking; but it is not felony in A. to make the felon escape. *1 Hal. Hist. P. C. 606.* *1 B. 2. Coron. 355.* *Statute 31.*

To make a rescue felony, the party rescued must be under custody for felony, or suspicion of felony; and it is all one whether he be in custody for that account by a private person, or by an officer, or warrant of a judge; for where the arrest of a felon is lawful, the rescue by him is felony; but it seems necessary that he should have knowledge that the person is under arrest for felony, if he be in the custody of a private person. *1 Hal. Hist. P. C. 606.*

But if he be in custody of an officer, there, as he will, he is to take notice of it; so if there be felons in a prison, and A. not knowing it, breaks the prison, and lets out the prisoners, tho' he knew not that there were felons there, it is felony. *1 Hal. Hist. P. C. 606.* *Cro. Car. 583.*

A person committed for high treason, who breaks the prison, and escapes, is guilty of felony, unless he lets others also escape, when he knows he is committed for high treason, in which case he is guilty of high treason, not in respect of his own breaking of prison, but of the rescue of the others. *1 B. 2. P. C. 140.*

If the person rescued were indicted or attainted of felony, the rescue is felony, tho' the escape or rescue of such a person is not felony. *1 Hal. Hist. P. C. 599.*

It is agreed, that the imprisonment is so far grounded on necessity, that the breaking of a prison is occasioned by such necessity, that the party himself breaking prison, is not guilty by the Common law, or by the statute *De fractura prisonis*, saved from the penalty of a capital offender,

tender, a stranger who rescues him from such imprisonment is in like manner also excused; *2 Hawk. P. C. 139.*

The return of a rescue of a felon, by the sheriff against A. is not sufficient to put him to answer for it as a felony, without indictment or presentment, by the assizes; *Ed. 3. c. 4. 1 Hal. Hist. P. C. 606.*

As in case of an escape, so in case of a rescue, if the party rescued be imprisoned for felony, and rescued before indictment, the indictment must *surmise a felony done, as well as an imprisonment for felony or fugition thereof*; but if the party be indicted, and taken by a *capias*, and rescued, then there needs only a recital that he was indicted *prout*, and taken and rescued. *1 Hal. P. C. 607.*

But tho' the rescuer may be indicted *before the principal is convicted* and attainted, yet he shall not be arraigned or tried *before* the principal be attainted; but if the person rescued were imprisoned for high treason, the rescuer may immediately be arraigned, for in high treason all are principals; also it seems that he may be immediately proceeded against for a misprison only, if the King please. *2 Hawk. P. C. 140.*

The rescuer of a prisoner for felony, tho' not within clergy, yet shall have his clergy. *1 Hal. Hist. P. C. 607.*

By the 6 Geo. 1. cap. 23. *sec. 5.* If any person rescue felons ordered for transportation, or assist them in making their escape, he shall be guilty of felony, and suffer death without benefit of clergy. See also 9 Geo. 1. c. 28.

As the offence of rescuing persons in cases of treason and felony is usually punished by indictment, so the offence of rescuing a person arrested on mesne process, or in execution after judgment, subjects the offender to a writ of rescous or a general action of trespass *vi et armis*, or an action on the case, in all which damages are recoverable. Also it is the frequent practice of the courts to grant an attachment against such wrong-doers, it being the highest violence and contempt that can be offered to the process of the court. *Co. Lit. 161. Co. Ent. 614. Rast. Ent. 577.*

He who rescues a prisoner from any of the courts of Westminster-Hall without striking a blow, shall forfeit his goods and profits of his lands; and suffer imprisonment during life; but not lose his hand, because he did not strike. *22 Ed. 3. c. 13. 3 Inst. 141.*

It is clearly agreed, that for a rescous on mesne process the party injured may have either an action of trespass *vi et armis*, or an action on the case, in which he shall recover his debt and damages against the wrong-doer; and the rather, because on mesne process he can have no remedy against the sheriff. *Cro. Jac. 436. Hob. 180.*

Also it hath been adjudged, that for rescous of a person in execution on a *ca. fa.* or *ca. uita.* an action will lie against the rescuer, tho' the party injured hath his remedy against the sheriff, and the sheriff hath his remedy against the wrong-doer; for perhaps the sheriff may be dead or insolvent; but herein it hath been held, that if he bring his action against the party who made the rescue, he may plead it in bar to an action brought by the sheriff; so if against the sheriff or his bailiff, they may plead that he had satisfaction from the party, so that if he recovers against one, the other is discharged. *Rast. 95. Cro. Car. 109. Hutt. 98. Hob. 180.*

By the statute 2 W. & M. stat. 1. cap. 5. *sec. 5.* on pound-breach or rescous of goods distrained for rent, the person grieved shall in a special action on the case recover treble damages and costs against the offenders, or against the owners of the goods if they come to his aid.

In an action on the case for a rescous, on this statute, it hath been held, that plaintiff shall recover treble damages as well as treble damages; for the damages are not given by the statute but increased; an action on the case lying for a rescous at Common law. *1 Salt. 216.*

An attachment will be granted not only against a common person, but even against a peer of the realm, for rescuing a person arrested by due course of law; so that if the sheriff in any such return to the court, that a person arrested, or goods seized, or possession of lands delivered by him, by virtue of the King's writ, were rescued or violently taken from him, &c. they will award an at-

tachment against the rescuers. *Dyer 272. 2 Jon. 39. 40. 122.*

But it seems to be the practice, not to grant an attachment in any case for a rescous, unless the officer will return it; for it hath been found by experience, that officers will take on them to swear a rescous where they will not venture to return one. *2 Hawk. P. C. 139.*

A distinction was taken where an attachment is prayed for a rescous in the first instance, and where a rule to show cause is only asked; in the first instance of the fact are sufficient; in the other case the sheriff's return is requisite. *Wrin. & Geo. 2. in B. R. Young v. Papes.*

Where on the return of a rescue, an attachment is granted, and the party examined on interrogatories, upon answering them he shall be discharged; but if the rescous is returned to the phylaxer, and process of outlawry issues, and the rescuer is brought into court, he shall not be discharged on affidavits. *Salt. 386.*

3. Of the form of the proceedings on a rescue.

An indictment of a rescous ought to set forth the special circumstances of the fact with such certainty, as to enable defendant to make a proper defence. *Dyer 164. No defect can be aided by the verdict. 1 Rel. Abr. 781.*

Therefore, if an indictment lay the offence on an uncertain or impossible day, as where it lays it on a future day, or lays one and the same offence at different days, or lays it on such a day which makes the indictment repugnant to itself, it is void. *Moor 555. Rast. Ent. 263.*

It has been adjudged, on exception taken to an indictment for a rescous, that it was not necessary to allege the place where the rescue was made, and that it should be intended that where the arrest was, there also was the rescue without the word *ibidem*. *Cro. Jac. 345. 2 Bull. 208.*

An exception taken to an indictment of rescous, that it wanted the words of *et armis* or *manu fortis*, but overruled, it being held by the court, that the word *rescous* implies it to be done by force. *Cro. Jac. 345.* The same exception taken in *Cro. Jac. 473* overruled; and there held, that tho' it were error at Common law, yet it is made good by the statute 3 Hen. 8. c. 8. Vide *Cro. Jac. 472. Hunt's Case.*

It is said, that an indictment of rescous is not within the statute of additions, and that naming the person indicted of such a parish, without giving him any title, is sufficient. *1 Inst. 665. 2 Hawk. 84.*

Notes. On an indictment of rescous, if it were on an arrest upon mesne process, and the party has appeared, the court will be easily induced to quash it; for if it be on process out of an inferior court, tho' the party has not appeared, for no aid is given to higher jurisdiction.

In an action for a rescous plaintiff must allege in his declaration all the material circumstances; as that such a writ issued, that he was arrested, and in custody, and that he was rescued, &c. *Godb. 125. 1 Lutw. 130.*

In an action on the case for a rescous on mesne process, the evidence was, the bailiff stood at the street door, and sent his follower up three pair of stairs in disguise with the warrant, who laid hands on the party, and told him that he arrested him; but he with the help of some women got from the follower, and ran down stairs, and defendant hearing a noise came up, and put the party into a room, locked the door, and would not suffer the bailiff to enter. But disputed whether this was a lawful arrest, being by the bailiff's serving, and with his process; but said, that plaintiff must prove his cause of action against the party; that he must prove the writ and warrant by producing sworn copies of them; he must prove the manner of the arrest, that it may appear to the court to be legal, and that the party rescued was not lawfully taken; and that the party rescued was not lawfully taken, and that the party rescued was not lawfully taken, and that the party rescued was not lawfully taken, &c. *1 Inst. 111.*

Form of the writ of Rescous.

GEORGE the King, to the Sheriff of the County of Middlesex, greeting. We command thee, that thou cause to be returned to us, by the Sheriff of the County of Middlesex, the names of all persons who have rescued or violently taken from him, by virtue of the King's writ, were rescued or violently taken from him, &c. they will award an at-

church or King; or is entertained in the King's service. 6 Rep. 21. 1 Cro. 580.

In an information on the statute, it was adjudged that the parson is to live in the parsonage-house, and not in any other, tho' in the same parish. But as by stat. 13 Eliz. cap. 20. Leases made by parsons are declared void, where the parson is absent above eighty days in any one year, &c. On this act defendant pleaded to an agreement for tithes, that the parson was absent from his parsonage by the space of eighty days in one year; and the jury found that he dwelt in another town adjoining, and came constantly to his parish church four days in every week, and there read divine service; and it was held, that this was not such an absence as is intended by the statute to avoid any agreement or lease made by the parson. 1 Bull. 112.

A person allowed to have two benefices, may demise or lease one of them (on which he is non-resident) to his curate only; but if the curate leases over, such lease shall last no longer than during the curate's residence, without absence above forty days in any one year. 1 Leon. 100. See 1 Cro. 123. Some words in the act 13 Eliz. as to leases by parsons not resident, repealed, vide 14 Eliz. cap. 11.

An incumbent presented by the university to a recusant's living, shall lose it by 60 days absence in a year, 1 W. & M. c. 26. s. 6. See 19 Vin. Abr. tit. Residence, and see Non-residence. And Black. Com. 1 V. 390, 392.

Residuary Legatee. Is he to whom the residuum of the estate is left by will. And such legatee being made executor with others, shall retain against the rest: where there are two residuary legatees, and one dies intestate, his administrator shall have a moiety of the surplus of the personal estate of the testator, contrary to joint executors, who are not intitled to moieties; because by making them residuary legatees, the testator intended an equal share to both: And if a residuary legatee dies before the will is proved, his executor shall have administration, &c. 6 H. 7. 1 Chanc. Rep. 238. Show. 26. See Executor, and Black. Com. 2 V. 514.

Resignation; (Resignatio) Is the yielding up a benefice into the hands of the ordinary, called by the Canonists *Renunciatio*; and tho' it is all one in nature with the word *surrender*, yet it is by use restrained to yielding up a spiritual living to the bishop, as surrender is the giving up of temporal land into the hands of the lord. And a resignation may now be made into the hands of the King as well as the diocesan, because he has *supremam auctoritatem ecclesiasticam*, as the Pope had in ancient times; tho' it has been adjudged that a resignation ought to be made only to the bishop of the diocese, and not to the King; because the King is not bound to give notice of the resignation to the patron, as the ordinary is; nor can the King make a collation himself, without presenting to the bishop. Plowd. 498. Roll. Abr. 358.

Every parson who resigns a benefice, must make the resignation to his superior; as an incumbent to the bishop, a bishop to the archbishop, and an archbishop to the King, as *supreme ordinary*; and a donative is to be resigned to the patron, not the ordinary; for in that case the clerk received his living immediately from the patron. 1 Rep. 137.

A common benefice is to be resigned to the ordinary, by whose admission and institution the clerk first came into the church: And the resignation must be made to that ordinary who hath power of institution; in whose discretion it is either to accept or refuse the resignation; as the law hath declared him the proper person to whom it ought to be made, it hath likewise empowered him to judge thereof. 2 Cro. 64, 198.

The instrument of resignation is to be directed to the bishop, and when the bishop hath accepted of it, the resignation is good; to make void the church, and not before; unless it be where there is no cure, when it is good without the acceptance of the bishop.

A resignation may be made before a publick notary, but without the bishop's acceptance it doth not make the church void: the notary can only attest the resignation, in order to its being presented, &c. Ibid.

Before acceptance of the resignation by the bishop, no Presentation can be had to the church; but as soon as the acceptance is made, the patron may present to the benefice resigned: And when the clerk is instituted, the church is full against all men in case of a common person; tho' before induction, such incumbent may make the church void again by resignation. Count. Parl. Compan. 106.

A parsonage is not to be granted over by the incumbent, but it may be resigned; and resignations are to be absolute, and not conditional: for it is against the nature of a resignation to be conditional, being a *judicial act*. 3 Nelf. Abr. 157.

If any incumbent corruptly resigns his benefice, or take any reward for resigning the same, he shall forfeit double the value of the sum, &c. given, and the party giving it, be incapable to hold the living. Stat. 31 Eliz. cap. 6. But a man may bind himself by bond to resign, and it is not unlawful, but may be on good and valuable reasons; as where he is obliged to resign if he take a second benefice, or if he be non-resident by the space of so many months, or to resign on request, if the patron shall present his son or kinsman when he shall be of age capable to take the living, &c. Cro. Jac. 249, 274.

Tho' bonds for resignation of benefices have no encouragement in Chancery; for on such bonds generally the incumbent is relieved, and not obliged to resign. 1 Roll. Abr. 443.

On debt upon a bond to resign a benefice, the court would not let defendant's counsel argue the validity of the bond, these bonds having been so often established even in a court of equity. 1 Strange 227. But such a bond will not be allowed, where money has been paid on it. Ibid. 534.

A parson's refusal to pay his tenths, 'tis said is a resignation, for which he may be deprived. Owen 5. And where resignation is actually made *de ecclesia*, it extends to all the lands and possessions of the church. Cro. Jac. 63.

The usual words of a resignation are *Renuncio*, *Cedo*, *Dimitto*, and *Resigno*; and the word *Resigno* is not a proper term alone, 2 Roll. 350. See Black. Com. 1 V. 382, 393.

Form of a Resignation of a Benefice.

IN Dei Nomine Amen. Ego A. B. rector & incumbens ecclesie parochialis de, &c. in com. & dioces. Oxon. Volens & ex certis causis & considerationibus veris, iustis & legitimis me in hac parte specialiter moventibus, ab onere, cura & regimine dicte mee rectorie, de, &c. & pertinent. ejusdem penitus exonerari, eandem rectoriam meam & ecclesiam parochialem præd. una cum suis juribus, membris & pertinentiis universis, in manus Reverendi Patris Johannis permissus divina Oxonie episcopi loci istius ordinarii & diocelani, vel ejusdem vicarii in spiritualibus generalis, seu alterius cujuscumque hanc meam resignationem admittend. potestatem habentis vel habituri, non vel in metu coactus, nec dolo malo, ad idem inductus, nec aliqua sinistra machinatione motus, sed ex certa scientia, animo deliberato & spontanea voluntate meo pure, simpliciter & ABSOLUTE RENUNCIO & RESIGNO, ac re & verbo vacuam DIMITTO, jure quoque titulo & possessione meis in eadem rectoria sive parochiali ecclesia, una cum suis juribus, membris & pertinentiis universis præhabitis & mihi hæcenus concessis omnibus & singulis RENUNCIO eosdemque CEDO & ab istdem recedo totaliter & expressè in his scriptis. In cujus rei testimonium nomen & sigillum meum his præsentibus apposui die & anno, &c.

As to resignation of temporal offices,—declaring at an assembly of the corporation, that he would hold the place of alderman no longer is a good resignation, especially since the corporation accepted it, and chose another in his place; but till such election he had power to waive his resignation, but not afterwards. 2 Salt. 433.

A burgess of a corporation came to the mayor, and desired the mayor to remove and dismiss him from the place of burgess. On return of this, a mandamus was denied to

to restore him; for having resigned voluntarily, he is estopped to say, that the mayor had no power to remove him; and the case being sent to Hale Ch. B. he agreed, and said that a corporation, as such, have power to take such resignation. *Sid. 14.*

But giving consent to be removed, does not amount to a resignation. *Per Holt and Powell*, a man may resign an office by parol. *Holt's Rep. 450.*

Resignation by a common council man need not be by deed. *Lutw. 405.*

Where an alderman is a justice of peace for life, by force of the patent of the King, who created the corporation, he cannot resign his office of justice of peace; because he cannot resign it but to a superior; *per Coke Ch. J. Quod fuit concessum; per Haughton. Rol. Rep. 135. pl. 19.*

Resignation of Offices. If a man can have no title to the profits of an office, without the admission or confirmation of a superior, there the resignation of that office must be to him. *3 Nels. Abr. 158.*

Resort, (Resortum) Signifies the authority or jurisdiction of a court: *Salvo tamen tam resorto quam aliis jure nostro et jure etiam alieno.* Spelm.

Dernier resort, the last refuge.

Respectu computi Vicecomitis habendo, Is a writ for respiting a sheriff's account, directed to the treasurer and barons of the Exchequer. *Reg. Orig. 139.*

Respite, (Respiatus) A delay, forbearance, or continuation of time. *Glanvil, lib. 12. c. 9.*

Respite of Homage, (Respiatus homagii) Is the forbearance or delay of homage, which ought to be performed by tenants holding by homage, &c. tho' it had the most frequent use for such as held in knight service and in capite, who formerly paid into the Exchequer every fifth term some small sum of money to be respited their homage: But this charge being incident to, and arising from knight service, it is taken away by the stat. 12 Crr. 2.

Respite of Jury, see *Jury*, and *Black. Com. 3 V. 354. x.*

Respondens, or Respondens Ouster, To answer over in an action to the merits of the cause, &c. If a demurrer is joined on a plea to the jurisdiction, person, or writ, &c. and it be adjudged against defendant, it is a *respondens ouster*. *Jenk. Cent. 306. See Judgment. And Black. Com. 3 V. 303, 396. 4 V. 332.*

Respondens Superior If sheriffs of London are insufficient, the mayor and commonalty must answer for them: And *per insufficiency del bailiff d'un liberty*, *respondens dominus libertatis.* *4 Inst. 114. Stat. 44 Edw. 3. cap. 13.*

If a coroner of a county is insufficient, the county as his superior shall answer for him. *Wood's Inst. 83.*

A gaoler constitutes another under him, and he permits an escape, if he be not sufficient, *respondens superior*; and superior officers must answer for their deputies in civil actions, if they are insufficient to answer damages. *Dr. & Stud. c. 24.*

Respondentia, see *Bottomry. Black. Com. 2 V. 459.*

Responsalis, (Qui responsum deservit) Is he who appears and answers for another in court at a day assigned. *Glanvil, lib. 12. c. 1.* And *Fleta* makes a difference between *responsalem*, *attornatum*, and *offeniatorem*; and says that *responsalis* was for the tenant, not only to excuse his absence, but to signify what trial he meant to undergo, the combat or the country. *Fleta, lib. 6. c. 21.*

This word is made use of in the Canon law, to signify procuratorem vel eum qui absentem excusat.

Restitution, (Restitutio) Is restoring any thing unjustly taken from another: It signifies also the setting him in possession of lands or tenements, who had been unlawfully disseised of them. *Cramp. Inst. 144.* And *restitution* is a writ which lies where judgment is reversed, to restore and make good to defendant what he hath lost; The court which reverses the judgment, gives on reversal, a judgment for *restitution*; whereon a *scire facias* quare *restitutionem habere non debet*, reciting the reversal of the judgment, and the writ of execution, &c. must issue forth. *2 Lill. Abr. 472.* But the law doth often restore the possession to one without a writ of *restitution*, i. e.

by writ of *habere facias possessionem*, &c. in the common proceeding of justice on a trial at law. *Ibid. 473.*

There is a *restitution* of the possessions of lands in cases of forcible entry; a *restitution* of lands to an heir, on his ancestor's being attainted of treason or felony; and *restitution* of stolen goods, &c.

A writ of *restitution* is not properly to be granted but where the party cannot be restored by the ordinary course of law; and the nature of it is, to restore the party to the possession of a freehold, or other matter of profit, from which he is illegally removed; and it extends to *restitution* on *mandamus* to any publick office. *2 Lill. 472, 473.*

Where a judgment for land is reversed in B. R. by writ of error, the court may grant a writ of *restitution* to the sheriff to put the party in possession of the lands recovered from him by the erroneous judgment; tho' there ought to be no *restitution* granted of the possession of lands, where it cannot be grounded on some matter of record appearing to the court. *Hill. 22 Car.* And persons who are to restore, are to be parties to the record; or they must be made so by special *scire facias*. *Cro. Car. 328. 2 Salk. 587.*

If a lease is taken in execution on a *Fi. fa.* and sold by the sheriff, and afterwards the judgment is reversed; the *restitution* must be of the money for which it was sold, not the term. *Cro. Jac. 246. Moor 788.* But a sheriff extended goods and lands on an *elegit*, and returned that he took a lease for years, which he sold and delivered to plaintiff as *Bona & Catalla* of defendant for the debt, and afterwards the judgment was reversed for error; and it was adjudged; that the party shall be restored to the lease, because the *elegit* gave the sheriff no authority to sell the term, therefore a writ of *restitution* was awarded. *Yel. 179.* And there has been in this case a distinction made between compulsory and voluntary acts done in execution of justice; where the sheriff is commanded by the writ to sell the goods, and where he is not, when the goods are to be restored, &c. *8 Rep. 96.*

If plaintiff hath execution, and the money is levied and paid, and afterwards the judgment is reversed, there the party shall have *restitution* without a *scire facias*, for it appears on the record what the party had lost and paid; but if the money was only levied, and not paid, then there must be a *scire facias* suggesting the sum levied, &c. And where the judgment is set aside after execution for an irregularity, there needs no *scire facias* for *restitution*; but an attachment of contempt, if on the rule for *restitution* the money is not restored. *2 Salk. 588.*

In a *scire facias* quare *restitution.* &c. defendant pleaded payment of the money mentioned in the *scire facias*, and it was held to be no plea. *Cro. Car. 328.* But now payment is a good plea to a *scire facias* by the stat. 4 & 5 Ann. c. 16. *2 Lill. Abr. 479.*

Upon a *Vi laticia removenda* a parson was put out of possession; and on a suggestion thereof, and affidavit made, *restitution* was ordered. *Cro. Eliz. 465.*

The justices of peace, before whom an indictment for forcible entry is found, must give the party *restitution* of his lands, &c. who was put out of possession by force. *Stat. 8. H. 6. c. 9.* But where one is indicted for a forcible entry, and the party indicted traverses the indictment, there cannot be *restitution* before trial and a verdict, and judgment given for the party, tho' the indictment be erroneous; it being too late to move to quash the indictment after the traverse, which puts the matter on trial. *2 Lill. 473, 474.*

A person being attainted of treason, &c. he or his heirs may be restored to his lands, &c. by the King's charter of pardon; and the heir by petition of right may be restored if the ancestor is executed: But *restitution* of blood must be by act of parliament; and *restitutions* by parliament are some of blood only, some of blood, honour, inheritance, &c. *3 Inst. 240. 1 Inst. 8, 391.* The King may restore the party or his heirs to his lands, and the blood as to all titles begotten after the attainder. *Ibid.*

There shall be a writ of *restitution* granted to the owner of stolen goods, by the court where a felon is tried on indictment, after attainder of the felon, as in case of appeal of

of robbery. 21 H. 8. c. 11. And it may be also of money when the felon is convicted of this felony by reason of the evidence given by the party robbed, or by his procurement, &c. And by this statute executors and administrators shall have restitution of goods, and it is said notwithstanding sale in market-overt. 2 Inst. 714. 3 Inst. 242. 5 Rep. 109.

If goods stolen are not waived by flight, or seized for the King, the party robbed may take his goods again without prosecuting the felon; but after seized for the King, they may not be restored without appeal or indictment. Kel. 48. 2 Hawk. P. C. 168.

A servant took gold from his master, and changed it into silver; the master shall have restitution of the silver by this statute. Cro. Eliz. 661. pl. 9.

A stole cattle and sold them at Coventry, in an open market, and immediately he was apprehended by the sheriff of Coventry, and they seized the money; and afterwards the thief was arraigned and hanged at the suit of the owner of the cattle. And by the court, the party shall have restitution of the money, notwithstanding the words of 21 H. 8. c. 11. the goods stolen, &c. And Crooke said, that it is usual at Newgate. Noy 128.

On this statute of restitution, see 2 Hawk. P. C. 171. c. 23. sec. 56.

'Tis said the party who loses goods and prosecutes the felon to conviction, shall have restitution of goods stolen, notwithstanding sale in market-overt, unless a new property be fairly acquired therein.

Kelyng's Rep. 47. 48. S. P. Dah Just. marg. c. 164. See Appeal of Robbery, and 19 Vin. Abr. tit. Restitution.

Restitution on an Indictment for a forcible entry. An indictment lies for one jointenant against another for a forcible entry, and the court of King's Bench hath power to award restitution, upon a removal of the indictment by certiorari. And per Hardwicke Ch. J. there must be a writ of restitution, unless the defendant pleads in a reasonable time. The King v. Marrew. Rep. Temp. Hardw. Per Annull, 174. Vide Latch 172. 4 Inst. 176. Salk. tit. Entry Forcible. Dalton's Justice, c. 131. p. 314. and c. 134. p. 319. Also vide the case above cited from Annull. And see Forcible Entry.

Re-restitution. Is when there hath been a writ of restitution before granted: And restitution is generally matter of duty; but re-restitution is matter of grace. Raym. 85.

A writ of re-restitution may be granted on motion, if the court see cause to grant it. And on quashing an indictment of forcible entry, the court of B. R. may grant a writ of re-restitution, &c. 2 Lill. Abr. 474.

Restitutio excoacti ab ecclesia. A writ to restore a man to the church, which he had recovered for his sanctuary, being suspected of felony. Reg. Orig. 69.

Restitutio Temporalium. A writ directed to the sheriff to restore the temporalities, or barony of a bishoprick to the bishop elected and confirmed. F. N. B. 169. 1 Roll. Abr. 880.

Resulting use. Whenever the use limited by a deed expires, or cannot vest, it returns back to him who raised it, after such expiration or during such impossibility, and is styled a resulting use. As, if a man makes a feoffment to the use of his intended wife for life, with remainder to the use of her first-born son in tail: Here, till he marries, the use results back to himself; after marriage, it is executed in the wife for life; and, if she dies without issue, the whole results back to him in fee. Bacon of Uses, 350. 1 Rep. 120. See Uses, and Black. Com. 2 V. 335. And Com. Dig. tit. Uses. (K. 7.)

Resumptions. (Resummonitio) Signifies a second summons, or calling a man to answer an action, where the first summons is defeated by any occasion; and when by death, &c. of the judges, they do not come on the day to which they were continued, for trial of causes, such causes may be revived or recontinued by resumptions. Vide Re-attachment.

Resumption. (Resumptio) Is particularly used for taking again into the King's hands such lands or tenements, &c. as before on false suggestion he had granted by letters patent to any man. Broke 298. It is said, that the

King cannot grant a prerogative of power so, but that he may resume it; otherwise it is of a grant of an interest. Skinner's Rep. 236. Resumption of Grants is mentioned in the Stat. 31 Hen. 6. c. 7. and other statutes.

Retainer. (From the Latin Retinere) Signifies in a legal sense, a servant but not menial or familiar, that is, not continually dwelling in the house of his master, but only wearing his livery, and attending sometimes upon special occasions. This livery was wont to consist of hats (or hoods) badges, or other suits of one garment by the year; and were many times given by great men, on design of maintenance and quarrels, therefore justly forbidden by several statutes; as 1 R. 2. c. 7. on pain of imprisonment and forfeiture to the King; and again, 16 R. 2. c. 4. 20 R. 2. c. 1. and 1 H. 4. c. 7. by which the offenders should make ransom at the King's will; and any knight or esquire thereby duly attainted should lose his livery, and forfeit his fee for ever, &c. Which statute is farther confirmed and explained by 2 H. 4. c. 21. 7 H. 4. c. 3. and 8 H. 6. c. 4. And yet this offence was so deeply rooted, that Edward the Fourth was necessitated to confirm the former statutes, and further to extend their meaning, as appears by 8 Edw. 4. cap. 2. adding a special penalty of five pounds on every man who gave such livery, and as much on every one so retained, either by writing, oath or promise, for every month.

These are by the feudists called *effidati*, sic enim dicuntur qui in alienius fidem & tutelam recepti sunt. And as our retainers are here forbidden, so are those *effidati* in other countries. But most of the above-mentioned statutes are repealed by 3 Car. 1. c. 1. Cowell.

Retainer of debts. By an executor or administrator, is a remedy effected by the mere operation of law, see Black. Com. 2 V. 511. 3 V. 18.

Retaining fee. (Merces retinens) Is the first fee given to any serjeant or counsellor at law, whereby to make him sure that he shall not be on the contrary part: It is, Honorarium seu premium causidici precedentium, quo clientis suo obligatur ut adversarii causam agat.

Retenementum. Is a word used for detaining, withholding, or keeping back. And sine ullo retenemento was an usual expression in old deeds and conveyances of lands. Cowell.

Retinentia. A retinue, or persons retained to a prince or nobleman. Pat. 14 R. 2.

Retorno habendo. see Returno habendo.

Retrahitus Aquæ. The ebb or return of a tide. Plac. 30 Edw. 1.

Retrahit. Is when plaintiff cometh in person in court where his action is brought, and saith he will not proceed in it; and this is a bar to that action for ever: It is so called, because it is the emphatical word in the Latin entry, entered thus, ff. Et præd. quer. in propria persona sua venit & dicit quod ipse placitum suum præd. versus præd. defendens. ulterius prosequi non vult, sed abinde omnino se retrahit, &c.

A retrahit must be always in person; if it is by attorney, it is error. 8 Rep. 58. 3 Salk. 245.

As to a retrahit, it is a bar to any action of equal nature brought for the same cause or duty; but a nonsuit is not. 1 Inst. 208. See Wils. par. 1. 90.

If plaintiff says he will not appear, this is not a retrahit, but nonsuit: But if the plaintiff says he will not sue, it is a retrahit. 2 Danv. Abr. 471. And retrahit is always on the part of plaintiff or demandant; and it cannot be before a declaration, for before the declaration it is only a nonsuit. 3 Leon. 47. 2 Lill. Abr. 476.

If plaintiff enter a retrahit against one joint-trespasser, it is a release to the other. Cro. Eliz. 762. But if a retrahit be entered as to one appellee in appeal of murder, the suit may be continued against the rest; because the appellant is to have a several execution against every one of them. H. P. C. 146. In a prohibition by three, 1 remainder of one shall not bar the other two plaintiffs. Moor 460. Nels. Abr. 165. See Nolle Prosequi. And Black Com. 3 V. 296, 395.

Retra. (Fr.) A charge or accusation. Stat. West. 1 cap. 2.

Return

Return, (*Retorna*, or *retorna*, from the Fr. *retour*, i. e. *reditio*, *recursus*) Hath many applications in law; but is most commonly used for the return of writs, which is the certificate of the sheriff made to the court, of what he hath done touching the execution of any writ directed to him; and where a writ is executed, or defendant cannot be found, &c. then *this matter is indorsed on the back of the writ* by the officer, and delivered into the court whence the writ issued, at the day of the return thereof in order to be filed. *Stat. Westm. 2. cap. 39. 2 Lill. Abr. 476.*

The name of the sheriff must always be to the return of writs; otherwise it doth not appear how they came into court: If a writ be returned by a person to whom it is not directed, the return is not good, it being the same as if there was no return on it. And after a return is filed it cannot be amended; but before it may. *Cro. Eliz. 310. 2 Lill. Abr. 477, 478.*

If the sheriff doth not make a return of a writ, the court will amerce him; so if he makes an insufficient return; and if he makes a false return, the party grieved may have an action of the case against him. *Wood's Inst. 71.*

If a sheriff return a vouchee summoned, where in truth he is dead, and there is no such person; or in a *præcipe quod reddat* that the tenant is dead, &c. there may be an averment against such returns, by the *stat. 14 Ed. 3. c. 8. Jenk. Cent. 121, 122.*

Some returns are a kind of declaration of an accusation; as the return of a rescous, and the like; and these must be certain and perfect, or they will be ill. *11 Rep. 40. Plow. 63, 117. Kelw. 165.*

Writs to do things in franchises, are directed to, and returned by the sheriff, to whom bailiffs make their returns: And an action will lie against a sheriff, who takes the return of one who is no bailiff, and against him who makes it; and likewise against the bailiff of a franchise, for negligence in execution, &c. *7 Ed. 4. 14. 12 Ed. 4. 15. Moor, c. 606.*

Sheriffs are to accept of returns of bailiffs of liberties, where they are sufficient. *1 Danv. 191.*

There is a return of juries by sheriffs; and returns of commissions, by commissioners, &c.

Return-Days, Are days in term called by that name; or days in bank. See *Term*.

Retorno Habendo, Is a writ which lies where cattle are distrained and replevied, and the person who took the distress justifies the taking, and proves it lawful; on which the cattle are to be returned to him.

This writ also lieth when the plaint in replevin is removed by recordare, into the King's Bench or Common Pleas, and he whose cattle are distrained makes default, and doth not prosecute his suit. *F. N. B. 74. See Replevin.*

Returns of members to Parliament. See *Parliament*.

Retornum Habendum, A judicial writ, the same with *retorno habendo*. *Reg. Judic. 4.*

Retornum irreplegiabile, Is a writ judicial, directed to the sheriff for the final restitution or return of cattle to the owner when unjustly taken or distrained, and so found by verdict; and it is granted after a nonsuit in a second deliverance. *Reg. Judic. 27.*

Rebe, or **Gerere**, (From the Saxon word, *Grefa*, *Præfatus*, Lambert's explanation of Saxon words, verb. *Præfatus*.) Signifies with us the bailiff of a franchise or manor, especially in the Western part of England: Hence *shire-reve* for sheriff. See *Kitchin, 43.*

Rebelach, rebellion, from *revellare*, to rebel. *Quicumque faciebat rebelach vel latrocinium vel violentiam facinora in domo inferbat, 20 solidis amadebatur. Gale. Domesday, iii. Cestrescire.*

Rebeland, Domesday book. *Herefordshire. Terra Regis. Hac terra fuit tempore Edwardi Regis Tainland, sed postea conversata est in Rebeland. Et tunc dicunt legati Regis, quod ipsa terra est confusa, qui inde erit, fursum auferetur a rege.*

The land here said to have been *Thainland*, T. E. R. and after converted into *Reveland*, seems to have been such land as being reverted to the King after the death of his *Thans*, who had it for life, was not since granted out

to any by the King, but rested in charge on the account of the *Reve* or bailiff of the manor, who (as it seemeth) being in this lordship of *Hereford*, like the *Reve* in *Chaucer*, a false brother, concealed the land from the auditor, and kept the profit of it, till the surveyors, who are here called *legati Regis*, discovered this falsehood, and presented to the King that *fursum auferetur Regi*.

This passage from Domesday-book is imperfectly quoted by Sir Edward Coke, in his *Institutes*, *sect. 117.* who from these words draws a false inference, That land holden by knight service was called *Thain-land*, and land holden by socage was called *reveland*. *Cowell. See Spelman of Feuds, c. 24. See Teinland.*

Rebels, Signify with us sports of dancing, masking, &c. formerly used in Princes courts, the inns of court, or other noblemens houses, which are commonly performed by night; and there was an officer to order and supervise them, who was intitled *Master of the Revels*. *Cowell.*

Rebentue, (Fr.) Is properly the yearly rent which accrues to any man from his lands and possessions; and is generally used for the *revenues* or profits of the crown.

An act passed for preventing all doubts and questions concerning the collecting the publick revenues. *1 W. & M. sess. 2. c. 3.*

Whoever chuses to be informed of the fiscal prerogatives of the King, or such as regard his revenue; which the British constitution hath vested in the royal person, in order to support his dignity and maintain his power, will find them very curiously and learnedly treated of by *Backstone*, in the 8th Chapter of the first Vol. of his *Commentaries*.

Reversal, Of judgment, is making it void for error, and when on the return of a writ of error, it appears that the judgment is erroneous, then the court give judgment, *Quod judicium revocetur, adnuletur & penitus pro nullo habetur.* *2 Lill. Abr. 481.*

The ancientest judge of the court, or in his absence the next in seniority, always pronounces the reversal of an erroneous judgment *openly in court*, on the prayer of the party; and formerly it was the course to pronounce it in French, to this effect, *Par les errors evandit, & autres errors manifest in le record, soit le judgment reverse, &c.* *Trin. 22 Car. B. R.*

Reversal of a judgment may be pronounced conditionally, *i. e.* That the judgment is reversed if defendant in the writ of error doth not shew good cause to the contrary at an appointed time; and this is called a *revocetur nisi*; and if no cause be then shewn, it stands reversed without further motion. *2 Lill. 482.*

The *stat. 21 Jac. 1. c. 16.* hath provided a new writ, where judgment is reversed after verdict, or where an outlawry is reversed, &c. *Lutw. 264. Vide Attainder, Error, Judgment, Outlawry.*

Reversion, (*Reversio*, from *Revertor*) Signifies a returning again; therefore *Reversio terre est tanquam terra revertens in possessione donatori sive heredibus suis post donum finitum.* *1 Inst. 142.*

A reversion hath two significations; the one is an estate left, which continues during a particular estate in being; and the other is the returning of the land after the particular estate is ended: It is said to be an interest in the land, when the possession shall fall, and so it is commonly taken; or it is when the estate which was parted with for a time, ceaseth and is determined in the persons of the alienees or grantees, &c. and returns to the grantor or donor, or their heirs from whence derived. *Plow. 160. 1 Inst. 142.*

But the usual definition of a reversion is, that it is the residuum of an estate left in the grantor after a particular estate granted away, continuing in him who granted the particular estate; and where the particular estate is derived out of his estate: As in a gift in tail, the reversion of the fee-simple is in the donor; and in a lease for life, or years, the reversion is in the lessor: Also a reversion takes place after a remainder, where a person makes a disposition of a less estate, than that whereof he was seised at the time of making thereof. *1 Inst. 22, 142. Wood's Inst. 151.*

When

When the particular estate determines, then the *reversion* comes into possession, and before it is separated from it; for he who hath the possession, cannot have the *reversion*, because by uniting them, the one is drowned in the other. 2 *Lill. Abr.* 484.

The *reversion* of land when it falls, is the land itself; and the possession of the tenant, preserves the *reversion* of the lands, with the rents, &c. in the donor, or lessor. 1 *Inst.* 324.

A *reversion* of an estate of inheritance, may be granted by bargain and sale inrolled, lease and release, fine, &c. And by the grant of lands, a *reversion* will pass; tho' by the grant of a *reversion*, land in possession will not pass. *Bridgm. Conveyan.* 237. 6 *Rep.* 36. 5 *Rep.* 124. 10 *Rep.* 107.

If one have a *reversion* in fee, expectant on a lease for years, he may make a bargain and sale of his *reversion* for one year, and then make a release to the bargainee in fee; by which the *reversion* in fee will pass to the bargainee. 2 *Lill. Abr.* 483. And a *reversioner* may covenant to stand seised of a *reversion* to uses, &c. 11 *Rep.* 46. Likewise a *reversion* may be devised by will; and a testator being seised in fee of lands which he had in possession, and of other lands in *reversion*, devised all his lands for payment of debts; adjudged, that by the words all his lands, the *reversion* as well as the possession passed. 2 *And.* 59. *Cro. Eliz.* 159.

A person devised a manor to A. B. for six years, and some other lands to C. D. and his heirs; and all the rest of his lands to his brother, and the heirs male of his body; and it was held, that these words, "the rest of his lands," did not only extend to the lands which were not devised before, but to the *reversion* in fee of the manor, after the determination of the estate for years. *Allen* 28. And by devise of all lands, tenements and hereditaments, undisposed of before in a will, a *reversion* in fee will pass. 2 *Vent.* 285. 3 *Nelf. Abr.* 166.

One seised of lands in fee, devises part thereof to B. for life, and after by the same will, gives to C. all his lands not before particularly disposed of; by this devise of "all lands," &c. the *reversion* of the part given for life passes to C. *Preced. Chanc.* 202. There was lessee for years, remainder for life, *reversion* in fee, the tenant for life died, and the lessee for years did not attorn to him in the *reversion*; yet it was resolved, that it passed without attornment, and he might bring an action of debt, or avow. *Hestl.* 73.

If tenant for life, and he in *reversion* join in a lease for life, or gift in tail, rendering rent; it shall enure, after the death of tenant for life, to him in *reversion*. 1 *Inst.* 214. And if a *reversion* be granted to one for life, and to another in fee, the *reversion* is gone for a moiety: Also if such tenant for life get the remainder or *reversion* of the land, his estate for life is at an end. 3 *Rep.* 60.

The particular estate for life or years, and his estate in *reversion*, are divers and distinct; therefore aid may be prayed of him in the *reversion*: Yet these estates have relation one to another. 3 *Shep. Abr.* 220.

Copyholder for life, cannot by forfeiture or otherwise destroy the estate in *reversion*: And he who hath a *reversion* cannot be put out of it, unless the tenant be ousted of his possession also. 39 *Hen.* 6. *Plowd.* 162. *Telv.* 1.

Reversions expectant on an estate-tail, are not assets, or of any account in law, because they may be cut off by fine and recovery; but it is otherwise of a *reversion* on an estate for life, or years. 1 *Inst.* 173. 6 *Rep.* 38. *Wood's Inst.* 151.

No lease, rent charge, or estate, &c. made by tenant in tail in remainder, shall charge the possession of the *reversioner*. 2 *Lill.* 448. But as no statute hath made any provision for those who have remainders or *reversions* on any estate-tail, they are barred by a recovery. 10 *Rep.* 32.

There were no *reversions* or remainders on estates in tail, at Common law: And by the Common law, no grantee of a *reversion* could take advantage of any condition or covenant broken by the lessees of the same land; but by statute, grantees of *reversions* may take advantage of con-

ditions and covenants against lessees of the same lands, as fully as the lessors and their heirs; and the lessees may have the like remedies against the grantees of *reversions*, &c. 1 *Inst.* 327. 32 *H.* 8. c. 34.

A *reversioner* may bring action of the case for spoiling trees; for any injury to his *reversion*, he may have this action; but he cannot have trespass, which is founded on the possession. 3 *Lew.* 209, 233. 3 *Cro.* 55.

He in *reversion* shall have a writ of entry *ad communem legem*, where tenant for life, &c. aliens the lands: And writ of intrusion, after their deaths, &c. *New Nat. Br.* 461.

How to plead a *reversion* in fee. 2 *Lutw.* 1174.

The difference between a *reversion* and a remainder, is that a remainder is general, and may be to any man, but he who granteth the land, for term of life or otherwise; and a *reversion* is to himself from whom the conveyance of the land proceeded, and is commonly perpetual, &c. And remainder is an estate, appointed over at the same time: But the *reversion* is not always at the same time appointed over. See *Remainder*. And *Black. Com.* 2 *V.* 175. *Reversions in Offices*, vide *Office*.

Review, (Fr. *Revue*) A Bill of Review in Chancery, is where the cause hath been heard, and the decree therein signed; but some error appears in the body of the decree, or new matter is discovered in time after the decree made: Which bill must be exhibited by leave of the court, and is usually done on oath made of the discovery of new matter, which could not be had or used at the time of the decree passed; and the sum of 20*l.* must be deposited in court, on bringing this bill, as a security for costs and delay, if the matter be found against the party, &c. *Ord. in Chanc.* 69. *Pract. Solic.* 121, 122.

Where a decree of Chancery is repugnant, or one part of it contradicts another, &c. it may be reversed by bill of review. *Ibid.* See *Black. Com.* 3 *V.* 454.

Review of Appeal of Delegates, Is a commission granted by the King, to certain commissioners, &c. See *Appeal to Rome*.

Rebelling church ordinances, Is a positive offence against religion, that affects the established church; for which see *Black. Com.* 4 *V.* 50.

Rebival of persons hanged. It is clear, that if, on judgment to be hanged by the neck till dead, the criminal be not thoroughly killed, but revives, the sheriff must hang him again. 2 *Hal. P. C.* 412. 2 *Hawk. P. C.* 463. For the former hanging was no execution of the sentence; and, if a false tenderness were to be indulged in such cases, a multitude of collusions might ensue. Nay, even while abjurations were in force, such a criminal, so reviving, was not allowed to take sanctuary and abjure the realm; but his fleeing to sanctuary was held an escape in the officer. *Fitzb. Abr.* t. *corone.* 335. *Finch. L. A.* 67. *Black. Com.* 4 *V.* 399.

Rebiving, Is a word metaphorically applied, to rents and actions, and signifies renewing them after they are extinguished. Of which see many examples in *Broke*, tit. *Revivings of Rents, Actions*, &c. 23. See 19 *Vin. Abr.* 228—230.

Rebivor, or Bill of Revivor, or Reviver. Is when a bill hath been exhibited in Chancery, against one who answers, and before the cause is heard, or if heard, and the decree is not inrolled, either party dies: In this case a bill of Revivor must be brought, praying the former proceedings may stand revived, and be put in the same condition as at the time of abatement.

If a party dieth, a female plaintiff marries, or there have been no proceedings on a decree, &c. for a year past, the decree and proceedings must be revived by *subpoena fieri facias*, or if the decree be inrolled, by bill of Revivor: But if the parties are not heirs or executors, &c. to the party dead, the decree or cause is to be revived by original bill, and not by *subpoena fieri fac.* or bill of Revivor; and a bill of Revivor lies not on a decree of long standing, but an original bill is to be preferred. *Pract. Solic.* 122. See *Black. Com.* 3 *V.* 448.

Revocation, (*Revocatio*) Signifies the calling back of a thing granted; or a destroying or making void of some deed that had existence until the act of Revocation, made, it

it void. 2 Lill. Abr. 485. And a revocation may be either general, of all acts and things done before; or special, to ~~revoke~~ such a thing: And where any deed or thing is *revoked*, it is as if it never had been. 5 Rep. 90. Perk. fect. 105. In voluntary deeds and conveyances, there are frequently *provisoes* containing power of *revocation*, which being coupled with an use, and tending to pass by raising of uses, according to the Stat. H. 8. are allowed to be good, and not repugnant; as where one seised of an estate in fee, covenants to stand seised thereof to the use of himself for life, and after to the use of his son in tail, remainder over, &c. with *proviso* that he may *revoke* any of the said uses; now if afterwards he *revokes* them, he is seised again in fee, without entry or claim: But in case of a feoffment or other conveyance, whereby the feoffee or grantee is in by the Common law, such *proviso* would be merely repugnant and void. 1 Inst. 237. Stat. 27 Hen. 8. c. 10.

And voluntary estates made with power of *revocation*, as to *purchasers*, are held in equal degree with conveyances made by fraud and covin to defraud purchasers. 27 Eliz. c. 4. 3 Rep. 82. Uses, and powers in contingency and possibility, by mutual assent of parties may be *revoked* and determined; and as by indenture they may be raised, so by *proviso* or limitation in the same indenture, they may be extinguished and destroyed. 10 Rep. 86. And where a power of *revocation* is reserved for a man to dispose of his own estate, it shall always have a favourable construction; but it shall be taken strictly when it is to charge the estate of another. 2 Vent. 250.

When there is a power to *revoke* uses, a new declaration of uses is a sufficient *revocation* of the former, without any express disannulling, &c. And limiting new uses shews the power to alter and determine the former uses: Also if power is reserved to a man to *revoke* a deed by writing, subscribed and sealed in the presence of two or more credible witnesses; if he makes his will in writing, without making any express *revocation*, it will be a good *revocation*, and the will a good execution of the power. Hob. 312. Raym. 295. 3 Nelf. Abr. 168, 169. Tho' it hath been held, that all incident circumstances prescribed by the *proviso* or power of *revocation*, as to subscriptions, witnesses, &c. ought to be observed. 10 Rep. 143. 6 Rep. 33. 2 Lill. 487.

It is said where the power is only to *revoke*, when that power is executed, a man cannot limit new uses. 1 Vent. 197. 3 Salk. 316. Yet it hath been decreed, that the limitation of new uses is good, where the express power in the first deed was only to *revoke*. 1 Chanc. Rep. 242. If a person make a feoffment in fee, or levy a fine, &c. of the lands, before the deed of *revocation* is executed; these amount to a *revocation* in law, and extinguish the power of *revocation*. 1 Vent. 371. 1 Rep. 111. Power of *revocation* may be released; and where a man has an entire power of *revocation*, and he suspends or extinguishes it as to part, he may *revoke* as to the residue, if the conveyance was by way of use; but not where a condition is annexed to the land. 1 Rep. 174. Moor 615. A will is *revocable*; and a last will *revokes* the former: Tho' a new publication of the first will, where there are two wills, it is said may *revoke* the last. Perk. 479. 2 Sid. 2. See 3 Mod. 207.

Wills are to be *revoked* by some other will in writing, signed in the presence of three witnesses, or by cancelling by the testator, &c. Stat. 29 Car. 2. c. 3. A will revoking a former, tho' it must be subscribed by three witnesses, 'tis said need not be in the testator's presence, as the will of lands must be, by the statute. 1 P. Williams 344. if a person cancels or *revokes* either the duplicate or original will, this avoids both: they being but one will, and must stand or fall together: But where a man makes a second will, and intends that as a *revocation* of the first; if it be insufficient, it shall not destroy the first will tho' cancelled. 3 Mod. 220, 258. 2 Fern. 741. The testator is to be of a good disposing memory when he *revokes* his will, as well as when he makes it; he must have *animus revocandi*, as well as *animus testandi*, to make an effectual *revocation*. Show, 89. Cro. Jac. 497. Hard. 574. 3 Mod. 203.

Writings of *revocation* are to be taken according to the subject matter, viz. where a last will cannot stand with the first. Ibid. A testator made his will, and some time afterwards made a feoffment of the lands in the will to uses; and adjudged this was a *revocation* of his will, because a will cannot take effect till after his death. Dyer 74. And a tenant in tail made his will in writing, which was duly executed; afterwards he made a bargain and sale of the same lands contained in the will, to make a tenant to the *præcipe*, in order to suffer a common recovery, which was done accordingly, and he declared the uses to himself and his heirs: by the bargain and sale, &c. the will was *revoked*. 3 Lev. 108.

It hath been admitted to be a settled rule in Chancery, that where a testator devises his land in fee to one, and after mortgages it in fee to another, and then dies before the principal and interest is paid; this is not a *total revocation* of the will, but only *quoad* so much for which the lands were mortgaged, and the devisee shall have the equity of redemption. 1 Salk. 236, 258. Where lands are devised to one in fee, and after mortgaged to the same person, it is a *revocation in toto* of the devise; but if the land be mortgaged to a stranger, in that case 'tis otherwise. Preced. Canc. 515. A man seised of lands, devises the same in fee, or for life, and afterwards makes a lease thereof to another for years, it shall not be a *revocation* but during the years: Tho' in case a person has devised lands to one and his heirs, and after leases the same to him for a certain term, to commence after his death; this is a *revocation* of the whole estate. 1 Roll. Abr. 616. 2 Cro. 49.

In case a fortune be given to a child by the father, subsequent to the making of his will, wherein he had bequeathed her a portion; this shall be taken as a *revocation* of the legacy and will for so much. Preced. in Chanc. 183. A person being unmarried, by will devised all his personal estate to T. P. and afterwards he married and had several children; and died without making any other will: It was ruled by Commissioners of Delegates, that there being such an alteration of his estate and circumstances, so widely different from the time of making his will to his death, there was room to *presume* a *revocation*, and that he did not continue of the same mind when he died. 2 Salk. 592.

Letters of attorney, and other authorities, may be *revoked*, by the persons giving the powers; and as they are *revocable* in their nature, it has been adjudged, that they may be *revoked*, tho' they are made irrevocable. 8 Rep. 82. Wood's Inst. 286. These *revocations* of a power regularly must be made after the same manner it was given; and there ought to be notice to the party, &c. But if once the power be executed, a *revocation* after will come too late. Dyer 210.

A warrant of attorney from a defendant to appear and accept a declaration, and plead for the defendant, may not be *revoked* with an intent to slay the plaintiff's proceedings; but the defendant on good cause shewn to the court may change his attorney, so as he plead by another in due time. Mich. 24 Car. B. R. 2 Lill. 486. Letters of Administration, and Presentations to benefices when and how *revoked*, vide those heads.

See farther as to *Revocation of Devises*, Black. Com. 2 V. 376.—Of Uses, ib. 2 V. 335, 339. xi.—Of a Will, ib. 2 V. 502.

Revocatione Parliamenti, An antient writ for recalling a parliament; and anno 5 Ed. 3. the parliament being summoned, was recalled by such writ before it met. Pryn's Animad. on 4 Inst. fol. 44.

Rewards. There are Rewards given in many cases by statute, for the apprehending of criminals, and bringing them to justice; as a Reward of 40 l. for apprehending of robbers on the highway, by 4 & 5 W. & M. c. 8. Also the like reward for the apprehending and taking of burglars. Stat. 5 Ann. c. 31. The same reward for apprehending of money coiners or clippers, &c. 6 & 7 W. 3. c. 17. And the like reward for the apprehension of thief-takers, not prosecuting felons; and of persons resisting the officers of the customs, by force of arms, &c. 6 Geo. 1. c. 20, 22. So for discovering of accomplices, in various cases, by 4 & 5 W.

W. & M. c. 8. 10 & 11 W. 3. c. 23. & 5 Ann. c. 1.

Rewey, A term among clothiers, signifying cloth unevenly wrought, or full of *Rewes*. 43 Eliz. c. 10.

Rhandir, Was a part in the division of *Wales* before the Conquest: Every township comprehended four gavels, and every gavel had four rhandirs, and four houses or tenements constituted every rhandir. *Taylor's Hist. Gavelk.* 1. 69.

Rial, From the Span. *Reale*, i. e. *Royal Money*, because it is stamped with King's effigies: Here in *England*, a *Rial* was a piece of gold coin, current for 10 s. in the reign of King *Hen. 6.* at which time there were half-rials passing for 5 s. and quarter-rials, or rial farthings, going for 2 s. 6 d. In the beginning of Queen *Elizabeth's* reign, golden rials were coined at 15 s. a piece; and 3 *Jac. 1.* there were rose-rials of gold at 30 s. and spur-rials at 15 s. *Lownd's Essay on Coins*, pag. 38.

Ribaud, (Fr. *Ribaud*, *Ribaldus*) A rogue, vagrant, whoremonger, or person given to all manner of wickedness: And there was a petition in parliament against ribauds and sturdy beggars. *Ann. 50 Ed. 3.*

Rice, To be exported from *Carolina* to other parts of *Europe*, &c. *Stat. 8 Geo. 2. cap. 19.* Rice, to what duties liable on importation. 4 & 5 *W. & M. c. 5. 3 & 4 Ann. c. 5.* concerning rice, how far confirmed, 3 *Geo. 2. c. 28.* See *Plantations*.

Richmond in Surrey, *Richmond* old park settled on Queen *Charlotte* for life. 2 *Geo. 3. c. 1.*

Richmond in Powysshire, Spiritual persons in the archdeaconry of *Richmond*, shall not exact portions of the deceased's goods. 26 *Hen. 8. c. 15.*

Richmond and Lenox, (Duke of) His lease of the aulnage of draperies provided for. 11 & 12 *Will. c. 20. stat. 2.*

Rider-Roll, Is a schedule or small piece of parchment, often added to some part of a roll or record.

Ridge washed Kersey, Is *Kersey* cloth made of fleece wool, washed only on the sheep's back. See *Stat 35 Eliz. cap. 10.*

Riding armed, With dangerous and unusual weapons, is an offence at Common law. 4 *Inst. 160.* By the *Stat. 2 Ed. 3. cap. 3.* None shall ride armed by night or day to the terror of the people; or come with force and arms before the King's justices, &c. during their office, upon pain to forfeit their armour, and suffer imprisonment at the King's pleasure; and a fine may be set upon them by the justices, by 10 *Ric. 2. cap. 1.* And no person can excuse the going or riding armed in publick, by alledging that he wears armour for his defence against an assault; but men may wear common arms according to their quality and the fashion, and have attendants with them armed agreeable to their characters; also persons may ride or go armed to take felons, suppress riots, execute the King's process, &c. 3 *Inst. 162.*

Riding-Clerk, Is one of the six clerks in *Chancery*, who in his turn, for one year, keeps the controllment books of all grants that pass the Great Seal. *Blount.*

Ridings, Are the names of the parts or divisions of *Yorkshire*, which are three, viz. *East-Riding*, *West-Riding*, and *North-Riding*, mentioned in the *Stat. 22 H. 8. c. 5.* And in indictments for offences in that county, the town and the riding must be expressed, &c. *West's Symb. par. 2.* See *Registry of Deeds*. The word *riding* is a corruption from *tribing*. See *Black. Com. 1 V. 116.*

Riens arrear, A plea used in an action of debt for arrearages of account, whereby the defendant alledges that there is nothing in arrear. *Book Entr.*

Riens passe per le fait, Signifies that nothing passes by the deed; and is the form of an exception taken in some cases to an action. *Broks.*

Riens per Descent, Is the plea of an heir, where he is sued for his ancestor's debt, and hath no land from him by descent, or assets in his hands. 3 *Cro. 151.* In an action of debt against the heir, who pleads *riens per descent*, judgment may be had presently; and when assets descend, a *scire facias* lies against the heir, &c. 8 *Rep. 134.*

Riter County, (*Retro Comitatus*, from the Fr. *arrear*, i. e. *posterior*) Is opposed to full and open county; and appears to be some publick place, which the sheriff appoints

for receipt of the King's money, after the end of his county court. 2 *Ed. 3. cap. 5.* *Stat. Westm. 2. c. 38.* *Pl. 1a, lib. 2. c. 67.*

Ristare, (from the Sax. *riefe*, *rapina*) To take away any thing by force; from whence comes our *English* word *riste*. *Leg. Hen. 1. c. 57.*

Ristura, A slight wound in the flesh: It is mentioned in *Fleta*, lib. 1. c. 41.

Right, (*ius*) In general signification includes not only a right, for which a writ of right lies, but also any title or claim, either by virtue of a condition, mortgage, or the like, for which no action is given by law, but only an entry. *Co. on Lit. lib. 3. c. 8. f. 445.* There is *ius proprietatis*, a right of property; *ius possessionis*, a right of possession, and *ius proprietatis & possessionis*, a right both of property and possession; and this was antiently called *ius duplicatum*: For example, If a man be disseised of an acre of land, the disseisee hath *ius proprietatis*, the disseisor hath *ius possessionis*; and if the disseisee release to the disseisor, he hath *ius proprietatis & possessionis*. *Co. on Litt. lib. 3. sect. 447.* *Jus est sextuplex. 1. Jus recuperandi. 2. Intrandi. 3. Habendi. 4. Retinendi. 5. Percipiendi. 6. Et possidendi.* *Co. 8 Rep. Edward Altham's case.*

Gilbert, Treat. of Ten. 18. says, That the disseisor has only the naked possession, because the disseisee may enter and evict him; but against all other persons the disseisor has right, and in this respect only can be said to have the right of possession; for in respect to the disseisee he has no right at all. But when a descent is cast, the heir of the disseisor has *ius possessionis*, because the disseisee cannot enter upon his possession, and evict him, but is put to his real action, because the freehold is cast upon the heir; and says, That the notions of the law do make this title to him, that there may be a person in being to do the feudal duties, to fill the possession, and to answer the actions of all persons whatever; and since it is the law that gives him this right, and obliges him to these duties, antecedent to any act of his own, it must defend such possession from the act of any other person whatever, till such possession be evicted by judgment; which being also the act of law may destroy the heir's title.

There are also a *present* and *future right*; a *ius in re*, which may be granted to a stranger; and what is called a *naked right*, or *ius ad rem*, where an estate is turned to a right, on a discontinuance, &c. *Co. Lit. 345.* A right in writs and pleadings, is properly in one, when he is ousted of the possession of his estate by disseisin or wrong, and hath remedy by entry, or action: But right doth also include an estate *in esse* in conveyances; and therefore if tenant in fee-simple makes a lease and release of all his right in the land to another, the whole estate in fee passes. *Wood's Inst. 115, 116.* Sir *Edward Coke* tells us, That of such an high estimation is right, that the law preserveth it from death and destruction; trodden down it may be, but never trodden out: And there is such an extreme enmity between an estate gained by wrong and an ancient right, that the right cannot possibly incorporate itself with the estate gained by wrong. 1 *Inst. 279.* 8 *Rep. 105.* 6 *Rep. 70.* A right may sometimes sleep, tho' it never dies; a long possession exceeding the memory of man, will make a right; and if two persons are in possession by divers titles, the law will adjudge the possession in him that hath the right. *Co. Litt. 478.* 6 *Litt. sect. 158.* Where there is no remedy, there is presumed to be no right by law. *Faugh. 38.* No commands shall be made under the great or little Seal, to disturb or delay common right. *Stat. 2 Ed. 3. c. 8.* See *Reds.* See also *Property*, and 19 *Vin. Abr. 230—235.*

Right Close, writ of. See *Reds.* and *Black. Com. 2 V. 99.* 3 *V. 195.*

Right Close, writ of, (*Abundum consuetudinem manerii*) Is a writ which lies for the King's tenants in ancient demesne, and others of a similar nature, to try the right of their lands and tenements in the court of the lord exclusively. See *Black. Com. 3 V. 195.*

Right in Court. See *Reds. in Curia.*

Rights and Liberties. The rights and liberties of the *English* subject, are secured (not granted) by *Magna Charta*, confirmed by many subsequent statutes, and particularly

ticularly by the act of the first of *William and Mary*, stat. 2. c. 2. (36.) See most of the laws relative to this subject collected together with many observations, and an essay on the constitution, in an octavo work, lately published, called *British Liberties*, being an enlargement of *Care's English Liberties*.

Rights and Liberties. The declaration of *rights and liberties* against the conduct of King *James II.* sets forth, That he by the assistance of divers evil counsellors, did endeavour to subvert the laws and liberties of this kingdom; by exercising a power of dispensing with, and suspending of laws; by levying money for the use of the crown by pretence of prerogative, without consent of parliament; by raising and keeping a standing army, in time of peace; by violating the freedom of election of members to serve in parliament; by violent prosecutions in the court of *King's Bench*; and causing partial and corrupt jurors to be returned on trials; excessive bail to be taken; and excessive fines to be imposed; also cruel punishments inflicted, &c. All which were declared to be illegal, and infringing upon the ancient *rights and liberties* of the people. 1st. 1 *W. & M.* stat. 2. c. 2. (36.)

Rine, (Sax. *ryne*) A water-course, or little stream, which rises high with floods.

Ringa, A military girdle; from the Sax. *ring*, i. e. *annulus, circulus*, because it was girt round the middle: But according to *Bracton*, *ringa enim dicuntur quod renes circumdant, unde dicitur accingere gladio*. *Bract. lib. 1. c. 8.*

Ringhead, An engine used in stretching of cloth. 43 *Elin. c. 10.*

Ringdote, A kind of bailiff or serjeant; and such *ringdote* signifies in *Welsh*. *Chart. Hen. 7.*

Riot, Rout and unlawful Assembly, *Riot*, (*riota* and *riotum*, from the French *riotte*, *quod non solum rixam & jurgium significat, sed vinculum etiam, quo plura in unum, fasciculum insar, colliguntur*.) Signifies the forcible doing of an unlawful thing by three, or more persons assembled together for that purpose. *West. Symbol. part 2. tit. Indictments, sec. 65.* The difference between a riot, rout and unlawful assembly, see in *Lamb. Eiren. lib. 2. cap. 5. Stat. 1 Mar. c. 12. and Kitchin 19.* who gives these examples of riots, the breach of inclosures, banks, conduits, parks, pounds, houses, barns, the burning of stacks of corn, &c. *Lamb. ubi supra*, mentions these, to beat a man, to enter upon a possession forcibly. *Cowell.*

Holt Ch. J. in delivering the opinion of the court, said, That the books are obscure in the definition of riots, and that he took it, that it is not necessary to say they assembled for that purpose; but there must be an unlawful assembly; and as to what act will make a riot or trespass, such an act as will make a trespass will make a riot. 11 *Mod. 116. pl. 2. Trin. 6 Ann. B. R. The Queen v. Selby.*

As if a number of men assemble with arms, in terror of the people, tho' no act is done, it is a riot. *Hob. 91.* If three come out of an alehouse, and go armed, it is a riot. 3 *H. 7. 1. Per Holt Ch. J.* in delivering the opinion of the court. 11 *Mod. 116, 117. The Queen v. Selby.*

Serjeant *Hawkins* says, A riot seems to be a tumultuous disturbance of the peace by three persons, or more, assembling together of their own authority, with an intent mutually to assist one another against any who shall oppose them; in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent turbulent manner, to the terror of the people, whether the act intended was of itself lawful or unlawful. *Hawk. P. C. 155. c. 65. f. 1.*

A riot seems to be, according to the general opinion, a disturbance of the peace by persons assembling together with an intent to do a thing, which if it be executed will make them rioters, and actually making a motion towards the execution thereof: But by some books, the notion of a riot is confined to such assemblies only, as are occasioned by some grievance common to all the company, as the inclosure of land in which they all claim a right of common, &c. However, *Hawkins* is generally agrees with a riot, as to all the rest of the above-mentioned particulars, requires a condition, a riot, ac-

cept only in this, that it may be a compleat offence without the execution of the intended enterprise, it seems not to require any farther explication. *Hawk. Pl. C. 158. c. 65. f. 8.*

That an unlawful assembly, according to the common opinion, is a disturbance of the peace by persons barely assembling together, with an intention to do a thing, which, if it was executed, would make them rioters, but neither actually executing it, nor making a motion towards the execution of it; but he says this seems to be much too narrow a definition; for any meeting whatsoever of great numbers of people with such circumstances of terror, as cannot but endanger the publick peace, and raise fears and jealousies among the King's subjects, seems properly to be called an unlawful assembly; as where great numbers, complaining of a common grievance, meet together armed in a warlike manner, in order to consult together concerning the most proper means for the recovery of their interests; for no one can foresee what may be the event of such an assembly. *Hawk. Pl. C. 158. c. 65. f. 9.*

If a man be in his house, and he hears that *J. S.* will come to his house to beat him, he may well make an assembly of people of his friends and neighbours to assist and aid him in safe keeping his person. *Per Finem Ch. J. Br. Riots, pl. 1. cites 21 H. 7. 39.*

But if a man be menaced or threatened that if he comes to the market of *B.* or to *W.* that he shall be beat, he cannot make an assembly of people to assist him to go there, and this in safeguard of his person; for he need not go there, and he may have remedy by surety of the peace; but the house of a man is to him his castle and his defence, and where he properly ought to abide, &c. *Br. Riots, pl. 1. cites 21 H. 7. 39. Per Finem Ch. Justice.*

Dalt. Just. cap. 137. cites S. P. Hawk. Pl. C. 158. cap. 65. sec. 10. cites S. C. accordingly, and says, That such violent methods cannot but be attended with the danger of raising tumults and disorders to the disturbance of the public peace.—Tho' a man may ride with arms, yet he cannot take two with him to defend himself even tho' his life is threatened; for he is in the protection of the law which is sufficient for his defence. Per Holt Ch. J. in delivering the opinion of the court. 11 Mod. 116, 117. pl. 2. Trin. 6 Ann. B. R. The Queen v. Selby.

If a number of people assemble together in a lawful manner, and upon a lawful occasion, as for electing a mayor (as it was in this case) or the like, and during the assembly a sudden affray happens, this will not make it a riot *ab initio*; but it is only a common affray. *Ld. Raym. 965. Trin. 2 Ann. Grampound Corporation's case.*

If a number of people assemble in a riotous manner to do an unlawful act, and a person, who was upon the place before upon a lawful occasion, and not privy to their first design, comes and joins himself with them he will be guilty of a riot equally with the rest. *Per Holt Ch. J. which Powell J. seemed to agree. Ld. Raym. Rep. 965. Trin. 2 Ann. Grampound Corporation's case.*

Holt Ch. J. thought an assembly might meet together with such circumstances of terror as to be a riot. *Salk. 594, 595. pl. 4. Trin. 6 Ann. in the case of The Queen v. Selby & al.*

If several are assembled lawfully without any ill intent, and an affray happens, none are guilty but such as act; but if the assembly was originally unlawful, the act of one is imputable to all. *Per Holt Ch. J. Salk. 595. 6 Ann. in affray in Middlesex. The Queen v. Ellis.*

It seems agreed, that a number of persons, being met together at a fair, or market, or church-ale, or any other lawful and innocent occasion, happen on a sudden quarrel to fall together by the sword, they are not guilty of a riot, tho' of a sudden affray only, of which none are guilty, but those who actually engage in it; because the design of their meeting was innocent and lawful; and the subsequent breach of the peace happened unexpectedly without any previous intention concerning it; yet it is said, that if persons lawfully assembled together, do afterwards upon a dispute happening to arise among them, form

form themselves into parties, with promise of mutual assistance, and then make affray, they are guilty of a riot, because upon their confederating together with an intention to break the peace, they may as properly be said to be assembled together for that purpose from the time of such confederacy, as if their first coming together had been on such a design; however, it seems clear, that if in an assembly of persons met together on any lawful occasion whatsoever, a sudden proposal should be started of going together in a body to pull down a house of inclosure, or to do any other act of violence, to the disturbance of the publick peace, and such motion be agreed to and executed accordingly, the persons concerned cannot but be rioters, because their associating themselves together for such a new purpose is no way extenuated by their having met at first upon another. *Henrik. Pl. C. 156, 157. c. 65. f. 3.*

A mayor and alderman of a town making a riot, are punishable in their natural capacities; but where they have countenanced dangerous riots within their precincts, their liberties have been seized, or the corporation fined. *3 Cro. 252. Dalt. 204, 326.* Women may be punished as rioters; but infants under the age of fourteen years, are not punishable. *Dalt. 325. Wood's Inst. 429.* By the Common law, riots are punished by fine and imprisonment; and if enormous, by pillory: And by statute, Justices of the peace have power to restrain rioters, &c. to arrest and imprison them, and cause them to be duly punished. *34 Ed. 3. c. 1.* As soon as the sheriff and other the King's ministers hear of a riot, or other assembly against the peace, they with the power of the county shall apprehend such offenders, and put them in prison until delivered by law. *27 R. 2. c. 8.* And two or more justices of the peace, dwelling near the place where such offences shall be committed, together with the sheriff or under-sheriff of the county, shall by the power of the county, if need be, suppress riots, routs, &c. arrest the offenders, and record what shall be done in their presence; by which record the offenders shall stand convicted, as by *Stat. 15 R. 2. in case of forcible entries*; and if offenders are departed, the said justices, &c. shall within a month after make inquiry thereof, and hear and determine the same; and if the truth cannot be found, then within a further month the justices and sheriffs are to certify to the King and council, &c. on default whereof, the justices, &c. shall forfeit 100*l.* *13 H. 4. c. 7.*

These statutes are understood of great and notorious riots: And the record of the riot within the view of the justices, by whom it is recorded, is such a conviction as cannot be traversed, the parties being concluded thereby; but they may take advantage of the insufficiency of the record, if the justices have not pursued the statute, &c. It is said that the offenders being convicted upon the record of their offence, in the presence of the justices, ought to be sent immediately to gaol, till they pay a fine assessed by the same justices; which fine is to be extracted into the Exchequer; or the justices may record such riot, and commit the offenders, and after certify the record into B. R. or to the assize or sessions: If the offenders are gone, then the justices shall inquire by a jury; and the riot being found, they are to make a record of it, and fine them, or receive their traverse, to be sent by the justices to the next quarter-sessions, or into the King's Bench, to be tried according to law. *Dalt. 200, 201, 202.*

It hath been adjudged, that where rioters are convicted upon the view of two justices, the sheriff must be a party to the inquisition on the *Stat. 13 H. 4.* But if they disperse themselves before conviction, the sheriff need not be a party; for in such case the two justices may make the inquisition without him; and this is *pro Domino Rege*: And if the justices neglect to make an inquisition within a month after the riot, they are liable to the penalty for not doing it within that time; but the length of the month doth not determine their authority to make an inquisition afterwards. *a Dalt. 592.*

Rioters convicted on view of two justices, and of the sheriff of the county, are to be fined by the two justices and the sheriff; and if the sheriff do not join in taxing the fine, it is error; for the statute requires that he should be joined with the justices in the whole proceedings.

Raym. 386. 13 H. 4. c. 7. By the *2 H. 5. c. 8.* If the justices make default in inquiring of a riot; at the instance of the party grieved, the King's commission shall be issued to inquire, by sufficient and indifferent men of the county, at the discretion of the Chancellor; and the coroners shall make the panel of inquest upon the said commission, which is returnable into the Chancery, &c. and by this statute, heinous rioters are to suffer one year's imprisonment.

The Lord Chancellor, having knowledge of a riot, may send the King's writ to the justices of peace, and to the sheriff of the county, &c. requiring them to put the statute in execution; and the Chancellor, upon complaint made, that a dangerous rioter is fled into places unknown, and on suggestion under the seals of two justices of peace and the sheriff, that the common fame runneth in the county of the riot, may award a *capias* against the party, returnable in Chancery upon a certain day, and afterwards a writ of proclamation returnable in the King's Bench, &c. *2 Hen. 5. c. 9. 8 Hen. 6. c. 14.*

If one justice of peace hath notice of a riot, he must endeavour to remove it, and may bind the rioters to the good behaviour; and if they have no sureties, or refuse to be bound, he may commit them to prison. *13 Hen. 4. c. 7. Mod. Inst. 368.* Where riots are committed, the sheriff, upon a precept directed to him, is to return twenty-four persons dwelling within the county to inquire thereof, &c. *19 Hen. 7. c. 13. The Stat. 1 Geo. 1. st. 2. c. 5.* enacts, That if any persons, to the number of twelve or more, unlawfully and riotously assembled against the peace, being required by a justice of peace, sheriff, under-sheriff, mayor, or other head officer of any town, &c. by proclamation in the King's name, to disperse themselves, shall continue together an hour afterwards, they shall be guilty of felony without benefit of clergy; and persons thus assembled and continuing, are to be apprehended and carried before a justice of peace, &c. And if in resistance, the rioters are killed, the persons concerned in it shall be indemnified: Persons by force hindering the proclamation, it shall be adjudged felony; and the offenders nevertheless guilty, if they do not disperse, &c. Rioters demolishing any church, chapel, or dwelling-house, are guilty of felony; and inhabitants of towns and hundreds are to yield damages for rebuilding or reparation, to be levied and paid in such manner as money recovered against the hundred, by persons robbed on the highway, &c. Prosecutions on this act are to be commenced within one year after the offence: And this is the severest statute that hath been made against rioters, but it being wholly in the affirmative, it doth not take away any authority in the suppressing a riot by Common law, or by other statutes. *Wood's Inst. 430. See Rebellious Assembly, and Black. Com. 4 V. 125, 142, 143, 146, 433.*

A record of a riot on view.

BE it remembered, That on the day, &c. in the first year of the reign of our Sovereign Lord George the Third, now King of Great Britain, &c. We A. B. and C. D. Esquires, two of the justices of our said Lord the King assigned to keep the peace in the county of, &c. aforesaid, and E. F. Esquire, then sheriff of the said county, upon the complaint and humble supplication of L. B. of, &c. in the county aforesaid, in our own proper persons went to the mansion-house of the said L. B. in the parish, &c. in the county aforesaid, and then and there saw G. H. of, &c. and J. K. and L. M. of, &c. in the county aforesaid, and other malefactors and disturbers of the peace of our said Lord the King, to us unknown, to the number of five persons, armed with swords, staves, &c. unlawfully and violently assembled at the said house, threatening great damage to the said L. B. to the disturbance of the peace of the said Lord the King, and terror of his people, against the form of the Statute, &c. And therefore we the said A. B. and C. D. then and there caused the said G. H. J. K. and L. M. to be arrested, and carried to the next gaol of our said Lord the King in the county aforesaid, by our names and record being convicted of the unlawful assembly, tumult and riot aforesaid, there in manner as they have made fine and ransom to our said Lord

The King for the same. In witness whereof we have set our seal to this our present record, dated at, &c. as aforesaid, the day and year above-mentioned.

Form of an inquisition of a riot.

South'ton, ff. **A** N inquisition for our Sovereign Lord the King, taken at, &c. in the county aforesaid, the day and year of the reign, &c. on the oath of A. B. C. D. E. F. G. H. &c. (the jury) honest and lawful men of the said county, before T. D. and J. B. Esquires, two justices of our said Sovereign Lord the King, assigned to keep the peace in the said county, &c. Which said jurors upon their oath aforesaid say, that J. K. of, &c. L. M. N. O. &c. and other malefactors and disturbers of the peace of our said Lord the King, to the said jurors unknown, on the day of, &c. last past, with force and arms, that is to say, with swords, staves, &c. and other offensive weapons, into the messuage of T. W. in the parish, &c. aforesaid, in the said county, between the hours, &c. of the same day, unlawfully and riotously entered, and him the said T. W. assaulted, beat and wounded, to the great disturbance of the peace of our said Lord the King, and terror of his people; and against the form of the statute in such case made and provided.

An indictment for a riot.

T H E jurors, &c. do present, That J. K. late of, &c. in the county of, &c. aforesaid, yeoman, L. M. late of, &c. and N. O. late of, &c. on the day, &c. in the year of the reign, &c. at, &c. with force and arms, &c. did riotously and unlawfully meet and assemble themselves together, to disturb the peace of our said Lord the now King; and being so assembled and met together, did then and there make an assault upon one L. B. then being in the peace of God and of our said Sovereign Lord the King; and then and there beat, wounded and evilly treated the said L. B. and other injuries did to him, to the great damage of the said L. B. and against the peace of our said Lord the King, his crown and dignity, and also against the form of the statute, &c.

Riparia, (from *ripa*, a bank of a river) Is a water running between the banks. *Magn. Chart. c. 5. Westm. 2. c. 47. 2 Inst. 478.*

Ripiers, (*riparii, a piscella, qua in deventendis piscibus stantur, Anglice a rip*) Are those that bring fish from the sea-coast to the inner parts of the land. *Camb. Briton. 234.*

Rippers, Reapers or cutters down of corn; and *rip-sowel* was a gratuity or reward given to customary tenants when they had reaped their lord's corn. *Cowell.*

Rivagium, (*rivage, or riverage*) A duty paid to the King on some rivers for the passage of boats or vessels.

Quieti sint ab omni lastagio, tallagio, passagio, rivagio, &c. Placit. temp. Ed. 1.

Ribeare, To have the liberty of a river for fishing and fowling. *Pat. 2 Ed. 1.*

Rivers, By the statute of *Westm. 2. c. 47.* The King may grant commissions to persons to take care of rivers, and the fishery therein: And the Lord Mayor of London is to have the conservation in breaches and ground overflowed as far as the water ebbs and flows in the river Thames. *4 Hen. 7. c. 15.* Persons annoying the river Thames, making holes, dams, casting dung therein, or taking away stakes, boats, timber-work, &c. off the banks, incur a forfeiture of *5 l.* *Stat. 27 Hen. 8. c. 18.* Commissioners were appointed to prevent exactions of the occupiers of locks, &c. upon the river Thames westward from the city of London, to be holden in the county of *Willes*, and for ascertaining the rates of water carriage, on the said river, &c. *Stat. 27 Hen. 8. c. 18.* And this statute is revived with authority for the commissioners to make orders and constitutions, as he obtained under penalties, &c. *3 Geo. 2. c. 24.*

As to annoyances in rivers, when committed by actual obstructions, or negatively, by means of obstructions, the person obstructing, or such who is bound to remove and cleanse them, or (in default of these last) the

parish at large, may be indicted, distrained to repair and amend them, and in some cases fined. *Black. Com. 47. 167.* By *6 Geo. 2. c. 37.* and *16 Geo. 2. c. 32.* it is made felony, without benefit of clergy, maliciously to clog down any river or sea-bank, whereby lands may be overflowed. By *1 Geo. 3. c. 19.* To destroy the tall-boats, or any sluice or lock on any navigable river, is made felony to be punished with transportation for seven years. And by *8 Geo. 2. c. 20.* Destroying sluices upon rivers is made felony without benefit of clergy, and the offence may be tried as well in an adjacent county, as in that where the fact is committed.

Rivers made navigable. The river *Wye* is declared a free and common river, for the carrying of goods and passengers, with power to trustees to make it navigable, and ordaining toll or tonnage duties to be paid for carriage of goods, &c. by the Stat. *7 & 8 W. 3. c. 14.* Duties and impositions are granted to recover and preserve the navigation of the river *Dun*, by *11 & 12 W. 3.* And the river *Derwent* is made navigable by Stat. *1 Ann.* So of many other rivers. *Vide 13 Geo. 1. c. 34.* If persons break down a lock, or other works on any navigable river, it is felony; and drawing up floodgates made for preserving the navigation of rivers, &c. shall be sent to the house of correction for a month. *8 Geo. 2. c. 20.* Persons may justify the going of their servants or horses upon the banks of navigable rivers, for towing of barges, &c. to whomsoever the right of the soil belongs. *1 Ld. Rayn. 725.*

Roba, A robe, coat or garment; and those who robes accipiens of another, are accounted of his family: *Walsingham. 267.*

Robbers. During the middle ages the highways were so much infested with banditti, that it was necessary for travellers to form themselves into companies or caravans, that they might be safe from the assaults of robbers. *Bouquet Recueil des Hist. Vol. 7. 515.* They became so frequent and audacious, that the authority of the civil magistrate was unable to repress them. The ecclesiastical jurisdiction was called in to aid it, councils were held with great solemnity, the bodies of the saints were brought thither, and in presence of their sacred reliques, anathemas were denounced against robbers, and other violators of the publick peace. *Id. Vol. 10. 360, 431, 536. Robert. Hist. Emp. C. V. 1 V. 329, 330.*

Robbery, (*Robaria*) Is a felonious taking away of another man's goods from his person or in his presence against his will, putting him in fear, and of purpose to steal the same. *West. Symbol. part 2. tit. Indictments, sect. 60.* And this offence was called *robbery*, either because they bereaved the true man of some of his robes or garments, or because his money or goods were taken out of some part of his garment or robe about his person. *Co. 3 Inst. cap. 16.* This is sometimes called *violens theft.* *West. Symbol. ibid.* which is felony of two-pence. *Kirkeby, fol. 16. and 22 Lib. off. 39.* See *Stat. de verborum signific. verb. Rob.* and *Crim. Justice of Peace, fol. 30.*

Robbery is a felony by the Common law, committed by a violent assault upon the person of another, by putting him in fear, and taking from him person his money, or other goods of any value whatsoever. *3 Inst. 68. c. 16.*

1. What is or amounts to a robbery in respect of the manner, or person from whom any thing is taken.
2. Of raising hue and cry, and what kind of robbery it may be, as made the hundred chargeable.
3. Who is to bring the action, and of the previous steps requisite.
4. At what time the action is to be brought; what evidence is necessary, and what shall excuse the hundred.
5. Of trying the money, or the hundredors.

1. What is or amounts to a robbery in respect of the manner, or person from whom any thing is taken.

The circumstance of putting one in fear makes the difference between a robbery and a cut-purse; both take it from the person, but this takes it clam & ferre without assault or putting in fear, and the robber by violent assault and putting in fear. *3 Inst. 68. cap. 16.*

Wherever

Wherever a person assaults another, with such circumstances of terror as put him into fear, and causes him, by reason of such fear, to part with his money, the taking thereof is adjudged robbery, whether there were any weapon drawn or not, or whether the person assaulted delivered his money upon the other's command, or afterwards gave it to him upon his ceasing to use force, and begging an alms; for he was put into fear by his assault, and gives him his money to get rid of him. *Hawk. Pl. C. 96, 97. cap. 34. sect. 9.*

In the case of *Macdaniel* and others, at the Old Bailey sessions in December 1755. Mr. Justice *Foster* was of opinion, that if a man attacked by an highwayman and robbed, previous to the robbery resists, and is overpowered, without being under any fear at all, it is not the less robbery upon that account. *Fost. 128.*

The words of the indictment, *violenter & felonice cepit*, must be understood that there is an actual taking in deed, and a taking in law, and that may be when a thief receives, &c. For example: If thieves rob a true man, and finding but little about him, take it, this is an actual taking; and by means of death compel him to swear upon a book to fetch them a greater sum, which he does and delivers it to them, which they receive, this is a taking in law by them, and adjudged robbery; for fear made him to take the oath, and the oath and fear continuing, made him bring the money, which amounts to a taking in law; and in this case there needs no special indictment, but the general indictment (*Quod violenter & felonice cepit*) is sufficient. And so it is, if at the first the true man for fear delivers his purse, &c. to the thief. *3 Inst. 68. cap. 16.*

See *Hawk. P. C. 96. c. 34. s. 4.* The thief must be in possession of the thing stolen, or otherwise he is not guilty of robbery. *3 Inst. 69. c. 16. S. P. Hawk. Pl. C. 96. c. 34. sect. 6.* But though he is not guilty of robbery, he is highly punishable by fine and imprisonment, &c. for so enormous a breach of the peace. See *infra*.

The words of the indictment are (*a persona*) &c. If the true man, seeking to escape for the safeguard of his money, casts it into a bush, which the thief perceiving, takes it: This is a taking in law from the person, because it is done at one time. *3 Inst. 69. cap. 16. S. P.* And so if he drives my cattle in my presence out of my pasture, or takes my hat which fell from my head, he may be indicted as having taken things from my person. *Hawk. Pl. C. 96. cap. 34. sect. 8.* See also *3 Inst. 69. cap. 16. And. 116. pl. 161. Sty. 156.*

In some cases, a man may be said to rob me, where in truth he never actually had any of my goods in his possession; as where I am robbed by several in one gang, and one of them takes my money, in which case, in judgment of law, every one of the company shall be said to take it, in respect of that encouragement which they give to another thro' the hopes of mutual assistance in their enterprize: Nay, though they miss of their first intended prize, and one of them afterwards rides from the rest, and robs a third person in the same highway, without their knowledge, out of their view, and then returns to them, all are guilty of robbery; for they came together with an intent to rob, and to assist one another in so doing. *Hawk. Pl. C. 96. cap. 34. sect. 7.*

If a carrier's man or son conspire to rob him, and do it accordingly, the carrier not being privy to it, he may sue the hundred on the statute of *Winton*; but the conspiracy may be given in evidence in mitigation of damages; per *Roll Ch. J. Style 427. Mich. 1654. Mat. show v. The hundred of Godalmin.*

If a man servant be robbed of his master's goods in his master's sight, this shall be taken for a robbery of the master. *Style 156. Mich. 1649. per Roll Ch. J. in Wright's case.*

Taking cattle from *A.* which he is driving on the highway, is a taking from his person, and so a robbery; per *Powell justice; Quod non fuit negatum. 2 Salk. 641. Green v. Goddard.*

An attempt to rob is made felony with benefit of clergy, by *7 Geo. 2. c. 21.*

2. Of raising hue and cry, and what kind of robbery it must be, to make the hundred chargeable.

The levying of hue and cry is enjoined by several acts of parliament, and to this purpose it is enacted by *W. 1. 1. cap. 9.* "That all be ready and apparelled at the summons of the sheriff, to pursue and arrest felons."

Though some imagined that hue and cry was grounded on this statute; yet Lord *Coke* says, That it was used long before, as appears even by this statute, which, instead of introducing a new law, enforces obedience to that which was founded on the ancient laws of the realm. *2 Inst. 171.*

By the statute of *4 Ed. 1. De officio coronatoris*, hue and cry shall be levied for all murders, burglaries, men slain, or in peril to be slain, as other where is used in *England*; and all shall follow the hue and steps as near as they can.

By the statute of *Winton*, or *13 Ed. 1. s. 2. c. 1.* it is enacted, "That from thenceforth every country shall be so well kept, that immediately upon robberies and felonies committed fresh suit shall be made from town to town, and from country to country." And *cap. 2.* of the said statute, If the country will not answer for the bodies of such offenders, the people dwelling in the country, shall be answerable for the robberies done, and also the damages: And if the robbery be done within the division of two hundreds, both the hundreds, and the franchises within them shall be answerable.

The statute of *Winton* gives the action against the hundred; but by subsequent statutes, such as *27 Eliz. cap. 13. 8 Geo. 2. cap. 16.* Several alterations and additions have been made therein.

It seems to be admitted, that no kind of robbery will make the hundred liable, but that which is done openly, and with force and violence; and that therefore the private stealing, or taking any thing from the party does not come within the statutes which make the hundred liable, because the hundred is not liable in not preventing the robbery, but because they did not apprehend the robbers, which in private felonies, and of which they had no notice, it would be difficult, if not impossible, for them to do. *7 Co. 6, 7. 2 Salk. 614.*

Also it hath been adjudged, and is admitted in all the books which speak of this matter, that a robbery in a house, whether it be by day or by night, does not make the hundred liable: The reasons whereof are, that every man's house is in law esteemed his castle, which he himself is obliged to defend, and into which no man can enter, to see what is doing there, without his leave; also being done in a house, the inhabitants of the hundred cannot be presumed to have notice of it, so as to be able to apprehend the offenders. *7 Co. 6. a. Sendl's case.*

But if a person be assaulted in the highway, and carried into a house, and there robbed, it seems the hundred shall be liable; for otherwise the provision made by the statute would be eluded. *1 Sid. 263. and see 1 Salk. 614. Faresl. 157.* Also it does not seem necessary, that the robbery should be committed in the highway, nor alledged to have been so by the plaintiff in his declaration. *Faresl. 159.* It may be in a private way, or be in a coppice; and in both cases the hundred shall be chargeable. *2 Salk. 614. and vide Cartb. 71. 3 Mod. 258. 1 Show. 60. Comb. 150. S. C. adjudged between Young and the inhabitants of the hundred of Talscomb.*

The robbers ought to be taken in 40 days, to excuse the hundred. In *3 Lev. 320.* it is said, that upon search of the parliament roll it appears, that the statute of *Winton* gives only forty days to the country, and that the statute *28 Ed. 3.* is but a confirmation thereof; and accordingly it was adjudged, where the plaintiff brought an action on the statute of *Winton*, and declared that he was robbed, and none of the robbers taken within forty days, according to the said statute; and with this the modern precedents agree, as *Rass. Ent. 406. Co. Ent. 351. Harb. 215. Theb. Brev. 141. 2 Sal. 376.*

Nevertheless the inhabitants shall make fresh suit and pursue after the offenders.

It is clearly agreed, that for a robbery committed in the night the hundred is not chargeable, because they cannot be presumed to have notice thereof, so as to be able to apprehend the robbers. 7 Co. 6 b. *Milborne's case*. 2 Inst. 369.

But yet it is not necessary that the robbery should be committed after sun-rise, and before sun-set, and that therefore if there be as much day-light at the time that a man's countenance might be discerned thereby, though it be before sun-rise, or after sun-set, the hundred shall be liable. 7 Co. 6. a. *Affpole's case*. Cro. Jac. 106. 1 And. 158. 1 Leon. 57. *Savil 33*. vide *Carth.* 71. Comb. 150. 3 Mod. 258. 1 show. 60. S. P. admitted.

Also it hath been held, that if robbers drive or oblige the waggoner to drive his waggon from the highway by day, but do not rob or take any thing till night, that yet this is a robbery in the day-time so as to charge the hundred. Sid. 263. *Farest.* 159. Also see *Hutton* 125.

Plaintiff was travelling in the highway in the hundred of A. where he was set upon and carried into the hundred of B. and robbed in a copse in the highway of this hundred; it was adjudged that the hundred of B. should be liable. 2 Salk. 614, 615. *Farest.* 157. S. C. *Cowper v. The Hundred of Basingstoke*.

By the 27 Eliz. cap. 13, par. 2. it is enacted, "That the inhabitants and residents of every hundred (with the franchises within the precinct thereof,) wherein negligence, fault or defect of pursuit and fresh suit after hue and cry made shall happen to be, shall answer and satisfy the one moiety of all such money and damages, as shall be recovered against the hundred, with the franchises therein, in which any robbery or felony shall be committed, to be recovered by action of debt, &c. by and in the name of the clerk of the peace for the time being, of or in every such county, and recovery by the party or parties robbed shall be, without naming the christian name or surname of the said clerk of the peace; which moiety so recovered shall be to the use of the inhabitants of the hundred where any such robbery, &c. shall be committed."

3. Who is to bring the action, and of the previous steps, requisite.

If a servant be robbed in the absence of his master, of his master's money, it is clear that the master may maintain an action for it against the hundred, but then the servant must make oath that he knew not any of the robbers. Cro. Car. 37. *Raymond v. Hundred of Okeing* adjudged. Also the servant being robbed in his master's absence, may himself maintain an action against the hundred, and may declare that he was possessed *ut de bonis suis propriis*, &c. And though the jury find that he was robbed of his master's money, yet shall he recover; for the servant is possessed *ut de bonis suis propriis*, against the hundred, and in respect of all, but him that hath the very right. 2 Salk. 613-4. 4 Mod. 303. Comb. 263. S. C. *Combs v. The Hundred of Bradley*, S. C. 1 Sid. 45.

If a servant be robbed in the presence of the master, the master must sue; and the oath of the master is sufficient. 2 Salk. 613. *per cur.* Carth. 147.

There must be an oath, vide *Carth.* 145. 2 Salk. 613. 1 Show. 94. 3 Mod. 287. S. C. *Affpole v. The Hundred of Elthorn*: and vide *infra*.

If A. and B. travelling together are robbed of a sum of money, to which they are both jointly intitled, they may both join in action against the hundred; *seem* if they had separate and distinct interests. Dyer 370. a. pl. 59.

By statute, 27 Eliz. cap. 13. par. 11. it is enacted, That no person that shall happen to be robbed shall maintain any action, or take any benefit of the statutes which make the hundred liable, except the person so robbed shall, with as much convenient speed as may be, give notice of the robbery to some of the inhabitants of some town, village or hamlet near unto the place where any such robbery shall be committed.

In the construction of this clause of the statute it hath been holden,

That if a person be robbed in a highway in divers hundredorum, he need not give notice to the inhabitants of each hundred, but notice to either of them is sufficient.

Cro. Jac. 675. *Foster v. The hundred of Speenhor and Illeworth*, adjudged, vide also, Cro. Car. 41. 379. 1 show. 94.

It hath been resolved, that though the notice given be five miles from the place where the robbery was committed, that it is sufficient; the reason whereof is, because that the party, who is a stranger to the country, cannot have conuance of the nearest place or town. March 11. *Sir John Compton's case*, which vide, and see also 2 Leon. 82.

Also if the party robbed give notice with as much convenient speed as may be, though he be otherwise remiss in not pursuing the robbers, or refuses to lend his horse for that purpose, yet he shall not lose his action for this, nor the hundred be excused. March 11. 2 Leon. 82. S. P. agreed *per cur.*

Now by the 8 Geo. 2. cap. 16. sect. 1. it is further enacted, "That no person shall maintain any action against the hundred, unless he shall, besides the notice already required by the last statute, with as much convenient speed as may be, after any robbery committed, give notice thereof to one of the constables of the hundred, or to some constable, borougher, headborough or tithingman of some town, parish, village, hamlet or tithing, near unto the place where such robbery shall happen, or shall leave notice in writing of such robbery at the dwelling house of such constable, &c. describing so far as the nature and circumstances of the case will admit, the felon, and the time and place of the robbery, and also shall, within the space of twenty days next after the robbery committed, cause publick notice to be given thereof in the London Gazette, therein likewise describing, so far as the nature and circumstances of the case will admit, the felon, and the time and place of such robbery, together with the goods and effects, whereof he was robbed."

By the 27 Eliz. c. 13. par. 11. it is enacted, "That the party robbed shall not have any action, except he shall first, within twenty days next before such action to be brought, be examined upon his corporal oath, before some justice of the peace of the county where the robbery was committed, whether he knows the parties that committed the robbery, or any of them; and if upon examination, it be confessed, that he knows the parties, or any of them, that then he shall, before the action be commenced, enter into sufficient bond by recognizance before the said justice, effectually to prosecute the same person and persons."

In the construction of this clause of the statute, the following points have been holden;

That if the party does not know the robbers at the time of the robbery committed, tho' he happens to know them afterwards, it is not material. March 11.

It hath been adjudged, that the oath may be taken before a justice of the county, though not in the county at the time of administering it. 1 Jones 239. *Holier v. The hundred of Benburs*.

As to giving bond for payment of costs, by stat. 8 Geo. 2. cap. 16. it is enacted, "That before any action commenced the party shall go before the chief clerk, or secondary, or the filazer of the county wherein such robbery shall happen, or the clerk of the pleas of that court wherein such action is intended to be brought, or their respective deputies, or before the sheriff of the county wherein the robbery shall happen, and enter into a bond to the high constable, or high constables of the hundred in which the robbery shall be committed, in the penal sum of one hundred pounds with two sufficient sureties to be approved of by such chief clerk, &c. with condition for securing to such high constable or high constables, the due payment of his or their costs, after the same shall be taxed by the proper officer; in case the plaintiff in such action shall happen to be non-suited, or shall discontinue the action, or in case judgment shall be given on demurrer, or a verdict against him."

And as to what time the action is to be brought; what evidence is necessary; and what shall excuse the hundred.

By 27 Eliz. c. 13. par. 9. The action is to be brought within one year after the robbery committed.

In the construction of this statute it hath been holden ; That if a person be robbed the 9th of *October* 13 *Jac.* and so laid, and the teste of the writ be the 9th *Octob.* 14 *Jac.* that this is not pursuant to the statute ; and that in this action, which is penal against the hundred, there is no reason to exclude the day on which the fact was done, nor to make such construction as is done in protections and the enrolment of deeds, which have always received a benign interpretation. *Hob.* 139, 140. *Moor* 878. *pl.* 1233. 1 *Brownl.* 156. S. C. *Norris v. Hundred of Gwotry.* Vide 1 *Sid.* 139. 1 *Keb.* 495. S. C. *Newman v. Inhabitants of Strafford.*

An action was brought by the master, on the statute of *Wimes*, for a robbery committed on his servant, in which he declared of an assault and battery done to himself, (though then 50 miles from the place,) also that he made oath that he did not know any of the persons ; the issue was entered of record, and the jury appeared at the bar ready to try it ; but being for other business adjourned to another day, the plaintiff observing his mistake moved to amend, by declaring of a robbery on his servant, &c. and it appearing that the year in which the action must be brought was expired, and consequently the action must be lost if not allowed, the court, after long debates and consideration of former precedents, admitted him to amend. 3 *Lev.* 347. *Barcroft ver. Hundred of Barnham and Stone.*

It seems that from the necessity of the case, the party himself that was robbed is to be admitted as a witness, but then his testimony must be corroborated by collateral proof and circumstances, and such as may induce a jury to believe that a robbery was actually committed, and that the party lost what he declared for. 2 *Leon.* 12.

By 8 *Geo.* 2. c. 16. it is enacted, " That in any action against any hundred, any person inhabiting within the hundred, or any franchise thereof, shall be admitted as witness for or on behalf of the hundred."

By 27 *Eliz.* cap. 13. par. 8. it is enacted, " That where any robbery is committed by two, or a greater number of malefactors, and that it happen any one of the said offenders to be apprehended by pursuit, to be made according to the statutes, that then, no hundred or franchise shall in any wise incur the penalty, loss or forfeiture mentioned in the statutes, although the residue of the malefactors shall happen to escape". See 1 *Vent.* 118, 325. *Raym.* 221. 2 *Lev.* 4. S. C. *Methwin ver. Hundred of Thistleworth, and vide infra.*

If hue and cry be made towards one part of the county, and an inhabitant of the hundred apprehends one of the robbers within another, this is a taking within the statute. 1 *Vent.* 118, 119. *per Hale Ch. J.*

By the 8 *Geo.* 2. cap. 16. it is enacted, " That no hundred, or franchise therein, shall be chargeable by virtue of any of the statutes, if any one or more of the felons, by whom such robbery shall be committed, be apprehended within the space of forty days next after publick notice given in the *London Gazette*, as by the statute is provided."

5. Of levying the money on the hundreders.

By 27 *Eliz.* c. 13. par. 14. it is enacted, " That after execution of damages by the party or parties so robbed had, it shall be lawful (upon complaint made by the party charged) to and for two justices of the peace (whereof one to be of the *quorum*) of the same county, inhabiting within the hundred, or near unto the same where any such execution shall be had, to assess and tax reasonably and proportionably, according to their discretions, all and every the towns, parishes, villages and hamlets, as well of the said hundred where any such robbery shall be committed, as of the liberties within the said hundred, so and toward an equal contribution, to be had and made for the relief of the inhabitants, against whom the party or parties robbed before that time had execution."

The constables, &c. are to levy the money and pay it over to the justices, and they are to deliver it over to the inhabitants, for whose use it was collected.

The same taxation is to be in cases where there's default or negligence of pursuit and fresh suit, for the be-

nefit of inhabitants having damages or money levied on them.

It hath been holden, that a person occupying lands in an hundred, although he hath no house or dwelling there, is an inhabitant within the meaning of the statute, for that otherwise the statute might be eluded. 2 *Sand.* 423. *Leigh v. Chapman.*

And now for the more equal rating and levying the money, for which the hundreds are chargeable, by the 8 *Geo.* 2. cap. 16. it is enacted, " That no process for appearance in any action to be brought upon either of the statutes against any hundred, shall be served on any inhabitant thereof, save only upon the high constable, or high constables of the hundred wherein the robbery shall happen, who are to cause publick notice thereof to be given, to enter an appearance, and defend the action, as advised. On recovery by the plaintiff and execution issued, the sheriff is to shew it to two justices, who are to cause an assessment, as directed by 27 *Eliz.* which is to include the high constable's costs." Vide the *Stat.* and see to the same purpose as to not executing writ of execution on any particular inhabitant, on any judgment obtained by virtue of any act of parliament. *Stat.* 22 *Geo.* 2. c. 46. *jud.* 34.

By *Stat.* 22 *Geo.* 2. cap. 24. No person shall recover against any inhabitants of any hundred, in any action on any of the statutes of hue and cry, more than 200 *l.* unless the persons robbed, at the time of such robbery for which such action is brought, be in company two at least, to attest the truth of being so robbed.

Robbers, (*Robatores*) Are interpreted to be mighty thieves by *Lambard* in his *Eiren. lib.* 2. c. 6. — *Larrones validi, qui in personas hominum inflicientes bona sua diripiunt.* *Spelm.*

Robbersmen or **Robardsmen**, Were a sort of great thieves, mentioned in the statutes 5 *Ed.* 3. c. 14. and 7 *R.* 2. c. 5. of whom *Sir Edw. Coke* says, That *Robin Hood* lived in the reign of *King Rich.* 1. on the borders of *England* and *Scotland*, by robbery, burning of houses, rapine and spoil, &c. and that these *Robardsmen* took name from him. 3 *Inst.* 197. See *Black. Com.* 4 *V.* 244.

Rocheſter, Oyster fishery in the *Midway* now regulated by the corporation of *Rocheſter*, 2 *Geo.* 2. cap. 19. For repairing *Rocheſter* bridge, 27 *El.* c. 25.

Rocheſter, (*Francis*, Lord Bishop) Subjected to pains and penalties, 9 *Geo.* 1. c. 17.

Rochet, Is that linen garment which is worn by bishops, gathered at the wrists, and differs from a surplice, for that hath open sleeves hanging down ; but a *rochet* hath close sleeves. *Lindewode, lib.* 3. tit. 27.

Rock-salt. See *Salt.*

Rob, (*Roda terra*) A measure of sixteen foot and a half long, otherwise called a *perch*.

Rob-knights, (From the Sax. *Rad. i. e. Equitatio* & *Cnyt*, *Famulus, quasi Ministri Equitantes*) Certain servitors, who held their land by serving their lords on horseback. *Bract.* lib. 2. c. 35.

Rogation-week, (*Dies Rogationum, Robigalia*) Is a time so called, because of the special devotion of prayer and fasting then enjoined by the church for a preparative to the joyful remembrance of *Christ's Ascension.* *Cousel.* — *Robigalia, dies festus septimo calend. Maii celebrari solitus, &c. ut Robiginem à segetibus averteret: Rogation, or Gang-week.* *Litt. Dig.*

Rogue, (*Fr.*) Signifies an idle sturdy beggar, who by ancient statutes, for the first offence was called a *rogue of the first degree*, and punished by whipping, and boring through the gristle of the right ear, with a hot iron ; and for the second offence, he was termed a *rogue of the second degree*, and executed as a felon, if he were above eighteen years old. 27 *Hen.* 8. c. 25. 24 *Eliz.* c. 5, &c. And by a late act, persons apprehended as vagabonds, and escaping, or refusing to go before a justice, or giving a false account of themselves ; and all such persons breaking prison, before the expiration of the term, or who having been punished and discharged, commit a second offence, are adjudged *incorrigible rogues.* A justice of peace may send any such *rogue* to the house of correction till the next sessions ; and then the justices shall order him to be detained six months, and to be kept to hard labour.

and also corrected by whipping, in manner and as often as they think fit; and afterwards the offender is to be passed away to his place of settlement: And if he make his escape from prison, he shall be judged guilty of felony, and be transported for seven years, &c. Stat. 13 Geo. 2. c. 24. Vide *Black. Com.* 4 P. 170.

Rogus, (Lat.) A great fire wherein dead bodies were burned; and sometimes it is taken for a pile of wood. *Clau.* 5 Hen. 3.

Roll, (Rotulus) Is a schedule of parchment that may be turned up with the hand in the form of a pipe. *Standf. P. C.* 11. *Rolls* are parchments on which all the pleadings, memorials, and acts of courts are entered and filed with the proper officer; and then they become records of the court. 2 *Lill. Abr.* 491. And by a rule made by the court of King's Bench, every attorney is to bring in his *rolls* into the office fairly ingrossed by the times thereby limited, viz. The *rolls* of Trinity, Michaelmas, and Hilary terms, before the effoin day of every subsequent term; and the *Rolls* of Easter term before the first day of Trinity term; and no attorney at large, or any other person, shall file any *rolls*, &c. but the clerks of the chief clerks of this court. *Ord. B. R. Mich.* 1705. If *rolls* are not brought into the office in time, it has been ordered that they shall not be received without a particular rule of court for that purpose. *Mich.* 9 W. 3.

Roll of court, (Rotulus curie) The court-roll in a manor, wherein the names, rents and services of the tenants were copied and inrolled. *Per rotulum curie tenere*, by copyhold—*Matildis le Tailor tenet per rotulum curie unum messuagium*, &c. *Paroch. Antiq.*

Rolls Office of the Chancery. There is an office called the *Rolls Office* in *Chancery Lane*, anciently called *Domus Conversorum*, which contains all the *rolls* and records of the High Court of Chancery, the master whereof is the second person in the Chancery, &c. See *Master of the Rolls*.

Rolls of the Exchequer, Are of several kinds, as the great *Wardrobe Roll*, the *Cofferer's Roll*, the *Subsidy Roll*, &c.

Rolls of Parliament, The manuscript registers of the proceedings of our old parliaments; and our statutes being anciently ingrossed in parchment: in these *rolls* are likewise a great many decisions of difficult points in law; which were frequently in former times referred to the determination of this supreme court by the judges of both benches, &c. *Nichol. Hist. Libr.* 47.

Rolls of the Temple. In the two Temples is a *Roll* called the *Calves-head Roll*, wherein every benchet, barrister, and student, is taxed yearly at so much to the cook and other officers of the houses, in consideration of a dinner of *Calves-heads* provided in Easter term. *Orig. Jurid.* 199.

Roma-peditz, Pilgrims that travel to Rome on foot. *Matt. Paris. Anno* 1219.

Rome, Church of, its incroachments of power here, and how suppressed; and no imposition to be paid to the bishop of Rome, &c. *Vid. Stat.* 25 H. 8. c. 19. and *Pope*.

Rome-Scot, (Romesh vel Romesc, Romescy, alias denarius Sancti Petri & hearib-peny) Is compounded of *Rome* and *Scot*, from the Sax. *Scot*, symbolum. *Mss. Westm.* says, It was *Consuetudo Apostolica*, a quany; *van, neg;* archiepiscopus vel episcopus, abbas vel prior, non quilibet in regno immunitas erat. It was an annual tribute of one penny from every family, paid yearly to Rome, at the feast of St. Peter ad Vincula, being the first of August. *Camden* in his *Brit.* says, *Offa*, the *Saxon*, first granted it; but others, that *Ina*, a King of the *Wessex*, being in pilgrimage at Rome, anno 725. gave it as an alms, and that *Ina* was forbidden by *Edward the Third*. It amounted to three hundred marks and a noble yearly. See *Leg. Hen.* 1. c. 1. *Rog. Hoveden per. poster. Jur.* *Anol. Joh.* 344. in *ville Hen.* 2. and see *Peter-Prince* and *Heard-Penny*. This payment was continued 25 H. 8. restored 1 & 2 H. 8. M. but utterly abolished 1 *Eliz.* 1. See *Spelman's Glossary*, verbiis *Romesh, Romeshab, Romescy*. This mark of Ravay was a burthen and a scandal to the English nation. Our fore-born ancestors often complained of it. It was one of the complaints of grievances

in parliament, 8 *Joh.* A. D. 1206. when the King issued out this writ of *sequestra*; *Rex archiepiscopo, episcopis, abbatibus, archidiaconis, &c. omni clero, apud sanctum Albani: contumaciter salutem. Consequens universitate civium, haereticorum, milium, & aliquam fideliem nostrorum, audimus quod non solum in laicorum gravem perniciem, sed in totius regni nostri intolerabile dispendium super Romescot praefer consuetudinem solvendo—Mandamus—ne contra regni nostri consuetudinem aliquid novum statuas.*—*Teste* me ipso apud *Rbor.* 16. die Maii, anno regni nostri, 8. Car. 2. Jo. m. 1. *Cordell.*

Romney-Marsh, Is a large tract of land in the county of Kent, containing 24000 acres; and is governed by certain ancient and equitable laws of sewers composed by *Henry de Bathe*, a venerable judge, in the reign of King Henry the Third; from which laws all commissioners of sewers in England may receive light and direction. 4 *Inst.* 276. The commissioners of sewers, in other parts of England, may act according to the laws and customs of *Romney-marsh*, or otherwise at their own discretion. *Black. Com.* 3 P. 74. But they are subject to the discretionary coercion of the court of King's Bench. 16.

Rood, or Holy Road, Signifies the Holy Cross:

Rood of Land, (Radata Terra) Is the fourth part of an acre. *Stat.* 5 *Eliz.* c. 5.

Rood-tile. See *Tiler*.

Roads. Destroying of trees, roots, shrubs or plants, &c. is by 6 Geo. 3. c. 36. & 48. made liable to pecuniary penalties for the two first offences, the third, felony, punishable with transportation. Stealing or destroying turnips, or the roots of madder, &c. punishable criminally, by whipping, &c. *Vide* 43 *Eliz.* c. 7. 15 *Car.* 2. c. 2. 23 *Geo.* 2. c. 26. 31 *Geo.* 2. c. 35.

Rope-dancers, &c. are public nuisances, and may, upon indictment, be suppressed and fined. 1 *Hawk. P. C.* 198, 225.

Ropes, Old ones may be imported duty-free. 11 *Geo.* 1. cap. 7. *Feb.* 10.

Ros, A kind of rushes, which some tenants were obliged by their tenures, to furnish their lords withal. *Brady.*

Rose-Tile, To lay upon the ridge of a house, is mentioned in the statute 17 *Ed.* 4. c. 4.

Rosetum, A low watery place of reeds and rushes; and hence the covering of houses with a thatch made of reeds, was called *Rosetum*. *Capitular. Glaston. M. S.* 107.

Rosary, Heathy land, or ground full of ling; also watery and moorish land, from the Br. *Rhor.* 1 *Inst.* 5.

Rother-Beasts, Under this name are comprehended oxen, cows, steers, heifers, and such like horned beasts. 21 *Jac.* c. 18.

Rotulus Antoninus, Was an exact survey of all England, per Comitatus, Centurias, & Decurias, made by King Alfred, not unlike that of *Domesday*; and it was so called, for that it was of old kept at Winchester, among other records of the kingdom; but this roll time hath consumed. *Ingaldb. Hist.* 516.

Roubte, Coin in *Muscovy* going for ten shillings, sterling. *Merch. Dia.*

Rowt, (Fr. Route, i. e. a company or number) In a legal sense, signifies an assembly of persons, going forcibly to commit an unlawful act, though they do not do it. *West. Symb. par.* 2. A rowt is the same which the Germans call *rot*, meaning a band or great company of men gathered together, and going to execute, or intend executing, any not or unlawful act; but the Stat. 18 *Ed.* 3. c. 1. against rowts before justices, or in assay of the people, and 2 R. 2. c. 6. that speaks of riding in great rowts, to make entry into lands, &c. do seem to make it to be where the persons unlawfully assembled, have moved forward in order to do the intended act, but part without doing it; for whether they put their purpose in execution or not, if they do not, or move forward, after their assembling, it is a rowt. *Broke* 4. 5. *Duke* 121. However, two things are common to rowts, routs, and unlawful assemblies; the one, that three persons at least be gathered together; the other, that they being together do disturb the peace, either by words, show of arms, turbulent

turbulent gesture, or actual violence, &c. *Lamb. Eiren. lib. 1. c. 5.* Process granted against persons causing routs, &c. *Vide 18 E. 3. And Bla. k. Com. 4 V. 146. See Riot.*

Royal Assent, (*Regius assensus*.) Is that assent which the King gives to a thing formerly done by others, as to the election of a bishop by Dean and Chapter; which given, then he sends a special writ for the taking of *fealty*. The form of which you may see in *F. N. B. fol. 170.* And to a bill passed in both houses of parliament, *Crompt. Jur. fol. 8.* which assent in parliament being once given, the bill is indorsed with these words, *Re Roy le veult, i. e. It pleases the King.* But if he refuse to agree to it, then thus, *Le Roy aviseira, i. e. The King will advise.* *Cowell. Vide Black. Com. 1 V. 154, 183.*

Royal family. See *Black. Com. 1 V. 219; &c.*

Royalties, (*Regalitates*) The several sorts of, you may see under *prerogatives* and *regalia*. Those *royalties* which concern government in an high degree, the King may not grant or dispose of. *Jenk. Cent. 79.*

Royces, Streams, currents, or other usual passages of rivers and running waters. *Cowell.*

Royston, (town of) Reduced to one parish. *32 Hen. 8. c. 84.*

Rozin, In what ships to be imported, *12 Car. 2. c. 18. sect. 8.* Importation of it from the *Netherlands*, or *Germany*; how prohibited, *13 & 14 Car. 2. c. 11. sect. 23.* To what duties liable on importation, *4 W. & M. c. 5. sect. 2.* Bringing it from *Scotland* how rewarded, *12 Ann. st. 1. c. 2.*

Rubies, may be imported duty-free. *6 Geo. 2. c. 7.*

Rubrics, (*a rubro colore*, because anciently writ in red letters) are constitutions of our church, founded upon the statutes of uniformity and publick prayer, *viz. 5 & 6 Ed. 6. cap. 1. 1 Eliz. cap. 2. 13 & 14 Car. 2. cap. 2.*

Rudas-Day, (From the Sax. *Rode*, i. e. *Cruz*, and *mafs-day*, i. e. *feast-day*) The feast of the *Holy-Cross*; and there are two of these feasts, one on the 3d of *May*, the invention of the cross; and the other the 14th of *September*, called *Holy Rood day*, and is the exaltation of the cross.

Rules of Court. Attornies are bound to observe the rules of the court, to avoid confusion; also the plaintiff and defendant in a cause are at their peril to take notice of the rules made in court touching the cause between them. *2 Lill. Abr. 492, 493.* The court will not make a rule for a thing which may be done by the ordinary course; and if the court be informed that they have made such a rule, they will vacate it. *Mich. 22 Car. B. R.* And if a rule be made by the court grounded upon an affidavit, the other side may move the court against this rule; and thereupon shall bring into court a copy of the affidavit and rule made, that the affidavit may be read, to put the court in mind for what reasons they made the rule, and whether there be stronger reasons for the vacating of it, than there were for the making of it, or not. *2 Lill. 494.* Where a rule of court is made, and it is not drawn up and entered before the continuance day of the same term, the clerk of the rules will not draw it up afterwards until the court be moved, and shall again order it to be entered. *Pasch. 1656.* For breach and contempt of a rule of court, an attachment lies; and if a rule of court is made betwixt parties by their consent, tho' the court would not have made such rule without their consent, yet, if either party refuse to obey such a rule made, the court will upon motion grant an attachment against the party that disobeyes the rule. *Hill. 1655.* But generally an attachment is not grantable for disobedience to any rule, unless the party hath been served with it personally; nor for disobeying a rule at *Nisi prius*, till it is made a rule of court; or for disobedience to a rule made by a judge at his chambers, if it be not entered. *1 Salk. 71, 83.* And a rule not entered, is of no force to ground a motion upon, &c. Service of a rule for an information at the house, not good where the defendant is gone to sea. *2 Strange 1044.*

Rule of court may be granted to any prisoner in the King's Bench or Fleet prison, every day the court sits,

to go at large, if such prisoner hath business in law of his own to follow. *2 Lill. Abr. 493.*

Rum. See *Brandy, Plantations.*

Rumney Marsh. King Hen. 3. granted a charter to *Rumney Marsh*, in the county of *Kent*, empowering twenty-four men thereunto chosen to make distresses equally upon all those who have lands and tenements in the said marsh, to repair the walls and watergates of the same, against the dangers of the sea. And there are several laws and customs observed in the said marsh, established by ordinance of justices thereto appointed, in the 42d year of King Hen. 3. the 16 Ed. 1. the 33 Ed. 3. &c. See *Rumney-marsh.*

Rumours, Spreading such as are false, is criminal and punishable by Common law. *1 Hawk. P. C. 234. See 19 Vin. Abr. 272.*

Runcaria, (from *Runca*.) Land full of brambles and briars. *1 Inst. fol. 5. a.*

Runcilus and **Runcinus**, Is used in *Domesday* (says *Spelman*) for a load-horse, *Equus operarius colonicus*, or a sumpter-horse; and sometimes for a cart-horse, which *Chaucer*, in the *Seaman's Tale* calls a *Rowney*. *Cowell.*

Runter, Is a measure of wine, oil, &c. containing eighteen gallons and a half. *1 R. 3. c. 13.* And it is said to be an uncertain quantity of liquor, from three to twenty gallons. *Merch. Dict.*

Runners of Foreign Goods, Who to be deemed so, and how punished. *8 Geo. 1. c. 18.*

Rutaris, Were soldiers, or rather robbers, called also *rutaris*; and *rutta* was a company of robbers: Hence we derive the word *rout*, and *bankrupt*. *Matt. Paris. Anno 1250.*

Ruptura, Arable land, or ground broke up, as used in ancient charters.

Rural Deans, Were certain persons having ecclesiastical jurisdiction over other ministers and parishes near adjoining, assigned by the bishop and archdeacon, being placed and displaced by them; such as the dean of *Craydon*, &c. *Lyndw. c. 1.* — *Sunt decani temporales ad aliquod ministerium sub episcopo vel archiepiscopo exercendum constituti, qui nec habent institutionem canonicam secundum doctores.* *Spelm.* And these rural deans were anciently termed *archipresbyteri*, and *decani christianitatis*. *Kennel's Paroch. Antiq. See Dean.*

Rural deanry. As every diocese is divided into arch-deaconries, (of which there are sixty) so each arch-deaconry is divided into rural deanries, which are the circuit of the archdeacon's and rural deans jurisdiction; And every deanry is divided into parishes. *Black. Com. 1 V. 111.*

Rusca, A tub or barrel of butter, which in *Ireland* is called a *rushin*: *Rusca apum* signifies a hive of bees. *Mon. Aug. tom. 2. p. 986.*

Ruscacia, The place where knesholm or broom grows. *Co. Lit. 5.*

Rush-lights. See *Candles.*

Russia and **Russia Company.** Goods of the growth or manufacture of *Russia* not to be imported but in *English* shipping, &c. *12 Car. 2. c. 18. sect. 8, 9.* Any of his Majesty's subjects to be admitted into the *Russia* company, *10 & 11 W. 3. c. 6.* Account of stores imported to be laid before parliament, *10 & 11 W. 3. c. 6. s. 4.* Trade opened to *Persia* through *Russia*, *14 Geo. 2. c. 36.* See *Moskovy Company.*

Rustics, The charls, clowns, or inferior country tenants, who held cottages and lands by the services of ploughing and other labours of agriculture for the lord. The land of such ignoble tenure was called by the Saxons *Gosland*, as afterwards *tenementum*, and was sometimes distinguished by the name of *terra rusticorum*. *Paroch. Antiq. 136.*

Rye, A corn or grain, of which bread is made in some parts of *England*.

Rye and Mustard. An act against ballast cast into the channel at *Rye* and *Whitby*, &c. *2 Ed. 6. c. 30.*

Shafa, A sort of poor small beer. *Lit. Did.*

Sabbatarius, A *Sabbatarian*, or Jew; of or belonging to the *Sabbath*.

Sabbath-breaking. The profanation of the Lord's Day, which is an offence against God and Religion, punished by the Municipal laws of England. Vide the Statutes. 27 H. 6. c. 5. 1 Car. 1. c. 1. And 29 Car. 2. c. 7.

Sabbatum, The *Sabbath*, or day of rest; the seventh day from the creation: It is used for peace in the book of *Domefday*.

Saballinz Pelles, i. e. Sable furs, mentioned in *Hornd. p. 758*.—*Statutum fuit in Anglorum gente ne quis escaletto, sabellino varia, vel griseo uteretur.* Brompt. Anno 1188.

Sabulonarium, A gravel pit; or liberty to dig gravel and sand; also the money paid for the same. *Pet. Parl. temp. Ed. 3.*

Sac, (*Saca vel saca*) Is an ancient privilege which a lord of a manor claims to have in his court, of holding plea in causes of trespass arising among his tenants, and of imposing fines and amercements touching the same: But by some writers it is the amercement and forfeiture itself. *Rastal*. In the laws of King Edward, set forth by *Lambard*, *saca* is said to be the amercement paid by him who denies that which is proved against him to be true; or affirms that which is not true. *Lamb. 244*. And according to *Fleta*, *Sac* significat acquitanciam de *scilla ad comitatum* & *hundredum*. *Fleta* lib. cap. 47. *Præcip. ut A. B. bene & libere habeat focan & facam.* *Brev. Hen. 2.*

Saca, In the Saxon properly signifies as much as *Causa* in Lat. whence we in England still retain the expression, For whose sake, i. e. For whose cause, &c.

Sacaburh or **Sacabere**, Is he that is robbed, or by theft deprived of his money or goods, and puts in surety to prosecute the felon with fresh suit. *Briton, c. 15 & 29*. With whom agrees *Bracton, lib. 3. c. 32*. The Scots term it *Sikerborgh*, that is *certum vel securum plegium vel pignus*; for with them *Siker* significeth *securus*, and *borgh*, *plegium*.

Saccini, Monks so called, because they wore next their skins a garment of goat's hair; and *saccus* is applied to coarse cloth made of such hair. *Walsing.*

Saccis, *Fratres de faccis*, the sack-cloth brethren, or the penitential order. *Placit. 8 Ed. 2.*

Saccus cum brachia, Is a service or tenure of finding a sack and a broach to the King, for the use of his army. *Bracton, lib. 2. c. 16.*

Sack of wool, A quantity of 26 stone of sheeps wool; and of cotton-wool, from one hundred and a half to four hundred. *Stat. 14 Ed. 3. c. 2.*

Sacrament, (*Sacramentum*) Is the most solemn act of worship amongst us, being instituted by our Saviour himself; and by the *Rubric* there must be three at the least to communicate, and a minister is not without lawful cause to deny it to any who shall devoutly and humbly desire it: But notorious sinners are not to be admitted to it till they have repented; nor those who maliciously contend, until they are reconciled, &c. also the Sacrament is not to be administered to such who refuse to be present at the prayers of the church, or to strangers; for a minister is not obliged to give it to any but those of his own parish; and the partakers of the Holy Sacrament ought to signify their names to the curate at least a day before it is administered. *Can. 27. Count. Paris. Com. 36, 37, 38.*

If a minister refuse to give the Sacrament to any one, being required by the bishop, he is to certify the cause of such refusal; and a person refusing to administer the Sacrament to any without just cause, is liable to be sued in action of the case; because a man may have a temporal loss by such refusal. *Rigs. Clergy 489*. By the statute, no person shall be chosen into any office of magistracy, or place of trust, &c. unless they receive the Sacrament, according to the rites of the church of England, and deliver a certificate thereof to the court of King's Bench or

quarter-sessions; under the hand of the minister, and prove it by witnesses. 13, 14 Car. 2. c. 4. 25 Car. 2. c. 2. In every parish church the Sacrament is to be administered three times in the year, (whereof the feast of *Easter* to be one) and every layman is bound to receive it thrice every year, &c. In colleges and halls of the Universities, the Sacraments are to be administered the first or second Sunday of every month; and in Cathedral Churches, upon all principal feast-days: *Canon 21, 22, 23*. The churchwardens as well as the minister, are to take notice whether the parishioners come so often to the Sacraments as they ought; and on a churchwarden's presenting a man for not receiving the Sacrament, he may be libelled in the Ecclesiastical court and excommunicated, &c. Reviling the Sacrament of the Lord's Supper is punishable by fine and imprisonment. 1 *Eliz. c. 1.*

Sacramentum, Is used for an oath: The common form of all inquisitions may by a jury run thus; *Qui dicunt fateri Sacramentum suum*, &c. whence possibly the proverbial offering to take the Sacrament of the truth of a thing, was first meant by attesting upon oath.

Sacramentum altaris, The sacrifice of the mass, or what is now called the Sacrament of the Lord's Supper; for which communion in the times of popery, the parish priest provided bread and wine for the people and himself, out of the offerings and oblations. *Parv. Antiq. 488*.

Sacrilege, (*Sacrilegium*) Is church robbery, or a taking of things out of a holy place; as where a person steals any vessels, ornament, or goods of the church: And it is said to be a robbery of God, at least of what is dedicated to his service. 3 *Cra. 153*. If any thing belonging to private persons, left in a church be stolen, it is only common theft, not sacrilege: But the Canon law determines that also to be sacrilege; as likewise the stealing of a thing known to be consecrated, in a place not consecrated. *Treat. Law. 360*. By the Civil law, sacrilege is punished with greater severity than any other thefts; and the Common law distinguished this crime from other robberies; for it denied the benefit of the clergy to the offenders, which it did not do to other felons: But by statute it is put upon a footing with other felonies; by making it felony excluded of clergy, as most other felonies are. 2 *Inst. 250*. All persons not in holy orders, who shall be indicted, whether in the same county where the fact was committed, or in a different county, of robbing any church, chapel, or other holy place, are excluded from their clergy, by 23 H. 8. c. 1. 25 H. 8. c. 3. 5 & 6 Ed. 6. c. 10. And all persons in general are ousted of their clergy for the felonious taking of any goods out of any parish church, or other church or chapel, by the 1 Ed. 6. c. 12. But the word robbing being always taken to carry with it some force, it seems no sacrilege is within these statutes, which is not accompanied with the actual breaking of a church, &c. *Kel. 58, 69. Dyer 224*. And the statute 23 H. 8. is the only act which extends to accessaries to these robberies; except the offence amount to burglary, in which case accessaries before are ousted of clergy, by 3 & 4 W. & M. c. 9. 2 *Hawk. P. C. 351*.

Sacrilege, Or alienation to laymen and to profane or common purposes of what was given to religious persons and to pious uses, was a guilt which our forefathers were very tender of incurring; and therefore when the order of the Knights Templars was dissolved, their lands were given to the Knights Hospitallers of Jerusalem for this reason—*Ne in pios usus erogata contra donatorum voluntatem in alios usus distraberentur*. *Paroch. Antiq. 390*.

Sacrista, (*Lat.*) A Sexton, belonging to a church, in old times called *Sacristan* and *Sagison*.

Safe-conduct, (*Salmi conductus*) Is a security given by the Prince, under the Great Seal, to a stranger, for his safe coming into and passing out of the realm; the form whereof is in *Reg. Orig. 25*. There are letters of safe conduct which must be enrolled in Chancery; and the persons to whom granted must have them ready to shew: And touching which there are several statutes, viz. 9 H. 3. c. 30. 15 H. 6. c. 3. 28 H. 8. c. 1. Vide *Black. Com. 1 P. 259: 4 P. 68*.

Saguardia, (*Salva guardia*) A protection of the King to one who is a stranger that fears violence from some of his

his subjects, for seeking his right by course of law. *Reg. Orig.* 26.

Safe-pledge, (*Salvus plegius*). A surety given for a man's appearance at a day assigned *Bracton. lib. 4. cap. 2.*

Sagaman, (From the Sax. *Saga*, i. e. *Fabula*) Signifies a tale-teller, or secret accuser. *Leg. Hen. 3. cap. 63.*

Sagibaro, alias **Sachbaro**, Is the same that we now call *justiciarius*, a judge. *Leg. Luc. c. 6.*

Sagitta Barbata, A bearded arrow—*Reddendo inde annuatim pro omni servitio sex sagittas barbata ad festum Sancti Michaelis, &c.* Blount.

Sagittaria, A sort of small ships or vessels, with oars and sails. *R. de Diceto, anno 1176.*

Sail-cloth. For encouraging the manufacture of *sail-cloth*, any person may import into this kingdom undressed flax, without paying any duty for the same, so as a due entry be made thereof at the Custom-house, &c. And no drawback is to be allowed on re-exportation of foreign *sail-cloth*: But an allowance shall be made of 1 *d.* per ell for *British sail-cloth* exported, &c. *4 Geo. 2. c. 27.* All foreign *sail-cloth* imported, from which duties are granted, shall be stamped, expressing from whence imported, &c. And manufacturers of *sail-cloth* in this kingdom, are to affix to every piece by them made, a stamp containing their names, and places of abode, or exposing it to sale, shall forfeit 10 *l.* And if any persons cut off or obliterate such stamps, they incur a forfeiture of 5 *l.* upon conviction before one or more justices to be levied by distress, &c. Ships built, on first setting out to sea, to have one complete set of sails manufactured here, on pain of 50 *l.* And no sail-maker may work up into sails foreign *sail-cloth* not stamped, under 20 *l.* penalty: Also *sail-cloth* made in Great Britain, the pieces being made of certain lengths and breadths, shall weigh so many pounds each bolt, and the warp wrought of double yarn, &c. And flax yarn used in *British sail-cloth* not to be whitened with lime, on forfeiture of 6 *d.* a yard. Sail-makers, &c. are to cause this act to be put up in their shops and work-houses, under the penalty of 40 *s.* *Stat. 9 Geo. 2. c. 37.* By the *stat. 19 Geo. 2. c. 27.* Masters of ships are to make entry of all foreign made sails on board, under the penalty of 50 *l.* and pay duty for the same, unless he chooses to deliver up the sails as forfeited; Sails brought from the *East-Indies* are exempted from duty: Foreign made *sail-cloth* imported, is to be stamped at the landing: Forger of stamps, &c. shall forfeit 50 *l.* A sail-maker making foreign *sail-cloth* unstamped into sails, shall forfeit 50 *l.* nor repair or amend the same under the penalty of 20 *l.* By the *stat. 23 Geo. 2. c. 32.* Duties are laid on *sail-cloths* imported from Ireland.

Saint Martin le Grand, Court of. The chief of the several courts in London are the *Sheriffs Courts*, holden before their steward or judge; from which a writ of error lies to the *Court of Husting*, before the mayor, recorder and sheriffs; and from thence to justices appointed by the King's commission, who used to sit in the church of *Saint Martin le Grand*, (*F. N. B. 32.*) and from the judgment of those justices a writ of error lies immediately to the House of Lords. *Black. Com. 3 V. 80. n.*

Salo & Salones, Fori vel Magistratus Minister. A tipstaff or serjeant at arms; derived from the Sax. *Sagol*, i. e. *Fustis*, because they use to carry a rod or staff of silver.

Salary, (*Salarium*) Is a recompence or consideration made to a person for his pains and industry in another man's business: The word is used in the *statute 23 Ed. 3. cap. 1.* *Salarium* at first signified the rent or profits of a *Sala*, hall or house; (and in *Gascogne* they now call the seats of the gentry *Sala's*, as we do halls) but afterwards it was taken for any wages, stipend, or annual allowance.

Sale, (*Venditio*) Is the transferring the property of goods from one to another, upon valuable consideration: And if a bargain is that another shall give me 5 *l.* for such a thing, and he gives me *earnest*, which I accept, this is a perfect *sale*, *Wood's Inst. 316.* On *sale* of goods, if *earnest* be given to the seller, and part of them are taken away by the buyer, he must pay the residue of

the money upon fetching away the rest, because no other time is appointed; and the earnest given binds the bargain, and gives the buyer a right to demand the goods; but a demand without paying the money is void: And it has been held, that after the earnest is taken, the seller cannot dispose of the goods to another, unless there is some default in the buyer; therefore if he doth not take away the goods and pay the money, the seller ought to require him so to do; and then if he doth not do it in convenient time, the bargain and sale is dissolved, and the seller may dispose of them to any other person. *1 Salk. 113.* A seller of a thing is to keep it a reasonable time, for delivery: But where no time is appointed for delivery of things sold, or for payment of the money, it is generally implied that the delivery be made immediately, and payment on the delivery. *3 Salk. 61.* Where one agrees for wares sold, the buyer must not carry them away before paid for; except a day of payment is allowed him by the seller. *Noy 87.* It is said a perfect bargain and *sale* between parties, will be good, tho' the seller knows of an execution that is against him; and doth sell the goods to prevent the falling of it upon them. *3 Shrep. Abr. 115.* A *sale* may be of any living or dead goods in a fair or market, be they whose they will, or however the seller come by them; if made with the cautions required by law: But if one sell my goods unduly, I may have them again. *Dott. and Stud. 328. Perk. Sect. 93.* If a man affirms a thing sold is of such a value when it is not, this is not actionable; but if he actually warrants it, at the time of the sale, and not afterwards, it will bear an action, being part of the contract. *2 Cro. 5, 386, 630. 1 Roll. Abr. 97.* See *Contract.* And *Sales of Goods in Markets*, to be binding, &c. Vide *Market.* And *Black. Com. 2 V. 9, 446.*

Salet, Is a head-piece, (from the Fr. *Salut*, i. e. *Salus*) A *salet* or skull of iron, &c. *20 R. 2. c. 1. 4 & 5 P. & M.*

Salicetum, The soil where willows grow, or an oster bed. *1 Inst. 4.*

Salina, Is a salt-pit, or place wherein salt is made: And *salina* is sometimes wrote for *salma*, i. e. a pound weight. *Chart. 17 Ed. 2. and statute R. 1.*

Salique law, (*Lex salica*) A law by which males only are to inherit. *De terra salica nulla portio hereditatis mulieri veniat, sed ad virilem sexum tota terra hereditas perveniat, &c.* It was an ancient law made by *Pharamond*, King of the *Franks*, part of which seems to have been borrowed by our *Henry the First* in compiling his laws, as *cap. 89. Qui hoc fecerit secundum legem salicam moriatur, &c.*

Salisbury, For better repairing the highways, streets, and water courses in the city of *Salisbury*, and enlightening the streets, &c. the mayor, recorder, and justices of the said city, with four principal inhabitants of each parish, are appointed trustees, &c. *Stat. 10 Geo. 2. cap. 6.*

Salmon. No person may take *Salmons* in rivers, between the 8th of September, (by late acts 1st August) and the 11th November; and *Salmon* are not to be taken under eighteen inches long, &c. under penalties. *Stat. 13 Ed. 1. 1 Eliz. c. 17.* None shall sell any *salmon* in vessels before it be viewed, unless the barrel contain forty-two gallons, and the half barrel twenty-one gallons, well packed, and the great *salmon* by itself, and small fish by themselves, &c. on pain to forfeit for every vessel 6 *s.* *8 d. Stat. 22 Ed. 4. c. 2.* *Salmon* not to be taken in the *Thames* between 24 August and 11th November. *9 Ann. c. 26.* Fishmongers prohibited to buy *salmon* under six pounds weight. *1 Geo. 1. c. 18.* *Salmon* may be taken in the *Ribble* between 1 Jan. and 15 Sept. *23 Geo. 2. c. 26.* See *Fish.*

Salmon-fry, An engine to catch *salmons* or such like fish. *25 H. 8. c. 7.*

Salatorium, Signifies a deer leap; *Quod habent unum Salatorium in Parco de H. Pat. 1 Ed. 3.*

Sale. The price of *sale* is to be set by justices of peace in their sessions; and persons selling it at a higher rate shall forfeit 5 *l.* Also *sale* shall be sold by weight after the rate of 56 *lb.* to the bushel, under the like penalty. *Stat. 9 & 10 H. 3.* And a duty is imposed on

salt by statute; pits to be entered, &c. at the *Salt-Office* on pain of 40 *l.* penalty; and proprietors removing *salt* from any pit, before weighed in presence of the proper officer, to forfeit 20 *l.* &c. 10 *l.* 3. c. 22. 1 *Ann.* c. 21. But the duties on *salt* made in this kingdom were taken off, and duty on foreign *salt* to continue, except for the *British* fishery, &c. by *Stat. Geo.* 2. c. 20. And since the duties on *salt* have been revived and continued, to be managed by commissioners, &c. who may grant licences to erect houses for refining of rock *salt*, at certain places in the counties of *Essex* and *Suffox.* 5 *Geo.* 2. c. 6. and 7 *Geo.* 2. c. 6. The *salt* duties continued for a further term, and under the same provisions, &c. with a clause of loan of 500,000 *l.* And proprietors of *salt* works in *Scotland*, are not to pay their work-people in *salt*, under the penalty of 20 *l.* *Stat.* 8 *Geo.* 2. c. 12. By a late statute, the *salt* duties are further continued, with a loan of 1,200,000 *l.* at 4 *l.* per cent. interest, &c. Rock *salt* may be used in the making of *salt* from sea water in works in *Wales*, paying the duties on both. 14 *Geo.* 2. c. 22. The *salt* duties are made perpetual by *Stat.* 26 *Geo.* 2. c. 3. And see *Stat.* 26 *Geo.* 2. c. 32.

Salt may be imported from any part of *Europe* to *Nova Scotia*, 2 *Geo.* 3. c. 24.

May be imported from *Europe* into *Quebec* in *America*, 4 *Geo.* 3. c. 19.

Salt-Duty in *London*. There is a custom duty in the city of *London* called *Grannage*, payable to the lord mayor, &c. for *salt* brought to the port of *London*, being the twentieth part. *Cit. Lib.* 125.

Salt-petre. What quantity to be delivered yearly into the royal stores, 1 *Ann. Stat.* 1. c. 12. *Stat.* 113. The King may prohibit the exportation of it, 29 *Geo.* 2. cap. 16. *Stat.* 1.

Salt-Silver, One penny paid at the feast of *St. Martin*, by the tenants of some manors, as a commutation for the service of carrying their lord's *salt* from market to his larder. *Paroch. Antiq.* 496.

Saltus, A high thick wood or forest. See *Bosius*.

Salva-garda, Is a security given by the King to a stranger, fearing the violence of some of his subjects, for seeking his right by course of law;—the form whereof see in *Reg. Orig.* fol. 26.

Salvage, Is an allowance made for saving of ships or goods from danger of seas, enemies, &c. *Merch. Dict.* And by statute, where a ship shall be in danger of being stranded or run on shore, justices of peace are to command constables to assemble as many men as shall be necessary to save the ship; and being preserved by their means, the persons assisting shall within thirty days after be paid a reasonable reward for the *salvage* by the master of the ship or merchant, in default whereof the ship or goods shall remain in the custody of the officers of the customs as a security. 12 *Ann.* c. 18. See *Black. Com.* 1 *V.* 293.

Salvagiis, Wild, savage; as *salvagiis catus*, the wild cat. *Rot. Carre* 1 *Job*.

Salute, (*Salus*) Was a coin made by King *Hen.* 5. after his conquest in *France*, whereon the arms of *France* and *England* were stamped and quartered. *Stow's Chron.* 589.

Sancta, Are the reliques of the saints; and *jurare super sancta* was to make oath on those reliques. *Leg. Caput.* c. 57.

Sanction of Laws. With regard to the *sanction* of laws, or the evil that may attend the breach of publick duties; it is observed, that human legislators have for the most part chosen to make the *sanction* of their laws rather vindicatory than remuneratory, or to consist rather in punishments, than in actual particular rewards. Because, in the first place, the quiet enjoyment and protection of all our civil rights and liberties, which are the sure, and general consequence of obedience to the Municipal law, are in themselves the best and most valuable of all rewards. Because, also, were the exercise of every virtue to be enforced by the proposal of particular rewards, it were impossible for any state to furnish stock enough for so profuse a bounty. And farther, because the dread of evil is a much more forcible principle of human actions than the prospect of good. (*Locks, Hum.*

Und. 1. 2. c. 21.) For which reason, tho' a prudent bestowing of rewards is sometimes of exquisite use, yet we find that those Civil laws which enforce and enjoin our duty, do seldom, if ever, propose any privilege or gift to such as obey the law; but do constantly come armed with a penalty denounced against transgressors, either expressly defining the nature and quantity of the punishment, or else leaving it to the discretion of the judges, and those who are entrusted with the care of putting the laws in execution.

Of all the parts of a law the most effectual is the vindicatory. For it is but lost labour to say, "do this, or avoid that," unless we also declare, "this shall be the consequence of your non-compliance." We must therefore observe, that the main strength and force of a law consists in the penalty annexed to it.—Herein is to be found the principal obligation of human laws. *Black. Com.* 1 *V.* 56, 7.

Sanctuary, (*Sanctuarium*) Is a place privileged for the safe-guard of offenders lives, being founded upon the law of mercy, and the great reverence and devotion which the Prince bears to the place whereunto he grants such privilege. *Sanctuaries* were first granted by King *Lucius* to our churches and their precincts; and among all other nations, our ancient Kings of *England* seem to have attributed most to those *Sanctuaries*, permitting them to shelter such as had committed both felonies and treasons; so as within forty days they acknowledged their fault, and submitted themselves to banishment; during which space, if any layman expelled them, he was excommunicated; and if a clerk, he was made irregular. *Mat. West. Ann.* 187. *S. P. C. lib.* 2. cap. 38. *Phia; lib.* 1. cap. 29. *St. John's* of *Beverly* in *Yorkshire* had an eminent *sanctuary* belonging to it in the time of the *Saxons*: And *St. Burien* in *Cornwall* had the like granted by King *Albelsian*, Anno 935. so had *Westminster* granted by King *Edward the Confessor*; and *St. Martin le Grand* in *London*. 21 *H. 8.* &c. See *Black. Com.* 4 *V.* 326, 358, 429.

Sanctuaries, It has been observed, did not gain the name of such till they had the *Pope's* bull, tho' they had full privilege of exemption from temporal courts by the King's grant only: But no *sanctuary* granted by general words, extended to high treason; tho' it extended to all felonies, except sacrilege, and all inferior crimes, not committed by a *sanctuary* man; and it never was a protection against any action civil, any farther than to save the defendant from execution of his body, &c. 2 *Hawck. P. C.* 335, 336. *Sanctuaries* were abolished here by the statutes 26, 28 & 32 *H. 8.* and 1 & 2 *Ed.* 6. And the *Plea of Sanctuary with Abjuration* is taken away by 21 *Jac.* 1. c. 2.

Sandal, A merchandise brought into *England*; and a kind of red bearded wheat. See 2 *R.* 2. c. 1.

Sand-gabel, Is a payment due to the lord of the manor of *Rodley* in the county of *Gloucester*, for liberty granted to the tenants to dig sand for their common use. *Tayl. Hist. Gavel.* 113.

Sane Memory, i. e. Perfect and sound mind and memory, to do any lawful act, &c. See *Non Sane*.

Sanguinem emere, Was where villeins were bound to buy or redeem their blood or tenure, and make themselves freemen.—*Omnes censualii tenen. de manerio de Grendon debent sanguinem suum emere.* *Lib. niger Heref.*

Sanguis, Is taken for that right or power which the chief lord of the fee had to judge and determine cases where blood was shed. *Mon. Angl. tom.* 1. p. 1021.

Sang and Sange, Words used for blood.

Saphota, To what duty liable on importation. 2 *W. & M. sess.* 2. c. 14.

Sarabara, A covering for the head. *Mat. Westm. Ann.* 1295.

Saracines, (from the *Fr.* *Sarcier*, Lat. *Sarcilary*) Is the time of season when husbandmen weed their corn.

Sarcalatura, Weeding of corn: *Una sarcalatura*, the tenants service of one day's weeding for the lord.—*Tempore sarcalaturæ, &c. lib. niger Heref.* *Antiq.* 203.

Sarkis. See *Guernsey*. And *Black. Com.* 1 *V.* 106.

Sarkillus,

Sarkellus, An unlawful net or engine for destroying fish. *Inquisic. Justic. Ann. 1254.*

Sarpier of Wool, (*Serpiera lance*, otherwise called a pocket) Is half a sack. *Fleta, lib. 2. c. 12.*

Sarcaparilla, May be imported from the American plantations; &c. if of the growth of America. 7 *Ann. cap. 8.*

Sart, or *assart*, A piece of woodland turned into arable. See *Assart*.

Sarum, Is intended for the city of Salisbury. It was a form of church-service called *secundum usum Sarum*, and was composed by *Osmund* the second bishop of Sarum in the time of William the Conqueror. *Holinghead, p. 17. col. B.*

Sasse, Is a kind of wear with flood-gates, most commonly in navigable and cut rivers, from the damming and shutting up and loosing the stream of water, as occasion requires, for the better passing of boats and barges; This in the West of England is called a *lock*; and in some places a *suice*. *Stat. 16 & 17 Car. 2. c. 12.*

Sassons, The corruption of *Saxons*, a name of contempt formerly given to the English, while they affected to be called *Angles*; they are still so called by the Welch.

Satisfaction, Is the giving of recompence for an injury done; or the payment of money due on bond, judgment, &c. In which last, it must be entered on record. 2 *Lill. Abr. 400.* See *Black. Com. 4 V. 421.*

Where money given one by will, shall be held to be in satisfaction of a debt, being more than that amounts to; and where it is not, and both have been allowed. *Præced. Chanc. 394, 395, 236. 2 Vern. 478.* See *Legacy. Satisfaction* and amends may be pleaded for involuntary trespass, &c. by stat 21 *Jac. 1. c. 5.* Vide *Payment*.

Saturday's Stop, A space of time from even-song on Saturday till sun-rising on Monday, in which it was not lawful to take salmon in Scotland, and the Northern parts of England. *MS.*

Saber-Default, Is a law-term for to excuse, as when a man having made default in appearance in court, &c. comes afterwards and alledges good cause for it, *viz.* Imprisonment at the time, or the like. *Book Ent.*

Sankelin, (Fr. from *Sang*, i. e. *Sanguis*, *Fin*, & *Fini*) Is the determination or final end of the lineal race and descent of kindred. *Britton, c. 119.*

Saurus, A hawk of a year old. *Bract. lib. 5. tract. 1. c. 2. par. 1.*

Saxon-lage, (*Saxon-laga*, *Lex Saxonum*) The law of the West Saxons by which they were governed. See *Merchenlage*. And *Black. Com. 4 V. 403, 4. 5.*

As to the reason why so many traces of the Saxon laws, language and customs are to be found in England, *Robertson*, in his History of Emperor Charles V. 1 *V. 197. Note, IV.* Says, "The Saxons carried on the Conquest of that country with the same destructive spirit, which distinguished the other barbarous nations. The ancient inhabitants of Britain were either exterminated; or forced to take shelter among the mountains of Wales, or reduced into servitude. The Saxon government, laws, manners, and language were of consequence introduced into Britain; and were so perfectly established, that all memory of the institutions previous to their Conquest was abolished." As to the laws of the Saxons, for putting an end to private wars. See *Id. 285.*

Scabini, Is a word used for wardens at *Linne* in Norfolk. *Sciunt presentes & futuri quod nos, &c. Custodes fore scabini & fratres fraternitatis fore glida mercatoria sancte trinitatis villa Linne in Com. Norf. Chanc. Hen. 8.*

Scalam, *Ad scalam*, The old way of paying money into the Exchequer. The Merit, &c. is to make payment *ad scalam*, i. e. *solvitur præter quamlibet numeratum librum seu denarium*. *Stat. W. 1.* And at that time sixpence being added to the pound made up the full weight, and near the intrinsic value. This was agreed upon as a medium to be the common estimate for the defective weight of money; thereby to avoid the trouble of weighing it when brought to the Exchequer. *Lowndes's Ess. on Coin, pag. 4. Hale's Sher. Accounts, pag. 21.*

Sealings, A quarry or pit of stones, or rather flints for covering houses: French *esailers*, whence *scaling* of houses, &c. *Mon. Angl. tom. 2. pag. 130.*

Scandal, Signifies a report or rumour, or an action whereby one is affronted in publick. *Cham.*

How the words are to be laid, and what is a material variance between the words laid and proved. See *Rep. Temp. Hardou. Per Anway, 305.* It is not necessary to charge the words to be false. *Id. 340.*

Scandal or Impertinence in Writs in Equity: If a bill in equity contain matter either scandalous or impertinent, the defendant may refuse to answer it, till such scandal or impertinence is expunged, which is done upon an order to refer it to one of the masters. *Black. Com. 3 V. 442.*

Scandalum magnatum, Is the special name of a statute, and also of a wrong done to any high personage of the land, as prelates, dukes, earls, barons, and other nobles; and also to the chancellor, treasurer, clerk of the Privy seal, steward of the house, justice of one bench or other, and other great officers of the realm, by false news, or horrible or false messages, whereby debates and discords betwixt them and the commons, or any scandal to their persons might arise. *Stat. 2 R. 2. cap. 5.* and hath given name to a writ, granted to recover damages thereupon. *Corwell.*

At the time of making the law, on which this action is founded, the constitution of this kingdom was martial, and given to arms; the very tempers were military, and so were the services; as knight-service, castle-guard and escuage; so that all provocations by vilifying words were revenged by the sword, which often created factions in the Commonwealth, and endangered the government itself; for in this kind of quarrels the great men, or peers of the realm, usually engaged their vassals, tenants and friends; so that laws were then made against wearing of liveries or badges, and against riding armed; so the stat. *Westm. 2.* appoints that the offender shall suffer imprisonment until he produces the author of a false report. 2 *Mod. 156.*

The law on which this action is grounded, is the 2 *Rich. 2. stat. 1. cap. 5.* which enacts, "That of counterfeits of false news, and horrible lies, of Prelates, Dukes, Earls, Barons, and other nobles and great men of the realm, and also of the chancellor, treasurer, clerk of the Privy seal, steward of the King's house, justices of the one bench or of the other, and other great officers of the realm, it is defended that none contrive or tell any false things of Prelates, Lords, and of others aforesaid, whereof discord or slander might rise within the realm, and he who doth the same shall be imprisoned till he have brought him forth that did speak the same." This statute is recited by the 12 *R. 2. cap. 11.* and thereby it is further provided, that the offender shall be punished by the advice of the council. 4 *Inst. 51. 4 Co. 12. b.* See *Black. Com. 1 V. 402. 3 V. 123.*

1. Who may bring this action, and for what words it lies.
2. Of the proceedings in this action.

1. Who may bring this action, and for what words it lies.

It hath been held, that the King is not included in the words *great men of the realm*, as the statute begins with an enumeration of persons of an inferior rank, as Prelates, Dukes, &c. *Crompt. Jurist. 19. 35.*

Also it is held, that a woman noble by birth is not included to this action. *Crompt. Jurist. 34.*

It hath been adjudged, that tho' there was no viscount at the time of making this statute, (the first viscount being John Beaumont who was created viscount, 18 *Hen. 6.*) yet when created noble, tho' by a new title, he was included to this action on this statute. *Crompt. Jurist. 136. Falsb. 565.* Viscount Sey and *See v. Stephens.*

Also it hath been adjudged, that since the union a peer of Scotland may have an action on this statute, and that it is not necessary for him to alledge that he hath a seat and

and voice in parliament; for by the 5 *Ann. c. 8. art. 23.* All peers of Scotland after the union shall be peers of Great Britain, and have rank and precedence, &c. be tried, &c. and enjoy all privileges of peers as the peers of England now do or hereafter may enjoy, except the right and privilege of sitting in the House of Lords, and the privilege depending thereon, and particularly the right of sitting upon the trial of peers. *Cam. 439. Lord Viscount Falkland v. Phipps.*

It hath been contended for, that no words of slander are punishable by this statute, unless they are actionable at Common law, and that they are only aggravated by the statute, which in this respect is like the King's proclamation. *2 Mod. 151. Sir Robert Atkins in his argument. Freeman. 222.*

But the contrary hereof seems to have been holden in most of the cases on this head, and not without reason, as it would be to no purpose to make a law, and thereby to give a peer an action for such words as a common person might have before the making of the statute, and for which the peer himself had equally a remedy by the Common law; and therefore the design of the statute must be, not only to punish such things as import a great scandal in themselves, or such for which an action lay at the Common law, but also such things as favoured of any contempt of the persons of the peers or great men, and brought them into disgrace with the Commons, whereby they took occasion of provocation and revenge. *2 Mod. 156.*

It hath been observed, that no action was brought on this statute 'till 100 years after the making thereof, the Lords still continuing the military way of revenge to which they had been accustomed. *2 Mod. 156. Sir Francis Pemberton's argument.*

The first case on this statute, said to be reported, is in *Kelw.* where the Lord *Blanchamp* brought an action of *scan. mag.* against Sir *Richard Croft*, for that the said *Richard* had sued out a writ of forgery of false deeds against him; and it was held, that the taking out the writ being done in a legal way, and in a course of justice, the action did not lie. *Kelw. 26, 27. 2 Mod. 164. cited.*

Scan. mag. brought for saying of a judge; you are a corrupt judge, and held actionable. *Cromp. Jur. 35. Ld. Ch. J. Dyer's case.* So for these words, He imprisoned me till I gave him a release. *3 Leon. 376. Lord Winchester's case, cited Freeman. 221.* So these words, You have writ a letter to me, which I have to shew, which is against the word of God, against the Queen's authority, and to the maintenance of superstition, and that I will stand to prove against you, were held actionable; and 500 marks damages given. *Cro. Eliz. 1. Bishop of Norwich v. Prichett.* So of these words, My Lord *Mordant* did know that *Prude* robbed *Shutbol*, and bid me compound with *Shutbol* for the same, and said he would see me satisfied for the same tho' it cost him 100*l.* which I did for him, being my master, otherwise the evidence I could have given, would have hanged *Prude*. *Cro. Eliz. 67. Ld. Mordant v. Bridges.* For these words wrote in a letter, I have heard that your Lordship hath sought by uncharitable means to bereave me of my life, lands and liberty, an action lies. *Moor 142. Ld. Lumley v. Fox.* 4 Co. 16. S. C. that the action as well lies for words written as those spoken. *2 Show. 505.*

An action of *scan. mag.* was brought for these words, There are more Jesuits come into England since the Earl of *Northampton* was Lord of the Cinque ports than ever there were before, and held actionable. *22 Co. Earl of Northampton's case.* In *scan. mag.* for these words spoken by a parson in the pulpit, The lord of *Lancaster* is a wicked and cruel man; and an enemy to the reformation in England, adjudged actionable, and 500*l.* damages given. *2 Sid. 21. Ld. Leicester v. Mancy.*

So for these words, The Earl of *Portland* is of so little esteem in the country, that no man of reputation hath any esteem for him, and no man will take his word for a *d.* and no man of reputation values him more than I do the dirt under my feet, and held actionable, tho' said they would not be so in the case of a common person. *Freem. 49. Earl of Portland v. Savill.*

If one says, I met *J. S.* whom I do not know, but my Lord *P.* sent after me to take my purse, an action of *scan. delum magnatum* lies, tho' not positively said my Lord *P.* sent him, or that it was to take the purse feloniously; which last, in case of an action by a common person, might be a good exception. *1 Lev. 277. 1 Sid. 434. 2 Keb. 537. E. of Peterborough v. Sir John Mordant. Vide 1 Sid. 233. 1 Keb. 813. 1 Lev. 148. Marquis of Dorchester v. Proby.* If one says of a peer, He is an unworthy man, and acts against law and reason; an action of *scan. mag.* lies, notwithstanding the words are general, and charge him with nothing certain: And so adjudged by *North, Windham, and Scroggs*; against the opinion of *Atkins*, who said the statute extended not to words of so small and trivial a nature, but to such only which were of greater magnitude, by which discord might arise, &c. and therefore the words horrible lies were inserted in the statute. Note; the rule laid down by the court in this case was, that words should not be construed either in a rigid or mild sense, but according to the general and natural meaning, and agreeable to the common understanding of all men. *2 Mod. 151. &c. 1 Mod. 232. Freeman. 220. Lord Townsend v. Doctor Hughes.*

2. Of the proceedings in this action.

It is now clearly agreed, that tho' there be no express words in the statute which give an action, yet the party injured may maintain one on this principle of law, that when a statute prohibits the doing of a thing, which if done might be prejudicial to another, in such a case he may have an action on that very statute for his damages. *2 Mod. 152.*

That tho' the action is to be brought *tam pro domino rege quam pro se ipso*, yet the party is to recover all the damages. *1 Peer Will. 690.* That if the words are actionable at Common law, the peer hath his election to proceed on the statute, or at Common law. *Freem. 49.* It hath been held, that this being a general law, the plaintiff need not recite it particularly, and that if he sets forth so much thereof as shews his case to be within the statute, it is sufficient. *Cro. Car. 136. 2 Sid. 21. Freeman. 425.* That it is now settled that no new trial is to be granted in *scan. mag.* for excessive damages; which points seem to have been first determined in the before mentioned case of Lord *Townsend v. Dr. Hughes*, where the jury gave 4000*l.* damages. *2 Mod. 151. 1 Mod. 231.*

It has been ruled, that in *scan. mag.* the defendant cannot justify, let the words be ever so true, because the action is brought *qui tam*, in which the King is concerned; but it hath been held that the defendants may explain the words by shewing the occasion of speaking of them, and thereby extenuate the meaning of them, as was done in Lord *Cromwell's* case. *4 Co. 14. 2 Mod. 166. Freeman. 220. Poph. 67.*

In *scan. mag.* the court will never change the venue on the common affidavit that the words were spoken in another county, because a scandal raised on a peer of the realm reflects on him thro' the whole kingdom; and he is a person of so great notoriety, that there is no necessity of his being tied down to try his cause among his neighbourhood. *Carth. 400. 2 Salk. 668. Vide 1 Lev. 56. 1 Keb. 514. 1 Sid. 185. 2 Mod. 216.*

But in the case of Lord *Shaftesbury v. Graham*, the court in *scan. mag.* on a special affidavit of the plaintiff's power and interest in the county where the action was laid, made a rule for changing the venue; but note, that the books which report and cite this case, mention it as a case of the times; and that it was owing to the great influence that Lord had in the city of London that the court varied from the general rule, and which rule hath ever since, notwithstanding this case, been adhered to. *2 To. 103. 1 Peer Will. 363. Skin. 40. 2 Show. 200.*

It hath been held, that the statute, which appoints that actions for words shall be commenced in the Exchequer chamber, does not extend to *scan. mag.* *Cro. Car. 586.* And it hath been held, that the statute 27 *Eliz.* for bringing a writ of error in the Exchequer chamber does not extend to this action. *Cro. Car. 385. 1 Sid. 143.*

It hath been held, that in an action of *flan. mag.* special bail is not required. 3 *Mod.* 41. *Holt Rep.* 646. It hath been held, that no costs are to be given the plaintiff on his obtaining a verdict. 2 *Show.* 506.

Scandalizing the marriage of King Hen. 8. with Anne Bullen was declared treason, by Stat. 25 *Hen. 8.*

Scarborough, Persons incorporated there, with power to distrain every man for the fifth part of houses and lands, towards the repairs of the pier and key, &c. See Stat. 37 *H. 8. c. 14.*

Scatitia Lex, A law against buggery. — *Quæ præpostera venaris usum coercerat, ita dicitur a scatitia latere.*

Scavage, Screebage, or Schewage, (from the Sax. *schewian*, i. e. *offendere*) A kind of toll or custom, exacted by mayors, sheriffs, &c. of merchant strangers, for wares shewed or exposed to sale within their liberties; prohibited by the statute 19 *H. 7. c. 7.* But the city of London still retains this ancient custom to a good yearly profit: And the Lord Chancellor, Treasurer, President of the Council, Privy Seal, Steward, and two Justices of the King's Bench and Common Pleas, are to ascertain these duties, and order tables to be made, mentioning the particulars, &c. by 22 *H. 8. c. 8.*

Scabaldus, The officer who collected the *scavage* money, which was sometimes done with great extortion.

Scavengers, (from the Belg. *schaven*, to scrape or carry away) Are persons chosen into this office in London and its suburbs, who hire rakers and carts to cleanse the streets, and carry the dirt and filth thereof away. 14 *Car. 2. c. 2.* In *Easter* week yearly, two tradesmen in every parish within the weekly bills of mortality must be elected *scavengers* by the constables, churchwardens, and other inhabitants, who are to take upon them the office in seven days, under the penalty of 10*l.* These *scavengers* every day, except *Sundays* or holidays, are to bring their carts into the streets, and give notice by a bell, or otherwise, of carrying away dirt, and to stay a convenient time, or shall forfeit 40*s.* and justices of peace in their petit sessions may give scavengers liberty to lodge their dirt in vacant places near the streets, satisfying the owner for the damage, &c. All persons, within the weekly bills, are to sweep the streets before their doors, every *Wednesday* and *Saturday*, on pain of forfeiting 3*s.* 4*d.* and persons laying dirt or ashes before their houses, incur a forfeiture of 5*s.* Inhabitants and owners of houses are also to pave the streets before their own houses, on the penalty of 20*s.* for every perch: And constables, churchwardens, &c. may make a scavenger's tax, being allowed by two justices of the peace, not exceeding 4*d.* in the pound, &c. 2 *W. & M. c. 2.* By the Stat. 1 *Geo. 1. c. 48.* Justices of peace in their quarter-sessions may appoint scavengers, and order the repairing and cleansing the streets in any city or market-town, and appoint persons to make assessments, so as not to exceed 6*d.* per pound per ann. to defray the charge of such scavengers, to be collected and levied by distress; and when new scavengers are chosen, the old ones must account before two justices for the money assessed and collected, and pay what remains in their hands to the new scavengers, or be committed to prison, &c. The assessments for scavengers of the parishes of *St. Anne Westminster*, and *St. James*, shall be rated according to the custom of the city; and ancient streets in the city are to be maintained according to ancient usage, &c. The Lord Mayor or any Alderman may present upon view, any offence within the city of London, and assess fines not exceeding 20*s.* to be paid to the Chamberlain for the use of the city, &c. Stat. 16. Trustees and commissioners appointed to clean and repair *St. James's Square*, and continue the same cleaned; and rates to be made and assessed on houses, at so much per foot in front, leviable by distress; and annoying the square by filth, is liable to 20*s.* penalty, &c. by 12 *Geo. 1. c. 25.* For the better paving and cleansing the streets in the city of *Westminster*, &c. Surveyors are to be nominated by justices of peace, who shall take a view of all the streets every six weeks, and make presentments of pavements out of repair, cause the same to be amended, &c. And the surveyors to have an allowance not exceeding 8*l.* per ann. out of the scavenger's rates, &c. Stat. 2 *Geo. 2. c. 11.* Persons authorized by 22 & 23 *Car. 2.* may order such parts of London streets, &c. as lie before vacant

houses, to be paved and amended; and impose assessments on the owners, to be paid on their account by the next occassers, and deducted out of rent; and in the mean time, the Chamberlain of the city shall pay the taxes: And such authorized persons may direct posts to be set up in all passages within the city, to preserve foot-paths, and for that purpose make assessments. 20 *Geo. 2. c. 22.* A scavenger's rate cannot be made for a division in which there is no parish officer. 1 *Str. 630.* See the new statutes.

Sceat, (Sax.) A small coin among the Saxons equal to four farthings.

Scectiman, (Sax.) A pirate or thief. LL. *Æthelredi apud Brompton.*

Sceppa Salis, An ancient measure of salt, the quantity now not known: And *sceppa* or *sceap* was likewise a measure of corn, from the Lat. *schapa*; baskets, which were formerly the common standard of measure, being called *ships* or *sheps* in the south parts of England; and a bee-hive is termed a *bee-skip*. Mon. Ang. tom. 2. pag. 284. Paroch. Antiq. 604.

Scecurum, A barn or granary. It is mentioned in *In-gulphus*, pag. 862.

Schiffa, A sheaf, as *schiffa sagittarum*, a sheaf of arrows. See *Schens de verbor. signif. cod. verbor.*

Scharpenny, A small duty or compensation: And some customary tenants were obliged to pen up their cattle at night in the pound or yard of their lord, for the benefit of their dung; or if they did not so, they paid a small compensation called *scharpenny* or *sharnpenny*, i. e. *dung penny*, or money in lieu of dung. The Saxon *searn* signified muck or dung. In some parts of the North they still call cow-dung by the name of *cow-stern*, and in *Westmorland* a *searny boughs* is a nasty, dirty dung-hill-wench. *Cowell.*

Schabaldus, The officer who collected the *scavage* money, which was sometimes done with extortion and great oppression. *Cowell.*

Schedule, Is a little roll, or long piece of paper or parchment, in which are contained particulars of goods in a house let by lease, &c. Vide *Lease*.

Schetes, Was formerly a term for usury; and the Commons prayed that order might be taken against this horrible vice, practised by the clergy as well as the laity. Rot. Parl. 14 *R. 2.*

Schiffa, A little bell used in monasteries, mentioned in our histories. *Eadmer. lib. 2. c. 8.*

Schirman, (Sax. *schirman*) A sheriff. LL. *In Regis apud Brompton.* See *Sheriffman*, and *Black. Com.* 1 *V.* 398.

Schirens-geld, (*shire-geld*) Was a tax paid to sheriffs for keeping the *shire* or county-court. Cartular. Abbat. *St. Edmund* 37.

Schism, (*schisma*) A rent or division in the church: There was a statute made to prevent the growth of *schism*. Anno 12 *Ann.* See *Black. Com.* 4 *V.* 52, 53.

Schoolmaster. No person shall keep or maintain a schoolmaster, who does not constantly go to church, or is not allowed by the ordinary; in pain of 10*l.* a month; and the schoolmaster shall be disabled, and suffer a year's imprisonment. Stat. 23 *Eliz. c. 1.* Recusants are not to be schoolmasters in any publick grammar school, nor any other, unless the persons be licensed by the bishop; under the penalty of forfeiting 40*s.* a day. 1 *Jac. 1. c. 4.* Every schoolmaster keeping any publick or private school, and every tutor in any private family, shall subscribe the declaration, that he will conform to the liturgy of the church of England as by law established, and be licensed by the ordinary; or he shall for the first offence suffer three months imprisonment, &c. 13 *Car. 2. c. 4.* If any papist shall be convicted of keeping a school, or take upon him the education of youth, he shall be adjudged to perpetual imprisonment. 12 *Geo. 2. c. 4.* Persons keeping schools without a licence from the bishop, and receiving the sacrament of the church of England, taking the oath, &c. (except tutors in reading, writing, and arithmetic) shall be committed to the common goal for three months, &c. 12 *Ann. c. 7.* But this last statute, as to schoolmasters receiving the sacrament of the church, is repealed by 5 *Geo. 3. c. 3.* By our canons, no man shall teach in a publick school, or private house, but such

as is examined and allowed by the bishop, and of school life: And all schoolmasters are to teach the catechism of the church in *English* or *Latin*; and bring their scholars to church; and afterwards examine them how they have benefited by sermons, *32. Can. 77, 79.* Tho' the act of uniformity obliges schoolmasters only to assent to and subscribe the declaration, yet it adds *according to the laws and statutes of this realm*, which presupposes some necessary qualification. And therefore a bishop may take time to inquire into the character of elected schoolmaster, before he licenses him. 2 *Strange* 1023. See *Black. Com.* 1 *V.* 453.

Scilicet, An *adverb*, signifies, that is to say, to wit; and hath been often used in law proceedings. Sir *John Hobart*, in his exposition of this word, says, it is not a direct and separate clause, nor a direct and intire clause, but *intermedia*; neither is it a substantive clause of itself, but it is rather to usher in the sentence of another, and to particularise that which was too general before, or distribute that which was too gross, or to explain that which was doubtful and obscure; and it must neither increase nor diminish, for it gives nothing of itself. But it may make a restriction, where the precedent words are not so very express, but they may be restrained. *Hob.* 171, 172. The word *scilicet*, in a declaration, shall not make any alteration of that which went before. *Poph.* 201, 204. And yet, in some cases, the *scilicet* which introduces a subsequent, shall not be rejected. 2 *Cro.* 618.

Scire facias, Is a writ judicial, most commonly to call a man to shew cause to the court whence it issues, why execution of a judgment passed should not be made out. This writ is not granted until a year and a day be elapsed after a judgment given. *Old Nat. Brev. fol.* 451. *Scire facias* upon a fine lies not, but within the same time after the fine levied, otherwise it is the same with the writ of *habere facias possessionem*. *Westl. Symbol.* part 2 *tit.* Pines, sect. 137. and 25 *E.* 3. stat. 5. cap. 1. and 39 *Eliz.* c. 7. Other diversities of this writ you may find in the table of the *Register Judicial and Original*. See also *Rastall's Entries*, verb. *Scire facias*. *Cowell.*

1. Of the nature of the writ, and in what cases it is a proper remedy.
2. Of the *scire facias* to revive judgments, and after what time necessary.
3. Of the *scire facias* on recognizances and statutes.
4. Of pleading to a *scire facias*.
5. Of *scire facias* against testaments, and against whom to be brought, &c.
6. Of other points generally, not classed under the former heads.

1. Of the nature of the writ, and in what cases it is a proper remedy.

A *scire facias* is deemed a judicial writ, and founded on some matter of record, as judgments, recognizances and letters patent, on which it lies to enforce the execution of them, or to vacate or set them aside; and tho' it be a judicial writ of execution, yet it is so far in nature of an original, that the defendant may plead to it, and is in that respect considered as an action; and therefore it is held, that a release of all actions, or a release of all executions, is a good bar to a *scire facias*. *Lit. sect.* 305. *Co. Litt.* 290. b. 291. a. *F. N. B.* 267.

But tho' it be held that a *scire facias* is in nature of an original, yet it hath been adjudged, that no writ of error lies into the Exchequer chamber on a judgment given in *B. R.* on a *scire facias* the statute 17 *Edw.* 3. cap. 8. which gives the writ of error, mentioning only suits or actions of debt, detinue, covenant, account, actions upon the case, *questions of law*, or trespass. *Cro. Car.* 286. 300. 460. *1 Rol. Rep.* 260. *1 Vent.* 38. *1 Ball.* 267.

Also it was formerly held, that the plaintiff could not in a *scire facias* recover costs; but this is now remedied by the statute 8 *W. 3.* *Will. 4.* *17 Geo. 3.* *3 Inst.* 320.

If a bill of exception be tendered to a judge, and he signs it and dies, a *scire facias* lies against his executor or administrators to certify it. *4 Inst.* 428. See *1 Inst.* 428.

A *scire facias* lies against a sheriff who levies money on a *fi. fa.* and retains it in his hands. *Holt* 32. *Cro. Jac.* 514. *1 And.* 247. *Godh.* 276.

So a *fi. fa.* will lie for a fine assessed on the party at the justice seat of a forest. *Cro. Car.* 409. Lies to have execution of damages recovered in appeal. *Cro. Jac.* 549.

Upon an *elegavit* returned by the sheriff, a *scire facias* lies against the pledges in a replevin, by plaint in the sheriff's court, transmitted to the hushings, and so to *B. R.* by *certiorari*. *Comb.* 1. That a *scire facias* lies against the sheriff for taking insufficient pledges in replevin. *Hutt.* 77.

If one hath judgment in a *quare impedit*, and afterwards, before execution, the party is outlawed, the King may have a *scire facias* to execute the judgment; the King having privy enough in this case to sue execution, because the thing, as it was in the plaintiff, vested in the King. *Moor* 241. *Cro. Eliz.* 44, 325. Where having the thing gives a sufficient privy to maintain a *scire facias*. *Kelw.* 168, 169.

On a motion to discharge an outlawry which was pardoned by the act of oblivion, the court held that it could not be done on motion, but that the party must bring a *scire facias* on the act. *Stil.* 348.

Where one obtained judgment, and after had judgment on a *scire facias* thereupon, and then became a bankrupt, and the original judgment was assigned by the commissioners to *S. S.* upon motion, it was entered to intitle him to the benefit of the judgment on the *scire facias* without bringing a new one. *3 Med.* 88.

A *scire facias* brought by the successor of a president of the college of physicians in *London*, upon a judgment in debt obtained by him upon the statute 14 *H.* 8. against practising physick in *London* without a licence, but died before execution; it was objected on demurrer, that the *scire facias* ought to have been brought by the executor or administrator of him who recovered: But without argument the court held, that the successor might well maintain the action, for the suit is given to the college by a private statute, and the suit is to be brought by the president for the time being; and he having recovered in right of the corporation, the law shall transfer that duty to the successor of him who recovered. *Cro. Jac.* 159. *Dr. Atkins v. Gardiner.*

A *scire facias* was brought in the court of *C. B.* to reverse a fine in ancient demesne; and it was ruled, that no such writ lay, but that the party ought to bring his writ of deceit. *Mitch.* 7. *W.* 3. in *C. B.* *Zouch v. Thompson.*

2. Of the *scire facias* to revive judgments, and after what time necessary.

There have been different opinions whether a *scire facias* lay at Common law; but this doubt, says my Lord *Coke*, arose for want of distinguishing between personal and real actions. *2 Inst.* 469.

At Common law, if after judgment given, or recognizance acknowledged, the plaintiff did not sue out execution within the year, the plaintiff or his counsel was driven to his original upon the judgment, and the *scire facias* in personal actions was given by the statute of *Westm.* 2. c. 45.

But in real actions, or upon a fine, tho' no execution was sued out within a year after the judgment given or fine levied, yet after the year a *scire facias* lay for the land, &c. because no new original lay upon the judgment or fine. *2 Inst.* 470.

A *scire facias* lay as well in mixed as real actions, and upon a judgment in an assize. So it lay upon a judgment in a writ of annuity. *10 E.* 258. 600.

It hath been adjudged, that if there be judgment in execution, and no execution had thereon is a year and a day, an *elegavit* from the sheriff cannot be sued out after without a *scire facias*; and *Holt Ch. J.* said, that as to the execution of the law, judgment was real, and the only remedy a *scire facias* for years had, and that a recovery therein bound the right of inheritance. *Salk.* 258. 600. *Comb.* 250. *Barth.* 64. and *1 Sid.* 307, 331. *2 Kellogg.* *Stil.* 161. *3 Lew.* 200. *Linn.* 2262.

But

But tho' after a year and a day there can be no execution of a judgment without a *scire facias*, yet if the plaintiff hath been delayed by a writ of error, he may take out execution within a year and a day after the judgment affirmed. 5 Co. 88. *Moor* 566. pl. 77a. *Cro. Elix.* 706. *Godd.* 372. *Palm.* 44. See 1 *Rel. Abr.* 899. *Lan.* 20. *Dennis v. Drake.* *Cro. Elix.* 416. S. P.

So if after the year after the recovery the defendant brings a writ of error, and the judgment is affirmed, tho' before the writ of error brought the recoverer was put to his *sci. fa.* yet this affirmance is a new judgment, and the recoverer may have within the year after the affirmance a *fi. fa.* or *capias* without a *scire facias*. 1 *Rel. Abr.* 899. and see *Palm.* 449. *Latch* 193.

So if he be nonsuit in the writ of error, or if the writ of error be discontinued; for tho' in these cases there is not any new judgment given, yet the bringing of the writ of error revives the first judgment. *Cro. Jac.* 364. 1 *Rel. Rep.* 104, 113. *Vide* 1 *Rel. Abr.* 899.

If upon a judgment there be a *cesset executio* for a year after the judgment, the plaintiff within the year may take out execution without a *sci. fa.* 6 *Mod.* 14, 288. *Farell.* 64. *Salk.* 600.

Also it hath been held, that where execution hath been taken out after the year and day, it is not void, but voidable only. 3 *Leon.* 404. *Salk.* 273.

If the execution is laid by injunction, tho' the act of the defendant, yet the court will not take notice thereof. 6 *Mod.* 28. *Salk.* 322. and see tit. *Injunction*.

If judgment be given in debt, and no execution sued out within the year, yet the plaintiff may after an award of an *elegit* on the judgment roll, as of the same term with the judgment, continue it from thence, by *viacomus non misit brevis*; so held on a motion to set aside the execution; and tho' the court said that an *elegit* ought to be actually taken out within the year, yet being informed by the clerks of the court, that it had been the practice for many years to make such entry, &c. it was said to be the law of the court, and they ordered the execution to stand. *Carth.* 283. *Seymour v. Greenwill.* 2 *Sbaw.* 235. S. P. *Comb.* 232. S. P.

If the demandant or plaintiff taketh his process of execution within the year, tho' it be not served within the year, yet if he continue the same, he may have execution at any time after the year. 2 *Inst.* 471. *Ca. Lis.* 290. b. and see 2 *Leon.* 77. 78, 87. 3 *Leon.* 259. 4 *Leon.* 44. 1 *Sid.* 59. 1 *Keb.* 159. 6 *Mod.* 288.

If the plaintiff delay the executing of a writ of inquiry till a year after the interlocutory judgment, he cannot do it after without a *sci. fa.* Cases in *B. R. Pasch.* 13 W. 3 *Harv v. Cuten*.

In the case of the King there need not be any *sci. fa.* after the year and day. 2 *Salk.* 603.

If a judgment be above ten years standing, the plaintiff cannot sue a *scire facias* without a motion in court; if under ten but above seven, he cannot have a *scire facias* without a motion at *sole bar*. Note; after such motion, and judgment revived by *sci. fa.* if the defendant dies before execution, the plaintiff must sue a new *sci. fa.* but may have it without motion, for the judgment was revived before. *Salk.* 598. *Hardisty v. Barny*.

After a judgment, if the plaintiff within the year sues a *sci. fa.* he cannot after have a *capias* within the year 'till he hath a new judgment in the *sci. fa.* 1 *Rel. Abr.* 900. *Trin.* 13 Car. 1. *Roberts v. Pifeng.* See *Black. Com.* 3 V. 421.

3. Of the *scire facias* on recognizances and statutes.

Recognizances and statutes are considered as judgments, being obligations solemnly acknowledged, and entered of record, and the *sci. fa.* on those is the judicial writ and proper remedy which the consuee hath; but herein we must distinguish between recognizances at Common law and statutes merchant, &c. for upon the former, if the consuee did not take out execution within a year after the day of payment assigned in the recognizance, he was obliged to commence the suit again by original; the law presuming the debt might have been paid, if they did not sue execution within the year after the money became payable; but this law is altered by *Westm.* 2. c. 49. by

which the consuee hath a *sci. fa.* given him to revive the judgment, and put it in execution, if the consuee cannot stop it by pleading such matter as the law judges sufficient for that end, such as a release, &c. but the consuee of a statute merchant, &c. may at any time sue execution on them without the delay or charge of a *sci. fa.* *Lit. R.* 89. That a *capias* lies not on a recognizance, but only a *sci. fa.* 1 *Brownl.* 83. *Co. Lit.* 291. 2 *Inst.* 469. *F. N. B.* 296. *Bro. Recog.* 17.

Also as to recognizances at Common law, and statutes and recognizances introduced by statute law, we must further distinguish, that if on the first the consuee dies before execution sued, his executor shall not sue it, even within the year, without bringing a *sci. fa.* against the consuee; the reason is, because the law presumes the debt might have been paid to the testator, and therefore will not suffer the debtor to be molested, unless it appear that he hath omitted to perform the judgment; and this is to be done by *sci. fa.* brought by the executor, for the alteration of the person altereth the process at Common law; but this tending to delay, the *sci. fa.* is taken away in statutes and recognizances by statute law, by the several acts of parliament which introduced them, and therefore upon the death of the consuee of a statute merchant, &c. his executors may come into Chancery, and upon their producing the testament and the statute, shall have execution without a *sci. fa.* as the testator himself might. 2 *Inst.* 395, 471. *Bro. Stat. Merch.* 16, 43, 50.

If a man be bound in a recognizance to the King, upon condition to be of good behaviour, &c. he cannot be indicted for breach of the good behaviour, by which he forfeits his recognizance, without a *sci. fa.* for if a *sci. fa.* had been brought, he might have pleaded some matter in discharge thereof. 4 *Inst.* 181. 1 *Rel. Abr.* 900. What shall be said a breach, see *Cro. Car.* 498. and how to be assigned, see 3 *Bulst.* 220. *Cro. Jac.* 415. *Stil.* 369.

If a man acknowledges a recognizance to be paid at a day within the year after the date of the recognizance, in this case he may have execution by *fi. fa.* or *elegit* within the year after the day of payment, tho' the year be past from the date of the recognizance. 21 *Ed.* 3. 22. b. 1 *Rel. Abr.* 899, 900. 2 *Inst.* 471. *Vide* 2 *Rel. Abr.* 468. *Ca. Lis.* 292.

If a man recovers an annuity, he shall have execution for every time that occurs after by *fi. fa.* or *elegit* within the year after the time incurred, tho' the year be past from the judgment, but not after the year without a *sci. fa.* 1 *Rel. Abr.* 900. 2 *Inst.* 471. *Salk.* 258, 600.

If two acknowledge a recognizance of 100 l. *quilibet eorum in solido*, that is jointly and severally, the consuee may sue several *sci. fa.* against the consuees upon this recognizance. 2 *Inst.* 395. See farther as to *sci. fa.* against bail, *Black. Com.* 3 V. 416. *et infra*.

4. Of pleading to a *scire facias*.

Scire facias may be pleaded to, before judgment given upon it; afterwards it is too late: Though a writ of error may be brought to reverse the judgment on the *scire facias*, if that be not good on which the judgment was grounded. *Ibid.* 503. Payment is no plea at Common law to a *scire facias* upon a judgment; because it is a debt upon record. 3 *Lev.* 120. But this is altered by the 4 & 5 *Ann.* c. 16. Whatever is pleadable to the original action in abatement, shall not be pleadable to disable the plaintiff from having execution on a *scire facias*; because the defendant had admitted him able to have judgment. 1 *Salk.* 2. If a judgment be obtained against an executor, and afterwards a *scire facias* is brought against him upon that judgment, he cannot plead a judgment recovered against his testator, and that he hath not assets *infra*, &c. because he might have pleaded it to the first action; for it is a settled rule that if a defendant hath a matter proper for his defence, and he neglects to plead it in bar to the action at the time he may, he shall never take advantage of it after. 2 *Strange* 732. In *scire facias* on a judgment in debt, or other personal action, the defendant cannot plead non-tenure of the land generally, where it is contrary to the return of the sheriff; but he may plead a special non-tenure: But in a *scire facias*

facias to have execution in a real action, the defendant may plead non-tenure generally, because the freehold is in question, and that is favoured in law; and the tenants may plead there are better tenants not named, and pray judgment if they ought to answer *quousq*, the others are summoned, &c. though it would be other wise if the *sci. fac.* had been against particular tenants by name. 2 *Salk.* 601. On a *sci. fac.* to have execution upon a judgment in action of debt, every tenant is to be contributory; and therefore one shall not answer, as long as he can shew that another is so, and not warned: *Contra* in a *scire facias* upon a judgment in a real action; for every tenant is to answer for that which he hath, and one may be contributory, and the other not. 2 *Cro.* 507. 3 *Nelf. Abr.* 204.

5. Of *scire facias* against ter-tenants, and against whom to be brought, &c.

There is to be a *scire facias* against the heir and tenants to reverse a common recovery of lands; the *scire facias* is to issue against all the ter-tenants, for they are to gain or lose by the judgment in the recovery. *Raym.* 16. 3 *Mod.* 274. A *scire facias* to have execution of a fine, shall not be sued against lessee for years; but against him who hath the freehold, who may have some matter to bar the execution. *Cio. Elm.* 471. 2 *Browl.* 144. In *quellment*, it was adjudged, that a *scire facias* might be brought by the lessee, though he was but nominal, and that it may be had by the lessor himself; as either of them may have a writ of error on the judgment: And that it might be brought against those who were strangers to the judgment, and against the executors of the defendant, &c. 2 *Lutw.* 1267.

6. Of other points generally, not classed under the former heads.

A defendant being summoned upon a *scire facias*, and the summons returned, if he doth not appear, but less judgment go by default, he is for ever barred. 1 *Leu.* 41, 42. If the sheriff hath returned him warned, he shall not have *audita querela* on a release, &c. for the defendant might have pleaded the same on the return of the *scire facias*; but if the sheriff return *nihil*, on which an execution is awarded, he shall have *audita querela*. *New Nat. Br.* 230. Where there has been no *scire fac.*, and only two *nibils*, the court will often relieve upon motion, and not put the party to an *audita querela*. *Salk.* 93, 264. 2 *Strange* 1675. Where the plaintiff in the judgment releaseth the defendant of all judgments and executions, &c. the defendant may upon his release sue out a writ of *scire facias* against the plaintiff in the judgment *ad cognoscendum scriptum suum relaxationis*; and he need not sue out his *audita querela*. *Hill.* 5 *W. & M.* B. R.

If one sues out two writs of *scire facias*, one after the other, where it is upon a judgment by bill, there ought to be fifteen days inclusive between the *teste* of the first and return of the second *scire facias*. *Salk.* 559. And the *teste* of the alias *scire facias* is to be the day of the return of the first. 3 *Ann. B. R.* 9 *Lill.* 503. Costs allowed in suits on writs of *scire facias*, &c. *Fide* Stat. 8 *Geo.* 3. c. 11.

For more learning on this subject, see 4 *New Abr.* and 19 *Wils. Abr.* 211. *Scire facias*, and *Wilson*, par. 1. 98, 243. par. 2. 61, 372.

Scire facias against bail. To an action, is where a *capias ad satisfaciendum* is sued out and returned, and *excommunicatus* against the principal, and the writ filed; after which this writ is brought to have execution against the bail, &c. And if upon the *scire facias*, or two *nibils* returned, the bail do not appear, judgment shall be entered against them. 1 *Inst.* 290. *Leu.* 1273. In C. B. there is but one *scire fac.* against the bail, and upon a *total* returned, there is execution; but in B. R. there are two *scire facias*'s and two *nibils*, and the *testes* to be duly returned, before the second is sued out, and there must be fifteen days inclusive between the *teste* of the first and the return of the last. 2 *Salk.* 599. There must be a particular warrant of attorney to a *scire facias* against the bail; for such a warrant in the principal action is

no warrant to the *scire facias*, because these are distinct actions; and the particular warrant is to be entered when the suit commences, which is when the writ is returned. 2 *Salk.* 603. When a *scire facias* is brought against the bail, it must be *in ea parte*, and where it is brought against the defendant in the principal action, it is to be *in hac parte*. 2 *Salk.* 599. If bail are prosecuted on a *scire fac.* when a writ of error is depending in the Exchequer-Chamber, and the defendants to bail will confess judgment, and enter into a rule to pay the debt, or to deliver up the principal within four days after the judgment affirmed; in such case the proceedings on the *scire facias* shall be stayed. *Med. Cas.* in 1 *S. E.* 130. And if there be no good judgment against the principal, judgment against the bail by *scire facias* may be reversed, &c. 3 *Nelf. Abr.* 190. See *Bail*, and *Black. Com.* 3 *V.* 416.

Scire facias ad audiendum Errores. On writs of error. There are to be fifteen days between the *teste* and return of every *scire fac. ad audiendum error*. upon a writ of error returnable in B. R. And if on the return of two *nibils*, &c. the defendant in error doth not appear, it is not then with him as in case of a *sci. fac. quare execution non*, &c. But the cause is to be set down to be heard by the court, and the plaintiff in errors shall be heard thereunto *ex parte*. 2 *Lill. Abr.* 499. If a writ of error is brought in B. R. and the record brought in, the defendant appearing may thereupon sue out a *scire facias quare executionem habere non debet*, and an alias *sci. fac.* after that, if there be not a *scire fac.* returned on the first writ; and if the plaintiff in error after a *sci. fac.* or two *nibils* returned, doth not, before the rule for judgment upon the *scire fac.* is out, appear and assign errors, or plead to the *scire fac.* there will be judgment against him, *Quod habet executionem*, &c. But the writ of error depends still until judgment is affirmed or reversed, or the plaintiff in the errors is nonsuited. *Ibid.* 502.

Scire facias in detinuit. In *detinuit*, after judgment, the plaintiff shall have a *distingas*, to compel the defendant to deliver the goods, by repeated distresses of his chattels; or else a *scire facias* against any third person in whose hands they may happen to be, to shew cause why they should not be delivered. *Black. Com.* 3 *V.* 413.

Scire facias to remove an usurper's clerk. On a *quare impedit*, and *as admittas* sued out, if the bishop, after receipt of the latter writ, admit any person, even though the patron's right may have been found in a *jure patronatus*, then the plaintiff, after he has obtained judgment in the *quare impedit*, may remove the incumbent, if the clerk of a stranger, by writ of *scire facias*. *Black. Com.* 3 *V.* 248.

Scire facias upon a recognizance in Chancery, may be sued out to extend lands, &c. If upon a *scire facias* upon a recognizance in the Chancery, the record be transmitted into B. R. to try the issue, and the plaintiff is nonsuited; he may bring a new *sci. fac.* in B. R. upon the record there. 2 *Saund.* 27. Where a statute is acknowledged, and the cognitor afterwards confesseth a judgment, and the land is extended thereon; in this case the cognisee shall have a *scire facias* to avoid the extent of the lands; but if the judgment be on goods, it is otherwise. 1 *Browl.* 37. 3 *Nelf. Abr.* 186. *Sci. fac.* lies on recognizance of the peace, &c. removed into B. R.

Scire facias to repeal letters patent and grants. Where the crown hath unadvisedly granted any thing by letters patent, which ought not to be granted, or where the patentee hath done an act that amounts to a forfeiture of the grant, the remedy to repeal the patent, is by writ of *scire facias* in Chancery. *Black. Com.* 3 *V.* 260, 261. which *vide*.

A *scire facias* to repeal a patent, must be brought where the record is, which is in Chancery; and there are to be two of these writs sued out of the party-bag office directed to the clerk of the Chancery, who by a letter under the seal of the court must summon the corporation or person whose concern the patent is, that there is a *scire facias* sued out, returnable at such a time, and remaining with him, for the revocation of such a patent, and that if they do not appear thereunto, judgment will be had against them by default; and this letter to be delivered to the

corporation or person interested in such patent, by some person who can make oath thereof. *Dalton's Sheriff*. On a *sci. fac.* out of Chancery returnable in *B. R.* to repeal letters patent, it was held, that if the letters patent are granted to the prejudice of any person, as if a fair is granted to the damage of the fair of another, &c. he may have a *scire facias* on the inrollment of such grant in Chancery, as well as the King in other cases; but it may be a question, whether a *scire facias* upon a record in Chancery is returnable in *B. R.* though after it is made returnable into *B. R.* that court, and not the Chancery, hath the jurisdiction of it. *Mod. Caf.* 229. In all cases at Common law, where the King's title accrues by a judicial record, and he grants his estate over; the party grieved could not have a *scire facias* against the patentee, but was forced to his petition to the King; otherwise it is when his title is by conveyance on record, which is not judicial. 4 *Rep.* 59. The King hath a right to repeal a patent by *scire facias*, where he was deceived in his grant, or it is to the injury of the subject. 3 *Lew.* 220. And where a common person is obliged to bring his action, there, upon an inquisition or office found, the King is put to his *scire facias*, &c. 9 *Rep.* 96. A *scire facias* to repeal letters patent doth not abate by the demise of the crown. 1 *Strange* 43.

Scire facias's Have issued to repeal the grants of offices, for conditions broken, non-attendance, &c. And for disability, or in case of forfeiture, the offices may be seized without *sci. fac.* 3 *Nelf. Abr.* 201, 202. See *Black. Com.* 3 *V.* 261.

Scire facias in appeal of murder, before a pardon shall be allowed: vide *Appeal*.

Scire feci. Is the return of the sheriff, on a *scire facias*, that he hath caused notice to be given to the party, against whom the *scire facias* issued. See the return *Black. Com.* 3 *V.* xxv.

Scirewyte, The annual tax or prestation paid to the sheriff for holding the assizes or county courts.—*In solutiis pro quadam pensione vocata Scirewyte annuatim 10 sol.*—*Paroch. Antiq.* p. 573.

Sicte, (Situs) Signifies the setting or standing of any place; the seat or situation of a capital messuage, or the ground whereon it stood. *Mon. Ang. Tom.* 2. fol. 278. The word in this sense is mentioned in the stat. 32 *H.* 8. c. 20. and 22 *Car.* 2. cap. 11.

Scolds, In a legal sense are troublesome and angry women, who by their brawling and wrangling amongst their neighbours, break the publick peace, and increase discord. Stat. 5 *H.* 3. They are indictable in the sheriff's turn, and punished by the *cucking-stool*, &c. *Kitch.* 13. See *Castigatory*, and *Black. Com.* 4 *V.* 169.

Scot and lot, (Sax. Scea, pars, & Llot, i. e. Sors) Signifies a customary contribution laid upon all subjects, according to their ability. *Spelm.* Nor are these old words grown obsolete, for whoever in like manner (though not by equal proportion) are assessed to any contribution, are generally said to pay *scot and lot*. Stat. 33 *H.* 8. c. 9.

Scotal or Scotalt, Is where any officer of a forest keeps an *alehouse* within the forest, by colour of his office, causing people to come to his house, and there spend their money for fear of his displeasure: It is compounded of *scot* and *ale*, which by transposition of the words is otherwise called an *alebot*. This word is used in the charter of the forest, cap. 8.—*Nullus foresterius faciat Scotalas, vel garbas colligat, vel aliquam collectionem faciat*, &c. *Manwood* 216.

Scottart, Those tenants are said *scottart*, whose lands are subject to pay *scot*. *Mon. Ang. Tim.* 1. pag. 875.

Scotland, Is united to England by *1 Ann.* In the reigns of King James 2. and King Charles 2. Commissioners were appointed to treat with commissioners of Scotland, concerning an union. But the bringing about this great work, was reserved for the reign of Queen Anne. The 1 *Ann.* cap. 14. ordained articles to be settled by commissioners for the union of the two kingdoms, &c. and by the 5 *Ann.* cap. 8. the union was effected; the kingdoms united are to be called Great Britain, and the cross of St. George and St. Andrew to be conjoined; they are to be represented by one parliament; and fifteen peers of Scotland, and forty-five commons are to be elected for Scotland, and have

all the privileges of parliament as peers and commons of England: The subjects of either kingdom shall have freedom of trade, and be liable to the same customs, and like laws for publick government, &c. Kirk-government of the church is confirmed; and the courts of justice are to remain the same as before the union, but subject to regulation: When 1,997,763 *l.* shall be raised in England on a land-tax, Scotland is to be charged with 48,000 *l.* And Scotland is to have an equivalent for being charged towards the payments of the debts of England, &c. A court of Exchequer is erected in Scotland, to be a court of record, revenue, and judicature for ever; and barons of the said court to be appointed, who shall be judges there. Statute 6 *Ann.* cap. 26. Peers of Scotland, and all officers civil and military, &c. are to take the oath of abjuration, &c. A peer committing high treason or felony in Scotland may be tried by commission under the Great Seal, constituting justices to inquire, &c. in Scotland: And the King may grant commissions ofoyer and terminer in Scotland, to determine such treason, &c. By 6 *Ann.* c. 14. and 7 *Ann.* cap. 21. Persons having lands in Scotland, guilty of high treason by corresponding with, assisting, or remitting money, &c. to the pretender, on conviction, are to be liable to the pains of treason; and their vassals continuing in dutiful allegiance, shall hold the said lands of his Majesty in fee and heritage for ever, where the lands were so held of the crown by the offender: And tenants continuing peaceable and occupying land, are to hold the same two years rent free. 1 *Geo.* 1. cap. 20. An act for disarming the Highlands of Scotland; and requiring bail of persons for their loyal and peaceable behaviour, &c. 1 *Geo.* 1. cap. 54. Persons summoned are to bring in and deliver up their arms, or refusing to do it, shall be taken as lifted soldiers to serve his Majesty beyond the seas; and concealing their arms, are liable to penalties: Also the lords lieutenants or justices of the peace, may appoint persons to search houses for arms, &c. Statute 11 *Geo.* 1. cap. 26. When any ordinary place is vacant in the court of sessions in Scotland, the King may nominate a person, who is to be examined by the lords of the session, and then admitted, &c. 10 *Geo.* 1. cap. 18. And the election of members of parliament for Scotland, is particularly regulated by a late statute; requiring the magistrates to summon the councils of boroughs, and an oath to be taken by every freeholder and voter as to the estates to qualify them, that they are actually their own, and not fictitious; and sheriffs or stewards not to make any false return, &c. under the penalty of 500 *l.* recoverable in a summary way: And no judge of the court of session, or baron of the Exchequer in Scotland, shall be elected a member of parliament. Stat. 7 *Geo.* 2. cap. 16. See 16 *Geo.* 2. c. 11. The city of Edinburgh in Scotland, to forfeit 2000 *l.* on account of the murder of Captain Porteus; (who was hanged by the mob, for causing his soldiers to fire upon persons hiding at an execution) and a reward of 200 *l.* ordered for apprehending the offenders. 10 *Geo.* 2. cap. 34. Acts for regulating the making of plaidings, stockings, &c. And of the linen manufactures in Scotland. See 6 *Geo.* 1. and 13 *Geo.* 1. c. 26. In time of scarcity, persons may import victuals from Ireland into Scotland, on obtaining a licence for it, &c. 14 *Geo.* 2. cap. 7. By the statute 19 *Geo.* 2. c. 9. Every juror for trial of high-treason or misprision of treason, shall be possessed in his own or his wife's right of lands, &c. as proprietor or life-renter within the shire, &c. of the yearly value of 40 *s.* Sterling at least, or valued at 30 *s.* Sterling per annum in the tax roll. By the stat. 19 *Geo.* 2. c. 38. Pastors or ministers not duly qualified are not to officiate in episcopal meeting-houses, and persons resorting to unregistered meeting-houses are subject to a penalty of 5 *l.* &c. and if a peer, he is disqualified from voting, or being elected. By the Stat. 20 *Geo.* 2. c. 32. the two colleges of St. Salvator and St. Leonard in the university of St. Andrews are united. By the stat. 20 *Geo.* 2. c. 43. the heretable jurisdictions are taken away and restored to the crown, and more effectual provision is made for the administration of justice by the King's courts and judges there: And all persons acting as procurators, writers or agents in the law, are to take the oaths. By the stat. 20 *Geo.* 2. c. 50. the tenure of ward-holding is taken

taken away; and converted into blanch and fen-holdings. The casualties of single and life-rent estates, incurred by horning and denunciation for civil causes, is taken away. A summary process is given to heirs and successors against superiors. The attendance of vassals at head-courts is discharged. Heirs and possessors of tailzied estates, are empowered to sell to the crown. By the Stat. 21 Geo. 2. c. 19. Offences of high-treason, committed in the shire of *Dumfriesshire, Stirling, Perth, Kincardine, Aberdeen, Inverness, Naír, Cromartie, Argyl, Forfar, Bamf, Sutherland, Caithness, Elgin and Ross*, or the shire or stewartry of *Orkney*, may be inquired of in any shire in Scotland, as shall be assigned by the King. Jurors may come out of adjoining counties. The practice of taking down evidence in writing, in crimes not affecting life or member, abrogated. By the Stat. 19 Geo. 2. c. 39. 20 Geo. 2. c. 51. and 21 Geo. 2. c. 34. Provision is made for disarming the Highlands, and restraining the use of the Highland dress; and the masters and teachers of private schools, chaplains, tutors, and governors of youth and children, are to take the oaths to his Majesty. The Stat. 22 Geo. 2. c. 29. For order for making an authentick roll of valuation of the shire of *Argyl*. By the Stat. 22 Geo. 2. c. 48. The court before whom any indictment for high-treason, or misprision of high treason in Scotland shall be found, may issue writs of *capias, proclamation, and exigent* against the party, if not in custody; whereon the defendant not appearing, shall be deemed outlawed and attainted of high treason, or misprision of high-treason; persons out of the kingdom, and returning within a year, may traverse the indictment. See Stat. 25 Geo. 2. c. 20. to obviate doubts that have arisen with regard to the admission of the vassals of the principality of Scotland, and payment of their rents and duties, and Stat. 25 Geo. 2. c. 41. for annexing certain forfeited estates in Scotland to the crown unalienable, and for making satisfaction to the lawful creditors thereupon, and applying the rents thereof for the better civilizing the Highlands, and Stat. 26 Geo. 2. c. 29. for explaining and amending, 19 Geo. 2. c. 39. and 20 Geo. 2. c. 51. and Stat. 26 Geo. 2. c. 36. For erecting publick buildings in the city of *Edinburgh*; and for widening and enlarging the streets of the said city.

See the *Tables to the Statutes*. Vide also, *Black. Com.* 1 V. 95, 168. 4 V. 116, 420.

Scots. Assessments by commissioners of sewers are so called.

Scripture. All profane scoffing of the Holy Scripture, or exposing any part thereof to contempt and ridicule is punished by fine and imprisonment. 1 *Henr. P. C.* 7. Vide *Black. Com.* 4 V. 59.

Scriveners. Are mentioned in the statute against *usury* and excessive interest of money. 12 *Ann. c. 6.* If a *scrivener* is intrusted with a bond, he may receive the interest; and if he fails, the obligee shall bear the loss; and so it is if he receive the principal, and deliver up the bond, for being intrusted with the security itself, it shall be presumed he is trusted with power to receive the principal and interest; and the giving up the bond on payment of the money is a discharge thereof; But if a *scrivener* be intrusted with a mortgage-deed, he hath only authority to receive the interest, not the principal; the giving up the deed in this case not being sufficient to restore the estate, but there must be a reconveyance, &c. Decreed in Chancery, *Hill. 7 Ann. 1 Salk. 157.* It is held, where a scrivener puts out his client's money on a bad security, which on inquiry might have been easily found so; yet he cannot be charged in equity to answer the money: for it is here said no one would venture to put out money of another upon a security, if he were obliged to warrant and make it good; in case a loss should happen, without any fraud in him. *Preced. Chanc. 146, 149.* See 19 *Vin. Abr.* 289—292.

Seutage. (*Soutage*, Sax. *Scilapung*) Was a tax or contribution, raised by those that held lands by knight-service, towards furnishing the King's army, at one, two, or three marks for every knight's fee. *Henry the Third*, for his voyage to the Holy Land, had a tenth granted by the clergy, and *Seutage*, three marks of every knight's fee, by the laity. *Baronag. Anglie, 1 Part. fol. 211.* b. This was also levied by *Henry the Second, Richard the*

First, and *King John*. See *Estuags*, and *Black. Com.* 1 P. 309. 2 V. 74.

Scutagio habendo. A writ that anciently lay against tenants by knight-service, to serve in the wars, or send sufficient persons, or to pay a certain sum, &c. *F. N. B.* 83.

Scute. A French gold coin of 3 s. 4 d. in the reign of *King Hen. 5.* And *Catherine Queen of England* had an assurance made her of sundry castles, manors, lands, &c. valued at the sum of forty thousand scutes, every two whereof were worth a noble. *Rot. Parl. 1 Hen. 6.*

Scutella. (from *Scutum*, Sax. *Scutel*) A scuttle, any thing of a flat and broad shape, like a shield.

Scutella elemosynaria. An alms basket or scuttle. *Paroch. Antiq.*

Scutum Armorum. A shield or coat of arms—*Novum universi per presentes me Johannem K. dedisse, &c. Richardo P. filio Humfridi P. Scutum Armorum meorum: Habund' & tenend' ac portand' & utend' ubicunque voluerit sibi & heredibus suis imperpetuum, ita quod nec Ego nec aliquis alius nomine meo aliquod jus vel clameum seu calumpniam in predicto scuto habere poterimus, sed per presentes jura exclusi in perpetuum. In cuius rei testimonium, &c. Dat. apud Knightley, anno 14 H. 6.*

Scylowit. (Sax.) Is a mulct for any fault; from the Saxon *Scild*, i. e. *Delictum*, & *Wite*, *pœna*. *Leg. Hen. 1.*

Scyra. A fine imposed on such as neglected to attend the *scyre* court, which all tenants were bound to do. *Mon. Ang. Tom. 1. p. 52.*

Scyregemot. (Sax.) Was a court held by the Saxons twice every year by the bishop of the diocese, and the earldorman, in shires that had earldormen; and by the bishop and sheriff, where the counties were committed to the sheriff, &c. wherein both the ecclesiastical and temporal laws were given in charge to the county. *Seld. Tit. Hen. 628.* This court was held three times in the year, in the reign of *King Canutus the Dane*.—*Et habeatur in anno ter Bergimotus & Scyregemotus.* *Leg. Canut. c. 38.* And *Edward the Confessor* appointed it to be held twelve times in a year. *Leg. Edw. Conf. c. 35.*

Sea. (Mare) By statute the sea is to be open to all merchants. 18 *Edw. 3. c. 3.* The main sea, beneath the low-water-mark, and round England, is part of England; for there the admiral hath jurisdiction. 1 *Inst. 260.* 5 *Rep. 207.* The seas which environ England are within the jurisdiction of the King of England. 1 *Roll. Abr. 528.* Sovereignty of the sea. Vide *Navy*.

Sea-banks. See *Banks*. See the statutes, 6 *Geo. 2. c. 37.* & 10 *Geo. 2. c. 32.* whereby it is made felony without benefit of clergy, maliciously to cut down any river or sea-bank, whereby lands may be overflowed.

Seal. (*Sigillum*) Is a stamp engraved with a particular impression, which is fixed upon the wax that closes letters, or affixed as a testimony. *Johns.* The first sealed charter we find extant in England, is that of *King Edward the Confessor* upon his foundation of *Westminster Abbey*. *Dugdale's Warwickshire, fol. 138. b.* Yet we read in the manuscript history of *Offa*, King of the *Mercians*.—*Rex Offa literas Regii Sigilli sui munimine consignatas eidem nuncio commisit deferendas.* And that seals were in use in the Saxons time, see *Taylor's History of Garulkind, fol. 73.* It was usual in the time of *H. 2.* and before, to seal all grants with the sign of the cross: *Has donationes & ordinationes confirmant & cruce signantur Henricus Rex & Mathildis Regina.* *Monast. 3 tom. fol. 7.* And *Ordericus Vitalis* tells us, That archbishop *Dunstan* with his suffragans, *predictarum rerum donationem facto crucis in Charta signo corroboravit.* lib. 4. That most of the charters of the English-Saxon Kings were thus signed, appears by *Ingulphus*, and in the *Monasticon*, and that the crosses were all gold. But it was not so much used after the conquest. *Constit. See Sigillum, Wang.*

Writs touching the Common law not to go out under any of the petty seals, 28 *Ed. 1. p. 3. c. 6.*

The courts in which the King's grants shall pass the seals, 27 *H. 3. c. 11.* Where clerk of the Privy seal to make warrants to the chancellor, 27 *H. 8. c. 11. f. 2.* What fees the clerk of the signet is entitled to, 27 *H. 8. c. 11. f. 4. 8.*

4, 8. What fees are not payable on grants of leases, 27 H. 8. c. 11. f. 12. Counterfeiting Great seal, &c. excepted out of general pardon, 20 Geo. 2. c. 52. f. 9.

As to counterfeiting the King's Great or Privy seal, it is high treason. See *Black. Com.* 4 V. 83, 89. and 1 Mar. 2. c. 6. With respect to the use, &c. of the Great seal, see *Black. Com.* 2 V. 346. 3 V. 47. As to the seal of a corporation, *Black. Com.* 1 V. 475. And as to the Privy seal, *ib.* 2 V. 347. With respect to sealing of deeds, *id.* 305. And as to the antiquity of seals, *id.* 305.

Sea-Laws, Are laws relating to the sea; as the *laws of Oleron*, &c. See *Oleron Laws*.

Sealer, (*Sigillator*) Is an officer in Chancery appointed by the Lord Chancellor, or Lord Keeper of the Great-seal of England, to seal the writs and instruments there made in his presence.

Sealing Deeds, Makes persons parties to them; and if they are not thus sealed they are void. *Dyer* 13. If a seal is broken off, it will make the deed void, and when several are bound in a bond, the pulling off the seal of one makes it void as to the others. 2 Lev. 220. But in a deed of covenants, 'tis held that a person's breaking off the seal of one of the covenantors, after making the covenant, shall avoid the deed only against himself. *Cro. Eliz.* 408, 546. In case the seal of a bond be broken or eat off by rats, or it is any ways cancelled, no action can be brought on such bond, &c. 2 Bullf. 246. But relief may be had in equity.

Seal, *Exchequer seal, Great seal, Privy seal, seals of office, of bishops, &c.* Vide the *heads*. As to sealing of deeds, see *Black. Com.* 2 V. 305.

Sea-Marks. The erection of beacons, light-houses, and sea-marks, is a branch of the royal prerogative. By 8 Eliz. c. 13. The corporation of the Trinity-House are empowered to set up any beacons or sea-marks wherever they shall think them necessary; and if the owner of the land or any other person shall destroy them, or shall take down any steeple, tree, or other known sea-mark, he shall forfeit 100l. or, in case of inability to pay it, shall be *ipso facto* outlawed.

Seamen, Retained to serve the King, are punishable for departing without licence. *Stat.* 2 R. 2. And fighting, quarrelling, and disturbances of seamen may be punished by the commissioners of the navy by fine and imprisonment. 19 Car. 2. c. 7. Registered seamen are exempted from serving upon juries, or in any parish office, &c. And shall have 40s. *per annum* bounty-money, besides their pay; and on disability of service be admitted into *Greenwich* hospital: And seamen to the number of 30,000 were to be registered for the King's service, by *Stat.* 7 & 8 W. 3. c. 21. repealed 9 Ann. 24. See *Stat.* 1 Geo. 2. c. 19. Seamen on board *English* merchant ships, maimed in fight against an enemy, shall be admitted into the hospital at *Greenwich*, as other seamen wounded in the service of his Majesty. 8 Geo. 2. c. 29. Provision for relief of widows of sea officers, see 6 Geo. 2. c. 25. Vide *Navy and Mariners*, and *Black. Com.* 1 V. 418.

Seamens Wages. They are one proper object of the Admiralty jurisdiction, even tho' the contract be made for them upon the land. 1 Vent. 146. *Black. Com.* 3 V. 107. Yet the courts of Common law have jurisdiction; and an action may be maintained for work and labour.

Seam-Fish, Seems to be that sort of fish which is taken with a large and long net, called a *sean*. *Stat.* 1 Jac. 1. c. 25.

Searcher, An officer of the *Customs*, whose business it is to search and examine ships outward bound, if they have any prohibited or unaccustomed goods on board, &c. This officer is mentioned in the *Stat.* 12 Car. 2. And there are searchers concerned in *customs* duties; of leather, and in divers other cases.

Seacreeper, *In villis maritimis ipsius maritimam Dominii jurisdictionem curat, littus lustrat, et ejusdem maris (quod wreck appellatur) Dominum colligit.* Spelm.

Sea-Robbers, Pirates and robbers at sea. *Stat.* 16 Car. 2. c. 6. Vide *Pirates*.

Secondary, (*Secundarius*) Is an officer who is second, or next to the chief officer; as the *Secretaries* to the *Prothonotaries* of the courts of B. R. and C. B. The *Secondary*

of the *Remembrancer* in the *Exchequer* & *Secondary* of the *Compter*, &c. 2 Lill. Abr. 506. *Secondary* of the *King's Bench*, may have three clerks. 2 Geo. 2. c. 23.

Secondary of the Office of Privy Seal, Is taken notice of by 1 Edw. 4. c. 1.

Secondary Conveyances, Those which presuppose some other conveyance, and precede it, and only serve to confirm, alter, restrain, restore, or transfer the interest granted, by such original conveyance. *Black. Com.* 2 V. 324.

Secondary Use. A use, tho' executed, may change from one to another by circumstances *ex post facto*; as, if A. makes a feoffment to the use of his intended wife and her eldest son for their lives, upon the marriage the wife takes the whole use in severalty; and, upon the birth of a son, the use is executed jointly in them both. This is sometimes called a *secondary*, sometimes a *shifting use*. Vide *Black. Com.* 2 V. 334, 335.

Second Deliberance, (*secunda deliberatione*) Is a judicial writ that lies after a nonsuit of the plaintiff in *replevin*, and a *retorno habendo* of the cattle replevied, adjudged to him that distrained them; commanding the sheriff to replevy the same cattle again, upon security given by the plaintiff in the replevin for the re-delivery of them, if the distress be justified. It is a second writ of replevin, &c. *F. N. B.* 68.

Second Marriage, (*secunda nuptia*) Is when after the decease of one a man marries a second wife; which the law terms *bigamus*.

Secunda, To duellers. See *Homicide, Murder*.

Second Surcharge, writ of. If after admeasurement of common, upon a writ of admeasurement of pasture, the same defendant surcharges the common again, the plaintiff may have this writ of *second surcharge, de secunda superincursionem*, which is given by the statute *Westm.* 2. c. 13 Ed. 1. c. 8. And thereby the sheriff is directed to inquire by a jury, whether the defendant has in fact again surcharged the common, contrary to the tenure of the last admeasurement: And if he has, he shall then forfeit to the King the supernumerary cattle put in, and shall also pay damages to the plaintiff. *Black. Com.* 3 V. 239.

Secretary, (*Secretarius à Secretis*) A title given to him that is *ab Epistolis et Scriptis Secretis*; as the two *Secretaries of State*, &c. The *Secretaries of State* have an extraordinary trust which renders them very considerable in the eyes of the King, and of the subject also; whose requests and petitions are for the most part lodged in their hands, to be represented to his Majesty, and to make dispatches thereupon, pursuant to his Majesty's directions: They are Privy Counsellors, and a Council is seldom or never held without the presence of one of them; they wait by turns, and one of these *Secretaries* always attends the court, and by the King's warrant, prepares all bills or letters for the King to sign, not being matter of law. And depending on them is the office called the *Paper Office*, which contains all the publick writings of state, negotiations, and dispatches, all matters of state and council, &c. and they have the keeping of the King's seal, called the *signet*, because the King's private letters are signed with it. There was but one *Secretary of State* in this kingdom, 'till about the end of the reign of King Hen. 8. but then that great and weighty office was thought proper to be discharged by two persons, both of equal authority, and styled *Principal Secretaries of State*. The correspondence with all parts of Great Britain is managed by either of the *Secretaries*, without distinction; but in respect to foreign affairs, all nations which have intercourse of business with Great Britain, are divided into two provinces, the *Southern* and the *Northern*; of which the *Southern* is under the *senior*, and the *Northern* is under the *junior Secretary*, &c. The *Secretaries of State* have power to commit persons for treasons, and other offences against the state, as conservators of the peace at Common law, or as justices of peace all over England; and it is incident to their office. 1 Hall. 247. Wood's Inst. 451. &c. If they are not constantly named in the commissions of the peace for every county in England and Wales; and whether they have any power to commit but in virtue thereof, as justices of the peace? See *Black. Com.* 4 V. 202.

Touching the power of a *Secretary of State* to commit criminals for high treason, writing seditious libels, &c. see *Wilson*, par. 2. s. 288.

The *Secretary of State*, as such, is not a *consequator*, or justice of the peace; nor is he, or the King's messengers in ordinary acting under his warrant within the meaning of the statute. 24 Geo. 2. c. 44. *Entick clerk v. Carrington* and others. C. B. M. 6 Geo. 3. *Wilson*, par. 2. s. 290, 291.

Secta, or **Suit**, (*a sequendo*). By this word was anciently understood the witnesses or followers of the plaintiff. *Seld. in Fortesc. c. 21. Black. Com. 3 V. 295.*

Secta ad Curiam, Is a writ that lies against him who refuses to perform his suit either to the county or court-baron. F. N. B. f. 158.

Secta ad Iusticiam faciendam, Is a service which a man is bound to perform by his fee. *Bracton*, lib. 2. cap. 16. num. 6.

Secta curiae, Suit and service done by tenants at the court of their lord. *Paroch. Antiq. p. 320.*

Secta facienda per illam quae habet sententiam partem, Is a writ to compel the heir, who hath the elder's part of the coheirs, to perform service for all the coparceners. *Reg. Orig. fol. 177.*

Secta Molendini, A writ lying where a man by usage time out of mind, &c. hath ground his corn at the mill of a certain person, and afterwards goeth to another mill with his corn, thereby withdrawing his suit to the former: And this writ lies especially for the Lord against his tenants, who hold of him to do suit at his mill. *Reg. Orig. 153. F. N. B. 122.* The count in the writ *secta molendini* may be on the tenure of the land; or upon prescription, viz. That the tenant, and all those who held those lands, have used to do their suit at the plaintiff's mill, &c. New Nat. Br. 272. *Secta ad molendinum*, and *offices of nuisance* are now much turned into actions of the case. See *Black. Com. 3 V. 235.*

Secta Regalis, A suit by which all persons were bound twice in a year to attend the sheriff's tourn; and was called *regalis*, because the sheriff's tourn was the King's leet, wherein the people were to be obliged by oath to bear true allegiance to the King, &c.

Secta unica tantum facienda pro pluribus hereditatibus, Is a writ that lies for an heir who is distrained by the lord to do more suits than one, in respect of the land of divers heirs descended to him. *Reg. Orig.*

Sectis non faciendis, Is a writ that lies for a woman, who, for her dower, ought not to perform suit of court. *Reg. Orig. fol. 174.* It lay also for one in wardship to be freed of all suits of court during his wardship. *Reg. Orig. fol. 173.* but see 12 Car. 2. c. 24.

Secundary. See *Secondary*.

Secunda Supercongratione Pasturae, Is a writ which lieth where admeasurement of pasture hath been made, and he that first surcharged the common doth it a second time, notwithstanding the admeasurement. *Old Nat. Br. 73.* See *Second Surcharge*, writ of.

Securitatem indentendi quod se non distent ad partes externas sine Licentia Regis, An ancient writ lying for the King against any of his subjects, to stay them from going out of this kingdom to foreign parts; the ground whereof is, that every man is bound to serve and defend the commonwealth, as the King shall think fit. F. N. B. 85. See *Ne exeat Regnum*.

Securitatis Pactis, Is a writ that lies for one who is threatened death or bodily harm by another, against him who so threatens; and is issued out of the Chancery directed to the sheriff, &c. *Reg. Orig. 88.*

Securitates for Money, As to their true construction, see *Black. Com. 3 V. 439.*

Security for good Behaviours, the Peace, and of Person, &c. See *Peace*, and *Black. Com. 1 V. 129. 4 V. 248, 251, 3.* See *Surety of the Peace*.

Se Defendendo, Is a plea for him that is charged with the death of another person, by alleging that he was driven unto what he did in his own defence; and the other so assailing him, that if he had not done as he did, he must have been in danger of his own life; which danger ought to be set out, as that it appears to have been otherwise insupportable. *Standf. P. C. lib. 1. c. 7.* Any person in his

defence may kill another for the safety of his life; and where a man is attacked, a defence may be made without expecting the first blow, which may render a person incapable of making any defence: But a defence ought to be always unblameable, not to take revenge. *Bar. Max. 25.* If a man attack another person on a sudden falling out, and before a mortal wound is given, the other flies to the wall, or some other unpassable place, to save his life, and being still pursued kills the person making the assault; from the unavoidable necessity of it, this is *se defendendo*; and so in the like cases. *Bract. 3 Edw. 3.* A flight upon necessity, to make killing another *se defendendo*, must not be a feigned one to gain breath, or opportunity to fall on afresh; but it must be a flying from the danger, as far as the party can, either by reason of some wall, ditch, company, or the fierceness of the assailant will permit. 1 *Hale's Hist. P. C. 483.* If A. assaults the master, who flies to avoid death, and the servant kills A. in his master's defence, it is *homicide defendendo* of the master; tho' if he had not been driven to that extremity, it would have been manslaughter. *Ibid. 484. Plowd. 100.* And if I have a weapon in my hand, and a person assaults me, if he runs so hastily after me, that he runneth on my sword which I hold forth for the defence of myself, and so is killed, it is *se defendendo*: But if there be any malice in the case, or one kill him before he need to do it, the offence will be of a higher nature. *Fitz. Coron. 284, 286, 307. Poult. 119.* There is no express judgment in *chancery*, or *se defendendo*; but the offender is let to mainprise to sue out his pardon; and yet his goods and chattels are forfeited: Tho' where one kills another in his own defence, upon the special matter found, it is said he may be dismissed without any forfeiture, or pardon purchased, 2 *Inst. 148. 3 Inst. 220. 1 Inst. 391. H. P. C. 138.* See the statute 4 H. 8. c. 5. and *Black. Com. 1 V. 130. 4 V. 183.*

Sedgmore, In the county of Somerset, an act for draining the same. 10 & 11 W. 3. c. 26.

Seditious Conventicles, To the disturbance of the peace, &c. See *Conventicles* and *Heresy*.

Seduction of Women-Children. By 4 & 5 Ph. & M. c. 8. If any person, above the age of fourteen, unlawfully shall convey or take away any woman child unmarried, (which is held *Str. 1162.* to extend to bastards as well as to legitimate children) within the age of sixteen years from the possession and against the will of the father, &c. he shall be imprisoned two years, or fined at the discretion of the justices. See the statute, and *Black. Com. 4 V. 209, 210.*

Sed-cod, (from the Sax: *sed*, seed, and *codde*, a purse, or such like continent) Is a basket or other vessel of wood, carried on one arm of the husbandman or sower of ground, to bear the seed or grain which he sows, and spreads abroad with the other hand. In *Westmoreland* a bolster or pillow is called a *cod*; and in other northern parts a pin-cushion is termed a *pin-cod*.—Pro uno seed cod empto 4 d. *Paroch. Antiq. 549. Kennet's Gloss.*

Seedier, A seedsmen, or one who sows the land. *Blount.*

Seignior, (Fr. *Seigneur*, i. e. *Dominus*) Is in general signification as much as Lord; but particularly used for the Lord of the fee, or of a manor, as *Seigneur* among the *Foedists* is he who grants a fee or benefit out of the land to another; and the reason is, because having granted away the use and profit of the land, the property or dominion he still retains in himself. *Hartm. P. N. B. 23.*

Seigniorage, Is a royalty or prerogative of the King, whereby he claims an allowance of gold and silver brought in the mints, to be exchanged for coin. As *seigniorage*, out of every pound weight of gold, the King had for his coin 5 s. of which he paid to the Master of the Mint for his work sometimes 1 s. and sometimes 1 s. 6 d. Upon every pound weight of silver, the *seigniorage* answered to the King in the time of King *Edw. 3.* was eighteen penny-weight, which then amounted to about 1 s. out of which he sometimes paid 8 d. at others 9 d. to the Master: In the reign of King *Hen. 5.* the King's *seigniorage* of every pound of silver was 15 d. *Stat. 9 Hen. 5. cap. 1. Hale's Sher. Acc. pag. 3.*

Seignior, in *grofs*, Seemeth to be one that is a Lord, but of no manor, and therefore can keep no court. *F. N. B. fol. 3.* See next title.

Seigniorie, (*Dominium*) Is borrowed from the French *seigneurie*, i. e. *dominatus imperium principatus*; and signifies with us a manor or lordship, *seigniorie de Schemans*, Kitchin, fol. 80. *Seigniorie in grofs*, which seems to be the title of him who is not lord by means of any manor, but immediately in his own person; as *tenure in capite*, whereby one holds of the King as of his crown, is *seigniorie in grofs*. Kitchin, fol. 206. See *Seignior*.

Seisin, (*seisus*, Fr. *seisne*) In the Common law signifies possession. To *seise* is to take possession of a thing; and *primer seisin* is the first possession. *Co. Litt. 152.* There is a *seisin* in deed or in fact, and a *seisin* in law; a *seisin* in deed is when an actual possession is taken; and *seisin* in law is where lands descend, and one hath not actually entered on them, &c. *1 Inst. 31.* *Seisin* in law is a right to lands and tenements, tho' the owner is by wrong disseised of them: And he who hath an hour's actual possession quietly taken, hath *seisin de droit & de claim*, whereof no man may disseise him, but must be driven to his action. *Perk. 457, 458.* A *seisin* in law is sufficient to avow upon; but to the bringing an *assise* actual *seisin* is required, &c. *4 Rep. 9.* *Seisin* of a superior service, is *seisin* of all inferior services which are incident thereto: And *seisin* of homage is a *seisin* of all other services, because in the doing thereof the tenant takes upon himself to do all services. *4 Rep. 80. 1 Danv. Abr. 647.* The *seisin* of rent, or other annual services, is a sufficient *seisin* of casual services. *4 Rep. 80.* But *seisin* of one annual service is not *seisin* of another annual service; as if there be lord or tenant by fealty, ten shillings rent, and three days work in the year; in this case *seisin* of the rent is no *seisin* of the work, nor is *seisin* of the rent *seisin* of the suit of court, which is annual. *4 Rep. 9. 1 Danv. Abr. 647. 2 Lill. 507.* The *seisin* of the father is not sufficient for the heir: Though if a fine be levied to one for life, the remainder to another in tail, and the tenant for life takes *seisin* of the services, this will be a good *seisin* for him in remainder; and the *seisin* of a lessee for years is sufficient for him in reversion. *2 H. 6. 7. 45 Edw. 3. 26. 1 Danv. 805, 646.* Where a man is seised of a reversion, depending upon an estate for life, the pleading of it is that he was seised of it *ut de feodo*, leaving out the word *dominio*; but if it be a reversion in fee, expectant upon the determination of a lease for years, there he may plead that he was seised of it *in dominio suo ut de feodo*. *Dyer 185, 257. Rep. 20, 27. 4 Rep. 62.* *Seisin* is never to be alledged, but where it is traversable; and when a defendant alledgeth a *seisin* in fee in any one under whom he claims, the plaintiff cannot alledge a *seisin* in another, without traversing, confessing or avoiding of the *seisin* alledged by the defendant. *Cro. El. 30. 1 Brown. 170.* If a *seisin* in fee is alledged, it shall be intended a lawful *seisin* till the contrary appears. *2 Lutw. 1337.* But the party is to shew of what estate he is seised, &c. *3 Nels. Abr. 215.* See Stat. 32 Hen. 8. cap. 2. See *Black. Com. 2 V. 131, 209.* Livery of *seisin*, *id. 2 V. 311.* Writ of *seisin*, *id. 2 V. 359. xix. 3 V. 412.*

Seisina habenda, quia Rex habuit Banum, *Seisina Massum*, Is a writ that lies for delivery of *seisin* to the lord of lands or tenements, after the King in right of his prerogative hath had the year, day and waste, on a felony committed, &c. *Reg. Orig. 165.*

Seising of Heriots, Is the seising of the best beast, &c. (where an heriot is due) on the death of the tenant. It is a species of self-remedy, not much unlike that of taking of cattle or goods in distress, only in the latter case they are seised as a pledge, in the former, as the property of the person for whom seised. See *Black. Com. 3 V. 15.*

Seizure of Goods by Offences. No goods of a felon or other offender can be seized to the use of the King, before forfeited; And there are two *seizures*, one verbal only, to make an inventory, and charge the town or place, when the owner is indicted of the offence; and the other actual, which is the taking of them away afterwards on conviction, &c. *3 Inst. 103.*

Set, Denotes the bigness of a thing to which it is added; as *Setwood* is a great wood.

Setda, (from the Sax. *felda*, a field, or fowl) is used for a shop, shed, or stall in a market. *Aff. 9 B. 1.* It is also made to signify a wood in fallows or willows: And Sir Edward Coke takes *setda* for a salt-pit. *Co. Lit. 4.*

Self-bane, (Sax. *self-bana*) Is where a man murders himself, called *felo de se*.

Self-Defence. As to the defence of one's self, or the mutual and reciprocal defence of such as stand in the relations of husband and wife, parent and child, master and servant; if the party himself, or any of these his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of the peace which happens, is chargeable upon him only who began the affray. *2 Rel. Abr. 346. 1 Hawk. P. C. 131.* See *Black. Com. 3 V. 3.* Also vide *Homicide*, and *Black. Com. 1 V. 130. 4 V. 183.*

Self-Murder. The law hath ranked this among the highest crimes, making it a peculiar species of felony, a felony committed on one's self. A *felo de se* is he that deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death. The punishment is, an ignominious burial in the highway, with a stake driven thro' his body; and a forfeiture of all his goods and chattels to the King. This forfeiture has relation to the time of the act done in the felon's life-time, which was the cause of his death. See *Black. Com. 4 V. 189, 190.*

Self-Preservation. Every creature has implanted in it by nature a strong desire of self-preservation: And by our ancient law, if a man stole victuals merely to satisfy his present hunger, being for the preservation of life, it was not felony; but this law is become obsolete. *Staundf. P. C. See Self-Defence.*

Setlon of Land, (*setio terra*) Is derived from the Fr. *seillon*, which signifies a ridge of ground rising between two furrows, and contains no certain quantity, but sometimes more and sometimes less: Therefore *Crompton* says, that a *setlon* of land cannot be in demand, because it is a thing uncertain. *Crompt. Jurist. 221.*

Setme, (Sax. *seam*, i. e. *onus*) A horse load or eight bushels of corn. *Blount.* A *sume of glass* is twenty-four stone, each stone five pounds weight.

Setmebale, A pipe or half a ton of wine. *Morib. Dist.*

Seminaries, Persons are not to go or be sent to *Papish seminaries*, to be instructed or educated, under diverse penalties and disabilities, by the Stat. 1 Jac. 1. c. 4. And contributing to the maintenance of a papish *seminary*, is made a *praemunire*. Stat. 27 Eliz. c. 2. See *Papish*.

Seminatorius, A preacher or sower of words. *Ps. Bless.*

Senage, (*senagium*, from *senatus*, sometimes used for *synod*) Is money paid for *synodals*.

Senator, (Lat.) As now taken is a parliament man. In the laws of King Edward the Confessor we are told, that the Britons called those *senators* whom the Saxons afterwards termed *aldermen*, and borough-masters; tho' not for their age, but their wisdom, for some of them were young men, but very well skilled in the laws. *Kenilb.* King of the Mercians, granted a charter which ran thus, *vix. Consilio & consensu episcoporum & senatorum gentis sue* &c. Statut. P. C. cap. 13.

Sentel, A kind of thin fine silk, mentioned in the Stat. 2 R. 2. c. 1.

Sentinel, (*Sentinalis*) derived from the Germ. *sein*, a house or place, and *Schoch*, an officer) is a Steward; and signifies one who hath the dispensing of justice, in some particular cases: As the *High Sentinel*, or Steward of England; *Sentinel de la Bord de Roy*, Steward of the King's Household; *Sentinel*, or Steward of Courts, &c. *Co. Lit. 51. Crut. Jurist. 102. Kirk. 83.* See *Steward*.

Sententia & *Quarantalle* and non tenant *placita de libertatibus*, A writ directed to the Steward, and Marshal of England, inhibiting them to take cognizance of

an action in their court that concerns freehold. *Reg. Orig.* 185, 191.

Widowhood. If a widow, having dower after the death of her husband shall marry *vel filium, vel filiam in senectute pariter*, she shall forfeit and lose her dower in what place soever in *Kent.* Tenen. in Gavelkind. Plac. Trin. 17 E. 3.

Widowhood. A word anciently used for widowhood. Plac. Trin. 17 E. 3.

Widow-days. Are play-days, or times of pleasure and diversion. — *Dies recreationis vocati, Anglice seney-days, &c.* *Regist. Eccl. Ebor. annis 1562.*

Widow. To what duties liable on importation. 1 *Geo.* 1. Stat. 2. c. 43.

Widow. Several, or severed and divided from other ground. *Paroch. Antiq.* 336.

Widow. (*separatio*) Is the living asunder of man and wife. See *Divorce, Mulier.*

Widow. *Blackstone*, in his *Commentaries*, 1 V. 189. says, (after observing that the utmost extent of time that the same parliament was allowed to sit, by the Stat. 6 W. & M. c. 2. was three years) "But by the Stat. 1 Geo. 1. §. 2. c. 38. (in order, *protestingly*, to prevent the great and continued expences of frequent elections, and the violent heats and animosities consequent thereupon, and for the peace and security of the government then just recovering from the late rebellion) this term was prolonged to seven years; and what alone is an instance of the vast authority of parliament, the very same house, that was chosen for three years, enacted its own continuance for seven."

Widow. The third Sunday before *Quadragesima* Sunday in *Lent*, and is called *Septuagesima*, because it is about the seventyish day before *Easter*; as *Septuagesima* and *Quinquagesima* are thus denominated from their being, the one sixty, and the other fifty days before the same feast, which are all of them days appropriated by the church to acts of penance and mortification, preparatory to the devotion of *Lent*. From *Septuagesima* Sunday until the *Octaves* after *Easter*, the solemnizing of marriage is forbidden by the Canon law; and the laws of King *Canutus* ordained a vacancy from judicature, from *Septuagesima* to *Quinquagesima Pasche*. See Stat. *Westm.* 1. c. 51.

Widow. The seventy interpreters of the Bible; who were in truth seventy-two, viz. six out of every one of the twelve tribes. *Litt. Dict.*

Widow. An enclosure so called, because it is encompassed *cum sepe & fossa*, with a hedge or ditch, at least with a hedge; and it signifies any place walled in.

Widow. (*sepulchrum*) Is the place where any body lies buried; but a monument is set up for the memorial of the deceased, tho' the corpse lie nowhere. *Cowell.*

Widow. An offering made to the priest for the burial of a dead body. *Doct. d.*

Widow. *sub suo Periculo*, Is a writ that lies where a summons *ad warrantandum* is awarded; and the sheriff returns that the party hath nothing whereby he may be summoned; then goes forth an *alias* and a *pluries*, and if he come not in on the *pluries*, this writ shall issue. *Old Nat. Br.* 163.

Widow. *Cause*, The process and depending issue of a cause for trial.

Widow. *Curia*, Is used for suit of court. — *Et quod sint liberi a sequela curia.* *Mss. Ang. tom. 2. p. 253.*

Widow. *molendinum*, The owing suit to a particular mill, or being bound to grind corn in that place only; which was a duty and service laid upon many tenants. *Considerare sequela molendini*, was to grant all the toll and profit arising from such customary rights. *Cowell.*

Widow. *Ultimogenitus*, The residue and appurtenances to the goods and chattels of *villans*, which were at the absolute disposal of the lord. In former times, when any lord sold his villen, it was said *dominus vendit villanum cum tota sequela sua*, which included all the villen's offspring. *Paroch. Antiq.* 266, 288.

Widow. *Sequitur*, Signify to follow a cause; as where a guardian is admitted *ad prosequendum* for an infant. *17. 1. Par.* 74.

Widow. (*sequestrare*) Is a term used in the *Civil law* for renouncing; as when a widow comes into court, and disclaims having any thing to do, or so intermeddles with her husband's estate who is deceased, she is said to *sequestrare*.

Widow. (*sequestratio*) Signifies the separating or setting aside of a thing in controversy, from the possession of both the parties that contend for it; and it is twofold, *voluntary* and *necessary*; voluntary, is that which is done by consent of each party; necessary, is what the judge of his authority doth, whether the party will or not. *Forfeiture*, cap. 50. *Dyer* 232, 256. And there is a *sequestration* on a person's standing out all the processes of contempt for non-appearance in *Chancery* upon a bill exhibited; so where obedience is not yielded to a decree, the court will grant a *sequestration* of the lands of the party, &c. And a *sequestration* is also a kind of execution for debt; especially in the case of a *beneficed clerk*, of the profits of the benefice, to be paid over to him that had the judgment, till the debt is satisfied. 2 *Inst.* 474. 2 *Roll. Abr.* 474. But the most usual *sequestration* of a benefice, is upon a vacancy, for the gathering up the fruits of the benefice to the use of the next incumbent; and the profits of the church being in abeyance, are to be received by the churchwardens by appointment of the bishop, to make provision for the cure during the vacancy, &c. Stat. 28 H. 8. c. 11. *Sequestration* is further the act of the ordinary, disposing of the goods of one that is dead, whose estate no man will meddle with. See *Kemmer's Glossary in Sequestrare*.

Sequestration in the court of *Chancery* is a commission usually directed to 7 persons therein named, and empowering them to seize the defendant's real and personal estate into their hands, (or it may be some particular part or parcel of his lands) and to receive and sequester the rents and profits thereof, until the defendant shall have answered the plaintiff's bill, or performed some other matter which has been ordered and enjoined him by the court, for not doing whereof he is in contempt. *Curf. Canc.* 89.

A *sequestration* out of *Chancery* is grounded on the return of the serjeant at arms, wherein it is certified that the defendant had secreted himself; and therefore this process issues, and gives authority and power to the *sequestrators* (who are persons of the plaintiff's own naming) to enter upon and seize his, the defendant's real and personal estate.

It appears that there were great struggles between the Common law courts and courts of Equity, before this process came to be established; the former holding that a court of conscience could only give remedy *in personam*, and not *in rem*; that *sequestrators* were trespassers, against whom an action lay; and in the case of *Colston v. Gardiner*, the Chancellor cites a case, where they ruled, that if a man killed a *sequestrator* in the execution of such process, it was no murder. *Cro. Eliz.* 651. *Arggrave v. Watts.* 1 *Mod.* 259. But 2 *Mod.* 258. that the Chancellor having issued such *sequestration*, it will be as binding as any other process according to the rules of the Common law. 2 *Chan. Ca.* 44.

But these were such bloody and desperate resolutions, and so much against common justice and honesty, which requires that the decrees of this court, which preserved men from deceit, should not be rendered illusory, that they could not long stand; but this process got the better of these resolutions on this ground; viz. that the extraordinary jurisdiction might punish contempts by the loss of estate as well as the imprisonment of the person, because that liberty being a greater benefit than property, if they had a power to commit the person, they might take from him his estate still he had answered his contempt. 2dly. To say that a court should have power to decree about liberty, and yet should have no jurisdiction *in rem*, is a perfect solecism in the constitution of the court itself. 2 *Par. Antiq.* 621. 2 *Ch. Ca.* 44.

It has been said, that the first instance of a *sequestration* after a decree, was Sir *Thomas Row's* case in Lord *Chancery's* time, and that it was afterwards awarded in *Chancery*, in the case of *Row v. Piu.* 1666, and affirmed

in parliament: and by the court of Exchequer, *Graves v. Fontaine*, 1687, and since, without scruple. The doubt formerly was, that lands were not liable to execution before the statute *West. 2. cap. 18. 1 Ch. Ca. 92. 2 Ch. Ca. 44.*

In *Porter's Reports* it is said, that *sequestrations* were first introduced in Lord Bacon's time, and then but sparingly used in process, and after a decree to sequester the thing in demand only. *1 Vern. 423. See Black. Com. 3. 444.*

1. In what cases a sequestration is to be awarded.

2. The power and duty of the sequestrators; and when a sequestration is determined.

1. In what cases a sequestration is to be awarded.

A *sequestration nisi* is the first process against a peer or member of the House of Commons. *2 Peer Will. 385. 1 Ch. Ca. 61, 138. S. P.*

A *sequestration* is also the first process against the menial servant of a peer, within the words and meaning of the statute 12 W. 3. for that otherwise such servant would have greater privilege than his lord. *1 Peer Will. 525.*

If there be a *sequestration nisi* against a peer for waste of an answer, and the peer puts in an answer, that is insufficient; yet the order for a *sequestration* shall not be absolute, but a new *sequestration nisi*. *2 Peer Will. 385.*

Notwithstanding the superintendent power of the courts in this kingdom over those in Ireland, and what is said in some of our books, it seems to be now the better opinion, that the court of Chancery here cannot award a *sequestration* against lands in Ireland. *1 Vern. 76. 2 Ch. Ca. 189. 2 Peer Will. 261.*

It was said, that such process had been awarded to the governor of North Carolina; but herein it was doubted whether such *sequestration* should not be directed by the King's council, where alone an appeal lies from the decrees in the plantations. *2 Peer Will. 261.*

Copyholds may be *sequestered*, tho' not extendible at Common law or the statute of *Westm. 2.* for courts of equity have *potestatem extraordinariam et absolutam*; but it seems a doubt whether such a *sequestration* can be revived against the heir of a copyholder, which arises from the difficulty of obliging the lord to admit, and depriving the lord of his fine, &c. upon the death of his tenant. *2 Ch. Ca. 46. Vide 1 Bernard. 431.*

A *sequestration* out of Chancery is more effectual than an execution by *fi. facias* at law; for a *sequestration* may lie against the goods, though the party is in custody upon the attachment; whereas in law, if a *capias ad satisfaciendum* is executed, there can no *fi. fa.* issue. *Cases in Lord Talbot's Time 222.*

Where the *sequestrators* seize the real estate of the party, any tenant or other person who claims title to the estate so sequestered, either by mortgage, judgment, lease or otherwise, who hath a title paramount to the *sequestration*, shall not be obliged to bring a bill to contest such title, but he shall be let in to contest such a title in a summary way.

He may move by his counsel as of course to be examined *pro interesse suo*; and in this case the plaintiff is to exhibit interrogatories in order to examine him for a discovery of his title to the estate, and he must be examined upon such interrogatories accordingly; and the master must state the matter to the court; and the parties may enter into proof touching the title to the estate in question; and when the master hath stated the whole matter, the court proceeds to give judgment therein upon the report; and if it appears that the party who is examined *pro interesse suo* hath a plain title to the estate, and is not affected with the *sequestration*, then it is to be discharged as against him, with or without costs, as the court shall determine upon the circumstances of the case, and so vice versa. *See Talbot's Time 1 Peer Will. 309.*

The *sequestration* binds from the time of awarding the commission; and only from the time of executing it and its being laid on by the commissioners; for if that should be admitted, then the inferior officer would have *ligandi & non ligandi potestatem*. *1 Vern. 58.*

2. The power and duty of the *sequestrators*; and when a *sequestration* is determined.

The *sequestrators* are officers of the court, and as such are amenable to the court, and are to act from time to time in the execution of their office as the court shall direct; they are to account for what comes to their hands, and are to bring the money into court as the court shall direct, to be put out at interest, or otherwise, as shall be found necessary; but this money is not usually paid to the plaintiff, but is to remain in court till the defendant hath appeared or answered and cleared his contempt, and then whatsoever hath been seized shall be accounted for and paid over to him; however, the court hath the whole under their power, and may do therein as they please, and as shall be most agreeable to the justice and equity of the case.

The plaintiff's counsel may move and obtain an order for tenants to attorn and pay their rents to the *sequestrators*, or for the *sequestrators* to sell and dispose of the goods of the party, and to keep the money in their hands, or to bring it into court, as shall be most adviseable and discretionary, and sitting for the court to do.

Sequestrators on mesne process are accountable for all the profits, and can retain only so far as to satisfy for contempt. *1 Vern. 248.*

If *sequestrators*, having power to sell timber, dispose of 7000*l.* worth, and only bring 2000*l.* to account, they, as officers and agents of the court, are responsible, and not the plaintiff. *1 Vern. 161.*

A *sequestration* is in nature of a *replevin* at Common law, and the party *sequestering* has neither *juris rem*, *vel in re*; the legal estate of the premises remaining in every respect as before. *1 Peer Will. 307.*

Sequestrators being in possession of a great house in St. James's square, which was the defendant's for life, the court ordered that the master allow a tenant for the house, and the *sequestrators* to make a lease, and the tenant to enjoy. *3 Ch. Rep. 87.*

It was moved, that the irregularity of a *sequestration* might be referred to the deputy, which was taken out against the defendant for not appearing, by reason of its being taken out sooner than by the course of the court it could, and yet the *sequestrators* had taken the goods off the premises, and threatened to sell them; the chief baron said, that as to the carrying the goods off the premises, it was clear the *sequestrators* could do that, because a *sequestration* upon mesne process answers to a *distingas* at law; but however, as to selling them, the court agreed in the present case it could not be lawful, and said it had lately been sealed on debate; and observed further, that courts of equity could not authorise *sequestrators* to sell goods even upon a decree till Lord Stamford's case, which makes decrees in this respect equivalent to a judgment; and even now the counsel said, *sequestrators* cannot sell but by leave of the court; however, the court said this was a matter proper for them to consider upon another occasion, and therefore only referred the irregularity of the *sequestration* as to the point of time to the deputy. *1 Bernard. Rep. 212. in Search.*

A *sequestration* that issues as a mesne process of the court will be discontinued and determined by the death of the party; but where a *sequestration* issues in pursuance of a decree, and to compel the execution of it, there tho' the same be for a personal duty, it shall not be determined by the death of the party. *1 Vern. 58.*

A *sequestration* was against the father, who appeared to be only a tenant for life, and on his death the *sequestration* was discharged. *1 Ch. Ca. 44. 2 Ch. Ca. 44. 48.*
Sequestration is made upon an action of debt; and the court of proceeding in it is the same. The action being entered, the officer goes to the shop or warehouse of the defendant, where there is no household, and takes a peevish man, and binds him upon the door, and then the words, *I sequester the goods and chattels of the defendant in this action, to the use of the plaintiff, the said defendant not his heirs, and makes return thereof at the Chamber; then the next day* being

being past, the next court after the plaintiff may have judgment to open the doors of the shop or warehouse, and to appraise the goods therein by a serjeant, who takes a bill of appraisement, having two freemen to appraise them, for which they are to be sworn at the next court holden *at that Compter*; and then the officer puts his hand to the bill of appraisement, and the court giveth judgment: Tho' the defendant in the action may put in bail before satisfaction, and so dissolve the *sequestration*; and after satisfaction, may put in bail *ad dispendium debiti*, &c. *Pract. Solic.* 429.

Sequestration, of the estates of *peers* and *members of parliament*, not appearing to actions, &c. *Stat. 12 W. 3.* See *Parliament*.

Sequestro habendo, Is a writ judicial for the discharging a *sequestration* of the profits of a church benefice granted by the bishop at the King's command, thereby to compel the parson to appear at the suit of another; and the parson upon his appearance, may have this writ for the release of the *sequestration*. *Reg. Judic.* 36. See *Black. Com.* 3 *V.* 418.

Serement, (Fr.) An oath which is to be taken before a person who hath power to administer it, or shall be void. 2 *Feb.* 284. See *Oath*.

Serjeant or Serjeant, (Lat. *Serviens*) Is a word diversely used in our law, and applied to sundry offices and callings. First a *Serjeant at law*, (*Serviens ad Legem*) otherwise called *Serjeant Counter* or of the *Cais*, is the highest degree in the *Common law*, as a *Doctor* is in the *Civil law*; but according to *Selman*, a doctor of law is superior to a *serjeant*, for the very name of a doctor is magisterial, but that of a *serjeant* is only ministerial. To these *serjeants*, as men best learned and experienced in the law and practice of the courts, one court is severally to plead in, by themselves, which is that of the *Common Pleas*, where the *Common law* of *England* is most strictly observed; yet they are not limited as to be restrained from pleading in any other court, where the judges (who cannot be such till they have taken the degree of *serjeant*) call them *brothers*, and hear them with great respect; and of which one or more are filed the *King's Serjeants*, being commonly chosen out of the rest in respect of their great learning, to plead for the King in all his causes, especially upon indictments for treason, &c. In other kingdoms the *King's Serjeant* is called *Advocatus Regis*; and here in *England*, in the time of King *Edward the Sixth*, *Serjeant Bente* wrote himself *solus serviens ad legem*, there being for sometime none but himself; and in *Ireland* at this day there is only a *King's Serjeant*. *Serjeants at law* are made by the King's writ directed unto such as are called, commanding them to take upon them that degree by a certain day; and by the writ or patent of creation it appears that the honour of *serjeant at law*, is a state and dignity of great respect: In conferring these degrees much ceremony is used; and the *serjeants* chosen hold a sumptuous feast, like that at a coronation, which formerly continued several days; also they make presents of gold rings to a considerable value, &c. *Fortescue*, c. 50. 3 *Cro.* 1. *Dyer* 72. 2 *Inst.* 213, 214. Their privilege of being impleaded in *C. B.* &c. Vide *Privilege*. See *Black. Com.* 3 *V.* 24. 3 *V.* 28.

Serjeants at Arms, Their office is to attend the person of the King; to arrest persons of condition offending, and give attendance on the Lord High Steward of *England*, sitting in judgment on any traitor, &c. There may not be above thirty *Serjeants at Arms* in the realm, who shall not oppress the people, in pain to lose their offices, and be fined, by the Stat. 13 *R.* 2. cap. 6. And two of them by the King's allowance, do attend on the two houses of parliament; the office of him in the house of commons is, the keeping of the doors, and the execution of such commands touching the apprehension and taking into custody of any offender, as that house shall instruct him. Another of them attends on the Lord Chancellor in the Chancery; and one on the Lord Treasurer of *England*. Also one upon the Lord Mayor of *London*, on extraordinary solemnities, &c. They are in the old books called *Portitores*, because they carried silver rods gilt with gold, as they now do, before the King. *Stat. 7 Hen. 7. c. 9. Grange.*

Jer. 9. Flata, l. 2. c. 38. See Black. Com. 3 V. 444.

Serjeants, of a more inferior kind are *Serjeants of the Mace*, whereof there is a great band in the city of *London*, and other corporate towns, that attend the mayor or other head officer, chiefly for matters of justice, &c. *Kitch.* 143. Formerly all the *Justices in Eyre* had certain officers attending them called *Serjeants*, who were in the nature of *tip-staves*. *Westm.* 1. c. 30. And the word *Serjeant* is used in *Britten* for an officer belonging to the county; which is the same with what *Bracton* calls *Serjeant of the Hundred*, being no more than bailiff of the hundred. *Bract. lib. 5. c. 4.* And we read of *serjeants of manors*, of the peace, &c.

Johannes Freeman tenet unam virgatam terra, per serjeantiam mensurandi fossata & opera Domini Regis, ad castrum Domini Regis. Lib. niger Herefordiz. Tho' services or tenures are now turned into *seage*, yet it may be necessary to shew how they are described in our old law-books, which see under the word *servitium*. See *Skene de verbor. signif.* and *Kennet's Glossary*.

Serjeants of the Household, Are officers who execute several functions within the *King's household*, mentioned in the Stat. 33 *H. 8. c. 12.*

Serjeanty, (*Serjeantia*) Signifies in law a service, that cannot be due from a tenant to any lord but to the King only; and this is either *grand serjeanty*, or *petit*; the first is a tenure whereby one holds his lands of the King by such services as he ought to do in person to the King at his coronation; and may also concern matters military, or services of honour in peace, as to be the King's butler, carver, &c. *Petit serjeanty*, is where a man holds lands of the King, to furnish him yearly with some small thing towards his wars; and in effect payable as rent. Though all tenures are turned into *seage* by the 12 *Car. 2. cap. 24.* Yet the honorary services of *grand serjeanty* still remain, being therein excepted. *List.* 153, 159. 1 *Inst.* 105, 108. See *Chivalry*. And *Black. Com.* 2 *V.* 73, 81.

Sermonium, Was an interlude or historical play, acted by the inferior orders of the clergy, assisted by youths, in the body of the church, suitable to the solemnity of some high procession day; and before the improvements of the stage, these ruder sort of performances were even a part of the unreformed religion. *Collect. Matt. Hutton, Es. Reg. Eccl. Lincoln.* MS.

Serpiens, A mantle or upper coat; from the Lat. *superpellicium*. *Blount.*

Servage, (mentioned in statute 1 *Rich. 2. c. 6.*) That is, when each tenant, besides payment of a certain rent, finds one or more workmen for his lord's service. *Ing. 7 Ed. 1. Not. Etiam est religio illa ita posita in servagio per abbates Cisterciensis, quod servitium Dei in hac parte impeditur.* *Pla. Parl.* 33 *E. 1.* See *Service*. King *John* brought the crown of *England* in servage to the see of *Rome*. 2 *Inst.* 274.

Servants, Are such as men of trades and professions employ under them, to assist them in their particular callings; or such persons as others retain to perform the work and business of their families, which comprehends both men and women: And *servants* are *menial*, or not so; *menial*, being domesticks living within the walls of the house. *Wood's Inst.* 51. Every person under the age of thirty years, that has been brought up in handicraft trades, and hath not lands of inheritance, or for life, of the yearly value of forty shillings, or is not worth ten pounds in goods, and so allowed by two justices of peace; and not being retained with any person in husbandry, or in the said arts, nor being lawfully hired as a servant with any nobleman or gentleman, or having any farm or other holding whereupon he may employ his labour; shall, upon request made by any person using the mystery wherein such person hath been exercised, be obliged to serve him as a servant therein, on pain of imprisonment. 5 *Eliz. c. 4.* And by the same Statute, persons are compellable to serve in husbandry by the year, with any person that cannot or useth husbandry, and who will require any poorer person to serve; and the justices of peace have authority therein, and to assess the wages of such servants in husbandry.

husbandry, order payment, &c. Also two justices, and mayors or head officers of any city or town, may appoint any poor woman of the age of twelve years, and under forty unmarried, to go to service by the year, &c. for such wages and in such manner as they think fit; and if any such woman shall refuse to go abroad as a servant, then the said justices, &c. may commit such woman until she is bound to service. *Stat. Ibid.* If any master shall give more wages than assessed by the justices; or any servant takes more, or refusing to serve for the statute wages, they are punishable; but a master may reward his servant, as he pleases, so as it be not by way of contract on the retainer: And if a servant depart before the end of the term, being hired for a year, without cause allowed by a justice; or after his term is expired, without giving a quarter's warning, two justices may commit him to prison till he give security to serve out the time; or one justice of peace may send him to the house of correction, there to be punished as a disorderly person. 7 *Jac. 1. c. 4.*

A master cannot put away a servant before the end of his term without some reasonable cause, to be allowed by one justice; nor after the end of the term without a quarter's warning given before witnesses, if a master discharges a servant otherwise, he is liable to a penalty of forty shillings. 5 *Eliz. c. 4.* And where servants quit their service, testimonials are to be given by constables and two householders, &c. declaring their lawful departure; and a servant not producing such a testimonial to the constable where he designs to dwell, is to be imprisoned till he gets one; and in default thereof be whipped as a vagabond; masters retaining them without such testimonial, shall forfeit five pounds. But the testimonial concerns only servants in trades and husbandry. *Stat. Ibid.*

No person may retain a servant for less than a year, by the ancient statutes; if one retains a servant generally, without expressing any time, the law construes it for a year; and where a servant is hired for a year, according to the statute, and the master dieth within that time, the executor must pay the wages. *Dalt. 129. 1 Inst. 42.* If a woman servant marrieth, she is obliged to serve out her year; but if a single woman who is with child procures herself to be retained with a master, who knows nothing thereof, this is a good cause to discharge her from her service; and so if she be gotten with child during her service. *Dalt. 92. Resol. Ann. 1633.* A servant retained for a year, falling sick, ought not to be discharged therefore, or for any disability by the act of God; neither may his wages be abated for these causes. *Dalt. 129.*

Master and servant may part by consent, and then the allowance of the discharge by a justice of peace is not necessary: And a master's detaining wages, not allowing sufficient meat, &c. or the master's wife beating him, are good causes for a servant's departure; but they must be allowed by a justice. *Dalt.* If a master put away his servant, he must pay him his wages to the time he served, though if the servant go away from his service before the end of the time agreed, he shall forfeit all his wages. *Dalt. 129.* A servant is not to depart from his service; and if he refuseth to do his business, this is a departure in law, altho' he go not ways. *Noy's Max. 90.*

Enticing away a servant, or retaining and keeping one who departed from his master without licence, knowing him to be a servant to another, the master may have action of the case against the person doing it. 2 *Lev. 63. Stat. 23 Ed. 3.* But if a man do retain another's servant, not knowing that he was in the service of the other, he shall not be punished for so doing, if he do not retain him after notice of his first service: And if a person do retain one to serve him forty days, and another doth afterwards retain him to serve for a year, the first covenant is avoided, because the retainer was not according to the statute. *New Nat. Br. 374. 375. i. e. according to the law above.*

A master is answerable for the actions and trespasses of his servant in many cases; but not for trespass of battery, &c. and in criminal cases, unless done by his commandment. *Noy's Max. 90.* And if the master order his servant to detain another man's cattle, and after he hath detained he kills or abuses the distress, the master shall answer it. *Noy 111.* If a man has a servant known to be such, and he send him to fairs and markets to buy

or sell, his master shall be charged if the thing come to his use; tho' if the servant makes a contract in his master's name, the contract will not be binding, unless it were by the master's commandment or assent; and where a servant borrows money in his master's name, without order, that does not bind the master. *Dodd & Stud. Dial. 2. c. 42.* A servant buys things in his own name, the master shall not be charged, except the things bought come to his use, and he have notice of it. *Kitch. 371.* Where a master always gives his servant money, he shall not answer for what the servant buys on trust; but if he sends sometimes on trust, he must answer to his usual tradesmen for what is so taken up upon trust by him. *Wood's Inst. 56.* A master used to give his servant money every Saturday, to defray the charges of the foregoing week, and the servant kept the money; per *Holt Ch. J.* the master is here chargeable; for the master at his peril ought to take care what servant he employs; and 'tis more reasonable that he should suffer for the cheats of his servants, than strangers and tradesmen who do not employ them. 3 *Salk. 234.* It has been adjudged, that where a servant usually buys goods for his master upon tick, and takes up things in his master's name, but for his own use, the master is liable; but it is not so where the master usually gives him ready money: That if the master gives the servant money to buy goods for him, and he converts the money to his own use, and buys the goods upon tick, yet the master is answerable, as the goods come to his use; otherwise he is not: Also a note under the hand of an apprentice shall bind his master, where he is allowed to deliver out notes, tho' the money is never applied to the master's use; but if he be not allowed or accustomed to deliver out notes, his note shall not bind the master, if the money be not applied to the use of the master. 3 *Salk. 234, 235.*

The act of a servant shall not bind the master, unless he acts by authority of his master; and therefore if a master sends his servant to receive money, and the servant instead of money takes a bill, and the master as soon as told thereof disagrees, he is not bound by this payment: But acquiescence, or any small matter, will be proof of his master's consent, and that will make the act of the servant the act of his master. *Hill. 2 Ann. B. R. 2 Salk. 442.* For what is within the compass of a servant's business, the master shall be generally chargeable; and also have advantage of the same against others. *Noy's Max.* An assumption of the servant, by order and appointment of the master, shall bind his master; and a promise to my servant is good to me: If my bailiff buy cattle to stock my ground, I shall be chargeable in debt for the money; and if he sell corn for me, I may have action in my own name against the buyer. *Bro. 24. Godb. 360.* If one owe me money, and I send my servant for it, and he pay it to him; this is a good payment and discharge, tho' the servant do not bring the same to me: But if I send him not, it is otherwise. *Dodd & Stud. 138.*

A master sends his servant with deceitful wares to market, and orders him to sell them, but says not to whom, if he sells them, no action will lie against the master: Tho' if he had bid the servant sell them to such a man in particular, and he had done so, the master would be chargeable in action of the case. 11 *Ed. 4. Kitch. 385.* The master is liable for the neglects of his servant; (tho' not the wilful wrong) where a carrier's servant loses things delivered to him, the master must answer it, and action lies against him; and if goods be undertaken to be carried safely for hire, but by negligence are spoiled, it has been held, that whoever employs another, is answerable for him, and undertakes for his care to all that make use of him. 2 *Noy. 440.* If a surgeon undertakes the cure of a person, and by sending medicines by his servant, the wound is hurt and made worse, the patient shall have action against the master, and not against the servant. 18 *Hon. 8.* And where a smith's servant pricks a horse in shoeing him, the master shall answer the damages. *Wood's Inst. 56.* A servant casting any thing into the highway to the nuisance of the King's subjects, the master shall be charged, &c. *Noy's Max. 49.*

A master may maintain the cause of his servant: He may bring an action for the battery of a servant, where he loses his service, which is to be alledged: And if a

servant is cozened of his master's money, the master may have action on the case against the person that cozened him. 9 Rep. 113. 10 Rep. 130. 1 Roll. Abr. 98. And in case a *servant* give away his master's goods, the master may have action against the receiver. *Noy's Max.* 94.

Where a *servant* damages goods of his master, action lies against him; and being employed to sell goods in his master's shop, if the *servant* carries away and converts them to his own use, action of trespass may be brought by the master against the *servant*; for the *servant* cannot meddle with them in any other manner than to sell them. 5 Rep. 14. 1 Leon 88. Moor 244. But if a *servant* be robbed, without his default, &c. he shall be excused, and allowed it in his account. 1 Inst. 9.

Servants going or making away with, imbeziling or purloining any of their master's goods, to the value of 40 s. are guilty of felony, by the stat. 21 Hen. 8. c. 7. and 12 Ann. c. 7. And assaulting their masters, they may be bound to the good behaviour, or be committed to prison for a year, &c.

By the stat. 20 Geo. 2. c. 19. All complaints and disputes between masters and *servants* in husbandry hired for a year or longer, or between masters and artificers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, and other labourers employed for any certain time, shall be heard and determined by a justice or justices of the peace, altho' no rate of wages hath been made that year by the justices, and may order payment of so much wages as to him and them shall seem just, not exceeding 10 l. to any *servant*, nor 5 l. to any artificer, &c. and in case of non payment by twenty-one days, may issue a warrant to levy the same of the master's goods. And upon complaint on oath of any misdemeanor, miscarriage or ill behaviour in any such *servant*, artificer, &c. such justice or justices may punish the offender by commitment to the house of correction, there to be corrected and held to hard labour, not exceeding a calendar month; or by abating some part of his or her wages, or by discharging such *servant*, artificer, &c. from his or her service or employment. And on complaint upon oath of any misfeasance, refusal of necessary provision, cruelty, or other ill treatment to such *servant*, artificer, &c. by any master, the justice or justices may summon the Master to appear before him or them, and upon proof thereof upon oath to the satisfaction of such justice or justices, he or they may discharge such *servant* or artificer, &c. from his said service or employment, such discharge to be given gratis. Persons thinking themselves aggrieved by any such determination, may appeal to the next sessions of the peace. But no *Certiorari* to remove any such proceedings to any of the Courts at Westminster. But there being a proviso in the act, that nothing therein contained should extend to the stannaries in Devon and Cornwall, by the stat. 27 Geo. 2. c. 6. that proviso is repealed, and it is thereby enacted that all the provisions and regulations in the said stat. 20 Geo. 2. c. 19. relating to *servants* in husbandry, &c. shall extend to such tinners and miners as shall be employed in the said stannaries; but not to hinder any person from applying to the stannary courts, or to the warden, subwarden, or steward of the stannaries, in relation to any of the aforesaid matters. See *Artificers, Felony, Labourers, Manufactures*, and *Black. Com.* 1 V. 423. 424. 3 V. 142, 153. 4 V. 230, 231.

Servi, Bond-men, or servile tenants. Our northern *servi* had always a much sadder condition than the Roman *servi*. *Servus non in nostrum morem deservit per familiam ministeriis utuntur, eum quisque suum, suos penalis regit. Ferventi modum domus, aut pecoris, aut vestis, colono iungit, & servus baltham parat. Tacitus de Moribus Germanorum.* Which plainly describes the condition of our *axon* and *Norman* *servants*, natives and villains, whose servitude had more respect to their tenure, than their persons. No author has fixed the distinction between *servus* and *villanus*, though undoubtedly their servile state was different, for they are all along in the *Domesday-Book* distinguished from each other. So in *Burcester* there were — *Quinque servi, & viginti octo villani*, &c. It's supposed the *servi* were those, whom

our lawyers have since called *pure villanes*, and *villani in gross*, who, without any determined tenure of land, were at the arbitrary pleasure of the lord appointed to such servile works, and received their wages or maintenance at discretion of the lord. The other were of a superior degree, and were called *villani*, because they were *villæ & glebæ adscripti*, i. e. held some cottage and lands, for which they were burdened with such stated servile offices, and were conveyed as appurtenant to the manor or estate to which they belonged. See *Kennet's Glossary*. The name and quality of their bondage do often occur in *Domesday* register: And their condition, no doubt, was worse than that of the *bordarii* or *Coseti*, who performed likewise some servile offices for their lord, and yet as to their persons and goods were not obnoxious to servitude, as the proper *servi* were. These were of four sorts, 1. Such as sold themselves for a livelihood. 2. Debtors that were to be sold, for being incapable to pay their debts. 3. Captives in war, retained and employed as perfect slaves. 4. *Nativi*, such as were born servants, and by such descent belonged to the sole property of the Lord. — All these had their persons, their children, and their goods, at the disposal of their Lord, incapable of making any wills, or giving away any matter. *Cowell*.

Servi, Were bond-men; and *servi testamentarii*, those which we now call *covenant servants*. Leg. Athelt. The proper *servi* were of four sorts, viz. such as sold themselves for a livelihood; debtors that were to be sold for being incapable to pay their debts; captives in war, employed as perfect slaves; *nativi*, such as were born servants, and by descent belonged to the sole property of the lord. And all these had their persons, their children and goods, at the disposal of their lords; and were incapable of making any wills, or giving away any thing, &c.

Servitium, (Servitium) Is that duty which the tenant by reason of his fee or estate, oweth unto the lord.

Our ancient law books make many divisions of it; as into *personal* and *real*; free and *base*; *continual* or *annual*; *casual* and *accidental*; *intrinsic* and *extrinsic*, &c. *Bract. lib. 2. Brit. c. 66. 4 Co. Rep. 9. Personal service*, is where something is to be done by the person of the tenant, as homage and fealty; and *real*, was wards and marriages, when in use: *Annual* and certain service is rent, suit of court to the lord, &c. *Accidental services*, are heriots, reliefs and the like: And some services are only for the lord's benefit; and some *pro bono publico*. *Co. Copyhold 22. Co. Litt. 222. 22 E. 4. 3. Also services* are said to be *intire*; of chattels valuable, such as an ox, or things pleasurable, as a hawk, &c. And so are those *personal*, and consisting of manual work, or to exercise some office, &c. The statute of *Magna Charta* ordains, that no freeman shall sell so much of his lands, but that of the residue the lord may have his services. 9 Hen. 3. c. 32. In feoffments to a man and his heirs, the feoffee shall hold the land of the lord by the same services as the feoffor, &c. *Stat. 18 Edw. 1. And where services* are intire, and cannot be divided; upon the alienation of parcel of the lands by the tenant, the services shall be multiplied, and every alienee render the whole services; tho' by the purchase of parcel by the lord, the whole is extinct, except in case of fealty and heriot custom. 6 Rep. 1. *Wood's Inst. 133. As to feodal service*, see farther *Black. Com. 2 V. 54. And as to heriot service*, *Id. 422. And see Heriot*.

Servitium et Sacraments, The penalty of depraving the sacrament of the altar, 1 Ed. 6. c. 1. The blessed sacrament to be administered in both kinds, 1 Ed. 6. c. 1. For the uniformity of the service and administration of sacraments, 2 & 3 Ed. 6. c. 1. 5 & 6 Ed. 6. c. 1. 1 Eliz. c. 1. 8 Eliz. c. 1. 13 & 14 Car. 2. c. 4. Such service shall be used as in the last year of King Hen. 8. 1 Mar. 2. c. 2. The penalty of disturbing a preacher or priest saying divine service, or pulling down an altar, &c. 1 Mar. 2. c. 3. The penalty of not repairing to church on Sundays and holidays, 1 Eliz. c. 2. The Bible and divine service shall be translated into the Welsh tongue, 5 Eliz. c. 28. All ecclesiastical persons to read and subscribe to the Book of Common Prayer, &c. 13 & 14 Car. 2. c. 4. 15 Car. 2. c. 5. All persons in office to take the sacrament, and the declaration against

tran-

transubstantiation, 25 *Car. 2. c. 2.* Time given to those in the *Fleet* and beyond sea till three calendar months after their return, 13 *Geo. 1. c. 29.* Four months, 2 *Geo. 2. c. 31.* Six months given for taking the sacrament, 16 *Geo. 2. c. 30.* Allowance of impediments for not reading the service, extended to the certificate of subscription, 23 *Geo. 2. c. 28.* Reading the articles to indemnify against neglect in point of time, *ib.*

Servitium Secular, Signifies worldly service, contrary to *Spiritual* and ecclesiastical. *Stat. 1 Edw. 4. c. 1.*

Servientibus, Are certain writs touching servants and their masters, violating the statutes made against their abuses, which see in *Reg. Orig. f. 189, 190, 191.*

Servitium feudale & praeiale, Was not a personal service, but only by reason of the lands which were held in fee. *Bracton, lib. 2. c. 16. par. 7.*

Servitium Forinsecum, A service which did not belong to the chief lord, but to the King: It was called *forinsecum* and *foraneum*, because it was done *foris*, *vel extra servitium quod sit domino capitali*: And we find several grants of liberties with the appurtenances, *salvo forensi servitio*, &c. in *Mon. Ang. tom. 2. pag. 48.*

Servitium Intrinsecum, Is that service which was due to the chief lord alone from his tenants within his manor. *Bracton, lib. 2. fleta, lib. 3.*

Servitium Liberum, A service to be done by feudatory tenants, who were called *liberi homines*, and distinguished from *vassals*, as was their service; for they were not bound to any of the *base* services of ploughing the lord's land, &c. but were to find a man and a horse, or go with the lord into the army. or to attend his court, &c. and sometimes it was called *servitium liberum armorum*; as in an old rental of the manor of *South Malling* in *Essex*, mentioned by *Sommer* in his treatise of *Gavelkind*, pag. 56.

Servitium Regale, Royal service, or the prerogatives that within a royal manor belonged to the lord of it; which were generally reckoned to be the following. *viz.* power of judicature in matters of property; and of life and death in felonies and murders; right to waifs and estrays; minting of money; assize of bread and beer; and weights and measures: All which privileges 'tis said were annexed to some manors by grant from the King. *Paroch. Antiq. 60.*

Servi testamentales, Were those whom we now call covenant servants. They are mentioned in the laws of King *Atelstan*, c. 34.

Servitius Requistandis, Is a writ judicial that lies for a man distrained for services to one, when he owes and performs them to another, for the acquittal of such services. *Reg. Judic. 27.*

Servitor, (*Servulus*) Is a serving-man; particularly applied to *Scholars* in the colleges of the universities, who are upon the foundation.

Servitors of Bills, Such servants or messengers of the *Marshal* of the *King's Bench*, as were sent abroad with *bills* or writs to summon men to that court. *Stat. 2 H. 4. c. 23.*

Sessur, Seems to signify the assessing or rating of wages. 25 *Ed. 3. c. 6.*

Sessio, (*Sessio*) Is a sitting of justices in court upon their commission; as the *Sessions* of *Oyer and Terminer*, &c. See *Black. Com. 4 P. i.*

Sessio of Parliament, (*Sessio Parliamenti*) The sitting of the parliament; and the *session* of parliament continues till it be prorogued or dissolved, and breaks not off by adjournment. 4 *Inst. 27.* See *Parliament.* And *Black. Com. 1 P. 186, 7.*

Sessio, great, of Wales. By the stat. 34 & 35 *Hi. 8. c. 26.* A sessions is to be held in *Wales*, twice in every year in each county by judges appointed by the King, to be called the *great sessions* of *Wales*, in which all pleas of real and personal actions shall be held, with the same form of process and in as ample a manner as in the court of Common Pleas at *Westminster*: And writs of error shall lie from judgments therein (it being a court of record) to the court of King's Bench at *Westminster*.

Sessio of Great Delfbery. A session held for delivering a gaol of the prisoners therein being. See *Black.*

Com. 4 P. iii. And *Crown & Circuit Com. 1 P. 6, 37, 58.*

Sessions of the Peace, A court of record, held before two or more justices of peace, (*Quorum unus*) for the execution of the authority given them by their commission and certain acts of parliament. And the justices of sessions have power to hear and determine trespasses against the publick peace, &c. and many offences by statute: This court is held four times in a year at some place within the county, &c. Also besides the *General Sessions* of the peace, there are private sessions held by the justices, for divers particular branches of the business of their offices. *Dak. Just. 573.* See *Black. Com. 4 P. 288.*

The sessions cannot adjourn any matter without expressly adjourning the court also. *Rep. Temp. Hardw. Per Anny, 80.* The sessions must make a direct and final judgment themselves, *Id. 81.* The sessions proceeding on indictments as a court of record at Common law, must make formal and regular continuances, but need not when they proceed in making orders on a power given them by statute, *Id. 81.* An order of sessions for discharging an apprentice must set out the appearance of the master. *Id. 101.*

Sessions for ordering Servants, called statute sessions, held by constables of hundreds, &c. 5 *Elix.* See *Statutum Sessionum.*

Sessions for Weights and Measures, In *London* four justices from among the mayor, recorder, and aldermen, (of which the mayor or recorder to be one) may hold a sessions to inquire into offences of selling by false weights and measures, contrary to the statutes; and to receive indictments, punish the offenders, &c. *Char. K. Chs. 1.*

Set off. A set off may be either by plea, or notice. In such case the defendant acknowledges the justice of the plaintiff's demand on the one hand; but, on the other, sets up a demand of his own, to counter-balance that of the plaintiff, either in the whole or in part. Vide the statutes 2 *Geo. 2. c. 22.* and 8 *Geo. 2. c. 24.*

Settlement of Poor, In parishes there are several statutes relating to, *viz.* 43 *Elix. c. 2.* 13 & 14 *Car. 2. c. 12.* 3 & 4 *W. & M. c. 11.* 8 & 9 *W. 3. c. 30.* 12 *Ann. c. 18.* 9 *Geo. 1. c. 7.* &c. See *Apprentice, Bastard, Poor. Burn's Justice, tit. Poor, and 19 Vin. Abr. tit. Settlement of the Poor.* And *Black. Com. 1 P. 362.*

Settlement, Act of. The stat. 12 & 13 *W. 3. c. 2.* is so called, whereby the crown was limited to his present Majesty's illustrious house, and some new provisions were added at the same fortunate æra for better securing our religion, laws and liberties; which the statute declares, to be "the birthright of the people of England;" according to the antient doctrine of the Common law. *Black. Com. 1 P. 128.* See *Id. 217.* and 4 *P. 433.*

Seven-oke, Wool-key, how vested in trustees for the King, subject to an agreement concerning the free-school in *Seven-oke*, 8 *Geo. 1. c. 31.*

Several Action, Is where two or more persons are severally charged in any action.

Several Covenant, A covenant by two or more severally: And in a deed where the covenants are several between divers persons, they are as several deeds, wrote in one piece of parchment. 5 *Rep. 23.*

Several Fishery, A free fishery, or exclusive right of fishing in a publick river, is a royal franchise; and is considered as such in all countries where the feudal polity has prevailed. *Black. Com. 2 P. 39.*

Several Inheritance, An inheritance conveyed, so as to descend, or come to two persons severally by moieties, &c. Vide *Inheritance.*

Several Tail, Is that whereby land is given and intailed severally to two. *Co. Litt.*

Several Tenancy, (*Tenura Separata*) A plea or exception taken to a writ that is laid against two persons as joint tenants, who are several. *Bro. 273.*

Severalty, Estate in. He that holds lands or tenements in severalty, or is sole tenant thereof is he that holds them in his own right only, without any other person being joined or connected with him in point of interest, during his estate therein. *Black. Com. 2 P. 179.*

Servant,

Severance, Is the singling or severing of two or more joined in one writ or action. There is a *Severance* of the tenants in an *assise*, when one or two disseisees appear upon the writ, and not the other. *Best Int. 8. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.* *Severance* in debt, where two executors, &c. are plaintiffs, and one refuseth to act or prosecute. *Ibid. 220. Severance* in *quarrel*, in *assise*, &c. *5 Rep. 97.* And it lies in real, as well as personal actions; and on writs of *expropr.* *F. N. B. 28. 10 Rep. 135.* In writ of *error*, if three defendants in the action bring *error*, and one releases the *error*, he may be summoned and seised, and then the other two shall proceed to reverse the judgment. *6 Rep. 26.* And if in *error* where there are several plaintiffs, one only appears and assigns *error*; this is not good, without summoning and severing the rest. *Cro. Eliz. 899.* It has been held, that summonses and *Severances* in partition; yet he who was seised shall have his part: For partition must be made of the whole. *Jenk. Cont. 211.* And in case of jointtenants of lands, by *Severance* the prosecution of the suit is severed, but not the jointure; for where one alone recovers afterwards, the other may enter into the moiety recovered. *Ibid. 40.* *Summons* and *Severance* is usually before appearance; as nonsuit is after appearance. *10 Rep. 134.* But according to *Hale*, there are two sorts of *Severances*, one when a plaintiff will not appear; and the other when several plaintiffs appear, but some will not proceed and prosecute. *Hale. 317. 3 Nels. Abr. 255.* If a plaintiff or defendant on a writ of *Summons* and *Severance*, sued out against him by another, doth not come in upon it, judgment shall be had *ad prosequendum* *scilicet* *pro*; and this hath been done in *B. R.* by giving a rule to appear and come in. *2 Lill. Abr. 539.* See *Summons* and *Severance*.

Severance of Corn. The cutting and carrying it from off the ground: and sometimes the setting out the *sithes* from the rest of the corn is called *Severance*. *2 Cro. 325.* And where executors of tenants for life, &c. dying before *Severance*, shall have corn down; see *Emblements*.

Severance of Jointure. An estate in joint-tenancy may be severed and destroyed by destroying any of its constituent unities. 1. That of *time*, which respects only the original commencement of the joint estate, cannot indeed (being now past) be affected by any subsequent transactions. But, 2. The joint-tenant's estate may be destroyed, without any alienation, by merely disuniting their possession. For joint-tenants being seised *per my et per te*, every thing that tends to narrow that interest, so that they shall not be seised throughout the whole, and throughout every part, is a *Severance* or destruction of the jointure. By statutes 31 H. 8. c. 1. and 32 H. 8. c. 32. joint-tenants either of inheritances or other less estates, are compellable by writ of partition to divide their lands. 3. The jointure may be destroyed, by destroying the unity of title. 4. It may also be destroyed, by destroying the unity of interest. See *Black. Com. 2 K. 183, 6, 7.*

Severity of Punishment. It is but reasonable among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness. See *Black. Com. 4 K. 16.* And the Marquis Beccaria's excellent Treatise on Rewards and Punishments: Especially cap. 6, &c.

Severs. A recompence for robberies done on the river *Severn* in Gloucestershire, may be had by action of debt, according to the statute of Winchester, 2 H. 6. None shall be disturbed in his passage over the *Severn*, nor any disorders committed upon the said river. Stat. 2 H. 6. and 19 H. 7. Vide *Passage*.

Seaward. A Saxon word for him who turns the face east; it signifies *Cyphodanias*.

Sewer, (*Sewera*) Is a fresh-water trench, or little river, inclosed with banks on both sides, to carry the water into the sea, and thereby preserve the lands against inundations, &c. The Kings of England granted Commissions of *Sewers* long before any statute was enacted in parliament for it; and during the reign of King Hen. 6. Ed. 2. & Hen. 7. several statutes were made for appointing commissions of *sewers* in all parts of the realm where needful: some for indurment years, some fifteen years, and others five years; &c. with certain powers to the commissioners; which commissions, by the 23 Hen. 8. are to

be settled by the Lord Chancellor, Lord Treasurer, and the two chief justices, or any three of them, whereof the Lord Chancellor to be one; and are to continue ten years, unless repealed by a new commission: And by this law, the commissioners each is appointed: they are to be qualified as justices, by having lands, tenements or hereditaments in fee or for life, worth forty marks *per ann.* besides reversion; and have moveables worth 100 l. and if they execute the commission, not being thus qualified or before sworn, they incur a forfeiture of 40 l. Commissioners that may lawfully act, have an allowance for their pains of 4 s. *per Diem*, and their clerks 2 s. a day, out of the taxes to be laid and levied. 23 H. 8. c. 5. The commissioners of *sewers* have power to make and ordain laws, but not to continue in force longer than their commission by this statute; and may decree lands to be sold to levy charges assessed, upon non-payment, &c. Stat. *Ibid.* All laws, and ordinances of the commissioners, are to remain in force till repealed, notwithstanding the determination of their commission; and clerks of commissioners of *sewers* are to collect fines and penalties imposed by the commissioners yearly into the Exchequer, by 13 Eliz. c. 9. The business of the commissioners of *sewers* is to repair sea-banks, and walls, survey rivers, publick streams, ditches, &c. and make orders for that purpose. They have authority grounded on the statutes, to inquire of all nuisances, and offences committed by the stopping of rivers, erecting mills, not repairing of banks and bridges, &c. and to tax and assess all whom it may concern, for the amending of defaults, which tend to the obstruction or hindrance of the free passage of the water through its ancient courses: and they may arrest carts and horses, and take trees, paying a reasonable price for them, for reparations; appoint workmen, bailiffs, surveyors, and other officers, &c. Terms de Ley 541. 4 Inst. 275. Laws Sew. 86, 96. They proceed by jury and view; in their inquiries into annoyances and defects of repairs; and the jury may amerce for neglects: Also the commissioners may punish by fine for contempt, and where officers are negligent in their duty; though they may not imprison persons for disobedience to their orders. Laws Sew. But they cannot intermeddle where there is not a publick prejudice; nor can they make a new river: Upon the statute 23 Hen. 8. of *sewers*, the commissioners decreed, that a new river should be made out of another large river; through the main land for seven miles, unto another part of the old river, and for that purpose they laid a tax of a sum in gross upon several towns: adjudged that the commissioners have no power to make a new river, or any new invention to cast out water, &c. for such things are to be done in parliament: But they may order an old bank to be new made, or alter a *sewer* upon any inevitable necessity; and the tax of a sum in gross is not warranted by their commission, they being to tax every owner or possessor of the lands, according to the quality of their lands, rents, and number of acres, and their respective portions and profits, whether of pasture, fishing, &c. 10 Rep. 141.

Commissioners of *sewers* are to tax all equally, who are in danger to receive any damage by the waters, and not only those whose lands are next adjoining; because the rage of the waters may be so great, that the land contiguous may not be of the value to make the banks; and therefore the stat. 6 Hen. 6. c. 6. will have all that are in danger to be contributory. 5 Rep. 200. The commissioners having made a rate, according to the quantity and quality of the land, &c. may grant warrants to distrain for it; or the land may be decreed to be sold to pay the rate. But the desires of commissioners of *sewers* are to be certified into the Chancery, and have the King's assent to be binding; and the commissioners and their proceedings are subject to the jurisdiction of the King's Bench.

There are several causes and considerations for which persons may be obliged to repair and maintain *sewers*; as *sewers* were bound to the repairs of the walls and banks, &c. by reason of franchise; by 27 Ed. 1. c. 10. The being owner of a bank, wall, or other defence, is a sufficient inducement to impose the charge of the repairs thereof

thereof upon such owner. 1 *Hen. 7. Prescription* and custom are much of the same nature, and the law takes notice of them in this case; but prescription doth not bind a man to the repairs, except it be *ratione tenuræ*. 21 *Ed. 4. 38.* 19 *Hen. 7.* By tenure of land, a person may be bound to repair a wall, bank, or defence mentioned in the statute of *sewers*. 12 *H. 4.* A man may bind himself and his heirs by covenant expressly to repair a bank, wall, or sewer, and be good; yet this shall not bind the heir after his death, where assets are not left from the ancestor, who entered into the covenant. *Callis's*

The use of defences may tie a man to the reparation thereof; if one and his ancestors have had the use of a river by failing up and down the same, or have used a ferry on or over it, &c. *Laws Sew. 57.* If no person or grounds can be known, who ought to make repairs by tenure, prescription, custom or otherwise, then the commissioners are to tax the *level*: And by the laws and statutes of *sewers*, all shall be charged, &c. *Ibid. 67, 68.* If it is found before commissioners of *sewers*, that such a person ought to repair a bank; and this is removed into *B. R.* the court will not quash the inquisition, or grant a new trial, except he repair it; and if afterwards he is acquitted, he shall be reimbursed. *Sid. 78.* In cases of *sewers*, the court of King's Bench inquires into the nature of the fact, before they grant a *certiorari* to remove orders; that no mischief may happen by inundations in the mean time, which is a discretionary execution of their power. 1 *Salk. 146.*

The court commonly hears counsel on both sides, where orders of commissioners of *sewers* are removed by *certiorari*, before such orders are filed; for if good, the court will grant a *procedendo*, which cannot be done after they are filed: but now they will file them in any case, where there is no danger likely to ensue. 1 *Salk. 145.* If commissioners of *sewers* proceed after a *certiorari* delivered out of *B. R.* attachment will issue against them, and they may be fined. 3 *Nels. Abr. 218.* An order of *sewers* was made for levying of 9 *d.* per acre on 1312 acres, to be paid to the clerk, to be applied towards defraying of charges in and about the execution of the commission; and held to be good, the act does not require it should be on the occupiers; and there is an express power to allow charges. 2 *Str. 1127.* 10 *Co. 139.*

Orders of *sewers* being removed by *certiorari*, the court would not file the orders till they had heard the objections debated, so as to have it in their power to send the orders back again. 2 *Str. 1263.* The court held, that a *certiorari* to bring up an order made by the commissioners, for the removal of their own clerk, was of common right, and not discretionary, as in the case of other orders, where great inconveniencies may follow by inundations in the mean time. 1 *Str. 609.*

The sea, creeks, and bays, on the coasts, are all within the statutes of *sewers*, in point of extent; but they and the shores, and the relinquished grounds, are out of the commission of *sewers*, to be determined thereby: but ports and havens, as well as the walls and banks of waters, are within the commission of *sewers*; and the shore and grounds left by the sea, when they are put in gainage and made profitable, are then within the power of the commission of *sewers*: And though before, the ground left by the sea, is not, as to defence, within the commission of *sewers*; yet a wall or bank may be thereon raised, for the succour of the country, although not for any private commodity, the commission of *sewers* aiming at the general good. *Callis's Read. Laws Sew. 31, 32.* The stat. 3 *Jac. 1. cap. 14.* ordains, That all ditches, banks, bridges, streams and watercourses, within two miles of London, falling into the Thames, shall be subject to the commission of *sewers*: And the Lord Mayor, &c. is to appoint persons who have power of commissioners of *sewers*. 7 *Ann. c. 10.* Repairs of sea-banks in Norfolk, by order of justices of peace as highways. See stat. 27 *Eliz. c. 24.* Breaking down sea-banks, whereby lands shall be damaged, is felony, by the 6 *Geo. 2. cap. 35.* And persons removing piles, &c. used to prevent inundations of rivers, shall forfeit 20 *l.* or be sent to the house of correction for six months. Stat. 10 *Geo. 2. c. 32.* See *Black. Com. 3 V. 73.*

Sextagesima Sunday, the sixtieth day before Easter. See *Sextuagesima.*

Serphindeni, (*Sax.*) The middle Thames, valued at 600 shillings. *Vide Hindeni Homines.*

Sextary, (*Sextarius*) Was an ancient measure, containing about our pint and a half, (according to our *Latin* dictionary.) The town of Leicester paid among other things to the King yearly, twenty-five measures called *Sextaries* of honey, as we read in *Domesday*. And in *Clay. 4 Ed. 3. m. 26.* we find *tresdecem Sextarios vini.*—*Et unum Sextarium salis apud Wainflete.* Mon. Angl. 2. par. fol. 849. b. *Decem mittas brassi, quatuor Sextarios avenæ ad præbendam.* Idem, 1. par. fol. 136. b. where it seems to have been used for a much greater quantity. A *Sextary* of ale contained sixteen *Lagenas*. *Cowell.* See *Tel-seffer.*

Sextery lands, (mentioned in the first part of the *Baronage of England*, fol. 324.) are lands given to a church or religious house, for maintenance of the Sexton or sacristan. *Cowell.*

Sextons. Parish clerks and sextons, are regarded by the Common law, as persons who have freeholds in their offices; and therefore though they may be punished, yet they cannot be deprived by ecclesiastical censures. 2 *Roll. Abr. 234.*

Shacke, Is a custom in Norfolk to have common for hogs, from the end of harvest till seed time, in all mens grounds without contradiction. *Co. 7 Rep. fol. 5.* *Corbet's case.* And in that country, *To go at shacke*, is as much as to go at large. *Cowell.*

Shalloons, Under what penalties not to be exported from Ireland to any place but England, 10 & 11 *W. 3. c. 10.*

Sharping-Corn, A customary gift of corn, which at every Christmas, the farmers in some parts of England give to their smith, for sharping their plough irons, harrow tines, &c. *Blount.*

Shaw, Is a grove of trees, or a wood, mentioned in 1 *Inst. 4.*

Shamaldices, A word unknown to *Samner*, who could not tell what it was, unless *Chevaliers*, which may agree with the signification, but not with the sound of the word; for it is more like soldiers than chevaliers. *Knight. anno 1318.* According to *Cowell*, the word signifies *soldiers*.

Shedding, Signifies a riding, tithing, or division in the Isle of Man, where the whole island is divided into six *sheddings*, in each of which there is a Coroner or chief Constable appointed by delivery of a rod at the *Tinwald* court, or annual convention. *King's Descrip. Isle of Man 17.*

Shearman's Craft, Is a craft or occupation used at Norwich; the artificers whereof do shear worsteds, suitings, and all woollen cloth. Stat. 19 *H. 7. c. 17.* and 22 & 23 *Car. 2.*

Sheep. By an ancient statute, no person shall keep at one time above two thousand sheep; but lambs are not to be accounted as sheep till they are a year old. 25 *Hen. 8. cap. 13.* Persons exporting sheep shall forfeit them, and 20 *s.* for every sheep, &c. 12 *Car. 2. c. 32.* And persons in the counties of Kent and Sussex, within ten miles of the sea, are to give an account in writing after sheep-shearing, of the number of Fleeces to the next officer of the customs, &c. 9 & 10 *W. 3. c. 40.* By late statutes, persons driving away, or stealing sheep, or other cattle, or killing them, with an intent to steal the carcasses, or any part thereof; and those who assist any one therein, shall be adjudged guilty of felony, without benefit of clergy; and a reward of 10 *l.* is ordered to be paid by sheriffs to any person who shall apprehend and convict such offenders, &c. Stat. 14 *Geo. 2. c. 6.* and 15 *Geo. 2. c. 34.* See *Wool.*

Sheep-Silver, A service turned into money, which was paid in respect that anciently the tenants used to wash the lord's sheep. *W. Jones Rep. 280.*

Sheffield, Regulation of the courts baron of Sheffield and Ecclesal, in Yorkshire, 29 *Geo. 2. c. 37.*

Shepway, Courts of. This is a court, held before the Lord Warden of the Cinque Ports, a writ of error lies from the mayor and jurats of each port, to the Lord Warden, in this court of Shepway, and from thence to the King's Bench. *Black. Com. 3 V. 79.*

Shertree, So the body of the lordship of Cardiff in South Wales is called, excluding the members of it. *Powell's Hist. Wal. 123.*

Sheriff, Sherriff, or Shire-reeve, (Vicecomes) Sax. *Scire gerebb, i. e. Pagi vel comitatus praepositus*, or rather from the Sax. *Scyrian*, to divide; is the chief officer under the King in every shire or county, being so called from the first division of the kingdom into counties. *Camb. Brit.*

1. *Of sheriffs generally.*
2. *Who are qualified or exempt from serving the office of sheriff.*
3. *Manner of appointing him, and of his oath.*
4. *The sheriff can execute no other office; how long to continue in office; and of his jurisdiction.*
5. *The sheriff cannot dispose of his bailiwick; and of his power and duty in appointing an under sheriff.*

1. *Of sheriffs generally.*

It seems that anciently the government of the county was by the King lodged in the Earl or Count, who was the immediate officer to the crown; and this high office was granted by the King at will, sometimes for life, and afterwards in fee; but when it became too burthensome, and could not be commodiously executed by a person of so high rank and quality, it was thought necessary to constitute a person duly qualified to officiate in his room and stead; from hence he is called in Latin *Viccomes*, and Sheriff from *Shire Reeve*, i. e. governor of the shire or county. He is likewise considered in our books as bailiff to the crown; and his county of which he hath the care, and in which he is to execute the King's writs, is called a bailiwick. *Dav. 60. Savil 43. 1 Rol. R.p. 274. Co. Lit. 168. Vide Pref. to 9 Rep. Co. 33.*

It is said by Lord Coke and Dalton, that Earls, by reason of their high employments and attendance upon the King, being not able to follow all the business of the county, were delivered of all that burthen, and only enjoyed the honour as they now do, and that labour was laid upon the sheriff; so that now the sheriff doth all the King's business in the county; and the sheriff, though he be still called *Viccomes*, yet all he doth, and all his authority, is immediately from and under the King, and not from or under the Earl; so that at this day the sheriff hath all the authority for the administration and execution of justice, which the Count or Earl had; the King by his letters patent now committing to the Sheriff *Custodiam Com.* 9 Co. 49. *Dalt. Sher. 2.*

He is therefore at this day considered as an officer of great antiquity, trust and authority, having, as Mr. Dalton observes, from the King the custody, keeping, command and government (in some sort) of the whole county committed to his charge and care; and, according to my Lord Coke, he is said to have *triplicem custodiam*, viz. *Vita justitiae, vita legis & vita reipublicae*, &c. *Vita justitiae* to serve process, and to return indifferent juries for the trial of mens lives, liberties, lands and goods; *vita legis* to execute process and make execution, which is the life of the law, and *vita reipublicae* to keep the peace. *Co. Lit. 168. Dalt. Sb. 5.*

It seems that anciently, and before the statute 9 Ed. 2. Sheriffs were elected by the freeholders of the county, as the coroners are at this day, and consequently that their offices did not determine by the death of the King. 2 *Inst.* 558. 2 *Brownl.* 282.

And though at this day the King hath the sole appointment of sheriffs, except in counties palatine, and where there are *jura regalia*, yet it hath been adjudged, that the office of sheriff is an entire thing, and that therefore the King cannot apportion or divide it, that is, he cannot determine it in part as for one town or one hundred; neither can he abridge the sheriff of any thing incident to or belonging to his office. *Dav. 60. 4 Co. 33. Milton's case, Dalt. Sb. 6. Hob. 13. Raym. 363.*

The Lord Mayor and citizens of London have the *soverignty of London and Middlesex* in fee; by charter; and two sheriffs are annually elected by them, for whom they are to be answerable: If one of these sheriffs dies, the other cannot act till another is made, and there must be two Sheriffs of London; which is a city and county, though

they make but one sheriff of the county of Middlesex: they are several as to plaints, in their respective courts. 3 *Rep.* 72. *Shew. Rep.* 289.

2. *Who are qualified or exempt from serving the office of sheriff.*

It is provided by several acts of parliament, that no man shall be sheriff in any county, except he have sufficient lands within the same county where he shall be sheriff, whereof to answer the King and his people in case that any person shall complain against them; and that none that is steward or bailiff to a great lord shall be made sheriff. 9 Ed. 2. 2 Ed. 3. c. 4. 4 Ed. 3. c. 9. 5 Ed. 3. c. 4.

It is holden that the King hath an interest in every subject, and a right to his service, and that no man can be exempt from the office of sheriff but by act of parliament or letters patent. *Sav. 43. 9 Co. 46.*

And on this foundation it was adjudged in Sir John Read's case, who was made high sheriff of Hertfordshire, at the time he was excommunicated for non-payment of alimony, that an information properly lay against him for not executing the office; though it was objected on his behalf, that the oath and sacrament imposed by act of parliament are necessary qualifications for all sheriffs, which he was disabled to take by reason of the excommunication; but the court held that he was punishable for not removing the disability, it being in his power to get himself absolved from the excommunication; and that therefore it could be no excuse. 2 *Mod.* 299. *Attorney General v. Sir John Read.*

And though in the above case it was admitted, that the subject was bound to serve the King in such capacity as he is in at the time of the service commanded, yet it was insisted upon, that he was not obliged to qualify himself to serve in every capacity; and that therefore a prisoner for debt is not bound nor compellable to be sheriff, no more than a person is bound to purchase lands to qualify himself to be either a coroner or justice of the peace; and it was likewise said, that by the stat. 3 Jac. 1. c. 4. Every recusant is disabled; he may conform, but he is not bound to it; for if he submits to the penalty, it is as much as is required by law. 2 *Mod.* 301.

Dissenters are not compellable to serve the office of sheriff, the *Chamberlain of London and Evans*, in the house of Lords 1766.

If a man is disabled by a judgment in law to bear an office, he is excused; *nam judicium redditur in invitum*; for though his fault or neglect was the occasion of such judgment, yet it is a mark set upon him by the government. *Salk. 168. 4 Mod.* 273.

And as nothing but an invincible necessity can exempt a person from serving the office of sheriff, &c. on this foundation a by-law made in London, that no freeman chosen sheriff, &c. shall be excused unless he voluntarily swears he is not worth 10,000 l. &c. and if he openly refuses to take the office, then to forfeit the sum of 400 l. was adjudged good. *Salk. 142. Carth. 480. 5 Mod.* 438. *City of London v. Fanacre.*

3. *Manner of appointing him, and of his oath.*

The high sheriff hath his authority given him by two patents; by the one the King commits to him the custody of the county; by the other the King commands all other his subjects within that county to be aiding and assisting to him in all things belonging to his office. *Dalt. Sb. 7.* where see the form of such patents.

By the stat. 9 Ed. 2. s. 2. The chancellor, treasurer and judges are to meet *crastino autumum*, being the 3d of November, every year, in the Exchequer chamber, to nominate persons to be made sheriffs; and the manner is, the lord chancellor, treasurer and other high officers, being of the Privy council, together with the judges of both benches and the barons of the Exchequer, being assembled in the Exchequer chamber, nominate three persons in every county to be presented to the King, that he may prick one of them to be sheriff of every county. *Dalt. Sb. 6.*

Sb. 6. But it may be put off to another day. *Cro. Car.* 13. 595.

And yet the King by his prerogative may make and appoint the sheriffs without this usual assembly, and election or nomination in the Exchequer, as is the daily practice at this day upon the death of any sheriff. *Dyer* 225. *Dalt. Sb.* 6.

The sheriffs in every of the shires of *Wales* shall be nominated yearly by the lord president, council and justices of *Wales*, and shall be certified up by them; and after appointed and elected by the King as other sheriffs be, 34 *Hen.* 8. cap. 26. *Dalt. Sb.* 6.

The sheriff, before he doth exercise any part of his office, and before his patent is made out, is to give security in the King's Remembrancer's office in the Exchequer, under pain of 100*l.* for the payment of his proffers, and all other profits of the sheriffwick; but these securities are never sued, unless there is a deficiency in the sheriff's effects. *Dalt. Sb.* 7.

The sheriff, before he takes upon him the exercise of his office, must not only take the oaths of allegiance and abjuration enjoined to all officers by divers acts of parliament, and all sheriffs, except those of *Wales* and the counties palatine, an oath, appointed by stat. 3 *Geo.* 1. c. 15. *stat.* 18. for the due execution of their office.

If a person refused to take upon him the office of sheriff, it was usual to punish him in the Star-chamber; and he may now be proceeded against by information in the court of King's Bench. Also if he refuses to take the oaths enjoined him, or officiates in the office before he hath thus qualified himself, the court, which hath a general superintendancy over all officers and ministers of justice, will grant an information against him; and it hath been held, that a refusal of oaths enjoined to be taken, amounts to a refusal of the office. *Dalt. Sb.* 15. *Dyer* 167. 3 *Lev.* 116. *Carib.* 307.

A sheriff at the entrance into his sheriffalty, is to go to the Remembrancer's office in the Exchequer, and there enter into a recognizance with sureties, with conditions for payment of his proffers or accounts: then his attorney, &c. will write him a note, signifying that he is chosen sheriff of such a county, and hath entered a recognizance; which he must deliver to one of the six clerks in Chancery, to make his patent by; with the writ of assistance, and writ of discharge to his predecessor: And in the next place, the new sheriff is to go to a master in Chancery, if he be in *London*, to take the oaths. *Dalt. Sher.* 291.

If the sheriff be not in *London*, the oath may be taken by *dedimus potestatem*, directed to any two justices of the peace of the same county, one to be of the *quorum*, or to any other commissioner or commissioners, or before one of the judges of assize for that county, or one of the masters in Chancery, who, it is said, may as well as the judge administer such oath without any *dedimus*. *Dalt. Sb.* 13, 14.

If the commissioners shall return the commission or writ, and the oaths to be taken when they are not taken, this is finable. *Dyer* 168. *Dalt. Sher.* 14.

When a sheriff is chosen, the old sheriff continues sheriff of the county till the new is sworn, which completes him in his office: But the office of the old sheriff ceases, and is at an end when the writ of discharge comes to him.

4. The sheriff can execute no other office; how long to continue in office; and of his jurisdiction.

It is holden, that a sheriff cannot be elected knight of the shire for that county for which he is sheriff. 4 *Inq.* 48. *Lit. R.* 326. Sir *Simon Dene's Year.* 38, 436.

And altho' a sheriff is by virtue of his office a conservator of the peace, yet it is enacted by the 1 *Mar.* 2. cap. 8. *stat.* 2. that no person having the office of sheriff of any county shall exercise the office of justice of the peace in any county where he shall be sheriff during the time he shall use the office of sheriff. *Dalt. Sb.* 27.

By the 1 *Hen.* 5. cap. 4. it is enacted, That no under-sheriff, sheriff's clerk, receiver, nor sheriff's bailiff, shall

be attorney in any of the King's courts during the time that he is in office. *Dalt. Sb.* 454.

By the 14 *Ed.* 3. cap. 7. Confirmed by 23 *H.* 6. cap. 8. It is enacted, That no sheriff, under-sheriff, nor sheriff's clerk, shall tarry or abide in his office above one year, upon pain to forfeit two hundred pounds a year as long as he occupieth the office; and every pardon made for such offence or forfeiture shall be void; and see 42 *Ed.* 3. cap. 9.

By the 1 *Ric.* 2. cap. 11. it is enacted, That none that hath been sheriff of any county a year shall be within two years next chosen again, or put in the same office, if there be other sufficient. Confirmed by 23 *H.* 6. cap. 8.

And by the 1 *H.* 5. cap. 4. it is enacted, That they that be bailiffs of sheriffs one year, shall be in no such office by three years next following, except bailiffs of sheriffs which inherit in their office.

By the Common law the patents of sheriffs, like all other commissions, determined by the death or demise of the King; but now by the statutes 7 *W.* 3. *Mav.* and 1 *Ann.* such commission shall remain in full force for the space of six months next after such death or demise, unless superseided, determined or made void by the next succession. *Dyer* 165. *Dalt. Sb.* 17. Vide 7 *Co.* 30.

It hath been held, that the office of sheriff doth not determine by the party's becoming a peer on the death of his father, but that he still remains sheriff *ad voluntatem Regis*. *Cro. Eliz.* 12. Sir *Lewis Mordant's* case.

By the fourth of *H.* 4. cap. 5. it is enacted, That every sheriff shall be dwelling in proper person within his bailiwick for the time he shall be such officer, and that the sheriff shall be sworn to do the same.

Hence it is clear, that a sheriff hath no jurisdiction in any other county, nor can he do a judicial act, and in which his personal presence is required, out of his county; but it is held that he may do a ministerial act, as make a panel, or return a writ out of his county, unless he is beyond sea. *Dalt. Sb.* 22. 9 *H.* 4. 1.

See farther, *Plowd.* 37. *Dalt. Sher.* 23.

A sheriff may make and deliver the return of a writ any where. *Wilson, par.* 1. fo. 328. A sheriff gives out a blank warrant upon a writ which is filled up by an attorney, this is ill. *Id. par.* 2. fo. 47.

5. The sheriff cannot dispose of his bailiwick; and of his power and duty in appointing an under-sheriff.

By the 23 *Hen.* 6. cap. 10. it is provided, "That no sheriff shall let to farm in any manner his county, nor any of his bailiwicks, hundreds or wapentakes."

In the construction hereof it hath been holden, that this is a particular law, and must be pleaded, otherwise the judges cannot take notice of it. 3 *Keib.* 678. *Ellis v. Nelson.*

It hath been held, that a lease whereof, tho' no rent was ever received, is within the statute; the intent thereof being that sheriffs should keep their counties in their own hands. 20 *H.* 7. 13. See *Dalt. Sher.* 23, 24. *Plowd.* 87. *Moor* 781.

By the 3 *Geo.* 1. cap. 15. *stat.* 10. "It shall not be lawful for any person to buy, sell, let or take to farm, the office of under-sheriff or deputy-sheriff, seal-keeper, county-clerk, shire-clerk, gaoler, bailiff, or any other office pertaining to the office of high-sheriff, or to contract for any of the said offices, on forfeiture of 500*l.* one moiety to his Majesty, the other to such as shall sue in any court at *Westminster*, within two years after the offence."

Provided, that nothing in this act shall hinder any high sheriff from constituting an under-sheriff or deputy-sheriff, as by law he may, nor to hinder the under-sheriff in any case of the high sheriff's death, when he acts as high sheriff, from constituting a deputy, nor to hinder the receipt of, or accounting to the sheriff, &c. for legal fees. See *Dalt.* 3, 514. *Hob.* 13. 2 *Brownl.* 281.

The high sheriff may execute the office himself, and the under-sheriff hath not, nor ought to have, any estate or interest in the office itself; neither may he do any thing in his own name, but only in the name of the high sheriff.

Sheriff, who is answerable for him. *Dut. Sher.* 3. *Salk.* 96.

By the 3 *Geo.* 1. *cap.* 19. *sec.* 8. it is enacted, "That if any sheriff shall die before the expiration of his year, or before he be superseded, the under-sheriff shall nevertheless continue in his office, and execute the same in the name of the deceased, till another sheriff be appointed and sworn; and the under-sheriff shall be answerable for the execution of the office during such interval, as the high-sheriff would have been; and the security given by the under-sheriff and his pledges shall stand a security to the King, and all persons whatsoever, for the performing his office during such interval."

The under-sheriff, before he intermeddle with the office, is to be sworn; this is enjoined by the statute 27 *Eliz.* *cap.* 12. and the form of the oath there prescribed. That before this statute the under-sheriff was never sworn. 1 *Roll. Rep.* 274. *per Coke.*

And now by the 3 *Geo.* 1. *cap.* 15. *sec.* 19. It is enacted, That all under-sheriffs of any counties in *South Britain*, except the counties in *Wales* and county palatine of *Chester*, before they enter upon their offices, shall take an oath, appointed by that act, for the execution of their office. *Vide the Statute.*

A sheriff cannot appoint two deputy-sheriffs extraordinary. *Wilson, par.* 2. *fo.* 378.

See farther, 4 *New Abr.* and 19 *Vin. Abr.* tit. *Sheriff.* See also, *Escape, Execution, Fieri facias, &c.*

Sheriff's Court in London. The chief of the courts in *London* are the *sheriff's courts*, holden before their steward or judge. *Black. Com.* 3 *V.* 80. *Vide* 4 *Inst.* 274. 8. And see *Courts.*

Sheriff's Tourn. See *Tourn or Turn*, and *Black. Com.* 4 *V.* 270, 404, 417.

Sheriffalty. (*viccomitatus*) Is the *sheriff's ship*, or time of a man's being sheriff. 14 *Car.* 1. *c.* 21.

Sheriffwick. The extent of a sheriff's authority. 13 *Eliz.* *c.* 22.

Sheriff-geld. A rent formerly paid by the *sheriff*; and it is prayed that the *sheriff* in his account may be discharged thereof. *Rot. Parl.* 50 *Ed.* 3.

Sheriff-tooth. Seems to be a tenure by the service of providing entertainment for the sheriff at his county-courts. *Rot. Plac. in itin. apud Cestr.* 14 *Hen.* 7. In *Derbyshire* the King's bailiffs anciently took 6 *d.* of every bovat of land, in the name of *sheriff-tooth.* *Ryl. Plac. Parl.* 653. And it is said to be a common tax levied for the sheriff's diet.

Shewring. (*monstratio*) Is specially used to be quit of attachment in a court, in plaints *shewed* and not avowed. *Shep. Epitom.* 1130. *Vide Monstrans.*

Shield. (*scutum*) An instrument of defence; (from the Sax. *scýldan*) to cover, or the Greek *συντα* a skin, anciently shields being made with skins.

Shifting Use. See *Secondary Use*, and *Black. Com.* 2 *V.* 335.

Shilling. (Sax. *selling*, Lat. *solidus*) Among the *English Saxons* passed but for 5 *d.* afterwards it contained 16 *d.* and often 20 *d.* In the reign of King *William I.* called the Conqueror, a shilling was of the same value as at this day. *Leg. H.* 1. *Domeyday.*

Shillotte. *Est emenda pro transgressione facta in nativam, tam impregnando.* *Monast. Rading.* MS.

Ship-money. Was an imposition charged upon the ports, towns, cities, boroughs and counties of this realm, in the time of King *Charles I.* by writs commonly called *ship-writs*, under the Great Seal of *England* in the year 1635 and 1636, for the providing and furnishing certain ships for the King's service, &c. which was declared to be contrary to the laws and statutes of this realm, the petition of right, and liberty of the subject. by Stat. 17 *Car.* 1. *c.* 14. See *Black. Com.* 4 *V.* 430.

Shipper. Is a *Dutch* word signifying the master of a ship, mentioned in the Stat. 1. *Jac.* 1. *rep.* 3. We use it for any common seaman; and commonly say *shipper*.

Shipper in Kent. Its inhabitants liable towards the repair of the King's ferry. 18 *Eliz.* *c.* 10.

Ships and Shipping. None of the King's subjects are to export and import merchandise in any ships but

English, on pain of forfeiture. 5 *R.* 2. *c.* 3. But merchants had power to hire other ships, by 6 *R.* 2. *c.* 8. and 4 *H.* 7. *c.* 10. Goods imported or exported out of or to any territories belonging to *England* in *Asia*, *Africa*, or *America*, shall be in ships belonging to the *English*, and the master and three-fourths of the mariners to be also *English*, upon pain to lose such goods and the vessel, &c. 12 *Car.* 2. *c.* 18. A duty of 5 *s.* per ton is granted on foreign built ships, one moiety for the chest at *Chatham*, and the other for *Greenwich Hospital*, to relieve decayed seamen. 1 *Jac.* 2. *c.* 18. No owner of a ship shall be liable answer loss, by reason of imbeziling any gold, silver, jewels, &c. taken in or put on board, or for any forfeiture incurred, without the privity or knowledge of such owner, further than the value of the ship and freight due: But other remedies against the master and seamen of such ships, are not taken away. 7 *Geo.* 2. *c.* 15. As a master or owners of a ship may have an action for the freight; either the one or the other are answerable, where goods are damaged in the ship. But where there are several owners, and one disagrees to the voyage, he shall not be liable to any action after for a miscarriage, &c. *Comberb.* 116. See 2 *Strange* 1251. where the owner, and not the freighter, is liable for a loss of gold sent by the ship. See how far owners of ships are liable for default of the masters at Common law, *Rep. Temp. Hardw.* *per Annaly*, 85, 194. Owners of ships are liable for the goods on account of the freight, tho' robbed of them, and for default of the master. *Id.* 86. An action doth not lie against a man as owner, but as he hath the benefit of the freight; for when there are several owners, and one dissents from the voyage, he shall not be liable afterwards for a miscarriage, &c. *Id.* 90. *Comb.* 117. *per Holt Ch. J.* See 2 *Strange* 816. where it was held, that *prima facie* the repairer of a ship has his election to sue the master who employs him, or the owners; but if he undertakes it on a special promise from either, the other is discharged. See Stat. 26 *Geo.* 2. *c.* 6. to oblige ships more effectually to perform quarantine; and for the more effectually preventing the plague being brought from foreign parts. Ships ballast in the *Thames*, how raised, and at what prices to be delivered, &c. *Vide* 6 *Geo.* 2. *c.* 29. *Ships of War*, see *Navy*.

By 26 *Geo.* 2. *c.* 19. Plundering any vessel either in distress or wrecked, and whether any living creature be on board or not, or preventing the escape of any person that endeavours to save his life, or wounding him, &c. or putting out false lights to bring any vessel into danger, are capital felonies. For assisting ships in distress, see 4 *Geo.* 1. *c.* 12.

Shire. (*comitatus*, from the Sax. *scýre*, to part or divide) Is well known to be a part or portion of this kingdom, called also county; The old *Latin* word was *scýra*; and *scýra*, *provincia indicabatur*. *Brompt.* 659. King *Alfred* first divided this land; and his division was in *satrapias*, which we now call *shires*, in *centurias*, now called hundreds, and *decennas*, which we call tithings. *Leg. Alfred.* See *Brompton* 956. and *Black. Com.* 1 *V.* 116.

Shire-clerk. Is he that keeps the county court; his office is so incident to the sheriff, that the King cannot grant it. *Mitton's case.* 4 *Rep.*

Shire-man, or Shyre-man. Was anciently judge of the county, by whom trials for land, &c. were determined before the conquest. *Lamb. Peramb.* p. 442.

Shire-mote. An assembly of the county or shire at the *assizes*, &c. See *Scyregemot, Shire, Turn.*

Shoemakers. Are to make their shoes of sufficient leather, or forfeit 3 *s.* 4 *d.* 1 *Jac.* 1. *c.* 22. Journeymen *shoemakers*, imbeziling leather, shall make satisfaction for damage, or be ordered by justices to be whipped, &c. Also persons buying or receiving such leather are to make reasonable recompence, to be levied by distress, &c. and search is to be made after the same. 9 *Geo.* 1. *cap.* 27. And all journeymen employed in making boots, shoes, slippers, or gloves, &c. that neglect their business, by working for any other master, before they have done the work first undertaken, may be committed to the house of correction for a month, by 13 *Geo.* 2. *c.* 8. *Vide Lea-*

Shooting. Shooting at persons in any dwelling house, or other place, felony without clergy. 9 Geo. 1. c. 22.

Shop. (*shopa*) A place where any thing is openly sold — *Johannem H. dediff. Rogero Smith anam shopam cum pertin. in, &c. situat. in le market-place, &c.* Dat. 27 Feb. 9 Edw. 4.

Shop-books. These are not allowed of themselves to be given in evidence for the owner; but a servant who made the entry may have recourse to them to refresh his memory: And if such servant (who was accustomed to make such entries) be dead, and his hand be proved, the book may be read in evidence. *Black. Com. 3 V. 368.* The degree of credit which such evidence deserves, must rest with a jury.

Shoplifters. Are those that steal goods privately out of shops; which being to the value of 5 s. tho' no person be in the shop, is felony excluded clergy, by the 10 & 11 W. 3. c. 23.

Shorling and morling. Are words to distinguish *fell* of sheep; *shorling* being the fells after the fleeces are shorn off the sheep's back; and *morling*, the fells she'd off after they die or are killed: In some parts of England they understand by a *shorling*, a sheep whose face is shorn off; and by a *morling*, a sheep that dies. Stat. 3 Ed. 4. c. 1. See *Morling*.

Shortheld. The ancient custom of the city of Exeter is, when the lord of the fee cannot be answered rent due to him out of his tenement, and no distress can be levied for the same; the lord is to come to the tenement, and there take a stone or some other dead thing of the said tenement, and bring it before the mayor and bailiffs; and thus he must do seven quarter-days successively; and if on the seventh quarter-day, the lord is not satisfied his rent and arrears, then the tenement shall be adjudged to the lord to hold the same a year and a day; and forthwith proclamation is to be made in the court, That if any man claims any title to the said tenement, he must appear within the year and a day next following, and satisfy the lord of the said rent and arrears: But if no appearance be made, and the rent not paid, the lord comes again to the court, and prays that, according to the custom, the said tenement be adjudged to him in his demesne as of fee, which is done accordingly; so as the lord hath from thenceforth the said tenement with the appurtenances to him and his heirs: And this custom is called *shortheld*; being as much as in French to *foreclose*. Izack's Antiq. Exet. 48.

Shrewsbury. Regulations of the drapers there. 8 Eliz. c. 7. 14 Eliz. c. 12. The streets to be paved, &c. 29 Geo. 2. c. 78.

Shribed, or Shylebed. (from Sax. *scrifan*) A penitent person confessed by a priest. See *Confessor*.

Shroud, stealing of. If any one in taking up a dead body steals the *shroud*, or other apparel, it will be felony; for the property thereof remains in the executor, or whoever was at the charge of the funeral. 3 Inst. 110. 12 Rep. 113. 1 Hal. P. C. 515.

Shrubs, destroying of shrubs, trees, roots, plants, &c. by 6 Geo. 3. c. 36 & 48. is for the two first offences liable to pecuniary penalties, and for the third the offender shall be guilty of felony, and liable to transportation for seven years. The *stealing* by night of any trees, or of any roots, *shrubs* or plants to the value of 5 s. is by statute 6 Geo. 3. c. 36. made felony in the principals, aiders and abettors, and in the purchasers thereof, knowing the same to be stolen.

Si Tition, &c. Is the conclusion of a *plea to the action*, when the defendant demands judgment if the plaintiff ought to have his action, &c.

Sib and Som. (Sax.) i. e. *pax & concordia*. Spelm.

Sica, Sicha. A ditch from the Sax. *sic, lacuna*. Mon. Angl. tom. 2. p. 130.

Sich. (*sichetum* and *sichetus*) Is a little current of water, which is dry in summer; a water furrow or gutter. Mon. Angl. tom. 2. p. 426.

Siclus. Was a sort of money current among the old English, of the value of 2 d. We read of it in *Egbert's Dialogo de Ecclesiasticis institutionibus*, p. 98.

Sicut alias. Another writ like the former; it runs, *Præcipimus tibi sicut alias præcepimus, &c.* 4 Co. Rep. 55. See *Alias*.

Sidelings. Are meers betwixt or on the *sides* of ridges of arable land. Mon. Ang. tom. 2. p. 275.

Sidemen, (rebus synodsmen) Is used for those persons or officers that are yearly chosen in great parishes in London and other cities, according to custom, to assist the churchwardens in their presentments of such offenders and offences to the ordinary, as are punishable in the spiritual courts: And they are also called *questmen*. They take an oath for doing their duty; and are to present persons that do not resort to church on *Sundays*, and there continue during the whole time of divine service, &c. Can. 90. They shall not be cited by the ordinary to appear but at usual times, unless they have wilfully omitted for favour, to make presentment of notorious publick crimes, when they may be proceeded against for breach of oath, as for perjury. Canon 117. Vide *Synodales Testes*.

Si fecerit te securum. A species of original writ, so called, from the words of the writ, which directs the sheriff to cause the defendant to appear in court, without any option given him, provided the plaintiff gives the sheriff security effectually to prosecute his claim. *Black. Com. 3 V. 274.*

Sigillum. A seal for the sealing of deeds and charters, &c. Before the time of William the Conqueror the English did not seal with wax, but they usually made a golden cross on the parchment, and sometimes an impression on a piece of lead, which hanged to the grant with a string of silk; and this was held a sufficient confirmation of the grant itself, without signing, or any witnesses. The colour of the wax with which the King's grants were sealed, was usually green, to signify *rem in perpetuo vigore permanuram*; and the impression in laymen's seals was, a man on horseback with a sword in his hand, till the year 1218, and then they began to engrave their coats of arms on their seals; only the archbishops and bishops, by a decree of Cardinal Otto, who was legate here in the year 1237, were to have *sigillum, puta nomen dignitatis, officii, seu collegii, & etiam illorum proprium nomen, qui dignitatis vel officii perpetui gaudens honore, insculptum notis & characteribus manifestis, sicque sigillum authenticum habebatur*. Cowell.

Sigla. (from the Sax. *sigel*) A sail, mentioned in the laws of King Ethelred, cap. 24.

Sign Manual. Is where any bill or writing is signed under the hand of the King, and usually in order to the passing of the King's grants, &c. through the offices of the *Keepers of Seals*. Counterfeiting sign manual made treason. 1 Mar. sess. 2. c. 6.

Signet. (Fr.) Is one of the King's seals, used in sealing his private letters, and all such grants as pass his Majesty's hand by bill signed; which seal is always in the custody of the King's secretaries, and there are four clerks of the *signet-office* attending them. 2 Inst. 556. The law takes notice of the *sign-manual* and *privy signet*; and it is said a *ne exeat regno* may be issued by commandment under the *privy signet*, as well as by the King's writ under the Great Seal. Wood's Inst. 457. See *Privy Seal*, and *Black. Com. 2 V. 347*.

Significavit. A writ issuing out of the Chancery, upon a certificate given by the ordinary of a man's standing excommunicate by the space of forty days, for the laying him up in prison till he submit himself to the authority of the church: And it is so called, because *significavit* is an emphatical word in the writ. Reg. Orig. There is also another writ of this name in the register, directed to the justices of the bench, commanding them to stay any suit depending between such and such parties, by reason of an excommunication alledged against the plaintiff, &c. Reg. Orig. 7. And in *Fitzherbert* we find writs of *significavit* in other cases; as *significavit pro corporis deliberatione, &c.* F. N. B. 62, 66. Stat. 23 & 24 Car. 2. The common writ of *significavit* is the same with the writ *de excommunicatione capiendo*.

Signing of deeds and wills is necessary to make them binding; the signing a will by the testator is an essential circumstance, without which 'tis not a will; for this is expressly

expressly required by the Stat. 29 Car. 2. c. 3. See *Black.* 2 V. 305.

Sign-Manual. The subscription of the King at the top of grants or letters patent, which first pass by bill, &c. *Black. Com.* 2 V. 347. By Stat. 1 Mar. 2. c. 6. If any person shall falsely forge or counterfeit the sign-manual, privy-signet, or privy-seal, such offences shall be deemed high treason.

Signum. A cross prefixed as a sign of assent and approbation to a charter or deed, used by the Saxons. Vide *Seals.*

Signs. The citizens of London are to hang out signs at their houses, for the better finding out their respective dwellings, &c. *Chart. K. Char. I.*

Silentarius. Signifies one of the privy council; and *silentium* was formerly taken for *conventus privatus*. *Matt. Paris.* anno 1171. According to *Littleton*, it is an usher, who seeth good rule and silence kept in court. *Litt. Dia.*

Silks. Certain species of wrought silk prohibited, and other wrought silks permitted to be imported, 19 H. 7. c. 21. Explained by 3 Geo. 3. c. 21. Regulation of the trade of silk-throwing in London, 13 & 14 Car. 2. c. 15. 8 & 9 W. 3. c. 36. f. 6. Silk thrown in the gum, 1 W. & M. c. 5. f. 2. Wrought, 2 W. & M. *seff.* 2. c. 4. f. 3. 4. 4 W. & M. c. 5. f. 2. 9 & 10 W. 3. c. 44. f. 80. 11 & 12 W. 3. c. 3. f. 1. And raw silk, 2 W. & M. *seff.* 2. c. 4. f. 5. And silk-ferret, or floret, to what duties liable, 4 W. & M. c. 5. f. 2. Thrown silk to be imported only from Italy, 2 W. & M. f. 1. c. 9. 1 An. f. 1. c. 27. c. 28. 2 & 3 An. c. 13. Restrictions on importing alamodes and lustrings, 4 & 5 W. & M. c. 5. f. 14. Permission to import fine Italian thrown silk, 5 W. & M. c. 3. Foreign alamodes, &c. to be sealed at the Custom-house, 5 W. & M. c. 20. f. 45. 6 & 7 W. 3. c. 18. f. 28. Alamodes, &c. not sealed, forfeited, 8 & 9 W. 3. c. 36. 9 & 10 W. 3. c. 43. f. 5. A duty per pound weight on imported lustrings and alamodes, 9 & 10 W. 3. c. 30. Alamodes and lustrings to be imported only at London, 9 & 10 W. 3. c. 43. Charter of the lustring company confirmed, 9 & 10 W. 3. c. 43. Penalty on officers of King's ships importing silks, 9 & 10 W. 3. c. 43. f. 4. Wearing French alamodes, &c. prohibited, 5 An. c. 20. Foreign silks mixed with gold or silver, forfeited, &c. 6 An. c. 19. f. 14. A duty on printed silks, calicoes and stuffs, 10 An. c. 19. f. 69. Persons printing silks, &c. at other places than their usual residence, to make a particular entry of the silks before printing, 1 Geo. 2. c. 36. f. 21. Premium on silk manufactures exported, 8 Geo. 1. c. 15. The importation of raw silk from the Streights, (except from the Grand Seigneur's dominions) restrained, 6 Geo. 1. c. 14. Raw silk of China to pay the same duty as Italy, 23 Geo. 2. c. 9. Raw silk of the plantations may be imported free, 23 Geo. 2. c. 20. Raw silk of Persia, bought in Russia, may be imported from any port in Russia, 23 Geo. 2. c. 34. Foreign silks and velvets to be sealed at the Custom-house, 26 Geo. 2. c. 21. Penalty of importing foreign silk ribbands, laces or girdles, 3 Geo. 3. c. 21. Act to prohibit the importation of foreign wrought silks and velvets for a limited time, and for preventing unlawful combinations of workmen employed in the silk manufacture, 6 Geo. 3. c. 28.

Silk-Thrower, and Throwster. Is a trade or mystery ~~the~~ winds, twills, and spins or throws silk, thereby sitting ~~it~~ *sew*. They are incorporated by statute, and mention is made of silk-winders and doublers, which are members of the same trade. 14 Car. 2. c. 15. None shall exercise the silk-throwers trade, but such as have served seven years apprenticeship to it, on pain of forfeiting 40 s. a month. *Stat. ibid.* Silk-winders, &c. imbezilling or detaining silk, delivered by silk-throwers, shall pay such damage as a justice shall order, or not doing it shall be whipped and set in the stocks; and the receivers are to be committed to prison by a justice of peace till satisfaction is made the party injured. 20 Car. 2. c. 6. 8 & 9 W. 3. c. 36.

Silva Cædua. Wood under twenty years growth, or coppice wood. 45 Ed. 3. f. 3.

Similitude of Hand-writing. From the reversal of Colonel Sidney's attainder by act of parliament in 1689, it may be collected that the mere *similitude of hand-writing* in two papers shewn to a jury, without other concurrent testimony, is no evidence that both were written by the same person. 2 Hawk. P. C. 431. *Black. Com.* 4 V. 351.

Simnel, (fiminellus, vel fimmellus) Is mentioned in the *assise of bread*, and is still in use, especially in *Lent*: The English *simnel* is *panis purior*, or the purest white bread. Stat. 51 H. 3.

Simnell, (fiminellus) From the Lat. *simila*, which signifies the finest part of the flour; *panis similageneus*, *simnell-bread*. It is mentioned in stat. *assisa panis*, (and is still in use, especially in *Lent*;) bread made into a *simnell* shall weigh two shillings less than wastell-bread. Stat. 51 H. 3. The English *simnell* was the purest white bread. *Cowell.*

Simony, (simonia, venditio rei sacræ) So called from *Simon Magus*.

1. Of *simony*, generally.

2. What shall be deemed *simony*; and the penalty on this offence.

3. How far bonds of resignation are lawful; and the power exercised over such bonds by the court of Chancery.

4. Whether the ordinary is obliged to accept a resignation on such bond; and some objections to these bonds considered.

1. Of *simony*, generally.

Simony is a corrupt contract for a presentation to any benefice of the church, for money, gift, or reward: It is defined to be, *studiosa voluntas emendi vel vendendi aliquid spirituale aut spirituali annexum opere subsecuto*. — Also *venditio rei sacræ*; so called from *Simon Magus*. And some authors mention *simony per munus triplex*; as *per munus a manu*, i. e. by bribery, where money is paid down for a benefice; *per munus a lingua*, by favour and flattery; *per munus ab obsequio*, i. e. by a sordid subjection to the patron, or doing him services: To which has been added, the making of presents, without taking any notice of expecting a church benefice.

It was agreed by all the justices, *Trin. 8 Jac.* That if the patron present any person to a benefice with cure, for money, that such presentation, &c. is void, tho' the presentee were not privy to it; and the statute gives the presentation to the King. Co. 12 Rep. fol. 74. *Simony* may be by compact between strangers, without the privy of the incumbent or patron. Cro. 1 par. fol. 331. *Barwiderake's case.* Hob. Rep. fol. 165. *Noy's Rep.* fol. 22. *Pasfall's case.* And 3 Inst. 153. Some authors mention *simoniacum per munus triplex*, and tell us of a person who took off the cap of *Grosulan*, an archbishop of Milan, and shaking it, told the people, *Iste Grosulanus qui est sub ista cappa (et non de alio dico) est simoniacus*, &c. *per munus a manu*, i. e. by bribery, *per munus a lingua*, i. e. by favour and flattery, *per munus ab obsequio*, i. e. by a sordid subjecting himself to the patron. *Cowell.*

Simony is generally said to be the buying or selling holy orders, or some ecclesiastical benefice. An ecclesiastical benefice, in the larger sense of it, in which it is here used, comprehends not only parochial benefices, but all ecclesiastical dignities and promotions. As by this offence worthy and learned men are kept out of the church, and a door is, to the great scandal of religion and prejudice of morality, opened to persons by no means qualified to discharge the duties of the sacred function, it is of the utmost consequence to society that it be prevented. With a view to this, canons were anciently made, by which a very strict oath was enjoined; and it was punished with deprivation or disability, as the case required.

In 1 Inst. 17, b. 89. a. *simony* is spoke of as a thing so detestable in the eye of the Common law, that a plaintiff in *quære impedit* could not, before the statute of *Westm.* 2. recover damages for the loss of his presentation, it being considered as a thing of no value; nor could a guardian in *soage* present to an advowson in the right of his heir, because, as he could take nothing for it, he could not bring

bring it to account. This doctrine is confirmed in 3 Inst. 176. and the book adds, that it is the more odious to the Common law, because it is frequently accompanied with perjury, for the presentee is sworn to commit no simony. In *Cro. Ch.* 353. *MacKaller and Fotherick*, it is said that this has by the law of God and of the land been always accounted a great offence. In *Hob.* 167. *Wincomb and Pulleton*, it is laid down, that a bond on a simoniacal contract is against law, because *ex turpi causa*, and *contra bonos mores*; nay, that it is as void as an usurious bond, which, if paid by an executor, is a *devastavit*. The same is held in *Cro. Car.* 425. *Byrte and Manning*. In *Carth.* 252. *Bartlett and Vinor*, such bonds are said to be void as being against law, altho' they are not so declared by the statute. As neither the consideration of the heinousness of the offence, nor the provision made against it by the Canon or Common law, was sufficient to put a stop to this mischief, it was at length restrained under severe penalties by stat. 31 Eliz. cap. 6. 4 *New Abr.* 465.

2. What shall be deemed simony; and the penalty on this offence.

By stat. 31 Eliz. c. 6. *sect.* 35. it is enacted, 'That if any person or persons, bodies politick or corporate, shall for any sum of money, reward, &c. or by reason of any promise, &c. present or collate any person to any benefice, &c. every such presentation, collation, &c. shall be utterly void, and it shall be lawful for the Queen, her heirs and successors, to present, &c. unto such benefice, &c. and that every person or persons, bodies politick or corporate, that shall give or take any such sum of money, &c. or take or make any such promise, &c. shall forfeit the double value of one year's profit of every such benefice, &c. and the person so corruptly taking, &c. such benefice, &c. shall be adjudged a disabled person in law to enjoy the same.'

By *sect.* 6. it is enacted, 'That if any person shall for any sum of money, reward, &c. admit, institute, install, induct, invest, or place any person in or to any benefice, &c. shall forfeit the double value of one year's profit of every such benefice, &c.' *Vide* the statute.

A donative is not within the words of the statute; yet, as a corrupt presentation thereto is within the mischief intended to be thereby remedied, it is within the meaning of it. *Cro. Car.* 331. *Bawderick and Mackaller*. For the same reason the corrupt promoting to, or obtaining of a curacy, has been held to be simony. *Carth.* 485. *Bishop of St. David's and Lucy*.

This offence is more frequently committed when a church is void; but it may be committed when it is full. If a contract be when a church is full, to give a sum of money for a presentation to it, when it shall become void, this is a simoniacal contract. 1 *Brownl.* 7. So the buying when a church is full, with intent to present a certain person, and the presenting that person when the living becomes void, is simony. *Lane* 102. *Kitchin v. Calvert*. *Noy* 25. *Wincomb v. Pulleton*. So if one purchase the next avoidance of a church, with intent to present his son or kinsman, and does present the person intended to be presented, this is simony. *Noy* 25. *Godb.* 390. So the purchase of the next avoidance of a church when the incumbent is sick or near dying, with intent to present a certain person, and the presenting him, is simony. *Winch* 63. *Sheldon v. Brett*. *Noy* 25. *Hughes* 390. See 4 *New Abr.* 469.

Notwithstanding the determinations, that if one person purchased the next presentation of a benefice when full, with design to present a certain person, and did present him, it was simony, it became a doubt whether it was so for a clerk himself to purchase for himself the next turn in a living? To remove this it was enacted, 'That if any person shall for money or profit, in his own name, or in the name of any other person, procure the next presentation or collation to any benefice, and be presented or collated thereto, it shall be deemed to all intents and purposes a simoniacal contract.' 12 *An. B.* 2. cap. 12. *par.* 2.

From all these authorities it appears, that altho' it be lawful, except in the cases excepted, to purchase the next avoidance when a church is full, there is great danger

of being guilty; at least *in foro conscientia*, of this offence. It is fit it should be so, else men would be for ever purchasing for their sons and friends, and the almost necessary consequence of such a traffick in livings, would be the filling the church with very improper persons. 4 *New Abr.* 469.

It is equally simony where the presentation is by a person usurping the right to present, as if it had been by the person having a good right. 3 *Inst.* 153. So if a presentation be by one usurping the right of patronage, and pending a *quare impedit* for removing his clerk, who is after removed, the living is sold, this is simony, for the church was never full of that clerk; and by this means the statute might be eluded, for it would only be getting an usurper to present while the living was void, and then selling it. 3 *Lev.* 115. *Walk. v. Hammerly*, S. C. 2 *Vent.* 32. A corrupt contract with the wife of the patron is simoniacal, altho' the patron is not privy to it. 1 *Ref. Rep.* 255. *Cro. Jac.* 385. If a clerk contracts to give money for being presented to a church, and is after presented *gratis*; this is simony. *Lane* 103. *Kitchin v. Calvert*. In this case the clerk is an unfit person, for having at that time been capable of intending to buy a living corruptly. It also implies some defect in him; for the presumption is that persons well qualified will always be preferred, and have therefore no need to purchase. With this agrees *Cro. Eliz.* 789. where simony is said to be *voluntas sine desiderio emendi vel vendendi spiritualia vel spiritualibus adhaerentia*. This offence may be by a corrupt contract between strangers, even when neither the patron nor incumbent is privy to it; for if there be a corrupt contract, it matters not by whom it is made: But in this case the presentee is not *simoniacus*, and only *simoniace promotus*. *Cro. Car.* 331. *Bawderick v. Mackaller*. *Sid.* 329. 3 *Lev.* 337. *Lane* 103. *Kitchin v. Calvert*. See *Lane* 73. and 3 *Lev.* 338.

If a stranger, the church being void, contracts with the patron for a grant of the void turn, and presents a clerk not privy to the contract; yet, although the grant being of a chose in action is void, as the incumbent comes in by a simoniacal contract, he is not to be considered as an usurper, but as one *simoniace promotus*. *Cro. Eliz.* 788. *Baker v. Rogers*. So where a father, the church being void, contracts with the grantee of the void turn to permit the grantor to present his son, and it is done, this is a simoniacal promotion. *Cro. Jac.* 533. *Booth v. Potter*. So if a father, in consideration of a clerk's marrying his daughter, doth covenant with the father of the clerk, to procure for him a presentation to a certain church when it shall become void, and he is afterwards thereto presented, it is a simoniacal promotion. *Cro. Car.* 425. *Birt v. Manning*.

These three last cases may serve to confirm what has been observed, that in the case of simony, it is unlawful for a father to do what may not be done by a stranger. See *Noy* 142. *Cro. Car.* 426. *Lutw.* 343.

3. How far bonds of resignation are lawful; and the power exercised over such bonds by the court of Chancery.

A bond of resignation is a bond given by the person intended to be presented to a benefice, with condition to resign the same; and is special or general. The condition of a special one is to resign the benefice in favour of some certain person, as a son, kinsman, or friend of the patron, when he shall be capable of taking the same; by a general bond the incumbent is bound to resign on the request of the patron. 4 *New Abr.* 470.

A bond with condition to resign within three months after being requested, to the intent that the patron might present his son when he should be capable, was held good; and the judgment was affirmed in the Exchequer chamber; for that a man may without any colour of simony bind himself for good reason, as if he takes a second benefice, or if he be non-resident, or that the patron may present his son, to resign; but if the condition had been to let the patron have a lease of the glebe or tithes, or to pay a sum of money, it had been simoniacal. *Cro. Jac.* 248. *Jones v. Lawrence*. The doctrine laid down in *Jones and Lawrence*, which was in the case of a special bond, was not many years after extended to that of a general

general bond, and the judgment in this last was also affirmed in the Exchequer Chamber. *Cro. Car.* 180. *Babington v. Wood.*

The authority of those two cases having been repeatedly recognised, at length it was considered as a point settled, that a general bond of resignation is good; and the court refused to let the validity of it be called in question. *Str.* 227. *Peels v. Countess of Carlisle.* So in a late case, Mr. Serjeant Draper being about to argue against the validity of such a bond, he was stopped by the court. *MS. Rep. Trin.* 27 *Geo.* 2. *Wyndham v. Bowyer.* If a bond of resignation, which ought only to be made use of to keep the incumbent to residence or good behaviour, be made an improper use of, the court of Chancery will interpose. *Chan. Proc.* 513. 2 *Chan. Rep.* 399. A perpetual injunction was granted against such a bond, because it appeared on hearing the cause, that the patron had made use of it to prevent the incumbent from demanding his tithes. *1 Vern.* 411. *Durston v. Sands.*

A bill being brought to be relieved against a judgment obtained on a bond to resign upon request, it appeared to have been offered to the incumbent, that if he would give 700*l.* he should not be sued upon it. Satisfaction was ordered to be entered upon the judgment, and a perpetual injunction was granted. A new bond of resignation in penalty of 200*l.* a much less sum was indeed decreed; but no action was to be brought on it without leave of the court: And the Lord Keeper said he did not know that such bonds were used before the statute; that they had been since allowed only to preserve the benefice for the patron himself, or some child or friend of his, or to prevent non-residence or a vicious course of life in an incumbent; and that though a bond be to resign generally, he would not allow it to be put in suit, unless some such reason was shewn for requiring a resignation, because a door would be thereby opened for simony. *Eq. Cases Abr.* 86. *Hilliard v. Stapleton.*

On a bill to be relieved against a judgment on such a bond, the defendant proved misbehaviour, and it was for that reason dismissed. *Eq. Cases Abr.* 228. *Hodgson v. Thornton.* So a bond to resign on request shall not be made use of to turn out the incumbent, unless there be non-residence or gross misbehaviour; and if any other use be made of it, the court will grant an injunction. *Chan. Proc.* 513. *Hawkins v. Turner.* From some of these cases, and particularly the last, which was *Passib.* 5 *Geo.* there is reason to conclude that general bonds of resignation were not then held good in equity: But later determinations shew that they now are. A bond to resign generally has been often held good in the court of Chancery. *Str.* 227. *Peels v. Countess of Carlisle.*

An injunction has been granted where an ill use has been made of the bond, *i. e.* by taking an annuity from the incumbent, for the use of the nephew, for whom the living was intended. *Str.* 534.

4. Whether the ordinary is obliged to accept a resignation on such bond; and some objections to these bonds considered.

However it may be now settled, that such bonds are good both in law and equity; a question has arisen, and is not perhaps settled by judicial determinations, whether the ordinary is obliged to accept a resignation on such a bond. 'Tis said it's in the power of the ordinary to discourage the use of such bonds, for he may refuse to accept a resignation made by constraint of one of them. *Wat. Com. Inc.* 24.

The bishop refused to accept a resignation on such a bond, and ordered the incumbent to continue to serve the cure, declaring that he would never countenance such unjust practices. 2 *Chan. Rep.* 398. *Durston v. Sands.* An ordinary is not obliged to accept a resignation on such a bond, unless there be just cause to turn the incumbent out of the benefice. *Chan. Proc.* 513. *Hawkins v. Turner.*

In a late case a grant was to a clerk of the two first of three livings which should fall, provided he was capable when they did fall of holding them. In order to make himself capable of taking one of these benefices, Griffith the clerk tendered a resignation of another benefice to the

ordinary, but he refused to accept it. One of the questions made in this case was, whether the ordinary was obliged to accept this resignation? It was insisted by Mr. Henley on one side, that no case could be adduced to shew that the ordinary can arbitrarily refuse to accept a resignation of a benefice. Mr. Attorney Murray, who was on the other side, contented himself, as to this objection, with saying, that the plainest points having scarce ever been called in question are supported by the fewest authorities. No decree was made as to this point; but Lord Hardwicke intimated it once or twice so strongly to be his opinion, that the ordinary ought to have accepted the resignation, that he did afterwards accept it. What fell from these great men on this occasion, is enough to render the doctrine of the two last cases suspicious: For if these are law, some notice would undoubtedly have been taken of them. This was not indeed in the case of a resignation bond; but it was perhaps a stronger case; for if the ordinary cannot refuse, where, as here, a clerk would resign merely to take another benefice, it would be strange to hold he may refuse a resignation made at the request of a patron, in consequence of an agreement with him, which it has been again and again determined both at law and in equity, he has a right to make. *Marquis of Rockingham v. Griffith, Easter term, 27 Geo.* 2.

Whatever doubt may still remain, as to the ordinary's being obliged to accept a resignation on such a bond, these two things have, as will presently appear, been determined; that the patron cannot present again till he has accepted it; and that whether he does or not, the obligor is liable to the penalty of the bond, if he undertakes as is usually done for the acceptance of the ordinary. 4 *New Abr.* 473. If a presentation be made before the bishop accepts the resignation of the last incumbent, it is void. Cases in the time of *Queen Ann* 276. *Riely v. Adams.* Noy 147. *Cro. Jac.* 198. If the obligor binds himself to resign a benefice, it is upon him to procure the ordinary's acceptance of his resignation. *Lutw.* 693. *Studholme v. Norrison.*

To an action upon a bond, with condition so to resign on request that the patron may present again, it was pleaded that the ordinary would not accept the defendant's resignation. On a demurrer this plea was held bad; and *per cur.* it should have been averred that the ordinary accepted the resignation, for his acceptance being, as is laid down, *Cro. Jac.* 198. necessary to complete the resignation; it was the duty of the obligor, who undertook to resign, to procure this. So if one undertakes to enfeoff another, he undertakes to make livery as incident thereto. The bishop as to the obligee is a stranger, and if an obligor undertakes for the act of a stranger, he is at his peril, as is held *1 Saund.* 215. to procure it. *MS. Reports Hil.* 28 *Geo.* 2. *Hefcot v. Gray.*

The result of the whole is, that bonds of resignation are good in law, and that equity will restrain all improper use of them. It is not always true, but is so much oftener than superficial and hasty thinkers imagine, that the law, and particularly that part of it which is deduced from judicial determinations, is founded in solid reason; and it may perhaps be shewn that it is so in the present case. The attempting this will at least be excusable, because some great and good men have expressed their dislike of these bonds. 4 *New Abr.* 473. which *vide.*

The principal of the particular objections is, that which is reported to have fallen from *Halt Ch. J. Comb.* 394. that is, that a resignation bond comes as near simony as possible; it being easy to procure a round sum of money thereby. By making the penalty of the bond adequate to the value of the benefice, and agreeing privately that the money shall be paid, it would without doubt be an oblique way of selling it, and more than come near, for it would be downright simony. If there was no other way, or not as easy a one, to do the same thing, this objection would be insurmountable; but if there is, it can never be of much importance to stop this up. The same clerk, whose conscience would allow him to do this, might as well advance the money agreed upon at first, or, if that did not suit him, give an absolute bond to pay the money at a future day. As the same crime might still be committed, and with as much secrecy, what

what good end would it answer to prohibit such bonds, which, as is allowed by all, may be made use of by a patron to punish neglect of duty or immoral conduct in the incumbent, and for other good purposes? 4 *New Abr.* 473, 474.

Another objection is, that, when the patron takes a general bond of resignation, it is only a presentation during pleasure. Be it so, and suppose, which is the utmost that can be supposed, that it is not taken with a design to awe the incumbent into great care in the discharge of his duty, but to let some friend or relation afterwards into the benefice. It by no means necessarily follows that the church, which is the grand thing to be guarded against, will therefore be filled with an unfit person. If the successor, which may be the case, is better qualified for the office, the interest of religion will be advanced by the exchange. If he be not so well qualified, it is a misfortune; but it is such a one as, in the present circumstances of things, cannot be entirely prevented. While the right of patronage, or while human nature continues as it is, there will be mistakes in judgment, and patrons will be induced by partiality to judge too well of the abilities of a relation or friend; but it makes no difference, whether either of these happens when the benefice is at first void, or at any given time after; or if there be any, it is in favour of the practice, for the mischief for so long at least as the first incumbent holds the living, is thereby postponed. 4 *New Abr.* 474. For more learning on this subject, see 19 *Fin. Abr.* 54 4 *New Abr.* tit. *Simony*, and *Black. Com.* 1 V. 389, 393. 2 V. 278. 4 V. 62.

Simple-contract, debt by. Debts by *simple-contract*, are such, where the contract upon which the obligation arises, is neither ascertained by matter of record, nor yet by deed or special instrument, but by mere oral evidence, the most simple of any; or by notes unsealed, which are capable of a more easy proof, and (therefore only) better, than a verbal promise. *Black. Com.* 2 V. 465.

Simple-larceny, The felonious taking and carrying away of the personal goods of another. See *Black. Com.* 2 V. 230, &c. where the subject is fully, methodically and learnedly treated: and see also, *Larceny*.

Simplex, Signifies simple, or single; as *Charta simplex* is a deed poll or single deed.

Simplex beneficium, A minor dignity in a cathedral or collegiate church, or any other ecclesiastical benefice opposed to a cure of souls; and which therefore is consistent with any parochial cure, without coming under the name of pluralities.

Simplex Justiciarius, This style was anciently used for any *justice* judge, that was not chief in any court: and there is a writ in the *Register*, beginning thus:—*I John Wood, a simple judge of the court of Common Pleas, &c.*

Simul cum, Are words used in indictments, and declarations of trespass against several persons, where some of them are known, and others not known: As the plaintiff declares against A. B. the defendant *simul cum* C. D. E. F. and *disseins* others unknown, for that they committed such a trespass, &c. 2 *Lill. Abr.* 469. If a writ is generally against two or more persons, the plaintiff may declare against one of them with a *simul cum*; but if a man bring an original writ against one only, and declares with a *simul cum*, he abates his own writ. *Comber.* 260.

Sine assensu capitali, A writ that lies where a bishop, dean, prebendary, or master of an hospital alien the lands holden in right of his bishoprick, deanry, house, &c. without the assent of the chapter or fraternity; in which case, his successor shall have this writ. *F. N. B.* 195. And if a bishop or prebendary be disseised, and afterwards he releaseth to the disseisor; this is an alienation, upon which may be brought a writ *De sine assensu capitali*: But the successor may enter upon the disseisor, if he doth not die seised, notwithstanding the release of his predecessor; for by the release, no more passeth than he may rightfully release. *New Nat. Br.* 432. A person may have this writ of lands upon demises of several predecessors, &c.

Sine-cure, Is where a rector of a parish hath a vicar under him endowed and charged with the cure; so that the rector is not obliged either to duty or residence. *Dagg's*

Parf. Connc. 195. And when a church is fallen down, and the parish becomes destitute of parishioners, it is said to be a *sine-cure*. *Wood's Inst.* 153. See *Black. Com.* 1 V. 386.

Sine die, i. e. Without day: before the act for turning the law into *English*, when judgment was given against the plaintiff in an action, he was said to be *in misericordia pro falso clamore suo*; and for the defendant, *eat inde sine die*, and the defendant was discharged, &c. 2 *Lill.* 220.

Single-bond, Simplex obligatio. A deed whereby the obligor obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to another at a day appointed. *Black. Com.* 2 V. 340.

Si non omnes, Is a writ on association of justices, by which if all in commission cannot meet at the day assigned, it is allowed that two or more of them may finish the business. *Reg. Orig.* 202. *F. N. B.* 185. And after the writ of association, it is usual to make out a writ of *Si non omnes*, directed to the first justices, and also to those who are so associated to them, which reciting the purport of the two former commissions, commands the justices, that if all of them cannot conveniently be present, such a number of them may proceed, &c. *F. N. B.* 111.

Sinking fund, Is a provision made by parliament, consisting of surpluses of other funds, appropriated for paying the publick debts of the nation: And many late statutes have been made for applying the growing produce thereof; also money is often borrowed on the credit of the *sinking fund*, usually one million a year towards raising supplies for publick service. See the several statutes concerning the funds.

This sinking fund is the last resort of the nation; it's only domestic resource, on which must chiefly depend all the hopes we can entertain of ever discharging or moderating our incumbrances. And therefore the prudent application of the large sums, now arising from this fund, is a point of the utmost importance, and well worthy the serious attention of parliament; which was thereby enabled, in the year 1765, to reduce above two millions sterling of the public debt. *Black. Com.* 1 V. 329, 330. which *vide*.

Stipessona, Was what we now call a hundred. *Leg. H.* 1. c. 6.

Si recognoscant, A writ that, according to the old books, lies for a creditor against his debtor, who before the sheriff in the county-court hath acknowledged to owe his creditor such a sum received of him: The form of which writ is this:—*Per viccom. S. Salutaris Præcip: tibi quod si A. B. recognoscat se debere C. D. Quinque lib. sine ulteriori dilatione tunc ipsum distringas ad prædicta debitam eidem C. sine dilatione reddendum. Teste, &c.* *Old Nat. Br.* 68.

Site of a messuage or manor-house, &c. See *Scite*.

Sithcundman, (Sax.) Such a man as had the office to lead the men of a town or parish. *Leg. Int.* cap. 56. *Dugdale* says that in *Warwickshire* the hundreds were formerly called *Sithesoca*, and that *Sithocundman* and *Sithcundman* was the chief officer within such a division, i. e. The high constable of the hundred. *Dugd. Antig. Warw.*

Sithesoca, A Saxon word for franchise or liberty, a hundred. *Rot. Parl.* 16 H. 2.

Six Clerks in Chancery. These are offices in Chancery of ancient continuance, and they were heretofore spiritual persons, as may appear by the Stat. 14 C. 15 c. 8. They are principally concerned in matters of equity: and transact and file all proceedings by bill and answer; and also issue some patents that pass the great seal, as pardons of men for *chancemedley*, patents for ambassadors, sheriffs patents, and some others: And all these matters are transacted by their under-clerks, or others by them appointed. They likewise sign all office copies in order to be read in court, and also certificates, and attend upon the court in term, by two at a time, at *Westminster*, and there read the pleadings.

The business of the office is done by their under-clerks; each of which has a seat in the office (in *Chancery-Lane*) and whereof every six-clerk has a certain number, usually about ten, besides two waiting clerks in each division; all

all which are accountable to their respective fix clerks for the business they transact. *Harrison's Chan. Pract.* 1 V. 25, 26.

Sirhindi, Were servants of the same nature with *red-wights*, viz. Bound to attend their lord wherever he went; but they were accounted among the *English Saxons* as freemen, because they had lands in fee, subject only to such tenure. *Leg. Inc. cap. 26.* See *Hindoni*.

Sizel, Is where pieces of money are cut out from the flat bars of silver, after drawn through a mill, into the respective *fixes* or dimensions of the money to be made; the residue is called by this name, and is melted down again. *Lownd's Ess. upon coin*, pag. 96.

Skarballa, Seems to be an engine for catching of fish: It was especially given in charge by the justices, that all juries should inquire *de hiis qui piscantur cum Kiddellis & Skarballis*. 2 *Inst.* 38.

Skerba, A scar or wound.—*Si ossa extrahuntur a capite & skerda magna levetur*, &c. *Bract.* lib. 3.

Skerries, (island or rock). Patent granted to William French, Esq; for a light-house there, confirmed, 3 *Geo.* 2. c. 36.

Skinner. None shall retain any servant, journeyman, &c. to work in the trade of a *skinner*, unless he himself hath served seven years as an apprentice in the same trade, in pain to forfeit double the value of his ware wrought. *Stat.* 3 *Jac.* 1. cap. 9.

Skins. None shall take the wool from any sheep-skin or lamb-skin, unless he make leather or parchment of it, &c. 5 *El.* c. 22. f. 1. None shall buy skins but to make leather or parchment, &c. 5 *El.* c. 22. f. 1. Exportation of skins and leather prohibited, 5 *El.* c. 2. f. 2. Of sheep-skins tawed permitted, 8 *El.* c. 14. None but artizans skimmers shall dress or export black coney-skins, 3 *Jac.* 1. c. 9. Merchants shall not buy coney-skins or morkins in small quantities, 3 *Jac.* 1. c. 9. Duty on skins imported, 9 *Ann.* c. 11. f. 1. Drawback of two-thirds on exportation, 9 *Ann.* c. 11. f. 39. Additional duty on skins imported, 10 *Ann.* c. 26. f. 1. Drawback on exporter's oath that hides are marked, 10 *Ann.* c. 26. f. 5. See *Leather*.

Skepinage, Is used for the precincts of *Calais*. *Stat.* 27 *H.* 6. cap. 2.

Slade, (Sax. *Slæd*.) A long narrow piece or slip of ground. *Paroch. Antiq.* 465.

Slander, Is the defaming of a man in his reputation, profession, or livelihood; which is actionable, &c. See *Action of the Case for Words*, and *Prohibition*, and *Black.* Com. 3 V. 123.

Slaves. There are no slaves in England; one may be a villain here, but not a slave. 2 *Salk.* 666.

As to slavery, as *Blackstone* observes, it is now laid down (*Salk.* 666.) that a slave or negro, the instant he lands in England, becomes a freeman; that is, the law will protect him in the enjoyment of his person and his property; yet, with regard to any right which the master may have acquired to the perpetual service of *John* or *Thomas*, this will remain exactly in the same state as before; for this is no more than the same state of subjection for life, which every apprentice submits to for the space of seven years, or sometimes for a longer term. *Black.* Com. 1 V. 424, 425. From this doctrine it evidently follows, that the master may maintain an action against any one, who, after notice, retains or harbours, or detains from his master's service, a negro, &c. against the will of the master: and this, whether the negro be or be not baptized which does not in any manner, alter the case.—As to slavery, see the subject learnedly treated in *Black.* Com. 1 V. 423 f. 4. and *Montesquieu's Spirit of Laws*, L. xv. and of the slavery of negroes. *Id.* c. 3.

Sledge. A sledge or hurdle is generally allowed to draw offenders guilty of high treason to the gallows, to preserve them from the extreme torture of being dragged on the ground or pavement. 1 *Hal. P. C.* 82.

Sloppe, A *Sirrup*; and there is a tenure of land by holding the King's *Sirrup*, in *Cambridgeshire*. *Cart.* 5 *H.* 7.

Sloppe-silver, A rent paid to the estate of *Wigmore*, in lieu of certain days work in harvest; heretofore reserved to the lord from his tenants. *Par.* 43 *Edw.*

Spilite, (*Exclusa*) Is a frame to keep or let water out of a ground. By stat. 1 *Geo.* 2. c. 19. to destroy any sluice or lock on any navigable river, is made felony to be punished with transportation for seven years.

Smack, A smack, or small light vessel. *Cowell.*

Small debts, Courts for. In London, and other trading and populous districts, courts are established for recovery of small debts in a summary way, called courts of conscience. See *Courts*, and *Black.* Com. 3 V. 81. 4 V. 434.

Smalt, (Ital. *Smalto*) Is that of which painters make their blue colouring; mentioned in the *Stat.* 21 *Jac.* 1. c. 3.

Smock-farthings, The pentecostals or customary oblations offered by the dispersed inhabitants within a diocese, when they made their procession to the mother cathedral church, came by degrees into a standing annual rent, called *smock-farthings*. *Cowell.*

Smoke-silver, Lands were holden in some places by the payment of the sum of 6 d. yearly to the sheriff, called *Smoke-silver*. *Pat.* 4 *Ed.* 6. *Smoke-silver* and *Smoke-penny* are to be paid to the ministers of divers parishes, as a *modus* in lieu of tithes-wood: And in some manors, formerly belonging to religious houses, there is still paid as appendant to the said manors, the ancient *Peter Pence* by the name of *Smoke-money*. *Twiss.* Hist. Vindicat. 77. The Bishop of *Lincoln*, anno 1444, issued out his commission—*Ad levandum le Smoke-Farthings*, &c.

Smugglers, Are those persons that conceal prohibited goods, and defraud the King of his customs on the *sea coasts*, by running of goods and merchandize. *Stat.* 8 *Geo.* 1. c. 18. See *Customs*, and *Black.* Com. 1 V. 317. 4 V. 155.

Snattering-silver, There was a custom in the village of *Wylgh*, that all the servile tenants should pay for their tenements a small duty called *Snattering Silver*, to the abbot of *Calchefer*. *Placit.* 18 *Edw.* 1.

Snuff or Snuth, Mixing and colouring it with *saker*, *umber*, or *fustick*, *yellow ebony*, *tobacco dust*, *sand*, &c. incurs a penalty of 3 l. for every pound-weight. *Stat.* 1 *Geo.* 1. cap. 46. The penalties of adulterating tobacco, extended to snuff, 5 *Geo.* 1. cap. 11. A duty is granted of 2 s. 6 d. a pound on snuff imported from the *Spanish West-Indies*; and 5 s. for what is brought from *Spain* and *Portugal*, &c. except *France*, by the *Stat.* 12 *Geo.* 1. c. 26.

Soc, (Sax.) Signifies power, or liberty to minister justice and execute laws; also the circuit or territory wherein such power is exercised: Whence our law *Latin* word *soca* is used for a seignior or lordship enfranchised by the King, with the liberty of holding or keeping a court of his *sockmen*: And this kind of liberty continues in divers parts of *England* to this day, and is known by the names of *soka* and *sofen*. *Bract.* lib. 3. Lamb.—*Nullus sockman habeat impune peccandi*; i. e. None hath liberty of sinning without punishment. *Leg.* H. 1.

Socage, or **Socage**, (*Socagium*, from the French *Soc*, that is *vomer*, a coulter or plough-share) Is a tenure of lands by or for certain inferior services of husbandry to be performed to the lord of the fee. *Socage de verbor.* signif. says, *Socage* is a tenure of lands, when a man is infeoffed freely, without any service, ward, relief or marriage, and pays to his Lord such duty as is called *petit serjeanty*, &c. There is *free socage*, and *base socage*, otherwise called *villanage*.—And according to *Bract.* *Socagium liberum est, ubi fit servitium in denariis Dominis capitalibus, & nihil inde omnino datur ad scutum & servitium Regis.* This *free socage* is also called *common socage*. *Stat.* 37 *H.* 8. cap. 20. Other divisions there are in our books, viz. *Bract.* lib. 2. cap. 8. num. 3. *Old Nat. Brew.* fol. 94. and others. But by the statute 12 *Car.* 2. cap. 24. all tenures shall be adjudged and taken to be turned into *free* and *common socage*. See *Kimber's Glossary in Socage*. This was a tenure of so large an extent, that *Littletown* tells us, all the lands in *England*, which were not held in knights service, were held in *socage*. So that it seems the land was divided between these two tenures, and as they were of different natures, so the descent of these lands was in a different manner; for

for the lands held in knights service descended to the eldest son; but these held in *quillano Socagio*, equally among all the sons; yet if there was but one messuage, the eldest son was to have it, so as the rest had the value of that messuage to be divided between them. *Bracton*, lib. 2. cap. 35, 36. See *Black. Com.* 2. V. 99, 98. 4. V. 412, 461.

Socagers, Were those tenants whose tenure was called *Socage*; otherwise styled *Sockmen*.

Sockmans, or **Sokemans**, (*Socmanni*) Are such tenants as hold their lands and tenements by *Socage* tenure, of which there are several kinds, *viz.* *Sokemans* of frank tenure, *Kitchin*, fol. 81. *Sokemans* of base tenures, *ibid.* and *Sokemans* of antient demesne, which last seem properly to be called *Sockmans*. *Cowell*.

Socmen. The husbandmen among our *Saxon* ancestors were of two sorts; one, that hired the Lord's outland or tenementary land, like our farmers; the other, that tilled and manured his inland or demesne (yielding *operam*, not *cursum*, work, not rent) and were thereupon called his *Sockmen*, or ploughmen. *Spelman of Feuds*, cap. 7. But after the conquest, the proper *Sockmanni*, or *Sokemanni*, often mentioned in *Domesday*, were those tenants who held by no servile tenure, but commonly paid their rent as a *Soke* or sign of freedom to the Lord, tho' they were sometimes obliged to customary duties for the service and honour of their Lord. *Cowell*.

Socna, (*Sax. Socne*) A privilege, liberty, or franchise. *Chart. Canut. Reg.*

Socome, Signifieth a custom of grinding corn at the Lord's mill; and *bond socome* is where the tenants are bound to it. *Blount*.

Sodomy, The crime of, and how punished, see *Bug-gery*, and *Black. Com.* 4. V. 215.

Sodor and **Man**, *Bishopric of*. By stat. 12 Geo. 1. c. 28. authority was given to the treasury to purchase the interest of the then proprietors of the *Isle of Man*, (which was formerly a distinct jurisdiction,) for the use of the crown: which purchase was at length completed in the year 1765, and confirmed by statutes 5 Geo. 3. c. 26 & 39. See the Statutes. The Bishopric of *Man* or *Sodor*, or *Sodor* and *Man*, was formerly within the province of *Canterbury*, but annexed to that of *York*, by stat. 33 H. 8. c. 31.

Soke, **Soc**, **Sob**, **Soca**, Generally signify liberty or privilege of tenants excused from customary burdens and impositions. Sometimes *Soka*, or *Soke*, was the territory or precinct in which the chief Lord did exercise his *Sac*, *Sake*, or *Saka*, his liberty of keeping court, or holding trials within his own *Soke* or jurisdiction. Sometimes it signified a payment or rent to the Lord for using his land with such liberty and privilege, as made the tenant a *Sockman* or freeholder, upon no other conditions than a quit-rent. *Cowell*.

Soke, Significat libertatem curiæ tenentium quam socam appellamus. *Fleta*, lib. 1. cap. 47. Stat. 32 H. 8. cap. 15.

Sokemans, and **Sokemanries**. The former certain copyhold tenants so called, the latter their tenures. Which *Briton*, c. 66. describes to be "lands and tenements, which are not held by knight-service, nor by grand serjeanty, nor by petit, but by simple services, being as it were lands enfranchised by the King or his predecessors from their antient demesne." And the same name is also given them in *Fleta*, l. 1. c. 8. Vide *Black. Com.* 2. V. 99, 100.

Soke-reebe, The lord's rent-gatherer in the *soke* or *soken*. *Fleta*.

Solarium, A *sollar*, upper room, or garret: *Unum solarium vocat'* a loft. *Chart. Antiq.*

Soldiers. The military state of *England* includes the soldiery by land and sea; and it is against our antient law to keep up any army of soldiers in the time of peace. In time of war particular orders are made for the order and discipline of officers and soldiers, which are to be consulted upon all emergencies: and therefore we are not to expect many standing and perpetual laws on that account. *Wood's Inst.* 45. The chief statutes relating to the army, and its contents, are as follow, *viz.* By 18 H. 6. Soldiers retained, departing from their colours, without li-

cence, are guilty of felony. The 7 H. 7. cap. 1, and 3 H. 8. cap. 5. enact, That if a captain shall not have the whole number of his soldiers, or not pay them their due wages, within six days after he hath received it, he shall forfeit all his goods and chattels, and suffer imprisonment. By the 4 & 5 Ph. & M. c. 3. If any person being commanded to muster, doth absent himself (having no lawful excuse) he shall suffer ten days imprisonment, or pay a fine of 40*s.* And if any one authorized to levy or muster soldiers, shall take any toward to discharge or spare any from the said service, he shall forfeit ten times as much as he shall take, &c. The statute 1 Jac. 1. cap. 4. ordains, That if any person go beyond sea, to serve any foreign prince, as a soldier, and he do not take the oath of allegiance before he goes, it is felony; and if he is a gentleman or officer, that is going to serve a foreign prince, he is to be bound with two sureties not to be reconciled to the see of *Rome*, &c. or it will be felony. By 31 Car. 2. cap. 1. no soldiers shall be quartered on any persons without their consent; and inhabitants of places may refuse to quarter any soldier, notwithstanding any order whatsoever. The 4 & 5 W. & M. c. 3. was made for punishing mutiny and desertion, &c. And by 10 & 11 W. 3. Officers and soldiers may exercise trades. The 1, 4, 7, 9 & 10, &c. Ann. were made for punishing mutiny and desertion of soldiers, and false-musters; and for better payment of the army and quarters, &c. Since which there have been a variety of acts to punish mutiny and desertion, &c. in general, all formed on the same plan. Vide the last.

The 3 Geo. 1. cap. 2. and 4 Geo. 1. c. 4. ordain, That no soldier shall be taken out of the service, by any process, except it be for some criminal matter, or for a real debt amounting to 10*l.* of which affidavit is to be made; and if any soldier be otherwise arrested, a justice of peace by warrant under his hand shall discharge him: Yet the plaintiff may file an appearance, in an action of debt, upon notice thereof given, and proceed to judgment and execution; other than against the body of such soldier. A serjeant in the guards cannot be arrested under 10*l.* *Wils. par.* 1. fo. 216.

A common soldier cannot be a vagrant within the stat. 17 Geo. 2. *Wilson*, par. 1. fo. 331.

By the 5 Geo. 1. c. 5. when an officer or soldier is accused of a capital crime, the commanding officer, on application made to him, is to use his utmost endeavours to deliver over the criminal to the civil magistrate, and he is not to be tried by a court-martial in eight days; within which time, application is to be made: but after that the criminal may be tried by a court-martial.

Stat. 11 Geo. 2. c. 6. No justice of peace having a military office, shall be concerned in quartering of soldiers in the company, &c. under his command: And victuals refusing soldiers quartered, or constables receiving reward to excuse them, are to forfeit not above 5*l.* nor under 40*s.* 3 Geo. 2. c. 2. By subsequent acts, so justice, constable, &c. may direct more billets for quartering soldiers than there are effective men: And if any soldier be quartered on a private house, without the owner's consent, he may have his remedy at law; and officers or constables that quarter wives, children, or maid servants of any officer or soldier in such manner; the officer shall be cashiered, and constable forfeit 20*s.* Likewise where persons are grieved in billeting soldiers, or constables, they may complain to the justices of peace, who shall order so many to be removed as they see cause.

13 Geo. 2. c. 10.

Officers or soldiers, if they destroy game on their marches, or poultry or fish, being convicted before a justice, are to forfeit 5*l.* an officer, and 20*s.* a soldier. *Ibid.* When any person is enlisted a soldier, he shall within four days be carried before the next justice of peace or chief magistrate of a town, and declare that he did it voluntarily; upon which the justice is to certify it; and give him the oath of fidelity, &c. But if then he dissent, on returning the money received, and 20*s.* for charges, he shall be discharged: And military officers acting contrary to this act, to incur the like penalty as for making a false muster. 8 Geo. 2. c. 2. If a person abscond, or refuses to go before a justice, in order to declare his at-

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sent or dissent; he shall be deemed a listed *soldier*, and may be proceeded against as if he had taken the oath directed by the articles of war. Stat. 10 Geo. 2. And in case any subject here or in *Ireland* shall list or enter himself, or any one procure him, to go beyond the seas, with an intent to be enlisted as a *soldier*, to serve any foreign prince or state, without leave of his Majesty, he shall be guilty of felony; but if such person listed, in 14 days after discover upon oath before any justice, &c. the person by whom he was drawn in, so as he may be apprehended and convicted, the party discovering is to be indemnified. 9 Geo. 2. c. 30. His Majesty may form articles of war, and constitute courts-martial as well in *Great Britain* and *Ireland*, as in the islands of *Minorca*, *Gibraltar*, &c. And if any officer or *soldier* deserts his Majesty's service beyond sea, and escape into this realm, or *Ireland*, he shall be tried here, as if the offence had been committed within this realm. Stat. 11 Geo. 2. c. 2. and 15 Geo. 2. c. 4. See *Court Martial*, and *Black. Com.* 1 V. 407. 4 V. 163.

Sole Corporations. A corporation sole consists of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the King is a sole corporation, so is a bishop; so are some deans and prebendaries, distinct from their several chapters: And so is every parson and vicar. See *Corporations*, and *Black. Com.* 1 V. 469.

Solet & Debet. Words inserted in writs for recovery of rights, &c. Vide *Debet*.

Sole Tenant. (*solus tenens*). Is he that holds land by his own right only, without any other joined; and if a man and his wife hold land for their lives, with remainder to their son for life; here the man dying, the lord shall not have a heriot, because he dies not *sole tenant*. *Kitch.* 134.

Solicitor. (*solicitor*) A person employed to follow and take care of suits depending in courts of law or equity; and solicitors are within the late statute to be sworn and admitted by the judges, like unto attorneys, before they shall practise in our courts; and attorneys may be admitted solicitors in the courts of equity, &c. Stat. 2 Geo. 2. c. 23. There is also a solicitor general to the King, who is a great officer next the attorney general. See *Attorney*, and *Black. Com.* 3 V. 27.

Solidagium. Used in the neuter gender is taken for that absolute right or property which a man hath in any thing. *Malmsh. lib.* 1.

Solinus terrae.—*In communis terra Sancti Martini sunt 400. aera. & dim. quae faciunt duos solinos & dim. Domesday.* In which book, this word is only used in *Kent*, and no other county. *Septem solini terra sunt 17 Carucatae.* 1 Inst. fol. 15. According to this computation *solinus terrae* is about 160 acres, and 7 *solini* are about 1120 acres, which is less than 17 *carucatae*, for at the lowest *carucata terrae* is 100 acres. But Lord Coke was of opinion, that it did consist of no certain number of acres. This word *solinus* was probably from the Sax. *julk* a plough, but what quantity of land this *solin*, *suling*, or *swoling* did contain, is not so easily determined. It seems to have been the same with a plough-land; so in *Domesday*, *Se defendit pro uno solino*, is, it is taxed for one carucate or plough-land. *Cowell.*

Soller or Solar. (*solarium*) A chamber or upper room. *Id.*

Solbendo esse. Is a term of art, signifying that a man hath wherewith to pay, or is a person *solvant*.

Solvere poenae. To pay the penalty; or undergo the punishment inflicted for offences. 3 *Salk.* 30.

Solvit ad diem. Is a plea in action of debt on a bond, bill, &c. that the money was paid at the day limited. *Mod. Cas.* 22. To a bond of 30 years standing the defendant pleaded *solvit ad diem*, relying on the presumption; the plaintiff proved payment of interest two years after the day; this falsified the plea; the defendant should have pleaded upon the act for amendment of the law, that he paid the money after the day, 1 *Strange* 652. See *Payment*.

Solutio scoti militis Parliamenti, and Solutio scoti Burgens. Parliamenti. Are writs whereby knights of the shire and burgesses may recover their allowance, if it be denied. Stat. 35 H. 8. c. 11.

Somerset-house. Assigned to Queen *Charlotte* for life, 2 Geo. 3. c. 1.

Somersetshire. Its fishery how preserved, 1 *Jac.* 1. c. 23.

Son Assuit Demeine. Is a justification in an action of assault and battery; because the plaintiff made the first assault, and what the defendant did was in his own defence. 2 *Lill. Abr.* 523. But *son assuit* cannot be pleaded by a defendant for his outrageous battery. *Ibid.* See *Black. Com.* 3 V. 120, 306.

Sontage. Was a tax of forty shillings laid upon every knight's fee, according to *Stow*, pag. 284.

Sope. A duty granted on it for 32 years, &c. And *sope-makers* are to give notice of the time of making and working of *sope* to excise officers, on pain of forfeiting 50 l. Stat. 10 Ann. c. 19. and 11 Geo. 1. c. 30.

Sophia. (princess) Naturalized, 4 Ann. c. 1 & 4. See *King*. She was the youngest daughter of *Elizabeth* Queen of *Bohemia*, who was the daughter of *James* the First, and (in the latter end of the reign of *William* the Third) the nearest of the ancient blood royal, who was not incapacitated (to take the crown) by professing the Popish religion. On her therefore, and the heirs of her body, being protestants, the remainder of the crown, expectant on the death of *King William* and *Queen Anne* without issue, was settled by statute 12 & 13 W. 3. c. 2.

Sorcery. (*fortilegium*) Witchcraft or divination by lots; which was made felony by 1 *Jac.* 1. c. 12. See *Witchcraft*. By 9 Geo. 2. c. 5. No prosecution shall for the future be carried on against any person for conjuration, witchcraft, sorcery, or enchantment. But the misdemeanor of persons pretending to use witchcraft, tell fortunes, or discover stolen goods by skill in the occult sciences, is still deservedly punished with a year's imprisonment, and standing four times in the pillory. *Black. Com.* 4 V. 61.

Sors. In sums of money lent upon usury, the principal was anciently called *sors*, to distinguish it from the interest. *Pryn's Collect.* tom. 2. p. 161.

Sorvus Accipiter. Is a *for* or *sear hawk*: *King John* granted to *Robert de Hese*, land in *Barton* of the honour of *Nottingham*, to be held by the service of yielding the King yearly one *sear hawk*, &c. Cartular. S. Edmund. MS.

Sothale. or **Sothail.** Is conceived to be mistaken for *scotale*. *Bract.* lib. 3.

Sothlaga. or **Sothlage.** Is an old word, which signifies history: From the Sax. *soth*, *verum*, and *saga*, *testimonium*; for all histories should be true, or true sayings; from hence we derive our English word *soothsayer*. *Cowell.*

Sovereign. or **Soveraign.** Is a chief or supreme person, one highest of all; as a King, &c.

Sovereign. A piece of gold coin current at 22 s. in 1 H. 8. when by indenture of the *Mint*, a pound weight of gold of the old standard was to be coined into twenty-four *sovereigns*. In 34 H. 8. *sovereigns* were coined at 20 s. a-piece, and half *sovereigns* at 10 s. But anno 4 Ed. 6. the *sovereign* of gold passed for 24 s. and in 6 Ed. 6. at 30 s.

Sovereign Power. or **Sovereignty.** By this is truly meant, the power of making laws; for wherever that power resides, all others must conform to and be directed by it, whatever appearance the outward form and administration of the government may put on. For it is at any time in the option of the legislature to alter that form and administration by a new edict or rule, and to put the execution of the laws into whatever hands it pleases. And all the other powers of the state must obey the legislative power in the execution of their several functions, or else the constitution is at an end. *Black. Com.* 1 V. 49. In our constitution the law ascribes to the King the attribute of sovereignty, but that is to be understood in a qualified sense, i. e. as supreme magistrate, not as sole legislator, as the legislative power is vested

vested in the King, Lords and Commons, not in any one of the three estates alone.

Mortuary. A mortuary is so called in the laws of King Canute. c. 13. See *Black. Com.* 2 V. 425. and vide *Mortuary*.

Sound. Is a narrow sea, as *Mare Balticum*, the Sound; and to sound is to make trial how many fathom a sea is deep. *Merch. Dict.*

Southampton. Any man may pull down wears; &c. in the haven of Southampton, between Calford and Redbridge; and whosoever levieth any other there, shall forfeit 100 l. *Stat. 11 H. 7. c. 5.* An act was made for confirming some part of the charter granted to the mayor, bailiffs and burgeses of Southampton, and for relief of the town. 4 Jac. 1. c. 10.

South-Sea Annuities. See *South-Sea Company*.

South-Sea Bonds. Stealing them made felony, 2 Geo. 2. c. 25. *sect. 3.*

South-Sea Company. A company of merchants trading to the South-Sea. They were incorporated, on lending the government ten millions of money, towards paying the debts of the army, &c. and may purchase lands not exceeding 1000 l. per annum; and besides an interest for the money advanced the government, 8000 l. a year is to be paid them out of the funds towards the management of this company: the corporation shall have the sole trade from the river Oronoko on the east-side of America, to the southermost part of Terra del Fuego, and from thence through the South-Sea, &c. And the company to be owners of all islands, ports, &c. they can discover. *Stat. 9 Ann. c. 21.* See 1, 6, 7 and 9 Geo. 1. 6 Geo. 2, &c. See *Stat. 24 Geo. 2. c. 11.* for reducing the interest upon the capital stock of the South-Sea company, from the time, and upon the terms therein mentioned, and for preventing of frauds committed by the officers and servants of the said company; and 26 Geo. 2. c. 16. for reducing the number of directors of the said company, and for regulating the election of the governors and directors of the said company.

Establishment of the South-Sea company and their fund, 9 Ann. c. 21. 3 Geo. 1. c. 9. Creation of the old South-Sea annuities, 9 Geo. 1. cap. 6. f. 3. Redemption of South-Sea annuities out of sinking fund, 4 Geo. 2. c. 5. And see 6 Geo. 2. c. 25. 9 Geo. 2. f. 34. 10 Geo. 2. c. 19. f. 35. New South-Sea annuities created, 6 Geo. 2. c. 28. Restrained from issuing bonds without a general court, 6 Geo. 2. c. 28. f. 26. 7 Geo. 2. c. 17. Fund for their annuity supplied, 2 Geo. 2. c. 3. f. 60. The company continued till the annuities shall be redeemed, 24 Geo. 2. c. 2. f. 31. The company's annuity reduced, 24 Geo. 2. c. 11. The first and second subscribed South-Sea annuities to be consolidated, 25 Geo. 2. c. 27. f. 26. See *Black. Com.* 1 V. 328.

Southwark, King Edward 3d by charter granted to the city of London, the village of Southwark, paying at the Exchequer the farms thereof due: Also the manor and Borough were granted; except the capital messuage called Southwark-place, by chart. Ed. 6. The inhabitants of the Jews there, not to be returned on juries. 11 Hen. 6. c. 1. No market to be held in the high-street of Southwark, nor hackney coaches, &c. to ply there. 28 Geo. 2. c. 9. Instead thereof a market to be held in a place called the Triangle. 28 Geo. 2. c. 23. 30 Geo. 2. c. 31.

Sowlegrove, Is an old name of the month of February, so called by the inhabitants of South Wales.

Sowne, From the Fr. *Souvenus*, i. e. remembered, is a word of art used in the Exchequer, where *estreats that sowne not*, are those that the sheriff cannot levy. *etc.* Such estreats and casualties as are not be remembered, and run not in demand; and *estreats that sowne*, are such as he may gather and are leviable. *Stat. 4 Hen. 5. c. 7. 4 Inst.* 107.

Spatharius, for *Spatharius*, Is a sword-bearer. Blount.

Spata Placitum, A court for the speedy execution of justice on military delinquents. *Brad. Append. Hist. Engl.* 45.

Spatularia, Is numbered among the holy vestments, &c. in *Mon. Ang. Tbm.* 3. p. 331.

Spaton and Fry of Fish. See *Fish*.

Speaker of the Parliament, The chief officer in that high and august court, who is as it were the common mouth of the rest: And as that Honourable Assembly contains two Houses, the Lords and Commons; so there are two speakers, the one termed the Lord Speaker of the House of Peers, and is most commonly the Lord Chancellor or Lord Keeper of the Great Seal of England; the other (being a member of that House) is called The Speaker of the House of Commons, both whose duties consist in managing debates, putting questions, and thereby collecting the sense of the houses, the passing of bills, seeing the orders of each House observed, &c. See *Parliament*.

Speaking with prosecutor. It is not uncommon when a person is convicted of a misdemeanor, which principally and more immediately affects some individual, as a battery, imprisonment, or the like, for the court to permit the defendant to speak with the prosecutor, before any judgment is pronounced; and, if the prosecutor declares himself satisfied, to inflict but a trivial punishment. *Black. Com.* 4 V. 356. 7. 'tis usual, on satisfaction made to the prosecutor, for him to give the person convicted, a release, the execution of which being proved, is tantamount to the prosecutor's acknowledgement of being satisfied.

Special matter in evidence, Is what is specially alleged, and comes not into the General Issue.

Specialty. (*Specialitas*) A bond, bill, or such like instrument; a writing or deed, under the hand and seal of the parties. *Litt.* See *Black. Com.* 2 V. 465.

Species. A relative term, expressing an idea which is comprised under some general one, called a genus. The idea of a species is formed by adding a new idea to the genus. This superadded idea is called the specific difference.

In law, when we treat of action on the case, generally, we may call it the genus, as we may call an action of assumpsit, of trover, &c. a species of that genus.

Specific legacies. A specific legacy, is a legacy left, or a bequest of any particular thing, as a piece of plate, a watch, a horse, &c. and cannot be taken by the devise without the consent of the executor. *Co. Lit.* 111. *Meyn* 39. *Black. Com.* 2 V. 512.

Specific relief in equity. The want of a more specific remedy than can be obtained in the courts of law, gives a concurrent jurisdiction to a court of equity in a great variety of cases. To instance in executory agreements, a court of equity will compel them to be carried into strict execution, unless where it is improper, or impossible, instead of giving damages for their non-performance. 1 *Equ. Caf. Abr.* 16. *Black. Com.* 3 V. 438.

Spelcum, The cell of a monk, mentioned in *Matth. lib. 3.*

Spices, For garbling spices 1 Jac. c. 19. Repealed, 6 Ann. c. 16.

Duty on spices imported, 6 & 7 W. 3. c. 7. made perpetual by 7 Ann. c. 7. and part of bank fund: And the surplus part of the aggregate fund, 1 Geo. 1. c. 12. Licences to import spices shall specify the quantity and place of landing, 6 Geo. 1. c. 21. f. 45. Spices packed in small parcels forfeited, 6 Geo. 1. cap. 21. f. 47. Duties on spices ascertained, 8 Geo. 1. c. 15. *sect.* Licences to import spices shall be delivered up at entering the ship, 8 Geo. 1. c. 18. f. 21. See *Customs, Funds, Grocery Warr.*

Spigurnet, (*Spigurnellus*) Is the sealer of the King's writs; from the Sax. *Spicurnan*, to shut up or inclose: but the following original has been given of this word, that *Gulfridus Spigurnel* being by King Hen. 3. appointed to be sealer of his writs, was the first in that office; and therefore in after-times the persons that enjoyed the office were called *Spigurnels*. *Pat. 11 H. 3. 4 Edw. 1.* This office was also known by the name of *Spicurnantia* or *Espicurnantia*; and Oliver de Standford held lands in *Nasled in Com. Oxon. per Serjeantiam Spicurnantiz in Cancellaria Domini Regis.* 27 Ed. 1.

Spitariatum, A sort of vessel which we now call a spit-mace. *Knight. Ann.* 4339.

Spindite,

Spindule, Were those three golden pins which were used about the archiepiscopal pall; and from thence *Spindulatus* signified to be adorned with the pall. *De Gange*.

Spinner, Is an addition in law proceedings usually given to all unmarried women; and it is a good addition for the estate and degree of a woman. But it is said a gentlewoman is to be named *generosa*, and not *spinner*, or it will be ill. *Dyer* 46, 88. 2 *Co. Inst.* 668. but 'tis immaterial.

Spirits and Strong waters. See *Brandy*.

Spiriting away men and children. This offence is commonly called *Kidnapping*. It is a very heinous crime, which the Common law of England, hath punished by fine, imprisonment, and pillory. *Raym.* 474. 2 *Show.* 221. *Skin.* 47. *Comb.* 10. By statute 11 & 12 *W.* 3. c. 7. If any captain of a merchant vessel, shall (during his being abroad) force any person on shore, or wilfully leave him behind, or refuse to bring home all such men as he carried out, if able and desirous to return, he shall suffer three months imprisonment.

Spiritual Corporations. *Spiritual* or *Ecclesiastical Corporations* are where the members that compose it, are entirely spiritual persons, such as bishops, &c. *Black. Com.* 1 *V.* 470.

Spiritual Courts, Have jurisdiction in causes matrimonial, and for probate of wills of goods, and granting administrations; and for tithes, where there is no *modus*; in cases of defamation, &c. Their jurisdictions are set forth in the *Stat. Articuli Cleri*, 9 *E.* 2. And in the *Stat. de Circumspelle agatis*, the 23 *H.* 8. c. 9. &c. See *Courts Ecclesiastical*, and *Black. Com.* 3 *V.* 61.

Spiritualties of a Bishop, Are those profits which he receives as a bishop, and not as a baron of parliament; such as the duties of his visitation, prebend-money, his benefit growing from ordinations and institutions of priests, the income of his jurisdiction, &c. *Staundf. P. C.* 132. The Archbishop of the Province is *Guardian of Spiritualities* when a see is vacant, and hath the jurisdiction of courts, &c. Vide *Custos Spiritualitatis*, and *Black. Com.* 1 *V.* 380.

Spirituality, As containing the *Clergy of England*, statutes made for preserving their privileges, &c. 4 *H.* 4. c. 2 & 3.

Spittle-house, Is a corruption from *Hospital*, and signifies the same thing; or it may be taken from the Teuton. *Spital*, an hospital or alms-house: It is mentioned in the 15 *Ed.* c. 9.

Spoliation, (*spoliatio*) A writ or suit for the fruits of a church, or the church itself, to be sued in the Spiritual court, and not in the temporal, that lies for one incumbent against another, where they both claim by one patron, and the right of patronage doth not come in question: As if a parson be created a Bishop, and hath dispensation to hold his benefice, and afterwards the patron presents another incumbent, who is instituted and inducted; now the bishop may have a *spoliation* in the Spiritual court against the new incumbent, because they both claim by one patron, and the right of patronage doth not come in debate; and for that the other incumbent came to the possession of the benefice, by the course of the Spiritual law, viz. by institution and induction; for otherwise, if he be not instituted and inducted, a *spoliation* lies not against him, but writ of trespass, or assise of *Novel disseisin*. *F. N. B.* 36, 37. So it is where a parson that hath a plurality accepts of another benefice, by reason whereof the patron presents another clerk, who is instituted and inducted; in this case one of them may have *spoliation* against the other, and then shall come in question, whether he hath a sufficient plurality, or not: And it is the same of deprivation, &c. *Terms de Ley* See *Black. Com.* 3 *V.* 91.

Sponsa oblata, A free gift or present to the King anciently so called.

Sportula, Signifies gifts and gratuities, forbidden to be received by the clergy: And St. Cyprian calls those clergymen *Sportulantes Fratres*, who accepted such gifts for their maintenance. *St. Cyp. Epist.* 20, 71.

Sponsals, The betrothing of a man or woman before full marriage. *Litt. Dig.* See *Sponsals*.

Spoils-breach, Is adultery opposed to simple fornication: The Lady *Katharine* was accused to the King of incontinent living before her marriage, and of *Spoils-breach* after the marriage. *Fox Art. Mon.* Vol. 2. pag. 540.

Springing uses, or *contingent uses*, They differ from an executory devise; in that there must be a person seized to such uses at the time when the contingency happens, else they can never be executed by the statute. See *Black. Com.* 2 *V.* 334. and *Resulting use*, &c.

Spillers of Yarn, Are persons that work at the *Spole* or wheel; or triers of yarn to see that it be well spun, and fit for the loom. 1 *Mar.* c. 7.

Sporus-Royal, (*Sporarium aureum*) An ancient gold coin—*Pro hac recognitione dedit Johan. H. unum Spurarium aureum*, &c. *Paroch. Antiq.* 321.

Squalley, Is a note of faultiness in the making of cloth. 43 *Elix.* c. 10. See *Rauy*.

Squibs, The making, selling, or exposing to sale of *Squibs*, serpents and other fire works; or throwing, casting or firing any *Squibs*, &c. is declared a common nuisance: And such persons who make or sell *Squibs*, shall forfeit 5 *l.* Also the persons throwing them, or assisting therein, incur a forfeiture of 20 *s.* leviable by a justice of peace's warrant; and not being paid, the offender is to be sent to the house of correction for any time not exceeding a month. *Stat.* 9 & 10 *W.* 3. c. 7. If any persons shall permit *Squibs* to be cast or thrown from out of their houses into the street, they shall forfeit 20 *s.* to be levied by distress and sale of goods, &c.

Notwithstanding the statute, if any person receives an injury by throwing of *Squibs*, the person injured, may maintain an action at law, for recovery of damages.

Stabbing Of persons is made felony without benefit of clergy, and punished as murder, by *stat.* 1 *Jac.* 1. cap. 8. See *Homicide*, *Manlaughter*. And *Black. Com.* 4 *V.* 193.

Stabilia, A writ called by that name, on a custom in Normandy, that where a man in power claimed lands in the possession of an inferior, he petitioned the Prince that it might be put into his hands 'till the right was decided; whereupon he had this writ, *Brevs de Stabilia*: To this a charter of King *Hen.* 1. alludes in *Pryn's Lib. Angl.* tom. 1. pag. 1204.

Stabilitio venationis, The driving deer to a stand. *Omnis burgenses de B. debent invenire unum hominem ter per annum ad stabiliamentum pro venatione capienda*, &c. *Lib. niger Herf.* And, *In venatione si quis ad stabilitatem non venit*, i. e. He who doth not come to the place where he ought to stand. *Leg. H.* 1. c. 17.

Stable-stand, (*Stabilis statio*, vel *stans in stabulo*) Is where a man is found at his standing in the forest, with a cross or long bow bent, ready to shoot at any deer; or standing close by a tree, with greyhounds in a leash, ready to slip: And it is one of the four evidences or presumptions, whereby a person is convicted of intending to steal the King's deer in the forest: the other three are *dog-draw*, *back-bear*, and *bloody hand*. *Manwood par.* 2. cap. 18.

Stack, A quantity of wood three foot long, as many feet broad, and twelve feet high. *Merch. Dig.*

Stadium, Is accounted a furlong of land; which is the eighth part of a mile. *Domesday*.

Staff-herding, Is a right to follow cattle within a forest: And where persons claim common in any forest, it must be inquired by the ministers whether they use *staff-herding*, for it is not allowable of common right; because by that means the deer which would otherwise come and feed with the cattle, are frightened away, and the keeper or follower will drive the cattle into the best grounds, so that the deer shall only have their leavings: Therefore if any man who hath right of common, under colour thereof use *staff-herding*, it is a cause of seizing his common till he pay a fine for the abuse. 1 *Jon. Rep.* 48.

Stage-Coaches. See *Coaches*.

Stage-plays. See *Plays*. And *Black. Com.* 4 *V.* 168.

Stagarius, Signifies a resident; as J. B. *Canonicus* & *Stagarius Sancti Pauli*, is a canon residentiary of St. Paul's church. *Hist. Eccl. S. Paul.* But this distinction was made between *residentarius*, and *Stagarius*: Every canon installed to the privileges and profits of residence, was *residentarius*; and while he actually kept such stated residence, he was *Stagarius*. *Statut. Eccles. Paulin. MS. 44.* *Stagaria*, the residence to which he was obliged; *Stagari*, to keep residence. Hence an old *Stager*.

Stagnes, (*Stagno*) Are pools of standing water. 5 *Eliz. c. 21.* A pool consists of water and land; and therefore by the name of *Stagnum*, the water and land shall pass also. *Inst. 5.*

Stake driven through the Body, This is part of the punishment of *Suicide*. See *Self-murder*.

Stal-boat, Is a kind of fishing boat, mentioned in the 27 *Eliz. c. 21.*

Stalkers, The going gently step by step, to take game; none shall *stalk* with bush or beast to any deer, except in his own forest or park, under the penalty of 10 *l.* *Stat. 19 H. 7. c. 11.*

Stalkers, Certain fishing-nets, by the statute 13 *R. 2. c. 20.*

Stallage, (*Stallagium*, from the Sax. *stal. i. e. stabulum, statio*) The liberty or right of pitching and erecting stalls in fairs or markets: or the money paid for the same. *Kennet's Gloss.*

Stallarius, Is mentioned in our historians, and signifies *profectum stabuli*; it was the same officer which we now call master of the horse:—Eadnothus *qui fuit Haroldi Regis stallarius*, &c. *Spelm.* Sometimes it hath been used for him who hath a stall in a market. *Flota, lib. 4. c. 28.*

Stamp-Duties. There are certain duties imposed by parliament on all vellum, parchment and paper, whereon deeds, grants, commissions, or any writings, or process in the law are ingrossed or written; which duties are as follow, *viz.* For all letters patent, grants of offices, presentations, dispensations, admittances of fellows of the college of physicians, and of attornies, pardons of crimes, &c. 40 *s.* All conveyances inrolled, writs of covenant for levying fines, *habeas corpus's*, &c. Decrees in Chancery, licences of marriage, probates of wills, &c. 5 *s.* Warrants under the sign manual, commissions out of ecclesiastical courts, judgments, &c. 2 *s.* 6 *d.* For admissions into any company, bills, answers, &c. in Chancery 1 *s.* All parchment and paper, upon which common deeds, bonds, writs, &c. are written, 6 *d.* And for every sheet of any declaration, or pleading, &c. 1 *d.* *Stat. 5 & 6 W. & M. c. 21.* And by 9 & 10 *W. 3. and 12 Ann.* These duties are doubled, and trebled: The common stamp is treble sixpenny, &c. Commissioners are appointed by virtue of these acts, to provide stamps or marks; and inferior officers for the stamping of parchment and paper, and for levying and collecting the duties: If any commissioner or officer, shall fix the mark or stamp to parchment or paper before the duty thereon is paid or secured, he shall forfeit 100 *l.* And persons ingrossing or writing upon any paper, &c. any thing for which the same is charged with the duty, before it shall be stamped, or writing upon any paper or parchment marked or stamped, for any lower duty than that which is required, shall incur a forfeiture of 5 *l.* and no deed or writing shall be good in law till the 5 *l.* is paid, and the same is stamped. *Vide Printing.* See 30 *Geo. 2. c. 19.* and 32 *Geo. 2. c. 35.* And *Black. Com. 1 V. 323.* And see the *Table to the Statutes*, tit. *Stamps*.

Stamps, forging of. Capital punishment is inflicted for this offence. See the several *Stamp Acts*.

Stand, Is a weight from two hundred and a half to three hundred of pitch. *Merch. Dict.*

Standard, (From the Fr. *Estandart*, &c. *signum, vexillum*) In the general signification, is an *Ensign in War*: And it is used for the standing measure of the King, to the scantling whereof all the measures in the land are or ought to be framed, by the clerks of markets, aulgners, or other officers, according to *Magna Charta* and divers other statutes: And it is not without good reason called a *Standard*, because it standeth constant and immoveable, having all measures coming towards it for their conformity; even soldiers in the field have their *Standard* of

colours, for their direction in their march; &c. to repair to. *Britton, c. 30.* There is a *standard of money*, directing what quantity of fine silver and gold, and how much alloy, are to be contained in coin of old sterling, &c. And *standard of plate*, and silver manufactures. *Stat. 6 Geo. 3. c. 11.* See *Alloy*.

Standardum Londini. *Vobis mandamus quod standardum Londini de hujusmodi mensuris diligenter asservari & probari, ac alias mensuras per dictum standardum fieri ad singulos comitatus regni*, &c. *Claus. 14 Edw. 2.*

Standardus, True standard, or legal weight or measure. *Cartular. S. Edmund. MS. 268.*

Standel, A young store oak tree, which in time may make timber; and twelve such young trees are to be set standing in every acre of wood, at the felling thereof, by *Stat. 35 H. 8.*

Standing-army, Not to be kept in time of peace, without consent of parliament. 1 *W. & M. sess. 2. c. 2.*

Stanes. For maintaining the bridge of *Stanes*, and *Egbam* causeway, a certain toll is appointed by an old statute, 1 *H. 8. c. 9.* There is a *turnpike* now erected across this bridge; and tolls are taken for all coaches, carts, horses, cattle, &c. going over, and lighters or vessels passing under the said bridge; but the inhabitants of *Stanes* are free for their horses, &c. *Stat. 13 Geo. 2. c. 25.*

Stanlam, A word anciently used for a stony hill. *Domesd.*

Stannaries, (*Stannaria*, from the Lat. *stannum*, i. e. tin) Are the mines and works where tin metal is got and purified; as in *Cornwall and Devonshire*, &c. *Camden Brit. 199.* The tanners are called *Stannary-men*; who had great liberties granted them by King *Edw. 1.* before they were abridged by the *Stat. 50 Edw. 3.* by which statute the privileges of the tanners are limited and expounded; and the jurisdiction of the *Stannary* courts is settled by the 16 & 17 *Car. 1. c. 15.* All labourers in and about the *Stannaries*, are to have the privilege of the *Stannary court* while they work there; and may not be impleaded in any other court, for any cause arising within the *Stannaries*; except for pleas of land, life or member: The jurisdiction of this court is guided by special laws and customs, and by prescriptions; and no writ of error lieth upon a judgment in the *Stannary court*, but it shall be reversed, where wrong, by appeal to the steward of the court where the matter lieth; or from the steward to the deputy-warden of the *Stannaries*; from the under-warden to the lord-warden of the *Stannaries*; and from him to the King's privy-council. 4 *Inst. 230, 232.* *Plowd 327. 12 Rep. 9. 1 Roll. Abr. 745.* Transitory actions between tinner and tinner, &c. though not concerning the *Stannaries*, or arising therein, if the defendant be found within the *Stannaries*, may be brought into these courts, or at Common law; but if one party alone is a tinner, such transitory actions which concern not the *Stannaries*, nor arise therein, cannot be brought in the *Stannary-courts*. 4 *Inst. 231.* Labourers in the *Stannaries* may recover their wages before justices of peace. 27 *Geo. 2. c. 6.* See *Black. Com. 3 V. 80.*

Stannarius, A jeweller or dealer in tin; of or belonging to tin. *Litt. Dict.*

Staple. (*Stapulum*) Comes from the Fr. *estape*, *forum vinarium*, a market or staple for wines, which was the principal commodity of France; or rather from the Germ. *sta;ulen*, which signifieth to gather, or heap any thing together: In an old French book it is written *à Calais Estape de la Laine*, &c. i. e. The staple for wool: And with us, it hath been a public mart appointed by law to be kept at the following places, *viz. Westminster, York, Lincoln, Newcastle, Norwich, Canterbury, Chichester, Winchester, Exeter and Bristol*, &c. A *Staple court* was held at the *Wool Staple* in *Westminster*, the bounds whereof began at *Temple-Bar* and reached to *Tusbill*; in other cities and towns, the bounds are within the walls; and where there are no walls, they extend through all the towns; and the court of the mayor of the *Staple* is governed by the law merchant in a summary way, which is the *Law of the Staple*. 4 *Inst. 235.* See *Stat. 27 Ed. 3.* The staple goods of England are wool, woollens, leather, lead, tin, cloth, butter, cheese, &c. as appears by the statute 14 *R. 2. c. 1.* Though some allow only the five first; and yet

yet of late *Staple goods* are generally understood to be such as are vendible, and not subject to perill, of any kind. Vide *Statute Staple*. And *Black. Com.* 1 *V.* 314.

Star, (*Starrum*, a contraction from the Hebr. *stetar*, a deed or contract) All the deeds, obligations, &c. of the Jews, were anciently called *stars*, and writ for the most part in Hebrew alone, or in Hebrew or Latin; one of which yet remains in the treasury of the *Exchequer*, written in Hebrew, without points, the substance whereof is expressed in Latin just under it, like an *English* condition under a Latin obligation; This bears date in the reign of King *John*; and many *stars*, as well of grant and release, as obligatory, and by way of mortgage, are pleaded and recited at large in the plea-rolls. *Rasch. 9 Edw. 1.* See *Black. Com.* 2 *V.* 343. 4 *V.* 262.

Star and Bent, Penalty on cutting *star* and *bent* on sand-hills. 15 *Geo. 2. c. 33. sect. 6.*

Star-Chamber, (*Camera stellata*, otherwise called *Chamber des estuylls*;) Was a chamber at *Westminster* so called (as Sir *Thomas Smith, de Rep. Anglor. lib. 2. c. 4.* conjectures,) because at first the ceiling thereof was adorned with images of gilded Stars. And in the 25 *Hen. 8. cap. 1.* it is written the *starred chamber*. *Henry* the Seventh, and *Henry* the Eighth, ordained by the statutes, viz. 3 *Hen. 7. cap. 1.* and 21 *Hen. 8. cap. 2.* That the Chancellor, assisted by others there named, should have power to punish *rauts*, *riots*, *forgeries*, *maintenances*, *embraceries*, *perjuries*, and other such *misdemeanors* as were not sufficiently provided for by the Common law, and for which the inferior judges were not so proper to give correction: And because that place was before set apart to the like service, it was still used accordingly. Touching the officers belonging to this court, see *Camd. p. 112, 113.* But by the statute 16 *Car. 1. c. 10.* This court, commonly called the *Star-chamber*, and all jurisdiction, power and authority thereto belonging, are abolished. *Cowell.*

Molloy and *Blackstone* seem to think it was called the *Star-chamber*, because the recognizances which the Jews formerly entered into, to the crown, and which were called *Stars*, were kept in that chamber. See *Black. Com.* 1 *V.* 230. 4 *V.* 263, 422, 426. 430.

Starch and Starch Powder. By a late act *starch-makers* are to make use of square or oblong boxes only, for boxing and draining green *starch*, before it is dried in the stove, under the penalty of 10 *l.* and shall give notice to the officers for the duties, when they box and dry their *starch*; and not remove the *starch* made before it is weighed, and an account taken thereof, on pain of forfeiting 50 *l.* Officers may search for *starch* concealed, by virtue of a justice's warrant, and seize the same, &c. A penalty is likewise inflicted on makers of hair-powder, perfumers, peruke-makers, barbers, &c. mixing any powder of alabaster, chalk, lime, &c. with *starch powder*, or making hair-powder of any other materials than powder of *starch*. And makers of powder for hair, are to make entries of their workhouses at the office of *Excise*; and any officer may enter warehouses and shops, and examine the powder, which being mixed, shall be forfeited, and the sum of 20 *l.* *Stat. 4 Geo. 2. c. 14.*

Statens damages. A court of equity cannot, any more than a court of law, relieve against a penalty, in the nature of *statens damages*; as a rent of 5 *l.* an acre for ploughing up ancient meadow: Nor against a lapse of time, where the time is material to the contract; as in covenants for renewal of leases. Both courts will equitably construe, but neither pretends to controul of change, a lawful stipulation or engagement. 2 *Atk. 139. Black. Com.* 3 435.

Statitics, (*Statites*, *Stantia ponderum*) Knowledge of weights and measures; or the art of balancing or weighing in scales. *Morris Dic.*

Stationarius, (From *Stans*, residence) Is the same with *Stagiarus*. Or, a common residentary in a cathedral church. See *Stagiarus*.

Staturium, A comb adorned with Statues.—*de quo sacra corpora terra illi statu munita sunt Romani statuarum commendatary, &c. English Dic.*

Statute de Mortuore, The Statute of a manor: All the tenants within the manor, meet in the court of their lord, to do their customary suit, and enjoy their right and use

ges; which was termed *omnis status de manerio*. *Paroch. Antiq. 456.*

Statute, (*Statutum*) Has divers significations: First, It signifies an act of parliament made by the King, and the three estates of the realm; and Secondly, it is a short writing called a *Statute Merchant*, or *Statute Staple*, which are in the nature of bonds, &c. and called *Statutes*, as they are made according to the form expressly provided in certain statutes. 5 *H. 4. c. 12.* To statutes enacted in parliament, there must be the assent of the King, Lords, and Commons, without which there can be no good act of parliament; but there are many acts in force, though these three assents are not mentioned therein, as *Dominus Rex statuit in parlamento*, and *Dominus Rex in parlamento suo statuta edit*, and *de communi concilio statuit*, &c. *Plowd. 79. 2 Bulst. 186.* And Sir *Edw. Coke* says, that several statutes are penned like charters in the King's name only; though they were made by lawful authority. 4 *Inst. 25.* Before the invention of printing, all statutes were proclaimed by the sheriff in every county, by virtue of the King's writ. 2 *Inst. 526; 644.*

Some statutes are general, and some are special: And they are called general from the genus, and special from the species; as for instance: The whole body of the spirituality is the genus, but a bishop, dean, and chapter, &c. is the species: Therefore statutes which concern all the clergy, are general laws; but those which concern bishops only are special. 4 *Rep. 76.* The statute 21 *H. 8. c. 13.* which makes the acceptance of a second living by clergymen, an avoidance of the first, is a general law, because it concerns all spiritual persons.

All statutes concerning mysteries and trades in general, are general or publick acts; though an act which relates to one particular trade is a private statute. *Dyer 75.* A statute which concerns the King is a publick act; and yet the *stat. 23 Hen. 8.* concerning sheriffs, &c. is a private act. *Plowd. 38. Dyer 119.* 'Tis a rule in law, that the courts at *Westminster* ought to take notice of a general statute, without pleading it: but they are not bound to take notice of particular or private statutes unless they are pleaded. 1 *Inst. 98.*

Statutes against the power of subsequent parliaments are not binding; notwithstanding the statute 42 *Ed. 3. c. 3.* declares that any statute made against *Magna Charta* shall be void: And this is evident, seeing many parts of *Magna Charta* have been repealed and altered by subsequent acts. *Read. on Stat. Vol. 4. p. 340.* And the law has been mistaken in this point; for the statutes which intervene between the 9 *Hen. 3.* and 42 *E. 3.* are not repealed, though they vary from, and are contrary to *Magna Charta*. *Jenk. Cent. 2. Statutes* continue in force although the records of them are destroyed, by the injury of time, &c. But if a statute is against reason, or impossible to be performed, it is void. 4 *Rep. 76. 2 Inst. 587.*

Old statutes must give place to new, where they are contrary; but when there is a seeming variance between two statutes, and no clause of *non obstantia* in the latter, such construction shall be made that both may stand. 11 *Rep. 56. Dyer 347.* By repealing of a repealing statute, the first statute is revived: And where one statute is repealed by another, the acts done in the mean time are valid. 4 *Vol. Read. Stat. Jenk. Cent. 233.*

Statutes consist of two parts, the words, and the sense; and 'tis the office of an expositor, to put such a sense upon the words of the statute, as is agreeable to equity and right reason: Equity must necessarily take place in the exposition of statutes; but explanatory acts are to be construed according to the words, and not by any manner of intendment; for it is incongruous for an explanation to be explained. *Plowd. 363, 465. Cro. Car. 23.*

The preamble of a statute, which is the beginning thereof, going before, is as it were a key to the knowledge of it, and to open the intent of the makers of the act; it shall be deemed true, and therefore good arguments may be drawn from the same. 1 *Inst. 11.* It is the most natural and genuine exposition of a statute, to construe one part by another part of the same statute, for that best expresses the meaning of the makers: The words of an act of parliament are to be taken in a lawful and rightful sense,

sense, and the construction of statutes in general must be made in suppression of the mischief, and for the advancement of the remedy intended by the statute; but so that no innocent person by a literal construction shall receive any damage. 1 *Inst.* 24, 381.

The best way to expound a statute, is to consider what answer the law-givers would probably have given to the question made, if proposed to them. *Plowd.* 465. 3 *Nels. Abr.* 245.

In the usual exposition of statutes, these things are to be observed, viz. 1. What was the Common law before the making of the statute? 2. The mischief and defect which the Common law did not provide against. 3. What remedy the statute hath appointed to cure this mischief. 4. The true reason of the remedy. 3 *Rep.* 5.

Where a statute gives a remedy for any thing, it shall be presumed there was no remedy before at Common law. And the rules to construe acts of parliament, are different from the strict rules of the Common law; though in the construction of a statute, the reason of the Common law gives great light. *Raym.* 191, 355. 2 *Inst.* 301. If an act of parliament is dubious, long usage may be good to expound it by; and the meaning of things spoken and written, must be as hath been constantly received; but where usage is against the obvious meaning of a statute, by the vulgar and common acceptance of words, then it is rather an oppression than an exposition of the statute. *Vaugh.* 169, 170.

A statute which alters the Common law, shall not be strained beyond the words, except in cases of publick utility, when the end and design of the act appears to be larger than the words themselves. *Ibid.* 179. Relative words in any statute, may make a thing pass as well as if particularly expressed: And cases of the same nature shall be within the same remedy. *Raym.* 54.

Such statutes as are beneficial to the people, shall be expounded largely, and not with restriction. *Style* 302. The exposition of statutes concerning the ecclesiastical courts, belongs to the common law courts: And a statute made in imitation of the common law, is to be expounded by it. *Hob.* 83, 97. An affirmative act, does not repeal a precedent affirmative statute. The affirmative words of statutes do not change the common law, without negative words added therein. And the statute of wills, being in the affirmative, doth not take away the custom to devise land in places where it is. *Jenk. Cent.* 212. *Dyer* 155. 1 *Inst.* 111. If a statute be made only in affirmance of the ancient common law, and doth not enact any thing new, but what was before provided for; it is nevertheless a statute, and may be pleaded: But the defendant hath a plea at common law. *Style's Reg.* 301. An act of parliament in affirmance of the common law, extends to all times after, though it mentions only to give remedy for the present; and where a thing is granted by statute, all necessary incidents are granted with it. 1 *Inst.* 235.

Wherever a statute gives or provides a thing, the common law supplies all manner of requisites. *Hard.* 62. Every statute made against an injury, gives a remedy by action, expressly or implicitly. 2 *Inst.* 55, 74. And besides an action upon the statute, as the subjects private remedy; the offender may be punished for contempt at the king's suit, by fine, &c. 2 *Co. Inst.* 131, 163. Things for necessity sake, or to prevent failure of justice, are excepted out of statutes. *Ibid.* 118.

Statutes made for the public good are to be expounded, so as to attain their end. 1 *Strange* 253, 258. *Kebble's Statutes* and *Rassal's* differed, and they who were for adhering to *Kebble* proved they had examined him with the parliament roll. The chief justice ruled it was enough, and *Kebble* was read. 1 *Strange* 446. Where an act of parliament only gives a remedy to the party grieved, it shall not be considered as a penal statute. *Willson* par. 1. fo. 412. How statutes are to be recited, and indictments drawn on them, see *Indictment*. And 4 *New Abr.* & 19 *Vin. Abr.* tit. *Statutes*. Also *vide Black. Com.* 1. v. 35.

Statute of Agreement between the King, Lords and Commons in parliament. 51 H. 3. Statute of Limitation of actions, and of *Jessails*, &c. *Vide the Heads.*

Statute Merchant. A *Statute Merchant* is a bond of record, acknowledged before the Clerk of the Statute Merchant, and lord mayor of the city of London, or two merchants assigned for that purpose; and before the mayors of other cities and towns, or the bailiff of any borough, &c. sealed with the seal of the debtor and the king, upon condition that if the obligor pays not the debt at the day, execution may be awarded against his body, lands, and goods, and the obligee shall hold the lands to him, his heirs and assigns, till the debt is levied. *Terms de Ley. Stat.* 13. *Edw.* 1. The Statute of *Abon Burnel*, 13 *Edw.* 1. enacts, That the merchant is to cause his debtor to come before the mayor of London, &c. to acknowledge the debt due, and day of payment; and the recognizance is to be entered in a roll: Then the clerk is to make out a bill obligatory, whereunto the seal of the debtor shall be affixed, together with the king's seal in the custody of the mayor, &c. And if the debtor fail in payment at the day, upon notice thereof to the mayor and clerk, they are to cause his goods and chattels to be sold by appraisement, to satisfy the creditor what his debt amounts unto, and the money without delay is to be paid to such creditor; or in case they cannot sell the goods, they shall cause so much of the goods to be delivered to the creditor as will answer his debt. If the debtor have no goods within the mayor's jurisdiction, the recognizance is to be sent to the Lord Chancellor under the king's seal, and he shall thereupon direct a writ to the sheriff in whose bailiwick the goods of the debtor are, who is to proceed therein as the mayor might have done if the said goods had been in his jurisdiction: And if the debtor have no goods whereupon the debt may be levied, he shall be imprisoned, and there remain until he agree with the creditor, &c. If the debtor have sureties, they shall be proceeded against in like manner as the debtor; but so long as the debt may be levied of the goods of the debtor, the sureties are to be without damage. Also a merchant stranger, to whom a debt is due by *Statute Merchant*, shall besides the payment of his debt, be satisfied for his stay and detainer from his business. And by the *statute de Mercatoribus*, 13 *Edw.* 1. the merchant shall cause his debtor to appear before the Mayor of the city of London, or other city or town, and there acknowledge the debt, &c. by recognizance, which is to be inrolled, the roll whereof must be double, one part to remain with the mayor, and the other with the clerk appointed by the king; and then one of the clerks is to write the obligation, which shall be sealed with the debtor's seal and that of the king, &c.

If the debt be not paid at the day upon the merchant's account, the mayor is to cause the debtor to be imprisoned, if to be found, and in prison to remain until he hath agreed the debt; and if the debtor cannot be found, the mayor shall send the recognizance into the Chancery, from whence a writ shall issue to the sheriff of the county where the debtor is, to arrest his body, and keep him in prison till he agree the debt; and within a quarter of a year, his lands and goods shall be delivered to him to pay the debt; but if the debtor do not satisfy the debt within that time, all his lands and goods shall be delivered to the merchant by a reasonable extent, to hold till the debt is levied thereby; and in the mean time he shall remain in prison; but when the debt is satisfied, the body of the debtor is to be delivered, together with his lands. If the sheriff return a *non est inventus*, &c. the merchant may have writ to all the sheriffs where he hath any land; and they shall deliver all the goods and lands of the debtor by extent, and the merchant shall be allowed his damage, and all reasonable costs, &c.

All the lands in the hands of the debtor, at the time of the recognizance, acknowledged, are chargeable; though after the debt is paid, they shall return to Grantees, if they are granted away, as shall the rest to the debtor: the debtor or his sureties dying, the merchant shall not take the body of the heir, &c. but shall have his lands until the debt is levied. In London, out of the commonalty, two merchants are to be chosen (and sworn by this statute); and the seal shall be opened before them, whereof one piece is to be delivered to the said merchants, and the other remain with the clerk; and before these merchants,

merchants, &c. recognizances may be taken; a fee of 1 s. per pound is allowed to the clerk for fixing the King's seal; and a seal is to be provided that shall serve for fairs, &c. but the statute extends not to Jews. Stat. *ibid.* Cro. Car. 440, 457. Statute Merchant were contrived for the security of merchants only, to provide a speedy remedy to recover their debts; but at this day they are used by others who follow not merchandize, and become one of the common assurances of the kingdom. Bridg. 21. Owen 82. And all obligations made to the king, are of the nature of these Statute Merchants. 12 Rep. 2, 3.

The form of a Statute Merchant bond, according to Flesay is as follows, viz.—*Noverint universi per presentis me A. B. de, &c. Teneri C. D. in centum libr. solvand. eidem C. D. ad festum, &c. Anno Regni, Regis, &c. Et nisi fecero, concedo quod currant super me & heredibus meis discretio & pena provisiva in Statuto Domini Regis edit. apud Westm. Datum London, tali die, &c.* See 3 Shep. Abr. 318. 2 New Abr. 331. Cro. Eliz. 233, 319. & Black. Com. 2 v. 160. 4 v. 419.

Statute Staple, is a bond of record, acknowledged before the mayor of the staple, in the presence of all or one of the constables; to this end, says the statute, there shall be a seal ordained, which shall be affixed to all obligations made on such recognizances acknowledged in the staple; this seal of the staple is the only seal the statute requires to attest this contract; but it is no more under the power or disposal of the mayor, than that appointed by the Statute Merchant; for though the statute appoints him the custody of it, yet it is in such a manner, that he cannot affix it to any obligation without their consent, it being to remain in the mayor's hands, under the security of their own seals. 2 Rol. Abr. 466. Stat. 27 Ed. 3. c. 9.

To understand a little of the original and constitution of the staple, and the advantage the nation had by this establishment, we must observe, that the place of residence, whither the merchants resorted with their staple commodities, was antiently called Estaple, which signifies no more than mart or market; and this was formerly appointed out of the realm, as at Calais, Antwerp, &c. and other ports on the continent, which were nearest to us, and whither the merchants might with safety coast it. 4 Inst. 238.

But besides these staple ports appointed abroad, there were others appointed at home, whither all the staple commodities were carried in order to their exportation, such as London, Westminster, Hull, &c. this was found to be of great use and consequence to the prince in particular, and to the interest and credit of the nation in general; for at these staple ports were the King's customs easily collected, and were by the officers of the staple, at two several payments, returned into the Exchequer; besides, at these staples, all merchants goods were carefully viewed and marked by the proper officers of the staple; and this necessarily avoided the exportation of decayed goods, or ill wrought manufactures, and consequently fixed a stamp of credit on the merchandizes exported, which, upon the view, always answered the expectation of the buyer. Maline's Lex Merc. 337—338. See the 27 Ed. 3. cap. 1.

The staple merchandizes, according to Lord Coke, are only wool, woollens, leather, lead and tin; others butter, cheese and cloths; but whatever they were, the mayor and constables had not only cognizance of all contracts and debts relating to them, but they had likewise jurisdiction over the people, and all manner of things touching the staple; this power was given them, lest the merchants should be diverted and drawn from their business and trade, by applying to the Common law, and running through the tedious forms of it, for a determination of their differences; and for the greater encouragement of merchants, that they might have all imaginable security in their contracts and dealings, and the most expeditious method of recovering their debts, without going out of the bounds of the staple. 27 Ed. 3. cap. 1. Maline's Lex Merc. 337. 27 Ed. 3. c. 1.

By this it appears, that this security was only designed for the merchants of the staple, and for debts only on

the sale of merchandizes brought thither; yet in time others began to apply it to their own ends, and the mayor and constable would take recognizances from strangers, surmising it was made for the payment of money for merchandizes brought to the staple; to prevent this mischief, the parliament in 23 H. 8. reduced the statute staple to its former channel, and laid a penalty of 40 l. on the mayor and constables who should extend the benefit of the statute to any but those of the staple; but though the statute of 23 H. 8. cap. 6. deprived them of this benefit; yet it framed a new sort of security, to be used *ad libitum* by all men, known by the name of a recognizance on 23 H. 8. or a recognizance in the nature of a statute staple, so called, because this act limits and appoints the same process, execution and advantage in every particular, as is set down in the statute staple. Co. Lit. 290.

A recognizance therefore in nature of a statute staple, as the words of the act declare, is the same with the former, only acknowledged under other persons; for as the statute runs, the chief justices of the King's bench and Common pleas, or in their absence, out of term, the mayor of the staple at Westminster, and the recorder of London jointly together, shall have power to take recognizances for payment of debt in the form set down in the statute; in this, as in the former cases, the King appoints a seal to attest the contract. Co. Lit. 290. a. 4 Inst. 238. 2 Rol. Abr. 466. Co. Ent. 12.

Debt lies as well upon a Statute Staple as upon a bond: And a statute acknowledged on lands, is a present duty, and ought to be satisfied before an obligation; a debt due on an obligation being but a chose in action, and recoverable by law, and not a present duty by law, as a debt upon a statute, judgment, or recognizance is, upon which present execution is to be taken without farther suit. Cro. Eliz. 355, 461, 494. 2 Lill. Abr. 536. But a judgment in a court of record, shall be preferred in case of execution before a Statute: Though if one acknowledge a Statute, and afterwards confess judgment; if the land be extended thereon, the cognisee shall have a *Scire facias* to avoid the extent upon the judgment. 6 Rep. 45. 1 Brough. 37. It is otherwise as to goods, for there he that comes first, shall be first served. *Ibid.* The cognisor of a Statute grants his estate to the cognisee; by this the execution of the Statute will be suspended. 2 Cro. 424. But if the cognisee before execution of a Statute, release to the cognisor all his right to the land; it will not be a discharge of the whole execution: For notwithstanding, he may sue execution of his body and goods. 3 Shep. Abr. 326. Upon a Statute Staple, a Capias and extent of lands, goods, and chattels are contained in one writ; but it is not so on a Statute Merchant. Jenk. Gent. 163. In Chancery the proceedings on a Statute Staple, are in the petty bag office; and Statute Staple are sueable in the King's Bench or Common pleas, as well as in Chancery. Cro. Eliz. 208. On a Statute's being satisfied, it is to be vacated by entering satisfaction, &c. Statute Staple and Statute Merchant are to be entered within six months, or shall not be good against purchasers. 27 Ed. 3. c. 4. See the Stat. 16 & 17 Car. 1. for preventing delays in extending Statutes. Vide Recognizance. Statutes Merchant and Staple, Tenants thereof. He that is in possession of lands on a Statute Merchant, or Staple, is called tenant by Statute Merchant, and Statute Staple, during the time of his possession: And creditors shall have freehold in the lands of debtors, and recovery by *novel disseisin*, if put out; but if tenant by Statute Merchant, or Statute Staple, hold over his term, he that hath right may sue out a *novus facias ad compellendum*, or enter, as upon an *assize*. 27 Ed. 3. c. 4.

As to recognizance in nature of a Statute Staple, see Stat. 23 H. 8. c. 6. Black. Com. 2 v. 160, 342. 4 F. 424. & 2d Recognizance.

Statute of a Corporation. An incident to a Corporation as soon as it is duly erected, and which is annexed of course, is to make by-laws, or private statutes for the better government of the Corporation; which are binding upon themselves, unless contrary to the laws of the land, and then they are void. This is included by law in the very act of Incorporation. Black. Com. 1 v. 179.

Statuto Stapulae. Is a writ that lies to take the body to prison, and seise upon the lands and goods of one who hath forfeited the bond called *statute staple*. Reg. Orig. 151.

Statuto Mercatorio. The writ for imprisoning him that hath forfeited a *statute merchant* bond, until the debt is satisfied: And of these writs, there is one against laypersons, and another against persons ecclesiastical. Reg. Orig. 146, 148.

Statutum de Laborantibus. An ancient writ for the apprehending of such labourers as refused to work according to statute. Reg. Judic. 27.

Statutum Sessionem. The *statute sessions*. A meeting in every hundred of constables and householders, by custom, for the ordering of servants, and debating of differences between the masters and servants, rating of servants wages, &c. 5 *Elix. cap. 4*.

Staurum. Any store or standing stock of cattle, provision, &c. *Matt. Westm. Anno 1259*.

Stealing. Is the fraudulent taking away of another man's goods, with an intent to *steal* them, against, or without the will of him whose goods they are. The Civil law judges open theft to be satisfied by the recompence of four-fold; and privy theft, by the recompence of double; but the law of England adjudges both those offences to be death, if the value of the thing stolen be above twelve-pence. *Cowell*. See *Larceny*.

Stealing an Heiress. This is the forcible abduction and marriage of an Heiress. It is made felony in the principal and his accessaries by 3 *H. 7. c. 2*. and by 39 *Elix. c. 9*. The benefit of clergy is taken away from all such felons, except accessaries after the offence.

Steel. See *Iron*.

Steepsmann. The same with the *stirmannus*, or *sturmmanus*.

Stephens (Joanna) 5000 *l.* reward granted to her for the discovery of her medicines for dissolving the stone, 12 *Geo. 2. cap. 23*.

Stepney. The rector of every church and chapel, converted into a parochial church in the parish of *Stepney*, to be nominated by *Brasen nose college*, 12 *Ann. B. 1. cap. 17*.

Sterling. (*Sterlingum*) Was the epithet for silver money current within this kingdom, and took name from this; that there was a pure coin stamped first in England by the *Easterlings*, or merchants of East Germany, by the command of King *John*; and *Houedon* writes it *Esterling*. Instead of the *pound sterling*, we now say so many *pounds of lawful English money*; but the word is not wholly disused, for though we ordinarily say lawful money of England, yet in the *mint* they call it *sterling money*; and when it was found convenient in the fabrication of monies, to have a certain quantity of baser metal to be mixed with the pure gold and silver, the word *sterling* was then introduced; and it has ever since been used to denote the certain proportion or degree of fineness, which ought to be retained in the respective coins. *Lownd's Essay upon coins* 14.

Steward. (*Senescallus*, compounded of the Sax. *Steda*, i. e. Room, or *Stead*, and *Ward*, a wardor keeper) Is as much as to say a man appointed in my place or *stead*, and hath many applications, but always denotes an officer of chief account within his jurisdiction. The greatest of these officers is, *The Lord High Steward of England*, who anciently had the supervising and regulating, next under the king, the administration of justice, and all other affairs of the realm, whether civil or military; and the office was hereditary, belonging to the *Baron of Leicester*, till forfeited to King *Hen. 3*. But the power of this officer being very great, of late the office of High Steward of England hath not been granted to any one, only *pro hac vice*, either for the trial of a peer of the realm on an indictment for a capital offence; or for the determination of the pretensions of those who claim to hold by grand serjeanty, to do certain honourable services to the King at his coronation, &c. for both which purposes he holds a court, and proceeds according to the laws and customs of England; and he to whom this office is granted must be of nobility and a Lord of parliament. 4 *Inst.* 58, 59. *Crompt. Jurisd.* 84. 13 *Hen.*

8. 11. 2 *Habck. P. C.* 5. Of the nine great officers of the crown, the Lord High Steward is the first; but when the special business for which he is appointed is over-ended, his commission expires. The first Lord High Steward that was created for the solemnizing of a Coronation, was *Thomas* second son of *Hen. 4th*; and the first Lord Steward for the trial of a peer, was *Edward Earl of Devon*, on the arraignment of *John Holderne* Earl of *Huntingdon* in the same reign, *Lex Constitution.* 170.

There is a Lord Steward of the Household, mentioned *Stat. 24 H. 8. cap. 13*, whose name was changed to that of *Great Master of the Household*, Anno 32 *H. 8*. But this statute was repealed by 1 *Mar. cap. 4*. and the office of Lord Steward of the household revived. He is the chief officer of the king's court, to whom is committed the care of the king's house; he has authority over all officers and servants of the household, except those belonging to the chapel, chamber, and stable; and the palace royal is exempted from all jurisdiction of any court, but only of the Lord Steward, or in his absence, of the Treasurer and Comptroller of the household, with the Steward of the Marshalsea, who by virtue of their offices, without any commission, hear and determine all treasons, murders, felonies, breaches of the peace, &c. committed in the King's palace: Besides the Treasurer and Comptroller, the Lord Steward hath under him a Cofferer, several Clerks of the Green Cloth, &c. He attends the King's person at the beginning of parliaments; and is a white staff officer, which he breaks over the hearse on the death of the King, and thereby discharges all officers under him: Of this officer's ancient power, read *Fleta, lib. 2.* and *F. N. B.* 241. In the liberty of *Westminster*, an officer is chosen and appointed, called *High Steward*; and there is a *Deputy Steward of Westminster*; and the word *Steward* is of to great diversity, that in most corporations, and all houses of honour, an officer is found of this name and authority. *Stewards of Manors*, see *Coppyhold*. See *Black. Com.* 4 *V.* 258, 260. As to the Lord High Steward, and as to Steward of the Household, *Id.* 3 *V.* 76. 4 *V.* 273.

Stewards of Courts. See, *Coppyhold*, *Manor*, *Leet*.

Stews. (from the Fr. *Estuon*, i. e. *Thermae*, *Balnearum*) Are those places which were permitted in England to women of professed incontinency, and that for hire would prostitute their bodies to all comers; so called, because dissolute persons are wont to prepare themselves for venereous acts by *batting*; and hot baths were by *Homer* reckoned among the effeminate sort of pleasures. These stews were suppressed by King *Hen. 8*. about the year 1546.

Stica. A brass Saxon coin, of the value of half a farthing four of them making a *belfing*.

Stick of Cels. A quantity or measure of twenty-five. A bind of cels contains ten sticks, and each stick 25 cels. *Stat. of Weights and Measures*.

Stichtler. An inferior officer who cuts wood within the King's parks of *Clarendon*. *Rot. Parl.* 1 *H. 6*.

Stiltpard, Strectyard. Otherwise called the *Sylebust*, in the parish of *Albhallows* in London, was by authority of parliament assigned to the merchants of the *Hanse* and *Almaine* or *Easterling* merchants, to have their abode in forever, with other tenements, rendering to the Mayor of London a certain yearly rent. *Stat. 14 Edw. 4*. In some records it is called *Gildhalda Tentonicorum*; and it was at first denominated *stijyard*, of a broad place or court where *stee* was sold, upon which that house was founded. See 19 *H. 7. c. 32*. 22 *H. 8. c. 9*. 1 *Edw. 6. c. 13*.

Stint, common without stint. There are commons without stint, and which last all the year. By the statute of *Merton* however, and other subsequent statutes, the lord of the manor may enclose so much of the waste as he pleases, for tillage or wood-ground, provided he leaves common sufficient for such as are entitled thereto. *Black. Com.* 2 *V.* 24. Not any commoner hath a right to surcharge the common to the prejudice of the other commoners. See *Second Surcharge*.

Stipula. *Stipula* left standing in the field after the corn is reaped and carried away. *Verbi gratia* *carac-*
rum, frugis, & dum sacra stipula, &c. *Cart. 2 Edw. 2.*
Stipu-

Sequestration in the Admiralty Courts. The first process in these courts is frequently by arrest of the defendant's person; when they take recognizances or stipulation of certain fidejussors in the nature of bail, and in case of default, may imprison both them and their principal. *Black. Com.* 3 *V.* 108, 109.

Steuermannus. (*Steuermannus*, Sax. *steer-man*) A pilot of a ship, or *steers-man*. *Domest.*

Stirpes, distribution per. Under the statute of distributions it will sometimes happen that personal estates are divided *per capita*, and sometimes *per stirpes*; whereas the Common law knows no other rule of succession but that *per stirpes* only. They are divided *per capita* to every man an equal share, when all the claimants claim in their own rights, as in equal degree of kindred, and not *jure representationis*, in the right of another person. As if the next of kin be the intestate's three brothers A. B. and C. here his estate is divided into three equal portions, and distributed *per capita*, one to each: But if one of these brothers, (A.) had been dead, leaving three children, and another, (B.) leaving two; then the distribution must have been *per stirpes*, viz. one third to A.'s three children, another third to B.'s two children, and the remaining third to C. the surviving brother: Yet if C. had also been dead, without issue, then A.'s and B.'s five children being all in equal degree to the intestate, would take in their own rights *per capita*, viz. each of them one fifth part. *Prec. Chan.* 54. *Black. Com.* 2 *V.* 517. 'Tis otherwise as to real estates. See the next title, or head.

Stirpes, succession in. The lineal descendants, in infinitum, of any person deceased, shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living.

Thus the child, grandchild, or great-grandchild (either male or female) of the eldest son succeeds before the younger son, and so in infinitum. And these representatives shall take neither more nor less, but just so much as their principals would have done. As if there be two sisters, Margaret and Charlotte, and Margaret dies leaving six daughters; and then John Stiles, the father of the two sisters, dies, without other issue: These six daughters shall take among them exactly the same as their mother Margaret would have done, had she been living; that is, a moiety of the lands of John Stiles in coparcenary. This taking by representation is called a succession by *stirpes*, according to the roots. *Black. Com.* 2 *V.* 217. So if Charlotte had died leaving three children, her three children would be intitled to the moiety the mother would have had, if living: Contrary to the case of distribution of personal estates under the statute.

Stock and Stobel. A forfeiture where any one is taken carrying *stipites* & *pabulum* out of the woods; for *stoc* signifies sticks, and *stovel* pabulum. *Antiq. Chart.*

Stock or Stroke. Syllables added to the names of places, from the Sax. *Stocce*, i. e. *Stipes*, *Truncus*; as *Woodstock*, *Basingstoke*, &c.

Stock and Family. If lands were devised generally to a *stock* or family; it shall be understood of the heir principal of the house. *Hob.* 33. See *Tylwinch*.

Stocks and Stocks, in Exchange Alley. All *stocks* are authorized by act of parliament, or by charter, or used by obsolete charters, shall be void, and the undertakings are declared null and void, by Stat. 6 *Geo.* 1. cap. 18. All *premiums* to deliver or receive, accept of refuse any public *stock*, or *share* therein, and contracts in nature of wagers, patts and *assumps* relating to the value of the *stock*, shall be void; and the *premiums* returned, or may be recovered by *action* with double costs; and the persons entering into or executing any such contract, shall forfeit 100*l.* No money shall be given to compound any difference, for not delivering or transferring *stock*, or not performing contracts; but the whole money agreed, is to be paid, and the *stock* transferred on pain of 100*l.* Persons buying, on refusal or neglect to transfer at the day, may buy the like quantity of *stock*, of any other person, and recover the damage of the first contractor: And contracts for sale of any *stock*, where contractors are not actually possessed of or intitled unto the same, to be void; and the parties agreeing to

sell, &c. incur a penalty of 500*l.* Brokers making agreements, &c. and doing contrary, are also liable to penalties: But this act not to hinder lending money on Stocks, or contracts for re-delivering or transferring thereon, so, as no *premium* be paid for the loan more than legal interest. Stat. 7 *Geo.* 2. c. 8. Made perpetual by 10 *Geo.* 2. As to Stocks sold, it is held, that an actual transfer is not necessary, unless the person to whom it ought to be made, was at the place and time ready to accept it; and then the time of tender is the last hour of the day on which the Stock was to be transferred. *Mod. Caf. in L. and E.* 106, 219. If the plaintiff doth not set forth in his declaration that he was at the *South-Sea House*, &c. on the day, at such a time, and staid till the last hour, to transfer his Stock, he cannot maintain his action. *Pagb.* 8 *Geo.* 1. In equity it has been adjudged, if a trustee, or executor, with the trust money buys stocks, and thereby gains considerably, he shall have the advantage of it to himself; in respect of the hazard he ran of being a loser by it, which he must have borne, if able. *Abr. Caf. Eq.* 398. But in a like case, where money laid out on Stocks was greatly improved; it was decreed, that as if the Stock had fallen, the trust must have suffered; so its accidental rise shall be for the benefit of it. 1 *P. Williams* 649. See *Brokers and Felony*.

Stocks, (cippus) A wooden engine to put the legs of offenders in, for the securing of disorderly persons, and by way of punishment in divers cases ordained by statute, &c. And it is said that every vill within the precinct of a town is indictable for not having a pair of Stocks, and shall forfeit 5*l.* *Kitch.* 13.

Stockland and Bondland. In the manor of *Wadhurst* in *Suffex*, there are two sorts of copyhold estates, viz. *Stockland* and *Bondland*, descendable by custom in several manors: As if a man be first admitted to *Stockland*, and afterwards to *Bondland*, and dies seised of both, his eldest son and heir shall inherit both estates; but if he be admitted first to *Bondland*, and after to the other, and of these die th seised, his youngest son shall inherit: And *Bondland* held alone, descends to the youngest son. 2 *Leon* 55.

Stola. Was a garment formerly worn by priests, like unto those which we now call hoods. And sometimes it is taken for the archiepiscopal pall. *Badmer. cap.* 188: Also a settlement which matrons wore. *Cowell*.

Stolen Goods. To help people to stolen goods for reward, without apprehending the felon, is felony. 4 *Geo.* 1. cap. 11. Prosecutors of such offenders how rewarded, 6 *Geo.* 1. c. 25. Persons buying or receiving lead, iron, copper, brass, bell-metal or solder, knowing it to be stolen, to be transported. 29 *Geo.* 2. c. 30. Stat. 3 & 4 *W. & M.* c. 9. & 5 *Ann.* c. 31. makes the person receiving stolen goods knowing them to be stolen, accessory to the theft and felony. And by 1 *Ann.* c. 9. and 5 *Ann.* c. 31. the receivers may be prosecuted for a misdemeanor, tho' the principal felon be not taken.

Trover for goods stolen from the plaintiff, and sold to defendant, not in a market overt; but in his shop (not in *London*) it appeared in evidence that the defendant did not know they were stolen goods, and Lord *Hardwicke* said in such case, tho' the property was not (strictly speaking) altered, yet as it was a fair transaction, he would hold the plaintiff to strict proof, that these were the identical goods stolen, and he not being able to prove that was nonsuited. *Rep. Temp. Hardwicke per Annotat.* 349. If the owner of the goods knew or had reasonable cause to suspect they were stolen; he shall not have restitution, unless he prosecutes the thief to conviction. *Id.* 350. A bill in a shop in *London* (dealing in such goods) which is by custom a market overt, will alter the property. *Id.* 350.

Stone. A weight of 14 pounds, used for weighing of wool, &c. The stone of wool ought to weigh 14 pounds; but in some places, by custom, it is less, as 12 pounds and a half. A stone of wax is 8 pounds; and in *London* the stone of beef is no more. 11 *Hen.* 7. c. 4. *Rot. Parl.* 27 *Ed.* 1.

Stones of War. Are not to be imbellied; and none to make *marks* of war with the King's marks, but contractors with the principal officers or commissioners of the navy, 10 *L.*

havy, &c. under the penalty of 200*l.* Stat. 9 & 10 W. 3. Plantation pitch and tar to be clean, 5 Geo. 1. c. 11. 24 Geo. 2. cap. 52. 25 Geo. 2. cap. 35. Penalty of having stores of the King's mark, 9 & 10 W. 3. cap. 41. 9 Geo. 1. c. 8. Justices may mitigate the penalty of concealing stores, 9 Geo. 1. cap. 8. Justices of assize and quarter-sessions may hear and determine offences relating to stores, 17 Geo. 2. c. 40. Pre-emption of stores imported in neutral ships, given to the commissioners of the navy, during the war, 19 Geo. 2. c. 36. Vide *Naval Stores*.

Stotarius, He who had the care of the stud or breed of young horses. *Leg. Alfred. c. 9.*

Stoth, *Nativi de W. soluit quilibet pro filiabus suis Maritandis Gerson Domino, & Ourlop pro filiabus corruptis, & Stoth, & alia servitia, &c.* Petr. Bleff. contin. Hist. Croyl. p. 115.

Stourton, The 29 Car. 2. not to make void the lease granted by the dean and chapter of York, of the parsonage and tythes, in Stourton in Nottinghamshire, 29 Car. 2. c. 8.

Stow, (Sax. i. e. *locus*) A place, and is often joined to other words; as *Godstow* is a place dedicated to God.

Stowage, Is the room where goods are laid, or 'tis the money paid for such places. See *Housage*.

Straits, A narrow sea between two lands, or an arm of the sea. Also there is a narrow coarse cloth antiently so called. 18 Hen. 6. c. 16.

Strand, (Sax.) Any shore or bank of a sea or great river. Hence the street in the west suburbs of London, which lay next the shore or bank of the Thames, is called the Strand. An impunity from custom, and all impositions upon goods or vessels, by land or water, was usually expressed by *strand* and *stream*; as King Hen. 2. in his charter to the town of Rochester.—*Concedo & confirmo in perpetuum cum socne & soke, & strand & stream.* Mon. Angl. tom. 3. p. 4.

Stranded, (from the Sax. *strand*) Is when a ship is by tempest or ill steerage run on ground, and so perishes. 17 Car. 1. c. 14. Where a vessel is *stranded*, justices of the peace, &c. shall command constables near the sea-coasts to call assistance for the preservation of the ship; and officers of men of war are to be aiding and assisting. 12 Ann. c. 18.

Stranger, (derived from the Fr. *estranger*, *alienus*) Signifies generally in our language, a man born out of the realm, or unknown. In the law it hath a special signification, for him that is not *privy* to an act: As a *stranger* to a judgment, is he to whom a judgment doth not belong; and in this sense it is directly contrary to *party* or *privy*. Old Nat. Br. 128. *Strangers* to deeds shall not take advantage of conditions of entry, &c. as parties and privies may; but they are not obliged to make their claims on a fine levied till five years; whereas privies, such as the heirs of the party that passed the fine, are barred presently. 1 Inst. 214. 2 Inst. 516. 3 Rep. 79. *Strangers* have either a *present* or *future* right; or an apparent possibility of right, growing afterwards; &c. Wood's Inst. 245. See *Black. Com.* 2 V. 356.

Stray, or going *astray* of beasts and cattle, see *Estray*.

Stream-works, A kind of works in the Stannaries, mentioned in the Stat. 27 H. 8. c. 23.

Streemau, (Sax.) *Robustus, vel potens vir.* Leland, vol. 2. p. 183.

Streets. If *streets* in London are not well paved, the mayor and aldermen, or any three justices there, may set fines upon persons, to be levied by distress or action, &c. 32 & 35 H. 8. c. 10. And for nuisances, disturbances, revelling, &c. in *streets*, certain penalties are inflicted by the city laws. *Lex Lond.* 194. It is made felony maliciously to assault persons in the *streets*, with intent to tear their clothes, &c. Stat. 6 Geo. 1. c. 23. s. 11. Vide *Rabbery*.

Strepitus, *Intestinis*. The circumstances of noise and crowd, and other turbulent formalities at a process or trial in a publick court of justice. And therefore our wise ancestors did in many cases provide, that right and justice should be done in a more private and quiet manner. *Cowell. Paroch. Antiq.* p. 344.

Streetward, Was an officer of the *streets*, like our surveyor of the highways, or rather a scavenger. *Mon. Angl. tom. 2. p. 187.*

Striking in the King's superior courts of justice, in Westminster-hall, or at the assizes, subjects the offender to the loss of the right-hand, imprisonment for life, and forfeiture of goods and chattels, and of the profits of his lands during life. *Stauf. P. C.* 38. 3 Inst. 440, 1. 1. Maliciously striking in the King's palace, wherein his royal person resides, whereby blood is drawn, is punishable by perpetual imprisonment, and fine at the King's pleasure; and also with loss of the offender's right-hand, the solemn execution of which sentence is described at length in the Stat. 35 H. 8. c. 12. See *Black. Com.* 4 V. 125, 273. And see *Church, Palace*.

Strip, (*strepitus*) Destruction, mutilation, from the Fr. *estropier*: *Strepitum & vestium facere*, i. e. to make strip and waste, or strip and waste. See *Estreperment*.

Strond, An old Saxon word signifying the same as *strand*.

Strumpet, (*meretrix*) A whore, harlot, or courtesan: This word was heretofore used for an addition. *Plac. apud Cestr.* 6 Hen. 5.

Strype, The eighth part of a seam or quarter of corn, a *stryke* or bushel. *Cartular. Rading. MS.* 116.

Strub of mares, Is a company of mares kept for breeding of colts; from the Sax. *stodmare*, i. e. *equa ad partum*.

Study of the Laws. See *Black. Com.* the Introduction to the first Volume.

Stultifying one's self. It hath been said, that a man who compasses himself, tho' he be afterwards brought to a right mind, shall not be permitted to alledge his own insanity, in order to avoid his grant; for that no man shall be allowed to stultify himself, or plead his own disability: But late opinions, feeling the inconvenience of this rule, have in many points endeavoured to restrain it. *Comb.* 469. 3 Mod. 310, 311. 1 Equ. Cas. Abr. 279. And it seems to be settled, that their acts are only binding, in case they be afterwards agreed to, when their imbecillity ceases. Vide *Black. Com.* 2 V. 291, 292.

Sturgeon, May be imported, 10 & 11 W. 3. c. 24. The King, where intitled to *sturgeon*, 17 Ed. 2. Stat. 1. c. 11.

Style, (*appellus*) Is to call, name, or intitle one; as the style of the King of England is *George the Third*, by the Grace of God King of Great Britain, France and Ireland, Defender of the Faith, &c. There is also an *Old* and *New* style, used in the dates of things abroad; the latter being eleven days before the former.

Subarrare. Florence of Worcester tells us, that King Alfred subarravit & duxit a noblewoman of Mercia, anno 868.

Sub-deacon, An antient officer in the church, made by the delivery of an empty platter and cup by the bishop, and of a pitcher, basin and towel by the archdeacon: His office was to wait on the deacons with the linen on which the body, &c. was consecrated, and to receive and carry away the plate with the offerings at sacraments, the cup with the wine and water in it, &c. He is often mentioned by the monkish historians, and particularly in the *Apostolical Canons*, 42, 43.

Subjection, civil. Civil subjection is the obligation, whereby the inferior is constrained by the superior to act contrary to what his own reason and inclination would suggest. Obedience to the laws in being is undoubtedly a sufficient extenuation of civil guilt before the municipal tribunal. *Black. Com.* 4 V. 28.

Subjects, (*subditi*) Are the members of the Commonwealth under the King their head. *Wood's Inst.* 22.

Subinfeudation, Was where the inferior lords, in imitation of their superiors, began to carve out and grant to others smaller estates than their own, to be held of themselves, and were so proceeding downwards in infinitum, till the superior lords observed, that by this method of *subinfeudation* they lost all their feudal profits, of wardships, marriages, and escheats, which fell into the hands of these meane or middle lords, who were the immediate superiors of the *vassals*, or him who occupied the land. This occasioned the Stat. of *Westm.* 3. of *quia emptores*, 18 Ed. 1. to be made; which directs, that, upon all sales or feoffments of lands, the feoffee shall hold the same, not of his immediate feoffor, but of the chief lord of the fee of whom such feoffor himself held it. And

from hence it is held, that all manners existing at this day must have existed by immemorial prescription; or at least ever since the 18 Ed. 1. when the statute of *quia emptores* was made. *Black. Com. 2 P. 91, 92.*

Subjugalis, Is any beast carrying the yoke. *Matt. Paris. 1249.*

Sublegerius, (from the Sax. *sublegeth*, i. e. *incestus*) One who is guilty of incestuous whoredom.

Sub-marshal, An officer in the *Marches*, who is deputy to the *Chief Marshal* of the King's House, commonly called the *Knight Marshal*, and hath the custody of the prisoners there. He is otherwise termed *Under Marshal*. *Comp. Jurif. 104.*

Submissio, Of matters to arbitrament, by bond or covenant, &c. upon which an action may be brought on non-performance of the award, if it is made for payment of money. *10 Rep. 131. See Arbitrament.*

Subnervare, To cut the sinews of the legs or thighs; to *ham-string*: And it was an old custom in England, meretricious & impudicæ mulieres subnervare.

Subornation, (*subornatio*) A secret under-hand preparing, intruding, or bringing in a false witness; and from hence *subornation of perjury* is the preparing or corrupt allying to perjury. Subornation of witnesses we read of in the 32 Hen. 8. c. 9. And procuring or suborning a witness to give false testimony in any court of record concerning lands or goods, the offender shall forfeit 10 l. or suffer imprisonment for half a year, stand on the pillory, &c. by 6 Eliz. c. 9. See *Perjury*.

Subpoena Is a writ whereby common persons are called into Chancery, in such cases where the Common law hath provided no ordinary remedy; and the name of it proceeds from the words therein, which charge the party called to appear at the day and place assigned, *sub poena centum librarum*, &c. *West. Symb. par. 2. Comp. Juridict. 33.* The *subpoena* is the leading process in the courts of equity; and by statute, when a bill is filed against any person, process of *subpoena* shall be taken out to oblige the defendant to appear and answer the bill, &c. 4 & 5 Ann. c. 16. Where a defendant absconds, or goes beyond sea, to avoid being served with process of *subpoena* to appear, &c. see 5 Geo. 2. c. 25. and *infra*. And there are several of these writs in Chancery; as the *subpoena ad respondendum*, *subpoena ad replicandum* & *ad rejoicendum*, *subpoena ad testificandum* & *ad audiendum judicium*, &c. which writs are to be made out by the proper clerks of the *subpoena office*; and *subpoena's* to answer must be personally served by being left with the defendant, or at his house with one of the family, on affidavit whereof, if the defendant do not answer, attachment shall be had against him, &c. *Pract. Solic. 5, 6.* A *subpoena ad testificandum* lies for the calling in of witnesses to testify in any cause, not only in Chancery, but in all other courts; and in that court, and in the Exchequer, is made use of in law and equity. The two chief writs of *subpoena* are to appear and to testify; and the latter issues out of the court where the issue is joined, upon which the evidence is to be given. 2 Lill. Abr. 536. In this writ the 100 l. penalty is inserted only in *terrorem*, being never levied; though if a witness served with a *subpoena*, refuse to appear, on tender of his charges, the party injured thereby may recover 10 l. damages, and other recompence by action of the case. 5 Eliz. c. 9. See *Black. Com. 4 P. 137.*

Subpoena ad testificandum. A writ or process, to bring in witnesses to give their testimony. See *stat. 5 Eliz. c. 9.* If a witness on being served with this process does not appear, the court will take an attachment against him, or a party plaintiff or defendant injured by his non-attendance may maintain an action against the witness. See *Black. Com. 3 P. 159.*

Subpoena duces tecum. This is a writ or process of the same kind with the preceding, including a clause of requisition, for the witness to bring and produce books and papers, &c. in his hands, belonging to, or wherein the parties are interested. See *Black. Com. 3 P. 158.*

Subpoena in equitate. A process in Equity, calling on a defendant to appear and answer to the complainant's bill. See *Black. Com. 3 P. 144.* and the *stat. 5 Geo. 2. c. 25.* Which enacts that where the party cannot be found to be served with *subpoena*, and absconds (as

believed) to avoid being served, a day shall be appointed him to appear to the bill of the plaintiff; which is to be inserted in the *London Gazette*, read in the parish church where the defendant last lived, and fixed up at the royal exchange; And if the defendant doth not appear upon that day, the bill shall be taken *pro confesso*. As to the original of this *subpoena*, see *Black. Com. 3 P. 51.* And see *supra subpoena*.

Subscription of witnesses. A will of lands must by *stat. 29 Car. 2. c. 3. § 5.* be attested or subscribed by three credible witnesses at least: In other conveyances, the actual subscription of the witnesses is not required by law, though it is prudent for them so to do. *Black. Com. 2 P. 378.*

Subsequent Conditions. These are such by the failure or nonperformance of which an estate already vested may be defeated. *Black. Com. 2 P. 254.* which vide.

Subsequent Evidence. In attain, he that brings the attain can give no other evidence to the grand jury, than what was originally given to the petit. *Black. Com. 3 P. 403.* The proceeding by attain is now out of use, as the courts of law will grant a new trial, where cause sufficient can be shewn, on an application in due time.

On a re-hearing in equity, all the evidence taken in the cause, whether read before or not, is admitted to be read: Because it is the decree of the Chancellor himself, who only now sits to hear reasons why the decree should not be enrolled and perfected; at which time all the omissions of either evidence or argument may be supplied. *Gill. Rep. 151, 152. Black. Com. 3 P. 454, 455.*

Subsidy, (*subsidium*) Signifies an aid, tax, or tribute, granted to the King for the urgent occasions of the kingdom; to be levied on every subject of ability according to the value of his lands or goods. Some persons have held, that the *subsidy* of tonnage, &c. might be taken by the King of his own prerogative; especially in a case of necessity, and for the publick good, as to make an equality of trade: And that the precedents of the Exchequer make the law herein. But the law was adjudged otherwise, by both houses of parliament. *Jenk. Cent. 208. Dyer 165. Lam 24. Gro. Car. 601. Vide Customs, and Tax.*

History does not mention that the Saxons Kings had any *subsidies* after the manner of ours at present; but they had both levies of money and personal services towards the building and repairing of cities, castles, bridges, military expeditions, &c. which they called *Bargbote*, *Brigbote*, *Harafare*, *Haregeld*, &c. But when the Danes harried the land, King Ethelred submitted to pay them for redemption of peace several great sums of money yearly. This was called *Danegeld*, for the levying of which every hide of land was taxed yearly at twelve pence, lands of the church only excepted, and thereupon it was after called *hydagium*, and that name remained afterwards upon all taxes and *subsidies* imposed upon lands; but sometimes it was laid upon cattle; and then was termed *borngeld*. The Normans called these sometimes *taxes*, sometimes *tallages*, otherwise *auxillia* & *subsidia*. The Conqueror had these *taxes*, and made a law for the manner of their levying, as appears in *Enchiridionibus ejus*, pag. 125. *feft. Polonus & Germani*, &c. Many years after the conquest they were levied otherwise than now, as every ninth lamb, every ninth hide, and every ninth sheaf. 14 E. 3. *stat. 1. cap. 26.* Of which you may find great variety in *Rastall's Abridgement*, tit. *Taxes*, *Tenures*, *Extentibus*, *Subsidibus*, &c. and 4 *Inst. fol. 26* and 33. Whence we may gather there is no certain rate, but as the parliament shall think fit. *Subsidy* is in our Statute sometimes confounded with customs. 12 H. 4. *cap. 2. Council.* See *Black. Com. 1 P. 307, 310, 311, 312, 313, 314.*

As aid to be taken but by assent of parliament. 14 Ed. 3. *stat. 2. cap. 1.*

Substance. The *substance* of the law is not to be regarded; and therefore our law doth not consist of *substantia*, before matters of circumstance, &c. as in the Statutes 36 E. 3. c. 15. 33 H. 6. c. 10. and 1 H. 7. c. 24. 23 Eliz. c. 4.

Sub-

Substitute, (Substitutus) One placed under another person to transact some business, &c. See *Attorney*.

Subtraction of conjugal Rights. This is when either husband or wife, lives separate from the other without any sufficient reason; in which case the ecclesiastical jurisdiction (on a suit for restitution of conjugal rights) will compel them to come together again, if either party be weak enough to desire it, contrary to the inclination of the other. *Black. Com. 3 V. 94.*

Subtraction of Legacies. This is the withholding or detaining of Legacies: As a consequential part of testamentary jurisdiction, the spiritual court administers redress herein, by compelling the executor to pay them. In this case the courts of equity exercise a concurrent jurisdiction with the ecclesiastical courts, as incident to some other species of relief prayed by the complainant; as to compel the executor to account for the testator's effects, or assent to the legacy, or the like. For, as it is beneath the dignity of the king's courts to be merely ancillary to other inferior jurisdictions, the cause, when once brought there, receives there also its full determination. *Black. Com. 3 V. 98.*

Subtraction of Rents and Services, &c. This happens, when any person who owes any suit, duty, custom, rent, or service to another, withdraws or neglects to perform or pay it, &c. See *Black. Com. 3 V. 230.*

Subtraction of Tithes. This is the withholding of tithes, from the parson or vicar, whether the former be a clergyman, or a lay appropriator. See *stat. 27 H. 8. c. 20. 32 H. 8. c. 7.* And *Black. Com. 3 V. 88, 102.* also vide *Tithes*.

Suburban, Are husbandmen, according to the *Monasticon*. Tom. 2. p. 468.

Succession to the Crown, see King.

Succession ab intestato. The statute of distributions bears some resemblance to the Roman law, of successions *ab intestato*. See *Black. Com. 2 V. 516.*

Succession to Goods and Chattels. The gaining a property in chattels, either personal or real, by *succession*, is in strictness of law, only applicable to corporations aggregate of many, as dean and chapter, mayor and commonalty, master and fellows, and the like; in which one set of men may, by succeeding another set, acquire a property in all the goods, moveables, and other chattels of the corporation. *Black. Com. 2 V. 430.*

Succession to the Crown. The succession to the crown, hath already been noticed under *Settlement*. See farther *Black. Com. 1 V. 197. 4 V. 433.*

Successor, (Lat.) Is he that followeth or cometh in another's place. *Sole corporations* may take a fee-simple estate to them and their successors; but not without the word *successors*: And such a corporation cannot regularly take in *succession* goods and chattels; and therefore if a lease for a hundred years be made to a person and his successors, it hath been adjudged only an estate for life: Nor may a sole corporation bind the successors. 4 *Rep. 65. 1 Inst. 8, 46, 94. 4 Inst. 249.* An aggregate corporation may have a fee-simple estate in *succession* without the word *successors*; and take goods and chattels in action or possession, and they shall go to the successors. *Wood's Inst. 111.* Vide *Corporation*, and *Supra*.

Successiones Arborum, The cuttings and croppings of trees. *Chart. 2 Hen. 5.*

Sufferance. Tenant at *sufferance*, is he who holdeth over his term at first lawfully granted. *Terms de Ley.* A person is tenant at *sufferance* that continues after his estate is ended, and wrongfully holdeth against another. *Sec. 1 Co. Inst. 57.* See *stat. 4 Geo. 2. c. 28.* and *Black. Com. 2 V. 150.*

Sufferentia pacis, A grant or sufferance of peace or truce. — *Pro quadam Sufferentia pacis cum illis habenda, per annum unum duratura.* Claus. 16 Ed. 3.

Suffragan, (Suffraganeus, Chorepiscopus, Episcopi vicarius) Is a *Vicar Bishop* ordained to aid and assist the bishop of the diocese in his spiritual function; or one who supplieth the place instead of the bishop. Some writers call these *Suffragani* by the name of *Subsidiary Bishops*, whose number is limited by the *stat. 26 H. 8. cap. 14.* By which statute it was enacted, That it should be lawful for every bishop, at his pleasure, to elect two

honest and discreet spiritual persons within his diocese, and to present them to the King, that he might give to one of them such title, stile and dignity of such of the Sees in the said statute mentioned, as he should think fit: And that every such person should be called a *Bishop Suffragan* of the same See, &c. This act sets forth at large for what places such *Suffragani* were to be nominated by the King; and if any one exercise the jurisdiction of a *Suffragan*, without the appointment of the bishop of the diocese, &c. he shall be guilty of a *Premunire*. *Stat. Ibid.* See *Chorepiscopi*.

Sugar, Duty upon Sugar, 6 *Geo. 2. c. 13.* The drawback on exportation of sugar imported from the *English* plantations in *America*, 9 & 10 *W. 3. cap. 23. 6 Geo. 2. c. 13.* Sugar may be imported from *Spain* and *Portugal*, as usual, 6 *Geo. 2. c. 13.* Drawback on *British* refined sugar out of the last subsidy, 21 *Geo. 2. c. 2.*

Suggestion, (sugessio) Is in law a surmise, or representing of a thing; and by *magna charta* no person shall be put to his law on the suggestion of another, but by lawful witnesses. 9 *H. 3. c. 28.* *Suggestion* are grounds to move for prohibitions to suits in the spiritual courts, &c. when they meddle with matters out of their jurisdictions. 2 *Lill. Abn. 536.* Though matters of record ought not to be stayed upon the bare suggestion of the party; there ought to be an affidavit made of the matter suggested, to induce the court to grant a rule for staying the proceedings upon the record. 2 *Lill. 537.* There are suggestions in *replevin*, for a *retorno habendo*; which it is said are not traversable, as there are for prohibitions to the spiritual or admiralty courts. 1 *Plowd. 76.* Breaches of covenants and deaths of persons must be suggested upon record, &c. 8 & 9 *W. 3. cap. 10.* See *Black. Com. 3 V. 113. 4 V. 305.*

Suicide. See *Self Murder*, and *Black. Com. 4 V. 189.*

Suit, (Sua, Fr. suis, i. e. consecutio, sequela) signifies a following another; but in divers senses. The first is a suit in law, and is divided into *suit real* and *personal*; which is all one with *action* real and personal. 2. *Suit of court*, an attendance which the tenant owes to the court of his lord. 3. *Suit covenants*, when a man hath covenanted to do suit in the Lord's court. 4. *Suit custom*, where I and my ancestors owe suit time out of mind. 5. *Suit* is the following one in chase, as *fresh suit*: And this word is used for a petition made to the King, or any great personage. See *Black. Com. 3 V. 295.*

Suit and Service. When the tenant had professed himself to be the man of his superior or lord, the next consideration was concerning the service, which, as such, he was bound to render for the land he held. This, in pore, proper, and original feuds, was only twofold: To follow, or do suit to, the lord in his courts in time of peace; and in his armies or warlike retinue, when necessity called him to the field. *Black. Com. 2 V. 54.*

Suit of Court, That is, suit to the lord's court, is that service which the feudary tenant was bound to do at the Lord's court. At first it was expressly mentioned in the grant how often these courts should be held. This appears by *Flota, l. 2. c. 71. par. 14. Qui faciant sedas ad curiam domini & quot sedas per annum.* Sometimes one or more, but never exceeding three. *Thorn* mentions two, *viz. Et faciant sedas ad curiam Cantuarie bis per annum, scilicet, in festo Michaelis & Pasche.* But all the lord's tenants were not bound to attend his courts, but only those to whom their estates were granted upon that condition; But every man was bound to attend the Sheriff's court twice in every year; which see in *form regalis*. And if the inheritance, by reason whereof the tenant was bound to attend only at one court, did descend to co-heirs, he who had *capitulum partem*, was bound to attend the lord's court both for himself and all the co-heirs. *Conell.*

None to be distrained for suit of court, but they who are bound to it by charter or prescription, 31 *Mod. 51. 2. 3. c. 9.* Joint-tenants and parceners shall make but one suit, 32 *H. 3. c. 9.* The remedy against the lord distraining for it, where it is not due, and against the tenant withholding it, where it is due, 32 *H. 3. c. 9.* It is not taken away, by 22 *Car. 2. 12 Car. 2. cap. 24. s. 5.*

Suits at law, Are to be prosecuted in certain times limited by the statute 21 Jac. 1. c. 16. *Sec.* Those persons who acted as libetarians, deputy lieutenants, justices of peace, &c. not authorized, at the bringing in of King William, were indemnified from vexatious suits, by 1 W. & M. c. 8. So persons that acted for security of the government, during the rebellion in the late reign. 1 Geo. 1. c. 39. Persons desiring to end any suits or controversies, for which there is no remedy but by personal action or bill in equity, may agree that their submission to the award of arbitrators, shall be made a rule of court, &c. 9 G. 10 W. 3. c. 15. See *Black. Com.* 3 V. 116.

Suit in equity, The first commencement (in Chancery) is by preferring a bill to the Lord Chancellor in the stile of a petition, setting forth the circumstances of the case at length, as some fraud, trust, or hardship, and praying relief, and also process of subpoena against the defendant. The defendant is to answer upon oath, to all the matter charged in the bill. Or the defendant may plead and demur, or demur alone, as advised by counsel. If the defendant answers, and the plaintiff finds sufficient matter confessed in the defendant's answer to ground a decree upon, he may proceed to the hearing of the cause on bill and answer only. But in that case, he must take the defendant's answer to be true in every point. Otherwise the course is for the plaintiff to reply generally to the answer, averring his bill to be true, certain, and sufficient, and the defendant's answer to be directly the reverse; which he is ready to prove as the court shall award: upon which the defendant rejoins, averring the like on his side; which is joining issue upon the facts in dispute. See *Black. Com.* 3 V. 442, *Sec.* 448, 9.

Suit of the King's Peace, Is the pursuing a man for the breach of the peace. 6 R. 2. c. 1. 3 H. 4. c. 15.

Suit-Silver, A small rent or sum of money paid in some manors to excuse the appearance of freeholders at the courts of their lords.

Sutcus-Aqua, A little brook or stream of water; otherwise called *Sty*, and in *Essex* *Stoke*. Paroch. Antiq. 537.

Suttry, (From *Stro Sax. Suth*, i. e. *Aratum*) A plough-land. 1 Inst. 55.

Suttinga, Sullingata Terra, Is the same with *Sutling*. Thon. pag. 1931.

Sutlage, (Sutagium & Suttinagium) Toll for carriage on horseback: *Pro uno equo portante suttagium ad unum milium Ann. obolum.* Chart. de Foresta, c. 14. Crompt. Jurif. 191.

Summary, (Summarium) Or an abridgement. *Law Lat. Dic.*

Summary conditions, A summary proceeding is such as is directed by several acts of parliament (for the Common law is a stranger to it) unless in the case of contempt) for the conviction of offenders, and the inflicting of certain penalties created by those acts of parliament. In these cases there is no intervention of a jury, but the party accused is acquitted or condemned by the suffrage of such person only, as the statute hath appointed for his judges, as one or more justice of the peace, &c. See *Black. Com.* 4 V. 277, *Sec.*

Summitter-Silver, A payment to the lords of the wood in the *Woods of Kent*, who used to visit those places in *summer-time*, when their under-tenants were bound to prepare little *summer-houses* for their reception, or else pay a composition in money. *Custom of Greenwich*, MS.

Summons, Is a writ judicial of great diversity according to the divers cases wherein it is used. *Just. Rep.*

Summoners, (Summonarii) Are petty officers that cite and warn men to appear in any court; and these ought to be sworn *summoners*, &c. *Plur. Reg.* The summoners were properly the apparitors, who warned the delinquents at a certain time and place to answer any charge or complaint exhibited against them. And in citations from a superior court, they were to be equals of the party cited, at least the latter were to be summoned by none under the degree of knight. *Black. Com.* 1 V. 177. See *Black. Com.* 3 V. 177.

Summonitores scaccarii, Officers who assisted in collecting the King's revenues, by citing the defaulters there in, into the court of Exchequer.

Summons, (Summons) Is with us as much as *eccellu in jus*, or *citatio* among the *Civilians*. *Fleta*, lib. 6. cap. 6. In general, it is a writ to the sheriff to warn one to appear at a day; and must be by certain summoners on the tenant's land, not his goods, &c. And if against an heir, shall be on the lands that did descend; or making default, at the *grand cape* he may wage his law of *non summons*. 6 Rep. 54. 37 H. 6. c. 26. There is a summons in writs of *formedon*, &c. And on every summons upon the land in a *real action*, fourteen days before the return, proclamation is to be made thereof on a Sunday, at or near the door of the church or chapel of the place where the land lies, which must be returned with the names of the summoners: And if such proclamation shall not be had, then no *grand cape* shall issue, but an *alias* and a *pluries summons*, until a summons and proclamation be truly made and returned. *Cro. Eliz.* 44. 2 Lill. Abr. 538. In a *præcipe quod reddat*, no man shall lose his land without being summoned. *Jenk. Cent.* 98. See *Black. Com.* 3 V. 279.

Summons and severance, This title is distinguished in the books by the name of summons and severance; but the proper name of it is *severance*; for the summons is only a process, which must, in certain cases, issue before judgment of severance can be given. 4 New Abr. 660. Severance is a judgment, by which, where two or more are joined in an action, one or more of these is enabled to proceed in such action without the other or others. 4 New Abr. 660.

It is a principle of law, where two or more have a joint right to a thing, they must join in an action for the recovery thereof. 4 New Abr. 660. Joint-tenants must implead jointly; for they claim under one and the same title. 1 Inst. 180. So parceners, who make but one heir, must in order to recover the possession of their ancestor, be joined in *præcipe*. 1 Inst. 163, 164. Executors, because the right of their testator devolves on all of them, must likewise all join in an action for the recovery thereof. *Gudolph. Orph. Leg.* 134. *Salk.* 3. *Garbis* 61.

And, wherever the right of action is in two or more persons, and they have not all joined in one that is brought, the defendant may plead in abatement: for, if one could recover in such case singly, every other might do the same; and by this means a defendant would be liable to answer in divers actions for the same thing. *Cro. Eliz.* 554. *Deuring v. Moor.* 19 Rep. 577. *Salk.* 3. 32. 2 Inst. 113. 3 Lev. 354. 1 Mod. 102.

It is indeed in the power of any one or more, where two or more have a joint right of action, to commence a suit in the name of all whose such right is: but, notwithstanding that a plea in abatement would be thereby prevented, it would still be in the power of any one of them, by neglecting to appear, or refusing to proceed afterwards in such suit, to render it fruitless. 1 Inst. 139. *Bro. Summ. and Sev.* pl. 17. For if two or more join in bringing an action, and one makes default, the nonsuit of him is the nonsuit of them all. *Bro. Summ. and Sev.* pl. 5. 7. So if divers join in a writ of error, the assignment of errors cannot be by one without the others. *Cro. Eliz.* 192. *Madgery v. Ed. Cromwell.*

To prevent the great inconvenience, and the failure of justice, which would befall us, when there is a joint right of action, should be proceeded by the negligence or collusion of any one of them, from having the effect of a suit for the recovery of such right; the law has provided, that if any one of these persons, in whose name a joint action is commenced, does not appear, or after appearance makes default, the other or others may have judgment *ad recuperandum*, or in other words a judgment of severance. *Black. 48. Manly v. Louck* *Bro. Summ. and Sev.* pl. 4, 16. And see *ib.* *Manly* 7. *2 Inst.* 199.

The consequence of this judgment is, that notwithstanding the severance of one or more who did not appear, the suit shall continue against the others who did appear.

Pear or who made default, the other plaintiff or plaintiffs in the action may proceed in the suit. 4 *New Abr.* 661.

Where two or more are plaintiffs in an action, and one of these has not appeared, he must be summoned before judgment of severance can be given against him: for it is a general rule, that a nonsuit is in no case peremptory before appearance, because a writ may have been purchased in the plaintiff's name without his privity. 1 *Inst.* 139. *Bro. Summ. and Sey. pl. 10.* 2 *Roll. Abr.* 488.

But if two joint plaintiffs have both appeared, and afterwards one makes default, the court may, without issuing any summons, immediately give judgment of severance. *Bro. Summ. and Sey. pl. 10.* 10 *Rep.* 135. *Hard.* 317. No judgment of severance can be given in a writ of error, unless it is prayed before the defendant has pleaded *nullo est erratum*. *Cro. Jac.* 117. *Blunt v. Sandstone*. But such judgment may be after joinder in the assignment of error. 2 *Lill. Pr. Reg.* 663.

For more learning on this subject, see 20 *Vin.* and 4 *New Abr. tit. Summons & Severance*.

Summons to parliament. According to *Blackstone*, in the main the constitution of parliament, as it now stands, was marked out so long ago as the seventeenth year of King John, *A. D.* 1215, in the great charter granted by that prince, wherein he promises to summons all archbishops, bishops, abbots, earls, and greater barons personally; and all other tenants in chief under the crown, by the sheriff and bailiffs, to meet at a certain place, with forty days notice, to assess aids and scotages when necessary. *Black. Com.* 1 *V.* 449.

Summons ad warrantizandum, Summoneas ad warrantizand. The process whereby the vouches in a common recovery is called. *Co. Litt.* 103.

Sumptuary laws, (Sumptuaria Lex, from Sumptuarius, of or belonging to expences) Are laws made to restrain excess in apparel, and prohibit costly clothes, of which heretofore we had many in England, but they are all repealed by 1 *Jac.* 1. 3 *Inst.* 199. See *Black. Com.* 4 *V.* 170.

Sunday, (Dies Dominicus) Is the Lord's Day set apart for the service of God, to be kept religiously, and not be profaned. Persons using bull-baiting or bear-baiting, or such like sports on a Sunday, shall forfeit 3 s. 4 d. and 5 s. for wrestling, bowling, &c. *Stat. 1 Car. 1. c. 1.* And if any butchers shall kill or sell meat on a Sunday, they are liable to a penalty of 6 s. 8 d. Carriers, drovers, &c. travelling on the Lord's Day, incur a forfeiture of 20 s. *Stat. 3 Car. 1. c. 2.* No person shall do any worldly labour on a Sunday, (except works of necessity and charity) on pain of 5 s. And crying and exposing to sale any wares or goods on a Sunday, the goods to be forfeited to the poor, &c. on conviction before a justice of peace, who may order the penalties and forfeitures to be levied by distress: But this is not to extend to dressing meat in families, inns, cook-shops, or victualling-houses; nor to crying of milk on a Sunday in the morning or evening. 29 *Car. 2. c. 7.* An indictment for exercising the trade of a butcher must be laid to be *contra formam statuti*; for it was no offence at Common law. 1 *Strange* 702. Law processes are not to be served on Sunday, unless it be in cases of treason or felony; or on an escape, by virtue of 5 *Ann. c. 9.* Sunday is not a day in law for proceedings, contracts, &c. And hence it is, that a sale of goods on this day in a market overt is not good: And if any part of the proceedings of a suit in any court of justice, be entered and recorded to be done on a Sunday, it makes it all void. 2 *Inst.* 264. 3 *Shep. Abr.* 181. The service of a citation on a Sunday is good, and not restrained by the *Stat. 29 Car. 2. c. 7.* And by two judges, the delivery of a declaration upon a Sunday may be well enough, it not being a process, but *Hall C.* I thought it all, because the act intended to restrain all sorts of legal proceedings. 1 *Ld. Raym.* 706. A writ of inquiry cannot be executed on a Sunday. 1 *Strange* 387.

Supercargo. A person employed by merchants to go a voyage, and oversee their cargo, and dispose of it, to the best advantage. *Merch. Dic.*

Super-institution, (super-institutio) Is one institution upon another, as where *A. B.* is admitted and instituted to a benefice upon one title, and *C. D.* is admitted and

instituted on the title or presentment of another, 2 *Cro.* 463. See *Institution*.

Super-jurare. A term used in our ancient law, when a criminal endeavoured to excuse himself by his own oath, or the oath of one or two witnesses, and the crime objected against him was so plain and notorious, that he was convicted by the oaths of many more witnesses: This was called *super-jurare*. *Leg. Hen. 1. c. 74.* *Leg. Athelstan.* c. 15.

Superoneratione Pastura. Is a judicial writ that lies against him who is impleaded in the county-court for the *furcharging* or overburthening a common with his cattle, in a case where he was formerly impleaded for it in the same court, and the cause is removed into one of the courts at Westminster. *Reg. Judic.*

Super Prærogativa Regis. A writ which formerly lay against the King's widow for marrying without his licence. *F. N. B.* 173.

Superseas. Is a writ that lies in a great many cases; and signifies in general a command to stay some ordinary proceedings at law, on good cause shewn, which ought otherwise to proceed. *F. N. B.* 236. A *superseas* is used for the staying of an execution, after a writ of error is allowed, and bail put in: but no *superseas* can be made out on bringing writ of error, till bail is given, where there are judgments upon verdicts, or by default, in debt, &c. though in case and trespass, where damages only are recovered, on the bringing and allowing of the writ, the clerk of the errors will make out a *superseas* without bail. 2 *Lill. Abr.* 543.

A writ of error is said to be in judgment of law a *superseas*, until the errors are examined, &c. that is to the execution; not to action of debt on the judgment at law: from the time of the allowance, a writ of error is a *superseas*; and if the party had notice of it before the allowance, it is a *superseas* from the time of such notice; but this must be where execution is not executed, or begun to be executed. *Cro. Jac.* 534. *Raym.* 100. *Mod. Ca.* 130. 1 *Salk.* 321.

If before execution, the defendant bring a writ of error, and the sheriff will execute a *fi. fac.* and levy the money, the court will award a *superseas, quia erronee emanavit*, and to have restitution of the money. *Stile* 14. After an execution, there was a *superseas, quia executio improvide emanavit*, &c. issued; and there being no clause of restitution in the *superseas*, it was insisted that the execution was executed before the *superseas* awarded, and that a faulty *superseas* is no *superseas*; but the court ordered another *superseas*, with a clause of restitution. *Moor* 466. 3 *Nalf. Abr.* 556.

The *superseas, quia erronee emanavit*, lies to restore a possession, after an *habere facias seisinam*, when sued out erroneously; so of a *superseas* after execution upon a *capias ad satisfaciend.* if it be immediately delivered to the sheriff. *Jenk. Cent.* 58. 92. It appearing upon affidavit, that there were two writs of execution executed upon one judgment: the party moved for a *superseas*, because there cannot be two such executions, but where the plaintiff is hindered either by the death of the defendant, or by some act in law, that he can have no benefit of the first; and so it was adjudged. *Stile* 255. A *superseas* is grantable to a sheriff to stay the return of an *habeas corpora*; and if he return it afterwards, and the parties proceed to trial of the error; and so are all the proceedings in an inferior court, after an *habeas corpora* delivered, unless a *procedendo* is awarded, in which case a *superseas* is not to be granted. *Cro. Car.* 43. 350.

When a *certiorari* is delivered, it is a *superseas* to inferior courts below; and being allowed, all their proceedings afterwards are erroneous; and they may be punished. The justices, &c. to whom a *certiorari* is sent, are to issue a *superseas* to the sheriff to stop execution of any award, &c. 2 *Hawk. P. C.* 293. If a sheriff holds plea of 40 s. debt in his county-court, the defendant may sue forth a *superseas*, that he do not proceed, &c. Or after judgment he may have a *superseas* directed to the sheriff, requiring him not to award execution upon such judgment; and upon that an *alias*, a *pluries*, and an *att. executione*, &c. *New Nat. Br.* 413.

Superseas may be granted by the court for setting aside an erroneous judicial process, &c. Also a prisoner may

may be discharged by *superfedeas*; as a person is imprisoned by the King's writ, so he is to be set at liberty; and a *superfedeas* is as good a cause to discharge a person, as the first process is to arrest him. *Fitch* 453. *Cro. Jac.* 379. If a privileged person is sued in any jurisdiction foreign to his privilege, he may bring his *superfedeas*. *Vaugh.* 155. But a peer being arrested by a bill of *Middlesex*, was ordered to plead his privilege; and not allowed a *superfedeas*. *Stile* 177. It is false imprisonment to detain a man in custody after a *superfedeas* delivered; for the *superfedeas* is to be obeyed; and in such case it is a new caption without any cause. *2 Cro.* 379. *3 Nels.* 256. There is a *superfedeas* where an *audita querela* is sued; and out of the Chancery, to set a person at liberty taken upon an *exigent*, on giving security to appear, &c. And in cases of surety of the peace and good behaviour, where a person is already bound to the peace in the Chancery, &c. *New Nat. Br.* 524, 529, 532. See farther, *4 New Abr.* and *26 Vin. Abr.* tit. *Superfedeas*.

Superfeding a commission of bankrupt. If a commission of bankrupt issues, and there is sufficient to pay all the creditors, and the charges, and satisfaction is made to all the creditors, the commission may be superseded. *2 Ch. Ca.* 144. A commission is also sometimes superseded, on the creditors agreeing with the bankrupt, and consenting to a *superfedeas*.

Super Statuto *1 Ed. 3. cap. 13, 13.* Is a writ that lay against the King's tenants holding in chief, who aliened the King's land without his licence. *F. N. B. fol.* 175.

Super Statuto de Vicariis Cleri. Cap. 6. A writ lying against the sheriff or other officer that distrains in the King's highway, or in the lands anciently belonging to the church. *F. N. B.* 173.

Super Statuto tunc pour Beneschal & Marshal de Roy, &c. Is a writ that lieth against the Steward or Marshal, for holding plea in his court of freshhold, or for trespass or contracts not made and arising within the King's household. *F. N. B.* 241.

Super Statuto de fuis Servantes & Laboratores. A writ against him who keeps *servants* departed out of their services contrary to law. *F. N. B.* 167.

Super Statuto de Pork, quo null terra meller, &c. Is a writ lying against a person that uses victualling, either in gross, or by retail, in a city or borough-town, during the time he is mayor, &c. *F. N. B.* 172.

Superstitious Uses. Causing forfeiture of lands and goods to the King, by Stat. *1 Hen. 6. c. 14.* See *Uses*, and *Black. Com.* 3 P. 428.

Supervisor, (Lat.) A surveyor or overseer: And it was formerly and still is a custom among the better sort of people, to make a *supervisor* of a will, to supervise and oversee the executors that they punctually perform the will of the testator; but this office is of late very carelessly executed, so as to be of little purpose or use. *Supervisor* (now surveyor) of the *highways*, is mentioned in the Stat. *5 Eliz. c. 13.*

Supplemental bill in equity. If a plaintiff hath replied to a defendant's answer whereby the cause is at issue, and afterwards new matter arises, which did not exist before, he must set it forth by a *supplemental bill*. *Black. Com.* 3 P. 448.

Suppletory oath. The Civil law universally requires the testimony of two. To extricate itself out of this absurdity, the modern practice of the Civil courts has plunged itself into another. Where there is only one witness, to make up the necessary complement of two, they admit the party himself (plaintiff or defendant) to be examined in his own behalf; and administer to him what is called the *suppletory oath*; and, if his evidence happens to be in his own favour, this immediately converts the half proof into a whole one. *Black. Com.* 3 P. 270, 271.

Supplicavit. Is a writ issuing out of Chancery, for taking surety of the peace, when one is in danger of being hurt in his body by another; it is directed to the justices of peace and sheriff of the county, and is grounded upon the Stat. *1 Ed. 3. c. 15.* which ordains, That certain persons shall be assigned by the Chancellor to take care of

the peace, &c. *F. N. B.* 80, 81. When a man hath purchased a writ of *supplicavit*, directed to the justices of the peace, against any person, then he, against whom the writ is sued, may come into the Chancery, and there find sureties that he will not do hurt or damage unto him that sueth the writ; and upon that he shall have a writ of *superfedeas* directed to the justices, &c. reciting his having found sureties in Chancery, according to the writ of *supplicavit*; and also reciting that writ, and the manner of the security that he hath found, &c. commanding the justices, that they cease to arrest him, or to compel him to find sureties, &c. And if the party who ought to find sureties, cannot come into the Chancery to find sureties; his friend may sue a *superfedeas* in Chancery for him; reciting the writ of *supplicavit*, and that such a one and such a one are bound for him in the Chancery in such a sum, that he shall keep the peace according to it; and the writ shall be directed to the justices, that they take surety of the party himself according to the *Supplicavit*, to keep the peace, &c. and that they do not arrest him; or if they have arrested him for that cause, that they deliver him. *New Nat. Br.* 180.

Sometimes the writ of *supplicavit* is made returnable into the Chancery at a certain day; and if so, and the justices do not certify the writ, nor the recognisance, and the security taken, the party who sued the *supplicavit* shall have a writ of *certiorari* directed unto the justices of peace to certify the writ of *supplicavit*, and what they have done thereupon, and the security found, &c. *Ibid.* If a recognisance of the peace be taken in pursuance of a writ of *supplicavit*, it must be wholly governed by the directions of such writ; but if it be taken before a justice of peace below, the recognisance may be at the discretion of such justice. *Lamb.* 100. *Dalt. c. 70.* To sue the writ of *supplicavit*, the party that desires it must go before one of the Masters in Chancery, and make oath that he does not desire the same through any malice, but for his own safety; upon which the master makes out a warrant, and the writ is made by it by one of the clerks in the six clerks office; and when made, the *supplicavit* is to be delivered to the sheriff to have his warrant thereupon for arresting the party, &c. and then having sued out a *certiorari*, it is to be delivered to them that took bail thereon; and they are required to certify it, &c. *Pract. Solic.* 130. See *Surety of the Peace*, and *Black. Com.* 4 P. 250.

Supplies. Extraordinary grants to government, by parliament, to supply the exigencies of the state. See on this subject, *Black. Com.* 1 P. 307.

Supremacy. Signifies sovereign dominion, authority and preeminence, the highest estate. *King Hen. 8.* was the first prince that shook off the yoke of *Rome* here in *England*, and settled the supremacy in himself, after it had been long held by the *Pope*. *Stat. 25 Hen. 8. c. 12, 20.* And by *1 Eliz. c. 1.* all ecclesiastical jurisdiction was annexed to the crown; and it was ordained that no foreign potentate should exercise any power or authority in this kingdom: Also the oath of supremacy was appointed, &c. By these laws, the great power of *Rome* was suppressed; and the act of *1 Eliz.* Sir *Edward Coke* says, was an act of restitution of the ancient jurisdiction ecclesiastical, which always belonged of right to the crown of *England*; and that it was not introductory of a new law, but declaratory of the old, and that which was of right ought to be, by the fundamental laws of this realm; parcel of the King's jurisdiction; by which laws, the King as *supreme head*, had full and entire power in all causes ecclesiastical as well as temporal: And as in temporal causes, the King doth judge by his judges in the courts of justice, by the temporal laws of *England*; so in causes ecclesiastical, they are to be determined by the judges thereof, according to the King's ecclesiastical laws. *5 Rep. 10.* *Cowdry's case.* And in this case it was resolved by all the judges, that by our ancient laws, this kingdom is an absolute empire and monarchy; consisting of one head, which is the King, and of a body politic, made up of many well agreeing members, all which the law divides into two several parts, the clergy and the laity, both of them immediately under the subject and obedient to the head. And the king's head of this political body, is furnished with prerogative and jurisdiction,

to render justice and right to every part and member of this body, of what estate or degree soever, otherwise he would not be at the head of the whole. 5 Co. Rep. 8.

There are several instances of ecclesiastical jurisdiction exercised by the King of England in former ages; and in this respect the King is said to be *persona mixta & unita cum sacerdotibus*. The King is the *supreme* ordinary, and by the ancient laws of the land, might without any act of parliament, make ordinances for the government of the clergy; and if there be a controversy between spiritual persons concerning jurisdiction, the King is arbitrator, and 'tis a right of his crown to declare their bounds, &c. Moor 755. 1043. Hob. 17. See *Appeals to Rome*, *Pope*, and *Præmunire*, and *Black. Com.* 1 V. 49, 146, 368. 4 V. 115, 423.

Surcharge, An over-charge, beyond what is just and right. *Merch. Dic.*

Surcharge of common. This is a disturbance of common of pasture, by any one who hath right of common putting more cattle therein than the pasture and herbage will sustain, or the party hath a right to do. This surcharging can, properly speaking, only happen where the common is *appendant* or *appurtenant*, and of course limitable by law; or where, when *in gross*, it is expressly limited and certain: for where a man hath common *in gross*, *sans nombre*, or *without stint*, he cannot be a *surcharger*. But even in this case there must be sufficient for the lord's own beasts; for the law will not suppose that, at the original grant of the common, the lord meant to exclude himself. The remedy for surcharging common, is by the lord's distraining the surplus number, or by his bringing trespass, or by action on the case, in which any commoner may be plaintiff. *Black. Com.* 3 V. 237, 238.

Surcharge of the forest, (*Superoneratio forestæ*.) Is when a commoner puts on more beasts in the forest than he has a right to. *Manwood*, part 2. cap. 14. num. 7. And is taken from the writ *De secunda superoneratione Pasturæ*, in the same sense when the commoner *surcharge* his. 3 Inst. fol. 293.

Sur Cui in vita, Is a writ that lies for the heir of a woman, whose husband hath aliened her land in fee, and she neglected to bring the writ *Cui in vita* for recovery thereof; in this case, her heir may bring this writ against the tenant after her decease. *F. N. B.* 193.

Surety, (*Vas Vadis*) A bail that undertakes for another man in a criminal case, or action of trespass, &c. And there is a *surety of the peace*, so called, because the party that was in fear is thereby secured, by bond or recognizance of the other, and his bail bound for him. *Lamb. Eiren. lib. 2.* Vide *Good Behaviour*, and 20 *Vin. Abr.* 101. See *infra*.

Surety of the Peace, (*Securitas Pacis*, so called, because the party that was in fear, is thereby secured,) Is an acknowledging of a bond to the prince, taken by a competent judge of record, for the keeping of the peace. This peace may a justice of the peace command, either as a minister, when he is commanded thereto by a higher authority; or as a judge, when he doth it of his own power, derived from his commission. Of both these, see *Lamb. Eiren. lib. 2. cap. 2. p. 77.* Cowell.

A justice of peace may, according to his discretion, bind all those to keep the peace, who in his presence, shall make any affray, or shall threaten to kill or beat any person, or shall contend together with hot words, and all those who shall go about with unusual weapons or attendance, to the terror of the people; and all such persons as shall be known by him to be common brawlers; and all who shall be brought before him by a constable, for a breach of the peace in the presence of such constable; and all such persons, who, having been before bound to keep the peace shall be convicted of having forfeited their recognizance. *Lamb. 77, 78. Bra. Peace, pl. 7, 8. 1 Hawk. 126.*

A wife may demand surety of the peace against her husband, if he threatens to beat her outrageously, or to kill her. *Fitz. N. B. 80. Lamb. 8. 2 Lea. 128. 1 Hawk. 127. V. 2 Stra. 1231.* Articles of the peace may be exhibited by a husband against his wife. *Sir. 1207. Spari's case. 1 Hawk. 127. See Pult. 18. Lamb.*

81, 83. *Bra. Peace, pl. 22. 1 Hawk. 127.* Infants and feme coverts ought to find surety by their friends, and not to be bound themselves. *1 Hawk. 127.*

When ever a person has just cause to fear that another will burn his house; or do him some corporal hurt, as by killing or beating him; or that he will procure others to do him such mischief, he may demand the surety of the peace against such person. *Lamb. 82. 1 Hawk. 127. Sir. 473.* Surety of the peace may be demanded by a wife, if her husband gives her unreasonable correction. *Mo. 874. Sir Thomas Symth's case, Godb. 215. Fitz. N. B. 80.* Surety of the peace ought not to be granted to a man for fear of danger to his servant or cattle. *Lamb. 83.* It hath however been said, that a man may have the surety of the peace against one who threatens to hurt his wife or child. *Dalt. 266.* The surety of the peace ought not to be granted for any past battery, unless there is a fear of some present or future danger: But the offender must in such case be punished by action or indictment. *Dalt. 266.* The demand of the surety of the peace ought to be soon after the cause of fear; for the suffering much time to pass, before it is demanded, shews that the party has been under no great terror. *6 Mod. 132. The Queen v. Lane.*

1. Of granting surety of the peace by the court of Chancery.
2. Of granting surety of peace by the court of King's Bench.
3. Of granting surety of the peace by a justice of the peace.
4. Of forfeiting a recognizance for keeping the peace, and how such recognizance may be discharged.

1. Of granting surety of the peace by the court of Chancery.

At the common law it was sufficient, in order to obtain process for surety of the peace from the court of Chancery, if the party who demanded it made oath, that he was in fear of some corporal hurt, and that he did not crave the same out of malice, and for the safety of his body. *Fitz. N. B. 79, 80.*

But by the 21st J. 1. c. 8. All process of the peace shall be void, unless granted on motion in open court on affidavit in writing.

When articles of the peace are exhibited in the court of Chancery, and oath is made that the surety of the peace is not craved by the party through malice, but for the safety of his life, a writ of *supplicavit* issues, directed to the justices of the peace generally, or to some one justice of the peace, or to the sheriff, commanding them or him to take security in the sum thereon indorsed, and, if the party refuses to find such security, to commit him to the next gaol, until he does find such security. *Fitz. N. B. 80. Vide Bra. Off. pl. 39. F. N. B. 81. Bra. Peace pl. 9. Lamb. 101, 107. 1 Hawk. 129.*

If no return is made to the writ of *supplicavit*, the party who sued it out may have a *certiorari*, directed to the person who ought to make a return, commanding him to certify the writ of *supplicavit*, and what has been done thereupon. *Fitz. N. B. 81. 1 Hawk. 129. Lamb. 109.*

When a writ of *supplicavit* has issued from the court of Chancery against any person, he may by himself, or some friend, come into the court of Chancery, and find sureties there, that he will not do any harm to him who hath sued out the writ, and thereupon he shall have a writ of *superfideas*, reciting the writ of *supplicavit*, and the security given, directed to the justice or justices of the peace, or to the sheriff, commanding that they surcease to arrest him, or compel him to find sureties, and if they have arrested him for that cause and no other, that they deliver him. *Fitz. N. B. 81, 238.*

2. Of granting surety of the peace by the court of King's Bench.

At the Common law the oath of the party was a sufficient ground for the court of King's Bench to grant the surety

surety of the peace; but this cannot, since the statute made in the 21 year of the reign of King James the First, c. 8. be done, unless articles of the peace are exhibited in this court upon motion in open court. *Fitz. N. B.* 79, 80.

Where articles of the peace are exhibited in the court of King's Bench, and oath is made, that the party does not crave the security of the peace out of hatred or malice, but merely for the preservation of his life and person from danger, an attachment of the peace issues to the sheriff commanding him to take a bond for the appearance of the party at the return of the writ to put in bail to the articles in this court; and, if such bond is not given, to commit the party to the next gaol. *Comb.* 427. *Ruffel's case.* *Fitz. N. B.* 79. Where the party against whom articles of the peace are exhibited, comes into court to put in bail, the articles must be read to him. *6 Mod* 132. *The Queen v. Lane.*

Robert Parnel having exhibited articles of the peace against Sir Thomas Allen, Bart. and three others, an attachment of the peace issued against them. Before bail was put in, *Parnel*, in a petition to the court recited some of the facts sworn to in the articles; and endeavoured to explain them. Hereupon the counsel for the defendants moved for a rule to review the articles, and some affidavits were read to contradict the facts therein charged. Upon reading the petition, and these affidavits, in which the fact were flatly contradicted by five or six persons, a rule was made to shew-cause, why the articles should not be reviewed, and that *Parnel* should attend upon the day for shewing cause. He did attend, and the court was, upon the whole, so satisfied of his having been guilty of perjury that he was immediately committed for wilful and corrupt perjury; and a rule was made, that all farther proceedings upon the articles should stay. The rule was pronounced in these terms, "and not to take the articles off the file, in order to give the defendants an opportunity, which could not otherwise have been done, of prosecuting *Parnel* for perjury." *MS. Rep. Rex v. Sir Thomas Allen, Bart. and others, Hil.* 32 Geo. 2. See *Lord Vane's case, Stra.* 1202.

Articles of the peace having been exhibited; by *John Brown*, against *Hannah Bennett* and three others, a rule was made, upon reading the affidavits of the defendants, to shew cause, why these articles should not be reviewed. In these affidavits it was sworn, that the defendants did not know any such person as *Brown* the articulant, and, besides other strong facts sworn to, it was suggested, that this was a contrivance of the defendant *Bennett's* husband to oppress her. No cause being shewn, the articles were ordered to be taken off the file. *MS. Rep. Rex v. Bennett and others, East.* 32 Geo. 2.

As to articles of the peace against persons living in the country. See *Stra.* 835. *Comb.* 427. 4 *New Abr.* 691.

It has not of late years been the practice of the court of King's Bench, to refuse the receiving of articles of the peace, where the articles contained in them is sufficient for craving the surety of the peace: But it seems, as if that court is now come to a resolution of putting a stop to this vexation of the subject; for in a very late case, where a motion was made by *Borough*, to exhibit articles of the peace against *Wait*, the court, it appearing that *Wait* lived at the *Devinces*, and that *Borough* had not endeavoured to obtain surety of the peace in the county, unanimously refused the motion: and *Lord Mansfield*, Chief-Justice, Apply to the magistrates of the county, and if surety of the peace is not granted you, come here again. *MS. Rep. Borough's case, East.* 32 Geo. 2.

When surety of the peace is granted by the court of King's Bench, if a *superfedeas* comes from the court of Chancery, to the justices of that court, their power is at an end; and the party as to them discharged. *Bro. Peace, pl.* 17. See *qu.*

3. Of granting surety of the peace, by a justice of the peace.

A justice of the peace may grant the surety of the peace, under the authority of the commission of the

peace, by which he is empowered to cause to come before him all those, who to any one or more of our people, concerning their bodies or the firing of their houses have used threats, to find sufficient security for the peace, or their good behaviour, towards us and our people; and if they shall refuse to find such security, then them in our prisons, until they shall find such security, to cause to be safely kept. *Lamb.* 36.

Whenever oath is made before a justice of peace by any person, that he is actually under fear that another will burn his house, or do or procure to be done to him some corporal hurt, and that he does not crave the surety of the peace through malice, but for the safety of his life, the justice is bound to grant it. *Lamb.* 83. *F. N. B.* 79. 1 *Hawk.* 127. But if the security of the peace is desired against a peer, the safest way is to apply to the court of Chancery or King's Bench. 1 *Hawk.* 127. *Lamb.* 81.

If the person against whom it is demanded, be present, the justice of the peace may commit him immediately, unless he offers sureties; and *a fortiori* he may be commanded to find sureties, and be committed for not doing it. *Bro. Mainp. pl.* 39. 1 *Hawk.* 127. But if he is absent, a warrant for committing him cannot be granted till a warrant is issued commanding him to find sureties; and this warrant, which must be under seal, ought to shew the cause for which it is granted, and at whose suit. *Lamb.* 85. 1 *Hawk.* 128.

The justice of the peace, who grants this last mentioned warrant, may in this case make it special for bringing the party before himself only, for, as he has most knowledge of the matter, he is best qualified to do justice in it. *5 Co.* 59. *Foster's case.* 1 *Hawk.* 128. But if the warrant be in general terms to carry the party before any justice of the peace, the officer, who executes it, has his election to carry him before what justice he pleases, and may carry him to gaol, by virtue of the same warrant, if he refuses to find sureties before such justice; for the warrant has these words in it, if he shall refuse to find surety, &c. *Bro. False Impris. pl.* 11. 1 *Hawk.* 128. 5 *Co.* 59.

If one, however, who apprehends that the surety of the peace will be demanded against him, finds sureties before any justice of the peace of the same county, either before or after a warrant is issued against him, he may have a *superfedeas* from such justice; and this shall prevent or discharge him from an arrest, under the warrant of any other justice, at the suit of the same party, for whose security he has found such securities. *Lamb.* 95, 96. 1 *Hawk.* 128.

The recognizance for keeping the peace, which a justice of the peace takes upon complaint below, is to be regulated, as to the number and sufficiency of the sureties, the largeness of the sum, and the time it is to continue in force, by the discretion of such justice. *Lamb.* 100. 1 *Hawk.* 129. It has been said that a recognizance taken by a justice of peace, to keep the peace as to *A. B.* for a year, or for life, or without expressing any certain time, which shall be intended to be for life, altho' no time or place is fixed for the party's appearance, or he is not bound to keep the peace as to all the King's liege people, is good. 1 *Hawk.* 129. *Lamb.* 100. But it seems to be the safest way, to bind the party to appear at the next sessions of the peace, and in the mean time to keep the peace as to the King, and all his liege people, and especially as to the party, who has demanded the surety of the peace. *Lamb.* 105. 1 *Hawk.* 129.

By the 3 H. 7. c. 1. it is enacted, "That every justice of the peace within this realm, that shall take any recognizance for keeping of the peace, shall certify, send, or bring the same recognizance at the next sessions of the peace, where he is or hath been justice, that the party so bound may be called." If one of the sureties of a man who is bound to keep the peace dies, he shall not be obliged to find a new surety; for the executors or administrators, of him who is dead are bound by the recognizance. *Lamb.* 113. *Bro. Peace, pl.* 1. 1 *Hawk.* 129.

4. Of forfeiting a recognizance for keeping the peace, and how such recognizance may be discharged.

By the 3 H. 7. c. 1. it is enacted, "That if the party, who is called at a sessions of the peace, upon a recognizance for keeping the peace, makes default, his default shall be then and there recorded, and the same recognizance, with the record of the default, be sent and certified into the chancery, or before the King in his Bench, or into the King's Exchequer."

He who is bound to keep the peace, and to appear at the sessions, must appear there, and record his appearance, otherwise his recognizance is forfeited. And altho' the party, who craved the surety of the peace, comes not to pray that it may be continued, the justices may in their discretion order it to be continued till another sessions. *Bro. Peace*, pl. 17. *Lamb.* 109.

But if an excuse, which is judged by the court to be a reasonable one, is given for the non-appearance of a party, it seems that the court is not bound peremptorily to record his default, but may discharge the recognizance, or respite it till the next sessions. 1 *Hawk.* 130. A recognizance for keeping the peace may be forfeited by any actual violence to the person of another, whether it be done by the party bound, or others by his procurement. *Lamb.* 115, 127. *Bro. Peace* pl. 2. 1 *Hawk.* 130. In support of a rule to stay proceedings in a *scire facias*, upon a recognizance for keeping the peace, it was said, that the assault, which had been made was not upon him at whose request the surety of the peace was granted, but upon another person. It was held that this makes no difference; and the rule was discharged. *MS. Rep. Rex. v. Stanly and his bail*, Trin. 27 Geo. 2. But a recognizance for keeping the peace, is not forfeited, where an officer, having a warrant against one who will not suffer himself to be arrested, beats or wounds him in the attempt to take him. *Lamb.* 128. 1 *Hawk.* 130.

So it is not forfeited, if a parent in a reasonable manner chastises his child; a master his servant, being actually in his service at the time; a schoolmaster his scholar; a gaoler his prisoner; a husband his wife. 1 *Sid.* 176, 177. *Lamb.* 127, 128. *Heil.* 149, 150. 1 *Hawk.* 130. *F. N. B.* 80.

And, without enumerating all the actual assaults, which a man may make upon the person of another, and not forfeit his recognizance for keeping the peace, it may be laid down as a principle, that such a recognizance is not forfeited by any assault which could have been justified in an action, or upon an indictment, for the assault. 4 *New Abr.* 694.

It has been held that a recognizance for the keeping the peace may be forfeited by any treason against the person of the King, or by any unlawful assembly in *terrorum populi*. *Lamb.* 115. 1 *Hawk.* 130. Words which tend directly to a breach of the peace, as challenging a man to fight, or threatening to beat one who is present, amount to a forfeiture of such recognizance. *Lamb.* 115. 1 *Hawk.* 130. *Cro. Eliz.* 86. A recognizance is likewise forfeited by threatening to beat a person who is absent, if the party, who has so threatened, does afterward lie in wait to beat him. *Lamb.* 115. But it is not forfeited by words of heat or choler, as the calling a man knave, liar, or rascal: For, although such words may provoke a hasty man to break the peace, they do not directly challenge him to do it; nor does it appear, that the speaker intended to carry his resentment any farther. *Cro. Car.* 198. *Rex. v. Heyward, and his bail.* 1 *Hawk.* 130. Nay, it has been held, that a recognizance for being of good behaviour shall not be forfeited for such words; and a *fortiori* one for keeping the peace shall not. *Cro. Eliz.* 86. *King's case.* *Mo.* 249. 1 *Hawk.* 130.

Such recognizance shall not be forfeited by a trespass on the lands or goods of another, unless it is with force. *Cro. Jac.* 598. 1 *Hawk.* 193. A man shall not forfeit a recognizance for keeping the peace, who does a hurt to another in playing at cudgels, or such like sport, by consent; for these sports, which tend to promote activity and courage, are lawful. *Dalt.* 284. 1 *Hawk.* 131. But he who wounds another in fighting with naked swords, forfeits his recognizance, because no consent, nor even the command of the King can make so dangerous a diversion lawful. *Bro. Cor.* 229. 1 *Hawk.* 131. If a

soldier hurts another soldier, by discharging his gun in exercising without sufficient caution, it is no forfeiture of a recognizance for keeping the peace: For altho' he would be liable in an action for the damage occasioned by his negligence, this, it not being a wilful breach of the peace, is not within the purport of the recognizance. 1 *Hawk.* 131. *Job.* 134. 2 *Roll. Abr.* 548.

A court of quarter-sessions cannot in any case proceed against the parties, for a forfeiture of a recognizance for keeping the peace; but the recognizance must be sent into some of the King's courts in *Westminster Hall*. 1 *Hawk.* 130. All proceedings upon a forfeited recognizance must be by *scire facias*, and not by indictment; because where a *scire facias* is brought, the parties have an opportunity of pleading any matter in their discharge. 1 *Roll. Abr.* 900. *Perrow's case.* *Cro. Jac.* 598. 1 *Hawk.* 130.

The demise of the King is a discharge of a recognizance for keeping the peace; for the condition being *servare pacem nostram*, his successor cannot take advantage of a breach thereof. *Bro. Peace*, pl. 15. 1 *Hawk.* 129. *sed qu.*

After such a recognizance is forfeited, the King may pardon the forfeiture: But he cannot release the condition before it is broken; because the party, at whose complaint it was taken, has an interest therein. *Bro. Recogn.* pl. 22. *Bro. Chart. de Pard.* pl. 24.

It is no time for the continuance of a recognizance for keeping the peace, is therein mentioned, it is perhaps in the power of the court, in which it was taken, or to whom it has been certified, to discharge it at their discretion. 4 *New Abr.* 695.

The usual practice of a court of quarter-sessions is to continue a recognizance for keeping the peace from sessions to sessions, until the court thinks proper to discharge it. It is the constant course of the court of King's Bench, to take a recognizance for twelve months, and, if no indictment is within that time preferred against the party bound to keep the peace, it may at the expiration thereof be discharged. 12 *Mod.* 251. *Anon. Str.* 835. This seems also to be the practice of the court of Chancery; for, upon a motion to discharge a writ of *supplicavit*, it was refused; and by my Lord Macclesfield, Chancellor: This application is too early; let the party stay till the year is out, and then have himself quietly all that time. 2 *Will.* 202. *Clavering's case.* See farther, *Sav.* 53. 1 *Lev.* 235. 1 *Hawk.* 129. *Bro. Peace*, pl. 17. *Lamb.* 111. 11 *Mod.* 109. *Cro. Jac.* 282. *Yelv.* 207. 2 *Hawk.* 294.

Surgeon, (Chirurgus) May be deduced from the Fr. *Chirurgus*, signifying him that dealeth in the mechanical part of physick, and the outward cures performed with the hand; and therefore is compounded of the two Greek words *Xip*, manus "Egyon, opus, and for this cause surgeons are not allowed to administer any inward medicine. By the stat. 32 H. 8. c. 42. the barbers and surgeons of London are incorporated and made one company; and shall be chosen yearly four masters for the said company, of which two must be expert in surgery, and the other two in barbery, who shall have power to punish and correct all defaults; and the company and their successors are to have the oversight and correction as well of freemen as foreigners, for such offences as they shall commit against the good order of barbery and surgery: They shall be exempted from bearing of arms, serving on juries, and all manner of parish offices, &c. but are to pay scot and lot, and other charges as formerly; and the said company shall have free liberty to take four persons condemned for felony, for anatomies yearly. No barber in London, or within one mile thereof shall practise surgery, letting of blood, or any other thing relating thereto, except drawing of teeth; nor shall any person who practises surgery within those limits, exercise the craft of a barber: Though any man not being a barber or surgeon, may retain in his house as a servant, a barber or surgeon, who may exercise his art in his master's house, or elsewhere, &c. All persons practising surgery in London, shall have an open sign in the street where they dwell, that people may know where to resort to them when wanted: And every person offending in any of the articles contained in this statute shall forfeit 5 l. a month, one moiety to the

the King, and the other to him who will sue for the same, &c. By the *stat. 18 Geo. 2. c. 15.* the *surgeons of London*, and the *barbers of London* are made two separate and distinct corporations. See *Physicians*.

Sar tui jur, i. e. Upon his oath, according to ancient laws. *Leg. W. 1. c. 16.*

Surmise, Is something offered to a court to move it to grant a prohibition, *Auditu Querela*, or other writ grantable thereon; and what shall be allowed to be a good surmise, or not so, see 2 *Cro. 219, 501, 669.* Vide *suggestion*.

Surplusage, (Fr. *Surplus*, Lat. *Surplusagium*, *Corollarium*) Is a superfluity or addition more than needful, which sometimes is the cause that a writ abates; but in pleading many times it is absolutely void, and the residue of the plea shall stand good. *Broke. Plowd. 63.* And on a writ of inquiry or damages in waste, in which the sheriff was commanded to go to the place wasted, and there to inquire of the waste done and damages, who returned the inquisition, without mentioning that he went to the place wasted; this was held to be *surplusage* in the writ that would not hurt, because by the plea in the action the waste was acknowledged, so that he need not go to the place wasted to view it. *Poph. 24.* A *disstringas* was returnable *Tres Trin. Nisi prius venerit Matthæus Hale Mil. Capital. Baro, &c.* on such a day *ejusdem Mensis Junii*; whereas the month of *June* was not mentioned before; and this was moved in arrest of judgment as a discontinuance; but adjudged that the word *ejusdem* shall be rejected as *surplusage* and void, and then the word *Junii* shall be intended *June* next; as a covenant to pay money at *Michaelmas*, shall be intended *Michaelmas* next ensuing. *Hard. 330.*

In a declaration for debt, upon demurrer, it was objected against the declaration, for that the plaintiff averred the defendant had not paid *præd. sexaginta Libras, &c.* when the word *sexaginta* was not before-mentioned: And it was resolved that it shall be *surplusage*, when 'tis that the defendant had not paid *præd. Libras*, which must be the pounds for which the plaintiff had declared. 1 *Lutw. 445. Cro. Eliz. 647. 3 Nels. Abr. 262.* A plaintiff being right named through all the proceedings, but in the last place, where it was said that a *Capias Utlagatum* was prosecuted against *prædict Johanne Fowler*, and his true name was *George*: It was ruled that the word *Johannes* shall be *surplusage* and be rejected; and then the plea will be that a *Capias Utlagatum* was prosecuted against *prædict Fowler*. 2 *Lutw. 919. 1 Lev. 428.* If a jury find the substance of the issue before them to be tried, other superfluous matter is but *surplusage*. 6 *Rep. 46.* And where a verdict or judgment is complete, if there be any other matter repugnant or uncertain, &c. it shall be rejected as *surplus*. 3 *Nels. 262. 2 Hawk. P. C. 441.*

Surplusage in an issue helped after verdict, where plaintiff to a plea of *plene administravit* replied that defendant had sufficient to satisfy the damages aforesaid, and it should have been *the debt and damages*. The court rejected damages as *surplusage*, and then it stood sufficient to satisfy, &c. which was held good, *Wilson, par. 1. fo. 238.* See *Pleading*.

Surplusage of Accounts, Signifies a greater disbursement than the charge of the accountant amounts unto. In another sense, *surplusage* is the remainder or overplus of money left. *Litt. Dist.*

Surplusage of Intestates Effects. By the *stat. 22 & 23 Car. 2. c. 10.* the *surplusage* of intestates estates (29 *Car. 2. c. 3. s. 25.*) shall, after the expiration of one full year from the death of the intestate, be distributed, one third to the widow, and the residue in equal proportions to his children, or, if dead, to their representatives; that is, their lineal descendants: If there are no children, or legal representatives, then a moiety to the widow, a moiety to the next of kindred in an equal degree, and their representatives: If no widow, the whole shall go to the children: If neither widow nor children, the whole shall be distributed among the next of kin in equal degree, and their representatives: But no representatives are admitted among collaterals, further than the children of the intestate, brothers and sisters. *Black. Com. 2 V. 515.* See *Succession*, the several heads.

Surrebutter, A second Rebutter; or more properly

it is the replication or answer of the plaintiff to the defendant's Rebutter. See *Rebutter*.

Surrejoinder, Is a second defence of the plaintiff's declaration in a cause, and answers the rejoinder of the defendant. *West. Symb. par. 2.* As a *rejoinder* is the defendant's answer to the replication of the plaintiff; so a *surrejoinder* is the plaintiff's answer to the defendant's rejoinder. *Wood's Inst. 586.* Where a plaintiff in his *surrejoinder* is to conclude to the country, and not with an averment. See *Raym. 94.* After *rejoinder* and *surrejoinder*, and *rebutter*, &c. there may be a demurrer. *Pract. Attorn. Edit. 1. p. 86.*

Surrender, (*Sarsum Redditio*) Is a deed or instrument testifying that the particular tenant for life or years, of lands and tenements, doth yield up his estate to him that hath the immediate estate in remainder or reversion, that he may have the present possession thereof; and wherein the estate for life or years may merge or drown by the mutual agreement of the parties. *Co. Litt. 337.* And of surrenders there are three kinds; a *surrender* properly taken at common law; a *surrender* of copyhold or customary estates; and a *surrender* improperly taken, as of a deed, a patent, rent newly created, &c. The *surrender* at common law is the usual *surrender*, and is of two sorts, viz. A *surrender in deed*, or by express words in writing; where the words of the lessee to the lessor prove a sufficient assent to give him his estate back again: And a *surrender in law* being that which is wrought by operation of law, and not actual; as if a lessee for life or years, take a new lease of the same land during the term; this will be a *surrender* in law of the first lease. 1 *Inst. 338. 5 Rep. 11. Perk. 601.* And in some cases a *surrender* in law is of greater force than a *surrender* in deed; for if a man makes a lease for years to begin at a day to come, this future interest cannot be *surrendered* by deed, because there is no reversion wherein it may drown; but if the lessee before the day, take a new lease of the same land, it is a good *surrender* in law of the former lease: And this *surrender* in law, by taking a new lease, holds good, though the second lease is for a less term than the first; and 'tis said, though the second lease is a voidable lease, &c. 5 *Rep. 11. 6 Rep. 69. 10 Rep. 67. 1 Inst. 218. Cro. Eliz. 873.*

If lessee for life do accept of a Lease for years, this is a *surrender* in law of his lease for life; if it should be otherwise the lease for years would be made to no purpose, and both the leases cannot stand together in one person. 2 *Lill. Abr. 544.* Lessee for twenty-one years takes a lease of the same lands for forty years to commence after the death of *A. B.* it is not any present *surrender* of the first term; but if *A. B.* dies within the term it is. 4 *Leon. 83.* A lessee for years took a second lease to commence at *Michaelmas* next; adjudged this was an immediate *surrender* in law of the first, and that the lessor might enter and take the profits from the time of the acceptance of the second lease, until *Michaelmas* following. *Cro. Eliz. 605.* If the lessor make, and lessee accept a new lease, and it is upon condition; this shall be a *surrender* in law: And if an assignee of tenant for years take a new lease, &c. the first lease will be by law *surrendered*. 1 *Inst. 218, 338.* If a woman lessee for years marries, and afterwards she takes a new lease for life without her husband, this is a *surrender* and extinguishment of the term; but if the husband disagree, then 'tis revived: Though if the new lease had been made to the husband and wife, then by acceptance thereof, the first lease had been gone. *Hutt. 7.* A lessor takes the lessee to wife, then the term is not drowned or *surrendered*; but he is possessed of the term in her right, during the coverture. *Wood's Inst. 285.* A *surrender* may be of any thing grantable, either absolute or conditional; and may be made to an use, being a conveyance tied and charged with the limitation of a use: But it may not be of an estate in fee; nor of rights and titles only to other estates for life or years; or for part of such an estate; nor may one term regularly *surrender* to another term; nor can a tenant at will *surrender* any more than he can grant. *Perk. 615. Noy's Max. 773. Cro. Eliz. 688. 1 Leon. 303.* Where things will not pass by *surrender*, the deed may enure to other purposes, and take effect by way of grant, having sufficient words. *Perk. 624, 588.* And a *surrender* may be made by these words: *Have surrendered, granted, yielded up, and confirmed, &c.*

To the making of a good *surrender* in deed of lands the following things are requisite; the *surrenderor* is to be a person able to grant and make a *surrender*, and the *surrenderer* a person able to receive and take it; the *surrenderor* must have an estate in possession of the thing *surrendered*, and not a future right; and the *surrender* is to be made to him that hath the next estate in remainder or reversion, without any estate coming between; the *surrenderer* must have a higher or greater estate in his own right, and not in the right of his wife, &c. in the thing *surrendered*, than the *surrenderor* hath, so that the estate of the *surrenderor* may be drowned therein; (for if lessee for life *surrender* to him in remainder for years, &c. it is a void *surrender*) there is to be a privy of estate between the *surrenderor* and *surrenderer*; and the *surrenderer* must be sole seized of his estate in remainder or reversion, and not in jointenancy; and the *surrenderer* agree to the *surrender*, &c. 1 *Inst.* 338. *Perk.* 584. 588. 2 *Roll. Abr.* 494. *Noy's Max.* 73.

A man who hath a fee-simple estate cannot *surrender* it, because it cannot be drowned in another estate. 12 *H.* 4. 21. And if a lease be made for life or years to A. the remainder for life to B. remainder in fee-tail to C. and the first tenant *surrenders* to C. this will not take effect as a *surrender*, by reason of the intervening estate. *Dyer* 112. The lessee for life or years may *surrender* to him that is next in remainder in fee-simple or fee-tail: And if lessee for life *surrenders* his estate to one in remainder, that is tenant for his own life; it is a good *surrender*, for a man's estate for his own life in judgment of law, is greater than that for another's. And where an estate is *surrendered* for life, there needs no livery and seisin, as in a grant. 1 *Inst.* 338. *Dyer* 251, 280.

Yet in some cases an estate, &c. may have continuance, though it be *surrendered*; as where lessee for life makes a lease for years, and after doth *surrender*, the term for years doth continue; and so of a rent charge granted by such lessee, &c. *Bro.* 47. 1 *Inst.* 338. If the lessee for years rendering rent, *surrenders* his estate to the lessor, hereby the rent is extinct: But if the rent were granted away before the *surrender*, it would be otherwise. 8 *Rep.* 145. *Bro. Surrend.* 42. Tenant for life is disseised, or for years ousted, and before entry, or possession gained, he *surrenders* to him in reversion; this *surrender* is void: And yet if lessee for years, after his term is begun, before he enters, and when no-body doth keep from him the profits, *surrenders*, it will be good. *Perk.* Sect. 600.

If there be lessee for years, the remainder for life, remainder in fee; the lessee for years may *surrender* to the lessee during life, and so may he to him in the remainder in fee: But if there is tenant for life, the remainder for life, and such remainder in fee; here the second tenant for life cannot *surrender* to him in remainder. *Ibid.* 605. *Sed qu.* See *Supra*, and *infra*. In case of tenant for life, the remainder for life, reversion in fee; it was a question formerly, whether the remainder man for life, by and with the consent of the tenant for life, could *surrender* to him in reversion without deed, only by coming on the land and saying, that he did *surrender* to him in reversion; the court were divided; but two judges held, that if tenant for life and he in remainder for life, *surrendered* to the reversioner, it should pass as several *surrenders*, viz. First of him in remainder to the tenant for life, and then by the tenant for life to him in reversion. *Popb.* 137. If tenant for life grant his estate to him in reversion, this is a *surrender*; and it must be pleaded according to the operation it hath in law, or it will not be good. 4 *Mod.* 151. Though if lessees for life or years, grant their estates to him in remainder or reversion and a stranger; it shall enure as a *surrender* of the one half to him in reversion, and as a grant of the other moiety to the stranger. 1 *Inst.* 335. And by statute, no estates of freehold, or of terms for years, shall be granted or *surrendered* but by deed in writing, signed by the parties, or unless by operation in law, &c. 29 *Car.* 2. c. 2. See *Leases*, and 4 *Geo.* 2. *Surrenders of Copyhold Estates*, see *Copyhold*. A *surrender* of a *prebendary's* lease upon condition, that if the then *prebendary* did not within a week after grant a new lease for three lives; the *surrender* shall be void: Held to be a good *surrender* within the statute. 2 *Strangers*

1201. See 20 *Vin. Abr.* 119—146. And *Blak. Com.* 2 *V.* 326.

Surrender of a Bankrupt. The bankrupt, at the third meeting of the commissioners, at farthest, which must be on the 42d day after the advertisement in the Gazette, upon notice personally served upon him, or left at his usual place of abode, must *surrender* himself personally to the commissioners, and must thenceforth in all respects conform to the directions of the statutes of bankruptcy; or, in default thereof, shall be guilty of felony without benefit of clergy, and shall suffer death, and his goods and estate shall be distributed among his creditors. See *Blak. Com.* 2 *V.* 481. and *Stat.* 5 *Geo.* 2. c. 30.

Surrender of Copyholds. It is the yielding up of the estate by the tenant into the hands of the lord, for such purposes as in the *surrender* are expressed. This method of conveyance is so essential to the nature of a copyhold estate, that it cannot possibly be transferred by any other assurance. See *Blak. Com.* 2 *V.* 365, &c. 367, 8. — *N. B.* The law will in some particular cases supply the want of a *surrender*. See *Copyhold*.

Surrender of Letters Patent, and Offices. A *surrender* may be made of letters patent to the king, to the end he may grant the estate to whom he pleases, &c. and a second patent for years, to the same person, for the same thing is a *surrender* in law of the first patent. 10 *R. p.* 66. Letters patent for years were delivered into Chancery to be cancelled, and new letters patent made for years; but the first were not cancelled: It was held that the second were good, because they were a *surrender* in law of the first, and the not cancelling was the fault of the Chancery, which ought to have done it. 10 *Rep.* 66, 67. 2 *Lill. Abr.* 545. If an officer for life accepts of another grant of the same office, it is in law a *surrender* of the first grant: But if such an officer takes another grant of the same office to himself and another, it may be otherwise. 1 *Ventr.* 297. 3 *Cro.* 198. See *Dyer* 167, 198. *Godb.* 415.

Surrogate, (Surrogatus) Is one that is substituted or appointed in the room of another; as the bishop or chancellor's *surrogate*, &c.

Surfise, (Superfisa) A word specially used in the castle of Dover for penalties and forfeitures laid upon those that pay not the duties or rent of *Castle-ward*, at their days limited. *Stat.* 32 *H.* 8. c. 40. It probably comes from the *Fr.* *Surfist*, i. e. forbore or neglected. *Brit.* 52. And *Bracton* hath it so in a general signification. *Bract.* lib. 5.

Survey, Is to measure, lay out, or particularly describe a manor, or estate in lands; and to ascertain not only the bounds and royalties thereof, but the tenure of the respective tenants, the rent and value of the same, &c. In this last signification, which is according to our law; it is also understood to be a court; for on the falling of an estate to a new lord, consisting of manors, where there are tenants by lease, and copyholders, a *survey of survey* is generally held; and sometimes at other times, to apprise the lord of the present terms and interests of the tenants, and as a direction on making further grants, as well as in order to improvements, &c. See *Comp. Court-Keep*.

A *survey* of the manor of D. in the county of G. belonging to the honourable W. B. esq; Taken this — day of, &c. in the year, &c.

A. B. of, &c. holds by lease for his life, and the lives of
T. B. and C. B. his sons, one messuage, and twenty
acres of land, meadow and pasture, situate in, &c. within
the said manor, under the yearly rent of 20 s. — 20 l.
per Ann.

C. D. holds by copy of court-roll for his own life and the
lives of M. his wife and C. his son (all of them living) one
messuage or tenement with the appurtenances within the said
manor, called, &c. quit rent 30 s. heriot 3 l. — 30 l.
per Ann.

E. F. holds by copy for the lives of K. his wife and T. his
son one tenement within the said manor, rent 10 s. heriot;
&c. — 15 l. per ann.

G. H. holds for the term of his own life, one cottage with
the appurtenances, quit-rent 5 s. — 10 l. per ann.

J. K. holds for her widowhood, a piece of ground called,
&c.

L. M. holds, &c.
 Examined by G. J. gent.
 Steward of the said manor.

Surbeyor, (Compounded of two Fr. words, *Sur*. i. e. *Super* & *Voir*, *Cohere*) Signifies one that has the overseeing or care of some great person's lands or works: And there was a court of *surveyors* erected by 33 H. 8. c. 39.

Surbeyor of the King's Exchange, An ancient officer belonging to the mint and coinage, mentioned in the statute 9 H. 5. c. 4.

Surbeyor General of the King's Manors and Lands, We read of in *Crompt. Jurisd.* 106.

Surbeyors of the Highways. Every parish is bound of common right to keep the high roads that go through it, in good and sufficient repair; unless by reason of the tenure of lands, or otherwise, this care is assigned to some particular private person. As it was not (formerly) incumbent on any particular officer to call the parish together, and set them upon this work; therefore, by Stat. 2 & 3 Ph. & M. c. 8. *Surveyors* of the highways were ordered to be chosen in every parish. According to that statute they were originally appointed by the constable and churchwardens, but afterwards by Stat. 3 W. & M. c. 12. They were constituted by two neighbouring justices out of such substantial inhabitants as had either 10*l.* per ann. of their own, or rented 30*l.* a year, or were worth 100*l.* — Now by the late highway act (an abstract of which see under *highway*) a list of ten persons, so qualified, is to be made out by the parish officers and principal inhabitants, from whence the justices in sessions are to take one or more. — See *Highways*, & Stat. 7 Geo. 3. c. 42.

Surbeyor of the Navy, An officer appointed over all stores; and to survey hulls and masts of ships, &c. *Chamberl.*

Surbeyor of the King's Ordnance, This officer surveys the ordnance and provisions of war, allows bills of debt, and keeps the checks on labourers works, &c.

Surbeyors of the Wards and Liveries, Taken away with the court of wards and liveries. 12 Car. 2. c. 24.

Survivor, (From the Fr. *Survivre*, and Lat. *Supervivere*) Is the longer liver of two jointenants, or of any two persons joined in the right of a thing: He that remaineth alive, after others be dead, &c. *Brake* 33. Where there are jointenants in any thing, when one dies, (if but two only) the whole goes to his *survivor*; but if there be more than two, then the part of him who is dead goes among all the *survivors*. 2 Lill. Abr. 546. Jointenants take by *survivorship*, unless they do any act whereby the jointure is severed; for then there can be no *survivorship*. *Wood's Inst.* 147. See *Jointenant* and *Black. Com.* 2 V. 183, 399.

Susana Terra, Is said to be land worn out with ploughing. *Thorn.*

Susceptor, (Lat.) An undertaker or godfather, also a receiver of tribute in the Roman provinces. *Lit. Dist.*

Suspense, (*Suspensio*) Is a temporal stop, or hanging up, as it were, of a man's right, for a time; and in legal understanding, is taken to be where a rent, or other profit out of lands, by reason of the unity or possession of the rent, &c. and the land out of which it issues, is not in effect for a certain time, *Et tunc dormiunt*, but may be revived or awaked: And it differs from *extinguishment*, which is when it dies or is gone for ever. *Co. Lit.* 213. A *suspension* of rent is, when either the rent or land are to be conveyed, not absolutely and finally, but for a time, after which the rent will be revived again. *Faugh.* 109. A rent may be *suspended* by unity for a time; and if a lessor does any thing which amounts to an entry on the land, though he presently depart, yet the possession is in him sufficient to *suspend* the rent, until the lessee do some act which amounts to a re-entry. *Faugh.* 39. 1 *Leon.* 110. As rent is not issuing out of a common, the lessor's inclosing the common cannot *suspend* his rent. *Cro. Jac.* 679. If part of a condition is *suspended*, the whole condition, as well for payment of the rent, as doing a collateral act, is *suspended*. 4 *Rep.* 52. And a thing or action personal once *suspended*, is for ever *suspended*, &c. *Cro. Car.* 373. See *Extinguishment*.

Suspension, A censure whereby ecclesiastical persons are forbidden to exercise their office, or take the profits of their benefices: or where they are prohibited for a certain time in both of them in the whole or in part: Hence is *suspensio ab officio*, or *suspensio à beneficio*, and *ab officio & beneficio*. *Wood's Inst.* 510. There is likewise a *suspension* which relates to the laity, i. e. *suspensio ab ingressu & clericiæ*; or from the hearing of divine service, &c. In which case it is used, as in the Canon law, *pro minore excommunicatione*. Stat. 24 Hen. 8. cap. 12.

Suspension of the Habeas Corpus Act. This is a measure that hath been thought necessary — But, (as observed by *Blackstone* 1 V. 136.) The happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great, as to render this measure expedient. For the parliament only, or legislative power, can authorize the crown, by suspending the *habeas corpus* act for a short and limited time, to imprison suspected persons without giving any reason for so doing. This ought to be done; only in cases of great emergency.

See what the great *Montesquieu* saith, alluding to the *habeas corpus* act, and a temporary suspension of it. "If the legislature leaves the executive power in possession of a right to imprison those subjects who can give security for their good behaviour, there is an end of liberty; unless they are taken up in order to answer without delay to a capital crime; in this case they are really free, being subject only to the power of the law."

But should the legislature think itself in danger by some secret conspiracy against the state, or by a correspondence with a foreign enemy; it might authorize the executive power, for a short and limited time, to imprison suspected persons, who in that case would lose their liberty only for a while, to preserve it for ever." L. 11. c. 6: 1 V. 210, 211. 4*to Ed. a Londres.*

In L. 12. c. 19. fo. 273. The author says, "I acknowledge that the practice of the freest nation that ever existed, induces me to think that there are cases in which a veil should be drawn for a while over liberty, as it was customary to veil the statues of the gods."

Suf. per Coll. On the trial of criminals, the usage now is for the judge to sign the calendar, or list of all the prisoner's names, with their separate judgments in the margin, which is left with the sheriff. As for a capital felony, it is written opposite to the prisoner's name, "Hanged by the neck;" formerly in the days of Latin, and abbreviation, "Suf. per coll." for "*suspendatur per collum*." N. B. This is at the assizes. *Black. Com.* 4 V. 396.

Suspicion, A person may be taken up on *suspicion*, where a felony is done, &c. but those who are imprisoned for a light *suspicion* of larceny or robbery, are bailable by statute 2 Hawk. P. C. 101. And the party being a private person, that takes up one on *suspicion* of felony, must do it of his own *suspicion*, not upon that of another; and he must have reasonable cause of it, &c. *Hale's Hist.* P. C. 78.

Suspiral, (From the Lat. *Suspirare*, i. e. *ducere Suspiria*) Is used for a spring of water, passing under ground towards a conduit or cistern. 35 H. 8. cap. 10.

Sussex, Its shire court, where to be held. 19 H. 7. cap. 24.

Suthdure, (Sax.) i. e. The south door of a church; it was the place where canonical purgation was performed, that is, where the fact charged upon a person could not be proved by sufficient evidence, and the party accused came to the south door of the church, and there in the presence of the people made oath, that he was innocent: And plaints, &c. were heard and determined at the *suthdure*; for which reason large porches were anciently built at the south doors of churches. *Garraf. Drob. de Reparation. Ecclesiæ Cantuar.*

Swan, (*Cygnus*) Is a noble bird of game; and a person may prescribe to have game of swans within his manor, as well as a warren, or park, 7 Rep. 17, 18. A swan is a bird royal; and all white swans not marked, which have gained their natural liberty, and are swimming in an open and common river, may be seized to the use of the

the king, by his prerogative: But a subject may have a property in white *swans* not marked; as any man may have such *swans* in his private waters, and the property of them belongs to him, and not to the King; and if they escape out of his private waters, into an open and common river, he may retake them; though it is otherwise if they have gained their natural liberty, and swim in open rivers without such pursuit. *Game Law*, par. 2. p. 152. Stealing *swans* marked and pinioned, or unmarked, if kept in a mote, pond, or private river, and reduced to tameness, is felony. *II. P. C.* 68. And he that steals the eggs of *swans* out of their nests, shall be imprisoned a year and a day, and be fined at the King's pleasure. *11 Hen. 7. c. 17.* No fowl can be a stray, but a *swan*. *4 Inst.* 280. See *Black. Com.* 4 V. 235.

Swanherd. The King's *swanherd*, *magister deductus cygnorum*. *Pat.* 16 R. 2. See King's *Swanherd*.

Swan-mark. No person may have a *swan-mark*, except he have lands of the yearly value of five marks, and unless it be by grant of the King, or his officers lawfully authorised, or by prescription. *Stat.* 22. E. 4. c. 6. See *Game*.

Swainmote, or Swainmote. (*swainmote*, from the Sax. *swang*, i. e. a country *swain*, and *gemote*, i. e. *convencus*) signifies a court touching matters of the *forest*, held by the charter of the forest thrice in the year, before the verderors as judges. *Crompt. Jurisd.* 108. 3 Hen. 8. c. 18. The *swainmote* is a court unto which all the freeholders in the forest do owe suit and service; and all the officers of the forest are to appear at every *swainmote*, also out of every town and village in the forest four men and a reeve; or on default, shall be amerced and distrained. *Game Law*, par. 2. 19, 20. A court of *swainmote* is incident to a forest, as the court of pie-powder to a fair, &c. *Chart. Forest. Hen.* 3. See *Forest*.

Swarf-Money Is mentioned among customs and services: And this *swarf-money* is one penny half-penny, paid before the rising of the sun; the party must go three times about the cross, and say the *swarf-money*, and then take witness and lay it in the hole; and he is to look well that his witness do not deceive him; for if it be not so paid, he shall pay a great forfeiture, *viz.* xxx s. and a white bull. This account was found in an old MS. containing the rents due to the *Catebys* in *Lodbroke*, and other places in *Warwickshire*. See *Wartb Money*.

Swath. (Sax. *swatba*) A *swathe*, or as in *Kent* a *sweth*, and in some parts a *sworth*, is a strait row of cut grass or corn, as it lies after the scythe at the first mowing of it. *Paroch. Antiq.* 399.

Swearing (Imprecatio) Is an offence against God and religion, and a sin of all others the most extravagant and unaccountable, as having no benefit or advantage attending it. There are several good laws and statutes for punishing this crime: The 21 *Jas.* 1. c. 20. enacts, That if any person shall profanely swear or curse in the presence of a justice of peace, or the same shall be proved before a justice, he shall forfeit 1 s. for every offence, to the use of the poor, to be levied by distress; and for want of a distress, the offender to be set in the stocks, &c. By the *stat.* 19 *Geo.* 2. c. 21. If any person shall profanely curse or swear, and be convicted by the oath of any one witness before any justice of peace, &c. he shall forfeit as follows, *viz.* Every day-labourer, common soldier, common sailor, and common seaman 1 s. Every other person under the degree of a gentleman 2 s. Every person of or above the degree of a gentleman 5 s. a second offence double, and every other offence treble. If the offence be committed in the hearing of a magistrate, he may convict without further proof. If the offence be committed in the hearing of a constable, if the offender be unknown to him, he shall secure him and carry him before a justice of peace; but if the offender be known to the constable, he shall make information against him before a justice of peace.

On information a justice is to order the offender to appear, and if on conviction he do not pay or give security for the penalty, he shall be sent to the house of correction for ten days; or being a common soldier or sailor, be set in the stocks. On default of duty, justices to forfeit 5 l. and constables 40 s. All convictions are to be written on

parchment, and returned to the next sessions. Penalties for profane cursing to go to the poor of the parish, and offender to pay all charges of conviction, or be committed to the house of correction for six days extraordinary. All prosecutions to be within eight days. This act to be read in all churches four times a year, under the penalty of 5 l. The justice's clerk may take for the information, summons and conviction 1 s. and no more. *Mod. Just.* 432. A conviction on the *stat.* 6 & 7 *W.* 3. c. 11. against profane *swearing*, and setting forth that the defendant was not a servant, labourer, &c. and the oaths, that the court might judge of the nature of them, for these reasons the same was quashed; though the counsel for the plaintiff insisted that the information was good; for if the defendant was a servant, &c. he ought to have given it in evidence at the trial. *Mish.* 8. *Geo.* 1. *Mod. Cas.* in *L. & E.* 58, 59. See *Black. Com.* 4 V. 59.

Swearing the Peace. If any man hath just cause to fear that another will burn his house, or do him a corporal injury, by killing, imprisoning or beating him; or that he will procure others so to do; he may demand sureties of the peace against such person: And every justice of the peace is bound to grant it, if he who demands it will make oath, that he is actually under fear of death or bodily harm, and will shew that he has just cause to be so, by reason of the other's menaces, attempts, or having lain in wait for him; and will also farther swear, that he does not require such surety out of malice or for mere vexation. *1 Hawk. P. C.* 127. This is called *swearing the peace* against another: and, if the party does not find such sureties, as the justice in his discretion shall require, he may be immediately committed till he does. *Ibid.* 128. *Black. Com.* 4 V. 252. See *Surety of the Peace*.

Swearpage. Is the crop of hay got in a meadow, called also the *swape* in some parts of England. *Co. Lit.* fol. 4.

Sweets. Made in Great Britain for sale are liable to a duty of excise, &c. See *Excise*.

Swainmote, Court of. The court of *swainmote* is one of the *forest courts*, and is to be holden before the verderors as judges, by the steward of the *swainmote* thrice in every year, the *swains* and freeholders within the forest composing the jury. The principal jurisdiction of this court is, first, to enquire into the oppressions and grievances committed by the officers of the forest; "*de suis per-one ratione forestariorum, et aliorum ministrorum so-ressa; et de eorum oppressiombus populo regis illatis.*" And secondly, to receive and try presentments certified from the court of attachments against offenders in vert and venison. *Stat.* 34. *Ed.* 1. c. 1. And this court may not only enquire, but convict also, which conviction shall be certified to the court of justice-seat under the seals of the jury; for this court cannot proceed to judgment. *4 Inst.* 289. *Black. Com.* 3. V. 72. See *Swainmote*.

Swine or Hogs. Shall not go unringed in woods, *35 Hen.* 8. c. 17. s. 17.

Forfeiture for keeping swine in London, &c. *2 W. & M. sess.* 2. c. 8. *sess.* 20. *8 & 9 W.* 3. c. 37. *sess.* 4. See *Cattle*.

Swoling of Land. (*Solinga vel Swolinga Terra*, in Sax. *Sulung*, from *Sul*) *aratrum*, (as to this day in the west country a plough is called a *Sul*) is as much as one plough can till in a year: A hide of land; though some writers say it is an uncertain quantity. — *Terram Trium Aratrorum, quum Cantiani Anglice dicunt three Swolings.* Chart. *Eccles. Cantuar.*

Sword Hilts. Silver sword hilts may be exported. *9 & 10 W.* 3. c. 28.

Sworn Brothers. (*Frates Jurati*) Persons who by mutual oath, covenanted to share each others fortune: And formerly in any notable expedition, to invade and conquer an enemy's country, it was the custom for the more eminent soldiers to ingage themselves by reciprocal oaths to share the reward of their service: so in the expedition of William duke of Normandy into England, Robert de Oily, and Roger de Ivery, were sworn brothers and copartners in the estate, which the conqueror allotted them. — Robertus de Oileio & Rogerus de Iverio *Frates jurati, & per fidem & sacramentum confederati venerunt ad*

conquestum Angliæ. Paroch. antiq. 57. This practice gave occasion to our proverb of sworn brothers or Brethren in Iniquity; because of their dividing plunder and spoil.

Sylva Cædun, Wood under twenty years growth: coppice-wood. See the statute 45 E. 3. cap. 3. It is otherwise called in law-french *subbois. 2 Inst. fol. 642.* See *Tæbes.*

Symbolum, Is a symbol, or sign in the sacrament; and the creed of the apostles is often called by this name by our historians.

Syncope, A Word used in several ecclesiastical council and synods, signifying to cut short or pronounce things so as not to be understood. *Synod. Wigorn. c. 10.*

Syndicus, An advocate or patron; a burges or recorder of a town, &c. *Mat. Paris. Anno 1245.*

Syngraph, (*syngraphus*) A deed, bond or Writing, under the hand and seal of all the parties; and it was the custom for both the debtor and creditor in writings obligatory to write their names and the sum borrowed on a piece of paper, with the words *syngraphus* in large letters in the middle; which being cut through, one part of the paper was delivered to each party, for their better security, &c. See *Chirograph.* and *Black. Com. 2 V. 296.*

Synod, (*synodus*) A meeting or assembly of ecclesiastical persons concerning religion; being the same thing in greek, as *convocation* in latin: And of synods there are four kinds, 1st, A general or universal synod or council, where bishops of all nations meet. 2dly, A national synod, of the clergy of one nation only. 3dly, A provincial synod, where ecclesiastical persons of a province only assemble. 4thly, A diocesan synod, of those of one diocese, &c. And our Saxon King's usually called a synod or mixed council, consisting of ecclesiasticks and the nobility, three times a year; which is said to have been the same with our parliament. See *Black. Com. 1 V. 279.*

Synodical, (*synodale*) Is a tribute or payment in money, paid to the bishop or archdeacon, by the inferior clergy, at Easter visitation; and it is called *synodale* or *synodaticum*, quia in synodo frequentius debatur. *Right. Clerg. 59.* They are likewise termed *synodites*, in the stat. 34 H. 8. cap. 16. And sometimes *synodale* is used for the synod itself; and *synodals provincial*, the canons or constitutions of a provincial synod. 25 Hen. 8. c. 19.

Synodals Cestres, Where the urban and rural deans, whose office at first was to inform of and attest the disorders of the clergy and people in the episcopal synod; and for which a solemn oath was given them to make their presentments, &c. But when they sunk in their authority, the synodical witnesses were a sort of impanelled grand jury, composed of a priest and two or three laymen of every parish, for the informing of or presenting offenders; and at length two principal persons for each diocese were annually chosen, till by degrees this office of inquest and information was devolved upon the churchwardens. *Paroch. Antiq. 649.*

Synonymous, A thing of the same name; or of the like signification. *Litt. Diæ.*

T.

EVERY person convict of any other felony (save murder) and admitted to the benefit of his clergy, shall be marked with a T. upon the brawn of his thumb. Stat. 4 H. 7. c. 13.

Tabacum, *Herba ab insula Tobaco, ubi copiose provenit; qui primus eam ex India ad nos adduxit, see Tobacco.*

Tabard, Tabarder; The bachelor scholars on the foundation of Queen's college Oxford, are called *tabitars* or *tabarders*; and these scholars were named *tabitars*, from a gown wore by them, called a *tabert*, *tabarr*, or *tabard*: For *Verstegan* tells us, that *tabert* anciently signified a short gown that reached not farther than the middle of the leg; and it remains for the name of such in Germany and other countries, which with the *Teutonic* and *Saxon* *taber*, signify all a kind of garment, &c.

Tabardum, A garment like a gown; and used for a herald's coat, but generally taken for the gown of ecclesiasticks. — *Frater sacerdos de &c. habebat unam Ro-*

bam integram, Tunicam, supertunicam, Tabardum & ca. n. cium nigri Coloris. *Mat. Paris. 164.*

Tabellion, (*Tabellio*) A notary publick or scrivener, allowed by authority, to ingross and register writings, &c. His office in some countries did formerly differ from that of notary, but now they are grown or made one. *Mat. Paris. Anno 1236.*

Table-Rents, (*redditus ad mensam*) Were rents paid to bishops, &c. reserved and appropriated to their table or house-keeping. See *Bord-land.*

Tabling of Fines, Is the making a table for every county, containing the substance of fines passed; as the name of the county, town or place where the lands or tenements lie, the name of the demandant and defendant, and of the particular lands, &c. mentioned in the fine: This is properly to be done by the *chirographer* of fines of the Common Pleas, who every day of the next term after the ingrossing of any such fine, doth fix the said tables in some open place of the said court during its sitting; and he also delivers to the sheriff of each county, his undersheriff or deputy, fair written in parchment, a perfect content of the table so made for that shire, in the term next before the assizes, or between the term and assizes, to be set up at the assizes in an open place of that court, and continue there so long as the justices shall sit, &c. And if either the chirographer, or sheriff fail herein, they shall be liable to the penalty of 5 l. *Stat. 23. Eliz. c. 3.*

Tabula, and *intabulati* of persons, &c. in cathedral churches. Vide *Ebdomadarium.*

Tac or Tak, *custumarius in Bosbury debet quasdam consuetudines, viz. tak & toll, &c. Blount's Ten. 155.*

Tacfree, Is used in old Charters, as an exemption from payments, &c. — *Cum household & haybold & tacfree de omnibus propriis porcis suis infra omnes metas de C. that is, they paid nothing for their hogs running within that limit.*

Tactare, for *confirmare.* *Fleta, lib. 2. c. 61.*

Tail, (*Fr. taille, from tailler, to cut or limit, Lat. feodum talliatum*) Is a limited fee, opposed to fee-simple: It is that inheritance whereof a man is seised to him and the heirs of his body begotten or to be begotten: And he that giveth the lands in *tail*, is called the *donor*, and he to whom the gift is made, the *donee.* *Litt. 18.* All estates of inheritance were originally *fee-simple* by the common law; but by the statute *de donis conditionalibus* the inheritance was divided, and a particular estate created by statute in the donee, which is what is called an *Estate-tail*, i. e. an estate cut and divided from the fee-simple; which estate is to return to the donor or his heirs after the determination of the *tail.* 3 *Nelf. Abr. 266.*

Before the statute of *Westm. 2. 13 Ed. 1.* If lands were given to a man and the heirs of his body, it was interpreted to be a fee-simple presently by the gift upon condition that he had issue; and if he had issue, the condition was supposed to be performed for three purposes, *viz.* to alien and disinherit the issue; and by the alienation to bar the donor or his heirs of all possibility of the reversion; to forfeit the estate for treason or felony; and to charge it with rent, &c. But by this statute, the will and intention of the donor is to be observed; as that the tenant in *tail* shall not alien after issue had or before, or forfeit or charge the lands longer than for his own life, &c. and the estate shall remain to the issue of the donee, or to the donor or his heirs where there is no issue; so that whereas the donee had a fee-simple before, now he has but an estate-tail, and the donor a reversion in fee expectant upon that estate-tail. *Co. Lit. 19.* In this manner it continued some time, though daily experience shewed that much mischief had crept into the law by intailed inheritances, as frauds to creditors, &c. and sons became disobedient when they found they could not be disinherited; wherefore the judges found out a way to bar an estate-tail, with remainders over, by a feigned recovery. *Ann. 12 Ed. 4.* And since by a fine to bar the issue, by 4 *Hen. 7. cap. 20.* and 32 *Hen. 8. cap. 33.* And for that owners of land held in *tail* were less fearful to commit treason on account of the easy forfeiture; therefore the stat. 26 *Hen. 8. cap. 13.* was made; and men that had intailed lands, could not make improvements, their estate be-

ing only for life ; for this reason the *stat. 32 H. 8. cap. 18.* gave them power to make leases for twenty-one years, or three lives, &c.

The statute *de donis* creates no entail, but of such an estate which was fee-simple at the common law ; and defendible as a fee-simple. *1 Inst. 19.* Lands of inheritance, and all inheritances favouring of the realty may be entailed ; so rents, profits, offices, dignities, &c. which concern lands, or certain places : But if the grant of an inheritance be merely personal, or exercised with chattels only ; it cannot be entailed. *4 Inst. 87. 7 Rep.* A grant of an annuity, to a man and the heirs of his body, is void ; and a lease for years to a person and the heirs of his body is also void ; though an assignment may be made of a lease for years, in trust to permit the issue in tail to receive the profits ; which is in effect an estate tail. *10 Rep. 87.*

Estate-tail of lands, are *general* or *special* : *General tail* is where lands or tenements are given to a man and the heirs of his body begotten ; or to a woman and the heirs of her body begotten : In this case, it is called a *general tail*, because whatever woman the man taketh to wife, the issue may inherit the lands ; and whatsoever man the woman takes to husband, the issue may inherit ; or if she have divers husbands, and have issue by every of them, they shall inherit one after another, as heir of her body.

Special tail is when lands and tenements are given to a man and his wife, and to the heirs of their two bodies begotten ; in which case, no other persons can inherit but the issue that are begotten by him on that particular wife ; and it is called *special tail*, for that if the wife die, and the husband marries a second wife, by whom he hath issue, such issue has no benefit, as they have by the *general tail*. *Litt. 14, 16. Co. Litt. 19, 20.* If lands are given to the husband and wife, and to the heirs of their bodies, both of them have an estate in *special tail* ; by reason of the word *heirs*, for the inheritance is not limited to one more than the other : Where lands and tenements are given to a man and his wife, and to the heirs of the body of the man, the husband hath an estate in *general tail*, and the wife an estate for life ; as the word *heirs* relates generally to the body of the husband : And if the estate is made to the husband and wife ; and to the heirs of the body of the wife by the husband begotten ; there the wife hath an estate in *special tail*, and the husband for term of life only ; because the word *heirs* hath relation to the body of the wife, to be begotten by that particular husband : If an estate be limited to a man's heirs which he shall beget on his wife, it creates a *special tail* in the husband ; but the wife will be intitled to nothing, &c. *Litt. 26, 28. Co. Litt. 22, 26.*

Lands given to a man and woman unmarried, and to the heirs of their bodies, will be an estate in *special tail* ; for they may marry. *1 Inst. 25. 10 Rep. 50.* And though lands are given to a married man and another man's wife, and the heirs of their two bodies, it may be a good estate-tail, for the possibility of their intermarrying. *15 Hen. 7.*

A *general tail*, and a *special tail*, may not be created at one and the same time ; if they are, the general, which is greater, will frustrate the special. *1 Inst. 28.* There are other estate-tails within the equity of the statute ; as if lands are given to a man and his heirs males or females, of his body begotten, the issue male or female shall only inherit according to the limitation : By virtue of the statute, here the daughter may be heir by descent, though there be a son : But in the case of a purchase, there cannot be an heir female where there is a son, who is right heir at law. *1 Inst. 24, 164.* And whoever will make claim, as heir *per formam doni* to an estate-tail, must make his descent by such heirs to whom it is limited ; if it is to heirs males of the body, there the pedigree is to be derived by heirs males ; and if it be to heirs female, he must derive it by heirs female one after another. *1 Inst. 376.* If a gift is to one, and the heirs males of his body, and he hath issue a daughter, who hath a son, and dies ; in this case the son shall not inherit the estate-tail, for he cannot make his descent by heirs male. *Ibid.* And where there is no heir to take according to the gift ; as when issue fails, the land shall

revert to the donor or descend to him that is to have it after the estate-tail is spent. *1 Inst. 25.*

It is the word *body*, or other words amounting to it, make the entail : And a gift to the heirs male, or heirs female, without anything farther, is a fee-simple estate, because it is not limited of what body : And hence a corporation cannot be seised in tail. *1 Inst. 13, 26, 27.* In a devise or last will, an estate-tail may be created without the word *body* ; also begotten shall be supplied and necessarily intended. *Noy's Max. 101. 1 Inst. 26.* If one gives lands to a man and his issue, or children of his body, without the words, *his heirs*, to convey the inheritance, he has but an estate for life : Though such words may be good enough to convey the inheritance in a will ; as estate-tail by devise are always more favoured in law, than estate-tail created by deeds. *1 Inst. 20.*

It has been held, that if the word *issue* is a limitation, 'tis an entail ; but if 'tis by way of description who shall take, 'tis only an estate for life. *Mod. Caf. in L. & E. 263.* The word *heirs* is necessary to create an estate-tail and inheritance by deed ; and where an use was limited to A. B. and to his heirs males, lawfully to be begotten ; these last words imply that it must be heirs males of his body, because no other heir male can inherit by virtue of his grant, but such who are lawfully begotten by the grantor. *7 Rep. 41.* If a man makes a feoffment to the use of himself for life, remainder to the heirs males of his body, this is an estate-tail executed in him ; and so it is if he covenanted to stand seised in the same manner. *1 Mod. 159.*

By a marriage settlement and fine levied, &c. to the use of the husband and wife, for their joint lives ; remainder to the heirs of the body of the wife by the husband to be begotten, remainder (the wife surviving the husband) to her for life, remainder to the right heirs of the husband ; this was held to be an estate-tail, executed in the wife. *Raym. 127. 3 Salk. 338.* Land is conveyed to the use of a man and his wife for their lives, and after to their next issue male in tail, then to the use of the husband and wife, and of the heirs of their bodies begotten, they having no male issue ; by this husband and wife are tenants in *special tail* executed, and when they have issue male, they will be tenants for life, remainder to their son in tail, the remainder to them in *special tail*. *1 Inst. 28.*

Where a person having an estate in fee, conveys it by lease and release to the use of himself for life, with remainder to trustees for their lives, and remainder to the heirs of his body ; he hath an estate-tail in him ; but he is only tenant for life in possession : It would be otherwise, if there had been no intermediate estate in the trustees for their lives. *2 Ld. Raym. 855.* A man seised of land in fee, makes a gift of it in tail, or lease for life, remainder to the right heirs male of the body of the donor, this remainder it is said will be a fee-simple, and not an estate-tail. *Dyer 156.* If the gift or grant of the land be to J. S. and his heirs, to hold to him and the heirs of his body, &c. here he will have an estate in tail, and a fee-simple upon it. *Litt. ch. 2. 1 Inst. 21.* Lands are given to two brothers, &c. and to the heirs of their bodies begotten ; during their lives they shall have joint estates, so that the survivor will have all for his life ; and after their deaths, their heirs have estates in *general tail*, by moieties in common one with another. *1 Inst. 25. 1 Rep. 140.*

When a remainder is limited to two, and the heirs male of their bodies, they have not joint but several estate-tails. And between baron and feme, 'tis said several moieties may be of an estate-tail, as well as of a fee-simple. *Cro. Eliz. 210. Moor 228. 3 Lill. Abr. 551.* A feoffment was made to the use of the feoffor for life, remainder to W. R. his son, and his heirs ; and for want of issue of him, remainder to the right heirs of the feoffor ; adjudged W. R. hath only an estate in tail ; for though the first words of the sentence, viz. to his son and heirs, make a fee-simple, the subsequent words in the same sentence, i. e. and for want of issue of him, make an estate-tail, by qualifying and abridging the same. *5 Mod. 266. 3 Salk. 337. See Hall. 57. Dyer 534.*

If a person gives lands to A. for life, and after his death without issue, then to another person ; though here

is an express estate for life given to *A.* the subsequent words make an estate-tail: But where lands are devised to *A.* during life, the remainder to trustees, remainder to his first son, &c. and if *A.* dies without issue, then, &c. The limitation upon the devisee's death, 'tis said will not give an estate in tail to *A.* but it shall be here intended, that if he died without having a son. *1 P. Williams, 605.* A father having two sons, devised his lands to his youngest son, and if he died without heirs, then to his eldest son and his heirs; the youngest son had an estate-tail, because the devise to him, and if he died without heirs, is the same as if the testator had devised it in these words, viz. If he die without heirs of his body; for otherwise the remainder limited to the eldest son had been void, as the youngest son cannot die without heirs, so long as the eldest is living. *1 Roll. Abr. 836.*

In ejectment the case was, the father having three sons, devised his lands to his second son, and his heirs for ever; and for want of such heirs, then to the right heirs of the father; then the father died, and his second son entered, and died without issue, leaving the eldest son: It was resolved, that the second son had but an estate-tail, and that the devise over by these words, and for want of such heirs, is void in point of limitation, for the testator's intent was that the lands should descend from himself, and not from his second son; and the words, want of such heirs, could import no other than want of issue, &c. so that the eldest son takes by descent in this case, and not by the will. *1 Salk. 233.*

A person devised land to his wife for life, remainder to his son, and his heirs for ever; and if he died without heirs, the same to remain to his two daughters: In this case it was held in equity, that the rule is, where a remainder over is to one, who may be the devisee's heir at law, such limitation will be good, and the first construed an estate-tail; for the generality of the word heirs, shall be restrained to heirs of the body, since the testator could not but know that the devisee would not die without an heir, while the remainder man, or any of his issue continued: But where the second limitation is to a stranger, 'tis merely void, and the first is a fee-simple. *Talbot's Chan. Caf. 2.*

An estate-tail cannot merge by the accession of the fee-simple to it: But it has been adjudged, that two fees immediately expectant upon one another, (as where a man is tenant in tail, and remainder in fee to the tenant in tail) cannot subsist in the same person; and the statute of *Westm.* having made estates-tail a kind of particular estates, they must like all other such estates be subject to merger and extinguishment, when united with the absolute fee. *8 Rep. 74. 1 Salk. 338.* If there be tenant in tail, remainder in tail, and tenant in tail entails the reversioner in fee; it is a *discontinuance*: And tenants in tail can make no greater estate than for their own lives; unless it be by lease, &c. according to the *stat. 32 H. 8. c. 28. 1 Rep. 140.*

If tenant in tail bargain and sell lands to another and his heirs, or make a lease and release to the use of himself for life, with remainder over to another, &c. These estates may be avoided by entry of the issue in tail. *Farrington, Mo. Ca. 23, 28.* Estates-tail are usually created upon settlements: Though an agreement to entail, is no entail; for no agreement shall bind the issue in tail, where there is a first entail, without a fine. *Chanc. Rep. 236.* It is incident to an estate-tail, to be disposable of *in waste*; that the wife of the donee shall be *entailed*; the husband of a feme donee, be tenant by the *curtesy*; and that the tenant in tail may suffer a common recovery, &c. and therefore conditions to restrain any of these, are void. *1 Inst. 284. 10 Rep. 38.*

As by statute it is incident to estates-tail to make leases; so by custom, it is to grant lands by copy of court roll, &c. Tenant in tail of a trust may bind his heir by articles in equity. *See Elliot, Recovery, 20 P. Abr. tit. Tails and Bails, Case 17. 112, 113, 114.*

Tail after Possibility of Issue extinct. Is where lands and tenements are given to a man and his wife in special tail, and either of them dies without issue had between them; the survivor hath an estate in tail after possibility of issue, &c. Also if they have issue, and the

issue dies without issue, whereby there is none left who may inherit by force of the intail, the survivor of the donees hath an estate-tail after possibility. *Litt. 32.* The estate of this tenant must be created by the act of God, viz. by the death of either party without issue; none can have this estate but one of the donees, or a donee in special tail; for a donee in general tail may by possibility have issue. *Litt. 32. 1 Inst. 28. 11 Rep. 80.* And if one gives lands to a man and his wife, and the heirs of their two bodies in special tail, and they live till each of them are one hundred years old, and have no issue; yet doth the law see no impossibility of having children, and they continue tenants in tail: But if the wife die without issue, there the law seeth an apparent impossibility. *1 Inst. 28.*

Tenants in tail after possibility of issue extinct, are not punishable for waste; as are tenants for life: but such tenants, or tenants by the curtesy, &c. may not suffer a recovery. And though they have more privileges than tenants for life hath; as if they alien the land, he in reversion cannot have a writ of entry in *casu consimili*; and they need not require aid, &c. Yet as to the quantity of their estates, they have no privilege above estates for life: For if such tenant in tail after such possibility, make a feoffment of his land, he in reversion may enter for the forfeiture, &c. *1 Inst. 27, 28. 9 Rep. 139. Litt. Sect. 34.* A tenant in tail cannot be seized to any use expressed; for his estate is so fixed, that none can execute the use: And where tenants in tail general or special, &c. die without issue, the donor or his heirs may enter. *Jenk. Cent. 195. Litt. 18.* If tenant in tail in remainder, be attainted of treason, &c. the King shall have the land; for it may not be in abeyance, nor in any other, he not being dead, but in law: The chief lord cannot have it, by reason the tenant for life is alive; so neither he that is in reversion, &c. and it cannot revert, before the tenant in tail die without issue. *2 Leon. 123. Vide stat. 10 Geo. 2. cap. 26. See Black. Com. 2 V. 124.*

Taking, (Fr. *trinh*, i. e. *infensus, tinus*) Is taken substantially for a conviction; or adjectively for a person convicted of treason or felony. See *Attaints*.

Taking, felonious. A felonious taking must be done, *animus furandi*: Or, as the civil law expresses it *lucris causa*, i. e. with an intent to steal. The circumstances must be left to the due and attentive consideration of the court and jury. *Black. Com. 4 V. 230, 232.*

Taking, unlawful. When I once have gained a rightful possession of any goods or chattels, either by a just occupancy, or by a legal transfer, whoever either by fraud or force, dispossesses me of them is guilty of a transgression against the laws of society, which is a kind of secondary law of nature, *Black. Com. 3 V. 145.*

Tale, or count. The first of pleadings or mutual allegations between the plaintiff and defendant, is the declaration, *narratio*, or count, antiently called the Tale; in which the plaintiff sets forth the cause of his complaint at length. *Black. Com. 3 V. 293.*

Talent. A weight of sixty-two pounds; also a sum of money among the Greeks, of about 100 l. value. *Merch. Dig.*

Tales, (Lat.) Is used in the law for a supply of men impanelled on a jury and not appearing, or on their appearance challenged as not indifferent; when the judge upon motion orders a supply to be made by the sheriff, &c. of one or more such persons present in court, equal in reputation to those that were impanelled, to make up a full jury, which he could do by the common law; and this is by the statutes *35 H. 8. c. 6. 2 & 3 Ed. 6. c. 32. 14 Eliz. c. 9. 7 & 8 W. 3. c. 32, &c.* Tales are of two sorts, i. e. *tales de circumstantibus*, and a *decem tales*; a *tales de circumstantibus* is where a full jury do not appear at the first assize, or so many are challenged that there is not a full jury; then on the prayer of the plaintiff's counsel or attorney, the judge will grant this *Tales*, which the sheriff returns immediately in court; A *decem tales* is when a full jury doth not appear at a trial at law, and is a writ to the sheriff, *appone decem Tales*. *10 Rep. 102. Finch 414. 2 Roll. Abr. 67.*

Upon a trial at bar, if the jury do not appear full, the court cannot grant a *Tales de circumstantibus*, but will grant a *decem Tales*, returnable in some convenient time the same term, to try the cause. 2 *Lill. Abr.* 552. And a *Tales de circumstantibus* ought not to be in an *assise*, only at *nisi prius*; the *decem Tales* must be awarded in an *assise*. *Cro. Car.* 341. A plaintiff or defendant may have a *Tales de circumstantibus*; and the statutes which authorize justices of *nisi prius* to award a *Tales de circumstantibus*, extend as well to capital cases as to others; but such a *Tales* cannot be prayed for the King upon an indictment, or criminal information, without a warrant from the attorney general, or an express assignment from the court before which the inquest is taken; though it may be awarded on an information *qui tam*, &c. because of the interest which the prosecutor hath in such prosecutions. 2 *Hawk. P. C.* 409. 3 *Salk.* 339. A *Tales* is not to be granted where the whole jury is challenged, &c. but the whole panel, if the challenge be made good, is to be quashed, and a new jury returned; for a *Tales* consists but of some persons to supply the places of such of the jurors as were wanting of the number of twelve, and is not to make a new jury. 2 *Lill. Abr.* 552.

If but one juror appears on the principal panel, the court may order a *tales* by the statute: 35 *H. 8. c. 6.* 10 *Rep.* 102. And if upon a *habeas corpora*, or a *disfringas jur.* none of the jury appear, it is said a *decem tales* shall be awarded: But it shall not be had upon a *venire fac.* *Cro. Eliz.* 502. *Moor* 528. See *Dyer* 245. 2 *Roll. Rep.* 75. At the assizes, one of the principal panel appeared, and no more, and a *tales* was awarded, the title whereof was *Nomina decem talium*, and under it eleven were returned; this was notwithstanding held good; for it is only a misprision of the clerk, and *decem* was struck out, and then the title was *Nomina talium*, &c. And it was adjudged, that if after a *tales* granted, the principal panel should be quashed, the *tales* should stand good, and more be added, &c. 4 *Rep.* 103. 2 *Cro.* 316. 3 *Nels. Abr.* 275.

No person shall take any reward or fee upon the account of any *tales* returned; on pain of forfeiting 10 l. one moiety to the informer, and the other to the king. 4 & 5 *W. & M. c. 24. s. 20.* And by this act the qualification of *talesmen* is to be 5 l. per annum freehold estate, &c. The *tales de circumstantibus*, is in some measure taken away, or rendered useless, by the late statute for regulating of juries. 3 *Geo. 2. c. 25.* See *Black. Com.* 3 *V.* 365. xi. 4 *V.* 348. And see the writ, 3 *V.* 364.

Tales, Is also the Name of a book in the King's Bench office, of such persons as were admitted of the *tales*. 4 *Inst.* 93.

Talions Lex. The Law of Retaliation. This can never be in all cases, (indeed but in few,) an adequate or permanent rule of punishment. In the case of murder, the punishment is death — But as to the subject, it is too prolix to treat here, fully. We must therefore refer to *Black. Com.* 4 *V.* 12, 13, &c. where it is judiciously treated.

Tallage, (*Tallagium*) from the Fr. *Taille*, Is metaphorically used for a part or a share of a man's substance, carved out of the whole, paid by way of tribute, toll, or tax. *Stat. de tallagio non concedendo temp. Edw. 1.* *Stow's Ann.* 445. And according to Sir *Edw. Coke*, tallage is a general word for all taxes. 2 *Inst.* 532. See *Black. Com.* 1 *V.* 310. 4 *V.* 412, 419.

Tallagers, Are tax or toll gatherers mentioned by *Chaucer*.

Tallagium facere, To give up accounts in the *Exchequer*, where the method of accounting is by *talleys*. *Mem. in Scacc.* Mich. 6 *Ed. 1.*

Talley, (*Tallea*, Fr. *Taille*, Ital. *Tagliare*, i. e. *Scindere*,) Is a stick cut in two parts, on each whereof is marked with notches, or otherwise, what is due between debtor and creditor; as now used by brewers, &c. And this was the ancient way of keeping all accounts, one part being kept by the creditor, the other by the debtor, &c. Hence the *tallier* of the *Exchequer*, whom we now call the *teller*. But there are two kinds of *tallies* mentioned in our statutes to have been long used in the *Exchequer*; the one is termed *tallies of debt*, which are in the nature of an acquittance for

debts paid to the king, on the payment whereof these *tallies* are delivered to the debtors, who carrying them to the clerk of the pipe office, have there an acquittance in parchment for their full discharge. 1 *R. 2. c. 5.* The other are *tallies of reward* or allowance, being made to sheriffs of counties as a recompence for such matters as they have performed to their charge, or such money as is call upon them in their accounts of course, but not leviable, &c. 27 *Hen. 8. c. 11.* 33 & 34 *H. 8. 2 & 3 Ed. 6. c. 4.* In the *Exchequer* there is a *talley court*, where attend the two deputy chamberlains of the *Exchequer*, and the *talley cutter*: And a *talley* is generally the king's acquittance for money paid or lent, and has written on it words proper to express on what occasion the money is received. *Lex Consuet.* 205.

Tallia, Every canon and prebendary in our old cathedral churches, had a stated allowance of provisions delivered to him *per modum tallie*; and thence their commons in meat and drink were called *tallia*. *Stat. Sti. Paul. Ann.* 1295.

Tallow, Prohibited to be exported, 18 *El. c. 9.* 13 & 14 *Car. 2. cap. 7. sect. 5.* Tallow to what duties liable on importation, 2 *Will. & Ma. sess. 2. cap. 4. sect. 36.* May be imported from Ireland duty free. 32 *Geo. 2. c. 12. sect. 1.* Extended to hogs-lard and grease. 1 *Geo. 3. c. 10.* And continued by 4 *Geo. 3. c. 6.*

Tallyman, A person that sells, or lets goods, clothes &c. to be paid by so much a week. *Merch. Dict.*

Talwood, (*Talliatura*) Fire wood cleft and cut into billets of a certain length; otherwise written *Talgwood*, and *Talvide* in the ancient statutes. 34 & 35 *H. 8. c. 3. 7 Ed. 6. c. 7.* 43 *Eliz. c. 14.*

Tam Quam. Is in nature of a *qui tam*, being where a man prosecutes as well for the king as for himself, on an information for breach of some penal law, whereby any penalty is given to the party that sues. *Terms de Ley.* In every case where the statute prohibits a thing, and doth not annex a penalty to the committing thereof, the party offending may be indicted for a contempt against the statute; or action lies against him for breach of it, which must be brought *tam pro domino rege, quam pro seipso*, as there is a fine to be paid to the king. 2 *Inst.* 118. *Cro. Eliz.* 655. *Cro. Jac.* 134. In action popular, brought *tam quam*, the king can discharge but his own part, and not the informer's; but before action brought, the king may discharge the whole. 3 *Inst.* 238. See *Information*.

Tangier, An ancient city of *Barbary*, formerly part of the dominions of the crown of England, as *Gibraltar* is at present; mentioned in the statute 15 *Car. 2. c. 7.* *Tangier*, deemed not to be a plantation. 22 & 23 *Car. 2. c. 26.*

Tanistry, Seems to be derived from *Thanis*; and is a law or custom in some parts of Ireland of which Sir *John Davis* says thus; — *Quant ascun person morust seise des ascuns castles, manors, terres ou tenements del tenure de tanistry; que donques mesme les castles, &c. dont descendre, & de temps dont memory de cour ont use de descendre seniori & dignissimo viro sanguinis & cognominis, de tiel person issint morant seise, & que le file ou les files de tiel person issint morant seise de tous temps avant dit, ne fueront inheritables de tiels terres ou tenements, ou ascun parte de eux.* *Dav. Rep.* 28. *Antiq. Hibern.* p. 38.

Tannare, Is a word used for to dress or tan leather. *Plac. Parl.* 18 *Ed. 1.*

Tanners. No person shall tan leather unless he hath been an apprentice for seven years with a *tanner*, or he be the son of a *tanner*, &c. on pain of forfeiting the leather tanned, or the value. *Stat. 1. J. 1. cap. 22.* *Tanners* over-liming hides, or using in tanning any thing but oak-bark, ash bark, culver-dung, &c. incur a forfeiture of the leather; and hastening the tanning of the leather by unkind heats, &c. are liable to a penalty of 10 l. and to stand in the pillory. And hides for sole-leather are to lie in the woods twelve months, and upper-leather nine months, or shall be forfeited, &c. *Stat. ibid.* *Tanners* shall not shave their hides. 13 & 14 *Car. 2. c. 7.*

Tantamount, Is where one thing doth amount to another, and then it is all one as if it was the same: as a lease

and release amount to a feoffment; and licence to occupy land for years, to a lease for the term; *Gr. 14 H. 8. 13. Shap. Epis. 1130.*

Tape, Exempt from payment of the duties called the two third subsidies. *7 Ann. c. 7. s. 14.*

Tar. See *Pitch, Stores.*

Tare and Tret. The first is an allowance in merchandise, made the buyer for the weight of the box, bag, or casks wherein goods are packed: And the last is a consideration in the weight, for waste in emptying and reselling the goods, by dust, dirt, breaking, &c. *Book Rates.*

Target, (From the Lat. *Targus*) A shield, originally made of leather, wrought out of the back of an ox. *Blount.*

Targia, (*Tarida*) Was a ship of burden, since called a *Tartan*, and *Tarrita*: Knighton, Anno 1385.

Tariff. Custom, duties, toll, or tribute payable upon merchandize exported and imported, are so called. See *Black Com. 1 V. 313.*

Tarpaulin, or *Tarpauling*, A tarred canvas to keep the weather out of ships; but it is commonly used for a mariner, or drudge in a ship that does the vilest service. *March. Dict.*

Tartaron, A sort of fine cloth or silk. *Stat. 4 Hen. 8. c. 6.*

Tas, (Fr.) Is a cock, heap, stack or rick of hay or corn. *Law Fr. Dict.*

Tassale, for *Casula*, A priest's garment covering him over.

Tassum, A Mow of Corn or Hay, from the Fr. *Tasser*, to pile up. *Tasser*, to mow or heap up; and *ad tassum surcare* is to pitch to the mow. *Rot. Hill. 25 Ed. 3.*

Tath. In the counties of *Norfolk* and *Suffolk*, the lords of manors, claimed the privilege of having their tenants stocks or sheep brought at night upon their own demesne lands, there to be folded for the improvement of the ground; which liberty was called by the name of *Tath*. *Spelm.*

Tavern. The king may license any *tavern* for selling of wine, &c. *16 Car. 1. c. 21.* But persons who inordinately haunt *taverns*, are indictable by the Common law, and continuing drinking, and tippling, &c. is liable to penalties, by the statutes *1 Jac. 1. c. 9. 21 Jac. 1. c. 7.*

Tau, By *Selden* in his notes upon *Eadmerus*, signifies a cross. *Mon. Ang. Tom. 3. p. 121.*

Tauri liberi Libertas, In ancient charters is used for a common bull; so called, because he is free and common to all the tenants within such a manor or liberty, &c.

Tawers. It is ordained that collar makers, gloves, bridle-cutters, and others, who dress *skins* in allum, &c. and cut the same into wares, shall be accounted *tawers*, and subject to the penalties, for frauds and concealments relating to the duty on leather, by *Stat. 9 Ann. c. 11.*

Tax, (*Taxa*, from the Gr. *Taxe*, i. e. *Ordo, Tributum*) A tribute or imposition laid upon the subject, which being certainly and orderly rated, was wont to be yearly paid into the king's Exchequer: And it differs from what is commonly called a *subsidy*, in this, That it is always certain as it is set down in the Exchequer-book, and levied in general of every town, and not particularly of every man, &c. See *Subsidy* and *Rastall's Abridgment, Tit. Taxes, Tenbs, Fifteenths, Subsidies, &c. and 4 Inst. 26, 33.*

It is said that in ancient times, *taxes* were imposed by the king at his pleasure; but king *Edward 1.* bound himself and his successors in the 25th year of his reign, that from that time forward no tax should be laid upon the subject, without the assent of the lords and commons in parliament. *Stat. 25 Edw. 1. c. 5.* But although *taxes* which are for the defence of the realm, cannot be imposed but by act of parliament; yet the crown has a right to ask them upon any emergency, and therefore it is held they have a virtual existence always, tho' no actual one. In the 14th year of *Edward 1.* an aid was granted to the king, by the parliament; and *anno 2. 2. a royal aid* for keeping the sea, and preserving of rights: And also a *subsidy* of 1s. in 20s. on goods, and aliens to pay 2s. &c.

was granted by 3 & 4 *Edw. 6.* Besides *fifteenths* and *tenbs*, payable by the temporality and clergy in two or three years, &c. And the way of *taxing* was formerly by *tenbs* and *fifteenths*; then by *subsidies*, afterwards by *royal aids*, and at last by a *pound rate*; the former were all upon the person and personal estate, and were much the same; but the pound-rate was upon lands and rents. *Anno 18 Ed. 3.* a valuation was made of all the towns in *England*; and returned into the *Exchequer*, and this became the standing rule for *taxing* every town (*viz.*) When a *tax* was given the officers of the *Exchequer* presently knew to how much it amounted for every town, and the inhabitants taxed the landlords, and occupiers of lands, and they were charged and paid their proportion, &c.

A subsidy was granted *anno 32 H. 8.* and this was a *tax* upon the person, both for lands and goods, and payable where the persons lived; and this continued till the 15 *Car. 1.* and about two years afterwards the first assessment was made upon lands and rents, according to a pound-rate. *2 Inst. 76, 77. 3 Salk. 340.* In the 16 & 17 *Car. 1.* *Taxes* were granted for relief of, and disbanding the army, &c. And 13 *Car. 2. c. 3 & 4.* The sum of 1,260,000 *l.* was granted for eighteen months at 70,000 *l.* per month, charged on the several counties by lieutenants, for ammunition for the militia, and several aids were granted, one of 2,477,000 *l.* for fitting out a navy and maintenance of wars, &c. in the years 16, 17, 18, 19 & 25 *Car. 2.* Also a free and voluntary present was granted to king *Charles 2.* but it was ordained that the same should not be drawn into example.

King *James 2.* had aids and taxes granted him by parliament; and after the *Revolution*, heavy taxes were necessarily laid on lands and personal estate, in the reigns of King *Will. 3.* and Queen *Anne*, to defend the crown and kingdom against the efforts of the King of *France*, in favour of the pretended *Prince of Wales*, and secure the protestant succession in the line of his Majesty King *George*. Since this necessity, joined to others, land taxes have been annually granted of 1s. 2s. 3s. and 4s. in the pound, as the present exigencies have required; enacted to be levied by commissioners on the several counties, cities, towns, &c. And in respect of this tax, it is not the quantity but the yearly value of lands that must be observed; the farmers or occupiers of the land, are to be charged; and deduct it out of their rents to the landlords; and a man may be rated for goods as well as lands, but not for both; and in case of a rate on goods, the charge must be on the person: The commissioners are to ascertain the several proportions of the tax, to be charged on every hundred or division; and appoint fit persons to be assessors and collectors in every parish to assess and levy the money, which when received is to be paid to Receivers General, and by them returned to the *Exchequer*, &c.

If any person refuse to pay the tax, the collectors may levy it by distress and sale of their goods; but if they are over-rated, they shall be relieved on appeal to the commissioners, who have power to charge the same on others, as they shall see cause, and in case of deficiency to make a re-assessment: assessors neglecting their duty, are to be fined not exceeding 40 *l.* And collectors detaining the money, shall be imprisoned, and their estates seized and sold, &c. If a general receiver neglects to return the money by him received, he is liable to the penalty of 500 *l.* And where there is any failure in raising and paying the sums of money charged on any county, process may issue against the commissioners for their neglect, &c. By other later statutes, when lands &c. are assessed at more than an equal *pound rate*, the commissioners upon complaint made in twenty days, shall abate it; and reassess such abatements within the whole hundred, &c. or on persons under-rated, so as the sum charged be fully paid. And where assessors have omitted to charge themselves to the land-tax for their own estates, commissioners by statute have been empowered to summon and examine them or others on oath, and upon discovery thereof, to award satisfaction to be made to the collectors. If lands or houses are unoccupied, whereby the parish is obliged to make good the tax, the collectors at any time after, may enter

enter and distrain, and sell the distress in four days, and the money shall be distributed proportionably to the parties who paid for such lands, &c.

In case any persons by changing their residence, escape the taxation, on proof before two of the commissioners, or a justice of peace, within one year, they are to be charged at treble the value, to be levied by distress, &c. And in the taking these distresses, collectors may break open houses, chests, &c. in the day-time, upon a warrant under the hands of two commissioners, and calling constables to their assistance: Also if any person refuse to pay the tax, by the space of ten days after demand, or convey away his goods, &c. the commissioners may commit him to the common gaol, till payment. *Papists* are doubly taxed; but the *colleges* in the universities are exempted from paying any thing to this tax: There is a poundage fee for collecting the tax, of 3 *d.* per pound to the collectors, 2 *d.* per pound to the general receiver, and 1 *d.* half-penny per pound to the commissioners clerks. *Stat. 1 Geo. 1, &c.* See 12, 13, & 15 *Geo. 2.* The above *statutes*, or *land-tax* acts, where 2 *s.* in the pound is granted, have generally clauses of *loan* of one million, and when the tax is 4 *s.* a pound, two millions for public uses; likewise in the *malt tax* acts, there is such clause of *loan* for 750,000 *l.* at 3 or 4 *per cent.* interest, the *loans* to be allowed by the commissioners of the treasury, &c.

Although an exciseman exercise his office in two counties, yet he shall be taxed for his salary in that county where he lives. 1 *Strange* 417. Lands were let at 120 *l.* per annum, but by improvements were worth 150 *l.* per annum, and taxed accordingly; the tenant shall not deduct the whole land-tax, but only in proportion, as 120 *l.* bears to 150 *l.* 2 *Strange* 1191. See *Black. Com.* 1 *V.* 139, 169, 307. 4 *V.* 419, 432. 1 *V.* 331.

Taxatio Bladozum, Is a tax or imposition laid upon corn, according to *Cowell*.

Taxatio Pontificensis, The valuation of ecclesiastical benefices made through every diocese in *England*, on occasion of the pope's granting to the King the tenth of all spirituals for three years. Which *taxation* was made by *Walter Bishop of Norwich*, delegated by the pope to this office in 38 *Hen. 3.* and obtained till the 19th of *Edw. 1.* when a new *taxation* advancing the value, was made by the bishops of *Winchester* and *Lincoln*. *Cowell*.

Taxers, Are two officers yearly chosen in *Cambridge* to see the true gauge of all weights and measures; though the name took rise from *taxing* or rating the rents of houses, which was anciently the duty of their offices.

Taylor's, Shall not make or set upon cloaths any button or button-holes of cloth, stuff, &c. nor shall any person wear clothes with such buttons, &c. on pain of forfeiting 40 *s.* per dozen. 4 *Geo. 1.* Contracts entered into with *journeymen taylor's*, for advancing their wages, are declared void; and *taylor's* giving greater wages than allowed, shall forfeit 5 *l.* and journeymen accepting the same, or refusing to work for the settled stated wages the hours appointed, may be sent to the house of correction for two months, &c. by *Stat. 7 Geo. 1. c. 13.*

By 8 *Geo. 3. c. 17.* Certain new regulations are established as to master taylor's and their journeymen. Their hours and price for working are limited within *London* and five miles thereof. The justices are empowered to call witnesses before them on suspicion that the regulation is broken through, and on conviction to commit the offenders. Also the quarter-sessions in *London*, are enabled to make new regulations, if requisite, as to wages and hours of work. Masters within the limits employing men out of the limits, to evade the act, are to forfeit 500 *l.* a moiety to the King, the other to the informer. See the *Act*.

Tea, Is a pleasant sort of liquor, of late much used in *England*, and introduced from *China* and the *East-Indies*, being made of the product of a shrub growing in those parts: It is mentioned in the *Stat. 12 Car. 2. c. 15.* And persons mixing with *tea* leaves, the leaves of other trees and shrubs, are liable to a penalty of 10 *l.* &c. by 4 *Geo. 2. c. 14.* The *East-India* company are to have allowance and drawback, on exporting *tea*. *Stat. 6 Geo. 2. c. 38.* By the *Stat. 18 Geo. 2. c. 26.* The duty of 4 *s.* per pound weight of *tea* given by the *Stat. 10 Geo.*

1. is taken off, and by this act is given a duty of 1 *s.* per pound weight *Averdupois*, and 25 *l.* per cent. on the price on all *teas* sold by the *East-India* company. And by the *Stat. 21 Geo. 2. cap. 14.* *Tea* is permitted to be exported to *Ireland* and his Majesty's plantations in *America* without paying the inland duties charged by the last act. See *Stat. 28 Geo. 2. c. 21.*

Team and Team, (From the Sax. *Tyman*, i. e. *pro-pagare*, to *team* or bring forth) Signifies a royalty or privilege granted by the King's charter to the lord of a manor, for the having, restraining and judging of bondmen and villeins, with their children, goods and chattels, &c. *Glanvil, lib. 5. c. 2.*

Technical words in indictments. In some cases particular words of art must be used, which are so appropriated by the law to express the precise idea which it entertains of the offence, that no other words, however synonymous they may seem, are capable of doing it. Thus, in treason, the facts must be laid to be done, "treasonably, and against his allegiance," else the indictment is void. In indictments for murder, it is necessary to say, that the party indicted "murdered," not "killed" or "slew" the other. In all indictments for felonies, the adverb "feloniously" must be used; and for burglaries, "burglariously;" and all these to ascertain the intent. In rapes, the word "ravished" is necessary, and must not be expressed by any periphrasis; in order to render the crime certain. So in larcenies also, the words "feloniously took and carried away," are necessary to every indictment; for these only can express the very offence. *Black. Com. 4 V. 302.*

Tithing-penny, *Tithing-penny*, *Tithing-penny*, A small duty or payment to the sheriff from each *tithing*, towards the charge of keeping courts, &c. for which some of the religious were exempted by charter from the King. *Chart. Hen. 1.*

Tennage, From the Sax. *Tynan*, to inclose or shut, is used in many parts of *England* for wood for fences and inclosures.

Tainland, Tainland, or T'ainland, The land of a *Thaine*, or noble person. See *Thane-Land*.

Teller, Is a considerable officer in the *Exchequer*, of which officers there are four; whose office is to receive all money due to the King, and to give the *Clerk of the Pells* a bill to charge him therewith: They also pay to all persons any money payable by the King, by warrant from the *Auditor of the Receipt*; and make weekly and yearly books of their receipts and payments, which they deliver to the Lord *Treasurer*.

Telligraphæ, (From the Sax. *Tellan*, i. e. *dicere*, and the Gr. *Γράφω*, *Scribo*, *quasi* a telling any thing by writing) Are written evidences of things past. *Blount*.

Tellwork, Is that work or labour which the tenant was bound to do for his lord, for a certain number of days; from the *Saxon* word *Tellan*, numerare, & *werc*, opus. *Thorn. Ann. 1364.*

Tementale or Tementale, A tax of two shillings upon every plough-land. *How. Hist. f. 419.*

Templars, or Knights of the Temple, (Templarii) Was a religious order of knighthood, instituted about the year 1119, and so called because they dwelt in part of the buildings belonging to the Temple at Jerusalem, and not far from the sepulchre of our Lord. They entertained christian strangers and pilgrims charitably, and in their armour led them through the Holy Land, to view the sacred monuments of christianity, without fear of infidels; for at first their profession was to defend travellers from highwaymen and robbers. This order continuing and increasing for near two hundred years, was far spread in *Christendom*, and particularly here in *England*. But at length some of them at Jerusalem, falling away (as some authors report) to the *Saracens* from christianity, or rather because they grew too potent and rich, the whole order was suppressed by *Clement Quintus*, anno 1307, by the council of *Vienne* 1312, and their substance given partly to the knights of *St. John of Jerusalem*, and partly to other religious. *Cassan. de gloria mundi, par. 9. Cap. 4.* And see *Ann. 1 Edw. 1. cap. 24.* These flourished here in *England* from *Henry the Second's* days, till they were suppressed. They had in every nation a particular

particular governor, whom *Bracton, lib. 1. cap. 10. calls Magistrum Militie Templi*. The Master of the Temple here was summoned to parliament, 49 H. 3. m. 11. in *Schedula*. And the chief minister of the Temple church in London, is still called *Master of the Temple*. Of these knights read Mr. Dugdale's *Antiquities of Warwickshire, fol. 706*. In ancient records they were also called *Fratres Militie Templi Solomonis*. Mon. Angl. 2. par. fol. 554. b. About nine years after their institution, they were ordered by a council held at *Triers*, to wear a white garment, and afterwards in the pontificate of pope *Eugenius*, they wore a red cross on their garments. The Temple, which we now call the *Inns of Court*, was the place where they dwelt, and in the *Middle Temple* the King's treasure was kept. *Cowell*. Templars land shall be forfeit for erecting their crosses, *St. Westm. 2. 13 Ed. 1. c. 33*. The jurisdiction of the conservators of their privileges restrained, *St. Westm. 2. 13 Ed. 1. c. 43*. The lands of the Templars given to the hospitals of *Jerusalem*. *St. de lair Temp. 17 Ed. 2. p. 3*.

Temple. Dugdale and Stow both tell us that the Temple in London is a place of privilege from arrests, by the grant of the King; but this hath been denied by the court of B. R. *Dugd. 317, 320. 3 Salk. Rep. 45*. In the *Middle Temple* the King's treasure was anciently kept.

Temporalities of Bishops. Are the revenues, lands, tenements, and lay-sec, belonging to bishops, as they are barons and lords of parliament; all things as a bishop hath by livery from the King, as manors, lands, tithes, &c. *1 Roll. Abr. 881*. It was a custom formerly, that when bishops received from the King their temporalities, they did by a solemn form in writing renounce all right to the same by virtue of any provision from the Pope, and acknowledged the receipt of them only from the King; which custom continued from the reign of *Edw. 1.* to the time of the reformation: And this practice began by occasion of a Bull of Pope Gregory 8. wherein he conferred the see of Worcester on a certain bishop, and committed to him administrationem spiritualium & temporalium episcopatus predicti. Anno 31 Edw. 1. The custody of the temporalities of every bishop and bishop, during the vacancy of the sees, belong to the King; and no subject can claim them by grant or concession. *F. N. B. 32, 34. 2 Inst. 15*. And the King may commit the temporalities during the vacation of the sees; also he may present to a void advowson, while the temporalities are in his hands. *1 Inst. 90, 388. Mag. Chart. c. 5. 14 Edw. 3. c. 14. See Black. Com. 1 V. 282, 380. 4 V. 414*.

Temporatio or Tentatio, Is used in ancient records for a trial, or proof. *Chart. 20 Ed. 1*.

Tempus Pessionis, Mast time in the forest, which is from about Michaelmas to St. Martin's Day, November 11.

Tempus pinguedinis & firmationis; The season of killing the Buck and the Doe. *MS. Temp. H. 3*.

Tena, Was that which we now call a *coif*, worn by ecclesiastick:—*Tene coronas abscondunt quasi calices radios repellentes, &c. Counc. Lambeth. Anno 1281*.

Tenancies, Are houses or places for habitation, held of another. *23 Eliz. c. 4*.

Tenant, (*Tenus*, from the Latin *tenere*, to hold,) Signifies one that holds or possesses lands or tenements by any kind of right, either in fee, for life, years, or at will. The word in law is used with divers additions, as *tenant in dower*, which is he that possesses land by virtue of her dower. *Kitchin, fol. 160. Tenant per statum-merchant*, that holds land by virtue of a statute forfeited to him. *Ibid. fol. 173. Tenant in frank marriage. Ib. fol. 158*. He that holds lands or tenements by virtue of a gift thereof made to him upon marriage between him and his wife. *Tenant by the curtesy, Id. fol. 195*. He that holds for his life, by reason of a child begotten by him of his wife, being an inheritrix, and born alive. *Tenant by elegit*, that holds by virtue of the writ called an *elegit*. *Tenant in mortgage*, that holds by means of a mortgage. *Tenant by the gift in ancient demesne (Id. fol. 81)* is he that is admitted by the rod in the court of ancient demesne. *Tenant by copy of right-tail* is one ad-

mitted tenant of any lands, &c. within a manor, which time out of mind have been demisable, according to the custom of the manor. *West. Symbol. part. 1. lib. 2. fol. 646*. *Tenant by charter* is he that holdeth by feoffment in writing, or other deed. *Kitchin, fol. 57*. There was also tenant by knights-service, tenant in burgage, tenant in socage, tenant in frank fee, tenant in villenage. So there is tenant in fee-simple. *Kitchin, fol. 150. Tenant in fee-tail. Id. fol. 153. Tenant at the will of the lord, according to the custom of the manor, Id. fol. 132, & 165. Tenant at will by the Common law, Ibid. Tenant upon sufferance, Ibid. Tenant of estate of inheritance, Staundf. Prærog. fol. 6. Tenant in chief, that holdeth of the King in right of his crown. *F. N. B. fol. 5. Tenant of the King* is he that holds of the person of the King, *Ibid.* or as some honour. *Ibid. Very tenant*, that holds immediately of his lord. *Kitchin, fol. 99*. For if there be lord, mesne and tenant; the tenant is *very tenant* of the mesne, but not to the lord above: *Tenant per avail. See Peravail. Pl. Cor. 197. and F. N. B. fol. 136. See Dyer's Com. fol. 25. num. 156*.*

So there are also *joint-tenants*, that have equal right in lands and tenements by virtue of one title. *Lit. lib. 3. cap. 3. Tenants in common*, that have equal right, but hold by divers titles, *Ibid. cap. 4. Particular tenant. Staundf. Prærog. fol. 13*, that holds only for his term. See *Coke* in Sir Will. Pellham's case, l. 1. fol. 15. called *term for life or years*. See *Plowd. Cotbir's case, fol. 23. Sole tenant, Kitchin, fol. 134*. He that hath no other joined with him. Several tenant is opposite to *joint-tenant*, or *tenants in common. Tenant to the præcipe* is he against whom the writ *præcipe* is to be brought. *Co. Rep. lib. 3. case of fines, fol. 88. Tenant in demesne, 13 Ed. 1. cap. 9. 32 H. 8. cap. 37*. is he that holdeth the demesne of a manor for a rent without service. *Tenant on service, 20 Ed. 1. stat. 1*. is he that holdeth by service. See *Britton, cap. 79. in principio & cap. 96. Car. fealty, &c. Tenant by execution. 32 H. 8. cap. 5*. that hold lands by virtue of an execution upon any statute, recognizance, &c. with divers others. *Cowell. See Joint-tenants, Curtesy, Dower, Life-estate, Estate-tail, Recovery, and Black. Com. 2 V. 59*.

Tenants in common, Are such as hold lands for life or years, by several titles, or by one title and several rights; and as *jointtenants* have one joint freehold, so tenants in common have divers freeholds. *1 Inst. 188*. If a conveyance is made to two persons, *habendum* the one moiety to one and his heirs, and the other moiety to the other, &c. it is a *tenancy in common*, and the heirs and executors of tenants in common, shall have their parts or shares, and not the survivors, as in case of *jointtenants*. *2 Lill. Abr. 559. Tenants in common* know not their own part, but take the profits in common: One tenant in common cannot bring action of trespass against another tenant in common; but one such tenant may bring waste against his partner, &c. *3 Leon. 307. 2 Lill. 561*. At Common law tenants in common were not compellable to make partition; though they are by the Stat. *31 H. 8. c. 1. See Jointtenant*.

Tenant to the præcipe, Is he against whom the writ of *præcipe* is to be brought in suing out a recovery. *3 Rep.*

Tender Seems to signify as much as *tender*, or offer; it is mentioned in our old books, as to *tend* a traverse, an averment, &c. *Britton, c. 76. Staundf. Prærog. 16*.

Tender, (*Fr. Tendre*) is the offering of money, or any other thing in satisfaction, or circumspetly to endeavour the performance of a thing; as a *tender of rent* is to offer it at the time and place when and where it ought to be paid: And it is an act done to save the penalty of a bond before action brought, &c. *Term. de Ley 557. Tender of rent on any part of the land, or at any time of the last day of payment, will save the condition for that time, though the landlord refuse it: But when rent is tendered, the lessor may after bring debt; though he cannot recover any damages; the lessee's being ready to pay excuses the damages, but doth not debar the other of his rent. 1 Inst. 200. Law. Rep. 33, 34. 3 Salk. 344*. A tender of rent to save the forfeiture must be of the whole rent due, without

without any deduction of taxes or other payments; unless it be so agreed, &c. stoppage being no payment. 1 *Inst.* 202.

Tender of money on a bond, is to be made to the person of the obligee at the day appointed, to save the penalty and forfeiture of the bond, and it ought to be done before witnesses; though if the obligor be sued afterwards, he must still pay it: But if the obligor be to do any collateral thing, or which is not part of the obligation, as to deliver a horse, &c. and the obligor offer to do his part, and the obligee refuseth it, the condition is performed and the obligation discharged for ever. 1 *Inst.* 207, 208. A sum awarded by an award, was lost by the tender; it being a collateral thing. 3 *Lev.* 277. On award, that the defendant should pay money on such a day, and at such place; the defendant pleaded, that he tendered the money at the day and place, and because he did not set forth that he continued there ready to pay it at the last instant of the day till after sun-setting, &c. It was held ill. 2 *Cro.* 243.

Where time and place of doing an act is made certain by agreement of the parties, and they both meet accordingly; he who pleads a tender, must also plead a refusal of the other party to accept; otherwise such plea will be ill upon a demurrer, but not after verdict; and if the plaintiff be absent, that is to be set forth, and that the defendant was at the time and place, & *obtulit solvere*, &c. 2 *Salk.* 623.

On a tender being pleaded, and the money paid into court, plaintiff replied a subsequent demand and refusal, whereupon issue being joined and tried, a verdict was found for defendant. Whereupon he moved to have the money paid into court, returned, in part of his costs, but the court was of opinion it could not be done. *Rep. Temp. Hardw. per Annals*, 206.

Tender and refusal said to be considered in some cases as payment. See *Wilson, par. 1. fo. 117.*

There is a difference in pleading a tender in action of debt, and in action on the case; in debt, the damages are but accessory, so that in pleading a tender to such action, the defendant must pray judgment *de damnis*; but in *assumpsit*, the damages are principal, and he is to plead *semper paratus*, with a *proferet hic in curia*, and pray judgment *de ulterioribus damnis*. *Salk.* 622. 3 *Salk.* 344, 345.

Tender may be of money in bags, without shewing or telling it, if it can be proved there was the sum to be tendered; it being the duty of him that is to receive the money, to put out and tell it. 5 *Rep.* 115. Though where a person held the money on his arm in a bag, at the time of offering it; this was adjudged no good tender, for it might be counters or base money. *Noy* 74. 3 *Nell. Abr.* 281. If a tender is made of more than is due, it is good; and the party to whom tendered ought to take out what belongs to him. 5 *Rep.* 114. Tender of the money is requisite on contracts for goods sold, &c. to intitle action of trover: And a tender of stock sold for so much money, if it be well made though not accepted, will intitle the party to the sum agreed to be paid. 3 *Salk.* 343. See *Bond, &c.* 5 *New Abr.* and 20 *Vin. Abr.* tit. *Tender*, and *Black. Com.* 3 *V.* 16, 303.

Tenement, (*Tenementum*.) Signifies properly a house or home-stall; but more largely it comprehends not only house, but all corporeal inheritances which are holden of another, and all inheritances issuing out of, or exercisable with the same. *Co. Litt.* 6, 19, 154. A tenement may be said to be any house, land, rent, or other such like thing, that is any way held, or possessed; but being a word of a large and ambiguous meaning, and not so certain as messuage, therefore it is not fit to be used to express any thing which requires a particular description. 2 *Lill. Abr.* 566. The word *tenement* is joined with the adjective *frank*, to denote an estate in lands, offices, &c. for life or in fee. *Kitch.* 41. See *Black. Com.* 2 *V.* 16, 59.

Tenementary Land, Was the outland of manors granted out to tenants by the Saxon Thanes, under arbitrary rents and services. *Spalm.*

Tenementis legatis, An ancient writ lying to the city of London, or any other corporation; (where the old custom was, that men might devise by will, lands and

tenements as well as goods and chattels) for the hearing and determining any controversy touching the same. *Reg. Orig.* 244.

Tenendum, Is a clause in a deed wherein the tenure of the land is created and limited: The office of a *tenendum* in a deed, is to limit and appoint the tenure of the land which is held, and how, and of whom it is to be held. Before the statute called *Quia emptores terrarum*, (18 *Ed.* 1.) the *tenendum* was usually from the feoffor and his heirs, and not of the chief lord of the fee, whereby lords lost their escheats, forfeitures, &c. But since the said statute the *tenendum*, where the fee-simple passes, must be of the chief lord of the fee, by the customs and services, whereby the feoffor held; yet this statute does not extend to a gift in tail; for the donee shall hold of the donor. *Co. Lit.* 6. a. 2 *Inst.* 66, 67, 500, 501, 502, 505.

The *tenendum* most commonly and properly succeeds the *habendum*, and was usually in these words, *tenendum per servitium*, &c. By the stat. of *Quia emptores terrarum*, when the fee-simple doth pass, the tenure is always of the chief lord, and is thus set forth, *Tenendum de capitalibus dominis*, &c. But this clause at this day is for the most part left out of deeds, and altogether omitted. *Shep. Com. Aff.* 391. The *tenendum* seems now to be incorporated with the *habendum*, for we say, To have and to hold, in which clause the estate is limited, &c. See *Black. Com.* 2 *V.* 298.

Tenenribus in villa non Onerandis, Is a writ that lies for him to whom a disseisor hath alienated the land whereof he disseised another, that he be not molested in assise for the damages, if the disseisor have wherewith to satisfy them. *Reg. Orig.* 214.

Tenhebed, or **Tienheofed**, A Saxon word signifying Decanus, Caput vel Princeps Decaniæ sive Decuriæ. *Leg. Edw. Conf.* c. 29.

Tenmentale, (Sax. *Tienmantale*, i. e. *decem virorum numerus*) *Decennaria*, *Tithinga*. *Leg. Edw. Conf.* Also an ancient tax or tribute paid to the King. *Hoveden* 737.

Tenor, (*Lat.*) Of writs, records, &c. is the substance or purport of them; or a transcript or copy. *Tenor* of a libel hath been held to be a transcript, which it cannot be if it differs from the libel; and *juxta tenorem* imports it, but not *ad effectum*, &c. for that may import an identity in sense, but not in words. 2 *Salk.* 417. In action of debt brought upon a judgment in an inferior court, if the defendant pleads *Nul tiel record*, a *tenorem recordi* only shall be certified; and by *Hale Chief Justice* it may be the same on *certiorari*'s. 3 *Salk.* 296. A return of the *tenor* of an indictment from London, on a *certiorari* to remove the indictment, is good by the city charter; but in other cases it is usual to certify the record itself. 2 *Haruk. P. C.* 295.

Tenore inditamenti mittendo, Is a writ whereby the record of an indictment, and the process thereupon, is called out of another court into the King's Bench. *Reg. Orig.* 69.

Tenore presentium, The *tenor* of these presents, is the matter contained therein, or rather the intent and meaning thereof; as to do such a thing according to the *tenor*, is to do the same according to the true intent of the deed or writing.

Tentates panis, The essay or assay of bread. *Blount.*

Center, A stretcher or trier of cloth, used by dyers and clothiers, &c. mentioned in the statutes 1 *R.* 3. c. 8. 39 *Eliz.* c. 20.

Tenths, (*Decimæ*) Are the tenth part of the annual value of every spiritual benefice, being that yearly portion or tribute which all ecclesiastical livings pay to the King. They were anciently claimed by the Pope, to be due to him *Jure divino*, as High Priest, by the example of the High Priest among the Jews, who had tenths from the Levites: But they have been often granted to the King by the Pope upon divers occasions, sometimes for one year, and sometimes for more; and were annexed perpetually to the crown by *Stat.* 26 *H.* 8. c. 3. 1 *Eliz.* c. 4. And at last granted with the *first fruits*, towards the augmentation of the maintenance of poor clergymen. 1 *Ann.* c. 11. Collectors of this revenue are

to be appointed by the King by letters patent, instead of the bishops; and an office is to be kept for management of the same, in some part of London or Westminster. 3 Geo. 1. c. 10. *Tenets* signify likewise a tax on the temporality. See the statutes of King Edw. 6. Queen Eliz. and King James. And vide tax and Black. Com. 1 V. 284, 308. 4 V. 106.

Tents, Robbing of, in fairs and markets, is felony, and punished as burglary. 5 & 6 Ed. 6. c. 9.

Tenure, (*Tenura*, from the Lat. *Tenere*) Is the manner whereby lands or tenements are holden; or the service that the tenant owes to his lord: And there can be no tenure without some service, because the service makes the tenure. 1 Inst. 1, 93. A tenure may be of houses, and land or tenements; but not of a rent, common, &c. All lands in the hands of a subject are held of some lord or landlord, by tenure or service: And all the lands and tenements in England are said to be holden either mediately or immediately of the King; and therefore he is *summus dominus supra omnes*. 2 Inst. 531.

Under the word *tenure* is included every holding of an inheritance; but the signification of this word, which is a very extensive one, is usually restrained by coupling other words with it; this is, sometimes, done by words which denote the duration of the tenant's estate: As if a man holds to himself and his heirs, it is called tenure in fee-simple. At other times the tenure is coupled with words pointing out the instrument by which an inheritance is held; thus, if the holding is by copy of court-roll, it is called tenure by copy of court-roll. At other times, this word is coupled with words that shew the principal service by which an inheritance is held: As where a man holds by knight's service, it is called tenure by knight's service. 5 New Abr. 34.

Tenure signifies the estate in the land; and *tenures* were anciently divided into the following, viz. *Escuage*, which was land held by the service of the shield, and by which the tenant was obliged to follow his lord into the wars at his own charge. *Knight's service* and *chivalry*, where lands were held of the King or mesne lord, to perform service in war, and which drew after it homage, escuage, wardship, &c. *Burgage* tenure, where land was holden of the lord of the borough, at a certain rent. *Villengage* a base tenure of lands, whereby the tenant was bound to do all inferior villanous services commanded by the lord. *Grand serjeanty*, a tenure of lands by honourary services at the King's coronation, &c. And *petit serjeanty*, where lands were held of the King to contribute yearly some small thing towards his wars. *Frankalmoinage*, a tenure by which land is held by ecclesiastical persons in free and perpetual alms. And *foage* tenure, where lands are holden by tenants to plough the land of their lord, and do other services of husbandry at their own expence; but this hath been turned into an yearly rent, for all manner of services, when it is called *free foage*.

Of these general ancient *tenures*, knight service, chivalry, escuage, petit serjeanty, villengage, &c. are taken away by stat. 12 Car. 2. c. 24. The common tenures at this day, are *fee-simple*, which is an absolute tenure of lands, to a man and his heirs for ever. *Fee-tail*, a limited fee to a person and the heirs of his body begotten, &c. By the *Curtesy*, where a man marries a woman seised of lands in fee-simple, &c. and hath issue by her born alive, after her death he shall hold the land during life. In *dower*, where a widow holds for her life the third part of her husband's land, whereof he was seised in fee. For *life* and *years*, where lands are held by tenants for those terms, on rents reserved. And *copyhold* tenure, a holding for lives or in fee, at the will of the lord, according to the custom of the manor, under divers services, &c. Vide the *Heads*, and see *Fee* and *Soage*. See farther as to ancient tenures Black. Com. 2 V. 59. and as to modern tenures, id. 78. and as to the feudal tenures, see Lord Lytt. Hist. Hen. 2. V. 2. 179—188.

Term, (*Terminus*) Signifies commonly the limitation of time or estate; as a lease for term of life, or years, &c. Bract. lib. 2.

Terminus qui Preterit, Writ of Entry ad. This is a writ for the reversioner, when the possession is withheld by the lessee or a stranger, after the determination of a lease for years. F. N. B. 201. Black. Com. 3 V. 183.

This writ is now disused, since the invention of ejectments.

Termor, (*Tenens ex Termino*) Is he that holds lands or tenements for term of years or life. Litt. 100. A termor for years cannot plead in *assise* like tenant of the freehold; but the special matter, viz. his lease for years, the reversion in the plaintiff, and that he is in possession, &c. Dyer 246. Jenk. Cent. 142. See Black. Com. 2 V. 142.

Terms, Are those spaces of time, wherein the courts of justice are open, for all that complain of wrongs or injuries, and seek their rights by course of law or action, in order to their redress; and during which, the courts in Westminster-hall sit and give judgments, &c. But the high court of parliament, the Chancery, and inferior courts, do not observe the terms; only the courts of King's Bench, the Common Pleas, and Exchequer, the highest courts at Common law. Of these terms there are four in every year, viz. *Hilary Term*, which begins the 23d of January, and ends the 12th of February; *Easter-Term*, that begins the Wednesday fortnight after Easter-Day, and ends the Monday next after Ascension-Day; *Trinity-Term*, which begins the Friday after Trinity Sunday, and ends the Wednesday fortnight after; and *Michaelmas-Term*, that begins the 6th of Nov. (if a week day) and ends the 28th of Nov. Each term has certain returns; as Hilary-Term has four, Easter hath five, Trinity four, and Michaelmas four: And by statute, Trinity-Term was abridged four returns; and Michaelmas-Term two returns; for those terms were formerly longer than now, till contracted by the statutes 32 H. 8. c. 21. and 16 Car. 1. c. 16.

There are four days in term, called the *Effoin-Day*; the day of exceptions; the day of returns of writs; and the day of appearance, called the *Quarto die post*: The term is said to begin on the *Effoin Day*, when one judge sits in each court of law at Westminster, to take and enter effoins; but the third day afterwards is the first day of the term, at which time the judges in all the courts sit to do the business of the term. 2 Lill. Abr. 569. All the terms in construction of law is accounted but as one day to many purposes; for a plea that is put in the last day of a term, is a plea of the first day of the term; and a judgment on the last day of term is as effectual as on the first day. Trin. 23 Car. B. R. See Wilson, Par. 1. fo. 37. And for this reason, the judges may alter and amend their judgments in the same term, &c. It has been held, that the courts sit not but in term, as to the giving of judgments: And the judges of B. R. and C. B. before Trinity Term 1651, did not sit longer in court than till one a clock upon the last day of term; because they would not encourage attorneys to neglect their client's business till the last day of term, as too commonly they do, to the toil of the court, and too much hurry in dispatch. Mich. 22 Car. 2. Lill. 91.

Terms have been adjourned, and returns of writs and process confirmed. 1 W. & M. Sess. 1. c. 4. Where there is a term intervening between the *teste* and return of a writ of *Capias*, &c. or when the term to which a suit is continued is adjourned, and the suit is not adjourned, it is a discontinuance, &c. 2 Hawk. 298.

The *issuable terms* are Hilary and Trinity-terms only; so called, because in them the issues are joined and records made up of causes, to be tried at the Lent and summer assizes, which immediately follow. 2 Lill. Abr. 568. By the Stat. 24 Geo. 2. c. 48. After Michaelmas day 1752, there shall only be four returns in Michaelmas-term, viz. The morrow of All Souls, the morrow of St. Martin, in eight days of St. Martin, and in fifteen days of St. Martin. And Michaelmas-term shall begin on the said morrow of All Souls, (except it be Sunday, and then on the morrow next after) for the keeping of effoins, &c. And full term shall begin on the fourth day of the said morrow of All Souls, (except it be Sunday, and then on the morrow next after.) And that for the more speedy proceedings in writs of dower *unde nihil habet*, and by writs of entry for common recoveries to be sued and prosecuted by writs of entry, or by writs of right of advowson, and in all other real actions, after Michaelmas 1752.

If any writ in any such action come in and be returnable in the Common Pleas on the morrow of All Souls, then day shall be given in fifteen days of St. Martin; if on

on the morrow of *St. Martin*, then in eight days of *St. Hilary*; if in eight days of *St. Martin*, then fifteen days of *St. Hilary*; if in fifteen days of *St. Martin*, then on the morrow of the *Purification*; if in eight days of *St. Hilary*, then in eight days of the *Purification*; if in fifteen days of *St. Hilary*, then in fifteen days of *Easter*; if on the morrow of the *Purification*, then in three weeks from the day of *Easter*; if in eight days of the *Purification*, then in one month from the day of *Easter*; if in fifteen days of *Easter*, then in five weeks from the day of *Easter*; if in three weeks from the day of *Easter*, then on the morrow of the *Ascension*; if in one month from the day of *Easter*, then on the morrow of the *Holy Trinity*; if in five weeks from the day of *Easter*, then in eight days of the *Holy Trinity*; if on the morrow of the *Ascension*, then in fifteen days of the *Holy Trinity*; if on the morrow of the *Holy Trinity*, then in three weeks from the day of the *Holy Trinity*; if in eight days of the *Holy Trinity*, then on the morrow of all *All Souls*; if in fifteen days of the *Holy Trinity*, then on the morrow of *St. Martin*; if in three weeks of the *Holy Trinity*, then in eight days of *St. Martin*.

In writs of dower *unde nihil habet* after issue joined, fifteen days between the teste and return of the *venire facias*, and any other process for the trial shall be sufficient. And all writs having day from the fourth day of the morrow of the *Ascension*, to the morrow of the *Holy Trinity* shall be good, though there be no fifteen days between the teste and return. Special days and returns may be appointed by the judges in such cases as have been usual. The days of Assize in *darrein presentment*, and in a plea of *quare impedit* appointed by the *Stat. of Marlebridge*; and the days to be given in attain by *Stat. 5 E. 3.* and also in *Stat. 23 H. 8.* not being contrary to this act, shall be in force. Day for swearing the mayor of London ninth November, unless it be *Sunday*, and then the next day. The morrow of *St. Martin* yearly, appointed for nominating sheriffs in the *Exchequer*.

The terms in Scotland are *Martinmas*, *Candlemas*, *Whitsuntide* and *Lanmas*, at which times the court of *Exchequer*, &c. there is to be kept. *Stat. 6 Ann. c. 6.* And the terms of our universities for students, are different in time from the terms of the courts of law. See farther as to the original of our law terms, *Black. Com. 3 V. 275.* As to the essoign-day, *id. 278.* As to the first day of the term, *Id. ibid.* And as to the returns. *Id. 277.*

Terms of the Law, Are artificial or technical words and terms of art, particularly used in and adapted to the profession of the law. 2 Hawk. P. C. 239.

Terms for Payment of Rent, Or *rent terms*, the four quarterly feasts, upon which rent is usually paid. *Cartular. Sti. Edmund. 238.*

Terra, In all the surveys in *Domesday* register, is taken for arable land, and always so distinguished from the *Praetium*, &c. *Kennet's Gloss.*

Terra affirmata, Signifies land let to farm.

Terra Boscatia, Woody lands, according to an inquisition. 8 Car. 1.

Terra Culta, Land that is tilled or manured; as *terra inculta* is the contrary. *Mon. Ang. tom. 1. pag. 500.*

Terra debilis, Weak or barren ground. *Inq. 22. R. 2.*

Terra dominica vel indominicata, The demesne land of a manor. *Cowell.*

Terra Excultabilis, Such land as may be ploughed. *Mon. Ang. tom. 1. p. 426.*

Terra extendenda, Is a writ directed to the escheator, &c. willing him to enquire and find out the true yearly value of any land, &c. by the oath of twelve men, and to certify the extent into the *Chancery*, &c. *Reg. of Writs, fo. 293.*

Terra frusta, Fresh-land, or such as hath not been lately ploughed; likewise written *Terra frisca*. *Mon. Ang. 2. par. f. 327.*

Terra hydata, Was land subject to the payment of *hydage*, and the contrary was *terra non hydata*. *Selden.*

Terra lucrabilis, Land that may be gained from the sea, or inclosed out of a waste, to a particular use. *Mon. Ang. 1 Par. f. 406.*

Terra Normannorum, In the beginning of *H. 3.* such land in *England* as had been lately held by some noble Norman, who by adhering to the French King, or Dauphin, had forfeited his estate in this kingdom, which by this means became an escheat to the crown, was called *Terra Normannorum*, and restored, or otherwise disposed at the King's pleasure. *Paroch. Anti. p. 197.*

Terra nova, Is land newly allotted and converted from wood ground to arable, *vel terra noviter concessa*. *Spelm.*

Terra Putura, Land in forests held by the tenure of furnishing man's meat, hortic-meat, &c. to the keepers therein. See *Putura*.

Terra sabulosa, Gravelly or sandy ground. *Inq. 10 Ed. 3. n. 3.*

Terra bestia, Is used in old charters for land sown with corn. *Cowell.*

Terra watuabilis, Tillable land. *Id. ib.*

Terra warennata, Land that has the liberty of free warren. *Rot. Parl. 21 Ed. 1.*

Terrae boscales, Woody lands. *Inq. 2. par. 8 Car. 1. num. 71.*

Terrae testamentales, Lands that were held free from feudal services, in *allodio*, in *socage*, descendible to all the sons, and therefore called *Gavel-kind*, were devisable by will, and thereupon called *Terrae testamentales*, as the *Thane* who possessed them was said to be *testamento dignus*. See *Sir Henry Spelman of Feuds, cap. 5.*

Terrage, (*Terragium*.) Edward the third granted to *John of Gaunt*, and *Blanch* his wife, for their lives, *quod sint quieti de thelonio, passagio, succagio, lastagio, tallagio, caruagio, priscagio, tichagio & terragio*, which seems to be an exemption a *precariis*, viz. Boons of ploughing, reaping, &c. and perhaps from all land-taxes, or from money paid for digging and breaking the earth in fairs and markets. *Cowell.*

Terrat, Or *Terrarium*, (*Terrarium, catalogus Terrarum*) Is a land-roll, or survey of lands, either of a single person, or of a town; containing the quantity of acres, tenants names, and such like; and in the *Exchequer*, there is a *terra* of all the glebe-lands in *England*, made about 11 E. 3. *Stat. 18 Eliz. cap. 17.*

Terrarius, A Land holder, or one who possesses many farms of land. *Leg. W. 1.*

Terrarius Coenobialis, An officer in religious houses, whose office was to keep a *terrier* of all their estates, and to have the lands belonging to the houses exactly surveyed and registered; and one part of his office was to entertain the better sort of convent-tenants, when they came to pay their rents, &c. *Hist. Dunelm.*

Terre-tenant, Tertenant, (*Terra Tenens*.) Is he who hath the actual possession of the land: For example, a lord of a manor has a freeholder, who letteth out his freehold to another, to be possessed and occupied by him, such other is called the *Tertenant*. *Wast. Symb. par. 2. Briton, cap. 29.* In the case of a recognizance, statute or judgment, the heir is chargeable as *tertenant*, and not as heir; because by the recognizance or judgment, the heir is not bound, but the ancestor *concedit* that the money *de terris*, &c. *levetur*. 3 Rep. 12. Plea of *tertenancy*, in a *Scire fac. &c.* Vide *Cro. Eliz. 872. Cro. Jac. 506.* See *Scire facias* and *Black. Com. 2 V. 91, 328.*

Terris, Bonis & Catallis recuperandis post Purge-tionem, A writ for a clerk to recover his lands, goods and chattels formerly seized, after he had cleared himself of the felony of which he was accused, and delivered to his ordinary to be purged. *Reg. Orig. 68.*

Terris & Catallis tentis ultra debitum levatum, Is a judicial writ for the restoring of lands or goods to a debtor, that is distrained above the quantity of the debt. *Reg. Judic. 38.*

Terris libertandis, A writ lying for a man convicted by attain, to bring the record and process before the King, and take a fine for his imprisonment, and then to deliver him his lands and tenements again, and release him of the *Strip* and *Waste*. *Reg. Orig. 232.* It is also a writ for the delivery of lands to the heir, after homage and relief performed; or upon security taken that he shall perform them. *Ibid. 293, 313.*

Terran

Tertian, A measure of eighty-four gallons; so called because it is a *third* part of a tun. 1 R. 3. 13. 2 H. 6. c. 11.

Test. As to bring one to the *test*, is to bring him to a trial and examination, &c. By the act of King Cha. 2. commonly called the *Test-act*, all officers civil and military are to take the oaths and *test*; and if they neglect it, and execute any office within the words of that statute, being legally convicted thereof upon information, presentment, or indictment, in any of the courts at *Westminster*, or at the assizes, they shall forfeit 500 l. to be recovered by him who will sue for the same in any action of debt, &c. 25 Car. 2. c. 2. See *Black. Com.* 4 V. 57, 432.

Testa de Nevil, Is an ancient record in the custody of the King's remembrancer in the *Exchequer*, compiled by *John de Nevil*, a justice itinerant in the 18 & 24 of King *Hien.* 3. containing an account of lands held in grand serjeanty, with fees and escheats to the King, &c.

Testament, (*Testamentum*) Is thus defined by *Plowden*, *Testamentum est testatio mentis*, a testament is a witness of the mind: But *Aulus Gellius*, lib. 6. cap. 12. denies it to be a compound word, and saith, It is *verbum simplex*, as *Calceamentum*, *Plaudamentum*, &c. And therefore it may be thus better defined, *Testamentum est ultime voluntatis iusta sententia, de eo quod quis post mortem suam fieri vult*, &c. Of testaments there are two sorts, viz. a testament in writing, and a testament in words, which is called a *Nuncupative testament*, which is, when a man being sick, and for fear, lest death, want of memory, or speech, should come so suddenly upon him, that he should be prevented if he laid the writing of his testament, desires his neighbours and friends to bear witness of his last will, and then declares the same before them by words, which after his decease is proved by witnesses, and put in writing by the ordinary, and then stands in as good force as if it had at the first, in the life of the testator, been put in writing, except only for lands, which are only deviseable by a testament put in writing in the life of the testator. See *Co. on Lit. lib. 2. c. 10. f. 167.* *Plowd. fol. 541.* *Paramore and Jurdley's case.* Co. 6 Rep. *Marquis of Winchester's case.* Testament was anciently used (according to *Spelman*) *pro scripto charta vel instrumento, quo prædictum rerumve aliarum transactio persequitur, sic dictum quod de ea re vel testimonium ferret vel testium nomina contineret.* — *Si quis contra hoc max. auctoritatis testamentum aliquod machinari impedimentum præsumpsit.* *Charta Croylandiæ ab Æthelbaldo Rege. Anno Domini 716.* *Covell.* See *Wills and Testaments*, and *Black. Com.* 2 V. 10, 12, 373, 489, 499. 4 V. 417, 423.

Testamentary Causes. A species of causes belonging to the ecclesiastical jurisdiction. They were originally cognizable in the King's courts of Common-law, viz. the county courts, and afterwards transferred to the jurisdiction of the church by the favor of the crown, as a natural consequence of granting to the bishops the administration of intestate effects.

As observed by *Lindewode*, the ablest canonist of the fifteenth century, testamentary causes belong to the ecclesiastical courts "de consuetudine Angliæ, & suæ per consensu regio & suorum procerum in talibus ab antiquo concessio." *Provincial, l. 3. c. 13. fol. 176.* *Black. Com.* 3 V. 95, which *vide*.

Testamentary Guardian. By 12 Car. 2. c. 24. any father may by deed or will, dispose of the custody of his child, either born or unborn, to any person, except a popish recusant, either in possession or reversion, until such child attains the age of one and twenty years. The guardians so appointed are called *guardians by statute* or *testamentary guardians*. N. B. The power and reciprocal duty of a guardian and ward are the same, *pro tempore*, as that of a father and a child. *Black. Com.* 1 V. 462.

Testamentary Jurisdiction in Equity. For want of a power of discovering, at law, what rests only in the private knowledge of the party, courts of equity have acquired a concurrent jurisdiction with every other court, in all matters of account. As incident to accounts, they take a concurrent cognizance of the administration of the personal assets, consequently of debts, legacies, the

distribution of the residue, and the conduct of executors and administrators. *Black. Com.* 3 V. 437.

Testamentary Jurisdiction in Spiritual Courts, See *Testamentary Causes*, and *vide* farther, *Black. Com.* 3 V. 97. 4 V. 414.

Testamento annexo, Administration *cum*. If a testator makes his will, without naming any executors, or if he names incapable persons, or if the executors named refuse to act; in any of these cases, the ordinary must grant administration *cum testamento annexo*, to some other person. *Black. Com.* 2 V. 503, 504.

Testator, (*Lat.*) He that makes a testament. See *Swinburn of Wills and Testaments*. And especially see a Dissertation of the probate of wills or testaments by the learned Sir *Henry Spelman* among his late remains, pag. 127.

Testatum, Is a writ in personal actions; where the defendant cannot be arrested upon a *capias* in the county where the action is laid, but is returned *non est inventus* by the sheriff; then this writ shall be sent out into any other county where such person is thought to be, or to have wherewith to satisfy: And this is termed a *Testatum*, by reason the sheriff hath testified that the defendant was not to be found in his bailiwick. *Kitch. Ret. Writs*, 287.

Teste. A word generally used in the last part of all writs; wherein the date is contained; which begin with these words, *Teste meipso*, &c. if it be an original writ; or *teste the lord chief justice*, &c. if judicial. There must be at least fifteen days between the *teste* and return of every process awarded from the King's Bench into any foreign county. *Co. Litt.* 134. See *Writs*.

Testimonial, Is a certificate under the hand of a justice of peace, testifying the place and time, when and where a soldier or mariner landed, and the place of his dwelling and birth unto which he is to pass. 39 Eliz. cap. 17. And formerly testimonials were to be given by mayors and constables to servants quitting their services, &c. 5 Eliz. cap. 4.

Testimonials of Clergy, Are necessary to be made by persons present, that a clergyman inducted to a benefice hath performed all things according to the act of uniformity; to evidence that the clerk hath complied with what the law requires on his institution and induction, which in some cases he shall be put to do. *Count. Parf. Comp.* 24, 26.

Testimoignes, Is *French* for Witnesses, and *Testimoigne*, Testimony. *Law Fr. Dic.*

Teston or Testoon, Commonly called *Tester*, a sort of money, which among the *French* did bear the value of 18d. but being made of brass lightly gilt with silver, in the reign of K. Hen. 8. it was reduced to 12d. and afterwards to 6d. *Lownd's Ess. on Coins*, pag. 22.

Textus, A text or subject of a discourse, and is mentioned by several authors to signify the *New Testament*; it was written in golden letters, and carefully preserved in the churches.

Textus magni Martis, We read of in *Domesday* and *Cartular S. Edmund.*

Textus Rossensis, An ancient manuscript, containing the rights, customs, and tenures, &c. of the church of *Rochester*, drawn up by the bishop of that see, anno 1114.

Thames. If any person procure any thing to be done to the annoyance of the *Thames*, in making shelves, digging, &c. or shall take away any boards or stakes, undermine banks, &c. therein, he shall forfeit 5 l. stat. 27. Hen. 8. And no fisherman shall cast any foil, gravel, or rubbish in the *Thames*; nor drive any piles in the said river whereby the common passage may be hindred, on the penalty of 10 l. Ord. 10 July 1763. And there are several ordinances of the Lord Mayor of London, &c. for regulating the fishing in the river *Thames*. *Cit. Lib.* 148. See *Watermen*, &c. Shares in the *Thames* water-works, how taxable. 30 Geo. 2. c. 3. sect. 53.

Thangage of the King, (*Thanagium Regis*,) Signified a certain part of the King's land or property, whereof the ruler or governor was called *Thane*. *Covell.*

Thane, (From the *Sax.* *Thenian*, *ministrare*,) Was the title of those who attended the *English Saxon* Kings in their courts, and who held their lands immediately of

those Kings, and therefore in *Domesday*, they were promiscuously called *thani* & *servientes Regis*, though not long after the conquest the word was disused, and instead thereof, those men were called *Barones Regis*, who as to their dignity, were inferior to earls, and took place next after Bishops, Abbots, Barons and Knights. There were also *thani minores*, and those were likewise called barons: They were lords of manors, and had a particular jurisdiction within their limits, and over their own tenants in their courts, which to this day are called court-barons: But the word signifies sometimes a nobleman, sometimes a freeman, sometimes a magistrate, but more properly an officer or minister of the King. Edward King grete mine Biscoeps, and mine Eorles, and all mine Thegnes on that soiren, wber mine Prestes in Paulus minister habband land. Charta Edw. Conf. Pat. 18. H. 6. m. 9. per Inspect. Lamb. in his Exposition of Saxon words, verb. *Thanus*. And Skene de verbor. signif. saith, That it is a name of dignity, equal with the son of an earl. This appellation was in use among us after the Norman conquest, as appears by *Domesday*, and by a certain writ of William the First: *Willielmus Rex salutet Hermannum episcopum, & Sterwinum, & Britwi, & omnes Thanos meos in Dorsetrensi pago amicaliter*. MSS. de Abbotsbury. Camden says, They were enobled only by the office which they administered. *Thanus Regis* is taken for a baron. 1 Inst. fol. 5. 1. And in *Domesday tenens, qui est caput manerii*. See Mills de Nobilitate, fol. 132. The Saxon *Thane* was so called from *Thenian*, service; and in Latin *minister, a ministrando*. So that a *Thane* at first (in like manner as an earl) was not properly a title of dignity, but of service. But according to the degrees of service, some of greater estimation, some of less: So those that served the King in places of eminence, either in court, or commonwealth, were called *Thani majores* and *Thani Regis*. Those that served under them as they did under the King were called *Thani minores*, or the lesser *Thanes*. Corwell. See Spelman of Feuds, cap. 7.

Thane-Lands, Such lands as were granted by charter of the Saxon Kings to their *Thanes*; which were held with all immunities, except the threefold necessity of expeditions, repairs of castles, and mending of bridges. — *Thanas* signified also land under the government of a *Thane*. Skene.

Thascia, A certain sum of money or tribute imposed by the Romans on the Britons and their lands. Leg. H. 1. c. 78.

Theft, (*Furtum*) Is an unlawful felonious taking away of another man's moveable and personal goods, against the will of the owner; And this is divided into *Theft* simply so called, and *Petit Theft*; whereof the one is of goods above the value of twelve pence, and is felony; and the other under that value, called *Larceny*. *Theft* is also from the *person*, and in the presence of the owner, and in his absence, and either *open* or *private Theft*; the civil law judges open *Theft* to be satisfied in its punishment by the recompence of double: But the law of England adjudges both these offences felony. West. Sym. par. 2. Vide *Larceny*. Robbery. And Black. Com. 4 V. 229, 237, 413.

Theft-bote, (From the Sax. *Theof*, i. e. *Fur*, & *Bote*, *compensatio*) Is the receiving of a man's goods again from a Thief, after stolen, or other amends not to prosecute the felon, and to the intent the Thief may escape; which is an offence punishable with fine and imprisonment, &c. H. P. C. 130. See *Compounding of Felony, Misprison of Felony*, and Black. Com. 4 V. 133.

Thelonium, or *Wyebe essendi quieti de Thelonio*, Is a writ lying for the citizens of any city, or burghesses of any town, that have a charter or prescription to free them from toll, against the officers of any town or market, who would constrain them to pay toll of their merchandize contrary to their said grant or prescription. F. N. B. fol. 226.

Thelonmannus, The toll-man, or officer who received toll. Cartular Abbat. Glasfow. MS. 446.

Thelonio rationabili habendo pro dominiis habentibus *dominica Regis ad armam*, Is a writ that lies for him that hath of the King's demesne in fee-farm to

recover reasonable toll of the King's tenants there, if his demesne hath been accustomed to be tolled. Reg. Orig. fol. 87.

Theminagium, A duty or acknowledgment paid by inferior tenants in respect of *theme* or *team*. Corwell.

Thenicium, *Theni.ii agrorum*, i. e. *Arborum crescentium circa agros pro clausura eorum*, vulgarly called hedge-rows, or dike-rows. Lindw. Corwell.

Theoden, In the degrees or distinctions of persons among the Saxons, the earl or prime lord was called *thane*, and the King's *thane*; and the husbandman or inferior tenant was called *theodan*, or under *thane*. See *Thane* and *Spelman*.

Theowes, The bondmen among our Saxons were called *theowes* and *esnes*, who were not counted members of the commonwealth, but parcels of their masters goods and substance. Spelman of Feuds, cap. 5.

Thesaurus, Was sometimes taken in old charters for *thesaurarium*, the treasury; and hence the *domesday* register preserved in the treasury or exchequer, when kept at Winchester, hath been often called *Liber Thesauri*. Chart. Q. Maud. wife of King Henry 1.

Thethinga, A word signifying a tithing: *Tithingmannus*, a tithingman. Sax.

Thew or Theowe, (Sax.) A slave or captive; bondmen among the Saxons were called *Theowes* and *Esnes*, who were not accounted members of the common wealth, but parcels of their masters goods and substance. Spelman of Feuds, cap. 5.

Chief-taker. Vide *Felony*.

Things, in general, the chief part of every thing, is the beginning of it; but the end thereof, though it be last in the execution, is first in intention, and therefore favoured in law. 1 Inst. 298. 10 Rep. 25. *Things* which are more worthy, are ever preferred before those less worthy; and draw the others after them. Plowd. 169. 1 Inst. 44. But *Things* may be destroyed by the same way or manner they were made. 6 Rep. 15. 2 Rep. 53. See Black. Com. 2 V. 1, 16, 384.

Thingus, The same with *Thanus*; a nobleman, knight or freeman. Cromp. Jurisd. 197.

Thirdborow, Is used for a constable, by Lambard in his duty of constables, p. 6. And in the stat. 28 H. 8. c. 10.

Thirdings, i. e. The third part of the corn growing on the ground, due to the lord for a heriot on the death of his tenant, within the manor of *Turfat* in Com. Hereford. Blount. Ten.

Third Night Awn-hinde, (*trium noctium hospes*) By the laws of St. Edward the Confessor, if any man lay a *Third Night* in an inn, he was called a *Third Night Awn-hinde*, for whom his *best* was answerable, if he committed an offence: The first night *Forman-Night* or *Uncuth*, he was reckoned a stranger; the second night, *Twa-Night*, a guest; and the third night, an *Agen-hinde*, or *Awn-hinde*, a domestick. BraB. lib. 3.

Third-penny, (*Denarius Tertius*) See *Denarius Tertius Comitatus*.

Thistle-take. It was a custom within the manor of *Halton*, in the county palatine of *Chester*, that if in driving beasts over the common, the driver permits them to graze or take but a thistle, he shall pay a half-penny a beast to the lord of the fee. And at *Fiskerton* in *Nottinghamshire*, by ancient custom, if a native or a cottager killed a swine above a year old, he paid to the lord a penny, which purchase of leave to kill a hog was also called *thistle-take*. Reg. Priogat. de Thurgarton. Cowell.

Thokes, Fish with broken bellies, 22 E. 4. cap. 2. which by the said statute are not to be mixt or packed with *sale-fish*.

Thorp, Threp, Trop, Either in the beginning or end of names of places, signifies a street or village, as *Aldeftrop*: From the Sax. *Thorpa*, villa, vicus.

Thrave of Corn, (*Trava bladi*, from the Saxon *Thrauv*, i. e. a bundle, or the British *drava*, i. e. twenty-four) In most parts of England consists of twenty-four sheaves, or four shocks, six sheaves to every shock 2 H. 6. cap. 2. yet in some counties they reckon but twelve

twelve sheaves to the *thraue*. King *Athelstan*, anno 923, gave by his charter to St. *John of Bowerly's* church, four *thraues* of corn from every plough-land in the *East-Riding* of *Yorkshire*. *Cowell*.

Thread, Thread, outneal, to what duties liable on importation, 4 *Will. & M. c. 5*. Sisters thread exempt from the two third subsidies, 7 *Ann. c. 7*.

Threatening Letters. By 9 *Geo. 1. c. 22*. Amended by 27 *Geo. 2. c. 15*. Knowingly to send any Letter without a name, or with a fictitious name, demanding money, venison, or any other valuable thing, or threatening (without any demand) to kill or fire the house of any person, is made felony without benefit of clergy. This offence was formerly high treason, by the *stat. 8 Hen. 5. c. 6*.

Threats. Threats and menaces of bodily hurt, through fear of which a man's business is interrupted, a species of injury to individuals. A menace alone, without a consequent inconvenience, makes not the injury; but to complete the wrong, there must be both of them together. The remedy for this is in pecuniary damages, to be recovered by action of trespass *vi et armis*, this being an inchoate, though not an absolute violence. *Black. Com. 3 V. 120*. As to threats or menaces where bodily harm is justly feared. See *Security for the Peace, &c.*

Threats of Accusation, to extort Money. Sending letters, threatening to accuse any person of a crime punishable with death, transportation, pillory, or other infamous punishment, with a view to extort from him any money or other valuable chattels, is punishable by statute 30 *Geo. 2. c. 24*. at the discretion of the court, with fine, imprisonment, pillory, whipping, or transportation for seven years.

Threngus. See *Drenches*. *Quia vero non erant ad hoc tempore Regis Willielmi milites in Anglia, sed Threngus, præcipit Rex ut de eis milites fierent ad defendendam terram, fecit autem Lanfrancus Threngos suos milites, &c.* *Somner's Gavelk. pag. 123, 210*. They were vassals, but not of the lowest degree of those who held lands of the chief lord; the name was imposed by the conqueror; for when one *Edward Sharnbourn* of *Norfolk*, and others, were ejected out of their lands, they complained to the Conqueror, insisting that they were always on his side, and never opposed him, which upon enquiry he found to be true, and therefore he commanded that they should be restored to their lands, and for ever after be called *drenches*. *Spelm.*

Thrimfa, (Sax. *Thrim*. Three) Was an old piece of money of three shillings, according to *Lambard*, or the third part of a shilling, being a German coin passing for 4 d. *Selden's Tit. Hon. p. 604*.

Thrything, (*Thrythingum*) A court consisting of three or four hundreds. *Stat. Merton, 2 Inst. 99*.

Thrymors and Thrymving of Silk. See *Silk*.

Thruanus, the sole printing thereof granted to *Samuel Buckley*, 7 *Geo. 2. c. 24*.

Thube (*Ueald*, Sax.) A woodward, or person that looks after the woods.

Thumelun, Signifies a thumb: 'Tis mentioned in *Le. Ina, cap. 55. apud. Brampton*.

Thwertnich, A Saxon word, which in some old writers is taken for the custom of giving entertainments to the sheriff, &c. for *Thres Nights*. *Rot. 11 & 12 Ric. 2*.

Tick and Ticking, to what duties liable on importation. 4 *W. & M. c. 5*.

Ticat, A piece of money in *China*, of two pounds, sixteen shillings, and three pence value. *March. Dist.*

Tidesmen, Are certain officers of the *custom-house*, appointed to watch or attend upon ships, till the customs are paid; and they are so called, because they go aboard the ships at their arrival in the mouth of the *Thames*, and come up with the tide.

Tierce, (Fr. *Tiers*, i. e. a third) Is a measure of wine, oil, &c. containing the third part of a pipe, or forty-two gallons. *Stat. 32 H. 8. c. 14*.

Tigh, (Sax. *Teag*) A close or inclosure mentioned in ancient charters; which word is still used in *Kent* in the same sense. *Chart. Becl. Cant.*

Titha, (Sax.) Signifies an accusation in the laws of *K. Canutus*.

Tiles. The earth for tiles is to be digged and cast up before the first of *November* yearly, and to be stirred and turned before the first of *February* following, and be wrought before the first of *March*: And every common tile must be in length ten inches and a half, in breadth, six inches and a quarter, and thickness half an inch and half a quarter; roof tiles are to be thirteen inches in length, and of the same thickness as the common tiles, &c. And if any persons put to sale any tiles contrary hereto, they shall forfeit double value, and be fined. *Stat. 17 Ed. 4. c. 4*. By a late statute, pan tiles must be thirteen inches and a half long, nine inches and a half broad, and half an inch thick, &c. and the penalty for making faulty bricks and tiles is 20 s. for every thousand so made. *Stat. 12 Geo. 1. c. 35*. See *Bricks*.

Tillage, (*Agricultura*) Is of great account in law, as being very profitable to the commonwealth; and therefore arable land hath the preference before meadows, pastures, and all other ground whatsoever: And so careful is our law to preserve it, that a bond or condition to restrain tillage, or sowing of lands, &c. is void. 11 *Rep. 53*. There are divers ancient statutes for encouragement of tillage and husbandry, as the 4 *Hen. 7. 25 Hen. 8. 33 Hen. 8. 5 & 35 Eliz. 21 Jac. 1. 15 Car. 2*.

Tilting. Where one kills another in fighting at tilting, by the King's command, the accident is excusable: But if it be by tilting without the command of the King; or by parrying with naked swords, covered with buttons at the points, &c. which cannot be used without manifest hazard of life, it will be felony of manslaughter. *H. P. C. 31*.

Timber, Is wood fitted for building, or other such like use; and in a legal sense extends to oak, ash and elm, &c. 1 *Roll. Abr. 649*. Lessees of land may not take timber trees felled by the wind; for thereby their special property ceases. 1 *Keb. 691*. Timber, &c. stolen, is to be severed from the soil to make it criminal. See *Yelv. 152*.

As to the importation, &c. of timber, see the several statutes of 12 *Car. 2. c. 18*. 13 & 14 *Car. 2. c. 11*. 2 *W. & M. sess. 2. c. 4*. 6 *Geo. 1. c. 15*.

Against cutting up, barking or destroying of timber: 1 *Geo. 1. stat. 2. c. 48*. 6 *Geo. 1. c. 16*.

Oak timber, (except for building) to be felled in *April*, *May* and *June*, 1 *Jac. 1. c. 22. s. 20*.

By 6 *Geo. 3. c. 36*. Any one who shall, in the night-time, lop, top, cut down, break, throw down, bark, burn, or otherwise spoil or destroy, or carry away, any oak, beech, ash, elm, fir, chestnut, or asp, timber-tree, or other tree or trees standing for timber, or likely to become timber, without the consent of the owner; or shall, in the night-time, pluck up, dig up, break, spoil or destroy, or carry away, any root, shrub, or plant, roots, shrubs, or plants, of the value of five shillings, and which shall be growing, standing, or being in the garden ground, nursery ground, or other inclosed ground, of any person or persons whomsoever; shall be deemed and construed to be guilty of felony, and the offenders may be transported. Those who are assisting, and purchasers, knowing the things to be stolen, shall be liable to the same punishment, as if they had stolen the same.

By 6 *Geo. 3. c. 48*. Every person convicted of damaging, destroying, or carrying away any timber-tree or trees, or trees likely to become timber, without consent of the owner, &c. shall forfeit for the first offence not exceeding 20 l. with the charges attending: and on non-payment, are to be committed for not more than 12, nor less than 6 months; for the second offence, a sum not exceeding 30 l. and on non-payment, are to be committed for not more than 18, nor less than 12 months; and for the third offence are to be transported for 7 years.

All oak, beech, chestnut, wallnut, ash, elm, cedar, fir, asp, lime, sycamore, and birch trees, shall be deemed and taken to be timber-trees within the meaning of the act. Persons convicted of plucking up, spoiling, or taking away, any root, shrub, or plant, out of private cultivated

cultivated ground, shall forfeit for the first offence, any sum not exceeding 40 s. with the charges; for the second offence a sum not exceeding 5 l. with the charges; and for the third offence are to be transported for seven years. Persons hindering, or attempting to prevent seizing offenders, forfeit 10 l. to the person convicting them; and if not paid down, to be committed to hard labour, not exceeding six months. Vide the statute, and *Black. Com.* 2 V. 281. 4 V. 233.

Timber for the Navy. An act for the increase and preservation of timber, within the forest of Dean. 20 Car. 2. c. 3. And two thousand acres of land in the new forest were ordained to be inclosed, for preserving timber for the navy royal, by stat. 9 & 10 W. 3. . . 36.

Timberlode. A service by which tenants were to carry timber felled from the woods to the lord's house. *Thorn's Chron.*

Time and Place. Are to be set forth with certainty in a declaration; but time may be only a circumstance when a thing was done, and not be made part of the issue, &c. 5 Mod. 286. It has been held, that an impossible time is no time; and where a day or time is appointed for the payment of money, and there is no such, the money may be due presently. *Hob.* 189. 5 Rep. 22. If no certain time is implied by law for the doing of any thing, and there is no time agreed upon by the parties, then the law doth allow a convenient time to the party for the doing thereof, i. e. as much as shall be adjudged reasonable, without prejudice to the doer of it. 2 Lill. Abr. 572. In some Cases one hath time during his life for the performance of a thing agreed, if he be not hastened to do it by request of the party for whom it is to be done; but if in such case he be hastened by request, he is obliged to do it in convenient time, after such request made. *Hil.* 22 Car. 1 B. R. Time taken generally, hath also its time: And what is done in time of peace, the law doth more countenance than in time of war; in case of bar of an entry, or claim by fine, and of descents, &c. 1 Inst. 249. 10 Rep. 82. 4 Shep. Abr. 6. Regularly, there cannot be any fraction in a day, and therefore the proceedings were set aside, where it appeared the principal surrendered on the day of the return of the *scire facias*. Rep. Temp. Hardw. per Annaly. 208. See *Bond, Month, &c.* and 20 Vin. Abr. 266—277.

Time limited, For the prosecution of actions. Vide *Limitation*.

Tincl ic Roy, (Fr.) the King's hall, wherein his servants used to dine and sup. 13 R. 2. c. 3.

Tineman, or **Tienman,** Was a prtty officer in the forest, who had the nocturnal care of vert and venison, and other servile employments. *Constitut. Forestæ Canuti Regis*, cap. 4.

Tinet, (*Tinettum*) is used for brushwood and thorns, to make and repair hedges: In *Heresfordshire* to tine a gap in a hedge is to fill it up with thorns, that cattle may not pass through it. *Chart.* 21 Hen. 6.

Tinewald, The parliament or annual convention of the people of the *Isle of Man*, of which this account is given: The governor and officers of that island, do usually call the twenty-four *keys*, being the chief commons thereof, especially once every year, viz. upon *Midsummer-day* at *St. John's Chapel* to the court kept there, called the *Tinewald Court*; where, upon a hill near the said chapel, all the inhabitants of the island stand round about, and in the plain adjoining, and hear the laws and ordinances agreed upon in the chapel of *St. John*, which are published and declared unto them; and at this solemnity the lord of the island sits in a chair of state with a royal canopy over his head, and a sword held before him, attended by the several degrees of the people, who sit on each side of him, &c. *King's Descript. Is. of Man*.

Tinkermen, Those fishermen who destroyed the young fry on the river *Thames*, by nets and unlawful engines, till suppressed by the mayor and citizens of *London*. Of which, see *Stow's Survey of London*, p. 18.

Tinpeny, A tribute so called, usually paid for the liberty of digging in tin mines, from the Sax. *Tinnen*, *Stannus*, & *Penig*. *Denarius*, according to *Du Fresne*: But some writers say it is a customary payment to the tithingman from the several *friburghs*, as *tidingpeny* signi-

fied the money paid the sheriff by the several tithings; for that *tin* is only a contraction of *ten*, and means the number *ten*. It is mentioned in several places in the *Monasticon*.——*Non tributa, non tethingpeny, non tinpeny, exigat.* Mon. Angl. Tom. 1. p. 419.

Tipstuffs, Officers appointed by the *Marshal* of the *King's Bench*, to attend upon the judges with a kind of rod or staff tipped with silver, who take into their custody all prisoners either committed, or turned over by the judges at their chambers, &c. See *Baſon. Stat.* 1 R. 2.

Tithes, (*Decimæ*, from the Sax. *Teotba*, i. e. tenth,) In some of our law books are briefly defined to be an ecclesiastical inheritance, or property in the church, collateral to the estate of the lands thereof: But in others they are more fully defined to be a certain part of the fruit, or lawful increase of the earth, beasts, men's labours, which in most places, and of most things, is the tenth part, which by the law, hath been given to the ministers of the gospel, in recompence of their attending their office. 11 Co. Rep. 13. *Dyer* 84.

1. Of the origin of tithes.
2. Of what tithes are in general due; and where personal tithes are due.
3. Of what predial tithes are due; and of the tithes of agistment, corn, hay, and wood.
4. Of what mixed tithes are due.
5. Of recovering small tithes in a summary way; and of recovering tithes due from quakers.
6. Of particular things for which tithes are paid, and for which not, in alphabetical order, for the ease of the reader.

1. Of the origin of tithes.

Bishop *Barlow*, *Selden*, father *Paul*, and others have observed, that neither tithes nor ecclesiastical benefices, (which are correlative in their nature) were ever heard of for many ages in the christian church, or pretended to be due to the christian priesthood; and, as that bishop affirms, no mention is made of tithes in the grand codex of canons, ending in the year 451, which, next to the bible, is the most authentick book in the world; and that it thereby appears, during all that time, both churches and churchmen were maintained by free gifts and oblations only. *Barlow's Remains*, p. 169. *Selden of Tithes* 82. See *Watson's Compleat Incumbent*. p. 3, 4, &c.

And Mr. *Selden* has shewn us, that tithes were not introduced here in *England*, till towards the end of the eighth Centery, i. e. about the year 786, when parishes and ecclesiastical benefices came to be settled, for, as is said, tithes and ecclesiastical benefices being correlative, the one could not exist without the other; for whenever any ecclesiastical person had any portion of tithes granted to him out of certain lands, this naturally constituted the benefice; the granting of the tithes of such a manor or parish, being in fact, a grant of the benefice; as a grant of the benefice did imply a grant of the tithes: And thus the relation between patrons and incumbents was analogous to that of lord and tenant by the feudal law. *Selden of Tithes*, 86, &c.

About the year, 794, *Offa*, King of *Merria*, (the most potent of all the *Saxon* Kings of his time in this island,) made a law, whereby he gave unto the church the tithes of all his kingdom, which the historians tell us was done to expiate for the death of *Ethelbert*, King of the *East Angles*, who in the year preceding he had caused basely to be murdered. But that tithes were before paid in *England* by way of offerings, according to the ancient usage and decrees of the church, appears from the canons of *Egbert*, archbishop of *York*, about the year 750. And from an epistle of *Boniface*, archbishop of *Mentz*, which he wrote to *Cuthbert*, archbishop of *Canterbury* about the same time; and from the seventeenth canon of the general council held for the whole kingdom at *Chalcuth*, in the year 787. But this law of *Offa*, was that which first gave the church a civil right in them in this land, by way of property and inheritance, and enabled the clergy

clergy to gather and recover them as their legal due, by the coercion of the civil power. Yet this establishment of *Offa* reached no further than the kingdom of *Mercia*, over which *Offa* reigned, until *Ethelwulf*, about sixty years after, enlarged it for the whole realm of *England*. *Prideaux on Tithes* 166, 167.

It is said, tithes, oblations, &c. were originally the voluntary gifts of christians, and that there was not any canon before that of the fourth council of *Lateran*, anno Dom. 1215, that even supposed tithes to be due of common right. *Wilson par. 2. fo. 182.*

2. Of what tithes are in general due; and where personal tithes are due.

Tithes are due either *de jure*, or by custom: All tithes, which are due *de jure*, arise from such fruits of the earth as renew annually; or from the profit that accrues from the labour of a man. Hence it follows, that such tithes can never be part of, but must always be collateral to, the land from which they arise. 11 *Rep.* 13, 14. *Priddle v. Napier.*

Nay, tithes due *de jure* are so collateral to every kind of land, that if a lease is made of the glebe belonging to a rectory, with all the profits and advantages thereof; and there is besides a covenant, that the rent to be paid shall be in full satisfaction of every kind of exaction, and demand, belonging to the rectory; yet, as the glebe is not expressly discharged of tithes, the lessee shall be liable to the payment thereof. 11 *Rep.* 13, 14. *Priddle v. Napier.* 1 *Roll. Abr.* 655. pl. 1. *Cro. Eliz.* 162, 261. *Cro. Car.* 362.

No tithe is *de jure* of the produce of a mine, or of a quarry; because this is not a fruit of the earth renewing annually; but is the substance of the earth, and has perhaps been so for a great number of years. *F. N. B.* 53. *Bro. Dism.* pl. 18. 2 *Inst.* 651. 1 *Roll. Abr.* 637. *Cro. Eliz.* 277.

No tithe is due *de jure* of any thing (generally) which is part of the soil, and does not renew annually, but may by custom. *Vide 2 Vern.* 46. 1 *Roll. Abr.* 637. pl. 5. 2 *Mod.* 77. 1 *Mod.* 35. 1 *Roll. Abr.* 642. S. pl. 7. 8.

No tithes are due *de jure* of houses; for tithes are only due *de jure* of such things as renew from year to year. 11 *Rep.* 16. *Graunt's case.* But houses in *London* are, by decree, which was confirmed by an act of parliament, made liable to the payment of tithes, 2 *Inst.* 659. 37 *H. 8. c. 2.* And before this decree, houses in *London* were by custom liable to pay tithes; the quantum to be paid being thereby only settled, as to such houses for which there was no customary payment. 2 *Inst.* 659. *Hard.* 116. *Gilb. Eq. Rep.* 193, 194. There is likewise in most ancient cities, and boroughs, a custom to pay tithes for houses; without which there would be no maintenance in many parishes for clergy. 11 *Rep.* 16. *Graunt's case.* *Bunb.* 102.

It was held by three barons of the Exchequer, *Pries, Montague*, and *Page*, contrary to the opinion of *Bury* Chief Baron, that two tithes may be due of the same thing, one *de jure*, the other by custom. *Bunb.* 43. *Earl of Scarborough v. Hunter.*

Tithes are of three kinds, *personal*, *predial*, and *mixt*. Such tithes as arise from the profit of the personal labour of a man, in the exercise of any art, trade or employment, are called *personal* tithes. 2 *Inst.* 649.

By the stat. 2 & 3 *Ed. 6. c. 13 par. 7.* Common day labourers are exempted from the payment of personal tithes. No personal tithes are due from servants in husbandry; for by their labour the tithes of many other things are increased. 1 *Roll. Abr.* 646. pl. 1. It is now settled, by a decree of the house of Lords, upon an appeal from a decree of the court of Exchequer, that only personal tithes are due from the occupier of a corn mill. 1 *Eq. Cas. Abr.* 366. *Newt. v. Chamberlain*, 2 *Will. Rep.* 463.

The stat. 9 *Ed. 2. stat. 1. c. 5.* (as to occupiers of mills, paying tithes,) provides, that new erected mills shall be liable to the payment of tithes: But, as nothing therein is said concerning ancient mills there can be no doubt, that such ancient mills as before the ma-

king of this statute were liable to pay tithes, continued afterwards to be liable, 12 *Mod.* 243. *Hart. v. Hale.* 3 *Bulst.* 212.

No personal tithe is due of the profit which a man receives without personal labour, or of the profit which one man receives from the labour of another. 1 *Roll. Abr.* 656. pl. 1. pl. 2. 2 *Inst.* 621, 639. If a man lets a ship to a fisherman, no personal tithe is due of the money received for the use of such ship; because this is a profit without personal labour. 1 *Roll. Abr.* 656. n. pl. 2. *Vide 1 Roll. Abr.* 656. n. pl. 3. 2 *Bulst.* 141.

3. Of what predial tithes are due; and of the tithes of agistment, corn, hay, and wood.

Such tithes, as arise immediately from the fruits of the earth, as from corn, hay, hemp, hops; and all kinds of fruits, seeds and herbs, are called predial tithes. 2 *Inst.* 649. They are so called, because they arise immediately from the fruits of the farm, or earth. 2 *Inst.* 647. By the ecclesiastical law many things are liable to the payment of predial tithes, which by the Common law are not so. 2 *Inst.* 621. 4 *Mod.* 344.

The design under this head, is to shew what things are liable by the Common law to pay predial tithes.

In doing this, it will appear, that some things, which are in the general exempted therefrom, become by custom liable to the payment of predial tithes. 1 *Roll. Abr.* 637. E. pl. 2. 1 *Roll. Abr.* 642. S. pl. 7. pl. 8.

It will also appear, that divers things, which are in the general liable thereto, are under particular circumstances exempted from the payment of such tithes. 1 *Roll. Abr.* 645. pl. 11. *Cro. Eliz.* 475. *Freem.* 335. 12 *Mod.* 235.

But wherever any fraud is used, to bring a thing under those circumstances, by reason of which it would, if it had come fairly under them, have been exempted from the payment of predial tithes, it is by such fraud rendered liable thereto. *Cro. Eliz.* 475. *Freem.* 335.

As it would be tedious, to enumerate all the things which are liable to predial tithes, only those shall be mentioned, concerning the tithes of which some question has arisen; but, from such as will be mentioned, it may be easily collected of what other things predial tithes are due.

Agistment. Agisting, in the strict sense of the word, means the depasturing of a beast the property of a stranger: But this word is constantly used, in the books, for depasturing the beast of an occupier of land, as well as that of a stranger. 5 *New Abr.* 53. An occupier of land is not liable to pay tithe for the pasture of horses, or other beasts, which are used in husbandry in the parish, in which they are depastured: Because the tithe of corn is by their labour increased. 1 *Roll. Abr.* 646. pl. 2. pl. 3. pl. 6. pl. 7. *Cro. Eliz.* 446. *Ld. Raym.* 130. But if horses or other beasts are used in husbandry out of the the parish, in which they are depastured, an agistment tithe is due for them. 7 *Mod.* 114. *Harrow's case.* *Ld. Raym.* 130.

It seems to be the better opinion, that no tithe is due for the pasture of a saddle horse, which an occupier of land keeps for himself or servants to ride upon. 1 *Roll. Abr.* 642. pl. 4. *Cro. Jac.* 430. *Bulst.* 171. *Bunb.* 3. No tithe is due for the pasture of milk cattle, which are milked in the parish, in which they are depastured; because tithe is paid of the milk of such cattle. 1 *Roll. Abr.* 646. pl. 2. *Ld. Raym.* 130. *Cro. Eliz.* 446.

Milk cattle, which are reserved for calving, shall pay no tithe for their pasture whilst they are dry: But, if they are afterwards sold, or milked in another parish, an agistment is due for the time they were dry. *Hart.* 100. *Ld. Raym.* 130. No tithe is due, from an occupier of land; for the pasture of young cattle, reared to be used in husbandry, or for the pail. *Cro. Eliz.* 476. *Sheringb v. Fleetwood.* But, if such young beasts are sold, before they come to such perfection as to be fit for husbandry, or before they give milk, an agistment tithe must be paid for them. *Hart.* 86. *Woolmerston's case.*

An occupier of land is liable to an agistment tithe, for all such cattle as he keeps for sale. *Cro. Eliz.* 446, 476. *Jenk.*

Jenk. 28. pl. 6. *Cro. Car.* 237. *Shew. P. C.* 192. Vide *Cro. Jac.* 430. 1 *Roll. Abr.* 647. pl. 14.

But if any cattle, which have neither been used in husbandry, nor for the pail, are, after being kept some time, killed, to be spent in the family of the occupier of the land on which they were depastured, no tithe is due for their pasture. *Jenk.* 281. pl. 6. *Cro. Eliz.* 446, 476. *Cro. Car.* 237. It is in general true, that an agistment tithe is due, for depasturing any sort of cattle the property of a stranger. *Cro. Eliz.* 276. *Cro. Jac.* 276. *Bunb.* 1. *Freem.* 329. No tithe is due for the cattle, either of a stranger or an occupier, which are depastured in grounds, that have in the same year paid tithe of hay. *Bunb.* 10, 79. *Poph.* 142. 2 *Roll. Rep.* 191.

No agistment tithe is due for such beasts, either of a stranger or an occupier, as are depastured on the head lands of ploughed fields: Provided that these are not wider than is sufficient to turn the plough and horses upon. 1 *Roll. Abr.* 646. pl. 19. No tithe is due for such cattle as are depastured upon land, that has the same year paid tithes of corn. *Bro. Dism.* 18. 1 *Mod.* 216. If land, which has paid tithe of corn in one year, is left unsown the next year, no agistment is due for such land; because, by this lying fresh, the tithe of the next crop of corn is increased. 1 *Roll. Abr.* 642. pl. 9. But if land, which has paid tithe of corn, is suffered to lie fallow longer than by the course of husbandry is usual, an agistment tithe is due for the beasts depastured upon such land. *Shew. Abr.* 1008.

As the question, whether an agistment tithe is due for sheep, does not seem to be quite settled, it will not be amiss to refer to the principal cases, in which this has been agitated, which are, 1 *Roll. Rep.* 63. pl. 7. *Mascul v. Price*, *Mich.* 12. *Jac.* 1. 1 *Roll. Abr.* 642. pl. 8. *Poph.* 197. *Cro. Car.* 207. 1 *Roll. Abr.* 647. pl. 13. *Bunb.* 90. *Gilb. Rep. in Equity* 231. *Bunb.* 313.

Agistment tithe, is a small tithe. *Wilson*, par. 1. fo. 170.

Corn. It is laid down in some books, that no tithe is due of the rakings of corn involuntarily scattered. 1 *Roll. Abr.* 645. pl. 11. *Cro. Eliz.* 278. *Freem.* 335. *Moor* 278. But, if more of any sort of corn is fraudulently scattered, than, if proper care had been taken, would have been scattered, tithe is due of the rakings of such corn. *Cro. Eliz.* 475. *Freem.* 335. And it has been said by *Holt*, Chief Justice, that tithe is due of the rakings of all corn, except such as is bound up in sheaves. 12 *Mod.* 235. No tithes are due of the stubbles left in corn fields, after mowing or reaping the corn. 2 *Inst.* 261. 1 *Roll. Abr.* 640. pl. 14.

Hay. Tithe of hay is to be paid, although beasts of the plough or pail, or sheep are to be foddered with such hay. *Cro. Jac.* 47. *Webb v. Warner*. 1 *Roll. Abr.* 650. pl. 12. 12 *Mod.* 497. But no tithe is due of hay grown upon the headlands of ploughed grounds, provided that such headlands are not wider than is sufficient to turn the plough and horses upon. 1 *Roll. Abr.* 646. pl. 19. It is laid down in one old case, that if a man cuts down grass, and, while it is in the swathes, carries it away and gives it to his plough cattle, not having sufficient sustenance for them otherwise, no tithe is due thereof. 1 *Roll. Abr.* 645. *Crawley v. Wells*, *Mich.* 9 *Car.* 1. And in a modern case, the court of Exchequer seemed to be of opinion, that no tithe is due of vetches or clover, cut green, and given to cattle in husbandry. *Bunb.* 279. *Hayes v. Dowse*, *Hil.* 3 *Geo.* 2. But in another case, some years before this last case, it was held, that the right to tithe of hay accrues upon mowing the grass, and that the subsequent application of this, while it is in grass, or when it is made into hay, shall not, although beasts of the plough or pail are fed with it, take away this right. 12 *Mod.* 498. And the doctrine of this last case coincides with that of an old case; in which it was held, that tares cut green, and given to beasts of the plough, may by special custom be exempted from the payment of tithes; from whence it follows, that such tares are not exempted *de jure*. 12 *Mod.* 498. *Selby v. Bank*, *Pasch.* 13 *W.* 3.

It is laid down in some books, that no tithe is due of aftermowth hay; because tithe can only be due once in the same year from the same land. *F. N. B.* 53. *Bro.*

Dism. pl. 16. 2 *Inst.* 262. 11 *Rep.* 16. *Cro. Jac.* 42. *Ld. Raym.* 243. But it is held in other books, that tithe is due of aftermowth hay. 1 *Roll. Abr.* 64. pl. 11. *Cro. Eliz.* 660. *Cro. Jac.* 116. *Cro. Car.* 403. 12 *Mod.* 498. *Bunb.* 10. And the principle, upon which the doctrine that no tithe is due of aftermowth hay is founded, is denied in some modern cases.

In some of these it is laid down, that tithes shall be paid of divers crops grown upon the same land in the same year. *Bunb.* 19. *Benson v. Watkins*, *Hil.* 3 *Geo.* 1. *Bunb.* 314. *Swansea v. Digby*, *Hil.* 5. *eo.* 2.

In others it is held, wherever there is in the same year a new increase from the same thing, tithe is due. *Bunb.* 9. *Baker v. Sweet*, *Mich.* 8 *Geo.* 1. *Gilb. Rep. in Eq.* 231. *Coleman v. Baker*, *Pasch.* 12 *Geo.* 1.

Wood. Tithe of wood is not due of common right; because wood does not renew annually: But it was, in very ancient times, paid in many places by custom. 2 *Inst.* 642. 12 *Mod.* 111. *Salk.* 656. *Comb.* 404. *Bunb.* 61.

A constitution was made, in the seventeenth year of the reign of *Edward the Third*, by *John Stratford*, archbishop of *Canterbury*, that tithes shall be paid, within this province, of *silva cadua*. 2 *Inst.* 642. *Palm.* 37, 38.

Several petitions having been presented to the King, complaining of the clergy for taking tithe of grofs wood and underwood, by virtue of this constitution; at length, a statute was made in these words: "At the complaint of the Great men and Commoners, shewing by their petition, that when they sell their grofs wood, of the age of 20 or 40 years, and of a greater age, to merchants, to their own profit, and to the aid of the King in his wars, the parsons and vicars of Holy church do implead and trouble the said merchants, in court christian, for the tithe of the said wood, under the denomination of *silva cadua*, by the reason of which they cannot sell their wood for the real value, to the great damage of themselves and the realm; it is ordained and established, that a prohibition in this case shall be granted, and upon the same an attachment, as it hath hitherto been." 45 *Ed.* 3. c. 3.

From the petitions and answers, from this statute, and from books of the best authority, it appears plainly, that no tithe of grofs wood was due *de jure* at the Common law; and that the demand thereof as such by virtue of the constitution made by the archbishop, was an encroachment. 2 *Inst.* 642. 45 *Ed.* 3. c. 3. *Plowd.* 470. *Bro. Paroch.* pl. 1. *Cro. Jac.* 100.

After the making of this statute, prohibitions were constantly granted to suits instituted in spiritual courts for tithes of grofs wood. But two questions often arose, What is grofs wood? And of what age grofs wood must be before it is exempted from the payment of tithe? 2 *Inst.* 643, 644, 645.

For the putting an end to these, it hath been long settled, that by grofs wood is not meant small wood, nor large wood, but such wood as is generally, or by the custom of a particular part of the country, used as timber; and that all such wood, if of the age of 20 years, is exempt from the payment of tithe. 2 *Inst.* 642, 643. *Cro. Eliz.* 1. 12 *Mod.* 524. *Bunb.* 127. Oaks, alders, and elms, being universally used as timber, it has been always held, that such trees, if of the age of 20 years, are grofs wood. 2 *Inst.* 642. It hath been held, upon great deliberation, notwithstanding what is laid down to the contrary in *Plowd.* 470, that a horn-beam tree, if of the age of 20 years, is grofs wood; because this is used in building and repairing. 2 *Inst.* 643. It has for the same reason been held, that an aspen tree, of the age of 20 years, is grofs wood. *Ibid.*

Tithes are not in the general due of beach, birch, hazel, willow, fallow, alder, maple, or white-thorn trees, or of any fruit trees, of whatsoever age they are: Because these are not timber. *Plowd.* 470. *Cro. Eliz.* 477. 1 *Cro. Jac.* 190. 1 *Roll. Abr.* 640. pl. 5. pl. 6. *Brownl.* 94. But, if the wood of any of these trees is used in a particular part of the country, where timber is scarce, in building and repairing, no tithe is due of such wood, if of the age of 20 years, in that part of the country. *Hob.* 219. *Brownl.* 94. It is laid down in several old books, that, if a timber tree, after it is of the age of 20 years, decays so as to be unfit to be used in building, no tithe is due

due of the wood of this tree; because it was once privileged. 11 Rep. 48. Cro. Eliz. 477. Cro. Jac. 100. 1 Roll. Abr. 640. pl. 2.

But the contrary is laid down in some other books.

In two of these it is laid down, that, if the wood of a coppice has been usually felled for firing, such wood shall pay tithe, altho' it stand till it be 40 years of age. Sid. 300. 1 Lev. 189. And in another it is laid down, that, if the wood of a timber-tree is sold for firing, it is, altho' the tree was of the age of 20 years, liable to pay tithe. Bunb. 99. Greenaway v. The Earl of Kent. The reporter of this last case mentions four others, in which the same had been held; and says, that it was in one of them laid down, that the wood of timber-trees is only exempted from the payment of tithe, on the account of its being used in building. Buckle v. Vanacre.

The doctrine, however, of the old books is confirmed by a very late case in the court of Chancery. A bill being brought for tithe of the loppings of timber-trees, which had been sold for firing, it was insisted that this wood, which would otherwise have been exempted from the payment of tithes, was liable thereto, because it was sold to be used for firing; and the cases just now cited were relied upon: But the bill was dismissed; and by Hardwicke Chancellor, in the case in 1 Lev. 189. and Sid. 300. the wood in question was coppice wood, which had been usually felled for firing; and such wood, of of whatever age it is, is always titheable. The case of Greenaway and the earl of Kent, is quite a singular one, and is not law; for in the case of Bibbs and Huxley, Hill. 11 Geo. 1. it was agreed, that no tithe is due of the wood of a timber tree, which has been once privileged from the payment of tithe, altho' such wood is sold to be used for firing. MS. Rep. Walton v. Tryon, Mich. 25 Geo. 2.

It is laid down in divers books, that, if a timber-tree of the age of 20 years is lopped, no tithe shall be paid of the loppings altho' they are not of 20 years growth. for that the tree, which is privileged, shall privilege the loppings. Bro. Dism. pl. 14. 11 Rep. 4. Cro. Eliz. 4. Godb. 175. 1 Roll. Abr. 640. pl. 3. But the doctrine laid down in one old book, is, that such loppings of a timber-tree, as are of the age of 20 years, shall be exempted from the payment of tithe; and it is added as a reason, that branches of that age may be useful in building. Plowd. 470. Soby v. Molins. The former, however, is the better opinion.

In the case just now cited, it appeared, that the loppings of the trees, for the tithe of which the bill was brought, were not of 20 years growth: But it also appeared, that the trees were of the age of 20 years, before they had ever been lopped. It was held by Hardwicke, Chancellor, that no tithe was due of these loppings; for that, if a tree is once privileged from paying tithe, the privilege extends to all future loppings, of whatsoever age they are. MS. Rep. Walton v. Tryon.

It has been said, that, altho' a tree has been once lopped before it was of the age of 20 years, the future loppings of such tree, provided these are of twenty years growth, are not titheable. 1 Roll. Abr. 640. pl. 1. But in the case already cited, it was laid down by Hardwicke Chancellor, that wherever a tree has been lopped before it was of the age of 20 years, all future lopping, altho' ever so old, are liable to pay tithe. MS. Rep. Walton v. Tryon. It has been laid down, that if a tree, which was once privileged from paying tithe, is felled, the germins that spring from the root of such tree, are also privileged. 11 Rep. 48. Liford's case. But, in the case already cited, it was said by Hardwicke Chancellor, that all germins, which spring from the roots of trees that have been felled, are titheable. MS. Rep. Walton v. Tryon.

The wood of a coppice, which has usually been felled for firing, is liable to pay tithe, altho' the same is of the age of 40 years. 1 Lev. 189. Sid. 300. And in the case so often cited, it was said by Hardwicke Chancellor, if, when the wood of coppice is felled, some trees growing therein, which are of the age of 20 years, and have never been lopped, are lopped, and these loppings are promiscuously bound up in faggots with the coppice

wood, tithe must be paid of the whole: because it would be very difficult, to separate the titheable wood from that which is not so; and the owner ought to suffer for his folly in mixing them. MS. Rep. Walton v. Tryon.

4. Of what mixed tithes are due.

Such tithes as arise from beasts or fowls, which are fed with the fruits of the earth, are called mixed tithes. 2 Inst. 649. 1 Roll. Abr. 635. Many things are by the ecclesiastical law liable to pay such tithes, which by the Common law are not. 2 Inst. 641. 4 Mod. 344.

The design under this head is to shew, of what mixed tithes are due by the Common law.

In doing this it will appear, that some things, which are in the general exempted therefrom, become by custom liable to the payment of mixed tithes. 1 Roll. Abr. 635. c. pl. 3. 636. pl. 7. Cro. Car. 339. 1 Vent. 5. It will also appear, that divers things, which are in the general liable thereto, are under particular circumstances exempted from the payment of mixed tithes. 1 Roll. Abr. 645. pl. 14. pl. 16. But, wherever any fraud is used, to bring a thing under these circumstances, by reason of which, if it had come fairly under them, it would have been exempted from the payment of a mixed tithe, it is by such fraud rendered liable thereto. 1 Roll. Abr. 645. pl. 15, 646. pl. 17.

As it would be tedious, to enumerate all the things, which are liable to pay mixed tithes, only those shall be mentioned concerning the tithe of which some question has arisen: But, from such as will be mentioned, it may be easily collected, of what other things mixed tithes are due.

Tithes are in the general due of the young of all beasts, except such as are *feræ naturæ*. But none are due of young hounds, apes, or the like, because such beasts are kept only for pleasure. Bro. Dism. pl. 20. No tithe is due of the young of deer; for these are *feræ naturæ*. 2 Inst. 651. And for the same reason none is due, but by custom, of young conies. 1 Roll. Abr. 635. c. pl. 3. Cro. Car. 339. 1 Vent. 5.

The young of all birds and fowls, except such as are *feræ naturæ*, are in the general liable to pay tithes; unless the eggs of such birds or fowls have before paid tithes. 1 Roll. Abr. 642. pl. 6. 2 Will. Rep. 463. But no tithes are due either of the eggs or young of any birds or fowls, which are kept only for pleasure. Bro. Dism. pl. 20. No tithes are due of the eggs or young of partridges or pheasants, because these are *feræ naturæ*. Moor 599. 2 Will. Rep. 463. If a man keeps pheasants in an inclosed wood, whose wings are clipped, and from their eggs hatches and brings up young ones, no tithe is due of these young pheasants, although none was paid for their eggs: Because the old ones are not reclaimed, and would go out of the inclosure, if their wings were not clipped. 1 Roll. Abr. 636. pl. 5.

It was heretofore held, that neither the eggs nor young of turkies are titheable; turkies being *feræ naturæ*. Moor 599. Hughes v. Price. But it has been held in a modern case, that, as turkies are now as tame as hens or other poultry, tithe is due of their eggs or young. 2 Will. Rep. 463. Charleton v. Brightwell. No tithe is due of such young pigeons as are spent in the house or the person who breeds them. 1 Roll. Abr. 644. Z. pl. 4. pl. 6. 1 Vent. 5. 12 Mod. 77. 12 Mod. 47. But if any young pigeons are sold, tithe is due to them. 1 Roll. Abr. 644. Z. pl. 5. pl. 6.

If a man pays tithe of young lambs at marks-tide, and at midsummer assizes shears the other nine parts of the lambs, tithe is due of the wool: For although there is but two months between the time of paying tithe lambs, which were not shorn, and the shearing of the residue, there is in this case a new increase. 1 Roll. Abr. 642. R. pl. 7. Bunb. 90. If a man shears his sheep about their necks at Michaelmas time, to preserve their fleeces from the brambles, no tithe is due of this wool: For it appears, that this, which is done before their wool is much grown, can never be for the sake of the wool. 1 Roll. Abr. 645. pl. 16. If a man, after their wool is well

well grown, shear his sheep about their necks, to preserve them from vermin, no tithe is due of the wool. 1 *Roll. Abr.* 645. *pl.* 14.

If a man, a little before shearing time, cuts dirty locks of wool from his sheep to preserve them from vermin, no tithe is due of such wool. 1 *Roll. Abr.* 646. *pl.* 17. But in either of these cases, if more wool than ought to have been cut off is fraudulently cut off, tithe must be paid of the wool. 1 *Roll. Abr.* 645. *pl.* 15. 646. *pl.* 17. Tithe is due of the wool of such sheep as are killed to be spent in the house. 1 *Roll. Abr.* 646. *pl.* 18. *Dent. v. Salvin. Pasch.* 14. *Car. Cont. Litt. Rep.* 31. *Civil v. Scott.*

Fish taken in a pond, or in any inclosed river, are liable to pay tithe. 1 *Roll. Abr.* 636. *pl.* 4. *pl.* 6. *pl.* 7. But no tithe is due, except by custom, of fish taken in the sea, or in any open river, although they are taken by a person who has a several fishery; because such fish are *feræ naturæ*. *Noy* 108. 1 *Roll. Abr.* 636. *pl.* 4. *pl.* 6. *pl.* 7. *Cro. Car.* 332. 1 *Lev.* 179. *Sid.* 278. Honey and bees-wax are both tithable. *Fitzb. N. B.* 51. 1 *Roll. Abr.* 635. *C. pl.* 1. *Cro. Car.* 559. But, where the tithe of their honey and wax has been paid, no tithe is due of the bees. *Cro. Car.* 404. *Anon.* No tithe is due of the milk spent in the house of a farmer; provided such house stands in that parish in which the cows are milked. *L. Raym.* 129. *Scoles v. Lowther.*

5. Of recovering small tithes in a summary way; and of recovering tithes due from quakers.

By the 7 & 8 *W. 3. cap.* 6. *f.* 1. It is, for the more easy recovery of small tithes, where the same do not amount to above the yearly value of forty shillings, from any one person, enacted, 'That if any person shall fail in payment for twenty days after demand, the parson may make complaint in writing to two justices of the peace, neither being patron, nor interested, who after summoning the party, are to hear and determine the complaint, give a reasonable allowance for the tithes and costs not exceeding ten shillings.'

If the person complained against insists on any prescription, composition, *modus decimandi*, or other title, delivers the same in writing to the justices, and gives to the party complaining sufficient security to pay costs at law, if the title is not allowed, the justices not to give judgment. The justices have power to give costs, not exceeding ten shillings, to the party prosecuted, if they find the complaint false and vexatious. The act not to extend to tithes within the city of London, or in any other place, where the same are settled by any act of parliament. An appeal is given to the sessions, and no proceedings, or judgments, had by virtue of this act, to be removed, or superseded, by any writ of *certiorari*, or other writ whatsoever, unless the title of such tithes shall be in question.

By the 7 & 8 *W. 3. c.* 34. *par.* 4. Where any quaker shall refuse to pay, or compound, for his great or small tithes, it shall be lawful for the two next justices of the peace of the same county, other than such justice of the peace as is patron of the church, or chapel, to which the tithes belong, or any ways interested, upon the complaint, to convene before them such quaker, and to examine upon oath the truth of the complaint, and to ascertain what is due from such quaker, and by order under their hands and seals to direct the payment thereof, so as the sum ordered do not exceed ten pounds; and upon refusal of quaker to pay, to levy the money. Any person aggrieved, may appeal to the next general quarter-sessions.

No proceedings, or judgment, had by virtue of this act, shall be removed or superseded by any writ of *certiorari*, or other writ out of his majesty's courts at Westminster, or any other court whatsoever, unless the title to such tithes shall be in question.

By the 1 *Geo. 1. f.* 2. *cap.* 6. *par.* 2. The like remedy is given for the recovery of all tithes and all other ecclesiastical dues from quakers, as by the 7 & 8 *W. 3. cap.* 34. is given for tithes to the value of ten pounds.

And such justices of the peace, upon complaint of any parson, vicar, curate, farmer or proprietor of such tithes, or other person who ought to have, receive or collect, any such tithes or dues, may proceed in a similar manner as directed by the former act, touching quakers. *Vide* the Statutes.

6. Of particular things for which tithes are paid, and for which not, in alphabetical order, for the ease of the reader.

The particular things for which tithes are paid, and for which not, according to our law, are the following, *viz.*

Acorns, as they yearly increase, are liable to the payment of tithes; but this is where they are gathered and sold, and reduced to a certain profit; not when they drop, and the hogs eat them. 2 *Inst.* 643. *Hell.* 27. *After-math*, or *after-pasture* pays no tithes, except by custom; being the remains of what was before tithed. 2 *Inst.* 652. 2 *Danv. Abr.* 589. *Tit. Dismes.* *Agistment* of cattle upon pasture-land, which hath paid no other tithes that year, pays tithe for the cattle; and if a man breeds or buys barren unprofitable cattle and sells them, he shall pay for the *agistment*; but if he depastures his land with his own saddle-horses, he shall pay no tithes. If ground is eat up with unprofitable cattle of a man's own, or others, a tenth part of the yearly value of the rent of the land, *i. e.* the sum of 2 *s.* per pound, is payable by the owner of the land, or his tenant; though the twentieth part is usually accepted. 1 *Roll. Abr.* 646. *Hard.* 184. *Alder* trees pay tithes, notwithstanding they are above twenty years growth, not being timber. *Asp* is timber, and therefore, if these trees are above twenty years growth, they are tithe free. *Asp* or *aspin* trees are exempted, if beyond that growth, in places where they are used for timber, 2 *Cro.* 199. 2 *Inst.* 643.

Bark of trees is not tithable, if the trees whereon produced were timber. 11 *Rep.* 49. *Barren land*, which is so of its own nature, pays no tithe; where land is barren, and not manurable without some extraordinary charge, in respect of such charge, and for the advancement of husbandry, such land being converted to tillage, shall for the first seven years after the improvement, be discharged from tithes, by the act 2 & 3 *Ed. 6. cap.* 13. But the barren land during the seven years of improvement, shall pay such small tithes as have been accustomedly paid before; and afterwards to pay the full tithe according to the improvement: And if land is over-run with bushes, or become unprofitable by bad husbandry, it cannot properly be called barren land; for if it be grubbed, or ploughed and sowed, it immediately pays tithes. 2 *Inst.* 656. *Cro. Eliz.* 475. *Beech* trees, where timber is scarce, and these trees are used for building, if above twenty years growth to be timber, are privileged from tithes, by the stat. 45 *Ed. 3. c.* 3. though this tree is not naturally timber, for it is necessity makes it so. 2 *Danv. Abr.* 589. *Bees* are tithable for their honey and wax, by the tenth measure, and tenth pound: It has been a question whether the tenth swarm can be demanded for tithes of bees, because bees are *feræ naturæ*; but when the bees are gathered into the hives, they are then under custody, and may pay tithe by the hive or swarm; but the tithe is generally paid in the tenth part of the honey or wax. 1 *Roll. Abr.* 651. 3 *Cro.* 404, 559. *Birch* wood is tithable, though of above twenty years growth. 2 *Inst.* 643. *Bricks* pay not tithes, for they are made of parcel of the freehold, and are of the substance of the earth, not an annual increase. 1 *Cro.* 1. *Broom* shall pay tithes; But it may be discharged by custom, if burnt in the owner's house, or kept for husbandry. 2 *Danv. Abr.* 597.

Calves are tithable, and the tenth calf is due to the parson when weaned, and he is not obliged to take it before; but if in one year a person hath not the number of ten calves, the parson is not intitled to tithes in kind for that year, without a special custom for it, though he may take it the next year, throwing both years together; and it is a good custom to pay one calf in seven, where there hath been no more in one year; and where

a man sells a calf to pay the tenth of the value, or for the parson to have the right shoulder, &c. 1 *Roll. Abr.* 648. *Raym.* 277. Cattle sold pay *tithe*; but not cattle kept for the plough or pail, which shall pay no *tithe* for their pasture, by reason the parson hath the benefit of the labour of plough cattle in tilling the ground, by the *tithe* of corn, and *tithe* milk for those kept for the pail; yet if such cattle bought are sold before used, or if being past their labour, the cows are barren, and afterwards fattened in order to sell, *tithe* shall be paid for them; though if the owner kill and spend the cattle in his own house, no *tithe* is due for them, being for his provision to support him in his labour about other affairs, for which the parson hath *tithe*. Cattle feeding on large commons, where the bounds of the parish are not certainly known, shall pay *tithe* to the parson of the parish where the owner lives; and if fed in several parishes, and they continue above a month in each parish, *tithe* shall be paid the two parsons proportionably. 1 *Roll. Abr.* 635, 646, 647. *Hardr.* 35. Chalk and chalk-pits are not *titheable*; nor is clay or coal, as they are part of the freehold, and not annual, to pay *tithe*. 2 *Inst.* 651. Cheese pays *tithe* by custom, where *tithe* is not paid for the milk; but if the milk pays a *tithe*, the cheese pays none: And it may be a good custom to pay the tenth cheese made in such a month, for all *tithe* milk in that year. 1 *Roll. Abr.* 651. Chickens are not *titheable*, because *tithe* is paid for the eggs. 1 *Roll. Abr.* 642. Colts pay *tithe* in the same manner as calves. *Ibid.* Conies are *titheable* only by custom, for those that are sold, not for such as are spent in the house. 2 *Danv. Abr.* 583. Corn pays a *predial tithe*; it is *tithe*d by the tenth cock, heap, or sheaf, which if the owner do not set out, he may be sued in an action upon the statute 2 & 3 *Ed. 6. c.* 13. And if the parishioner will not sow his land usually sown, the parson may bring his action against him. When *tithe* corn is set forth, the law gives the parson a reasonable time to carry it away; and if he suffer the same to lie too long on the land to the prejudice of the owner thereof, he may be liable to an action: But the parson may not set out the *tithe* himself, or take them away without leave. 1 *Roll. Abr.* 644. 1 *Sid.* 283. 2 *Vent.* 48. *Ley* 70.

Deer are not *titheable*, for they are *feræ naturæ*; though in parks, &c. they pay *tithe* by custom. 2 *Inst.* 651. Doves kept in a dove-house, if they are not spent in the owner's house, are *titheable*. 1 *Vent.* 5.

Eggs pay *tithe* when *tithe* is not paid for the young. 1 *Roll. Abr.* 642. Elm trees being timber are discharged from the payment of *tithe*, but not if under twenty years growth. 2 *Inst.* 643.

Fallow Ground is not *titheable* for the pasture in that year in which it lies fallow, unless it remain beyond the course of husbandry; because it improves and renders the land more fertile by lying fresh. 1 *Roll. Abr.* 642. Fens being drain'd and made manurable, or converted into pasture, are subject to the payment of *tithe*. 1 *Roll. Rep.* 354.

Fish taken in the sea or common rivers, are *titheable* only by custom, and the *tithe* is to be paid in money, and not the tenth fish; but fish in ponds and rivers inclosed, ought to be set forth as a *tithe* in kind. 2 *Danv. Abr.* 583, 584. Flax pays *tithe*; every acre of flax or hemp sown shall pay yearly 5 s. for *tithe*, and no more. 11 & 12 *W. 3. cap.* 16. Forest lands shall pay no *tithe* while in the hands of the King, though such lands in the hands of a subject shall pay *tithe*; and if a forest shall be disafforested, and within a parish, it shall pay *tithe*. 1 *Roll. Abr.* 655. 3 *Cro.* 94. Fowls, as hens, geese, ducks, are to pay *tithe*, either in eggs or the young, according to custom, but not in both: Turkeys are said to be exempt from *tithe*. 2 *Danv. Abr.* 583. *qu.* Fruit, apples, pears, plums, cherries, &c. pay *tithe* in kind when gathered; and ought to be set out according to the statute. 2 *Inst.* 621. Fruit-trees cut down and sold, are not *titheable*, if they have paid *tithe* fruit that year before cut. *Ibid.* 652. Furnes, if sold, pay *tithe*, not if used for fuel in the house, or to make pens for sheep, &c. *Wood's Inst.* 166.

Gardens are *titheable* as lands, and therefore *tithe* in kind are due for all herbs, plants, and seeds sowed in them; but money is generally paid by custom or agreement. *Ibid.* Grass mowed is *titheable* by payment of

the tenth cock, or according to custom; but for grass cut in swarths for sustenance of plough cattle only, not made into hay, no *tithe* is to be paid. Grass or corn, &c. when sold standing, the buyer shall pay the *tithe*; and if sold after cut and severed, the seller must pay it. The parson is not obliged to take *tithe* of grass the day it is cut, but may let it lie long enough to make it into hay. 1 *Strange* 245. 1 *Roll. Abr.* 644, 645. *Wood's Inst.* 166.

Hazel, Holly, and Maple trees, &c. are regularly *titheable*, although of 20 years growth. 2 *Danv. Abr.* 589. Hay pays a *predial tithe*; the tenth cock is to be set out and paid, after made into hay, by the custom of most places, and the parishioners shall make the grass cocks into hay for the parson's *tithe*; but if they are not obliged to make the *tithe* into hay, they may leave it in cocks, and the parson must make it, for which purpose he may come on the ground, &c. A prescription to measure out and pay the tenth acre, or part of grass standing, in lieu of all *tithe* hay, may be good: And if meadow ground is so rich, that there are two crops of hay in one year, the parson by special custom may have *tithe* of both. 1 *Roll. Abr.* 643, 647, 950. Headlands are not *titheable*, if only large enough for turning the plough; but if larger, *tithe* may be payable. 2 *Inst.* 653. Herbage of ground is *titheable* for barren cattle kept for sale, which yield no profit to the parson. *Wood's Inst.* 167. Honey pays a *tithe*, as under Bees. Hops are *titheable*, and the tenth part may be set out after they are picked: There are several ways of *tithe*ing hops, *viz.* by the hills, pole, or pound; in some places they set forth the tenth pole for *tithe*; but my Lord Chief Just. *Roll* tells us, they ought not to be *tithe*d before dried. 1 *Roll. Abr.* 644. Horses kept to sell, and afterwards sold, *tithe* shall be paid for their pasture; though not where horses are kept for work and labour. *Hutt.* 77. Houses for dwelling are not properly *titheable*: A *modus* may be paid for houses in lieu of *tithe* of the land upon which they are built, and a great many cities and boroughs have a custom to pay a *modus* for their houses; as it may be reasonably supposed that it was usual to pay so much for the land, before the houses were erected on it. 11 *Rep.* 16. 2 *Inst.* 659. Kids pay a *tithe* as calves, the tenth is due to the parson. *Wood* 167.

Lambs are *titheable* in like manner as calves; but if they are yeaned in one parish, and do not tarry there thirty days, no *tithe* is due to the parson of that place: If there be a custom that the parishioner having six lambs or under, shall pay so much for every lamb; and if he have above that number, then to pay the seventh, it is good. 3 *Cro.* 403. Lead may pay *tithe* by custom, as it does in some counties; but it doth not without it. 2 *Inst.* 651. By custom only, Lime and Lime-kilns are *titheable*. 1 *Roll. Abr.* 642.

Mast of Oak and Beach pays *tithe*, as under Acorns. Milk is *titheable* when no *tithe* is paid for cheese, all the year round, except custom over-rules; and it is payable by every tenth meal, not tenth quart or part of every meal; and is to be brought to the house of the parson, &c. by custom, in which particular this *tithe* differs from all others, which must be fetched by the receiver. In some places they pay *tithe* cheese for milk, and in others some small rate according to custom. *Cro. Eliz.* 609. 2 *Danv. Abr.* 596. Mills, as there are several sorts of them, the *tithe* is different; the *tithe* of corn-mills driven by wind or water, are paid in kind, every tenth toll-dish of corn to the parson of the parish wherein the mills are standing: But ancient corn-mills are *tithe-free*, being suggested that they are very ancient, and never paid *tithe*, &c. And it is questioned whether *tithe* is due for any corn-mills, unless by custom, because the corn hath before paid *tithe*; and it seems rather a *personal tithe* where due: The *tithe* of fulling-mills, paper-mills, powder-mills, &c. are *personal*, charged in respect to the labour of men, by custom only; and are regarded more as engines of several trades than as mills. 1 *Roll. Abr.* 656. 2 *Inst.* 621. Mines pay no *tithe* but by custom,

custom, being of the substance of the earth, and not annually increasing. 2 Inst. 651.

Nurseries of trees shall pay *tithes*, if the owner dig them up and makes profit of them by selling. 2 Danv. Abr. 585.

Oak trees are privileged as timber from the payment of *tithes* by the statute of *Sylva Cadua*, 45 Edw. 3. c. 3. if of or above twenty years growth; and if oaks are under that age, it is the same when they are apt for timber. Moor 541. *Offerings, &c.* are in the nature of *personal tithes*. 2 Inst. 659, 661. *Orchards* pay *tithes* both for the fruit they produce, and the grass or grain, if any be sown or cut therein. 2 Inst. 652.

Parks are *titheable* by custom, for the deer and the herbage; and when disparked and converted into tillage they shall pay *tithes* in kind: The *tithes* of parks may be in part certain, and part casual; and 2 s. a year, and a shoulder of every third deer, hath been paid as *tithe* for a park. 1 Roll. Rep. 176. Hob. 37, 40. *Partridges* and *Pheasants, &c.* as they are *feræ naturæ*, yield no *tithes* of eggs or young. 1 Roll. Abr. 636. *Pease*, if gathered for sale, or to feed hogs, pay *tithes*; but not green pease spent in the house. 1 Roll. Abr. 647. *Pigeons* ought to pay *tithes* when sold; and this holds good if they lodge in holes about an house, as well as in a dove-house; and by custom if spent in the house, they may be *titheable*, though not of common right. 2 Danv. Abr. 583, 597. *Pigs* are *titheable*, as calves. Ibid. *Pollard trees*, such as are usually lopped, and distinguished from timber-trees, pay *tithes*. Plowd. 470.

Quarries of stone, &c. are not subject to pay *tithes*; because they are part of the inheritance, and *tithes* ought to be collateral to the land, and distinct from it. 1 Roll. 644.

Rakings of corn are not *titheable*, for they are left for the poor, and are properly the scatterings of the corn whereof the *tithes* have been paid, left after the cocks set out are taken away. Cro. Eliz. 660.

Saffron pays a *predial* and small *tithe*. 1 Cro. 467. *Salt* is not *titheable*, but by custom only. 1 Bunb. 10. *Sheep*, a *tithe* is paid for, of lambs and wool; and therefore they pay no *tithe* for their feeding. If sheep are in the parish all the year, they are to pay *tithe* wool to the parson; but if removed from one parish to another, the parsons of each parish to have *tithe pro rata*, where they remain thirty days in a parish; and if they are fed in one parish, and brought into another to be shorn, the same *tithe* is to be observed. 1 Roll. Abr. 642, 647. 3 Cro. 237. *Stubble* pays no *tithe* under aftermath. 2 Inst. 652.

Tares, vetches, &c. are *titheable*; but if they are cut down green, and given to the cattle of the plough, where there is not a sufficient pasture in the parish, no *tithe* shall be paid for them. 1 Cro. 139. *Trees* are no yearly increase, and not *titheable*. 2 Inst. 651. *Timber trees*, such as oaks, alders, and elms, and in some places beech, &c. above the age of twenty years, were discharged of *tithes* by the Common law, before the statute 45 Ed. 3. c. 3. and the reason of it is, because such trees are employed to build houses, and houses when built are not only fixed to, but part of the freehold; and if those trees stand so long till they become rotten and fit for firing only, no *tithes* is due for them, because they were once privileged; and loppings of timber-trees above twenty years growth, pay no *tithes*, for the branch is privileged as well as the body of the tree; and the roots of such trees are exempted as parcel of the inheritance. *Trees* cut for plough-boot, cart-boot, &c. shall not pay *tithes*, although they are no timber; but all trees not fit for timber, and not put to those uses, pay *tithes*. 1 Roll. Abr. 650. Cro. Eliz. 477, 499. *Turfs* used for fuel are part of the soil, and *tithe-free*. 2 Inst. 651.

Underwood is *titheable*, though the *tithe* is not of annual payment; and is set out while standing, by the tenth acre, pole, or perch, or when cut down, by tenth faggot or billet, as custom directs; and if he that sells the wood doth not set out the *tithe*, he is liable to the treble damages by 2 & 3 Ed. 6. cap. 13. But if the underwood is used for firing in a house of husbandry, or to burn brick to repair the house, or for hedging and fencing

the lands in the same parish, it may be discharged from *tithe*. 2 Inst. 642, 643, 652. Hb. 250. 2 Danv. Abr. 597.

Warrens where *titheable*, see *Conies*. *Waste ground*, whereon cattle feed, is liable to the payment of *tithes* 2 Danv. Abr. *Wood* growing in the nature of an herb is a *predial* and small *tithe*. 2 Danv. 594. *Wood* is generally esteemed to be a great *tithe*. If wood grounds have likewise timber trees growing on them, and consist for the most part of such trees, the timber-trees shall privilege the other wood; but if the wood is the greatest part, then it must pay *tithes* for the whole. 13 Rep. 13. If wood be cut to make hop-poles, where the parson hath *tithe* hops, no *tithe* shall be paid for it. Hugber's Abr. 689. *Wool* is a mixed small *tithe*, paid when clipped; one fleece in ten, or in some places one in seven is given to the parson. If there is under ten pounds of wool at the shearing, a reasonable consideration shall be paid, because the *tithes* are due of common right; and if less than ten fleeces, they shall be divided into ten parts, or an allowance be otherwise made. All sheep killed, and sheep which die, pay *tithe* wool; and neck wool cut off for the benefit of the wool, but not if it is to preserve the sheep from vermin, &c. Also the wool of lambs shorn at *Midsummer*, though *tithe* was paid for the lambs at *Mark-tide*, is *titheable*. 1 Roll. Abr. 646, 647. 2 Inst. 652. Vide *tithe* of *Sheep*.

When any thing is *titheable* only by custom, it may be exempted from *tithe* by custom; but custom to exempt corn, &c. from *tithe* will not be allowed, because for that *tithes* are due *de jure*. Count Parf. Compan. 155. See *Modus* and *Prescription*.

Tithes Extraparochial, which do not lie in any parish, belong to the King. 2 Rep. 2, 44.

Great *tithes* generally belong to the rector; and small *tithes* to the vicar. Cro. Car. 20.

Great *tithes* are corn, hay, and wood; small *tithes* comprehend all other *predial tithes* besides corn and hay, &c. as also those *tithes* which are personal and mixed; some things may be great or small *tithes*, in regard of the place; as *hops* in gardens are small *tithes*, and in fields may be great *tithes*; and 'tis said the quantity will turn a small *tithe* into a great one, if the parish is generally sown with it. 1 Roll. Abr. 643. 1 Cro. 578. Wood's Inst. 162.

For more learning on this subject, see 5 New Abr. tit. *Tithes*, 8 Vin. Abr. tit. *Dismes*, and a new treatise on the laws concerning *Tithes*. See also, Black. Com. 1 V. 384, 388. 2 V. 24. 3 V. 48, 88, 102, 384, 437.

Tithing, (*Tithinga*, from the Sax. *Teothunge*, i. e. *Decuriam*) Is in its first appointment the number or company of ten men with their families, held together in a society, all being bound for the peaceable behaviour of each other: And of these companies there was one chief person who was called *teothung-man*, at this day *tithing-man*; but the old discipline of *tithings* is long since left off. In the Saxon times, for the better conservation of the peace, and more easy administration of justice, every hundred was divided into ten districts or *tithings*; and within every *tithing*, the *tithing-men* were to examine and determine all lesser causes between villages and neighbours; but to refer greater matters to the then superior courts, which had a jurisdiction over the whole hundred. Paroch. Antiq. 633. See Black. Com. 1 V. 113. 4 V. 404.

Tithing-men, Are now a kind of petty constables, elected by parishes, and sworn in their offices in the court-leet, and sometimes by justices of peace, &c. There is frequently a *tithing-man* in the same town with a constable, who is as it were a deputy to execute the office in the constable's absence; but there are some things which a constable has power to do, that *tithing-men* and headboroughs cannot intermeddle with. Dalt. 3. When there is no constable of a parish, the office and authority of a *tithing-man* seems to be all one under another name, Stat. 13 & 14 Car. 2. cap. 12. See *Constable*, and Black. Com. 1 V. 114, 406.

Tithe, (*Titulus*) Is when a man hath lawful cause of entry into lands whereof another is seized; and it signifies

ties also the means whereby a man comes to lands or tenements, as by feoffment, fine, last will and testament, &c. The word *title*, includeth a *right*; but is the more general word: Every right is a *title*, though every *title* is not such a right for which an action lies; so that *titulus est justa causa possidendi quod nostrum est*, and is the means of holding the lands. *Co. Litt.* 345. A man may plead in trespass, &c. without particularly setting forth his title, where his justification is collateral to the title of the land; so if damages are to be recovered, and the title of the land is not in question; and in actions on real contracts, where the plaintiff shews enough to entitle him to the action, &c. *2 Mod.* 70. *1 Roll Rep.* 13. *Cro Car.* 571. *3 Nelf. Abr.* 325. But in trespass for cutting corn on lands, the party must set forth the title which he hath to the corn, or on demurrer it will be judged ill; for the shewing that he is possessed thereof, is not sufficient without a *title*, because the property shall be intended to be in the owner of the soil. *2 Sand.* 401. *3 Salk.* 361. When a person will recover any thing from another, he must make out and prove a better *title* than the other hath; or it will not be enough to destroy his *title*, &c. *Hob.* 103. It is not allowed for the party to forsake his own *title*, and fly upon the other's; for he must recover by his own strength, not the other's weakness. *Ibid.* 104. If by the record it appears that the plaintiff in the cause hath no *title*, he shall not have judgment. *Lutw.* 1631. The law will not permit *titles* and things in entry, &c. to be granted over; and the buying or selling any pretended rights or *titles* to lands, is prohibited by statute as *Maintenance*. *32 H. 8. c. 9.* See *20 Vin. Abr.* 278—288. and *Black. Com.* 2 *V.* 195.

Title of Acts of Parliament. After the House of Commons hath finally agreed (on a third reading) that a bill pass, the *title* to it is then settled; which used to be a general one, for all the acts passed in the session, 'till in the 5th year of *Hen. 8.* distinct *titles* were introduced for each chapter. *Black. Com.* 1 *V.* 182, 3.

Title to Lands, pretended, buying or selling. By stat. *32 H. 8. c. 9.* it is provided that no one shall sell or purchase any pretended right or title to land, unless the vender hath received the profits thereof for one whole year before such grant, or hath been in actual possession of the land, or of the reversion or remainder; on pain that both purchaser and vender shall each forfeit the value of such land to the King and the prosecutor.

Title to the Crown. In the opinion of *Blackstone*, the grand fundamental maxim upon which the *ius coronæ*, or right of succession to the throne of these kingdoms, depend, is, "That the Crown is, by Common law" and constitutional custom, hereditary; and this in a manner peculiar to itself: But that the right of inheritance may from time to time be changed or limited "by act of parliament; under which limitations the "Crown still continues hereditary." *Black. Com.* 1 *V.* 191. which *Vide*, the proposition being there fully proved at large.

Title to Things personal. As to the title to things personal, or the various means of acquiring, and of losing such property as may be had therein—The methods of acquisition or loss are principally twelve; 1. By occupancy. 2. By prerogative. 3. By forfeiture. 4. By custom. 5. By succession. 6. By marriage. 7. By judgment. 8. By gift. 9. By contract. 10. By bankruptcy. 11. By testament. 12. By administration. *Black. Com.* 2 *V.* 400. which *Vide*.

Titles of Clergymen, Signify some certain place where they may exercise their functions. A *title* in this sense, is the church to which a priest was ordained and constantly to reside: And there are many reasons why a church is called *titulus*; one is because in former days the name of the saint to whom the church is dedicated was engraved on the porch, as a sign that the saint had a *title* to that church; from whence the church itself was afterwards denominated *titulus*. *Concil. London.* Anno 1125. No person shall be ordained without a *title*; and this is required to keep out those from the ministry who might otherwise for want of maintenance bring disgrace upon the church, And if a bishop shall

admit any person into the ministry without any *title*, he shall maintain him till he prefers him to some ecclesiastical living; or if he refuses so to do, he shall be suspended from giving orders for one year. *Can.* 31. Anciently a *title* of clergy was no more than entering their names in the bishop's roll, and then they had not only authority to assist in the ministerial function, but had a right to the share of the common stock or treasury of the church; but since a *title* is an assurance of being preferred to some ecclesiastical benefice, a certificate that the clerk is provided of some church, or place, &c. or where the bishop who ordains him, intends shortly afterwards to admit him to a benefice or curacy then void. *Count. Parf. Comp.* 2, 3.

Title of Entry, Is when one seized of land in fee, makes a feoffment thereof on condition, and the condition is broken; after which the feoffor hath *title* to enter into the land, and may do so at his pleasure, and by his entry the freehold shall be said to be in him presently. And it is called *Title of entry*, because he cannot have a writ of right against his feoffee upon condition, for his right was out of him by the feoffment, which cannot be reduced into entry; and the entry must be for the breach of the condition. *Corwell.*

Titinylls, An old word for tale-bearers. — In all realms the popish practice hath had confederacy of false, forsworn, factious, and traitorous *titinylls*, untrue to their sovereign, &c. Letter Secr. State, 28 *II.* 8. to *James 5.* King of Scotland.

Tiberton in Devon, for rebuilding the town of, *5 Geo. 2. cap.* 14.

Toalia, A towel; and there is a tenure of lands by the service of waiting with a towel at the King's coronation: — *Petrus Picote tenet unum mesuag. &c. per servientiam serviendi cum una toalia ad coronationem regis.* *Inq. Ann.* 12, 13, *K. John.*

Tobacco, Is not to be planted in England, on pain of forfeiting 40*s.* for every rod of ground thus planted; but this shall not extend to hinder the planting of tobacco in physick gardens. *12 Car. 2. cap.* 34. And justices of peace have power to issue warrants to constables, to search after and examine whether any tobacco be sown or planted, and to destroy the same; which they are to do under penalties &c. *22 & 23 Car. 2. cap.* 26. The *5 Geo. 1. c.* 11. continues the statute *22 & 23 Car. 2.* And by a late act, if any person shall cut walnut-tree leaves, or other leaves, (not being tobacco leaves) or colour them so as to resemble tobacco; or shall sell the same mixed with tobacco, they shall forfeit 5*s.* per pound: And the like penalty is inflicted for exporting such leaves, or engines for cutting, which may be seized by the officers of the customs, &c. Also servants employed therein may be committed to gaol, or the house of correction, for any time not exceeding six months, &c. *1 Geo. 1. cap.* 46. See *Stat. 24 Geo. 2. c.* 41. No drawback allowed on exportation of tobacco, unless shipped from the port at which it was imported, and in the original package if unmanufactured. Importer within fourteen days after the delivery of tobacco to any purchaser to give to the officer where it was imported an account of the marks, numbers, and weights, &c. of every hoghead sold, and the ship's name, &c. the account to be signed by the importer and purchaser. No tobacco nor tobacco stalks above 24*lb.* nor snuff above 10*lb.* to be carried by land from any port of importation without a certificate from the collector, &c. of the port where, &c. before removal the proprietor to insert on the back of the certificate the package, marks, numbers, weights and species, &c. of the goods, and to subscribe his name, and make oath of the truth thereof; the certificate to accompany the goods, and to be delivered to the officer where the goods shall be conveyed, &c. Tobacco, tobacco stalks and snuff, exceeding the respective weights aforesaid, found removing without such certificates, with the horses and carriage shall be forfeited, and the carrier may be committed to the county gaol for one month. See further in the same act for securing the duties upon tobacco. And *Stat. 26 Geo. 2. c.* 13. For other matters, see *Customs, Plantations, Snuff.*

Tobacco-pipe Clay, Not to be exported. *13 & 14 Car. 2. c.* 18. *f.* 8. *6 Geo. 1. c.* 21. *f.* 32.

Toll of Wool. Contains twenty-eight pounds, or two stone; mentioned in the statute 12 Car. 2. cap. 32.

Toll, (Tostum) A messuage or rather a place or piece of ground where an house formerly stood, but is decayed or casually burnt, and not re-edified; it is a word much used in fines, wherein we often read *tostum* and *croftum*, &c. West's Symb. par. 2. Stat. 22 & 23 Car. 2.

Tollman (Tostmannus) The owner or possessor of a *toll*. Reg. Priorat. Lew. pag. 18.

Tote, (Fr. i. e. Tela) A net to encompass or take deer which is forbid to be used unlawfully in parks, on pain of 20*l.* for every deer taken therewith. 3 & 4 W. & M. c. 10.

Tokens False to get money or goods by, from others, &c. See *False Tokens*.

Toleration. The penalties formerly imposed on protestant dissenters are all of them suspended by the Stat. 1. W. & M. Stat. 2. c. 18. commonly called The Toleration Act; which exempts all dissenters (except papists, and such as deny the Trinity) from all penal laws relating to religion, provided they take the oaths of allegiance and supremacy, and subscribe the declaration against popery, and repair to some congregation registered in the bishop's court or at the sessions, the doors whereof must be always open: And dissenting teachers are also to subscribe the thirty-nine articles, except those relating to church government and infant baptism of dissenters, see *Nonconformists*.

Toll, To bar, defeat, or take away; as to toll the entry, i. e. to deny or take away the right of entry. Stat. 8 Hen. 6. c. 9.

Toll, (Tolnetum, vel Theolonium) Is a Saxon word, and properly a payment in towns, markets, and fairs, for goods and cattle bought and sold. It is a reasonable sum of money due to the owner of the fair or market, upon sale of things *tollable* within the same. 2 Inst. 220. And it is used for a liberty as well to *take*, as to be *free* from *toll*; of which freedom from *toll* the city of *Coventry* boasts an ancient charter granted by *Leofrick* earl of the *Mercians*, in the time of King *Edw. the Confessor*, who at the importunity of *Godeva*, his virtuous lady, granted this freedom to that city. By the ancient law of this land, the buyers of corn or cattle in fairs or markets ought to pay *toll* to the lord of the market, in testimony of the contract there lawfully made; for *toll* was first invented that contracts in markets should be openly made before witnesses; and privy contracts were held unlawful. But the King shall pay no *toll* for any of his goods; and a man may be discharged from the payment of *toll*, by the King's grant. Also tenants in ancient demesne are discharged of *toll* throughout the kingdom, for things which arise out of their lands, or bought for manurance thereof, &c. not for merchandizes. *Horn's Mir. lib.* 1. 2 Inst. 221. 2 Roll. Abr. 198. *Toll* doth not of common right belong to a fair; though it hath been held, that some *toll* is due of common right, as appears from the immunities of several persons not to pay *toll*, which proves that if it was not for those privileges, they ought to pay *toll* of common right; therefore where the King grants a market, *toll* is due, although it is not expressed in the grant what *toll* is to be paid; and this from the necessity of it, because the property of things sold in a market is not altered without paying *toll*. *Palm.* 76. 2 Lutw. 1377. 3 Nels. Abr. 326. But it is said, if the King grants to a man a fair or market, and grants no *toll*, the patentee shall have no *toll*; for *toll* being a matter of private right for the benefit of the lord, is not incident to a fair or market, as a court of piepowder is, which is for the benefit of the publick and advancement of justice, &c. Such a fair or market, is *free from toll*; and after the grant made, the King cannot grant a *toll* to such free fair or market, without some proportionable benefit to the subject: And if the *toll* granted with the fair or market be outrageous, the grant of the *toll* is void, and the same is a free market, &c. 2 Inst. 220. *Cro. Eliz.* 559. When the King grants a fair, he may likewise grant that *toll* shall be paid, though it be a charge upon the subjects; but then it must be of a very small sum. *Toll* is to be reasonable, for the King cannot grant a burthenfome *toll*; and one may have *toll* by

prescription for some reasonable cause, but such a prescription to charge the subject with a duty of *toll*, must import a benefit or recompence for it, or some reason must be shewn why it is claimed. *Cro. Eliz.* 559. 3 Lew. 424. 2 Mod. 143. 4 Mod. 323. The *toll* in fairs is generally taken upon the sale of cattle, as horses, &c. but in the markets for grain only; and the lord may seize until satisfaction is made him: It is always to be paid the buyer, unless there be a custom to the contrary; and nothing is *tollable* before the sale, except it be by custom time out of mind; which custom none can challenge that claims the fair or market by grant since the reign of King *Richard* 2d; so that it is better to have a market or fair by prescription, than grant. 2 Inst. 220, 221. At this day there is not any one certain *toll* to be taken in markets; but if that which is taken be unreasonable, it is punishable by the stat. 3 Edw. 1. cap. 31. And what shall be deemed reasonable is to be determined by the judges of the law, when it comes judicially before them: *toll* may be said to be unreasonable and outrageous, where a reasonable *toll* is due, and excessive *toll* is taken; or when no *toll* is due, and *toll* is unjustly usurped, &c. 2 Inst. 222. If excessive *toll* be taken in a market-town, by the lord's consent, the franchise shall be seized; and if by other officers, they shall pay double damages, and suffer imprisonment, &c. Stat. Westm. 1. 3 Edw. 1. Owners of markets and fairs are to appoint *toll-takers*, where *toll* is to be taken, under penalties, by the 2 & 3 Ph. & M. cap. 7. And he that hath the *toll*, or profit of the market where no *toll* is, ought to provide a lawful measure of brads, and chain it in the publick market-place, or shall forfeit 5*l.* 22 Car. 2. cap. 8. *Toll* is not incident of common right, to a fair. 2 Strange 1171. See *Market*, and *Wilsen*, par. 1. 109.

Port-Toll. A prescription to have *port-toll* for all goods coming into a man's *port* may be good; and this it is said without any consideration. 2 Lev. 96. 2 Lut. 1519. And it hath been adjudged, that the liberty of bringing goods into a port for safety, implies a consideration in itself. 3 Lev. 37. Prescription of *toll* for goods landed in a manor, or to have *port-toll* for all goods coming into *port*, is a good prescription; but not to have *toll* of goods brought into a river, &c. 2 Lev. 96, 97. *Toll* may be appurtenant to a manor. 2 Mod. 144.

Toll-Travers, Is where one claimeth to have *toll* for every beast driven over his ground; for which a man may prescribe, and distrain for it *in via regia*. *Cro. Eliz.* 710. They who claim these *tolls* by grant, ought to aver the certainty of the sum mentioned in the grant, &c. *Palm.* 76. *Toll-travers* being to pass a nearer way, he that has it is to repair the way, because he receives money for it. 2 Lill. Abr. 585.

Thorough-Toll, Is when a town prescribes to have *toll* for such a number of beasts, or for every beast that goeth through their town; or over a bridge or ferry, maintained at their cost, which is reasonable, though it be for passing through the King's highway, where every man may lawfully go, as it is for the ease of travellers that go that way. *Terms de Ley* 561, 562. Persons may have this *toll* by prescription or grant; but it must be for a reasonable cause, which must be shewn, viz. that they are to repair and maintain a causeway, or a bridge, or such like. *Cro. Eliz.* 711. The King granted to a man, to take such *toll* of persons that passed over certain bridges with their cattle, as was taken there and elsewhere in *England*, &c. and it was held void for incertainty. *Bridg.* 88.

Turn-Toll, A *toll* paid for beasts that are driven to market to be sold, and do return unsold. 6 Rep. 46. There is also *in-toll*; and *out-toll*, mentioned in ancient charters: But if any one take *toll* where he ought not, the party grieved shall have an action on the case, or action of trespass, &c. 3 Nels. Abr. 325, 326. Of *tolls*, and grants, customs and prescriptions for *tolls*, good, and not so, see 4 Mod. 319. 5 Mod. 361. *Lutw.* 1380, 1518.

Tollage, Is the same with *sallage*; signifying generally any manner of custom, or imposition. This word occurs in the statute 17 Car. 1. cap. 15.

Toll-Booth, The place where goods are weighed, &c. **Toll-Cozn,** Is corn taken for *toll* ground at a mill: And an indictment lies against a miller for taking too great *toll*. 5 Mod. 13.

Toll.

Toll-Heap, A small dish or measure by which toll is taken in a market, &c.

Toll-Traders, see *ante* **Toll-Traders**. It should have been **Toll-Traders**, & b being inserted, instead of a b.

Toll Traverſe Is properly when a man pays certain toll for paſſing over the ſoil of another man in a way not a high ſtreet. 22 *Aſſ. 58.* by *Thorpe*, M. 41. 42 *El. B. R.* in *Smith v. Shepherd's caſe*. The words *toll-through* and *toll-traverſe* are uſed promiſcuouſly. *Arg.* And the court ſeemed to agree. *Mod.* 232. in caſe of *James v. Johnſon*. A man cannot preſcribe to have thorough-toll of men paſſing through a vill in the high ſtreet becauſe it is againſt the common law and common right; for the high ſtreet is common to to all. 2 *Roll. Abr.* 522. 25 *Aſſ. 58.* by *Thorpe*, M. 41 & 42 *El. B. R.* between *Smith v. Shepherd*, *dubitatur* without alledging of a ſpecial conſideration as the repairing the way. And the King cannot have ſuch toll for paſſing in the high ſtreet, as in the caſe aforeſaid, for the cauſe aforeſaid. 2 *Roll. Abr.* 522. 22 *Aſſ. 58.* by *Thorpe*.

A man cannot preſcribe to have thorough-toll of men for paſſing through a vill in a place which is not the high ſtreet; for it is more than the law allows to go there. 2 *Roll. Abr.* 523. 22 *Aſſ. 58.* A man may preſcribe to have toll-traverſe of men paſſing over his ſoil in a way which is not a high ſtreet, and the preſcription ſhall be good. 2 *Roll. Abr.* 522. 22 *Aſſ. 58.* *Bro. Toll. pl.* 6. cites *S. C.*

Tolleſter, (*Tolleſtrum*) An old exciſe, or duty paid by the tenants of ſome manors to the lord, for liberty to brew and ſell ale. *Cartular. Radſing.* 221. *Chart.* 51. *Hen.* 3.

Tollſey, (from the Sax. *Tol. i. e. Tributum*, and ſee *Se-des*.) Is the place where merchants meet, in a city or town of trade.

Toll, A writ whereby a cauſe depending in a court baron, is removed into the country court. *Old Nat. Br.* 4. And as this writ removes the cauſe to the country court; ſo the writ *pone* removeth a cauſe from thence into the court of *Common Pleas*, &c.

Tolla, Wrong, rapine, extortion, any thing exacted or impoſed contrary to right and juſtice. — *Nec aliquam de rædetur, nec homicidia, vel incendia, roberias, tollas, ſeu alia hujusmodi perpetret enormia.* *Pat.* 48 *H. 3.* in *Brady Hiſt. Eng. Append.* p. 235.

Tombs, Deſacing of in churches. See *Monument*.

Tomſin, A weight of 12 grains uſed by goldſmiths and jewellers.

Tongue, cutting out or diſabling. By *Stat.* 5 *Hen.* 4. c. 5. to remedy a miſchief that then prevailed, of beating, wounding, or robbing a man, and then cutting out his tongue, or putting out his eyes, to prevent him from being an evidence againſt them, this offence is declared to be felony, if done of malice prepenſe. See *Black. Com.* 4 *V.* 206, 207.

Tonnage, (*Tonnagium*) Is a cuſtom or impoſt paid to the King for merchandize carried out, or brought in ſhips, or ſuch like veſſels, according to a certain rate upon every ton. *Corwell.* See *Cuſtoms. Tonnage*.

Torcure, Is a word mentioned in *Fleta*, 2 *lib. c.* 75. *par. 2. viz.* *Boves ſtriliare & torcare*: Which is to comb and cleanſe his oxen.

Torra, (Sax. *Tor*) A mount or hill; as *Glaſtenbury Torre*. *Chart. Abbat. Glaſton.* MS. pag. 114. So a variety of high hills, in *Derbyſhire* are called *Tor*; but generally ſome epithet is prefixed, as *Mam-Tor*, &c.

Tort (from the Lat. *Tortus*) Is a French word for injury or wrong; as *de ſon tort meſme*, in his own wrong. *Cro. Rep. fol.* 20. *White's caſe*. Wrong or injury is properly called *tort*, becauſe it is wreſted or crooked. *Co. on Lit. f.* 158. See *de ſon tort demefne*, and 20 *Vin. Abr.* 305. Alſo *Black Com.* 3 *V.* 117.

Tortfeasor, (Fr. *Tortſaiſeur*) A wrong doer, a trefpaſſer. *Co. 2 par. f.* 383. *numb.* 11.

Tortitum, Is mentioned in *Fleta*, and other books, and ſignifies a *tort*.

Torture. The Statute law of *England* doth very ſeldom, and the Common law doth never, inflict any puniſhment extending to life or limb, unleſs upon the higheſt neceſſity: And the conſtitution is an utter

ſtranger to any arbitrary power of killing or maiming the ſubject without the expreſs warrant of law. “*Nullus liber homo, ſays the great charter (c. 29.) aliquo modo deſtruatur, niſi per legale judicium parium ſuorum aut per legem terræ.*” Which words, “*Aliquo modo deſtruatur,*” according to *Sir Edward Coke*, (2 *Inſt.* 48.) include a prohibition not only of killing, and maiming, but alſo of torturing (to which our laws are ſtrangers) and of every oppreſſion by colour of an illegal authority.

But note—on an indictment for high treaſon, or for the loweſt ſpecies of felony, *viz.* petit larceny, and in all miſdemors, ſtanding mute is equivalent to conviction. But, upon appeals or indictments for other felonies or petit treaſon, the priſoner ſhall not be looked upon as convicted, ſo as to receive judgment for the felony; but ſhall, for his obſtinacy, receive the terrible ſentence of *Penance*, or *Paine forte & dure*.

The rack, or queſtion, to extort a confeſſion from criminals, is a practice of a different nature; this being only uſed to compel a man to put himſelf upon his trial; that being a ſpecies of trial in itſelf. And the trial by rack, is utterly unknown to the law of *England*. See *Raſſow. Coll.* i. 638. *Black. Com.* 4 *V.* 320, 321. *Beccaria's* Eſſay on Crimes and Puniſhments, c. 16. &c. And a work intituled, “*Eſſai ſur l'Uſage & les Inconveniens de la Torture, dans la Procédure Criminelle, par Mr. S. D. C.*” Published with “*Observations ſur des Matieres de Jurisprudence Criminelle.*” Translated from the Latin of *Paul Rivi*.

No perſon to be ſubject to torture in *Scotland*. 7 *Ann.* c. 21.

Tortes quoties, As often as a thing ſhall happen, &c. uſed in deeds and conveyances. 19 *Car.* 2. *cap.* 4.

Totted. A good debt to the King, is by the foreign apoſter or other officer in the *Exchequer* noted for ſuch by writing the word *tot* to it: And that which is paid ſhall be totted—*Tot pecunie regi debetur.* *Stat.* 42 *Ed.* 3. *cap.* 9. 1 *Ed.* 6. *cap.* 15.

Tourn, The ſheriff's court ſo called. See *Turn.* and *Black. Com.* 4 *V.* 270, 404, 417.

Tournaments, Martial exerciſes frequent in former ages, wherein the combatants fought with blunt weapons, and in great companies; the intent of them was to inure men to the wars. Vide *Juſſi*.

Tout tempus priſt & uncorpe eſt, i. e. Always was, and is at preſent ready; and is a kind of plea by way of excuſe for him that is ſued for any debt or duty. *Broke* 258. See *Black. Com.* 3 *V.* 303.

Towage, (*Towagium*, Fr. *Tavage*) Is the rowing or drawing a ſhip or barge along the water by another ſhip or boat faſtened to her; or by men or beaſts on land: It is alſo money which is given by bargemen to the owner of ground next a river where they tow a barge or other veſſel. *Plac. Parl.* 18 *Edw.* 1.

Town, (*Oppidum, Villa*) A walled place or borough: The old boroughs were firſt of all towns; and upland towns, which are not ruled and governed as boroughs, are but towns, though incloſed with walls. *Finch* 80. There ought to be in every town a conſtable, or tithing-man; and it cannot be a town unleſs it hath or had a church, with celebration of ſacraments and burials, &c. But if a town is decayed ſo that it hath no houſes left, yet it is a town in law. 1 *Inſt.* 115. Under the name of a town, or village, boroughs, and 'tis ſaid, cities are contained; for every borough or city is a town. Where a murderer eſcapes untaken in a town, in the day-time, the town ſhall be amerced. 3 *Hen.* 7. *cap.* 1. And a townſhip is anſwerable for felons goods to the King, which may be ſeized by them. 1 *R.* 2. c. 3. But ſee 31 *Ed.* 3. *cap.* 3. A cuſtom may be alledged in a town, &c. See *Black. Com.* 1 *V.* 114.

Town-Clerk, Ought not to be a *Papiſh* recusant convicted. 3 *Jac.* 1. c. 5. How to deliver a ſchedule of fines, &c. to the ſheriff. 22 & 23 *Car.* 2. c. 22. And a duplicate into the court of *Exchequer*. 16. How puniſhable for diſcharging or concealing an indictment, &c. 16. Or not returning eſtreats into the court of *Exchequer*. 3 *Geo.* 1. c. 15.

Towarts, Were little boats, ſo called from their being made out of ſingle beams, or pieces of timber cut hollow. *Florence of Worceſter*, pag. 618.

Trabes in churches, was that we now call *branches*, made usually with brass, but formerly with iron. *Corwell*.

Tractus, A *trace* by which horses in their gears draw a cart, plough, or waggon. *Paroch. Antiq.* 549.

Trade, In general signification is traffick or merchandize: Also a private art, and way of living. All the King's subjects were to have a free *trade* with *France*, *Spain*, &c. Stat. 3 Jac. 1. cap. 6. But by 1 W. & M. cap. 34. all *trade* with *France* was prohibited during the war, and importing goods was declared a common nuisance, and the commodities were to be seized and burnt; the vessels with their furniture, &c. to be forfeited; and landing goods, or assisting therein, incurred a penalty of 500*l.* Though the prohibition of *trade* to *France* was taken off and repealed by 9 Ann. cap. 8. The King was enabled to prohibit all *trade* with *Sweden*, on the intended invasion of this kingdom, by the late King of *Sweden*, 3 Geo. 1. cap. 1. All *trade* with *Spain*, during the late war, was prohibited; and no goods of the growth or manufacture of *Old Spain*, to be imported into *Great Britain* or *Ireland*, &c. from any place, mixt or unmixed with commodities of any other nation, on pain of forfeiting the goods and treble value; and also the ship or vessel, with all her furniture, &c. Stat. 13 Geo. 2. cap. 27. None of the King's subjects may *trade* to and with a nation of *Infidels* without the King's leave, because of the danger of relinquishing christianity: And Sir *Edward Coke* said, That he had seen a licence from one of our Kings, reciting, That he having a special trust and confidence that such a one, his subject, would not decline his faith and religion, licensed him to trade with *Infidels*, &c. 3 *Nell. Abr.* 331. As to *private trades*, at Common law, none was prohibited to exercise any particular *trade*, wherein he had any skill or knowledge; and if he used it unskillfully, the party grieved might have his remedy against him by action on the case, &c. By the 5 *Eliz.* a man must serve seven years apprenticeship before he can set up any *trade*; though it hath been resolved that the statute doth not prohibit the use of a *trade* for a family, but the publick use of it in general. An indictment on 5 *Eliz.* c. 4. for exercising a *trade* used at that time in *Great Britain*, quashed, it should have been *England*, there being then no such kingdom as *Great Britain*. 1 *Strange* 552. 2 *Strange* 788. 11 *Rep.* 53. If a bond or promise restrains the exercise of a *trade*, though it be to a particular place only, if there was no consideration for it, it is void; if there be a consideration, in such case it may be good: But if the restraint be general throughout *England*, although there be a consideration, it will be void. 2 *Lill. Abr.* 179. Lord *Raym.* 1436. 2 *Strange* 739. Hence we see how the law favours *trade*, &c. Vide *Black. Com.* 1 V. 427. 4 V. 154, 160, 167, 412, 417, 421, 424, 427, 432.

Trade, *Companies of*, and their privileges and advantages, see *Merchant*.

Tradescunt, *Actions against*. There is in law, always, an implied contract with a common taylor, or other workman, that he performs his business in a workman-like manner: in which, if they fail, an action on the case lies to recover damages for such breach of their general undertaking. 11 *Rep.* 54. 1 *Saund.* 324. But if I employ a person to transact any of these concerns, whose common profession and business it is not, the law implies no such general undertaking; but in order to charge him with damages, a special agreement is required. *Black. Com.* 3 V. 160.

Traga, A waggon without wheels; mentioned in *Mon. Ang. Tom.* 1 pag. 851.

Train-Oil, see *Oil*.

Trait, Bread of *Trait* was formerly what we now call white-bread.

Traitsors. Persons guilty of high-treason. All traitors from the time of conviction, are incapable of making testaments. *Black. Com.* 2 V. 499. See *Treason*.

Transcript, Is the copy of any original writing, or deed, &c. where it is written over again, or exemplified. Stat. 34 & 35 Hen. 8. cap. 14.

Transcripto pedes finis levati mittendo in Cancellarium, A writ for certifying the foot of a *fine* levied be-

fore justices in eyre, &c. in the Chancery. *Reg. Orig.* 669.

Transcripto Recognitionis factæ coram Justiciariis itinerantibus, &c. Is an old writ to certify a recognition taken by justices in eyre. *Reg. Orig.* 152.

Transgression, A writ or action of *trespass*, according to *Fitzherbert*.

Transire, (from *Transire*) Is used for a warrant from the custom-house, to let pass. 14 *Car.* 2. cap. 11.

Transitory, Is the opposite to *local*: *Transitory* actions are those that may be laid in any county, or place; such as personal action of *trespass*, &c. See *Local*, and *Black. Com.* 3 V. 294.

Translation, (*Translatio*) In a common sense of the word signifies a version out of one language into another; but in a more confined acceptation, it denotes the setting from one place to another, and the removal of a bishop to another diocese, &c. which is called *Translating*: And such a bishop writes not *anno consecrationis*, but *anno translationis nostræ*, &c. A bishop *translated*, is not consecrated *de novo*: for a consecration is like an ordination, 'tis an indelible character, and holds good for ever. 3 *Salk.* 72. But the bishop is to be a-new elected, &c. 1 *Salk.* 137. See *Possulation*.

Transportation, Is the banishing or sending away a criminal into another country. And by statute, if any one convicted of felony, shall in open court pray to be *transported*, it may be done if the court thinks fit. 31 *Car.* 2. cap. 2. The 4 *Geo.* 1. cap. 11. was made for the more effectual *transportation* of offenders convicted of felony, or larceny, within the benefit of clergy, &c. And all charges in transporting felons, are to be borne by the place for which the court was held, &c. By the 5 *Geo.* 1. cap. 28. Deer-stealers may be transported to the plantations, &c. And if any persons forcibly hinder officers of the customs, in executing their office, being armed with weapons, and eight in company, they shall be transported, by 6 *Geo.* 1. So three persons assembled near the sea coasts, with fire-arms, &c. to run uncustomed goods. Stat. 9 *Geo.* 2. c. 35. Directions for trial of offenders who return from *transportation*, or do not transport themselves. 16 *Geo.* 2. c. 15. Reward for convicting such offenders. *Ibid.*

Returning from transportation, or being seen at large in *Great Britain* before the expiration of the term, for which the offender was sentenced to be transported, is a capital offence against public justice, and is made felony without benefit of clergy, by statutes 4 *Geo.* 1. c. 11. 6 *Geo.* 1. c. 23. & 8 *Geo.* 3. c. 15.

Transportation, Of goods and *merchandise*, is allowed and not allowed, in many cases by statute, for the advantage of trade. See *Merchant*, &c.

Transubstantiation, (*Transubstantiatio*) Is a converting into another substance: To *transubstantiate*, i. e. *Quidpiam in aliam substantiam convertio*. *Litt. Dict.* A declaration against the doctrine of *transubstantiation* used in the church of *Rome*, is required by the Stat. 30 *Car.* 2. cap. 1.

Travellers. Inn-keepers are to receive travellers, and find them lodgings, victuals, &c. And on refusal, a reasonable price being tendered, they may be indicted and fined; or action of the case lies against them. 2 *Hawk.* 225.

Traverse, (from the Fr. *Traverser*) Is used in the law for the denying of some matter of fact, alledged to be done in a declaration or pleadings; upon which the other side comes and affirms that it was done; and this makes a single and good issue for the cause to proceed to trial: And the formal words of a *traverse* are in our French *Sans ceo*, in Latin *Abque hoc*, and in English *without that*, that such a thing was done or not, &c. *Kitch.* 217. *West. Synb.* par. 2. A plea will be ill, which neither *traverse*th, nor confesseth the plaintiff's title, &c. And every matter in fact, alledged by the plaintiff, may be *traversed* by the defendant, but not matter of law, or where it is part matter of law and part matter of fact; nor may a record be *traversed* which is not to be tried by a jury. And if a matter be expressly pleaded in the affirmative, which is expressly answered in the negative, no *traverse* is necessary, there being a sufficient issue joined; also

also where the defendant hath given a particular answer in his plea, to all the material matters contained in the declaration, he need not take a traverse; for when the thing is answered, there needs no further denial. *Cro. Eliz.* 755. *Yebu.* 173, 193, 195. 2 *Mod.* 54. If a traverse contain no more than the party hath pleaded before, it will not be good: No traverse ought to be taken but where the thing traversed is issuable: And where one will make a traverse to a declaration, he ought to traverse that part of it, the doing whereof will make an end of the matter, when the point is determined by the jury. 2 *Roll. Rep.* 37. 2 *Lill. Abr.* 587. 3 *Nelf. Abr.* 355.

As one traverse is enough to make a perfect issue, a traverse cannot be regularly taken upon a traverse, if 'tis well taken to the material point, and goes to the substance of the action; but where the first traverse is not well taken, nor pertinent to the matter, there to that which was sufficiently confessed and avoided before, the other party may well take a traverse after such immaterial traverse taken before: And if special matter alledged in a foreign county in the defendant's plea be false, the plaintiff may maintain his action, and traverse that special matter; and in such case a traverse on a traverse hath been adjudged good. 1 *Saund.* 32. *Poph.* 101.

These rules are to be observed in traverses: 1. The traverse of a thing not immediately alledged, vitiates a good bar. 2. Nothing must be traversed but what is expressly alledged. 3. Surplusage in a plea doth not inforce a traverse. 4. It must be always made to the substantial part of the title. 5. Where an act may indifferently be intended to be at one day or another, there the day is not traversable. 6. In action of trespass generally the day is not material; though if a matter be to be done upon a particular day, there it is material and traversable. 2 *Roll. Rep.* 37. 1 *Roll. Rep.* 235. *Yebu.* 122. 2 *Lill. Abr.* 313. If the parties have agreed on the day for a thing to be done, the traverse of the day is material; but where they are not agreed on the day, it is otherwise; and though 'tis proved to be done on another day, 'tis sufficient. *Palm.* 280. Per *Holt Ch. Just.* Where a traverse goes to the matter of a plea, &c. all that went before is waved by the traverse; and if the traverse goes to the time only, it is not waved. 2 *Salk.* 642. In action of trespass, a particular place and time were laid in the declaration, and in the plea there was a traverse as to the place, but not as to the time: On averment that it was *eadem transgressio*, the plea was held good. 3 *Lev.* 227. 2 *Lutw.* 1452. Where a plea in justification of a thing is not local, a traverse of the place is wrong. 2 *Mod.* 270. The substance and body of a plea must be traversed. *Hob.* 232. But a traverse that a person died seized of land in *fee modo & forma* as the defendant had declared, was adjudged good. *Hutt.* 123. A lord and tenant differ in the services, there the tenure and not the seisin shall be traversed; but if they agree in the services, the seisin and not the tenure is traversable; and it is a general rule, that the tenant shall never traverse the seisin of the services without admitting the tenure. *March* 116. 3 *Nelf. Abr.* 361. That which is not material nor traversable, is not admitted when it is alledged, and not traversed. 2 *Salk.* 361. But the omitting a traverse where it is necessary, is matter of substance. 2 *Mod.* 60. And a traverse of a debt is ill when a promise is the ground of the action; which ought to be traversed, and not the debt. *Leon.* 252.

A traverse should have an inducement to make it relate to the foregoing matter. And, 'tis no good plea for the plaintiff to reply, that a man is alive who is alledged to be dead, without traversing that he is not dead. 3 *Salk.* 357. *Qu.* It is said that where a traverse *absque hoc* comprizes the whole matter generally, it may conclude *& de hoc pon. se super patriam*; but when it traverses a particular matter, the conclusion ought to be with an averment, &c. 1 *Salk.* 4.

Traverse may be in an answer in Chancery, replication, &c. In an action upon a bail bond the arrest is not traversable. 1 *Strange* 444. Traverses of a seisin in fee is ill, where a less estate would be sufficient. 2 *Strange* 818. Where the party confesses and avoids, he ought not to traverse:

And it may be passed over and issue taken upon the traverse. 2 *Strange* 837. See *Chancery*, and *Black. Com.* 3 *V.* 312.

Traverse of an indictment or presentment, is to take issue upon, and contradict or deny some chief point of it: As in a presentment against a person for a highway overflowed with water, for default of scouring a ditch, &c. he may traverse the matter, that there is no highway, or that the ditch is sufficiently scoured; or otherwise traverse the cause, *viz.* That he hath not the land, or he and they whose estate, &c. have not used to scour the ditch. *Lamb. Eiren.* 521. *Boek Entr.* See *Black. Com.* 4 *V.* 345.

Traverse of an Office, is to prove that an inquisition made of lands or goods by the escheator, is defective and untruly made. No person shall traverse an office, unless he can make to himself a good right and title: And if one be admitted to traverse an office, this admission of the party to the traverse, doth suppose the title to be in him, or else he had no cause of traverse. *Vaugh.* 64. 2 *Lill. Abr.* 590, 591. The traverse of an inquisition for the King is to be considered as a debt, and the prosecutor may carry down the record. 2 *Strange* 1208. See *Black. Com.* 3 *V.* 260.

Traberium, Signifies a ferry: It is mentioned in the *Monasticon.* Tom. 2. pag. 1002.

Trawlermen, A kind of fishermen on the river Thames, who used unlawful arts and engines to destroy fish, of which some were termed *Tinckermen*, others *Hobbermen*, and *Trawlermen*, &c. And hence come to trowl or travel for pikes. *Stow's Surv. Lond.* pag. 19.

Traybaston. See *Justices of Traybaston*; and see copies of several commissions granted to them by Edward the First, in *Spelman's Glossary*, verbo *Traybaston*. The common people in those days called them *Traybaston*, *quod sonat, trabe baculum*. Edward the First in his thirty-second year, sends out a new writ of inquisition, called *Trailbaston*, against intruders on other men's lands, who, to oppress the right owner, would make over their lands to great men; against batterers hired to beat men, breakers of the peace, ravishers, incendiaries, murderers, fighters, false assisors, and other such malefactors: Which inquisition was so strictly executed, and such fines taken, that it brought in exceeding much treasure to the King. *Chron.* fol. 111. See *Plac. parliamentaria*, fol. 211, & 280. And 4 *Inst.* 186. And in a parliament 1 Ric. 2. the commons of England petitioned the King, that no commission of Eyre or *Traybaston*, might be issued during the wars, or for twenty years to come. *Rot. Par.* 1 R. 2. *Cowell*.

Traytoz, (*Traditor, Proditor*) A state offender, betrayer, &c. See *Treason*.

Trayterous, (*Perfidiosus*) Treacherous or full of disloyalty. *Lat. Low Dict.*

Trayterous position, Of taking arms by the King's authority against his person, and those that are commissioned by him, is condemned by the Statute 14 Car. 2. cap. 3.

T. R. E. *Tempore Regis Edwardi*. These initial letters have this continual note of time in the *domesday register*, where the valuation of manors is recounted, what it was in the time of *Edward the Confessor*; and what since the conquest. As in *Oxfordshire*—*manerium de Burcestre*, T. R. E. *valuit quindecim libras, modo sexdecim.* *Cowell*.

Treason, (From the Fr. *Trahir*, to betray, and *Trahison*, betraying, contracted into *treason*) is the crime of treachery and infidelity to our lawful sovereign; the Latin word for which used in law is *proditio*.

Treason is divided into

High Treason, *Alia proditio*,
and
Petit Treason, *Proditio parva*.

Mention is also made, in some of our statutes of *accumulative* and *constructive* treason. High treason is designed to be an offence committed against the security of the King and kingdom; and as all treasons include felony, the word *proditio* must be used in the indictment for treason, to distinguish it. 3 *Inst.* 4, 15. The great-ness

ness of this offence of treason and severity of the punishment thereof, is upon two reasons, because the safety, peace and tranquillity of the kingdom, is highly concerned in the preservation of the person and government of the King; and therefore the laws have given all possible security thereto, under the severest penalties: And as the subjects have protection from the King and his laws; so they are bound by their allegiance to be true and faithful to him. 1 *Hale's Hist. P. C.* 59.

At Common law there were different opinions concerning high treason; and before the statute 25 *Ed.* 3. Treason was a very uncertain crime; for the killing of the King's brother, or even of his messenger, was taken to be included in it; so when acts tended to diminish the dignity of the crown, and where a man grew popular, this was construed to be inroaching royal power, and held to be treason; so that by the excess of the times, any crime by aggravating the circumstances of it, was heightened into treason: Wherefore this statute was made to determine what should be treason; and since the making thereof, there can be no constructive treason; *i. e.* Nothing can be construed to be treason, which is not literally specified in that act; nor may the statute be construed by equity, because it is a declarative law, and one declaration ought not to be the declaration of another; besides it was made to secure the subject in his life, liberty, and estate, which by admitting constructions to be made of it, might destroy all. 1 *Hawth. P. C.* 34. 3 *Salk.* 358.

The statute 25 *Ed.* 3. *cap.* 2. (reciting that divers opinions having been, what cases should amount to high treason) enacts and declares, That if a person doth compass or imagine the death of the King, Queen, or their eldest son and heir; or if he do violate and deflower the King's wife or companion, or his eldest daughter unmarried, or the wife of the King's eldest son; or if he levy war against the King in his realm, or adhere to his enemies, give them aid and comfort in the realm, or elsewhere, and thereof be probably attainted of open deed; and if a man counterfeit the King's Great or Privy Seal, or his money; or bring false money into the kingdom, like to the money of *England*, to make payment therewith in deceit of the King and his people; or if he kill the Chancellor, Treasurer, or any of the King's Justices in either Bench, Justices of Assize, &c. being in their places, doing their offices; these cases are to be adjudged treason: And if any other case happen before the justices, supposed to be treason, they shall not proceed to judgment till it be declared by the King and parliament whether it ought to be judged treason or not.

This statute may be considered as one of the greatest bulwarks of *English* liberty.

But to proceed. It was made high treason to wish or desire, by words or writing, or to imagine the death of the King, Queen, or their heir apparent; or to publish, that the King was an heretick, schismatick, infidel, &c. by 26 *H.* 8. *c.* 13. And to endeavour to depose the King, or affirm by writing, that he is an usurper, tyrant, &c. was declared treason by the 1 *Edw.* 6. *c.* 12. But these are repealed by 1 *Mar.* which enacts, That no act, deed or offence, shall be deemed or adjudged treason, but such as are declared and expressed to be so by the 25 *Ed.* 3. concerning treasons. 1 *Mar. Sess.* 1. *c.* 1. All treasons were settled by the *Stat.* 25 *Edw.* 3. *c.* 2. And by 1 *Mar.* *c.* 1. that act was re-inforced and confirmed, and made the only standard of treason; the 1 *Mar.* takes away the power of the King and parliament to adjudge any thing else to be treason; than what is declared to be such therein: So as no crime is at this day high treason, petit treason, or misprision of treason, unless it be declared by 25 *Ed.* 3. or by some statute since the 1 *Mar.* *cap.* 1. All other statutes made between those two acts concerning high treason are abrogated; but since 1 *Mar.* many offences are made high treason by statute, which were not so before; as relating to the *Pope*, *Papish Priests* and *Papists*, the *Protestant Succession*, &c. And to say that the King is a Papist, or that he intends to introduce Popery; intending death or bodily harm, or a restraint of the King's person; or to incite an invasion, &c. and such intention: declared by printing, writing or speaking, the offenders

shall be adjudged traitors. 13 *Car.* 2. *c.* 1. It was declared treason for persons to send any arms, powder, masts, cordage, &c. to *France*, during the late war, by 3 & 4 *W. & M.* *c.* 13. Corresponding with the pretended *Prince of Wales*, or remitting him money, is made high treason. 13 *W.* 3. *c.* 3. And if any one shall maliciously by writing or printing, declare that the King is not lawful King, or that the *Pretender* hath any title to the crown, he shall be guilty of treason. 4 & 5 *Ann.* *c.* 3. Officers or soldiers of this realm, holding correspondence with any rebel, or enemy to the King, or giving them any advice, information by letter, message, &c. is declared treason by the 2 & 3 *Ann.* *c.* 20. And if a subject of *Great Britain* or *Ireland* shall enlist himself a soldier, with intent to go beyond sea, to serve any foreign prince or state, he shall suffer and forfeit as in treason. See 12 *Ann.* *B.* 2. *c.* 11. and 9 *Geo.* 2. *c.* 30.

These are the chief of our statutes ancient and modern, declaring what offences shall be treason; and treason committed out of the realm may be tried in *B. R.* as if the offence had been done in the county of *Middlesex*; also they may be inquired of and tried in such county as the King thinks fit, &c. A party within one year after outlawry for treason, may surrender himself to the Chief Justice of *England*, and traverse the indictment; and none shall be attainted of treason but by the testimony of two witnesses, &c. by *Stat.* 35 *H.* 8. *c.* 2. 5 & 6 *Edw.* 6. *c.* 11.

All trials for high treason shall be according to the course of the Common law, and not otherwise. 1 & 2 *Ph. & M.* *cap.* 10. And persons indicted for treason, are to have a copy of the indictment five days before trial, to advise with counsel; and shall be admitted to make a full defence by counsel learned in the law, and by lawful witnesses, &c. and there must be two witnesses to the same overt-act, or two acts of the same treason produced face to face, to make out the treason against them. 7 *W.* 3. *cap.* 3.

If one witness in high treason be positive, and the other is only by hearsay; these are not two lawful accusers within the statutes: But two witnesses are not required either upon the indictment or trial of treason for counterfeiting money, by the proviso of the statute 1 & 2 *P. & M.* Offenders guilty of high treason by being concerned in the rebellion in the first year of *K. Geo.* 1. were to be tried before such commissioners of *oyer* and *terminer* and gaol-delivery, and in such county as his Majesty by any commission under the Great Seal should appoint, by lawful men of the same county, as if the fact had been there committed: This extended only to persons actually in arms. 1 *Geo.* 1. *c.* 33. All are principals in high treason; and on attainder of treason, the blood of the criminal is corrupted; he shall be drawn, hang'd and quarter'd; and forfeit his lands and goods to the King, &c.

Treason by the *Stat.* 25 *Ed.* 3. in compassing and imagining the death of the King, must be manifested by some overt-act; as by providing arms to do it, consulting to levy war against him, writing letters to excite others to join in it, assembling persons in order to imprison or depose the King, or to get him into their power, &c. these acts are sufficient to prove that one compassed or imagined the death of the King, and to make a man guilty of high treason. 3 *Inst.* 6, 12. It has been a very great question whether words spoken can amount to high treason: But it was resolved in the trial of the *regicides*, that though a man cannot be indicted of high treason for words only; yet if he be indicted for compassing the King's death, these words may be laid as an overt act, to prove that he compassed the death of the King; and to support this opinion, the case of a person was cited who was indicted of treason, *Anno* 9 *Car.* 1. for that he being the King's subject at *Lisbon*, used these words: *I will kill the King*, (*innuendo* King *Charles*) if I may come to him; and afterwards he came into *England* for that purpose; and two merchants proving that he spoke the words, for that his traitorous intent and the wicked imagination of his heart was declared by these words, it was held to be high treason by the Common law, and within the statute of the 25 *Ed.* 3. *cap.* 2. *Cro. Car.* 242. 1 *Lev.* 57.

Deliberate words, which shew a direct purpose against the King's life, will amount to an overt act of compassing or imagining the King's death; as the compassing or imagining the death of the King is the *treason*, words are the most natural way of expressing the imagination of the heart, and may be good evidence of it: And any external act which may be a manifestation of such imagination, is an overt act; but although words may be an overt-act of *treason*, they must be so certain and positive, as plainly to denote the intention of the speaker, and be laid with an averment that they were spoken *de Rege, &c.* 1 *Hawk. P. C.* 40. 2 *Salk.* 631. 3 *Mod.* 52.

The maxim, that no words can amount to *treason* at this day, is not generally true; and notwithstanding the objection made against words being high *treason*, from the *Stat. 1. M. cap. 1.* wherein it is said, that many honourable persons, and others of good reputation, had then of late for words only suffered shameful death, that the severity of such like dangerous and painful laws should be abolished: It was enacted, That no offence made *treason* by words, writing, cyphering, &c. should be adjudged *treason*. It appears from the next part of the preamble of the said statute, that it is applicable only to the statutes in the time of King *Hen. 8.* which made bare words high *treason*. And in the first edition of *Hale's Pleas of the Crown*, it is twice said, that it hath been adjudged that words are an overt-act; though in the latter edition it is said, that compassing by bare words is not an overt-act, &c. 1 *Hawk.* 41.

Ever since the revolution, it has been the constant practice, where a person, by *treasonable discourses*, has manifested a design to murder or depose the King, to convict him upon such evidence: And Chief Justice *Halt* was of opinion, That express words were not necessary to convict a man of high *treason*; but if from the tenor of his discourse, the jury were satisfied he was engaged in a design against the King's life; this was sufficient to convict the prisoner. *State Trials*, Vol. 4. pag. 172.

Words of *persecution* to kill the King, are overt-acts of compassing his death; and it hath been adjudged, that he who intended by force to prescribe laws to the King, and to restrain him of his power, doth intend to deprive him of his crown and life; that if a man be ignorant of the intention of those who take up arms against the King, if he join in any action with them, he is guilty of *treason*; and that the law construesth every rebellion to be a plot against the King's life, and a deposing him, because a rebel would not suffer that King to reign and live, who will punish him for rebellion. *Moor* 620. 2 *Salk.* 63. 3 *Nels. Abr.* 365.

It is said that words spoken to draw away the affection of the people from the King, and to stir them up against him, tend to his death and destruction, and are *treason*: But the imagination, in high *treason*, without act or word, is not punishable. *Dyer* 128. 1 *Rep. Jenk. Cent.* 88. If words are set down in writing, and kept privately in one's closet, they are not an overt-act of *treason*, except the words are published. *Kil.* 20. But it hath been held, that *treasonable* matter put in writing, *scribere est agere*; and though it was not published, but sent in a box to the King, it shewed the intent of the party to be high *treason*. 2 *Roll. Rep.* 88.

Under the head of compassing and imagining the King's death, *intention of treason* proved by circumstances, is high *treason*: The law takes notice of intentions to commit *treason*, and mens actions are governed by their intentions, &c. 1 *Inst.* 140. 5 *Mod.* 206. For a man to say that he will be King after the King's death, hath been adjudged *treason*: And so to prophesy when the King shall die; for this may imply a knowledge of a conspiracy. *Roll Rep.* 88.

There must be a compassing, intent or imagination to kill the King, to make the offence *treason*; the killing him *per infortunium*, as Sir *Wm. Tyrrel* killed King *Will. 2.* by the glance of an arrow in *New Forest*, is not *treason*: And though by the ancient law, if a madman killed, or offered to kill the King, it was held to be *treason*; by the 25 *Ed. 3. st. 5. c. 2.* by force of the words *compass* or *imagine*, he that is *non compos mentis*, and totally deprived

of all compassings and imaginations, cannot commit high *treason*; but it must be an absolute madness, and total deprivation of memory. 3 *Inst.* 6.

If the husband of a Queen Regent conspire her death; or a Queen Consort shall conspire the King's death, either of these acts are *treason*: And though the compassing the death of the Queen Consort be *treason*, by the 25 *Ed. 3.* this must be intended during the marriage; and it doth not extend to a Queen Dowager. 3 *Inst.* 8. And the eldest son and heir of the King, that is living, is intended by the said act, though he was not the first son; but if the heir apparent to the Crown be a collateral heir, he is not within the statute; nor is a conspiracy against such collateral heir, *treason* by this act. *Ibid.*

Also violating the Queen Consort is high *treason*, and her yielding and consenting to it is *treason*; but this doth not affect a Dowager Queen: So likewise violating the Wife of the Prince is *treason* only during the coverture. 3 *Inst.* 9. And the eldest daughter of the King is such a daughter as is eldest not married at the time of the violation, which will be *treason*, although there was an elder daughter than her, who died without issue: for now the elder alive has a right to the inheritance of the Crown, upon failure of issue male: And violating the Queen's person, &c. was high *treason* at Common law, by reason it destroyed the certainty of the King's issue, and consequently raised contention about the succession. *H. P. C.* 16.

A Queen Dowager after the death of her husband, is not a Queen within the statute; for though she bears the title, and hath many prerogatives answering the dignity of her person, yet she is not the King's wife or companion: And a Queen divorced from the King a vinculo matrimonii, is no Queen within this act, although the King be living; which was the case of *Q. Katharine*, who after twenty years marriage with King *Hen. 8.* was divorced *causa affinitatis*. 1 *Hale's Hist. P. C.* 124.

At Common law compassing the death of any of the King's children, and declaring it by overt-act, was taken to be *treason*; though by this statute it is restrained to the eldest son and heir. *Ibid.* 125.

By the Common law, levying war against the King was *treason*: But, as in cases of high *treason*, there must be an overt-act; a conspiracy or compassing to levy war is no overt-act, unless a war is actually levied; though if a war is actually levied, then the conspirators are all traitors, although they are not in arms: And a conspiracy to levy war will be evidence of an overt-act to maintain an indictment for compassing the King's death; but if the indictment be for levying war only, proof must be made that a war was levied, to bring the offender under this clause of the 25 *Ed. 3. st. 5. c. 2.* 3 *Inst.* 8, 9. *H. P. C.* 14. If two or more conspire to levy war, and one of them alone raises forces; this shall be adjudged *treason* in all. *Dyer* 98.

Persons raising forces for any publick end or purpose, and putting themselves in a posture of war, by chusing leaders, and opposing constables or guards, &c. is high *treason*. Formerly there was a great riot in London by the apprentices there, some whereof being imprisoned, the rest conspired to kill the Lord Mayor, and release their comrades; and in order to it, to provide themselves with armour, by breaking open two houses near the Tower; they marched with a cloke on a pole, instead of an ensign, towards the Lord-Mayor's house; and in the way meeting with opposition from the sheriffs, resisted them; this was held levying of war, and *treason*. *Trin.* 37. *Eliz.* *Sid.* 358.

Those who make an insurrection in order to redress a publick grievance, whether it be a real or pretended one, are said to levy war against the King, although they have no direct design against his person; as they are for doing that by private authority, which he by publick justice ought to do, which manifestly tends to a rebellion: For example; where great numbers by force endeavour to remove certain persons from the King, or to lay violent hands on a privy counsellor, or revenge themselves against a magistrate for executing his office, or to deliver men out of prison, expel foreigners, or to reform the law of religion,

religion, to pull down all bawdy-houses, to throw down all inclosures in general, &c. But where a number of men rise to remove a grievance to their private interest, as to pull down a particular inclosure, they are only rioters; for there is a difference between a pretence that is publick and general, and one that is private or particular. 3 *Inst.* 9. *H. P. C.* 14. *Kel.* 75. 1 *Harwk. P. C.* 37.

It was resolved by all the judges of England in the reign of King Hen. 8. that an insurrection against the statute of labourers, for raising their wages, was a levying of war against the King; because it was generally against the King's law, and the offenders took upon them the reformation thereof. *Read. Statutes Vol. 5. pa.* 150. Not only such as directly rebel and take up arms against the King; but also those who in a violent manner withstand his lawful authority, or attempt to reform his government, do levy war against him; and therefore to hold a fort or castle against the King's forces, or keep together armed men in great numbers against the King's express command, have been adjudged a levying war, and *treason*: But those who join themselves to rebels, &c. for fear of death, and return the first opportunity, are not guilty of this offence. 3 *Inst.* 10. *Kel.* 76.

A person in arms was sent for by some of the council from the King, and to give in the names of those that were armed with him; but he refused, and continued in arms in his house, and it was held *treason*: Also where he went with a troop of captains and others into London, to pray help of the city to save his life, and bring him to court to the Queen, though there was no intent of hurt to her, was adjudged *treason*; and in them who joined with him, though they knew nothing but only a difference between him and some courtiers: So if any man shall attempt to strengthen himself so far, that the Prince cannot resist him. *Earl of Essex's Case, Moor* 620.

To succour or adhere to the King's enemies, give them comfort or relief, or for any person to be in council with others to levy any seditious wars, are high *treason*: And the delivery or surrender of the King's castles or forts, by the captains thereof, to the King's enemy, within the realm or without, for reward, &c. is an adhering to the King's enemies, and *treason* by 25 *Ed. 3. st. 5. c. 2.* A lieutenant of Ireland let several rebels out of Dublin Castle, and discharged some Irish hostages which had been given for securing the peace; and for this he was attainted of high *treason* in adhering to the King's enemies. 33 *H. 8.* Adhering to the King's enemies out of the realm is *treason*, and one who was beyond sea having solicited a foreign Prince to invade the kingdom, was held guilty of high *treason*, and triable by the statute 35 *Hen. 8.* But adherence out of the realm must be alledged in some place in England. 3 *Inst.* 10. *H. P. C.* 14. *Dyer* 298, 310. If there be war between the King of England and France, those Englishmen that live in France before the war, and continue there after, are not merely upon that account adherents to the King's enemies, to be guilty of *treason*, unless they actually assist in such war; or at least refuse to return into England upon a privy seal, or on proclamation and notice thereof; and this refusal is but evidence of an adherence, and not so in itself. 1 *Hale's Hist. P. C.* 165. It has been adjudged, that adhering to the King's enemies is an adhering against him; and that the English subjects joining with rebel subjects of the King's allies, and fighting with them under the command of an alien enemy prince, is *treason*, in adhering to the King's enemies; and cruising in a ship with intent to destroy the King's ships, without doing any act of hostility, is an overt-act of adhering, comforting and aiding; for where an Englishman lifts himself and marches, this is *treason* without coming to battle, or actual fighting. 2 *Salk.* 634.

An indictment for levying of war, or adhering to the King's enemies generally, without shewing some particular instance, is not good; because of these words, *quia. And thereof shall be proveably attained by overt deed,* which follow and are not connected to the *treasons* of compassing the King's death, levying war, and adhering

to the King's enemies; and as these *treasons* are several and distinct *treasons*, one of them cannot be made an overt-act of another. *Ibid.* There is no necessity expressly to alledge that adherence was against the King; but the special manner of adherence must be set forth: And it is said, that the succouring a rebel fled into another realm, is not within the statute; for a rebel is not properly an enemy, and the statute is strictly taken. 1 *Harwk.* 38.

Subjects of the King in open war or rebellion, are not the King's enemies, but traitors; and if a subject join with a foreign enemy, and come into England with him, if he be taken prisoner, he shall not be ransomed or proceeded against as an enemy, but as a traitor to the King: On the other hand, an enemy coming in open hostility into England, and taken, shall be either executed by martial law, or ransomed; for he cannot be indicted of *treason*, because he never was within the ligeance of the King. 3 *Inst.* 11.

By the word *proveably*, a person ought to be convicted of the *treason* on direct and manifest proofs, and not upon presumptions or inferences; and the word *attainted*, necessarily implies, that the prisoner be proceeded against and attainted according to due course of law; wherefore if a man be killed in open war against the King, or be put to death arbitrarily, or by Martial law, and be not attainted of *treason* according to the Common law, he forfeits nothing; for which cause some persons killed in open rebellion against the King, have been attainted by act of parliament. *Ibid.* 12.

If a person be indicted of *treason*, and will not answer, or if he answers impertinently, judgment shall be given against him as taken *pro confesso* that he is guilty. *Style* 104. On a judgment for high *treason*, error was brought, for that the indictment did not conclude *contra ligeantiam*, &c. Now though all the particular facts of the *treason* were fully expressed, so that it appeared that it must be *contra ligeantiam suae debitum*, yet the judgment was reversed. 3 *Lev.* 396. Upon a writ of error to reverse an attainder in *treason*, because the party convicted was not asked what he had to say why judgment should not be given against him, the attainder was reversed; for he might have a pardon, or some matter to move in arrest of judgment. 2 *Salk.* 630. 3 *Mod.* 265. And the omission of any necessary part of the judgment for *treason*, is error sufficient to reverse an attainder, as it is more severe and formidable in *treason* than for any other crime. 2 *Salk.* 632.

As to the counterfeiting the King's seal, this was *treason* by the Common law; and the statute 25 *Ed. 3.* mentions only the great seal and privy seal; for the counterfeiting of the sign manual or privy signet, is not *treason* within that act, but by 1 & 2 *P. & M. c. 6.* Those who aid and consent to the counterfeiting of the King's seal are equally guilty with the actors: But an intent or compassing to counterfeit the great seal, if it be not actually done, is not *treason*; there must be an actual counterfeiting, and it is to be like the King's great seal. 3 *Inst.* 15. *S. P. C. 3. H. P. C. 18.* And this branch of the statute does not extend to the affixing the great seal to a patent, without a warrant for so doing; nor to the raising any thing out of a patent, and adding new matter therein; or to the taking off the wax impressed by the great seal from one patent, and fixing it to another; yet this, though it be not a counterfeiting, has been adjudged a misprison of the highest degree: And a person guilty of an act of this nature, with relation to a commission for levying money, &c. had judgment to be drawn and hang'd. 2 *H. 4. 3 Inst.* 16. *Kel.* 80. Till a new great seal is made, the old one of a late King, being used and employed as such, is the King's seal within the statute; notwithstanding its variance in the inscription, portraiture, and other substantial: And when an old great seal is broken, the counterfeiting of that seal, and applying it to an instrument of that date wherein it stood, or to any patent, &c. without date, is *treason*. 1 *Hale's Hist. P. C.* 177. The adding a crown in a counterfeit privy signet, which was not in the true; and omitting some words of the inscription, and inserting others, done purposely to make

a little difference, alters not the case, but 'tis high *treason*; being published on a feigned patent to be true, &c. *Ibid.* 184.

At Common law *forging of the King's money was treason*, as counterfeiting it is by the 25 *Ed. 3. c. 2.* Forging or counterfeiting foreign money made current here by proclamation, is likewise high *treason*, by 1 *Mar. c. 6.* And if not current here, it is misprision of *treason*. Counterfeiting the King's coin, or impairing or lightening it by clipping, &c. is *treason*; but it shall work no corruption of blood. 18 *El. cap. 1.* And as those who coin money without the King's authority are guilty of *treason*; so are those that have authority to do it, if they make it of greater alloy, or less weight than they ought. 3 *Inst. 17. 2 Inst. 577. H. P. C. 20.* If A. counterfeits money, and another vent the same for his own benefit, he is not guilty of *treason*; for it is only a cheat and misdemeanor in him, punishable by fine and imprisonment: But if one counterfeits the King's money, though he never vents it, this is a counterfeiting and *treason* within the statute. And if any man doth counterfeit the lawful coin of this kingdom in a great measure, but with some variation in the impression, &c. yet it is counterfeiting of the King's money; and shall not evade the statute. 1 *Hale's Hist. P. C. 214, 215. Treason* in making stamps, dyes, &c. for coining and colouring metal, &c. see 8 & 9 *W. 3. c. 26. and Coin.*

Bringing false money into this kingdom, counterfeited like the money of England, knowing it to be false, is *treason* by the 25 *Ed. 3.* In this case it must be counterfeited, according to the likeness of English money, and is to be knowingly brought over from some foreign nation, not from any place subject to the Crown of England; and must be uttered in payment. 3 *Inst. 18.*

The killing of the King's chancellor, treasurer, justices of either bench, &c. declared to be *treason*, relates to no other officers of state besides those expressly named; and to them only when they are in actual execution of their offices, representing the person of the King, and it doth not extend to any attempt to kill, or wounding them, &c. 3 *Inst. 18, 38. H. P. C. 17.* The places for the justices to do their offices, are the courts themselves, where they usually, or by adjournment, sit for dispatch of the business of their courts. 1 *Hale's Hist. P. C. 232.*

By the *stat. 17 Geo. 2. c. 39.* it is made high *treason* to hold correspondence with the Pretender's sons. And if they land or attempt to land in his majesty's dominions, they are to be deemed attainted of high *treason*. By the *stat. 20 Geo. 2. c. 39.* any person impeached by the Commons of high *treason*, whereby any corruption of blood, may make his defence by council, not exceeding two, to be assigned him on application at any time after articles exhibited. See *Misprision.* See farther as to High *Treason*, *Black. Com. 4 V. 75, 431.* with respect to trials in high *treason*, *Id. 345, 433.* As to *Misprision of Treason*, *Id. 120.*

High *Treason, Appeal of.* It was antiently permitted, that any subject might appeal another subject of high *treason*, either in the courts of Common law (*Britt. c. 22.*) or in parliament, or (for *treasons* committed beyond the seas) in the court of the high constable and marshal. The cognizance of appeals in the latter still continues in force; and so late as 1631 there was a trial by battle awarded in the court of chivalry, on such an appeal of *treason*: (By Donald Lord *Rea* against David *Ramsay*. *Rushw. Vol. 2. part 2. pag. 112.*) But the first was virtually abolished by the statutes 5 *Ed. 3. c. 9. & 25 Ed. 3. c. 24.* (1 *Hal. P. C. 349.*) and the second (*i. e.* appeals in parliament) expressly by *stat. 1 Hen. 4. c. 14.* So that the only appeals now in force for things done within the realm, are appeals of Felony and Mayhem. *Black. Com. 4 V. 310.*

Petit *Treason*, is where one, out of malice, takes away the life of a subject, to whom he owes special obedience: And it is called *petit treason* in respect to high *treason*, which is against the King. 3 *Inst. 20.* It may be committed where a servant kills his master, a wife her husband, or a secular or religious person killeth his prelate or superior. 25 *Ed. 3. c. 2.* And aiders, a-

bettors, and procurers, are within the act; but if the killing is upon a sudden falling out, or *se defendendo*, &c. it is not *petit treason*; for persons accused of *petit treason* shall be adjudged Not guilty, or principal and accessory, according to the rules of law in other cases. *H. P. C. 24.*

Petit treason is committed against the head, though not against the supreme head; and if a servant kills his mistress, or the wife of his master, she is master within the letter of the statute, and it is *petit treason*: But this statute is so strictly construed, that no case which cannot be brought within the meaning of the words of it, shall be punished by it; and therefore if a son kill his father, he shall not be tried for *petit treason*, except he served his father for wages, &c. in which case he shall be indicted by the name of a servant; and yet the offence is more heinous by far in a child than a servant. 3 *Inst. 20. H. P. C. 23. 11 Rep. 34.* A servant procured another to kill his master, who killed him in the servant's presence; this was *petit treason*, in the servant, and murder in the other; if the servant had been absent, the crime would not have been *petit treason*, but murder, to which he would have been accessory. 3 *Inst. 20. Moor 91. v. infra.* Where a servant intended to kill his master, and laid in wait for that purpose while he was his servant, but did not do it till he had been a year out of his service; it was adjudged *petit treason*. *H. P. C. 23.* A maid servant and a stranger conspired to rob the mistress, and in the night the servant opened the door and let in the stranger into the house, who killed her mistress, she lighting him to her bed, but neither saying nor doing any thing, only holding the candle; and this was held murder in the stranger, and *petit treason* in the servant. *Dyer 128.*

If a wife and a stranger kill the husband, it is *petit treason* in the wife, and murder in the stranger: And so it is of an ecclesiastick person, killing his prelate, &c. *Dalt. 337.* If a wife and her servant conspire to kill the husband, and appoint time and place for it, but the servant alone in the absence of the wife killeth him; it shall be *petit treason* in both: And if the wife procure a servant to kill the husband, both are guilty of *petit treason*; also if a stranger procures a wife or servant to kill the husband or master, he may be indicted as accessory to *petit treason*. *Dyer 128, 332. Crompt. 41.*

Where the wife and another who was not her servant, conspired the death of the husband, the indictment was that the wife *proditrice*, and the other person *feloniae* gave him poison, &c. whereof he died; and the wife being acquitted on the indictment, she brought an action against her son-in-law for a malicious prosecution, and recovered damages; but afterwards he brought an appeal of murder against her, upon which she was convicted in *B. R.* and carried down into the county where the fact was done, and there executed. *Crs. Car. 331, 382. Mod. Ca. 217. 3 Nels. Abr. 372.* On divorce from the husband for adultery, a woman is a wife within the statute to be guilty of *petit treason* against her husband; for they may cohabit again: But where a man marries a second wife, the former being alive, she is not within this law. 1 *Hale's Hist. P. C. 381.*

If a clergyman be ordained by the bishop of A. and he kills that bishop, it is *petit treason*, for he hath professed canonical obedience to him: And where a parson hath benefices in two dioceses, if he kill the bishop of either it is *petit treason*; but in case he kill a bishop out of the diocese where he is beneficed, it is only murder. 1 *Hale's Hist. P. C. 381.* A parson kills the metropolitan of his province, this will be *petit treason*, though he be not his immediate superior. *Ibid.* In *petit treason*, it is said that there must be two witnesses to the indictment; and need not be to the trial of it, for it is not within the statute 7 *W. 3. c. 3. 2 Hawk. P. C. 258.* All *petit treason* implies murder, and it is the highest degree thereof: And an attempt by a wife to kill her husband; piracy by a subject, &c. were *petit treason* by the Common law. 1 *Hawk. 87, 88.*

This kind of *treason* gives forfeiture of lands by escheat to the lord of the fee, &c. and a man is drawn and hanged for it; and a woman burned. 1 *Inst. 37.* One apprehended by an officer may surrender within the year

year in order to reverse an outlawry. 2 *Strange* 824. Commitment for *treason* may be general, without expressing the particular species. 1 *Strange* 3.

On the subject of *treason*, see farther, 5 *New Abr. tit. Treason*. See farther to as to *petit treason*, *Black. Com.* 4 V. 75, 203.

Treasure. (*Tresaurus*) Signifies riches and wealth; and as the *King's treasure* is the honour and safety of the King, for this reason mines of gold and silver belong to the King.

Treasurer. (*Treasurarius*) Is an officer to whom the *treasure* of another is committed to be kept, and truly disposed of: The chief of these with us is the *Lord Treasurer of England*, who is a lord by his office, and one of the greatest men of the kingdom. This great officer holds his place *durante bene-placito*, and is instituted by the delivery of a white staff to him by the King; and in former times he received his office by delivery of the golden keys of the *treasury*: He is also *treasurer* of the *Exchequer*, by letters patent. And by 31 *Edw. 3. Stat. 1. c. 12*. In writs of error the lord chancellor and lord *treasurer* shall cause the record and process of the *Exchequer* to be brought before them, who are judges; but the writ is to be directed to the *treasurer* and barons, who have the keeping of the records. Under the charge and government of the lord *treasurer*, is all the King's wealth contained in the *Exchequer*; he has the check of all the officers employed in collecting the customs and royal revenues; all the offices of the customs in all parts of *England* are in his gift and disposition; escheators in every county are nominated by him; and he makes leases of all the lands belonging to the crown, &c.

But the high and important post of lord *treasurer* has of late years, like some other great offices, been esteemed too great a task for one person, and been generally executed by commissioners. And see more belonging to this office, *Stat. 20. Edw. 3. c. 6.* 31 *H. 6. c. 5.* 4 *Ed. 4. c. 1.* 17 *Edw. 4. c. 5.* 21 *H. 8. c. 20.* and 1 *Edw. 6. c. 13.* 4 *Inst. 104.* See farther *Black. Com.* 3 V. 44, 56. If any one kill the *treasurer*, being in his place, doing his office, it is high-treason *per Stat. 25 Ed. 3. c. 2.*

Besides the lord *treasurer*, there is a *treasurer* of the *King's household*, who is of the privy council, and with the comptroller, &c. has great power. *Stat. Westm. 2. c. 1.* A *treasurer* of the navy or war. 35 *Eliz. c. 4.* *Treasurer* of the *King's chamber*. 33 *H. 8. c. 39.* A *treasurer* of the wardrobe. 25 *Ed. 3. c. 21.* And there are *treasurers* of corporations, &c.

Treasurer in Cathedral Churches. An officer whose charge was to take care of the vestments, plate, jewels, relics, and other *treasure* belonging to the said churches; and at the time of the reformation, the office was extinguished as needless in most cathedral churches; but it is still remaining in those of *Salisbury, London, &c.*

Treasurer of the County. Is he that keeps the county stock: There are two of them in each county, chosen by the major part of the justices of the peace, &c. at *Easter* sessions; they must have 10*l.* a year in land, or 150*l.* in personal estate, and shall not continue in their office above a year; and they are to account yearly at *Easter* sessions; or within ten days after to their successors, under penalties: The county stock, of which this officer hath the keeping, is raised by rating every parish yearly; and is disposed to charitable uses, for the relief of maimed soldiers and mariners, prisoners in the county gaols, paying the salaries of governors of houses of correction, and relieving poor alms-houses, &c. And the duty of those *treasurers*, with the manner of raising the stock, &c. is particularly in the statutes of 43 *El. c. 2.* 7 *Jac. 1. c. 4.* 11 & 12 *W. 3. c. 18.* 5 *Ann. c. 32.* 6 *Geo. 1. c. 23.*

Treasure-Trove. (*Tresaurus inventus*) Is where any money is found hid in the earth, but not lying upon the ground, and no man knows to whom it belongs; then the property thereof belongs to the King, or the lord of the manor by special grant or prescription: But if the owner may any ways be known, it doth not belong to the King or lord of the liberty, but such owner: By the *civil law*, *treasure-trove* is given to the finder; but the law of *England* gives it to the King by his prerogative, or some

other claiming under him, &c. *Bract. lib. 3. c. 3. Inf. 132. Kirb. 80.* Nothing is said to be *treasure-trove*, but gold and silver; and it is every subject's part as soon as he has found any *treasure* in the earth, to make it known to the coroners of the county, &c. and concealing *treasure* found is punished by fine and imprisonment. *Briton. cap. 17. S. P. C. 25.* Coroners ought to enquire of *treasure-trove*, being certified thereof by the King's bailiffs or others, and of who were the finders, &c. 4 *Edw. 1.* And seizure of *treasure-trove*, may be inquired of in the sheriff's turn. 2 *Haw. P. C. 67.* See *Black. Com.* 1 V. 295, 296. 4 V. 121.

Treasury. Signifies sometimes the place where the King's *treasure* is deposited; and at other times the office of *treasurer*. *Cowell.*

Treaties, Leagues and Alliances. It is the King's prerogative to make treaties, leagues, and alliances with foreign states and princes. For it is by the law of nations essential to the goodness of a league, that it be made by the sovereign power; and then it is binding upon the whole community: And in *England* the sovereign power, *quoad hoc*, is vested in the person of the King. Whatever contracts therefore he engages in, no other power in the kingdom can legally delay, resist, or annul. And yet, lest this plenitude of authority should be abused to the detriment of the public, the constitution hath here interposed a check, by the means of parliamentary impeachment, for the punishment of such ministers as from criminal motives advise or conclude any treaty, which shall afterwards be judged to derogate from the honour and interest of the nation. *Black. Com.* 1 V. 257.

Trebuchet, Trebuchet, Tribuch. (*Turbicatum*) A tumble or cucking stool. Also a great engine to cast stones, to batter walls. 3 *Inst. 219.* See *Castigary. Matt. Paris 1246.* and *Black. Com.* 4 V. 169.

Trees. The proprietors of trees cut down or taken away how recompensed and the offenders punished, 43 *El. c. 7.* 15 *Car. 2. c. 2. f. 2.* The houses of persons suspected to have cut or taken them away, to be searched, 15 *Car. 2. c. 2. f. 3.* Persons destroying plantations punished as trespassers, 23 & 23 *Car. 2. c. 7. f. 5.* 1 *Geo. 1. Stat. 2. c. 48.* 6 *Geo. 1. c. 16.* 29 *Geo. 2. c. 36. f. 6.* As felons, 9 *Geo. 1. c. 22. f. 1.* The neighbouring inhabitants, 1 *Geo. 1. Stat. 2. c. 48.* 6 *Geo. 1. c. 16.* And the hundred answerable for damages, 9 *Geo. 1. c. 22. f. 7.* 29 *Geo. 2. c. 36. f. 9.* See *Timber*, 20 *Vin. Abr. 415—420.* and *Black. Com.* 4 V. 233, 244, 245.

Trett. (*Triticum*) Fine wheat mentioned in the statute 51 *H. 3.*

Tremagium, Tremesium, Termisium. The season or time of sowing summer corn, being about *March*, the third month, to which the word may allude; and corn sowed in *March* is by the *French* called *Tremes* and *Tremois*: *Tremisium* was the season for summer-corn, barley, oats, beans, &c. opposed to the season for winter-corn, wheat, and rye, called *Hibernagium*, and is thus distinguished in old charters. *Cartular. Gloucn. MS. 91.*

Tremellum. A word used for granary, in *Mon. Ang. tom. 1. pag. 470.*

Trencher. (From the *Fr. Trancher*, to cut) A carver of meat at a table; as in the patent rolls mention is made of a pension granted by the King to *A. B. uni trencheriarum nostrorum, &c.*

Trenchis. A trench, or dike newly cut. *Preamb. 33 H. 3.*

Trental. (*Fr. Trentale*) An office for the dead, that continued thirty days, or consisting of thirty masses; from the *Ital. Trenta*, i. e. *Triginta.* *Stat. 1. Edw. 6. c. 14.*

Treppet. A great engine to throw stones against a wall in storming a town. It mentioned in *Knighton, anno 1382.*

Tresple. The name of a writ, to be sued, on ouster, by abatement, on the death of the grandfather's grandfather—now obsolete.—See *Black. Com.* 4 V. 186.

Trespals. (*Transgressio*) Is any transgression of the law under treason, felony, or misprision of either; but it is most constantly used for that wrong or damage, which is done by one private man to another; or to the King

King in his forest, &c. In which signification it is of two sorts: *Trespass general*, otherwise called *trespass vi & armis*, and *trespass special*, or upon the case. *Bro. Trespas. Brad. lib. 4.*

Trespass supposes a wrong to be done with force; and *trespasses* against the person of a man are of several kinds, viz. By menacing or threatening to hurt him; assaulting or setting upon one, to beat him; battery being the actual beating of another; maiming of a person so that he loses the use of his limbs; by imprisonment, or restraining him of his lawful liberty, &c. *Trespases* against a man's property may be committed in divers cases; as against his wife, children, or servants, or his house and goods, &c. and against his land, by carrying away deeds and evidences concerning it, cutting the trees, or spoiling the crops therein, &c. *F. N. B. 86, 87. Finch 198, 201. 2 Roll. Abr. 545.*

Action of *trespass* lies where a man makes an entry on the lands of another, and does damage: And *trespass vi & armis*, may be brought by him that hath the possession of goods, or of a house, or land, if he be disturbed in his possession; for the disturbance besides the private damage, is also a breach of the publick peace. *1 Inst. 57. 2 Roll. Abr. 572. 2 Lill. Abr. 596.* There is this difference between an action of *trespass vi & armis*, and *trespass* on the case: The one lies where the original act was a wrong in itself, and the other where an injury is consequential to a lawful act; as for instance, it is lawful for a man to make a dam on his own ground; but if by making it, the water overflows his neighbour's land, an action on the case lies against him. *Mod. Caf. in L. & E. 275. 1 Strange 634.* Entry into a house against a man's will is *trespass*; but a man may lawfully come into the house of another person, to demand or pay money; and if *trespass* be brought he may plead it specially. *2 Lill. Abr. Trespass* lies generally for breaking a man's close; for chasing cattle, whereby they die or are injured; taking away pales, and breaking of fences, or of doors or windows of a house; for driving a cart and horses over the ground of another, where there is no way for it; Fishing in another person's pond, and for breaking the pond; for eating the corn of another with cattle, and digging in any man's coal mines, and carrying away coals; for taking away so much of the plaintiff's money; tearing a bond, &c. *1 Bro. 338. 1 Saund. 220. 2 Cro. 463. Latch 144.* And where a person has only the crop and vesture, or pasture of land, he may maintain *trespass*. *Moor 456.*

Trespass lies for an accidental hurt, as if whilst a man is uncocking a gun it goes off and wounds another. *1 Strange 596.* But a man shall not be answerable criminally, by way of indictment, for a casual damage done to another. *1 Strange 190.* *Trespass* lies for setting the end of a bridge on another man's soil, though it be a highway. *2 Strange 1004.* And for erecting a stall in a market, without agreeing for stallage. *Ibid. 1238.* And against an officer of the customs for a wrongful seizure, though upon probable cause. *Ibid. 820.* Laying hold of a horse is no *trespass*, without particular damage. *Ibid. 872.*

In *trespass* for taking goods, the plaintiff must alledge a property in himself; because in such case there may be two intendments, one that they were the defendant's own goods, and then the taking is lawful; and the other that they were the goods of the plaintiff, when the taking will be wrongful; but wherever the construction is indifferent, it shall always be most strong against the plaintiff. *2 Lev. 20. Yelv. 36.*

If the defendant makes the place where the *trespass* was done material by his plea, he must shew it with great certainty; but if it be a *trespass quare clausum fregit* in B. and the defendant pleads that the place where is his freehold, which is the common bar in this case, so justifies as in his freehold, &c. if issue be taken thereon, the defendant may give in evidence any close in which he hath a freehold; though if the plaintiff had replied and given the close a name, defendant must have a freehold in that very close. *2 Salk. 453. Cartbow's Rep. 176.*

A plaintiff may make a new assignment of the place where, &c. and then the defendant may vary from his

first justification: As for instance; an action of *trespass* assigned to be done generally in D. the defendant justified the taking damage feasant; and the plaintiff in his replication made a new assignment, upon which the defendant justified for a heriot; and it was adjudged good. *Moor 540. 3 Nelf. Abr. 381.* The defendant in his plea may put the plaintiff to the new assignment; and every new assignment is a new declaration, to which the defendant is to give a new answer, and he may not traverse it, but must either plead or demur; yet where *trespasses* are alledged to be done in several places, and the defendant pleads to some, and agrees to the places wherein the plaintiff alledged the *trespasses* to be done, there the plaintiff may answer that part of the plea by a traverse, and shew a new assignment as to the rest. *Cro. Eliz. 492, 812.*

One action of *trespass* may be brought for a *trespass* committed in lands which lie in several towns or vills, if they are in one and the same county; for else they cannot receive one trial as they are local causes of action triable in the county where done. *2 Lill. Abr. 595.* A man may have one action of *trespass* for several *trespasses*: And if divers actions of *trespass* are brought for one and the same cause, the defendant may get them joined into one, if brought to vex him; but the *trespasses* must not be of several natures, which may not be tried in one action. *Mich. 24 Car. B. R.* All persons that are accessory to any *trespass*, may be charged as principals; and *trespasses* continued may be laid with a *continuando diversis diebus & vicibus*; But things must lie in continuance, and not terminate in themselves, or it will not be good: And where a *trespass* is alledged with a continuance, that cannot be continued, the evidence ought only to be to the first act. *2 Salk. 638, 639.*

The best way to declare for such *trespasses* which lie in continuance, is for the plaintiff to set forth in his declaration, that the defendant between such a day and such a day, cut several trees, &c. and not lay a *continuando transgressionem* from such a day to such a day; and upon such declaration, the plaintiff may give in evidence a cutting on any day within those days. *3 Salk. 360.* When a *trespass* is done before the day mentioned in the declaration, it is good enough; because being once a *trespass*, it is always a *trespass*. *Cro. Eliz. 32.* The day is not material, whether laid before or after the time when the *trespass* was committed, if it is laid before the action brought.

In all *trespasses* there ought to be a voluntary act, and also a damage; and in detinue and trover, where the thing itself is in demand, it should be particularly named; if *trespass* be laid in a declaration for the taking of goods, without expressing the quantity and quality of them, or the value, &c. it is bad upon a general demurrer; tho' as to the omission of the value, it hath been held to be good after verdict. *Latch. 13. Style 170. 230. Lutw. 1384. Sid. 39.*

If the defendant in *trespass quare clausum fregit*, disclaim any title to the land, and the *trespass* is involuntary or by negligence, he may be admitted to plead a disclaimer and tender of amends before the action brought, &c. And if it be found for the defendant, the plaintiff shall be barred. *21 Jac. c. 16.*

Where a defendant justifies for a *trespass*, he must confess it, or it will be ill: And the defendant shall never be excused in *trespass*, unless upon an inevitable necessity, &c. *3 Nelf. Abr. 379.* In a *trespass quare clausum fregit*, where there is only a force in law; as if one enters into the ground of another, the party must be required to go out before hands may be laid on him; for every imposition of hands is an assault which cannot be justified upon the account of a force or breaking a close in law, without a request to be gone; but it is otherwise where there is an actual force. *2 Salk. 644.*

For any the least beating of a man's wife the husband and wife together may bring action of *trespass*: And if it be such a beating, as he thereby loses her company, or service, he alone may have this action. *3 Rep. 113. 10 Rep. 130.* But he must declare *per quod servitium amisit*, i. e. that he thereby lost her service, or company, &c.

Trespass for breaking the plaintiff's close, and beating his servant; the plaintiff had a verdict, but could never get judgment, because he did not declare *per quod servitium amisit*: The servant himself may have an action of *trespass* for the beating, though his master cannot, unless it be so great that he loses his service; without which, it is no damage to the master. 5 Rep. 10. 9 Rep. 111. Action of *trespass* may be brought for taking away a man's servant; but not for the taking away of a man generally. 5 Mod. 191.

Trespass quod cepit & abduxit lies not for the father for taking and carrying away any of his children, except for taking of a son or daughter who is heir. Cro. Eliz. 769. A man committed adultery with a woman in *Southwark*, where they both dwelt, and the woman went to *Ratcliff* in *Middlesex*, from whence the man brought her to *Richmond* in *Surrey*; the husband brought an action of *trespass de uxore rapta & abducta cum bonis viri*; and it was a doubt whether upon the matter given in evidence, the defendant could be found guilty in *London*; but the jury found him guilty generally, and gave the plaintiff 300 l. damages. Dyer 256.

Executors may bring *trespass* for goods taken out of their possession, or for goods and chattels taken in the life of the testator; also administrators shall have it for goods of intestates; and an ordinary may bring action of *trespass* for goods in his own possession to administer as ordinary, &c. If a man voluntarily take away my goods or cattle, and keep them till I pay him money, on pretence that they are his heriot, &c. when they are not so, I may have action of *trespass*. Bro. Tresp. 354. And if the sheriff have a writ against the lands and goods of one man, and he by mistake execute it upon my lands or goods; this action lies against him, and it will be no excuse that the plaintiff or any other informed him they were the goods, &c. of the defendant. Dyer 295. Kelw. 119, 129.

He that is possessed of lands, though he hath no good title, shall have this action for a *trespass* against one who hath no right to the lands; but not against him that hath right: And yet a man having right or title to land only, by descent, lease, &c. may not bring *trespass*, before entry made thereon. Plowd. 431, 546. Kelw. 163. The lessee for years after his lease is expired, may have action for a *trespass* done on the land before his lease was ended. Bro. Tresp. 456. An action of *trespass* was brought by the lord of a manor, for *trespass* done in the highway, by a tenant's beasts breaking out of his close into the waste; and it was adjudged it would not lie. 1 Bulst. 157.

If A. is bound to fence his close against B. and he against C. a neighbour; and neither of them inclose against one another, so that the beasts of C. for want of inclosure go out of the ground to that of B. and thence to A's ground: In this case A. shall have *trespass* against C. for he is bound only to fence against B. and every one ought to keep his cattle as well in open grounds, not inclosed, as in several grounds where there is inclosure. Dyer 366. Jenk. Cent. 161.

One drives my cattle into another man's land, I may go on the land and fetch them out; yet by this I am a *trespasser* to the owner of the ground, and he may have his action against me for it, and I must take my counter-remedy against him that drove them in. 21 H. 7. 27. 1 Rep. 54. If another man have a horse, or other goods in my house or ground, and he enter to take it away, without my leave, action of *trespass* lies against him: But if I drive the cattle or carry the goods of another into my land, he may come upon the land and take them, and no action lieth. 4 Shep. Abr. 135, 136.

If a man hunt my beasts, in ground belonging to me, or some other person; he is liable to this action: Though the owner of the land wherein cattle are doing this *trespass*, may gently by himself, or his dogs, chase them out, and justify the same. Hill. 16 Jac. B. R. Bro. Tresp. 421. 8 Rep. 67. If any person shall maliciously maim, or hurt any cattle, or destroy any plantation of trees, or throw down inclosures, he shall forfeit treble damages in action of *trespass*. 22 & 23 Car. 2. c. 7. But in action of *trespass*, if the jury give not 40 s. damages, the plaintiff shall have no more costs than damages,

except the freehold or title of land come in question, or something of the plaintiff's be carried away, &c. Stat. 23 Car. 2. c. 9. Though the plaintiff, where the *trespass* is wilful and malicious, upon certificate thereof by the judge on the back of the record, shall recover damages and full costs, by 8 & 9 W. 3. c. 11.

In *trespass* for putting diseased cattle into a close, the plaintiff shall have full costs, though the damages found be under 40 s. 1 Strange 192. And in *trespass* for consuming provisions. 2 Strange 1130. And on an issue *extra viam*. Ibid. 1168. And damages being small under 40 s. in *trespass*, on motion full costs have been allowed; where entry was made on the freehold, &c. Skin. 100. Carthew 225.

A court which is not a court of record, cannot hold plea of *trespass Vi & Armis*. F. N. B. 85. Writs of *trespass* lie either to the sheriff to determine the matter in the county-court, or returnable in B. R. or C. B. And the words *Vi & Armis* shall be in the returnable writs, but not in the others: Though in writs of *trespass* upon the case, those words must not be inserted, if returnable in B. R. &c. F. N. B. 86, 190. *Trespass quare Vi & Armis clausum fregit*, was brought, wherein the plaintiff laid damage to the value of 20 s. and the defendant demurred for that cause, alledging that B. R. could have no cognizance at Common law, or by the statute of Gloucester, to hold plea in an action where the damages are under 40 s. But it was adjudged, that *trespass quare vi & armis* will lie in this court, be the damages what they will. 3 Mod. 275.

At Common law, in *Trespass Vi & Armis*, if the defendant was convicted, he was to be fined and imprisoned; but in other *trespasses* only amerced. Jenk. Cent. 185. In action of *trespass* against two persons for carrying away goods, &c. one lets judgment go by default, and the other justifies under a licence from the plaintiff, and has a verdict; this goes to the whole, and judgment shall be arrested as to the other defendant. 2 Ld. Raym. 1372, 1374. The process in writ of *trespass* is an attachment and *disfringas*, and upon a return of a *nihil* by the sheriff, a *capias*, *alias*, and *pluries* shall issue; and then exigent and process of out-lawry, &c. New Nat. Br. 193, 203. See *Action on the Case*, and *Traverse*.

Of the difference between a positive abuse of an authority or licence in fact, and of an authority or licence in law.

The reason of the difference, between the case of a positive abuse of an authority or licence in fact, and that of a positive abuse of an authority or licence in law, is in one book said to be, that the abuse in the latter case is deemed a *trespass* with force *ab initio*: Because the law intends from the subsequent tortious act, that there was from the beginning a design to be guilty thereof. 8 Rep. 146. *The six carpenters case*.

But this reason, which equally applies to both cases, is by no means conclusive: For it may be as well intended in the former case, from the subsequent tortious act, that there was from the beginning a design of being guilty thereof. Perhaps the difference between the two cases may be better accounted for in the following manner. In the one, where the law has given an authority or licence, it seems reasonable, that the same law should, in order to secure the persons, who are without their direct assent made the objects thereof, from all positive abuses of such authority or licence, whenever either of these is positively abused, make the same void from the beginning; and leave the abuse thereof in the same situation, as if he had acted without any authority or licence. And this agrees perfectly with the maxim *Actus legis namini facit injuriam*. But in the other case, where a man, who was under no necessity of giving an authority or licence to any person, has thought proper to give one of these to a certain person, who is afterwards guilty of a positive abuse thereof, there is no reason that the law should interpose; and make all that has been done, under the authority or licence by him so voluntarily given, void from the beginning: Because it was his

his own folly to place a confidence in a man, who was not fit to be trusted. 5 New Abr. 156.

The interposition of the law in such case would, moreover, be quite contrary to the maxim, *Vigilantibus non dormiantibus servit lex*. 5 New Abr. 156. For more learning on this subject, see 20 Vin. Abr. New Abr. 111. Trespas. And Black. Com. 3 V. 208, 209. As to the Action of Trespas, *vi et armis*. Id. 3, 120, 121, 123. As to *Capi* in Trespas, Id. 401. And as to *Action of Trespas upon the Case*, Id. 122. See also *Action on the Case*.

Trespasants, (Fr.) Is used by Britton, cap. 29. for passengers.

Trespasser, Is one who commits a *trespas*; and though the law allows a man to enter a tavern, a landlord to distrain on land, &c. yet if he doth abuse it by committing a *trespas*, the law will adjudge him a *trespasser ab initio*. 8 Rep. 146. But where persons for any irregularity in taking a distress, &c. shall not be *trespas*ers *ab initio*; so as they make satisfaction for any special damage, *vide* Stat. 11 Geo. 2. c. 19. and *Distress*. With respect to *Trespas*ers, *ab initio*, see Black. Com. 3 V. 15.

Trespasser viam, To turn or divert another way; as *trespasser viam*, to turn the road. Cowell. Chart. King John.

Trepts, (Fr.) Signifies, taken out or withdrawn, and is applied to a juror removed or discharged. F. N. B. 159.

Trial, (*Triatio*) Is the examination of a cause, civil or criminal, before a judge who has jurisdiction of it, according to the laws of the land; it is the trial and examination of the point in issue, and of the question between the parties, whereupon judgment may be given. 1 Inst. 124. Finch 36.

Also 'tis taken for the manner and order of proceeding, in the hearing and determining of matters in difference, being diversely used, according to the nature of the thing to be tried. *Ibid*.

And there are many kinds of trials; as of matters of fact, which shall be tried by a jury; matters of law that are triable by the court; and matters of record tried by the records themselves (as whether the defendant be an attorney, or not. 1 Strange 76, 532.)

Also some things shall be tried by the bishop's certificate; and some by inspection, &c. 2 Lill. Abr. 602.

A lord of parliament, upon an indictment of treason or felony, shall be tried without any oath by his peers upon their honour and allegiance; but in appeal at the suit of any subject, they shall be tried *per bonos & legales homines*. If ancient demesne be pleaded of a manor, and denied, this shall be tried by the record of *domesday*. Ballard, excommungement, lawfulness of marriage, and other ecclesiastical matters, shall be tried by the bishop's certificate. Of the ancient manner of trial by combat and great assize, see *Combat* and *Assize*. See also *Staudf. Pl. Cor.* cap. 1, 2, 3. and twelve men. *Triatio est evadiffima lris confestae, coram iudice per duodecimvirale sacramentum, & agitatio*.

Nothing that is triable by an issue, can be directed to be tried otherwise: Irregularities in suing out a judgment or execution, are tried by reference, &c. But other matters subsequent to the judgment, by an *audita querela*. Comber. 8, 14.

In criminal cases, it is usual to ask the criminal how he will be tried; which was formerly a very significant question, though it is not so now, because anciently there were trials by battle, by ordeal, and by jury; and when the offender answered the question, *By God and his country*, it shewed that he made choice to be tried by a jury: But now there is no other way of trial of criminals. Black's Dig.

It is ordained by *Magna Charta*, that no person shall be condemned on any accusation without trial by lawful judgment of his peers, or by the law. 9 Hen. 3. cap. 29. And the most general rule has been, that every trial shall be out of that town, precinct, &c. within which the matter of fact triable is alleged, or the nearest thereunto, for the better cognizance of the fact committed; and not to have things tried in foreign countries, where the jury are strangers to the parties, to the witnesses, and the point in issue. 1 Inst. 125. But when an indictment is found against a person in the proper

county, it may be heard and determined in another county by special commission, &c. 3 Inst. 27.

If a subject of England be killed in a foreign kingdom by an Englishman, he may be tried by the constable and marshal; or by commissioners in any county. Stat. 33 H. 8. If any man die here in one county, of a wound received in another; he shall be tried by a jury of the county where his death was: In appeal in such case, it is to be there brought, and trial be by both counties. Stat. 3 Ed. 6. cap. 24. 3 H. 7. c. 12. And if one be wounded on the sea, or out of England, and die of the same here; or shall be wounded in England, and die on the sea, or at any place abroad; an indictment may be found by jurors of the county in which the death or stroke, &c. happened, and the judges proceed in the trial against the offenders, as if the felony were there done, &c. by Stat. 2 Geo. 2. c. 21.

An issue being joined in B. R. of a matter triable in Ireland; this shall be sent into Ireland to be tried, and after trial be remanded. 2 Qu. Though if an issue be thus joined of a thing in Wales, the record shall not be sent there to be tried; but it shall be tried in the next county of England adjoining thereto. 1 Dawd. Abr. 248.

If a foreign issue which is local, should happen, it may be tried where the action is laid; and for that purpose the plaintiff may enter a suggestion on the roll, that such a place in such a county is next adjacent; and it may be tried in B. R. by a jury from that place, according to the laws of that country, which may be given in evidence: Adjudged in action of debt for rent, upon a lease made in London of lands in Jamaica; and it was held, that where the lessor declares upon the privity of estate, the action must be brought where the lands are; but 'tis otherwise when the action is founded on the privity of contract, the one being local, and the other transitory, as in this case. 2 Salk. 651.

Seizing a house in the East-Indies is not triable here. 1 Strange 646. In covenant the action was laid in London, and issue joined upon a feoffment in Oxfordshire; of lands in that county, and the cause was tried in London; after verdict it was objected that the trial ought to have been in Oxfordshire, but resolved that by the Stat. 17. Car. 2. it was well tried in the county where the action was brought: But though the words of that statute are, that it shall be good, if tried by the county where the action is laid, it hath been adjudged, that must be understood of a trial by the county where the matter in issue doth arise; for otherwise it would destroy the whole law concerning trials by juries. 3 Salk. 364.

In the trial of a grant of lands, if the issue be whether such grant was made or not, the *Vifne* shall be from that place where that is alleged; so upon *dimissit*. But 'tis otherwise of a feoffment or lease for life, when livery is made; for there it should be tried where the land lieth. Jenk. Cent. 338. In ejectment the venue ought to come always from the place where the lands lie, and not from the place where the demise is laid to be made: But that fault is helped after a verdict. Mod. Ca. 265. And by the statute 4 & 5 Ann. c. 16. the venue for the trial of any issue in a civil cause, shall be awarded of the body of the county where the issue is is. And also in any action, or information upon a penal statute. 24 Geo. 2. c. 18.

On civil causes grown to issue, if they are to be tried in London or Middlesex, and the defendant live not forty miles from London, eight days notice of trial is to be given; and if the defendant lives that distance or further, he must have fourteen days notice from the plaintiff, before he tries his cause; but eight days notice of trial is good at the assizes, let the defendant live where he will, except on an old issue; where a cause hath remained four terms without prosecution; in which case a term's notice is to be given: Upon due notice of trial, the defendant must generally go to trial, or judgment will pass against him by default; and where the plaintiff proceeds not to trial after notice, and there is no countermand, the defendant shall have costs for attendance, &c. or the defendant may give a rule to try the cause by *proviso*, and on notice given the plaintiff may bring it to trial, that he may discharge himself of the action,

action, and herein he may recover costs. 2 *Lill. Abr.* 609, 613. 23 *Hen. 8. cap. 15.*

A late statute ordains, that were any issue is joined in the courts at *Westminster, &c.* if the plaintiff neglects bringing it to be tried, according to the usual practice, the judges on motion made, and due notice given, shall pass the like judgment for the defendant in the action, as in case of a nonsuit, and award him costs; unless a judge find cause to allow further time for the trial: And no cause shall be tried before any justice of assize or *nihi prius*, or at the sittings in *London* or *Westminster*, without ten days notice at least, if the defendant lives above forty miles from the said cities; and when any party gives such notice of trial, if he does not countermand it in writing six days before, he shall pay costs to the defendant, &c. *Stat. 14 Geo. 2. c. 17.*

If a cause to be tried, be not entered in the judge's book, two days before the time of trial, a *ne recipiatur* may be entered, that it be not set down to be tried that time; but this will not be admitted in sittings after the term. *Hill. 22 Car. B. R.*

To proceed to trial, in the courts at *Westminster*, when the declaration is drawn, and the appearance of the defendant made, it must be delivered to the defendant's attorney; then it is to be entered upon the roll and docketed; then a rule must be given for the defendant to plead by such a day, or the plaintiff to have judgment: The defendant having pleaded, a copy of the issue is to be made out and delivered to the defendant's attorney, giving him notice of trial; in order to which, the *venire facias* must be had and returned by the sheriff, and then is sued out the *habeas corpora*, to bring in the jury, the record is made up, and the parties go to trial: But if the defendant neglects to plead, and lets it go by default, on entering a judgment, a writ of enquiry of damages, unless in debt, is to be awarded, of the execution whereof the defendant's attorney shall have notice; which being executed, and the damage inserted in a schedule annexed to the writ returned by the sheriff, a rule is to be given upon it, and costs are taxed; lastly, it is carried to the clerk of the judgments, who on giving him the number roll and term, when the judgment was entered, he will make out a writ of execution, either a *capias ad satisfaciend.* or *fiat facias*, &c. for the damages and costs, &c. *Practif. Attorn. Edit. 1. pag. 99.*

At the *assizes*, when a cause comes on to trial, first a *disfringas* of the jury is to be returned by the sheriff, and then the record must be delivered to the judge's marshal; and the record being put into the hands of the marshal, briefs prepared for the counsel, and all parties ready, the marshal delivers the record to the judge, and the crier calls over the jury: The jury are now to be ballotted and sworn, and bid to stand together and hear their charge; after which, the junior counsel for the plaintiff, (if the issue lies on him, otherwise the defendant's counsel) opens the pleadings, the senior counsel states the case. The evidence is given. If plaintiff begins, the defendant's counsel states his case, and if he has any evidence to produce, the same is given; the plaintiff's counsel then replies, making observations on the defendant's evidence, &c. The judge then sums up the whole of the evidence, and gives it in charge to the jury to act impartially. If the jury can't immediately agree on their verdict, and are desirous of going out of court, to consult privately among themselves, a bailiff being sworn to keep them without meat, drink, &c. till they are agreed, they depart from the bar; and when they are all agreed, they return to give in their verdict: Then the plaintiff is called, and if he do not appear, a nonsuit shall be recorded; but if he appears, the clerk asks this jury who they find for, and what damages, if they find for the plaintiff. The jury naming the sum, and what costs, he enters it on the back of the panel, and repeats it to the jury, which finishes the trial: And after the trial is over, the associate delivers to the party recovering the record with the *disfringas*, and the names of the jury annexed, on the back of which he indorses the substance of the verdict, and the costs given by the jury; and then upon the back of the record is ingrossed the *posseu*, which is delivered to the clerk of the

rule, and he makes out a four days rule for judgment; and when the rule is out, if judgment be not arrested, further costs are taxed, and the judgment is fit to be entered.

But in trials at the *assizes*, the record and *disfringas* are usually kept by the associate till the next term, when he is to be called upon for the *posseu*, and you proceed to have it marked, make out a rule, and sign judgment; and judgment being entered, execution is thereupon awarded, and writs of *Ca. fa. Fieri fac. Elegit, &c.*

If a trial be had the last day of term, or at the sittings after the term, or the *assizes*, judgment cannot be given thereon, till the first or 4th day of the next term. When a defendant is not prepared to try his cause, upon petition and affidavit of the reasons, the judge will order the cause to be stayed till another day the same *assizes*; or in *London* till the next term, on payment of costs: And in case at a trial, the court sees that one of the parties is surprised, through some casualty, and not by any fault of his own, they may in their discretion, put off the trial to another time, until such party is better prepared. 2 *Lill. 609, 610.*

If the matters contested are of great value, or the title in question is difficult or intricate, on motion the judges will order a trial at bar, for the better satisfaction of the parties; though it is not usual to grant trials at bar the same term moved for: And these trials are appointed by the statute of *Westm. 2.* where the cause requires *magnam examinationem*; also officers of the court, and barristers at law, may insist upon a trial at bar; after which, a new trial is not to be granted. 2 *Salk. 648, 651, 653.* The court will grant a trial at bar for the importance of the consequence. 1 *Strange 52.* And where the whole estate is of value, though against several defendants. *Ibid. 479.* And in case of a great misdemeanor. *Ibid. 644.* No rule for a trial at bar before issue is joined. *Ibid. 606.* The crown is not intitled to a trial at bar of course where there is a prosecutor. 2 *Strange 816.* No trial at bar can be granted in a cause arising in *London*, for the citizens are not to be brought out of the city. *Ibid. 856.* It hath been laid down as a rule, that after a trial at bar, no new trial shall be had in any case, except it appear that there hath been some corruption in the jury. *Carthw. 507.* See *vide 1 Strange 584. 2 Strange 1105 contra.*

New trials may be granted generally in several cases, viz. where the defendant had not sufficient notice given him of the former trial; if excessive damages are given; a verdict is against evidence; there was any fraud, &c. But a new trial ought not to be allowed for want of evidence at the former trial, which the party might then have produced: And it hath been denied, where the defendant forgot to bring a settlement at the trial; so likewise where very large damages were given, on the report and opinion of the judge who tried the cause, that he believed the jury gave a verdict according to their consciences: And no new trial shall be granted for too small damages; unless where action of covenant is brought for a sum certain, and the jury give damages under the same, &c.

The reason of granting new trials upon verdicts against evidence at the *assizes* is, because the trials are subordinate to the courts; and such new trials have been anciently granted, as appears from this; that it is a good challenge to a jurymen to say that he hath been a juror before in the same cause.

Adjudged that a new trial cannot be granted in an inferior court. 2 *Salk. 648, 649, 650. Anell. Abr. 414, 417.* New trial not granted after a verdict for the defendant in a *quo warranto*. 1 *Strange 601.* Or in a *qui tam*. 2 *Strange 899, 1238.* Nor where the party might have had evidence on the first trial. 1 *Strange 691.* New trial cannot be had a second time for excessive damages. *Ibid. 692.* Nor where one of the defendants was rightly acquitted. 2 *Strange 814.* Defendant convicted of forgery must appear personally when he moves for a new trial. *Ibid. 968.* No new trial for smallness of damages. *Ibid. 1051.* Nor where there is evidence on both sides. *Ibid. 1142.* A new trial denied, where the jury find a matter left to them against the strength of evidence.

evidence. *Ibid.* 1105. Inferior courts cannot grant a new trial. 1. *Strange* 113. After a motion in arrest of judgment, the party shall not move for a new trial; but after motion for a new trial he may move in arrest of judgment. 2. *Salk.* 647. A new trial is never granted in criminal cases, where the defendant is acquitted, if some fraud or trick be not proved in the case. *Ibid.* But on conviction, a new trial may be granted upon cause; so if a trial on indictment be by a wrong venue; and in cases where appeal may be brought. 2. *Litt.* 606, 613.

If the issue tried in any cause is not joined, it is not a good trial; except it be an issue in *Chancery* in the petit bag side, which is to be sent from thence to be tried in *R. Hill.* 22 *Car.* It is a mis-trial for a thing to be tried before a judge, who hath interest in the thing in question; and if a cause is tried by a jury out of a wrong county, or there be any error in the process against the jurors, or it is directed to a wrong officer, &c. it is a mis-trial; likewise where matter of record is tried by a jury, it will be a mis-trial; but if the matter of record be mixed with matter of fact, trial by jury is good. *Hob.* 124. A mis-trial is helped by the statute of *jeofails.* See *Issue, Nisi prius,* &c. See farther as to trial, *Black. Com.* 3 V. 330, 4 V. 336, 407. and with respect to new trial, *Id.* 3 V. 387. 4 V. 355, 431.

Trials in criminal cases. First the bill of indictment against an offender is prepared; and the party prosecutor and others bound over to give evidence, being ordered to attend, the grand jury consider of the bill; and on examination of the witnesses, either they find the bill of indictment, or bring it in *ignoramus*: If the jury find the bill, the prisoner is brought to the bar of the court; and the crier says to him, *A. B.* hold up thy hand, Thou standest indicted by the name of *A. B.* for such a felony, &c. (reciting the crime laid in the indictment) How sayest thou, art thou Guilty of this felony, &c. whereof thou standest indicted, or Not Guilty? To which the prisoner answers, Not Guilty; whereupon the clerk of the peace says, *Culpri,* How wilt thou be tried? And the offender answers, By God and my country: When the prisoner has pleaded Not Guilty, (which is the common plea) it is to be recorded; and then the petty jury are called upon the panel, and a full jury appearing, the prisoner is told they are to pass upon his life and death, and that he may challenge any of them before they are sworn; for not being indifferent, but partial, or other defect, &c. Then the jury are sworn well and truly to try the prisoner, and to bring in a true verdict: This being done, the indictment is recited, and the jury are acquainted with the particular crimes of which the prisoner stands indicted; and the clerk of the peace says, To which indictment he hath pleaded Not Guilty, and for his trial hath put himself upon God and his country, which country you are: so that you (the jury) are to inquire whether he be guilty of the felony, &c. whereof he stands indicted, or not? If you find him Guilty, you are to make enquiry into what goods and chattels he had at the time that the said felony, &c. was committed, or at any time since: And if you find him Not Guilty, you shall inquire whether he did fly for it; and if he fled for it, what goods, &c. he had at the time of his flight; but if you find him Not Guilty, and that he did not fly, you shall then say no more. Then the clerk of the peace calls the witnesses to give true evidence; to speak the whole truth, and nothing but the truth; and when the evidence is given to the jury concerning the prisoner, the jury (if they go out of the court to consider of their verdict,) are to be kept in a room, by a sworn bailiff appointed, without meat, drink, fire or candle, and without any persons speaking to them, till they bring in their verdict. All things being given in charge, the jury go to their room, and consider of the matter; when they are all agreed, and returned within or near the bar, the prisoner is brought forth, and the jury are called over; who all appearing, and the prisoner set to the bar, the clerk of the peace says to them, Look upon the prisoner, you gentlemen of the jury; How say you, is *A. B.* Guilty of the felony, &c. of which he stands indicted, or Not guilty? If the jury say Not guilty, it is recorded, and the

prisoner taken away; if they say Guilty, he is bid to down upon his knees, &c. and then the clerk of the peace says, My masters of the jury, hearken to your verdict as the court hath recorded it; You say *A. B.* is guilty of the felony, &c. whereof he stands indicted: To which they answer Yes: Then proclamation is made for all persons to keep silence, on which the prisoner is set to the bar, and sentence passed upon him; after which an order or warrant is made for his execution.

This is the manner of proceeding against common criminals: the court is to be of counsel with the prisoner, and ought to advise him for his good, not taking advantage too strictly against him. *Mod. Just. Edit.* 3. pag. 402, 403. 2 *Hawk. P. C.* 910. *Rep.* 9. And a great author observes, that through the punctuality required by law in the trial of causes, there is as much as art and conscience can contrive against corruption, and in favour of right, liberty, life and reputation: And the greatest criminals here, have privileges which they cannot be debarred of. See *Fortescue's Laud. Leg. Angl.* 59, 60.

Tribuch and Trebuchet, (*Terbichetum*,) A tumbrel, or cucking stool. *Cowell.* See *Trebuchet*.

Tricennate, Is the same with *Trental.* 1 *Ed.* 6.

Tricenna, An ancient custom in a borough in the county of *Hereford*, so called, because thirty *burgesses* paid 1 *d.* rent for their houses to the bishop, who is lord of the manor. *Lib. Niger Heref.*

Tridingsmote, The court held for a *triding* or *trithing.* *Chart. King Hen.* 1.

Triennial Elections. The utmost extent of time that the same parliament was allowed to sit, by the stat. 6 *W. & M. c. 2.* was three years; after the expiration of which, reckoning from the return of the first summons, the parliament was to have no longer continuance. But, by the stat. 1 *Geo. 1. c. 38.* this term was prolonged to seven years. See *Parliament*, and *Black. Com.* 1 V. 153, 189, 430, 432, 433.

Trigintale, See *Trental.*

Trithing or Trithing, (*Sax. Trithinga*) Contains the third part of a county, or three or four hundreds: Also it was a court held within that circuit, of the nature of the court-leet, but inferior to the county-court. *Cambr.* 102. *Magn. Chart. cap.* 36. The *Ridings* in *Yorkshire* are corruptly called by that name, from *Tridings* or *Trithings*: And those who anciently governed those *Trithings*, were termed *Trithing-Reves*, before whom were brought all causes which could not be decided in the hundreds; for from the hundred-court suits might be removed to the *Trithing*, and thence to the county-court. *Spelm.* See *Last-reva.*

Trillion, A word used by merchants in accounts, to shew that the word million is thrice mentioned. *Merch. Dia.*

Trimilchi, The *English Saxons* denominated the month of *May Trimilchi*; because they milked their cattle three times every day in that month. *Beda.*

Trinity, (Trinitas) The number of three persons in the Godhead or Deity; and denying any one of the persons in the Trinity to be God, is subject to divers penalties and incapacities by the stat. 9 & 10 *W. 3. c. 32.* See *Religion.*

Trinity-House, Is a kind of college at *Deptford*, belonging to a company or corporation of seamen, who have authority by the King's charter to take knowledge of those that destroy sea-marks; also to redress the faults of sailors, and divers other things belonging to navigation. 8 *Elix. c. 13.* By a late statute, pilots of ships coming up the *Thames*, are to be examined and approved by the Master and Wardens of *Trinity-House*, &c. 3 *Geo. 1. c. 13.* See 5 *Geo. 2. c. 20.*

Trink, A fishing net, or engine to catch fish. 2 *Hen.* 6. c. 15.

Trinobantes, The inhabitants of *Middlesex, Essex, & Hertfordshire*, &c.

Triphida Decemana, Signified a threefold necessary tax, to which all lands were liable in the *Saxon times*, i. e. for repairing of bridges; the maintaining of castles or garrisons; and for expeditions to repel invasions: And in the King's grants, and conveyances of lands, these three things

things were excepted in the immunities from other services, &c.—*Exceptis his tribus, expeditione, pontis & arcis constructione.* Paroch Antiq. 46. See Black. Com. 1 V. 263, 357. 2 V. 102.

Triers, Triours, or Trifers. Are such as are chosen by the court to examine whether a challenge made to the panel of jurors, or any of them, be just or not. *Broks* 122.

Triers, lords. On the trial of a peer, in parliament, a precept was formerly issued to summon only eighteen or twenty, selected from the body of the peers: then the number came to be indefinite; and the custom was, for the Lord High Steward to summon as many as he thought proper (but of late years not less than twenty-three) and that those lords only should sit upon the trial, which threw a monstrous weight of power into the hands of the crown, and this it's great officer; of selecting only such peers as the then predominant party should most approve of. But now by stat. 7 W. 3. c. 3. upon all trials of peers for treason or misprision, all the peers who have a right to sit and vote in parliament shall be summoned at least twenty days before such trial, to appear and vote therein; and every lord appearing shall vote in the trial of such peer, first taking the oaths of allegiance and supremacy, and subscribing the declaration against popery. See Black. Com. 4 V. 259, 260.

Triers of Jurors. Jurors may be challenged *propter affectum*, for suspicion of bias or partiality. This may be either a principal challenge or to the favour. A principal challenge is such, where the cause assigned carries with it, *prima facie*, evident marks of suspicion, either of malice or favour: as, that a juror is of kin to either party within the ninth degree; that he has been arbitrator, has an interest in the cause, &c. See Challenge. Challenges to the favour, are where the party hath no principal challenge; but objects only some probable circumstances of suspicion, as acquaintance and the like; the validity of which must be left to the determination of *triers*, whose office it is to decide whether the juror be favourable or unfavourable. The *triers*, in case the first man called be challenged, are two indifferent persons, named by the court; and, if they try one man and find him indifferent, he shall be sworn; and then he and the two *triers* shall try the next; and when another is found indifferent and sworn, the two *triers* shall be superseded, and the two first sworn on the jury shall try the next. *Co. Lit.* 158. and see Black. Com. 3 V. 363.

Tripodium, Leg. H. 1. cap. 64. *In quibus vero causis triplicem ladam haberet, ferat judicium tripodii, i. e. 60 solid.* The meaning is, that as for a small offence, or for a trivial cause, the composition was twenty shillings; so for a great offence, which was to be purged *triplici lada*, the composition was to be three times twenty shillings, *viz. tripodio.* *Cowell.*

Triroda terre, A quantity of land, containing three rods or perches. *MS. Eliam Ashmole Ar.*

Tristega, Was the uppermost room in the house, a garret or room three stories high. 'Tis mentioned in *Matt. Paris*, anno 1247.

Tristis, (From the Fr. *Traist*, i. e. *Trust*) Is an immunity, whereby a man is freed from attendance on the lord of a forest when he is disposed to chase within the forest; and by this privilege, he shall not be compelled to hold a dog, to follow the chase, or stand at any place appointed, which otherwise he is obliged to, on pain of amercement. *Manwood*, par. 1. pag. 86.

Tristra, A post or station, in hunting. *Cowell.*

Trithing, Trithing-Reeve, The third part of a county, or three more hundreds or wapentakes, were called a *triding* or *trithing*; such sort of portions are the *laths* in *Kent*, the *rapes* in *Sussex*, and the *ridings* in *Yorkshire*, and those who governed these trithings, were thereupon called *trithing-reves*, before whom were brought all causes that could not be determined in the wapentakes or hundreds. See *Spelman of the ancient government of England*. p. 52. See *Trithing* and Black. Com. 1 V. 116.

Trumbur, A trithing-man, or constable of three hundreds. *Hist. Elfenf.*

Tronage, (*Tronagium*) Is a customary duty or toll for weighing of wool: According to *Fleta*, *trona* is a beam

to weigh with, mentioned in the stat. *Westm.* 2. cap. 25. And *tronage* was used for the weighing wool in a staple or publick mart, by a common *trona* or beam; which for the *tronage* of wool in *London*, was fixed at *Leadens-Hall*. *Fleta*, lib. 2. c. 12. The mayor and commonalty of *London*, are ordained keepers of the beams and weights for weighing merchants commodities, with power to assign clerks, and porters, &c. of the great *beam and balance*; which weighing of goods and wares is called *Tronage*: And no stranger shall buy any goods in *London*, before they are weighed at the King's beam, on pain of forfeiture. *Chart. King Hen. 8.*

Tronator, (From *Trona*, i. e. *Statara*) An officer in the city of *London*, who weighs the wool brought thither.

Trope, (*Tropus*) A rhetorical way of speech. *Litt. Dig.*

Troper, (*Troperium*) Is a book of alternate turns or responses in singing mass; called *Liber sequentiarum*, by *Linderwode*. *Hoved. Hist.* p. 283.

Trophy-money, Signifies money yearly raised and collected in the several counties of *England*, towards providing harness and maintenance for the militia, &c. *Stat.* 15 Car. 2. 1 Geo. 1. See *Militia*.

Trover, (From the Fr. *Trouver*, i. e. *invenire*) Is an action which a man hath against one, that having found any of his goods, refuseth to deliver them upon demand: Or if another hath in his possession my goods, by delivery to him, or otherwise, and he sells or makes use of them without my consent, this is a *conversion* for which *trover* lies; so if he doth not actually convert them, but doth not deliver them to me on demand. 2 *Lill. Abr.* 618. It is called *Trover* and *Conversion*, and is a special action of the case, brought to recover the damages to the value of the goods, &c. In this action, the plaintiff surmisseth that he lost such and such goods, and that the defendant hath found them, and converted them to his own use at such a place; but the losing is but a mere suggestion, and not material: For if the plaintiff delivered the goods to the defendant; or if the defendant take the goods in his presence, &c. this action lies against him, if there be a conversion; which is the point of the action, and therefore must be particularly alledged: If a man finds goods, he may take possession of them, and no action lies; but he ought not to abuse or use them, for therein lies the offence: And where a man finds my goods, and refuseth to deliver them upon demand, it is a conversion in law; but if he answers that he knows not whether I am the true owner or not, and therefore denies to deliver them; this is no conversion if he keeps them from me. 1 *Dawson. Abr.* 21, 22, 23. A person finds the goods of another, and uses or wilfully abuses them; as if it be paper, and he put it into water, or the like, this action of *trover* lies against him: But not for any negligence in the keeping of them; as where one finds another's garment, and suffers it to be moth-eaten, &c. here no action will lie. 1 *Cro.* 219.

If in *trover*, an actual conversion cannot be proved, then proof is to be had of a demand made, before the action brought, of the thing for which the action is commenced, and that the thing demanded was not delivered: in this case, though an actual conversion may not be proved, a demand, and refusing to deliver the things demanded, is a sufficient evidence to the jury that he converted the same, till it appears to the contrary. 10 *Rep.* 56, 491. 2 *Lill.* 619.

Where a defendant comes to the point by finding, denial is a conversion; but if he had the goods, &c. by delivery, there denial is no conversion, but evidence of a conversion: And in both cases, the defendant hath a lawful possession, either by finding or by delivery: And where the possession is lawful, the plaintiff must shew a demand and a refusal, to make a conversion: Though if the possession was tortious, as if the defendant takes away the plaintiff's hat, the very taking is a sufficient proof of the conversion, without proving a demand and refusal. *Sid.* 264. 3 *Salk.* 365.

By *Holt, Chief Justice*, the denial of goods to him, who hath a right to demand them, is a conversion; and after a demand and refusal, if the defendant tender the goods,

goods, and the plaintiff refuse to receive them, that will go only in mitigation of damages; not to the right of the action of *trover*, for the plaintiff may have that still. *Mod. Caf.* 212. 3 *Nelf. Abr.* 424, 425. An action of *trover* and conversion may be brought for goods, although the goods come into possession of the plaintiff before the action is brought; which doth not purge the wrong, or make satisfaction for that which was done to the plaintiff by detaining the goods: If a man takes my horse and rides him, and afterwards delivers him to me, *trover* lies against him; for this is a conversion, and the redelivery is no bar to the action. 1 *Danv. Abr.* 21. 2 *Lill.* 618.

If goods are delivered to one to deliver over to another, and he to whom they were first delivered do afterwards refuse to deliver them over, and converts them to his own use; he is liable to action of *trover* not only by him who first delivered them but also by him to whom they were to be delivered: And a plaintiff may chuse to have his action of *trover* against the first finder of goods; or any other who gets them afterwards by sale, &c. 1 *Bulst.* 68. 1 *Leon.* 183. If a common carrier has goods delivered to him to carry to a certain place, and a stranger takes them out of his possession, and converts the goods to his own use; action of *trover* and conversion lies for the carrier against him. 1 *Mod.* 31.

Trover doth lie against a common carrier for negligence in losing goods; though it doth not for an actual wrong: And if goods are stolen from a carrier, he may not be charged in *trover* and conversion; but action upon the case on the custom of the realm, &c. 2 *Salk.* 47.

It has been held, that where goods are stolen, and there is prosecution of the offender by indictment the party does not bring action of *trover*, it lies not; for so felonies are compounded: but where *A.* steals the goods or money of *B.* and is convicted, and hath his clergy, upon prosecution of *B.* If he brings *trover* and conversion for the money, and on not guilty pleaded this special verdict is found, the plaintiff shall recover. 1 *Hale's* P. C. 546.

If upon a *feri facias* the sheriff takes goods in execution, and before the sale of them, a stranger takes them away and converts them to his own use; the sheriff may have an action of *trover* and conversion, as he had a lawful possession, and is answerable for them. 2 *Saund.* 47.

And an executor may have *trover* for the goods of the testator; the law gives him a property, which draweth the possession to it, though there be not an actual possession. *Litch.* 214. There must be a right or property in the goods, or a lawful possession, &c. which is to be proved by the plaintiff in *trover*, before the goods came to the defendant's hands: And if a man finds his goods lost in the hands of another, if he bought them in open fair or market; this alters the property, and he cannot recover them. 1 *Inst.* 498. 1 *Danv.* 23. Adjudged that *trover* lay for the finder of a jewel, against a goldsmith who defrauded him of it. *Ibid.* 505. Drawing out part of a vessel, and filling it up with water, is conversion of all the liquor. *Ibid.* 576. A recovery in *trover* vests the property of the goods in the defendant. 2 *Strang.* 1078. In *trover*, the plaintiff may declare upon a *conventum ad manus* generally; or specially *per inventionem ad conventum*: And the plea on the defendant's part is commonly not guilty, on which the special matter may be given in evidence, to prove the plaintiff hath no cause of action; or to intitle the defendant to the thing in controversy. 2 *Bulst.* 313. *Wood's* Inst. 540. *Vide* also, 2 *Salk.* 654. *Telv.* 198. *Cro. Car.* 27. 2 *Lill.* 621.

In *trover* *for a bond*, the plaintiff need not shew the date; for the bond being lost or converted, he may not know the date; and if he should set out the date, and mistake it, he would fail in his action. *Cro. Car.* 262. If the defendant find the bond, and receive the money, action of account lieth against the receiver, and not *trover*. *Cro. Eliz.* 723.

The place of conversion must be generally mentioned in *trover*, or it will be naught. *Cro. Eliz.* 78, 79. And yet where the *trover* of goods is in one county, and the con-

version in another county, the action brought for these goods may be laid in the county where the conversion was, or in any other county, as it is only a transitory action; and neither the place of *trover*, nor conversion, are traversable. *Pasch.* 23 *Car. B. R.* If there be *trover*, before the marriage of a female plaintiff, and conversion afterwards; the husband and wife may join, and it will be good. 2 *Lev.* 107.

Trover lies against baron and feme, setting forth that they converted the goods to the use of the husband; for the feme may be a trespasser, and convert them to the husband's use, or the use of the stranger, but not to her own use; and if the conversion be laid *ad usum* of herself and husband, or *ad usum proprium*, &c. it will not be good. *Cro. Car.* 494. In *trover* the plaintiff may lay a conversion here, and prove it in Ireland; it is otherwise in trespass *quare clausum fregit*, for there the party cannot prove the trespass but where it lies, nor lay it in any other place than where it is. *Stile* 331. 1 *Mod. Entr. Engl.* 303.

Action of *trover*, at the plaintiff's election, may be brought for goods detained; for it is but justice that the party should have his goods detained if they may be had, or else damages to the value for the detaining and conversion of them. 2 *Lill. Abr.* 618. And trespass or *trover*, lies for the same thing; though they cannot be brought in one declaration: And the allegation of the conversion of the goods in trespass, is for aggravation of the damages, &c. *Cro. Jac.* 50. *Lutw.* 1526.

Detinue doth not lie for money numbered; but *trover* and conversion lies for it: For though in the finding and converting generally, the money of one person cannot be distinguished from that of another, all money being alike; yet the proof that the plaintiff lost, and defendant converted so much, maintains the action, if the verdict finds it. *Jenk. Cent.* 208. Where money is given to a person to keep, though it be not in bags, action of *trover* will lie; because this action is not to recover the money, but damages. *Poph.* 91. 3 *Salk.* 365. In case a master delivers corn to his servant to sell, who does so and converts the money, the master may bring *trover* against the servant. 2 *Bulst.* 307. 1 *Roll's Rep.* 59.

There is no proper plea in action of *trover*, where it lies, but the general issue not guilty; on which the defendant may give in evidence that the goods and money were not the plaintiff's. *Bro.* 109. *Trover* lieth not for any part of a freehold; but if doors fixed are removed and converted, it will lie. *Wood's Inst.* 540. In *trover*, the defendant may not wage his law, as he may in *detinue*; wherefore it often takes place of that action. See *Detinue* and *Black. Com.* 3 *V.* 151. 4 *V.* 356.

Troy-weight, (*Pondus Trojæ*) A weight of twelve ounces to the pound, having its name from *Troyes* a city in *Champaign*, whence it first came to be used here.

Truce, (*Treuga*) A league or cessation of arms; and anciently there were keepers of *truces* appointed; as King *Edw.* 3. constituted by commission two keepers of the *truce* between him and the King of *Scots*, with this clause, *Nos volentes treugam prædictam quantum ad nos pertinere observari*, &c. *Rot. Scot.* 10 *Edw.* 3. *Vide* *Conservators of the Truce*.

By *Stat.* 2. *Hen.* 5. *Stat.* 1. c. 6. Breaking of *truce* and safe-conducts, or abetting and receiving the *truce-breakers*, was declared to be high-treason, against the crown and dignity of the King; and conservators of *truce* and safe-conducts were appointed in every port, &c. See the *Stat.* and 14 *H.* 6. c. 8. 20 *H.* 6. c. 11. 29 *H.* 6. c. 2. and 31 *H.* 6. c. 4. Also 14 *Edw.* 4. c. 4. But *Blackstone* supposes 2 *H.* 5. repealed by the general statutes of *Edw.* 6. and *Q. Mary* for abolishing new created treasons; though Sir *Matt. Hale* seems to question it, as to treasons committed on the sea. 1 *Hal. P. C.* 267. But (according to *Blackstone*) the *Stat.* of 31 *H.* 6. remains in full force to this day. *Black. Com.* 4 *V.* 69, 70.

Trug-Corn, (*Truga frumenti*) Is a measure of corn; and at *Llunminster*, at this day the vicar hath *trug-corn* allowed him for officiating at some chapels of ease within that parish. *Liber Niger Heref.*

Truncus, A trunk set in churches, to receive the oblations of pious people; of which, in the times of popery, there were many at several altars and images, like the boxes which since the reformation have been placed near the doors of churches for receiving all voluntary contributions for the poor: And the customary free-will offerings that were dropt into those trunks, made up a good part of the endowment of vicars, and thereby oftentimes rendered their condition better than in latter times.—*Vicarius habebit oblationes quasunque ad truncos tum in dicta ecclesia de, &c. quam alibi infra parochiam ipsius ecclesie suas.* Ordin. Vic. Lancast. Anno 1430.

Trussa, A truss or bundle of corn; mentioned among the customary services done by tenants. *Cartular S. Edmund. MS.*

Trust, (*Fiducia, confidentia*.) Is a confidence which one man reposes in another—but, as generally used in law, it is a right to receive the profits of land, and to dispose of the land itself (in many cases) for particular purposes, as directed by the lawful owner, or pointed out by settlement, &c. or that which is created by the person who created the trust. A trust is but a new name given to an use.—If a person in whom a trust is reposed, breaks or doth not perform the same, the remedy is by bill in Chancery, the Common law generally taking no notice of trusts. 2 *Lill. Abr.* 624. A trust and use were all one at Common law, till the Stat. 27 H. 8. which distinguishes them: The method of making conveyances by way of trust, was invented to evade the statute of uses; and these conveyances are not so much favoured in law, as plain and direct conveyances of estates. *Pascb. 23 Car. B. R.*

Trusts and legal estates are to be governed by the same rules; and this is a maxim which has universally prevailed. It is so in the rules of descent, as in gavelkind, and borough English lands; there is a *possessio fratris* of a trust, as well as of a legal estate. The like rules in limitations, and also of barring entails of trusts, as of legal estates; per the master of the rolls, who said he thought there was no exception out of this general rule, nor is there any reason that there should; and that it would be impossible to fix boundaries, and shew how far, and no farther, it ought to go; and that perhaps in early times the necessity of keeping thereto was not seen, or thoroughly considered. 2 *P. Wms's Rep.* 645. *Sutton v. Sutton.*

Declarations and creations of trust, of lands, tenements or hereditaments, are to be in writing, signed by the party empowered to declare such trust, &c. 29 *Car. 2. c. 3.* In the explanation of this statute, it is provided, that this shall not extend to *resulting trusts*, or trusts arising by implication or construction of law; which shall be of like force as before that act. 4 & 5 *Ann. c. 16.* And there is a statute by which infants seized of estates in fee in trust, may make conveyances of such estates, by order of the Chancery. 7 *Ann. c. 19.* If a man buys land in another person's name, and pays the money for the land, this will be a trust for him that paid the money, though there be no deed declaring the trust; because the statute of fraud extends not to trusts raised by the implication of law: And a bare declaration by parol, on a deed assigned, may prevent any resulting trust to the assignor. 2 *Vent. Rep.* 361. 2 *Vern.* 294. Where there has been fraud in gaining a conveyance from another, that is a reason of making the grantee considered as a trustee: But the Statute 29 *Car. 2. c. 3.* relates only to *equitable trusts* and interests, and not an use, which is a legal estate. 1 *P. Williams* 113. There are only two kinds of trusts by operation of law; either where the deed or conveyance has been taken in the name of one man, and the purchase-money paid by another; or where the owner of an estate has made a voluntary conveyance of it, and declared the trust with regard to one part to be for another person, but hath been silent as to the other part; in which case he himself ought to have the benefit of that, it being plainly his intent. *Barnardist.* 388. There shall be a tenancy by the curtesy. *Esc. of a trust estate*; but of such an estate a woman shall not be endowed. 1 *P. Williams* 109. *Talbot's Caf.* 139. See 2 *P. Williams* 147. A fine and recovery of *Cestui que trust* shall bar and transfer a trust, as it should an estate at law, if it were upon a consideration. *Chanc. Rep.* 49.

In equity trusts are so regarded, that the act of a trustee will prejudice the *cestui que trust* for though a purchaser, for valuable consideration, without notice, shall not have his title any ways impeached, yet the trustee must make good the trust: But if he purchases, having notice, then he is the trustee himself, and shall be accountable. *Abr. Caf. Eq.* 384. Where trustees in a settlement, join with tenant for life in any conveyance, to defeat a remainder, before it comes in esse; this is a plain breach of trust; and those who claim under such deed, having notice of the trust, will be liable to make good the estates. 2 *Salk.* 680. Yet in case a trustee joins with *cestui que trust* in tail, in a deed to bar the entail; as it is no more than what he may be compelled to, it is no breach of his trust. 1 *Chanc. Caf.* 49, 213.

It has been decreed, that a trust for a son, &c. shall pass with the lands into whose hands soever they come, and cannot be defeated by any act of the father or trustees. And though a husband and wife, have no children in many years, and they and the trustees agree to sell the land settled, &c. it will not be permitted in Chancery. *Abr. Caf. Eq.* 391. 1 *Vern.* 181. A tennor grants his lands in trust for himself for life, and to his wife for life, and after to his children for their lives, and then to A. B. This trust to A. B. is good; though if it had been to the heirs of their bodies, it would be otherwise: And a remote trust of a term, which tends to a perpetuity, has been decreed a void limitation. *Chanc. Rep.* 230, 239.

If a husband makes a lease for years, in trust for his wife, he may sell it, and it will bind her: But when a trust is first created for a wife *bona fide*, he cannot sell it, unless he join in a fine. *Ibid.* 307, 308. It has been adjudged, where a term is settled in trust for a jointure on a wife, or in pursuance of marriage articles, or if the term of the wife be assigned by her before marriage; the husband can neither charge nor sell it, &c. though if the assignment is made after marriage in trust for the wife, it is then voluntary and fraudulent. *Ibid.* 225.

A trust to pay portions, legacies, &c. out of the rents and profits of the lands, at the day prefixed, gives the trustees power to sell; if the annual profits will not do it within that time, then they may sell the land, being within the intention of the trust: And they cannot sell to raise the money, except it be to be paid at a certain time. *Ibid.* 176. A trustee for sale of lands for payment of debts, paying debts to the value of the land, thereby becomes a purchaser himself. *Ibid.* 199. Where a trustee for paying portions, pays one child his full share, and the trust estate decays, he shall not be allowed such payment. 2 *Chanc. Ca.* 132. If one devises lands to trustees until his debts are paid, with remainder over, and the trustees misapply the profits, they shall hold the land only till they might have paid the debts, if the rents had been duly applied; and after that the land is to be discharged, and the trustees are only answerable. 1 *P. Williams* 519. And a person having granted a lease of land to trustees, in trust to pay all the debts which he should owe at his death, in a just proportion, without any preference; it was here declared, that the simple contract debts became as debts due by mortgage, and should carry interest. *Ibid.* 229.

Trust of a fee-simple estate, or fee-tail, is forfeited by treason, but not by felony; for such forfeiture is by way of escheat, and an escheat cannot be but where there is a defect of a tenant, and here is a tenant. *Hard.* 495. See *Jenk. Cent.* 245. A trust for a term is forfeited to the King in case of treason or felony; and the trustees in equity shall be compelled to assign to the King. *Cra. Jac.* 513. If a bond be taken in another's name, or a lease be made to another in trust for a person, who is afterwards convicted of treason or felony, they are much liable to be forfeited as a bond or lease made in his own name, or in his possession. 2 *Hawk.* 450. Execution may be sued, and lands held in trust delivered, where any person is seized or possessed in trust for another; by the statute of frauds, 29 *Car. 2. c. 3.*

Trustees being obliged to join in receipts, one is not chargeable for money received by the other: In the case of executors it is otherwise. 1 *Salk.* 318. 2 *Vern. Rep.* 515. A trustee robbed by his own servant, shall be discharged

discharged of it on account, though great negligence may charge him with more than he hath received, in the trust. 2 Chan. Cas. 2. 1 Vern. 144. There is a breach of trust in servants going away with their master's goods delivered them, &c.

Of a resulting trust, or trust by implication of law.

It was ruled by lord chancellor *Cowper*, that the statute of frauds, *stat. 3.* which says, 'That all conveyances, where trusts and confidences shall arise or result by implication of law, shall be as if that act had never been made,' must relate to trusts and equitable interests, and cannot relate to any use which is a legal estate. *Mitch. 1709.* in the case of *Lamplugh v. Lamplugh*, 1 P. Wms. 112.

No rule is more certain than that if a man makes a conveyance in trust for such persons, and such estates as he shall appoint, and makes no appointment, the resulting trust must be to him and his heirs. The trust in equity must follow the rules of law in the case of an use, and that it would be so in the case of an use is undoubtedly true, and that was Sir *Edward Cleer's* case in 6 Rep. per Lord Chancellor. *Fitz-Gib. 223. Fitzgerald v. Ld. Faulconbridge.*

Wherever there is a consideration there can be no resulting trust. But if a lease be made for years without a consideration, there well be a resulting trust to the lessor.

Where a daughter's portion was charged upon the father's land, she at the request of her father, had released her interest in the land, to the intent that he might be enabled to make a clear settlement thereof upon the son. It was declared by the lord keeper, that if this was done by the daughter without any consideration, there would be a resulting trust in the father, whereby he should be chargeable to the daughter for so much money. *Freem. 305. Lady Tyrell's case.*

But where a trustee purchases lands out of the profits of the trust estate, and takes the conveyance in his own name; tho' probably, if he cannot make other satisfaction for the misapplication, these lands may be sequestered, yet they cannot be declared to be a trust for *cestui que use*, no more than if A. borrows money of B. for it is not a trust in writing; and a resulting trust it cannot be, because that would be to contradict the deed by parol proof, directly against the statute of frauds. But if this purchase had been recited to have been made with the profits of the trust estate, this appearing in writing might ground a resulting trust. On appeal to the house of lords, this decree was affirmed. *Chan. Proc. 84. pl. 77. Kirk v. Webb.*

So where a testator impowered the executor to lay out the personal estate in land, and settled it on A. and his heirs: And the executor being about to purchase told A.'s mother of it, and asked her consent, but took the conveyance in his own name, and no trust in writing was declared, but it was proved that he at several times declared it must be sold to make A. satisfaction; yet the court (though inclined to decree a conveyance to A. the executor being dead insolvent) declared it could not, because there was no express proof of the application of the trust money. *Ch. Proc. 168. pl. 139. For more learning in this subject, see 21 Vin. Abr. tit. Trust, and 5 New Abr. tit. Uses and Trusts. See farther as to Trusts, Black. Com. 2 V. 27. 3 V. 431, 439.*

Trustee of Parishes, A. enabled to make presentations to churches. *Stat. 12 Ann. c. 14.*

Tub, A measure containing sixty pounds weight of teas; and from fifty-six to eighty-six pounds of camphire, &c. *Merch. Dict.*

Tub-man, In the Exchequer, In the court of exchequer two of the most experienced barristers, called the *Post-man*, and the *Tub-man*, (from the places in which they sit) have a precedence in motions. *Black. Com. 3 V. 28. u.*

Tumbrell, (*Tumbrellum, Turbichetum*) Is an engine of punishment, which ought to be in every liberty that hath view of frank-pledge, for the correction of scolds and unquiet women. *Kitchin, fol. 13. See Castigatory, Cuck-ing-stool.*

Tun, (Sax.) In the end of words signifies a Town, or dwelling-place.

Tun, (Lat. *Tunellum*) A vessel of wine and oil, being four hogheads. 1 R. 3. c. 12. A tun of timber is a measure of forty solid feet, cut to a square. 12 Car. 2. c. 14. And a tun is twenty hundred weight of coals, &c. by Stat. 9 & 10 W. 3. c. 13.

Tunnage, (*Tunnagium*) Is a custom or impost granted to the crown for merchandize imported or exported, payable after a certain rate for every tun thereof. *Stat. 12 Hen. 4. c. 3. 6 Hen. 8. c. 14. 1 Ed. 6. c. 13. 12 Car. 2. c. 4. See Customs.*

Tun-greve, (Sax. *Tungeræva*, i. e. *villa præpositus*.) A reeve or bailiff, *qui in villis (& quæ dicimus manerii) domini personam sustinet, ejusque vice omnia disponit & moderatur.* *Spelman.*

Turbagium, The liberty of digging turfs. *Mon. Ang. Tom. 1. p. 632.*

Turbary, (*Turbaria* from *Turba*, an obsolete Latin word for turf) Is a right to dig turfs on a common or in another man's ground. *Kitch. 94.* Also it is taken for the place where turfs are digged: And *turbus* hath been used for the *turf*, and *turbarius* for the *turbary*.

Turbets, May be imported as they might have been before 10 & 11 W. 3. 1 Geo. 1. Stat. 2. c. 18.

Turkey Company of merchants, having divers factories abroad, and which carry on great trade to Turkey, &c. created in the time of Queen Elizabeth. See *Merchant.*

Turkins, A kind of sky-colour'd cloth, mentioned in *Stat. 1 R. 2. c. 8.*

Turn, or **Tourn,** Is the King's leet through all the county; of which the sheriff is judge, and this court is incident to his office; wherefore it is called the *sheriff's tourn*: And it had its name originally from the sheriff's taking a *turn* or circuit about his shire, and holding this court in several places; for the word *turn* properly taken, doth not signify the court of the sheriff, but his perambulation. *Crompt. Jurisd. 230. 4 Inst. 260. 2 Hawk. P. C. 55.* The *turn* is a court of record; and by the Common law, every sheriff ought to make his *turn* or circuit throughout all the hundreds in his county, in order to hold a court in every hundred for redressing common grievances, and preservation of the peace; and this court might be holden at any place within the hundred, and as often as the sheriff thought fit: But this having been found to give the sheriff too great power of oppressing the people, by holding his court at such times and places at which they could not conveniently attend, and thereby increase the number of his amercements; by the *Stat. of Magna Charta, cap. 35.* it was enacted, That no sheriff shall make his *turn* through a hundred but twice in a year, *viz.* once after *Easter*, and once after the feast of St. Michael; and at the place accustomed: Also a subsequent statute ordained, That every sheriff shall make his *turn* yearly, one time within the month after *Easter*, and another time within the month after *Michaelmas*; and if they hold them in any other manner, they shall lose their *turn* for that time. 37 Ed. 3. cap. 15.

Since these statutes, the sheriff is indictable for holding this court at another time, than what is therein limited, or at an unusual place: And it has been held, that an indictment found at a sheriff's *turn*, appearing to have been holden at another time, is void. *Dalt. Sher. 390, 391. Dyer 151. 38 Hen. 6.*

At Common law the sheriff might proceed to hear and determine any offence within his jurisdiction, being indicted before him, and requiring a trial, till sheriffs were restrained from holding pleas of the crown by *Magna Charta, cap. 17.* But that statute doth not restrain the sheriff's *turn*, from taking indictments or presentments, or awarding process thereon; tho' the power of awarding such process being abused, was taken from all the sheriffs (except those of London) by the 1 Ed. 4. c. 2. and lodged in the justices of peace at their sessions, who are to award process on such indictments delivered to them by the sheriff, as if they had been taken before themselves, &c. 2 Hawk. 57, 70, 71.

The sheriff's power in this court is still the same as anciently it was, in all cases not within the statutes above mentioned; he continues a judge of record, and may inquire in his *turn* of treasons and felonies, by the Common law; as well as the lowest offences against the King, such as purprestures, seizures of treasure trove, of waifs, eltrays, goods wrecked, &c. All common nuisances and annoyances, and other such like offences; as selling corrupt victuals, breaking the assize of beer and ale, or keeping false weights or measures, are here indictable; also all common disturbers of the peace, barretors, and common oppressors; and all dangerous and suspicious persons, &c. And the sheriff in his *turn* may impose a fine on all such as are guilty of contempts in the face of the court; and upon a tutor to the court making default, or refusing to be sworn on the jury; or on a bailiff not making a panel; or a tithingman neglecting to make his presentment; or a person whose constable refusing to be sworn, &c. And he may amerce for offences; which fines and amercements are leviable and recoverable by distress, &c. *Id.* 58, 60, 67. But notwithstanding this it has been observed, that great part of the business of the *turn* and *leet*, in several years past, through the negligence of sheriffs and stewards, devolved on the *quarter sessions*. *Wood's Inst.* See *County-Court*, and *Court-Leet*.

Turnips. Penalties on stealing turnips, 23 Geo. 2. c. 26. s. 13.

Turno Vicecomitum. Is a writ that lieth for those that are called to the *sheriff's turn* out of their own hundred. *Reg. Orig.* 173.

Turnpikes. There are statutes continually made for erecting turnpikes for repairing ways; empowering justices of peace and other commissioners to appoint surveyors of the roads to amend the same; and also collectors of the toll at the places where the turnpikes are set up.

Now by the *stat.* 7 Geo. 3. c. 40. all the laws relative to the turnpike roads are reduced into one law. The substance of that act is as follows:

By *sect.* 1. Five or more trustees for turnpike roads, at a general meeting, are empowered to erect weighing engines, for weighing carriages; and to take 20 s. (additional tolls) for every hundred weight which every narrow four wheel'd carriage, with the loading, shall weigh above 60 C. weight. So for all broad four wheeled carriages weighing above six tons; and also for all carts, or two wheeled carriages, with broad wheels, weighing above three tons;—to be levied as the other tolls, and applied in repair of the road.

2. Not to extend to waggons, &c. having axletrees of such different lengths, that the distance from wheel to wheel (of the narrower pair) be not more than four feet two inches; and that the distance from wheel to wheel of the other pair be such that the fore and hind wheels roll only one single path of sixteen inches wide at the least, on each side, and having the fellies of the breadth of nine inches at the bottom; but that the same shall pass on any turnpike road, and through any toll gate within 100 miles from London, on paying only so much of the tolls as shall not exceed one half of the full toll payable for waggons, &c. having the fellies of the breadth of nine inches from side to side, or for the beasts of draught drawing the same, and not rolling a path of sixteen inches.

3. Nor to extend to carriages employed in husbandry.

4. Trustees are empowered to order the fellies of carriages to be gaged.

5. No composition for tolls to be made in respect of narrow wheeled carriages.

6. Penalty of 5 l. on fraudulently unloading goods at or before the same come to any gate or weighing engine; or laying on goods after having passed the same;—the driver to be committed for one month: And collectors neglecting their duty are to be discharged, or forfeit 5 l. at the option of trustees.

7. No waggon, &c. shall pass along any turnpike road, above 20 miles from London or Westminster, having the fellies of the breadth of nine inches at the bottom, unless the same be made in such manner, that no pair of wheels (except such as roll a surface of sixteen inches) be wider

than four feet six inches from inside to inside; and that the distance from the centre of the fore to the centre of the hind wheel of such waggon, &c. (not being used for carriage of timber only) be not above nine feet; on forfeiture of 5 l. by the owners.—Officers are required to measure such carriages:—5 l. penalty on obstructing them, &c.

8. No broad wheeled waggon, &c. to be drawn with more than eight horses; nor two wheeled carriages with more than five;—*in pairs*. Narrow four wheel'd carriages not to be drawn with more than four horses, &c. nor two wheel'd carriages with more than three;—on forfeiture of 20 s. and the supernumerary horses. *v. sect.* 13.

9. Five pounds penalty on fraudulently taking off any horse, or altering the distance of the wheels, before coming to any gate, &c.

10. And a driver travelling with more horses the same day, than he shall have passed through any gate with, shall be deemed guilty of a fraud.

11. Provided that where it is necessary, trustees may allow waggons, &c. with broad wheels to be drawn up hills by ten horses; and narrow wheel'd carriages by six.—the extent of the hills to be specified in the order of allowance, which is to be certified to the general quarter sessions: And the order, if approved, is to be confirmed, and filed; otherwise to be vacated; and after such confirmation and filing, no person shall be liable to any penalty for using such number of horses, as shall be allowed.

12. Provided also, that if it appear, that any waggon, &c. could not by reason of deep snow or ice, be drawn with the respective weights, and by the number of horses allowed; then it shall be lawful to stop all proceedings for recovery of any penalty which may have been incurred by drawing with more horses than allowed.

13. Narrow wheel'd carriages not to be drawn by horses in pairs; except four wheel'd carriages loaden with fish, rabbits, poultry, calves alive or slaughtered, or lambs only.

14. No carriage to be fraudulently turned out of a turnpike road, to avoid the tolls, on forfeiture of one of the horses, (not being the shaft horse) with all his gears and accoutrements, to the use of any person who shall seize and detain the same.

16. Driver of any waggon, &c. with wheels not duly constructed; or drawn by more horses than authorized, may be apprehended by any person, taken before a justice; and on conviction forfeits 5 l.

17. Drag irons to be flat at the sole, and of the breadth of the fellies, on forfeiture of 40 s.

18. The owner's real name and place of abode, to be painted on the *sill*, or most conspicuous part of each waggon, &c.; also the words **Common Stage Waggon** or **Cart**, as the case may be. Travelling without the owner's name and place of abode; or with a fictitious name thereon, forfeits 5 l. And without the words required, 40 s.

23. The act not to extend to "any chaise marine, coach, landau, berlin, chariot, chaise, calash, or hearse; or to any caravan, or covered carriage, or any nobleman or gentleman for his private use; or to such ammunition or artillery as shall be for his Majesty's service; or to any cart or—carriage drawn by one horse, or two oxen, and no more; or to any carriage, having the sole or bottom of the fellies of the wheels thereof less than breadth of nine inches, which shall be laden with one block of marble, one piece of metal, or one piece of timber."

24. But persons fraudulently taking the benefit of any exemption, forfeit not exceeding 5 l. nor less than 40 s.

28. Forty shillings penalty on surveyors suffering any obstruction to remain on the roads.

30. Direction posts to be set up where several highways meet; and where the highways are subject to deep or dangerous floods; and for guiding travellers in the safest tract. Mile stones also to be set up:—Expences to be defrayed out of the tolls.—Surveyors neglecting their duty herein, forfeit 20 s.

31. Penalty not exceeding 5*l.*, nor less than 10*s.* on pulling up or destroying posts or banks to be set up on the sides of the roads, for security thereof, or the parapets of bridges; or defacing mile-stones, or direction posts; or the offender may be committed and kept to hard labour, not exceeding a month, nor less than seven days, and whipt.

37. Nuisances on the road may be prosecuted at the expence of the revenues of the *turnpike*: But prosecutions are restrained, unless on offender's confession, or proof by witnesses.

48. Any seizure or distress made for any forfeiture incurred, unless by warrant, is to be delivered over to the constable till proof made of the offence before some justice; and if not made within six days after such delivery, the distress to be returned to the owner; and the seizer to pay expences of keeping; but on conviction, an order to be made for delivering the distress to the seizer.—Seizer not duly prosecuting such seizure forfeits 40*s.*

49. All convictions to be on confession; or oath of one or more witnesses:—Inhabitants competent witnesses:—Any justice (tho' a trustee) may act.

51. Penalties, &c. (not otherwise directed) are to be levied by distress and sale; one half to the informer, the other to the surveyor, towards repairs: For want of distress, &c. offender to be committed, not exceeding three months; unless the penalty, &c. be sooner paid.

53. Prosecutors or informers at liberty to sue, either as the act directs; or by action of debt for pecuniary penalties; or by action of trover for any beast of draught, or other goods, in which the forfeiture shall be sufficient evidence of property to plaintiff, he need not prove any seizure or demand; and shall have full costs:—But *ten days notice in writing*, to be given to the party offending, previous to the commencement of such action:—The same to be brought within one month after the offence.

54. Distress for money to be levied by virtue of the act, shall not be deemed unlawful, nor the party making it be deemed a trespasser, for default of form in the proceedings; nor shall the party *distraint* be deemed a trespasser *ab initio*, on account of any subsequent irregularity.

55. But no plaintiff shall recover in any action for such irregularity, if tender of sufficient amends has been made before action brought: And if no tender has been made, defendant may pay money into court before issue joined.

56. Appeal to the General Quarter Sessions, given.

60. Action against any person for any thing done in pursuance of the act, to be commenced within three months after the fact committed:—To be local.—Defendant may plead the general issue, and give the special matter in evidence:—If the action is brought after the time limited, or made *transitory*, the jury shall find for defendant; who in all cases shall have treble costs.

By this act the principal parts of all the former *turnpike* acts are repealed. See *Highways*.

Turny, (Fr. *Tourney*) Mentioned in the Stat. 24 H. 8. c. 13. See *Tournament*.

Tutors, The statute relating to, 13 & 14 Car. 2. c. 4. Vide *Schoolmaster*.

Twalte, Signifies a wood grubbed up, and converted to arable land. Co. Litt. 4.

Twaight Geste, (*Hostes Duorum Noctium*) Was a guest at an inn a *second Night*; and if he did any injury to any person, he was to answer for it himself; and not his host, as in case of a *third Night's Awnbinde*. Sax. Lex.

Twelthind (Sax.) The highest rank of men, in the Saxon government, who were valued at 1200 shillings; and if an injury were done to such persons, satisfaction was to be made according to their worth. Leg. King Alfred, cap. 12, 13, &c. and of King H. 1. c. 76.

Twelve Men, (*Duodecimo homines legales*) Is a number of twelve persons or upwards, by whom and whose oath as to matter of fact all trials pass, both in civil and criminal causes, through all courts of the Common law in this

realm: They are otherwise called the *jury* or *inquest*. See *Jury*.

Two Witnesses, *When necessary*. In all cases of high treason, petit treason, and misprision of treason, by Statutes 1 Edw. 6. c. 12. 5 & 6. Edw. 6. c. 11. & 1 & 2 Ph. & Mar. c. 10. Two lawful witnesses are required to convict a prisoner; except in cases of coining, and counterfeiting the seals; or unless the party willingly, and without violence confess the same. Such confession, by Stat. 7 W. 3. c. 3. must be in open court.—See the Statutes and 1 Hal. P. C. 297. Stat. Tr. 2 V. 144. Foster 235. Black. Com. 3 V. 350. And see also *Suppletory Oath*.

Twophind (Sax.) Were the lower order of Saxons, valued at 200*s.* as to pecuniary mulcts inflicted for crimes, &c. Leg. Alfred. c. 12.

Typtian, An accusation, impeachment, or charge, of any trespass or offence. Leg. Ethelred. c. 2.

Tylwith, (Brit. derived from *Tyle*, i. e. *locus ubi stetit domus*, vel *locus edificandæ domus aptus*, or from *tylath*, *trab*, *tignus*) Signifies a place whereon to build a house, or a beam in the building: And it is applied to *familia*, a tribe or family, derived forth of another, which in the old English *heraldry* is called *second or third houses*; so that in case the great paternal stock brancheth itself into several *tylwiths*, or *houses*, they carry no second or younger house farther; and the use of these *tylwiths* was to shew not only the originals of families as to the pedigree, but the several distinctions and distances of birth, that in case any line should make a failure, the next in any degree may claim their interest according to the rule of descent, &c.

Tynmouth. There is a customary descent of lands in the honour of *Tynmouth*, that if any tenant hath issue two or more daughters, and die seised in fee, the land shall go the eldest daughter for life only, and after to the cousins of the male-line; and for default thereof to escheat. 2 Keb. 111, 114.

Type, (*Typus*) A figure, example, or likeness of a thing. Litt. Dist.

Typographia, The trade of printing. Ibid.

Tythes, (*Decimæ*.) See *Tithe*.

V.

Vacant, Vacant, free, that is at leisure; also void. Litt. Dist.

Vacaria, A void place, or waste ground:—*Dedimus omnia dominica nostra vacariis, & forestis, &c.* Mem. in Scacc. Mich. 9 Edw. 1.

Vacat, See *Judgment*, and 21 Vin. Abr. 536.

Vacating Records. Imbezzling or *vacating records*, or falsifying certain other proceedings in a court of judicature, is a felonious offence against public justice. See the Statutes 8 H. 6. c. 12. 21 Jac. 1. c. 26. 4 W. & M. c. 4. and Black. Com. 4 V. 128.

Vacation, (*Vacatio*) Is all the time between the end of one term and the beginning of another; and it begins the last day of every term as soon as the court rises. The time from the death of a bishop, or other spiritual person, till the bishoprick or dignity is supplied with another, is also called *vacation*. Stat. Westm. 1. c. 21. 14 Ed. 3. c. 4. See Black. Com. 3 V. 276.

Vacatura, An avoidance of an ecclesiastical benefice; as *prima vacatura*, the first voidance, &c.

Vaccary, (*Vaccaria*) Is a house or place to keep cows in; a dairy-house, or cow pasture. Fleta, lib. 2.

Vaccarius, The cow-herd, who looks after the common herd of cows. Ibid.

Vadare Duellum, To wage a combat, where two contending parties on a challenge give and take a mutual pledge of fighting. Corwell.

Vadium ponere, Is to take security, bail, or pledges for the appearance of a defendant in a court of justice.—

Præcipimus tibi, &c. quod ponas per vadium & salvas plegios Johannem de B. &c. Reg. Orig.

Vadium Mortuum, A mortgage or pawn of lands so engaged to the creditor, that he hath a right to the mean profits for the use of his debt. Glanvil. lib. 10. cap. 8. See Black. Com. 2 V. 157.

Vadium

Adium bibum. A living pledge, as when a man borrows a sum of another, and grants him an estate, as of 20*l.* per annum, to hold until the rents and profits shall repay the sum borrowed. *Black. Com.* 2 V. 157.

Vagabond, (Vagabundus) One that wanders about, and has no certain dwelling; an idle fellow: And rogues, *vagabonds*, and sturdy beggars, are mentioned in divers statutes. See *Vagrants*, and *Black. Com.* 4 V. 170.

Vagrants, (Vagrantes) By the statute 17 Geo. 2. c. 5. They, who threaten to run away and leave their wives or children to the parish; or unlawfully return to a parish from whence they have been legally removed; or, not having wherewith to maintain themselves, live idle, and refuse to work for the usual wages; and all persons going from door to door, or placing themselves in streets, &c. to beg in the parishes where they dwell, shall be deemed *idle and disorderly persons*. All persons going about as patent gatherers, or gatherers of alms, under pretence of losses by fire, &c. or as collectors for prisons, &c. all fencers and bearwards; all common players of interludes, and persons who for hire, gain, or reward act, represent, or perform, or cause to be acted, or represented, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any part therein, not being authorised by law; all minstrels, jugglers; all persons pretending to be *gypsies*, or wandering in the habit or form of *Egyptians*, or pretending to have skill in physiognomy, palmistry, or other crafty science, or to tell fortunes, or using any subtle craft to deceive and impose on a person; or playing or betting at any unlawful games or plays; and all persons, who run away and leave their wives and children, whereby they become chargeable to any parish; all pedlars not duly licensed; all persons wandering abroad and lodging in ale-houses, barns, outhouses or in the open air, not giving a good account of themselves; and all persons wandering abroad, and begging, pretending to be soldiers, mariners, or pretending to go to work in harvest, not having proper certificates; and all other persons wandering abroad and begging; and all persons going from door to door, or placing themselves in streets, &c. to beg in the parishes where they dwell, and being apprehended for the same, shall resist or escape, shall be deemed *rogues and vagabonds*.

All end-gatherers offending against the Stat. 13 Geo. 1. c. 23. being convicted; all persons apprehended as rogues and vagabonds, and escaping, or refusing to go before a justice, or to be examined upon oath before such justice, or refusing to be conveyed by pass; or giving a false account of themselves after warning of the punishment; and all rogues or vagabonds breaking or escaping out of any house of correction; and all persons who having been punished as rogues and vagabonds shall again commit any of the said offences, and offenders against this act having children with them, (and such children being put out apprentices or servants pursuant to this act) being again found with the same children, shall be deemed *incorrigible rogues*.

The punishment of *idle and disorderly persons* is commitment to the house of correction, there to be kept to hard labour, not exceeding a month. *Rogues and vagabonds* are to be publicly whipped or sent to the house of correction until the next sessions, or any less time, and after such whipping or commitment may be passed to their last legal settlement or place of birth, or if under fourteen, and have a father or mother living, to the place of abode of such father and mother. And if committed until the next sessions and adjudged a rogue or vagabond, the justices may order him to be kept in the house of correction to hard labour not exceeding six months.

A person adjudged at the sessions an *incorrigible rogue* may be kept in the house of correction to hard labour, not exceeding two years, nor less than six months, and during the confinement be corrected by whipping, at such times and places as the justices shall think fit, and may then be passed as aforesaid: And if a male, and above the age of twelve years, the justices before his discharge may send him to be employed in the King's service, either by sea or land. If before the expiration of his confinement he shall escape from the house of correction,

or offend again in the like manner, he shall be deemed to be guilty of felony, and transported for any time not exceeding seven years.

Any person may apprehend and carry before a justice any persons going about from door to door, or placing themselves in streets, highways or passages to beg alms in the parishes where they dwell, and the justices may order the overseers of the poor to pay such person 5*s.* for every offender, which on refusal of payment may be levied on the overseers goods. Any person may apprehend an offender against this act, and carry him before a justice.

A constable refusing or neglecting to use his endeavour to apprehend any offender shall forfeit not exceeding 5*l.* nor less than 10*s.* to the use of the poor, to be levied by distress. And any other person charged by a justice of peace to apprehend such offender, refusing so to do, shall forfeit 10*s.* A justice may order the high constable to pay to any person, whether a constable or not, who shall apprehend any such offender, 10*s.* for every offender. The justices are four times in the year at least, to cause a general privy search to be made in one night, for the apprehending rogues and vagabonds.

To prevent expences in passing rogues, vagabonds and incorrigible rogues, the justice is to deliver to the officer a note directing how they are to be conveyed, whether in a cart, by horse, or on foot. The constable is to convey such person in such manner and time as by the pass is directed, the next direct way way to the place where such person is ordered to be sent, if in the same county, &c. but if in another county, &c. he shall deliver the person to the proper officer of the first town in the next county, &c. in the direct way to the place where such person is to be conveyed, together with the pass and duplicate of examination, taking his receipt for the same; and such officer is immediately to apply to a justice of peace in the same county, who is to make a like note, and deliver it to the officer, who is to convey the person to the first parish, &c. in the next county, and so in like manner from one county to another, till they come to the place where such person is sent: And if the officer who shall receive such person there, shall think the examination to be false, he may carry the person before a justice of peace, who, if he see cause, may commit such person to the house of correction, till the next sessions, where the justices, if they see cause, may deal with such person as an incorrigible rogue, but he shall not be removed but by order of two justices.

If the *vagrant* upon search be found to have effects sufficient to pay all or part of the expence of passing him, the justice may order the same to be sold and employed for that purpose. The justices at sessions may direct what rates and allowances shall be made for passing such rogues, vagabonds, &c. and make orders for the more regular proceeding therein. The high constable is to pay to the petty constable or other officer the rates so allowed, on penalty of forfeiting double the sum, to be levied by distress.

When a *vagrant* is to be passed to *Ireland*, the *Isle of Man*, *Jersey*, *Guernsey*, or *Scilly*, the master of any ship bound to those places shall, on a warrant from a justice of peace, and being paid such allowance as the justice shall think proper, receive such *vagrant* and convey him to such place, and give a receipt for the *vagrant* and money on the back of the warrant, on penalty of 5*l.* to the poor, to be levied by distress; but not to be obliged to take above one *vagrant* for every twenty tons burden of his ship. The parish to which any *vagrant* shall be passed may employ him in work till he shall betake himself to some service, and if he shall refuse to work or go to service, he may be sent to the house of correction.

By the Stat. 25 Geo. 2. c. 36. It shall be lawful for any two or more justices, in case any person apprehended, upon any general privy search, or by virtue of any special warrant, shall be charged before them with being a rogue and vagabond, or an idle and disorderly person, or with suspicion of felony (although no direct proof be then made thereof) to examine such person upon oath, not only to the parish or place where he was last legally settled, but also as to his means of livelihood, the substance

of which examination shall be put into writing, and be subscribed by the persons so examined, and the said justice shall likewise sign the same, and transmit it to the next sessions of the peace to be there filed and kept on record: And if such person shall not appear to such justices, that he has a lawful way of getting his livelihood, or shall not procure some responsible housekeeper to appear to his character, and to give security for his appearance before such justices, at some day to be fixed (if the same shall be required) to commit such person to some prison or house of correction, for any time not exceeding six days, and in the mean time to order the overseers of the poor where such person shall be apprehended, to insert an advertisement in some public paper, describing such suspicious person, and any things which shall be found upon him, and which he shall be suspected not to have honestly come by, and mentioning the place to which he is committed, and the time and place when and where such person is to be again brought before them to be re-examined; and if no accusation shall then be laid against him, then such person shall be discharged. See *Rogue, Lunatic*. For the method of conveying *vagrants*, see 26 Geo. 2. c. 34. See also *Black. Com.* 4 V. 170.

Valer, Valest, or Valelet, (Valettus vel Valesta) Was anciently a name specially denoting young gentlemen, though of great descent or quality; but afterwards attributed to those of lower rank, and now a servitor, or gentleman of the chamber. *Cam. Selden's Tit. Hon. Bract. lib. 3.* In the accounts of the *Inner Temple*, it is used for a benchers's clerk or servant; and the butlers of the house corruptly call them *Varlets*.

Valentia, The value or price of any thing. See *value*.

Valerheria, Signifies the kindred of the slain, one on the father's side, and another on the side of the mother, to prove that a man was a *Welfman*. It is mentioned in *Stat. Wallæ, 12 Edw. 1. c. 4.*

Valor maritagii. Under the antient tenures, while an infant was in ward, the guardian had the power, of tendering him or her a suitable match without *disparagement* or inequality: Which if the infants refused, they forfeited the value of the marriage, *valorem maritagii*, to their guardian; that is so much as a jury would assess, or any one would *bona fide* give to the guardian for such an alliance: And if the infants married themselves without the guardians consent, they forfeited double the value, *duplicem valorem maritagii*. This was one of the greatest hardships of our antient tenures—But, the tenures being taken away, the law is abolished. See *Black. Com.* 2 V. 70.

Valuable Consideration. Is, in a deed, &c. money, marriage, labor, &c. See *Black. Com.* 2 V. 297.

Valvasors. The first name of dignity, next beneath a peer, was antiently that of *vidames, vice domini*, or *valvasors*, who are mentioned by our antient lawyers, as *viri magnæ dignitatis*; and Sir Edward Coke speaks highly of them. Yet they are now quite out of use; and our legal antiquarians are not agreed upon even their original or antient office. See *Black. Com.* 1 V. 403. and *Valvasor*.

Value, (Valentia, Valor) Is a known word; and the value of those things as to which offences are committed, is usually comprised in indictments; which seems necessary in *theft* to make a difference from *petit larceny*, and in trespass to aggravate the fault, &c. But in other cases a distinction has been made between *value* and *price*. If a plaintiff declares in an action of trespass for the taking away of live cattle, or one particular thing, he ought to say that the defendant took them away, *pretii* so much; if the declaration be for taking of things without life, it must be alleged *ad valentiam*, &c. so that live cattle are to be prized at such a price, as the owner of them did esteem them to be worth; and dead things to be reckoned at the value of the market which may be certainly known. Of coin not current it shall be *pretii*; but of common coin current, it shall be neither said *pretii* nor *ad valentiam*, for the value and price thereof is certain: The difference between *pretii* and *ad valentiam* may proceed from the rule in the register of writs, which shows it to be according to the antient forms used in the law. *West. Symb. par. 2. 2 Lill. Abr.* 629. A jewel it is said is

not *valuable* in law, but only according to the *valuation* of the owner of it, and is very uncertain: But there seems to be a certain value for diamonds among the merchant jewellers, according to their weight and lustre, &c. *Hill. 21 Car. B. R. 2 Lill. 628.* A man cannot say that another owes him so much, when the value of the thing owing is uncertain; for which reason actions in these cases are always brought in the *detinet*, and the declaration *ad valentiam*, &c. 1 Lutw. 484. See *money*.

Value of Land. May be intended such as it was anciently, and not adjudged according to its improved value. 2 Leon. 44. Lutw. 1304. Vide *Purch. fe.*

Value of Marriage, (Valore maritagii) Was a writ that lay for the lord, having offered marriage to an infant without disparagement, if the man refused to take the lord's offer, and married another woman, to recover the value of the marriage. *Reg. Orig.* 164. This is also called forfeiture of marriage, *forisfactura maritagii*. See the statute 12 Car. 2. cap. 24.

Want, (S. v.) He wanted for me at the want, i. e. stood for me at the rent. *Blount.*

Wannus, A Vane, Venti Index; and *vannus*, a fan to winnow corn with. *Witt. Dict.*

Wantarius, (Vancurfor) As *vantarius Regis*, the King's fore receiver. *Richardus R. Miles ten. terras per serjeantiam esse wantarium regis, &c. Rot. de finibus.* Term, Mich. 2 Edw. 2.

Variance, (Variantia, from the Fr. *Varier*, i. e. *Alterare*) signifies any alteration of a thing formerly laid in a plea, or where the declaration in a cause differs from the writ, or from the deed upon which it is grounded, &c. 2 Lill. Abr. 629. If there is a variance between the declaration and the writ, it is error; and the writ shall abate. And if there appear to be a material variance between the matter pleaded and the manner of the pleading it, this is not a good plea; for the manner and matter of pleading ought to agree in substance, or there will be no certainty in it. *Cro. Jac.* 479. 2 Lill. 629. But when the pleading is good in substance, a small variance shall not hurt. 3 Mod. 227. If the record of *Nisi Prius* agrees with the declaration delivered, a variation from the issue is not material. 2 Strange 1131. Where the original writ varies from the declaration, it is not remedied by any statute of *Jeofails*. 5 Rep. 37. Though verdict in ejectment was for a messuage next the messuage of A. B. and the judgment for a messuage next another messuage in the occupation of A. B. This is no material variance, but is amendable by the Stat. 16 & 17 Car. 2. cap. 8. which enacts, That all omissions, variances, &c. not being against the right of the matter of the suit, shall be amended. *Raym.* 398. 3 Salk. 368. The original writ in C. B. concluded *ad damnum* 40*l.* and the declaration was *ad damnum* 100*l.* The jury gave 12*l.* damages; and on a writ of error brought, this variance was assigned; it was held that this had been a good objection in the original action on a demurrer to the declaration; but it is not so after verdict; not being matter in point of judgment, especially as the jury found only 12*l.* damages; but if the verdict had found more damages than what was mentioned in the writ, though less than what was set forth in the declaration, it had been ill, because there was no writ to warrant such damages. 2 Cro. 629. 1 Bull. 49.

If a defendant pleads a variance between the writ and declaration, he is to crave over of the writ before he shall have any advantage of the variance, because the writ and declaration are not upon the same roll; and therefore if the defendant plead to it without demanding over, on demurrer judgment may be for him to answer over, &c. 2 Salk. 658. If in the imparlance roll the declaration is indebt, and in the plea-roll it is in trespass; this is such a variance, that if the plaintiff hath judgment it shall be reversed. 3 Bull. 229. When a contract is intire, an action of debt cannot be brought for part of the money, without shewing how the other is satisfied; if it be, this variance from the true debt will make it ill. 3 Nels. Abr. 440.

In writ of error in the Exchequer chamber to remove a record out of B. R. of a certain trespass the husband and wife had done, the record certified was of a trespass done by the woman alone; and for this variance the

writ

writ was abated, and the record judged not removed. *Sid.* 269. 3 *Salk.* 369. If a lease be alledged to be made by two persons, and it appears on evidence they were tenants in common, and so several leases; it is a material variance: But on its appearing that the two lessors were coparceners, it will be otherwise, for it is there a lease of them both. 2 *Roll. Abr.* 719.

On variance in the persons or number of acres, &c. between a fine and an indenture to lead the uses; if the party avers, there was not any other consideration, or new agreement, but that the fine was levied according to the uses and intents mentioned in the indenture, it is good. 5 *Rep.* 25. Variance of the sum in a judgment, not cured by a remittit. 2 *Strange* 1171. A slight variance fatal in the name of a corporation. 2 *Strange* 787. Variance in the christian name of an earl immaterial. 1 *Strange* 316. *Segrave* and *Seagrave* no material variance upon an issue of null tiel record. 2 *Strange* 889. Variance in names, &c. how supplied by averment, that a man is the same person, and inquest of office, &c. See *Averment*, and *Pardon*. Vide *Amendment* and *Cam. Dig.* tit. *Verdict*.

Vassal, (*Vassallus*) In our ancient customs signified a tenant or feudatory; or person who vowed fidelity and homage to a lord, on account of some land, &c. and of him in fee; also a slave or servant, and especially a domestick of a prince. *Du Cange*. *Vassalus* is said to be quasi inferior socius, as the vassal is inferior to his lord, and must serve him; and yet he is in a manner his companion, because each of them is obliged to the other. *Skene*. See *Black. Com.* 2 *V.* 53.

Vassalage, Signifies the state of a vassal, or servitude and dependency on a superior lord: *Liege vassalage* belonged only to the King.

Vassalicia, Was the tenure of holding of vassals. *Cowel*.

Waste, Is a writ that lies against tenants for term of life or years, committing waste. *F. N. B.* 55. *Reg. Orig.* 72. See *Waste*.

Wastum, A waste or common lying open to the cattle of all tenants who have a right of commoning. *Paroch. Antiq.* 171.

Wastum forestae vel bosci, That part of a forest or wood, wherein the trees and underwood were so destroyed, that it lay in a manner waste and barren. *Paroch. Antiq.* p. 351.

Vavafors, Is one who was in dignity next to a baron. *Camd. Brit.* 109.—*Sunt & alii Potentes Regni, qui dicuntur Barones hoc est, robur belli: et alii sunt qui dicuntur Vavafores, Viri Magnae Dignitatis, &c.* *Bract. lib.* 1. cap. 8. *Spelm. Gloss.* See *Vavafors*.

Vavaforia, (*Vavaforia*) The lands that a Vavafor held. *Bract. lib.* 2.

Ubiquity of the King. The legal ubiquity of the King is a consequence of his prerogative. His Majesty, in the eye of the law, is always present in all his courts, though he cannot personally distribute justice. His judges are the mirror by which the King's image is reflected. It is the regal office, and not the royal person, that is always present in court, always ready to undertake prosecutions, or pronounce judgment, for the benefit and protection of the subject. And from this ubiquity it follows, that the King can never be nonsuit; for a nonsuit is the desertion of the suit or action by the non-appearance of the plaintiff in court. For the same reason also, in the forms of legal proceedings, the King is not said to appear by his attorney, as other men do; for he always appears in contemplation of law in his own proper person. *Black. Com.* 1 *V.* 270.

Went Money, The tenants within the manor of *Bradford*, in the county of *Wilts*, pay a yearly rent by this name to their lord, in lieu of *went* paid formerly in kind. *Blount's Ten.*

Wettigat Justiciarium, Is applied to money or fines paid to the King, to defray the charge he is at in maintaining the courts of justice, and protection of the people. 3 *Salk.* 33.

Wetours, (*Vifores*, from the Fr. *Vetor*, i. e. *Cernere*) Are such persons as are sent by the court, to take a view of any place in question, for the better decision of the

right thereto. And it is used for those that are appointed to view an offence; as a man murdered, a woman ravished, &c. *Old Nat. Br.* 112. *Bract. lib.* 5.

Veltrai, (*Ministerium de Veltraria*) The office of dog-leader or a courser. *Rot. Pip.* 4 *1176*.

Veltraias, One who leads greyhounds, which dogs in Germany are called *Welters*, in Italy, *Velures*, &c. And lands are held *per servitium inveniend. unum veltrarium Canes ducere*, &c. *Blount's Tenures*, pag. 9.

Velum quadragesimale, A veil or piece of hangings, drawn before the altar in Lent, as a token of mourning and sorrow.—*Item ad quodlibet altare, &c.* *Velum quadragesimale, Velum Nuptiale, Pallia Mortuorum, &c.* *Synod. Exon. Anno* 1217.

Venaria, Are those beasts which are caught in the woods by hunting. *Leg. Canut. c.* 108.

Venatio, In the statute of *Charta de Foresta* signifies *Venison*, in Fr. *Venaison*: It is called *Venaison*, of the means whereby the beasts are taken, *quoniam ex venatione capiuntur*, and, being hunted are most wholesome: And they are termed beasts of *venery* (not *venery*) because they are gotten in hunting. 4 *Inst.* 316.

It is sometimes taken for the exercise of hunting.

Venditioni exponas, Is a judicial writ, directed to the sheriff, commanding him to sell goods which he hath formerly taken into his hands, for the satisfying a judgment given in the King's court. *Reg. Judic.* 33. *Stat.* 14. *Car.* 2. cap. 21. The sheriff upon a *fieri facias* takes goods in execution, and returns that he hath so done, and cannot find buyers; or if he delay to deliver them to the party, &c. then the writ *Venditioni exponas* shall issue to the sheriff, to make sale of the goods, and bring in the money. 13 *H. 7.* 1. *Dyer* 363. If a *Superfedeas* be not delivered to the sheriff till he hath in part executed a writ of execution, he may afterwards be authorized to go through with it by a *Venditioni exponas*; as he may also in the like case after a writ of error. *Dyer* 98. *Cro. Eliz.* 597. 1 *Roll. Abr.* 894.

Venditor Regis, The King's saleman; being the person who exposed to sale goods and chattels seized or distrained to answer any debt due to the King: This office was granted by King *Edw. 1.* to *Philip de Lardimer*, in the county of *York*: *Item quod ipse vel certus suus attornatus ibit ad mandatum vice-comitis de loco in locum infra compred. sumptibus suis ad predictas venditiones faciendas, & capiat de unaquaque venditione pro feodo suo xxxii den.* But the office was seized into the King's hands for the abuse thereof. *Anno* 2 *Ed.* 2.

Vendo, and **Vendee**. *Vendo* is a person who sells any thing, and *vendee* the person to whom it is sold. Where a man sells a thing to another, it is implied that the vendor shall make assurance by bill of sale to the vendee, but not unless it be demanded; per *Finch Chancellor*. 2 *Chan. cases* 5. *Mich.* 32. *Cur.* 2. *Legate v. Hochwood*. See 21 *Vin. Abr.* tit. *Vendor and Vendee*.

Venella, Is a narrow or strait way: It is mentioned in the *Monast.* 1 tom. pag. 408.

Venia, Is used for a kneeling or low prostration on the ground, by penitents. *Walsing.* 196.

Venire factas, A writ judicial awarded to the sheriff to cause a jury of the neighbourhood to appear, when a cause is brought to issue, to try the same; and if the jury come not at the day of this writ, then there shall go a *habeas corpus*, and after a *disseise* until they appear. *Old Nat. Br.* 157. But where a *venire* omits part of the issue to be tried, or any of the parties; if a jury is named in the *habeas corpus*, by a name different from that in the *venire*; or a jury returned on such a panel is omitted in the *habeas corpus*; or a *venire* or *disseise* are issued without any award on the roll to warrant them; it will be ill, and it is said to be a discontinuance. 2 *Harok. P. C.* 298, 299. A *venire factas* ought to be de aliquo adductis; and *venire de vicinis clivibus*, is good without naming of the parish within the city or of which the jurors are summoned. 2 *Lill.* 633, 636. Though it hath been held, that the *venire factas* may be of a town, parish, manor, or any place known; called a *venia town*; but not of a city or county. *Cro. Eliz.* 280. And yet where a *venire* cannot come from a vill, hamlet, &c. there it might be de corpore communitatis, to prevent

vent failure of justice, before the statute 4 & 5 Ann. c. 16. By which a *venire facias* may be from the body of the county, &c. In an information against a county for not repairing a bridge, it was held, that the attorney general might take *venire* to any adjacent county; and that it might be *de corpore* of the whole, or *de vicineto* of some particular place therein next adjoining. *Trin.* 3 Ann. 3 Salk. 381.

The plaintiff in *assumpsit* declared upon a promise made at Maidstone in Kent; and upon *non assumpsit* pleaded, the *venire facias* was *de vicineto villa & parochia de Maidstone*, and a trial was had: But it was resolved to be an insufficient trial, because the *venire* ought to be of a larger precinct than the plaintiff himself had alledged in his declaration. *Telo.* 104. And it will be error if the *venire* be short; as a defendant in trespass prescribed for a foot-way leading from Hinton so far as the foot-way of Horn-Castle, &c. Issue was taken upon this prescription, and the *venire facias* awarded *de vicineto de Hinton* only, when it should have been of Hinton and Horn-Castle; and the judgment was reversed. *Moot* 357, 412. So if in ejectment lands are laid in A. B. and C. and tried for the plaintiff by a *visne* out of A. only; this is insufficient. 5 Rep. 36. Though in action of trespass, &c. for rescuing a distress for rent, setting forth that the plaintiff made a lease of lands to the defendant, lying in three several places; the plaintiff having a verdict, it was moved in arrest of judgment, that the trial was insufficient, because the *venire* was from one place, when it ought to be from all three places where the lands lie; but adjudged, that this action being brought against a wrong doer, and not upon the lease itself, the *venire* may be laid in that very place where the wrong was done. *Lutw.* 213. but see 4 Ann. c. 16.

One *venire facias* is sufficient to try several issues, between the same parties, and in the same county. 2 Cro. 550. And where an action was brought against two, they both joined issue, and one died; and after the *venire facias* was awarded to try the issue between both, which was done; and held to be no error, though it issued against a dead person, because one of the defendants was living. *Cro. Car.* 308. 3 Nels. Abr. 444. If a *venire facias* is returned by the coroner for defect of the sheriff, &c. when it ought to be returned by the sheriff, the trial is wrong, and not remedied by any statute of jeofails. 5 Rep. 36. In all cases, where there is to be a special jury, the *venire* must be special: If the matter to be tried be within divers places, and one and the same county, the *venire facias* shall be general; and if in several counties, it shall be special. 2 Lill. Abr. 635.

If a matter of law be depending in court undetermined, and an issue also joined in the cause, there is to be a special *venire* awarded, *tam ad triandum exitum, quam ad inquirendum de dampnis*, &c. as well to try the issue, as to find the damages both upon the issue and the matter put in judgment of the court. *Ibid.* 636. The plaintiff's attorney ought to give a copy of the jury returned upon a *venire facias*, to the defendant's attorney, before the trial; and it is to be filed. *Pafib.* 24 Car. B. R. At a trial at *nisi prius*, the plaintiff changed the *venire facias* and panels, and had a jury the defendant knew not of; and ruled, that the defendant cannot be aided, if the first *venire* was not filed: And a difference was taken when the first *venire* was not filed, that he cannot be aided, because he may resort to the sheriff, and have a view of the panel, so be prepared for his challenges; but if the first *venire* was filed, then the defendant shall have a new trial. *Raym.* 79.

A *venire facias* after filed, cannot be altered without consent of parties: Though where a verdict in a cause is imperfect, so that judgment cannot be given upon it, there shall be a new *venire facias* to try the cause, and find a new verdict. 2 Lill. 634, 635. And if a plaintiff be nonsuit on a mistake in the *nisi prius* record, and the paper book and roll are right; the nonsuit may be set aside, and a *venire facias* de novo awarded, and the issue tried, &c. *Cro. Jac.* 669. A *venire facias* may be amended by the issue roll, when that is right, in some cases. 3 Nels. 446. *Venire* now little more than form.

Venire facias, Is also the common process upon any *presentment*, being in nature of a summons for the party to appear; and is a proper process to be first awarded on an indictment for any crime, under the degree of treason, felony, or maihem, except in such cases wherein other process is directed by statute: And if it appears by the return to such *venire*, that the party has lands in the county whereby he may be distrained, the distress infinite shall be awarded till he do appear; and he shall forfeit on every default, so much as the sheriff returns upon him in issues: But if a *nihil* be returned, a *capias*, *alias*, and *plurins*, shall issue, &c. 2 Hawk. 283. The *venire facias ad respondendum* may be without a day certain, because by an appearance the fault in this process is cured; but a *venire facias ad triand. exitum* must be returnable on a day certain, &c. 3 Salk. 371.

Venire facias tot Matronas, Is mentioned in *Lambard's Eiren.* lib. 4. See *Ventr. inspiciendo*.

Venitane, Is the book of Ecclesiasticus; so called because of the *Venite Exultemus Domino* *Jubilate Deo*, &c. writ in the hymn-book or psalter as it is appointed to be sung, &c. It often occurs in the history of our English synods; and is called *Venitarium*. Mon. Ang. Tom. 3. pag. 432.

Venter, signifies the belly; but it is also used for the children by a woman of one marriage: There is in law a *first and second venter*, &c. where a man hath children by several wives; and how they shall take in descents of land, vide *Descend.*

Ventre inspiciendo, Is a writ to search a woman that saith she is with child, and thereby with-holdeth lands from the next heir: The trial whereof is by a jury of women. *Reg. Orig.* 227. The law hath provided this writ for the benefit of right heirs, *contra partus supposititios*; and it is sued out of Chancery, and returnable in the Common pleas, &c. And if a man having lands in fee-simple, or fee-tail, dieth, and his wife soon after marries again, and feigns herself with child by her former husband, in this case, though she be married, the writ *de ventre inspiciendo* doth lie for the heir against her. 2 Lill. Abr. 631. Thomas de Aldbam of Surry, brother of Adam de Aldbam, Anno 4 Hen. 3. claimed his brother's estate: But Joan, widow of the said Adam, pleaded she was with child; whereupon the said Thomas obtained the writ *venire inspiciendo* directed to the sheriff—*Quod assumptis tecum discretis & legalibus militibus & discretis & legalibus mulieribus de comitatu tuo in propria persona accedas ad ipsam Joannam, & ipsam a prædictis mulieribus coram præfatis militibus videri facias, & diligenter tractari per ubera & ventrem, & inquisitionem factam certificari facias sub sigillo tuo & sigillo duorum militum justiciarii nostri apud Westm.* &c. And in Easter term 39 Elin. this writ was sued out of the Chancery into C. B. at the prosecution of Percival Willoughby, who had married the eldest of the five daughters of Sir Francis Willoughby, who died without any son, but left a wife named Dorothy, that at the time of his death pretended herself to be with child by Sir Francis; which if it were a son, all the five sisters would thereby lose the inheritance descended unto them; which writ was directed to the sheriffs of London, and they were commanded to cause the said Dorothy to be viewed by 12 knights, and searched by 12 women, in the presence of the 12 knights, *ut ad triandum per ubera & ad ventrem inspiciendum*, whether she were with child, and to certify the same to the court of Common pleas; and if she were with child, to certify for how long in their judgments, *et quando sit paritura*; upon which the sheriffs accordingly caused her to be searched, and returned that she was twenty weeks gone with child, and that within twenty weeks more *fuisset paritura*: Thereupon another writ issued out of C. B. requiring the sheriffs safely to keep her in such a house, and that the doors should be well guarded; and that every day they should cause her to be viewed by some of the women named in the writ, and when she should be delivered, that some of them should be with her to view her birth, whether it be male or female, to the intent that there should be no falsity: And upon this writ the sheriffs return'd, That they had caused her accordingly to be kept and

and view'd, and that such a day she was delivered of a daughter. *Cro. Eliz.* 566.

In *Moor* 523. pl. 692. it is said the sheriffs of London, with a jury of women, whereof two were midwives, came to the lady's house, and into her chamber, and sent to her the women, sworn by the sheriffs before, to search, try, and speak the truth whether she was with child or not. The men all went out, and the women searched the lady, and gave their verdict that she was with child; whereupon the sheriffs returned the writ accordingly.

In the 22d year of K. James 1. the widow of one *Duncomb* married within a week after the death of her first husband, and his cousin and heir brought the writ *ventre inspiciendo* directed to the sheriff of L. who returned that he had caused her to be searched by such matrons who found her with child, *et quod paritura fuit* within such a time; and thereon it was prayed, that the sheriff might take her into his custody, and keep her till she was delivered, but because she ought to live with her husband, they would not take her from him; but he was ordered to enter into a recognizance not to remove her from his dwelling-house, and a writ was awarded to the sheriff to cause her to be inspected every day by two of the women which he had returned, had searched her, and that three of them should be present at her delivery, &c. *Cro. Jac.* 685. These two last cases are notable precedents of the form of prosecuting these writs: And where women condemn'd for crimes, who plead their bellies, pretending to be with child, are to be viewed, and tried by a jury of matrons, see *Repricue*, and 1 *Black. Com.* 456.

Venue, (*Vicinitum*, or *Visnetum*) Is taken for a neighbouring place, *locus quem vicini habitant*: It is the place from whence a jury are to come for trial of causes. *F. N. B.* 115. In actions of trespass and ejectment, the *venue* is to be from the vill or hamlet where the lands in question do lie: And in all real actions, the *venue* must be laid in that county where the thing is for which the action is brought. 2 *Lill. Abr.* 634, 635. But the judges may in all transitory actions, alter the *venue* from the place where by the law it otherwise should be, if they believe through any just cause, there cannot be an indifferent trial in the county the *venue* was first laid in; though if a defendant will move to change the *venue*, he must make *affidavit* that the cause of action (if any be) did arise in the county where he would have the *venue* to be, or elsewhere, and not in the county where the plaintiff hath laid his action: And if upon a motion the court orders the *venue* to be altered, the plaintiff is to alter his declaration, and lay his action in the other county, &c. *Mich. 22 Car. B. R.* Motion to change a *venue* must be within eight days after the declaration delivered; but this rule is not strictly observed: It is never granted after the rules for pleading are out; and it is a rule not to change a *venue* where necessary evidence arises in two counties to support the action, if the plaintiff will be bound to give some material evidence in the county where he laid his action. 2 *Salk.* 668, 669. If the defendant is a barrister or attorney, on motion the *venue* shall be changed into *Middlesex*, and where an attorney is plaintiff, and lays his action in *Middlesex*, there the *venue* shall continue. *Ibid.* Where an attorney is defendant he may change the *venue* into *Middlesex*. 2 *Strange* 1049. But not where there is another defendant joined with him. 1 *Strange* 610. A barrister may lay the *venue* in *Middlesex*. 2 *Strange* 822. The want of a *venue* is only curable by such a plea which admits the fact, for the trial whereof it was required to lay a *venue*. 3 *Salk.* 381. Vide *Venire facias*.

It is a general rule that the county in the margin of a declaration will help the *venue* laid in the body of it, but will not hurt it. See 1 *Barnes's Notes*, 345.

It is to be observed however, that in all real actions the *venue* ought to be laid in that county where the thing is for which the action is brought; for being local, it is only triable there; whereas matters which are transitory may be tried in any county. 2 *Lil. Abr.* 782.

With respect to criminal cases it is ordained by the statute 21 *Jac.* 1. cap. 4. that all informations on penal statutes shall be laid in the counties where the offences were committed. See the statute 21 *Jac.* 1. c. 4. and see 5 *New Abr.* 327, 329. See *Black. Com.* 3 V. 294, 484.

Verderer, (*Viridarius*, from the Fr. *Verdeur*, i. e. *Custos Nemoris*) Is an officer in the King's forest, whose office is properly to look to the *vert*, and see it well maintained; and he is sworn to keep the assises of the forest, and view, receive, and inrol the attachments, and presentments of trespasses of *vert* and venison, &c. *Manwood par.* 1. pag. 332.

Verdict (*Vereditum*, quasi dictum Veritatis) Is the answer of a jury given to the court, concerning the matter of fact in any cause committed to their trial; wherein every one of the twelve jurors must agree, or it cannot be a *verdict*: And the jurors are to try the fact, and the judges to adjudge according to the law that ariseth upon it. 1 *Inst.* 226.

Verdicts are either *general* or *special*. A *general verdict* is that which is brought into the court in like general terms to the general issue; as if a defendant pleads Not guilty, or *nul tort*. then the issue is general, whether he be guilty, or the fact be a wrong or not; which being committed to the jury, they upon consideration of the evidence, say for the plaintiff, that the defendant is guilty of a wrong, or for the defendant, that it is no wrong, &c. A *special verdict* is where they find the matter at large, according to the evidence given, that such a thing is done by the defendant; and declaring the course of the fact, as in their opinions it is proved, pray the judgment of the court as to what the law is in such a case. *S. P. C.* 1 *Inst.* 227. And a *fact* may be found *specially*, viz. Where a person is indicted of murder; the jury may bring him in guilty of manslaughter, &c. Or they may leave the matter to the judges, in which cases sometimes it is referred to the Lord Chief Justice of B. R. and all the judges, to determine it; wherein 'tis said a recorder of London who tried a prisoner hath given his opinion; and the King himself, to whom the matter was reported. (*Sed quæ*) 3 *Lev.* 255. 2 *Nels. Abr.* 97.

There are likewise *publick* and *privy verdicts*: *Publick*, when given in open court; and *privy*, when given out of the court, before any of the judge thereof; and is called *privy*, being to be kept secret from the parties 'till affirmed in court. 1 *Inst.* 227. But a *privy verdict* is in strictness no *verdict*; for it is only a favour which is allowed by the court to the jury for their ease: The jury may vary from it, and when come into court give a contrary *verdict*; but this must be before the *privy verdict* is recorded. 5 *Mod.* 351. 1 *Inst.* No *privy verdict* can be given in criminal matters, which concern life, as felony, &c. but it must be openly in court; because the jury are commanded to look upon the prisoner, when they give their *verdict*, and so the prisoner is to be there present: But in criminal causes, where the defendant is not to be personally present at the time of the *verdict*, and in informations, a *privy verdict* may be given. *Raym.* 191. 1 *Ventr.* 97.

A *special verdict* may be given in criminal or civil cases; and where the court directs the jury to find a *special verdict* in a civil cause, one of the counsel on each side agree upon notes for it, and draw them up and set their hands to them; and then they are to be delivered to the jury in convenient time, or the court will take a *general verdict*: If at the prayer of the plaintiff or defendant, a *special verdict* is ordered to be found, the party praying it is to prosecute the *special verdict*, that the matter in law may be determined; and if either party delay to join in drawing it up, and pay his part of the charges, or if the counsel for the defendant refuses to subscribe the *special verdict*, the party desiring it shall draw it up and enter it *ex parte*. 2 *Lill. Abr.* 645, 653. Where the parties disagree, or the *special verdict* is drawn contrary to the notes agreed upon, the court on motion will rectify it; and the court may amend a *special verdict*, to bring the special matter in question: Though if a matter of fact be

left out in the notes of the special *verdict* drawn by counsel, this cannot be amended afterwards. *Ibid.* 646.

The plaintiff and defendant are both of them to appear in court to hear a special *verdict*, and the jury is to be called and to have a special *verdict* read unto them by the secondary; and upon the reading of it, if there be any mistake in the drawing it up, the counsel on either side may except against it; and when the counsel are agreed, then the secondary demands of the jury, whether they agree to find it so; and if they answer they do, the *verdict* is found; and it is to be afterwards entered, &c. *Pasch.* 23 *Car. B. R.* 2 *Lill.* 646. A special *verdict*, though agreed to by the counsel, &c. is not a special *verdict* till allowed by the court. *Ibid.*

In all cases and all actions, the jury may give a general or special *verdict*; and the court is bound to receive it, if pertinent to the point in issue; and if the jury doubt, they may refer themselves to the court, but are not bound so to do. 3 *Salk.* 373. Though the plaintiff and defendant in a cause consent to have the jury find a special *verdict*, yet they may find a general *verdict*; but this is not usual: And if the jury will take upon them to find, against the directions of the court, any thing in matter of law, the court will receive the *verdict*; but if they give a false *verdict*, they are liable to attain. *Pasch.* 23 *Car.*

The ancient course of laying a fine on jurors, barely for giving a *verdict* contrary to the directions of the court, is condemned as illegal, and disused: And it is the same if the *verdict* be given against evidence; for the jury may give it against evidence, if they know the facts themselves. *Kel.* 50, 58. If jurors eat or drink any thing at the charge of him for whom they give their *verdict*, before they are agreed; or if by casting of lots they find for the plaintiff or defendant; or if any writing, letter, &c. be delivered by the plaintiff, or in his behalf to the jury, concerning the matter in issue, after the jury are gone from the bar, and the *verdict* is found for the plaintiff; or either of the parties, their attorneys or solicitors, speak any thing to the jury before agreed on their *verdict*, which relates to the cause; as that 'tis a clear cause, or I hope you will find for such a person; or if any witness be sent for by the jury, after gone from the bar, and he repeats his evidence again, &c. In these cases the *verdict* shall be void and set aside: But though where the jury eat and drink at the charge of the plaintiff, and the *verdict* being found for him, it is void; it is not so if given for the defendant: And if the plaintiff, after the jury are gone from the bar, deliver any writing to any of the jurors, although the *verdict* shall be void if given for the plaintiff; it is otherwise if given for the defendant, and *vice converso*, &c. Also if the jury have eat or drank after they went from the bar, and before they gave their *verdict*, this ought to be shewn before the *verdict* is given. 1 *Inst.* 227. 1 *Ventr.* 125. 2 *Lev.* 140. *Moor* 17. 3 *Nels. Abr.* 454.

A jurymen withdrawing from his fellows, or keeping them from giving their *verdict*, without giving good reason for it shall be fined; but if he differ from them in judgment, he shall not: And although jurymen are punishable for misdemeanors, every misdemeanor of the jury before they give their *verdict*, is not a sufficient cause to make void the *verdict*. *Dyer* 53. 2 *Lill. Abr.* 647. If one of the jury that found a *verdict*, were outlawed at the time of the *verdict*, it is not good: And where a *verdict* is given by thirteen jurors, it is said to be a void *verdict*; because no attain will lie. 2 *Lill.* 644, 650. If there be eleven jurors agreed, and but one dissenting, the *verdict* shall not be taken, nor the refuser fined, &c. Though 'tis said anciently it was not necessary, that all the twelve should agree in civil causes. 2 *Hale's Hist. P. C.* 297.

In capital cases, a *verdict* must be actually given; and if the jury don't all agree upon it, they may be carried in carts after the judges, round the circuit till they agree; and in such case they may give their *verdict* in another county. 1 *Inst.* 227. 281. 1 *Ventr.* 97. The court may set aside a *verdict* that convicts a man contrary to evidence in a criminal cause; but they cannot set aside a *verdict* which acquits him. *Wood's Inst.* 648. If the jury ac-

quit a person of an indictment of felony against evidence, the court, before the *verdict* is recorded, may order them to go out again and re-consider the matter; but this hath been thought hard, and of late years is not so frequently practised as formerly: There are instances where defendants acquitted of crimes contrary to evidence, have been bound to the good behaviour. 2 *Hawk. P. C.* 442.

In case a jury acquits a man upon trial against full evidence, and being sent back to consider better of it, are peremptory in and stand to their *verdict*, the court must take it, but may respite judgment upon the acquittal: And here the King may have an attain. And if the jury will by *verdict* convict a person against or without evidence, and against the opinion of the court; they may relieve him before judgment, and certify for his pardon. 2 *Hale's Hist. P. C.* 310.

When a *verdict* in a civil action is given against evidence, it shall be set aside, and a new trial had, &c. If the fact upon which the court was to judge, be not found by the *verdict*, a new *venire facias* may be granted. 1 *Roll. Abr.* 693. A *verdict* being given where no issue is joined, there can be no judgment upon it; but a *repleader* is to be had. *Mod. Ca.* 4. And if a *verdict* be ambiguous, insufficient, repugnant, imperfect, or uncertain, judgment shall not pass upon it. 1 *Saund.* 154, 155.

Verdicts must in all things directly answer the issue, or they will not be good; and if a *verdict* finds only part of the issue, it may be ill for the whole. 3 *Salk.* 374. But there is a difference between actions founded on a wrong, and on a contract; for where 'tis founded on a wrong, as on a trespass, or escape, &c. 'tis maintainable if any part of it is found: So in debt for rent, a less sum than demanded may be found by the *verdict*, because it may be apportioned; but where an action is founded on a contract, there 'tis intire, and otherwise. 2 *Cro.* 380. If several persons are indicted, or jointly charged in an information, a *verdict* may find some of the defendants guilty, and not others. And if the substance of an issue be found, or so much as will serve the plaintiff's turn, although not directly according to the issue, the *verdict* is good. 1 *Lev.* 142. *Hob.* 73. 1 *Mod.* 4. According to *Glyn*, Ch. Just. if an action be brought for 500*l.* the jury may find part paid against the plaintiff, and part unpaid against the defendant, and so divide the *verdict*. *Trin.* 1658. 2 *Lill. Abr.* 649. If the jury find the issue and more, it is good for the issue, and void for the residue: And where a jury find a point in issue, and a superfluous matter over and above, that shall not vitiate the *verdict*. 2 *Lev.* 253. Yet if a man brings an action of debt, and declares for 20*l.* and the jury upon *nil debet* pleaded, find that the defendant owed 40*l.* this *verdict* is ill; for the plaintiff cannot recover more than he demands; and in this case he may not recover what he demands, because the court cannot sever their judgment from the *verdict*. 3 *Salk.* 376.

A plaintiff failing to prove his issue, the *verdict* ought to be found for the defendant, and the court will give judgment for the defendant, where it appears that the plaintiff hath recovered by *verdict* without cause of action. 2 *Lill.* 644, 651. A *verdict* found against a record, which is of a higher nature than any *verdict*, is not good: But where a *verdict* may be any ways construed to make it good, it shall be so taken, and not to make it void. *Ibid.* Upon a general issue, a *verdict* which is contrary to another record, may be allowed; but not where the *verdict* found is against the same record upon which it is given. *Dyer* 300. A *verdict* against the confession of the party, is void: But it has been held, that the *verdict* may be good in the disjunctive, though it be not formal; but if it find a thing merely out of the issue, 'tis not good. *Jenk. Cent.* 257. *Hob.* 53, 54. And where the jury begin with a direct *verdict*, and end with special matter, &c. that shall make the *verdict*: Also if they begin with any special matter, and after make a general conclusion upon it, contrary to law; the judges will judge of the *verdict*, according to the special matter. *Ibid.* 53.

No *verdict* will make that good, which is not so by law, of which the court is to judge; judgment is to be given on *verdicts*, that stand with law; and what both parties have.

have agreed in the pleading, must be admitted so to be, though the jury find it otherwise, it being a rule in law. *Hob. 112. 2 Cro. 678. 2 Mod. 4.* The statute of jeofails helps after *verdict*; as it supposes the matter left out was given in evidence, and that the judge directed accordingly. *1 Mod. 292.* If there be no original writ, it is helped by a *verdict* by the statute of jeofails; but not if there be a bad writ: A declaration that is not good, is in many cases helped after *verdict*; but not where the declaration doth not make it appear that the plaintiff had some cause of action, to warrant his declaration, &c.

A *verdict* may make an ill plea good, by intendment, &c. But a *verdict* will not help, where there is no issue; and what is good after *verdict*, would be ill on demurrer; also in criminal cases, real actions, or actions *qui tam*, if there be any errors in the proceedings, they are not helped after *verdict*, by the Stat. of jeofails. *2 Lill. Abr. 644, 647. 2 Bull. 41. 2 Salk. 664. 3 Mod. 161.* Where a *verdict* is found for the plaintiff, and he will not enter it, the defendant may compel him to do it, upon motion; or the defendant may enter it himself. *2 Lill. Abr. 644.* After a *verdict* is returned into court, it cannot be altered, but if there be any misprision, it is to be suggested before: And a mistake of the clerk of the assizes appearing to the court, was ordered to be amended. *Cro. Eliz. 112, 150.*

On return of *verdicts*, in civil causes, given at the assizes, to the courts at *Westminster*, judgment is had thereon; and generally if the judgment differ from the *verdict*, it may be reversed, &c. In debt on a covenant to pay money, the *verdict* must go to every part of the demand, and find as to the whole of the demand. *2 Strange 1089.* A special *verdict* finding nothing as to one of the offences, is an acquittal of that offence. *Ibid. 845.* Where the plaintiff's cause of action is confessed by the defendant's plea, and thereupon, notwithstanding the parties go to issue, and a *verdict* is found for the defendant, yet the *verdict* shall be set aside, and a writ of inquiry awarded. *Ibid. 873.* Assets on a special *verdict* severed by the court. *Ibid. 1036.* Inquire damages severed by the court. *Ibid. 1038.* *Verdict* amended by the judges notes. *Ibid. 1197.* Special *verdict* amended by affidavit of the evidence. *1 Strange 514.* See *Issue and Judgment.* See *5 New Abr. tit. Verdict*, and *Black. Com. 3 V. 377, 402. 4 V. 140, 354.*

Verecundum, Is specially used for injury done to any one. *Somer of Gavelkind, pag. 174.*

Verge, (*Virgata*) The compass of the King's court, which bounds the jurisdiction of the Lord Steward of the Household; and that seems to have been twelve miles about. *Stat. 13 R. 2. cap. 3. Britton 68. F. N. B. 24.* There is also a *verge of land*; which is an uncertain quantity directed by the custom of the country, from 15 to 30 acres, as appears under *Yard-Land*. *28 Ed. 1.* And the word *verge* has another signification, of a stick or rod, whereby one is admitted tenant to a copyhold estate. *Old Nat. Br. 17.* As to *verge of the court*, see *Black. Com. 3 V. 76.*

Verge of land, (*Virgata terra*.) Mentioned in *28 Ed. 1. Statute of wards.* See *Yard-land*.

Vergers, (*Virgatores*) Are such as carry white wands before the justices of either bench. *Flota, lib. 2. cap. 38.* Otherwise called *portatores virga*.

Verjuice. See *Vinegar*.

Veronica, A word mentioned by our *Historians*, having its original from this, That as our Saviour was led towards the cross, the likeness of his face was formed on his handkerchief in a miraculous manner, which is still preserved in St. Peter's church at *Rome*, and called *Veronica*. *Mat. Paris. Anno 1216. pag. 514. Brompt. 121. 94.*

Vert, (*Fr. Verd*, i. e. *Viridis*, otherwise called *Green-bus*) In the *forest* laws signifies every thing that beareth a green leaf within a forest, that may cover a deer; but especially great and thick coverts. Of *verts* there are divers kinds; some that bear fruit, which may serve for food, as chestnut-trees, service-trees, nut-trees, crab-trees, &c. And for the shelter of the game, some are called *haut-boys*, serving both for food and browze; also for the defence of them, as oaks, beeches, &c. and for shelter and

defence, such as ashes, poplars, maples, alder, &c. Of sub-boys, some for browze and food of the game; of bushes and other vegetables, some are for food and shelter, as the hawthorn, black-thorn, &c. And some for hiding and shelter, such as brakes, gorse, heath, &c. But herbs and weeds, although they be green, our legal *vert* extendeth not to them. *4 Inst. 327.* *Mansuud* divides *vert* into *overt-vert* and *nether-vert*; the *overt-vert* is that which the law books term *haut-boys*; and *nether-vert*, what they call sub-boys: And into *special vert*, which is all trees growing within the forest that bear fruit to feed deer; called *special*, because the destroying it is more grievously punished than of any other *vert*. *Mansu. par. 2. pag. 33.* And *vert* is sometimes taken for that power which a man hath by the King's grant to cut green wood in the forest. See further, *Black. Com. 3 V. 71.*

Verbise, A kind of cloth, mentioned in the statute 1 R. 3. c. 8. See *Plunkets*.

Very lord and very tenant, (*Verus Dominus & Verus Tenens*) Are they that are immediate lord and tenant one to another. *Broke.* In the taking of leases there is to be a *very lord* and *very tenant*; and a man is not a *very tenant*, until he hath attorned to the lord by some service, &c. *Old Nat. Br. 19 H. 7. c. 19.*

Vessels, for beer, ale, and sops, &c. their contents and how to be made. *23 H. 8.* See *Coopers*.

Vest, (*Vestire*.) To invest with, to make possessor of, to place in possession. *Plenam possessionem terra vel predii tradere, feifnam dare, infeudare*, saith *Spelman*.

Vesta, The vest, vesture, or crop on the ground. *Hist. Croyl. contin. p. 454.*

Vested, If an estate in remainder is limited to a child before born, when a child is born the estate in remainder is *vested*, &c. *2 Leon. 219.* A remainder must vest in the grantee during the continuance of the particular estate, or *eo instanti* that it determines. *Plowd. 25. 1 Rep. 66. Black. Com. 2 V. 168, which vide ante & post.*

Vested legacy, see *Contingent Legacy*, and *Black. Com. 2 V. 513.*

Vestry, A place adjoining to a church, where the vestments of the minister are kept; also a meeting at such place: And sometimes the bishop and priests sit together in *vestries*, to consult of the affairs of the church; in resemblance of which ancient custom, the ministers, churchwardens, and chief men of most parishes, do at this day make a *parish vestry*. By custom there may be select *vestries*, or a certain number of persons chosen to have the government of the parish, make rates, and take the accounts of churchwardens, &c. *2 Strange 728.* And when rates are made, the parishioners must have notice of a *vestry* held for that purpose; and then all that are absent shall be concluded by a majority of those that are present, who in construction of law are the whole parish. *Wood's Inst. 90.* And if a parishioner be shut out of the *vestry* room by the clerk of the *vestry*; and he makes it appear that he hath a right to come into the room, and to be present and vote in the *vestry*, &c. action of the case lies, as a remedy. *Mod. Ca. in L. 5 E. 52, 354.*

Vestrymen in *London* are a select number of the chief parishioners in every parish within the city and suburbs, who yearly choose officers for the parish, and take care of its concerns, &c. by statute 15 Car. 2. c. 5. On erecting parishes for the new churches to be built in or near *London* and *Westminster*, the commissioners for building the churches are empowered to name a sufficient number of the inhabitants of each new parish to be *vestrymen*; and on their deaths or removal, the majority of the parishioners to choose others, &c. And the parish officers, with the *vestry* or principal inhabitants of the new parishes, are in *Easter* week to assess the rates for the poor, &c. *9 Ann. c. 22.* *Vestries* of parishes are to be consulted by parish officers, and to give their assent on hiring of houses for the better employing and maintaining of the poor. *9 Geo. 1. c. 7.* The right of adjoining a *vestry* is in the parish at large. *2 Strange 1045.*

A *vestry* was called to consider about building a workhouse, where it was agreed to, and to borrow money for that purpose; and that whoever should be bound for it should be indemnified by the parish. This order was confirmed by another, and both signed by the vicar and so-

veral of the inhabitants, 300 l. being the sum agreed upon, was borrowed of A. to whom B. gave bond for it. An order of vestry was made for raising the money, but upon appeal to the quarter-sessions by some new parishioners was quashed. B. was sued on the bond, and paid the money, and then brought a bill for relief. And the master of the Rolls decreed him his principal, interest, and costs at law, and in this court; and that the defendants the vicar, churchwardens, and overseers of the poor, call a vestry to make a rate for payment; and if the inhabitants refuse payment, the plaintiff to be at liberty to apply to the court: And said that he did not see why the court might not as well compel those who are not parties to pay the rate, as order tenants though not parties to pay the rates; and because the defendants had put in a fair answer, their costs were decreed to be raised by the same rate; but said, that if those who had appealed to the quarter-sessions had been before the court, they should have paid all the costs. 2 Wms. Rep. 1332. Trin. 1751. *Blackburn v. Webster & al.* See 21 Vin. Abr. p. 443.

Vestura, A crop of grass or corn; and mention is made of *prima vestura*, and *secunda vestura*, &c. Cartular. Abb. St. Edmund, MS. fol. 182. The word was often used for a vest, vesture, livery, delivery, i. e. an allowance of some set portion of the products of the earth, as corn, grass, wood, &c. for part of the salary or wages to some officer, servant or labourer, for their livery or vest. So foresters had a certain allowance of timber and underwood yearly out of the forest for their own use. *Paroch. Antiq.* p. 620.

Vesture, (*Vestura*) Signifies a garment; but in the law it is metaphorically applied to a possession or seisin. *Stat. West.* 2. cap. 5. And in this signification it is borrowed of the *Feudists*, with whom *investitura* imports a delivery of possession, and *vestura* possession itself. *Hotom. Vestura* of an acre of land is the profit of it; and it shall be enquired how much the *vestura* of an acre of ground is worth, and how much the land, &c. 4 Ed. 1. 14 Ed. 3. By grant of *vestura terre*, the soil will pass; and the *vestura* being the profit of land, 'tis generally all one to have that, as the land itself. 1 Vent. 393. 2 Roll. Abr. 2.

Vetitum nannum, Is where the bailiff of a lord distrains beasts or goods of another, and the lord forbids his bailiff to deliver them when the sheriff comes to make replevin: The word *nannum* signifying a taking or distress, and *vetitum* forbidden; and the owner of the cattle may demand satisfaction for the injury, which is called *Placitum de vetito nanno*. Divers lords of hundreds and courts baron, had power to hold plea de *vetito nanno*: Matilda de Morton *clamat in manerio de M. duas law days*, &c. *Placito de Namio vetito, sine Brevis Domini Regis*, &c. 2 Inst. 140. Record in Thesaur. Scacc. See *Naam*, and *Black. Com.* 3 V. 148.

Via militaris, A highway. *Bract. lib.* 4. cap. 16. par. 7. *Fleta, lib.* 4. c. 6. par. 3.

Vingti, The Kings of the East Angles were so termed from King Uffa, who lived in the year 578. *Matt. West.*

Via Regia, Is the highway or common road, called the King's way, because authorised by him, and under his protection: It is also denominated *Via Militaris*. *Leg. Hen.* 1. c. 80. *Bract. lib.* 4.

Vicar, (*Vicarius, quasi vice fungens rectoris*) The priest of every parish is called *Rector*, unless the predial tithes are appropriated, and then he is stiled *vicar*; and when rectories are appropriated, *vicars* are to supply the rectors places. At first a *vicar* was a meer curate to the impropriator of the church, temporary, and removeable at pleasure; as those who are now parish priests, in ancient times when there were no particular parishes, were only curates to the bishops; but by degrees the vicars got a settled maintenance of glebe, and some kind of tithes, and now claim their dues either by endowment or by prescription: And where the *vicar* is endowed, and comes in by institution and induction, he hath *curam animarum actualiter*; and is not to be removed at the pleasure of the rector, who in this case hath only *curam animarum habitualiter*; but where the *vicar* is not endowed, nor comes in by institution and induction, the rector hath *curam animarum actualiter*, and may remove the *vicar*. 1 Vent. 35. 3 Salk. 378. In every church appropriated, one is to be ordained

perpetual *vicar*, and to be canonically instituted and inducted, and also endowed at the discretion of the ordinary; which endowment is a part of the rectory, set out by the patron, parson, and ordinary, for maintaining the *vicar*: The institution and induction, &c. of *vicars* is done in the same manner as that of rectors; and over and above they are to take an oath of perpetual residency, but this the bishop may dispense with; the statutes concerning pluralities, dilapidations, &c. relate to them as well as to parsons. 4 H. 4. 2 Roll. Abr. 337.

Upon endowment, the *vicar* hath an equal, though not so great an interest in the church as a rector; the freehold of the church, church-yard and glebe is in him; and as he hath the freehold of the glebe, he may prescribe to have all the tithes in the parish, except those of corn, &c. Many *vicars* have a good part of the great tithes; and some benefices, that were formerly severed by impropriation, have, by being united, had all the glebe and tithes given to the *vicars*: But tithes can no other way belong to the *vicar* than by gift, composition or prescription; for all tithes *de jure* appertain to the parson; and yet generally *vicars* are endowed with glebe and tithes, especially small tithes, &c. If a *vicar* be endowed of small tithes by prescription, and afterwards land, which had been arable time out of mind, is altered, and there are growing small tithes thereon, the *vicar* shall have them; for his endowment goes to such tithes, in any place within the parish. *Cro. Eliz.* 467. *Hob.* 39. But where the *vicar* is endowed out of the parsonage, he shall not have tithes of the parson's glebe, or of land that was part thereof at the time of the endowment, but now severed from it: Yet it seems to be otherwise, if the glebe lands are in the hands of the parson's lessee. *Cro. Eliz.* 479. *Mallor.* 2. *Imped.* 4. The endowment of *vicarages* hath been always favoured in law, the *vicars* for the most part having the cure of souls. 2 Roll. 335. *Comp. Incumb.* 347. *March Rep.* 11. See *Black. Com.* 1 V. 387.

Vicarage, (*Vicaria*) Of places did originally belong to the parsonage or rectory, being derived out of it: The rector of common right is patron of the *vicarage*; but it may be settled otherwise; for if he makes a lease of his parsonage, the patronage of the *vicarage* passes as incident to it. 2 Roll. Abr. 59. And if a *vicarage* become void, during the vacancy of the parsonage, the patron of the parsonage shall present to such *vicarage*. 19 Edw. 2. 41. If the profits of the parsonage or *vicarage* fall into decay, that either of them by itself is not sufficient to maintain a parson and *vicar*, they ought again to be re-united: Also if the *vicarage* be not sufficient to maintain a *vicar*, the bishop may compel the rector to augment the *vicarage*. 2 Roll. 337. *Parf. Counsell.* 195, 196. *Stat.* 29 Car. 2. c. 8. Upon the appropriation of a church, and endowment of a *vicar* out of the same, the parsonage and *vicarage* are two distinct ecclesiastical benefices: And it hath been held, that where there is a parsonage and *vicarage* endowed, that the bishop in the vacation may dissolve the *vicarage*; but if the parsonage be impropriated, he cannot do it; for on a dissolution the cure must revert, which it cannot into lay hands. *Comp. Incumb.* 2 Cro. 518. *Palm.* 219. For the most part *vicarages* were endowed upon appropriations; but sometimes *vicarages* have been endowed without any appropriation of the parsonage; and there are several churches, where the tithes are wholly impropriated, and no *vicarage* endowed; and there the impropriators are bound to maintain curates to perform divine service, &c. The parson, patron and ordinary, may create a *vicarage*, and endow it: And in time of vacancy of the church, the patron and ordinary may do it; but the ordinary alone cannot create a *vicarage*, without the patron's assent. 17 Edw. 3. 51. *Cro. Jac.* 516. Where there is a *vicarage* and parsonage, and both are vacant, and in one person's patronage; if he presents his clerk as parson, who is thereupon inducted, this shall unite the parsonage and *vicarage* again. 11 Hen. 6. 32. *Vicarage* or not, is to be tried in the Spiritual court, because it could not begin to be created but by the ordinary. 3 Salk. 378. See *Black. Com.* 1 V. 387. 4 V. 431.

Vicarial Tithes. Privy or small Tithes. See *Tithes*.

Vicario,

**Writas deliberando occasione cuiusdam Recogni-
tionis, &c.** Is an ancient writ that lies for a spiritual
person imprisoned, upon forfeiture of a recognizance, &c.
mentioned in *Reg. Orig.* 147.

Vice-Admiral, An under admiral at sea; or admiral
on the coasts, &c.

Vice Admiralty Courts. There are *vice admiralty*
courts, in *America*, and our other plantations. From those
courts appeals may be brought before the courts of ad-
miralty in *England*, as being a branch of the admiral's
jurisdiction, though they may also be brought before the
King in council. But in case of prize vessels, taken in
time of war, in any part of the world, and condemned in
any courts of admiralty, or vice-admiralty as lawful prize,
the appeal lies to certain commissioners of appeals con-
sisting chiefly of the privy council and not to judges de-
legates. And this by virtue of divers treaties with for-
eign nations, &c. *Black Com.* 3 *V.* 69. which *vide*.

Vice-Chamberlain, A great officer next under the
lord chamberlain: And in his absence hath the rule and
controul of all officers appertaining to that part of his
majesty's household, which is called the *chamber* above
stairs. 13 *R. 2. c. 1.*

Vice-Constable of England, An officer whose office is
set forth in *Pat. 22 Edw. 4.*

Vice-Consul, The same as *Vicecomes* or sheriff. *Leg.*
Ed. Conf. cap. 12.

Vice-Dominus, The same with *vicecomes*.—*Vice-*
dominus dicitur est prefectus provincie. *Leg. Hen. 1. c. 7.*
Selden's Tit. Hon. par. 2. Ingulphus.

Vice-Dominus Episcopi, Is the vicar-general, or
commissary of a bishop. *Blount.*

Vice-gerent, A deputy or lieutenant. *Stat. 31 Hen.*
8. c. 10.

Vice-Marshal, Is mentioned with *vice-constable*. *Pryn's*
Animad. on 4 Inst. 71.

Vice-Roy, (*Pro. Rex.*) The King's lord lieutenant
over a kingdom. *Litt.*

Vice-Treasurer, An officer under the *lord treasurer* in
the reign *Hen. 7.* See *Under-Treasurer of England.*

Vicinage, (*Fr. Voisinage, Vicinetum*) Neighbourhood,
or near dwelling. *Magn. Chart. c. 14.* See *Vijne*.

There is common because of *vicinage*, or neighbour-
hood, where the inhabitants of two townships which lie
contiguous, have usually intercommoned with one ano-
ther; the beasts of the one straying mutually into the
others fields, without any molestation from either. See
Black Com. 2 V. 33.

Writs & Wencillis mundandis, Is a writ which lieth
against a mayor or bailiff of a town, &c. for the clean
keeping of their streets. *Reg. Orig. 267.*

Viscount, or Viscount, (Vicecomes) Signifies as much
as *sheriff*: Between which two words, there seems to
be no other difference, but that the one comes from
the *Normans*, the other from our ancestors the *Sax-*
ons, of which, see more in *Sheriff*. *Viscount* also sig-
nifies a degree of nobility next to an earl, which *Camd.*
(*Briton. pag. 170.*) says, is an old name of office, but a
new one of dignity, never heard of amongst us, till *Henry*
the sixth's days, who in his eighteenth year in parliament
created *John lord Beaumont*, viscount *Beaumont*, but far
more ancient in other countries, *Cassan. de gloria*
mundi, par. 5. consider 55. See *Sheriff* and *Selden's Titles*
of honour, fol. 761.

Viscountiel, or Viscontiel, Is an adjective from *viscount*,
and signifieth any thing that belongeth to the sheriff;
as writs *viscontiel* are such writs as are triable in the
county or sheriff's court, of which kind there are divers
writs of nuisance, &c. mentioned by *Fitzherbert*. *Old*
Nat. Br. 109. F. N. B. 184. *Viscontiels* are certain
farms, for which the sheriff pays a rent to the King, and
he makes what profit he can of them: And *viscontiel*
rents usually come under the title of *firma comitatus*;
and the sheriff hath a particular roll of them given in
to him, which he delivers back with his accounts. 33
& 34 H. 8. c. 16. 3 Ed. 6. 4. 22 Car. 2. c. 6.

Viscountiel Jurisdiction, Is that jurisdiction which
belongs to the officers of a county; as to sheriffs, coro-
ners, escheators, &c.

Viscountiel, or Viscontiel rents, mentioned 22 *Car. 2.*
cap. 6. See *Viscontiel*. The *viscontiel rents*, usually came

under the title of *Firma comitatus*, which were written ge-
nerally *sub nomine vicecom.* without expression of the parti-
culars. The sheriff had a particular roll of the *viscontiel*
rents given in to him, which roll he delivered back with
the accounts. See *Hale's sheriff's accounts, pag. 40.*

Viduals, (Vidus) Sustainance, and things necessary
to live by, as meat and provisions: *viduallers* are those
that sell *viduals*; and we call now all common alehouse-
keepers by the name of *viduallers*. *Viduallers* shall sell
their *viduals* at reasonable prices, or forfeit double va-
lue: And *viduallers*, fishmongers, poulterers, &c. coming
with their *viduals* to *London*, shall be under the gover-
nance of the lord mayor and aldermen; and sell their
viduals at prices appointed by justices, &c. 23 *& 31*
Edw. 3. c. 6. 7 R. 2. 13 R. 2. No person during the time
that he is a mayor, or in office in any town, shall sell *vic-*
tuals, on pain of forfeiture, &c. But if a *vidualler* be
chosen mayor, whereby he is to keep the assize by sta-
tute, two discreet persons of the same place who are not
viduallers, are to be sworn to assize bread, wine, and
viduals, during the time that he is in office; and then,
after the price assessed by such persons, it shall be law-
ful for the mayor to sell *viduals*, &c. 6 *R. 2. c. 9.*
3 *Hen. 8. c. 8.* If any one offend against these statutes,
the party grieved may sue a writ directed to the justices
of assize, commanding them to send for the parties, and
to do right; or an attachment may be had against the
mayor, officer, &c. to appear in *B. R.* Selling of cor-
rupt *viduals*, or exposing them to sale, is punishable by
statute 1 *R. 3. c. 1.* And in some manors they chuse
yearly two surveyors of *viduals*, to see that no unwhole-
some *viduals* be sold, and destroy such as are cor-
rupt. 1 *Mod. 202.* If any *viduallers*, butchers, brewers,
poulterers, cooks, &c. conspire and agree together not
to sell their *viduals* but at such prices; they shall for-
feit for the first offence 10 *l.* for the second 20 *l.* for the
third 40 *l.* Stat. 2 *& 3 Edw. 6. c. 15.* The rates of
viduals in all places, except corporations, shall be as-
sessed by the King's justices, &c. And *viduals* are
not to be transported, by 25 *H. 8. c. 2.* See *Fort-*
stallers.

Widame, Was the same as *Vice-Dominus*, the bishop's
deputy in temporal matters. See *Palmer.*

Widelicet, A *widelicet* in a deed may make a separa-
tion, as well as an *habendum*: And if there be a several
habend. of an annuity of 20 *l.* to one, and so to four
others; it will be to the same effect, though it says
habendum 100 *l.* to them, to be equally divided, (*viz.*)
20 *l.* to one, and so to the rest, &c. 5 *Mod. Rep. 29.*

Widuitatis Professio, The making a solemn profession
to live a sole and chaste widow; which was heretofore
a custom in *England*. *Dugd. Warwicksh. pag. 313.*
654.

Widimus, Mentioned in the 15 *Hen. 6. cap. 3.* See
Innotescimus.

Wit Pruis, Are words used in indictments, &c. to
express the charge of a forcible and violent committing
any crime or trespass: But on appeal of death, on a
killing with a weapon, the words *vi & armis* are not ne-
cessary, because they are implied; so in an indictment
of forcible entry, alleged to have been made *manu*
forti, &c. 2 *Hawk. P. C. 179. 1 Hawk. 150, 220.*
And where the omission of *vi & armis*, &c. is helped
in indictments, *vide* the Stat. 4 *& 5 Ann. c. 16.*

Witw, (*Fr. Veue, i. e. Visus*) Is generally where a real
action is brought, and the tenant doth not know cer-
tainly what is in demand; in such case he may pray
that the jury may *view* it. *Briton, cap. 45. F. N. B.*
178. This *view* is for a jury to see the land or thing
claimed, and in controversy; and lies in ejectment,
waste, assizes of *novel disseisin*, where at least six of the
recognitors, must have the *view* before the assizes. 2 *Lill.*
Abr. 655. Stat. 13 Ed. 1. c. 48. 12 Edw. 2. And
though formerly there could not have been a *view* in a
personal action, but upon withdrawing of a juror after
they were sworn, and consent of the parties by a rule of
court; now by the *act for the amendment of the law*, it
may be granted in any action brought in the courts at
Westminster, where necessary the better to understand the
evidence upon the trial; in which case the courts may
order special writs of *disfringas* or *habeas corpora* to the
sheriff.

sheriff, requiring him to have six of the jurors, or a greater number of them, at the place in question, some convenient time before the trial; who shall have the matter shewn to them by two persons named in the writ of *distingas*, and appointed by the court; and the said sheriff executing the writ is specially to return the *view* made accordingly, &c. 4 & 5 Ann. cap. 16. Upon a *view*, the thing in question is only to be shewn to the jury; and no evidence can be given on either side. 2 Lill. 656. But where in action of waste, several places are assigned, and the jury hath not the *view* of some of them, they may find no waste done in that part which they did not *view*: In waste for wailing of wood, if the jury *view* the wood without entering into it, it is good; also waste being assigned in every room of an house, the *view* of the house generally is sufficient. 1 Leon. 259, 267. If a rent or common is demanded, the land out of which it issues must be put in *view*. 1 Leon. 56. And if a *view* be denied, where it ought to be granted, or granted where it ought not to be, &c. it is error. 2 Lev. 217.

By stat. 3 Geo. 2. c. 25. (the balloting act) s. 14. it is provided, 'That where a *view* shall be allowed, six of the jurors named in the panel, or more shall have the *view*, and shall be the first sworn, (or such of them as appear,) before any drawing.' But as the having a *view* was not, by either of these statutes, made a matter of course, though such a practice had prevailed, and had been abused to the purposes of delay, the court thought it their duty to take care that their ordering a *view* should not obstruct justice, and prevent the cause from being tried: And they resolved not to order one any more, without a full examination into the propriety and necessity of it. For they were all clearly of opinion that the act of parliament meant that a *view* should not be granted, unless the court was satisfied that it was proper and necessary: And they thought it better that a cause should be tried upon a *view* had by any six, or by fewer than six, or even without any *view*, than be delayed for a greater length of time: Accordingly they added a clause to the usual rules for *views*, purporting that the party praying a *view* consented, 'That in case no *view* should be had; or if a *view* should be had by any of the jurors whomsoever (tho' not being six of the first twelve,) yet the trial should proceed, and no objection be made on account thereof, or for want of a proper return.' Since which, motions for *views* are become motions of course, with such additional consent annexed to them. Bur. Rep. 256.

See the form of the *usual rule*, and also of the modern *addition*, both in causes to be tried by special juries and those to be tried by common juries, respectively, recited *verbatim*, in Bur. Rep. 257, 258. See *Affise*, *Vejours* or *Viewers*, &c. and Black. Com. 3 V. 298, 358.

View of Frank-pledge (*Visus Franci plegii*) Signifies the office which the sheriff in his county court performs in looking to the King's peace, and seeing that every man be in some *pledge*, &c. Or it is a power of holding a *court-leet*, in which court formerly all persons at the age of fourteen were bound with their sureties or *pledges* for their truth to the King, and the steward was to certify on *view*, Bract. lib. 2. And there is a writ to exempt a person from coming to the *view of frank-pledge*, who is not resident within the hundred; as men are bound to this *view* by reason of their habitation only, and not of lands held where they dwell not; Which writ is called *Visus Franci Plegii*. Reg. Orig. 175. See *Frank-pledge*, and Black. Com. 4. V. 270.

Vigil, (*Vigilia*) Is the eve, or next day before any solemn feast; because then Christians were wont to watch, fast, and pray in their churches. Stat. 2 & 3 Ed. 6. c. 19.

Vi Laica Removenda, A writ that lies where two parsons contend for a church, and one of them enters into it with a great number of laymen, and holds out the other *vi & armis*; then he that is holden out shall have this writ directed to the sheriff, that he remove the force: But the sheriff ought not to remove the incumbent out of the church, whether he is there by right or wrong, but only the force F. N. B. 54. 3 Inst. 161. and see 5

R. 2. c. 2. And the writ *vi laica removenda* ought not to be granted, until the bishop of the diocese where such church is, hath certified into the *chancery* such refusing and force, &c. though it is said in the *new natura brevium*, it lieth upon a surmise made by the incumbent, or by him that is grieved, without any such certificate of the bishop. New Nat. Br. 121. A restitution was awarded to one who was put out of possession by the sheriff upon a *vi laica amovenda*. Cro. Eliz. 466. 5 Mod. 443.

Vill, or **Village** (*Villa*) Is sometimes taken for a Manor, and sometimes for a parish or part of it: But a *vill* is most commonly the out-part of a parish, consisting of a few houses, as it were separate from it. — *Villa est ex pluribus mansionibus, vicinata, & collata ex pluribus vicinis*. 1 Inst. 115. *Fleta* mentions the difference between a mansion, a village, and a manor, *viz.* a mansion may be of one or more houses, but it must be but one dwelling-place, and none near it; for if other houses are contiguous, it is a *village*; and a manor may consist of several *villages*, or one alone. *Fleta*, lib. 6. cap. 51. And according to *Fortescue*, the boundaries of *villages*, are not by houses or streets; but by a circuit of ground, within which there may be hamlets, woods, and waste ground, &c. *Fortesc. de Laud. Leg. Ang. cap. 24*. When a place is named generally, in legal proceedings, it is intended to be a *vill*, because as to civil purposes the kingdom was first divided into *vills*; and it is never intended a parish, that being an ecclesiastical division of the kingdom to spiritual purposes, though in many cases, the law takes notice of parishes as to civil purposes. 1 Mod. 250. 3 Nels. Abr. 57. If no *vill*, &c. is alleged, where a messuage and lands lie, no trial can be had concerning it: But some counties in the north of England, and in Wales, have no *vills* but parishes; where in both real and personal actions, a jury of the parish will serve. Jenk. Cent. 328, 33. A *vill* and a parish by intendment shall be all one; and in process of appeal, a parish may be intended a *vill*. Cro. Jac. 263. 3 Salk. 380. If a *venue* be laid in *Gray's Inn*, which is no parish or *vill*; the defendant must plead there is no such *vill* as *Gray's Inn*, or it shall be intended a *vill* after verdict, &c. 3 Salk. 381. Two houses in an extraparo-chial place are not enough to denominate a *vill*. 2 Strange 1004, 1071. See *Parish*, and *Venire facias*. See Black. Com. 1 V. 114.

Villa Regia, A title given to those country *villages*, where the Kings of England had a royal seat, and held the manor in their own demesne, having there commonly a free chapel, not subject to ecclesiastical jurisdiction; *Paroch. Antig. 53*.

Villain, **Villein**, (*Villanus*, Fr. *Vilain*, i. e. *Vilis*) Signifies a man of servile or base condition, a bondman, or servant. Of those bondmen or *villains* there were two sorts in England; one termed a *villain in gross*, who was immediately bound to the person of the lord, and his heirs: The other, a *villain regardant* to a manor, being bound to his lord as a member belonging and annexed to a manor, whereof the lord was owner. And he was properly a *pure villain*, of whom the lord took redemption to marry his daughter, and to make him free; and whom the lord might put out of his lands and tenements, goods and chattels at his will, and chastise, but not maim him: For if he maimed his *villain*, he might have appeal of maihem against the lord; as he could bring appeal of the death of an ancestor against his lord, or appeal of rape done to his wife. Bract. lib. 1. cap. 6. Old Nat. Br. 8. *Terms de Ley*.

Some were *villains* by title or prescription, that is to say, that all their blood have been *villains* regardant to the manor of the lord time out of mind: And some were made *villains* by their confession in a court of record, &c. Though the lord might make a *manumission* to his *villain*, and thereby enfranchise him: And if the *villain* brought any action against his lord, other than an appeal of maihem, &c. and the lord, without protestation, made answer to it; by this the *villain* was made free. *Terms de Ley* 576. *Villain* *esse* was contradistinguished to free estate, by the statute 8 Hen. 6. c. 11. And the *villains* were such as dwelt in *villages*, and of that servile condition,

condition, that they were usually sold with the farm to which they respectively belonged; so that they were a kind of slaves, and used as such: And *villanage* or bondage, it is said, had beginning among the Hebrews, and its original of *Canaan* the son of *Cham*, who, because he had mocked his father *Noe* to scorn, was punished in his son *Canaan* with penalty of bondage, *Ibid.* 455.

Villanage cometh of *villain*, and was a base tenure of lands or tenements, whereby the tenant was bound to do all such services as the lord commanded, or were fit for a *villain* to perform: The division of *villanage*, by *Bracton*, was into *purum villanagium a quo præstatur servitium incertum & indeterminatum*, & *villanagium focagium*; which was to carry the lord's dung into his fields, to plough his ground at certain days, sow and reap his corn, &c. and even to empty his jakes, as the inhabitants of some places were bound to do, though afterwards turned into a rent, and that *villanous* service excused. Every one that held in *villanage*, was not a *villain* or bondman; for tenure in *villanage* could make no freeman *villain*, unless it were continued time out of mind; nor could free land make a *villain* free. *Bract. lib. 2. c. 8.* Copyhold tenures seem to be sprung from *villanage*. *F. N. B.* 28. And the slavery of this custom hath been long ago taken off; for we have hardly heard of any case in *villanage* since *Crouche's* case in *Dyer's Rep.* There are not properly any *villains* now; and the title and tenure of *villanage* are abolished by the stat. of *Car. 2.* See *Neif.* See farther as to *Villain*, generally, *Black. Com. 2 V. 92. 4 V. 413.* As to *Villain in gross*, *id.* 2 V. 93. *Villain regardant*, *Id.* 1b. *Villain services*, *Id.* 2 V. 61. *Villain socage*, *Id.* 2 V. 98.

Villain estate or condition, Contradistinguished to free estate. *Stat. 8. H. 6. 11.* They were called *villains* from *villa*, because they dwelt in villages; they were also called *pagenes* and *rustici*, a *rusticus quæ excoluerunt*; and they were of that servile condition, that they were usually sold with the farm to which they respectively belonged; so that they were slaves and used as such, and kinder usage made them insolent. *Cowell.*

Villanis regis subtrahitis reducendis, Is a writ that lay for the bringing back of the King's bond-men, that had been carried away by others out of his manors whereto they belonged. *Reg. Orig. fol. 87.*

Villanous Judgment, (*Villanum Judicium*) Is that which casts the reproach of *villany* and shame upon him against whom it is given, as a conspirator, &c. And the judgment in such a case shall be like the ancient judgment in *attaint*, viz. That the offender shall not be of any credit afterwards; nor shall it be lawful for him to approach the King's court; and his lands and goods shall be seized into the King's hands, his trees rooted up, and body imprisoned, &c. *Staundf. P. C. 157. Lamb. Eiren. 63. Stat. 4 H. 5.* And the punishment at this day appointed for *perjury*, may partake of the name of *villanous judgment*; as it hath somewhat more in it than corporal, or pecuniary pain, i. e. the discrediting the testimony of the offender for ever. See *Black. Com. 4 V. 136.*

Villain fleeces, Are bad fleeces of wool, shorn from scabbed sheep. *31 Edw. 3. cap. 8.*

Villanage, (*Villanagium*) from *villain*, Signifies a servile kind of tenure belonging to land or tenements, whereby the tenant was bound to do all such services as the lord commanded, or were fit for a villain to do. *Ubi sciri non poterit vespere quale servitium fieri debet manere.* For every one that held in *villanage*, was not a villain or bondman: *Villanagium vel servitium nihil detrahbat libertatis, habitu tamen distinctione utrum tales sunt villani & tenuerint in villano focagio de dominico domini regis.* *Bract. lib. 1. cap. 6. num. 1.* The division of *villanage* was into *villanage by blood*, and *villanage by tenure*. Tenure in *villanage* could make no freeman *villain* unless it were continued time out of mind, nor even free land make a *villain* free. *Bracton, lib. 2. cap. 8. num. 3.* divides it into *purum villanagium, a quo præstatur servitium incertum & indeterminatum, ubi sciri non poterit vespere, quale servitium fieri debet manere, viz. ubi quis facere tenetur quicquid ei præceptum fuerit*; the other he calls *villanum focagium*, and was tied to the performance of certain services agreed

upon between the lord and tenant, and was to carry the lord's dung into his field, to plough his ground at certain days, to reap his corn, plash his hedges, &c. as the inhabitants of *Bickton* were bound to do for those of *Clun-castle* in *Shropshire*, which was afterwards turned into a rent, now called *Bickton silver*, and the service excused. There were likewise *villani sockmanni*, which were those who held their land in socage, and there were *villani adventitii*, who were those who held lands by performing certain services expressed in their deeds. *Bract. lib. 2. cap. 8.* See *Socage tenure*, and *Black. Com. 2 V. 90, 92, 98.*

Vinagium, (*Tributum a vino*) A payment of a certain quantity of wine instead of rent, to the chief lord for a vineyard. *Mon. Ang. 2. tom. pag. 980.*

Vinculo Matrimonii, Divorce *a.* If a marriage is improper through some cause which existed previous to the marriage, and was such a one as rendered the marriage unlawful *ab initio*, as consanguinity, corporal imbecillity, or the like; in this case the law looks upon the marriage to have been always null and void, because contracted *in fraudum legis*, and decrees not only a separation from bed and board, but a *vinculo matrimonii* itself. *Black. Com. 3 V. 94.* See *Divorce.*

Vinegar and Verjuice. Duties on vinegar by former acts taken off, and a new duty imposed, 10 & 11 W. 3. c. 21. s. 8, &c. What to be deemed vinegar or liquors preparing for vinegar, 10 & 11 W. 3. c. 21. s. 11. Thirty four gallons to be deemed a barrel of vinegar, 10 & 11 W. 3. c. 21. s. 15. Informations against vinegar makers for a false quantity, &c. to be laid within three months, 12 & 13 W. 3. c. 11. s. 17. Vinegar made for pickles for sale to pay duties, 8 Ann. c. 7. s. 4. Vinegar made by the manufacturers of white lead exempt from duties, 8 Ann. c. 7. s. 5. Verjuice bought or made for sale how chargeable with duties, 7 & 8 W. 3. c. 30. s. 28. Every hoghead to pay 5 d. 8 Ann. c. 7. s. 1. Additional duty of 8 d. per ton on French vinegar imported, 3 Geo. 3. c. 12. And on all other vinegar imported, 4 l. per ton, *ibid.*

Vineyards, The owners of *vineyards* may make wine of *British* grapes only growing there, free from any duty. *Stat. 10 Geo. 2. c. 17.*

Vinnet, A flower or border which printers use to ornament printed leaves of books; mentioned in the *Stat. 14 Car. 2. cap. 33.*

Vintners, The *vintners* company of *London* were incorporated 7 Jac. 1. with certain privileges for selling wine in the city, by all *freemen* within the same, &c. 2 Keb. 372. See *Wine.*

Violating the Queen, &c. If a man do violate the King's companion (i. e. the Queen) or the King's eldest daughter unmarried, or the wife of the King's eldest son and heir, it is high treason—By violation is understood carnal knowledge, as well without force as with it: And this is high treason in both parties, if both be consenting. *Contra*, as to violating a Queen or Princess Dowager. *Black. Com. 4 V. 81.*

Violence, (*Violentia*) All violence is unlawful: If a man assault another with an intention of beating him only, and he dieth, it is felony. And where a person knocks another on the head who is breaking his hedges, &c. this will be murder, because it is a violent act beyond the provocation. *Kel. Rep. 64, 131.* There is a *violence* in committing riots, &c.

Violent Presumption: This is many times equal to full proof; for there those circumstances appear which necessarily attend the fact. See *Black. Com. 3 V. 371.*—The enumerating of cases, would be of little use, as every case must be governed according to its own peculiar circumstances.

Virga, A rod or white staff, such as *Sheriffs*, *bailliffs*, &c. carry as a badge or ensign of their office. *Cowell.*

Virgata terræ, A yard land, ex 24 acris constat, quatuor virgatæ bidam faciunt, & quinque bidæ feodum militis. *Kenner's Gloss.*

Virge, Tenant by. A species of copyholders, i. e. such as are said to hold by the virge, or rod. In fact copyholders and customary tenants differ not so much in nature as in name, for though called by different names, yet

yet they all agree in substance and kind of tenure: Their lands are holden in one general kind, that is, by custom and continuance of time. See *Calhorpe on Copyholds*, 51, 54, and *Black. Com.* 2 V. 147, 148.

Uiridario eligendo, Is a writ that lies for the choice of a *viridario* in the forest. *Reg. Orig.* 177.

Uirus Koba, A coat of many colours; for in the old books *viridis* is used for *varius*. *Bract. lib.* 3.

Uirilia, The privy members of a man; to cut off which was felony by the Common law, though the party consented to it. *Bract. lib.* 3. pag. 144.

Uis (Lat.) Is any kind of force, violence, or disturbance relating to a man's person, or his goods, right in lands, &c. See *Force*.

Viscount, (*Viccomes*) A degree of nobility next to an earl. See *Viscount*. They are now made by patent, as an earl; but their number is small in this kingdom, in comparison with the other degrees of peerage. Vide *Black. Com.* 1 V. 399.

Visitation, (*Visitatio*) Is that office which is performed by the bishop of every diocese once every three years, or by the archdeacon once a year, by *visiting* the churches and their rectors throughout the whole diocese; *Ut populus illorum curæ commissis salubriter a pastoribus & ordine gubernetur: Et ne quid detrimenti capiat ecclesia*, &c. *Reform. Leg. Eccl.* pag. 124. And when a *visitation* is made by the archbishop, all acts of the bishop are suspended by *inhibition*, &c. A commissary at his court of *visitation*, cannot cite lay parishioners, unless it be churchwardens and fidesmen; and to those he may give his articles, and inquire by them. *Noy* 123. 3 *Salk.* 370. *Proxies* and *Procurations* are paid by the parsons whose churches are *visited*, &c. *Ibid.*

Visitation Books of Heralds. The original visitation books of heralds, compiled when progresses were solemnly and regularly made into every part of the kingdom, to enquire into the state of families, and to register such marriages and descents as were verified to them upon oath, are allowed to be good evidence of pedigrees. *Comb.* 63. *Black. Com.* 3 V. 105.

Visitor, Is an inspector of the government of a corporation, &c. The ordinary is *visitor* of spiritual corporations; but corporations instituted for private charity, if they are lay, are *visitable* by the founder, or whom he shall appoint, and from the sentence of such *visitor* there lies no appeal. 3 *Salk.* 381. By implication of law, the founder and his heirs are *visitors* of lay foundations, if no particular person is appointed by him to see that the charity is not perverted. *Ibid.* And where founders are *visitors* of hospitals, &c. The appointment of a bishop without his christian name to be a *visitor*, extends to his successors. 2. *Strange* 913. The *visitor* in his citation must pursue his authority. *Ibid.* He may punish one man for acts done by him jointly with others. *Ibid.* Offences against the statutes of a college are not pardoned by an act of grace. *Ibid.* 912. See *Stat.* 39 *Eliz.* c. 5. 43 *Eliz.* c. 4. See farther as to *visitor* generally *Black. Com.* 1 V. 479 of *Civil Corporations*. *Id.* 1 V. 481 of *Colleges*. *Id.* 1 V. 482 of *Hospitals*, *id. ib.*

Visitor of Manners, In ancient time was wont to be the name of the *Regarder's* office in the forest. *Manwood*, par. 1. pag. 195.

Visne, (*Visnctum*) Signifies a neighbouring place, or place near at hand. 19 R. 2. cap. 6. See *Venus*.

Visus, View, or inspection; as wood is to be taken *per visum forestarii*, &c. *Hoved.* 784.

Vita Justitiæ & Legis, A sheriff of the county is said to be the *life of justice*, as no suit begins, and no process is served but by him; and after suits are ended, he hath the making execution, which is the *life of the law*. *Co. Litt.*

Vivary, (*Vivarium*) A place by land or water, where living creatures are kept: And in law it is most commonly used for a park, warren, piscary, &c. 2 *Inst.* 100.

Viva voce, Is where a witness is examined personally in open court. See *Deposition*.

Vivo vadio, Estate in. When a man borrows a sum of another, and grants him an estate until the rents and profits shall repay the sum borrowed; he is then said to

have an estate *in vivo vadio*. See *Vadium Vivum*, and *Black. Com.* 2 V. 157.

Vltus, A hulk of a ship of burden. *Leg. Ethelred.*

Village, Is when there is want of measure in a cask, &c.

Vlnage, The same with *Alnage*. Vide *Alnage*.

Vlna ferrca, Is the standard ell of iron, kept in the *Exchequer* for the rule of measure, *Mon. Angl. Tem.* 2. pag. 383.

Umpirage, Is where there is but one arbitrator of matters submitted to award; and is usually when the parties submit themselves to the arbitrament of certain persons; and if they cannot agree, or are not ready to deliver their award in writing before such a time, then to the judgment of another as *umpire*: And this is often the effect of bonds of submission to arbitration. 1 *Roll. Abr.* 261, 262. See *Arbitration*.

Umpire, (*Arbiter*) One chosen by compromise to deal indifferently between both parties. *Litt.* See *Arbitrament*. *Award*.

Una cum omnibus aliis, In the grant of a deed, is a new addition of other things than were granted before; and hath its own conclusion attending it. *Hob.* 175.

Unanimity of Jurors. The necessity of a total unanimity of the jurors, on every trial, seems to be peculiar to our own constitution. See *Black. Com.* 3 V. 376.

Unceasefath: This is an obsolete word, mentioned in *Leg. Inæ*, cap. 37. viz. He who kills a thief, may make oath that he killed him in flying for the fact, & *parentibus ipsius occisi juret unceasefath*, that is, that his kindred will not revenge his death: From the Saxon *ceas*, *liti*, and *un*, which is a negative particle, and signifies without, and *ath*, which is oath, i. e. to swear that there shall be no contention about it. *Cowell*.

Uncertainty of the Law. On this subject we will state what is said, by one of our best authors, in his own words.

“ The uncertainty of legal proceedings is a notion so generally adopted, and has so long been the standing theme of wit and good humour, that he who should attempt to refute it would be looked upon as a man, who was either incapable of discernment himself, or else meant to impose upon others—yet it may not be amiss, before we enter into the several modes whereby certainty is meant to be obtained in our courts of justice, to inquire a little wherein the uncertainty, so frequently complained of, consists, and to what causes it owes its original.—It has sometimes been said to owe its original to the number of our municipal constitutions, and the multitude of our judicial decisions; which occasion, it is alledged, abundance of rules, that militate and thwart with each other, as the sentiments or caprice of successive legislatures and judges have happened to vary.—The fact of multiplicity is allowed, and that thereby the researches of the student are rendered more difficult and laborious: But that, with proper industry, the result of those inquiries will be doubt, and indecision, is a consequence that cannot be admitted.—People are apt to be angry at the want of simplicity in our laws: They mistake variety for confusion, and complicated cases for contradictory.—They bring us the examples of arbitrary governments, of *Denmark*, *Muscovy*, and *Prussia*; of wild and uncultivated nations, the savages of *Africa* and *America*; or of narrow domestic republics in ancient *Greece* and modern *Switzerland*; and unreasonably require the same paucity of laws, the same conciseness of practice, in a nation of freemen, a polite and commercial people, and a populous extent of territory.—In an arbitrary, despotic government, where the laws are at the disposal of the prince, the rules of succession, or the mode of enjoyment, must depend upon his will and pleasure.—Hence there can be but few legal determinations relating to the property, the descent, or the conveyance of real estates; and the same holds in a stronger degree with regard to goods and chattels, and the contracts relating thereto. Under a tyrannical sway, trade must be continually in jeopardy, and of consequence can never be extensive: This therefore puts an end to the necessity of

of an infinite number of rules, which the *English* merchant daily occurs to for adjusting commercial differences. — Marriages are there usually contracted with slaves; or at least women are treated as such: No laws can be therefore expected to regulate the rights of dower, jointures and marriage settlements. Few also are the persons, who can claim the privileges of any laws; the bulk of those nations, *viz.* the commonalty, boors, or peasants, being merely villeins and bondmen. — Those are therefore left to the private coercion of their laws, are esteemed (in the contemplation of these boasted legislators) incapable of either right or injury, and of consequence are intitled to no redress. We may see, in these arbitrary states how large a field of legal content is already rooted up and destroyed. — Again, were we a poor and naked people, as the savages of *America* are, strangers to science, to commerce and the arts as well of convenience, as of luxury, we might perhaps be content, as some of them are said to be, to refer all disputes to the next man we met upon the road, and so put a short end to every controversy. For in a state of nature there is no room for municipal laws; and the nearer any nation approaches to that state, the fewer they will have occasion for. When the people of *Rome* were little better than sturdy shepherds, or herdsmen, all their laws were contained in ten or twelve tables; but as luxury, politeness, and dominion increased, the civil law increased in the same proportion, and swelled to that amazing bulk which it now occupies, though successively pruned and retrenched by the emperors *Theodosius* and *Justinian*. — In like manner we may lastly observe, that in petty states, and narrow territories, much fewer laws will suffice than in large ones, because there are fewer objects upon which the laws can operate. The regulations of a private family are short and well known; those of a prince's household are necessarily more various and diffuse. — The causes therefore of the multiplicity of the *English* laws are, the extent of the country which they govern; the commerce and refinement of its inhabitants; but above all the LIBERTY and PROPERTY of the subject. These will naturally produce an infinite fund of disputes; which must be terminated in a judicial way: And it is essential to a free people, that these determinations be published and adhered to; that their property may be as certain and fixed as the very constitution of their state. For though in many other countries every thing is left in the breast of the judge to determine, yet with us he is only to declare and pronounce, not to make or new-model, the law. Hence a multitude of decisions, or cases adjudged, will arise; for seldom will it happen that any one rule will exactly suit with many cases. — And in proportion as the decisions of the courts of judicature are multiplied, the law will be loaded with decrees, that may sometimes (though rarely) interfere with each other: Either because succeeding judges may not be apprized of the prior adjudication; or because they may think differently from their predecessors; or because the same arguments did not occur formerly as at present; or in fine, because of the natural imbecillity and imperfection that attends all human proceedings. But, wherever this happens to be the case in any material point, the legislature is ready, and from time to time, both may, and frequently does, intervene to remove the doubt; and upon due deliberation had, determines by a declaratory statute how the law shall be held for the future. Whatever instances therefore of contradiction or uncertainty, may have been gleaned from our records, or reports, must be imputed to the defects of human laws in general, and are not owing to any particular ill construction of the *English* system. Indeed the reverse is most strictly true. The *English* law is less embarrassed with inconsistent resolutions and doubtful questions, than any other known system of the same extent and the same duration. I may instance in the civil law: The texts whereof as collected by *Justinian* and his agents, is extremely voluminous and diffuse; but the idle comments, obscure glosses, and jarring interpretations grafted thereupon by the learned jurists, are literally without number. And these glosses which are mere private opinions of scholastic doctors

(and not, like our books of reports, judicial determinations of the court) are all of authority sufficient to be vouched and relied on; which must needs breed great distraction and confusion in their tribunals. The same may be said of the Canon law; though the text thereof is not of half the antiquity with the Common law of *England*; and though the more antient any system of laws is, the more it is liable to be perplexed with the multitude of judicial decrees. When therefore a body of laws of so high antiquity as the *English*, is in general so clear and perspicuous, it argues deep wisdom and foresight in such as laid the foundations, and great care and circumspection, in such as have built the superstructure: But is not (it will be asked) the multitude of law-suits which we daily see and experience, an argument against the clearness and certainty of the law itself? by no means: For among the various disputes and controversies which are daily to be met with in the course of legal proceedings, it is obvious to observe how very few arise from obscurity in the rules or maxims of law. An action shall seldom be heard of to determine a question of inheritance, unless the fact of the descent be controverted. But the dubious points, which are usually agitated in our court, arise chiefly from the difficulty there is of ascertaining the intentions of individuals, in their solemn dispositions of property; in their contracts, conveyances and testaments. It is an object indeed of the utmost importance in this free and commercial country, to lay as few restraints as possible upon the transfer of possessions from hand to hand, or their various designations, marked out by the prudence, convenience, or necessities, or even by the caprice of their owners: Yet to investigate the intention of the owner is frequently matter of difficulty among heaps of entangled conveyances or wills of a various obscurity. The law rarely hesitates in declaring its own meaning. But the judges are frequently puzzled to find out the meaning of others. Thus the powers, the interest, the privileges, and properties of a tenant for life, and a tenant in tail, are clearly distinguished and precisely settled by law: But, what words in a will shall constitute this or that estate, has occasionally been disputed for more than two centuries past; and will continue to be disputed as long as the carelessness, the ignorance, or singularity of testators shall continue to cloathe their intentions in dark or new fangled expressions."

"But, notwithstanding so vast an accession of legal controversies, arising from so fertile a fund as the ignorance and wilfulness of individuals, these will bear no comparison in point of number to those which are founded upon the dishonesty and disingenuity of the parties: By either their suggesting complaints that are false in fact, and thereupon bringing groundless actions; or by their denying such facts as are true, in setting up unwarrantable defences, *ex falso oritur jus*: If therefore, the fact be perverted or misrepresented, the law which arises from thence will unavoidably be unjust or partial. And, in order to prevent this, it is necessary to set right the fact, and establish the truth contended for, by appealing to some mode of probation or trial, which the law of the country has ordained for a criterion of truth and falsehood."

"These modes of probation or trial form in every civilized country the great object of judicial decisions. And experience will abundantly shew, that above a hundred of our law-suits arise from disputed facts, for one where the law is doubted of. About twenty days in the year are sufficient, in *Westminster-Hall*, to settle (upon solemn argument) every demurrer or other special point of law that arises throughout the nation: But two months are annually spent in deciding the truth of facts, before six distinct tribunals, in the several circuits of *England*; exclusive of *Middlesex* and *London*, which afford a supply of causes much more than equivalent to any two of the largest circuits." *Blackstone's Com.* 3 V. 325, &c.

We may here with *Blackstone* observe, that trial is the examination of the matter of fact in issue; of which there are many different species, according to the difference of the subject, or thing to be tried. For the law of *England* so industriously endeavours to investigate

truth at any rate, that it will not confine it self to one, or to a few manners of trial; but varies its examination of facts according to the nature of the facts themselves: This being the one invariable principle pursued, that as well the best method of trial, as the best evidence upon that trial, which the nature of the case affords, and no other, shall be admitted in the *English* courts of justice.

N. B. The species of trial in civil cases are seven. By *Record*; by *Inspection* or *Examination*; by *Certificate*; by *Witnesses*; by *Wager of Battle*; by *Wager of Law*; and by *Jury*.

Uncia, terrar, Uncia agri. These phrases often occur in the charters of the *British* Kings, and signify some measure or quantity of land. It was the quantity of 12 *modii*, and each *modius* possibly 100 foot square. *Mon. Ang. tom. 3. p. 198.*

Uncoere pñst. Is a plea of a defendant in nature of a plea in bar, where being sued for a debt due on bond at a day past, to save the forfeiture of the bond, he says that he tendered the money at the day and place, and that there was none there to receive it; and that he is also still ready to pay the same. This will save the defendant from the penalty of his obligation; and if the plaintiff now refuseth to receive the money, but takes issue upon the tender, and it is found against him, he loseth his money for ever. 7 *Ed. 6. 6. 9 Rep. 70. PraB. Al-torn. Edit. 1st pag. 82, 83. See Black. Com. 3 V. 303.*

Uncuth. A Saxon word, signifying as much as *incognitus*, i. e. unknown; and is used in the old Saxon laws for him that cometh to an inn guestwise, and lies there but one night. *BraB. lib. 3.*

Unde nihil habet. A writ of dower, for which see *Dote unde nihil habet.*

Under-Chamberlain of the Exchequer. Is an officer there that cleaves the tallies, written by the clerk of the tallies, and reads the same, that the clerk of the pell, and comptrollers thereof, may see their entries be true. He also makes searches for all records in the treasury, and hath the custody of *Domesday book*. There are two officers there of this name. *Cowell. Vide Exchequer.*

Under-Escheator, (Sub-Escheator.) Mentioned in *stat. 5 E. 3. c. 4. See Escheator.*

Under-Sheriff, (Sub-Fiscarius.) See *Sheriff, 21 Vin. Abr. 59. and Black. Com. 1 V. 345.*

Undertakers. Are such as the King's *Parvours* employed as their deputies; And those that undertake any great work; as drawing of *tens*, &c. *Stat. 2 & 3 P. & M. c. 6. 43 Eliz. c. 11. 12 Car. 2. c. 24.* Also persons that undertake funerals, are particularly so called.

Under-Treasurer of England, (Vice Thesaurarius Angliæ) An officer first created in the time of King *Hen. 7th*, but some think he was of a more antient original: His business was to chest up the King's treasure at the end of every term, to note the content of money in each chest, and see it carried into the King's treasury for the ease of the *lord treasurer*, as being a thing too mean for him, but fit to be performed by a man of great trust and secrecy: And in the vacancy of the *lord treasurer's* office, he did all things in the receipt, &c. This officer is mentioned in several statutes; and named *treasurer of the exchequer* till the reign of Queen *Eliz.* when he was termed *under-treasurer of England.* 39 *Eliz. cap. 7.*

Underwood, Stealing of. Stealing *underwood*, &c. is punishable criminally, by whipping, small fines, imprisonment, &c. See 43 *Eliz. c. 7. 15 Car. 2. c. 2. 23 Geo. 2. c. 26. and 31 Geo. 2. c. 35.*

Un Disce & Un Ray. Was the learned Judge *Littleton's* motto.

Underage. A word used for minors, or persons under age; not capable to bear arms, &c. *Flam. lib. 1. c. 9.*

Untrid. One that hath no quiet or peace. *Sax.*

Ungeld. A person out of the protection of the law, so that if he were murdered, no gold or fine should be paid, or composition made by him that killed him. *Leg. Ethelred.*

Ungifna ðær. This is mentioned in *Bromton, Leg. Ethelred, pag. 898.* and it signifies almost the same as *ungeld*, viz. where a man was killed attempting any felony, he was to lie in the field unburied, and no pecuniary compensation was to be paid for his death: From the *Sax. un*, without, *gilda*, solutio, and *acera*, ager. *Cowell.*

Uniformity, (Uniformitas) One form of publick prayers and administration of sacraments, and other rites and ceremonies of the church of *England*, prescribed by statutes, to which all must submit. 1 *Eliz. c. 2. 14 Car. 2. c. 4. But see Dissenters.*

Union, (Unio) Is a combining and consolidating of two churches into one: Also it is when one church is made subject to another, and one man is rector of both; and where a conventual church is made a cathedral. *Lyndeswode.* In the first signification, if two churches were so mean, that the tithes would not afford a competent provision for each incumbent, the ordinary, patron, and incumbents might unite them at Common law, before any statute was made for that purpose; and in such case it was agreed which patron should present first, &c. for though by the union, the incumbency of one church was lost, yet the patronage remained, and each patron might have a *quare impedit* upon a disturbance to present in his turn. 3 *Nels. Abr. 480.* The bishop, patron, and incumbent may unite churches, without licence from the King, by the statute of 37 *H. 8.* The licence of the King is not necessary to an union, as 'tis to the appropriation of advowsons; for an appropriation cannot be made by them without the King's licence; because that is a mortmain, and the patronage of the advowson is lost, and by consequence all tenths for first fruits. *Dyer 259. Moor 409, 661.*

By assent of the ordinary, patron, and incumbent two churches lying not above a mile distant one from the other, and whereof the value of the one is not above six pounds a year in the King's books of first fruits, may be united into one. *Stat. 37 H. 8. c. 21.* And by another statute, in cities and corporation towns, it shall be lawful for the bishop, patrons, and mayors, or chief magistrates of the place, &c. to unite churches therein; but where the income of the churches united exceeds 100 *l.* a year, the major part of the parishioners are to consent to the same; and after the union made, the patrons of the churches united shall present by turns, to that church only which shall be presentative, in such order as agreed; and notwithstanding the union, and each of the parishes united shall continue distinct as to rates, charges, &c. though the tithes are to be paid to the incumbent of the united church. 17 *Car. 2. c. 3.* A union where made of churches of greater yearly value than mentioned in the statute 37 *H. 8.* was held good at Common law; and by the Canon law, the ordinary with consent of the patron, might make an union of churches, of what value soever: So by statute, with the assent of the King. *Dyer 259. 2 Roll. Abr. 778.* And when two parochial churches were thus united, the reparations continued several as before; and therefore the inhabitants of the parish where any such church was demolished, were not obliged to contribute to the repairs of the remaining church to which it was united. *Hob. 67.* And this occasioned the statute 4 & 5 *W. & M.* by which it is ordained, That where any churches have been united, by virtue of the statute 17 *Car. 2.* and one of them is demolished; when the other church shall be out of repair, the parishioners of the parish whose church is down, shall pay in proportion towards the charge of such repairs, &c. *Stat. 4 & 5 W. & M. c. 12.*

Union of England and Scotland, When and how brought about, and the laws relating to it, see *Scotland. and Black. Com. 1 V. 96. 4 F. 420, 433.*

Unity of Possession, (Unitas Possessionis) Is where a man hath a right to two estates, and holds them together jointly in his own hands; as if a man take a lease of lands from another at a certain rent, and after he buys the fee-simple, this is an unity of possession, by which the lease is extinguished, because that he who had before the occupation only for his rent, is now become lord and owner.

owner of the land. *Terms de Ley*. A lessee for years of an advowson, on the church becoming void, was presented by the lessor, and instituted and inducted; and it was held, that this was a surrender of his lease; for they cannot stand together in one person, and by the unity of possession one of them is extinguished. *Hutt. 105*. No unity will extinguish or suspend tithes; but notwithstanding any unity they remain, *Ec. 11 Rep. 14. 2 Lill. 658*. Unity of possession extinguisheth all privileges not expressly necessary; but not a way to a close, or water to a mill, *Ec.* because they are thus necessary. A way of ease is destroyed by unity of possession; and a rent, or easement, do not exist during the unity, wherefore they are gone. *Latch. 153, 154. 1 Vent. 95. Trin. 7 W. See Black. Com. 2 V. 180*.

University, (*Universitas*) Is a place where all kinds of literature are universally taught: It is likewise used by civilians for any corporation, or body politick. The universities with us are taken for those two bodies which are the nurseries of learning and liberal sciences in this kingdom, viz. *Oxford and Cambridge*; endowed with great privileges. And by the 13 *Eliz.* it is enacted, That each of the universities shall be incorporated by a certain name, though they were ancient corporations before; and that all letters patent and charters granted to the universities, shall be good and effectual in law: That the chancellor, masters, and scholars of either of the said universities, shall enjoy all manors, lands, liberties, franchises, and privileges, and all other things which the said corporated bodies have enjoyed, or of right ought to enjoy, according to the intent of the said letters patent; and all letters patent, and liberties, franchises, *Ec.* shall be established and confirmed, any law, usage *Ec.* to the contrary notwithstanding. The universities have the keeping of the assise of bread and beer, and are to punish offences concerning it: Also they have the assise of wine and ale, *Ec.* And the chancellor, his commissary, and deputy, are justices of peace for the vill of *Oxon*, county of *Oxon*, and *Berks*, by virtue of their offices; see the *Stat. 51 H. 3. 31 Ed. 1. 7 Ed. 6. 2 & 3 P. & M.* and the *Chart. 29 Ed. 3. 14 H. 8. Ec.* By letters patent, *Anno 11 Car. 1.* granted to the university of *Oxford*, the old privileges are explained, and larger granted: And the privilege of the university is allowed to scholars, and servants, *Ec.* 14 *Car. 2. c. 4*. Persons acting theatrical performances within the precincts of either university, or five miles thereof, shall be deemed vagrants; and the chancellor, *Ec.* may commit them to the house of correction, or common goal for one month. *Stat. 10 Geo. 2. c. 19*.

Their courts are called the chancellor's courts. The chancellors are usually peers of the realm, and are appointed over the whole university. But the courts are kept by their vice-chancellors their assistants or deputies; the causes are managed by advocates or proctors. *Id. ibid.* By charter of 14 *H. 8*.

These courts have jurisdiction in all causes ecclesiastical and civil (except mayhem, felony and freehold) where a scholar, servant or minister of the university is one of the parties in suit. *Id. ibid.* and *Cro. Car. 73. Wilcocks v. Bradnell*. But see the petition against the grant of *H. 4.* in *Prynne's Animad. p. 368, 369*.

Their proceedings are in a summary way according to the practice of the civil law; and in their sentences they follow the justice and equity of the civil law, or the laws, statutes, privileges, liberties and customs of the universities, or the laws of the land at the discretion of the chancellor. *Cro. Car. 73. Wilcocks v. Bradnell. Hatley 25. Thomas Wilcocks's case. Hurd. 508, Castle v. Litchfield*.

If there is an erroneous sentence in the chancellor's court of the university of *Oxford*, an appeal lies to the congregation, thence to the convocation, and from thence to the King in chancery, who nominates judges delegates to hear the appeal; the appeal is of the same nature in *Cambridge*. *Wood's Inst. 549. 2 Ld. Raym. 13, 46. The King v. The chancellor, &c. of Cambridge*.

As by charter confirmed, as above mentioned, by act of parliament, cognizance is granted to the university of

all suits arising any where in law or equity against a scholar, servant or minister of the university, depending before the justices of the King's bench, Common pleas and others there mentioned, and before any other judge, tho' the matter concern the King: If an *indultatus assumpsit* is brought by *quo minus* in the exchequer against a scholar or other privileged person, the university shall have consuance, for the court of exchequer is included in the general words *Cro. Car. 73. Wilcocks v. Bradnell. Hurd. 505. Castle v. Litchfield*.

If a debtor and accountant to the King sues a scholar by bill in equity in the exchequer, or if an attorney sues a scholar by writ of privilege, it is said that the universities shall not have consuance, for a general grant shall not take away the special privilege of any court. *Hurd. 189. Wilkins v. Shalcroft. Lit. Rep. 304. Oxford Letter patent. S. P. 3 Leon. 149. The lord Auderjon's case. 2 Danv. Abr. 164*.

But in the cases where privilege is allowable, a scholar, *Ec.* cannot waive his privilege, and have a prohibition in the courts of *Westminster*, for the university by right has the consuance of the plea, where one is a privileged person; and a stranger is forced to sue a privileged person in their courts by reason of that right vested in them. *Cro. Car. 73. Wilcocks v. Bradnell. Heil. 28. Thomas Wilcocks's case*.

But a scholar ought to be resident in the university at the time of the suit commenced; and no other ought to be joined in the action with him, for in such case he shall not have privilege. *Heil. 28. Thomas Wilcocks's case*. Tho' it is said that servants of the university are privileged, yet it has been held, that a bailiff of a college was not capable of privilege. *Brownl. 74. Carrel. v. Pask*. Neither is a townsmen intitled to privilege, to exempt him from an office in the town, if he keeps a shop and follows a trade, tho' he is matriculated as servant to a scholar. 2 *Ven. 106. The city of Oxford's case*.

It is to be observed, that tho' mayhem, felony and freehold appear as above, to be the only causes excepted in their charter; yet it has been held that in actions for the recovery of the possession of a term, without claiming title to the freehold, they shall have no privilege, because the freehold may come in question. *Cro. Car. 87, 88 Hayley's case. Lim. Rep. 252. Cripp's and Webb's case*.

It hath been disputed how far the words of the grant intitled them to privilege in matters of equity. And the general principle of construction seems to be, that where chattels only are concerned, or where damages only are to be given, there their privilege is allowable, but where the suit is for the thing itself, there their privilege cannot be allowed. *Vide 2 Vent. 362*.

The franchises of the universities are confirmed by the *Stat. 13. Eliz. c. 29*. Where any fellow, *Ec.* resigns for reward, the person for whom it is given made incapable, *Ec.* 31 *Eliz. c. 6. f. 3*. The universities and royal colleges excepted out of the statute of charitable uses, 43 *El. c. 4. f. 2*. The presentation of benefices belonging to papists given to the two universities, 13 *Jac. 1. c. 5. f. 18, 19. 1 W. & M. c. 26. 12 Ann. c. 14*. Universities may file a bill in equity to discover trusts, 12 *Ann. f. 2. c. 14. f. 4*. Pending *quare impedit*, a rule may be made for examining patron and clerk, 12 *Ann. f. 2. c. 14. f. 5*.

Collegians refusing to take the oaths, King may nominate persons to succeed, 1 *Geo. 1. c. 10. f. 12*. Mandamus lies to admit King's nominee, 1 *Geo. 1. c. 13. f. 13*. Vice-chancellor of *Cambridge* may act as justice of the county without the landed qualification, 7 *Geo. 2. c. 10*. The universities and royal colleges excepted out of the mortmain act, 9 *Geo. 2. c. 36. f. 4*. Colleges possessed of more advowsons than a moiety of the fellows, not to purchase more, 9 *Geo. 2. c. 36. f. 5*.

Grants made by papists of ecclesiastical livings vested in the universities, void, 11 *Geo. 2. c. 17. f. 5*.

See 5 *New Abr.* and 22 *Vin. Abr. tit. University*. See courts of the universities, and *Black. Com. 1 V. 471. 3 V. 83. 4 V. 274*.

Unknown Persons, larceny from. An indictment will lie, for stealing the goods of a person unknown. 1 Hal P. C. 512. Black. Com. 4 V. 236.

Utlage, A Saxon word, denoting an unjust law; in which sense it is used in Leg. Hen. 1. cap. 34.

Unlawful Assembly, (Illicita Congregatio) The meeting of three persons or more together, by force, to commit some unlawful act. Lamb. Vide Assembly.

Unnatural, (Præternaturalis) That which is not of or by nature: And what is *unnatural* to man generally, must be the same to all men, and at all times; but what is *unnatural* to this or that person, is to him only, and but for the time 'tis so, Argument on incestuous marriages. Vaugh. 224.

Unques prift, Always ready to perform a thing: Used in pleading to an action, which if the plaintiff cannot prove to the contrary, he shall recover no damages. Kirch. 243.

Uociferatio, An out-cry, or hue and cry. Leg. Hen. 1. cap. 12.

Vacatance, (Vacatio) Is a want of an incumbent upon an ecclesiastical benefice. Vid Avoidance.

Void and Voidable: In the law some things are absolutely void and some are voidable. A thing is void which is done against law at the very time of the doing of it, and it shall bind no person: But a thing which is only voidable, and not void, although it be what he that did it ought not to have done; yet when it is done, the doer cannot avoid the same; though by some act in law it may be made void by his heir, &c. 2 Lill. Abr. 653. Where a grant is void at the commencement, no act afterwards can make it good: If a lease is absolutely void, acceptance of rent will not affirm it; it is otherwise when a lease is only voidable, there it will make it good. 3 Rep. 64. A lease for life which is voidable only, must be made void by re-entry, &c. Ibid. It is generally held that covenants made in a void lease or deed, are also void. Yelv. 18. See Owen 136.

A deed of exchange, entered into by an infant, or one non sane memorie, is not void; but may be avoided by the infant, when arrived at age, or by the heir of him who is non sane memorie. Perk. 281. But it hath been adjudged, that a bond of an infant, or of one non compos, is void, because the law hath not appointed any thing to be done to avoid such bonds; for the party cannot plead non est factum, as the cause of nullity doth not appear upon the face of the deed. 2 Salk. 675. 3 Nels. Abr. 436. Where the condition of a bond is void, in part by statute, it may be void totally, though it is otherwise if void in part by the Common law, for there it shall be good for the residue. Moor 856. 1 Brownl. 64. A deed being voidable, is to be avoided by special pleading; and where an act of parliament says, that a deed, &c. shall be void, it is intended that it shall be by pleading, so as it is voidable, but not actually vacated. 5 Rep. 119. A judgment given by persons who had no good commission to do it, is void, without writ of error: But an erroneous attainder is not void, but voidable by writ of error, &c. 2 Harok. P. C. 459, 321.

Voire, A French word signifying truly. Law Fr. Dict.

Voire dire, (Fr. Veritatem dicere) Is when it is prayed upon a trial at law, that a witness may be sworn upon a voire dire; which is, that he shall on his oath speak the truth, whether he shall get or lose by the matter in controversy; and if it appears that he is unconcerned, his testimony is allowed, otherwise not. Blount. On a voire dire, a witness may be examined by the court, if he be not a party interested in the cause, as well as the person for whom he is a witness; and this has been often done, where a busy evidence, not otherwise to be excepted against, is suspected of partiality. Terms de Ley. 981.

Volumus, Is the first word of a clause in the King's writs of protection and letters patent; of protections some are cum clausula volumus. 13 R. 2. c. 16. Co. Litt. 199.

Voluntary, As applied to a deed, is where any conveyance is made without a consideration, either of money, or marriage, &c. And remainders limited in settlements, to a man's right heirs, &c. are deemed voluntary in equity, and the persons claiming under them called volunteers. Abr. Cas. Eq. 385. 3 Salk. 174. See Fraud. So an escape may be voluntary. See Escape, and Black. Com.

3 V. 415. 4 V. 130. So may oaths, see Oath, and Black. Com. 4 V. 137. So may waste, see Waste, and Black. Com. 2 V. 281.

Voluntas, Is when a tenant by lease holds lands at the will of the lessor; or a copyholder holdeth his lands at the will of the lord, by copy of court roll, according to the custom of the manor, &c.

Votum, A vow or promise, used by Flata for nuptia; so dies votorum, is the wedding day. Flata, lib. 4.

Vouche, (Fr. in Latin Voco) Signifies to call one to warrant lands, &c.

Voucher. The person who is vouched, in a writ of right, see Voucher, and Black. Com. 2 V. 358. xviii.

Voucher, Is a word of art, when the tenant in writ of right calls another into the court, who is bound to him to warranty; and is either to defend the right against the demandant, or yield him other lands to the value, &c. And it extends to lands or tenements of freehold or inheritance, and not to any chattel real, personal, or mixed: He that voucheth is called the voucher, (vocans) and he that is vouched, is called the vouchee, (varrantatus) and the process whereby the vouchee is called, is a summonas ad varrantizandum; on which writ if the sheriff return that the party hath nothing whereby he may be summoned, then goes out another writ called sequator sub suo periculo, &c. Co. Litt. 101. There is also a foreign voucher, when the tenant being impleaded within a particular jurisdiction, as in London, voucheth one to warranty in some other county out of the jurisdiction of that court, and prays that he may be summoned, &c. 2 Rep. 50. On a suit in England, a voucher doth not lie in Ireland: But it lies in Wales, and the tenant shall be summoned in the next county to it. A vouchee by entering into warranty, becomes tenant in law of the lands; and when the demandant counts against him, he may plead a release, &c. Jenk. Cent. 41, 100. In a writ of entry in the degrees, none shall vouch out of the line: And in writs of right and possession, it is a good counterplea, that neither the vouchee nor his ancestors had ever seisin of the land. Stat. 3 Ed. 1. c. 40. And the demandant may aver a vouchee to be dead, and that there is no such person, where the tenant voucheth a person deceased, to warranty. 14 Ed. 3. c. 18. Single, double, and treble voucher. See Recovery. And vide Warranty.

Voucher, Is also used for a ledger-book, or book of accounts, wherein are entered the acquittances or warrants for the accountant's discharge. Stat. 19 Car. 2. cap. 1.

Vox, Vocem non habere, A phrase made use of by Bracton, signifying an infamous person, one who is not to be admitted to be a witness. Bract. lib. 3.

Upholsters, None shall put to sale any beds, bolsters, &c. except such as are stuffed with one sort of dry pulled feathers, or clean down; and not mixed with scalded feathers, fen-down, thistle-down, sand, &c. on pain to forfeit the same, or the value: And they are to stuff quilts, mattresses and cushions, with clean wool, and flocks; without using horse-hair, &c. therein, under the like forfeiture. Stat. 11 H. 7. c. 19. and 5 & 6 Ed. 6. c. 23.

Upland, High ground, or terra firma, as it is called by some, contrary to marshy and low ground. Ingulph.

Usa, Is the river Isis; which river was termed Isis from the goddess of that name; for it was customary among the Pagans to dedicate hills, woods, and rivers, to favourite goddesses, and to call them after their names; and the Britons having the greatest reverence for Ceres and Proserpina, who was also called Isis, did for that reason name the river Isis: And the being the goddess of the Night, from thence they computed days by nights; as Seven Night, &c. Blount.

Usage, Differs from custom, and prescription: No man may claim a rent, common, or other inheritance by usage; though he may by prescription. 6 Rep. 65. See Prescription.

Usance, A calender month, as from May 20, to June 20, and double usance, is two such months; words used in Bills of Exchange. Merch. Dict.

Use, (Usus) Is in application of law, the profit or benefit of lands and tenements; or a trust and confidence reposed in a man for the holding of lands, That he to whole

whose *use* the trust is made shall take the profits thereof. *West. Symb. par. 1. 1 Inst. 272.*

An *use* is only a trust or confidence which one man puts in another; and therefore it is not a thing issuing out of the land, but collateral to it, and annexed to the privacy of estate between them, (*viz.*) That he to whom the *use* is made shall have the profits; and that the tenant of the land shall make an estate as he shall direct: But the *cestui que use* hath neither *jus in re* or *ad rem*, his only remedy being in Chancery to compel the *cestui que trust* to execute the *use*. 3 *Nels. Abr.* 487. See *infra*.

The limitation of an *use*, was at the Common law but a matter of equity: But now feoffments to *uses*, &c. have the same acceptation as deeds at Common law; and *uses* limited by any conveyance, are governed and directed according to the rules of the law. 2 *Lill. Abr.* 664. There were two inventors of *uses*; fear in the time of trouble and civil war, for the saving of inheritances from forfeiture; and fraud in time of peace, to defeat debts, cheats, &c. And it is said the original of *uses* was the statute of *Mortmain*, which cramped the clergy so much that they were forced to take shelter under the laity, and make use of them to purchase lands in trust for them and to their *use*: Afterwards the wars between the houses of York and Lancaster coming on, trusts and *uses* increased more than ever; and although the Common law could take no cognizance of them, yet there were always, until King Henry 8th's reign, clergymen chancellors, who were ready upon all occasions to decree the performance of the trust and *use*. 2 *Lill.* 662, 663.

It hath been observed by some writers, that there were no such things as *uses* at Common law; the reason was, because the feoffee was always taken as the owner of the land; and it was very inconvenient and absurd that there should be two several fees, and the owners of the same land *simul & semel*; therefore by the Common law the feoffees to *uses* were the very tenants, &c. But the statute of *uses* hath united the estate to the *use*, so that now the feoffees to *uses* have no estate or interest at all, but in respect of the contingent estate and *uses* limited in the deed. 3 *Salk.* 386. Because in time many deceits were invented, by settling the possession in one man, and the *use* in another, inasmuch that the possession and the *use* were divided, which opened a gap for frauds: To avoid these inconveniencies, the statute of 27 H. 8. c. 10. gives the possession to him who has the *use*, and as before the statute the possession ruled the *use*, so now the *use* governs the possession; for this reason in conveyances, it is set down in the *habendum* to whose *use* the lands are conveyed, and whatever estate a man hath in the *use*, the same he hath in the possession at this day. 1 *Rep.* 121. 2 *Leon. cap.* 25.

The Stat. 27 H. 8. cap. 10. enacts, That where any are or shall be seised of lands, to the *use* of any other, by reason of any bargain and sale, feoffment, fine, recovery, contract, agreement or will, &c. he to whose *use* the lands are settled in fee-simple, fee-tail, for life, or otherwise, shall be esteemed in possession of the land to all intents and purposes: And where one is seised of lands to the *use* or intent that another shall have an yearly rent out of the same, *cestui que use* shall be deemed in possession and seisin of the said rent, and of like estate as in the *use*, &c. And if there are any *uses* limited in a new manner, they are void. 1 *Rep.* 129, 138.

But there are *uses* that are not executed by this statute; as if lands are granted to others in trust, that the feoffees shall take the profits, and deliver them to the feoffor and his heirs; also leases for years of lands in *use*, (which leases had their being before, and are granted over in *use* and trust) where the lessee is possessed only of his term, and not seised of any freehold, &c. and there still remains an *use* of goods and chattels personal, which is properly a *Chancery* trust, wherein the *use* and possession are divided; though in other cases the statute executes agreements as the *Chancery* would have done before. *Wood's Inst.* 256, 257.

All lands of inheritance, liberties, franchises, visible or local, may be conveyed by way of *use*: But inheritances personal, which have no relation to lands or local hereditaments, cannot be conveyed by way of *use*. And some

questions having been made, out of what an *use* shall arise, it hath been held, That *uses* shall be raised only out of a freehold; that they cannot be raised out of a chattel, nor out of an *use*, or a bare right or power, nor out of an intended purpose, &c. *Moor* 509. 1 *Leon.* 148. 3 *Salk.* 386.

In *uses* there ought to be privacy of estate to erect the *use* upon: And there are four things required to the execution of a *use* within the statute, *viz.* There must be a person seised; but the King or a corporation, an alien, &c. cannot be seised to the *use* of another: There is to be a *cestui que use* in being; for the words of the act are, Stand and be seised to the *use* of any person or persons: There must be a *use* in esse, in possession, remainder, or reversion; and the estate of the feoffee, &c. out of which the *use* arises, is to be vested or transferred to *cestui que use*; and if any of these fail, the *use* will not be executed. 1 *Rep.* 126. 1 *Inst.* 19. 2 *Cro.* 50, 401.

Uses are in esse, either in possession, remainder, or reversion; or in contingency, which by possibility may fall into possession, or in reversion, &c. Contingent *uses* in posse, may be created though they are not executed by the statute, but remain at Common law: But when they come in esse, then the statute executes them; and before that, they may be destroyed, discontinued, or suspended. 1 *Rep.* 135.

A *use* is also express, or implied; express, as when a feoffment is made of land to A. B. and his heirs, to the *use* of C. D. and the heirs of his body, &c. Implied, where the *use* is not declared between the parties, but is left to the construction of the law: And if a man seised of lands makes a feoffment in fee without any consideration, and it is not declared to whose *use*, by implication of law it shall be to the *use* of the feoffor, &c.

It hath been adjudged, that if by feoffment, or lease and release, a man conveys any particular estate mediately or immediately to another person, there the residue of the estate shall by implication remain to the use of the party himself: But where no estate is limited to another, the whole conveyance is to no purpose, if the party be construed to have the resulting *use* in him; indeed upon a fine or recovery persons may have their particular estates in other respects, as barring upon nonclaims, &c. 1 *Rep.* 121. 2 *Roll. Abr.* 781, 782. 2 *Salk.* 678. 3 *Salk.* 387.

An *use* may be raised two manner of ways, 1st, By transmutation, or departing with the possession of the estate. 2dly, Without transmutation of the estate, by keeping the land in a man's own hands, and making the possession be to the use of another: Those *uses* that arise by transmutation of estate, are by feoffment, fine, recovery, &c. And those which arise without transmutation, being by bargain and sale inrolled, and covenant to stand seised to uses. 1 *Plowd.* 301. 1 *Inst.* 271.

Conveyances to uses are of three sorts; a covenant to stand seised; a feoffment, fine, or recovery to uses; and a bargain and sale; by which last a contingent use cannot be supported, though by the two first it may; and there is a difference between a feoffment to uses, and a covenant to stand seised, because the feoffor departs with his whole estate, but the covenantor departs with no more than what is actually vested in the *cestui que use*. 2 *Sid.* 64, 129. In bargains and sales, and covenants to stand seised, some consideration is necessary to make those deeds operate to uses; the consideration of money in a bargain and sale, and natural affection, blood, affinity, marriage, &c. in the covenant to stand seised: And they may be good to a man's wife or family without any consideration; but not to others. *Plowd.* 301. *Dyer* 169. 3 *Leo.* 306. The consideration, or reservation of 1 s. d. a penny, or a pepper-corn, are sufficient considerations to raise an *use*. 1 *Mod.* 251. 3 *Salk.* 287.

If a man covenants in consideration of marriage, or of a sum of money paid to him, that the covenantee shall have such lands; the time shall change the use immediately, for there are good considerations either to change or raise uses. *Dyer* 6. But if a person covenants to make an estate to certain persons to certain uses, in consideration of marriage; no use arises by such bare covenant, unless the estate be made accordingly: So where upon

marriage there is a covenant to levy a fine, except the fine be levied; but if a fine be levied, it shall be to the use. *Dalif. 112. 3 Lev. 306. Cro. Elin. 401.*

An use arises when declared by estate executed, which needs no consideration: A fine itself without any consideration, doth raise use, where a marriage is intended; but in other conveyances, the consideration of marriage will not raise an use, if the marriage take not effect; because the consideration must be executed before the use shall arise. *1 Leon. 138.*

A consideration of money given by one, may extend to all the estates; but if it be of blood, &c. it is singular, and will raise the use of that only to which it goeth: Though if I covenant with B. in consideration of the marriage of my son with his daughter, to be seised to the use of a stranger for life, and after to my son and his wife in tail; here the use shall arise to the stranger, to bear up the remainder, which is not good without a particular estate. *Plowd. 307. Dyer 174. 11 Rep. 24.* Yet if such covenant be to stand seised to the use of myself for life, and after to C. a stranger for the term of twenty years, and after that to my son in tail; in this case the use limited to C. is void, and my son after my death shall have the land. *1 Rep. 155.*

A covenantant for natural affection, to be seised to the use of himself for life, and after his death that the land should descend or remain to his cousin B. in fee; resolved by all the judges, that no use is raised to B. by reason of the disjunctive, descend or remain. *Jenk. Cent. 267.* An use cannot be raised by any covenant, proviso, or bargain and sale, upon a general consideration, without special averment: And although he that hath the fee-simple of land, may make what uses he will of it in fee, for life or years; yet tenant in tail may not. *4 Shep. Abr. 180. 2 Cro. 400, 401.* On a covenant to stand seised in consideration of natural love and affection, one named in the deed may aver himself to be a relation. *2 Strange 934.* Uses may be made to a man and the wife he shall marry, or to his first, second, or third wife, &c. And if parties to a deed declare, that one of them shall make a feoffment, or levy a fine to the use and intent that one shall hold the land for life, and after his death another in tail, and after that a third in fee-simple, &c. the estate settleth according to the uses declared by the deed. *1 Rep. 13, 121.*

A devise may be to an use, and be so executed: A man makes a feoffment to the use of his will, he hath the use in the mean time; and when the feoffor by will limits the estate pursuant to his power, the estate takes effect by the feoffment, and the use is directed by the will. *Lutw. 823. 6 Rep. 17, 18.* If uses are settled upon condition, the condition must first be performed; and a future use may well arise upon the non-performance of a condition. *2 Lill. Abr. 668.*

There may be a future springing use, without a precedent estate made to support it, as a man covenants to stand seised after his death to the use of his kinsman and his heirs, the estate in the mean time is in him; for it cannot pass out of him during his life, and therefore in case of covenant he hath such estate. *1 Rep. 154. 2 Lev. 77.*

An use is construed as favourably as may be, to comply with the intent of the party: Intention is the foundation of uses, but it ought to be out of the words of the deed, to be agreeable to law, and collected and taken from the intire deed. *1 Mod. 98. Lutw. 700, 790.* If the meaning of the party doth appear, that he intended to pass his estate by way of raising an use; there the words give, grant, &c. shall enure as a covenant to stand seised: But where it doth not appear, that he intended to pass it by way of use, but by conveyance at Common law, no use is raised. *March 50.* Lands being once sold and settled to uses, the party that makes the use may not create any further uses: Where the estate out of which an use ariseth is gone, the use is gone likewise; and uses may be made void by release, or power of revocation. *Dyer 186. 1 Inst. 237.* Deeds of gift of goods, &c. made in trust to the use of the grantor, shall be void. *3 Hen. 7. c. 4.* And no use will prevent dower of a woman after her husband's death, &c. See *Covenant to*

stand seised. Gilbert's Law of Uses, Lord Bacon's Law Tracts. 5 New Abr. and 22 Vin. Abr. Tit. Uses, and Black. Com. 2 P. 327, &c.

Superstitious uses. By statute, a devise of lands or goods to superstitious uses, is where it is to find or maintain a chaplain or priest to pray for the souls of the dead, or lamp in a chapel, a stipendiary priest, &c. These, and such like, are declared to be superstitious uses; and the lands and goods so devised are forfeited to the King. *1 Ed. 6. c. 14.* But a man devised lands to trustees and their heirs, to find a priest, to pray for his soul, so long as the laws of the land would permit; and if the laws would not permit it, then to apply the profits to the poor, with power to convert the profits to either of the said uses; adjudged this was not a devise to any superstitious uses. *3 Nelf. Abr. 259.* And where certain profits arising out of lands are given to superstitious uses, the King shall have only so much of the yearly profits, which were to be applied to the superstitious uses; though when the land itself is given by the testator, declaring that the profit, without saying how much shall be employed for such uses, in this case the King shall have the land itself. *Moor 129.* If a sum certain is given to a priest, and other goods which depend upon the superstitious use, all is forfeited to the King; yet if land, &c. is given to find an obit, or anniversary, and for another good use; and there is no certainty how much shall be employed to the superstitious use, the gift to the good use shall preserve the whole from forfeiture. *4 Rep. 104. 2 R. II. 205.* It has been held, where a superstitious use was void, so that the King could not have it; that it was not so far void, as to result to the heir at law; and therefore the King may apply it to charity. *1 Salk. 163.* See the Stat. 23 H. 8. under Mortmain; and the 1 Geo. 1. Title Forfeiture.

Uter de Writon, Is the pursuing or bringing an action, in the proper county, &c. *Brake 64.*

Usher, (Fr. *Huissier*, a door-keeper) Is an officer in the King's house, as of the privy chamber, &c. And there are ushers of the courts of Chancery and Exchequer.

Usuraption, (*Usuraptio*) Signifies the enjoying by continuance of time; a long possession, or prescription. *Terms de Leg.*

Usufructuary, (*Usufructuarius*) One that hath the use and reaps the profit of a thing.

Usurious contract, Is any bargain or contract, whereby any man is obliged to pay more interest for money than the law allows. See *Usury.*

Usurpation, (*Usurpatio*) Is the using that which is another's; an interruption or disturbing a man in his right and possession, &c. And usurpations in the Civil and Canon law are called intrusions; and such intruders having not any right shall submit, or be excommunicated and deprived, &c. by Boniface's Constit. *Gibf. Codex 817.* The usurpation of a church benefice is, when one that hath no right, presenteth to the church, and his clerk is admitted and instituted into it, and hath quiet possession six months after institution before a *quare impedit* brought: It must commence upon a presentation, not a collation; because by a collation the church is not full, but the right patron may bring his writ at any time to remove the usurper. *1 Inst. 227. 6 Rep. 30.* And by usurpation, the fee of an advowson may be gained, as well as the avoidance upon which the usurpation is made: And the true patron cannot remove the incumbent to regain the possession, without a writ of right of advowson, which he is driven to for recovery of the inheritance. *6 Rep. 49.*

It has been formerly held, that upon an usurpation, the usurper gains a fee-simple in the advowson; in like manner as he who enters into land during a vacation, and claims the same as his inheritance by wrong: But as the dying seised of lands in that case, will not take away the entry of the successor; no more shall the usurpation on a vacancy, take away his right of presentation when the church becomes void. *2 Co. Inst. 360. 17 Edw. 3. c. 37.* At Common law the patron in fee was put out of possession by an usurpation, and to recover the advowson itself by a writ of right; but he hath no remedy for the presentation *hac vice*, nor if another avoidance happen, unless he bring his writ of right of advowson, and re-continue the advowson: If the patron had the advowson in tail, or for life, this turn and also

his whole advowson was gone. 3 Salk. 388. An *usurpation* upon a lessee for years, gains the fee-simple, and puts the true patron out of possession; and though by the Stat. Westm. 2. he in reversion after the determination of the lease for years, may have a *quare impedit* when the church is void, or may present; and if his clerk is instituted and inducted, then he is remitted to his former title; yet till that is done, the *usurper* hath the fee, and the writ of right of advowson lies against him. Hist. 66. 3 Salk. 389. Upon the Stat. 1 Eliz. if an *usurpation* be on a bishop, it shall bind him; but his successor may present to the next avoidance, or bring a *quare impedit*, although he is out of possession: All *usurpations* shall bind the bishop who suffers them, not their successors. 1 Leon. 80. 2 Cro. 673.

No one can *usurp* upon the King; but an *usurpation* may dispossess him of his presentation; so as he shall be obliged to bring a *quare impedit*; though it will not so divest his estate in an advowson, as to bind his inheritance, and put him to a writ of right. 3 Salk. 389. One Coparcener or jointenant, &c. cannot *usurp* upon the other: But where there are two patrons of churches united, if one presents in the other's turn, it is an *usurpation*; for they are not as coparceners, who are privy in blood. Dyer 259. 17 Edw. 3. If one presents to a church in time of war, the presentment shall not put the rightful patron out of possession: And a presentation which is void in law, as in case of simony, or to a church that is full, &c. makes no *usurpation*. 2 Rep. 93. Wood's Inst. 160. Also by a late statute, no *usurpation* on any avoidance, shall displace the estate or interest of any person intitled to an advowson; or hinder him to present upon the next avoidance, or to maintain a *quare impedit* to recover possession, &c. 7 Ann. c. 18. This statute hath quite altered the law concerning *usurpations* of churches. Mallor. 2. Imped. 146. See Black. Com. 3 V. 242.

Usurpation of Franchises and Liberties, Is when a subject unjustly uses any royal franchises, &c. And it is said to be an *usurpation* upon the King, who shall have the writ of *quo warranto* against the *usurpers*. See *Quo Warranto*, and Black. Com. 3 V. 262.

Usury (Usura) Is money given for the use of money; and is particularly defined to be the gain of any thing by contract above the principal, or that which was lent, exacted in consideration of loan thereof, whether it be of money, or any other thing. 3 Inst. 151. Some make *usury* to be the profit exacted for a loan made to a person in want and distress; but properly it consists in extorting an unreasonable rate for money, beyond what is allowed by statute. The letting money out at interest, or upon *usury*, was against the Common law; and in former times, if any one after his death had been found to be a *usurer*, all his goods and chattels were forfeited to the King, &c. And according to several ancient statutes, all *usury* is unlawful; but at this time neither the Common or Statute law, absolutely prohibit *usury*. 3 Inst. 151, 152.

Though excessive *usury* is liable to forfeiture of treble value of the money taken by statute; and if judgment cannot be given on the statute, if it be found that a person took money for forbearance by corrupt agreement, judgment may be given against him at Common law, which is fine and imprisonment. 3 Salk. 391.

Reasonable interest may be taken for the use of money at this day: The Stat. 27 Hen. 8. cap. 9. allowed 10 l. per cent. for money lent on mortgages, &c. The 13 Eliz. c. 8. ordained 8 l. per cent. And the 21 Jac. 1. c. 17. the like interest. The 12 Car. 2. c. 13. lowered the interest to 6 l. per cent. And the 12 Ann. cap. 16. to 5 l. per centum per annum. But it is said, that the Stat. 13 Eliz. and 21 Jac. 1. allowed not *usury*, but punish the excess of it; and the 12 Ann. is called the Statute against Excessive *Usury*.

By the Stat. 12 Ann. c. 16. no person shall take directly or indirectly, for loan of any money, or any thing, above the value of 5 l. for the forbearance of 100 l. for a year, and so proportionably for a greater or less sum; and all bonds, contracts, and assurances made for payment of any principal sum to be lent on *usury*, above the rate of 5 l. per cent. shall be void: And whoever shall take, accept or receive by way of corrupt bargain, loan,

&c. a greater interest, shall forfeit treble the value of the money lent; and scriveners, solicitors, and drivers of bargains, are not to take above 5 s. for procuring the loan of 100 l. for a year, on pain of forfeiting 20 l. &c.

It hath been adjudged on this statute, that a contract for 6 l. per cent. made before the statute, is not within the meaning of it; and therefore that it was still lawful to receive such interest, in respect of any such contract: And if a man, when interest was at 6 l. per cent. lent money at that rate, and after the statute comes and sinks the interest to 5 l. per cent. if he continues the old interest on that bond, the bond shall not be void as *usurious*; but it is said the party shall be liable to forfeit treble value. 1 Harw. 246. 1 Mod. 69. The receipt of higher interest than is allowed by the statute, by virtue of an agreement subsequent to the first contract, doth not avoid an assurance fairly made; and a bond made to secure a just debt, payable with lawful interest, shall not be avoided by a corrupt *usurious* agreement between others, to which the obligee was no ways privy: Nor shall mistakes in drawing writings make void a fair agreement. Ibid.

If the original contract be not *usurious*, nothing done afterwards can make it so: And a counter-bond to save one harmless against a bond made upon a corrupt agreement, will not be void by the statutes. But if the original agreement be corrupt between all the parties, and so within the statute, no colour will exempt it from the danger of the statutes against *usury*. 1 Brownl. 73. 2 And. 428. 4 Shep. Abr. 170. A fine levied, or judgment suffered as a security for money, in pursuance of an *usurious* contract, may be avoided by an averment of the corrupt agreement; as well as any common specialty, or parol contract: And it is not material, whether the payment of the principal and the *usurious* interest, be secured by the same, or by different conveyances; for all writings whatsoever for the strengthening such a contract are void; also a contract reserving to the lender a greater advantage than allowed, is *usurious*, if the whole is reserved by way of interest, or in part only under that name, and in part by way of rent for a house, let at a rate plainly exceeding the known value; so where part is taken before the end of the time, that the borrower hath not the profit of the whole principal money, &c. 1 Harw. P. C. 248. 3 Nelf. Abr. 509.

By Holt chief justice, if A. owes B. 100 l. who demands his money, and A. acquaints him, that he hath not the money ready, but is desirous to pay it, if B. can procure it to be lent by any other person; and thereupon B. having present occasion for his money, contracts with C. that if he will lend A. 100 l. he will give him 10 l. on which C. lends the money, and the debt is paid to B. this is a good and lawful contract, and not *usurious* between B. and C. Carthew's Rep. 252. It is not *usury*, if there be not a corrupt agreement, for more than the statute interest; and the defendant shall not be punished, unless he receive some part of the money in affirmance of the *usurious* agreement. 3 Salk. 390.

There can be no *usury*, without a loan; and the court hath distinguished between a bargain and a loan. 1 Lutw. 273. Sid. 27. If a man lend another 100 l. for two years, to pay for the loan 30 l. and if he pays the principal at the year's end, he shall pay nothing for interest; this is not *usury*, because the party may pay it at the year's end; and so discharge himself. Cro. Jac. 509. 5 Rep. 69. And it is the same where a person by special agreement, is to pay double the sum borrowed, &c. by way of penalty, for non-payment of the principal debt; the penalty being in lieu of damages, and the borrower might repay the principal at the time agreed, and avoid the penalty. 2 Inst. 89. 2 Roll. Abr. 801.

A man surrenders a copyhold estate to another upon condition that if he pays 80 l. at a certain day, then the surrender to be void; and after it is agreed between them that the money shall not be paid, but that the surrenderor shall forfeit, &c. In consideration whereof, the surrenderer promises to pay to the surrenderor out of certain day 60 l. or 6 l. per annum from the said day, *pro usura* & interest of the said 60 l. till that sum is paid: This 6 l. shall be taken to be interest *damnum*, and not *lucrum*, and

and not limited as a penalty for non-payment of the 60*l.* as *a nomine pene*, &c. 2 *Roll. Rep.* 406. 1 *Danv. Abr.* 44. On a loan of 100*l.* or other sum of money for a year, the lender may agree to take his interest half-yearly, or quarterly & to receive the profits of a manor or lands, &c. and be no *usury*, though such profits are rendered every day. *Cro. Jac.* 26.

If a grant of rent, or lease for 20*l.* a year of land which is worth 100*l.* *per annum* be made for one hundred pounds, it is not *usurious*; if there be not an agreement, that this grant or lease shall be void, upon payment of the principal and arrears, &c. *Jenk. Cent.* 249. But if two men speak together, and one desires the other to lend him an hundred pounds, and for the loan of it, he will give more than legal interest; and to evade the statute, he grants to him 30*l.* *per Annum* out of his land for ten years, or makes a lease for one hundred years to him, and the lessee regrants it upon condition that he shall pay 30*l.* yearly for the ten years: In this case it is *usury*, tho' the lender never have his own hundred pounds again. 1 *Cro.* 27. See 1 *Leon.* 119.

A man granted a large rent for years, for a small sum of money: The statute of *usury* was pleaded; and it was adjudged, that if it had been laid to be upon a loan of money, it had been *usurious*; though it is otherwise if it be a contract for an annuity. 4 *Shep. Abr.* 170. If one hath a rent-charge of 30*l.* a year, and another asketh what he shall give for it, and they agree for 100*l.* this is a plain contract for the rent-charge, and no *usury*. 3 *Nelf.* 510. The grant of an annuity for lives, not only exceeding the rate allowed for interest, but also the proportion for contracts of this kind, in consideration of a certain sum of money, is not within the statutes against *usury*; and so of a grant of an annuity, on condition, &c. *Cro. Jac.* 253. 2 *Lev.* 7. See 1 *Sid.* 182. Where interest exceeds 5*l.* *per cent. per annum* on a bond, if possibly the principal and interest are in hazard, upon a contingency, or casualty; or if there is a hazard that one may have less than his principal, as when a bond is to pay money upon the return of a ship from sea, &c. these are not *usury*. 2 *Cro.* 208, 508. 1 *Cro.* 27. *Show.* 8. Though where *B.* lends to *D.* three hundred pounds on bond, upon an adventure during the life of *E.* for such a time; if therefore *D.* pays to *B.* twenty pounds in three months, and at the end of six months, the principal sum, with a further premium, at the rate of 6*d.* *per pound* a month; or if before the times mentioned *E.* dies, then the bond to be void: This differing from the hazard in a *bottomry* bond, was adjudged an *usurious* contract. *Carthrew* 67, 68. *Comberb.* 125.

One hundred pounds is lent to have 120*l.* at the year's end, upon a casualty; if the casualty goes to the interest only, and not the principal, it is *usury*: The difference in the books is, that where the principal and interest are both in danger of being lost, there the contract for extraordinary interest is not *usurious*; but when the principal is well secured, it otherwise. 3 *Salk.* 391. Discounting notes beyond legal interest held *usurious*. 2 *Strange* 1243. A person secures the interest and principal; if it be at the will of the party who is to pay, it is no *usury*. 2 *Cro.* 509. And a lender accepting a voluntary gratuity from the borrower, on payment of the principal and interest; or receiving the interest before due, &c. without any corrupt agreement, shall not be within the statutes against *usury*. 2 *Cro.* 677. 3 *Cro.* 501. Also if one gives an *usurious* bond, and tenders the whole money; yet if the party will take only legal interest, he shall not forfeit the treble value by Statute. 4 *Lev.* 43. Judgment on an indictment for *usury* was arrested, because it only laid a corrupt agreement, without any loan, or taking excessive interest in pursuance of it. 2 *Strange* 816.

Or an information upon the statute of *usury*, he who borrows the money may be a witness, after he hath paid the money. *Raym.* 191. But cannot be a witness to prove the repayment of the money, because till that is proved he is no witness at all. 1 *Strange* 633. In action for *usury*, a corrupt agreement must be set forth: It is not sufficient to plead the statute, and say that for the lending of 20*l.* the defendant took more than 5*l.* *per cent.* without setting forth a corrupt agreement, or contract. *Lutw.* 466.

2 *Lill.* 672. 3 *Nelf.* 514. In case of *usury*, &c. an obligor is admitted to aver against the condition of a bond, or against the bond itself, for necessity's sake. *Pasch.* 6. *W. & M. B. R.*

As to pleading the statute of *usury*, vide *Com. Dig.* 5 *V. Tit. Pleader*. Also see farther on this subject, 5 *New Abr.* and 22 *Vin. Abr. Tit. Usury*. See as to *usury* *Black. Com.* 2 *V.* 455. 4 *V.* 115, 156.

Utias, *Ottawa*, is the eighth day following any term or feast; as the *utias* of St. Michael, &c. And any day between the feast and the *Ottawa* is said to be within the *utias*: The use of this is in the return of writs; as appears by the Stat. 51. H. 3.

Utensil, Is any thing necessary for use and occupation; household stuff. *Cowel.*

Uterinus Frater. A brother by the mother's side. *Frater fratri uterino non succedit in hereditate paterna.* *Fortesc. de Laud. LL. Angl.* 5.

Utsangthef, (*Fur extra captus, scilicet, extra dominium, vel jurisdictionem*.) Is an ancient privilege or royalty granted to a lord of a manor, by the King, which gives him power to punish a thief dwelling out of his liberty, and committing theft without the same, if he be taken within his fee. *Bracton*, lib. 2. tract. 2. cap. 35. says thus, *Utsangthef dicitur extraneus latro, veniens aliunde de terra aliena, & qui captus fuit in terra ipsius qui tales habet libertates.* See *Ousangthef*.

Utlagato captendo quando utlagatur in uno comitatu & postea fugit in alium, Is a writ, the nature whereof is sufficiently expressed by the name. See *Reg. Orig. fol.* 133.

Utlegh, (*Utblagus*.) An outlaw, signifies *Bannitum extra legem*. *Fleta*, lib. 1. cap. 47. See *Outlawry*.

Utlagary, (*Utlagaria, vel Utlagatio*) See *Outlawry*.

Utlepe (*Sax.*) Signifies an escape of a felon out of prison. *Fleta*, lib. 1. c. 47.

Utrum, A writ now of little use. *Terms de Ley.* See *Affise de utrum*.

Utter Barristers, (*Juris consulti*) Are barristers at law, newly called, who plead without the bar, &c. Vide *Barrister*.

Uttering false Money. By 1 & 2 *P. & M.* c. 11. If any person bring into the realm false or counterfeit foreign money, being current here, knowing the same to be false, and shall utter the same in payment, they shall be deemed offenders in high-treason. See *Black. Com.* 4 *V.* 89. By 15 & 16 *Geo.* 2. c. 28. If any person shall tender in payment any counterfeit coin, knowing it so to be, he shall for the first offence be imprisoned six months, and find sureties for his good behaviour six months more; for the second offence shall be imprisoned and find sureties for two years; and for the third offence shall be guilty of felony without benefit of clergy. See the Stat. and *Black. Com.* 4 *V.* 99.

Utlgaris Purgatio. The most ancient species of trial, was that by *ordal*, which was peculiarly distinguished by the appellation of *Judicium Dei*; and sometimes *vulgaris purgatio*, to distinguish it from the canonical purgation, which was by the oath of the party. See *Black. Com.* 4 *V.* 336.

Utraba, A wound in the face — *Utrivam* 50 *fol. componat.* *Leg. Sax.*

Utrius de Luca, The image of our crucified Saviour kept at *Lucca* in the church of the Holy Cross: And *Will.* 1. called the Conqueror, often swore *per sanctum vultum de Luca*. *Eadmer.* lib. 1. *Malmsh.* lib. 4.

Uxorium, A mulct or fine paid for not marrying. *Litt. Dist.*

W.

Wade, (*Vado*) To wade or ford over a river. *Litt.*

Wastors, (*Wastores*) Are conductors of vessels at sea; King *Edw.* 4. constituted certain officers with naval power, whom he styled *custodes, conductores, and wastores*, to guard our fishing vessels on the coasts of *Norfolk* and *Suffolk*. *Pat.* 22 *Edw.* 4.

Wage,

Wage, (*Vadiare*, from Fr. *Gage*) Signifies the giving of security for performance of any thing; as to *wage* or *gage deliverance*, to *wage law*, &c. Co. Litt. 294.

Wager of Battel. A species of trial of great antiquity, but much disused; though still in force if the parties chuse to abide by it. This mode of trial was used in the court-martial, or court of chivalry and honour: In appeals of felony; and on issues joined in writs of right. See *Black. Com.* 3 V. 337, 339. iii. 4 V. 340. 411, 414, 417.

Wager of Law, (*Vadiare Legem*) Is where an action of debt is brought against a man upon a simple contract between the parties, without deed or record; and the defendant swears in court in the presence of his purgators, that he oweth the plaintiff nothing in manner and form as he hath declared: And the reason of *waging of law* is, because the defendant may pay the plaintiff his debt in private, or before witnesses who may be all dead, and therefore the law allows him to *wage* his law in his discharge; and his oath shall rather be accepted to discharge himself, than the law will suffer him to be charged upon the bare allegation of the plaintiff. 2 Inst. 45. *Wager of law* is used in actions of debt without specialty; and also in action of detinue, for goods or chattels lent or left with the defendant, who may swear on a book, and certain persons with him, that he detaineth not the goods in manner as the plaintiff has declared, and his compurgators are to be six, eight or twelve of his neighbours, as the court shall assign him. *Terms de Ley*.

The manner of *waging law* is thus: He that is to do it, must bring six compurgators with him into court, and stand at the end of the bar towards the right-hand of the chief justice; and the secondary asks him whether he will *wage his law*? If he answers that he will, the judge admonisheth him to be well advised, and tell him the danger of taking a false oath; and if he still persists, the secondary says, and he that *wages his law* repeats after him: *Hear this ye justices, That I A. B. do not owe to C. D. the sum of, &c. nor any penny thereof in manner and form as the said C. D. hath declared against me: So help me God.* Though before he takes the oath, the plaintiff is called by the crier thrice; and if he do not appear he becomes nonsuited, and then the defendant goes quit without taking his oath; and if he appear, and the defendant swears that he owes the plaintiff nothing, and the compurgators do give it upon oath that they believe he swears true, the plaintiff is barred for ever; for when a person has *waged his law*, it is as much as if a verdict has passed against the plaintiff: If the plaintiff do not appear to hear the defendant perform his law, so that he is nonsuited; he is not barred, but may bring a new action. 1 Inst. 155. 2 Lill. Abr. 674.

In an action of debt on a by-law, the defendant *waged law*; a day being given on the roll for him to come and make his law, he was set at the right corner of the bar, and the secondary asked him if he was ready to *wage his law*; who answering that he was, he laid his hand on the book, and then the plaintiff was called: Then the judges admonished him and his compurgators not to swear rashly; and thereupon he made oath, that he did not owe the money *modo & forma* as the plaintiff had declared; and then his compurgators, who were standing behind him, were called, and each of them laying his right-hand upon the book, made oath that they believed what the defendant had sworn was true. 2 Vent. 171. 2 Salk. 682. The defendant cannot *wage his law* in any action, but personal actions, where the cause is secret; and *wager of law* has been denied on hearing the case, and the defendant been advised to plead to issue, &c. Also this *wager of law* being, it is said, abused by the iniquity of the times, the law was forced to find another way to do justice, and that was by turning actions of debt on simple contract, &c. into action upon the case by *indebitat. assumpti*, which hath ousted the defendant of his *ley gager*. 2 Lill. 675, 676. See *Black. Com.* 3 V. 341. 4 V. 407, 417.

Wagering Policies. By Stat. 19. Geo. 2. c. 37. All insurances interest or no interest, or without farther proof of interest, than the policy itself, or by way of gaming or wagering, or without benefit of salvage to the insurer,

shall be totally null and void, except upon private ships, or ships in the *Spanish* and *Portuguese* trade. See the Statute.

Wagers. By statute, all *wagers* laid upon a contingency relating to the late war with France, and all securities, &c. therefore, were declared to be void; and persons concerned to forfeit double the sums laid. 7 Ann. cap. 17.

Wages, Is what is agreed upon by a master to be paid to a servant, or any other person which he hires to do business for him. 2 Lill. Abr. 677. The *wages* of servants, labourers, &c. is to be assessed by justices. 5 Elin. cap. 4. 1 Jac. 1. cap. 6. And justices of peace may order payment of *wages* for husbandry, &c. but not in other cases. Mod. Caf. 204, 205. The *statute* of labourers *wages* extends to covenant servants in husbandry; though an order of justices was quashed in B. R. because made upon the servant's oath, without other evidence. 2 Ld. Raym. 1305. See *Servants*. *Wages* of seamen, vide Stat. 4 & 5 Ann. 1 Geo. 1. c. 25. For the better adjusting and more easy recovery of the *wages* of certain servants, see Stat. 20. Geo. 2. c. 19. 27 Geo. 2. c. 6.

Wages of Members of Parliament. The rate of these *wages* established in the reign of Edw. 3. was four shillings a day for a knight of the shire, and two shillings for a citizen or burghers.

Waggons and Waggoners, see *Carts, Highways, Turnpikes*.

Waifs, (From the Sax. *Wafian*, Fr. *Chose guaiue*, Lat. *Bona Wavata*) Are goods which are stolen and *waved*, or left by the felon, on his being pursued, for fear of being apprehended; which are forfeited to the King or lord of the manor. Kitch. 81. If a felon in pursuit *waves* the goods, or having them in his custody, and thinking that pursuit was made, for his own ease and more speedy flight, flies away and leaves the goods behind him; then the King's officer or the bailiff of the lord of the manor, within whose jurisdiction they are left, who hath the franchise of *waif*, may seize the goods to the King's or lord's use and keep them; except the owner makes fresh pursuit after the felon, and sue an appeal of robbery within a year and a day, or give evidence against him whereby he is attainted, &c. In which case, the owner shall have restitution of his goods so stolen and *waved*. 21 H. 8. cap. 11. 5 Rep. 109. Goods *waved* by a felon, in his flight from those who pursue him, shall be forfeited: And tho' *waif* is generally spoken of goods stolen; yet if a man be pursued with *hue and cry* as a felon, and he flies and leaves his own goods, these will be forfeited as goods stolen; but they are properly *fugitive's goods*, and not forfeited till it be found before the coroner, or other wife of record, that he fled for the felony. 3 Hawk. 450. 5 Rep. The law makes a forfeiture of goods *waved*, as a punishment to the owner of the goods, for not bringing the felon to justice: But if the thief had not the goods in his possession, when he fled, there is no forfeiture: If a felon steals goods and hides them, and afterwards flies, these goods are not forfeited; so where he leaves stolen goods any where, with an intent to fetch them at another time, they are not *waved*; and in these cases the owner may take his goods where he finds them, without fresh suit, &c. Cro. Eliz. 694. 5 Rep. 109. Moor 785. *Waifs* and *strays* are said to be *nullius in bonis*; and therefore they belong to the lord of the franchise where found. Briton, cap. 17. We read of *placita coronæ & wif*, in the manor of Upton, &c. in com. Salop. See 22 Vin. Abr. 408—410.

Wain, (*Plaustrum*) A cart, waggon, or plough to till land.

Wainable, i. e. That may be ploughed, or manured; land tillable. Chart. *finē dar'*.

Wainage, (*Wainagium*) According to Sir Edw. Coke, signifies the contentment of a villain; or the furniture of his cart or *wain*. 2 Inst. 28. And the villain of any other, if he fall into our mercy, shall be amerced saving his *wainage*. Magn. Chart. c. 14. *Wainage* has been also used for tillage. Mon. Ang. Tum. 2. p. 612. See *Gainage*.

Waive, (*Waivare*) In the general signification, is to forsake; but is specially applied to a woman, who for any crime,

crime, for which a man may be *enslaved*, is termed *Wale*. Reg. Orig. 132.

Waiver, Signifies the passing by of a thing, or a refusal to accept it: Sometimes it is applied to an estate, or something conveyed to a man, and sometimes to a plea, &c. And a *waiver* or disagreement as to goods and chattels, in case of a gift, will be effectual. *Litt. Sect.* 710. If a joingure of lands be made to a woman after marriage, she may *waive* this after her husband's death. 3 Rep. 27. And an infant, or if he die, his heirs may by *waiver* avoid an estate made to him during his minority. 1 Inst. 23, 348. But where a particular estate is given with a remainder over, there regularly he that hath it may not *waive* it, to the damage of him in remainder: Though it is otherwise where one hath a reversion; for that shall not be hurt by such *Waiver*. 4 Shep. Abr. 192. After special issue joined in any action, the parties cannot *waive* it, without motion of court. 1 Keb. 225. Assignment of Error by attorney on an outlawry, ordered to be *waived*, and the party to assign in person, after demurrer for this cause. See 2 Keb. 15.

Wake, The eve-feast of the dedication of churches; which in many country places, is observed with feasting and rural diversions, &c. *Paroch. Antiq.* 609.

Wakeman, (*Quasi* watchman) the chief magistrate of the town of *Rippon* in *Yorkshire*, is so called. *Camd.*

Wales, (*Wallia*) Is part of *England* on the west side formerly divided into three provinces, *North-Wales*, *South-Wales*, and *West-Wales*, and inhabited by the offspring of the ancient *Britons*; chased thither by the *Saxons*, called in to assist them against the *Picts* and *Scots*. *Lamb. Stat. Wallia*, 12 Edw. 1. *England* and *Wales* were originally but one nation, and so they continued till the time of the *Roman* conquest: but when the *Romans* came, those *Britons* who would not submit to their yoke, betook themselves to the mountains of *Wales*, from whence they came again soon after the *Romans* were drove away by their dissensions here: After this came the *Saxons*, and gave them another disturbance, and then the kingdom was divided into an *heptarchy*; and then also began the *Welsh* to be distinguished from the *English*: Yet it is observable, that though *Wales* had princes of their own, the King of *England* had superiority over them, for to him they paid homage. *Camd.* 67. 2 Mod. 11.

The Stat. 28 Edw. 3. c. 2. annexed the marches of *Wales* perpetually to the crown of *England*; so as not to be of the principality of *Wales*. And by the 27 Hen. 8. c. 26. *Wales* was incorporated to and united with *England*; and all persons born in *Wales* shall enjoy the like liberties as those born in *England*, and lands descend there according to the *English* laws: The laws of *England* are to be executed in *Wales*; and the King to have a *Chancery* and *Exchequer* at *Brecknock* and *Denbigh*: Officers of law and ministers shall keep courts in the *English* tongue; and the *Welsh* laws and customs to be inquired into by commission, and such of them as shall be thought fit continued; but the laws and customs of *North Wales* are saved. By 34 & 35 Hen. 8. cap. 26. A division of *Wales* was made into twelve counties; and a president and council shall remain in *Wales* and the marches thereof, with officers, &c. Two justices are to be assigned to hold a session twice every year, and determine pleas of the crown, and assises, and all other actions; and justices of peace shall be appointed as in *England*, &c. The 18 Eliz. cap. 8. enacts, That the King may appoint two other persons learned in the laws, to be judges in each of the *Welsh* circuits, which had but one justice before; or grant commissions of association, &c.

An office for inrolments was erected, and the fees and proceedings regulated in passing fines and recoveries in *Wales*, by 27 Eliz. cap. 9. Persons living in *Wales*, may give and dispose of their goods and chattels by will, in like manner as may be done within any part of the province of *Cambridge*, or elsewhere. 7 & 8 W. 3. c. 38. Jurors returned to try issues in *Wales*, are to have 6*l.* a year of freehold or copyhold, above reprises: And none shall be held to bail in *Wales*, unless affidavit be made that the cause of action is 20*l.* or upwards. 11 & 12 W. 3. cap. 9. In actions where the debt, &c. amounts not to 10*l.* in the court of

great sessions in *Wales*, the plaintiff shall sue out a writ or process, and serve the defendant with a copy eight days before holding of the said court, &c. who shall appear at the return, or before the third court; or the plaintiff may enter an appearance, and proceed. 6 Geo. 2. c. 14. Murders and felonies in any part of *Wales* may be tried in the next *English* county. 1 Strange 553. A *certiorari* lies to *Wales* on indictments for misdemeanours. 1 Strange 704. A *habeas corpus* may be granted of course to remove a prisoner from *Wales* to an *English* county. 2 Strange 945. A prohibition granted to the great sessions to stay a suit on a *subpoena* served out of the jurisdiction. 1 Strange 630. Of process into *Wales*, judgments, and courts there, &c. See 3 Nels. Abr. 519, 520, 522, and Courts of *Wales*. Prince of *Wales*, vide Prince.

Walscheria, The learned *Spelman* says signifies *Wallie pars*: But by others it is interpreted *parentela hominis infernalis*; the same with *valesheria*.

Walscus, (i. e. *Servus*) A servant, or any ministerial officer. *Leg. Ina.* c. 34.

Walkers, Are *foresters* within a certain space of ground, assigned to their care in forests, &c. *Crompt. Jurisd.* 145.

Wall, *Sea-Wall*, A bank of earth. See *Water-gate*.

Waltingham. The demesne lands in *Waltingham* may be let by copy, and shall be copyholds. 35 Hen. 8. c. 13.

Waltingham Blacks. In the reign of K. Geo. 1. there sprung up a set of desperate villains called *Waltingham Blacks*, headed by one whom they stiled K. John; who blacking their faces, and using other disguises, robbed forests, parks, and warrens, destroyed cattle, levied money on their neighbours, by threats and menaces to fire their houses, and committed divers other violences and outrages to the great terror of the people; but they were suppressed, and declared felons, by Stat. 9 Geo. 1. c. 22.

Wandering Soldiers and Mariners. Such, or persons pretending so to be, wandering about, and not having a testimonial from a justice of peace, &c. guilty of felony, per Stat. 39 Eliz. c. 17. which vide.

Wang, (*Sax.*) We use for the cheek, or jaw wherein the teeth are set: Hence *Chaucer* called the cheek-teeth or grinders, *Wangs* or *wang-teeth*; which is recorded in this old way of sealing writings:

And in witness that this is sooth,
I bite the wax with my wang-tooth,

Wanga, An iron instrument with teeth. *Consuetud. Dom. de Farend.* MS. 18.

Wanlass, or driving the *wanlass*, is to drive deer to a stand, that the lord may have a shoot; which is one of our ancient customary tenures of lands. *Blount's Ten.* 140.

Want. Whether a man in extreme want of food or clothing, may justify stealing either, to relieve his present necessity; hath occasioned great speculation among the writers of general law. Some of our own lawyers have held that he might. *Briston*, c. 10. *Mirr.* c. 4. f. 16. But it is now antiquated, the law of *England* admitting no such excuse at present. 1 Hal. P. C. 54. *Black. Com.* 4 V. 31. And we may add, very properly, as a judge may respite, and a merciful king pardon. The ancient doctrine, if now in force, would open a door to many villainies.

Wapentake, (From the *Sax. Weapon*, i. e. *Armatura*, & *Tac. tabus*) Is all one with what we call a hundred; specially used in the north countries beyond the river *Trent*. *Bract. lib.* 3. *Lamb.* The words seem to be of *Danish* original, and to be so called for this reason; when first this kingdom, or part thereof, was divided into *wapentakes*, he who was the chief of the *wapentake* or hundred, and whom we now call a high constable, as soon as he entered upon his office, appeared in the field on a certain day on horseback with a pike in his hand, and all the chief men of the hundred met him there with their lances, and touched his pike; which was a sign that they were firmly united to each other, by the touching their weapons. *Hoveden. Flita. lib.* 2. But Sir *Thomas Smith* says, that antiently

musters were made of the armour and weapons of the several inhabitants of every wapentake; and from those that could not find sufficient pledges for their good abearing, their weapons were taken away, and given to others; from whence he derives this word. *Rep. Angl. lib. 2. cap. 16. Camd. Brit. 159. 2 Inst. 99. Stat. 3. Hen. 5. c. 2. 9 Hen. 6. cap. 10. 15 Hen. 6. cap. 7.* — Wapentak hoc est quitancia de feitis & bundredis quod dicitur Wapentake. MS. in Bibl. Cotton.

Wapping. An act was made for the partition of Wapping marsh. *Stat. 35. H. 8. c. 9.* And persons sheltering themselves from debts, and obstructing the execution of writs in Wapping, Stepney, &c. to be guilty of felony, by 11 Geo. 1. c. 22.

War, (Bellum) A fighting between two Kings, princes or parties, in vindication of their just rights; also the state of war, or all the time it lasts. By our law, when the courts of justice are open, so that the King's judges distribute justice to all, and protect men from wrong and violence, it is said to be a time of peace: But when by invasion, rebellion, &c. the peaceable course of justice is stopt, then it is adjudged to be a time of war: And this shall be tried by the records and judges, whether justice at such a time had her equal course of proceeding or not. For time of war gives privilege to them that are in war, and all others within the kingdom. 1 *Inst. 249.* In the civil wars of K. Char. 1. it was computed that there were not fewer than 200,000 foot and 50,000 horse in arms on both sides; which was an extraordinary host, considering it composed of Britains sufficient to have shaken Europe, though it was otherwise fatally employed. And in ancient times, when the Kings of England were to be served with soldiers in their wars, a knight or squire that had revenues, farmers and tenants, would covenant with the King by indenture inrolled in the Exchequer, to furnish him with such a number of military men; and those men were to serve under him, whom they knew and honoured, and with whom they must live at their return. 1 *Inst. 71.* This was an excellent institution; but we have had many statutes which have altered this method of recruiting the army, by introducing the lifting of soldiers, and retaining them by virtue of money paid and advanced, &c. The statute 25 Edw. 3. enacted, That none should be constrained to find men of arms but by tenure of land, or grant in parliament. And what persons are obliged to attend upon the King, when he goes in person himself to the wars, &c. Vide 11 H. 7. c. 18. See *Laws of arms, and Soldiers.* See *Black. Com. 1 V. 257.*

Wara, A certain quantity or measure of ground. *Mon. Ang. Tom. 1. p. 172.*

Ward, (Custodia) Is variously used in our old books: A ward in London is a district or division of the city, committed to the special charge of one of the aldermen; and in London there are twenty-six wards, according to the number of the mayor and aldermen, of which every one has his ward for his proper guard and jurisdiction. *Stow's Surv. A forest is divided into wards. Manwood, par. 1. p. 97.* And a prison is called a ward. Lastly, The heir of the King's tenant, that held in capite, was termed a Ward, during his nonage: But this wardship is taken away by the Stat. 12 Car. 2. c. 24.

Warda, The custody of a town or castle, which the inhabitants were bound to keep at their own charge. *Mon. Ang. Tom. 1. p. 372.*

Wardage, (Wardagium) Seems to be the same with Wardpeny.

Warden, (Gardianus, Fr. Gardin) Is he that hath the keeping or charge of any persons or things by office; as the wardens of the fellowships or companies in London. 14 H. 8. cap. 2. Wardens of the marches of Wales, &c. 14 H. 7. cap. 8. Wardens of the peace. 2 Ed. 3. c. 3. Wardens of the tables of the King's exchange. 2 Ed. 3. c. 7. Warden of the armour in the Tower. 1 Ed. 4. c. 1. Wardens of the rolls of the Chaucery. 1 Ed. 4. c. 5. Warden of the King's writs and records of his court of Common Bench. *Ibid.* Warden of the lands for repairing Rochester bridge. 18 Eliz. c. 7. Warden of the flanneries. 14 Car. 2. c. 3. Warden and minor Canons of St. Paul's church. 22 & 23 Car. 2. Warden of the Fleet prison. 8 & 9 W. 3. c. 27. &c. See *Guardian.*

Wardmote, (Wardmotus) Is a court kept in every ward in London; ordinarily called the Wardmote court: And the wardmote inquest hath power every year to inquire into and present all defaults concerning the watch, and constables doing their duty; that engines, &c. are provided against fire; persons selling ale and beer be honest, and suffer no disorders, nor permit gaming, &c. that they sell in lawful measures; and searches to be made for vagrants, beggars, and idle persons, &c. who shall be punished. *Chart. K. Hen. 2. Lex Lond. 185.*

Wardpeny, Money paid and contributed to watch and ward. *Domesday.*

Wardwit, Is to be quit of giving money for keeping of wards. *Terms de Ley.*

Wards, Was a court first erected in the reign of King Hen. 8. and afterwards augmented by him with the office of Liveries; wherefore it was stiled the Court of Wardens and Liveries, now discharged by the 12 Car. 2. c. 24.

Ward-Staff, The constable or watchman's staff: And the manor of Langbourn in Essex is held by the service of the ward-staff, and watching the same in an extraordinary manner, when it is brought to the town of Abridge. *Camd.*

Wareffare, To plough up land designed for wheat in the spring, in order to let it lie fallow for better improvement; which in Kent is called Summer-land: Hence *wareabilis campus*, a fallow field; *campus ad wareffam, terra wareffata, &c.*

Wares. Certain wares not to be brought into this realm from abroad, to be sold or exchanged here, on pain or forfeiture. See *Stat. 5 Eliz. cap. 7.*

Wargus, A banished rogue. *Leg. Hen. 1. cap. 83.*

Warristura, Is used for garniture, furniture, provision, &c. *Pat. 9 Hen. 3.*

Warnoth. It is an ancient custom, if any tenant holding of the castle of Dover failed in paying his rent at the day, that he should forfeit double, and for the second failure treble: And the lands so held are called *Terris cultis & terris de Warnoth.* *Mon. Angl. Tom. 2. pag. 589.*

Warrant, A precept under hand and seal to some officer to bring any offender before the person granting it: And warrants of commitment are issued by the privy council, a secretary of state, or a justice of peace, &c. where there hath been a private information, or a witness has deposed against an offender. *Wood's Inst. 614.* Any one under the degree of nobility, may be arrested for a misdemeanor, or any thing done against the peace of the kingdom, by warrant from a justice of peace; though if the person be a peer of the realm, and he must be apprehended for a breach of the peace by process out of B. R. &c. *Dals. Just. 263.* A constable ought not to execute a justice's warrant, where the warrant is unlawful, or the justice hath no jurisdiction; if he doth, he may be punished. *Plowd. 394.* But if any person abuse by throwing in the dirt, &c. or refuse to execute a lawful warrant; it is a contempt of the King's process, for which the offender may be indicted and fined. *Crompt. 149.* See *Constable, Justices of Peace.* For the apprehending persons in any county, upon warrants granted by justices of any other county. See *Stat. 24 Geo. 2. c. 55.* For warrants of distress, see *Stat. 27 Geo. 2. c. 20.*

Warrant of Attorney, Is an authority and power given by a client to his attorney, to appear and plead for him; or to suffer judgment to pass against him by confessing the action, by *Nil dicit, non sum informatus, &c.* And although a warrant of attorney given by a man in custody to confess a judgment, no attorney being present, is void as to the entry of a judgment; yet it may be a good warrant to appear and file common bail. 2 *Lill. Abr. 682.* A warrant of attorney which warrants the action, is of course put in by the attorneys for the plaintiff and defendant; so that it differs from a letter of attorney which passes ordinarily under the hand and seal of him that makes it, and is made before witnesses, &c. Though a warrant of attorney to suffer a common recovery by the tenant, is acknowledged before such persons as a commission for the doing thereof directs. *West's Symb. par. 2.* A warrant of attorney filed of any term *pendente Lite* is sufficient. 1 *Strange 526. 2 Strange 807.* Vide *Stat. 4 & 5 Ann. c. 16.*

Warrantia

Warrantia Chartae, is a writ that lieth where a man is infeoffed of lands with *warranty*, and then he is sued or impleaded. And if the feoffee be impleaded in *assise*, or other action, in which he cannot vouch or call to *warranty*, he shall have this writ against the feoffor, or his heirs, to compel them to *warrant* the land unto him; and if the land be recovered from him, he shall recover as much lands in value against the *warrantor*, &c. But the *warrantia chartae* ought to be brought by the feoffee depending the first writ against him, or he hath lost his advantage. *F. N. B.* 134. *Terms de Ley* 372, 588. And if a person doth infeoff another of lands by deed with *warranty*, and the feoffee make a feoffment over, and taketh back an estate in fee, the *warranty* is determined; and he shall not have the writ *warrantia chartae*, because he is in of another estate: Also where one makes a feoffment in fee with *warranty* against him and his heirs, the feoffee shall not a *warrantia chartae* upon this *warranty* against the feoffor or his heirs, if he be impleaded by them; but the nature of it is to *rebut* against the feoffor and his heirs. *Dalt.* 48. 2 *Lill. Abr.* 684.

This writ may be sued forth before a man is impleaded in any action, but the writ doth suppose that he is impleaded; and if the defendant appear and say, that he is not impleaded, by that plea he confesseth the *warranty*, and the plaintiff shall have judgment, &c. and the party shall recover in value of the lands against the vouchee, which he had at the time of the purchase of his *warrantia chartae*; and therefore it may be good policy to bring it against him before he is sued, to bind the lands as he had at that time; for if he have aliened his lands before the voucher, he shall render nothing in value. *New Nat. Br.* 298, 299. If a man recover his *warranty* in *warrantia chartae*, and after he is impleaded; he ought to give notice to him against whom he had recovered, of the action, and pray him to shew what plea he will plead, to defend the land, &c. And where one upon a *warranty* doth vouch and recover in value, if he is then impleaded of the land recovered, he may not vouch again, for the *warranty* was once executed. 23 *Ed.* 3. 12. In a *warranty* to the feoffee in land, made by the feoffor; upon voucher if special matter be shewed by the vouchee, when he entered into the *warranty*, viz. That the land at the time of the feoffment was worth only 100*l.* and now at the time of the voucher it is worth 200*l.* by the industry of the feoffee; the plaintiff in a *warrantia chartae*, &c. shall recover only the value as it was at the time of the sale. *Jenk. Cent.* 35. If the vouchee can shew cause why he should not warrant, that must be tried, &c.

Warrantia Dicit, Is an ancient writ lying where one having a day assigned personally to appear in court to any action, is in the mean time employed in the King's service, so that he cannot come at the day appointed: And it is directed to the justices to this end, that they neither take nor record him in default for that time. *Reg. Orig.* 18. *F. N. B.* 17. See *Effoin*.

Warranty, (*Warrantia*) Is a promise or covenant by deed made by the bargainor, for himself and his heirs, to *warrant* or secure the bargainee and his heirs, against all men for the enjoying of the thing granted. *Bract. lib.* 2. *§ 5.* *West's Symb. par.* 1.

A *warranty* is *real* or *personal*; *real*, when it concerns lands and tenements, granted in fee, or for life, &c. And *real warranties* are either in *deed*, as by the word *warrantize* or *warrant* expressly; or in *law*, by the word *dedi*, &c. And a deed of gift and exchange, have a *warranty* in law implied. *Litt.* 697. Sir *Edward Coke* defines a *real warranty* to be a covenant real annexed to lands, whereby a man and his heirs are bound to *warrant* the same to some other and his heirs; and that they shall quietly hold and enjoy the lands, and upon voucher, or by writ of *warrantia chartae*, to yield other lands and tenements to the value of those that shall be evicted by elder title: And *warranty* being a covenant real, bindeth to yield lands in recompence. 1 *Inst.* 365, 384.

Warranty is also of three sorts, viz. *Warranty lineal*, *warranty collateral*, and *warranty* that commences by *disseisin*: *Warranty lineal* is where a man seised in fee makes a feoffment, and binds himself and his heirs by the deed to *warranty*, and hath issue a son and dies, and the

warranty descends to his son and heir; for if no deed with *warranty* had been made, then the right of the lands should have descended to the son as heir to his father, and he would have conveyed the descent from father to son: This *warranty* binds the right of fee-simple; but not the right of an estate-tail, unless the lineal *warranty* be with assets in fee-simple. *Litt.* 697, 703. 1 *Inst.* 370.

Collateral warranty is when the party upon whom the *warranty* descends, cannot convey the title which he hath in the land from him that made the *warranty*, or shew that he is his heir, &c. As if tenant in tail discontinues the tail, or alienates the land, and then dieth, leaving issue, and the uncle of the issue releases to the discontinuance with *warranty*, and dies without issue; this is a collateral *warranty* to the issue in tail, and bindeth his right, without assets, it descending upon him, and he can't make a title to the intail from his uncle. *Litt.* 704. 1 *Inst.* 373, 376.

Warranty by disseisin, is where one that hath no right to the freehold of another, entereth and conveyeth it away with *warranty*; which shall not bind or bar the person disseised, or the right heir that ought to have the land: And if where tenant for life, remainder in tail, leases for years with agreement with the lessee, that he shall make a feoffment of the land, and then he will release with *warranty*, which is done accordingly; adjudged that this collateral *warranty* commencing by disseisin, shall not bind the heir in tail, upon whom it descended. *Litt.* 698. 1 *Inst.* 366, 367. *Cro. Car.* 483. *Accomp. Conv.* 1 *Vol.* 56.

He that makes a *warranty*, may make it as large, or as strait as he pleases; as for himself and his heirs, and what heirs, &c. And if the *warranty* be made for life, or in tail, 'tis good, and shall bind for so long only. 1 *Inst.* 387. 1 *And.* 262, 305. But no *warranty* can enlarge an estate granted; for if the lessor by deed doth release to his lessee for life, and *warrant* the land to him and his heirs, it shall not make his estate greater. 1 *Inst.* 389. And where one binds him and his heirs to *warranty*; by this they are not bound to *warrant* new titles, or any right that commences after *warranty* made, but such as were *in esse* at that time. *Bridgm.* 77. If one make an estate, and grant to *warrant* the land, but doth not say for how long; it shall be taken for so long as the estate to which the *warranty* is knit doth last: A man grants to *warrant* lands to another, and says not against what persons; here it will be held a general *warranty* against all men. 1 *Rep.* 1.

A *warranty* may be annexed to estates of inheritance or freehold, and that not only to houses and lands, but also rents, advowsons, commons, &c. which issue out of lands or tenements. 1 *Inst.* 366, 389. And to every good *warranty* in deed, to make it binding; the person that doth *warrant* must be a person able; it is necessary that there be some estate to which the *warranty* is annexed, to support it; that the *warranty* descend upon him who is heir of the whole blood by the Common law, to him that made it, and not upon another; and that the heir claim by the same right as the ancestor; that it take effect in the life-time of such ancestor; and he be bound thereby; and the estate of freehold, which is to be barred, be put to a right before, or at the time of the *warranty*; and that he to whom the *warranty* descends, have then but right to the land. 1 *Inst.* 367, 370, 384, 388. 10 *Rep.* 96, 97. If one be a successor only in case of a corporation, he shall not be bound by the *warranty* of his natural ancestor; and he that comes into land merely by act of law, as the lord by escheat, &c. shall never take advantage of a *warranty*; but it is otherwise where the estate arises by limitation of use, or a common recovery, which is the act of the party. 1 *Inst.* 370. 3 *Rep.* 62. Though if the estate the *warranty* is annexed to be spent, the *warranty* is gone: So if a feoffment with *warranty* be made to two or more, and they being jointenants, do after by deed make partition.

But where one enfeoffs two men and their heirs, and a feoffment is made in fee by one of them; the other may notwithstanding have the benefit of the *warranty*. 10 *Rep.* 96. 6 *Rep.* 12. 1 *Inst.* 385. Two persons make

a feoffment with *warranty*, the survivor shall not be charged alone, without the heir of the other; and if both die, the heirs of both shall be equally bound. 3 Rep. 14.

All *warranties* before the *Statute of Gloucester*, which descended to those who were heirs to the *warrantors*, were bars to the same heirs to demand any of the lands; except the *warranty* began by disseisin. That statute hath ordained, that the *warranty* of the father shall be no bar to his son for the lands which come by the heritage of the mother; nor the *warranty* of the mother be binding to the son for the lands which come by the heritage of the father; but neither the statute 11 H. 7. cap. 20. or any other statute hath provided any remedy against a collateral *warranty*; therefore such *warranty* is yet in force, and shall be a bar to the issue in tail. *Litt. Terms de Ley* 370, 371. But by the 4 & 5 Ann. c. 16. for amendment of the law, *warranties* made by tenant for life, of any lands, coming or descending on him in reversion or remainder, shall be void; and all collateral *warranties* made of any lands, &c. by any ancestor, who hath not an estate of inheritance in possession therein, shall be also void against the heir.

If lands are held of a man and his heirs, by certain service, without any clause of *warranty*, they are bound to *warranty*: But when the deed is *dedi & concessi*, &c. to be holden of the chief lord of the fee, or of others, and not the feoffors and their heirs, reserving no service, and without the aforesaid clause; here the heirs of the feoffor shall not be bound to *warranty*. Stat. 4 Ed. 1. A *warranty* according to law is intire, and extends to all the lands, and is a bar to every person on whom it descends; and where several have a right, jointly or severally, every one of them are barred: Though there is this difference as to *warranties*; where the entry is gone, and only a right of action is left, there a *warranty* descending upon the heir at law, shall bind: And where there is a right of entry, it shall not bind. 8 Rep. 54. 2 Lill. Abr. 684. And if any person make a deed with *warranty*, by which his heir should be barred, and after the *warrantor* is attainted of felony; his heir shall not be bound by such *warranty*, for it cannot descend upon him, the blood being corrupted. *Litt.*

If a *warranty* descend upon an infant, it shall not bind him, in case his entry into the lands be lawful; but he must take care not to suffer a descent after his full age, before he hath made his re-entry. 1 Rep. 140. Popb. 71. *Warranty* may be added to any conveyance of lands, tenements, or hereditaments; as upon fines, feoffments, gifts, release and confirmation, &c. And the ancient form of a *warranty* is in this manner.—*Et ego præfatus A. B. & heredes mei prædicti. messuag. & decem acras terræ cum pertinentiis suis, præfato D. hereditibus & assignatis suis contra omnes gentes warrantizabimus in perpetuum per præsentis, &c.*

Warranty of goods sold, A man offers plate to sale with a *warranty*, and afterwards sells it to the same person for less money, the *warranty* does not extend to this sale. 1 Strange 414: Vide *Action on the Case, and Sale*.

Warren, (*Warrenna*, from Germ. *Wabren*, i. e. *Custodire*, or the Fr. *Garenne*) Is a franchise or place privileged, by prescription or grant from the King, for the keeping of beasts and fowls of the *warren*; which are hares and conies, partridges, pheasants, and some add quails, woodcocks and water fowl, &c. *Terms de Ley* 589. 1 Inst. 233. A person may have a *warren* in another's land, for none may alien the land, and reserve the franchise: But none can make a *warren*, and appropriate those creatures that are *feræ naturæ*, without licence from the King, or where a *warren* is claimed by prescription. 8 Rep. 108. 11 Rep. 87. A *warren* may lie open; and there is no necessity of inclosing it, as there is of a park. 4 Inst. 318. If any person offend in a *free warren*, he is punishable by the Common law, and by Stat. 21 Ed. 3. And if any one enter wrongfully into any *warren*, and chase, take or kill any conies, without the consent of the owner, he shall forfeit treble damages, and suffer three months imprisonment, &c. by 22 & 23 Car. 2. c. 25. When conies are on the soil of the party, he hath a property in them by reason of the possession, and action lies for killing them; but if they run out of the *warren*, and

eat up a neighbour's corn, the owner of the land may sue them, and no action will lie. 5 Rep. 104. 1 Cro. 526. In waste, &c. against a lessee of a *warren*, the waste assigned was for stopping coney-boroughs; and it was held, that this action did not lie, because a man cannot have the inheritance of conies; and action may be brought against him who makes holes in the land, but not against him that stops them, by reason the land is made better by it. Owen 66. 3 Nels. Abr. 530.

Warscot, Was a contribution usually made towards *armour*, in the time of the Saxons. Leg. Canut.

Warth, A customary payment for cattle-guard. *Blount's Ten.* 60.

Wath, A shallow part of a river, or arm of the sea; as the *wishes* in *Lincolnshire*, &c. Knight 1346.

Wassail, (*Sax.*) A festival song, heretofore sung from door to door about the time of the *Epiphany*.

Waste, (*Vastum*,) Hath divers significations: First, It is a spoil made either in house, wood, lands, &c. by the tenant for life or years, to the prejudice of the heir, or of him in the reversion or remainder. *Kitchin, fol.* 168. Whereupon the writ of *waste* is brought, for the recovery of the thing *wasted*, and treble damages. *Waste* of the forest is most properly where a man cuts down his own woods within the forest, without licence of the King, or Lord Chief Justice in Eyre. See *Manwood, part 2. cap. 8. numb. 4 & 5*. Secondly, *Waste* is taken for those lands which are not in any man's occupation, but lie common; which seem to be so called because the lord cannot make such profit of them as of his other lands, by reason of that use which others have of it in passing to and fro; upon this none may build, cut down trees, dig, &c. without the lord's licence. Thirdly, *Year, day and waste, Annus, dies & vastum*, is a punishment or forfeiture belonging to petit treason or felony, whereof see *Staundf. Pl. Cor. lib. 3. cap. 30*. And see *Year, Day and Waste*. Cowell.

Waste is the committing any spoil or destruction in houses, lands, &c. by tenants, to the damage of the heir, or of him in reversion or remainder: Whereupon the writ or action of *waste* is brought for the recovery of the thing *wasted*, and damages for the *waste* done. 5 New Abr. 459.

1. Of the several kinds of waste, and of the Stat. of Marlebridge, with observations thereon.
2. What acts shall be deemed waste.
3. What waste shall be deemed excusable and justifiable.
4. Who may bring an action of waste, and against whom it may be brought.
5. In what cases general waste may be restrained by injunction in equity.
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7. Of the process, &c. in waste.

1. Of the several kinds of waste, and of the Stat. of Marlebridge, with observations thereon.

There are two kinds of waste, viz. *voluntary* or *actual*, and *negligent* or *permissive*. *Voluntary* waste may be done by pulling down or prostrating houses, or cutting down timber-trees: *negligent* waste may be by suffering a house to be uncovered, whereby the spars or rafters, planches or other timber of the house are rotten. 1 Inst. 53. a. Vide *Dyer* 38. pl. 35. Owen 92. *Dyer* 281. pl. 21.

The statute of *Marlebridge*, 52 Hen. 3. c. 23. *stat.* 2. enacts, that "Farmers, during their term, shall not make waste, sale, nor exile, of houses, woods and men, nor of any thing belonging to the tenements that they have to farm, without special licence had by writing of covenant, making mention that they may do it; which thing if they do, and thereof be convicted, they shall yield full damage, and shall be punished by amercement grievously."

This act provideth remedy for waste done by lessee for life, or lessee for years, and it is the first statute that gave remedy in those cases: For the rule of the Register is, that there are five manner of writs for waste, viz. two at the Common law, as for waste done by tenant in dower, or by the guardian; and three by statute or special law,

as *tenant for life, tenant for years, and tenant by the curtesy* 2 *Inst.* 145. • This statute is a penal law, and yet because it is a remedial law, it has been interpreted by equity. *Arg.* 10 *Mod.* 281. In case of *Hammond v. Webb*.

Farmers] Here farmers do comprehend all such as hold by lease for life or lives, or for years, by deed or without deed. 2 *Inst.* 145. It has been resolved likewise that it should extend to strangers. *Arg.* 10 *Mod.* 281. In case of *Hammond v. Webb*. Altho' the Register says *sciend'* that *per statutum de Marlebridge, cap. 23. data fuit quedam prohibitio vasti versus tenentium annorum*, which is true; yet the stat. extends to farmers for life also, but this act extended not to tenant by the curtesy, for he is not a farmer, but if a lease be made for life or years, he is a farmer tho' no rent be reserved. 2 *Inst.* 145.

Shall not make waste] By these words they are prohibited to *justify waste*, for it has been resolved that this act extends to waste *omittendo*, tho' the word is *faciant*, which literally imports *active waste*. *Arg.* 10 *Mod.* 281. In case of *Hammond v. Webb*.

Nor of any thing] Houses, woods, and men were before particularly named, and these words do comprehend lands and meadows belonging to the farm. 2 *Inst.* 146. Altho' these general words have a further signification, and therefore, if there had been a farmer for life, or years, of a manor, and a tenancy had escheated, this tenancy so escheated did belong to the tenement, that he held in farm, and therefore this extended to it; and the lessor shall have a writ generally, and suppose a lease made of the lands escheated by the lessor, and maintain it by the special matter. 2 *Inst.* 146.

Special licence by writing] This grant ought to be by deed, for all waste tends to the disinheritation of the lessor, and therefore no man can claim to be dispensable of waste without deed. 2 *Inst.* 146. Likewise this special grant is intended to be *absque impetratione vasti*; without impeachment of waste. 2 *Inst.* 146.

Yield full damage] And this must be understood such a prohibition of waste upon this statute as lay against a tenant in dower at the Common law, and single damages were given by this statute against lessee for life, and lessee for years. 2 *Inst.* 146.

But waste may be committed not only in houses and lands, but in gardens, orchards, timber-trees, dove-houses, warrens, parks, fish-ponds, and other subjects of property, as will be shewn. 1 *Inst.* 53. a.

2. What acts shall be deemed waste.

It has been laid down as a general principle, that the law will not allow that to be waste, which is not any way prejudicial to the inheritance. *Heil.* 35. *Barret v. Barret*. Nevertheless it has been held, that a lessee or tenant cannot change the nature of the thing demised: tho' in some cases, the alteration may be for the greater profit of the lessor. Thus if a lessee converts a corn-mill into a fulling-mill, it is waste; altho' the conversion be for the lessor's advantage. *Cro. Jac.* 182. *Circuit. Lond. v. Greyme*. Also converting a brewhouse of 120 l. *per ann.* into other houses let for 200 l. a year, is waste; because of the alteration of the nature of the thing, and of the evidence. 1 *Lev.* 309. *Cole v. Green*.

We will now consider what shall be deemed waste with respect to particular subjects of property.

Waste in lands. If the tenant converts arable into wood, or *vice versa*, it is waste; for it did not only change the course of husbandry, but also the proof of evidence. *Holmes's Rep.* case 296. p. 234. But if a lessee suffers arable land to lie fresh, and not manured, so that the land grows full of thorns, &c. this is not waste, but ill husbandry. 2 *Roll. Abr.* 814. Likewise, the conversion of meadow into arable is waste, for it not only changes the course of husbandry, but the proof of his evidence. 1 *Inst.* 53. b. But if meadow be sometimes arable, and sometimes meadow, and sometimes pasture, there the plowing of it is not waste. 2 *Roll. Abr.* 815. Neither is the division of a great meadow into many parcels, by making of ditches, waste; for the meadows may be bet-

ter for it, and it is for the profit and ease of the occupiers of it. 2 *Le.* 174. pl. 210.

Likewise converting a meadow into a hop-garden, is not waste; for it is employed to a greater profit, and it may be meadow again; *per Windham and Rhodes J.* But *Periam* said tho' it be a greater profit, yet it is also with greater labour and charges. 2 *Le.* 174. pl. 210. But converting a meadow into an orchard, is waste, tho' it be to the greater profit of the occupier. *Per Periam. Id. ibid.* If a lessee ploughs the land sowed with conies, this is no waste; unless it be a warren by charter or prescription. 2 *Roll. Abr.* 815. So if a lessee of land destroys the coney-boroughs in the land, it not being a free warren by charter or prescription, it seems is not waste; for a man can have no property in them, but only a possession. *Id. ibid. Ow.* 66. *Moyle v. Moyle*.

It is waste to suffer of a wall of the sea to be in decay, so as by the flowing and reflowing of the sea the meadow or marsh is surrounded, whereby the same becomes unprofitable. But if it be surrounded suddenly by the rage and violence of the sea, occasioned by wind, tempest, or the like, without any default in the tenant, this is not waste. Yet if the tenant repair not the banks or walls against rivers or other waters, whereby the meadows or marshes be surrounded and become rushy and unprofitable, this is waste. 1 *Inst.* 53. b. So *a fortiori*, if arable land be surrounded by such default; for the surrounding washes away the marle and other manurance from the land. 2 *Roll. Abr.* 816.

Waste in trees and woods. Trees are parcel of the inheritance, and therefore, if a lessee assigneth his term, and excepts the timber-trees, it is void; for he cannot except that which doth not belong to him by law. 5 *Rep.* 12. *Saunders's case*. The lessor, after he has made a lease for life or years, may by deed grant the trees, or reasonable estovers out of them, to another and his heirs; and the same shall take effect after the death of the lessee. But such a gift to a stranger is void during the estate for life, because of the particular prejudice which might be done to the lessee. 11 *Rep.* 48. *Lisford's case*. The lessee hath but a particular interest in the trees, but the general interest of the trees doth remain in the lessor: for the lessee shall have the waste and fruit of the trees, and the shadow for his cattle, &c. But the interest of the body of the tree is in the lessor, as parcel of his inheritance. Therefore if trees are overthrown, by the lessee or any other, or by wind or tempest, or by any other means disjoined from the inheritance, the lessor shall have them in respect of his general ownership. 11 *Rep.* 81. *Bowles's case*.

With respect to timber-trees, such as oak, ash, elm, (which are timber-trees in all places) waste may be committed in them, either by cutting them down, or lopping of them, or doing any act whereby the timber may decay. Also in countries where timber is scarce, and beeches or the like are converted to building for the habitation of man, they are also accounted timber. 1 *Inst.* 53. a. 54. b. Thus, waste may be committed in cutting of beeches in *Buckinghamshire*, because there by the custom of the country it is the best timber. 2 *Roll. Abr.* 814.

So waste may be committed in cutting of birches in *Berkshire*, because they are the principal trees there for the most part. *Ibid.* If the tenant cut down timber-trees, or such as are accounted timber, as is aforesaid, this is waste; and if he suffer the young germins to be destroyed, this is a destruction. So it is, if the tenant cut down underwood (as he may by law), yet if he suffer the young germins to be destroyed, or if he stub up the same, this is destruction. 1 *Inst.* 53. a. If lessee or his servants suffer a wood to be open, by which beasts enter and eat the germins, tho' they grow again, yet it is waste; for after such eating they never will be great trees, but shrubs. 2 *Roll. Abr.* 815. If a termor cuts down underwood of hazel, willows, maple, or oak, which is seasonable, it is not waste. 2 *Roll. Abr.* 817. If ashes are seasonable wood to cut from ten years, it is not waste to cut them down for house-wood. *Ibid.*

But if the ashes are grofs of the age of nine years, and able for great timber, it is waste to cut them down. *Id. ibid.*

If oaks are seasonable, and have been used to be cut always at the age of twenty years, it is not waste to cut them at such age, or under, for in some countries, where there is a great plenty, oaks of such age are but seasonable wood. *Id. ibid.* But after the age of twenty-one years, oaks cannot be said to be wood seasonable, and therefore it shall be waste to cut them down. *Id. ibid.* Cutting down of willows, beech, birch, asp, maple, or the like, standing in the defence and safeguard of the house, is destruction. If there be a quickset fence of white thorn, if the tenant stub it up, or suffer it to be destroyed, this is also destruction: And for all these and the like destructions an action of waste lieth. *1 Inst. 53. a.* The cutting of horn-beams, hazels, willows, fallows, though of forty years growth, is no waste, because these trees would never be timber. *Per Meade Just. Godb. 4. pl. 6.*

If the lessee covenant, that he will leave the wood at the end of the term as he found it; if the lessee cut down the trees, the lessor shall presently have an action of covenant: For it is not possible for him to leave the trees at the end of the term. So that the impossibility of performing the covenant shall give a present action on a future covenant. But it is otherwise in the case of a house; for there, though the lessee commit waste, yet he may repair the waste done, before the term expires. *5 Rep. 21. Mayne's case.*

The cutting down of trees is justifiable for house-boot, hay-boot, plow-boot, and fire-boot. *1 Inst. 53. b. Hob. Rep. c. 296. Br. Waste, 130.* By the Common law lessee shall have them, though the deed does not express it; but if he takes more than is necessary he shall be punished in waste. *Bro. Waste, pl. 30.* The tenant may take sufficient wood to repair the walls, pales, fences, hedges and ditches as he found them, but he cannot make new. *1 Inst. 53. b.* Cutting of dead wood is no waste. *1 Inst. 53.* But converting trees into coals for fuel, where there is sufficient dead wood, is waste. *Id. ibid.*

Waste in digging for gravel, mines, &c. If the tenant digs for gravel, lime, clay, brick, earth or stone, hid in the ground, or for mines of metal or coal, or the like, not being open at the time of the lease, it is waste. *1 Inst. 53. b.* If a man hath land in which there is a mine of coals, or the like, and maketh a lease of the land, (without mentioning any mines) for life or for years, the lessee for such mines as were open at the time of the lease made, may dig and take the profits thereof. But he cannot dig for any new mine that was not open at the time of the lease made, for that would be adjudged waste. *1 Inst. 54. b.* Likewise, if there be open mines in the land, and the owner leases it to another, with the mines in it, he may dig in the open mines, but not in the close mines; but otherwise it would be if there was not any open mine there; for then the lessee might dig for mines, otherwise the grant would take no effect. *Id. ibid.* If lessee dig slate-stone out of the land, it is waste. And, digging for stones, unless in a quarry, is waste, though the lessee fill it up again. *2 Roll. Abr. 816. Ow. 66. Moyle v. Moyle.* Likewise, if he have a lease of land, in which there was a coal mine, but not open at the time of the lease; if the lessee open it, and assigns his interest, it is still waste in the assignee; but where the lease is of lands, and all mines in it, there he may dig in it. *5 Rep. 12. a. b. Saunderson's case.*

But if lessee of land, with mines of coals, iron, and stone, digs the coals, iron, and stones, so much as is necessary for him to use without selling, it is not waste. *2 Roll. Abr. 816.* If a lessee digs earth, and carries it out of the land, action of waste lies. *Id. ibid.* If a lessee digs for gravel or clay, for reparation of the house, not being open at the time of the lease, it is not waste, any more than the cutting of trees for reparation. *1 Inst. 53. b.*

Waste in gardens, orchards, fish-ponds, dove-houses, parks, &c. If the tenant cut down or destroy any fruit-trees growing in the garden or orchard, it is waste: But if such trees grow upon any of the ground, which the tenant holdeth out of the garden or orchard, it is no waste. *1 Inst. 53. a.* Breaking a hedge also is no waste. *Id. ibid.* Likewise destruction of saffron heads in a gar-

den, is not waste. *Bro. Waste, pl. 143.* cites *10 A. 7. c. 2.* If the tenant of a dove-house, warren, park, vivary, estanges, or such like, takes so many that so much store is not left as he found at the time of the demise, it is waste. *1 Inst. 53. a. Hob. Rep. c. 296.* Likewise if the lessee of a pigeon-house stops the holes, that the pigeons cannot build, it is waste. *1 Inst. 53. a.* So likewise, suffering the pales of a park to decay, whereby the deer are dispersed; is waste. *Id. ibid.* Also, if the lessee of a hop-ground plow it up and sow grain there, it is waste. *Ow. 66. Moyle v. Moyle.* The breaking a weare is waste, and so of the banks of a fish-pond, so that the water and fish run out. *Ow. 66. Moyle v. Moyle.*

Waste with respect to houses. Waste may be done in houses, by pulling them down or prostrating them, or by suffering the same to be uncovered, whereby the spars or rafters, plances or other timber of the house are rotten. *1 Inst. 53. a.* Default of coverture of an house is waste, though the timber be standing. *2 Roll. Abr. 815.* But if the house be uncovered, when the tenant cometh in, it is no waste in the tenant to suffer the same to fall down. *1 Inst. 53. a.* Though there be no timber growing upon the ground, yet the tenant at his peril must keep the houses from wasting. *1 Inst. 53. a.* If a lessee rases the house, and builds a new house, if it be not so long and wide as the other, it is waste. *2 Roll. Abr. 815.* So if he rebuilds it more large than it was before, it is waste; for it will be more charge for the lessor to repair it. *1 Inst. 53. a.*

But if a lessee of land makes a new house upon the land where there was not any before, this is not waste; for it is for the benefit of the lessor. *2 Roll. Abr. 815.* But according to lord Coke, if the tenant build a new house, it is waste; and if he suffer it to be wasted, it is a new waste. Yet if the house be prostrated by enemies or the like, without default of the tenant, or was ruinous at his coming in, and fall down, the tenant may build the same again with such materials as remain, and with the other timber, which he may take growing on the ground, for his habitation; but he must not make the house larger than it was. *2 Roll. Abr. 815. 1 Inst. 53. a.* If the house be uncovered by tempest, the tenant must in convenient time repair it. *1 Inst. 53. a.* If a lessee flings down a wall between a parlour and a chamber, by which he makes a parlour more large, it is waste; it cannot be intended for the benefit of the lessor, nor is it in the power of the lessee to transpose the house. *2 Roll. Abr. 815.* So if he pulls down a partition between chamber and chamber, it is waste. *Bro. Waste, 143.* Or if a lessee pulls down a hall or parlour, and makes a stable of it, it is waste. *2 Roll. Abr. 815.* If a lessee pulls down a garret over head, and makes it all one and the same thing, it is waste. *Id. ibid.* If a lessee permits a chamber *fore in decays pro defectu plastrationis, per quod grossum mabiremium devenit putridum, & camera illa turpissima & foetissima devenit*, action of waste lies for it. *Id. ibid.* So if a lessee permits the wall to be in decay for default of daubing, *per quod mabiremium devenit putridum*, action of waste lies. *Id. ibid.* Breaking of a pale or of a wall uncovered, is not waste. *Bro. Waste, pl. 94.* But breaking of a wall covered with thatch, and of a pale of timber covered, is waste. *Id. ibid.* Burning the house by negligence or mischance, is waste. *1 Inst. 53. a.* But by the *6 Ann. c. 31.* No action is to be prosecuted against any person in whose house or chamber, any fire accidentally begins. If the tenant do or suffer waste to be done in his house, yet if he repair them before any action brought, there lieth no action of waste against him, but he cannot plead, *quod non fecit vastum*, but the special matter. *1 Inst. 53. a.*

Waste in things annexed to the freehold. The removing a post in a house is waste. *42 Edw. 3. 6.* So the removing of a door. *Id. ibid. 1 Inst. 53.* So the removing of a window. *42 Edw. 3. 6.* The digging up a furnace annexed to the frank-tenement, and selling it, is waste. *Bro. Waste, pl. 143.* The removing of a bench is waste, though annexed by the tenant himself.

Bro.

Bro. Waste, pl. 143. 1 *Inst.* 53. a. If waincot annexed to the house be taken away, it is waste. *Id. ibid.* Of tables dormant and fixed in the land, and not to the walls by termor, and taken off within his term, waste does not lie; for the house is not impaired by it. *Per Kingsmill J. and Grevil Scrj. Bro. Waste*, pl. 104.

Beating down a wooden wall, or suffering a brick wall to fall, is no waste, unless it be expressly alledged, that the walls were coped or covered. *Dyer* 108. b. pl. 31. *Earl of Bedford v. Smith*. If waste be assigned in pulling up a plank floor and mangers of a stable, plaintiff must shew that the same were fixed. *Id. ibid.* If lessee erects a partition, he cannot break it down without being liable to an action of waste, for he has joined it to the frank tenement. *Mo.* 178. *Cooke's case*. Shelves are parcel of the house, and not to be taken away; and though it is not shewed that the shelves were fixed, it ought to be intended that they were fixed. *Per Coke Chief Justice.* 2 *Bulst.* 113. *Lady St. John v. Pratt*. Pavement is a structure, for they use lime to finish it. *Id. ibid.* If the tenant suffers the groundfells to waste, in his default of defence or removing the water from off them, or of dirt or dung or other nuisance which lies or hangs upon it, the tenant shall be charged, for he is bound to keep it in as good case as he took it. *Ow.* 43. *Strick-leborne v. Hetchman*.

3. What waste shall be deemed excusable, and justifiable.

It may be observed in general, that waste which ensues from the act of God is excusable: Thus if a house falls by tempest, the tenant shall be excused in action of waste; but if it be uncovered by tempest, and stands there, if the tenant has sufficient timber to repair it, and does not, the lessor, if the lease be made on condition of re-entry for waste, may re-enter, but not immediately upon the tempest, for it is no waste 'till the tenant suffers it to be so long unrepaired, that the timber be rotted, and then it is waste. *Per Hull. Br. Cond.* pl. 40.

Likewise, if a house be abated by lightning, or thrown down by a great wind, it is not waste. 1 *Inst.* 53. a. So if apple-trees are torn up by a great wind, if lessee afterwards cuts them, it is not waste. *Bro. Waste*, pl. 39. If the banks are well repaired by the lessee, and the water notwithstanding subverts them, and surrounds his meadow, by which it is become rushy, it is not waste. 2 *Roll. Abr.* 280. *Contra*, 20 *H. 6. c. 1. b.* The lessor cannot give trees during the tenant's lease. But if he grants them to a stranger, and commands the tenant to cut and deliver them, who does it, this shall excuse him in an action of waste. And yet the tenant was not bound by law to obey and execute this command. *Bro. Done*, &c. 13. Tenant in tail may commit waste in houses as well as in all other parts of the estate, notwithstanding any restraint to the contrary, and no instance can be shewn, where a tenant in tail has been restrained from committing waste by injunction of the court of Chancery. *Caf. Temp. Ld. Talb.* 16. *Glenorchy v. Bosville*.

If tenant in tail grants all his estate, his grantee is punishable of waste; so such grantee's grantee is also punishable; *Per Clerk J.* 3 *Le.* 121. pl. 173. *Anon.* If a man devises land to two in tail, and after the one devisee dies without issue, by which the reversion in fee of one moiety reverts to the heir of the donor; but the other devisee is tenant for life of the whole, and after he commits waste, action of waste lies against him by the heir of the donor for the one moiety. *New Abr.* 469. But action of waste does not lie against tenant in tail after possibility, for the greatness of the estate of inheritance which was once in him; and also, as some say, because the estate was not within the statute at the creation. 11 *Rep.* 80. a. *Lewis v. Bowles*.

If lands are given to the husband and wife, and to the heirs of the body of the husband, the remainder to the husband and wife, and to the heirs of their two bodies begotten, and the husband dies without issue: The wife shall not be tenant in tail after possibility; for the remainder in special tail was utterly void, for that it could never take effect. For so long as the husband should have issue, it should inherit by force of the general tail;

and if the husband die without issue, then the special tail cannot take effect, inasmuch as the issue which should inherit in special tail; must be begotten by the husband; and so the general, which is larger and greater, hath frustrated the special, which is lesser; and the wife, in that case, shall be punished for waste. 1 *Inst.* 28. b.

It has been agreed, that tenant for years may cut wood; but it has been doubted, if tenant at will may; but it seems, that as long as tenant at will is not countermanded he may cut seasonable wood, &c. *Bro. Waste*, pl. 114. Where a man leases a wood which consists only of great trees, the lessee cannot cut them. *Hobart's Rep. Caf.* 296. Nevertheless, if the lessee cuts trees for reparation, and sells them, and after buys them again, and employs them in reparation, yet it is waste by the sale. 1 *Inst.* 53. b. So if lessee cuts trees, and sells them for money, though with the money he repairs the house, yet it is waste. *Id. ibid.* As to the cutting of timber-trees for repairs by lessee, there is no difference whether the lessor or lessee covenants to repair the houses; for in either case it is not waste, if lessee cuts them. *Mo.* 23. pl. 88. *Anon.*

If a house be prostrated by enemies of the King, or such like, without default of the lessee, the lessee may rebuild it again with the same materials that remain, and may cut other timber upon the land to rebuild it, but he must not make the house larger than it was. 1 *Inst.* 53. a. So if the house was ruinous at the time of the lease, and fell within the term, this is not waste in the tenant. 1 *Inst.* 53. a. *Bro. Waste*, pl. 130. But the lessee shall not cut trees to make a new house where there was not any at the time of the lease. *Hobart's Rep. Caf.* 296. So if a lessee suffers a house to fall for default of covering, which is waste, he cannot cut trees to repair the house. *Br. Waste*, pl. 39. And in general, if the tenant suffer the house to be wasted, he cannot justify the felling of timber to repair it. 1 *Inst.* 53. b. If a house be ruinous at the time of the lease, though the lessee is not bound to repair it, yet he may cut trees to repair it, 1 *Inst.* 54. b. The tenant may likewise dig for gravel or clay for the reparation of the house, though the soil was not open when the tenant came in; and it is justifiable as well as cutting of trees. 1 *Inst.* 53. b. So with regard to a stable, if it fall without default of the lessee in time of the lessor, the lessee take trees of the heir to make a new stable, if it be of necessity. *Bro. Waste*, pl. 67. But if the stable falls in default of the lessee, in time of the lessor, he cannot in time of the heir cut trees to make a new stable. *Br. Waste*, pl. 67.

Cutting wood to burn, where the tenant has sufficient hedge wood is waste. *F. N. B.* 59. (M.) Where lessee for years has power to take hedge-boot by assignment, yet he may take it without assignment; for the affirmative does not take away the power which the law gives him. *Dy.* 19. pl. 115. If lessor excepts his trees in his lease, the lessee shall not have fire-boot, hay-boot, &c. which he should have otherwise; and the property of the trees is in the lessor himself. 4 *Le.* 162. pl. 269. *Sir Richard Lowkner's case*. Yet it has been said, that lessee for years, the trees being excepted, has liberty to take the shrouds and loppings for fire-boot; but if he cuts any tree, it shall be waste, as well for the lopping as for the body of the tree. *Noy* 29. *Rich v. Makepeace*. If a tenant that has fire-boot to his house in another man's land, cuts wood for that intent to make his boot-wood, and the owner of the land takes it away, an action of trover and conversion lies against him by the tenant of the land who hath such fire-boot. *Clayt.* 40. pl. 69. *Coram Berkeley, Anon.* See *Dyer* 36. pl. 38. *Clayt.* 47. pl. 81. 1 *Lev.* 171. Cutting of dead wood is no waste. *F. N. B.* 59. (M.)

If a man leases lands with general words of all mines of coals, where there is not any mine of coals open at the time of the demise, and after the lessee opens a mine, he cannot justify the cutting of timber-trees for making punchions, corfes, roll-scoops, and other utensils in and about the mine, though without them he could not dig and get the coals out of the mine: And this is like a new house built after the demise, for the reparation of which he cannot take timber upon the land; and it had been

been waste to open it, if it had not been granted by express words: And it was said by *Hobart*, that the law had been the same if the mine was open at the time of the demise. *Hobart's Rep. c. 296. Lady Darcy v. Ashwith.* And see *Hutt. 19.* where the case is more fully reported.

4. *Who may bring an action of waste, and against whom it may be brought.*

By *Stat. 13 Edw. 1. cap. 28.* the action of waste is given to one tenant in common against another.

Where there are tenants in common for life, the one shall not have trespass of trees cut against the other, but shall have waste *pro indiviso*, though they are only tenants for term of life, &c. but the one may have trespass of corn cut against the other. *Br. Waste, pl. 79.* Qu. If one coparcener before partition makes feoffment to another, and one of them does waste in the trees, waste lies. 11 *Rep. 49. a. Lifford's case.* Likewise, if two jointenants do waste, and after the one enters into religion, waste lies against the other alone. 2 *Roll. Abr. 828.*

By the 20 *Edw. 1. Stat. 2.* An action of waste is maintainable by the heir for waste done in the time of his ancestor, as well as for waste done in his own time.

This action must be brought by him that hath the immediate estate and inheritance in fee-simple or fee-tail, but sometimes another may join with him. 1 *Inst. 53. a. 285. a.* It is said, that the reversion must continue in the same state that it was at the time of the waste done, and not granted over; for 'tho' the reversioner taketh the estate back again, the action is gone, because the estate did not continue: But in some special cases an action of waste shall lie; tho' the lessor had nothing in the reversion at the time of the waste done: for if a bishop makes a lease for life or years and dies, and the lessee, the fee being void, doth waste, the successor shall have an action of waste. This is allowed, though the statute of 20 *Edw. 1.* speaks of those that are inheritors. 1 *Inst. 53. b. 356. a. 2 Roll. Abr. 825.*

A tenant for life cannot have this action, but a parson, &c. may have an action of waste, and the writ shall say, *Ad exheredationem ecclesie*, for it is the dowry of the church. If a tenant doth waste, and he in reversion dieth, the heir shall not have an action of waste for waste done in the life of the ancestor: For he cannot say that the waste was done to his disinherison, neither shall a bishop, master of an hospital, parson, &c. have an action of waste done in the time of their predecessors. 1 *Inst. 341. a. 1 Inst. 53. b. 356. a.* If a lease is made to A. for life, the remainder to B. for life, remainder to C. in fee; no action of waste lieth against the first lessee during the estate in the mean remainder, for then his estate would be destroyed. Otherwise if B. had a mean remainder for years, for that would be no impediment, the recovery not destroying the term of years. 5 *Rep. 76, 77. 1 Inst. 54. a.*

If lessee for years commit waste, and the years do expire, yet the lessor shall have an action of waste for treble damages, tho' he cannot recover the place wasted; but if the lessor accepteth of a surrender of a lease after the waste done, he shall not have his action of waste. It is said that if a tenant repairs before action brought, he in reversion cannot have an action of waste; but he cannot plead that he did no waste, therefore he must plead the special matter. 1 *Inst. 283. a. 285. a. 306. 5 Rep. 119. 2 Cro. 658.* Likewise, by 11 *H. 6. c. 5.* where tenants for life, or for another's life, or for years, grant over their estates, and take their profits to their own use, and commit waste, they in reversion may have an action of waste against them. 2 *Inst. 302.* He in the remainder as well as the reversioner may bring this action, and every assignee of the first lessee, mediate or immediate, is within this act, 5 *Rep. 77. Page's case. 2 Inst. 302.*

It has been said, that there are five writs of waste, two at the Common law, as for waste done by tenant in dower, or by guardian; three by statute, as against tenant for life, tenant for years, and tenant by the curtesy. It has been said however, that tenant by the curtesy

was punishable for waste by the Common law, for that the law created his estate as well as that of the tenant in dower, and therefore the law gives like remedy against them. 1 *Inst. 54. a. 2 Inst. 145, 299, 301, 305.* But on this subject the authorities in the books are very contradictory, as the reader will perceive by attending to the note subjoining to the following clause of the statute of Gloucester, 6 Ed. 1. cap. 5. which enacts, that "A man from henceforth shall have a writ of waste in the Chancery against him that holdeth by the law of England, or otherwise for term of life, or for term of years, or a woman in dower."

No action of waste lay before the statute of Gloucester, but against tenant in dower and guardian, and by the statute, action of waste is given against the tenant by the curtesy, tenant for term of life, and tenant for term of years. *Br. Waste, pl. 88.* Lord Coke says, a reason is required, (that seeing as well the estate of the tenant by the curtesy, as the tenant in dower are created by act in law,) wherefore the prohibition of waste did not lie as well against tenant by the curtesy as the tenant in dower, at the Common law; and the reason he assigns is this, for that by having issue the state of the tenant by the curtesy, is originally created, and yet after that he shall do homage alone in the life of the wife, which proves a larger estate; and seeing that at the creation of his estate he might do waste, the prohibition of waste lay not against him after his wife's decease; but in the case of tenant in dower, she is punishable of waste at the first creation of her estate. 2 *Inst. 145.* But 2 *Inst. 299.* says, that at the Common law, waste was punishable in three persons, (*viz.*) tenant in dower, tenant by the curtesy, and the guardian, but not against tenant for life or tenant for years; and the reason of the diversity was, for that the law created their estates and interest; and therefore the law gave remedy against them; but tenant for life and for years came in by demise and lease of the owner of the land, &c. and therefore he might in his demise provide against the doing of waste by his lessee; and if he did not, it was his negligence and default.

Shall have a writ of waste] Neither this act, nor the statute of *Murlebridge*, doth create new kind of waste, but gives new remedies for old wastes; and what is waste, and what is not, must be determined by the Common law. 2 *Inst. 300, 301.*

Against him] If two are jointenants for years or for life, and one of them does waste, this is the waste of them both as to the place wasted, notwithstanding the words of the act are, (*him that holds*). 2 *Inst. 302.*

Holds by the law of England] Here tenant by the curtesy is named for two causes. 1st, For that albeit the common opinion was, that an action of waste did lie against him, yet some doubted of the same in respect to this word, (*tenet*) in the writ, for that the tenant by the curtesy did not hold of the heir, but of the lord Paramount; and after this act, the writ of waste grounded thereupon doth recite this statute; 2dly, for that greater penalties were inflicted by this act than were at the Common law. 2 *Inst. 301.*

Or otherwise for term of life, or for term of years] A lessee for his own life, or for another man's life, is within the words and meaning of this law, and in this point this act introduces that which was not at the Common law. 2 *Inst. 301.* If some lessee for life takes husband, the husband does waste, the wife dies, the husband shall not be punished by this law; for the words of this act be (a man that holds, &c. for life) and the husband held not for life; for he was seized but in right of his wife, and the estate was in his wife. 2 *Inst. 301.* He that hath an estate for life by conveyance at Common law, or by limitation of use, is a tenant within the statute. 2 *Inst. 302.* Tenant for years of a moiety, 3d or 4th part, *pro indiviso*, is within this act; and so it is of a tenant by the curtesy, or other tenant for life of a moiety, &c. 2 *Inst. 302.*

Or a woman in dower] This is to be understood of all the five kinds of dowers whereof *Littleton* speaks, *viz.* dower at Common law, dower by the custom, dower ad ossium ecclesie, dower ex assensu patris, and dower de la plus beale; and against all these the action of waste did lie

lie at the Common law. *2 Inst.* 303. If tenant in dower be of a manor, and a copyholder thereof commits waste, an action of waste lies against tenant in dower. *2 Inst.* 303. Action of waste lies against an occupant for life, because he has the estate of the lessee for life, and holds for life, as the statute mentions. *6 Rep.* 37. *b. Dean and chapter of Worcester.* If a lessee for life be attainted of treason, by which the lease is forfeited to the King, who grants it over to *I. S.* and he afterwards does waste, though he comes *en le poss.* yet action of waste lies against him. *2 Roll. Abr.* 826. So if a man disseises the tenant for life, and does waste, yet action of waste lies against the tenant for term of life; for he may have his remedy over against the disseisor. *Br. Waste, pl.* 138. Likewise, if an estate be made to *A.* and his heirs, during the life of *B.* *A.* dies, the heir of *A.* shall be punished in an action of waste. *1 Inst.* 54. *a.*

But an action of waste does not lie against tenant by statute merchant, elegit or staple, because it is not an estate for life or years, and the statute mentions those who hold in any manner for life or years. *Contra, Fitzb. Nat.* 58 *H.* and there said, that in the register is a writ against him. *6 Rep.* 37. Some books give the reason of it to be, because the consolor, if he commits waste, may have a *venire facias ad computandum*, and the waste shall be recovered in the debt. *Fitz. Nat.* 58. *b. (K.)* If a man makes a lease for years, and puts out the lessee, and makes a lease for life, and the lessee for years enters upon the lessee for life, and does waste, the lessee for life shall not be punished for it. *2 Inst.* 303. If lessee for years makes a lease of one moiety to *A.* and of the other moiety to *B.* and *A.* does waste; the action shall be against both; for the waste of the one is the waste of the other. *Brownl.* 238. *Anon.*

An action of waste lies against a devisee, and the writ may suppose it *ex legatione*, for it is within equity of the statute. *Br. Waste, pl.* 132. If an estate of land to be made to baron and feme, to hold to them during the coverture. &c. if they waste, the feoffor shall have writ of waste against them. *Lit. sect.* 381. If feme lessee for life marries, and the husband does waste, action lies against both. *2 Roll. Abr.* 827. And if in the above case, the husband dies, action of waste lies against the feme for the waste he committed. *Id. ibid.*

But if tenant in dower marries, and the husband does waste and dies, the feme shall not be punished for this. *Id. ibid.* Likewise, if baron and feme are lessees for life, and baron does waste, and dies, the feme shall be punished in waste, if she agrees to the estate. *Id. ibid.* *1 Inst.* 54. *Kel.* 113. But if she waives the estate, she shall not be charged. *2 Roll. Abr.* 827. So upon lease for years made to the baron and feme, waste lies against both. *Id. ibid.* And if baron and feme are joint lessees for years, and baron does waste, and dies, action of waste lies for this against the feme. *Id. ibid.* Upon lease for life, to baron and feme, waste lies against both. *Id. ibid.* Likewise, if feme commits waste, and then marries, the action shall be brought against both. *Id. ibid.* And the writ may be *Quod fecerunt vastum*, or *Quod uxor, dum sola fuit, fecit vastum*. *Br. Waste, pl.* 55.

If baron, seised for life of his wife in right of his wife, does waste, and after the feme dies, no action of waste lies against the baron in the *tenuit*, because he was seised only in right of his wife, and the frank-tenement was in the feme. *1 Inst.* 54. *5 Rep.* 75. *b.* But if the baron, possessed for years in right of the feme, does waste, and after the feme dies, action of waste lies against the baron, because the law gives the term to him. *1 Inst.* 54. See *Good. 4, 5, pl. 6. Ow.* 45.

5. In what cases in general, waste may be restrained by injunction in equity.

If a tenant for life plant wood on the land, which is of so poisonous a quality that it destroys the principles of vegetation, without an express power in his lease, where it is usual to have such powers, it may be considered as waste, and the court of Chancery may grant an injunction. *5 New Abr.* 493. *MSS. Rep.* Marquis of Powis v. Derall, *Canc.*

If there be lessee for life, remainder for life, the reversion or remainder in fee, and the lessee in possession wastes the lands, though he is not punishable for waste by the Common law, by reason of the mean remainder for life; yet he shall be restrained in Chancery, for this is a particular mischief. *Moor* 554. *S. P.* *1 Vern.* 23. *S. P.*

But if such lessee has in his lease an express clause of *without impeachment of waste*, he shall not be enjoined in equity. *1 Vern.* 23.

If *A.* is tenant for life, remainder to *B.* for life, remainder to first and other sons of *B.* in tail male, remainder to *B.* in tail, &c. and *B.* (before the birth of any son) brings a bill against *A.* to stay waste, and *A.* demurs to this bill, because the plaintiff had no right to the trees, and no one that had the inheritance was party; yet the demurrer will be over-ruled, because waste is to the damage of the publick, and *B.* is to take care of the inheritance for his children, if he has any, and has a particular interest himself, in case he comes to the estate. *Dawp. v. Chapnes,* *1 Eq. Caf. Abr.* 400. See *ibid.* *Cook v. Whaley,* and *Carew v. Carew.*

It seems to be a general principle, that tenant in tail, after possibility, shall be restrained in equity from doing waste by injunction, &c. because the court will never see a man disinherited; *per Chan. Finch.* And he took a diversity where a man is not punishable for waste, and where he hath a right to do waste; and cited *Uvedale's case,* *24 Car. 1.* Ruled by lord *Roll,* to warrant that distinction. *2 Show.* 69. *pl.* 53. *Abraham v. Bubb.*

A. devised lands, on which timber was growing, to his wife for life, remainder to *B.* in fee, paying several legacies within a limited time, and in default of payment, the remainder to *C.* he paying the legacies; and on a bill brought by *B.* the court gave him leave to cut timber for the payment of the legacies, though it was opposed by the tenant for life and the devisee over, he making satisfaction to the widow for breaking the ground by carriage, waste, &c. *2 Vern.* 152. *Claxton v. Claxton.* See *ib.* 218. *Affinwale v. Leigh & al.*

A lease *without impeachment of waste* takes off all restraint from the tenant of doing it; and he may in such case pull up, or cut down wood or timber, or dig mines, &c. at his pleasure, and not be liable to any action. *Plowd.* 135. But though the tenant may let the houses be out of repair, and cut down trees, and convert them to his own use; yet where a tenant in fee-simple made a lease for years without impeachment of waste, it was adjudged that the lessor had still such property, that if he cut and carried away the trees, the lessee could only recover damages in action for the trespass, and not for the trees: Also it hath been held, that tenant for life, without impeachment of waste, if he cuts down trees, is only exempt from an action of waste, &c. *11 Rep.* 82. *1 Inst.* 220. *2 Inst.* 146. *6 Rep.* 63. *Dyer* 184. And if the words are, to hold without impeachment of waste, or any writ or action of waste, the lessor may seize the trees, if the lessee cuts them down, or bring trover for them. *Wood's Inst.* 574.

In many cases, likewise, the court of Chancery will restrain waste through the lease, &c. be made without impeachment of waste. For,—the clause of *without impeachment of waste*, never was extended to allow the destruction of the estate itself, but only to excuse for permissive waste, and therefore such a clause would not give leave to fell or cut down trees ornamental or sheltering of a house, much less to destroy or demolish a house itself. See *5 New Abr.* 495. *MSS. Rep. in Chan.* 1744. *Packington v. Packington,* and *2 Freem. Rep.* 53. *Abraham v. Bubb.* Where *A.*, on the marriage of his eldest son, in consideration of 10,000*l.* portion, settled (*inter alia*) *Raby castle* on himself for life, without impeachment of waste, remainder on his son for life, and to his first and other sons in tail male; afterwards, having taken some displeasure to his son, he got 200 workmen together, and of a sudden stripped the castle of the lead, iron, glass, doors, and boards, &c. to the value of 3000*l.* And the court, on the son's filing his bill, granted an injunction to stay committing waste in pulling down the

castle, and upon hearing the cause, not only the injunction to continue, but that the castle should be repaired, and put in the same condition it was in; and for that purpose a commission was to issue to ascertain what ought to be repaired, and a master to see it done at the charge and expence of the father, and the son to have his costs. 2 Vern. 738, 739. 1 Colk. 161. S. C. *Vane v. Ld. Bernard*. Vide 1 P. Will. 527.

6. *What relief may be given in equity, in cases of waste.*

A bill was brought to restrain tenant in dower from getting peat; Lord Chancellor dismissed it with costs, as it appeared to be vexatious; the peat she sold not being above the value of 10*d.* But herein it was said, that digging peat is in many places the ordinary boot; and perhaps the only fruit that can rise from the land. They do not carry away the soil, for they dig off the turff, then take away the peat, and lay the turff down again: And the tenant for life can no more dig peat to sell, than cut down timber to sell; and the Chancellor said, if he was to give any relief, he must direct an issue; but that the cause was of too frivolous a nature to maintain the expence. 5 New Abr. 496. MSS. Rep. *Wilson v. Bragg*. 1742. Vide 2 Vern. 392. *Hanson v. Derby*.

A tenant for life, remainder to trustees to preserve, &c. remainder to C. the plaintiff in tail, remainder over, with power to A. with consent of trustees, to fell timber, and the money arising to be vested in lands, &c. to the same uses, &c. A. felled timber to the value of 3000*l.* without consent of trustees, who never intermeddled; and A. had suffered some of the houses to go out of repair, C. by bill prayed an account and injunction. The master of the rolls said, that the timber might be considered under two denominations, to wit, such as was thriving and not fit to be felled; and such as was unthriving; and what a prudent man and good husband would fell, &c. and ordered the master to take an account, &c. and the value of the former, which was waste, and therefore belongs to the plaintiff, who is next in remainder of the inheritance, is to go to the plaintiff, and the value of the other is to be laid out according to the settlement, &c. but as to repairs, the court never interposes in case of permissive waste, either to prohibit or give satisfaction, as it does in case of wilful waste; and where the court hath jurisdiction of the principal, viz. the prohibiting, it does in consequence give relief for waste done, either by way of account, as for timber felled, or by obliging the party to rebuild, &c. as in case of houses, &c. and mentioned Lord Bernard's case as to *Raby Castle*. 2 Vern. 738. But as to repairs, it was objected, that the plaintiff here had no remedy at law by reason of the demesne estate for life to the trustees, between plaintiff's remainder in tail, and the defendant's estate for life, and that therefore equity ought to interpose, &c. and that it was a point of conscience. *Sed non allocatur*. 5 New Abr. 496. MSS. Rep. *Mish. vac.* 1733. *Castlemain v. Lord Craven*.

A lord of a manor may bring a bill for an account of oar dug, or timber cut by the defendant's testator. Thus,

A customary tenant of lands, in which was a copper mine, that never had been opened, opened the same, and dug out and sold great quantities of oar, and died; and his heir continued digging and disposing of great quantities out of the same mine. The lord of the manor brought a bill in equity against the executor and heir, praying an account of the said oar; and alledged that these customary tenants were as copyhold tenants, and that the freehold was in the plaintiff as lord of the manor and owner of the soil; and that the manner of passing the premises, was by surrender into the hands of the lord, to the use of the surrendree. It was insisted for the defendants, that it did not appear, that the admittance in this case was to hold *ad voluntatem domini secundum consuetudinem*, &c. without which words, it was insisted, that there could be no copyhold, as had been adjudged in Lord Ch. J. *Hell's* time. And Lord Chan. Cowper said it would be a reproach to equity to say, that where a man has taken another's property, as oar, or timber, and disposed of it in his life-time, and dies, there should be no remedy. P. Will. Rep. 406. pl. 112. *Bishop of Winchester v.*

Knight. Vide *Fin. Rep.* 135. *Wile v. Sir Ed. Stradling*. 2 Vern. 263. pl. 247.

One seised in fee of lands in which there were mines, all of them unopened, by a deed conveyed those lands, and all mines, waters, trees, &c. to trustees and their heirs, to the use of the grantor for life, (who soon after died) remainder to the use of A. for life, remainder to his first, &c. son in tail male successively; remainder to B. for life, remainder to his first, &c. son in tail male successively, remainder to his two sisters C. and D. and the heirs of their bodies, remainder to the grantor in fee. A. and B. had no sons, and C. one of the sisters died without issue, by which the heir of the grantor as to one moiety of the premises, had the first estate of inheritance: A. having cut down timber and sold it, and threatened to open the mines; the heir of the grantor, being seised of one moiety *ut supra*, by the death of one of the sisters without issue, brought his bill for an account of the moiety of the timber; and to stay A's opening of any mine: And it was adjudged the right to this timber belongs to those, who at the time of its being severed from the freehold, were seised of the first estate of inheritance, and the property becomes vested in them. 2 P. Will. 240. *H'isfield v. Bewit*.

A bill was brought against the executors of a jointress, to have a satisfaction out of assets for permissive waste upon the jointure of the testatrix, &c. But by Cowper J. the bill must be dismissed, for here is no covenant that the jointress shall keep the jointure in good repair; and in the common case, without some particular circumstances, there is no remedy in law or equity for permissive waste after the death of the particular tenant. *Fin. Abr.* tit. *Waste*, p. 523. cites MSS. Rep. 1 Geo. 1. in *Canc.* *Turner v. Buck*.

It has been said in equity, that remainder-man for life shall, in waste, recover damages in proportion to the wrong done to the inheritance, and not in proportion only to his own estate for life. 1 Vern. 158. *Brown v. Brown*.

A. being tenant for ninety-nine years, if he should so long live, with trustees to preserve remainder to his first and other sons in tail, remainder to B. in tail. A. and B. before issue born of A. fell timber. The eldest son of A. afterwards bring his bill, for an account and satisfaction of the timber against B. Per Lord Chan. Plaintiff has no remedy at law either in his own name, or in the name of his trustees. A. if he had not consented to it, should have brought trespass; for tenant for years is considered as a fiduciary for remainder-man or his lessor. If A. had had an estate for life, and no limitation to trustees, the plaintiff could have had no remedy; because tenant for life might have barred, or surrendered the whole estate to the remainder-man: But here the freehold was in the trustees; and the possession of lessee for years is in law the possession of the owner of the freehold. The trustees however could not here have maintained waste, because the Common law gave no action of waste, but to the owner of the inheritance; and the statute of Gloucester gives the writ to the same person; but the trustees are in no other condition than remainder-man for life. Trustees may bring a bill in equity to stay waste, before the contingent remainder comes in *esse*. If the trustees had brought such a bill, the court, as to trees actually cut, would have obliged them to have made satisfaction in money, to have been secured to attend the contingent uses. Where there is tenant for life or years subject to waste, and timber is blown down, the owner of the first remainder in tail vested, shall have it; for the Common law considers an estate in contingency as no estate: and when the tree is severed the property vests in somebody. If there be tenant for life, remainder for life, remainder in fee, remainder-man can have no action for waste; because plaintiff must recover the place wasted, which would be injustice to the remainder over; but such a remainder-man of the inheritance after the intervening estate may have trover for the trees, and if remainder-man for life dies in the life of remainder-man in fee, he may bring waste.—Though an injunction is a proper remedy, yet it has never been determined that a bill for an account

account cannot be maintained afterwards: And tho' a recovery was suffered after waste done, it was to the use of plaintiff and his heirs, which is no new use, and ought not to bar waste in equity. It is true, action of waste dies with the person, but tho' waste will not lie at law, as the person committing it is dead, yet *he may have relief in this court*. It has been held in all cases of fraud, the remedy never dies with the person, but relief may be had against the executor out of assets; and this court will follow the assets of the party liable to the demand; and collusion in this court is the same as fraud. Decreed a satisfaction to be made to the plaintiff for the value of the timber, as he is now tenant in fee of the estate; but would not give any interest, as that would be carrying it too far. *5 New Abr. 499. Garth v. Cotton*. See as to waste generally, *Black. Com. 2 V. 281. 3 V. 223. How prevented in equity, Id. 3 V. 438. Impeachment of waste, Id. 2 V. 283. As to waste of lands, Id. 2 V. 14, 91. and as to the writ of waste, Id. 3 V. 227. For more learning on this subject, see 5 New Abr. and 22 Vin. Abr. tit. Waste.*

7. Of the process, &c. in waste.

The process incident to action of waste, is first a writ of summons made by the curitor of the county where the land lies, and on the return of this writ the defendant may *essoign*, and the plaintiff *adjourn*, &c. Then a *pone* is to be made out by the filazer of the county, on the return of which a *distingas* issues for the defendant to appear, and upon his appearing the plaintiff declares, and the defendant pleads, &c. Or if the defendant makes default, a writ of enquiry goes to the sheriff to enquire by the oath of twelve jurors what damage the plaintiff hath sustained, and then the party hath judgment to recover the treble of it; also after judgment entered, a writ of *seisin* is awarded to the sheriff to give possession to the plaintiff of the place wasted. *Comp. Attorn. 250, 251, 258, 259.* And a plaintiff shall have costs in all actions of waste, where the damages found do not exceed twenty nobles, which he could not by the Common law. *Stat. 8 Ed. 9 W. 3. c. 11.* A common writ of waste is of this form. *GEORGE the Third, &c. To the sheriff of S. Greeting: If A. B. shall secure you, &c. then summon by good summoners C. D. that he be before our justices, &c. to shew why, whereas by the common council of this kingdom of England, it is provided, that it shall not be lawful for any man to commit waste, spoil, or destruction in lands, houses, woods or gardens to him demised for term of life or years; the said C. in a house, lands and woods at W. which he holds for the term of his life, of the demise of the said A. hath made waste, spoil, and destruction, to the disheriting of him the said A. and against the form of the provision aforesaid, &c. See Supra.*

Wassel-Bowl, (From the Sax. *Waf-beal*, i. e. Health be to you) A large silver cup or bowl, wherein the Saxons, at their entertainments, drank a health to one another, in the phrase of *wafsi-beal*: And this *wassel* or *wafsi-beal bowl*, was set at the upper end of the table in religious houses for the use of the *Abbot*, who began the health or *poculum charitatis* to strangers, or to his fraternity. Hence cakes and fine white bread, which were usually sopped in the *wassel bowl*, were called *Wassel Bread*. *Matt. Paris.*

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Wassors, Were a kind of thieves so called; mentioned among robbers, draw-latches, &c. *Stat. 4 Hen. 4. c. 27.*

Watch, Is to stand sentry or attend as a guard, &c. And *watching* is properly for the apprehending of rogues in the night, as *wayting* is for the day; and for default of watch and ward the township may be punished. In all towns, &c. between the day of *Ascension* and *Michaelmas-day*, *night-watches* are to be kept, in every city with six men at every gate; and six or four in towns; and every borough shall have twelve men to watch, or according to the number of the inhabitants of the place, from sun-setting to sun-rising; who are to arrest strangers suspected, and may make hue and cry after them, and justify the detaining them until the morning: And *watches* shall be kept on the sea coasts, as they have been wont to be. *Stat. 13 Ed. 1. c. 4. 5 Hen. 4. c. 3.* Every justice

of peace may cause these *night-watches* to be duly kept; which is to be composed of men of able bodies, and sufficiently weaponed: And none but inhabitants in the same town are compellable to watch, who are bound to keep it in turn; or to find other sufficient persons for them, or on refusal, are indictable, &c. *Co. Litt. 70. Cro. Eliz. 204.* By a late statute the watch of St. James's parish, and Hanover-Square are regulated; the vestry to chuse a sufficient number of watchmen, and one beadle for each ward, and appoint stands, and what wages or allowances shall be made them; and may make orders for their better government, &c. The watchmen shall apprehend all rogues, vagabonds, and other disturbers of the peace, and deliver them to the constable of the night, in order to be carried before a justice, &c. Vestries may assess houses to defray the charge of watchmen and beades, not exceeding 4 d. in the pound of yearly value, and collectors to account, &c. *Stat. 8 Geo. 2. c. 15.* The like particular acts, for regulating the nightly watch in the parishes of St. Martin in the Fields, St. Paul Covent-Garden, St. Margaret, and St. John the Evangelist, and St. Anne, within the liberties of Westminster; also constables shall twice or oftner every night, go about their parishes, and with the watchmen use endeavours to prevent fires, murders, and robberies, &c. and to that end apprehend malefactors, suspected persons, &c. *9 Geo. 2. c. 8, 13, 17, & 19.* The watch of the parish of St. Andrew Holborn in the county of Middlesex, to be under the same regulation, by *Stat. 10 Geo. 2. c. 25.* Watchmen in the city of London, see *Constables of London*.

Persons aggrieved by assessments for watch and ward may appeal to the Mayor, &c. *11 Geo. 1. c. 18. s. 13.*

Watches, made by artificers, are to have the makers names, &c. under the penalty of 20 l. *Stat. 9 & 10 W. 3. c. 18.*

Water, In which are included navigable rivers and streams, the statutes relating to. Vide *Rivers*.

Water-Bailiff, An officer in port-towns, for the searching of ships. Also in the city of London, there is a water-bailiff who hath the supervising and search of fish brought thither; and the gathering of the toll arising from the Thames: And he attends on the Lord Mayor, having the principal care of marshalling the guests at his table; and arrests men for debt, or other personal or criminal matters upon the river of Thames. *28 H. 6. c. 5.*

Water-course, A water-course does not begin by prescription, nor yet by assent, but begins *ex jure nature* having taken this course naturally, and cannot be diverted. *Per Whillock J. 3 Bulst. 340. in case of Surry v. Piggot.*

Action on the case lies for diverting a water-course to my prejudice. See *Action on the case*, and *Her. 32. Skin. 316, 389. 5 Mod. 206. and 22 Vin. Abr. 525, 528.*

Water-gage, A sea wall or bank, to restrain the current and overflowing of the water: And it signifies an instrument to gauge or measure the quantity or deepness of any waters.

Water-gang, (*Watergangium*) Is a Saxon word for a trench or course to carry a stream of water; such as are commonly made to drain water out of marshes. *Ordin. Narisc. de Romn. Chart. H. 3.*

Water-gabel, Was a rent paid for fishing in, or other benefit received from some river. *Chart 15 Hen. 3.*

Water-measure, Is greater than Winchester measure, and used for selling of coals in the pool, &c. mentioned in the *Stat. 22 Car. 2. c. 11.*

Watermen. The Lord Mayor and court of aldermen in London, have a great power in the government of the Company of Watermen, and appointing the fares for plying on the Thames; and the justices of peace for Middlesex, and other adjoining counties, have likewise authority to hear and determine offences, &c. Watermen's names are to be registered; and their boats be twelve foot and a half long, and four foot and half broad, or be liable to forfeiture: And watermen taking more than according to the fares assessed, shall forfeit 40 s. and suffer half a year's imprisonment; and refusing to carry persons for their fare, be imprisoned for twelve months: Also none shall ply on the river, but such as have been apprentices to watermen

watermen for seven years, &c. *Stat. 2 & 3 P. & M. c. 16. 29 Car. 2. c. 7.* The **lightermen** on the *Thames*, and **watermen** are made a company; and the Lord Mayor and Aldermen are yearly to elect eight of the best **watermen**, and three of the best **lightermen** to be overseers and rulers; and the **watermen** to chuse assistants at the principal stairs, for preserving good government; and the rulers and assistants may make rules to be observed under penalties, &c. The rulers on their court-days, shall appoint forty **watermen** to ply on *Sundays*, for carrying passengers cros the river; and pay them for their labour, and apply the overplus of the money to the poor decayed **watermen**: And where persons travel on a *Sundry* with boats, they are to be licensed and allowed by a justice, on pain of forfeiting 5 *s.* 11 & 12 W. 3. c. 21. No person working any wherry boats, or barges on the river *Thames*, shall take an apprentice or servant, but such **watermen** as are housekeepers, &c. on pain of 10 *l.* And no apprentice shall take upon him the care of any boat, till he is sixteen years of age, if a **waterman's** son; and seventeen, if a landman's; unless he hath worked with some able **waterman** for two years, under the penalty of 10 *s.* And if any person not having served seven years to a **waterman**, &c. row any boat on the said river for hire, he shall forfeit 10 *l.* But gardeners boats, dung boats, fishermen, wood lighters, western barges, &c. are excepted. The penalties to be levied by distress, for want of which the Lord Mayor, or a justice of peace may commit the offenders to the house or correction for any time not exceeding a month, nor less than 14 days, &c. *Stat. 2 Geo. 2. c. 26.* **Watermen** using boats, &c. upon the *Thames*, are not to take any apprentice under 14 years old, who shall be bound for seven years, and enrolled in the book of the **watermen's** company, on pain of 10 *l.* And no more than two apprentices to be taken at one time, when the first hath served four years, under the like penalty. No tilt boat, rowbarge, &c. shall take in above thirty-seven passengers, and three more by the way; nor any other boat above eight passengers, and two by the way, on forfeiture of 5 *l.* for the first offence, and 10 *l.* for the second, &c. And in case any person be drowned, where a greater number is taken in, the **watermen** to be guilty of felony, and transported: Also tilt-boats used between *London Bridge* and *Gravesend* shall be 15 tons, and not under, and the other boats 3 tons. And rulers of the company of **watermen** are to appoint two officers, one at *Billinggate* at high water, and another at *Gravesend*, to ring a bell for the tilt-boats, &c. to put off; and they not immediately proceeding in their voyage with two sufficient men, shall forfeit 5 *l.* leviable on their boats, tackle, &c. Persons navigating flat bottomed boats or barges, not subject to the penalties of the act 10 Geo. c. 31. The fares of **watermen** assessed by the court of aldermen, are from *London Bridge* to *Linchouse*, *Ruscliff-Croft*, &c. Oars 1 *s.* Skulkers 6 *d.* *Wapping* dock, *Kentish church* stairs, &c. Oars 6 *d.* and skulkers 3 *d.* From either side of the water above the *Bridge* to *Lambeth* and *Faux-lall*, oars 1 *s.* skulkers 6 *d.* All the stairs between *London Bridge* and *Westminster*, oars 6 *d.* and skulkers 3 *d.*

Water-Ordeal, A way of purgation used by the Saxons. See *Ordeal*, and *Black. Com. 4 V. 336.*

Watercourse, (From the Sax. *Water*, *Aqua*, & *Schap*, *ductus*) An aqueduct, or passage for water.

Watling street, Is one of those four ways which the Romans are said to have made here, and called them *Conulares*, *Prætorios*, *Militares* & *Publicas*. This street is otherwise called *Wiclam street*. *Et strata quam filii Wette regis ab orientali mari usque ad occidentale per Angliam straverunt.* R. Hov. f. 248. a. n. 10. This street leads from *Dover* to *London*, *St. Albans*, *Dunstable*, *Towcester*, *Atherston*, and the *Severn*, near the *Wrekin* in *Shropshire*, extending itself to *Anglesey* in *Wales*. Anno 39 El. c. 2. The second is called *Ikenild-street*, so called ab *Icenis*, stretching from *Southampton* over the river *Isis*, at *New-bridge*; thence by *Camden* and *Litchfield*; then it passeth the river *Derwent* by *Derby*, so to *Bolseover* castle, and ends at *Tinnemuth*. The third was called *The Fosse*, because in some places it was never perfected, but lies as a

large ditch, leading from *Cornwall* through *Devonshire*, by *Tetbury*, near *Stowin* the *Wolds*, and besides *Coventry* to *Leicester*, *Newark*, and so to *Lincoln*. The fourth was called *Ermine* or *Erminage-street*, beginning at *St. David's* in *West Wales*, and going to *Southampton*. See the laws of *Edward the Confessor*, whereby these four publick ways had the privilege of *Pax Regis*. See *Hollinshed's Chron. vol. 1. cap. 19.* and *Henry of Huntington, lib. 1. in principio.* And in *Leg. Will. 1. c. 30.* there are three ways mentioned; but *Ikenild-street* is omitted, which was called *Iknild* from the *Icenis*, and *street*, which signifies a way. See an old description of these ways, made by *Robert of Gloucester. Dug. Antiq. of Warw. p. 6.* Cowell.

Wabefon, Is used for such goods as after shipwreck do appear swimming upon the waves. *Chart. 18 Hen. 8. See Jetton.*

Wax-chandlers. Justices of peace shall examine the goodness of **wax-candles**; and **chandlers** are to take but 3 *d.* a pound for the candles, &c. more than the common price of the **wax**, on pain of forfeiture and to be fined by the justices, &c. *Stat. 11 H. 6. c. 12.* **Wax-chandlers** mixing with their **wax**, tallow or other deceitful stuff, shall forfeit the candles; and they are to have stamps or marks, which shall not be counterfeited, under penalties, &c. 23 Eliz. c. 8.

Waxicot, (*Teragium*) A duty anciently paid twice a year towards the charge of **wax candles** in churches.—*Tributum quod in ecclesiis, pendebatur ad subministracionem cere & luminarium.* Spelm.

Way, (*Via*) A passage, street, or road. *Litt.* And where a man has a way to his close, he cannot go further without a prescription; but it is held if he go to a mill or bridge, it may be otherwise. 1 *Ld. Raym. 75.* See *High-way*.

See farther *Black. Com. 2 V. 35.* And as to disturbance of a way, see *Action on the Case*, and *Black. Com. 3 V. 241.*

Ways and means, Committee of. When the Commons of *Great Britain* in parliament assembled, have voted a supply to his Majesty, and settled the quantum of that supply, they usually resolve themselves into what is called a committee of ways and means, to consider of ways and means to raise that supply so voted. See *Black. Com. 1 V. 307, 308.*

Weald, or **Wald**, In the beginning of names of places, signifies a situation near wood, from the Sax. *Weald*, i. e. a wood: And the woody parts of the counties of *Kent* and *Suffex*, are called the *Wealds*; though misprinted *wildes* in the statute 14 Car. 2. c. 6.

Weatref, (From the Sax. *Weal*, i. e. *Strages*, & *Reaf*, *Spoliatio*) Is the robbing of a dead man in his grave. *Leg. Ethelred. cap. 21.*

Weir, A great dam made across a river, accommodated for the taking of fish, or to convey a stream to a mill. And all weirs for the taking of fish, are to be put down, except on the sea-coasts, by the statutes 9 H. 3. c. 23. and 25 Ed. 3. c. 4. Also commissions shall be granted to justices, to keep the waters, survey weirs and mills, and to inquire of and correct abuses; and where it is found by them that any new weirs are made, or others altered to the nuisance of the publick, the sheriff by *seire facias* is to give the person making them notice of it; and if he do not amend the same in three months, he shall forfeit 100 marks, &c. *Stat. 1 & 4 H. 4. 12 Ed. 4.*

Weavers. Persons using the trade of a weaver, shall not keep a tucking or fulling-mill, or use dying, &c. Or have above two looms in a house, in any corporation or market-town, on pain of forfeiting 20 *s.* a week. And shall serve an apprenticeship of seven years to a weaver or clothier, or shall forfeit 20 *l.* &c. *Stat. 2 & 3 P. & M. c. 11.*

Wed, (Sax.) A covenant or agreement; whence to **wedd**, a wedded husband, **wedded** bond-slave. Cowell.

Weddery, the customary service which inferior tenants paid to their lord in cutting down their corn, or doing other harvest duties. From the Sax: *Wed*, a covenant or agreement (whence to **wedd**, **wedding**, a **wedded** husband, a **wedded** bondslave, &c.) and *Biddan* to pray or

or desire, and *ripan* to reap or mow. As a covenant of the tenant to reap for the lord at the time of his bidding or commanding. *Paroch. Antiq.* 401. *Corwell.*

Week, (*Septuaginta*) Seven days of time; four of which weeks make a month, &c. And the week was originally divided into seven days, according to the number of the seven planets. *Shene.*

Wetgh, (*Waga*) Is a weigh of cheese or wool, containing two hundred and fifty-six pounds; and in Essex the weigh of cheese is three hundred pounds. A weigh of barley or malt is six quarters, or forty-eight bushels: And we read of a weigh of salt, &c. 9 H. 6. c. 8.

Weights, (*Pondera*) and *Measures,* Are used between buyers and sellers of goods and merchandize, for reducing the quantity and price to a certainty, that there may be the less room for deceit and imposition. There are two sorts of weights in use with us, *viz.* *Troy-weight* and *Averdupois*: *Troy-weight* contains twelve ounces to the pound, and no more; by which are weighed gold, silver, pearl, jewels, medicines, silk, wheat-bread, &c. and *Averdupois* contains sixteen ounces in the pound, by which grocery wares, copper, iron, lead, flesh, cheese, butter, tallow, hemp, wool, &c. are weighed: and here twelve pounds over are allowed to every hundred, so as one hundred and twelve pounds make the hundred weight. *Dalt.* 248. In the composition of *Troy-weight*, twenty pennyweights make an ounce; twenty-four grains a pennyweight, twenty mites a grain, twenty-four droits a mite, twenty perits a droit, and twenty-four blanks a perit: And the *Troy-weight* is said to be 20 s. sterling in the pound; and the *Averdupois weight* 25 s. sterling. 4 *Shep. Abr.* 194. *Fleta* mentions a weight, called a *Tromeweight*, being the same with what we now call *Troy-weight*; and according to the same author, all our weights have their composition from the penny sterling, which ought to weigh thirty-two wheat-corns of the middle sort; twenty of which pence make an ounce, and twelve such ounces a pound; but fifteen ounces make the merchants pound. *Fleta lib.* 2. c. 12. By *Magna Charta*, 9 H. 3. c. 25. 14 Ed. 3. c. 12. 25 Ed. 3. c. 10. 27 Ed. 3. &c. There is to be but one weight, &c. throughout the kingdom; but this is to be understood of the same species of goods, otherwise the *Troy* and *Averdupois* weights would not be permitted. Every city, borough and town, shall have a common balance, with common weights sealed; on pain of 10 l. in the city, 5 l. the borough, and 40 s. the town. 8 H. 6. c. 5. But only cities and market-towns are enjoined to have common balances, weights and measures, by 11 H. 7. c. 4. And by this statute, weights are to be marked by the chief officers of places, and sealed, &c. Refusing or delaying to do it, is liable to a penalty of 40 s. And allowing weights not agreeable to the standard, incurs a forfeiture of 5 l. &c. And the mayors and such officers are once a year to view all weights and measures, and burn and destroy those which are defective; also fine the offenders, &c. And two justices of peace have power to hear and determine the defaults of mayors. See the statutes 17 Car. 1. c. 19. 22 Car. 2. c. 8. &c. and *vide* Measure.

Weights of Bunel, mentioned in stat. 14 Ed. 3. H. 1. c. 12. See *Auncel-weight.*

Wend, (*Wendus*, i. e. *Perambulatio*, from the Sax. *Wend*) Signifies a certain quantity or circuit of ground. *Rental. Regal. Maner. de Wye*, pag. 31.

Were, (*Sax. Wera*) Is the sum paid in ancient time for killing a man, when such crimes were punished with pecuniary mulcts, not death: Or, it is *pretium redemptionis* of the offender. 12g. Ed. Conf. cap. 11.

Werelada, (from the Sax. *Wera*, i. e. *Pretium Capitis Hominis Occisi*, & *Ladian purgare*) Was where a man was slain, and the price at which he was valued not paid to his relations; but the party denied the fact; when he was to purge himself by the oaths of several persons, according to his degree and quality, which was called *Werelada*. Leg. H. 1. c. 12.

Wergild, (*Wergildus*) The price of homicide; paid partly to the King for the loss of a subject, partly to the lord whose vassal he was, and partly to the next of kin of the person slain. LL. H. 1. See *Black. Com.* 4 V. 188, 308, 406.

West-Saxonlage, Was the law of the *West-Saxons*. See *Merchenlage*, and *Black. Com.* 1 V. 65. 4 V. 405.

Westminster, (*Westmonasterium*, Sax. *West-mynster*, i. e. *Occidentale Monasterium*) The ancient seat of our Kings; and is now the well known place where the High Court of Parliament, and courts of judicature sit: It had great privileges granted by Pope Nicholas; among others, *Ut amplius in perpetuum Regie constitutionis locus sit atque repository regium insignium*. 4 Inst. 255. By the Stat. 22 Geo. 2. c. 49. A free market is to be erected for the sale of fish in the city of Westminster.

Westmomy and Iceland, Fishing vessels not to proceed thither till the 10th of March, 15 Car. 2. c. 15.

Whales, And *Sturgeon*, *vide* *Regal Fishes*, and *Black. Com.* 1 V. 223.

Whale-fishing, In the northern seas, &c. See *Greenland*.

Wharf, (*Wharfa*) A broad plain place, near some creek or haven, to lay goods and wares on that are brought to or from the water. 12 Car. 2. c. 4.

Wharfage, (*Wharfagium*) Is money paid for landing of goods at a wharf, or for shipping and taking goods into a boat or barge from thence: It is mentioned in the statutes 17 H. 8. c. 26. and 22 Car. 2. c. 11.

Wharfs. By statutes 1 Eliz. c. 11. and 13 & 14 Car. 2. c. 11. sect. 14. the crown is enabled by commission to ascertain the limits of all ports, and to assign proper wharfs and quays in each port, for the exclusive landing and loading of merchandize. *Vide* the Statutes.

Wharfinger, Is he that owns or keeps a wharf: 12 Car. 2. and 22 Car. 2. And wharfingers commonly keep boats or lighters of their own, for the carrying out and bringing in of goods, in which if a loss or damage happens, they may in some cases be made answerable. *Lex Mercat.* 133.

Wheelage, (*Rotagium*) *Tributum est quod rotarum nomine penditur; hoc est, pro plaustris & carris transcurrentibus.* Spelm.

Wherlicotes, The ancient *British* chariots, that were used by persons of quality before the invention of coaches. *Stow's Surv.* Lond. pag. 70.

Whiniard, A sword, from the Sax. *Winn*, i. e. to get, and *Are* honour; because honour is gained by the sword.

Whipping, A punishment inflicted for many of the smaller offences.

White-ashes. None shall ship, lade, or convey away any white-ashes, to parts beyond sea, under the penalty of 6 s. 8 d. a bushel. Stat. 2 & 3 Ed. 6. cap. 6.

Whitehart-Silver, Is a mulct on certain lands in or near the forest of *Whitehart*, paid yearly into the *Exchequer* imposed by King Hen. 3. upon *Thomas de la Linde*, for killing a beautiful white hart which that King before had spared in hunting. *Camb. Brit.* 150.

White-meats, Are milk, butter, cheese, eggs, and any composition of them, which before the reformation were forbid in Lent as well as flesh, till King Hen. 8. published a proclamation allowing the eating of white-meats in Lent. Anno 1543.

White-Rent, A duty or rent payable by the tinners in *Devonshire* to the Duke of *Cornwall*. See *Quit-Rent*.

White-Rents. Payments or chief rents reserved in silver or white money, called *white-rents* or *blanch-farms*, *reditus albi*; in contradistinction to rents reserved in work, grain, &c. *Black. Com.* 2 V. 42.

White-spurs, A kind of Esquires called by this name.

Whitstontide, The feast of *Pentecoste*, being the fiftieth day after *Easter*: And is so called, saith *Blount*, because those who were newly baptized came to the church between *Easter* and *Pentecoste* in white garments. *Blount's Dict.*

Whitson-farthings, Mentioned in letters patent of King Hen. 8. to the Dean of *Worcester*. See *Pentecostials*.

White-straits, A kind of coarse cloth in *Devonshire*, about a yard and half a quarter broad, raw, mentioned in Stat. 5 H. 8. c. 2.

Whole-blood. A kinsman of the whole blood is he that is derived, not only from the same ancestor, but from the same couple of ancestors. See *Black. Com.* 2 V. 227.

Wille, A place on the sea-shore, on the bank of a river. *1 Inst.* 4. But it more properly signifies a town, village, or dwelling-place; and it is often in the Saxon language made a termination to the name of the town, which had a complete name without it, as *Lunden-wic*, i. e. *London town*; so *Ipswich* is written in some old charters *Villa de Gippo Wico*, which is the same thing, for *Gipps* is the name, and *Gipps Wic* is *Gips Town*.

Wicca, A country house or farm, and there are many such houses now called the *Wick* and the *Wike*. *Cartular. Abbat. Glaston.* pag. 29.

Wichencrif, A Saxon word for *witchcraft*, which occurs in the laws of *K. Canut.* cap. 27.

Widow, (*Vidua, Relicta*) A married woman bereft of her husband, left all alone. *Litt.* The widow of a freeman of London, may use her husband's trade, so long as she continues a widow. *Chart. K. Cha. I.*

Widow's-Chamber. In London the widow of a freeman, is, by the custom of the city, intitled to her apparel, and the furniture of her bed-chamber, called the *Widow's Chamber*.

Widow of the King, (*Vidua Regis*) Was she that after her husband's death, being the King's tenant *in capite*, could not marry again without the King's consent. *Staudf. Prærog. cap. 4. Stat. 17 Edw. 2. and 32 H. 8. cap. 46.*

Widowhood, (*Viduitas*) The state and condition of a widow. — *Sciant quod ego Margeria de R. in viduitate & legitima potestate mea, remissi, relexavi, &c.* *Dat. apud, &c. Ann. 9 Hen. 4.*

Wife, (*Uxor*) Is a woman married; and after marriage the will of the wife, in judgment of law, is subject to the will of the husband; and it is said a wife hath no will, *sed fulget radiis mariti*. *Plowd. 344. 4 Rep.* A wife cannot contract for any thing; or bring actions, &c. without her husband. See *Baron and Feme. Wife* granted to another, vide *Dower*.

Wigrebe, (From the Sax. *Wig*, i. e. *Sylva*, and *Grewa*, *Præpositus*) The overseer of a wood. *Spelm.*

Wight Island, Was anciently called *Gnith* by the Britains; whence it had many other names, as *Ista*, *Wotha*, &c. *Law Lat. Diff.* See *Stat. 4. Hen. 7. c. 16.*

Wild-fowl, Are not to be destroyed by nets or otherwise, nor their eggs taken, under divers penalties by *Stat. 25 Hen. 8. c. 11. 1 Jac. 1. c. 17. 9 Ann. c. 25. Vide Game.*

Will, Deft of. An involuntary act, as it hath no claim to merit, so neither can it induce any guilt: The concurrence of the will, when it hath its choice either to do, or to avoid the fact in question, being the only thing that renders human actions either praise-worthy or culpable. See *Black. Com. 4 V. 20, 21.* But note, trespasses will lie for an accidental hurt.

Will, Estates at. An estate at will is where lands or tenements are let by one man to another, to have and to hold at the will of the lessor; and the tenant by virtue of this lease obtains possession. Every estate at will is at the will of both parties, landlord and tenant, so that either of them may determine his will, and quit his connections with the other at his own pleasure. Note, if tenant at will sows his lands, and the landlord before the corn is reaped, puts him out, yet the tenant shall have the emblements and free ingress, egress and regress, to cut and carry away the profits. See *Black. Com. 2 V. 145, 146.*

Will of the Lord. Though in general copyholders are still said to hold their estates at the will of the lord, yet it is such a will as is agreeable to the custom of the manor; which customs are preserved and evidenced by the rolls of the several courts baron in which they are entered or kept on foot by the constant immemorial usage of the several manors in which the lands lie. See *Black. Com. 2 V. 95, 147.*

Will, vitious. In all temporal jurisdictions an *overt* act, or some open evidence of an intended crime, is necessary, in order to demonstrate the depravity of the will, before the man is liable to punishment. And, as a vitious will without a vitious act is no civil crime, so, on the other hand, an unwarrantable act, without a vi-

cious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vitious will; and, secondly, an unlawful act consequent upon such vitious will. See *Black. Com. 4 V. 20, 21.*

Will, or Last Will and Testament, (*Testamentum, ultima voluntas*) Is a solemn act or instrument, whereby a person declares his mind and intention, as to the disposal of his lands, goods or effects, and what he would have done after his death. *Co. Litt. 111.*

1. Of wills generally, and the technical terms, &c.
2. Who are capable of making a will or testament.
3. What are the requisites, to constitute a good will.
4. Of wills to pass lands and tenements.
5. In what language a will may be written, and of the circumstances of signing, sealing, attestation and publication.
6. Of re-publishing of a will; what shall amount to a re-publication, and where a re-publication shall make a devise good.
7. What shall be a sufficient proof of a will, and in what cases devisees, legatees and creditors may be admitted to prove a will.
8. Of nuncupative wills.
9. Of the nature and effect of a will or testament and of a codicil; and how wills shall be construed.
10. Of revoking a will, and where a will shall be set aside for fraud.

1. Of wills generally, and the technical terms, &c.

The Common law calls that a *will* when lands or tenements are given; and where it concerns goods and chattels alone, it is termed a *testament*: In a will of goods there must be an executor appointed, but not of lands only without goods; an executor having nothing to do with the freehold. *1 Inst. 111.* If lands are given by will, it is called a devise; and goods and chattels a legacy: And there is this diversity between lands and goods given by a will, that when lands are devised in fee, or for life, the devisee shall enter without the appointment of others: In case of goods and chattels there must be the assent of the executor, &c. *Swinb. 24.* If lands are given and devised by will, the will ought to be proved in the Chancery; and of goods it must be in the spiritual court: A will both of lands and goods, may be proved in the spiritual court. *Ibid.* A will hath not force till after the testator's decease; but then without any further grant, livery, &c. it gives and transfers estates, and alters the property of lands and goods, as effectually as any deed or conveyance executed in a man's lifetime; and hereby descents may be prevented, estates in fee-simple, fee-tail, for life or years, &c. be made: And he that takes land by devise, is in nature of a purchaser. *Litt. 167.* A devisee is in by act executed in the devisor's life-time, though it be not consummated till his death. *Roll. Rep.* And therefore a devise shall take effect, before a descent: But an heir may be in the land by descent, notwithstanding a devise made to him; and to give a thing by will to such a person to whom the law gives it, is as if it had not been given. *2 And. 11. Moor, Ca. 496. Styles, 149.*

He who makes the testament, is called the testator; and when a man dies without a will, he is said to die intestate. *Shep. Abr. part. 4. voc. Testament.* A testamentary schedule without witnesses, or an executor, has been declared a will. *2 Lord Raym. 282. Powell v. Berresford.* There are two sorts of wills or testaments: First, in writing, which is, where the mind of the testator, in his life-time, by himself, or some other by his appointment, is put in writing: Or, secondly, by word, or without writing, which is, where a man is sick, and for fear that death, or want of memory or speech, should surprize him, that he should be prevented, if he staid the writing of his testament, desires his neighbours and friends to bear witness of his last will, and then declares the same presently, by word, before them: And this is called a nuncupative or nuncupatory will or testament; and this being after the death proved by witnesses, and put in writing

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writing by the ordinary, is of as great force for any other thing, but land, as when at the first in the life of the testator it is put in writing. 1 *Inst.* 111. *Perk.* f. 476. *Wood*, part 1. 187. A codicil is also in writing or by word, as a will or testament is. The civilians have other divisions of wills and testaments, solemn and unsolemn, privileged and unprivileged, whereof the Common law makes no mention. *Id. ibid.*

2. Who are capable of making a will or testament.

An infant, until he be of the age of 21 years, can make no will of his lands by statute 32 *H. 8. c. 1.* But by special custom in some places, where land is devisable by custom, he may devise it sooner; and of his goods and chattels, if he be a boy, he may make a will at fourteen years of age, and not before; and if a maid, at twelve years of age, and not before: And then they may do it without and against the consent of their tutor, father, or guardian. 32 *H. 8. c. 1.* 34 *H. 8. c. 5.* *Swinb.* part 11. *sect.* 2.

If he or she hath attained to the last day of 14 or 12 years, the testament by him or her in the very last day of their several ages aforesaid, is as good and lawful, as if the same day were already then expired. *Ibid.* Likewise, if after they have accomplished these years of 14 or 12, he or she do expressly approve the testament made in their minority, the same by the new will and declaration is made strong and effectual. *Swinb.* part 11. *sect.* 2. And yet some say an infant cannot make a will of his goods and chattels until he be of 18 years age. 1 *Inst.* 89. *b.* It has however been agreed in equity, that a female may make a will at 12 years of age of a personal estate, and a male at 17 years of age or 15, if he be a person of discretion. 2 *Vern.* 469.

A feme covert cannot make a will of her lands and goods, except it be in some special cases: For of her lands she can make no will with or without her husband's consent, stat. 32 & 33 *H. 8. c. 4.* *Rep.* 51. *Bro. Testament*, 13. But of the goods and chattels she has, as executrix to any other, she may make an executor without her husband's consent; for if she does not so, the administration of them must be granted to the next akin to the deceased testator, and shall not go to the husband. 12 *H. 7. c. 24.* *Perk. sect.* 502. *Fitz. Exec.* 40. But now even of them she can make no devise with or without her husband's leave, for they are not devisable; and if she devises them, the devise is void. *Plowd.* 526.

Of the things due to the wife, whereof she was not possessed during the marriage, as things in action, and the like, she may make her will, at least she may make her husband executor of her *paraphernalia*, viz. her necessary wearing apparel, being that which is fit for one of her rank. Some say, she may make a will without her husband's leave, others doubt of this; however all agree, that she, and not his executor, shall have this after her husband's death; and that the husband cannot give it away from her, and of the goods and chattels her husband has either by her or otherwise, she may not make a will without the licence and consent of her husband first had so to do: But with leave and consent she may make a will of goods, and make him her executor if she will. And it is said also, that if she does make a will of his goods in truth without his leave and consent, and after her death he suffers the will to be proved, and delivers the goods accordingly, in this case the testament is good: And yet if the husband gives the wife leave to make a will of his goods, and she does so, he may revoke the same at any time in her life-time, or after her death, before the will is proved. But a woman after a contract with any man, before marriage, may make a will as well as any other, and not at all disabled hereby. 12 *H. 7. c. 24.* 18 *Edw. 4. c. 11.* *Perk. sect.* 501. *Fitz. Exec.* 28, 109. *Bro. Testa.* 11. Likewise, a wife, whose husband is banished by act of parliament for life, may make a will as a feme sole. 2 *Vern.* 104.

A mad or lunatick person, during the time of his insanity of mind, cannot make a will of lands or goods; but such a one as hath his *lucida intervalla*, clear or calm

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intermissions, may, during the time of such quietness and freedom of mind, make his will, and it will be good; *Swinb.* 11. f. 3. So an idiot, i. e. such an one as cannot number twenty, or tell what age he is, or the like, cannot make a will or dispose of his lands or goods; and although he make a wife, reasonable, and sensible will, yet it is void: But such a one as is of a mean understanding only, that has *grossum caput*, and is of the middle sort, between a wise man and a fool, is not prohibited to make a will. *Id. part* 11. f. 4. An old man likewise, who, by reason of his great age, is childish again, or so forgetful that he forgets his own name, cannot make a will, for a will made by such an one is void. *Id. ibid. par.* 11. f. 1. 6 *Rep.* 23. *Marquis of Winchester's case.* So also it seems a drunken man, who is so excessively drunk that he is deprived of the use of his reason and understanding, during that time may not make a will, for it is requisite that when the testator makes his will, he should be of sound and perfect memory, i. e. that he have a competent memory and understanding to dispose of his estate with reason. *Swinb.* part 11. f. 1. and *sect.* 6.

A man who is both deaf and dumb, and is so by nature, cannot make a will; but a man who is so by accident, may by writing or signs make a will. *Id. part* 11. f. 1. & 10. And so also may a man that is blind. *Id. part* 1. f. 1 & 11. But an alien enemy, persons convicted and attainted, and recusants convicted, cannot make a testament of lands or goods. *Wood's Inst.* 335. Neither may the head, or any of the members of a corporation, make a will of the lands or goods they have in common, for they shall go in succession. *Fitz. Abr. Test.* 1. *Perk.* 498.

A traitor attainted, from the time of the treason committed, can make no will of his lands or goods, for they are forfeited to the King: But after the time he has a pardon from the King for his offence, he may make a will of his lands and goods to another man. *Swinb.* part 11. f. 12. 5 & 6 *Edw. 6. c. 11. f. 9.* A man who is attainted or convicted of felony cannot make a testament of his lands or goods, for they are forfeited; but if a man be only indicted, and dies before the attainer, his will is good for his lands and goods both; and if he be indicted, and will not answer upon his arraignment, but stands mute, &c. in this case his lands are not forfeited, and therefore he may make a will of them. *Swinb.* part 11. f. 13. *N. B.* If a man kill himself, his will as to his goods and chattels is void, but as to his lands is good. *Plowd.* 261. *Hales v. Pettit.*

A man likewise, who is outlawed in a personal action, cannot make a will of his goods and chattels, so long as the outlawry continues in force, but of lands he may make a will. *Swinb.* part 11. f. 21. But note, that however the wills of traitors, aliens, felons, and outlawed persons are void as to the King or lord that has right to the lands or goods by forfeiture or otherwise; yet the will is good against the testator himself, and all others but such persons only. *Wood, Com. v. Shep. Abr. part* 4. *voc. Testament.* And note also, by the civil law the wills of divers others, as excommunicate persons, hereticks, usurers, incestuous persons, sodomites, libellers, and the like, are void; but by our law the wills of such persons, at least as to their lands, are good by the statutes that enable men to devise their lands. *Id. ibid.*

In short, all persons whatsoever, male or female, old or young, lay or spiritual, at any time before their death, whilst they are able to speak so distinctly, or write so plainly, that another may understand them, and perceive that they understand themselves, may make wills of their lands, goods and chattels, and that although they have sworn to the contrary; and none are restrained of this liberty, but such as are before named. *Id. ibid.*

3. What are the requisites to constitute a good will.

To constitute a good will it is necessary,

1. That the testator be a person legally capable of making a will.

2. The

2. The second thing required to the making of a good testament, is, that there be a person to take, and one that is capable; for in all gifts by devise, or otherwise, that are good, there must be a donee in *esse*, and not *potest* only, and one that shall have capacity to take the thing given, when it is to vest, or the gift shall be void. *Shep. Abr. part 4. f. 13. voc. Test.*

And hence it is, that where the devisee of lands or goods, or an executor of a will, doth die before the deviser, or him that makes the will, the devise and will is void, and that neither the heir or executor shall have the thing devised. *Id. ibid. Plowd. 345. Brett v. Rigden.* A devise to the wife for life, and after to the children unpreferred, is good. 1 *And. 60. Amner v. Luddington.* But a devise by a man to his heir and his heirs, is void. 2 *And. 11. Garryn v. Arsfate.*

One devised his lease of lands to B. his eldest son, except the sum of 140*l.* to be paid out for portions for his daughters, and made B. his executor; and held a good devise to them after this manner, and that the daughters might sue for it in the ecclesiastical court, or court of equity. *Shep. part 4. p. 13. voc. Test.*

If one devise to the son in tail, and if he die without issue, to the next of his name; the daughter after married cannot have it, for she is not of his name. *Cro. Eliz. 532. Bon v. Smith.* One seized of a manor and lands, deviseth the same to his son, and after, by another part of his will, deviseth part of the same to another of his sons; these devises are good, and they shall be joint-tenants. 3 *Leo. 11.*

3. That the testator, at the time of making his will, have *animum testandi*, i. e. a mind or serious intention to make such a will.

For it is the mind, not the words of the testator that gives life to the will: Since if a man rashly, unadvisedly, incidently, jestingly or boastfully, and not seriously, writes or says, that such a one shall be his executor, or have all his goods, or that he will give to such a one such a thing; this is no will, nor to be regarded. And the mind of the testator herein is to be discovered by circumstances; for if at the time he be sick, or sets himself seriously to make his will, or requires witnesses to bear witness of it, it shall be deemed in earnest; but if it be by way of discourse only, or somewhat he will do hereafter, or the like, it shall be taken for nothing. *Swinb. part 1. f. 3.*

4. That the mind of the testator in making his will be free, and not moved by fear, fraud, or flattery.

For when the testator is moved to make his testament by fear, or circumvented by fraud, or overcome by some immoderate flattery, the same is void, or at least voidable by exception: And therefore, if a man, by occasion of some present fear or violence, or threatening of future evil, does at the same time, or afterwards by the same motive, make a will, it is void, not only as to him that puts him in fear, but as to all others, altho' the testator confirms it with an oath: but if the cause of fear be some vain matter, or, being weighty, is removed, and the testator afterwards, when the fear is past, confirms the testament, in this case, perhaps, the will may be good. And if a man, by occasion of some fraud or deceit, be moved to make a will, if the deceit be such as may move a prudent man or woman, and if the end be evil also, the will is void, or voidable at the least; but if the deceit be light and small, or if it be to a good end, as where a man is about to give all his estate to some lewd person, from his wife and children, and they persuade the testator that the lewd fellow is dead, or the like, and thereby procure him to give his estate to them, this is a good will. And one may, by honest intercessions, and modest persuasions, procure another, to make himself or a stranger executor to him, or the like, and this will not hurt the will; also a man may use fair and flattering speeches to move the testator to make his will, and to give his estate unto himself or some friend of his; except it be in case where the flatterer first threatens him, or puts him in fear, or to his flattery joins fraud and deceit; or where the testator is a person of weak judgment, or under the government of the flatterer, or in danger from him; as when the physician shall persuade his patient wh-

der his hand to make his will, and give his estate to himself; or the wife attending on her husband in his sickness shall neglect him, and in the mean time flatter him to give her all: Or where the persuader is importunate, and will have no denial: Or where there is another testament made before; for in all these cases, the will will be in danger to be avoided. If I be much privy to another man's mind, and he tells me often in his health how he intends to settle his estate, and he being sick, I of my own head, draw a will according to his mind, before declared to me, and bring it to him, and ask him whether this shall be his will or no; and he considers of it, and then delivers it back to me, and says, yes; this is a good will. But if otherwise, some friends of a sick man, of their own heads shall make a will, and bring it to a man in extremity of sickness, and read it to him, and ask him, whether this shall be his will, and he says, yes, yes: Or if a man be in great extremity, and his friends press him much, and so wrest words from him; especially if it be in advantage of them, or some friends of theirs; in these cases the wills are very suspicious. *Id. ibid. part 11. f. 25. and part 7. sect. 2, 3, & 4.*

5. That the will be made in the form prescribed by law.

4. Of wills to pass lands and tenements.

By the Common law, no lands or tenements (except by particular custom) were deviseable by any last will or testament, neither could they be transferred from one to another, but by solemn livery of seisin, matter of record or sufficient writing. Because it was presumed, that the testator would do that *in extremis*, that he would not do in his health; that it proceeded from the distemper of his mind by the anguish of his disease, or by finitior persuation to which in his sickness he was more subject. 1 *Inst. 111. b. 1 Roll. Abr. 608.*

The true reason seems to be from the nature of the feudal tenure, and the relation that was first established betwixt the lord and his tenant. For though donations after length of time were made to the tenant and his heirs, or the heirs males or females of his body, under certain duties and services, expressly reserved, or which the law created; and though the word *heirs*, &c. he words of limitation, and appropriated to measure out the length or continuance of the estate: yet they were always understood, the heirs of the *present* tenant, who being liable to the same services when they came into the tenancy, the lord was to have the tuition and education of such heirs, in case they happened, by reason of their minority to be incapable of performing the services, that so he might, by his care and discipline, secure to himself tenants always capable thereof, either in their own persons, if they happen to be males, or by proper marriages with his tenants if they proved to be females; and therefore by no act of the tenants could he dispose of the feud, so as to defeat the lord of the advantages of his seignior; and hence it was, that a tenant could not devise it even to his own heir, so as to make him a purchaser thereof; for then he coming in, not by the donation of the lord, but the disposition of the tenant, though he remained liable to the naked services, yet the lord lost the advantages of wardship, marriages, &c. which were annexed only to those who came in upon the terms of his own donation by descent. 1 *Eq. Caf. Abr. 401.*

The *Stat. 32 H. 8. cap. 1.* usually called the statute of wills, enacts, "That every person having manors, lands, &c. shall have power to give, dispose, will, and devise by will, in writing or otherwise, by act-executed in his life-time, all his said manors, &c. any law, statute &c. to the contrary notwithstanding."

There have been several resolutions concerning wills made pursuant to this statute since the making thereof: But as the *Stat. 29 Car. 2. c. 3. (vide infra)* is now the proper pattern to follow, having altered the forms, by requiring more ceremony and greater exactness, it will be sufficient barely to mention some of the cases on this statute of 32 H. 8. viz. That the lands must be *free*, and therefore lands purchased after a will is made will not pass. *Vide Plow. 344.* A devise of an authority to executors to sell

fell is within the act. *Moer* 341. A man beyond sea wrote a letter, in which he declared his will to be, that his lands should go in such a manner; and adjudged a good will. *Moer* 177. So if a man had ordered one to make his will, and thereby to devise Whiteacre to A. and his heirs, and Blackacre to C. and his heirs, and he had written the devise to A. but before the devise to C. was wrote, the deviser died, yet as to A. this had been a good devise. 3 Co. 31. b. So a will was held good where a lawyer took only short note, with design to reduce it into form, which he afterwards did, but the deviser died before it was read to him. 1 And. 34. A will wrote without the appointment of the testator, if read to him, and approved by him, was held good; signing and sealing was not necessary. *Cro. Eliz.* 100. *Dyer* 72. a. 2 Leon. 35. As to signing see *infra*.

By the statute of frauds and perjuries, 29 Car. 2 c. 3. §. 5. All devises and bequests of any lands or tenements devisable by the statute of wills, or by any particular custom, shall be in writing, and signed by the party devising the same, or some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said deviser by three or four credible witnesses, or else they shall be utterly void and of none effect.

And by §. 6. "No devise in writing of lands, tenements or hereditaments, or any clause thereof, shall be revocable other than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence, and by his directions and consent: But all such devises and bequests shall remain in force until the same be burnt, &c. in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the deviser, signed in presence of three witnesses, declaring the same."

Therefore if a will be of lands or tenements, it must be in writing, and it must be committed to writing at the time of the making thereof; and it is not sufficient that it be put in writing after the death of the testator, being first made by word of mouth only, for then it is but nuncupative still. See *Wood*, part 1. 798. *Dyer* 72. *Plowd.* 345.

5. In what language a will may be written, and of the circumstances of signing, sealing, attestation and publication,

It is not material in what matter or stuff, whether in paper or parchment, nor in what language, whether in Latin, French, Dutch, or any other tongue, or in what hand or letters, whether in secretary hand, roman hand, or court hand, or in any other hand, a will be written, so that it be fair and legible, that it be read and understood; neither is it material whether the same be written at large or by notes or characters usual or unusual, as XX. for twenty, or when the figure 1 is used instead of the letter A. if it be usual in the testator's writing, or the like; for the will is good notwithstanding. So also, if some words be omitted, or improper sentence used, when the intent and meaning is apparent; as where a man says, I make my wife of this my last will and testament, leaving out the word executrix, yet the will is good; and this shall be understood. But if it be so done as it cannot be read, or by reading the mind of the testator cannot be known, then the will is void and of no force, in like manner as a nuncupative will is when the words spoken are so ambiguous, obscure, and uncertain that thereby the meaning of the testator cannot be known or understood. *Swinb.* part 4. §. 28.

The clauses of the 29 Car. 2. c. 3. above recited, having rendered the circumstances of signing, &c. necessary, it is next to be inquired, when, in legal construction, these requisites shall be deemed to have been complied with; which may be best collected by an attention to the following cases.

It has been held, that sealing of a will, is a signing within the statute of frauds and perjuries. 2 Str. 764.

Warnford v. Warnford. But a will in writing need not be sealed. *Park.* 477.

Where the testator owns his hand before the witnesses who subscribe the will in the testator's presence, the will is good, though all the witnesses did not see the testator sign; and it is observable that the statute of frauds does not say that the testator shall sign his will in the presence of three witnesses; but requires these three things, first, That the will should be in writing. Secondly, That it is signed by the testator. And thirdly, That it should be subscribed by three witnesses in the presence of the testator. 3 P. Will. 254. *Stonehouse & ux' v. Evelyn*. Nevertheless a will has been held to have been well executed, though it was not mentioned in the attestation to have been signed in the presence of the testator. 2 Str. 1109. *Croft v. Pawlet*. If a will be attested by three witnesses, who severally signed their names, not being present together; yet each signing being in the presence of the testator, makes it a good will within the statute. 2 Chan. Cases 109. *Anon*.

But if a man subscribes his will in the presence of two witnesses, and they subscribe it in his presence, and after makes a codicil in writing, reciting that he had made a former will and confirmed the same, (except what was excepted by the codicil) and declares, that the codicil shall be taken as part of his will, and publishes it in the presence of one of the witnesses to the first will and another new witness, this is not a good will, for there were not three subscribing witnesses in the presence of the testator; and one of the witnesses to the codicil never saw the will. Adjudged, though it was objected, the will and codicil made but one will, and the circumstance of three witnesses wanting, the will was perfected by the codicil. 3 Mod. 263. *Lee v. Lib. Sed qu.* So if a man makes a will in several pieces of paper, and there are three witnesses to the last paper, and none of them ever saw the first, this is not a good will. 3 Mod. 263. v. *infra*.

A will of lands was originally executed in the presence of two witnesses only, and at the distance of four years afterwards, the testator re-executed his will, by drawing a pen on the old strokes, in the presence of one other person, who likewise subscribed his name as a witness to it. Upon an ejectment brought by the heir at law, and on a special verdict, it was determined by the court, that this will was properly executed, and attested, under the statute of frauds and perjuries. 5 New Abr. 509. MSS. Rep. *Jones v. Dale*, B. R. Hill. 16 Geo. 2.

It was determined by Lord chancellor, that a will is well proved, tho' the witnesses did not see the testator sign his name; if he declares it to be his hand-writing to them, and they attest it in his presence, and in the presence of each other. 5 New Abr. 509. MSS. Rep. *Grayson v. — in Chan.* 25, 26 Geo. 2.

A will was attested by three witnesses, in the presence of the testator and of each other, but the testator did not write his name or put his seal in their presence, but pointed to the paper, and said, that was his will, and he had writ it, and that his name, *William Ellis* subscribed, was his writing and name; and laid his hand on the seal, and said, that was his seal. Determined by Lord Hardwicke, assisted by Lord Ch. J. *Wilkes*, *Strange* master of the Rolls and the Ch. Baron, on a question in this cause, whether this will so executed, was good as a revocation of a former will, under the sixth section of the statute of frauds? And held clearly that it was; it not being doubted but that it was good, as an original will, according to the authorities determined on this head, that the owning it to be his hand-writing was sufficient. 5 New Abr. 509. MSS. Rep. *Ellis v. Smith*, Hill. & Mich. 27 Geo. 2.

The testator desired the witnesses to go into another room, seven yards distance, to attest his will, in which there was a window broken, through which the testator might see them. And it was held, that this will was according to the statute of frauds; for tho' the statute requires attesting in his presence, to prevent obtruding any other will in the place of the true one, yet it is enough if the testator might see. It is not necessary that he should actually see them signing; for, at that rate, if a man should

should but turn his back, or look off, it would vitiate the will: And the signing was in the view of the testator; he might have seen it, and that is enough. So if the testator, being sick, should be in bed and the curtain drawn. 2 Salk. 688. *Shires v. Glisfcock*.

But where one devised lands to *I. S.* and his heirs, and duly subscribed his will in the presence of three witnesses; who, for the ease of the testator, went down stairs into another room, and attested the will there, which was out of the presence of the testator; and the heir at law was prevailed on to join in a lease and release of the devised premises, in trust for the devisee; the will and the release were both set aside, for the release reciting that the will was duly executed, was *suggestio falsi*, and the concealing from the heir, that it was not duly executed, was *suppressio veri*; either of which circumstances are good reasons for setting aside a release or conveyance. 1 P. Will. 239. *Broderick v. Broderick*.

If the testator writes the will with his own hand, tho' he does not subscribe his name, but seal and publishes it, and three witnesses subscribe their names in his presence, it is a good will; for his name being wrote in the will it is a sufficient signing: And the statute does not direct, whether it shall be at the top, bottom, &c. and by three judges against one, sealing is a signing within the act. And note, it is not said in the act, that the signing shall be in the presence of the three witnesses at the same time. 3 Lev. 1. *Lemayne v. Stanley*. See *Comyn's Rep.* 197. *Peate v. Ougley*. 2 Raym. 1282.

A. by will in writing, attested by three witnesses, devised a copyhold estate to his wife: And afterwards the testator, on the day of his death, directed his nephew to obliterate some devises, but said nothing as to the copyhold devised to his wife, and then caused a memorandum to be written, that he examined, perused, and approved of the will as so obliterated and altered by his nephew, in his presence, but did not republish it in the presence of three witnesses, but directed his nephew to have it wrote out fair; but before it was brought back he became delirious; and this was held a good will as to the copyhold. 2 Vern. 498. *Burkitt v. Burkitt*.

It has been determined, that a trust of an inheritance must be devised in the same manner as a legal estate. Vide 2 Will. Rep. 258.—*Wagstaff v. Wagstaff*.

J. S. possessed of a term of five hundred years in Blackacre, afterwards purchases the fee-simple in *B's* name, and devises Blackacre by will, all of his own hand-writing, to *C.* in fee; but the will was neither dated, subscribed, or attested. Decreed *per* his honour, that as this was a term which would have attended the inheritance, and in equity have gone to the heir, and not to the executor, in which respect it was to be considered as part of the inheritance; so the will which was not attested by three witnesses, as the law required it to be, when land was to pass, should not carry this term. 2 Will. Rep. 236. *Whitchurch v. Whitchurch*.

An ejectment by the heir at law, the question for the opinion of the court was, whether it should be left to a jury to determine, whether the witnesses to a will (being all dead) set their names in the presence of the testator, and this merely upon circumstances without any positive proof? *Per Cur.* This is a matter fit to be left to a jury, which is all that is referred to the court. The witnesses, by the statute of frauds, ought to set their names as witnesses in the presence of the testator; but it is not required by the statute that this should be taken notice of in the subscription to the will: And whether inserted or not, it must be proved: If inserted, it does not conclude but it may be proved *contra*, and the verdict may find *contra*; then if not conclusive when inserted, the omission does not conclude it was not so, and therefore must be proved by the best proof the nature of the thing will admit. In case the witnesses be dead, there cannot probably be any express proof, since at the execution of wills few are present but the deviser and witnesses; then, as in other cases, the proof must be circumstantial, and here are circumstances. First, three witnesses have set their names, and it must be intended they did it regularly. Secondly, one witness was an attorney of good character, and may be presumed to understand what ought to be

done, rather than the contrary. And there may be circumstances to induce a jury to believe, that the witnesses set their hands in the presence of the testator, rather than the contrary; and it being a matter of fact, was proper to be left to them; as whether the *litem* was given on a feoffment, when no livery is indorsed; whether a deed was executed when only a counterpart was produced, &c. And the court was of opinion, that the plaintiff ought to be non-suited. *Comyn's Rep.* 531. *Hands v. James*. See also *Vir. Abr. tit. Devise*, (N. 9.) Ca. 4. p. 128. *Croft on Dem. of Dalby v. Parvles*.

A will shall not be read in proof of a witness's hand, unless there be positive proof that he is dead. *Comyn's Rep.* 614. *Bishop v. Burton*.

If a copyholder, after admittance, surrenders the lands to the use of his last will, and by his will gives them to *A.* but the will is not attested by any witnesses; yet *A.* is well intitled to the lands. *Per Lord Chan. Barnard. Rep. in Chan.* 11, 12. *Tufnell v. Page*.

N. B. It was considered as sufficient to declare the uses of the surrender.

A surrender was made of a copyhold estate to trustees, to the use of the will; which was made with only two witnesses to it. It was admitted, that a will of a copyhold estate does not require three witnesses. *Select Ca. in Chan.* 42. *Appleyard v. Wood*.

A will made beyond sea, of lands in England, must be attested by three witnesses. 2 H. L. Rep. 293. See *Vir. Abr. tit. Devise*, (N. 2.) ca. 16. p. 119. and (N. 10.) ca. 3. p. 128.

If a testator signs his will, but delivers it as his act and deed; yet this will be a sufficient publication. *Vir. Abr. tit. Devise*, (N. 7.) ca. 13. pl. 125.

An uncle having devised his estate from his nephew and heir at law, a younger brother of the heir at law, at the uncle's funeral, snatched the will out of the hands of the executor, and tore it in many small pieces, but muck of them, and particularly such part wherein was the devise of the land, were picked up and stitched together again: And on a bill to have the will established, it was decreed that the devisee should hold against the heir, and he to convey to him, altho' there was no direct proof made that the heir directed the tearing of the will. 2 Vern. 441. *Haynes v. Haynes*.

6. Of re-publishing a will; and what shall amount to a re-publication, and where a re-publication shall make a devise good.

If a man devises certain lands, and after aliens the land to a stranger, and re-purchases; and after shews his intent, that the said will shall be his will: This is a new publication, and the land shall pass by the devise. 1 Vern. 330. *Hall v. Dunch*.

So the testator's saying his will was in a box in his study, amounted to a new publication. 2 Vern. 209. *Cotton v. Cotton*.

If a man seized of lands, devises all the lands to *I. S.* and afterwards purchases the manor of *D.* and afterwards writes his will that *I. D.* shall be his executor: yet this is not any new publication, to make the land pass. 1 Roll. Abr. 618.

But if after the purchase of the manor of *D.* he delivers the first will as his will, and says, that it shall be his will, without putting any words thereto: yet this is a new publication to make the lands newly purchased pass. *Id. ibid.* 1 Salk. 237.

So if a man seized of lands in *D.* devises to another, by his bill in writing, all his lands in *D.* and after purchases other lands in *D.* and afterwards *I. S.* comes to him, and requests him to give him the buying of the lands last purchased: And he answers him, that he will not, but that his intent was, that those lands should go to the executors (the devisee being made executor by the will) as his other lands should: And after the deviser causes a codicil to be written, in which there is a devise of several personal things, as corn and implements of household, and annexes it to his first will: And after dies without other publication; yet this shall be a sufficient publication to make the lands newly purchased to pass by

by the will, for there need no other words in the will than there were before; and his intent appears, that it should be his will, by the annexing the codicil. 1 *Roll. Abr.* 618.

But if a man has issue two daughters *A* and *B*, and he devises lands to *A*, and to the heirs of her body, and for want of issue to *B*, and *A* dies in the life-time of the testator, having issue; tho' after the testator annexes a codicil to his will, and thereby disposes of some part of his personal estate; yet this will not amount to a republication of the will, nor give any title to the issue of *A*, tho' the testator had declared in his will, that *B*, had married against his consent, and that what he had given her, was in full of her portion, and in bar of any further part of his real estate. 1 *Abr. Eq. Cases* 407. 2 *Fern.* 722. *Lutton v. Simpson*.

It has been said, that if a codicil be executed after making a will and purchasing lands, it will amount to a republication, and pass the land purchased after making the will, and that it was so determined by all the judges in the case of *Acherly* and *Vernon*; which see *infra*, *sed. 2*. Unless it appears he had his real estate under consideration. 5 *New Abr.* 516. *MSS. Rep. Gibson v. Rogers*, in *Chanc. Trin.* 23 *Geo.* 2.

A, having given a legacy *inter alia* to his son *Joseph*; *Joseph* died, and he afterwards had another *Joseph*, and then by a codicil to his will, confirming his will, he took notice, that since the last, it had pleased God to give him another son, and gave him a smaller legacy. Determined, that this was a re-publication of his will, and amounted to a substituting *Joseph* in the place of the first; and gave him the first legacy as well as the second. *MSS. Rep. Perkins v. Micklethwaite*. See *Cro. Eliz.* 422. 1 *Lev.* 243. 1 *Vent.* 341. 2 *Jones* 135. *Raym.* 408.

J. S. after making his will, and devising his real and personal estate, to trustees, for particular purposes, purchases several fee farm-rents, assart rents, and other lands and tenements, and then by a codicil he recites that he made a will, dated 17th *Jan.* 1711, and then says, "I hereby ratify and confirm the said will, except in the alterations hereafter mentioned. The portion to my niece *L.* shall be made up 6000*l.* and what I have given to my sister and niece, shall be accepted by them in satisfaction of all they may claim out of my real and personal estate, and on condition they release all right, &c. to my executors and trustees in my will named; and thus having provided for my sister and niece, I devise all the lands by me purchased since my will, to my trustees and executors in my will named, to the same uses, and subject to the same trusts to which I have mentioned to devise the manor of *H.* and the bulk of my estate; and I revoke that part of my will, whereby I appoint *A. B.* and *C.* three of my trustees, in my will, and I desire *K.* and *N.* to be two of my trustees, and devise my said real estate to them accordingly." Lord *Macclesfield*, 20th *Nov.* 1723. decreed, that the will was confirmed by the codicil; that *J. S.* signing and publishing his codicil in the presence of three witnesses was a re-publication of his will, and both together made but one will; and by the said will and codicil, his fee-farm rents, assart rents, and lands, contracted to be purchased, and all his real and personal estate (except the copyhold purchased before his will) did well pass. On appeal to the lords, the decree was affirmed. *Comyns's Rep.* 381. *Acherly v. Vernon*.

It was determined upon the opinion of all the judges, that if a will be made, and afterwards another will without cancelling the former; and then by an act subsequent to both, the first will be confirmed, the limitations in that will so confirmed, will take place: Also that if there are two inconsistent wills of the same date, neither of which can be proved to be last executed; they are both void by the Common law for uncertainty, and will let in the heir at law: Also, that although the wills are dated the same day, the limitations may take place if they are consistent in both, to the disinherison of the heir at law: And upon this opinion, the order appealed from, which was a dismission of the plaintiff's bill in the court of Exchequer in *Ireland*, was confirmed in favour of Lord *Anglesey*, by the house of lords. 5 *New Abr.* 517.

MS. Rep. Phips v. Anglesea in Dom. proc. June 1751. See the printed copy.

7. What shall be a sufficient proof of a will; and in what cases devisees, legatees and creditors may be admitted to prove a will.

A written will, when it is written with the testator's own hand, proves itself, and therefore needs not the help of witnesses to prove it; and for this cause, if a man's will be found written fair and perfect, with his own hand, after his death, although it be not subscribed with his name, sealed with his seal, or have any witnesses to it, if it be known or can be proved to be his hand, it is held to be a good testament, and a sufficient proof of itself; but if it be sealed with his seal, and subscribed with the name of the testator, and can be proved by witnesses, it is more authentick; and when it is found amongst the choicest evidences of the testator, or fast locked up in a safe place, it is the more esteemed; for if it be written in another hand, and the testator's hand and seal, or one of them, not to it, although it be found in such a place as before, yet some proof will be expected of it further by witnesses in that case; and if a writing be found under the testator's own hand, yet if it be but a scribbling writing, written copywise, with a great distance between every line, without any date, in strange characters, with many interlineations, and lying amongst his void papers, or the like: This will not be esteemed a sufficient will, nor a good proof of it, but it shall be accounted rather a draught or image of the testator's will, for a direction to him after to make his will by; and yet, if it can be proved that the testator did declare himself that this should be his will, this will be a good will, and a good proof of it. *Swinb. part 4. sect. 28. and part 7. sect. 13.* This as to personal.

If it be proved, that the testator said his testament was in such a schedule, in the hands of *J. S.* and *J. S.* produces a writing, deposing it to be the same, this is a sufficient proof: *qu.* But if he says withal, it is written with his own hand, then it seems some other proof, as by comparing hands, or the like, that it is his hand wherein it is written, will be expected. *Id. ibid.* If the witnesses will prove the writing produced to be the last will of the testator, or that he said it was, or it should be his last will, or that it was the same writing that was shewn to them, and whereunto they are witnesses, although they never heard it read, or set their hands to it, it is a sufficient proof. *Id. ib.*

Where there is no question or opposition moved or had about or against a will, there the oath of the executor alone is esteemed a sufficient proof of it; and in that case regularly no other proof is required; and where more proof is necessary, it is in the discretion of the ordinary what proof to admit and allow: And those witnesses, for number, nature and quality, or such other proof that he deems and accepts for sufficient, is sufficient; and the will so proved by such witnesses, or such other proof, is sufficiently proved. 5 *New Abr.* 519. This as to personal.

All persons, male and female, rich and poor, are esteemed competent witnesses to prove a will, save only such as are infamous, as perjured persons, and the like; such as want understanding and judgment, as children, infants, and the like; and such as are presumed to bear affection, as kindred, tenants, servants, &c. *Swinb. par. 4. sect. 24.* *Qu.* as to the latter sort.

But an interested witness, such as a legatee, &c. was not, (before the stat. 25 *Geo.* 2. c. 6.) a credible witness. 5 *New Abr.* 519. *MSS. Rep. Aussy v. Dowling. Mich.* 1746. *B. R.*

Witnesses have been examined to prove the testator's intent. 2 *Ld. Raym.* 1326. *Cliffe & al. v. Gibbons & al.* The probate of a will cannot be controverted at Common law. *Ld. Raym.* 262. *Sir Richard Rains's case.* A recital of a will in a copyhold admittance is evidence against any but the heir. *Id.* 735. According to *Holt Ch. J.* the register's book is good evidence to prove a will concerning lands. 1 *Ld. Raym.* 731. *St. Leger v. Adams.* One of the subscribing witnesses to the attestation of a will, having an annuity devised to his wife, was held

not to be a credible witness within the statute. 2 *Str.* 1253. *Holdfast on dem. of Ansty v. Dowling*. Parol evidence is not admitted to contradict the words of a will. *Id.* 1261. *Loufield v. Stensham*, and *Cas. Temp. Talbot, Brown v. Selwin*, 240. A proof of a will cannot be made against a man by confession of his own witness. 1 *Ld. Raym.* 730. *Pyke v. Crouch*. An executor may be sued for a legacy where he proves the will, tho' he does not live in that diocese. *Id.* 847. *Edgworth v. Smalridge*.

Devisees, legatees, and creditors, are now made competent witnesses to wills, for by the act of the 25 *Geo.* 2. c. 6. for avoiding and putting an end to certain doubts and questions, relating to the attestation of wills and codicils, concerning real estates, in that part of Great Britain called England, and in his Majesty's colonies and plantations in America, it is enacted, That if any person shall attest the execution of any will or codicil, which shall be made after the 24th of June 1752, to whom any beneficial devise, legacy, estate, interest, gift or appointment of, or affecting any real or personal estate, (other than except charges on lands, tenements, or hereditaments, for payment of any debt or debts which shall be thereby given or made,) such devise, &c. or appointment, shall, so far only as concerns such persons attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil, within the intent of the act of 29 *Car.* 2. notwithstanding such devise, &c.

And it is also enacted, That in case by any will or codicil made or to be made, any lands, tenements, or hereditaments are or shall be charged with debts; and any creditor whose debt is so charged, hath attested, or shall attest, the execution of such will or codicil, such creditor shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act. That if any person hath attested the execution of any will already made, or shall attest the execution of any will, &c. made on or before the 24 June 1752, to whom any legacy is or shall be thereby given, whether charged upon lands, tenements or hereditaments, or not; and such person before he shall give his testimony concerning the execution of such will, &c. shall have been paid, or have accepted or released, or shall have refused to accept such legacy or bequest, upon tender made thereof; such person shall be admitted as a witness to the execution of such will, &c. within the intent of the said act. Provided that in case of tender and refusal, such legatee shall in no wise be intitled to such legacy.

This act not to extend to the case of any heir at law, or of any devisee in a prior will or codicil of the same testator, executed and attested according to the act of 29 *Car.* 2. or any person claiming under them respectively, who has been in quiet possession for two years next preceding the 6th of May 1751; as to such lands, tenements, or hereditaments, whereof he has been in quiet possession as aforesaid. This act not to extend to any will or codicil, the validity or due execution whereof hath been contested in law or equity by the heir of such deviser, or devisee, in any such prior will or codicil so contested, or any part thereof, or for obtaining any other judgment or decree for the lands, &c. mentioned to be devised, in any other judgment, or decree relative thereto, on or before the said 6th of May 1751, and which has been already determined in favour of such heir at law, or devisee in such prior will or codicil, or any person claiming under them respectively, or which is still depending, and has been prosecuted with due diligence; but the validity of every such will or codicil, and the competency of the witnesses thereto, shall be adjudged and determined in the same manner as if this act had never been made.

No possession of any heir at law, or devisee in such prior will or codicil as aforesaid, or of any person claiming under them respectively, which is consistent with, or may be warranted by or under any will or codicil attested according to the intent of this act, or where the estate descended or might have descended to such heir at law, till a future or executory devise by virtue of any will or codicil attested according to this act, should or might take ef-

fect, shall be deemed to be a possession within the intent of the clause herein last contained. This act shall extend to such of the British colonies in America, where the 29 *Car.* 2. is by act of assembly made, or by usage received as a law; or where by act of assembly or usage, the attestation and subscription of a witness or witnesses are made necessary to devises of lands, &c. And shall have the same force and effect in the construction of, or for the avoiding of doubts upon the said acts or assembly and laws of the said colonies, as the same ought to have in the construction of, or for the avoiding doubts, upon the said act in England. Provided always, that as to the cases arising in any of the said colonies, no such devise, legacy, or bequest aforesaid, shall be made null and void by virtue of this act, unless the will or codicil whereby such devise, &c. shall be given, shall be made after March 1. 1753.

In the case of *Wyndham v. Chetwynd* in *B. R. Bur. Rep.* 414 to 431. On a will of land, dated 14 May 1750, and a codicil of the same date, an objection was made, "that the subscribing witnesses to the will were not, at the time of their attestation, credible witnesses," the witnesses being creditors. But in that case, it was resolved they were credible witnesses.

In another case, which afterwards came before the court of Common Pleas for determination (the present Lord Camden Chief Justice,) viz. the case of *Doe* on the demise of *Hindson v. Kersey*, the principles laid down in the former case, were controverted.

In the latter case, there was a devise to certain poor persons, of the parish of *A.* Some of the parishioners were witnesses; and adjudged they were not credible, for that a devise to the poor of any place, being in rate of the poor rate, the parishioners were interested. These two last cases, and the arguments at length, as delivered, in the respective cases, by Lord Mansfield and Lord Camden, are published together, in a quarto pamphlet, to which we refer, as being too long to state fully, in a work of this kind.

8. Of nuncupative wills.

By the stat. 29 *Car.* 2. c. 3. s. 19. For the preventing fraudulent practices, it is enacted, "That no nuncupative will shall be good where the estate thereby bequeathed shall exceed the value of 30 pounds, that is not proved by the oaths of three witnesses, at the least, that were present at the making thereof, and bid by the testator to bear witness that such was his will, or to that effect." And by stat. 4 *Ann.* c. 16. s. 14. it is declared, "That all such witnesses, as are and ought to be allowed to be good witnesses upon trial at law by the laws and customs of this realm, shall be deemed good witnesses to prove any nuncupative will, or any thing relating thereto. Nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the habitation where he or she has been resident for ten days next before making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned. That after six months passed after the speaking of the testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will. That no letters testamentary, or probate of any nuncupative will, shall pass the seal of any court, till fourteen days, at the least, after the decease of the testator be fully expired, nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow, or the next of kindred to the deceased, to the end they may contest the same, if they please. That no will in writing concerning any goods or chattels, or personal estate, shall be repealed; nor shall any clause, devise, or bequest therein, be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read to the testator, and allowed by him, and proved to be so done by three witnesses at the least."

" Provided that any soldier in actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages, and personal estate, as before the making of this act."

A. being ill, desired *B.* to make her will, who wrote down only names and initial letters to this effect, viz: to *Tho. West* 200 *l.* to *Jo. Dav.* 100 *l.* to *Rob. Cro.* 50 *l.* to self, 10 *l.* and to several other persons in like manner, to above 400 *l.* which being more than her estate, *B.* made an alteration in the second column, by subtracting part of the sums of the legatees, as set down in the second column, and then told *A.* the sense of the proposed devise: There were two persons in the room that did not hear any thing that passed between *A.* and *B.* but only heard the testatrix at last pronounce, that all was well. *B.* went to a scrivener to have the devise drawn out at length and in form, and before she returned the testatrix died: The judge below pronounced for this will; but upon appeal to the delegates, it was reversed; and in this case it was agreed, that if the will had been written in words at length, so as they had carried a sense and meaning in themselves, it had been a good will; for that there was one witness that wrote it, and two that heard the testatrix pronounce, that it was well: Which would have been intended to have amounted to a second witness, in regard it appeared on all hands, by several witnesses, that the testatrix did then seriously dispose herself to make her will; and for that was quoted the case of one *Pepper*, where a person disposed herself to make her will, and dictated it to a person who wrote it down; and another, not called in as a witness, lay behind the hanging, out of curtesy; and yet such will was allowed to be good, being proved by these two witnesses: But they distinguished this case because the will was not substantive, but was to take its sense from the interpretation of the witness; and so there would be innuendo upon innuendo, which made purely a nuncupative will: And as such, not being attested by the number of witnesses appointed by the statute of frauds and perjuries, the will and legacies were void. 1 *Abbr. Eg. Caf.* 403.

Dr. Shallmer, by will in writing, gave 200 *l.* to the parish of *St. Clement's Danes*, and after, *Prew* the reader coming to pray with him, his wife put him in mind to give 200 *l.* more towards the charges of building their church, at which, tho' *Dr. Shallmer* was at first disturbed, yet after, he said he would give it, and bid *Prew* take notice of it: And the next day he bid *Prew* remember of what he had said to him the day before, and died that day. Within three or four days after, the doctor's wife puts down a memorandum in writing of the said last devise, and so did her maid. *Prew* died about a month after, and amongst his papers was found a memorandum of his own writing, dated three weeks after the doctor's death, of what the doctor said to him about the 200 *l.* and purporting that he had put it in writing the same day it was spoken: But the writing which was mentioned to be made the same day it was spoken did not appear, and these three memorandums did not expressly agree. About a year after, on application by the parish to the commissioners of charitable uses, and producing these memorandums and proof by *Mrs. Shallmer* and her maid, they decreed the 200 *l.* but on the exceptions taken by the executors, the decree was discharged of this 200 *l.* and Lord Chancellor held it not good, because it was not proved by the oath of three witnesses; for tho' *Mrs. Shallmer* and her maid had made proof, yet *Prew* was dead; and the statute in that branch requires not only three to be present, but that the proof shall be by the oath of three witnesses. 1 *Abbr. Eg. Caf.* 404.

A daughter deposits 180 *l.* in the hands of her mother (the defendant); and afterwards makes her will in writing, and thereby devises several legacies, and makes her mother executrix, but takes no manner of notice of this 180 *l.* afterwards, by word of mouth, she desires her mother to give this 180 *l.* to the plaintiff, if she thought fit, and then soon after died: The mother proved the will, and this bill was brought against her, to have the 180 *l.* paid. The mother, by her answer, admits she had such a sum in her hands, and that her daughter did make

such a request to her, but that she left it to her election whether she would give it to the plaintiff or not, by the very form of the devise: And insisted, that she did not think fit to give it to the plaintiff. And in this case it was agreed, that this was not as a nuncupative will, being above 10 *l.* and not reduced into writing within six days after the speaking, as the statute requires. 2dly, That if the defendant had insisted on the statute of frauds and perjuries, the court could not have relieved the plaintiff as upon a trust: But in this case the defendant having by answer confessed the trust, there was no danger of perjury from variety of proof, which was the mischief the statute intended to provide against; and therefore the court took it to be in nature of a trust, and decreed for the plaintiff: Tho' the defendant expressly swore, she did not think fit to give it to the plaintiff, and that the testatrix had left her at liberty. But this decree was against the opinion of several at the bar, who thought too hard on the election left in the mother: But the court principally relied on the case of *Kingman v. Kingman*, where a man devised away an estate of 2000 *l.* per ann. and upwards, from his son and heir to a bargeman. And by his will devised 20 *l.* per ann. to his son, with this clause, that if he behaved himself well, and gave no trouble or disturbance concerning his will, that he might make it up 80 *l.* if he thought fit. And the court decreed the 80 *l.* per ann. to the son. But note, the 80 *l.* per ann. in the case of *Kingman v. Kingman* seems to have been decreed purely upon the circumstances and hardships of the case: But in the present case there were no such circumstances or ingredients of hardship on the plaintiff: But *quære*, for it seems to be a trust in the hands of the mother. *Id. ibid. Gil. Eg. Rep.* 146. *Jones v. Nabbs.*

9. Of the nature and effect of a will or testament, and of a codicil; and how wills shall be construed.

A will or testament is of that nature, that it differs much from other acts and deeds that men do and execute in their life-time: For although it be made, sealed, and published in ever so solemn a manner, yet it has no life, no virtue in it, until the testator's death: For it is a maxim in law, *Omne testamentum morte consummationem est, et voluntas est ambulatoria usque ad extremum vitæ exitum*; it is therefore resembled until death to the interlocutory sentence, and after death to the definitive sentence of a judge; and hence it is said, *Sed legum servanda fides, suprema voluntas quod mandat ferique jubet parere necesse est.* 1 *Inst.* 112. 4 *Rep.* 61. b. *Forse v. Hembling's case.*

And for this reason a man may alter or make void his will at his pleasure; and he may make as many new wills and testaments as he pleases, and there is no way to bar a man of this liberty. *Shep. Abr. part 4. p. 9. Voc. Test.*

And the latter testament always revokes and overthrows the former: But otherwise it is of a codicil, for a man may make as many of these as he will, and make no testament at all: Or if he makes a testament, he may afterwards make as many codicils as he will, and one of them will not overthrow the other; for in the first case they must be all annexed to the letters of administration, and the administrator must perform them; and in the latter case they must be all annexed to the testament, and the executor must take care to perform them. *Lit.* 168. *Swinb. p. 1. sect. 5. Br. Testament* 20.

A testament therefore is said to have three degrees. 1st, An inception, which is the making of it, 2dly, A progression, which is the publication of it, 3dly, A consummation, which is the death of the testator. *Shep. Abr. part 4. p. 9. Voc. Test.*

In grants therefore the first is of the greatest force, but in testaments the last is of greatest force. 1 *Inst.* 112. b.

But when a testament is perfected by the death of the party, it as effectually gives and transfers estates, and alters the property of lands and goods, as acts executed by deed in the life-time of the parties: For hereby devises of lands are prevented. And a man may make estates in fee-simple, or fee-tail, for life or years, of lands, tenements, rents, reversions or services, as effectually as by deed; and these estates also will be good without any livery

livery of seisin or attornment, and hereby also rents and power to distrain for them, may be reserved, conditions created and annexed to estates or things devised. *Shep. Abr. part 4. p. 10. Voc. Test.* And therefore they that take by devises of land, are said to take in the nature of purchasers. And therefore if a testator in tail makes a feoffment to the use of himself in fee, and after devises the same to his wife in fee, and dies, the son is not remitted though the father dies seised, for the devise prevents the descent.

It is to be observed, that where the words of a will have a plain sense, and no doubt is in any matter within or without the words, touching the matter of the devise, there the words of the will shall always be taken to be the intent of the devisor, and his intent to be what the words say. 2 *And. 17. Lowen v. Bedd.* That all the words of a will are to be carried to answer the intent of the devisor; but this is to be understood in cases where the intent of the party may be known by the words that are in the will. 2 *And. 10, 11, 134.* That if there are inconsistent and contradictory words in a will, some words must be rejected to make it sense. Thus where a testator gave the interest of a sum of 6000 l. to Mary Comfortle, his daughter, for her life, and after her decease gave the money between Charles Comfortle her husband, and their children: And in another part of the will he said, and in case there be no such child or children, I give it to Charles Comfortle and such children. — Lord Chancellor rejected these latter words, as they were absurd and contradictory. 5 *New Abr. 525. MS. Rep. Boon v. Comfortle, Pasch. 24 Geo. 2. in Chan.*

A. having a wife and no children, made his will, and said, lest it should please God that he should not return, he gave and devised a real and personal estate, or to that effect. He returns, has children and dies, without altering his will: The plaintiff being a legatee, and there being a direction in the will, for the sale of the real estate to pay his legacy; Lord Chancellor was of opinion, that the disposition was merely contingent, and that no part of the will was to take effect but on the contingency of his return. 5 *New Abr. 525. MSS. Rep. Parsons v. Lennox, Hill 22 Geo. 2. in Chan.*

That a will must have a favourable interpretation, and as near to the mind and intent of the testator as may be, and yet so withal as his intent may stand with the rules of law, and not be repugnant thereunto; it being a rule or maxim of law, *Quod ultima voluntas testatoris perimplenda est, secundum veram intentionem*; and that, *sed legum servanda fides, suprema voluntas quod mandat ferique jubet parere necesse est.* In deeds the rule of construction is, that the intention must be directed by the words, but in wills, the words must follow the intent of the devisor; and such a construction is to be made of them, as to make use of all the words, and not of part, and so as they may stand together, and have no contrariety in them: *Shep. Abr. part 10. Voc. Testament. Bridg. 105. Standish v. Short.*

That such a sense shall be made of a devise, that it may be for the profit of the devisee, and not to his prejudice. *Shep. Abr. 11. p. 11. Voc. Test.* That general and doubtful words in a will, shall not alter an express devise before, nor carry any thing contrary to the apparent intent. *Id. ibid.* That the clauses and sentences of a will shall be severally transposed to serve the meaning of it. And construction shall be made of the words to satisfy the intent, and they shall be put in such order as the intent may be fulfilled. *Id. ibid.* That no sense may be framed upon the words of a will, wherein the testator's meaning cannot be found. *Id. ibid.* That to give a thing to such a person to whom the law gives it, is as if it had not been given; and so a devise of a man's land to his heirs is void. *Styles 148, 149.* That a construction of a will must be gathered out of the words of the will, and not by any averment. *Shep. Abr. part 11. p. 11. Voc. Test.*

That though a parol averment shall not be admitted to explain a will, so as to expound it contrary to the import of the words, yet when the words will bear it, a parol averment may be admitted. As, for instance, to ascertain a person, but in no case to alter the estate.

Freem. 292. Sleade v. Berrier. 5 Rep. 68. Lord Chyney's case.

That one part of a will shall be expounded by another: as where a man leaves an estate to another and his heirs, and afterwards mentions to have given him an estate tail, his heirs shall be taken to mean heirs of the body, and the devisee shall take only an estate tail. 2 *Freem. 267. Bamfield v. Popham.* See farther on this subject, the cases of *Strong, Clerk, v. Teatt, lessee of Merwyn* &c. *Bur. Rep. 912—924.—Doe ex Dm. Long, v. Laming. Bur. Rep. 1110—1113.—Bagshaw v. Spencer, 5 A.P. 1 Vesey, 142, &c. before Lord Hardwicke on an appeal from the rolls.*

The case in short was, Benjamin Ashton by will of 7 September 1725, devised all his manors, lands, &c. to five trustees, in trust, int. al. as to one moiety to Benjamin Bagshaw for his natural life without impeachment of waste, and after determination of that estate to the trustees to preserve contingent uses, but to permit Benjamin Bagshaw to receive the rents for his natural life, and after his decease, then to the use and behoof of the heirs of the body of said Benjamin Bagshaw lawfully begotten, and to be begotten, and in default of such issue, then, &c.

Benjamin Bagshaw suffered a common recovery of his moiety: At the rolls, his honour declared, that Benjamin Bagshaw took an estate-tail, and decreed accordingly.

On the appeal, the case was reduced by the chancellor, to two general questions, viz.

1. Whether the estate devised to Benjamin Bagshaw was a legal estate, that is an use executed by the statute of uses, or a mere trust in equity?

2. Supposing it to be a mere trust in equity, whether it was an estate-tail, or an estate for his life only, with contingent remainders over to all the issue of his body respectively?

As to the first question, Lord Hardwicke was of opinion, that it was a trust in equity.

As to the second question, his lordship observed, it would depend on the construction of the words, "heirs of the body of Benjamin Bagshaw, lawfully begotten or to be begotten," as they stood in the will. If they were to be taken as words of limitation, then he was tenant in tail, and his recovery was good in equity; if words of purchase, then he was tenant for life only, and his recovery was void.

And his lordship was of opinion, that he was tenant for life only, and therefore his recovery was void. And his judgment was to reverse so much of the decree made at the rolls, as declared that Benjamin Bradshaw took an estate-tail by the will, &c. See the reasonings at large in *Vesey*. — It is a case of great consequence, and treated in a very masterly manner by the chancellor.

10. Of revoking a will; and where a will shall be set aside for fraud.

By Stat. 29 Car. 2. cap. 3. it is enacted, "that no devise in writing of lands, tenements, or hereditaments, or any clause thereof shall be revokable, otherwise than by some other will or codicil in writing, or other writing, declaring the same, or by burning; cancelling, tearing or obliterating the same, by the testator himself, or in his presence, and by his directions and consent, but shall continue, &c. unless altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or more credible witnesses, declaring the same: And by the same act, no will in writing, concerning personal estates, shall be repealed, nor any clause or bequest therein altered by words, or will by word of mouth only, except the same be, in the life of the testator, committed to writing, and read to, and allowed by him, and proved to be done by three witnesses."

But where a man, by will in writing, devised the residue of his personal estate to his wife, and after, she dying, he, by a nuncupative codicil, bequeathed to J. S. all that he hath given to his wife, it was resolved good; for, by the death of the wife, the devise of the residue was totally void; and the codicil was no alteration of the former

former will, but a new will for the residue. *Raym.* 334.

Revocations by the act of the party are either *express*, as where the devisor expressly declares his mind, that his will should be revoked; or *implied*, as where the estate or thing devised is altered after making of the will. 2 *Abr. Eq. Caf.* 769. *Sir Richard Templeman's case*, *Micb.* 4 *Ann.* in C. 6.

Lord *Hatfield*, Lord Chancellor: The general principle is, that at the time of the devise the devisor must have a disposing capacity, and an estate in the land devised; and the estate must remain in the same plight and condition until his death: For the least alteration by an act of his, makes it a different estate, and shews a different intention, and therefore is an actual revocation. Thus if one seised in fee devises, then in fee to another to the use of himself in fee, tho' it is the old use that remains, yet it is a revocation, tho' it is his own reversion. So of a bargain and sale without enrolment. So if a man thinking himself tenant in fee, devises, and then apprehending himself to be only tenant in tail, suffers a recovery, with intent to confirm his will, it is a revocation. As to mortgages, they are exceptions out of the rule. At law a mortgage for years, and in equity a mortgage in fee, are revocations *pro tanto* only; and the reason is, that a mortgage is only a security; and tho' it be a conveyance of a real estate, yet in this court it is a chattel interest only, and goes to the executor, and it gives no dower. In the case wherein these leading principles were established, after the testator had devised all the manors, lands, tenements, and hereditaments, he by a deed conveyed an advowson which he was seised of at the time of making his will, to and to the use of trustees and their heirs; in trust to present the church when void to a particular person, if qualified, on the terms prescribed therein: And if such a person should be incapable, then to present such clerk as A. should nominate; and in default of nomination by him, as the trustees should think fit. The person intended was presented; and on a bill brought by the heir at law of the testator, to have a legal conveyance of the residue of the advowson, the question was, Whether this deed, being only a trust for a particular purpose, as it was alleged, was a total or partial revocation? And determined by Lord Chancellor, after arguing as above, that it was a total revocation; it being a grant of the legal interest; and the trust was a real and beneficial interest given by it to the trustees, that of nominating themselves in default of A.'s nominating: And he decreed, a conveyance to be made according to the prayer of the bill. 5 *New Abr.* 527. cites *MS. Rep. Sparrow v. Hardcastle* in *Canc. Pafe.* 17 *Geo.* 2.

I. S. seised of a lease for lives, devises it; and afterwards I. S. surrenders the old lease, and takes a new one to him and his heirs for 3 lives. Decreed by Lord Chancellor King, that this renewal of the lease was a revocation of the will, as to this particular. 3 *P. Will. Rep.* 166, 170. *Marnwood v. Turner*.

So were a testator devised by his will, a leasehold estate under *Magdalen College, Oxon.* and after the making of this will, before his death, renewed his lease, by surrendering the old one, and taking a new lease. Determined by Lord Chancellor, that this was a revocation of his will. And tho' the testator, after the renewal, looking amongst his papers, had said, this is my will, that was held to be no republication. 5 *New Abr.* 527. cites *MS. Rep. Sir Tho. Abney v. Miller*, in *Canc. Trin.* 1743.

If the latter part of a will is inconsistent with the former part of it, it supercedes and revokes it. *Per Reynold Ch. B. and Comyns and Thompson, Barons in Scacc. Fitzgibbons* 195. *Attorney General v. Gower and Co. of Chelsea water-works*.

It was agreed to be the constant rule of this court, that where a legacy was given to a child, who afterwards upon marriage, or otherwise, hath the like or greater sum, it should be intended in satisfaction of the legacy, unless the testator should declare his intent otherwise; and it was said the words of ratifying, and confirming do not alter the case, tho' they amount to a new publication, being only words of form, and declaring nothing of the tes-

tator's intent in this matter. 2 *Freem. Rep.* 224. *Irod v. Hurst*.

Defendant's testator by his will gave his four daughters 600 l. a-piece, and afterwards married his eldest daughter to the plaintiff, and gave her 700 l. portion; after that he makes a codicil, and gives 100 l. a-piece to his unmarried daughters, and thereby ratifies and confirms his will, and dies. Plaintiff preferred his bill for the legacy of 600 l. given to his wife by the said will. And his honour held, that the portion given by the testator in his life-time, should be intended in satisfaction of the legacy. *Id. ibid.* See farther, *Pre. in Chan.* 183. *Ward v. Lant. Vin. Abr. tit. Devise. (R. 2.) Ca.* 16. p. 140. *Parker v. Lamb. Pre. in Chan.* 263. *Hofkins v. Hopkins. Vin. Abr. tit. Devise (P.) Ca.* 10. p. 136. *Pre. in Chan.* 298. *Bird v. Hooper*.

A man makes his will duly executed and attested according to the statute of frauds and perjuries, and at the same time, in like manner, executes a duplicate thereof; sometime after, the testator having a mind to change one of his trustees, orders his will to be wrote over again, without any variation whatsoever from the first, save only in the name of that trustee. And when it was so wrote over, he executes it in the presence of three witnesses, and the three witnesses subscribed their names, but not in his presence. After this the testator cancels the duplicate, by tearing off the seal, and then dies. And the question was, Whether this second will, not being good, as a will to pass lands, should yet be a revocation of the first, and if it should not, whether the cancelling the other should be a revocation thereof within the statute of frauds and perjuries. And it was decreed, that neither the making of the second, nor the cancelling the first, was a revocation thereof; tho' in the second there was an express clause, that he did thereby revoke all former and other wills; wherein my Lord Chancellor took this distinction, that the second was not intended barely a revocation of the first, so as to signify his intention of dying intestate, or without any will; but it was intended as an effectual will to pass the lands to the persons, and in the manner thereby devised: And therefore if it was not good as a will to that purpose, it was no revocation of the first, but as it was supposed to be valid as a will for passing the lands by the second: And if a man by his will devises lands to A. and after makes a second will, and thereby devises the lands to B. if this second will be not good, as a will to pass the lands to B. it shall be no revocation of the devise in the first to A. for it is plain, A. was to lose only what B. was to gain; and if B. gains nothing by the second, A. shall lose nothing that was given him by the first: But if a man executes a second will, which appears to have no other intention than to revoke the first, and to die intestate, tho' this second be not in all circumstances duly executed as a will whereby to pass lands, yet it will operate as a revocation of the first: And as to the cancelling or tearing of the first will, that is no revocation of it in this case, because that was no self-subsisting independent act, but done to accompany, or in a way of affirmation of the second: It was done from an opinion, that the second had effectually revoked the first, and therefore he tears the first as of no use: But the first was not effectually revoked by the second: And the act of tearing the first will, will not destroy it neither: For though a man may, by the statute of frauds, as effectually destroy his will, by tearing or cancelling it, as by making a second; yet if he does make a second, and intends that as revocation of the first, if it be insufficient for that purpose, as in the principal case, the tearing and cancelling being only in consequence of his opinion, that he made a good second will, it shall not destroy the first; but it ought to be set up again in equity. 1 *Abr. Eq. Cases* 407. See as to part, *Cont. 10 Mod.* 233. *Vin. Abr. tit. Devise, (R. 3.) p.* 141.

But if a man cancels or revokes either the duplicate or original will, this is an effectual avoiding of both, they being both but one will; and therefore must stand or fall together. 2 *Fern.* 742. *Onions v. Tyrer*.

A man makes his will in writing, and thereby devises all his real and personal estate to his wife, her heirs and executors,

executors, in trust to pay his debts and legacies; and then devises several legacies to his children and other persons, and concludes, "In witness whereof I have, to this my last will and testament, containing nine sheets of paper, and to a duplicate thereof, to be left in the hands of such a one, set my seal to every sheet thereof, and to the last of the said sheets my hand and seal, in the presence of three witnesses, who all subscribed their names in due form of law." Afterwards the testator being minded to add other trustees to his wife, and make some alterations in his will, sends for a scrivener, and gave directions to prepare a draught of instructions for another will, which the scrivener does accordingly, and the testator read it over and approved of it very well, and sets his hand to it; and being at a tavern, thinking he had now made a new will, he pulls out of his pocket the first will and tears off the seal from the first eight sheets, which the scrivener seeing, asked him what he was doing; why says he, I am cancelling my first will. Pray says the scrivener hold your hand, the other will is not perfected; it will not pass your real estate for want of being executed pursuant to the statute of frauds and perjuries. I am sorry for that, says he, and immediately desisted from tearing off any more of the seals; and in some short time dies without having done any thing further to perfect the second will, or to cancel the first.

Lord Chancellor held, that the subsequent will could be no revocation as to the real estate, not being executed according to the statute of frauds and perjuries: And that as to the tearing off the seals from the first eight sheets, that not being done *animo cancellandi*, was no revocation; and that the seal remaining whole to the last sheet was sufficient, and in strictness it was not necessary that all the sheets should be sealed. *Abr. Eq. Caf. 409. Hyde v. Hyde. 3 Chan. Rep. 155. S. C. See Vin. Abr. tit. Devise (R. 4.) Ca. 3. p. 142. Townsend v. Pearce.*

If *A.* devises lands to *B.* and his heirs, and afterwards mortgages the same lands to *J. S.* for years, or in fee, though a mortgage in fee be a total revocation at law, yet in equity it shall be a revocation *pro tanto* only. *1 Vern. 329, 342, 97, 141, 182. 1 Salk. 158. S. P.* So if a man seised in fee devises to *J. S.* in fee or for life, and afterwards makes a lease to *J. D.* for years, this, even at law, shall not be a revocation, but during the years; for his intent does not appear further than during the term for years. *1 Roll. Abr. 616. Montagu v. Jeffries.* So if a husband possessed of a term for 40 years, devises it to his wife, and after leases the land to another for twenty years, and dies; this lease is not any revocation of the whole estate; but only during the twenty years, and the wife shall have the residue of the devise. *Id. ibid. Wilcox's case.*

But if *A.* devises lands to *B.* and his heirs, and twelve years after leases the same lands to *B.* for sixty years, to commence after his death, and delivers the deed to a stranger, to the use of *B.* who does not deliver it to *B.* till after the death of *A.* This is a revocation of the whole estate, for both estates are not consistent nor can vest in *B.* at the same time; and it was plainly the intention of the deviser, that *B.* should have the less estate only. And it was so adjudged, though objected, that it was the intention of *A.* that *B.* should have his liberty to take by the lease or devise, *B.* not having agreed to the lease in the life-time of *A.* *1 Abr. Eq. Caf. 410.* But if the lease made to the devisee had been to begin either *in presenti* or *future*, in the life of the deviser, it had not been a revocation, for inasmuch as the lease might have determined in his life, it was consistent with his will. *Cro. Jac. 49, Coke v. Bullock.* So where *A.* by will devised to his younger son a certain messuage for ninety-nine years, if three lives lived so long, yielding and paying to his sister the plaintiff 20*l.* *per ann.* until twelve years old, and thence 40*l.* *per ann.* for life: And afterwards the said *A.* for 300*l.* fine, demised the said messuage to *J. S.* for ninety-nine years, if three lives lived so long, yielding and paying 50*l.* *per ann.* to *A.* the testator, his heirs and assigns; and though it was held at the Rolls to be a revocation, yet on an appeal to my Lord Keeper, he decreed it to be no revocation, and that the daughter should be paid her annuity; and he said, that the

rule is, where a subsequent act shall amount to a revocation by implication, it must be a necessary implication. And the act must be wholly inconsistent with the devise. *2 Vern. 495. Lamb v. Parker. 2 Freem. 284. S. C.*

So if *A.* devises lands to trustees to pay his debts, and then to pay his wife 200*l.* *per ann.* for her life; and the testator living several years after, his debts increased from 2000*l.* to 10,000*l.* for 8000*l.* whereof his said trustees were bound, and afterwards *A.* the testator, by deed and fine, conveys his lands to his said trustees, to sell to pay his debts, and the surplus to him and his heirs, and tho' the wife joined with him in the fine and conveyance, yet this shall be no revocation of the wife's 200*l.* *per ann.* and she shall have the 200*l.* *per ann.* out of the surplus money after the debts are paid. *2 Vern. 241, Vernon v. Jones. 2 Freem. 117. S. C. See the case of Clinton and Wynn, 1 Abr. Eq. Caf. 411. 2 Freem. 102. 1 Abr. Eq. Caf. 412. Pollen v. Husband.*

A. having issue four daughters, and no male issue, devises lands to trustees, in trust to permit his daughter *S.* to receive the rents and profits until her marriage or death, and in case she married with the consent of two of the trustees and her mother, then to convey the premises to her and her heirs: But if she died before marriage, or married without such consent, then to convey to other persons: Afterwards *S.* married in the life-time of her father, and with his consent, and he settled part of those lands on her and her husband, and died. And it was held, that this settlement was no revocation of the will, as to the devise of the other lands. *2 Vern. 720. Clarke v. Berkley. See Vin. Abr. tit. Devise, Ca. 11. p. 154. Clarke and Ux. v. Lucas & al'. 1 Vern. 23. 1 Abr. Eq. Caf. 413. Brown v. Thompson.*

If *A.* by his will devises all the residue of his personal estate to *B.* and *C.* and makes them executors; and after, by a codicil, cancels and revokes every legacy, thing, and part relating to *B.* and revokes his being executor; *C.* shall have the whole. A revocation, with a new gift, shall have the same effect as if it had been expressly given; and whether it be by codicil or obliteration, it is the same. *5 New Abr. 535. MSS. Rep. Humphries v. Taylor, in Chan. Hil. 25 Geo. 2.*

Though marriage and the having of children has been deemed a revocation of a will, yet it is only a presumptive revocation; for if it appears by any expression, or other means, to be the intent of the deviser, that his will should continue in force, the marriage will be no revocation of it. *1 Ld. Raym. 441. Lugg v. Lugg. Vide Vin. Abr. tit. Devise, (Y) Ca. 2. Saunders v. Hawkins. Ib. (R. 6.) Ca. 25. p. 147. Barnardiston v. Carter.*

If lands are devised to one in fee, and afterwards mortgaged to the same devisee, it is a revocation *in toto*, being inconsistent with the devise; though it was agreed, if the mortgage had been to a stranger, it had been a revocation *quoad* the mortgage only. Decreed *per* Lord Macclesfield, *Pres. in Chan. 514. Hacknuff v. Bayley. Vide 1 P. Will. 681. Hareton v. Whitmore, and Vin. Abr. (Y. 2.) Ca. 10. 2 P. Wms. 328. Rider v. Wager.*

I. S. on his marriage with *F.*'s daughter, settled 500*l.* *per annum* on her; he afterwards surrendered some copyhold estates to the use of his will which he made, and gave the copyhold to his wife. Afterwards *I. S.* on the death of his wife's father, became intitled to 1500*l.* in right of his wife; then *I. S.* levied a fine, and made a new settlement, and increased her jointure 300*l.* *per annum*, but never altered his will. And *per* Lord Chancellor, The settlement is a revocation of the will, for such lands as are comprized in it; but the copyhold is not, and therefore passes by the will. *Sole's Cases in Chan. 48. Lannoy v. Lannoy. See Sole's Cases in Chan. 63. Vin. Abr. tit. Devise, (R. 6.) Ca. 30. p. 148. Luther v. Kirby.*

By marriage articles it was agreed, that the wife's lands, whereof she was seised in tail, should be conveyed to the husband in fee; they married, the husband made his will and devised those lands; then the husband and wife suffered a recovery of those lands, to such uses, and for such estates, as they should jointly appoint, and in default of such appointment, to the use of the husband and his heirs. She died without appointing. *Per*

Hardwicke Chanc. This amounts to a revocation of the will. And in this case the following rules were laid down.

If a man seised in fee devises, and then makes a conveyance by fine, feoffment, or recovery, and takes back a new estate, it is certainly a revocation; and so if he takes back the old use unaltered, from a presumption that he could not have made such a conveyance, without an intention to alter his will: But if after making his will he had made a lease, or charged it with a sum of money, &c. it would only have been a revocation *pro tanto*. The rules are the same in the devise of a real, and of a personal estate, with regard to charges made afterwards: But if a man, having an equitable estate in fee, devises it, and then takes a conveyance of the legal estate; it is no revocation. The equitable estate will not pass by will, but the heir at law by descent of the legal estate, may become a trustee for the devisee, who may call for a conveyance of the estate. If a man contracts by articles for the purchase of lands, and before a conveyance devises the lands and dies; the devisee shall have the lands, and call for a conveyance from the vendor. If a man, seised of a legal estate, makes his will, and then conveys the legal estate to another in trust for himself, it is a revocation. If in this case the husband had only taken the legal estate by the recovery to execute it into the equitable estate, it would have been no revocation; but new uses are appointed, and tho' the wife died without making any appointment, that will not alter the case, for here he took the fee by the recovery differently qualified, subject to different conditions, differently conveyed: But if two parceners make partition, levy a fine, and declare the use, that will not be a revocation, because it is to effectuate the partition. 5 *New Abr.* 538. *MSS. Rep. Parsons v. Freeman. In 25 Gra. 2. Vide Fitzgib. Rep. 207.*

Though a covenant or articles do not at law revoke a will, yet if entered into for a valuable consideration, amounting in equity to a conveyance, they must consequently be an equitable revocation of a will, or of any writing in nature thereof. A woman's marriage is alone a revocation of her will. 2 *P. Will. Rep. 624. Cotter v. Layer.* See S. P. resolved in the case of *Sir Barnham Ryder v. Sir Charles Wager. Ibid. 332. See 4 Rep. 61.*

Tenant in tail, remainder to himself in fee, devises his lands to A. and then suffers a recovery to the use of himself in fee, and dies without issue male; this is a revocation of the will. 3 *P. Will. Rep. 163. Marwood v. Turner.* See *Vin. Abr. tit. Devise, (R. 2.) Ca. 17. p. 140. Hyde v. Masen. 5 New Abr. 541. MSS. Rep. Loyd and Ux' & al' v. Epillet & al'. Id. ib. Widd v. Adam, &c.*

As to setting aside wills for fraud, *Jekyl* Lord Commissioner took a difference between a will and a deed gained upon a weak man, and upon a misrepresentation or fraud; for if a will be gained from such by false misrepresentation, this is not a sufficient reason to set it aside in equity; as was determined in the Duke of Newcastle's will, betwixt *Lord Thane and Lord Clare*, and in the case of *Bodvil and Roberts*: But where a deed which is not revokable as a will is, is so gained from such a person, and without any valuable consideration, the same ought to be set aside in equity. 2 *P. Will. Rep. 270. James v. Greaves.* A will obtained in extremis, and upon importunity of testator's wife, his hand being guided in the writing of his name, has been set aside. *Vin. Abr. tit. Devise, (Z. 2.) Ca. 7. p. 167. Money Penny v. Brown.* A will likewise concerning land may be good at law, as being well executed, and yet be set aside in equity for fraud. 1 *P. Will. 287, 289. Goff v. Tracey.* See *Vin. Abr. tit. Devise, (Z. 2.) Ca. 11. p. 167. Bransby v. Keridge, &c. 2 P. Will. 286. Stephen v. Gardiner.*

Where a bill is brought to prove a will of lands, the sanity of the testator must be proved; but it is otherwise in a case of a deed of trust to sell for payment of debts. 3 *P. Will. Rep. 93. Harris v. Ingledew. N. B.* A will having relation only to the testator's death, and not to the making, (for till his death he is master of his own will,) therefore the will of a papist in Ireland, was held to be avoided by a subsequent statute made in that kingdom, which enacts, that the lands of papists there shall not be devisable, but descend in gavelkind. *Vin. Abr. tit. De-*

vis, (H. 6.) Ca. 7. p. 273. Bark v. Morgan. It has been said, that wills (of personal estates only) though gained by fraud, if proved in the Spiritual court, are not to be controverted in equity. 2 *Vern. 8, 9. Archer v. Maff. 1 P. Will. 388. Plume v. Beale.*

So where an executor proved a will of a personal estate, wherein one of the legacies was forged; it was decreed, that the executor had no remedy in equity; but ought to have proved the will, with a special reservation as to that legacy. 1 *P. Williams, 388. Plume v. Beale.* But though wills (of personal estates only) gained by fraud, and proved in the Spiritual court, are not to be controverted in equity, yet if the party claiming under such will comes for any aid in equity he shall not have it. 2 *Vern. 76. Nelson v. Oldfield.* It has been determined likewise, that the courts of equity can hold plea concerning a legacy, and likewise concerning the devise of the *residuum*, which is but a legacy: And they may in notorious cases decree a legatee, who has obtained a legacy by fraud, to be a trustee for another: As if the drawer of the will should insert his own name instead of the name of the legatee. 1 *Str. 673. Marriot v. Marriot.* But it has been decreed in the House of Lords, that a will of a real estate could not be set aside in a court of equity for fraud or imposition, but must first be tried at law on *devisavit vel non*, being matter proper for a jury to inquire into. 1 *Abr. Eq. Cases 406. Bransby v. Keridge.*

As to the forms of wills, of various sorts, see the 3d vol. of *Wood's Body of Conveyancing.*

Win, (*Sax.*) In the beginning or ending of the names of places, signifies that some battle was fought, and victory gained there.

Winchelsea, The hundred of *Winchelsea* where to be deemed as two distinct hundreds. 9 & 10 *W. 3. c. 40.*

Winches, A kind of engines to draw barges against the stream of a river. 21 *Jac. 1. cap. 32.*

Winchester measure. A standard originally kept at *Winchester*: and we find in the laws of King *Edgar*, near a century before the conquest, an injunction that one measure, which was kept at *Winchester*, should be observed throughout the realm. See *Black. Com. 1 P. 274, 275.*

Windas, or *Windblasts*, Corruptly *wandast*, is a term for hunting of deer in forests to a stand, &c. See *Wandast*.

Wind-mill, A man may not erect a wind-mill within any forest, because it frights deer, and draws company to the disquiet of the game. *W. Jones Rep. 293.*

Window-tax. By the statutes 20 *Geo. 2. c. 3, 42. 21 Geo. 2. c. 10.* A yearly duty is laid on every dwelling-house inhabited of 2 s. having 10, 11, 12, 13, or 14 windows 6 d. per window, having 15, 16, 17, 18, or 19 windows, 9 d. per window, having 20 or more windows 1 s. per window, besides the 2 s. Every kitchen, scullery, buttery, pantry, larder, wash-house, laundry, bake-house, brew-house, and lodging-room belonging to, or occupied with any dwelling-house, whether within or not, or contiguous or disjointed from such dwelling-house, shall be deemed part of such dwelling-house. When two or more windows are fixed in one frame, if there be a division between them of twelve inches breadth, they shall be charged as distinct windows; and so if they extend to give light into more rooms than one. Sky-lights, and lights in garrets, stair-cases, cellars and passages are chargeable. An inhabitant of any chamber in any of the inns of court or Chancery shall be chargeable for every window in his chamber, but not to the 2 s. on a house-keeper. The regulation of this act is under the direction of the commissioners of the land-tax. On default of payment, this duty is to be levied by distress, and if no sufficient distress, the party is to be sent to gaol without bail or mainprise till payment. See *Stat. 26 Geo. 2. c. 17.* For the more effectual levying the window-tax in Scotland.

Windsor. The mayor and bailiffs, &c. of *Windsor* are to maintain the great bridge there, and receive tolls for carriages, cattle, &c. passing over it, and barges going under the same. *Stat. 9 Geo. 2. c. 15.*

Wine, (*Vinum*) Is to be tried twice a year, viz. at *Easter* and *Michaelmas*; and none shall sell wines but at a reasonable price, by *Stat. 4 Ed. 3. cap. 22.* The Lord Chancellor hath authority to set the prices of wines by the

but, barrel, &c. Perform selling at greater prices shall forfeit 40 l. and no persons may sell wine by retail, but such as are licensed by justices of peace, &c. 28 H. 8. cap. 14. 7 Ed. 6. cap. 5. By statute, *Canary wines*, *Alicant*, and other *Spanish* or *sweet wines* were not to be sold for above 1 s. 6 d. a quart, and *Gascoign* and *French wine* not above 8 d. the quart, &c. unless appointed at a higher price: And when the Lord Chancellor, Treasurer, &c. set the prices of all wines, they were to cause them to be written, and proclamation made thereof in the *Chancery* in term-time, or in the cities, towns, &c. where it is to be sold at those prices. Also the number of retailers of wines, in every city and market-town, was particularly limited. Stat. 7 Ed. 6. 12 & 13 Car. 2. The King may grant commissions to commissioners to license persons to retail wine; and they may under their seal of office grant licences, for any term not exceeding 21 years, under certain rents, &c. the revenue whereof is to be paid into the *Exchequer*; but the privileges of the *Universities*, and of the company of *Vintners* in *London*, &c. were saved by this statute, 12 Car. 2. cap. 25. And the revenue of wine licences is granted to the King, his heirs and successors, by the 22 & 23 Car. 2. cap. 6. One single act is selling by retail. 2 Strange 718. But selling a dozen quart bottles of wine is not selling by retail measure within the statutes, so as to require a licence. *Ibid.* 1124. Merchants, &c. selling wines, who shall adulterate the same, or utter any adulterated wine, are liable to a penalty of 300 l. And retailers of mixed adulterated wine, incur a forfeiture of 40 l. Stat. 12 Car. 2. 1 W. & M. c. 34. Also if any retailer of wine sells it in measures not made of pewter, and sealed, he shall pay 50 s. for every offence, leviable by a justice of peace's warrant, &c. 2 W. & M. c. 14. But see 4 & 5 W. & M. Persons retailing *English* made wines, (on which there is a duty of 12 s. *per* barrel) must be licensed by two justices of peace; and be keepers of publick houses, by Stat. 10 Geo. 2. c. 17. By the Stat. 18 Geo. 2. c. 9. is given an additional duty of 8 l. for every ton of *French wine* and vinegar, and 4 l. for every ton of all other wines and vinegars. See Stat. 26 Geo. 2. c. 12. To prevent wines imported from any of the out-ports, being afterwards brought into the port of *London* or parts adjacent, without paying the *London* duty. See *Black. Com.* 1 V. 288. 4 V. 162.

Winter-heyning, Is a season between the eleventh day of *November* and the three and twentieth day of *April*; which is excepted from the liberty of commoning in the *Forest of Dean*, &c. Stat. 20 Car. 2. cap. 3.

Witte, Penalty on importing foreign card wire or iron wire for making of wool cards, 13 & 14 Car. 2. c. 19. Iron wire, 2 W. & M. sess. 2. c. 4. s. 16. Steel wire, 2 W. & M. sess. 2. c. 4. s. 17. Lattin, brass or copper wire, and gold and silver wire imported, to what duties liable. 4 W. & M. c. 5. s. 2. Brass wire how exempt from payment of duties on exportation. 7 An. c. 8. s. 8.

Wire-Drawers. It is enacted by statute, that silver wire-drawn for making gold and silver thread, shall contain certain quantities to the pound weight, on pain of 5 s. *per* ounce wanting. 9 & 10 W. 3. c. 39. The silver wire to be drawn for silver thread, is to hold eleven ounces and fifteen penny weight, and all silver to be gilt and used in the wire-drawers trade, shall hold eleven ounces and eight penny weight of fine silver on the pound weight Troy; and four penny-weight and four grains of gold, to be laid upon each pound of silver, on forfeiture of 5 s. for every ounce made otherwise. 15 Geo. 2. cap. 20.

Wista, A measure of land among the Saxons; being the quantity of half a hide, and the hide 120 acres.—*Octo virgatae unum hidam faciunt; wista vero quatuor virgatis constat.* Mon. Ang. Tom. 1. p. 133.

Witam, *Secundum wita* jurare, Was for a person to purge himself by the oaths of so many witnesses, as the offence required. Leg. Ina, cap. 63.

Witchcraft, Using of, was felony by Stat. 1 Jac. 1. cap. 12. repealed by 9 Geo. 2. c. 5. See *Conjuration*, and *Black. Com.* 4 V. 60, 429.

Witte, A Saxon word, used for punishment; a pain, penalty, mulct, &c. And *witnesse* is a term of privilege or immunity from fines and amercements. Sax. Dict. From hence come the words *Blood-wite*, *Lacherwite*, &c.

Witena-gemot, or *Witena-gemot*, (Sax. *Conventus sapientum*) Was a convention or assembly of great men to advise and assist the King, answerable to our parliament, in the time of the Saxons; or, rather an assembly of the whole nation. See *Diet*, and *Squire's* *Antiquities of the Saxon-Government* 165, &c.

Witens, Were the chief of the Saxon Lords or *Thanes*, their nobles and wise men. Sax. Dict.

Witenden. A taxation of the *West Saxons*, imposed by the publick council of the kingdom. *Chart. Eitelwolfi*. Reg. Anno 855.

Withdrawing from allegiance. By 3 Jac. 1. c. 4. if any natural born subject be withdrawn from his allegiance, and reconciled to the Pope or See of *Rome*, or any other prince or state, both he and all such as procure such reconciliation shall incur the guilt of high treason.

Withernam, (From the Sax. *Witber*, i. e. *altera*, or, as some say, *contra*, & *Nam*, *captio*) Is where a distress is driven out of the county, and the sheriff upon a *replevin* cannot make deliverance to the party distrained: In this case the writ of *withernam* is directed to the sheriff, for the taking as many of his beasts or goods, who did thus unlawfully distrain, into his keeping till the party make deliverance of the first distress, &c. It is a taking or reprisal of other cattle or goods, in lieu of those that were formerly unjustly taken and esloined, or otherwise withholden. *F. N. B.* 68, 69. 2 Inst. 140. Stat. West. 2. 13 Ed. 1. c. 2. This writ is granted on the return of the sheriff upon the *alias* and *pluries* in replevin, that the cattle, &c. are esloined, by reason whereof he cannot replevy them; and it appears by our books, that the sheriff may award *withernam* on replevin sued by plaintiff, if it be found by inquest in the county, that the cattle were esloined according to the bailiff's return, &c. Though upon the *withernam* awarded in the county-court, if the bailiff doth return that the other party hath not any thing, there shall be an *alias* and *pluries*, and so infinite, and no other remedy there: But on a *withernam* returned in the *King's Bench*, or *Common Pleas*, if the sheriff return that the party hath not any thing, &c. a *capias* shall issue against him, and exigent and outlawry. *New Nat. Br.* 166. In replevin, &c. the sheriff returns *averia elongata sunt* by the defendant; thereupon a writ of *withernam* is awarded; and if he return *nihil*, the plaintiff proceeds to outlawry by *alias* and *pluries cap. in withernam*, and so to exigent: And there is some difference where the defendant appeareth upon the return of the *pluries capias*, and when he stays longer, and appears on the return of the exigent and not before; for in the first case his cattle shall not be taken in *withernam*, but he must find pledges to make deliverance, or be committed; and in the last case, he shall not only find pledges for making deliverance, but shall be fined, and his cattle may be taken in *withernam*: In both cases, the plaintiff may declare for the unjust taking, and yet detaining of his cattle, and so go to trial upon the right; and if 'tis found for him, then he shall recover the value of the cattle with costs and damages, or may have the cattle again by a *return. habendo* directed to the sheriff; but if it be found for the defendant, he shall keep the cattle, and have costs and damages for the unjust prosecution. 1 Brownl. 180. 3 Nelf. Abr. 553, 554.

A defendant in replevin may have a writ of *withernam* against the plaintiff; as if the defendant hath a return awarded for him, and he sueth a writ *de return. habendo*, and the sheriff return upon the *pluries*, *quod averia elongata sunt*, he shall have a *fei. fac.* against the pledges which the plaintiff put in to prosecute, &c. and if they have nothing, then he shall have a *capias ad withernam* against the plaintiff. *Ibid.* And the cattle taken in *withernam* are to be *ad valentiam*, i. e. to the value of the cattle that were first taken and detained; for it is to be understood not only of the number of the cattle, but according to the worth and value; otherwise he that brings the *replevin* and *withernam*, will be deprived of his satisfaction.

Witnesham. 3 *Lill. Abr.* 690. Where cattle have been taken in *witnesham*, they have been by a rule of court delivered back and restored to the owner, on his payment to the plaintiff of all his damages, costs and expenses. *Ibid.* Cattle taken in *witnesham* may be milked, or worked reasonably; because they are delivered to the party as his own cattle, &c. *Contrā* of cattle distrained. 1 *Leon.* 302. This word *witnesham* also signifies reprisals taken at sea by letters of mart ships. See *Replevin*.

Wittherlake. An apostate, or perfidious renegade. *Leg. Canut. cap.* 27.

Witness. (*Testis*) Is one that gives evidence in a cause; an indifferent person to each party, sworn to speak the truth, the whole truth, and nothing but the truth: And if he will be a gainer or loser by the suit, he shall not be sworn as a witness. 2 *Lill. Abr.* 700. If a witness to a bond becomes administrator of the obligee, his hand may be proved. 1 *Strange* 34. If a witness becomes interested, his deposition taken before cannot be read. *Ibid.* 101. *qu.* A party whose deed is forged, is no witness on an indictment for the forgery. 2 *Strange* 728. Party supposed to be defrauded, allowed a witness in perjury. *Ibid.* 1229. The proprietor of a note allowed a witness on an indictment for tearing it. 1 *Strange* 595. Giver of a note no witness on an indictment for perjury, in denying an agreement relating to it. 2 *Strange* 1043. Defendant in ejectment no witness, on an indictment for perjury at the trial. *Ibid.* 1104. The creditor of a bankrupt is no witness to prove him a gamester. 1 *Strange* 507. A creditor allowed to prove the debtor not intitled to his discharge, on the *mint act*. *Ibid.* 650. The vendor witness to a title, where there is no covenant for warranty. *Ibid.* 445. *qu.* Wife of *prochein amy* a witness. *Ibid.* 506. *Prochein amy* no witness. 2 *Strange* 1026. A guardian on record, no witness. 1 *Strange* 506. Wife of a party, admitted to prove her husband's death. *Ibid.* 568. Wife witness against her husband, on an indictment for an assault on herself. *Ibid.* 633. The wife of one defendant cannot be a witness for the other, on an indictment against two. 2 *Strange* 1095. Sheriff's bailiff no witness to prove an attempt to arrest. 1 *Strange* 650. In an action against the master for the negligence of his servant, the servant having a release from the defendant, is a competent witness. 2 *Strange* 1083. A goldsmith's servant, who overpays money, is a witness in an action for it again. 1 *Strange* 647.

A witness to a deed becoming administrator, &c. his hand may be proved. *Stran.* 34. If a witness becomes interested, his deposition taken before cannot be read. *Stran.* 101. *qu.* Laying a wager on the cause does not incapacitate for a witness. *Stran.* 652. Party whose deed is forged, no witness. *Stran.* 728. Bankrupt not admitted to prove his own act of bankruptcy. *Stran.* 828. If the witness to a deed becomes infamous, he is considered as dead. *Stran.* 833. Quaker no witness in an appeal of murder. *Stran.* 856. This is, on his affirmation; but if a quaker will take an oath, he may be a witness in any criminal proceeding. Affidavit of one convicted of forgery not to be read to support a complaint. *Stran.* 1148. Party supposed to be defrauded; allowed a witness in perjury. *Stran.* 1229. A bond proved by co-obligor. *Stran.* 35.

If a witness being served with a *subpoena* does not attend, the court will grant an attachment against him. 1 *Strange* 510. 2 *Strange* 810. But he ought to have reasonable notice of the trial. 1 *Strange* 510. To be served personally. 2 *Strange* 1054. And reasonable expenses tendered to him. *Ibid.* 1150. See *Evidence*.

See also farther as to witnesses, *Black. Com.* 3 *V.* 369. Witnesses for prisoners, *Id.* 4 *V.* 352, 434. Tampering with witnesses, *Id.* 4 *V.* 126. The expenses of witnesses, *Id.* 3 *V.* 369. 4 *V.* 355. Witnesses to deeds, *Id.* 2 *V.* 307. Witnesses to wills, *Id.* 2 *V.* 501. Trial by witnesses, *Id.* 3 *V.* 336. Where two witnesses are necessary, *Id.* 3 *V.* 370. 4 *V.* 350.

Witnesham-gemote. See *Witnesham-gemote*, and *Black. Com.* 1 *V.* 148. 4 *V.* 405.

Woad. A profitable herb much used for the dying of blue colours, mentioned in the *Stat.* 27 *H.* 8. *cap.* 2.

Wold. (*Sax.*) Signifies a down, or open champaign

ground, void of wood; as *Stow* in the *Wolds*, *Cotswold* in *Gloucestershire*, &c.

Wolfehead. or **Wolferhefod.** (*Sax.*) *Caput Lupinum.* Was the condition of such as were outlawed in the time of the Saxons; who if they could not be taken alive to be brought to justice, might be slain, and their heads brought to the King; for they were no more accounted of than a wolf's head, a beast so hurtful to man. *Leg. Edw. Conf. Brañ. lib.* 3.

Women. Laws relating to. A woman is capable of being a sexton, and of voting at an election for one. 2 *Strange* 1114. A bastard is within the statute of *P. & M.* against taking away young women. *Ibid.* 1161. See *Baron and Feme, Forcible Marriage*, &c.

Wong. A Saxon word for field. — *Tres acras terrae jacentes in le wongs, i. e. in Campis opinar seminalibus.* Spelm.

Wood. If any person purposely burn any pile of wood, or bark any trees, &c. the owner may recover treble damages for it in trespass. *Stat.* 37 *Hen.* 6. *c.* 6. None may destroy any woods, by turning them into tillage or pasture, &c. if two acres or more in quantity, on pain of 40 s. an acre: And no person shall suffer his swine to go in a wood unringed, under penalties. Where there is wood or coppice in common, the lord may inclose a fourth part, &c. 35 *H.* 8. *c.* 17. 13 *Elix.* *c.* 25. If coppice wood is felled at or under twenty-four years growth, there must be left twelve standils of oaks in every acre, or the like number of ash, elm, &c. on pain of forfeiting 3 s. 6 d. for every standil wanting; and they are not to be cut down till ten inches square within three foot of the ground, or until so many years after left, under the penalty of 6 s. 8 d. &c. *Stat.* 35 *H.* 8. *cap.* 17. All woods or coppices felled at fourteen years growth, shall be preserved from destruction for eight years; and no cattle be put into the ground from the time of felling, till five years afterwards, by 13 *Elix.* *cap.* 25. The statutes 43 *Elix.* *cap.* 7. and 15 *Car.* 2. *cap.* 2. provide against woodstealing, ordaining recompence to be made, and inflicting a forfeiture of 10 s. &c. Burning woods, or underwood, is made felony: And persons maliciously cutting or spoiling timber-trees, fruit-trees, &c. are to be sent to the house of correction for three months, and whipt once a month, by 1 *Geo.* 1. *c.* 48. Also where persons destroy trees, woods, or break open hedges, the owners shall have satisfaction from the inhabitants of the place, as for dikes overthrown in the night, provided by 13 *Ed.* 1. under *approvement*: If the offenders be not convicted in six months, &c. 6 *Geo.* 1. *cap.* 16. It has been adjudged, that if A. plants a tree upon his own ground, and in growing its roots extend into the land of B. adjoining, they are tenants in common of this tree: But if all the root grows in the ground of A. though the boughs overshadow B.'s land, yet the branches follow the root, and the property of the whole is in A. 1 *Ld. Raym.* 737.

Wood-corn. A certain quantity of grain paid by the tenant of some manors to the lord, for the liberty to pick up dead or broken wood. *Cartular. Burgi S. Petri MS.* 142.

Wood-geld. Is taken to be the cutting of wood within the forest, or rather money paid for the same to the foresters; or it signifies to be free from payment of money, for taking wood in any forest. *Crompt. Jurif.* 157. *Co. Litt.* 233.

Woodmen. Seem to be those in forests, that have their charge particularly to look to the King's woods there. *Crompt. Jurif.* 146.

Woodmote. Is the old name of that court of the forest which is now called the *Court of Attachments*; and was wont to be held at the will of the chief officers of the forest, without any certain time, till since the statute of *Charta de Foresta.* Manwood, *cap.* 22. pag. 207. See *Black. Com.* 3 *V.* 71.

Wood-plea-court. A court held twice in the year in the forest of *Clun* in *Shropshire*, for determining all matters of wood and agistments there.

Woodstock. Wool and yarn may be sold in *Woodstock* on market and fair days, 18 *Elix.* *c.* 21. See *Marlborough*.

Woodward.

Woodward, Is an officer of the forest, whose office consists in looking after the woods, and vert and venison, and presenting offences relating to the same, &c. And *woodwards* may not walk with bow and shafts, but with forest bills. *Crompt. Jur. if.* 201. *Manswood, par.* 1. 189.

Wool, Being a staple commodity of the greatest value in this kingdom; the employment of our poor at home, and our most beneficial trade abroad, depending in a great measure upon it; there have been divers good laws made to preserve the same intirely to ourselves, and to prevent its being transported to other nations. The *Stat. 27 Ed. 3.* declared it felony to transport wool: But the felony was repealed by *38 Ed. 3. cap. 6.* By the *12 Car. 2. cap. 32.* If any person shall export any wool, yarn, &c. he shall forfeit the same, and for every pound weight of goods 3s. And the owners of the ship in which it shall be transported, being privy to the offence, shall forfeit all their interest in the said ship; also the master and mariners assisting, all their goods; and any persons may seize such wool, and shall be intitled to one moiety, and the King to the other moiety of forfeitures, &c. The *13 & 14 Car. 2. cap. 18.* made the transportation of wool felony again; though this being thought too severe, the *7 & 8 W. 3. cap. 26.* a second time repeals the felony, and ordains that exporting wool beyond sea shall incur a forfeiture of the vessel, and treble value; and persons aiding and assisting, to suffer three years imprisonment.

By the *stat. 9 & 10 W. 3. cap. 40.* the former laws are explained, and a further provision is made against transporting wool; by obliging entries to be made of wool shorn, and wool not to be carried near the sea-coasts, but between sun-rising and sun-setting, &c. Unlawful exporters of wool, where judgment is obtained against them, are to pay the sum recovered within three months; or be liable to transportation for seven years as felons. *4 Geo. 1. cap. 11.* The Admiralty shall appoint three sixth rate ships, and eight sloops to cruise on the coasts, and search and seize vessels having manufactures of wool of the kingdom of Ireland, to be exported to foreign parts; which with the ships shall be forfeited, &c. *Stat. 5 Geo. 2. cap. 21.* All woollen manufactures are to be shipped from Dublin, and certain other ports in Ireland, and imported here into Biddesford, and ports named, and none others; and be brought from thence hither in ships built in Great Britain or Ireland, and duly registered on oath. *12 Geo. 2. cap. 21.* Wool-fells, &c. shall be packed up in leather, or canvas marked, and not in any box, &c. on pain of forfeiting 3s. for every pound: Also no coverlets, waddings, or beds, &c. stuffed with combed wool, may be exported under the like penalties as for exportation of wool. *Stat. Ibid.* Persons that by way of insurance, undertake to carry woollen goods abroad, shall forfeit 500 l. And if they give a bribe or reward to any officer to connive at exporting wool, they are liable to 300 l. forfeiture; and persons obstructing the officer, or being armed, &c. rescuing any goods, shall be transported as felons, for seven years. *Ibid.* See *13 Geo. 2. c. 8.*

Wool-buyers, Are such as buy wool in the country of the sheep owners, and carry it on horseback to the clothiers, or to market-towns, to sell again. *2 & 3 P. & M. c. 13.*

Woolfetherbed. See *Wolfshead*.

Wool-key, Its ground, wharf and key, in the parish of *All-Saints, Barking*, in London, vested in trustees for his Majesty, his heirs and successors, &c. *8 G. 1. c. 31.*

Woollen Manufactures, Combination of weavers, wool-combers, &c. prohibited, *12 G. 1. c. 34.* *29 G. 2. c. 33.* Extended to combers of Jersey wool, framework-knitters and stocking-makers, *12 G. 1. c. 34. f. 8.* and to other manufactures, by *22 G. 2. c. 27. f. 2.* Regulations for the payment of wages, *13 G. 1. c. 25. f. 5, 9.* *29 G. 2. c. 23.* *30 G. 2. c. 12.* Punishment of endgatherers, *13 G. 1. c. 23. f. 8.* Having in custody cloth stolen from the rack, or wool left to dry, first offence treble value, third transportation, *15 G. 2. c. 27.*

Wool-staple, Mentioned in *Stat. 51 H. 3. Stat. 5. 10.* That city or town where wool was sold. See *Staple*.

Woolwinders, Those that wind up every fleece of wool, intended to be packed and sold by weight, into a kind of bundle, after it is cleaned as required by statute, to avoid deceits by thrusking in locks of refuse wool, and thrums, to gain weight: They must be sworn to perform this office truly, between the owner and the wool buyer or merchant, by *Stat. 8. Hen. 6. c. 22.* *2d Hen. 8. c. 17.* Persons winding and selling deceitful wool, shall forfeit for every fleece 6 d. And if wool-packers do not make good and due packing, without putting any locks, pelt wool, sand, earth, dirt, &c. in fleeces, action of trespass and deceit lies against them, &c. *Stat. Ibid.*

Worcester. A market for hops to be held by the guardians of the poor of the city of Worcester; and the liberty of holding the said market, and all tolls usually had by the mayor, aldermen and citizens, shall be vested in such guardians, for the uses expressed in the act *2 & 3 Ann. c. 8. Stat. 4 Geo. 2. c. 25.*

Worcesters, and *worsted* cloths, are mentioned in many of our old statutes, as *17 R. 2. 7 E. 4. 14 & 15 Hen. 8. c. 3. &c.* See *Abr. Stat.*

Words, Which may be taken or interpreted by law in a general or common sense, ought not to receive a strained or unusual construction: And ambiguous words are to be construed so as to make them stand with law and equity; and not to be wrested to do wrong. A Latin word in pleading, which signified divers things, was well used to express tharthing intended to be expressed by it: Incertain words in a declaration, are made good and certain by a plea in bar, where notice is taken of the meaning of them; and words which are in themselves uncertain, may be made certain by subsequent or following words. The different placing of the same words may cause them to have a different sense, and construction: A word which is written short or abbreviated, is not good without a dash to distinguish it: And senseless words are void and idle; though they shall not hurt where it is good without them. Nor shall words in deeds that are needless, impeach a clause certain and perfect without such words. *2 Lill. Abr. 711, 712, 713, 714. Hob. 313. Vide Scilicet.*

Words Defamatory that are actionable, and criminal, making libels, and high treason; words how expounded in wills, &c. See the *Heads*.

Words, reasonable. It seems clearly to be agreed, that by the Common law, and the statute of Edward 3. words spoken amount only to a high misdemeanor, and no treason. See *Black. Com. 4 V. 80.*

Work-houses. The most considerable work-house in the city of London, is that in *Bishopgate-street*; wherein some hundreds of idle persons are constantly employed in beating hemp, &c. and a great many poor children maintained and educated. *Stat. 13 & 14 Car. 2.* And in the city of Bristol a great work-house is erected, for the better employing and maintaining the poor, governed by a corporation, &c. *7 & 8 W. 3.* So in the cities of Worcester, Gloucester, and Canterbury, by the *Stat. 3 Ann. 13 Geo. 1. and 1 Geo. 2. Parochial Work-houses, see Poor.*

Wormtak. *Item est ibidem, apud, &c. de Wormtak, vi sol viii den. solvend annuatim ad Festum S. Martini. Inquisit. Heref. 22 Rich. 2.*

Worth, or *Worth*, (From the Sax. *Worth*) A curtilage or country farm. *Matt. Westm. 270.*

Worthiest of blood. An expression of the lawyers, signifying the preference given in descents, to sons before daughters.

Worthine of Land. Is a certain quantity of ground, so called in the manor of *Kingsland* in the county of *Hertford*: And in some places the tenants are called *Worthies*. *Consuetud. Maner. de Hadenham in Com. Bucks. 18 Edw. 3.*

Wreck, (Lat. *Wreckum Maris*, Fr. *Wreck de Mer*, sometimes writ *Wreche*, *Wreche* & *Sew-wreche*, quasi *Sew-up-wreche*, i. e. *Ejectur Maris*) Signifies in our law such goods as, after a ship-wreck, are cast upon the land by the sea, and left there within some county; for they are not wrecks so long as they remain at sea, in the jurisdiction of the Admiralty. *2 Inst. 167.* Where a ship perishes on the sea, and no man escapes alive out of it, this is called *wreck*: And the goods in the ship being brought to land by the waves, belong

belong to the King by his prerogative, or to the lord of the manor: 5 Rep. 106. By the Common law all wrecks belonged to the crown; and therefore they are not chargeable with any customs, and for that goods coming into the kingdom by wreck, are not imported by any body, but cast ashore by the wind and sea: But it was usual to seize wrecks to the King's use, only when no owner could be found; And in that case, the property being in no man, it of consequence belongs to the King, as lord of the narrow seas, &c. *Bract. lib. 2. cap. 5.* And by the Stat. of *Westm. 1. 3 Ed. 1. cap. 4.* it is enacted, that when a man or any living creature, escapes alive out of a ship cast away, whereby the owner of the goods may be known, the ship or goods shall not be wreck; but the same shall be kept a year and a day by the sheriff, to be restored to any person that can prove a property in the goods within that time; and if no body comes, then the same shall be forfeited as wreck. The year and day shall be accounted from the seizure; and if the owner of the goods dies within the year, his executors or administrators may make proof: And when the goods are *bona peritura*, the sheriff may sell them within the year; so as he disposes of them to the best advantage, and accounts for them, &c. 2 Inst. 167. 5 Rep. 106. *Wood's Inst. 214.* If a man have a grant of wreck, and goods are wrecked upon his lands, and another taketh them away before seizure, he may bring action of trespass &c. For before they are seized, there is no property gained, to make it felony. 1 Hawk. P. C. 94.

If goods wrecked are seized by persons having no authority, the owner may have his action against them; or if the wrong-doers are unknown, he may have a commission to enquire, &c. 2 Inst. 166. Goods lost by tempest, or piracy, &c. and not by wreck, if they afterwards come to land shall be restored to the owner. 27 Ed. 3. cap. 13. Where a ship is ready to sink, and all the men therein, for the preservation of their lives quit the ship, and afterwards she perishes; if any of the men are saved and come to land, the goods are not lost: A ship on the sea was chased by an enemy; the men therein for the security of their lives forsook the ship, which was taken by the enemy, and spoiled of her goods and tackle, and then turned to sea; after this by stress or weather she was cast on land, where it happened her men safely arrived; and it was resolved that this was no wreck. 2 Inst. 167. If a wreck happens by any fault or negligence in the master or mariners, the master must make good the loss; but if the same was occasioned by tempest, enemies, &c. he shall be excused: And making holes in ships, or doing any thing wilfully tending to the loss thereof, is felony, by Stat. 12 Ann. . . Which act requires justices of peace to command assistance for preserving ships in danger of wrecks on the coasts; and officers of men of war, and other ships, are to be aiding, &c. under the penalty of 100*l.* No person shall enter any such ship without leave from the commander, or a constable, &c. And persons carrying away goods from such ships, are liable to pay treble value; but the persons giving assistance, shall be paid by the masters a reasonable reward for salvage, &c. 12 Ann. St. 2. c. 18. See *Pilot. Mariners shipwrecked* how relieved abroad, by Stat. 1 & 9 Geo. 2. See Stat. 26 Geo. 2. c. 19. For enforcing the laws against persons, who shall steal or detain shipwrecked goods, and for the relief of persons suffering losses thereby: Whereby it is enacted (amongst other things) That persons convicted of plundering, stealing, &c. shipwrecked goods, &c. or of obstructing the escape of any person from a wreck, or of putting out false lights to bring any ship or vessel into danger, shall suffer death. Vide *Mariner*.

Wreckfree, is to be exempt from the forfeiture of shipwrecked goods and vessels; which K. Edw. 1. by charter granted to the *Barons of the Cinque Ports*. Placit. temp. Edw. 1.

Writ, (*Brevs* in Sax. *Writan*, i. e. *scribere*) in general is the King's precept, in writing under seal, issuing out of some court to the sheriff, or other person, and commanding something to be done touching a suit or action, or giving commission to have it done. *Termin. de Ley. 1 Inst. 73.* Also a writ is said to be a formal letter of the King's, in parchment sealed with a seal, directed to some judge, officer, or minister, &c. at the suit or plaint of a subject,

requiring to have a thing done, for the cause briefly expressed, which is to be discussed in the proper court according to law. *Old Nat. Br. 4. Shep. Abr. 245.* Of writs there are divers kinds, in many respects; some writs are grounded on rights of action, and some in nature of commissions; some mandatory and extrajudicial, and others remedial; and some are patent or open, and some close or sealed up; some writs issue at the suit of parties; some are of office, some ordinary, and others of privilege; and some writs are directed to the sheriffs, and in special cases to the party, &c. 1 Inst. 289. 2 Inst. 39. 7 Rep. 20.

The writs in civil actions are either original or judicial: Original writs are issued out in the court of Chancery, for the summoning a defendant to appear, and are granted before the suit is begun, to begin the same; and judicial writs issue out of the court where the original is returned, after the suit is begun: The originals bear date in the name of the King; but judicial writs bear teste in the name of the chief justice: And it is observed, that a writ without a teste is not good, for the time may be material when it was taken out, and it is proved by the teste; and if it be out of the Common law courts, it must bear date some day in term, (not being Sunday) but in Chancery writs may be issued in vacation as well as term-time, as that court is always open; also there are to be fifteen days between the teste and return of all writs, where the suit is by original; but by statute delays in actions by reason of fifteen days between the teste and return of writs in personal actions, and ejectments, are remedied. *F. N. B. 51, 147. 2 Inst. 40. Lutw. 337. 13 Car. 2. cap. 2.*

Writs in actions are likewise real; concerning the possession of lands, called Writs of Entry, or of right touching the property, &c. Personal, relating to goods, chattels, and personal injuries; and mixed, for the recovery of the thing, and damages. 2 Inst. 39. And writs may be possessory, of a man's own possession; or ancestral, of the seisin and possession of his ancestor: And there are certain writs of prevention or anticipation; and of restitution, &c. But the most common writs in daily use, are in debt, detinue, trespass, action upon the case, account, and covenant, &c. which with others must be rightly directed, or they will be naught. *F. N. B. Style 42, 237.* And in all writs care is to be taken, that they be laid and formed according to the cause or ground of them, and so pursued in the process thereof: Though the writ in some cases may be general; and the count or declaration special. *Hob. 18, 84, 251.* After the action is fixed on, for a wrong done, or right detained, such a writ must be taken out as is suitable to the action; for the writ is different from the action; though they are often confounded: The writ is to be grounded upon the action, and is the means to bring the plaintiff to his right. *Wood's Inst. 560.*

The King's writs cannot be denied to the subject; and it is regularly true, that no man shall be punished for suing of writs in the King's courts, be it of right or wrong: But writs may be abated in several cases, &c. *Ibid.* An original writ defective in form is abatable; but no abatement of the writ is admitted after judgment in the cause, the writ being allowed by the pleadings and proceedings; and a writ that did not pursue the exact form of the register, has been held good: 2 Lill. Abr. 717. *Hob. 51. 3 Nels. Abr. 575.* Writs judicial, if erroneous, may be amended; original writs are not amendable, if the error be by default of the party who gave instructions; yet a new original may be taken out, where it is not amendable. 2 Lill. 716.

Writs may be renewed every term, until a defendant is arrested; but in B. R. if the *latitat* be not renewed in five terms, a new writ is to be taken out, and the plaintiff may not renew the old one. The sheriff's bailiffs cannot execute a writ directed to the sheriff, without his warrant; and if in a writ several persons are included, (for four defendants may be in one writ) there must be several warrants from the sheriff to execute the same. *Comp. Attorn.* All writs are to be returned and filed in due time, to avoid *post-terminum*; and it is very unsafe to keep writs unfiled, because the filing them is the warranty for the proceedings: And where a writ is issued

out directed to the sheriff, when it comes to his hands, though the plaintiff requires the writ back again, the sheriff must return and file it in the court where returnable; unless the plaintiff procure a writ of *superfideas*. 2 Lill. Abr. 720. Attachment lies against sheriffs, &c. for not executing a writ, or for doing it oppressively by force, extorting money thereon, or not doing it effectually, thro' any corrupt practice. Vide 8 Rep. 86. The court of B. R. cannot give judgment of a writ but where it is before them; and has deferred to quash it, because the defendant was not present in court. 1 Ld. Raym. 618, 620. See *Arrests, Variance, &c*

Writ of Assistance, Is a writ issuing out of the Exchequer, to authorise any person to take a constable, or other publick officer, to seize goods or merchandize prohibited and uncustomed, &c. And there is a writ of this name issued out of the Chancery, to give possession of land. Stat. 14 Car. 2. cap. 1.

Writ of Deilberg, In what cases grantable, 13 & 14 Car. 2. c. 11. f. 30.

Writ of Entry. See *Entry*.

Writ of Inquiry of Damages, Is a judicial writ, that issues out to the sheriff upon a judgment by default, in action of the case, covenant, trespass, trover, &c. commanding him to summon a jury to inquire what damages the plaintiff hath sustained *occasione præmissorum*; and when this is returned with the inquisition, the rule for judgment is given upon it; and if nothing be said to the contrary, judgment is thereupon entered. 2 Lill. Abr. 721. This writ lies on a *nihil dicit*, non sum informatus, or a demurrer; but not upon a verdict; and it is executed before the sheriff, or his deputy, at the which time both parties have the liberty of being heard before the sheriff, by their counsel or attornies, and evidence may be given on both sides: It is the duty of the jury diligently to inquire what damages have been sustained by the plaintiff, and this cannot be without evidence given them; and if where an *indebitat. assumpsit* is brought for 100l. for goods sold, and the defendant lets this go by default; if the plaintiff at the executing the writ of inquiry, gives no evidence to the jury of any goods sold or delivered to the defendant: In this case, the jury must find some damages, because the defendant hath confessed the action, and admitted that there is damage; but there not being any proved, they ought to find only a penny, or some such small matter. 2 Lill. Abr. 721, 722.

If a writ of inquiry be executed without giving due notice thereof to the defendant, it shall be quashed. 2 Lill. 721. In action of covenant, judgment was given for the plaintiff in the *Common Pleas* by default, and a writ of inquiry of damages executed, and final judgment for the plaintiff. And on a writ of error brought in B. R. amongst other exceptions, one was, that no day was given on the writ of inquiry, and therefore it might be a discontinuance; but the court resolved, that they never give a day in C. B. on this writ, nor is it necessary, because nothing is done but to ascertain the damages. 1 Ld. Raym. 388. A writ of inquiry was ordered to be executed before the Lord Chief Justice, the action being laid for very large damages: And such writ hath been set aside where the jury gave too little damages; and a new writ of inquiry ordered by rule of court, on payment of costs, &c. *Mod. Caf. in L. and E.* 213, 240. A judgment shall not be set aside, after a writ of inquiry executed, unless in particular cases.

Writ of Rebellion, A writ out of the Chancery, or Exchequer, against a person in contempt, for not appearing in those courts, &c. See *Commission of Rebellion*.

Writer of Tallies (*Scriptor talliarum*) Is an officer in the Exchequer, being clerk to the auditor of the receipt, who writes upon the tallies, the whole letters of the sellers bills. *Conwell*.

Writing, (*Scriptum*) A simple writing or declaration, not in the manner of a deed, made to a certain person, &c. shall be good in law. *Hob.* 312.

Wrong, (*Injuria*) Signifies any damage or injury, being in law contruction that which is contrary to right. *Co. Litt.* Vide *Tort*.

Wronglands, Seem to be ill grown trees that will never prove timber; such as wrong the ground they grow in. *Kitch.* 169.

Wudebeth, (From the Sax. *Wude*, i. e. *Sylva*) a selling of wood. *Leg. Hen.* 1. c. 37.

Wydaught, A water-passage, gutter, or watering-place; often mentioned in old leases of houses, in the covenants for repairs, &c.

Wyke, Wyka, ——— *Et totam Wykam cum hominibus, &c.* Mon. Ang. tom. 2. p. 154. See *Wic* and *Wica*.

Wyte, Parna, Mulza — Saxones duo mulzarum genera statuere, i. e. *Weram, & Wytam*. Vide *Wite*.

X.

Xutus, Is used for *Sonitus*: *Xanta Dei lex est qua mortuos vivere docet.*

Xenia, Dicuntur munuscula, quæ a provincialibus rectoribus provinciarum efferebantur: *Vox est in privilegiorum chartis non infusa; ubi quietus esse a Xeniiis immunes notat ab hujusmodi muneribus aliisque donis regi vel reginæ præstandis, quando ipsi per prædia privilegiatorum transierint.* Chart. Dom. Scemplingham. *Concedo ut omnia monasteria & ecclesie regni mei a publicis vestigialibus, operibus & oneribus absolvantur: — Nec munuscula præbeant regi vel principibus, nisi voluntaria.* Spelm. Gloss. *Nulla autem persona, parva vel magna, ab hominibus & terra radingensis monasterii exigit, non equitationem sive expeditionem, non summagia, non vestigalia, non navigia, non opera, non tributo, non Xenia, &c.* Mem. Scacc. Anno 20 Edw. 3.

Xenodochium, Is interpreted an inn, allowed by publick licence for the entertainment of strangers, and other guests: Also an hospital, *In qua valetudinarii & senes, i. e. Infirmi, recipiuntur & aluntur.* Vocab. utriusque Juris.

Xerophagia, A kind of Christian fast; the eating of dry meat. *Litt. Diab.*

Xytopola, A woodmonger, or dealer in wood. *Litt.*

Xystrus, Is a wrestler, or champion: And *xystrus* was a covered place or theatre, where men used wrestling and other exercises in the winter. *Ibid.*

Y.

Y and Nay, — *Quod homines de Rippon sint credendi per suum ya, & per suum nay in omnibus querelis, &c.* Charta Athelstan. Reg. Mon. Angl. tom. 1. p. 173.

Yard, Is a well known measure, three foot in length; by which cloth, linen, &c. are measured: It was ordained by King *Hen.* 1. from the length of his own arm. *Baker's Chron.*

Yardland, (*Virgata Terra*) Is a quantity of land, different according to the place or country; as at *Wimbleton* in *Surrey*, it is but fifteen acres, in other counties it is twenty, in some twenty-four, and in others thirty, and forty acres. *Bract. lib.* 2. c. 10.

Yards belonging to the Navy. Persons making disturbance, or counterfeiting the hands of signing or vouching officers in yards, how punished, 1 Geo. 2. c. 25. sect. 6.

Yarmouth. There is an act for regulating the time of bringing in and selling *berrings* at the fair of *Gyart Yarmouth*, fixing the prices and quantity by the last, &c. 31 Edw. 3. c. 2.

Yarn. No person shall buy yarn or wool, but he that makes cloth of it: And none may transport yarn beyond the sea, by Stat. 8 H. 6. c. 5. 33 H. 8. c. 16.

Yatch, A yacht, or little bark; also a fly-boat, pinnace, &c. In Lat. called *Celox*, à *celeritudine*, from its swiftness. *Litt. Diab.*

Yconagus, *Oeconomus*; an advocate, patron, or defender. *Vit. Abbat. S. Albani.*

Year, (*Annus*) In the full extent of the word, contains a system or cycle of several months usually twelve; and is the time wherein the sun goes round his compass through the twelve signs, viz. three hundred and sixty-five days, and about six hours. A year is twelve months, as divided by *Julius Cæsar*: And the church begins the year on the first day of January, called *New-year's-day*; but the civil

civil account formerly, not till *March* the 25th. It appears by ancient grants and charters, that our ancestors began the year at *Christmas*, which was observed here till the time of *William I.* commonly called the *Conqueror*; but afterwards, for some time the year of our Lord was seldom mentioned in grants, only the year of the reign of the King. *Mss. Ang. tom. 1. p. 62.*

the King. *Mfn. Ang. tom. 1. p. 62.*
There is a year of the world, and a year of Christ: And besides the *annus solaris*: the lunar year, being the time in which any of the celestial bodies finish their course; and thirty days, by which the *Egyptians* reckoned. Year is also taken for time in general; and the age of man. *Litt.* By the *Stat. 24 Geo. 2. c. 23.* It is enacted, That the first day of *January* next following the last day of *December 1751.* shall be the first day of the year 1752. And that the first day of *January* next after the first day of *January 1752,* shall be the first day of the year 1753. And so on, the first day of *January* in every year, shall be the first day of the year. And that after the first day of *January 1752.* the several days of each month shall go on in the same order; and the feast of *Easter* and other moveable feasts thereon depending, shall be ascertained according to the same method they then were until the second day of *September 1752.* and that the natural day next following the said second day of *September,* shall be reckoned the fourteenth day of *September,* omitting for that time only the eleven intermediate days. And that the several natural days which shall succeed the said fourteenth day of *September,* shall be reckoned in numerical order according to the order and succession of days now used in the present calendar. All writings, &c. after the first of *January 1752.* to be dated according to the new stile: After 2 *September 1752. Hilary* and *Michaelmas* terms, and all courts to be held on the same nominal days and times they then were: The several years 1800, 1900, 2100, 2200, 2300, or any other hundredth year, (except every four hundredth year, of which the year 2000 shall be the first) shall not be deemed *Bissextile* or *Leap Year,* but common years consisting of 365 days. The years 2000, 2400, 2800, and every other four hundredth year from the year 2000 inclusive, and all other years, which are now esteemed *Bissextile* or *Leap Years,* shall for the future be esteemed *Bissextile* or *Leap Years* consisting of 366 days.

A calendar, and certain tables and rules for the fixing the true time for the celebration of the feast of *Easter*, and the finding of the times of the full moons on which the same depends, are annexed to this act, which shall be prefixed to all future editions of the *Common-Prayer Book*. Courts of Session and *Exchequer* in *Scotland*, and markets, fairs, and marts to be held upon the same natural days they should have been holden on, if this act had not been made. The natural days and times for the opening and inclosing of commons of pasture, not altered by this act. The natural days and times of payment of rents, annuities, sums of money or interest, or of the delivery of goods, commencement or expiration of leases, &c. Or of attaining the age of 21 years, &c. not altered by this act. See 25 Geo. 2. c. 30. 26 Geo. 2. c. 9. 34.

Year and Day. (*Annus & Dies*) Is a time that determines a right, or works a prescription in many cases by law; as in case of an estray, if the owner challenge it not within that time, it belongs to the lord; so of a wreck, &c. A year and a day is given to prosecute appeals; and for actions in a writ of right, &c. after entry or claim, to avoid a fine: And if a person wounded die in a year and day, it makes the offender guilty of murder, &c. 3 Inst. 53. 6 Rep. 107. See as to year and day in Appeals of Death, Appeal, and Black. Com. 4 V. 311, 329. In Continual Claims, See Claim, Entry, Fine, and Black. Com. 3 V. 175. In Copyhold Forfeiture, see Copyhold, and Black. Com. 2 V. 284. In Estrays, see Estray, and Black. Com. 1 V. 297. In Fines, see Fine, and Black. Com. 2 V. 354. In Murder, see Appeal, Homicide, Murder, and Black. Com. 4 V. 197. In Wreck, see Wreck, and Black. Com. 1 V. 293. **Year and Waste.** (*Annus, Dies & Vastum*) Is a

Year, Day and Waste, (*Annus, Dies & Vastum*) Is a part of the King's prerogative, whereby he hath the profits of lands and tenements for a year and a day of those that are attainted of petit treason or felony, whosoever is lord

of the manor whereto the lands or tenements do belong ; and the King may cause waste to be made on the tenements, by destroying the houses, ploughing up the meadows and pastures, rooting up the woods, &c. except the lord of the fee agree with him for the redemption of such waste ; afterwards restoring it to the lord of the Fee. *Staudf. Prærog. 44.*

Stat. 9 H. 3. cap. 22. "We will not hold the lands of them that be convict of felony but one year and one day, and then those land shall be delivered to the lords of the fee."

This appears by *Glanvill* to be due to the King by his ancient prerogative, 2 *Inst.* 36. cites *Glanvill* 7. cap. 17. fol. 59.

This chapter of *Magna Charta* Charter doth expresse that which doth belong to the King, viz. the year and the day, and omits the waste as not belonging to him; and this is notably explained by our ancient books with an uniform consent. 2 *Inst.* 36. cites *Braddon, lib. 3. fol. 129.* c. 137. and *Britton, cap. 5. fol. 14.* and *Flota, lib. 1. cap. 28.* and *Mirror, c. 5. f. 2.* The mirror, speaking of this chapter, saith; *Le point des terres aux felons tenir per un an, est de fustie, car pei la ou le roy ne duist aver que le gult de droit, ou l'an en noisme de fine pur salver le fief de l'efcriptement preignent les ministres le roy ambideux.* Upon all which it appears, that the King originally was to have no benefit in this case upon the attainder of felony, where the free land was holden of a subject, but only in detestation of the crime, *Ut poena ad paucos, metus ad omnes perveniat*; to prostrate the houses, to extirpate the gardens, to eradicate his wood and to plow up the meadows of the felon; for saving whereof, and *pro bono publico*, the lords, of whom the lands were holden, were contented to yield the lands to the king for a year and a day; and therefore not only the waste was justly limited out of this chapter of *Magna Charta*, but thereby it is enacted, that after the year and day the land shall be rendered to the lord of the fee, after which no waste can be done. 2 *Inst.* 37. Sejeant *Hawkins* says it seems agreed, that by the Common law, upon an attainder of felony, the King had a right utterly to waste the lands holden of any but himself, whereof the person attainted was seised of an estate of inheritance, either in his own or in his wife's right. And it is said by some, that the King hath both this right, and also a right to hold such lands for a year and a day. But it is holden by others, that the right to hold over the lands for a year and a day was given to the King in lieu of the waste, and it seems implied in *Magna Charta, cap. 22.* which saying, that the King shall not hold over the lands of those convicted of felony but for one year and a day, and making no mention of the waste, it seems plainly to intimate, that at the time of the making that statute the King was thought to have no other right but only to the year and day, 2 *Hawk. Pl. C.* 449. cap. 49. f. 8. *ibid.* in marg. says it seems admitted, 8 *Edw. 3. Fitz. Trav.* 489. *Prescription* 50. That the King was intitled to the waste, as well as to the year and day since that statute.

And where the treatise of *prærogativa regis*, made in 17 Edw. 2. says, *Et postquam dominus rex habuerit annum, diem, & vassum, tunc redditur tenementum illud capitali domino feodi illius, nisi prius faciat finem pro anno, die & vasso*; which is so to be expounded, that forasmuch as it appears in the said old books, that the officers and ministers did demand both for the waite and for year and day, that came in lieu thereof, therefore this treatise nameth both, not that both were due, but that a reasonable fee might be paid for all that which the King might lawfully claim. But if this act of 17 Ed. 2. be against this branch of *Magna Charta*, then it is repealed by the act of 4 Ed. 3. cap. 1. 2 Inst. 37. 2 Hawk. Pl. C. 449, cap. 49. f. 8. says, that the statute *de prærogativa regis*, made in 17 Ed. 2. having declared the King's right to the year and day, and also to the waite, it seems to have been the more general opinion since that time, that he had a right to both. Indeed if this statute had been against the express purview of *Magna Charta*, it would have been clearly repealed by those many subsequent statutes, which repeal all statutes contrary to *Magna Charta*; but being not contrary

trary to the express words of it, but only to what is argumentatively drawn from it, it may be well argued that it is still in force. 2 Hawk. Pl. C. 449. cap. 49. § 8.

Hereby it also appears how necessary the reading ancient authors is for understanding of ancient statutes. And out of these old books you may observe, that when any thing is given to the King in lieu, or satisfaction of any ancient right of his crown, when once he is in possession of the new recompence, and the same in charge, his officers and ministers will many times demand the old also, which may turn to great prejudice, if it be not duly and discreetly prevented. 2 Inst. 37.

If there be lord, mesne, and tenant, and the mesne is attainted of felony, the lord paramount shall have the mesnalty, presently; for this prerogative belonging to the King, extends only to the land, which might be wasted, in lieu whereof the year and day was granted, 2 Inst. 37. And this is to be understood when a tenant in fee simple is attainted: for when tenant in tail, or tenant for life is attainted, there the King shall have the profits of the lands during the life of tenant in tail, or of the tenant for life. 2 Inst. 37.

[That be *convict*] Here *convict*, in a large sense, is taken for *attainted*: For the nature and true sense of both these words, see the first part of the *Institutes*; and likewise for this word felony there. 2 Inst. 37.

[Of felony] Must be understood of all manner of felonies punished by death, and not of petit larceny, which notwithstanding is felony. 2 Inst. 38. If lord and tenant are, and the tenant is attainted of felony, and the King has *annum, diem & wastum*, yet if the lord enters without due process, and the writ sued to the escheator, the land shall be re-seized, and he shall answer for the mesne issues and profits. Br. Re-Seizer, pl. 36. cites Ed. 2. and Fitz. Traverser, 48.

The statute *de prerogativa Regis*, cap. 15. wills, that if a felon has land, *tunc Rex statim illam habeat, & habeat inde annum & wastum & terra destruetur, &c. & tunc reddatur capitali domino, &c.* Quere, if this word (*statim*) shall be otherwise intended but after office found. Br. Corone, pl. 209.

Tenant by copy of court-roll by the verge in ancient demesne committed felony, and was attainted of it, and *annum, diem & wastum* was awarded for the King; and the reason seems to be, inasmuch as franktenants in ancient demesne have no other evidence but copies of court-rolls; for otherwise it seems to be of a mere copyholder out of ancient demesne for other frank tenement. Br. Tenant per copie, &c. pl. 22. cites 3 Ed. 3.

A man was outlawed of felony, and aliened his land to J. N. on which *scire facias* issued against him, who came and would have traversed the felony; and the court doubted if he might traverse it, by reason that he is a stranger to the record; but per Pigot by 7 Ed. 4. c. 2. he cannot traverse it in case of felony bring a stranger to the record; contra in case of trespass; on which it was prayed for the King, that year, day, and waste be adjudged for the King immediately, and so it was immediately from that day till a year and a day next after; *quod nota.* Quere, if the King may take the year and the day at what time he pleases; it seems he cannot. Br. Corone, pl. 205. cites 49 Ass. 2.

The King shall have the first year and day and waste of the land of him who is attainted of felony, which comes after the attainder, and whosoever takes the profits the year shall answer the profits to the King; per Fitzherbert. But it seems that this is to be understood after office found, or that the inquest which attaints him finds also what lands he had at the time of the felony committed, or after. And in the case above of 49 Ass. 2. the outlawry of felony was 18 Ed. 3. and writ issued to the coroner to inquire of his goods, lands and tenements, 48 Ed. 3. which returned that he had land, and aliened to J. N. after the outlawry; and upon this *scire facias* issued against J. N. who came and would have traversed the felony; and the year and day was awarded to the King with the waste. And so it seems that the King cannot take it, unless after office, which was thirty years after, as there. But Quere if, upon the office found, he who receives the profits the first year after the felony shall

not be charged; it seems he shall per Fitzherbert. above; Quere the experience thereof in B. R. Br. Corone, pl. 207. cites F. N. B. fol. 144.

Year-books. Reports in a regular series from the reign of King Edw. 2. inclusive, to the time of Hen. 8. which were taken by the prothonotaries, or chief scribes of the court, at the expence of the crown, and published annually, whence they are known under the denomination of the *year-books*. Black. Com. 1 V. 71, 72.

Years, Estates for. An estate for years is a contract, for the possession of lands or tenements, for some determinate period: and it happens where a man letteth them to another, for the term of a certain number of years, agreed between the lessor and lessee, and the lessee enters thereon. If the lease be but for half a year, or a quarter, or any less time, this lessee is respected as a tenant for years, and is styled so in some legal proceedings. See Lease and Black. Com. 2 V. 140.

Yeoman, or Peoman, or Poman. A derivative of the Saxon, *geman*, i. e. *communis*. These Camden. in his Brit. pag. 105. placeth next in order to gentlemen, calling them *ingenues*, whose opinion the statute affirms, anno 6 Rich. 2. cap. 4. and 20 Rich. 2. cap. 2. Sir Thomas Smith in his *Republ. Anglorum*, lib. 1. c. 23. calls him a *yeoman*, whom our law calls *legalem hominem*, which (says he) is in the *English* a free-born man, that may dispend of his own free-land in yearly revenues to the sum of forty shillings sterling. Verstegan in his *Restitution of decayed Intelligence*, cap. 10. writes, That *geman* among the ancient Teutonicks, and *gemein* among the modern, signifies as much as *common*, and the latter being turned into y, is written *yemen*, which therefore signifies a *commoner*. Yeoman also signifies an officer in the King's house, in the middle place between the serjeant and the groom, as *yeoman of the chandry*, *yeoman of the scullery*, 33 H. 8. cap. 12. *yeoman of the crown*, 3 E. 4. 5. The word *youngmen* is used for *yeomen*, in the statute 33 H. 8. cap. 10. Cowell. See Black. Com. 1 V. 406.

Yeme, Is an ancient corruption of *hieme*, winter. Ib. id.

Yeben, or Yeoben, (as we use at the end of indentures and other instruments, *Yeoven, the day and year first above written*) Is derived from the Saxon, *ceorian*, i. e. *dare*, and is the same with *given*. So *Diñum de Kenelworth* concludes with—*Yeoven, and proclaimed in the castle of Kenelworth the day before the calends of Nov. anno 1256.* Cowell.

Yew, Is derived from the Greek *ἔνυ*, to hurt, and probably because before the invention of guns our ancestors made bows with this wood, with which they annoy'd their enemies, and therefore they took care to plant the trees in the church-yards, where they might be often seen and preserved by the people. Minshew.

Yielding and paying, (*Reddendo & Solvendo*) Comes from the Sax. *Galdan & Gildan*; and in *Domesday*, *Gildare* is frequently used for *Solvere*, *Reddere*, the Sax. G. being often turned into Y.

Yingman, Mentioned in the laws of King Hen. 1. c. 15. Spelman thinks may be a mistake for *Inglishman* or as we now say *Englishman*: But perhaps the *yingme* were rather *youngmen*, printed for *yeomen* and *yemen*, in Stat. 33 H. 8. cap. 10.

Yokelet, (Sax. *Yoclet*) Is a little farm, &c. in some parts of Kent, so called from its requiring but a yoke of oxen to till it. Sax. *Diñ*.

Yoke and Yokelet. Persons inhabiting, or those who have any goods within the province of York, may by Will dispose of all their personal estate, &c. 4 & 5 W. & M. cap. 2. And a registry of deeds, conveyances, and wills, &c. of lands, is ordained in the *West-Riding of Yorkshire*, by 2 Ann. c. 4. And so in the *East and North-Ridings*, by subsequent acts. Large wastes in the *West-Riding* of the county of York, by consent of lords of manors, &c. to be inclosed; a sixth part for the benefit of poor clergymen, &c. 12 Ann. St. 1. c. 4. *Fork market* is regulated for sale of butter, &c. which shall be viewed, searched and weighed before sold, by Stat. 8 Geo. 1. *Yorkshire cloths* are to be of certain lengths and breadths, under the penalty of 20 s. leviable by justices of peace, &c. And narrow woollen cloths shall have the names of the maker, millman, and searcher

searcher stamped thereon; and not stretched above a yard in length, &c. under diverse penalties. See *Stat. 7 Ann. c. 13.* 1 *Geo. 1. c. 15.* 11 *Geo. 2. c. 24.* 7 *Geo. 2. c. 25.* 11 *Geo. 2. c. 28.* and 14 *Geo. 2. c. 35.*

Widow's Custom of. In the city of London, and province of York, the effects of an intestate after payment of his debts, are in general divided, according the ancient universal doctrine of the *pars rationabilis*. If the deceased leaves a widow and children, his substance, deducting the widow's apparel and furniture of her bed-chamber, which in London is called the *widow's chamber*, is divided into three parts; one of which belongs to the widow, another to the children, and the third to the administrator: if only a widow, or only children, they shall respectively, in either case, take one moiety, and the administrator the other: If neither widow nor child, the administrator shall have the whole. And this portion of *dead man's part* the administrator was wont to apply to his own use, 'till the *Stat. 1 Jac. 2. c. 17.* declared that the same should be subject to the statutes of distribution. So that if a man dies worth 1800 *l.* leaving a widow and two children, the estate shall be divided into eighteen parts; whereof the widow shall have eight, six by the custom, and two by the statute; and each of the children five, three by the custom, and two by the statute: if he leaves a widow and one child, they shall each have a moiety of the whole, or nine such eighteenth parts, six by the custom, and three by the statute: if he leaves a widow and no child, the widow shall have three-fourths of the whole, two by the custom, and one by the statute; and the remaining fourth shall go by the statute to the next of kin. If the wife be provided for by a jointure before marriage, in bar of her customary part, it puts her in a state of non-entity, with regard to the custom only; but she shall be intitled to her share of the *dead-man's part*, under the statute of distributions, unless barred by special agreement. And if any of the children are advanced by the father in his life-time, with any sum of money, (not amounting to their full proportionable part) they shall bring that portion into hotchpot with the rest of the brothers and sisters, (but not with the widow,) before they are intitled to any benefit under the custom: but if they are fully advanced, the custom intitles them to no farther dividend. *Black. Com. 2 V. 518, 519.* In the province of York, the heir at Commonlaw, who inherits any lands in fee or in tail, is excluded from any filial portion, or reasonable part. *Black. Com. 2 V. 519.*

Widow's Buildings Company. A corporation or company erected by statute for raising *Thames water*, in *York-Buildings*; and this company having bought the *forfeited estates* in Scotland on the rebellion anno 1 *Geo. 1.* to enable them to make good their engagements to the government, they were empowered to dispose of rent-charges, grant annuities, &c. and any person may purchase annuities of the said company. 7 *Geo. 1. cap. 20.*

Ydmoneta. In Latin *Altitonans*, signifies God; the thunderer.

Yvernagium. (From the French *Hyvernee*, that is, the winter season) Was anciently used for the winter seedness, or season following of corn. *Cowell.* See *Hybernagium*.

Yule. In the North of England, the country people call the Feast of the Nativity of our Lord by the name of Yule, which is the proper Scotch word for Christmas; and the sports used at Christmas here, called Christmas Gambols, in Scotland they term Yule Games. A statute was made not long since for the repeal of a repealing act passed in the parliament of Scotland, intitled an act for discharging the Yule-vacance. 1 *Geo. 1. c. 8.*

Z.

Zabolus, i. e. *Diabolus*, as used in many old writers, viz. *Edgar. in Leg. Monach. Hydanf. c. 4.* *Orderic. Vitalis 460, &c.*

Zabulum, (Latin, *Sabulum*) Gross sand or gravel. *Quinque plaustratas zabuli*, for five wain-loads of sand. *Computus temp. H. 6. Cowell.*

Zachluc, A foreign coin of gold. *Merch. Dict.*

Zala, i. e. *Incendium*; from whence we derive the English word *mal*.

Zancha, A kind of vesture or garment. *Litt.*

Zant-billow, A measure containing six English bushels.

Zatobin, Sattin, or fine silk; mentioned in *Mon. Ang. Tom. 3. p. 177.*

Zealot, (*Zelous*) Is for the most part taken in *pejorem sensum*, so that we term one that is a separatist or schismatic from the church of England, a Zealot or Fanatick.

Zereth, An Hebrew measure of nine inches. *Litt. Dict.*

Zeta, A room kept warm like a stove; a withdrawing chamber with pipes conveyed along in the walls, to receive from below either the cool air in the summer, or the heat of fire, &c. in winter: It is called by our English historians a dining-room, or parlour. *Osborn vita S. Elphagi apud Wharton. Angl. par. 2. p. 127.*

Zigagus, A strolling thief, or gipsy. *Litt.*

Zodiac, (*Zodiacus*) A circle in the heavens, containing the twelve signs through which the sun passes every year. *Litt.*

Zuche, (*Zuchens*, *Stips fccus & aridus*) A withered or dry stock of a tree. — *Rex, &c. Quia accepimus per inquisitionem, quod non est ad dampnum seu prejudicium nostrum aut aliorum, concedimus dilecto valedito nostro Richard. de S. omnes Zuchens aridos, qui Anglice vocantur Stovenes infra Haiam de Bawkwood, infra Forestam nostram de Shigewood, &c. Placit. Forest. in Com. Nott. de Anno 8 H. 3.* This seems to have been the writ of *ad quod damnum* issued, on granting of *zuches* or dead wood in a forest, &c. *Auxilium facient. Burgenfibus Salop. de veteribus Zuchis, & de mortuo luche, &c. Claus. 4 Hen. 3. m. 10. Rex concessit Thomæ de C. omnes Zucheos aridos, vocat. Speltes, arborum succisum in foresta de G. ibidem capiunt per visum custodis forestæ ultra Trentam. Pat. 22 Ed. 1.*

Zygosta, Is a clerk of the market, to see to weights, &c. *Litt. Dict.*

Zythum, A drink made of corn, used by the old Gauls; so called from the *seething* or boiling it, whence *syder* had its name.

